

DONALD FRASER AND OTHERS, EXECUTORS AND TRUSTEES OF THE LAST WILL AND TESTAMENT OF ARCHIBALD FRASER, DECEASED (DEFENDANTS).....

APPELLANTS;

1934

*Oct. 23, 24
*Dec. 12

AND

THE PROVINCIAL SECRETARY-TREASURER OF THE PROVINCE OF NEW BRUNSWICK (PLAINTIFF).

RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK,
APPEAL DIVISION

Succession Duty Act, R.S.N.B., 1927, c. 15—Construction—Ascertainment of duty—Allowance for debts, etc.—Properties against which allowances made.

F. died leaving property of the value of \$175,429.11 liable by law to payment of debts, etc. In addition there were insurance policies on his life payable to his wife and children, yielding \$184,884.86, and a gift made *inter vivos* to a daughter of \$50,000, which policies and gift were, under s. 10 of the *Succession Duty Act, R.S.N.B., 1927, c. 15* (and amendments), included in "property passing on the death" of F., and, under s. 3, subject to succession duty. His debts, etc., amounted to \$331,343.26.

Held (Crocket J. dissenting): Under the Act, the amount of the debts, etc., should be deducted from the total of the said sums of \$175,429.11, \$184,884.86, and \$50,000; and succession duty levied only on the difference.

The method of determining "the dutiable value of property" under s. 5, providing for allowance for debts, etc., applies to all property upon which succession duty is imposed, namely, all "property passing on the death of any person" as defined in the Act.

Judgment of the Appeal Division of the Supreme Court of New Brunswick, 7 M.P.R. 367, reversed.

Per Crocket J., dissenting: In levying the duty against the insurance moneys and the gift *inter vivos*, there should be no allowance for debts, etc., under s. 5. Under the Act, the duty is to be assessed and levied distributively on the component parts of the property passing in the hands of the individual successors to whom it goes or has gone; and the allowance for debts, etc., is deductible only from such properties as are liable by law for the deceased's debts.

APPEAL by the defendants from the judgment of the Appeal Division of the Supreme Court of New Brunswick (1) given on a special case stated for the opinion of the said Court.

*PRESENT:—Duff C.J. and Cannon, Crocket, Hughes and Maclean (*ad hoc*) JJ.

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The following facts are taken from the said special case, as agreed to for the purposes of the appeal on the question submitted.

Archibald Fraser, late of Edmundston in the Province of New Brunswick, died on October 10, 1932, while resident and domiciled in said province. He had made his last will on December 18, 1930, whereby he appointed the defendants to be executors and trustees. The will was admitted to probate and letters testamentary were issued to defendants, who filed, in accordance with the provisions of *The Succession Duty Act*, R.S.N.B., 1927, c. 15, and amending Acts, an Affidavit of Value and Relationship, with all proper schedules. According to the schedules filed the testator was, at the time of his death, seized and possessed of assets, liable for the payment of debts, encumbrances and expenses allowable under the provisions of s. 5 of *The Succession Duty Act* as deductions, of the gross value of \$175,429.11. The funeral expenses, debts, encumbrances and Probate Court fees, as set forth in the Affidavit of Value and Relationship and Schedule thereto, allowable as deductions under the provisions of said s. 5, amounted to \$331,343.26. In addition to the above assets the testator had insurance on his life, payable to his wife and to his children, which yielded the beneficiaries the net sum of \$184,884.86. It was agreed that this latter sum formed no part of the estate and was not subject to its debts and liabilities. The schedules also disclosed that within five years before his death the testator had made a gift *inter vivos* to a daughter of a sum of \$50,000.

The Proper Officer made no assessment of duty on the said assets of the gross value of \$175,429.11, but made an assessment (computed in accordance with clauses of sec. 11 of the Act) on the sum of \$234,884.86, which was the total amount of the said sums of \$184,884.86 and \$50,000. In making such assessment he allowed debts, encumbrances and expenses to the extent only that there were assets in the estate liable for the payment of debts and encumbrances and made no allowance for debts, encumbrances and expenses beyond the amount of the assets in the estate available to pay same.

The plaintiff claimed that the assessment made by the Proper Officer was correct. The defendants claimed that under the provisions of the Act the debts, encumbrances

and expenses amounting to the sum of \$331,343.26, should be deducted not alone from the value of the assets forming the estate and liable to the payment of debts, encumbrances and expenses, amounting to the sum of \$175,429.11, but from the value of all the property passing on the death of the testator, amounting to the sum of \$410,313.90, and that duty should be assessed only on the difference, that is to say on the sum of \$78,970.64.

The question which the court was asked to determine was (clause 16 of the special case) whether, under the provisions of *The Succession Duty Act*, the debts, encumbrances and expenses should be deducted only from the value of the assets of the estate, liable for the payment of such debts, liabilities and expenses, or whether the debts, encumbrances and expenses should be deducted from the value of all the property passing on the death of the testator within the meaning of the Act, including both the assets liable for the payment of debts, encumbrances and expenses and the property not so liable.

The Appeal Division of the Supreme Court of New Brunswick held (Hazen C.J. dissenting) (1) that under the provisions of the Act the debts, encumbrances and expenses should not be deducted from the value of all the property passing on the death of the testator within the meaning of the Act, including both the assets liable for the payment of debts, encumbrances and expenses and the property not so liable.

From this judgment the defendants appealed to the Supreme Court of Canada. By its judgment now reported, the appeal was allowed with costs throughout, Crocket J. dissenting.

R. B. Hanson K.C. for the appellant.

W. H. Harrison K.C. for the respondent.

The judgment of the majority of the court (Duff C.J. and Cannon, Hughes and Maclean (*ad hoc*) J.J.) was delivered by

DUFF C.J.—This appeal raises questions touching the construction and application of the *Succession Duty Act* of New Brunswick. The charging section is section 3 and is in the following words:

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3. For the purpose of raising a revenue for Provincial purposes, and except as herein expressly otherwise provided, there shall be levied and paid for the use of the Province a duty to be called "Succession Duty" on all property passing either in whole or in part on the death of any person, and such duty shall be computed, assessed and levied in the manner in this Chapter provided.

It is to be observed that the subject of the duty which is to be levied and paid under that section is "all property passing either in whole or in part on the death of any person." Then, the duty is to be computed, assessed and levied "in the manner in this chapter provided."

Coming at once to section 5 upon the scope and application of which the controversy mainly turns. The purpose of that section is plainly stated: for specified purposes certain definitions are to be applied and allowances and deductions made. The opening words, which specify the subject matter in respect of which the section is to be operative, are these:

In determining the dutiable value of property, or the value of a beneficial interest in property * * *

Now, in the interpretation clause (section 2 (d)), we find this definition of "dutiable value":

"Dutiable value" means the value to which any rate is applied for the purpose of computation under section 11.

Then, turning to section 11, there are these words:

11. The rates by which succession duty is to be computed shall be as follows:

That is the section which enacts what the rates are to be by which succession duty is to be computed.

To summarize: Succession duty is (by section 3) to be levied and paid on all property passing in whole or in part on the death of any person. "Dutiable value" means the value to which any rate prescribed under section 11 is to be applied, and, under section 11, the rate prescribed is the rate by which succession duty is to be computed. The plain result of all this is that succession duty is to be ascertained by applying the appropriate rate, under section 11, to the value—"the dutiable value"—of "all property passing in whole or in part on the death of any person."

Then, in section 5, we have a provision for determination of "the dutiable value of property." If it had not been for the judgment of the court below, I do not think I should have had any difficulty in concluding that this necessarily means the dutiable value of the property upon which succession duty is imposed by the enactment of section 3;

that is to say, "all property passing in whole or in part on the death of any person." Then, by definition, under s. 10 (1) (b), as amended by 22 Geo. V, c. 14, such property includes (*inter alia*) dispositions *inter vivos*, not made bona fide five years before the death of the deceased, and, under s. 10 (1) (f), monies received under certain types of policies of insurance.

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As it appears to me, these provisions are expressed in words which have an ordinary, grammatical, and natural sense, and, construing them according to that sense, they give a plain and intelligible result; the result I have just indicated.

Mr. Justice Baxter, with the concurrence of Mr. Justice Grimmer, in an able judgment, has given his reasons for thinking that "property," under section 5, is not used in the sense in which it is used in section 3, that it does not include property not forming part of the estate of the deceased in the ordinary sense, that is to say, property not, in fact, passing on death. This he seems to deduce from a principle he lays down: that in providing for allowances the enactment must be taken to have in contemplation, as regards debts for which allowance is to be made, only property out of which by law such debts are payable; and the learned judges seem to have been influenced by difficulties they detected in respect of the working out of the directions expressed in the section concerning allowances and deductions. With respect, I think there is nothing in the enactments of section 5 inconsistent with the view that they are applicable to all property subject to duty under section 3.

There are several powerful reasons against the acceptance of this restricted interpretation propounded by the learned judges. One is that, so construing section 5, the statute contains no provision for ascertaining the dutiable value of property which passes on death only by force of the statutory fiction. Another is: it is not easy to see why, if such property is, by force of the statutory fiction, to be subject to the duty imposed by the statute, it should not also, by force of the same fiction, be subject to the provisions of the statute by which dutiable value is to be determined; and there are at least two provisions of the Act which I am unable to reconcile with the assumption that the Legisla-

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ture recognized any such distinction in respect of the application of section 5.

First: Section 3, which is the charging section, embraces such property, and the plain direction given by section 3 is that the duty, as regards all property in respect of which it is to be levied, "shall be computed, assessed and levied in the manner in this chapter provided." Computation necessarily involves the application of the provisions of section 11, which, in turn, necessarily involves, reading the terms of section 3 in light of the provision of section 2 (*d*), a determination of dutiable value. In other words, the determination of dutiable value is an essential step in the computation of duty. This plain imperative direction by section 3 seems, therefore, unambiguously to contemplate the provisions of section 5 which contains the only provisions of the statute giving directions for the ascertainment of "dutiable value."

Then, the language of section 10, which creates the fiction, is this:

Property passing on the death of any person shall be deemed to include for all purposes of this Chapter the following property:

The words "for all purposes of this chapter" are as plain, as unequivocal, as words could be. Apart from some controlling context, it is impossible to give these words a construction which would exclude section 5 from the operation of the fiction. There is no controlling context. Section 10 appears to me to afford an insuperable obstacle to the acceptance of the view I am considering.

It must not be forgotten that we are dealing with a taxing statute and, where the language of such a statute has an ordinary, grammatical, and natural meaning, the courts are bound, subject, of course, to any controlling context, to give effect to that meaning, quite regardless of what the consequences may be.

I do not think it necessary for the purposes of this appeal to examine in detail the operation of section 5. I do not see that any greater difficulty arises in applying the earlier branch of the section to property which constructively passes than in applying it to property which actually passes. As regards the second branch of the section, it seems to me, and in this I agree with Baxter and Grimmer JJ., that it deals with particular items of property subject to some special charge; it does not contemplate

the liability of the assets of the deceased to be applied in payment of debts. On this point, I cannot accept the argument of the Attorney-General. There may be difficulties in working out the section, but I cannot discover any ground upon which a court of law can justify itself in excluding from the operation of the section property which only fictionally passes. These reasons seem sufficient for the disposition of the question before us, as stated in paragraph 16 of the stated case.

The answer is, as regards the first alternative stated in the question submitted, in the negative; and, as regards the second alternative, in the affirmative.

The appeal should be allowed with costs throughout.

CROCKET J. (dissenting)—The testator died seized and possessed of real and personal property of the total value of \$175,429.11, which passed directly to his executors and trustees and were available for the payment of outstanding debts and encumbrances. In addition to these assets there were several insurance policies on his life payable to his wife, his two sons and his daughter, which yielded \$184,884.86, and a gift *inter vivos* of \$50,000 which he had made to his daughter within five years of his death. These insurance moneys and the gift *inter vivos*, while not liable in any way for the testator's debts, were liable to the payment of succession duties under s. 10 of the New Brunswick *Succession Duty Act* as "property passing" on his death. As the testator's debts together with his funeral expenses and the probate court and proctor's fees amounted to \$331,343.26—a sum more than \$150,000 in excess of the gross value of the properties passing directly to the executors and trustees—the Succession Duty Officer made no assessment upon these properties, but levied a duty upon the insurance moneys passing to the widow and the deceased's two sons severally and upon the insurance moneys and the gift *inter vivos* passing to the daughter, without making any allowance in respect of these items or classes of property by way of deduction for debts, encumbrances and expenses under s. 5 of the Act.

The appellants contended that under the provisions of s. 5 the debts, encumbrances and expenses should be deducted from the gross value of all the property passing or deemed to have passed within the meaning of the Act, that

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is to say, from the sum of the assets of the estate proper, which were liable for the payment of such debts, encumbrances and expenses, and of the insurance moneys and gift *inter vivos*, which were not liable therefor. A stated case was submitted to the Appeal Division of the Supreme Court for the decision of the question thus raised before the Succession Duty Officer. The Court decided, per Grimmer and Baxter, JJ., Hazen, C.J., dissenting, that the debts, encumbrances and expenses should not be deducted from the value of all the property passing on the death of the testator within the meaning of the Act, including both the assets liable for the payment of such debts, encumbrances and expenses and the property not so liable. It is from this decision the present appeal is taken.

It is apparent from this statement and the form of the question submitted for the opinion of the Appeal Division that, although the problem arises upon the provision for the allowance of debts, encumbrances and expenses, which is found only in s. 5, its solution primarily involves a consideration of the governing principle of the Act, viz: whether it imposes the duty upon the aggregate value of all property passing or deemed to pass, collectively, including gifts *inter vivos* and insurance moneys, which are not liable for the deceased debts, etc., as well as of all other properties actually passing or intended to pass on his death, which are liable therefor, or whether its governing principle is that the duty shall be assessed and levied distributively in the hands of the individual successors, to whom it severally passes or is intended to pass or has previously passed. The appellants' claim is founded entirely upon the former hypothesis. It follows that if the latter hypothesis, and not the former, is found to be the true intentment of the Act, the question must be answered against the appellants as it was by the Appeal Division.

The appellants' counsel relies upon s. 2 (a), (d), (g) and (h) and ss. 3, 4, 5, 7 and 10 as establishing "that the duty is a tax imposed on all property passing or deemed to pass on the death of a testator," and argues that the sum of \$410,313.97 is the gross value of the estate in the case at bar for succession duty purposes under the provisions of the Act, and \$78,970.71 its "aggregate value," determinable by deducting from the gross value the sum of \$331,343.26 allowed for debts, encumbrances and expenses under s. 5.

After a careful examination of all the provisions relied upon and of the entire Act, I find it impossible to accede to the contention that the Succession Duty Officer should have deducted the whole amount of the debts and expenses allowance from the gross value of all properties liable to duty without regard to whether they are severally liable to the payment of the testator's debts, secured or unsecured, or any of the expenses specified in s. 5.

The section chiefly relied upon by the appellants' counsel is s. 3, the so-called charging section of the Act. This section undoubtedly enacts that the duty shall be levied "on all property passing either in whole or in part on the death of any person" but it leaves the computation, assessment and levying of the duty to be made "in the manner in this chapter provided." That duty cannot be assessed and levied upon all such property is, I think, clearly evidenced by the provisions of s. 7, which provides that no duty shall be computed in reference to certain estates and descriptions of property. That the word "all" does not denote in any event that the computation, assessing and levying is to be made upon the property in the aggregate is shewn, in my opinion, by the provisions of s. 11, which in reality is the section by which succession duty is to be computed. See s. 8. S. 11 does not purport to fix any uniform duty which is to be applicable to all classes and descriptions of property alike, but provides that the "rates by which succession duty is to be computed shall be" etc. These rates vary, not only according to "the aggregate value of the property passing on the death" of the deceased, but according to the relationship which the person or persons, to whom "the property passes either in whole or in part," bears to the deceased. It is in this section that we find the expression, "the aggregate value of the property passing on the death," upon which the appellants so much rely. This, however, is but one factor which enters into the fixing of the appropriate rate by which the duty is to be computed. Another factor, equally important, is the degree of relationship, if any, which the person or persons, to whom any property passes, bears to the deceased, and still another is the fact whether any successor to whom any of such property passes resides within or out of the province. Throughout its six subsections there are several references to property in addition to those already quoted.

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For instance, in subs. (2) we find the expression: "If the value of the property passing to or for the benefit of *any one* of the persons mentioned in subs. (1)" exceeds, etc. In subs. (3): "If *any property* subject to duty passes on the death of any person, either in whole or in part, to or for the benefit of *any* lineal ancestor or descendant," etc., and in the same subsection the expression: "If the aggregate value of *a property* passing on the death of such person," and in subs. (5) the expression "If *any property* subject to duty passes on the death of *any* person, either in whole or in part, to or for the benefit of *any* person in any other degree of consanguinity to the deceased," etc. It will be seen from these quotations from s. 11 that the term "aggregate value" is not used in the sense of indicating the subject matter upon which the succession duty is imposed, but only for the purpose of determining one of the factors which the proper officer must consider in computing the duty which is to be assessed and levied upon the different portions of the property which is subject to duty.

When s. 5 is examined, around which more than any other section the issue perhaps centres, it will be seen that it does not itself purport to determine either the "aggregate value" or the "dutable value" of any property, or even to lay down, as I read it, a complete code for determining its dutiable value. It does prescribe the basis upon which "the dutiable value of property, or the value of a beneficial interest in property" is to be determined, viz: its fair market value as at the date of the death of the deceased, and immediately enacts that "allowance shall be made for reasonable funeral expenses, debts, encumbrances," and for probate court and proctor's fees, subject to the explicit proviso that "any debt or encumbrance for which an allowance is made shall be deducted from the value of the land or *other subject of property* liable thereto," and that an allowance shall not be made for certain descriptions of debts indicated in clauses (a) and (b) or "more than once for the same debt or encumbrance *charged upon different portions of the estate.*" The term "dutable value" is defined by s. 2 (d) as meaning simply "the value to which any rate is applied for the purpose of computation under s. 11." There is no mention either of "aggregate value" or of "the property passing on the death" of the deceased anywhere in the section. The introductory clause: "In

determining the dutiable value of *property*, or the value of a beneficial interest in *property*," the mandatory proviso above quoted, and the whole context of the section appear to me to point to but one conclusion, viz: that the duty is intended to be assessed and levied distributively on the component parts of the property passing in the hands of the individual successors to whom it goes or has gone, and that the debts and expenses allowance is deductible only from such properties as are liable therefor.

I can find nothing in ss. 3, 5 and 11 or in any other section of the entire Act to indicate that the duty is assessable and leviable upon the gross value of all property passing or deemed to pass, as a whole, and that the debts and expenses allowance is to be deducted from such gross amount, regardless of whether some or any of the properties passing or deemed to pass cannot in any manner be made legally liable for the payment of such debts and expenses.

Mr. Justice Baxter, who wrote the judgment of the Appeal Division, has exhaustively and lucidly expounded all the relevant provisions of the Act. I need add to those I have particularly discussed only ss. 19 and 22, the former of which enacts that the duty imposed shall be a lien upon the property out of which it is payable, while the latter frees the executor or trustee from any personal liability to pay the duty on any property to which any legatee, donee or other successor beneficially entitled, so long as he does not transfer such property without deducting therefrom the duty to which it is liable.

For these reasons I concur in the decision of the Appeal Division and would dismiss the appeal.

Appeal allowed with costs.

Solicitors for the appellants: *Hanson, Dougherty & West.*

Solicitor for the respondent: *W. H. Harrison.*

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