Saint John 1968 June 4 Ottawa June 20

BETWEEN:

DAVID S. CHRISTIE, Executor of the Estate of Charles S. Christie ..... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE ..... RESPONDENT.

Estate tax—Wife predeceasing husband—Wife entitled to interest in expectancy in father's estate—Death of husband before wife's estate administered—Valuation of husband's interest in wife's estate—Estate Tax Act, R.S.C. 1958, c. 29, s. 58(1)(o), s. 58(1)(s)(i) and (ii).

Mrs. C, who was residuary legatee of her father's estate expectant on the death of her mother as life tenant, died intestate in 1963 survived by her husband and son, who were entitled to share her estate equally by the laws of New Brunswick, where she and her husband were domiciled. The husband, who died soon afterward, bequeathed his estate to the son, who obtained administration of both estates. In assessing the husband's estate the Minister included his half interest in his wife's estate, valuing it at $52,579 under s. 58(1)(s)(i) of the *Estate Tax Act.*

Held, confirming the assessment, on the death intestate of the wife the husband acquired a right to have her estate administered, which is a chose in action and therefore "property" within the definition of s. 58(1)(o); that right's value was the value of the husband's half interest in his wife's interest in expectancy in her father's estate computed under s 58(1)(s)(i), and not merely the value of his right to have her estate administered computed at its fair market value under s. 58(1)(s)(ii)—as to which there was no evidence in any event. *Lord Sudeley v. Att'y-Gen.* [1897] A.C. 11, applied.

APPEAL under *Estate Tax Act.*

Ian M. Whitcomb for appellant.

M. A. Mogan for respondent.

CATTANACH J.:—This is an appeal under the *Estate Tax Act* from an assessment in respect of the estate of Charles S. Christie, who died testate at the City of Saint John, in the Province of New Brunswick on August 10, 1964, by his son, David S. Christie as executor.

Immediately prior to trial the parties agreed upon an admitted statement of facts in the following terms:

> The Appellant and the Respondent hereby admit the several facts respectively hereunder specified but these admissions are made for the purpose of this appeal only and may not be used against either party on any other occasion or by any other than the Appellant and the Respondent. The parties reserve the right to object

to the admissibility of any or all of the said facts on the ground that they are not relevant or material to any of the issues to be determined in this appeal.

1. Charles S. Christie (hereinafter called for reasons that will later become apparent "the second decedent") died testate, resident and domiciled in the Province of New Brunswick on August 10, 1964.

2 On February 7, 1964, the second decedent signed, published and declared his last will and testament wherein, inter alia, he nominated his only son, the Appellant, his sole executor and residual beneficiary.

3. The second decedent's estate was admitted to probate in the Probate Court, County of Kings, Province of New Brunswick, on September 18, 1964. Administration of the estate was granted to the Appellant in accordance with the second decedent's last will and testament.

4. The second decedent was predeceased by his wife, Mary Louise Christie (hereinafter called "the first decedent") who died intestate, resident and domiciled in the Province of New Brunswick on October 31, 1963.

5. The first decedent's estate was originally admitted to probate in the Probate Court, County of Kings, Province of New Brunswick, on September 18, 1964, being the same date on which the second decedent's estate was so admitted. Administration of the first decedent's estate was granted to the Appellant.

6. The Appellant, as administrator of the first decedent's estate, filed an ET60 Estate Tax Return dated November 12, 1964, wherein he reported the property of the first decedent as having a total value of $57,807 70.

7. By Notice of Assessment dated the 18th day of March, 1966, the Respondent increased the reported total value of the property of the first decedent by the sum of $58,975.74 to produce, for assessing purposes, a revised total value in the amount of $116,063 44; and a revised aggregate net value in the amount of $115,500.94.

8. Annexed hereto as Exhibit "A" is a photocopy of the Notice of Assessment of the first decedent's estate dated the 18th day of March, 1966, to which is annexed photocopies of Forms ET86A, ET85 and an unnumbered form dated the 28th day of February, 1966, with the initials GR/GHP.

9. By a Notice of Re-Assessment dated the 5th day of October, 1967, the Respondent decreased the revised total value of the property of the first decedent (as determined by the assessment of March 18, 1966—Exhibit "A") by the sum of $2,704 24 to produce, for assessing purposes, a revised total value in the amount of $113,359.20; and a revised aggregate net value in the amount of $112,796.70.

10. Annexed hereto as Exhibit "B" is a photocopy of the Notice of Re-Assessment of the first decedent's estate dated the 5th day of October, 1967, to which is annexed photocopies of Forms ET86A, ET85 and an unnumbered form dated the 20th day of September, 1967, with the initials GKR/AMO'P.

11. The Appellant, as administrator of the first decedent's estate, did not object to or appeal from the said Re-Assessment (Exhibit "B") of October 5, 1967.

12. The Appellant, as executor of the second decedent's estate, filed an ET60 Estate Tax Return dated November 17, 1964, wherein

1968

CHRISTIE v. MINISTER OF NATIONAL REVENUE

Cattanach J.

he reported the property of the second decedent as having a total value of $152,432.24. In computing the said total value, the Appellant included the sum of $31,029.59 as representing the second decedent's interest in the estate of the first decedent.

13. By Notice of Assessment dated the 17th day of March, 1966, the Respondent increased the reported total value of the property of the second decedent by the sum of $106,831.02 to produce, for assessing purposes, a revised total value in the amount of $259,263 26.

14. In the said sum of $106,831 02, the Respondent included the amount of $18,209 85 representing an increase in the value of the second decedent's interest in the estate of the first decedent from $31,029.59 (as reported) to $49,239.44.

15. Annexed hereto as Exhibit "C" is a photocopy of the Notice of Assessment of the second decedent's estate dated the 17th day of March, 1966, to which is annexed photocopies of Forms ET86A, ET85 and an unnumbered form dated the 1st day of March, 1966, with the initials GKR:ADK.

16. By Notice of Objection dated the 13th day of June, 1966, the Appellant objected to the Assessment (Exhibit "C") of the second decedent's estate.

17 By a Notice of Re-Assessment dated the 5th day of October, 1967, the Respondent increased the revised total value of the property of the second decedent (as determined by the Assessment of March 17, 1966) by the sum of $3,340.40 to produce, for assessing purposes, a revised total value in the amount of $262,603 66.

18. The said sum of $3,340 40 represented an increase in the value of the second decedent's interest in the estate of the first decedent from $49,239 44 (as determined by the previous Assessment—Exhibit "C") to $52,579.84.

19. Annexed hereto as Exhibit "D" is a photocopy of the Notice of Re-Assessment of the second decedent's estate dated the 5th day of October, 1967, to which is annexed photocopies of Forms ET86A, ET85 and an unnumbered form dated the 20th day of September, 1967, with the initials GKR/AMO*P.

20 In this Agreed Statement of Facts, the parties have used the phrase "the second decedent's interest in the estate of the first decedent" as a matter of convenience, and this phrase is not to be taken as an admission by the Appellant that the second decedent did in fact have an interest in the estate of the first decedent.

THE PARTIES HERETO reserve the right to call such further and other evidence as Counsel may advise

Appended to the Agreed Statement of Facts were Exhibits A, B, C, & D.

Exhibit "A" is comprised of a Notice of Assessment of Mrs. Christie's estate, Department of National Revenue forms ET86A and ET85 showing the calculation of tax and valuation charges and a further sheet showing the calculation of the interest in expectancy in the estate of Otty J. Fraser. Exhibit "A" is referred to in paragraphs 8 and 9 of the Agreed Statement of Facts.

Exhibit "B" is comprised of a revised Notice of Assessment of Mrs. Christie's estate, forms ET86A and ET85, being a calculation of the revised tax and valuation charges and a revised computation of the interest in expectancy in the estate of Otty J. Fraser. Exhibit "B" is referred to in paragraphs 10 and 11 of the Agreed Statement of Facts.

Exhibit "C" is comprised of a Notice of Assessment of Mr. Christie's Estate, forms ET86A, being the calculation of tax and ET85, being valuation charges, as well as a sheet calculating the value of Mr. Christie's interest in his wife's estate and a further calculation of the value of the expectancy of Mrs. Christie in her father's estate as at the date of Mr. Christie's death. Exhibit "C" is referred to in paragraphs 15, 16 and 18 of the Agreed Statement of Facts.

Exhibit "D", which is referred to in paragraph 19 of the Agreed Statement of Facts, is a revised Notice of Assessment of the estate of Mr. Christie, with supporting documents as in the previous exhibits.

Neither party called any further evidence in accordance with the reserved right to do so in the concluding paragraph of the Agreed Statement of Facts.

The facts so outlined may be stated briefly. Mrs. Christie died intestate on October 31, 1963. The aggregate net value of her estate was computed by the Minister to have been $112,796.70 for assessment purposes. Included in these assets was the value of Mrs. Christie's interest in expectancy in the estate of her father, Otty J. Fraser, as at October 31, 1963, computed by the Minister to have been in the amount of $106,919.53. In his will, the late Otty J. Fraser, after making certain specific bequests had directed the payment of the income from the residue of his estate to his wife during her lifetime, with authority to the trustees to encroach on the corpus of his estate if necessary for that purpose. On the decease of his wife he had then bequeathed the residue of his estate to his daughter, Mrs. Christie, to be hers absolutely. Both parties agreed and the present issue was argued upon the basis that the interest in expectancy of Mrs. Christie in her father's estate constituted part of her estate passing on her intestacy. The assessment of Mrs. Christie's estate was neither objected to nor appealed.

1968

CHRISTIE v. MINISTER OF NATIONAL REVENUE

Cattanach J

By virtue of the provisions of the *Devolution of Estates Act*[1] applicable to intestate succession, Mrs. Christie's estate was divisible in equal shares between the appellant herein as her only child and Charles S. Christie as her husband.

Mr. Christie died testate on August 10, 1964, 284 days after the death of his wife, prior to the grant of administration of Mrs. Christie's estate. In fact the administration of the estates of Mrs. Christie and Mr. Christie was granted on the same day, September 18, 1964, to the appellant herein, David S. Christie, their only son and issue.

In assessing the estate of Charles S. Christie as he did, the Minister computed the total value for assessment purposes at an amount of $262,603.66 included in which was the value of a one-half interest in the estate of his wife, in the amount of $52,579.84. It is to the inclusion of this amount and to the valuation of the interest to Mr. Christie in the estate of Mrs. Christie that the appellant objects. The appellant does not object to the accuracy of the Minister's mechanical computation, nor to the figures used therein, but he says that the Minister based his computation upon incorrect principles.

As I understood the argument on behalf of the appellant, it was that at the time of Mr. Christie's death his only right or interest in the estate of his wife was that of a next-of-kin or heir-at-law in the unadministered estate of a deceased person; that such right was a chose in action consisting solely of a right to have the estate of his wife properly administered; that such chose in action was not an "income right, annuity, terms of years, life or other similar estate or interest expectancy" within the meaning of these words in section 58(1)(*s*)(i) of the *Estate Tax Act* and accordingly the method of valuation, as prescribed by the regulations referred to in such sub-section, is not applicable but rather that the value of such chose in action should be the fair market value within section 58(1)(*s*)(ii) and that such value is nil or at least negligible.

Section 58(1)(*s*) reads as follows:

> (1) In this Act,
>
> (*s*) "value",
>
> (i) in relation to any income right, annuity, term of years, life or other similar estate or interest in expectancy,

[1] R.S.N.B. 1952, c. 62.

means the fair market value thereof ascertained by such means and in accordance with such rules and standards, including standards as to mortality and interest, as are prescribed by the regulations, and

(ii) in relation to any other property, means the fair market value of such property,

computed in each case as of the date of the death of the deceased in respect of whose death such value is relevant or as of such other date as is specified in this Act, without regard to any increase or decrease in such value after that date for any reason.

An "interest in expectancy" is defined in section 58(1)(*k*) as including "an estate or interest in remainder or reversion and any other future interest whether vested or contingent, but does not include a reversion expectant on the determination of a lease".

The fair market value of an interest in expectancy is to be ascertained in accordance with formula outlined in section 10 of the Estate Tax Regulations.

There is no doubt whatsoever in my mind that the interest which Mrs. Christie had in the estate of her father as remainderman subject to the life interest of her mother was an "interest in expectancy" within the meaning of those words as they appear in section 58(1)(*s*)(i) of the *Estate Tax Act* and as those words are defined in section 58(1)(*k*) and that accordingly the Minister's valuation of that interest for the purpose of assessment of Mrs. Christie's estate was properly computable in accordance with the Regulations.

The question for determination in the present appeal is whether Mrs. Christie died possessed of any property which passed upon her death to her husband and if so what was the value of that property. Was it valueless as contended by the appellant or was it $52,579.84 as computed by the Minister and contended by him to be the correct value?

To arrive at the above figure the Minister computed the increase in the value, because of the further advance in years of Mrs. Christie's mother, of the interest in expectancy which Mrs. Christie had in the estate of her father, as at August 10, 1964, the date of Mr. Christie's death, in accordance with the method outlined in section 58(1)(*s*)(i), and added that increase to the value of Mrs. Christie's interest in expectancy which had been computed by the same formula as of October 31, 1963, the date of

1968

CHRISTIE v. MINISTER OF NATIONAL REVENUE

Cattanach J.

Mrs. Christie's death and divided the result by two. This computation is set forth on the fourth page of Exhibit "D" to the Agreed Statement of Facts. As I have intimated above, there is no dispute as to the accuracy of the computation, but the dispute is as to whether such method of computation is properly applicable in the facts of this appeal.

The first step in the contention of the appellant, as I understood it, was that no property passed on the death of Mrs. Christie to her husband.

Section 3(1) of the *Estate Tax Act* reads in part,

> 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, ...

The appellant contended that all that passed to Mr. Christie was a right to have the estate of Mrs. Christie administered which is not a proprietary interest but merely a "nebulous" interest.

The right that passed to Mr. Christie is a right properly enforceable by legal action and was accordingly a chose in action, a premise which was accepted by counsel for both parties and with which I am also in agreement.

In section 58(1)(*o*) of the *Estate Tax Act* property is defined as meaning "property of every description whatever, whether real or personal, movable or immovable, or corporeal or incorporeal, and without restricting the generality of the foregoing, includes any estate or interest in any such property, a right of any kind whatever and a chose in action;".

In view of the express terms of the foregoing definition, I cannot accede to the appellant's submission that no property passed on the death of Mrs. Christie to her husband.

The next problem is to ascertain if the value of the property so passing was properly determined.

The Minister's contention is that it is not the value of Mr. Christie's right to have his wife's estate administered which should be included in the aggregate net value, but the value of the assets which will devolve upon him as a consequence of that right.

What Mrs. Christie had, among other assets of lesser value, was an interest in expectancy in the estate of her father. Upon her intestacy her husband was given a statutory right by virtue of the *Devolution of Estates Act* (*supra*) to participate to the extent of one-half in the distribution of that asset. It would seem to me that what Mr. Christie could expect to receive upon the distribution of his wife's estate was a one-half interest in his wife's interest in expectancy and accordingly I cannot follow how that asset can be anything other than an interest in expectancy for which the value is to be computed in accordance with section 58(1)(*s*)(i). The Minister so computed the value of that asset at the time of Mr. Christie's death and in my opinion, he was right in doing so.

In *Lord Sudeley and Others v. The Attorney-General* (*on behalf of Her Majesty*)[2], the House of Lords affirmed the majority decision of the Court of Appeal[3]. In that case the executors of Frances Tollemache were entitled to a fourth part of the residuary estate of her late husband. Mrs. Tollemache and her late husband had been domiciled and had died in England. A sum of £111,850, part of such residuary estate, was the value of one-fourth part of mortgages in New Zealand. The Crown claimed probate duty on this sum. The executors resisted the claim on the ground that the sum was the value of a foreign and not an English asset and was, therefore, not subject to probate duty in England. It was held that such sum was an English asset. The only interest that the executors of Frances had in the estate of her husband was the right to recover from her husband's executors one-fourth of the clear residue of his estate. This was held to have been a chose in action situated in England. Therefore probate duty was held to have been payable upon such asset. However the value of the asset, i.e. English chose in action, being the right of Frances to have her husband's estate administered, was held to have been one-fourth of the value of the New Zealand mortgages by Lopes and Kay L.JJ. in the Court of Appeal (Lord Esher M.R. dissenting). The House of Lords agreed with the majority in the Court of Appeal. Therefore the Court of Appeal and the House of Lords placed a value of the chose in action for probate duty purposes at the precise value of one-fourth

[2] [1897] A.C. 11.

[3] [1896] 1 Q.B. 354.

1968

CHRISTIE v. MINISTER OF NATIONAL REVENUE

Cattanach J.

part of the New Zealand mortgages, that is the value of the asset which formed the basis of the chose in action. This is what the Minister did in the present instance and, in my view, he was correct in doing so.

Even assuming that the proper valuation of the property should have been the fair market value in accordance with section 58(1)(*s*)(ii), as was contended by the appellant, with which contention I do not agree, there was no evidence adduced before me to support the allegation in Head B, paragraph 2(*d*) of the Notice of Appeal that the "aforementioned chose in action had no exchangeable or fair market value" at the relevant date. Therefore, the appellant has failed to discharge the onus upon him to demonstrate that the assessment by the Minister was wrong.

For the foregoing reasons the appeal is dismissed with costs.