THE TORONTO GENERAL TRUSTS CORPORATION, EXECUTOR AND TRUSTEE OF THE ESTATE OF HENRY HILDER, DECEASED ..... APPELLANT;

1958

*Apr. 28
Jun. 26

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Succession duties—Property comprised in "succession"—Legacy prevented from lapsing by The Wills Act, R.S.O. 1950, c. 426, s. 36(1)—The Dominion Succession Duty Act, R.S.C. 1952, c. 89, ss. 2(j), (m), (n), 3(1)(i), 6(13).

B died testate on February 2, 1949; his sister S died in 1950 having made a will in 1948 under which B was a beneficiary. By a judgment of the Supreme Court of Ontario, it was declared that the gift to B had not lapsed, and the benefits bequeathed to him were paid to his executor pursuant to s. 36(1) of *The Wills Act*. Succession duties were paid on both estates, including as part of B's estate the post-mortem accretion received from S's estate. The respondent, however, claimed a second duty on this accretion on the basis that there was a second succession from B or his executors to the beneficiaries of his estate.

Held (Martland J. dissenting): Only one succession duty was payable in respect of this post-mortem accretion and the "succession" was from S to the beneficiaries of B's estate. Even though s. 36(1) of *The Wills Act* did not operate to make a direct gift to B's beneficiary from S (*Johnson v. Johnson* (1843), 3 Hare 156, applied), the fiction of survival was not for all purposes but merely for the purpose of preventing a lapse and carrying the property into the estate of the deceased beneficiary. Re Perry, [1951] O.R. 153 at 161, approved. The only effect of the section in this case therefore was to carry the property into B's estate and to make it distributable according to his will. There was and could be no extension of his life by operation of law so as to make him a living person beneficially entitled to the property derived from S. The property so derived was accordingly not a "succession" as defined by s. 2(m) of the *Dominion Succession Duty Act*, and in particular, it was not "property of which the person dying was at the time of his death competent to dispose" within the terms of s. 3(1)(*i*). The "successors" in this case, *i.e.*, the persons who became beneficially entitled to the property on the death of S, were the beneficiaries under the will of B, and not B's executor, and there was only one succession. *In re Scott*, Deceased, [1901] 1 K.B. 228, disapproved and distinguished.

Per Martland J., *dissenting*: The property derived by B's executor from S's estate was, by virtue of s. 36(1) of *The Wills Act*, "property of which the person dying was at the time of his death competent to dispose". *In re Scott, Deceased, supra*, agreed with. The effect of s. 36(1) was to make the property in question part of B's estate and subject to be distributed according to his will. *The Lord Advocate v. Bogey et al.*, [1894] A.C. 83, distinguished.

*PRESENT: Kerwin C.J. and Locke, Cartwright, Martland and Judson JJ.

1958

TORONTO GEN. TRUSTS CORPN. v. MINISTER OF NATIONAL REVENUE

APPEAL from a judgment of Hyndman D.J. in the Exchequer Court of Canada[1], affirming an assessment for succession duties. Appeal allowed, Martland J. dissenting.

W. E. P. De Roche, Q.C., and *K. Wang*, for the appellant.

D. H. W. Henry, Q.C., and *A. L. DeWolf*, for the respondent.

The judgment of Kerwin C.J. and Locke, Cartwright and Judson JJ. was delivered by

JUDSON J.:—Henry Herbert Hilder died on February 2, 1949. He left his estate to his widow for life with remainder to his three children. His sister Henrietta, who died on September 4, 1950, had made a will on September 1, 1948, by which she left a legacy and one-half of the residue to her brother. She made no change in this will even though her brother had predeceased her. On a motion for advice and direction Barlow J. declared that the executor of Henry Hilder was entitled to receive the benefits bequeathed to the deceased brother under the will of Henrietta and that s. 36 of *The Wills Act*, R.S.O. 1950, c. 426, applied. No appeal was taken from this judgment. The executor of Henry received $62,992.68 from the executor of Henrietta and succession duties were duly assessed and paid on the successions derived from Henrietta, including the succession of $62,992.68 just referred to. No appeal was taken from this assessment. The Succession Duty Department then treated the $62,992.68 as a post-mortem accretion to the estate of Henry and claimed additional duties on the successions derived from Henry on the basis that such successions had been augmented by the amount derived from the estate of Henrietta. This claim was sustained on appeal to the Minister and to the Exchequer Court[1]. The executor of Henry now appeals to this Court against this double levy of duty and the questions for consideration in this appeal are, first, the nature of the devolution of property when s. 36 of *The Wills Act* comes into operation, and second, whether by the terms of the *Dominion Succession Duty Act*, R.S.C. 1952, c. 89, a double duty is possible even if the property disposed of by Henrietta in favour of her deceased brother does first go into the brother's estate.

[1] [1956] Ex. C.R. 373, [1956] C.T.C. 161, 56 D.T.C. 1096.

Section 36 was enacted to avoid lapse in certain cases. It provides:

36. (1) Where any person, being a child or other issue or the brother or sister of the testator to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the life-time of the testator either before or after the making of the will, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

It is slightly wider in scope than the English section (*The Wills Act*, 1837, c. 26, s. 33) which is limited to a child or other issue. The English section has been the subject of much litigation which has raised many doubts and difficulties as to the precise limits of its application. But one clear principle does emerge and it is that the issue do not take by way of substitution. The section does not operate to make a direct gift to them from the testator. This was decided as early as 1843 in *Johnson v. Johnson*[1]. The object of the section being to prevent a lapse in a certain situation, one might have expected that it would have been drawn so as to carry the gift that would otherwise have lapsed, directly to the issue of the deceased beneficiary. But it is not so worded and its result is to put the property into the estate of the deceased beneficiary to be dealt with as part of his estate, either according to his will or as upon an intestacy. Thus it may not benefit his issue at all because of the claims of creditors: *In re Pearson; Smith v. Pearson*[2].

The difficult question is to determine how far the fiction of survival is to be carried. Is it for all purposes or merely for the purpose of avoiding a lapse and carrying the property into the deceased beneficiary's estate? One extreme application of the fiction is to be found in *Eager v. Furnivall*[3], where the husband of a deceased daughter of the testator was held to be entitled to an estate by the curtesy in property that came into the daughter's estate by way of post-mortem accretion. *In re Scott, Deceased*[4], where a double estate duty was held to be payable, is another extreme example. On the other hand, there are cases which illustrate what has sometimes been referred to

[1] (1843), 3 Hare 156, 67 E.R. 336.
[2] [1920] 1 Ch. 247.
[3] (1881), 17 Ch. D. 115.
[4] [1901] 1 K.B. 228.

1958

TORONTO GEN. TRUSTS CORPN. v. MINISTER OF NATIONAL REVENUE

Judson J.

as the narrow view of the application of the section. *Pearce v. Graham*[1] was the case of a daughter who by her marriage contract was bound to settle property which came to her during coverture. She predeceased her father but a gift under his will was saved from lapse by the section. The property came into her estate but the fiction of survival was not applied so as to compel a settlement. *In re Hurd; In re Curry; Stott v. Stott*[2] and *In re Basioli; McGahey v. Depaoli et al.*[3] were two cases in which the child died intestate. How was the post-mortem accretion to be distributed—to those who were entitled according to the law of intestate succession as it was at the date of the actual death or at the date of the fictional death under the section? The judgment of the Court in both cases was that the actual date of death was the governing factor. The theory of a notional survival for all purposes was rejected and the only purpose of the section was held to be the prevention of lapse. According to Theobald on Wills, 11th ed. 1954, p. 672, Jarman on Wills, 8th ed. 1951, pp. 467-8, and a note in 69 L.Q.R. 447, this is the better view and it was the one adopted by the Ontario Court of Appeal in *Re Perry*[4], and in my opinion it is the one that should be adopted by this Court. The fiction should not be pushed beyond its purpose. There is the high authority of Lord Mansfield in *Morris v. Pugh et al.*[5] for caution of this kind.

My conclusion is that in this case the only effect of the section is to carry the property into the estate of the deceased brother and make it distributable according to his will to his wife and three sons. There is and can be no extension of his life by operation of law so as to make him as a living person beneficially entitled to the property derived from his sister.

Before I leave this branch of the case, I wish to point out that this problem cannot arise in those Provinces which have followed the wording suggested in the draft uniform *Wills Act*. These Provinces are Alberta,

[1] (1863), 32 L.J. Ch. 359.
[2] [1941] Ch. 196, [1941] 1 All E.R. 238.
[3] [1953] Ch. 367, [1953] 1 All E.R. 301.
[4] [1941] O.R. 153 at 161, [1941] 2 D.L.R. 690.
[5] (1761), 3 Burr. 1241 at 1243, 97 E.R. 811.

Saskatchewan, Manitoba and New Brunswick and their legislation provides that the gift that would otherwise have lapsed

> shall . . . take effect as if it had been made directly to the persons amongst whom and in the shares in which that person's estate would have been divisible if he had died intestate and without debts immediately after the death of the testator.

The Provinces of British Columbia, Ontario, Prince Edward Island, Nova Scotia and Newfoundland have legislation in the form of s. 33 of English *Wills Act*, 1837. The matter has some importance when a general taxing Act such as the *Dominion Succession Duty Act* has to be applied to the same problem of devolution and that problem has been dealt with in two different ways by various Provinces.

I turn now to a consideration of the terms of the *Dominion Succession Duty Act*. By s. 6 the duty is levied on a succession and by s. 13 the liability for the duty is on the successor in respect of the succession to him. "Succession", by s. 2(*m*) means

> every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property . . . and every devolution by law of any beneficial interest in property . . .

By s. 3(1)(*i*) a succession is deemed to include "property of which the person dying was at the time of his death competent to dispose". The submission of the Crown is that by virtue of the operation of s. 36 of *The Wills Act*, Henry Hilder was competent to dispose of the property that came from his sister's estate and that consequently there was a "succession" from Henry Hilder to his wife and children. This submission depends for its validity upon the assumption that the legal fiction of survival applies for all purposes because by the very definition of "succession" the successor must become beneficially entitled to property on death.

How could Henry Hilder, who died in 1949, become beneficially entitled to the property which was left to him by his sister's will in view of the fact that he predeceased his sister? A dead man cannot become beneficially entitled and s. 36 of *The Wills Act* does not mean that he must be deemed by law to be alive at the time of his sister's death so as to be deemed to be beneficially entitled. The successors in the case, the persons who became beneficially

1958

TORONTO GEN. TRUSTS CORPN. v. MINISTER OF NATIONAL REVENUE

Judson J.

entitled to property on the death of Henrietta Hilder, are the wife and three children of Henry Hilder and there was only one succession. The executor of Henry Hilder, who received the property from the executor of Henrietta, was not the successor. He did not become beneficially entitled to the property. The Department contends that two successions are involved, one from Henrietta to Henry Hilder and the second from Henry Hilder to his wife and children. There is error here because it is based on the fallacious assumption that, for the purposes of the *Dominion Succession Duty Act,* Henry Hilder was still alive at the date of his sister's death, when in fact he was dead.

The judgment under appeal is founded upon the decision of the Court of Appeal in England in *In re Scott, Deceased, supra.* The problem in that case was one of estate duty under the *Finance Act, 1894,* 57 & 58 Vict., c. 30. A father devised real property to his son who had predeceased him and the devise took effect by virtue of the *Wills Act,* 1837, s. 33. The son had devised his residuary real estate to trustees. The Commissioners of Inland Revenue claimed an estate duty not only on property passing on the death of the father but also upon property deemed to pass on the death of the son, and both duties were held to be payable. Property deemed to pass on death under this legislation included "property of which the deceased was, at the time of his death, competent to dispose". Serious doubts have been expressed whether *In re Scott* was correctly decided. Hanson's Death Duties, 10th ed. 1956, p. 216, bases the doubt on the fact that at the time of his actual death the son had only a valueless *spes successionis* and that this was not an interest in expectancy capable of valuation at the time of death, as the statute required. The implication of this criticism is that the Court of Appeal was in error in taking the date of the notional death under s. 33 of the *Wills Act* as the date when the property was deemed to pass and to become the subject of valuation. The criticism, to the extent that it may be based upon the suggested failure to apply correctly the English taxing Act, is of no particular significance in the present case but to the extent that the

decision rests upon the fiction of survival for all purposes, I would reject it in favour of the view I have already expressed.

But there is a much more serious objection to the application of *In re Scott* to a case under the *Dominion Succession Duty Act*. The *Finance Act, 1894*, imposed an estate duty, not a succession duty. I have already stated that the Canadian Act taxes a successor who becomes beneficially entitled to property consequent upon a death. The English Act imposes a tax on property passing on death or property deemed to pass on death. The expression "passing on death" is not further defined by the Act but it has been held to mean "some actual change in the title or possession of the property as a whole which takes place at the death": *Attorney-General v. Milne et al.*[1] There is no possible analogy between a duty imposed upon a successor when there is a change of beneficial ownership and an estate duty imposed on property passing or deemed to pass on death. The two Acts differ so widely in structure and incidence of taxation that cases decided under one Act are of little assistance to the interpretation of the other and it is of no help that sections of one Act may have been copied from the other. The *Dominion Succession Duty Act* must be construed independently and the caution expressed in *Attorney-General for Ontario v. Perry*[2] against a consideration of statutory origins and evolution as an aid to interpretation is particularly appropriate here where the two Acts differ so fundamentally.

My conclusion is that there was no succession from Henry Hilder to his wife and children with respect to the property acquired from Henrietta Hilder. This is the only assessment under review. It was made in error and should be set aside. I would allow the appeal with costs throughout and set aside the judgment below and the decision of the Minister.

MARTLAND J. (*dissenting*):—This is an appeal against a judgment of the Exchequer Court[3] dismissing the appeal of the appellant from an assessment for succession duties

[1] [1914] A.C. 765 at 779, per Lord Parker of Waddington.
[2] [1934] A.C. 477, [1934] 4 D.L.R. 65, [1934] 3 W.W.R. 35.
[3] [1956] Ex. C.R. 373, [1956] C.T.C. 161, 56 D.T.C. 1096.

1958

TORONTO GEN. TRUSTS CORPN. v. MINISTER OF NATIONAL REVENUE

Martland J.

made by the Minister of National Revenue. The only question is as to the liability for the payment of such duties.

The facts are not in dispute. Henry Herbert Hilder died on February 2, 1949. The appellant is the sole executor and trustee of his will, dated April 8, 1938. The beneficiaries named in this will were his widow and three sons, all of whom are alive.

Henrietta Hilder, his sister, died on September 4, 1950, having made a will dated September 1, 1948. It provided for the transfer of her interest in a furniture business, which she and her brother had previously operated, and of one-half of the residue of her estate to Henry Herbert Hilder. She knew of the death of her brother and of the provisions of his will before she died.

The bequest made by Henrietta Hilder to her brother did not lapse because of the provisions of s. 36(1) of *The Wills Act*, R.S.O. 1950, c. 426, which provides:

> 36. (1) Where any person, being a child or other issue or the brother or sister of the testator to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the life-time of the testator either before or after the making of the will, leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Succession duties were assessed and paid in respect of the succession derived from Henrietta Hilder. Additional duties were also assessed upon the successions derived from Henry Herbert Hilder upon the basis that such successions included the additional property received by the estate of Henry Herbert Hilder from his sister's estate. The question in issue is as to whether there is liability for payment of these additional duties.

This issue depends upon whether there was a single succession from Henrietta Hilder to the widow and the three sons of Henry Herbert Hilder, or whether there were two successions, one from Henrietta Hilder to Henry Herbert Hilder and another from him to his beneficiaries.

Hyndman J., in the Exchequer Court[1], ruled that there were two successions and that accordingly the additional

[1] [1956] Ex. C.R. 373, [1956] C.T.C. 161, 56 D.T.C. 1096.

succession duties were payable upon the successions derived from Henry Herbert Hilder.

The *Dominion Succession Duty Act*, R.S.C. 1952, c. 89, provides for the assessment, levy and payment of duties upon or in respect of successions. Section 2 of the Act contains the following provisions:

2. In this Act,

* * *

(*j*) "predecessor" means the person dying after the 14th day of June, 1941, from whom the interest of a successor in any property is or shall be derived;

* * *

(*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;

(*n*) "successor" means the person entitled under a succession.

Section 3(1)(*i*) of this Act provides:

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:

* * *

(*i*) property of which the person dying was at the time of his death competent to dispose.

Counsel for the appellant contends that there was only one taxable succession. He argues that Henry Herbert Hilder never was "beneficially entitled" to the property derived from his sister's estate, so that there was no succession to him within the meaning of s. 2(*m*) of the *Dominion Succession Duty Act*.

He submits that the only effect of s. 36(1) of *The Wills Act* was to delineate the devolution of the property and that the subsection served no other purpose. The subsection only made provision for the devolution of the property from the estate of Henrietta Hilder to the beneficiaries of the estate of Henry Herbert Hilder.

Counsel for the respondent relies upon the provision contained in s. 2(*m*) which says that a "succession" "also includes any disposition of property deemed by this Act

1958

TORONTO GEN. TRUSTS CORPN. v. MINISTER OF NATIONAL REVENUE

Martland J.

to be included in a succession" and upon s. 3(1)(*i*) quoted above. He contends that by virtue of the provisions of s. 36(1) of *The Wills Act* the property derived from the estate of Henrietta Hilder was "property of which Henry Herbert Hilder was at the time of his death competent to dispose". Such property, he argues, is, therefore, deemed to constitute a succession.

The words contained in s. 3(1)(*i*) of the *Dominion Succession Duty Act* are derived from the wording of subs. (1) of s. 2 of the English *Finance Act, 1894*, 57 & 58 Vict., c. 30. It was pointed out in argument by the appellant that, while the words of the English statute were apt, in view of the fact that the English Act imposes a tax upon "property", the wording was not apt in the *Dominion Succession Duty Act* which, by its terms, imposes a tax upon a "succession". The wording of cl. (*i*) of s. 3(1) does not, by its specific terms, describe a disposition of property, but only describes property. However, while the wording might be improved, some meaning must be given to it and, in my view, it should be construed as referring to a disposition of property of which the person dying was at the time of his death competent to dispose.

At first glance it would appear that s. 3(1)(*i*) would only be applicable to property actually owned by the person dying at the time of his death. However, the effect of s. 33 of the English *Wills Act, 1837*, 7 Will. 4 & 1 Vict., c. 26, from which s. 36(1) of the Ontario statute is derived, coupled with the provisions of s. 2(1) of the *Finance Act, 1894*, was considered by the Court of Appeal in *In re Scott, Deceased*[1]. The facts of that case were similar to those in the present one. The Court in the *Scott* case held that the property in question there was, by virtue of s. 33 of the *Wills Act*, property of which the person dying was at the time of his death competent to dispose.

Dealing with this this point, A. L. Smith M.R., at pp. 233-4, says as follows:

> We find, by s. 33, that in a case like the present, although the son should die in the lifetime of his father, a bequest of the father to the son shall not lapse, but shall "take effect" as if the son had died immediately after the death of his father, unless the contrary intention should appear

[1] [1901] 1 K.B. 228.

1958

TORONTO GEN. TRUSTS CORPN. v. MINISTER OF NATIONAL REVENUE

Martland J.

by the will. As before stated, if the son in the present case had in fact died immediately after the death of his father, the second estate duty now claimed would clearly have been payable; and, if there had been no Wills Act, the son would have had nothing to dispose of. But the Wills Act enacts that the will of the father shall take effect as if the son had died immediately after his father—i.e., that, in the special circumstances to which the section applies, the son shall be competent to dispose of what is left to him by his father, although he may in fact die before his father. It is obvious that the Wills Act must be resorted to by the appellants to get rid of the lapse which otherwise would have taken place; and the same section of the Act by which the appellants get rid of the lapse enacts that the will of the father shall "take effect" as if the son had died immediately after his father; that is, that the son in this case was competent to dispose of the 80,000*l* of property, subject to his father revoking his will which he never did.

Similar conclusions were reached by the other members of the Court, Collins L.J. and Stirling L.J., quotations from whose judgments are contained in the judgment of the Exchequer Court[1].

We were invited to find that the *Scott* case had been improperly decided, or, in the alternative, that it was not applicable in the present instance in view of the fact that, whereas the English *Wills Act* and the *Finance Act, 1894,* were both enacted by the same legislative body, in the present case *The Wills Act* is an enactment of the Legislature of the Province of Ontario, while the *Dominion Succession Duty Act* is an enactment of the Parliament of Canada.

With respect to the first argument, I have reached the conclusion that the *Scott* case was correctly decided and its principle is applicable in the present case. The effect of s. 36(1) of *The Wills Act* of Ontario was to give to Henry Herbert Hilder power to dispose, by his will, of property which might become a part of his estate by virtue of the provisions of that subsection. It is the will of Henry Herbert Hilder which governs the disposition which is to be made of the property bequeathed to him by his sister. Section 36(1) does not delineate the persons who are ultimately to succeed. Its effect is to make the property in question a part of the estate of Henry Herbert Hilder, subject to the dispositions in his will.

[1] [1956] Ex. C.R. 373, [1956] C.T.C. 161, 56 D.T.C. 1096.

1958

TORONTO GEN. TRUSTS CORPN. v. MINISTER OF NATIONAL REVENUE

Martland J.

It also would appear that s. 36(1) has this effect, whether one adopts what has been described as the "broad" interpretation of the subsection or the "narrow" interpretation of it. The difference between these two interpretations has been referred to in Theobald on Wills, 11th ed. 1954, p. 672, as follows:

> The question whether the effect of the section is limited to carrying the testator's property to the child's estate or whether the child is deemed to survive the testator for all purposes is one of some difficulty and the authorities are not consistent.

The cases which were cited in relation to the so-called "narrow" interpretation were cases which decided that, in the determination of the persons who would be entitled to succeed to the property in question, regard would be had to those beneficiaries entitled at the date of the actual death of the deceased beneficiary, rather than those who would have been entitled had his death occurred on the assumed date of death immediately after the death of the testator. It would appear to me that there is nothing in the so-called "narrow" interpretation which would have the effect of saying that the ultimate disposition of the property is not governed by the provisions of the will of the deceased beneficiary, or that the property which is in question is not property of which the person dying was at the time of his death competent to dispose.

Counsel for the appellant placed reliance upon *The Lord Advocate v. Bogie et al.*[1], and argued that the provisions contained in the will of Miss Scott, in that case, were similar in effect to the provisions of s. 36(1) of *The Wills Act*. I do not agree with that contention. In *The Lord Advocate v. Bogie et al.* the testatrix bequeathed a share of her estate to her nephew and, failing him, to his executors and representatives. He died in her lifetime, leaving a will, and the Crown claimed not only inventory duty and legacy duty on her estate, but also a second inventory duty and legacy duty from the nephew's executors. The latter

[1] [1894] A.C. 83.

duties were held not to be payable, as the property was neither part of the nephew's estate nor in his disposition. In effect, by virtue of the provisions of the will of the testatrix, there was a direct gift to the beneficiaries under his will.

This is not the case in respect of s. 36(1) of *The Wills Act,* which, by its terms, says that "such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will". In the *Bogie* case the testatrix made specific provision as to what should occur in the event of the death of the named beneficiary. The provision in *The Wills Act* is such that for the purposes of the subsection the deceased beneficiary is deemed to have lived until immediately after the death of the testator.

With respect to the second point made by counsel for the appellant in relation to the *Scott* case, while it is obvious that a provincial Legislature cannot legislate in such a manner as to alter the provisions of the *Dominion Succession Duty Act,* nevertheless, in applying the provisions of that Act, it is necessary to look to relevant provincial legislation to determine what property may be included in a succession. It is quite proper to look to the effect of provincial legislation in determining, for the purposes of s. 3(1)(*i*), what is "property of which the person dying was at the time of his death competent to dispose". The effect of s. 36(1) of *The Wills Act* was to make the property bequeathed by Henrietta Hilder to her brother property of which he was competent to dispose by the provisions of his will, notwithstanding the fact that his death occurred before hers.

My conclusion is, therefore, that the property derived from the estate of Henrietta Hilder was property of which Henry Herbert Hilder was at the time of his death competent to dispose and that, therefore, the disposition

1958

TORONTO GEN. TRUSTS CORPN. v. MINISTER OF NATIONAL REVENUE

Martland J.

of that property by his will constituted a succession by virtue of the provisions of s. 3(1), coupled with those of s. 2(*m*). This being so, there was a taxable succession in respect of the property which passed to the beneficiaries of Henry Herbert Hilder in accordance with the provisions of his will. This appeal should, therefore, be dismissed with costs payable out of the estate of Henry Herbert Hilder, deceased.

Appeal allowed with costs throughout, MARTLAND J. *dissenting.*

Solicitors for the appellant: Blake, Cassels & Graydon, Toronto.

Solicitor for the respondent: A. A. McGrory, Ottawa.