1947

Sept. 15

Oct. 28

BETWEEN:

THE ROYAL TRUST COMPANY AND DAME HELENA ADA DAWES, IN THEIR QUALITY AS EXECUTORS OF THE WILL OF THE LATE DR. GEORGE ALEXANDER FLEET, ... } APPELLANTS,

AND

THE MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Succession duty—Dominion Succession Duties Act 4-5 Geo. VI, c. 14, ss. 2(m), 3(1) (a), (b), (d), (J), 6, 8(2) (a), 10, 11—Obligation created under antenuptial contract not discharged until after death of obligor—"For full consideration in money or money's worth" —Release of a possibility of future rights in non-existing estates is not one made for "full consideration in money or money's worth"—Succession—Appeal allowed.

By an antenuptial contract dated May 25, 1916, F. obligated himself *inter alia* during the existence of his intended marriage to D. to pay to her the sum of $20,000 for her own use and enjoyment. F. and D. were married on June 1, 1916. F. died on April 23, 1943, predeceasing his wife. By his will he had directed his executors to pay to his wife any indebtedness remaining unpaid under the terms of the marriage contract. The executors claimed a deduction from succession duties of the said sum of $20,000, none of which F. had paid to his wife during his lifetime. This deduction was disallowed by the respondent and the executors appealed to this Court.

Held: That any property transferred, settled or agreed to be transferred or settled in consideration of marriage, prior to April 29, 1941, is not a succession within the meaning of the Dominion Succession Duty Act.

(1) (1924) 34 B.C. R. 4.

2. That the bare possibility of future rights to community property and to dower, in non-existing estates, is not a subject of value at the date of an antenuptial contract, and the release of such a possibility is not one "for full consideration in money or money's worth" within s. 8(2) (*a*) of the Dominion Succession Duty Act.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Montreal.

Charles A. Hale, K.C. for appellant.

Alan A. Macnaughton, K.C. and *J. G. McEntyre* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

CAMERON J. now (October 28, 1947) delivered the following judgment:

This is an appeal by the executors of the will of Dr. George Alexander Fleet, late of the City of Montreal, physician, from an assessment dated April 22, 1944, made under the Dominion Succession Duty Act, c. 14, Statutes of Canada, 1940-41. The facts are not in dispute and may briefly be summarized as follows:

On May 25, 1916, the late Dr. Fleet and Helena Ada Dawes, both of the City of Montreal, in the Province of Quebec, executed an antenuptial contract duly passed before a Notary Public for that province. By the contract, after reciting that the parties declared that they were about to be united in marriage, it was agreed that in view thereof the parties covenanted as follows:

FIRST. No community of property shall at any time hereafter exist between said parties by reason of their said intended marriage.

SECOND. The said parties shall be separate as to property, as permitted by the Civil Code of Lower Canada.

THIRD. The property of the said party of the second part consists at present of certain personal effects and jewellery.

And it is agreed in consideration of the premises that all goods, chattels, household furniture, moveables and effects at any time found in and garnishing the common domicile of the parties hereto, whatever may or shall be the value thereof, and however acquired, shall be held and considered as belonging to the said party of the second part exclusively, the said party of the first part hereby abandoning in her favour, she accepting thereof all right, title, interest and claim he may have thereto or therein.

1947

THE ROYAL TRUST CO. ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron J.

AND the said party of the first part doth hereby furthermore agree and bind himself to pay unto the said party of the second part, during the existence of said intended Marriage, the sum of Ten Thousand dollars, to be employed and expended by her the said party of the second part, for the purpose of purchasing household furniture, and moveable effects, in her own name, and on her own behalf, as her absolute property, which shall be employed in furnishing and garnishing their common domicile or dwelling.

FOURTH. There shall be no dower, the said party of the second part as well for herself as for the child or children which may be born of said intended marriage hereby expressly renouncing thereto.

FIFTH. In consideration of the stipulation that no community of property is to exist between said parties and further in consideration of the renunciation to dower hereinabove made by the said party of the second part, the said party of the first part doth hereby promise and oblige himself to pay to the said party of the second part during the existence of said intended marriage, the sum of Twenty thousand dollars, but as an obligation on the part of the said party of the first part purely and solely in favour of the said Miss Helena Ada Dawes said party of the second part.

AND PROVIDED that in the event of the said obligation not being paid or satisfied during the existence of said marriage and that the said party of the second part should survive the said party of the first part, she, the said party of the second part, shall immediately upon the decease of the said party of the first part have the right to demand, collect and receive from the estate of the said party of the first part payment of the said sum of Twenty thousand dollars, which, in such case, shall bear interest from the date of the decease of the said party of the first part at the rate of six per centum per annum.

PROVIDED ALSO, that in the event of the said party of the second part dying before the said party of the first part, and said sum of Twenty thousand dollars not having been paid or satisfied during the existence of said marriage the heirs or representatives of the said party of the second part shall have no right or claim whatever in respect thereto, or in respect to any part of the same against the said party of the first part.

The obligation on the part of the said party of the first part to pay said sum of Twenty thousand dollars, being as above stated and agreed to, purely personal to and exclusively in favour of the said party of the second part, the same shall not be or become transmissable in the event of her dying before the said party of the first part to her heirs or assigns, and the exigibility thereof shall not in such case pass to or in any way become vested in the heirs or legal representatives of the said party of the second part.

The said parties were married on June 1, 1916, and thereafter resided in Montreal until Dr. Fleet met his death by drowning on April 23, 1943.

Clause 2 of Dr. Fleet's Will, dated December 31, 1934, provides as follows:

I hereby direct my executors hereinafter named to pay out of the capital of my estate all my just debts, including such indebtedness,

if any, as may remain unpaid to my wife under the terms of our marriage contract, passed on the 25th May, 1916, before John F. Reddy, Notary, funeral expenses and succession duties, without the intervention or consent of the beneficiaries hereinafter named or their representatives.

Dr. Fleet left an estate of a gross value of $129,985.97. In their return to the Dominion Succession Duties Department, the executors claimed as a deduction from the gross estate the sum of $20,000.00 which, by the antenuptial contract, Dr. Fleet had agreed to pay to his wife, and no part of which had been paid to her during his lifetime. The Department, in its assessment, disallowed that item as a deduction; an appeal was taken and, so far as that item was concerned, was disallowed and the assessment affirmed. Following notice of dissatisfaction and the Minister's reply affirming the assessment, the matter came before this Court.

It is admitted that at the time of the marriage the parties were without any substantial assets and that the assets of Dr. Fleet's estate were all accumulated by his own efforts since his marriage. No evidence was taken at the hearing, the parties relying on those facts admitted in the pleadings.

Counsel for the appellant argues that the claim of $20,000.00 is a debt which, by the provisions of Section 8 (1), is deductible as an allowance from the gross estate. Counsel for the respondent, while agreeing that it is a debt payable out of the estate, contends that inasmuch as it was not a debt created for full consideration in money or money's worth, wholly for the deceased's own use and benefit, it is barred as a deduction by the provisions of Section 8 (2) (*a*). The relevant parts of Section 8 are as follows:

(1) In determining the aggregate net value and dutiable value respectively, an allowance shall be made for debts and encumbrances .....

(2) Notwithstanding anything contained in the last preceding subsection, allowance shall not be made

(*a*) for any debt incurred by the deceased, or encumbrance created by a disposition made by him, unless such debt or encumbrance was created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit and to be paid out of his estate.

For the appellant it is urged that the consideration for the agreement to pay the sum of $20,000.00 was: (*a*) the surrender by Mrs. Fleet to Dr. Fleet of her interest in the

1947

THE ROYAL TRUST CO. ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron J.

community property which her husband might have at marriage, or later acquire; (*b*) her surrender of her dower rights. It is pointed out that had no antenuptial contract been entered into then the widow's rights in the community of property would have been one-half of the aggregate value of an estate of $115,562.81, or $57,781.40, instead of the sum of $20,000.00 which by the marriage contract she was to receive. It is further pointed out that dower, although not an important factor here, is in some cases very important and that the surrender of dower rights was an added consideration which, coupled with the surrender of the wife's community rights, constituted more than full value in money or money's worth for the agreement by the deceased to pay the sum of $20,000.00.

My opinion, however, is that if this item is a debt of the estate it was not created by the deceased for full consideration in money or money's worth. In the first place, it must be remembered that at the time of the contract neither contracting party possessed any assets of any real value; and I think that in determining whether the deceased received full consideration in money or money's worth in return for the creation of an obligation to pay $20,000.00, reference must be made to the facts existing at the time of the contract and not to the facts existing twenty-seven years later. Mrs. Fleet, therefore, in surrendering her rights to community property and to dower, did not give to Dr. Fleet, nor did he receive, full consideration in money or money's worth in return for his obligation to pay the sum of $20,000.00. The obligation to pay on the part of Dr. Fleet remained whether or not he later acquired substantial assets. The bare possibility of future rights to community property, and to dower, in non-existing estates, would not have been a subject of value at the time of the antenuptial contract; and the release of such a possibility would not, I think, satisfy the words, "for full consideration in money or money's worth". See *Floyer* v. *Bankes* (1).

Under the English Act it has been held that an obligation by a husband in a marriage contract to make certain payments to his marriage contract trustees for the benefit of his wife and children, as the counterpart of similar obligations by his wife, could not be regarded on his death

(1) (1863) 3 DeG J. & S. 306.

as a debt incurred by him for full consideration in money or money's worth wholly for the deceased's own use and benefit.

Section 7 (1) (*a*) of the *Finance Act*, 1894, 57-58 Vict. Cap. 30 is as follows:

In determining the value of an estate for the purpose of estate-duty allowance shall be made for reasonable funeral expenses, and debts, and encumbrances; but an allowance shall not be made—(*a*) for debts incurred by the deceased or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created bona fide for full consideration in money or money's worth wholly for the deceased's own use and benefit, and take effect out of his interest ....; and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto.

In considering that section in the case of *Inland Revenue* v. *Alexander's Trustee* (1), The Lord Ordinary said at p. 370:

I should say that, to make a debt incurred or incumbrance created by the deceased himself deductible in determining the value of his estate for the purpose of estate-duty, the debt or incumbrance must be shown to have originated in something of the nature of a proper purchase, in which the deceased received, for his own use and benefit, full consideration in money or money's worth. I should say that it could not, therefore, cover any stipulation in a marriage contract, although reciprocal in character and issuing in a debt incumbrance, where the true consideration is a thing incapable of being expressed in money or money's worth—to wit, the marriage itself.

I am of the opinion, therefore, that if the obligation of the estate of Dr. Fleet to pay his widow the sum of $20,000.00 can be considered a debt, it is not such a debt as was created for full consideration in money or money's worth wholly for the deceased's own benefit.

Alternatively, the appellant says that the sum of $20,000.00 is not taxable by reason of the provisions of Section 3 (1) (*j*) of the Act which is as follows:

3(1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:—

(*j*) property transferred to or settled on or agreed to be transferred to or settled on any person or persons whatsoever on or after the 29th day of April, 1941, and within three years of the death, by the deceased person, in consideration of marriage.

This section of the Act is not referred to in the Statement of Claim as forming part of the grounds of appeal,

(1) (1905) 7 F. S. C. 367.

1947

THE ROYAL TRUST CO., ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron J.

but it is raised in the Notice of Dissatisfaction, and in the argument counsel for both parties referred to it. Section 3 (1) as a whole has to do with certain dispositions of property which are deemed to be successions. Subsection (*j*) deals particularly with transfers or settlements of property, or agreements to transfer or settle property *in consideration of marriage*. Counsel for the respondent contended throughout that the true consideration of the antenuptial contract was the marriage itself and in his alternative argument, appellant's counsel agreed. I think that the true consideration was the marriage itself. Reference may be made to *Lord Advocate* v. *Sidgwick* (1), and *Inland Revenue* v. *Alexander's Trustees supra.*

The contract here having been made in consideration of marriage, there can be no doubt that had the sum of $20,000.00 been paid by Dr. Fleet to his wife at any time prior to April 29, 1941, it would not have been subject to duty. I think it is clear that at least completed settlements or transfers made in consideration of marriage are dutiable only if the following conditions exist: (*a*) the settlement, or transfer, was made within three years prior to the death of the deceased; and (*b*) it was made on or after April 29, 1941.

Section 3 (1) (*j*) refers not only to completed settlements or transfers of property made in consideration of marriage, but *to property agreed to be transferred or settled in consideration of marriage,* and places on such agreements precisely the same limitations as to completed settlements or transfers—namely, those agreements to transfer or settle after April 29, 1941, and within three years prior to the death of the deceased.

If it is admitted, as I think it must be, that completed transfers made in consideration of marriage, and made prior to April 29, 1941, are excluded from duty, I think that it must follow also that where agreements to transfer are put on the same basis as completed transfers, then such agreements to transfer, entered into prior to April 29, 1941, are also excluded. The agreement to transfer the sum of $20,000.00 was here made in 1916.

It is clear from the terms of Subsection 3 (1) (*j*) that, if an agreement to settle or transfer property in considera-

(1) (1877) 4 R. S.C. 815.

tion of marriage were made on or after April 29, 1941, and the person who had agreed to settle or transfer property lived more than three years after the date of the agreement, and had not, prior to his death, completed the transfer or settlement, such disposition of property would not be deemed to be a succession. I do not think that if Parliament intended to exclude such a disposition from those deemed to be successions, that it could be inferred that a similar disposition, made twenty-five years before the Act came into force and twenty-seven years before the death of the testator, could be deemed to be a succession. I am of the opinion that Parliament did not intend that any property transferred, settled or agreed to be transferred or settled in consideration of marriage prior to April 29, 1941, should be deemed a succession.

It follows, I think, that the disposition of the sum of $20,000.00, made by Dr. Fleet in 1916, is not by virtue of Section 3 (1) (*j*) deemed to be a succession.

For the respondent it is further contended that the disposition here made falls within the definition of "succession" contained in Section 2 (*m*) of the Act; or, alternatively, within the dispositions deemed to be included in a succession by Subsections (*a*), (*b*) or (*d*) of Section 3.

Section 2 (*m*) is as follows:

"Succession" means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession.

I am of the opinion that Section 2 (*m*) does not here apply. It is clear that the sum of $20,000.00 is not payable to Mrs. Fleet by devolution by law; nor did she become beneficiary entitled thereto upon the death of Dr. Fleet. The agreement was made in 1916 and she became beneficially entitled thereto on that date or, in any event, during the lifetime of Dr. Fleet, as the contract provided. It was not by reason of his death that the money was payable to her. The disposition made by Dr. Fleet was not, therefore, a succession "as defined by Section 2 (*m*)" unless it is included in Section 3.

1947

THE ROYAL TRUST CO. ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron J.

Section 3 (1) (*a*), (*b*) and (*d*) as they were in effect at the death of Dr. Fleet are as follows:

3(1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:—

(*a*) property and income therefrom voluntarily transferred by grant, bargain or gift, or by any form or manner of transfer made in general contemplation of the death of the grantor, bargainor or donor, and with or without regard to the imminence of such death, or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise, or the effect of which is that any person becomes beneficially entitled in possession or expectancy to such property or income;

(*b*) property taken as a *donatio mortis causa*;

(*d*) property taken under a gift whenever made of which actual and bona fide possession and enjoyment shall not have been assumed by the donee or by a trustee for the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise;

Section 3 (1) (*a*) has here no application. No property of any sort was transferred; there was merely an agreement to pay. Nor can it be said that the agreement was entered into in general contemplation of death. Specifically, it was made in contemplation of marriage.

Nor does Section 3 (1) (*b*) apply here. To constitute an effectual *donatio mortis causa* it is essential that (1) the gift be made in contemplation of death, though not necessarily in expection of death; (2) there be delivery to the donee of the subject of the gift; (3) that the gift be made in circumstances which show that it is to take effect only if the death of the donor follows. None of these three essentials exists here.

3 (1) (*d*) deals with property taken under gifts with reservation of benefits to the donor. It has here no application.

I find, therefore, that the agreement to pay the sum of $20,000.00 is not a succession as defined by Section 2 (*m*), nor is it deemed to be a succession by reason of the provisions of Section 3. But I have also found that if it is a debt of the estate it is not deductible under the provisions of Section 8 (2). These conclusions would appear to be conflicting, for on my finding that the sum of $20,000.00, due Mrs. Fleet, is not a succession within the definition of Section 2 (*m*), which includes those deemed to be a succes-

sion, it is not subject to duty, which by Section 6, and the charging provisions of Sections 10 and 11, is payable only on successions. On the other hand, if it is not such a debt as can be deducted under Section 8, it would appear that it is not deductible. I have had some difficulty in reaching a conclusion on the matter. My decision has been finally reached on consideration of the Act as a whole. I need not repeat what I have said in regard to the provisions of Section 3 (1) (*j*). I think it is clear that in enacting this section Parliament intended to deal with the particular problem of dispositions of property in consideration of marriage.

Put in brief form, the argument of counsel for the respondent amounts to this. He admits that there was an agreement in 1916 to pay the sum of $20,000.00 in consideration of marriage; but as it was unpaid at the time of Dr. Fleet's death it was a debt of his estate, but not such a debt as is deductible by reason of the provisions of Section 8 (2) as not being one for full consideration in money or money's worth, wholly for the deceased's own use and benefit. Therefore, it forms part of his dutiable estate. If that argument is followed, precisely the same argument would apply to all agreements whenever made to settle or transfer property in consideration of marriage, unless completed by actual transfer or settlement prior to death.

The words in Section 3 (1) (*j*), "or agreed to be transferred to or settled on" would therefore become quite meaningless and of no effect, but they form part of the section and cannot be treated as superfluous or meaningless. They must have been inserted with a purpose. That purpose, in my view, was to place in one category all property transferred to or settled on any person in consideration of marriage, and all property agreed to be transferred to or settled on any person in consideration of marriage; and to declare that all in that category are deemed to be successions if the transfer or agreement to transfer was made after April 29, 1941, and within three years prior to death; and to exclude from being successions all other such transfers or agreements to transfer, made in consideration of marriage.

Moreover, the inclusion in Section 3 (1) (*j*) of "property agreed to be transferred to or settled on" following as they

1947

THE ROYAL TRUST CO., ET AL. v. MINISTER OF NATIONAL REVENUE

Cameron J.

do "property transferred to or settled on", indicates that it refers to agreements not completed by transfer or settlement of the property itself and which property, therefore, remains in the possession of the "donor" at the time of his death. There could be no purpose in using these words at all if it followed that, as they were in the estate of the "donor" at his death, they were then subject to the provisions of Section 8 (2). To that extent, and in the circumstances here disclosed, the two sections are repugnant and I prefer to follow what I think was the manifest intention of the Act in dealing specifically with dispositions in consideration of marriage.

My conclusion, therefore, is that if effect is to be given to the words used in the section it must be found that this disposition by Dr. Fleet, made in 1916, is not a succession. Succession duties are levied only on successions, and therefore, in my opinion, the sum of $20,000.00, forming no part of the succession, and forming no part of the taxable estate, is not subject to duty. It does not need to be deducted as a debt as it is not part of the taxable estate.

The appeal is therefore allowed, with costs to be taxed: and the assessment appealed from is set aside.

Judgment accordingly.