1941

* May 1, 2.
* Dec. 2.

IN THE MATTER OF THE TRUSTS UNDER THE WILL OF HENRY MARSHALL JOST, DECEASED

THE EASTERN TRUST COMPANY, SOLE SURVIVING EXECUTOR AND TRUSTEE UNDER THE WILL OF HENRY MARSHALL JOST, DECEASED (PLAINTIFF) ..... APPELLANT;

AND

MONTREAL TRUST COMPANY AND GRACE M. E. GAETZ, EXECUTORS OF THE WILL OF JOHN J. GAETZ, DECEASED; AND OTHERS (DEFENDANTS) ..... RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NOVA SCOTIA IN BANCO

Administration of estates—Payment by executors of succession duties—Will giving bequests of specific sums and residuary bequest—Depreciation in value of estate owing to severe slump in stock market shortly after testator's death, causing insufficiency to pay bequests in full or anything on residuary bequest—Rates at which duties should be calculated—Duties paid based on net value of estate as at date of testator's death and at the rates appropriate to the different classes of beneficiaries, including the residuary legatee, as named in the will—Question whether payments made on wrong basis of computation under the circumstances and whether executors chargeable for overpayment.

The question on the appeal was whether the executors of a deceased's will, who had paid amounts claimed by certain provinces of Canada for succession duties, were justified in having paid those amounts, or whether the duties had been paid according to a wrong basis of computation under the circumstances and consequently there had been overpayment for which the executors were chargeable.

The deceased, residing in the province of Nova Scotia, died on August 25, 1929, leaving a large estate consisting almost entirely of listed stocks and shares. His will made bequests of specific sums, directed a certain fund to be set aside for certain life interests and afterwards to revert to his estate, and bequeathed the whole of the residue to a university in the province of New Brunswick. The will provided that no bequests (except income from said fund) be paid for three years after deceased's death, the expressed purpose being to allow the executors time to dispose of securities to the best advantage and not in a depressed market. The will contained no express instructions with regard to payment of succession duties.

Shortly after the executors entered upon their duties and before they had realized any portion of the estate the stock market took an unprecedented and severe slump and the value of securities constituting the estate fell very much below the inventory values, with the result that the estate has ever since been insufficient to pay the legacies in full; all the general legacies had to abate and there was no residue.

* PRESENT:—Duff C.J. and Crocket, Kerwin, Hudson and Taschereau JJ.

Between 1930 and 1936 the executors paid (from time to time as funds were available or were rendered available by sale of assets or by borrowings) to the Provinces of Nova Scotia, Ontario, Quebec and British Columbia the succession duties claimed to be payable in respect of all property passing under deceased's will. The payments were made on the footing that the amounts thereof constituted a charge upon the assets of the estate and that the executors were legally bound to pay them. The duties were paid on the basis of the net value of the estate as at the time of deceased's death and at the rates appropriate to the different classes of beneficiaries, including the residuary legatee, as named in the will.

The Supreme Court of Nova Scotia *in banco* held (15 M.P.R. 477) that the executors were not entitled to pay succession duties as so claimed; that they were entitled to pay succession duties based upon the rates applicable to the persons who receive property or beneficial interest in property from the estate and not at rates applicable to persons by whom no property or beneficial interest in property is received although such latter persons may have been named in the will.

The sole surviving executor appealed to this Court.

Held (*per* the Chief Justice and Hudson and Taschereau JJ.; Crocket and Kerwin JJ. dissenting): The appeal should be allowed. The executors were justified in having paid out of the assets of the estate the claims as made for succession duties.

The material statutory provisions considered were in the Nova Scotia *Succession Duty Act* (R.S.N.S., 1923, c. 18), the material statutory provisions in other provinces to whom duty was paid being substantially the same.

Per Hudson and Taschereau JJ.: The tax is primarily a property tax and is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator. The tax is intended to be determined by the state of things existing at the date of the deceased's death. Agreement expressed with the following holding by Hall J., dissenting, in the Court below: It is the purpose and intention of the Act that the two factors necessary to determine the duty—valuation and rates—shall be constant. Irrespective of market fluctuations, duty shall be levied upon the fair market value (less deductions) at the date of death. The rate is determined by the relationship or nature of the person for whose benefit property passed on the death. Computation is made by applying the appropriate rate to property passing to each person beneficially on the testator's death. The duty is paid on the basis of the distribution intended by the testator. The executor deducts the amount which was payable on each legacy under s. 10 (1) of the Act. He must do this in order to carry on the administration of the estate. He cannot discharge his functions as executor until he has freed the assets of the estate from the lien imposed for succession duties.

Per Crocket J. (dissenting): Property which "passes on the death of any person", within the meaning of the Act, means property which changes hands at the death; it vests in the executor, though he has no beneficial interest in it; it only actually "passes" to the beneficiary when it reaches him. It would be unreasonable and unjust

1941

In re JOST ESTATE.

to levy duty in respect of property that the beneficiary never received; and it should only be levied if the Act in the clearest terms directed it. S. 10 (1) of the Act cannot possibly be construed as imposing any liability upon the beneficiary for succession duties upon any property which he has not received. In view of the facts of this case, the executors were not justified in paying out of the assets of the estate the succession duties they did, and which included an amount in respect of the residuary gift, which they fully realized, at the time of payment of duties, was of no value.

Per Kerwin J. (dissenting): The tax is imposed in respect of property "passing on the death." The executor is not liable for the payment of it, though he is required (and is under penalty for failure) to deduct the duty before transferring to a legatee, etc., any property to which such person is entitled. Apart from this, the only one liable is the person to or for whose benefit any property passes, under s. 10 (1). It must be borne in mind that the Court is here dealing with general legacies of specific amounts, except, of course, the residuary bequest. The residuary legatee actually received nothing. It cannot be held that any legatee who actually received nothing, though the will mentioned a bequest of a large sum to him, should pay a tax. In the present case the executors acted unreasonably, particularly as they knew when they paid a great portion of the duties that the assets would not be nearly sufficient to pay all the legacies.

APPEAL by the sole surviving executor and trustee under the last will and testament of Henry Marshall Jost, late of Guysboro in the province of Nova Scotia, deceased, from the judgment of the Supreme Court of Nova Scotia *in banco* (1) dismissing (subject to a certain proviso) the appeal of the executors and trustees under said will from part of the judgment of Carroll J. (2).

The question on the present appeal was whether the executors, who had paid amounts claimed by certain Provinces of Canada for succession duties, were justified in having paid those amounts, or whether the duties had been paid upon a wrong basis of computation under the circumstances and consequently there had been overpayment for which the executors were chargeable.

For the purposes only of the appeal asserted from the judgment of Carroll J., the following facts were agreed upon:—

1. Henry Marshall Jost, the Testator, died August 25th, 1929, leaving a gross estate valued as at the date of death at $904,297.12 less known liabilities of $112,007.38, leaving a net value of $792,289.74. This estate consisted almost entirely of listed stocks and shares.

(1) 15 M.P.R. 477; [1941] 1D.L.R. 642.

(2) 15 M.P.R. 477 (at 477 to 492).

2. Probate of the Will was granted in due course to the Executors named therein, viz., The Eastern Trust Company, J. A. Fulton and George R. Hart (now deceased).

3. The Testator by his Will made bequests of specific amounts aggregating $482,150. In addition he directed that $150,000 be set aside in Government Bonds and the income therefrom paid to John J. Gaetz for life and that on the death of Gaetz the fund of $150,000 should fall into and become part of the residue of his estate: provided however, that if Gaetz's wife should survive him (which she did) she was to be paid $1,200 yearly for life.

By the Will the whole of the residue was bequeathed to the Regents of Mount Allison University.

4. Clause 79 of the Will reads as follows:

"It is my Will that no bequests be paid for three years after my demise except the half yearly income to my nephew John J. Gaetz or to his wife in the event of her surviving him. This provision is to allow the Executors time to dispose of my securities to the best advantage and not in a depressed market".

5. Shortly after the Executors entered upon their duties and before they had realized any portion of the estate, the stock market took an unprecedented and severe slump and the value of the securities constituting the estate fell very much below the inventory values with the result that the estate has ever since been insufficient to pay the legacies in full. All the general legacies will have to abate and there will be no residue to go to the Regents of Mount Allison.

6. Between the years 1930 and 1936 the Executors paid the following amounts in succession duties, which amounts included interest, viz:—

To the Province of Ontario	$ 77,031.50
To the Province of Quebec	22,928.86
To the Province of British Columbia	2,293.31
To the Province of Nova Scotia	62,798.73
	$165,052.40

7. The payment of these duties was made from time to time as funds were available or were rendered available by the sale of assets or by borrowings.

8. The succession duties thus paid are all the succession duties in the four named Provinces claimed to be payable in respect of all property passing under the Will of the Testator. No attempt was made prior to or at the time of payment to break down these duties and allocate them to the various legatees, nor were the legatees ever called upon to pay to the Executors the amount of succession duties claimed to be payable in respect of their respective legacies, but the amounts claimed as duties were paid by the Executors on the footing that they constituted a charge upon the assets of the estate and that they were legally bound to pay them.

Included in the bulk sums paid are succession duties claimed in respect of the residuary legacy which would have passed to Mount Allison University had it been possible to realize the assets at inventory price as at the death of the Testator.

9. On a rough break-down it is estimated that had the assets proved sufficient to pay all the legacies in full including the residuary gift to

1941

In re JOST ESTATE.

Mount Allison, the amount of succession duty in all four Provinces attributable to the property thus passing to Mount Allison would be approximately $79,271.17.

10. Succession Duty Returns were filed by the Executors with the Provinces of Ontario and Quebec in November, 1929, with the Province of Nova Scotia in September, 1931, and with the Province of British Columbia late in 1932 or early in 1933, and Statements of duty claimed were received by the Executors from the Provinces of Ontario and Quebec prior to the expiration of one year from the date of Testator's death.

11. The succession duties claimed by the Province of Ontario were paid in March, 1931, as to the amount of $74,876.49; and the balance, being payments in respect of the Gaetz legacy, was paid out of general income in the years 1932 and 1933.

12. The succession duties claimed by the Province of Quebec were paid as to $1,000 in 1930, and as to the balance in 1933.

13. The succession duties claimed by the Province of Nova Scotia were paid in the years 1935 and 1936.

14. The succession duties claimed by the Province of British Columbia were paid in the year 1934.

15. The Will of the Deceased contained no express instructions with regard to the payment of succession duties.

16. On March 11th, 1932, the Executors took out an Originating Summons for the determination of certain matters arising in connection with the Estate, and on August 3rd, 1932, His Lordship Mr. Justice Carroll by whom the motion had been heard granted an Order determining certain questions and directing that the determination of the remaining questions be deferred. Copies of the said Originating Summons and Order will be printed as part of the Case on Appeal.

17. By Order dated April 26th, 1938, and made by His Lordship Mr. Justice Carroll the hearing of the undetermined matters raised by the said Originating Summons was set for May 20th, 1938; and on July 29th, 1938, it was ordered that a Reference be held before Charles F. Tremaine, Esq., K.C., Special Referee. Copy of the Order for Reference will be printed as part of the Case on Appeal.

18. The hearing of the said Reference was proceeded with before Charles F. Tremaine, Esq., K.C., Special Referee, who on April 11th, 1939, filed an Interim Report, a copy of which will be printed as part of the Case on Appeal.

19. A hearing of the matters raised by the Interim Report was had before Mr. Justice Carroll in the presence of Counsel for all parties interested, and on or about the 13th day of March, 1940, he delivered his Decision on the various points at issue.

20. An Order for Judgment based on this Decision was granted on the 1st day of April, 1940.

21. The present appeal is from a portion of the said Decision and portion of the said Order for Judgment. The said Decision, Order for Judgment and Notice of Appeal therefrom will be printed as part of the Case on Appeal.

22. On the hearing before the said Referee, as well as upon the hearing before Mr. Justice Carroll it was agreed that it would not be necessary to prove the law of the Provinces of Quebec, Ontario and British Columbia as matters of fact, but that the said Referee and the said learned Judge

might have resort to the Statutes of the said Provinces for the purpose of determining the law of such Provinces respectively with regard to succession duties.

The appeal from the judgment of Carroll J. was in respect of his decision upon the question of payment of succession duties. In the formal order for judgment of Carroll J. the question was stated and answered as follows:

(4) Q. Were the Executors entitled to pay out of the assets of the estate to the Provinces of Nova Scotia, Quebec, Ontario and British Columbia the succession duties claimed by the said Provinces respectively in respect of property passing to the various legatees named in the Will or chargeable to such legatees respectively? A. No.

(A copy of the order was to be served on the referee aforesaid and it was ordered that he complete his enquiry into the accounts and report.)

In their notice of appeal from the judgment of Carroll J., the executors stated:

Part only of the said Decision and Order for Judgment are hereby appealed from, namely, such part or parts of the said Decision and Order for Judgment as hold or determine:

(*a*) That the Executors were not entitled to pay out of the assets of the Estate to the Provinces of Nova Scotia, Quebec, Ontario and British Columbia the succession duties claimed by the said Provinces respectively in respect of property passing to the various legatees named in the Will or chargeable to such legatees respectively; and/or

(*b*) That there has been overpayment of succession duties by the Executors or any breach of trust or other improper conduct by the Executors in connection with the payment of succession duties; and/or

(*c*) That the Executors are in any way responsible for any overpayment of succession duties.

The appeal to the Supreme Court of Nova Scotia *in banco* was dismissed (subject to a proviso) *per* Graham, Doull and Archibald JJ.; Hall J. dissenting. The formal order dismissing the appeal ordered:

That the appeal in regard to (*a*), (*b*) and (*c*) set out in the notice of appeal be dismissed subject to this proviso that the answer of the trial judge to question 4 as set out in the order for judgment be varied to read as follows:

"No. The executors are entitled to pay succession duties based upon the rates applicable to the persons who receive property or beneficial interest in property from the estate of the deceased and not at rates applicable to persons by whom no property or beneficial interest in property is received although such latter persons may have been named in the will".

and further ordered that a copy of the order, of the judgments delivered on the appeal, and of the order appealed

1941
In re JOST ESTATE.

from, be served on the Referee aforesaid, and that he complete his inquiry into the accounts and report; and that the Referee

in reporting upon the amount of succession duties payable in respect of property passing to the various legatees named in the Will or chargeable to such legatees respectively, shall make his finding thereon upon the basis of the judgments of the Honourable Mr. Justice Graham and the Honourable Mr. Justice Doull (as concurred in by the Honourable Mr. Justice Archibald) delivered herein on this appeal.

The present appeal was then brought to this Court. The appellant in its factum submitted

1. That the majority in the Court *in banco* erred in holding that the rate at which succession duties were calculated depended upon the relationship to the Testator of the persons who actually received the proceeds of the Estate on distribution rather than on the relationship of those who would have received such proceeds had the Estate realized inventory value and been distributed according to the directions contained in the Will.

2. That the majority in the Court *in banco* erred in holding that any change in value of the assets constituting the Estate taking place between the date of the death of the Testator and the date of distribution would change the amount of the succession duties payable.

3. That the majority in the Court *in banco* erred in holding in effect that there had been overpayment of succession duties by the Executors and that the Executors were liable to reimburse the Estate for any such overpayment.

4. That the majority in the Court *in banco* erred in not holding that the Executors were entitled to pay out of the assets of the Estate to the Provinces of Nova Scotia, Quebec, Ontario and British Columbia the succession duties claimed by the said Provinces respectively in respect of property passing to the various legatees named in the Will or chargeable to such legatees respectively.

C. B. Smith K.C. for the appellant.

No one for the respondents.

THE CHIEF JUSTICE—I have had an opportunity of considering the judgment of my brother Hudson and I concur with his conclusion.

CROCKET J. (dissenting).—I think this appeal should be dismissed. The question involved in the appeal to the Nova Scotia Supreme Court *en banc* from the decision of Carroll J., on an originating summons, concerned the propriety of the payment by the appellants as executors and trustees of and under the will of one, H. M. Jost, of succession duties in respect of the various bequests thereof.

The testator died on August 25th, 1929. His estate consisted almost entirely of listed stocks and shares, the market value of which, after making the statutory deductions, was placed at $792,289.74. The will directed the setting aside as a trust fund of $150,000, the income of which was to be paid for life to his nephew, J. J. Gaetz, and that on his death the fund should fall into and become part of the residue of the testator's estate with the proviso that, if Gaetz's wife should survive him (which she did), she was to be paid $1,200 yearly for life. It also made a number of specific bequests to other beneficiaries. These bequests, including the trust fund, aggregated $482,150. The whole of the residue was bequeathed to the Regents of Mount Allison University.

Clause 79 of the will read as follows:

> It is my Will that no bequests be paid for three years after my demise except the half yearly income to my nephew John J. Gaetz or to his wife in the event of her surviving him. This provision is to allow the Executors time to dispose of my securities to the best advantage and not in a depressed market.

The will contained no express instructions about payment of succession duties.

The executors filed succession duty returns for the Provinces of Ontario and Quebec with the proper officers in November, 1929. The returns for Nova Scotia, however, were not filed until September, 1931, while those for British Columbia were not filed until late in 1932 or early in 1933—after the expiration of a period of three years from the testator's death. Succession duties claimed by the Province of Ontario to the amount of $74,876.49 were paid in March, 1931, and further sums, it appears, amounting to $2,155.01, were paid to the Government of the Province of Ontario in respect of the Gaetz legacy in the years 1932 and 1933. As for the Quebec succession duties, it is simply stated in the case, as it comes before us, that the executors paid $1,000 in 1930 and the balance ($21,928.86) in 1933. The succession duties claimed by the Province of British Columbia ($2,293.31), were paid in the year 1934, and those claimed by the Province of Nova Scotia ($62,798.73), in the years 1935 and 1936. The total amount of succession duties thus paid by the executors, as set out in the case, was $165,052.40, which, it appears, included interest. Nothing is said about the

1941

In re JOST ESTATE.

Crocket J.

filing of any succession duty returns for the Province of New Brunswick, though it is said in the agreed case submitted to the Supreme Court that

> included in the bulk sums paid are succession duties claimed in respect of the residuary legacy which would have passed to Mount Allison University had it been possible to realize the assets at inventory price as at the death of the testator,

and that

> on a rough break-down it is estimated that had the assets proved sufficient to pay all the legacies in full including the residuary gift to Mount Allison, the amount of succession duty in all four provinces attributable to the property thus passing to Mount Allison would be approximately $79,271.17.

So that of the total $165,052.40 paid for succession duties to the other four provinces, $79,271.17 was paid on account of the residuary bequest to the University of Mount Allison in the Province of New Brunswick.

It is said in the statement of facts, as agreed upon between the solicitor for the appellants and Mr. F. D. Smith, K.C., (who was appointed solicitor and counsel by the court *en banc* to oppose the appeal to that court, on account of no one having appeared to represent the defendant respondent), in explanation of the seemingly extraordinary situation regarding the payment of these succession duties, that

> shortly after the executors entered upon their duties and before they had realized any portion of the estate, the stock market took an unprecedented and severe slump and the value of the securities constituting the estate fell very much below the inventory values, with the result that the estate has ever since been insufficient to pay the legacies in full;

and that

> no attempt was made prior to or at the time of payment to break down these duties and allocate them to the various legatees, nor were the legatees ever called upon to pay to the executors the amount of succession duties claimed to be payable in respect of their respective legacies, but the amounts claimed as duties were paid by the executors on the footing that they constituted a charge upon the assets of the estate and that they were legally bound to pay them.

The question stated for the opinion of the learned trial judge on the originating summons was:

> Q. Were the Executors entitled to pay out of the assets of the estate to the Provinces of Nova Scotia, Quebec, Ontario and British Columbia the succession duties claimed by the said Provinces respectively in respect of property passing to the various legatees named in the will or chargeable to such legatees respectively?

To this he answered "No". On appeal to the Supreme Court *en banc,* as I have said, no one appeared to oppose, and that court, having assigned Mr. Smith to that duty, the agreed statement of facts referred to was submitted and argued, pro and con, with the result that the appeal was dismissed by Graham, Doull and Archibald JJ.; Hall J. dissenting. The case now comes to us on appeal from this judgment and was here heard *ex parte.*

It was stated by counsel for the appellant that the sole question for determination is whether or not the executors paid the duties computed on a wrong basis, and as the case was presented to the Nova Scotia court on the said agreed statement of facts, that may be true in a sense. But, as I read the written reasons of both Graham and Doull JJ., for the majority judgment, I gather that in their view the real question was whether the executors were entitled to charge the assets of the estate with the entire amount of these payments as calculated and allocated by themselves as succession duties payable by them in respect of property passing to the various legatees named in the will within the meaning of the *Succession Duty Act* of Nova Scotia, notwithstanding the fact that the executors knew when they paid these duties that the property was insufficient to pay the specific bequests in full, and that there could be no residue.

Graham J., after referring to the relevant provisions of the Act, as set out in the judgment of his brother, Doull, distinctly held that property which "passes on the death of any person" within the meaning of the *Succession Duty Act* means property which changes hands at the death; that it vests in the executor, though he has no beneficial interest in it; that it only actually "passes" to the beneficiary when it reaches him; that it would be unreasonable and unjust to levy duty in respect of property that the beneficiary never received, and that it should only be levied if the Act, in the clearest terms, directed it. In this I fully agree with that learned judge.

Doull J., with whom Archibald J. concurred, considered particularly the effect of s. 10 (1) in the light of s. 2 (1) of the interpretation clause, and s. 11 (1). Section 10 (1) provides that every person

1941

In re JOST ESTATE.

Crocket J.

to or for whose benefit any property passes on the death of any other person shall be liable for the duty upon so much of the property as so passes to him.

Section 11 (1) enacts that

* * * an executor * * * shall not transfer or deliver such property to the person so entitled without deducting therefrom the duty for which such person is liable.

In effect he concluded that, whether s. 10 (1) was itself a sufficient indication, the whole intendment of the Act, as regards the payment of succession duties, in respect of the passing of personal property to specific or residuary legatees, was that such succession duties should not be paid where the property does not pass to the intended beneficiaries. "The argument against the executors," he said,

is that the liability to pay the succession duty rests upon the legatees, and that there can be no liability upon any particular legatee unless he received some portion of the estate. I think that this contention is correct, although * * * the matter is not quite so simple as might appear from that statement.

Later, after discussing the particular sections I have mentioned, he said:

As the case stands now before the Court, the only question is whether the executors paid these duties on a proper basis. There is nothing in the Act requiring them to pay the duties before they can ascertain what the legacies are going to be. For example, they certainly should not pay succession duty on an estate of $1,000,000 until it appeared that the case was not one where there was $1,000,000 of debts.

And further:—

Now, assume that the estate at the death of the testator had a fair market value of $800,000, and that $150,000 was an outright gift to one legatee in priority to all other gifts and assume that before payment could be made or the security sold, the estate had shrunk to $150,000. In such a case duty is payable on $800,000 but it is payable by the one legatee and not by the following legatees, who receive nothing. Even the preferred legatee would be required to pay only to the extent of the property which he receives.

Applying this to the present case, Mount Allison University received nothing and pays nothing. It should not appear on the list of persons to whom property passes. The property must be assessed at the value at the date of testator's death, but the only way of working this out is finding the amount to which each legatee will be entitled and to affix to that amount its proper proportion of the total value at the date of testator's death. The residuary legatee received nothing and does not come into the calculation.

This was quite evident to the executors before they made any payment of succession duty and if by paying duty on a bequest to a charity outside of the province for which there will be no funds, the

succession duty, which must be borne by the others, has been increased by applying a rate not applicable to those others, the executors are clearly responsible.

There are no figures before the Court of Appeal, but I understand that, by assuming that a gift passed to Mount Allison University or by assuming that legatees other than John J. Gaetz obtained their gifts in full, the succession duty was considerably increased. If so, I see no reason why the executors should not be chargeable with the difference.

Whether or not the expression " so much of the property as so passes to him " (the beneficiary), as used in s. 10 (1), can properly be said to exclude any personal property, such as share certificates,—which in strictness of law as well as in point of fact do not pass to anybody on the owner's death, and certainly not to the executors of the deceased's estate until the executors are appointed and the transfer of the certificates is legally completed,—there can, I think, be no doubt that this particular provision cannot possibly be construed as imposing any liability whatever upon the beneficiary for succession duties upon any property which he has not received.

I agree with the conclusion of the majority judges that the executors, in view of the facts of this case, were not justified in paying out of the assets of the estate the succession duties they did, and which admittedly included an amount of approximately $79,000 in respect of the gift to the Regents of Mount Allison University, that they fully realized at the time was of no value whatsoever.

The appeal, in my opinion, should be dismissed.

KERWIN J. (dissenting).—The Nova Scotia *Succession Duty Act* is chapter 18 of the Revised Statutes of 1923. By section 3:

> For the purpose of raising a revenue for Provincial purposes, * * * there shall be levied and paid for the use of the Province a duty * * * at the rates hereinafter specified upon all property hereinafter mentioned * * * which passes on the death of any person who shall hereafter die, the duty to be according to the fair market value of such property at the date of the death of the deceased.

The definition of the expression " passing on the death " does not assist in the consideration of the present appeal, but subsection 2 of section 3 lists what shall be included in " property passing on the death." By section 5,—

> In determining the aggregate value of property the fair market value shall be taken as at the date of the death of the deceased of all property passing on his death.

1941

In re JOST ESTATE.

Kerwin J.

By section 6,—

> In determining the dutiable value of property the fair market value shall be taken as at the date of the death of the deceased of property subject to duty.

By section 7,—

> the property on which succession duty shall be levied and paid under this Chapter at the rates hereinafter specified shall be as follows:

and then follows what is really a list of the dutiable property.

Subsection 1 of section 9 reads in part as follows:

> 9. (1) If any property subject to duty passes on the death of any person, either in whole or in part, to or for the benefit of the grandfather, grandmother, father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of the deceased, the same or as much thereof as so passes shall be subject to duty as follows:
>
> If the aggregate value of the property passing on the death of such person—
>
> (*a*) exceeds twenty-five thousand dollars but does not exceed seventy-five thousand dollars to a duty at the rate of two dollars and fifty cents for every one hundred dollars of the dutiable value;

The expression " to or for the benefit of " occurs in other subsections and explains the wording in subsection 1 of section 10:

> 10. (1) Every person to or for whose benefit any property passes on the death of any other person shall be liable for the duty upon so much of the property as so passes to him.

The tax is thus imposed in respect of property " passing on the death ". The executor or trustee is not liable for the payment of it, although he is required to deduct the duty before transferring to a legatee, etc., any property to which such person is entitled, failing which the executor or trustee is made liable to a penalty equal to twice the amount of the duty. Apart from this, the only one liable is the person to or for whose benefit any property passes under section 10.

It is true, the fair market value of the property is to be taken as at the date of the death of the deceased. It must be borne in mind that we are dealing with general legacies of specific amounts, except, of course, the residuary bequest. The Regents of Mount Allison University, while expecting to receive a substantial sum, actually received nothing, and it cannot be intended that they still would be liable for succession duty taxes. The University, of course, was outside Nova Scotia, but it cannot be held that an indi-

vidual legatee resident in Nova Scotia, who actually received nothing although the will mentioned a bequest of a large sum, should pay a tax.

I am of opinion that in the present case the executors acted unreasonably, particularly as they knew when they paid a great portion of the duties that the assets would not be nearly sufficient to pay all the legacies. Clause 4 of the original order of Mr. Justice Carroll, of August 3rd, 1932, provides:—

> 4. That in the administration of the said Estate the said Executors have acted honestly and reasonably and ought fairly to be excused for any breach of trust that may have heretofore arisen in the administration of the said Estate and for omitting to heretofore obtain directions of the Court in connection with any matter arising in the administration of the said Estate, and the said Executors and each of them be hereby wholly relieved from any personal liability for any such breach of trust or failure to take directions of the Court.

Any breach of trust that may have arisen before that order and from which therefore, by its terms, the executors ought fairly to be excused, should be held not to apply to the payment of succession duty, as that question was not raised in the originating summons on which the order was based.

The appeal should be dismissed.

The judgment of Hudson and Taschereau JJ. was delivered by

HUDSON J.—The testator, Jost, died leaving a large estate consisting almost entirely of stocks and shares. By his will he directed that $150,000 should be set aside as a trust fund to provide an annuity for a nephew, and, following this, there were numerous bequests of specific sums to various persons and institutions, and finally a general residuary bequest to the Regents of Mount Allison University.

Soon after the executors entered on their duties, there was a serious depreciation in the value of the assets, so that it appeared that there must be an abatement in the legacies of specific sums and that there would be no residue. Notwithstanding this depreciation of assets, the executors paid succession duties on the basis of the value of the estate at the time of death and at the rates appropriate to the different classes of beneficiaries, including the Regents of Mount Allison University, as named in the will. This action of the executors was questioned, and the Supreme

1941

In re JOST ESTATE.

Hudson J.

Court of Nova Scotia *in banco* has ruled, quoting from the formal judgment of the Court:

> The executors are entitled to pay succession duties based upon the rates applicable to the persons who receive property or beneficial interest in property from the estate of the deceased and not at rates applicable to persons by whom no property or beneficial interest in property is received, although such latter persons may have been named in the will.

The majority of the judges in the Court *in banco* held the view that the rate at which the duties are to be calculated is dependent upon the relationship of the persons who receive the proceeds of the estate on distribution rather than on the relationship of those who would have received such proceeds had the estate realized inventory value and been distributed according to the directions contained in the will.

The question thus raised is important, as it affects the administration of the Succession Duties Acts in all of the Canadian provinces.

Portions of this estate for taxation purposes were in four different provinces but, as the material statutory provisions in each of these provinces are substantially the same, it will be sufficient to consider those of Nova Scotia, from which province this appeal comes to us. The Nova Scotia Act is chapter 18 of the Revised Statutes of Nova Scotia, 1923. It provides:

Section 3:

> (1) For the purpose of raising a revenue for Provincial purposes, and save as is hereinafter otherwise expressly provided, there shall be levied and paid for the use of the Province a duty (called Succession Duty), at the rates hereinafter specified upon all property hereinafter mentioned which has passed on the death of any person who has died on or since the 1st day of July, A.D. 1892, or which passes on the death of any person who shall hereafter die, the duty to be according to the fair market value of such property at the date of the death of the deceased.
>
> (2) Property passing on the death of the deceased shall be deemed to include for all purposes of this Chapter the property following, that is to say:
>
> (*a*) property of which the deceased was at the time of his death competent to dispose;
>
> * * *

Section 5:

> In determining the aggregate value of property the fair market value shall be taken as at the date of the death of the deceased of all property passing on his death, including the value of property situate out of Nova Scotia, and a deduction or allowance shall be made of the deductions and allowances hereinafter mentioned in respect of dutiable value.

Section 9 (1):

If any property subject to duty passes on the death of any person, either in whole or in part, to or for the benefit of the grandfather, grandmother, father, mother, husband, wife, child, grandchild, daughter-in-law or son-in-law of the deceased, the same or as much thereof as so passes shall be subject to duty as follows:—

the rates applicable to the different classes being then specified. Section 10 (1) provides:

Every person to or for whose benefit any property passes on the death of any other person shall be liable for the duty upon so much of the property as so passes to him.

Section 11 (1):

No executor shall in the first instance be personally liable to pay the duty on any property which passes on the death of the deceased and to which any person is beneficially entitled, but an executor or other person in whom any interest in any property so passing or the management thereof is at any time vested, shall not transfer or deliver such property to the person so entitled without deducting therefrom the duty for which such person is liable.

Then follows a penalty for failing to observe this duty. Section 13 (1) provides:

Unless otherwise in this Chapter provided, the duty imposed by this Chapter shall be due at the death of the deceased and payable within eighteen months thereafter * * *

Section 16 (1):

Every person to or for whose benefit any property passes on the death of any other person and every executor shall, within three months after the death of the deceased or such later time as may be allowed by the Treasurer, make and file with the Treasurer a full, true and correct statement under oath giving—

(*a*) a full inventory in detail of all the property which passed on the death of the deceased and the fair market value thereof on the date of his death; including all property that passed on his death and which is situate out of Nova Scotia;

(*b*) the several persons to or for whose benefit the same passes, their places of residence and the degrees of relationship, if any, in which they stand to the deceased.

Then follow provisions for settling the values in accordance with the provisions of the statute.

If we exclude for the moment consideration of the provision contained in section 10 (1), it would appear quite clear that the tax imposed by the statute is intended to be determined by the state of things existing at the date of death of the deceased. The value of the assets is to be ascertained as of that date and the duty is then due, although the date for payment is postponed for eighteen months.

1941

In re JOST ESTATE.

Hudson J.

The corresponding provisions in the New Brunswick Act were under consideration by the Judicial Committee in the case of *The King* v. *Lovitt* (1), and it was stated by Lord Robson, at page 223:

> Although called a succession duty, the tax here in question was laid on the corpus of the property, and the statute made its payment a term of the grant of ancillary probate. By s. 6 the executor is required to give a bond for its due payment, and if he fails to do so the probate granted to him is cancelled. He is directed to deduct the duty before handing over the property; to pay it forthwith to the Receiver General of the province; and if a foreign executor transfers the stock of any company in the province liable to duty, on which the duty has not been paid, he is to pay it, and the company permitting such transfer shall also become liable.
>
> These provisions shew that the Act under consideration assimilates the tax to the probate duty. It is imposed as part of the price to be paid by the representatives of a deceased testator for the collection or local administration of taxable property within the province, and, in the view of their Lordships, it is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator.

It is quite clear, then, that the tax is primarily a property tax and, as stated by Lord Robson, it is intended to be a direct burden on that property, varying in amount according to the relationship of the successor to the testator. In Lord Robson's view, the tax is assimilated to a probate or estate duty in contrast to the legacy and what is called in the English Act succession duty, where by express provision the legatee or beneficiary need not pay until the time arrives for distribution, and then on the value as at the date of such distribution.

The provision in the New Brunswick statute corresponding to section 10 (1) of the Nova Scotia Act, imposing personal liability, was not relevant to the question under discussion in the *Lovitt* case (2) and does not seem to have given rise to any comment there. However, it is this section which creates some serious difficulty here. The argument is this: that in section 10 (1) obviously the words "passes on the death" must refer to the actual passing of property into the hands of the beneficiary, as otherwise a beneficiary would be personally liable for a duty in respect of property which he had not received and might never receive, a result so manifestly unfair and unreasonable that the Legislature could not possibly have so intended.

(1) [1912] A.C. 212.

(2) [1912] A.C. 212.

The majority of the judges in the Court below avoid this situation by construing the words "passes on the death" as used in section 10 (1), and the words "passing on the death" in section 3 (1), as applicable only to the time when the property was distributed to the beneficiaries.

A section of the British Columbia *Succession Duty Act* corresponding to section 10 (1) of the Nova Scotia Act was under consideration by the British Columbia Court of Appeal in the case of *In Re Drummond Estate* (1); and the majority of that Court faced the difficulty and dealt with it in the following way (page 265):

> Mr. Symes submitted that, at this stage, in the administration of the estate, the executors only were liable to pay the duty, the beneficiaries under the will not being "liable for payment" until their interests vested. I cannot agree. Section 10 (2) of the Act reads: "Every person domiciled or resident in the Province to whom property situate within the Province subject to any duty imposed by this Act passes shall be personally liable for the duty."
>
> The obligation is limited to persons domiciled or resident in the Province. They are personally liable for payment of the duty on any property passing to them by the will. If the word "passed" had been used this contention might be sound, assuming it was not defined in the interpretation section. We have a definition of the word "passing" or "passing on death" in section 2 of the Act. Without quoting it is clear that it is not restricted to property finally vesting in the beneficiary upon distribution of the estate. The word "passes" is used in other sections of the Act in a sense inconsistent with the view that it means a vested interest.
>
> It was submitted that the Legislature could not have intended that the beneficiaries should be liable to pay the duty before they received the property or money upon which the tax is levied, as it might later transpire from various causes that their shares might disappear or their value be diminished. By section 11 however the duties are made payable at the death although in working out the Act and in the administration of the estate it is not, I assume, demanded (or in fact ascertained) at that time. The beneficiaries are personally liable for payment where the property passes by operation of the will even though it may not be demanded at that time.

The definition of "passing on the death" in section 2 (1) of the Nova Scotia Act and corresponding sections of the other Provincial Acts is as follows:

> 2. (1) In this Chapter, unless the context otherwise requires:
>
> (*a*) the expression "passing on the death", or a similar expression, means passing either immediately on the death or after an interval either certainly or contingently and either originally or by way of substitutive limitation, whether the deceased was at the time of his death domiciled in Nova Scotia or elsewhere.

which gives no real assistance in disposing of the difficulty.

(1) [1936] 4 D.L.R. 264; 50 B.C.R. 485.

1941

In re JOST ESTATE.

Hudson J.

The direct application of section 10 (1) here is not the question. The duty in respect of the residuary bequest has been paid. The complaint is that it has been overpaid, inasmuch as the rate applicable to a bequest to the residuary legatee in this case would be somewhat higher than the rate payable by more preferred beneficiaries and the burden thus imposed on them would be greater to that extent. The situation is anomalous, but that is not sufficient in itself to override the language of the statute. Reference here might be made to the remarks of Lord Hanworth in the case of *Attorney-General for Ontario* v. *National Trust Company* (1):

> * * * suppose on the facts of the present case that the value of the property at the time of the gift had been $260,000, and that had dwindled down to $10,000 at the time of the death, there would have been a hardship upon the donee, who would then have been compelled to pay duty as upon a value 26 times that to which the property had diminished at the time of the death. The tax would have been payable, but the gift would provide no sufficient resources from which to pay it.

I agree with what was said by Mr. Justice Hall in the last paragraph of his dissenting judgment in the Court below:

> The object and meaning of The Succession Duty Act must be gathered from the words of the statute. It is the purpose and intention of the Act that the two factors necessary to determine the duty—valuation and rates—shall be constant. Irrespective of market fluctuations, duty shall be levied upon the fair market value (less deductions) at the date of death. The rate is determined by the relationship or nature of the person for whose benefit property passed on the death. Computation is made by applying the appropriate rate to property passing to each person beneficially on the death of the testator. The duty is paid on the basis of the distribution intended by the testator. The executor deducts the amount which was payable on each legacy under section 10 (1). He must do this in order to carry on the administration of the estate. Succession Duties are "a first lien upon the property in respect to which they are payable until they are paid", and the executors cannot discharge their functions as executors until they have freed the assets of the estate from this lien and have paid the duties.

and would allow the appeal and answer affirmatively the question submitted in the summons, costs to be paid out of the estate.

Appeal allowed; costs throughout of all parties to be paid out of the estate.

Solicitor for the appellant: *C. B. Smith.*

(1) [1931] A.C. 818, at 823.