BETWEEN: 1950 May 24 June 6

ALFRED CURZON DOBELL, ... APPELLANT;

AND

THE MINISTER OF NATIONAL REVENUE, ... RESPONDENT.

Revenue—Income Tax—Gift Tax—An Act to amend the Income War Tax Act, 1917, St. of C. 1926, c. 10, s. 7—Income War Tax Act R.S.C. 1927, c. 97, ss. 32(2), 88—Marriage contract wherein separation as to property is stipulated—Donation inter vivos and irrevocable by a future consort to the other—Arts. 755, 819, 821, 1257, 1422 cc.—Grant in fulfilment of donation not a transfer to evade taxation and not subject to provisions of s. 32(2) of the Income War Tax Act—Appeal allowed.

By his marriage contract entered into on June 7, 1911, wherein separation as to property was stipulated, D., domiciled in the Province of Quebec, gave to his future wife, by donation *inter vivos* and irrevocable, a sum of $10,000 and as security for said sum he mortgaged and hypothecated an immovable property. D. paid his wife a first instalment and in 1943 the balance, namely $9,000, by handing over to her Dominion of Canada Victory bonds and Province of Quebec bonds and obtained from her a release and discharge of the mortgage.

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D. was assessed for the year 1943 in respect of income derived from the said bonds and in respect of gift tax, and from such assessments he appealed.

Held: That the grant made by Dobell to his future wife was not a transfer to evade taxation: it is not subject to the provisions of s. 32(2) of the Income War Tax Act, R.S.C. 1927, c. 97. The grant was effected in fulfilment of the donation which Dobell had made and had the right to make to his wife by his marriage contract. *Molson et al* v. *The Minister of National Revenue* (1937) Ex. C.R. 55 followed. *David Fasken Estate* v. *The Minister of National Revenue* (1948) Ex. C.R. 580 disapproved.

APPEAL under the provisions of the Income War Tax Act.

The appeal was heard before the Honourable Mr. Justice Angers at Quebec.

Roger Letourneau, K.C. for appellant.

Fernand Choquette, K.C. and *Edouard Belleau, K.C.* for respondent.

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

ANGERS J. now (June 6, 1950) delivered the following judgment:

In his statement of reasons for appeal the appellant says:

the appellant's marriage contract is valid as to form, having been made and executed in accordance with the law of England where it was actually entered into and signed;

the domicile of the husband at the date of the marriage and the matrimonial domicile of the parties being in the Province of Quebec, the rights and obligations deriving from the marriage contract are to be governed by the law of the said province;

according to the law of the Province of Quebec, gifts *inter vivos* of present and future property can be validly made in a marriage contract (articles 778, 819 and 1257 c.c.) and a donor may stipulate for the return to him of the property given, in the event of the donee dying before the donor (article 779 c.c.).

under the law of the Province of Quebec, the legal effect of a gift *inter vivos* is to divest the donor by mere consent of the parties and without the necessity of delivery of his ownership in the property given and to vest the donee with the said ownership (articles 777 and 795 c.c.).

the gift from the appellant to his wife of the sum of $10,000 was a valid and irrevocable disposition *inter vivos,* duly accepted by the donee and fully and effectively made and completed long before the coming into force of the Income War Tax Act;

from the date of the marriage contract, namely June 7, 1911, the appellant's wife became the legal owner of the property given, viz. the sum of $10,000, the precarious possession of which only remained with the appellant, who, from that date, became legally indebted to his wife for the said sum;

the payment by appellant to his wife, in 1943, of the sum of $9,000, in order to be valid under the law of the Province of Quebec, must necessarily be related to the marriage contract of 1911 and both the said contract and the said payment form one complete non-severable transaction which cannot be governed by The Income War Tax Act of 1917 and the amendments thereto;

since the coming into force of paragraph 2 of section 32 of The Income War Tax Act there has been no transfer of property from the appellant to his wife, either with or without intent to evade taxation, and there could have been no valid transfer of property from him to her under the law of the Province of Quebec;

since the coming into force of section 88 of The Income War Tax Act and amendments thereto there has been no transfer of property from the appellant to his wife "by way of gift or donation";

a similar situation arose in 1933, after the death of *Kenneth Molson* and both the Exchequer Court and the Supreme Court of Canada held that the payment of a debt arising from a valid gift made by marriage contract was not a transfer of property within the purview of paragraph 2 of section 32 of the Income War Tax Act;

wherefore the appellant submits:

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that he is not liable to income tax in respect of the income derived, since 1943, from the Dominion of Canada and Province of Quebec bonds handed over to his wife as payment of his debt to her;

that he is not liable in any way for the gift tax imposed by section 88 of the Income War Tax Act in respect of the value of the said bonds;

that the two assessments hereby appealed from, dated October 9, 1946, for $122.47, and October 29, 1946, for $446.24, should be withdrawn and cancelled.

The Minister of National Revenue, through his Assistant Deputy Minister, on January 16, 1948, affirmed the said assessments on the ground that income tax was correctly assessed in accordance with subsection 2 of section 32 of The Income War Tax Act and a gift tax in accordance with section 88 thereof and "by reason of other provisions of The Income War Tax Act".

A notice of dissatisfaction, dated February 5, 1948, was mailed by the appellant to the Minister in compliance with the provisions of section 60 of The Income War Tax Act.

After reiterating the facts recited in the notice of appeal and reaffirming the statutory reasons for appeal therein contained, the appellant adds:

that the transfer of property involved herein was legally effected and accepted prior to his marriage with Helen Maffett, so that there never was and could not be a transfer of property between consorts as contemplated by subsection 2 of section 32 of the Act;

that the payment by him to his wife, in 1943, of $9,000, mentioned in the notice of appeal, is not a transfer of property within the meaning of said subsection 2 of section 32, nor is it a transfer by way of gift or donation within the meaning of section 88.

In his reply the Minister of National Revenue, through the Deputy Minister of National Revenue for Taxation, denies the allegations in the notice of appeal and notice of dissatisfaction in so far as incompatible with the statements contained in his decision and affirms the assessment as levied.

The attorney for appellant produced a copy of a deed of deposit done and passed before W. Noble Campbell, Notary Public, on July 31, 1911, and of an indenture of agreement or contract of marriage entered into between Alfred Curzon Dobell, of St. Colomba of Sillery, Province of Quebec, and Helen Maffett, of the City of Kingston, County of Dublin, Ireland, on June 7, 1911; a copy of those two documents was marked as exhibit 1. The marriage contract is valid according to article 7 c.c.; its validity is admitted in paragraph 1 of the defence. The matrimonial domicile of appellant and his wife has always been in the Province of Quebec.

Clause 1 of the marriage contract stipulates separation of property; it reads thus:

> That there shall be no community of property (communauté de biens) between the said intended consorts, any law, usage or custom of the said Province of Quebec or of any other Province, State or Country to the contrary notwithstanding, and the said Alfred Curzon Dobell and Helen Maffett shall be separate as to property (séparés de biens) and the property now belonging or which may hereafter belong or accrue to either of them shall be and continue the sole and distinct property of each respectively, and neither of them shall be liable for the debts of the other.

Clause 6 relating to the donation of the sum of $10,000 is worded as follows:

> In further consideration of the renunciation aforesaid and of the Love and Affection which he beareth towards her, the said Alfred Curzon Dobell did and doth hereby give and grant unto the said Helen Maffett accepting thereof the sum of Ten thousand dollars ($10,000) payable from time to time in and by instalments at the option of the said Alfred Curzon Dobell as his means shall permit, during the continuation of the said intended marriage, and which said sum of Ten thousand dollars shall be a first claim upon the following described property of the said Alfred Curzon Dobell who did and doth hereby for the purpose of securing the said amount and each and every instalments thereof unto the said Helen Maffett, bind, pledge, mortgage and hypothecate unto her the said property, that is to say.

The designation of the property follows; I do not deem it necessary to reproduce it.

Clause 6 then contains this provision:

> And the present mortgage is hereby granted as aforesaid in order to secure unto the said Helen Maffett the absolute and undisputed possession of the present gift of Ten thousand dollars which is hereby declared to be made by way of aliment and not liable to seizure for any of the debts of her the said Helen Maffett.

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Clause 7 provides that, in the event of the said Helen Maffett predeceasing her husband without issue of their intended marriage surviving her, all the linen, china and glass ware and the sum of money or the investments representing the same hereby given shall revert to the said Alfred Curzon Dobell in full ownership from the time of the death of the said Helen Maffett.

By deed passed before Yves Montreuil, N.P., on May 4, 1943, a copy whereof was filed as exhibit 2, Helen Maffett declared to have received from the appellant the sum of $10,000 in full payment of a mortgage for the same amount by the said Dobell in her favour under and in virtue of the marriage settlement dated at Leeds, Yorkshire, England, on June 7, 1911, of which a copy was marked as exhibit 1. The deed states that in consideration of this payment the said Helen Maffett grants a release pure and simple and requests from the registrar of the said registration division the cancellation of the hypothecary inscriptions of the said deed in her favour.

The case is governed by the civil code of the Province of Quebec, particularly articles 754, 755, 819, 821 and 1257.

The donation *inter vivos* of the sum of $10,000 made by Alfred Curzon Dobell to his future wife Helen Maffett, by their marriage contract, is legal and valid.

Article 755 c.c. defines the gift *inter vivos* thus:

> Gift *inter vivos* is an act by which the donor divests himself, by gratuitous title, of the ownership of a thing, in favour of the donee, whose acceptance is requisite and renders the contract perfect. This acceptance makes it irrevocable, saving the cases provided for by law, or a valid resolutive condition.

Article 819 c.c. enacts:

> Subject to the same rules, when particular exceptions do not apply, future consorts may likewise by their contract of marriage give to each other, or one to the other, or to the children to be born of their marriage, property either present or future.

Article 821 c.c. stipulates that gifts of present property by contracts of marriage are, like all others, subject to acceptance *inter vivos*. It adds that the acceptance is presumed in the cases mentioned in the second section of this chapter, namely Chapter Second.

Article 1257 provides as follows:

> All kinds of agreements, may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos*, would be void;

such as the renunciation of successions which have not yet devolved, the gift of future property, the conventional appointment of an heir, and other dispositions in contemplation of death.

Alfred Curzon Dobell and his wife Helen Maffett are separate as to property in virtue of their marriage contract. The wife separate as to property has the full ownership of her property, retains the entire administration of it and has the free enjoyment of her revenues. Article 1422 c.c. stipulates:

> When the consorts have stipulated by their marriage contract that they shall be separate as to property, the wife retains the entire administration of her property moveable and immoveable, the free enjoyment of her revenues and the right to alienate, without authorization, her moveable property. She cannot, without authorization, alienate her immoveables, or accept a gift of immoveables.

The marriage contract, as already said, was duly registered.

The donation therein stipulated was unquestionably made in good faith and not for the purpose of evading taxation, as it was effected prior to the coming into force of The Income War Tax Act, 1917, on September 20, 1917.

The claim of the Minister is based upon subsection 2 of section 32 of the said Income War Tax Act (R.S.C., 1927, chap. 97). Prior to the revision of the statutes in 1927 subsection 2 of section 32 was paragraph (*b*) of subsection 4 of section 4 as enacted by 16-17 Geo. V, chap. 10. Subsection 2 of section 32 and paragraph (*b*) of subsection 4 of section 4 are literally the same and read thus:

> Where a husband transfers property to his wife, or vice versa, the husband or the wife, as the case may be, shall nevertheless be liable to be taxed on the income derived from such property or from property substituted therefor as if such transfer had not been made.

It seems to me evident that the object of subsection 2 of section 32 is, as, before the revision of the statutes in 1927, the object of paragraph (*b*) of subdivision 4 of section 4 was, to tax in the hands of transferor property transferred for the purpose of evading taxation.

The grant made by Alfred Curzon Dobell to his future wife was not a transfer to evade taxation and it is not, in my judgment, subject to the provisions of subsection 2 of section 32 of the Income War Tax Act. It was effected by said Dobell in fulfilment of the donation of $10,000 which he had made and had the right to make to his wife by his marriage contract.

Counsel for appellant relied on the case of *Molson et al.* v. *The Minister of National Revenue* (1). The material facts in that case were very similar to those existing in the present one. The testamentary executors of one Kenneth Molson, of Montreal, appealed from the assessments dated April 11, 1933, whereby additional taxes were levied against the estate for the years ending December 31, 1925 to 1931 inclusive, the said assessments having been, as usual, affirmed by the Minister of National Revenue. The head note fairly accurate and comprehensive contains, after a short recital of the facts, this summary of the decision:

> *Held:* That the conveyance made by Kenneth Molson to his wife was not a transfer to evade taxation; it was made in fulfilment of his marriage contract and from the date of transfer he had no further interest in the shares transferred to his wife and was no longer liable to taxation on the income derived therefrom.

The Minister appealed; the appeal was dismissed (2).

Counsel for respondent pointed out that four members of the Supreme Court had not expressed any opinion on the question set forth in the judgment *a quo* and that Cannon, J. alone had dealt with it. I do not think that this can affect the merit of the judgment appealed from, if merit there be. The appeal of the executors was allowed and the assessments set aside.

The reasons of Duff, C.J., Davis and Hudson, JJ. are summed up in the abstract of the judgment, which reads in part as follows:

> Sec. 32 of c. 97, R.S.C., 1927, had not the effect of making M. liable to be taxed on the income derived in 1930 from the property transferred by him to his wife in 1925, in the circumstances mentioned, because s 32, as it stands in the Revised Statutes, can have no application to properties transferred prior to the original enactment of it in 1926.

Cannon, J., in his notes, after relating the facts, expresses the following opinion (p. 224, in fine):

> Prior to the institution of the appeal, it was agreed between the parties that the decision of the Exchequer Court with reference to the notice of assessment No. 88893 for the taxation period for 1930 shall apply to and include six similar notices of assessment, all bearing date the 11th April, 1933, and covering the other taxation periods included from the 23rd March, 1925, to the 31st December, 1931.

For that period of 1930, we must apply to the above facts parag. 2 of sec. 32, R.S.C., 1927, c. 97, which says:

(1) (1937) Ex. C.R. 55. (2) (1938) S.C.R. 213.

(Text of paragraph 2 of section 32, R.S.C. 1927, chap. 97 quoted)

I take it that the "transfer of property" means and contemplates a valid and real transfer. This section, when property is transferred gratuitously between husband and wife or vice versa, cannot apply to consorts governed by the Quebec law . . .

(Article 1265 c.c. referred to)

In order to favour and encourage marriages, article 1257 of the Code says:

All kinds of agreements may be lawfully made in contracts of marriage, even those which, in any other act *inter vivos,* would be void; such as the renunciation of successions which have not yet devolved, the *gift of future property,* the conventional appointment of an heir, and other dispositions in contemplation of death."

Article 778 reads as follows:

Present property only can be given by acts *inter vivos.* All gifts of future property by such acts are void, as made in contemplation of death. Gifts comprising both present and future property are void as to the latter, but the cumulation does not render void the gift of the present property.

The prohibition contained in this article does not extend to gifts made in a contract of marriage.

Both litigants have considered the transfer as valid and binding on the parties. It appears from the above quotations that, in order to be valid and binding, the transfer made in 1925 must necessarily be related and linked to the ante-nuptial contract of March, 1913, whereby was created the obligation and indebtedness of the future husband to his future wife, and the deed of conveyance of the 28th March, 1925, which evidences the payments, satisfaction and discharge of this pre-nuptial obligation cannot be considered apart from the other, as they must, to be valid and legal under the law of Quebec, form but one complete non-severable transaction. The legislation which is now sought to be applied originated in 1917, years after the ante-nuptial contract; and subsection 4 of section 4 of 7 & 8 Geo. V, c. 28, applied only to a person who, "after the first day of August, 1917, has reduced his income" by the transfer of any movable or immovable property to such person's wife or husband, as the case may be, if the Minister was satisfied that such transfer or assignment was made for the purpose of evading the taxes imposed under the Act.

I deem fair to note incidentally that my judgment in this case was disapproved by the President of the Court in *The Executors of the estate of David Fasken and The Minister of National Revenue* (1), as was also that of the Supreme Court. With due deference, I must say that I adhere to my opinion.

In the case of *The Minister of National Revenue* v. *National Trust Company Limited* (2) an appeal was made

(1) (1948) Ex. C.R. 580. (2) (1946) Ex. C.R. 650.

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by the company from an item in an assessment under the Dominion Succession Duty Act, 4-5 Geo. VI, chap. 14, as amended. The item in question consisted of certain securities in a trust fund established by a deed of settlement dated December 8, 1930, to take effect on January 1, 1931, between one Edward Rogers Wood, referred to as the settlor, and F. Fisher and Hastie as trustees and the daughter of the settlor, Mildred P. S. Fleming, referred to as the donee. The deed of settlement was amended on February 1, 1937. The Dominion Succession Duty Act was assented to on June 14, 1941. The settlor died on June 16, 1941.

In an Act to amend the Dominion Succession Duty Act, 6-7 Geo. VI, chap. 25, assented to on August 1, 1942, there is a clause relating to the application of the Act which reads thus:

11. The provision of this Act shall apply retrospectively to successions derived from persons dying on or after the fourteenth day of June, one thousand nine hundred and forty-one.

O'Connor, J., in his reasons for judgment, stated that the Dominion Succession Duty Act must be considered in the form in which it stood at the date of the settlor's death.

The subject matter of the tax is obviously not the same as in the case now pending and the law applicable thereto is different. The underlying principle however is similar and for this reason I believe that the judgment of O'Connor, J., is relevant. It was affirmed by the Supreme Court (1).

In the matter of *The Royal Trust Company et al. and The Minister of National Revenue* (2) the headnote of the judgment of Cameron, J., fully comprehensive, reads as follows:

By an antenuptial contract dated May 25, 1916, F. obligated himself *inter alia* during the existence of his intended marriage to D. to pay to her the sum of $20,000 for her own use and enjoyment. F. and D. were married on June 1, 1916. F. died on April 23, 1943, predeceasing his wife By his will he had directed his executors to pay to his wife any indebtedness remaining unpaid under the terms of the marriage contract. The executors claimed a deduction from succession duties of the said sum of $20,000, none of which F. had paid to his wife during his lifetime. This deduction was disallowed by the respondent and the executors appealed to this Court.

(1) (1949) S.C.R. 127, 131. (2) (1948) Ex. C.R. 34.

Held: That any property transferred, settled or agreed to be transferred or settled in consideration of marriage, prior to April 29, 1941, is not a succession within the meaning of the Dominion Succession Duty Act.

2. That the bare possibility of future rights to community property and to dower, in non-existing estates, is not a subject of value at the date of an antenuptial contract, and the release of such a possibility is not one "for full consideration in money's worth" within s. 8(2) (*a*) of the Dominion Succession Duty Act.

The judgment of Mr. Justice Cameron was affirmed by the Supreme Court (1).

The summary of the latter judgment, fairly exact and complete, is thus worded:

By antenuptial contract made in 1916, the husband obligated himself during the existence of his intended marriage, to pay his wife $20,000, in consideration of her renunciation of community and dower. This sum remained unpaid at the husband's death in 1943. His executors claimed to deduct this from the value of his estate for the purpose of the Succession Duty Act of the Dominion. The deduction was disallowed by the Minister but restored by the Exchequer Court.

Held: (Kerwin J. dissenting), that the agreement did not fall within the definition of "succession" in s. 2(*m*) of the Dominion Succession Duty Act.

Held, further, (Kerwin J. dissenting), that property transferred or agreed to be transferred in consideration of marriage, prior to April 29, 1941, is not deemed to be a "succession" under s. 3 (1) (*j*) of the Act.

Per The Chief Justice and Taschereau J.: The renunciation of community and dower is a "consideration in money or money's worth" within the meaning of s. 8(2) (*a*).

Per Kerwin, J. (dissenting): As the widow became entitled upon the husband's death, it is a "succession" within s. 2(*m*) of the Act. It is not a debt under s. 8(2) (*a*), because it was not created "for full consideration in money or money's worth".

The notes of Taschereau, J., on pages 731 and 732 are material and to the point.

See also *Connell* v. *Minister of National Revenue* (2).

The report discloses that prior to his marriage the appellant transferred certain securities to trustees for his future wife and that by a marriage settlement he directed the trustees to allot shares to her immediately after the marriage and to hold other securities in trust with the income thereof to be paid to her during her lifetime. The Minister of National Revenue assessed the appellant on the income received by his wife from such securities. It was held (*inter alia*):

That a transfer of securities by a taxpayer to trustees for his intending wife with instructions in a marriage settlement, executed prior to the marriage, that immediately after the marriage certain shares should be

(1) (1949) S.C.R. 727.

(2) (1946) Ex. C.R. 562.

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transferred to his wife and other securities held in trust with the income to be paid to her for life is not a transfer of property by a husband to his wife within section 32(2) of the Income War Tax Act and the taxpayer is not liable to income tax on the income derived by his wife from such securities.

The following observations of the President are relevant (p. 567):

> The assessments of the appellant for the income received by his wife from the securities referred to can be supported only if it can be shown that it was income derived from property transferred by a husband to his wife. In order that the Minister may bring such income within the letter of the law, so that the words of section 32(2) may reach it, he must show that the dispositions by the appellant of the securities referred to were transfers of property from a husband to his wife. The only kind of transfer of property that is caught by section 32(2) is a transfer by a husband to his wife, or vice versa, that is to say, a transfer between spouses. At the time of the transfer the transferor and the transferee must be married to one another and the rights to the transferred property must pass to the one spouse by the transfer from the other. Unless a disposition of property meets these requirements it is not within the letter of the law as expressed by section 32(2) and the income derived therefrom is not reached by its words.

Reference may be had beneficially to *Mignault, Droit civil canadien,* vol. 4, p. 196, and vol. 6, p. 139; *Billette, Traité de Droit civil canadien,* vol. 1, p. 7; *Viger and Kent et al. and Lecavalier and Trudel* (1); *Morin and Bédard and Hamel et al.* (2); *Denis and Kent & Turcotte and Lafontaine and Lynn* (3); contra, *Page* v. *Beauchamp & Beauchamp* (4).

I do not think that the validity of the clause stipulating reversion in favour of the donor in case of the predecease of the donee is questionable: articles 779 and 824 c.c.; *Mignault,* vol. 4; p. 114; *The Minister of National Revenue and National Trust Company* (*supra*).

Counsel for appellant submitted that the conventional hypothec provided in the marriage contract is valid; in support of his contention he relied upon the judgment in the case of *Morin* v. *Albert* (5) and the decision of the Court of King's Bench of the Province of Quebec in *Plourde* v. *Dagenais* (6), reversing the judgment of the Superior Court. No hypothec was constituted in the latter case, which consequently has no pertinence, unless it be inferred

(1) (1888) 16 R.L. 565.
(2) (1889) 17 Q.L.R. 30.
(3) (1900) R.J.Q. 18 S.C. 436.
(4) (1901) 7 R. de J. 337.
(5) (1948) R.J.Q., S.C. 299, 306 et seq.
(6) (1935) R.J.Q. 59 K.B., 385.

that a hypothec was estabilished by the marriage contract. The first case is more to the point; on page 307 we find the following reason in the judgment of Côté, J.:

> Il n'y a pas de doute que si la pleine et entière désignation légale avait été insérée au contrat de mariage, aucune discussion sur la validité de l'hypothèque ne pourrait être élevée.

I may say that the validity of the hypothec does not seem to me to have any materiality herein.

After giving the matter my best consideration I have reached the conclusion that the appeal must be allowed and the assessments set aside.

The appellant will be entitled to his costs against the respondent.

Judgment accordingly.