1954
Jan. 24
May 28

BETWEEN:

HOSPITAL FOR SICK CHILDREN.....APPELLANT,

AND

MINISTER OF NATIONAL REVENUE..RESPONDENT,

AND BETWEEN:

ISABELLA ARLOW ET AL. .....APPELLANTS,

AND

MINISTER OF NATIONAL REVENUE...RESPONDENT.

Revenue—Succession duty—Dominion Succession Duty Act, R.S.C. 1952, c. 89, s. 2(a)(k)(m), 6(1)(a)(b), 10(1), 11, 13(1), 15—"Succession"—Bequest duty free—Dutiable gifts and duty thereon taxable but the total does not constitute a succession—No duty on duty.

A testator bequeathed to his widow certain gifts free of succession duty. The respondent assessed the succession duties payable on the basis that such devise and the duty payable thereon together constituted a succession within the meaning of the Dominion Succession Duty Act. An appeal from said assessment was taken to this Court.

Held: That a gift free of duty is two gifts, one of the property given and the other a legacy of the sum required to pay the duty.

2. That the dutiable succession to the widow are the total amount of the values at the death of the testator of the devises and bequests to her free of duty and also the amount of money required to pay such duty, and that duty is assessable on the sum of the two as one succession but the Act does not authorize further calculations of duty upon duty.

3. That while the amount of money required to pay the duty on the dutiable gifts given duty free was a succession and together with such gifts dutiable, the duty payable on the sum of the two was not a succession within the meaning of the Act.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice Potter at Toronto.

A. S. Pattillo, Q.C. and *A. J. MacIntosh* for Hospital for Sick Children.

Terence Sheard, Q.C. and *G. E. Hill, Q.C.* for other appellants.

Russell Whitely, Q.C. and *A. L. DeWolfe* for respondent.

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

POTTER J. now (May 28, 1954) delivered the following judgment:

These are appeals from decisions of the Minister of National Revenue under section 38 of the Dominion Succession Duty Act, chapter 89, R.S.C. 1952, whereby he, following Notices of Appeal from his assessment of the amounts of duties upon or in respect to successions to property under the last will and testament of George James Arlow, deceased, affirmed the said assessment.

Both the above-named matters arose out of the succession to property under the will of George James Arlow, deceased, and when they came on for hearing before this Court at Toronto, in the Province of Ontario, on the 29th day of January, 1954, Mr. Terence Sheard, Q.C., counsel for the appellants in the second-named matter, moved for an order that the above-named matters be consolidated and tried together to which Mr. A. S. Pattillo, Q.C., counsel for the appellant in the first-named matter agreed, as did Mr. Russell Whitely, Q.C., counsel for the respondent in both matters.

As neither the Exchequer Court Act, chapter 98, R.S.C. 1952 nor the rules of the Court contain any applicable provisions, the procedure in Her Majesty's High Court of Justice in England on the 1st day of January, 1928 applies. According to Order 49, Rule 8 of the Rules of the Supreme Court, 1883 and in force on the 1st day of January, 1928:—

> Causes or matters pending in the same division may be consolidated by order of the Court or a Judge in the manner in use immediately before November 1, 1875 in the Superior Courts of Common Law.

There appearing to be no reason why the two above-named matters should not be consolidated and tried together it was so ordered.

George James Arlow, late of the city of Toronto, in the county of York and province of Ontario, died on or about the 5th day of June, 1952, having duly made his last will and testament of which Letters Probate were issued to the executors therein named, out of the Surrogate Court of the County of York on the 29th day of August, 1952.

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At the date of his death the aggregate net value of the estate of the deceased was $995,670.02.

The will of the deceased contained the following relevant provisions:—

II. I nominate, constitute and appoint my wife Isabella Arlow, my Solicitor, Arthur Wellesley Holmested, of the said City of Toronto, and National Trust Company Limited, hereinafter called "my trustees", to be the executors of and trustees under this my will.

III. All my estate both real and personal, of whatsoever kind or nature and wheresoever situate of which I may be seized, possessed or entitled to or over which I may have any power of appointment at the time of my decease, I give, devise, requeath and appoint unto and in favour of my trustees upon the following trusts, namely:

(*a*) To pay out of the capital of my general estate my just debts, funeral and testamentary expenses and all succession duties and inheritance and death taxes that may be payable in connection with any insurance on my life or any gift or benefit given by me either in my lifetime or by survivorship or by this my will or any codicil thereto, and whether such duties and taxes be payable in respect of estates or interests which fall into possession at my death or at any subsequent time; and I hereby authorize my trustees to commute the duty or tax on any interest in expectancy.

Then followed directions with reference to the realization of his estate with power to his trustees to sell, call in and convert into money, in their discretion, any part or parts thereof or to postpone such conversion etc., and Clauses III(c) and (d) were as follows:—

(*c*) So soon as conveniently may be after my decease to pay to my wife Isabella Arlow the sum of One Hundred Thousand Dollars ($100,000.00) for her own use absolutely.

(*d*) To pay to my wife Isabella Arlow from the date of my decease the sum of Twenty-five Thousand Dollars ($25,000.00) per annum in four equal quarterly instalments during her lifetime.

Then followed directions to deliver to his wife for her sole use and benefit his household furniture, etc., and to convey to her for her sole use and benefit the residence which he occupied in the City of Toronto, and Clause III(g) was as follows:—

(*g*) Upon the decease of my wife Isabella Arlow to take all steps necessary to wind up my estate and to pay and/or convey the assets then remaining to the Hospital for Sick Children which conducts a hospital in the said City of Toronto.

On August 12, 1952, the executors filed Succession Duty returns as follows:—

1. Statement of Value and Relationship, Form S.D. 1.
2. Schedule of Debts, Form S.D. 14.

3. Copy of Last Will and Testament of George James Arlow, dated February 10, 1947.

Forms S.D. 1 showed the following totals:—

A—Real Estate		$ 48,000.00
C—Stocks		504,107.76
E—Cash ($144,542.76 plus $9.38)		144,552.14
F—Interest in business (Purity Milk Cap Company estimated value)		220,000.00
J—Life Insurance		108,526.00
K—Miscellaneous property		44,379.00
	$ 1,069,564.90	
Debts as per Form S.D. 14 attached	68,427.03	
Aggregate net value		$ 1,001,137.87

As will appear by statements attached to the Notice of Assessments, this amount was, after making the following additions and deductions reduced to $995,670.02 viz.—

Aggregate net value as per S.D. 1 filed		$ 1,001,137.87
Add increase value of assets	10,162.15	
	$ 1,011,300.02	
Deduct claim of Purity Milk Cap Company (Export) Limited	15,630.00	
		$ 995,670.02

On May 12, 1953, the Minister of National Revenue mailed Notice of Assessments showing the amount of duty payable as $376,315.97, made up as follows:—

Successor	—	Combined Rate	Amount of Duty
Charitable Donations	$ 277.33		
ARLOW, Isabella—			
Exempt Section 7(1) (a)	20,000.00		
Gifts—exempt	3,000.00		
Dutiable Portion	972,392.69	38.7	$ 376,315.97

The Notice of Assessments also carried the following:—

N.B. Further successions have been added to the widow's share of the additional benefits which she enjoys by reason of the Succession Duty Free clause in the Will. In the final analysis, it was determined that the whole Estate, apart from the gifts to charities made in the deceased's lifetime, was a succession to the widow.

The method by which the duty claimed was calculated was set out in four statements attached to the Notice of Assessments.

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Statement No. 1 was headed "To Determine Dominion Succession Duty as Additional Succession to Widow" and was as follows:—

Aggregate Net Value	$1,010,982.20	District	TORONTO	Initial Rate 12·9
Assets per S.D.1				$ 1,069,564.90
Increase per S.D.1D				10,162.15
				$ 1,079,727.05
Debts per S.D.14			$ 68,427.03	
Deduct *re* error in totalling Debts on S.D.14 .....$	100.00			
Claim of Purity Milk Cap Co. (Export) Ltd.	15,530.00		15,630.00	84,057.03
AGGREGATE NET VALUE				$ 995,670.02

Successor	Succession	—	Add Rate	Total Rate	Duty
Charitable Donations within (3) years prior to death.....	.....	277.33	.....	.....	N/C
Isabella Arlow—Widow "A" (67) Gifts (Exempt Sec. 7 (1) (f)..	.....	3,000.00	.....	.....	N/C
Insurance.....	108,526.00				
Joint Bank Acts.....	144,542.76				
Legacy.....	100,000.00				
H. H. Gds. Effects & Cars...	39,779.00				
21 Whitney Ave.....	35,000.00				
Annuity (25,000.00 x 9.10063)..	227,515.75				
	655,363.51	635,363.51	23.2	36.1	229,366.23
Exempt Sec. 7 (1) (a).....	.....	20,000.00			
The Hospital for Sick Children Residue (Exempt Sec.	7 (1) (d)....	337,029.18	.....	.....	N/C
		995,670.02	.....	.....	229,366.23

Statement No. 2 began with the same figures in the heading as Statement No. 1, but to the six items making up the total value of the succession to the widow of $655,363.51 were added two items shown as Dominion Succession Duties $120,371.92 and Ontario Succession Duties amounting to $109,214.25, making a total of $884,949.68 from which was deducted the $20,000.00 gift to the widow exempt under section 7(1)(a), leaving a dutiable value of the succession to the widow of $864,949.68 to which an additional rate of duty of 25 per cent or a total rate of 37·9 per cent was applied resulting in the duty claimed being $327,815.93.

It will be noted that the total of the two items added to the widow's succession of $655,363.51 does not equal exactly the duty claimed by Statement No. 1 of $229,366.23, the difference being $219.94, which difference was explained by a statement filed at the request of the Court on May 4, 1954, as follows:—

The Dominion Duty claimed on Statement No. 1 was calculated before allowance for duties paid the Province of Ontario, in accordance with section 12 of the Act, and without taking into account the provisions of the will for the payment of duties. The total Ontario Duty assessed was $109,214.25, as set out on Statement No. 2, but full credit for that amount was not given against the Dominion Duties since the Ontario Duties assessed included a duty on a gift of $2,000.00 which was excluded in assessing the Dominion Duty as the gift was made more than three years prior to death. The credit allowed against the Dominion Duties for the Ontario Duty was therefore $108,994.31 which sum when subtracted from the Dominion Duty claimed by Statement No. 1 of $229,366.23, left the figure of $120,371.92 which is the amount shown as Dominion Succession Duties on Statement No. 2.

This difference between the total of the Dominion and Ontario Succession Duties shown on Statement No. 2 and the Dominion Duty claimed on Statement No. 1 is $219.94 and is carried through the various calculations except for an error of ·31 made in transferring the amount of the Dominion Duties to Statement No. 3, which should have been $218,821.62 instead of $218,821.93.

According to Statement No. 2, after treating the duty calculated on Statement No. 1 as an additional succession to the widow, and before deducting the duty calculated on Statement No. 2, the value of the residue going to the Hospital for Sick Children was $107,443.01.

Statement No. 3 again showed the succession to the widow of $655,363.51, and to that was added Ontario Succession Duties of $109,214.25 and $218,821.93 (.62) being

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the balance of the Dominion Duties after deducting therefrom the allowed credit for Ontario Duties of $108,994.31 and again the total of the Dominion and Ontario Duties differed from the duty claimed by Statement No. 2 by $219.94. By the calculation on Statement No. 3, the succession to the widow was increased from $655,363.51 to $983,399.69, or a dutiable amount of $963,399.69, after allowing the exemption of $20,000.00, and the value of the residue to the Hospital for Sick Children was reduced to $8,993.00. To the dutiable succession to the widow was applied an additional rate of 25·8 per cent or a total rate of 38·7 per cent which produced a duty of $372,835.68.

By Statement No. 4 the calculation again began with the succession to the widow of $655,363.51, but to that was not added the Succession Duty claimed by Statement No. 3 of $372,835.68 less the credit of $108,994.31 for duties paid to the Province of Ontario but the sum of $337,029.18, described as Dominion and Ontario Duties, which was obviously a figure taken to balance the statement so that the aggregate of the specific gifts, the gifts exempt from duty and the amount claimed for Dominion and Ontario Succession Duties would not exceed the net aggregate value of the estate, although on this statement an additional rate of 25·8 per cent or a total rate of 38·7 per cent was applied and a duty of $376,315.97 calculated, which is the amount of duty claimed according to the Notice of Assessments. This amount of duty with the specific gifts totalling $658,640.84 equal $1,034,956.81, exceeding the net aggregate value of the estate by $39,286.79, and if this amount of duty were paid out the net aggregate value of the estate, the amount divisible among all beneficiaries would be reduced to $619,354.05.

If the full amount of duty of $372,835.68 calculated on Statement No. 3 had been carried forward to Statement No. 4 and added to the specific gifts to the widow the result would have exceeded the net aggregate value of the estate by $36,026.44 with final duty still to be calculated, as follows:—

Successor		Succession		Add'l Rate %	Total Rate %	Duty
Charitable Donations			$ 277.33			
Widow—						
Gifts—exempt			3,000.00			
Specifics, etc.		655,363.51				
Dominion Duty, as per Statement No. 3	$372,835.68					
Less credit for Ontario Duties	108,994.31					
		263,841.37				
Ontario Duties as assessed		109,214.25				
		$1,028,419.13	20,000.00			
			1,008,419.13			
				26.0	38.9	$392,275.04
			$1,031,696.46			
Net aggregate value			995,670.02			
			$ 36,026.44			

If duty upon the dutiable portion of the estate of $1,008,419.13, at a total rate of 38·9 per cent, had then been calculated, it would have been $392,275.04, which, with the adjusted credit for Ontario duties, if added to the specific gifts, would have exceeded the aggregate net value of the estate by $55,465.80, and the amount divisible among the beneficiaries would have been reduced to $603,175.04.

The result of a general application of this method of calculation is illustrated by the following, the actual calculations involved in which are filed herewith:—

Example 1. Assume an estate with a net aggregate value of $450,000.00 and gifts to a widow of $320,100.00 free of duty, of which $20,000.00 would be exempt from duty under section 7(1)(a), with residue to a charitable organization within section 7(1)(d). The initial rate would be 10·4 per cent, the additional rate 18 per cent, or a combined rate of 28·4 per cent and the duty by a first calculation would be $85,228.40.

If this duty is treated as an additional legacy and added to the widow's dutiable succession of $300,100.00 and duty again calculated on $385,228.40 the additional rate becomes 19·6 per cent or a combined rate of 30 per cent and the duty becomes $115,598.52.

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If the method is continued, on the fourth calculation the duty free succession to the widow of $300,100.00 plus $20,000.00 exempt from duty plus duty on the succession of $300,100.00 which has become $129,900.34, and which is treated as a further gift to the widow, exceed the net aggregate value of the estate by .34.

As it is conceivable that the gift of $320,100.00 free of duty might go to a successor who would not be entitled to the full exemption of $20,000.00 or that the difference between the total gifts to a successor free of duty and the net aggregate value of the estate might be greater than in this illustration, it might be necessary to continue such calculations to a point at which there is no further appreciable increase in the duty with still some residue to go to the charitable organization.

If this method of calculation is continued in this example, on the fifteenth calculation the duty becomes $134,827.53 and on the sixteenth calculation the duty is the same amount, the result at this stage being that the gifts to the widow of $300,100.00, plus the $20,000.00 exempt from duty, plus the duty of $134,827.53 equal $454,927.53, exceeding the net aggregate value of the estate by $4,927.53.

If the amount of this duty of $134,827.53 is a first claim on the net aggregate value of the estate of $450,000.00, the widow's gifts would have to abate from $320,100.00 to $315,172.47 in accordance with the rule laid down by Bacon, V.C. in *Wilson* v. *O'Leary,* (1), in which he held:—

> That there being in fact no residue, the gift of the legacies free of legacy duty to be paid out of the residuary estate failed *pro tanto,* and that the Defendant Hughes, and the other persons whose legacies were similarly given, must bear the legacy duty thereon to the extent to which the estate was insufficient to provide for it.

Example 2. Assume an estate with a net aggregate value of $400,000.00 and gifts to a widow of $320,100.00 free of duty, of which $20,000.00 would be exempt from duty under section 7(1)(a), with residue to a charitable organization within section 7(1)(d). The initial rate would be 10 per cent and the additional rate 18 per cent, or a combined rate of 28 per cent and the duty by a first calculation would be $84,028.00.

(1) (1874) L. R. 17 Eq. 419 at 420.

The dutiable successions to the widow of $300,100.00, which are given free of duty, plus $20,000.00 which is exempt from duty under section 7(1)(a), plus the duty of $84,028.00 claimed by the first calculation, together equal $404,128.00, exceeding the net aggregate value of the estate by $4,128.00.

Once again, will the gifts to the widow be obliged to abate by that amount in accordance with the rule in *Wilson* v. *O'Leary* (*supra*) and further calculations discontinued, or should the calculations be continued to the point where they do not increase the duty?

In this example, on the sixteenth calculation, the duty is $132,320.75 and on the seventeenth calculation it is the same amount, ignoring for practical purposes the fractions of one cent.

At this stage the calculated duty of $132,320.75 plus the gifts to the widow of $300,100.00 free of duty, plus the $20,000.00 exempt of duty, equal $452,420.75, exceeding the net aggregate value of the estate by $52,420.75.

If the duty of $132,320.75 is a first claim on the net aggregate value of the estate, do the gifts to the widow have to abate to $267,679.25, and, if so, could the widow claim that there could not possibly be a duty of $132,320.75 on bequests which netted $267,679.25?

The questions which arise out of the method of calculation set out in the four statements attached to the Notice of Assessments in this case, and to which there appear to be no satisfactory answers, are as follows:—

1. Are such calculations to be continued to the point where the specific gifts free of duty, plus gifts exempt from duty, plus the duty on duty exceed the net aggregate value of the estate; and, if so, is the resulting duty not to be claimed in full but reduced so that the total of the items mentioned shall exactly equal the net aggregate value of the estate, and then a final calculation of duty made?
2. Where the difference between the specific gifts free of duty, plus gifts exempt from duty, and the net aggregate value of the estate, is sufficiently large to enable the calculations to be continued to the point where the duty is no longer increased by a further calculation

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and there is still something left for the residuary legatee, should the calculations be continued to that point?

3. Are the calculations to be continued until the duty on duty is no longer increased by a further calculation and if that amount plus the duty free gifts and exemptions exceed the net aggregate value of the estate must the specific gifts which were given free of duty abate, and, if so, can those receiving such abated gifts object that the amounts received by them could not possibly be the net after applying the initial rate plus the proper additional rate of duty, and demand a new calculation?

The cardinal rules applicable to the interpretation of taxing statutes, which have been many times stated in judicial decisions, are as follows:—

> Statutes which impose pecuniary burdens, also, are subject to the same rule of strict construction. It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation. Maxwell on the Interpretation of Statutes, Tenth edition, p. 288.
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> Statutes which encroach on the rights of the subject, whether as regards person or property, are similarly subject to a strict construction in the sense before explained. It is a recognized rule that they should be interpreted, if possible, so as to respect such rights . . . It is presumed, where the objects of the Act do not obviously imply such an intention, that the Legislature does not desire to confiscate the property, or to encroach upon the right of persons; and it is therefore expected that, if such be its intention, it will manifest it plainly, if not in express words at least by clear implication and beyond reasonable doubt. Ibid, pp. 285 and 286.
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> While the court approaches the Act with the idea that the legislature will not readily be presumed to have enacted a glaring injustice, it cannot consider what is fair and what is oppressive in taxation. If the person sought to be taxed comes within the letter of the law, he must be taxed, however great the hardship may appear: on the other hand, if he is not within the letter of the law, he is free, however much within the spirit of the law the case otherwise appears to be. Green's Death Duties, Third edition, page 5.

And with regard to the powers of disposition of a testator the following are relevant:—

> To the extent of his powers of disposition, a testator or other disponer may effectually prescribe the manner in which, as between the beneficiaries, any duties are to be borne, the commonest provisions being that specified property shall be free of duty or that duties generally shall be paid out of a specified fund. 13 Halsbury, page 299, para. 312.

A testator may effectually prescribe the manner in which as between the beneficiaries, any duties payable under his will are to be borne, and his intention may be gathered from any direction in the will. Ibid, page 337, para. 370. See also Ibid, page 390, para. 439.

Any testator, settlor or other disponer may effectually prescribe, so far as his powers of disposition extend and without prejudice to the rights of the Crown, the manner in which, as between the beneficiaries, any duty is to be paid or borne. Green's Death Duties, Third edition, page 512.

With these statements of the law taken from recognized textbooks, and with the decisions on which they are based, in mind, the questions for decision in this case may be approached.

The Dominion Succession Duty Act, chapter 89, R.S.C. 1952, contains the following provisions relevant to this enquiry:—

2. In this Act,

(*a*) "aggregate net value" means the fair market value as at the date of death, of all the property of the deceased, wherever situated, . . .

2(*k*) "property" includes property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death, and any right or benefit mentioned in section 3;

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;

Section 3 defines what dispositions shall be deemed to be included in a succession, but it was stated by counsel for the respondent that no part of that section was being invoked on behalf of the Crown. Then follow certain taxing sections .

6.(1) Subject to the exemptions mentioned in section 7, there shall be assessed, levied and paid at the rates provided for in the First Schedule duties upon or in respect of the following successions, that is to say,

(*a*) where the deceased was at the time of his death domiciled in a province of Canada, upon or in respect of the succession to all real or immovable property situated in Canada, and all personal property wheresoever situated; and

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(*b*) where the deceased was at the time of his death domiciled outside of Canada, upon or in respect of the succession to all property situated in Canada.

Section 10 provides in part:—

10.(1) There shall be assessed, levied and paid to the Receiver General of Canada, upon or in respect of each succession mentioned and described in section 6 an initial duty at the rate set forth under the heading "Initial rates dependent on aggregate net value" in the First Schedule that corresponds to the aggregate net value in the said Schedule, and the duty so levied shall be payable by each successor in respect of his succession.

Section 11 provides in part as follows:—

11. In addition to the duty imposed by section 10, there shall be assessed, levied and paid upon or in respect of each succession mentioned and described in section 6 a duty at the rate set forth in the First Schedule that corresponds to the dutiable value in the said Schedule—

Section 13 provides in part as follows:—

13.(1) Every successor is liable for the duty by this Act levied upon or in respect of the succession to him, and the duty in respect of any gift or disposition *inter vivos* to a successor is also payable by and may be recovered from the executor of the property of the deceased.

Subsection (2) of this section provides that all duties assessed and levied under the Act shall be payable by and may be recovered from the executor of the property of the deceased, etc.

Section 15 is as follows:—

15. Every executor who is required to pay duty upon or in respect of the succession to property that is being administered by him is entitled to deduct from the amount paid over by him the amount of the duty paid by him or, in the event of the successor being satisfied otherwise than in money paid over by him, to recover from the successor the amount of the duty so paid.

It will be noted by section 6(1)(a) that the duty is to be assessed, levied and paid upon or in respect of the succession to all real or immovable property situated in Canada, and all personal property wheresoever situated; that by section 10 an initial duty at the rate set forth in the First Schedule is imposed according to the aggregate net value of the estate and is payable by each successor in respect of his succession; that by section 11 an additional duty at the rate set forth in the First Schedule is assessed, levied and paid upon or in respect of each succession and that by section 13 every successor is liable for the duty in respect of the

succession to him and that the executor of the estate is also liable and he may deduct the duty from each succession paid over by him.

"'Succession' means every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property" and "'property' includes property, real or personal, movable or immovable, of every description, and every estate and interest therein . . . capable of being devised or bequeathed by will or of passing on the death. . ."

It was contended for the appellants that the duty of $229,366.23 on the specific gifts to the widow of $655,363.51, less the exemption of $20,000.00, was not itself subject to duty, or, in the alternative, if the first amount of duty of $229,366.23 was itself subject to duty, there was no authority to again calculate duty on the dutiable part of the specific gifts plus duty thereon and continue such calculations, because such duty was not a succession; i.e., a disposition of property by reason whereof the widow of the testator became beneficially entitled to any property real or personal, movable or immovable, or any estate or interest therein.

It was contended on behalf of the respondent that a gift free of duty amounted to two gifts, the gift itself and a gift of the amount of money required to pay the duty on the gift; that the dutiable part of the gift and such duty should be added together, duty calculated on the total at the authorized rates, and that such calculations should be continued until the dutiable part of the specific gifts plus the first duty and duty thereon nearly equalled the net aggregate value of the estate; that if the result of the last calculation produced an amount of duty which, when added to the specific gifts, exceeded the net aggregate value of the estate, the duty ascertained by the last calculation could be arbitrarily reduced so that the specific gifts, plus such portion of the duty, would not exceed the net aggregate value of the estate, though the residue was completely exhausted; the final result being that the widow was deemed to have succeeded to the whole estate with duty to be assessed and levied accordingly even though her duty free gifts would abate.

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According to Statement No. 1 attached to the Notice of Assessment, the total value of the specific gifts to the widow was $655,363.51 of which, after deducting the $20,000.00 exempt from duty under section 7(1)(a), $635,363.51 was dutiable at a combined rate of 36·1 per cent. and on which the resulting duty was calculated to be $229,366.23.

The first question is, was the amount of $229,366.23, claimed as duty by the respondent, a succession to the widow?

It is well-settled that a gift free of duty is in law two gifts: one of the property given and the other a legacy of the sum required to pay the duty. Editorial Note in *Re King, Barclay's Bank Limited* v. *King and Others* [1942] 2 All E. R. 182.

In this case, Luxmoore, L. J. at page 185, after outlining the circumstances under which the case arose and the clauses of the will, said:—

It is admitted that the direction at the beginning of cl. 3 that the benefits given by that clause are to be duty free exonerates the widow from all liability for estate duty, succession duty and legacy duty. It is also admitted that all sums required to comply with such direction must be treated as additional legacies.

This principle has long been followed by the Courts of England and Scotland.

Beginning with the Stamp Duties Act, 1779, 20 George 3, chapter 28, receipts or other discharges for any legacies left by any will or testamentary instrument or for any share or part of personal estate divided by force of the Statute of Distributions, should carry certain stamps.

By the Stamp Duties Act of 1783, 23 Geo. 3, chapter 58, additional stamp duties were imposed, as was done by the Stamp Duties Act, 1789, 29 Geo. 3, chapter 51.

The Legacy Duty Act, 1796, 36 Geo. 3, chapter 52 recited that it was expedient that the said Acts should be repealed and that new duties be granted by this Act in lieu of the duties repealed, excepting that the provisions made by the said several Acts for collecting the duties thereby imposed should be further enforced as to the duties not repealed by this Act.

Then followed provisions imposing duties on legacies and upon every part of the clear residue of the personal estate of every person who should die, whether testate or intestate,

and leave personal effects of the clear value of one hundred pounds or upwards, the rates of duty depending on the relationship of the beneficiaries to the deceased, with certain exceptions being made in the cases of husbands or wives of the Royal family.

Section XXI, however, was as follows:—

XXI. Provided always, and be it further enacted, that if any direction shall be given, by any will or testamentary instrument, for payment of the duty chargeable upon any legacy or bequest out of some other fund, so that such legacy or bequest may pass to the person or persons to whom or for whose benefit the same shall be given, free of duty, no duty shall be chargeable upon the money to be applied for the payment of such duty, notwithstanding the same may be deemed a legacy, to or for the benefit of the person or persons who would otherwise pay such duty.

It is clear that at the time of the enactment of this Statute, therefore, it was anticipated that money to be applied to the payment of legacy-duty on a duty-free bequest would be deemed an additional legacy to or for the benefit of the person or persons who would otherwise pay such duty.

In *Noel* v. *Henley* (1), Lord Chief Baron Richards in the Exchequer Chamber said at page 253:—

The legacy duty is a charge upon the legacy, not upon the estate; but where the legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the same fund.

While the section itself refers to a direction for the payment of the duty out of some other fund, the legacy in this case was to be paid out of the rents and profits and the produce of the sale of real estate devised to be sold, yet the Lord Chief Baron considered the balance of the fund out of which the legacy was paid to be some other fund.

In *Farrer* v. *Saint Catherine's College, Cambrige,* (2), Lord Selborne, L. C. said:—

A gift of legacy duty on a specific or pecuniary legacy was a common pecuniary legacy for the benefit of the specific legatee in the one case, and of the pecuniary legatee in the other; and in the event of the general estate being insufficient the gifts of legacy duty must abate along with other pecuniary legacies.

In *The Lord Advocate and Miller's Trustees,* (3), the Lord Ordinary (Fraser) whose opinion is given in the report of the hearing on appeal to the First Division, is reported

(1) (1819) 7 Price 241. (2) (1873) L. R. 16 Eq. Cas. 19 at 25.
(3) (1884) 11R. (Ct. of Sess.) 1046.

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to have said in the note at page 1052, in discussing section XXI of the Legacy Act, 1796:—

> What is the meaning of the words that if any direction shall be given for payment of the duty "out of some other fund"? It plainly means some fund other than the legacy or bequest, and it is a fund over which the testator has power to deal, for the clause assumes that he can dispose of it by will or testamentary instrument. Now, that fund can only mean the residue or the real estate, something, in short, apart from the legacy itself.

He then quotes from the decision of Chief Baron Richards in *Noel* v. *Henley* (*supra*).

In giving the judgment of the Court on the appeal the Lord President said at page 1055 after quoting section XXI of 36 Geo. 3, chapter 52:—

> Now, there can be very little doubt that but for this enactment, in every case where a legacy is given free of legacy-duty by the will of the testator, and the executry estate can afford to relieve and does relieve the legatee of the amount of the duty by paying the duty out of the executry estate, that portion of the executry estate so applied would itself be subject to legacy-duty. But in the case supposed, this enactment provides that that portion of the executry estate which is so applied to relieve the legatee is not itself to be subject to legacy-duty. *And the reason for the enactment is plain enough.*

Lord Adam said at page 1059:—

> If there be a direction by the testator to pay the duty out of the residue, the statute of Geo. III comes into play, and provides that no duty shall be payable on the £10 or £3 paid to relieve the legatee from the payment of the duty. It is in that case only that the statute comes into play. In this case there was no direction to pay out of any particular fund, and though that may be inferred as being a direction to pay out of residue, there was here no residue; and therefore, in my opinion, the case does not fall within the 21st section of the Act of Geo. III. I do not think that it has any application to the case, and the Crown, as in the case I put, would just take its ten or three per cent.

He proceeded further and held that the Crown was entitled to treat the amount required to pay the legacy-duty on the legacy as an additional legacy and to require payment of duty on the sum of the two amounts.

In *Re Turnbull, Skipper* v. *Wade,* (1), a testatrix who made her will in 1893 and died in 1903 bequeathed numerous pecuniary legacies and directed that all the legacies should be paid "free from duty". Her estate was insufficient to pay all the legacies in full.

(1) [1905] 1 Ch. 726.

Beginning at page 728, Farwell, J. reviewed the authorities, including those already cited, and, after quoting from the same, said at page 730:—

> It follows that the legacy duty must be treated as an addition to each legacy, and then all the legacies will abate rateably, and each of the abated legacies will bear its own duty.

In *Re Hadley, Johnson* v. *Hadley,* (1), Parker, J. said at page 25:—

> A direction to pay out of residue a duty which but for such direction would be payable out of the appointed fund is in effect a pecuniary legacy to the appointees of the amount of the duty.

On the authorities, therefore, a gift free of duty is a gift of the subject matter of the gift itself and of the amount of money necessary to pay the duty on the gift.

It was, however, submitted on behalf of the appellants in one of the above-named matters that the sum of $229,366.23 shown on Statement No. 1 as duty on the dutiable gifts to the widow was not a succession to the widow and should not have been carried forward, after an adjustment of the amount credited for duty paid the province of Ontario, and added to the succession to the widow on Statement No. 2 because it was not property to which she became beneficially entitled within the meanings of the definitions contained in section 2(m) and (k), and that the English and Scottish cases to the effect that a gift of a legacy free of duty was a gift of the legacy itself and of an amount of money sufficient to pay the duty did not apply as they were authorities to the effect that legacies given duty-free must abate if there was insufficient in the residue or some other designated fund to pay the duty.

In this connection the cases of *In Re Miller's Agreement, Uniacke* v. *Attorney General,* (2), and *Re Flavelle Estate,* (3), were cited.

In *Re Miller's Agreement,* by the terms of an agreement of dissolution of partnership, two continuing partners covenanted with the retiring partner to pay, as from his death, to his three daughters certain annuities for their respective lives. No trust in favour of the daughters was created and the annuities were expressly chargeable on the partnership assets. On the death of the retiring partner

(1) [1909] 1 Ch. 20. (2) [1947] Ch. 615.
(3) [1943] O. R. 167.

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the revenue claimed that his daughters were liable to pay both estate duty under the Finance Act of 1894 and succession duty under the Succession Duty Act of 1853 with respect to the annuities which became payable to them.

Wynn-Parry, J., after deciding that the annuities were property under section 2 of the Succession Duty Act of 1853, decided that they were not property to which the daughters became beneficially entitled. At page 619 he said:—

> In my view, the word "interest" in the sub-section means such an interest in property as would be protected in a court of law or equity.

At page 623:—

> Upon its true construction I cannot find—and this is really admitted —that the deed confers upon any of the plaintiffs any right to sue, or anything more than a right to retain any sums which may from time to time be paid by Mr. Miller or Mr. Vos under the deed.

At page 624:—

> On the view which I take of the document, the payments, if and when made, will be no more than voluntary payments and, as such, appear to me to be quite outside the scope of the section.

At pages 624 and 625, disregarding the word "beneficially", he said:—

> The word "entitled" as used in this section, appears to me necessarily to carry the implication that for a person to be entitled to property under this section it must be capable of being postulated of him that he has a right to sue for and recover such property.

The *ratio decidendi* of this case may be deduced from the foregoing quotations which will be further considered.

In *Re Flavelle Estate* (*supra*) Rose, C.J. H. C. held that where a testator directed his executors to pay succession duties out of his general estate, no duty was payable under the Succession Duty Act, 1937, of Ontario. At page 194 he distinguished the English and Scottish cases, already quoted from, by finding that the Ontario Act applicable to the case which he had under consideration did not impose legacy duties properly so called and at page 196 held that, as the duty was imposed upon so much of the property that passed to a beneficiary, as the duty never reached the beneficiary but went to the Treasurer, no duty was leviable upon it.

As the definition of "succession" in the Dominion Succession Duty Act includes all testamentary gifts and devolutions and the Act imposes a duty on successions and not expressly on property passing, the distinctions made by Rose, J. are, in my opinion, not relevant to this inquiry.

The definition of "succession" contained in section 2(m) of the Dominion Succession Duty Act, as already stated, is as follows:—

> 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 . . .

It has been recognized as well-settled from the time the Legacy Duty Act of 1796 was enacted down to the case of *Re King, Barclay's Bank Limited* v. *King and Others* (1), that:—

> . . . a gift free of duty is in law two gifts: one of the property given and the other a legacy of the sum required to pay the duty.

In Canada the principle was applied by the Court of Appeal of Saskatchewan in *Re Anderson, Canada Permanent Trust Company* v. *McAdam* (2).

The amount of money required to pay the duty on a gift given free of duty being a legacy, the right of a legatee or beneficiary to sue for the same in equity was well established.

In *Wilcox* v. *Smith* (3), Vice Chancellor Kindersley said:—

> Becoming entitled means, therefore, entering into the state of being entitled from the state of not being entitled. In other words to "become entitled" means to acquire a right or title.

In the article on legatees' suits contained in 13 Halsbury, page 38, para. 34, the following is stated:—

> At first a legatee could sue for his own legacy solely, but the proceedings came to be enlarged in their scope as in the case of a creditor's action. If the executor admitted assets, the legatee continued to be entitled to a decree for payment. But otherwise an account of all legacies was directed, with an order for payment rateably. The action involved an account of the personal estate, and also, since debts had priority over legacies, an account of debts, and hence a creditor could make his claim in the action.

(1) [1942] 2 All E. R. 182. (2) [1928] 4 D. L. R. 51.
(3) (1857) 4 Drewery 40 at 51.

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As authority for these propositions, Halsbury cites Mitford Pleadings in Chancery, Fifth edition, page 194, which is to the same effect with a number of authorities cited.

As a legatee had the right to sue for a legacy in equity, or, as Wynn-Parry, J. said in *Re Miller's Agreement* (*supra*), at page 619, "had such an interest as would be protected in a court of law or equity", he must have been "entitled" to the same within the definition of that word also given by Wynn-Parry, J. in that case, and although the procedure in some jurisdictions may have been varied by statutes or rules, the right would still be there regardless of the method by which it is enforced or protected.

I therefore conclude that the succession to the widow was $655,363.51, of which $635,363.51 was dutiable, plus the duty on the same of $229,366.23 or together, after adjusting the credit for succession duties claimed by the Province of Ontario, $884,949.68; that duty was properly calculated on that amount, less $20,000 or $864,949.68, and that such duty amounted to $327,815.93.

The result of this calculation after adjusting the credit for duty claimed by the Province of Ontario is shown in the columns headed "Successor" and "Succession" in Statement No. 3 (Exhibit 1c) as follows:—

Successor		Succession
Charitable Donations		$ 277.33
Widow—		
Gifts—Exempt		3,000.00
Specifics, etc.	$655,363.51	
Dominion Duties	218,821.93	
Ontario Duties	109,214.25	
	983,399.69	
Exempt		20,000.00
Dutiable (subject to this judgment)		963,399.69
Hospital for Sick Children		8,993.00
		$995,670.02

The next question is, are further calculations of duty upon duty authorized by the Act?

In order to determine the duty on the dutiable part of the succession to the widow of $655,363.51, the initial rate of 12·9 per cent, plus the additional rate of 23·2 per cent, or together a rate of 36·1 per cent, was applied, the

amount of which, when found, was a second legacy to the widow and which the testator must be deemed to have intended when he gave her, free of duty, the various items making up the succession to her.

Once that amount was ascertained and added to the specific gifts to the widow, the total value of the succession to her was fixed, and it was correct to apply the increased additional rate in order to find the duty on the total succession so ascertained, which amounted to $327,815.93.

In my opinion, however, the Act contains no authority to continue the process and increase the additional rate of duty at every calculation for the authority to fix rates of duty ceased when the original value of the dutiable succession to the widow plus the duty on the same and duty on such combined total succession was ascertained.

As already pointed out, no basic principle was established on which such further calculations could be based and which would be applicable, with certainty, to all estates in which gifts are given free of duty with residues to charitable organizations or other beneficiaries.

The method was, however, continued, and according to Statement No. 3, the calculated duty was $372,835.68. If the method used was correct, that amount of duty is a debt to the Crown and should be paid whether or not there is sufficient in the residue when carried forward to Statement No. 4 to pay it and specific gifts, for on the authority already cited if there is insufficient in the residue to pay the duty lawfully due, the specific gifts must abate even though they were given free of duty.

On the other hand, if the difference between the aggregate duty-free gifts and the net aggregate value of the estate is sufficiently great, it is possible to carry on the calculations until the point is reached where a calculation no longer increases the duty over the next preceding amount ascertained, and there may still be some residue for the residuary beneficiaries, whether they are charitable organizations or others.

If that method is sound it should be applied to all such estates with the result, in many instances, that not only would the residue be completely exhausted, but part of the specific gifts, which had been given duty free, would be claimed as duty.

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These two suggested methods are incompatible and no provisions in the Act were relied on to support either, nor were sound reasons advanced for their use.

Very little assistance can be obtained from decided cases, although the Lord President in giving judgment on the appeal in *The Lord Advocate* v. *Millers' Trustees* (*supra*), commenting on the provision contained in section XXI of the Legacy Act of 1796, did say at page 1056:—

> But in the case supposed, this enactment provides that that portion of the executry estate which is so applied to relieve the legatee is not itself to be subject to legacy-duty. *And the reason for the enactment is plain enough.*

In the same case, Lord Adam, speaking of a direction by a testator to pay duty out of the residue, said at page 1059:—

> It is in that case only that the statute comes into play.

While it is difficult to indicate the fallacy in the method of calculation of duty upon duty, thereby increasing the succession to the widow, applying increasing additional rates and exhausting the residue, as used in this estate, the basic error appears to be in the assumption:—

That the duty calculated upon the total of the succession to the widow of $635,363.51 plus the amount of $229,366.23 (the first duty calculated) is a succession within the meaning of the Act.

It has already been decided that the money required to pay the duty on the amount of the gifts given free of duty is an additional succession and that duty is payable on the total of those two amounts, but it does not follow that the duty upon these two amounts, calculated and shown as such on statement No. 2 and amounting to $327,815.93, is also a succession.

The charging sections of the Act, viz. sections 6, 10, and 11, and the relevant definitions have already been quoted.

> The identification of the subject matter of the tax is naturally to be found in the charging section of the statute, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessary. Per Lord Thankerton in *Provincial Treasurer of Alberta* v. *Kerr* [1933] A. C. 710 at 720 and 721.

In all these sections, 6, 10 and 11, it is the "succession" upon which the duty is assessed and levied and the succession, for the purposes of the question under consideration,

by sections 2(m) and (k) means briefly a disposition of property capable of being devised and every estate and interest therein by reason whereof any person shall become beneficially entitled thereto upon the death of any person.

The meaning of the words "become beneficially entitled" has also already been discussed, and while it follows from the authorities that the amount of money required to pay the duty on the dutiable gifts given duty free was a succession and, together with such gifts, dutiable, the duty payable on the sum of the two was, in my opinion, not a succession.

Such last-mentioned duty was not a disposition of property to which the widow became "beneficially entitled". She will benefit by the payment of the same by the executors, out of the residue, but to use, *mutatis mutandis,* the words of Wynn-Parry in *Re Miller's Agreement, Uniacke* v. *Attorney General (supra),* at p. 625, it is not capable of being postulated of her that she has a right to sue for and recover such property.

While, by making gifts free of duty, the testator must be deemed to have intended that such duty, when ascertained, would be an additional gift and would be payable out of the residue of his estate, that the only method of ascertaining the amount of such duty as an additional gift would be by applying the appropriate rates set out in the Schedule to the Act, and that the two gifts would together be subject to duty, if he had known what the exact net value of his estate would be he could have, within a near figure, given his wife sufficient so that after the payment of duty the net to her would have been the total of the specific gifts shown on Statement No. 1 and in the first six items of the columns headed "Successor" and "Succession" on Statement No. 2, with the residue to the Hospital for Sick Children, as shown on Statement No. 3 attached to the Notice of Assessments.

In accordance with the principles of law already quoted, the right of a testator to prescribe the manner in which, as between beneficiaries, duties are to be borne, should not be abridged, and the residue of the estate should not be confiscated unless authority to do so is clearly expressed or implied by the Act.

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Furthermore, the method of calculation used beyond Statement No. 2, the result of which is shown in the columns headed "Successor" and "Succession" on Statement No. 3, has no rational strength as demonstrated by the examples given.

I therefore hold that the Act does not authorize calculations of duty beyond that made on Statement No. 2, which amounted to $327,815.93.

Two other questions were raised by the appellants, viz., first, that the respondent was bound by the practice set out in the explanatory Brochure (Revised to March, 1947) and marked exhibit 3, for the purpose of identification, and, second, that by reason of admissions contained in paragraph 10 of the respondent's defence the appeal should be allowed in any event.

It is unnecessary and therefore improper for me to express an opinion on the second question for it would be *obiter*.

With regard to the practice set out in the Brochure and its admissibility in evidence, while I hold that the Brochure would be admissible as some evidence of the accepted meaning of some words in the Act, the respondent is not bound by the instructions or suggestions contained in the same.

In *The Lord Advocate* v. *Miller's Trustees (supra)*, the Lord Ordinary (Fraser) stated the rule to the effect that the Crown is not bound by the acts or omissions of its officers and that it was needless to inquire what was the reason or origin of this privilege.

To recapitulate; the dutiable successions to the widow, Isabella Arlow, are, first, the total amount of the market values at the death of the testator of the devises and bequests to her free of duty, and, second, the amount of money required to pay such duty. And duty is payable on the sum of those amounts only.

The appeals of the appellants in both the above-named matters will be allowed, and the assessment varied by reducing the duties assessed from $376,315.97 to $327,815.93 as calculated and set out on Statement No. 2 (Exhibit 1b) attached to the Notice of Assessments (Exhibit 1), and the said appellants will have their costs.

Judgment accordingly.