1961
Apr. 27
Dec. 14

BETWEEN:

THE ROYAL TRUST COMPANY, JOHN WHITE HUGHES BASSETT and CHARLES H. PETERS, Executors of the Last Will and Testament and of a Codicil thereto of the late JOHN BASSETT . . APPELLANTS;

AND

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

Revenue—Dominion Succession Duty Act, R.S.C. 1952, c. 89 and R.S.C. 1952, Supplement, c. 317, s. 3(1)(g)—"Succession"—Pension to widow not provided by deceased husband—Non-contributory annuity provided by employer of deceased husband—Voluntary and benevolent undertaking on part of employer in recognition of past services—Capitalized value of annuity added to succession by Minister—Appeal from assessment allowed—Date of acquiring vested interest in the annuity—Calculation of value of interest—Civil Code, Article 1029—"Accruing or arising by survivorship or otherwise on the death of the deceased".

The abovenamed deceased, John Bassett, who died on February 12, 1958, was at the time of his death and had been for many years prior thereto a director and officer of the Gazette Publishing Co. Ltd. of Montreal, Quebec. On March 27, 1947 the company entered into an agreement which recited that Mr. Bassett had served the company in diverse capacities and offices throughout many years but that he was not entitled to any benefit under any existing pension plan of the company and that the company desired to enter into an agreement not only with regard to his continuing remuneration, so long as he should be president of the company but also appropriately recognizing his long and effective service in the company's interest. It provided for the payment of a pension to him for his lifetime on his ceasing to be the company's president and that after his death it would pay to his wife during her lifetime if she survived him a pension at the rate of $5,000 per year and that the benefits so provided were in recognition of the valuable services rendered by him to the company prior to the execution of the agreement. The capitalized value of the annuity to the widow was added by the Minister of National Revenue to the assets of the succession of the deceased and taxed accordingly. From that assessment the executors of the will of Mr. Bassett appeals to this Court.

Held: That the annuity was not provided by the deceased but was of a non-contributory nature and constituted a benevolent undertaking on the part of the company for the deceased's past services which had been fully paid for and acquitted and could not form the basis for any further claim against the company by the deceased or his widow, and by accepting a guaranteed minimum salary from the company Mr. Bassett could not be said to be sacrificing his own interest in order to benefit his wife.

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2. That the widow acquired a vested right in and to the annuity upon the execution of the agreement of March 27, 1947 providing for it even though contingent on her surviving her husband and it had an appreciable value in 1947 by reason of the difference in age of the husband and wife.

3. That the appeal must be allowed.

APPEAL under the *Dominion Succession Duty Act.*

The appeal was heard before the Honourable Mr. Justice Kearney at Ottawa.

John deM. Marler, Q.C. for appellants.

A. H. Graham Gould, Q.C. and *Paul Boivin, Q.C.* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

KEARNEY J. now (December 14, 1961) delivered the following judgment:

This is an appeal by the above-mentioned executors of the will of the late John Bassett, publisher, in his lifetime of the city of Montreal, from an assessment levied by the respondent under s. 3(1)(*g*) of the *Dominion Succession Duty Act,* R.S.C. 1952, c. 89, and R.S.C. 1952, Supplement, c. 317.

The issues in this appeal arose because the appellants allegedly had omitted to include among the assessable assets of the Succession of the late John Bassett (hereinafter sometimes called "the deceased"), who, up to the time of his death and for many years prior thereto, had been a director and officer of The Gazette Printing Co. Ltd. of Montreal, P.Q., the capitalized value amounting to $54,033.85 of an annuity payable by the said Company to the deceased's widow. The Minister considered that the above-mentioned amount was subject to duty under s. 3(1)(*g*) of the Act as aforesaid, added the said amount to the assets of the Succession and taxed it accordingly. The relevant provisions of the above-mentioned section read thus:

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.

(*g*) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased, . . .

The appellants contested the applicability of s. 3(1)(*g*) and appealed from the said added assessment, but on review the Minister affirmed it.

The parties agreed that the widow was in receipt of an annuity and that it was not purchased by the deceased and that its value, subsequent to his death, amounted to $54,033.85.

As appears more fully by the appellants' amended statement of claim, they deny: (a) that the annuity was provided by the deceased; (b) that any interest accrued or arose on said decease, since, by reason of an agreement, dated March 27, 1947, entered into between the deceased and the Company, and to which the widow was made a party, she in principle but not in value had exactly the same rights in the annuity prior to her husband's death as she had subsequent thereto. Alternatively, even if it is admitted that the annuity was purchased or provided by the deceased and that a beneficial interest accrued or arose upon the death of her husband, any additional assessment must be limited to the difference if any between the value of Mrs. Bassett's rights or interest prior and subsequent to the decease of the husband.

In respect of the amount of such difference, it was submitted that, if the valuation were made an instant before and an instant after her husband's demise or in *articulo mortis* (as it is sometimes described), the value of the widow's interest would not be materially less than $54,033.85, in which case no additional tax could be levied. But if the said valuation were made as of the date on which the deceased attained his 72nd year, his wife's interest, provided of course she were then alive, would amount to $21,547.60 instead of $54,033.85 as claimed and the respondent would only be entitled to add to the assessable value of the deceased's estate the difference between the foregoing amounts, namely $32,486.25.

The material facts disclosed by the record and the oral evidence, which was brief, is neither contradictory nor disputed. The following admissions in writing were filed by the parties:

1. The said late John Bassett died on February 12th., 1958;

2. The said late John Bassett was born on February 7th, 1886, and was therefore 72 years of age at the time of his death;

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3. The said late John Bassett left a Will dated October 4th, 1947, and one Codicil thereto dated April 7th, 1955, both probated in the Superior Court, District of Montreal, on March 5th, 1958;

4. Appellants are the Executors of said Will and Codicil;

5. The wife of the late John Bassett, Marion Wright Avery, was born on May 10th, 1894. At the time of her husband's death, which she survived, she was therefore 63 years of age and she is still living;

6. The value of an annuity of $5,000 per annum, payable in monthly instalments, to a person aged 63 beginning upon the death of a person aged 72 years is the difference between the value of such an annuity on a life aged 63 and the value of such an annuity on the two lives and is the sum of $21,547.60 provided both are alive at time of valuation.

(see Ex. 2).

As appears by Exhibit 4, the vice-president and secretary-treasurer of the Company, being duly authorized for the purpose (Ex. 5), signed on behalf of the Company the previously referred to agreement dated March 27, 1947.

In the preamble of the said agreement it is stated that Mr. Bassett had served the Company in diverse capacities and offices throughout many years, but that he was not entitled to any benefit under any existing pension plan of the Company, and that the Company desired to enter into an agreement, not only with regard to his continuing remuneration, so long as he should be president of the Company, but also with regard to the provisions appropriately recognizing his long and effective service in the Company's interest in the past. The body of the agreement recites, *inter alia,* certain undertakings by the Company, the most relevant of which are substantially as follows:

(*a*) that so long as the deceased continued to be its president, it would pay him at the same rate of salary (exclusive of bonuses) paid to him in respect of the year 1945 and would continue at its expense to place at his disposal the same facilities as were available to him throughout that year and that on the deceased's ceasing to be its president it would pay him during his lifetime a certain pension; and the deceased undertook that when entitled to receive the pension provided for as aforesaid he would not, without the consent of the Company, become an officer, director or employee of or acquire any financial interest in any newspaper not owned or operated by the Company either alone or with others (with the exception, in certain circumstances, of The Sherbrooke Record) and would not devote to the affairs of The Sherbrooke Record any larger portion of his time or energies than the average devoted by him during the three calendar years ending on December 31st, 1941.

(*b*) that the Company undertook that as and from the deceased's death it would pay to his wife during her lifetime, should she survive him, a pension at the rate of $5,000 per annum, payable by even and equal monthly installment of $416.66 each.

(c) that the benefits so provided to be received by the deceased and by his widow should she survive him were in recognition of the valuable services rendered by the deceased to the Company prior to the execution of the Agreement and should in no way be affected or invalidated by any failure or inability from whatsoever cause or reason on the part of the deceased to fulfil any or all of his obligations connected with his office of president of the Company and that the Company was not precluded from paying to the deceased such bonus or bonuses or additional remuneration as the directors of the Company might at any time or times in the future in their discretion decide upon.

The first and main issue depends on the interpretation to be given in the light of the circumstances to the word "provided".

As far as I am aware, Canadian jurisprudence is lacking on the above-mentioned question, but the relevant provisions of s. 3(1)(*g*) were taken from and are identical to s. 2(1)(*d*) of the *Finance Act* of 1894 which has received judicial consideration in England.

In *Bibby & Sons, Ltd. v. Inland Revenue Commissioners*[1] it was held that s. 2(1)(*d*) was inapplicable because the widow had no established beneficial interest in or enforceable right to the annuity against the Company because the trustees of the pension fund had unfettered discretion as to its disposition. But Harman J., dealing with the question of whether an annuity or pension payable to the widow was *provided* (emphasis supplied) or purchased by the deceased, stated at page 487:

I would add, if it be necessary, that, in my judgment, this annuity, if it be an annuity and if the interest of the plaintiff be a beneficial one, is not an annuity provided or purchased by the deceased. Certainly it is not purchased, because he did nothing to purchase it. He made no bargain, and he did not come into the company's employment under the promise, express or implied, of a pension. He had, as I say, satisfied all the conditions of the pension deed before the deed was ever in existence, and there is no evidence that he ever changed his position thereafter or stayed longer or did more work or got less pay because of the existence of the deed. It is said, however, that he provided the pension because he was, as I say, the sine qua non of its payment. That does not seem to me to be enough. It seems to me that the person who provided it was the company. They put up all the money and through their agents, the trustees, might or might not distribute it to certain persons who were the objects of the company's bounty. Therefore, I hold also that the deceased did not provide the pension.

[1] [1952] All E.R. 483.

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Commenting on the interpretation to be given to the word "provided", the following remarks are found in Green's *Death Duties*, 4th ed., p. 155:

> If the deceased did not contribute directly, the benefit cannot be said to have been provided by him merely by reason of his services to his employer. Duty will be payable under a non-contributory scheme only if the deceased provided the benefit in some other way, e.g., by surrendering part of his own pension; or where the provisions of s. 30(1) of the Finance Act, 1939, apply.

Likewise, in the tenth edition of Hanson's *Death Duties*, under the title of *Pension and Provident Funds*, p. 272, No. 629, it is said:

> No duty is payable under the subsection where the deceased made no pecuniary contribution to the fund out of which the benefit is paid unless the benefit arising was secured by the deceased giving up part of his own benefit under the scheme. If the deceased made some contribution and the employers also contributed, duty may be payable on the whole benefit arising on the ground that it was provided by the deceased in concert or by arrangement.

I think the reasoning in the above-mentioned authorities is applicable in the present case. Exhibits 4 and 5 and the testimony of Charles H. Peters, president of The Gazette Printing Company and formerly its vice-president, is proof, in my opinion, that the late John Bassett did not deplete his patrimony in order to benefit his wife. He had no legal right to any annuity prior to 1947. The annuity which his wife became entitled to thereafter was of a non-contributory nature and constituted a benevolent undertaking on the part of the Company. What motivated the Company in granting the annuity was the deceased's past services, which had been fully paid for and acquitted and could not form the basis for any further claim against the Company by him or his widow.

It was stressed on behalf of respondent that the deceased, in agreeing to accept for the future, so long as he held the office as president of the Company, the same salary as was paid him in respect of the calendar year 1945, in a measure provided his wife's annuity [Ex. 4, para. (1)].

Paragraph (1) of the agreement must be read in conjunction with paragraph 8, which provides that nothing in paragraph (1) will preclude the Company from paying Mr. Bassett any bonuses or additional remuneration, as the directors may at any time see fit to pay after taking into consideration the services rendered by the deceased and the then financial position of the Company.

In 1956, when Mr. Bassett ceased to be president and became chairman of the Board, his duties declined considerably, but Exhibit 6 shows that, beginning in 1955 until he died in 1958, the deceased's annual remuneration, including bonuses, was about $3,000 in excess of what he received in 1947 when the agreement was signed.

Under other circumstances, it might be said that by accepting to work for the Company at the same rate of salary he sacrified his own interest to benefit to his wife, but I do not think that such a conclusion is warranted in the instant case. On the contrary, I think it is true to say that by accepting a guaranteed minimum salary the late Mr. Bassett, far from sacrificing his own interest in order to benefit his wife, did himself a signal service. Mr. Peters' evidence discloses that, although the deceased "died in harness", he was confined to an invalid's chair due to a tubercular hip during the last fifteen years of his life, was an excellent salesman but his activities in this respect were greatly restricted by this incapacity, his general health was poor and his hip trouble was increasing. For the Company, under the circumstances, to guarantee the deceased a non-diminishing salary, which was binding on it, notwithstanding a possible sale by the owners of their controlling stock interest in the Company, in my opinion, without detracting from the deceased's loyalty and devotion to the Company's interests, constitutes additional evidence of the Company's attitude of benevolence. Although the deceased had never asked for an increase in salary or a pension, the directors of the Company were aware that when his incapacity became permanent at the age of 61, he was greatly worried about the future, particularly as his stock interest in the Company was negligible and he had to provide for a wife who was nine years his junior. According to Mr. Peters, without consulting Mr. Bassett the directors of the Company decided to establish, in favour of himself and his wife, separate annuity benefits fashioned on the form in general use in the banking world, and when the decision was made known to the late Mr. Bassett, he and his wife accepted it with gratitude and enthusiasm.

Counsel for the respondent submitted as a further argument that we were here dealing with a stipulation *pour autrui* by a husband in favour of his wife, as envisaged by article 1029 C.C. I do not think this to be the case because

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the word "stipulate" implies authority and connotes the action of specifying or laying down certain conditions. In my opinion the facts disclose that the deceased was in no position to stipulate for himself, much less for his wife, and it was the Company which was in complete control of the situation and which determined the conditions of the annuity. Insofar as both beneficiaries were concerned, it only remained for them to accept or refuse the Company's offer. For the foregoing reasons I conclude that the respondent has failed to establish that the annuity in issue was provided by the deceased.

Did the beneficial interest accrue or arise on the death of the deceased?

In seeking to determine whether such an interest accrued or arose within the meaning of s. 2(1)(*d*) of the *Finance Act* (*supra*), Lord Morton of Henryton in *D'Avigdor-Goldsmid* and *Inland Revenue Commissioners*[1] made the following observations (p. 366):

> There are three conditions which must be satisfied in order to give rise to a claim for duty under section 2(1)(*d*), namely:—
>
> (i) There must be an annuity "or other interest"; (ii) It must have been "purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person"; and (iii) A beneficial interest therein must accrue or arise by survivorship or otherwise on the death of the deceased.

In respect of condition (iii) it was submitted by the respondent, on whom the burden lies, that Mrs. Bassett "had no right (beneficial interest) whatever until the death took place" and, on the death, the beneficial interest accrued or arose; and alternatively, that any right she might have possessed prior thereto "had no value at all" and consequently her beneficial interest could only arise subsequently to her husband's death.

It is difficult for me to see how the respondent, having admitted that, according to accepted actuarial tables, the expectant interest of the widow, calculated when the deceased was alive and on the day he attained his 72nd birthday, was $21,547.60, can now be heard to say that she had no beneficial right during the lifetime of her husband and that, if she had, it was worthless.

[1] [1953] A.C. 347.

In my opinion, upon the execution of Exhibit 4 Mrs. Bassett acquired a vested right in and to the $5,000 annuity. True it was contingent, in the sense that it was only enforceable provided she and her husband were not divorced and she survived him, but it was binding on the Company, and notwithstanding that its value was subject to heavy discount during the lifetime of the deceased; nevertheless, it had an appreciable value in 1947 by reason of the difference in age of the two parties concerned.

The difficulty involved in properly interpreting the meaning of the words "accrue" and "arise", as used in condition (iii), may be gathered from the conflicting views expressed thereon in the relatively recent case of *Westminster Bank v. Inland Revenue Commissioners*[1].

Briefly, the case, which in some respects is apposite, concerned two settlements, one made in 1929 and the other in 1932. I shall refer only to the second one, wherein a settlor assigned to a trustee four fully-paid policies on his life, directing him to hold the same in trust for his four sons, and, on the settlor's death, to divide the proceeds of the policies in certain proportions among them—one of whom was given a life interest.

It was held (reversing the Court of Appeal, Lord Reid and Lord Radcliffe dissenting) that estate duty was not payable under s. 2(1)(*d*) *supra* because the beneficial interest of the four sons in the proceeds of the policies did not accrue or arise on the death of their father.

Lord Keith at page 236 summarized the respondents' argument as follows:

> . . . . if the life-tenant could not demand of the trustees that the policy should be converted into an interest-bearing asset during the lifetime of the settlor, there was in the life-tenant only an interest in expectancy, which became an interest in possession of the life-tenant on surviving the settlor. This, it was said, was a beneficial interest in the policy provided, accruing or arising by survivorship on the death of the settlor.

Then, after quoting the *D'Avigdor-Goldsmid* case, wherein the interest provided was an absolute and an indefeasible one on the death of the settlor and wherein it had been decided that no beneficial interest arose on the death of the settlor, His Lordship went on to say at page 237:

> I would examine the argument, however, more fully. It is obvious, in the circumstances postulated, that if the life-tenant fails to survive the settlor, he will get no enjoyment of what has been provided for him.

[1] [1958] A.C. 210.

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That of itself seems to me to be a circumstance of little importance. It might be said to be merely a matter of degree. If he survives the settlor he may live to enjoy his life-interest only for a day, or a week, or a month. A person absolutely entitled may also not survive to enjoy the benefit provided. The benefit, it is true, in the fulness of time will fall into his estate, or he may sell it during his life and before the settlor's death, suitably discounted. But these are differences due to the nature of the interest provided. The one must bear full fruit; the other may wither in the bud. If the life-tenant survives to enjoy what has been provided he takes, not by virtue of a beneficial interest accruing or arising by survivorship, but because the interest provided has begun to bear fruit.

And at page 237:

It would be a remarkable thing, in my opinion, that where the right at the death is cut down to a life interest (as in the instant case) a different result should follow.

Lord Keith of Avondale stated at p. 235:

I would observe also that it is the interest provided that is to be deemed to pass at the death, but the value of this interest is quantified, for the purposes of duty, by the extent of the beneficial interest accruing or arising by survivorship at the death.

Because I have already come to the conclusion that the respondent has failed to satisfy condition (ii), I think it is unnecessary for me to determine whether or not condition (iii) has been fulfilled.

I will pass on to the question of whether—a), assuming that the deceased provided the annuity and it accrued or arose upon his death, the additional assessment in question should be limited to the excess value of the widow's right or interest after the death of her husband over its previous value prior thereto; and b), if so, in what manner should such difference be determined.

I think query a) should be answered in the affirmative.

Of course, no two cases are the same, but in *Adamson v. Attorney-General*[1], wherein it was established that a child's interest had been provided by the deceased, Lord Warrington of Clyffe stated at page 277:

. . . . In the present case the interest of each child was unquestionably provided by the deceased, and is therefore to be deemed to be included in the expression "properly passing on the death of the deceased," but only to the extent of the beneficial interest accruing or arising on the death of the deceased.

Following the *Adamson* case a retroactive amendment was made to the *Finance Act* of 1934, whereby it was provided that for the purposes of s. 2(1)(*d*) of the *Finance Act, 1894,*

[1] [1933] A.C. 257.

the extent of any beneficial interest accruing or arising by survivorship or otherwise on a death shall be ascertained without regard to any interest in expectancy that the beneficiary may have had before the death. This amendment was designed to nullify the effect of the decision in *Adamson v. Attorney-General* referred to above. However, no corresponding amendment to the *Dominion Succession Duty Act* has been made and I believe that the principle laid down in the *Adamson* case is still applicable to cases arising under the *Dominion Succession Duty Act.*

In a later case, *Attorney-General v. Lloyd's Bank Ltd.*[1], which was a matter in which the issue turns on a settlement and a deed of appointment in which the settlor reserved a power of revocation by deed or will but died without having revoked the appointment, it was held that the life interest of each child (which was absolute and immediate though liable to defeasance) was within s. 2(1)(*d*) of the *Finance Act, 1894,* but that the duty thereunder was leviable only on the excess, if any, of the value of the expectant life interest of each child after the death of the settlor over its previous value.

b) How should any excess be determined?

As appears by an amended statement of claim filed with the permission of the Court, the appellants averred that the comparable value of the widow's interest in expectancy, if determined an instant before and an instant after the deceased's death, would have been for practical purposes the same and no Succession Duty tax would be exigible.

In support of this latter submission reliance was placed on (i) the *D'Avigdor-Goldsmid* case and particularly on the observations therein of Lord Porter, where he stated at page 365:

> My Lords, the difference between the moment when an assured man is in articulo mortis and the moment of his actual decease must be infinitesimal and I am not convinced, as at present advised, that the law would pay attention to so minute a sum.

and (ii) the evidence on cross-examination of the respondent's actuary Walter Riese, wherein he conceded that the value of the annuity at the two instants above-described "would certainly be very close".

[1] [1935] A.C. 382.

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The appellants concede that on the death of the deceased the value of his widow's annuity was properly arrived at in accordance with s. 35 of the Act which reads as follows:

> 35. The value of every annuity, term of years, life estate, income, or other estate, and of every *interest in expectancy* in respect of the succession to which duty is payable under this Act shall for the purposes of this Act be determined by such rule, method and standard of mortality and of value, and at such rate of interest as from time to time the Minister may decide (emphasis supplied).

In order to place the value of $54,033.85 on the widow's annuity following the death of her husband, the respondent made use of the actuarial method of determination.

As we have seen, the widow's interest in expectancy, calculated as of the 72nd birthday of the deceased, when both he and his wife were alive, amounts to $21,547.60, but counsel for the appellants submits by his amended statement of claim that the comparable value of the widow's interest in expectancy, if determined an instant before and an instant after the deceased's death, would have been for practical purposes the same and no tax was exigible.

Bearing in mind that the subject-matter to be evaluated is an interest in expectancy, I believe that the-instant-before-and-after method is self-defeating because it only becomes applicable when the event the uncertainty of which gives rise to the expectancy has taken place. Even were the above method highly commendable, the Minister, who under s. 35 of the Act is endowed with broad discretionary power, has not seen fit to adopt it for succession duty purposes; consequently, I think its applicability to the instant case can be disregarded.

The difference between the two methods becomes apparent if one considers that, when the deceased attained his 72nd birthday, actuarially speaking his expectant life span had several years to run, but, as shown by subsequent events, it was in fact limited to less than a week.

If, assuming that s. 3(1)(*g*) were applicable and it became necessary for me to determine the extent of the widow's interest accruing or arising on the death of the deceased, as presently advised, and in the absence of any evidence of a contrary valuation, I would be disposed, for the foregoing reasons, to hold that it would be the difference

between the $21,547.60 previously mentioned and the amount of $54,033.85 claimed by the respondent, namely the sum of $32,486.25.

Since, for reasons given earlier, I consider that the respondent has failed to establish that the present case falls within the purview of s. 3(1)(*g*), I maintain the appeal with costs.

Judgment accordingly.