IN THE MATTER OF THE ESTATE OF GEORGE V. STEED, DECEASED

AND

IN THE MATTER OF THE ESTATE OF JAMES KENNETH RAEBURN, DECEASED.

1948
*Nov. 18, 19, 22.
1949
*May 9

THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

WENDELL THOMAS FITZGERALD..... RESPONDENT.

AND

HIS MAJESTY THE KING..... APPELLANT;

AND

JOHN WALTER WALSH AND WENDELL THOMAS FITZGERALD ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Succession duties—Whether property situated in Canada—Chose in action—Situs—Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, ss. 6 (b), 2 (k).

W. domiciled in B.C., Canada, bequeathed to his wife "the sum of one hundred and fifty thousand dollars or one-half of my estate whichever may be the larger sum", making this bequest a first charge on the estate. W. died in Vancouver in 1921. His widow, also domiciled in B.C., died in 1924 leaving the residue of her property to Bonnie S., domiciled in California, U.S.A., who died in January 1941 and left all her property to her husband George S., also domiciled in California, and appointed him executor. He died in 1944 and left all his estate to his nephew R., domiciled in California. R. died in 1944 leaving portions of the estate bequeathed by George S. to members of his family. The estate of W. in B.C. consisted chiefly of real property and the executor delayed the sale of it until November 1945, when the sum of $250,000 was realized therefrom. The respondent Fitzgerald was appointed by a California Court administrator with the will annexed of Bonnie S. and by virtue of a Power of Attorney from him the respondent Walsh was appointed ancillary administrator of the estate of Bonnie S. in B.C. Upon his death he was succeeded by Tupper who is now the sole executor of the will of W. and of W's widow. The Minister of National Revenue assessed duties on the

*PRESENT: Rinfret C.J. and Kerwin, Rand, Kellock and Locke JJ.

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succession from George S. to R. and on the succession from R. to his family. On appeal to the Exchequer Court by the administrator, the assessments were set aside.

Section 2(*k*) of the *Act* reads as follows: "Property includes property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death, and any right or benefit mentioned in section three of this Act".

Held, affirming the judgment below, (Locke J. dissenting), that there was no "property situated in Canada" within the meaning of sec. 6 of the *Succession Duty Act,* as neither George S. nor R. had, in the British Columbia estate, the interest that is required by sec. 2(*k*) of the *Act.* All that devolved upon their deaths was a right to have the estate of Bonnie S. administered and that right was a chose in action properly enforceable in the country of Bonnie S.'s domicile, i.e. in California.

Per Locke J. (dissenting): Raeburn in his personal capacity and those claiming under his will each succeeded to an interest in property situate in British Columbia out of which the legacies were payable, within the meaning of sec. 2(*k*) of the *Dominion Succession Duty Act,* and such successions were liable to duty. (*In re Smyth* (1898) 1 Ch. 89; *Attorney-General* v. *Watson* (1917), 2 K.B. 427 and *Skinner* v. *Attorney-General* [1940] A.C. 350 followed: *Attorney-General* v. *Sudeley* [1897] A.C. 11 and *Doctor Barnado's Homes* v. *Special Income Tax Commissioners* [1921] A.C. 1 distinguished).

APPEALS by the Minister of National Revenue from the decision of the Exchequer Court (1), O'Connor J., setting aside the assessments made under the *Dominion Succession Duty Act,* 1940-41, Statutes of Canada, c. 14, in the estate of George V. Steed, deceased, and in the estate of James Kenneth Raeburn, deceased.

J. W. Pickup, K.C. and John J. Connolly, K.C. for the appellant.

C. F. H. Carson, K.C. and Alfred Bull, K.C. for the respondents.

The judgment of the Chief Justice and of Kerwin J. was delivered by

KERWIN J.:—This is an appeal against a judgment of the Exchequer Court (1) pronounced in two appeals from assessments made under the *Dominion Succession Duty Act,* chapter 14 of the 1940-41 Statutes of Canada and in an action commenced in the Exchequer Court by a writ of

(1) [1947] Ex. C.R. 589.

immediate extent. The proceedings in this action and in the two assessment appeals were consolidated as the question to be determined is the same in all three.

That question depends upon whether there was "property situated in Canada" within the meaning of section 6 of the *Succession Duty Act* firstly upon the death of George Steed, and secondly, upon the death of James Kenneth Raeburn, both of whom were domiciled in California, in the United States of America. Section 6, so far as relevant, reads as follows:—

> 6. Subject to the exemptions mentioned in section seven of this Act, there shall be assessed, levied and paid at the rates provided for in the First Schedule to this Act duties upon or in respect of the following successions, that is to say, . . .
>
> (*b*) where the deceased was at the time of his death domiciled outside of Canada, upon or in respect of the succession to all property situated in Canada.

It is admitted that upon each death there was a "succession" as defined by section 2 (*m*) of the *Act*:—

> (*m*) "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 * * *

"Deceased person" is defined by section 2(*d*) to mean a person dying after the coming into force of the *Act*. The *Act* came into force on June 14, 1941; George Steed died August 16, 1944, and James Kenneth Raeburn was killed while serving in the United States Armed Forces December 13, 1944.

In order to appreciate the nature of the property which, on behalf of the appellants, it is alleged was situate in Canada, it is necessary to state certain events that occurred before George Steed's death. One Adolphus Williams, domiciled in British Columbia, died at Vancouver in 1921, having made his last will and testament and codicils. By the will the testator bequeathed to his wife Katherine the sum of $150,000 "or one-half of my estate whichever may be the larger sum to be paid to her by my trustees as hereinafter mentioned free of succession duty, and I

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direct that the bequest to my wife shall be a first and prior charge on my estate and shall not be subject to any abatement whatsoever." By virtue of the will and first codicil, Walter William Walsh, the testator's wife Katherine and William Godfrey were appointed trustees and executors, and by the second codicil the testator directed his trustees to pay to his wife in equal consecutive monthly instalments, commencing immediately after his death, interest at 5 per cent per annum on the legacy on such portion thereof as might from time to time remain unpaid, and directed that this interest, as well as the legacy, should be a first and prior charge on his estate and not subject to any abatement whatsoever. These directions mean nothing more than that the widow was entitled to be paid the legacy and interest in priority to any other legatee.

Probate was granted to the three executors. The bulk of the estate consisted of real estate in Vancouver. The widow received interest on the legacy but no part of the principal and she died domiciled in British Columbia in 1924, having made her last will and testament and a codicil thereto whereby she devised and bequeathed all her property to her trustees to pay debts and transfer the residue to her sister Isabella Steed, generally known as and hereafter called Bonnie Steed. Probate was granted to the named executors, William Godfrey and Walter William Walsh.

Bonnie Steed was the wife of George Steed and she died January 10, 1941, domiciled in California, having made her last will and testament wherein she devised and bequeathed all her property to her husband and appointed him executor. No proceedings to prove this will in California were taken during the lifetime of George Steed but on March 26, 1941, probate was granted in British Columbia to him, limited to his wife's estate in that province.

George Steed, domiciled in California, died August 16, 1944, and by his will he left all his property to his nephew, James Kenneth Raeburn, and appointed him executor. Probate of this will was granted in the name of Mr. Raeburn by a California court on December 22, 1944, in ignorance of the fact that he had been killed on the 14th of that month. Subsequently, in March 1945, the California court granted letters of administration with the will annexed of

George Steed to Mr. W. T. Fitzgerald, who also in November of that year was granted letters of administration with the will annexed of Mr. Raeburn. By his will, Mr. Raeburn divided among various people what he had inherited from his uncle George Steed but appointed no executor.

It appears that Mr. Walsh, the surviving executor of Adolphus Williams considered it expedient to hold the several parcels of real estate in the hope that they would increase in value and that something would be available for the legatees mentioned in the will of Adolphus Williams other than the latter's widow Katherine. The real estate was not sold until November 5, 1945, at which time, upon receiving the purchase price, Mr. Walsh segregated a sufficient sum to pay the balance of Katherine Williams' legacy and all accrued interest thereon, and placed such sum in the bank in his name in trust.

However, the important date so far as George Steed is concerned is that of his death, August 16, 1944. Upon his death, all that any one claiming under him was entitled to, in relation to the Vancouver real estate of Adolphus Williams, was a right to have the estate of Bonnie Steed administered. The crux of the matter is to ascertain where that right was naturally and properly enforceable, per Lopes and Kay L.JJ. in the Court of Appeal in *Sudeley* v. *Attorney General* (1), whose judgments were explicitely approved in the House of Lord (2). That right was the property which devolved upon the death of George Steed, and that property had its situs, not in Canada, but in Bonnie Steed's domicile, California. It matters not that George Steed took out probate of his wife's will in British Columbia limited to her property there, since George Steed's executor, Raeburn, died without having been effectively granted probate of George's will and without he, himself, having appointed an executor. Upon George Steed's death there was no personal representative of Bonnie Steed in Canada. Neither, it is true, was there one in California but that was her domicile, and the right of any one claiming under George Steed to have the estate of the latter's wife administered was naturally and properly enforceable in the country of her domicile. As a matter of fact, on January 11, 1946, letters of administration with

(1) (1896) 1 Q.B. 354. (2) [1897] A.C. 11.

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the will annexed of Bonnie Steed were granted in California to Mr. Fitzgerald and on February 6, 1948, letters of administration with the will annexed of all the unadministered estate within British Columbia, of Bonnie Steed, were granted to Mr. Walsh. Before that namely on November 5, 1945, Mr. Walsh had set aside the balance of Mrs. Williams' legacy and interest, and holding that sum in his capacity as administrator with the will annexed of Bonnie Steed, his duty apparently would be to remit that sum, less debts and administration expenses to Mr. Fitzgerald, the administrator in the country of Bonnie Steed's domicile. An order to that effect was made in the Supreme Court of British Columbia upon Mr. Walsh's motion for directions and what prevented those directions being carried out was the issuance of the writ of immediate extent.

Mr. Pickup relied upon the judgment of the House of Lords in *Partington* v. *Attorney General* (1) but that was merely a decision as to what duty was payable in view of the particular steps taken by the plaintiff Partington. In *Re Berchtold* (2), is a decision on the conflict of laws and it is dangerous and misleading to attempt to apply conflict of laws cases to those of taxation.

The only remaining decision of importance put forward as bearing on the matter is that of the House of Lords in *Skinner* v. *Attorney General* (3). The point there was whether there was "property in which the deceased or any other person had an interest ceasing on the death of the deceased" within section 2, subsection 1, paragraph (*b*) of the *Finance Act*, 1894, which reads as follows:—

> 11. (1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say: . . .
>
> (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole;

By testamentary dispositions a testator devised and bequeathed his property to two nephews, subject to specific and pecuniary legacies, including an annuity to his wife. He died domiciled in Northern Ireland and his assets in

(1) (1869) 9 H.L. 100.
(2) (1923) 1 Ch. D. 192.
(3) [1940] A.C. 350.

England were of such little value that no estate duty was payable there in respect thereof. However, his executors invested the greater part of the estate in English securities and it was under those circumstances that upon the death of the testator's widow the English authorities claimed estate duty in respect of the testator's estate in so far as it was then represented by English securities.

In his speech, which was approved by all the other peers, Lord Russell of Killowen, (1) with reference to the provisions of the *Finance Act* set out above, stated at page 358:—

> It appears to me to be beyond question that an annuitant, whose annuity is payable out of a testator's estate and who is therefore interested in the whole estate, is necessarily also interested in all the parts which compose the whole; and that her right to take proceedings (if necessary) to have the estate administered for the purpose of providing her annuity, is merely the right of enforcing or realizing that interest which she has in the whole and its parts.

At page 359 he pointed out that in the *Sudeley* (2) case the interest which was being repudiated was a proprietary interest, and proceeded:—

> The case is not in any way a decision that the widow or her executors had no interest in the mortgages, and it is certainly no authority against the view that an annuitant whose annuity is charged on the estate of a testator "has an interest" in the different items of which that estate from time to time consists.

These extracts from Lord Russell's speech indicate the difference between the *Skinner* (1) case, on the one hand, and the *Sudeley* (2) case and the present one, on the other. Here, we are not dealing with a statute imposing a tax on the passing of property in which a deceased had an interest, ceasing on his death, but with one which imposes a tax upon a succession to property situate in Canada, By section 2 (*k*) of the *Succession Duty Act*:—

> property includes property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death, and any right or benefit mentioned in section three of this Act;

Undoubtedly, as it is put by Lord Halsbury in the *Sudeley* (2) case, in a loose and general way of speaking, George Steed had an interest in the British Columbia real estate held by Mr. Walsh as trustee of Adolphus Williams

(1) [1940] A.C. 350.
(2) [1897] A.C. 11.

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but what is referred to in (*k*) is not such a nebulous interest but a proprietary interest, either legal or such an equitable one that is recognized by our Courts, and that Steed did not have. All that devolved upon his death was a right to have the estate of Bonnie Steed administered; and that right was a chose in action properly enforceable and therefore situated in California and not in Canada.

The same result necessarily follows in connection with the death of James Kenneth Raeburn and the appeal should therefore be dismissed with costs.

RAND J.:—This appeal arises out of an unusual situation, the facts of which, however, can be shortly stated.

Adolphus Williams, whom I shall call A, dies in 1921, domiciled and resident in British Columbia where his property is situate, bequeathing his wife, to be called B, one-half of his estate but to be not less than $150,000. The executor of A continues an investment which constitutes the bulk of the assets for the purposes of the estate and in the result B becomes entitled to the minimum sum. The time required for this, however, carries the administration beyond the year 1944. B dies, domiciled in British Columbia, in 1924, leaving her estate to Bonnie Steed, called C, a domiciled resident of California. C dies in January, 1941, leaving her estate to George Steed, her husband, called D. D dies in August, 1944, leaving his estate to a nephew, James Raeburn, called E, of California, who lost his life while serving in the armed forces of the United States in December, 1944. Administration with the will annexed was granted in California to the respondent Fitzgerald in the estates of D and E: and the question is whether those two estates are liable for succession duty under the *Succession Duty Act* of the Dominion which came into force in June, 1941.

Although the definitions of "property" and "succession" in the *Act* are sufficiently broad to cover any property interest which is descendible, the determination of this controversy rests, I think, on a comparatively simple ground which is not affected by them.

An executor holds strictly a representative capacity; he stands in and enforces the right of the testator. At com-

mon law a legatee could not bring an action against an executor before at least the executor assented to the legacy; and a fortiori that rule is applicable where the bequest is residual and unascertained. It is equally clear that rights in action, as assets of the estate, can be asserted in a court only by the legal representative.

But in addition to his capacity of representing the deceased, the executor in equity is looked upon as quasi-trustee for the beneficiaries; and the beneficiary is entitled to resort to that court to have the duty of the executor enforced. The "interest" in property that is transmitted results from that right and becomes, therefore, an equitable interest, subject to the rules which underlie equitable administration.

The applicable section of the *Act* is 6 (*b*) and the duty is based on the operation of the territorial law in vesting a title to property which is within its jurisdiction. The res here as to B and C is undoubtedly in Canada. C acquired a direct right against the representative of B in respect of an interest in property resulting from a personal equitable right in the representative of B against the representative of A. But when C died, domiciled and resident outside of Canada, what was then the legal position? I think it was this: as equity in working out the rights and interests in property which it confers considers that done which ought to be done, the relation of the law of Canada to C must be determined as if the executor of B had reduced the assets of the estate to possession; in that situation, after administering in Canada, his duty, which the law of British Columbia would authorize him to carry out, was to transfer the property to the person entitled, C, in California. When it would then appear that C was dead, a new transmission came to the notice of the court in Canada, while the property was still there; but subject to the administration of that property as an asset of C in Canada, the duty of the executor of B became to deliver the asset over to the representative of C either in Canada or in California. At that point the transmission by Canadian law ends; the personal representation of C remains until the estate is fully administered in California; the death of a particular executor does not affect that representation; and the desti-

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nation of the Canadian property is to that estate in California. The interests of D and E arise out of rights existing by virtue of the law of California as the new situs of the res and are enforceable against the personal representatives there. The concern of Canadian law with the estate of C would be for the ascertainment of the persons entitled under the domiciliary law and the tax deduction to be made from the sum otherwise to be sent out of the country. Since the obligation lies between a Canadian personal representative and a Californian personal representative, with what is equivalent to a corporate existence on both sides, the death of a beneficiary of the estate of C neither appears to the Canadian law nor is it relevant to any action by it. In contemplation of law, therefore, and as it would in fact be carried out in formal procedure as the duty of the executor in Canada, the funds have become possessed by the executor at the domicile in California, they have ceased to be property in Canada, and the Canadian law has nothing further to do with them.

In this conception a present equitable interest which can be realized only in the course of a series of administrations is deemed to exist; but a present "transmission" takes place only subject to the rules and conditions which attach to equitable operation. In that contemplation, if execution of a series of future administrations carries the realized property beyond the jurisdiction, transmission by the local law obviously ceases; present equitable interests arise by that law only up to that point. Succeeding interests may arise and be recognized by the local jurisdiction, but they would not be taken as having been created locally. This view of the nature of transmission seems to underlie the statement of Dicey, 5th Ed. at page 336 where he says: "There can be no succession to property without administration."

The case of *Partington* v. *Attorney-General* (1), was pressed upon us. There a domiciled resident of the United States became entitled to personal property of a deceased person in England. Administration of the estate was granted to the solicitor to the Treasury. The legatee died before receiving the bequest and her husband died without

(1) L.R. 4 E. & 1 App. 100.

administering her estate. A son by attorney was then granted administration of both estates, and the question arose whether probate duty became payable on each. The majority opinion in the House of Lords, that it did, was based largely upon two circumstances: that administration of both had actually been granted; and that under a rule followed in England administration of the estate of a deceased wife must be taken out either by the husband or by his legal representative. Lord Westbury dissented. He viewed the situation in this way: the principal administration in each case would be in the United States; the legal representative of the mother either by himself or certainly after administration taken out in England, could give a discharge to the administrator of the original estate, and with that done the English courts would no longer be interested in the property which would thereafter be administered according to the law of the domicile. He impliedly rejected the view that administration of the father's estate in England was necessary to establish the right of the son to represent his mother there; and if the son had been named the executor of his mother's will it would seem to be beyond doubt that the father's estate would never be brought in question before the English courts: certainly that would appear to be so in relation to succession duty. The situation so conceived is that here. The only question before Canadian courts is the power to discharge the executor of B: that is possessed by the administrator of C: The estates of D and E do not come in question. The power of discharge is the converse aspect of the view of the equitable operation in respect of "interests" already expressed and obviously leads to the same result. The two grounds mentioned, together with the fact that it was probate duty there as against succession duty, distinguish it from the present controversy, to which the opinion expressed by Lord Westbury is, I think, unassailable in its application.

I would, therefore, dismiss the appeal with costs.

KELLOCK J.:—The Crown in the first appeal claims duty upon the succession consequent upon the death of the late George V. Steed, who died domiciled in California,

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entitled to the residue of the estate of his deceased wife, Bonnie Steed, also of California domicile. In the second appeal the claim is for duty upon the succession consequent upon the death of one Raeburn, who died domiciled in California, entitled to the residue of the estate of George V. Steed.

The *Dominion Succession Duty Act* came into force on the 14th of June, 1941. Bonnie Steed died on the 10th of January of that year, leaving a will under which she appointed her husband sole executor and sole beneficiary. Bonnie Steed was entitled under the will of her sister, the late Katherine Williams, to the residue of the latter's estate, all of the assets of which were locally situated in British Columbia. Bonnie Steed also had other assets to the value of some $10,000 in California. Katherine Williams had died on the 9th of April, 1924, being in her turn entitled to substantial benefits under the will of the late Adolphus Williams, all of whose assets were also in British Columbia. At the date of the death of George Steed on August 16, 1944, the estate of Adolphus Williams had not been fully administered. That did not take place until November of 1945. Consequently, the estates of his widow and of Bonnie Steed were also unadministered.

In the meantime J. K. Raeburn, the sole executor and sole beneficiary under the will of George Steed, had died in December 1944, domiciled in California. W. T. Fitzgerald was appointed by the California court as administrator with the will annexed of the estate of George Steed on the 12th of March, 1945, and on the 28th of November, 1945, Ftzgerald was also appointed administrator with the will annexed of the estate of Raeburn. George V. Steed had, on March 26, 1941, taken out letters probate in British Columbia limited to the estate of Bonnie Steed there. On the 16th of January, 1946, Fitzgerald was appointed in California administrator with the will annexed of Bonnie Steed. Pursuant to a power-of-attorney given by Fitzgerald, Walter William Walsh, who was the surviving executor of the estate of Adolphus Williams, was, on February 5, 1946, appointed by the court in British Columbia administrator de bonis non of the estate of Bonnie Steed.

The Crown's claim as against the estate of George V. Steed is rested upon the fact of his death prior to the actual distribution of the British Columbia assets of the estate of Bonnie Steed in the lifetime of George V. Steed. It is said that there was a succession to property in British Columbia within the meaning of the *Succession Duty Act* on the death of George Steed which is taxable under the provisions of 6 (*b*) of that *Act*.

"Property" is defined by section 2(*k*) of the statute as including real and personal property and every estate and "interest" therein capable of being devised or bequeathed by will or of passing on death. The question in each appeal is whether there was, upon the death of George Steed and of Kenneth Raeburn, respectively, any succession to property or an interest therein in Canada consequent thereon.

Dealing first with the situation arising upon the death of George Steed, the assets of the estate of Bonnie Steed, of which he was residuary beneficiary, consisted of certain assets in California where she was domiciled and where her executor was also domiciled and also an interest in the residuary estate of Katherine Williams. I think the situation becomes clear if one disregards the fact that George Steed was also the sole executor of Bonnie Steed and if the situation be considered as though another person still living were the executor. When the executor of Katherine Williams had realized upon her residuary estate and was in a position to pay, it would have been necessary to take out administration to the estate of Bonnie Steed in British Columbia, Bonnie Steed being then dead and there being no person qualified by the law of British Columbia to give a discharge. Bonnie Steed's representative would have been liable to succession duty in such event but the law of British Columbia would have had no further concern with the moneys so paid over beyond enforcing the claim of the personal representative appointed by the law of the domicile of Bonnie Steed, namely, California, to payment over of such moneys.

The argument on behalf of the Crown is that it would be the duty of the executor of Katherine Williams before paying the administrator in British Columbia of the estate

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of Bonnie Steed, to inquire whether any of the beneficiaries of that estate, or those claiming under them, were then dead, and to refuse to pay such part of the proceeds of Katherine Williams' estate from which any such deceased person might ultimately obtain a benefit without payment of succession duty under the *Dominion Act* or without a release under that *Act* having been obtained.

It seems to me that in the absence of clear language in the legislation such is not the case. I think this view finds support in the judgment of Lord Westbury in *Partington* v. *Attorney-General* (1). The fact that this judgment was a dissenting judgment does not affect the present point.

In *Partington's* (1) case one, Mary Shard, had died in England in 1819 intestate, leaving one, Isabel Cook, her next-of-kin, domiciled in the United States. The latter died in 1825 without having taken out letters of administration and Isabel Cook's husband, Ellis Cook, also died in 1830 without having taken out letters of administration to his deceased wife. After his death the appellant, under a power-of-attorney, took out letters of administration in England to the estate, first of Ellis Cook and then of Isabel Cook, and it was held that probate duty was payable in respect of both estates. In his judgment Lord Westbury pointed out that the administration of the estate of Isabel Cook was necessary to enable that administrator to give a valid discharge to the administrator of Mary Shard but neither the personal estate of Isabel Cook nor that of Ellis Cook had to be distributed or administered in England. He was therefore of opinion that there was no basis for the levying of duty in respect of the estate of Ellis Cook. The personal representative of Mrs. Shard was of course entitled to receive a discharge upon the distribution of the assets in his hands. As Isabel Cook was dead, Mrs. Shard's administrator was entitled to have a discharge from a personal representative of Isabel Cook appointed in England. It was therefore necessary to take out letters of administration to Isabel Cook in England but solely for the purpose of giving such a discharge. Beyond that the law of England was not interested. In Lord Westbury's

(1) L.R. 4 E. & 1 App. 100.

view therefore the course that ought to have been adopted by the parties was to have taken out administration to the estate of Isabel Cook in the appropriate court in the United States and ancillary letters of administration in England. Notwithstanding that this course was not in fact followed, Lord Westbury would have decided the liability on the part of the estate of Ellis Cook to duty as though that course had in fact been followed.

The Lord Chancellor, Lord Hatherley, however, held that both estates were liable to duty as would have been the case had both been domiciled in England. Administration having in fact been taken out in England in respect of both estates it was not, in his view, for their Lordships to say that they were not bound by this course of action. He was unwilling to decide what might have been the case if the course suggested by Lord Westbury as the proper course had in fact been followed. The judgment of Lord Chelmsford and that of Lord Colonsay also proceeded on the basis of the course actually adopted by the parties. Lord Cairns was, however, of the view that, notwithstanding the course followed, both estates were liable to duty.

In my opinion in the case at bar the representative of Bonnie Steed was entitled to receive that to which Bonnie Steed was entitled under the will of Katherine Williams and to give a good discharge therefor. The accident that George Steed was not only beneficiary but executor and was dead when the time came for payment over does not affect the principle. I do not think the law of British Columbia could be further interested once the moneys reached the hands of the personal representative in British Columbia of Bonnie Steed, whose duty it then was to remit to the administrator in the domicile; *Eames* v. *Hacon* (1).

I pause at this point to deal with an argument of Mr. Pickup, that because in fact George Steed proved the will of Bonnie Steed in British Columbia before there was any administration taken out to her estate in California, British Columbia was thereby constituted as the local situation of all her estate and the main forum of its administration, with the result that George Steed died entitled to the residue of Bonnie Steed's estate, all of which was situate

(1) (1880-81) 18 Ch. D. 347.

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in Canada. In my opinion this argument is not entitled to prevail. I think the case must be viewed apart from such accidents. Administration was always necessary in California and was ultimately taken out there and the administration in British Columbia ultimately granted subsequent to the death of George Steed was purely ancillary.

There is a further consideration which confirms the view to which I have come, as above expressed. In *Lord Sudeley* v. *Attorney-General* (1), a case dealing with probate duty, it was held that the residuary legatee of a testator who died domiciled in England where his estate was undergoing administration, but whose property included mortgages on real property in New Zealand, was not entitled to any part of the mortgages in specie but to require the testator's executors to administer his personal estate and to receive her share and that this was an English asset of the estate of the residuary beneficiary. The judgment of Lopes L.J., in the Court of Appeal (2) was approved. At p. 363 that learned judge said:

> The right of the executors of Frances (the widow and residuary legatee of the testator) as against the executors of her husband is a right to have his estate administered. Administration where? The husband was domiciled in England, his will was proved in England, his executors are in England, and his estate is being administered in England, and the money recoverable will be brought to England. The executors of the husband can only be sued in the English Courts by the executors of Frances. It is an English chose in action, recoverable in England, and is, in my opinion, an English and not a foreign asset * * *

With respect to estate duties in England the law is thus stated in Dymond on Death Duties, 10th Edition, at page 93:

> In the case of absolute interests in an unadministered estate the right of a residuary legatee, under English law and many other legal systems, is not to the specific assets of the testator. He is entitled merely to require the executors to administer the estate, and to pay him the clear residue, or a share thereof, as the case may be. The same rule applies under an intestacy. If, therefore, a residuary legatee or person entitled under an intestacy dies while the original estate is still under administration, the locality of his interest, as an asset in his estate, is determined by the residence of the debtors, viz., the personal representatives of the original testator or intestate (*Sudeley* v. *A.-G.* (1897) A.C. 11; *Barnardo's Homes* v. *Special Commissioners of Income Tax* (1921) 2 A.C. 1; *Re Steinkopff, Favorke* v. *Steinkopff* (1922) 1 Ch. 174), and by the forum of administration, the latter being determined by the domicile of the testator or intestate. In practice, as between Northern Ireland and Eire

(1) [1897] A.C. 11. (2) (1896) 1 Q.B. 354.

and Great Britain the domicile is treated as the material factor; . . . The Revenue has conceded the application of the general principle stated above to cases where the deceased beneficiary was also the sole personal representative of the other deceased person.

The author points out at page 87 that as regards claims for estate duty on property situate in Ireland such property ranks as colonial or foreign property.

If the question be looked at therefore in accordance with the view of the text writer, the locality of the interest of George Steed in the estate of his deceased wife was situate in California, where the executor was domiciled and where the main administration would proceed. It has not been considered by any text-writer, so far as I have been able to find, that anything said in *Skinner* v. *Attorney-General* (1) is relevant to the situation referred to by Dymond.

It was contended in the case at bar, however, that the decision in Skinner's (1) case was, however, relevant. In that case the House was concerned with a claim of the revenue to estate duty under section 2, 1 (*b*) of the *Finance Act*, 1894, in respect of investments in England made by the executors of a deceased person who died domiciled in Northern Ireland where his estate was undergoing administration, leaving annuities, among others, to his widow. Estate duty was claimed upon the death of the widow on the ground that the widow had had an "interest" in the English investments ceasing on her death within the meaning of the legislation.

It was held that section 2, 1 (*b*) did apply. In the course of his judgment Lord Russell of Killowen considered the decision in *Sudeley's* case and said that it was not in any way a decision that the widow in that case, or her executors, had no interest in the New Zealand mortgages, but that the gist of the decision was that she had no interest in the mortgages so as to make them an asset of her estate.

Assuming that the view of Lord Russell was that for the purposes of such legislation as the *Finance Act*, the widow in *Sudeley's* case was to be considered as having an interest within the meaning of that *Act*, and applying that view to the case at bar, George Steed had not only his claim against the executor of Bonnie Steed in California, but an interest in the assets of Bonnie Steed, one of which

(1) [1940] A.C. 350.

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was an interest in the assets of the estate of Katherine Williams in British Columbia. In other words, George Steed had an interest in the interest of Bonnie Steed in Katherine Williams' residuary estate. When one comes to Kenneth Raeburn, he, similarly, had an interest in the interest of George Steed in the interest of Bonnie Steed in the residuary estate of Katherine Williams.

In my opinion, while "property" is defined by section 2(*k*) of the statute as including every estate and "interest" in real and personal property capable of being devised or bequeathed by will or of passing on death, I see no reason for construing this statute, without more express language, as including an interest in an interest or more remote interests.

In my opinion therefore the appeal should be dismissed with costs.

LOCKE J. (dissenting):—The bequest by Adolphus Williams to Katherine Wylie Williams, his wife, was the sum of $150,000 or one-half of his estate, whichever might be the larger sum, and it was directed that this bequest should be a first and prior charge on the estate and not subject to any abatement. After making certain further smaller bequests all of the testator's real and personal property was devised to trustees to sell and call in and convert into money and out of the proceeds to pay the debts and the legacies bequeathed by the will, and the trustees were empowered to postpone the conversion of any of the testator's property for so long as they should think best in the interest of the estate. The trustees were further empowered at the request of the wife to convey any part of the real and personal estate at their own fair market value in satisfaction of her legacy. By a codicil it was provided that the named trustees should pay interest on the legacy to the wife in monthly instalments at the rate of five per cent from the date of the death of the testator. By the will of Katherine Wylie Williams made on July 15, 1922, following the death of her husband, after directing the payment of debts, funeral, testamentary expenses, probate and succession duties, and providing a legacy of $5,000 to John Walter Walsh, the trustees were required

"to convey, assign, transfer and set over all the rest and residue of my property, both real and personal, unto my sister Isabella Steed, wife of George V. Steed, of the City of San Francisco, in the State of California" and in the event of her prior death to transfer such residue to George V. Steed. In the exercise of the discretion given to them by the will of Adolphus Williams, his trustees delayed the conversion into money of the Castle Hotel property in Vancouver, which was the main asset of the estate, until November of 1945 when they were able to effect a sale for $250,000 cash and to provide for the balance of the legacy of $150,000 and accumulated interest for the first time since the death of the testator. In the interval Mrs. Williams had died in the year 1924 and her sister Isabella Steed, who is referred to in the proceedings as Bonnie Steed, on January 10, 1941. Mrs. Williams had received some payments by way of interest upon her legacy and Bonnie Steed some small payments of principal, and the balance payable to the estate of Katherine Wylie Williams at the date of the sale of the property was $134,952.66, the balance of the principal amount of the legacy, and $24,-394.67, accumulated interest.

Adolphus Williams, his wife Katherine and Bonnie Steed all died prior to the date upon which the *Dominion Succession Duty Act* came into force and the duty imposed did not attach to the successions in any of these estates. The will of Bonnie Steed made on December 9, 1924, at San Francisco, where she resided with her husband and was domiciled, after directing payment of her debts bequeathed "all my property, real, personal and mixed of whatsoever kind and wheresoever situated" unto her husband and appointed him executor. Following the death of Mrs. Steed her husband applied for probate of her will to the Supreme Court of British Columbia, limited to the estate within that province and letters probate were issued on April 1, 1941, and at the time of the death of George V. Steed on August 16, 1944, no other probate had been obtained in California or elsewhere. By the will of George V. Steed made in California on February 4, 1941, he bequeathed "all my property of whatsoever kind and wheresoever situated" unto James Kenneth Raeburn, his wife's

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nephew, and by the will of Mr. Raeburn dated October 11, 1944, he left the estate which he had inherited from George V. Steed to his sister and other relations, in varying proportions. Raeburn was killed while on active service with the American Forces in December 1944. It is upon the successions in these two estates that the duties in question have been levied.

The assessment made upon the estate of Steed is upon what is said to be a succession of the value of $159,347.33 which, according to the notice of assessment, consisted of money on deposit with the main branch of the Royal Bank of Canada at Vancouver standing in the name of W. W. Walsh in trust. In the estate of Raeburn the dutiable value of the successions is stated to be $143,205.29. The notice in connection with this estate does not assume to designate any particular place as the situs of the moneys bequeathed. While Raeburn had been named the executor of George V. Steed and an application for probate made on his behalf granted in the Supreme Court of California on December 22, 1944, in ignorance of the fact that he had been killed in action earlier that month, his will did not name an executor. Raeburn who by virtue of sec. 75 of the *Administration Act*, cap. 5, R.S.B.C. 1936 would have had all the powers and rights of George V. Steed as executor of the estate of Bonnie Steed in British Columbia, did not exercise those rights and nothing has been done pursuant to these powers from the date of Steed's death. On March 12, 1945, letters of administration with the will annexed of the will of Raeburn were granted to the respondent Fitzgerald by the Superior Court of California and on January 11, 1946, a like appointment was made in that court in relation to the will of Bonnie Steed. Thereafter Fitzgerald, by power of attorney, authorized the appointment of Mr. Walsh as ancillary administrator of the Bonnie Steed estate in British Columbia and letters of administration with the will annexed de bonis non were granted in the Supreme Court of British Columbia on February 5, 1946. Upon the death of Mr. Walsh, Mr. R. H. Tupper was appointed to succeed him as administrator de bonis non of this estate.

Property is defined by sec. 2 of the *Dominion Succession Duty Act* as including *inter alia* "property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death." Succession is defined as meaning:

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.

The duties imposed by the Act are levied where the deceased was at the time of his death domiciled outside of Canada "upon or in respect of the succession of all property situate in Canada" and the point for determination is as to whether the succession of Raeburn under the will of George V. Steed and of Nan Raeburn, Thomas W. Raeburn, Elizabeth W. R. Allan and William J. M. Raeburn, under the will of J. K. Raeburn, were successions to property situated in Canada.

I do not think that the proper determination of this question depends upon the fact that by the will of Adolphus Williams the bequest to his wife was declared to be a first charge upon the estate, since I think this was simply intended as a direction that the wife should be paid in preference to all other legatees and that there was no intention to create a charge in the sense of an encumbrance upon the real and personal assets. Nor do I think that the fact that letters probate of the will of Bonnie Steed were obtained in British Columbia by her executor affects the matter since no one now is vested with the status of executor of the estate in British Columbia and the claim to the moneys in question is made by the administrator with the will annexed, properly authorized by the court in the jurisdiction in which Mrs. Steed was domiciled and died. I am, however, of the opinion that George V. Steed at the time of his death had an interest in the assets of the estate of Adolphus Williams, within the meaning of

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subs. (*k*) of sec. 2 of the *Act*, and that the rights of Raeburn and of his legatees under the respective wills gave to these persons an interest in that property.

As of the date of the death of Steed on August 16, 1944, the remaining assets of the Adolphus Williams estate consisted of the Castle Hotel property and some other less valuable properties in Vancouver, and the unpaid portion of the legacy to Katherine Williams with accumulated interest was to be paid out of moneys realized from the sale of the property, in priority to the other legacies. It was this right which the trustees of Katherine Williams were required by her will to transfer and set over unto Bonnie Steed and it was this right which passed to George V. Steed under the bequest of the residue of his wife's estate and of which he died possessed. The right to receive the amount of the bequest from the executors of Katherine Williams was vested in Steed qua executor of his wife's estate. I am, however, of the opinion that Steed in his personal capacity had not only what was referred to by Romer, J. in *In re Smyth* (1), as an equitable chose in action entitling him to require the executor to administer the estate but also an interest in the assets out of the proceeds of which the legacy was to be paid. In *A.-G.* v. *Watson* (2), a testator bequeathed an annuity of £1,000 per annum to be paid out of his residuary estate and primarily out of the income thereof during the life of the annuitant or such less period as in the will mentioned. By s. 2, sub-s. 1 of the *Finance Act*, 1894, property passing on the death of a deceased was deemed to include property in which the deceased had an interest ceasing on the death of the deceased to the extent by which a benefit accrued or arose by the cesser of such interest, and upon the death of the annuitant the question arose as to whether he had an interest in the testator's residuary estate within the meaning of this section. Lush, J. said at p. 431:—

> On behalf of the defendants it has been contended that the annuitant had no interest in the corpus, and that no annuitant can be said to have an interest in the property out of which the annuity is payable unless the property has been actually appropriated and set apart to answer the annuity. If that is so of course the contention on behalf of the Crown fails, because there has been no express appropriation or setting apart of any specific property to answer this annuity. But in my judgment that is not the true interpretation to be placed upon s. 2, sub-s. 1 (*b*),

(1) (1898) 1 Ch. D. 89 at 91. (2) (1917) 2 K.B. 427.

of the *Finance Act*, 1894. The object of the section is to make estate duty payable whenever there has been a succession in fact, or that which is equivalent to a succession—whenever there has been a cesser of an annuity by reason of the death of the annuitant, which cesser causes a benefit to accrue to that property. And I think one is bound to construe the words "had an interest" in the wider sense and not to restrict the words, and put upon them the narrower meaning for which Mr. Disturnal has contended on behalf of the defendants. In my judgment this annuitant had, according to the ordinary use of language, an interest in the corpus of this property; she had an annuity accruing from day to day, payable out of the property, and it was to that property that the annuitant would necessarily look for the payment of her annuity. It is true she had no estate in the property, but she had an interest in it, because that was the source of the annuity bequeathed to her by the testator. It was the fund to which she could look and to which she was entitled to have recourse, and even to claim to have realized for the purpose of paying the annuity.

In *Skinner* v. *Attorney-General* (1), this decision was approved, Lord Russell of Killowen saying that an annuitant whose annuity is payable out of a testator's estate and who is, therefore, interested in the whole estate is necessarily also interested in all the parts which compose the whole and that her right to take proceedings (if necessary) to have the estate administered for the purpose of providing her annuity is merely the right of enforcing and realizing that interest which she has in the whole and its parts.

In the present case the learned trial judge in coming to the conclusion that the administrator of the estate of George V. Steed had no interest, legal or equitable, in the assets of the estate of Adolphus Williams, considered that the matter was concluded by the decision of the House of Lords in *Attorney-General* v. *Sudeley* (2), which was followed in *Dr. Barnardo's Homes* v. *Special Income Tax Commissioners* (3). In *Sudeley's* (2) case a testator who had died domiciled in England by his will, after bequeathing certain legacies, gave the residue of his real and personal estate to his executors in trust for his wife for life, and by a codicil gave one-fourth of his "said residuary real and personal estate" to his wife absolutely. The will was proved in England by his executors domiciled there and the estate included mortgages on real property in New Zealand. The wife died and her will was proved in England and at the date of her death her husband's estate had not been fully administered, the clear residue had not been ascertained

(1) [1940] A.C. 350.
(2) [1897] A.C. 11.
(3) (1921) 2 A.C. 1.

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and no appropriation had been made of the New Zealand mortgages to the particular shares of the ultimate residue. It was contended by the executors of the wife that no probate duty was payable under her will upon what they contended to be her fourth interest in the New Zealand mortgages since this was an asset the situs of which was New Zealand. It was held that the rights of the wife's executors was not to one-fourth or any part of the mortgages in specie but to require her husband's executors to administer his personal estate and to receive from them a fourth of the clear residue and that this was an English asset of the wife's estate and, accordingly, probate duty was payable under her will upon one-fourth of the value of the mortgages. Dealing with the contention of the executors, Lord Herschell said that the whole fallacy of the argument rested on the assumption that the testatrix was entitled to any part of the mortgages as an asset and that he did no consider that she or her executors had "any estate, right or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate." In Skinner's case Lord Russell pointed out that this passage from Lord Herschell's speech made it clear that the interest which had been repudiated was a proprietary interest and that it was not an authority for the proposition that the widow or her executors had no interest in the mortgages, and was certainly no authority against the view that an annuitant whose annuity is charged against the estate "has an interest" in the different items of which that estate from time to time consists. As Lord Russell pointed out, the whole point of the decision was that the widow did not own any part of the mortgages.

The decision in *Dr. Barnardo's Homes* (1) case does not appear to me to be at variance with this view of the law. There Dr. Barnardo's Homes National Incorporated Association named as the residuary legatee of an estate claimed that certain income received from investments of the estate following the testator's death but before the residue had been ascertained was exempt from income tax on the footing that the residue was its property. Following the decision in *Lord Sudeley's* (2) case it was held that until the residue was ascertained the institution had no property

(1) (1921) 2 A.C. 1.

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

in any specific investment forming part of the estate or the income therefrom and that accordingly income tax had been properly levied.

I think the rights of George V. Steed as at the time of his death were of the same nature as that of the annuitant in *In re Smyth* (1) and in *Skinner's* (2) case and that the matter is not affected by the fact that in Steed's case an action against the executors of Katherine and Adolphus Williams for the protection of his rights would normally be made by him in his capacity of executor of the estate of his deceased wife. It was to the real property held by the trustees of Adolphus Williams that Steed was entitled to look for the payment of the legacy and had the personal representative of his wife's estate been someone other than himself and had it been necessary to take some step for the protection of his legacy or to compel the administration of the estate of either Katherine or Adolphus Williams, Steed could have brought such an action in his own name had the personal representative declined to act, joining the representative of his wife's estate as a party defendant. As pointed out by Lord Russell of Killowen in *Skinner's* (2) case, his right to take proceedings, if necessary, to have the estate administered for the purpose of providing the legacy was merely the right of enforcing or realizing the interest which he had in the whole estate. In my opinion, the decisions in *Sudeley's* (3) case and in that of *Dr. Barnardo's Homes* (4) do not affect the matter to be decided here. The definition of "property" in sec. 2(*k*) of the *Dominion Succession Duty Act* says that the term includes every interest in property, real or personal, and not merely proprietary interests. If there could be any doubt as to the sense in which the word "proprietary" was used by Lord Russell in Skinner's (2) case it would be dispelled by the context. It was used to distinguish between the interest of one who claims a right of property in or ownership of assets, and one who has an interest arising out of the fact that an annuity is to be paid out of the income of such assets or the proceeds of their sale. In my opinion, Steed had no such proprietary interest in the assets of the

(1) (1898) 1 Ch. D. 89.
(2) [1940] A.C. 350.
(3) [1897] A.C. 11.
(4) (1921) 2 A.C. 1.

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estate of the late Adolphus Williams in the sense that that term is used in Skinner's (1) case, but that appears to me to be aside from the point.

The tax imposed by the *Dominion Succession Duty Act* is upon the succession and in the estate of Steed the succession of the interest was to Raeburn and I consider that his rights as against the assets in the hands of the executors of Adolphus Williams did not differ from those of his predecessor. When Mr. Raeburn made his will it was in the form of a letter addressed to his sister and was apparently made while he was on active service. The exact nature of the bequests to Nan Raeburn, Thomas W. Raeburn, Elizabeth W. R. Allan and William J. M. Raeburn, was expressed to be fractional portions of the estate which he had inherited from the late George V. Steed and in the case of Nan Raeburn certain bonds, an insurance policy and some cash which had not formed part of the inheritance. In the case of these legatees a further administration intervenes but, for the same reason which leads me to conclude that George V. Steed died possessed of an interest in the assets of the estate of Adolphus Williams within the meaning of sec. 2(*k*) of the *Dominion Succession Duty Act,* I think these legatees succeeded to such an interest.

The appeal should be allowed with costs and the judgment in the Exchequer Court set aside. There should be a declaration that the moneys deposited in the Royal Bank of Canada in trust are liable to payment of succession duty at the appropriate rate on the dutiable value of the successions referred to in the assessment notices. The appellant should have the costs of the proceedings in the Exchequer Court.

Appeal dismissed with costs.

Solicitors for the appellant: *Clark, Robertson, MacDonald & Connelly.*

Solicitor for the respondent Fitzgerald: *E. G. Gowling.*

Solicitor for the respondent Walsh: *Alfred Bull.*

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(1) [1940] A.C. 350 at 358.