BETWEEN:

1956

Mar. 26

Aug. 27

THE TORONTO GENERAL TRUSTS CORPORATION, Executor and Trustee of the ESTATE of HENRY HERBERT HILDER ..... APPELLANT;

AND

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

Revenue—Succession Duty—Bequest to brother who predeceases testatrix leaving issue her surviving—Whether bequest part of brother's estate and liable to succession duty—The Wills Act, R.S.O. 1950, c. 426, s. 36(1)—Dominion Succession Duty Act, R.S.C. 1952, c. 89, ss. 2(m), 3(1)(i) and 6(1)(a).

T died in 1949 having by his will directed that the interest on the residue of his estate be paid his widow for life and on her death the residue be distributed among his three sons. Probate of the will had been granted and the duties levied under *The Dominion Succession Duty Act,* R.S.C. 1952, c. 89, paid, when in 1950 T's sister died survived by T's widow and sons. The sister by her will drawn some five months prior to T's death bequeathed him a legacy of some $62,992. In view of this bequest the respondent, the Minister of National Revenue, made a further assessment of T's estate and claimed additional succession duty. The appellant contested the demand contending that T's estate was merely a "conduit pipe", that the real and immediate successors of the sister were the beneficiaries under T's will and that no succession duties were properly chargeable against T's estate which had been closed before his sister's death.

Held: That the bequest, which at Common Law would have lapsed, took effect by virtue of *The Wills Act,* R.S.O. 1952, c. 36, s. 1, as if T's death had happened immediately after his sister's. T was to be presumed alive at the time of his sister's death. The legacy thus became part of T's estate and was properly assessable for succession duties as claimed by the respondent. *In re Scott* [1900] 1 K.B. 372; [1901] 1 K.B. 228 applied.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice Hyndman, Deputy Judge of the Court, at Toronto.

W. E. P. DeRoche, Q.C., and *P. N. Thorsteinsson,* for the appellant.

W. B. Williston, Q.C., and *A. L. DeWolf,* for the respondent.

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HYNDMAN D.J. now (August 27, 1956) delivered the following judgment:

This is an appeal from an assessment for succession duties made by the Minister of National Revenue dated the 27th of August, 1953. The amount of the duty charged is not in dispute. The only question is as to the liability of the estate to pay such duties.

The material facts may be simply stated.

The deceased Henry Herbert Hilder died on the 2nd day of February, 1949, testate, leaving him surviving his widow, Florence Maude Hilder, and three sons, Edwin Albert Hilder, Herbert Wilson Hilder and John William Hilder, all of whom remain alive. Letters Probate of his will were granted to the appellant by the Surrogate Court of the County of Welland on the 13th of April, 1949.

The deceased's will provided for certain specific bequests to his widow, for payment of the income from the residue of the estate to the widow for life, and for distribution of the residue amongst his children after the death of his widow.

In due course the succession duties were levied and paid, and the business of the estate was in due course settled.

Henrietta Hilder, sister of said Henry Herbert Hilder, died on or about the 4th day of September, 1950, having first made her last will and testament dated the 1st day of September, 1948, that is about five months prior to the death of her said brother.

Letters Probate of said will were granted to Thomas J. Darby, the surviving executor named therein, on the 20th day of November, 1950, and all succession duties were duly assessed and paid.

In her will, said Henrietta Hilder provided for the payment of certain legacies, for the transfer of her interest in a furniture business, and one-half of the residue of her estate to her brother, the said Henry Herbert Hilder, and the remaining half of the residue for certain religious and charitable objects.

The amount of the bequest to the said Herbert Henry Hilder was about $62,992.68.

In view of the said bequest to Herbert Henry Hilder, a further assessment was made by the Minister of National Revenue and mailed the 27th of August, 1953, claiming additional succession duties with respect to bequest of said $62,992.68. Notice of Appeal was lodged with the respondent and rejected on the 7th day of July, 1954. Appellant lodged with the respondent a Notice of Dissatisfaction on the 6th day of August, 1954, but on the 11th day of January, 1955, the assessment was confirmed by the Minister—hence this appeal.

Notwithstanding the said Henrietta Hilder was aware of the death of her brother, she made no further will, nor any alteration in the will of 1948.

At common law the said bequest to her brother would lapse. However, s. 36 of c. 426, R.S.O. 1950, enacts:

> 36. (1) Where any person, being a child or other issue or the brother or sister of the testator to whom any real estate or personal estate is devised or bequeathed, for any estate or interest not determinable at or before the death of such person, dies in the life-time of the testator either before or after the making of the will; leaving issue, and any of the issue of such person are living at the time of the death of the testator, such devise or bequest shall not lapse but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention appears by the will.

In view of the said s. 36(1), it must be presumed that the said Henry Herbert Hilder was alive at the time of death of his said sister, and therefore such bequest would not lapse.

Section 6(1) of c. 89, R.S.C. 1952, of the *Dominion Succession Duty Act* provides:

> Subject to the exemptions mentioned in section 7, there shall be assessed, levied and paid at the rate 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;

Section 2(*m*) provides:

> "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, etc., etc.

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And Section 3(1) provides:

A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:—

* * *

(i) property of which the person dying was at the time of his death competent to dispose;

The contention of the appellant is in effect, that the estate of the said Henry Herbert Hilder was merely a "conduit pipe", that the real and immediate successors or beneficiaries of Henrietta Hilder were the beneficiaries under the will of Henry Herbert Hilder and that, therefore, no succession duties can properly be chargeable against his estate, which had been closed before the death of his said sister.

The Minister of National Revenue, however, assessed the brother's estate on the ground that the said bequest became part of his estate or assets and therefore would be subject to succession duties, first as against the estate of Henry Herbert Hilder, and subsequently against the beneficiaries of his estate.

After the best consideration I have been able to give the matter, I have come to the conclusion that the contention of the appellant cannot be sustained.

Although Henry Herbert Hilder died before his sister, under the law and interpretation of said s. 36(1) the legacy from his sister devolved upon him. In its ordinary natural meaning it must be assumed that, at the time of Henrietta Hilder's death, her brother although in fact dead was still alive, and consequently became a successor to the property involved.

Many authorities were cited, but I think I need only refer to the reasoning in the case of *In Re Scott* (1), which in my opinion applies equally to the present case.

At page 233 of [1901] 1 K.B., A. L. Smith, M.R., said:—

I do not agree with Mr. Joseph Walton when he says on behalf of the appellants that the Wills Acts, 1837 (similar to s. 36(1) of c. 426, R.S.O. above), has nothing to do with the case in hand, for, in my judgment, it has, and it must be looked at to ascertain what it was that the son at the time of his death was competent to dispose of. For instance, it must be looked at to see whether the son was competent to dispose

(1) [1900] 1 K.B. 372; [1901] 1 K.B. 228.

only of property of which he was possessed at the date of his will, as was the case as to real estate before the Wills Act, or of which he was possessed at the time of his death, which is the case since the passing of the Wills Act. When ascertaining what real estate he was competent to dispose of, and upon which taxation is to take place, surely the Wills Act must be looked at, for it plays a very important part in the investigation. Now s. 24 of the Wills Act enacts that every will shall "take effect" as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will; in other words, by the Wills Act a testator is competent to dispose of all the real and personal estate he possesses at the time of his death, and not only, as before the Wills Act, of the real estate he possessed at the date of his will. This may make a great difference when, for the matter of taxation, it has to be determined, as in this case, what the deceased was competent to dispose of; for this is made the subject of estate duty. Again, to see whether the son took anything under his father's will of which he was competent to dispose, the Wills Act must also be looked at, in order to see whether it has any effect upon what the son was competent to dispose of. And what do we find? We find, by s. 33, that in a case like the present, although the son should die in the lifetime of his father, a bequest of the father to the son shall not lapse, but shall "take effect" as if the son had died immediately after the death of his father, unless the contrary intention should appear by the will. As before stated, if the son in the present case had in fact died immediately after the death of his father, the second estate duty now claimed would clearly have been payable; and, if there had been no Wills Act, the son would have had nothing to dispose of. But the Wills Act enacts that the will of the father shall take effect as if the son had died immediately after his father—*i.e.*, that, in the special circumstances to which the section applies, the son shall be competent to dispose of what is left to him by his father, although he may in fact die before his father. It is obvious that the Wills Act must be resorted to by the appellants to get rid of the lapse which otherwise would have taken place; and the same section of the Act by which the appellants get rid of the lapse enacts that the will of the father shall "take effect" as if the son had died immediately after his father; that is, that the son in this case was competent to dispose of the £80,000 of property, subject to his father revoking his will, which he never did. If the appellants take the benefit of s. 33, which they do, and thus obtain the £80,000 of property, they must take the burden also—*i.e.*, of paying the estate duty chargeable thereon.

And Collins, L.J., at page 234, said:

This case appears to me to present little difficulty when s. 33 of the Wills Act is construed in what seems to me its obvious *primâ facie* meaning, and in accordance with the interpretation which, as I think, it has received through a series of authorities. There is no doubt that, under s. 1, s. 2, sub-s. 1, and s. 2, subs-s. 1(*a*), of the Finance Act, estate duty is payable upon the property in question, if, under the last sub-section, John Scott, junior, was at the time of his death "competent to dispose of it". The property in question could clearly never have been his to dispose of in the events which happened but for the operation of s. 33 of the Wills Act. The property was devised to him by his father, and, as he died in

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his father's lifetime, the devise would have lapsed, and could not, therefore, have come under any disposition made by him. But it seems to me equally clear that the effect of s. 33 of the Wills Act is to confer upon him a right to dispose of it.

And Stirling, L.J., at page 238, said:

By s. 1 of the Finance Act, 1894, there is imposed in the case of every person dying after August 1, 1894, estate duty "upon the principal value, ascertained", as in the Act mentioned, "of all property, real or personal, which passes on the death of such a person". By s. 2, sub-s. 1, "property passing on the death of the deceased shall be deemed to include", amongst other particulars, "(*a*) property of which the deceased was, at the time of his death, competent to dispose". By s. 22, sub-s. 2(*a*), "a person shall be deemed competent to dispose of property, if he has such an estate or interest therein, or such general powers as would if he were *sui juris*, enable him to dispose of the property".

It is contended on behalf of the Crown that, regard being had to the terms of the Wills Act, s. 33, John Scott, jun., had such a general power as enabled him to dispose of the property devised to him by his father's will, and consequently that this property fell within the terms of s. 2, sub-s. 1(*a*), as being property of which he was at the time of his death competent to dispose. In my opinion this contention is right.

In view of what is said above I must find that the bequest of Henrietta Hilder to her said brother became part of his assets and estate, and properly assessable for succession duties as claimed by the respondent, and therefore this appeal must be dismissed with costs payable out of the estate of said Henry Herbert Hilder, deceased.

Should any question arise as to the amount of the duty the matter may be spoken to.

Judgment accordingly.