IN THE MATTER OF THE ESTATE OF Dr. GEORGE ALEXANDER FLEET, DECEASED.

1949

*May 3, 4
*Oct. 31

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

AND

THE ROYAL TRUST COMPANY ET AL. ..... RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Succession duty—Obligation under antenuptial contract to pay a sum of money in consideration of renunciation of community and dower—Obligation not discharged prior to death of obligor—Whether obligation is a "succession"—Whether a debt deductible—Whether "consideration in money or money's worth"—Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, ss. 2(m), 3(1) (j), 8(2) (a).

By antenuptial contract made in 1916, the husband obligated himself during the existence of his intended marriage, to pay his wife $20,000, in consideration of her renunciation of community and dower. This sum remained unpaid at the husband's death in 1943. His executors claimed to deduct this from the value of his estate for the purpose of the *Succession Duty Act* of the Dominion. The deduction was disallowed by the Minister but restored by the Exchequer Court.

Held, (Kerwin J. dissenting), that the agreement did not fall within the definition of "succession" in s. 2(*m*) of the *Dominion Succession Duty Act.*

*Present: Rinfret C.J. and Kerwin, Taschereau, Rand and Estey JJ.

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Held, further, (Kerwin J. dissenting), that property transferred or agreed to be transferred in consideration of marriage, prior to April 29, 1941, is not deemed to be a "succession" under s. 3(1) (*j*) of the *Act*.

Per The Chief Justice and Taschereau J.: The renunciation of community and dower is a "consideration in money or money's worth" within the meaning of s. 8(2) (*a*).

Per Kerwin J. (dissenting): As the widow became entitled upon the husband's death, it is a "succession" within s. 2(*m*) of the *Act*. It is not a debt under s. 8(2) (*a*), because it was not created "for full consideration in money or money's worth".

APPEAL from the judgment of the Exchequer Court of Canada (1), Cameron J., reversing the decision of the Minister of National Revenue confirming an assessment made under the *Dominion Succession Duty Act*.

J. G. McEntyre and *R. G. Decary* for the appellant.

C. A. Hale, K.C., for the respondents.

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

TASCHEREAU, J.:—The Minister of National Revenue appeals from a judgment of the Exchequer Court of Canada (1) rendered on the 28th of October, 1947, maintaining the respondents' appeal from an assessment of succession duties upon the estate of the late Doctor George Alexander Fleet, in his lifetime of the City of Montreal.

Doctor Fleet died on the 23rd of April, 1943, and in his Will, appointed the Royal Trust Company and his wife, Helena Ada Dawes as executors of his estate, valued at $115,562.81. Doctor Fleet and his wife, both domiciled in the City of Montreal in the Province of Quebec, were married on June 1st, 1916, and on May 25th of the same year, they executed before John F. Reddy of Montreal, N.P., a marriage contract which stipulated separation of property and an obligation by Doctor Fleet to pay to his wife during their marriage, the sum of $20,000. It was further provided that in the event of such sum not having been paid during the marriage, and in the event of his wife surviving him, she would immediately upon his death have the right to receive from his estate, payment of the said sum with interest at the rate of six per centum from the date of the death.

(1) [1948] Ex. C.R. 34.

The executors filed with the Minister of National Revenue, as provided for by the *Dominion Succession Duty Act,* a statement showing the assets and liabilities of the estate, and in which the sum of $20,000, which had not been paid during the lifetime of the deceased, appeared as a liability. The Minister disallowed this sum as a debt of the estate, and Mr. Justice Cameron (1) allowed the appeal of the respondents, holding that the sum of $20,000 did not form part of the succession, was not a part of the taxable estate and not subject therefore to duty. It is from the setting aside of this assessment that the Minister of National Revenue now appeals.

The marriage contract stipulates that no community of property shall at any time exist between the parties, that there shall be no dower, and that in consideration of the renunciation by the wife to community and dower, the husband promised and obliged himself to pay to his wife during the existence of the marriage, a sum of $20,000. The marriage contract also contained the following paragraph:—

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.

The relevant sections of the *Dominion Succession Duty Act* are the following:—

2. (*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, and also includes any disposition of property deemed by this Act to be included in a succession;

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:

(1) [1948] Ex. C.R. 34.

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(*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 twenty-ninth day of April, one thousand nine hundred and forty-one, and *within three years of the death,* by the deceased person, in consideration of marriage;

8. (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;

Dealing first with the claim of the executors that the promise of the husband to pay $20,000 was "a debt incurred by the deceased created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit" was subject to an allowance, the learned trial judge held that it was not. He came to the conclusion that at the time of the marriage contract, neither party possessed any assets of any real value, and that Mrs. Fleet in surrendering her rights to community and to dower, did not give to her husband, nor did he receive, full consideration in money or money's worth in return for the obligation to pay $20,000. He held that in order to determine that full consideration had been received, reference must be made to the facts as they existed at the time of the contract, and not to the facts existing twenty-seven years later.

In renouncing community of property, the wife abandoned one-half ownership in the earnings of her husband, as a physician and surgeon, and therefore gave up her potential rights to one-half ownership in the entire estate, which at the time of her husband's death amounted to $115,562.81. In renouncing the customary dower, she also abandoned a potential right to the usufruct of one-half of the immovables which belonged to her husband at the time of the marriage, and of one-half of those which might have accrued to him during the marriage, from his father, mother, or other ascendants. (C.C. 1434.)

In consideration of these renunciations, Mrs. Fleet was promised $20,000. I find it impossible to say that the obligation of the husband to pay this $20,000 is a mere debt contracted by him without consideration. It is admitted by all parties that this obligation was created *bona*

fide, and I am quite satisfied that there was ample consideration. The husband promised to pay $20,000, and the wife agreed not to claim an amount which eventually proved to be much larger than what the estate now owes her. She also waived her right to dispose by Will of half of her husband's property, if she had predeceased him, which would have meant a partition of Doctor Fleet's whole assets during his lifetime.

Marriage contracts often contain gratuitous provisions, which of course in certain cases may be taxable, but they also very frequently contain covenants which are not of the same character. In the present case, the agreement entered into was bilateral, onerous, and I find that the essential element of gratuitousness necessary to constitute a gift, is absent. The jurisprudence and the teachings of the authors are unanimous on this point. Vide *Turgeon* v. *Shannon* (1); *Simpson* v. *Thomas* (2); *Filion* v. *Beaujeu* (3); *Huot* v. *Bienvenue* (4); *Lapointe* v. *Larochelle* (5); *Royal Trust Company* v. *The King* (7).

In *Sabourin* v. *Périard* (1), it was held:—

Where a wife sues the testamentary executor of her husband claiming $2,000 under the marriage contract and the payment is refused on the ground that the marriage contract was never registered, the action should be maintained if it appears that the wife in renouncing her dower renounced to more than she would have received otherwise and the obligation to pay the amount claimed became an onerous one and consequently did not require to be registered.

At page 43, Mr. Justice Mackinnon says:—

Although the word "donation" is found in the clause of the marriage contract stipulating the payment to the plaintiff of an amount of $2,000 this in no way changes the nature of the contract. The plaintiff in renouncing her dower renounced to more than she was to receive and the obligation undertaken by her husband in the marriage contract became an onerous one.

At pages 44 and 45, Mr. Justice Bissonnette expresses his views as follows:—

Comme M. le juge Mackinnon le démontre à mon entière satisfaction, la convention particulière et inusitée que contient le contrat de mariage est bilatérale et onéreuse, de sorte qu'elle échappe aux exigences ordinaires de l'enregistrement des donations. Au surplus, la preuve que le dossier nous apporte écarte davantage tout doute, puisqu'elle révèle la remise de prestations synallagmatiques, apparemment plus lourdes pour la donataire que pour le donateur.

(1) 20 S.C. (Que.) 135.
(2) 4 R.L. (Que.) 465.
(3) 5 L.C.J. 128.
(4) 33 S.C.R. 370.
(5) 74 S.C. (Que.) 75.
(6) 79 S.C. (Que.) 304.
(7) Q.R. [1947] K.B. 34.

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Par cette preuve, toute présomption de gratuité qui s'attache aux clauses habituelles des conventions matrimoniales est non seulement détruite, mais cette stipulation, bien que qualifiée de donation, devient une convention à titre onéreux, parce que l'élément essentiel de libéralité ne s'y retrouve pas.

It will also be interesting to consult the following authors:—

Dalloz, Répertoire Pratique (1912, Vol. Donation, t. 4, pages 519 and 520) where the learned author says:—

3. La donation est un acte essentiellement gratuit; néanmoins, elle peut être faite avec stipulation de certaines charges. Dans ce cas même, la donation ne cesse pas d'être considérée comme une transmission à titre gratuit, et est soumise, par conséquent, à toutes les règles des donations entre vifs.

Cependant, si la charge imposée au donataire égale l'avantage qu'il retire de la donation, il n'y a plus de libéralité, et l'acte, bien que qualifié de donation, constitue une convention à titre onéreux, sans, d'ailleurs, qu'il y ait à distinguer suivant que les charges sont imposées au profit du donateur ou au profit d'un tiers,—Jugé, en ce sens, que l'acte qualifié donation, qui impose au donataire des charges ou des services d'une valeur équivalente ou sensiblement égale à celle des biens donnés, peut être considéré comme constituant, en réalité, un contrat à titre onéreux.

Planiol, Droit Civil, (8th ed., p. 491, para. 2505) says:—

2505. *Donations onéreuses*—Une donation n'est pas toujours entièrement gratuite; souvent des charges diverses sont imposées au donataire; on a alors une donation avec charges ou donation sub modo. L'existence de ces charges peut diminuer ou même détruire complètement le caractère gratuit de l'acte. Voyez ce qui en est dit ci-dessous, nos. 3009 et suiv.

I, therefore, have to come to the conclusion that in 1916, Doctor Fleet contracted "a debt in good faith, for full consideration in money or money's worth for his own use or benefit", and that the second part of section 8 (2) (*a*) of the *Act* applies. With deference I cannot agree on this point with the trial judge, although I fully concur with him in the other reasons that he gives in his judgment.

I have cited supra the definition given in the *Act,* in section 2 (m), of the word "succession". The last words of this definition are the following: "and also includes any disposition of property deemed by this *Act* to be included in a succession". Section 3 enumerates several dispositions of property deemed to be included in a succession, and subsection (*j*) says that "property transferred to or settled on or agreed to be transferred to or settled on any person or persons whatsoever on or after the twenty-ninth day of April, one thousand nine hundred and forty-one, and

within three years of the death, by the deceased person, in consideration of marriage" is deemed to be included in a succession. It follows that if, in consideration of marriage, property is transferred after the twenty-ninth day of April, one thousand nine hundred and forty-one, and within three years of the death, the amount of the property thus transferred is taxable. It is also logical to say that if the property is transferred in consideration of marriage, before the twenty-ninth day of April, one thousand nine hundred and forty-one, the property transferred is not subject to duty; and nobody could successfully argue that if Doctor Fleet had paid to his wife before the above mentioned date, the $20,000 that he had promised in his marriage contract to pay her, the Minister of National Revenue would be entitled to claim succession duties at the death of Doctor Fleet. But, section 3 (1) (*j*) does not apply only to property which is actually transferred; it applies also to property settled on *or agreed to be transferred* in consideration of marriage. It seems therefore clear to me that Doctor Fleet having, before the twenty-ninth day of April, one thousand nine hundred and forty-one, and obviously within three years prior to his death, agreed to transfer $20,000 to his wife in consideration of marriage, this amount is excluded from duty. The agreement made between the parties is by law, put on the same footing as a complete transfer. In virtue of this section 3 (1) (*j*), the amount thus agreed to be transferred is property which is not deemed to be included in the succession.

It has been further argued that the agreement falls within the definition of "succession" contained in section 2 (*m*). The mere reading of 2 (*m*) will show that this contention cannot prevail. As the learned trial judge said, this sum of $20,000 is not payable to Mrs. Fleet by devolution by law, nor did she become beneficially entitled thereto upon the death of Doctor Fleet. The agreement was made in 1916 and she became beneficially entitled thereto on that date or, in any event, during the lifetime of Doctor Fleet as the contract provided. It was not by reason of Doctor Fleet's death that the money was payable to her.

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It has also been contended that alternatively the disposition here made falls within the dispositions deemed to be included in a succession, by subsections (*a*), (*b*) or (*d*) of section 3. These subsections read as follows:—

(*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 ade 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;

These sections have no application. Under (*a*), in order that the property may be deemed a succession, it has to be voluntarily transferred by grant, bargain or gift, or made in general contemplation of the death of the grantor. Here, no property was transferred; there was merely an agreement to pay later. The agreement was not entered in general contemplation of death, it was made in contemplation of marriage. It cannot be said either that it falls under subsection (*b*) as being property taken as a "*donatio mortis causa.*" The elements which are necessary to constitute a donation *mortis causa* have been dealt with by the learned trial judge, and none of these elements can be found in the agreement that has been entered into. As to (*d*), it is clear that it cannot apply.

I, therefore, come to the conclusion that this appeal should be dismissed with costs.

KERWIN J. (dissenting):—This is an appeal by the Minister of National Revenue against a judgment of the Exchequer Court (1) allowing the respondents' appeal from an assessment of succession duties upon the estate of the late Dr. George Alexander Fleet. The respondents are the executors of Dr. Fleet who was domiciled and resident at the City of Montreal, in the Province of Quebec, and who died April 23rd, 1943. The point to be determined depends upon the construction of the *Dominion Succession Duty*

(1) [1948] Ex.C.R. 34.

Act, chapter 14 of the Statutes of 1940-1941, which came into force June 14th, 1941, and of a marriage contract executed May 25th, 1916, between Dr. Fleet and Helena A. Dawes, the parties to which were married on June 1st of the same year.

At the time of the execution of the contract and of the marriage, both parties were without any substantial assets. The contract stipulated separation of property. Miss Dawes possessed certain personal effects and jewellery, and it was agreed that all goods, chattels, household furniture, moveables and effects at any time found in and garnishing the parties' common domicile should belong to the wife, and there was a covenant by the husband to pay his wife during the existence of the marriage the sum of $10,000 for the purpose of purchasing such goods. The right to dower was renounced. Clause 5 of the contract provided in part as follows:—

> 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.

It was also agreed that the obligation on the part of Dr. Fleet to pay the sum of $10,000 was purely personal to and exclusively in favour of the wife and that, in the event of her predeceasing her husband before the sum should have been paid her, her representatives should have no claim in respect thereto.

By his Will, Dr. Fleet directed his executors to pay his debts, including such indebtedness, if any, as might remain unpaid under the contract. No part having been paid in his lifetime, his executors, in filing a return under the *Act*,

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claimed that the total amount should be deducted from the value of his estate which, due to the doctor's own efforts since his marriage, amounted to about $130,000. This deduction was disallowed by the Minister but was restored by the Exchequer Court (1).

Under section 6 of the *Act*, subject to the exemptions mentioned in section 7 (with which we are not concerned), there is to be assessed, levied and paid, at the rates provided for in the first schedule, duties (*inter alia*) upon or in respect of the succession to all real or immoveable property situated in Canada, and all personal property wherever situated, of a deceased domiciled in a province of Canada. By section 2 (*d*) "deceased" means a person dying after the coming into force of the *Act*, and by section 2 (*m*):—

> (*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, and also includes any disposition of property deemed by this Act to be included in a succession;

The trial judge decided that the widow did not "become beneficially entitled" to the $20,000 "upon the death" of Dr. Fleet. "The agreement" he states "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."

With respect, I am unable to agree. Upon the husband's death, "the event has occurred upon which (her) title accrued", per Jessel M.R., in *Attorney General* v. *Noyes* (2) and, as it is put by Lord Justice Brett in the same case, at 141:—"The condition which has not happened is not to be regarded." Lord Justice Cotton, the third member of the Court of Appeal, expressed a similar opinion. The point there decided was that as the succession under a certain settlement actually took effect on the death of the settlor, succession duty was payable upon the whole of the fund and not merely on the income of it for the period

(1) [1948] Ex.C.R. 34.

(2) (1881) 8 Q.B.D. 125.

between the death of the settlor and the end of a term when the beneficiaries would have become entitled, in any event, to the *corpus*. The circumstances were quite different from those before us but the same reasoning should be applied.

Section 2 (*m*) corresponds sufficiently to section 2 of the *British Succession Duty Act*, 1853, to make opposite the remarks of Lord Macnaghten in *Northumberland* v. *Attorney General* (1):—"It is clear the terms "disposition" and "devolution" must have been intended to comprehend and exhaust every conceivable mode by which property can pass, whether by act of parties or by act of law." Leaving aside the question of sales, section 2 (*m*) of our *Act* is wide enough to cover dispositions made for value.

Section 2 (*m*) states that "succession" *means* certain things and also *includes* any disposition of property deemed by the *Act* to be included in a succession, thereby referring to section 3:—

> 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:—

Here follow certain provisions which enlarge the definition of "succession" in section 2 (*m*) so as to bring into the revenue cases not covered by 2 (*m*). While I am conscious of the warning given by the Judicial Committee in *Attorney General of Ontario* v. *Perry* (2) in considering the *Ontario Succession Duty Act*, to proceed with caution in applying decisions upon British taxing statutes as amended from time to time to enactments elsewhere that appear full grown, the proper relationship of section 2 (*m*) and section 3 is that pointed out by Lord Macnaghten in *Earl Cowley* v. *Inland Revenue Commissioners* (3). After referring to the principle on which the *Finance Act* of 1894 was founded, he proceeds:—

> Sect. 1 gives effect to that principle. Subject to certain exceptions or savings, it imposes a duty called estate duty upon the principal value of all property "settled or not settled" which passes on death. Sect. 2 is merely subsidiary and supplemental. It was intended apparently to sweep in a few cases which were thought perhaps to be within the spirit though not within the letter of the proposed enactment, or else were supposed likely to lead to evasion if not made equally subject to estate duty. Sect. 2 therefore declares that the expression "property passing on the

(1) [1905] A.C. 406 at 410.
(2) (1934) 4 D.L.R. 65.
(3) [1899] A.C. 198 at 211.

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death of the deceased" shall be "deemed to include" property classified under four different heads, to no one of which rightly understood is that expression literally applicable.

Lord Davey, at page 128, agreed, although whether the case fell within the first or second section, he arrived at the same result. The Earl of Halsbury was of the same opinion (p. 207).

In this view, it is unnecessary to consider whether the marriage contract falls within section 3 (*j*):—

> (*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 twenty-ninth day of April, one thousand nine hundred and forty-one, and within three years of the death, by the deceased person, in consideration of marriage;

However, arguments have been advanced as to the meaning of this provision and it is advisable that they should be dealt with. Contrary to the submission of the appellant, my view is that the date, April 29th, 1941, applies not only to transfers and settlements but also to agreements therefor. But I am unable to agree with the respondent's contention that 3 (*j*) is a special category, applying to all transfers and agreements therefor made in consideration of marriage, and that unless such an agreement falls within 3 (*j*), it must be taken out of 2 (*m*). It is to be recollected that the *Act* came into force June 14th, 1941; that it applies only to the death of a deceased occurring thereafter; and that April 29th, 1941, is the date on which the Budget of that year was introduced in the House of Commons. It had been held by the Judicial Committee in *A.G. for Ontario* v. *Perry* (*supra*) that marriage was a good and valuable consideration for the transfer of property, and that such a transfer did not constitute a gift within a section of the *Ontario Succession Duty Act*. In the *Dominion Act*, the main provision as to successions upon which duties are levied is found in section 2 (*m*), which, however, requires the beneficiary to become beneficially entitled to property upon the death of the deceased. A transfer made in consideration of marriage, presumably not being a gift under one of the earlier paragraphs of section 3, Parliament decided in 3 (*j*) to make provision as to such transfers. Any property actually transferred in consideration of marriage before April 29th, 1941, and property so transferred after that date but more than three years prior to the death, is

not covered. Neither of these cases falls within 2 (*m*) because the beneficiary did not become entitled upon a deceased's death and they are not touched by 3 (*j*) which requires a transfer after April 29th, 1941, and within three years of the death.

Parliament also dealt in section 3 (*j*) with agreements to transfer or settle in consideration of marriage. As I have already stated, to me, the natural reading of the clause applies the date April 29th, 1941, to these agreements. If A agreed to transfer in consideration of marriage and, as in the case before us, the beneficiary becomes entitled upon A's death, section 2 (*m*) applies. However, there would be no succession within 2 (*m*) if the agreement was to transfer, not at A's death but at some date which turned out to be after such death, as, for instance, if the agreement were to transfer at the expiration of ten years and A died before that time arrived. Parliament provided for such a situation by 3 (*j*).

While Dr. Fleet's marriage contract falls within section 2 (*m*), the $20,000 would be a debt for which an allowance should be made pursuant to subsection 1 of section 8:—

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

unless it falls within the terms of subsection 2 (*a*) of section 8, which reads as follows:—

> (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;

The words "for full consideration in money or money's worth" appear in section 17 of the *British Succession Duty Act*, and in a consideration of them in *Floyer* v. *Bankes* (1), the Lord Chancellor, Lord Westbury, at page 312, points out:—"Marriage is by the law of England a valuable consideration for a contract and that of the highest kind; but property arising under a contract in consideration of marriage is not excepted even in favour of persons coming directly within that consideration." Accordingly, a marriage contract or settlement being a "disposition" within

(1) (1863) 3 De G. J. 2 S. 306.

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section 2 of the *British Act*, it has been held that money payable thereunder upon death is subject to succession duty since the contract or settlement was not made for valuable consideration in money or money's worth. This has been held to be so in respect of (*a*) a sum which a father covenanted in his daughter's marriage contract to pay at the first term after his death to her trustees: *Lord Advocate* v. *Roberts' Trustees* (1); (*b*) a sum which a bridegroom bound himself in his ante-nuptial contract to pay after his death to his children: *Lord Advocate* v. *Maiklam's Trustees* (1878) Court of Session, not reported but referred to in Green's Death Duties, 2nd edition, at page 420, and in Hanson's Death Duties, 9th edition, at 578.

These decisions should be followed in the present case under our *Act* and none the less although the marriage contract was executed in Quebec. It may be taken that the jurisprudence and doctrine in that province are that such a contract is bilateral and onerous, and not gratuitous; but granting all that and admittting that the $20,000 was a debt created *bona fide*, it should be held that it was not created "for full consideration in money or money's worth". The appeal should be allowed with costs in both Courts and the decision of the Minister affirmed.

The judgment of Rand and Estey JJ. was delivered by

RAND, J.:—The Crown claims succession duty in respect of the sum of $20,000 which accrued to the respondent, Dawes, on the death of her husband in the following circumstances. They were married June 1st, 1916. On May 25th, a week before, they had entered into a marriage contract by which, among other things, it was agreed (*a*) that community of property should not exist between them, (*b*) that they should be separate as to property, (*c*) that there should be no dower for either wife or children, and (*d*), in consideration of the stipulation that community should not exist and the renunciation of dower, the husband obliged himself to pay to the wife during marriage the sum of $20,000. If payment should not have been so made, the wife, surviving the husband, would be entitled to collect from his estate, with interest from that date until payment; but should the wife predecease the

(1) (1857) 20 Dunl. (Ct. of Sess. 449, 452).

husband, the obligation would thereupon become void. The husband died on April 23rd, 1943, without having paid over any part of the money.

That Article 1257 of the *Civil Code* permits such a provision in a marriage contract is undoubted:—

...toutes sortes de conventions, même celles qui seraient nulles dans tout autre acte entrevifs;

and specifically:—

...la donation de biens futurs.

Then section 777 by the last paragraph provides:—

...la donation ...d'une somme d'argent ou autre chose non déterminée que le donateur promet payer ou livrer, dessaisit le donateur en ce sens qu'il devient débiteur du donataire.

The contract, therefore, creates an obligation which, apart from any question of registration, is a créance against the husband and his estate in favour of his wife, and which, in the absence of statutory provision to the contrary, as in the case of the *Bankruptcy Act*, ranks the wife as a creditor; in *re Denis B. Viger, insolvent* (1): in *re Morin, ex parte Hamil* (2): in *re Cameron, ex parte Hebert* (3). The obligation must, however, be distinguished from the legal result where a community exists but a special sum is agreed upon as the value of the wife's share. In that case, upon dissolution of the community the property right becomes realized, subject only to the limitation; the community is preserved for all purposes except the quantum. Here we have separation of goods, the right of the wife to prove with other creditors of her husband, and the termination of the obligation should she predecease him.

That being its nature, is it a "disposition" within the meaning of that word in s. 2 (*m*) of the *Dominion Succession Act*?

The decisive consideration is the meaning to be attributed to s. 3 (1) (*j*) of that *Act*. The paragraph is as follows:—

> (*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 twenty-ninth day of April, one thousand nine hundred and forty-one, and within three years of the death, by the deceased person, in consideration of marriage;

and the crucial language, "or agreed to be transferred, etc.". The Crown's contention is that s. 3 must be taken to be an

(1) 16 R.L. (Que.) 565.
(2) 17 Q.L.R. 30.
(3) 3 C.B.R. 771.

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enlargement of the definition of "succession" in s. 2 (*m*) and that I think is so; but so far as it assumes that if transfers dealt with in s. 3 had become effective "on the death" of the deceased they would be within the definition, it is not fully warranted. For instance, paragraph (*h*) is a benefit accruing upon a death, but it must, I should say, be taken as outside the definition: *Fryer* v. *Morland* (1).

If paragraph (*j*) by itself is capable of a clear and rational meaning, I must first examine its effect before assuming any particular scope to s. 2 (*m*). The opening language "all transfers or settlements", taking the latter to mean an immediate beneficial vesting, in relation to the periods specified, presents no initial difficulty. The draftsman has not been precise in the language "within three years of the death" if he intended "prior to" as in paragraph (*c*) or "before" in (*d*); but I take it that he did. Then come the words "or agrees to transfer, etc.". Counsel protests that these cannot mean that the agreement itself is to be made after April 29th, 1941, and within the three years of death; but I have not been able to gather just what he thought they did mean. The whole clause was no doubt drawn without an adequate conception of what was intended. For instance, is there to be any distinction in transfers between cases where the marriage contract was made before 1941 and those made afterwards? Without suggesting or examining other possible situations, I think the reasons behind the paragraph and its meaning can be deduced from the purpose and indicated considerations of the statute. Elderly men not infrequently marry but to permit them to withdraw their property from the taxation by transfers of it to their wives is against the policy of the *Act*. To prevent that subtraction, Parliament has closed the opportunity to make it within three years before death. Certainly the agreement, the marriage and the transfer may and in many cases do take place virtually as one event; in other cases the last may remain unexecuted at death: but both classes are brought under the condemnation. The property may or may not have been agreed to pass on death, but that fact would not be material. The necessary implication from this is that property so passing on death would not come within any other section. It is

(1) 3 Ch. D. 675 at 685.

not sufficient to say there is overlapping between ss. 2 (*m*) and 3; this is a precise description of property of a special category and it cannot be taken as *ex abundantia cautela,* nor the words treated as being so absurdly superfluous. I construe the paragraph then to deal only with agreements made after April 29th, 1941, and within three years before the death of the deceased person, regardless of whether the transfer is made before or after the death, and that only transfers made pursuant to such agreements are intended to be deemed successions. From that, under the maxim *expressio unius est exclusio alterius,* it follows that an agreement made prior to 1941, though becoming effective on death, is not a succession and not subject to the taxation.

It is argued that *prima facie* the obligation comes within the language of 2 (*m*) and it must be taken to be taxable unless shown to be excluded by some other provision. No doubt there is force in this contention. But we must bear in mind, as Jessel, M.R. remarked in *Fryer* v. *Morland,* (*supra*), that underlying the *Act* is the conception that it provides for a tax on successions by gratuitous title: "that a man gets something on the death of the prior owner either by way of settlement or by way of gift or descent and thereby gets a profit" upon a death. He adds: "the only exception I can find to that principle is that a marriage consideration is treated as if it were a gratuitous title for this purpose." It is pertinent also that the terms "predecessor" and "successor" apply to s. 3 but not expressly to 2 (*m*) in which the word "death" is not restricted to the person from whom the property is derived; and in the same case the view of Jessel, M.R. was that property transferred for valuable consideration could not be said to be "derived" from the owner.

It is argued also that s. 8 (2) (*a*) brings all such transmissions within 2 (*m*) as not being for a consideration in money or money's worth. I agree that although marriage is a valuable consideration it is not consideration in money or money's worth. But s. 8 (2) (*a*) has nothing whatever to do with successions; it provides merely for certain deductions from gross value to ascertain aggregate net value and dutiable value for the purpose of determining the rates of tax on successions. There is no warrant for the inference that all aggregate value is represented by succession, and

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of course dutiable value is that of succession already found. An obligation might be payable out of assets in priority to bequests even though not deductible for the purpose of determining rates of taxation or successions.

English decisions must be applied to this *Act* with caution: *Attorney-General of Ontario* v. *Perry* (1). For example, in *Floyer* v. *Bankes* (2), in which Lord Westbury used the oft-quoted language of distinction between valuable consideration and that for money or money's worth, what was being considered was s. 17 of the *Act* of 1853, in which the latter words were used in relation to obligations payable on death; they defined exemptions from successions and, with other language of the statute, implied that all transmissions, unless for consideration of money or money's worth, were intended to be subject to the tax. This is the section to which Jessel, M.R. doubtless had reference when he made the remark quoted on marriage consideration. The draftsman of the Dominion statute has refashioned the provisions of the English Acts, and we must take it as we find it. Section 8 (2) (*a*) has its analogue in s. 7 of the *Finance Act*, 1894, which deals not with successions, but with aggregate value for the purposes of an estate tax. There is nothing in the *Canadian Act* that expressly exempts *bona fide* sales, as in s. 7 of the *Act* of 1853; nor does the definition of "predecessor" help except as already considered: but the implication of s. 3 (1) (*k*) and the object of the *Act* are sufficient for that purpose. The implication of paragraph (*j*) does, I think, the like office for marriage consideration; and the juxtaposition of these two provisions seems to me to strengthen that conclusion.

But this strife with interpretation by itself is significant support for the respondent. A taxing statute must make reasonably clear the intention to impose the tax; but apart conceivably from the mind of the draftsman, I cannot find that it has been made so in this case.

I would, therefore, dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitor for the appellant: *J. G. McEntyre.*

Solicitors for the respondents: *Laverty, Hale & Laverty.*

(1) (1934) 4 D.L.R. 65. (2) 46 E.R. 654.