BETWEEN:

SHULAMIT ELFRIEDE VASKEVITCH ... APPELLANT;

AND

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

Toronto 1968 Sept. 17-18

Ottawa 1969 Jan. 3

Estate tax—Insurance purchased by wife on husband's life—Insurance moneys paid to wife—Whether chargeable—Estate Tax Act, 1958, c. 29, s 3(1)(j)—"Concert", "arrangement", meaning.

Mrs *V*, whose husband was about to make a flight to the Orient, accompanied him to the Toronto airport where Mr. *V* having mentioned insurance Mrs *V* of her own volition completed two applications for flight insurance on his life, inserting his name in the places provided for the name of applicant or insured, naming herself as beneficiary and paying the premiums of $8 00 from her own funds. Mr. *V* personally signed both applications as the insurers required. Mr. *V* was killed on the flight and the proceeds of the two policies, $95,000, were paid to his wife.

Held, the insurance proceeds were not chargeable to estate tax by s. 3(1)(*j*) of the *Estate Tax Act* as the policies were not purchased or provided by the husband either by himself alone or in concert or by arrangement with his wife. The fact that the insurers intended to contract with the husband did not determine the ownership of the policies as between husband and wife, and there was no presumption of a loan of the amount of the premiums by the wife to the husband. To act "in concert or by arrangement with another person" within the meaning of s. 3(1)(*j*) presupposes some form of active participation rather than passive consent to a decision taken by another person.

Lethbridge v. Attorney General [1907] A.C. 19, referred to.

APPEAL from estate tax assessment.

Wolfe D. Goodman for appellant.

N. A. Chalmers for respondent.

CATTANACH J.:—This is an appeal from an assessment dated March 22, 1967 under the *Estate Tax Act*, chapter 29, Statutes of Canada, 1958 whereby the Minister assessed the appellant as executrix of the estate of her late husband, Theodore Vaskevitch, by adding to the aggregate net value of that estate the sum of $95,000 being the proceeds of two policies of accident insurance.

The facts giving rise to the assessment are relatively simple and straight forward and are, in the main, agreed upon between the parties with the exception of one major particular upon which I shall comment in detail later.

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On Friday, February 25, 1966, Theodore Vaskevitch, the husband of the appellant, departed from Malton Airport at Toronto, Ontario by Canadian Pacific Airlines for the Orient.

Mr. Vaskevitch was an engineer engaged in the manufacture of electronics on his own account and in the course of his business he frequently flew to Europe and to Japan and Hong Kong.

Immediately prior to his departure, two policies of flight insurance were obtained, one being policy No. DC-11091668 issued by Fidelity and Casualty Company of New York in the principal sum of $75,000 (hereinafter called the Fidelity policy) and the second being policy No. T18BAC-29826-A issued by Mutual of Omaha Insurance Company in the principal sum of $20,000 (hereinafter called the Omaha policy). The term of the Fidelity policy was for the duration of Mr. Vaskevitch's flight to the Orient and for the duration of his return flight, whereas the term of the Omaha policy was for a period of 14 days from February 25, 1966.

In each case the principal sum was payable in the event of the death of Theodore Vaskevitch and in the event of the loss of hands, eyes or feet and a lesser sum in respect of the loss of a single eye, hand or foot.

The appellant was named the beneficiary in both policies.

It was agreed by both parties that these policies were policies of accident insurance.

The aircraft in which Mr. Vaskevitch was a passenger crashed at Mount Fuji, Japan on March 5, 1966, killing him and many other passengers and members of the crew.

The principal sums payable under the policies of insurance were promptly paid to the appellant by the insurers, but the appellant, in completing an estate tax return, did not include those amounts in her declared total value of the estate of the deceased.

The Minister, by his notice of assessment, dated March 22, 1967, did so.

The appellant filed a notice of objection.

The Minister confirmed the assessment on the ground that the proceeds of the two policies above mentioned was

property passing on the death of the late Theodore Vaskevitch and the value of such property was properly included in computing the aggregate net value of the property so passing, pursuant to the provisions of section 3(1)(*j*) of the *Estate Tax Act*.

The said section 3(1)(*j*) reads as follows:

> 3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,
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> . . .
>
> (*j*) 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 therein arising or accruing by survivorship or otherwise on the death of the deceased;
>
> . . .

Under section 3(1)(*j*) there are three conditions which must be present to give rise to estate tax being exigible on this part of the deceased's estate:

(1) there must be an annuity or other interest,

(2) 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

(3) a beneficial interest therein must accrue or arise by survivorship or otherwise on the death of the deceased.

There is no doubt in my mind and it was accepted by both parties that an accident policy is an "other interest" in property and the subject of duty, but the two other conditions above mentioned must also be present if the proceeds of these two particular accident insurance policies are to be taxable as part of the aggregate net value of the appellant's husband's estate.

Counsel for the appellant submitted that,

(1) the policies, here involved, were not purchased by the deceased alone or in concert or by arrangement with the appellant and that even if such had been the case, which he vigorously denied, then,

(2) there was no beneficial interest therein arising or accruing by survivorship or otherwise on the death of the deceased.

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It is with respect to the facts upon which the appellant bases the first of the two above contentions that a controversy arises between the parties.

Therefore it is incumbent upon me to examine the evidence adduced in this regard with care.

On all previous business flights taken by the deceased the appellant had made all of her husband's arrangements such as the flight booking, hotel reservations and the withdrawal of money for expenses. However the appellant was opposed to her husband going to the Orient. She had a prejudice against the country to which her husband was going. She thought it to be uncivilized, subject to earthquakes, tidal waves and like disasters. Furthermore, she had a premonition that her husband would not return from this particular trip. Her husband did not share the appellant's apprehensions and apparently felt that this trip was necessary for his business interests. To alleviate domestic friction he made the necessary arrangements himself which was contrary to their usual custom. It had also been the custom of the appellant and the deceased to take out flight insurance in the amount of $75,000. The appellant knew that her husband was going to take this trip, but he had kept his departure date secret from her in the interest of harmony and to postpone his wife's inevitable protestations until the last possible moment.

On Wednesday, February 23, 1966, the appellant had received a cheque from the German Government in the amount of 5000 marks in restitution of war damage suffered by her. During the morning of Thursday, February 24, 1966, the appellant cashed this cheque, rather than depositing it, the cheque having been drawn on a bank other than her own, and she received therefor approximately $1300 in Canadian funds.

That evening the husband revealed his plan to leave for the Orient by air the next morning. He had exhausted his Canadian funds. Therefore the appellant gave him an uncertain amount of Canadian money from the proceeds of the cheque she had cashed that morning so that upon her husband's return he would have Canadian funds in case she was prevented from meeting him at the Toronto airport because of the winter weather. While she did not know the precise amount she gave her husband, nevertheless, she did know that the smallest denomination of the

bills she gave him was $20. This was confirmed by the contents of the deceased's wallet which was returned to the appellant after his death in the crash and which contained no Canadian currency in smaller denominations than $20.

The appellant, as was her custom, drove her husband to the airport, all the while continuing her objections to him going on the trip.

After her husband had checked in for his flight at the Canadian Pacific Airlines counter and he and the appellant were on their way to the departure gate they stopped at the insurance counter.

Her husband, to placate the appellant and to allay her fears of disaster, suggested that he should take out a flight insurance policy for $300,000, an amount greatly in excess of the amount of $75,000 normally taken out.

The appellant rejected her husband's suggestion that he should take out a policy in such a large amount on the ground that, as she put it, "it would put a jinx on the flight and I was against that". She then said to her husband, "I don't want such a large policy. I will take out $75 myself". (By $75 she meant $75,000). This culmination of the dispute between the appellant and her husband took place as they made their way from the airline counter to the insurance counter.

As they approached the counter the appellant preceded her husband and announced, "I will take out $75,000". Her husband said that she should do as she pleased.

At the insurance counter there was another customer being served by the attendant. While waiting the appellant in her own handwriting filled in a portion of the Fidelity policy for $75,000. The document which I admitted in evidence is a photostatic copy of the original. The original was surrendered to The Fidelity and Casualty Company of New York at the time that the claim for payment was made and it was retained by that company for eighteen months and then destroyed. The copy in evidence was made by the solicitor for the appellant immediately prior to sending it to the company with his request for payment. In my opinion this is a clear case in which secondary evidence is properly admitted.

The appellant printed the first two lines in the spaces provided in a box at the top of the document. On the

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left-hand side of the first line she printed her husband's name as the "name of the applicant" and on the right-hand side of the same line her own name as the "name of the beneficiary". The second line sets out their addresses which are the same and which were printed by the appellant. The information in the two bottom lines in the box was completed by the attendant at the insurance counter, except at the extreme right the deceased signed his name in the space entitled, "Personal signature of the Applicant". It is specifically stated at the end of the policy that the policy "shall not be binding on the Insurer unless the application is signed personally by the Applicant". On a previous policy for a prior trip, the deceased and the appellant had noticed that the deceased had failed to sign thereby avoiding liability on the part of the Insurer. On this occasion they were careful not to repeat the former omission. Furthermore, they were informed at this time by the attendant that it was mandatory for the traveller to personally sign the application and the policy was placed before the deceased for that purpose. In the spaces filled in by the attendant it is indicated that the policy was taken out at 9 o'clock a.m. and that the premium was $2.50.

A second policy was also taken out at this time which was the Mutual of Omaha policy for the principal sum of $20,000. The appellant testified that this was done because of her aversion to the country her husband would visit. She was anxious to provide hospital expenses and the like against the event of injury befalling her husband in the "uncivilized" lands he would visit.

As in the former policy the appellant also printed and wrote the information required in a box entitled "Schedule" at the beginning of the document. However in this policy her husband is described as the "insured" rather than as the "applicant" as in the Fidelity policy. The attendant filled in the balance of the information which indicated, among other things, that the premium was $5.50 and that the policy was effective from 9:55 o'clock a.m. of that day. Again the deceased personally signed the policy as the "insured" at the request of the attendant. In this instance the original policy was introduced in evidence. Apparently Mutual of Omaha Insurance Company did not require the production of the original policy and its

surrender as a condition precedent to payment thereof as was the case with Fidelity, although both policies were sold over the same counter by the same attendant.

The premiums for both policies totalled $8.00.

The appellant tendered the payment of that amount by producing a $10 bill from her purse, being part of the funds she had received upon cashing the cheque payable to her which she had received two days previously from the German government as restitution of war damages which she had incurred. The proffered $10 bill was accepted by the attendant who gave the appellant a $2 bill as change and the two policies were delivered to her which she kept and stored in a drawer at her home.

The appellant did not ask for nor obtain a receipt for the $8 she paid the attendant, nor did she have her husband execute a form of assignment. The attendant who sold these policies was called as a witness. She testified that the form of assignment was conclusive evidence that the assignee was the owner of the policy and that both forms, the receipt form and the form of assignment were available at the desk for persons who requested them, but that, as a matter of practice, she did not advise customers that such forms were available. It is only to the statement by the attendant that she neither advised Mr. and Mrs. Vaskevitch that such forms were available nor proffered them to them that I attach particular significance.

In my opinion it is quite understandable that the appellant would not request a receipt for the premiums paid unless prompted to do so. She had possession of the effective policies and a receipt would not be necessary to her. As to the form of assignment, it should be borne in mind that these policies are usually purchased in a hurry with an aircraft standing by to take off. I think it is understandable that the appellant, in the time available to her, would not think of requesting a form of assignment to be completed by her husband and the attendant did not offer her such a form. I do not think it would have occurred to the attendant to do so because (1) she would not have been aware of the circumstances leading to the purchase of the policies and (2) as she testified, she never proffered this form of assignment unless requested to do so by the customer as she was not requested to do by the appellant or the deceased in this instance.

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There were no forms available to cover the circumstance where a person other than the traveller took out the policy. There are discrepancies in the appellant's testimony to which counsel for the Minister referred as illustrative of the unreliability of her evidence as a whole.

He specifically pointed out that on the Fidelity policy the time of purchase inserted by the attendant as 9 a.m. and the Mutual of Omaha policy indicated it was effective from 9:55 a.m., which time was also inserted by the attendant. The appellant insisted that the second policy was bought immediately following the first and that in her recollection 9 o'clock a.m. would be approximately the correct time. She could offer no explanation for the apparent difference of fifty-five minutes between the purchase of the two policies. Furthermore, the appellant testified that the aircraft on which her husband travelled took off at 9:30 or 9:35 a.m., so it would have been impossible for her husband to have signed the second policy at 9:55 a.m. She made this statement in her examination in chief. The matter arose again in cross-examination. Again she could offer no explanation for the difference in time. She volunteered the information that she wished to establish the precise time of take-off so she called Canadian Pacific Airlines and was informed that it was between 9:30 and 9:35 a.m. that the aircraft took off, although she could not recall which of the two times she was told.

I cannot be certain how far the appellant's first evidence as to the departure time of the aircraft was influenced by the information she received pursuant to her telephone call to the airline. However she did drive her husband to the airport and she would have known the departure time and would have estimated the time required to get there with some accuracy.

To the best of the appellant's recollection the attendant at the insurance counter was wearing a uniform consisting of a skirt and jacket. The appellant said in response to a question put to her in cross-examination she thought the jacket was red in colour and that the attendant was blonde, although in both instances she prefaced her answers by stating that she could not recall with certainty. Her answers in these respects were only guesses on her part as she indicated they could only be.

As I have intimated before, the attendant was called as a witness. She testified that she wore a uniform consisting of a skirt and jacket, but that the jacket was blue. I observed that the attendant's hair was raven black and she said that she had never been a blonde.

The attendant did not recall the sale of these two particular policies, but she was adamant in her insistance that she would have inserted the correct time in the second policy because it was her invariable practice to do so.

I accept the appellant's testimony as to the time of purchase of the policies and there are good and valid reasons for doing so. This was an event of paramount importance in the appellant's life whereas to the attendant it was merely a routine sale of two of many policies. Neither do I think that the attendant was infallible in inserting the times in the policies. A few minutes either way would be of no great significance to her. I am therefore certain that the attendant made a mistake and inserted the wrong time in the second policy purchased.

Neither do I think that the appellant's vague and incorrect recollections of the colour of the attendant's garb and hair is of particular significance. The appellant's mind was directed to other matters of far more importance to her with respect to which I accept her testimony.

I think it is clear that it was the intention of the insurer, under both contracts of insurance herein, to enter into agreements only with the actual traveller, in this instance Mr. Vaskevitch. There is no ambiguity in the language of the policies as to the parties thereto. In the Fidelity policy Mr. Vaskevitch is described as the applicant and he personally signed the application in that capacity. Similarly in the Mutual of Omaha policy he is described as the insured and he signed the application as such. It would appear that the insurer was willing to contract only with the actual traveller as is indicated by the form of the application and by the fact that it was a condition to the validity of the policies that the traveller should personally sign the applications.

Therefore as between the insurers and Mr. Vaskevitch there is no doubt that the insurer considers him to be the other contracting party, but this circumstance does not resolve the question of the ownership of the policies as between the appellant and her husband.

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As I have accepted the appellant's testimony it follows that she purchased both these accident policies on her husband's life for which she paid the premiums with her own money. Because those money were paid to a third party there can be no presumption of a loan to her husband and furthermore the evidence, in my view, effectively rebuts any presumption of a loan or gift to her husband if such should exist.

Section 3(1)(*j*) of the *Estate Tax Act* is enacted in language identical to that used in section 2(1)(*d*) of the *Finance Act* of the United Kingdom. Therefore the English decisions on that section are applicable and helpful.

Lord *Lorebum, L.C. said in Lethbridge v. Attorney General*[2] at page 23, that the general purpose of the section is "to prevent a man escaping estate duty by subtracting from his means, during life, money or money's worth which when he dies are to reappear in the form of a beneficial interest accruing or arising on his death".

The facts as I have found them to be in the present case show that Theodore Vaskevitch did not "subtract from his means" for the purpose of paying the premiums in question. This was done by the appellant alone out of her own free property.

Accordingly it follows that the deceased, Theodore Vaskevitch, did not "purchase or provide" the two accident policies "by himself alone" within the meaning of the above quoted words as they appear in section 3(1)(*j*).

However the question remains whether he "purchased or provided" those policies "in concert or by arrangement with any other person" that is in the present instance, his wife, the appellant.

While it is true that the deceased initiated the discussion with his wife concerning the purchase of an accident policy for the substantial amount of $300,000 that suggestion was rejected by the appellant and from that point forward, as I view the evidence, all decisions and steps taken were those of the appellant to which the deceased merely consented and acquiesced. To act "in concert" or "by arrangement with another person", in my opinion, presupposes

[2] [1907] A.C. 19.

some form of active participation rather than passive consent to a decision taken by another person. It follows that the deceased did not purchase or provide the policies in question "either by himself alone or in concert or by arrangement with any other person" which is a condition of the proceeds of these two particular accident insurance policies being properly included as part of the aggregate net value of the appellant's husband's estate.

Because of the conclusion I have reached it is not necessary for me to consider the second submission on behalf of the appellant that there was no beneficial interest in the two accident insurance policies arising or accruing by survivorship or otherwise on the death of the deceased.

Accordingly the appeal is allowed with costs.