1951

Apr. 2 & 3
June 29

BETWEEN:

FELICIA H. FLINTOFT, GRACE C. CASSILS and JAMES FLINTOFT, the Executors and Trustees named in the Last Will and Testament of EDWARD PERCY FLINTOFT, deceased ..... } APPELLANTS;

AND

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

Revenue—Succession Duty—The Dominion Succession Duty Act 4-5 Geo. VI, c. 14, s. 3(1) (g)—"Succession"—Benefits paid voluntarily and not payable out of a fund "established for the purpose" do not constitute a "succession"—Appeal allowed.

After the death of F, in his lifetime employed by the Canadian Pacific Railway Company, a monthly pension of $230.74 became payable to and was paid to his widow, of which the sum of $16.74 was payable out of the Canadian Pacific Railway Company Trust Fund, almost entirely comprised of employees contributions, the balance being payable out of the railway company's current revenue and charged to working expenses. The respondent in his assessment made under the Dominion Succession Duty Act included in the aggregate value of the assets of the estate the capitalized value of the total pension of $230.74 per month. F's executors appealed from such assessment in so far as it included that portion of the pension, $214, paid out of the railway company's current revenue.

Held: That the monthly payment of $214 not being payable or granted out of the Pension Trust Fund or out of any other fund established for the purpose but being a voluntary payment made by the railway company out of its revenue does not fall within the provisions of s. 3(1) (*g*) of the Act and is not a succession under any provision of the Act.

2. That the taxability of superannuation or pension benefits or allowances is limited by s. 3(1) (*g*) of the Act to those cases in which the benefits or allowances are payable "out of a fund established for the purpose" except in those cases when they are payable under legislation of Canada or a province.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice Cameron at Montreal.

R. C. Holden, K.C. and *C. F. H. Carson, K.C.* for appellants.

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

Bernard Bourdon, K.C., Paul Fontaine, K.C. and *I. G. Ross* for respondent.

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

CAMERON J. now (June 29, 1951) delivered the following judgment:

This is an appeal from an assessment dated March 12, 1948, and made under the Dominion Succession Duty Act (1940-41, c. 14 as amended) on the estate of Edward Percy Flintoft, late of the City of Montreal, who died testate on May 8, 1946. His last will and testament dated March 30, 1944, was duly admitted to probate by order dated May 20, 1946. Mr. Flintoft in his lifetime was employed by the Canadian Pacific Railway (hereinafter called the company) from 1908 until the time of his retirement on March 1, 1945, on which latter date he was its general counsel and one of its vice-presidents. In the said assessment there was included in the aggregate net value of the assets of his estate the capitalized value of a pension of $230.74 per month, payable to his widow, Felicia H. Flintoft. In appealing from the said assessment, the appellants admitted that of the monthly sum of $230.74, payable to Mrs. Flintoft, the sum of $16.74 was payable out of the Canadian Pacific Railway Company Trust Fund (hereinafter to be referred to as "the Trust Fund"), and that that proportion of the total pension was properly included as an asset of the estate and taxable under the provisions of section 3(1) (*g*) of the Act. They contend, however, that the balance of $214 which has been paid and is being paid, not out of the Trust Fund but out of the company's current revenue and charged to working expenses, is not an asset of the estate and is not a "succession" within any of the provisions of the Act.

The full amount of the assessment has been paid by the appellants under protest and in these proceedings a declaration is sought setting aside the assessment in regard to this matter and for the repayment to the appellants of any sums paid by them in excess of the amount to which the respondent is legally entitled. By order of this Court pleadings were delivered.

On August 10, 1936, a new policy for employee pensions was adopted by the Board of Directors of the company, as shown by an extract from the minutes of that date (Ex. A-1). Effective January 1, 1903, the company had inaugurated a system of voluntary pensions without contribution from the employees. At the meeting of August 10, 1936, it was resolved that, subject to certain reservations not here material, the former plan would be dropped and a new system of contributory pensions would come into effect on January 1, 1937. The rules and regulations of the new Pension Department and effective January 1, 1937, form part of Ex. A-1. The rules and regulations in effect at the time of Mr. Flintoft's death are contained in the pamphlet Ex. A-3.

Pursuant to Rule 10(*a*), Mr. Flintoft on December 3, 1936, elected to become a contributor under the new pension system (Ex. A-2). From and after January 1, 1937, until his retirement on March 1, 1945, he made contributions to the Pension Fund equal to 3 per cent of his salary in accordance with the pension rules, his total contributions over that period aggregating $4,768.80. Under Rule 18(*a*), Mr. Flintoft upon retiremeent would have been entitled to a monthly pension of $576.12, but no part thereof under that rule would have been payable to his surviving wife. Rule 19(*a*) provides that "any contributor may elect to receive in lieu of the pension allowance granted under Rule 18, an allowance payable to himself during his life, subject to the condition that one-half of the allowance will be continued to his wife should she survive him"; and by Rule 19(*f*) it is provided that "the optional allowances referred to in this rule shall be calculated in accordance with the methods prescribed from time to time by the Actuary." Mr. Flintoft, desiring to take advantage of that provision and within the time limit set out in Rule 19(*c*), gave notice by Ex. A-4, dated April, 1944, that he desired the reduced pension allowance provided for in Rule 19, subject to the condition that one half of such pension allowance should be continued to his wife should she survive him. From the date of his retirement on March 1, 1945, Mr. Flintoft received the reduced pension at the rate of $461.47 per month until his death on May 8, 1946, the total payments aggregating $6,579.67. Of the total monthly payment of $461.47,

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

$33.47 was paid each month out of the Trust Fund established under the pension rules, and $428 was paid by the company out of its current revenue and charged to working expenses. Upon his death his widow, in accordance with Rule 19, began to receive a monthly pension allowance of $230.74, of which $16.74 was paid out of the Trust Fund and $214 was paid out of the current revenues of the company, and charged to working expenses.

The pension system is administered by a committee of seven members, four of whom are officers of the company and appointed by its Board, the remaining three being elected from among the general chairmen of the organized classes of employees of the company (Rule 2). Its powers are set out in Rule 6 and include the power to determine the eligibility of employees to receive pension allowances, the amount of contributions, all pension allowances and refunds; to retain the services of an actuary for the purpose of valuing the Trust Fund and to determine the percentages that may be withdrawn therefrom; and it shall from time to time, as required, make reports of its actions to the Board, which may review, alter or rescind such actions.

Rule 12 provides for the establishment of the Trust Fund and the payments to be made therefrom. The applicable parts are as follows:

12. (*a*) All contributions by employees shall in the first instance be deposited in a chartered bank in a separate account to the credit of the Trust Fund of which Canadian Pacific Railway Company shall be trustee, which Trust Fund shall not form any part of the revenues or assets of the Company. The Trust Fund shall be administered by the Trustee subject to the provisions of these rules and shall be invested from time to time in Dominion Government Securities or securities guaranteed by the Dominion Government.

(*b*) From the Trust Fund thus set up there shall be paid:

1. The cost of administering the Trust Fund.

2. Such proportion of the cost of administering the pension system as the Committee may from time to time determine.

3. A proportion of the pension allowance of any contributor retiring after January 1, 1937. Such proportion shall be determined and certified to from time to time by the Actuary, and unless the Committee shall otherwise direct shall be expressed as a percentage of that portion of the total pension which accrues in respect of the period for which the employee has made contributions. The proportion so determined shall not be increased until such time as the Fund shall be found to be in a position to bear 50 per cent of the cost of all pensions emerging thereafter; provided,

however, that any contribution made by the Company under Rule 13(*b*) shall, if at any time so directed by the Board, be applied in whole or in part to increase either temporarily or permanently the proportion so determined.

It will be noted that only a proportion of the pension allowance of any contributor is payable out of the Trust Fund. Pursuant to the requirements of Rule 12(*b*) 3, Mr. Rutherford, the actuary appointed under Rule 6(*a*), made a report on the valuation of the Pension Trust Fund (Ex. A-9) and made the following recommendation:

It is recommended that, effective from January 1, 1945, the proportion of each pension emerging in future to be charged to the Fund be increased from 30 per cent to 33 1/3 per cent of that portion of the total pension which shall accrue in respect of the period for which the employee shall have made contributions.

That recommendation was carried into effect and it was pursuant thereto that *out of the Trust Fund* there was paid to Mr. Flintoft upon retirement the monthly sum of $33.47, and following his death the monthly sum of $16.74 was paid to Mrs. Flintoft. The evidence indicates that the company issues all cheques to pensioners, its pension payrolls (of which Exhibits A-5 to 8 are samples) indicating the amounts payable out of the Trust Fund, and monthly thereafter it recovers from the Trust Fund the payments which it had made on its behalf. The evidence is conclusive that the balance of the payments to both employee pensioners and dependent pensioners was paid out of current revenues of the company and charged monthly to working expenses; and that the company had established no fund or reserve in respect thereof.

Rule 13 is as follows:

13. (*a*) The Company shall pay in to the Trust Fund monthly an amount equal to 25 per cent of any allowances paid pursuant to Rule 21, except the minimum allowances provided for in the said rule or allowances which are commuted under the provisions of said rule. Such payments into the Trust Fund will be applied from time to time for the purpose of increasing the proportion of the pension allowances which the Trust Fund would otherwise provide.

(*b*) The Company may from time to time make contributions directly to the Trust Fund, to be applied in accordance with the directions of the Board, for the purpose of increasing the proportion of the pension allowances which the Trust Fund would otherwise provide.

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

Under para. (*a*) thereof, the payments by the company to the Trust Fund were small, aggregating up to December 31, 1950, only $9,554. Under para. (*b*) thereof the company up to December 31, 1950, had paid into the Trust Fund a sum in excess of $22,000,000. All payments made to the Trust Fund are ear-marked so as to indicate contributions by employees, and contributions by the company under both Rule 13(*a*) and Rule 13(*b*). It will be noted, however, that contributions made under Rule 13(*b*) are "to be applied in accordance with the directions of the Board" (i.e., the Board of Directors of the company), and the evidence is that up to date no direction has been given by the Board in relation thereto. While, therefore, those contributions form part of the Trust Fund, they are as yet not available for the purpose of increasing the proportion of the pension allowances which the Trust Fund would otherwise provide. It is being invested and allowed to accumulate. The Trust Fund which is now available for payment of a proportion of the pension allowances is comprised of employees' contributions and the negligible amount provided by the company under Rule 13(*a*). Mr. L. B. Unwin, Vice-President of the company in charge of finance, and Chairman of the committee administering the pension system, stated that from his experience and knowledge it would not be at least until 1970 that it would be advisable for the Board to direct the actuary to take into account in his calculation of the percentage payable out of the Trust Fund, any monies contributed by the company under Rule 13(*b*). I assume that the intention is to build up the Trust Fund over a period of years and in the meantime to pay the remaining portion of the allowances out of the current revenue. Rule 12(*b*) 3 provides for the actuary to determine and certify from time to time the proportion of pension allowances payable out of the Trust Fund and that the proportion so determined shall not be increased until such time as the Fund shall be found to be in a position to bear 50 per cent of the cost of all pensions emerging therefrom (subject to a provision not now relevant.) The actuary, Mr. Rutherford, stated that the Trust Fund is not now able to bear 50 per cent of such cost and that as an actuary he was of the opinion that the Fund would not be in that position in the foreseeable future.

The question for decision, therefore, is whether the monthly payment of $214 to Mrs. Flintoft is a "succession" within the meaning of the Act. "Succession" is defined in section 2(*m*) and by that section the term also includes "any disposition of property deemed by this Act to be included in a succession." Section 3 declares certain dispositions to be deemed as successions and for the respondent it is submitted that section 3(1) (*g*) is applicable to the facts of this case. It is as follows:

> 3. (1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property:
>
> (*g*) any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased, including superannuation or pension benefits or allowances payable or granted under legislation of the Parliament of Canada or of any Province, or under any other superannuation or pension fund or plan whether the said benefits or allowances are payable or granted out of the revenue of His Majesty in respect of the Government of Canada, or of any Province thereof, or out of any fund established for the purpose, which benefits or allowances shall be deemed for the purposes of the Act to have been purchased, acquired, or provided by the deceased.

As originally enacted, subsection (*g*) comprised only the first five lines as it now appears, concluding with the words "on the death of the deceased." That part I shall refer to as the original part of the subsection. By 6-7 Geo. V. c. 25, the subsection was repealed and a new subsection (*g*), as above quoted, was substituted therefor. It contained all the original subsection, but added thereto were all the words commencing, "including superannuation or pension benefits or allowances." That part I shall refer to as the added part of subsection (*g*).

In *McDougall* v. *Minister of National Revenue* (1), I considered the meaning and effect of subsection (g) in regard to certain lump sum payments made to the widow of an employee of the Bell Telephone Company under the provisions of its "Pension Fund." In that case, no contribution to the fund had been made by the deceased employee or his widow. In that case I held that the award and payments

(1) (1949) Ex. C.R. 314.

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

were purely voluntary and that the recipient of the payments had no right to enforce the payment thereof, and that under those circumstances there was no beneficial interest arising by survivorship or otherwise to the donee, upon the death of the employee. In that case I referred to and followed the case of *re Miller's Agreement, Uniacke* v. *Attorney-General* (1), in which Wynn-Parry, J. said at p. 80:

> The property in question in each case is an annuity, and is clearly in each case an annuity purchased or provided by Mr. Noad, the deceased. However, the vital question is: Did any beneficial interest, within the meaning of that phrase as used in the section, accrue to the plaintiffs on the death of Mr. Noad? In my view, the word "interest" in the subsection means such an interest in property as would be protected in a court of law or equity. In the present case, it is clear—and counsel for the Crown, does not contend to the contrary—that the effect of the deed of Feb. 4, 1942, is not to create any trust in favour of the annuitants. It further appears clear to me, from the reasoning of the Court of Appeal in *Re Schebsman, Ex. p. Official Receiver, Trustee* v. *Cargo Superintendents (London), Ltd. & Schebsman,* that at common law the annuitants have no right to sue Mr. Miller or Mr. Vos under the deed. On the receipt by each of the annuitants of any payment in respect of her annuity, the property in the money so paid will pass to her, but she has no right to compel any payment. At common law, so far as each annuitant is concerned, the deed is *res inter alios acta,* and she has no right thereunder.

And, at pp. 82-3 he said:

> On its true construction, I cannot find—and this is really admitted—that the deed confers on any of the annuitants 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. In my view, the annuitants are not persons to whom the deed purports to grant something or with whom some agreement or covenant is purported to be made, and, in these circumstances, the annuities are not annuities within the meaning I place on the word as appearing in the Finance Act, 1894, s. 2(1) (*d*) . . . 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. Therefore, I hold that the annuitants are not liable to estate duty in respect of the annuities.

In the *Uniacke* case it was held:

> (i) on the true construction of the deed, notwithstanding the use of the word 'entitled to,' the annuitants had no rights thereunder either at common law or in equity, except the right to retain any sums paid to them.
>
> (iii) the word "interest" in the Finance Act, 1894, s. 2(1) (*d*), meant such an interest in property as would be protected by the courts, and the annuities payable under the deed were, therefore, not annuities within the meaning of s. 2(1) (*d*), and the annuitants were not liable to estate duty in respect of them.

(1) (1947) A.E.R. 78.

(iv) since the annuitants had no right to sue for the annuities, they did not become "entitled" to them within the meaning of that phrase in the Succession Duty Act, 1853, s. 2, and, therefore, they were not liable to succession duty in respect of them.

Now, in the original part of subsection (*g*) it will be noted that it is not all of the interest purchased or provided by the deceased that is deemed to be a succession, but only "the extent of the beneficial interest accruing or arising by survivorship or otherwise."

There can be no doubt that all contributions of the company to the Trust Fund (save possibly the small amounts payable under Rule 13*a*) were to be and remain voluntary and that no pensioner or pensioner's dependent would have any claim *against the company* for pension allowance. The entire scheme arises from the Board meeting of August 10, 1936, and clause 7 of the plan therein outlined in Ex. A-1 is as follows:

7 All contributions of the Company are to remain voluntary and no employee or pensioner will have a legal right or claim against the Company for pension allowance.

Then Rule 31 is as follows:

31. (*a*) The establishment and continuance of this system of pensions insofar as the Company's contributions are concerned is purely voluntary on the part of the Company, which reserves the right to alter, suspend or discontinue from time to time and in whole or in part its contributions towards pension allowances or to the Trust Fund, and neither such establishment and continuance nor any action at any time taken by the Board or the Committee shall be construed as giving to any employee or pensioner a legal right or claim to any allowance from the Company for pension. While it is the policy of the Company to encourage its employees to remain with it, and by faithful service, to qualify for pension allowances, nothing contained in these rules shall diminish or affect any right which it otherwise has to discharge any employee at any time when the interests of the Company in its judgment may so require, without liability for any claim for any pension or allowance, other than salary or wages owing and unpaid, and for the repayment of the contributions, if any, made by the employee under Rule 11.

(*b*) Notwithstanding anything contained in these rules, the Company may cancel its voluntary proportion of any pension whenever it is established, in the opinion of the Committee, that a pensioner is guilty of serious misconduct.

Now it is not necessary to consider whether Mrs. Flintoft has or has not a legal right to enforce the payment to her of the monthly sum of $16.74 out of the Trust Fund because of the admission made by the appellants that as to that

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

amount the assessment is valid. It is clear that under the Rules she cannot compel the Committee in charge of the Trust Fund to resort to that part of the Trust Fund which is made up of company contributions made under Rule 13(*b*), until the Board has so directed; or to increase the monthly payments out of other trust funds until the actuary has so directed. On the evidence, it is extremely improbable that the payments to Mrs. Flintoft out of the Trust Fund will be increased during her lifetime, as she is now in her 70th year. It is equally clear that the balance of the monthly payments, amounting to $214, is not paid out of the Trust Fund or out of any fund set aside for the purpose, but is paid voluntarily by the company out of its current revenues and charged to working expenses. Mrs. Flintoft would have no legal right to compel the company to pay that or any other amount and if it was discontinued she would be without any remedy. On the principles followed in the *McDougall* case I must reach the conclusion that the monthly pension of $214 does not fall within the original part of subsection (*g*).

In my opinion, the added part of subsection (*g*) was enacted for the purpose of broadening the meaning of the opening words of the original subsection, "Any annuity or other interest purchased or provided by the deceased," so as to include therein certain superannuation or pension benefits or allowances which might not be considered to have been "purchased or provided by the deceased," but which thereafter "shall be deemed for the purpose of this Act to have been purchased, acquired or provided by the deceased." Provision is made for two classes of such benefits or allowances, namely: (i) those payable or granted under legislation of the Parliament of Canada or of any province; and (ii) those payable or granted under any other superannuation fund or plan.

The dispute as to whether the monthly payment of $214 falls within the added part of section 3(1) (*g*) centres around the meaning to be attributed to the words (which I shall refer to as the "whether" clause)—

> Whether the said benefits or allowances are payable or granted out of the revenue of His Majesty in respect of the Government of Canada or of any Province thereof, or out of any fund established for the purpose.

Counsel for the appellants admits that such monthly payment falls within the words "under any other pension plan," and that were it not for the provisions of the "whether" clause, which I have just quoted, such payment would be taxable as a succession. His submission, however, is that full effect must be given to all the words of the added part and that the "whether" clause expressly limits the general words which precede it, and that any superannuation or pension benefits or allowances not payable or granted under any legislation of Canada or of one of its provinces, but granted or payable under any other pension fund or plan is dutiable only if payable or granted *out of any fund established for the purpose.* In this case he submits that the payment, being merely voluntary and not payable out of any "fund established for the purpose," is therefore not assessable to duty.

In interpreting a taxing Act, the Court must be governed by the expressions used in the Act itself and the intention of Parliament must be gathered therefrom. In *Tennant* v. *Smith* (1), Lord Halsbury said at p. 154:

> This is an income tax Act, and what is intended to be taxed is income. And when I say "what is intended to be taxed", I mean what is the intention of the Act as expressed in its provisions, because, in a taxing Act it is impossible, I believe, to assume any intention, any governing purpose in the Act, to do more than take such tax as the statute imposes.

In *Salomon* v. *Salomon* (2), Lord Watson in considering the expression "intention of the legislature," said at p. 38:

> "Intention of the legislature" is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication.

For the respondent it is contended that all such benefits or allowances payable or granted "under any other superannuation fund or plan" are subject to duty whether or not they are payable or granted out of a fund established for the purpose. To support this contention would mean that I must either read "whether" as "whether or not," or limit

(1) (1892) A.C. 150. (2) (1897) A.C. 22.

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

the applicability of the whole of the "whether" clause to benefits or allowances granted or payable by the Parliament of Canada or by a province.

There can be no doubt, I think that the "whether" clause is made applicable to all the benefits or allowances previously mentioned in the section whether they be made under legislation or "under any other superannuation or pension fund or plan." The words "the said benefits or allowances" which follow immediately after "whether" refer back to the "benefits or allowances" previously mentioned and which are there identified as being of two classes, namely, those payable or granted under legislation and those payable or granted "under any other superannuation or pension fund or plan." The first part of the "whether" clause relating to the revenue of His Majesty can have no application to the payments made "under any other fund or plan," and it would follow, therefore, that the remaining words "or out of any fund established for the purpose" must refer to those payments made "under any other superannuation or pension fund or plan," although they are not necessarily limited thereto. I am unable to agree with the submission of counsel for the respondent that the "whether" clause has no application to this appeal. I think it has, and later herein will consider what effect should be given to that view of the matter.

Nor do I think that "whether" means the same as "whether or not." The phrase "whether or not" is a very broad term indicating that no limit or qualification is to be placed on the preceding words; it is equivalent to "in any case" or "in all events." It is suggested by Mr. Carson that if "whether" were to be read as "whether or not," the "whether" clause would be wholly unnecessary in that it would add nothing to the broad meaning of the preceding words, that therefore it would be meaningless and such an interpretation should not be adopted. There is much force to that argument, but I prefer to rest my opinion on what I consider to be the real meaning of "whether," when, as here, it is followed by the correlative "or." In my view, it is used here as introducing a disjunctive clause having a qualifying or conditional force, and when used with the

word "or" is equivalent to "in either of the cases mentioned." In my opinion it would be improper to read "whether" as meaning "whether or not."

To what extent, then, does the "whether" clause qualify the preceding words? In my view, it limits the taxability of such superannuation or pension benefits or allowances to those cases in which the benefits or allowances are payable "out of a fund established for the purpose," except in those cases where they are payable under legislation of Canada or a province, in which latter cases, even if payable out of revenue, they are made dutiable.

I have stated above that in my opinion the "whether" clause is made applicable to the words "under any other superannuation fund or plan." It seems to me that in referring to "revenue" of His Majesty and to "any fund established for the purpose," Parliament has indicated that not all superannuation or pension benefits or allowances should be made dutiable successions, but only those where there is reasonable certainty that the payments will be continued. In the case of legislative payments that assurance is provided whether the source be revenue or out of an established fund; in other cases, such assurance is provided only if a fund for that purpose has been established. Such a limitation in my view is implicit in the "whether" clause. It also seems to me to be a not unreasonable limitation, excluding from taxation, as I think it does, those benefits or allowances which are dependent only on a plan but lack the assurance of continuity in payment, such as is provided by the existence of a fund or by being payable out of Government revenue. If there were no such limitations, it is apparent that in many cases the estates of decedents could be charged with succession duty in respect of benefits or allowances to dependents which the latter might never receive, or from which they might benefit for but a short period.

It is of some interest to note that in the Province of Nova Scotia the Succession Duty Act, 1945, c. 7, s. 3(2) (*g*) was amended by Statutes of 1946, c. 53, by adding thereto the following:

including superannuation or pension benefits or allowances *whether contractual or gratuitous* payable or granted under legislation of the Parlia-

1951

FLINTOFT v. MINISTER OF NATIONAL REVENUE

Cameron J.

ment of Canada or of any Province or under any other superannuation or pension fund or plan *where* the said benefits or allowances are payable or granted out of the revenue of His Majesty in respect of the Government of Canada or of any Province or out of any fund established for the purpose *or otherwise,* which benefits or allowances shall, for the purposes of this Act, be deemed to have been purchased, acquired or provided by the deceased.

It will be noted that the wording is very similar to the added part of section 3(1) (*g*) of the Dominion Act, but that the words "benefits or allowances;" that "where" replaces the word "whether" as used in the Dominion Act, and that the words "or otherwise" follow the expression "or out of any fund established for the purpose." These variations are of great significance and I think it may be assumed that if the words "or otherwise" were also in the Dominion Act, the appeal herein would fail.

My conclusion, therefore, is that the monthly payment of $214.00 to Mrs. Flintoft, not being payable or granted out of the Pension Trust Fund or out of any other fund established for the purpose, but being a voluntary payment made by the company out of its revenue, does not fall within the provisions of section 3(1) (*g*) and is not a "succession" under any provision of the Act. The appeal will therefore be allowed and there will be a declaration:

(1) That the only part of the monthly payment to Mrs. Flintoft which is subject to payment of succession duties is the capitalized value of that part thereof which is payable out of the Canadian Pacific Railway Pension Trust Fund, which capitalized value by agreement of the parties is fixed at $2,108;

(2) That the appellants are entitled to be repaid the difference between such amount as they have paid under the assessment relating to the whole of the said pension, and the amount properly assessable on the monthly payment of $16.74, payable out of the Canadian Pacific Railway Company Trust Fund, having a capitalized value of $2,108. During the course of the trial, counsel for the appellants intimated that such difference amounted to $2,842.93 but I do not think that counsel for the respondent agreed thereto. If the parties are unable to agree on the amount, there will be a reference back to the Minister for the purpose of amending the assessment in accordance with my finding.

I should state further that by the stipulation of the parties duly filed, it has been agreed that while in the original assessment *in respect of the whole pension* its capitalized value was fixed at $29,056.13, that valuation was in error and should have been fixed at $16,000.

The appellants are also entitled to their costs after taxation, and to payment out of the amount deposited for security for costs.

Judgment accordingly.