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BETWEEN:

RICHARD K. WURTELE, EDWIN A. JARRETT and THE ROYAL TRUST COMPANY, Executors under the will of CHARLES WURTELE, deceased .. APPELLANTS;

AND

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

Revenue—Succession duties—Dominion Succession Duty Act R.S.C. 1952, c. 89, ss. 3(1)(f)(g)(h)—Life insurance policies proceeds—Policies placed in trust pursuant to separation agreement and leisury settlement—Income interest to wife at death of insured husband—Capital to children at death of wife—Whether a disposition for succession duty purposes—"Successions"—"Donees"—Appeal allowed.

The deceased husband, prior to 1930, took out seven policies of insurance on his life, with his wife named as sole beneficiary. In that year his wife sued him for alimony and obtained a judgment directing a reference to the Local Master to fix the amounts. He also drew up a settlement which was found to be invalid as being a step taken by him without authority. In 1938 a valid settlement was arrived at. It provided that the policies were irrevocably transferred to trustees on these trusts: on the death of the insured husband to pay to the wife a lump sum of $20,000 plus the net income from the balance for her lifetime, after investment of the proceeds, and on her death to pay the entire remaining sum to the children of the marriage. The husband retained the right to borrow on the policies to the extent of $30,000 for business purposes, such loans to be repaid; he also convenanted to pay the premiums, to not change beneficiaries and not allow the policies to lapse. The agreement recited that the assured was doing all this "for valuable consideration".

The husband died in 1957. His wife and children survived him. The trustees paid the wife the $20,000 and held the balance on the aforementioned trusts. The Minister levied succession duty under the *Dominion Succession Duty Act* upon the amount of the fund held for the children contending that their interests in the proceeds of the insurance policies came to them as "successions" and dutiable accordingly. On appeal to this Court the appellants contended that the children were not "donees" and that their interests arose out of a transaction in which valuable consideration had been given.

Held: That the appeal be allowed.

2. That the proceeds of the insurance policies held for the children are not dutiable.
3. That valuable consideration had been given by the widow in the covenant under which the trust was effected and that the interests of the children, arising in 1938 under the trust, did not come to them by way of a donation or gift.
4. That the proceeds of the policies could not be held dutiable under s. 3(1)(*f*) of the Act as the property in question did not pass to the children on the death of the father but only on the death of the mother.

5. That the insurance monies were not within the words of s. (1)(*g*) as "any annuity or other interest purchased or provided by the deceased".

6. That the entire history of the matter from the beginning of the disputes between the husband and wife and the action at law against the husband to the settlement agreement reached in 1938 showed that the wife had in reality renounced her future or alternative benefits from her husband's property and income and the reservation of a right to borrow on the policies by the husband, all showed that the transaction was made for hard consideration and at arm's length and not as a donation to the children, and that the policies had not been kept up "for the benefit of any existing or future donee" as provided in s. 3(1)(*h*) of the Act.

APPEAL under the *Succession Duty Act*.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Toronto.

John DesBrisay for appellants.

Terence Sheard, Q.C. and *F. J. Cross* for respondent.

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

DUMOULIN J. now (March 28, 1963) delivered the following judgment:

The matter hereunder decided, a succession duty case, heard in Toronto, on 1st of June, 1960, by the late Mr. Justice Fournier, was referred to me for adjudication by the President of this Court, pursuant to the parties' written consent, filed on December 17, 1962.

One Charles Wurtele, late of the City of Victoria, B.C., died "on or about the 12th day of October, 1957, having duly made his Last Will and Testament, Probate whereof was issued out of the Victoria Registry Office of the Supreme Court of British Columbia on the 9th day of January, 1958, to the Appellants as the Executors therein named".

"By assessment dated the 23rd day of July, 1958, succession duties in the amount of $65,789.88 were levied by the Respondent in respect of the dispositions of the Will and Estate of the deceased and this sum included duty levied in respect of a part of the proceeds of certain policies of insurance on the life of the deceased, which part was valued by the Respondent at $49,062.67 and was payable to the Royal Trust Company and Richard K.

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Wurtele as Trustees to be held in trust for children of the deceased..." (Statement of Claim, para. 2).

The seven life insurance policies, maturing at the Insured's demise, were taken out by him prior to 1930, with as sole beneficiary his wife, Lily Wurtele.

Paragraph 6 of the Statement of Claim next explains that:

> 6. In the year 1930 Lily Wurtele instituted in The Supreme Court of Ontario proceedings against the deceased for alimony and by Judgment of that Court dated the 13th day of April, 1931, it was declared that she was entitled to alimony and a Reference was directed to the Local Master of The Supreme Court at Goderich to ascertain and fix a proper allowance to be paid her. (cf. exhibit 1, para. 2).

Implementation of the judgment for alimony in favour of the aforesaid plaintiff, Mrs. Lily Wurtele, "...during the lifetime of the parties and so long as the plaintiff shall live separate and apart from the Defendant..." (exhibit 1, para. 4), was delayed until September 16, 1932, when the Local Master of the Court, after stipulating a monthly payment of $600.00 to the wife, purported to draw up a settlement deal "...in connection with the existing insurance policies upon the life of the Defendant..." (cf. exhibit 2, paras. 3 & 4). Presumably, the Court Official, in exceeding thus the authority imparted to him by Mr. Justice Wright's directives of April 13, 1931, assumed he was empowered so to do by the joint consent of the solicitors mentioned in exhibit 2.

Some six years later, on June 29, 1938, this estranged couple duly assented to a covenant (exhibit 3) appointing as Trustee the Royal Trust Company and a son, Richard K. Wurtele, and witnessing, *inter alia*, that:

> . . . in consideration of the premises and of *valuable consideration* (emphasis is mine throughout these notes) the Insured (Charles Wurtele) and the Party of the Second Part (Lily Wurtele) agree that the proceeds of the said policies shall be held by the Trustee and they hereby *irrevocably direct the Trustee to hold the said proceeds* when received by it on the following trusts, namely:
>
> 1. In the event of the death of the Insured in the lifetime of the Party of the Second Part, to pay to the Party of the Second Part out of the proceeds of the said policies when received by the Trustee the sum of Twenty Thousand Dollars ($20,000.00) for her own use absolutely and to invest and keep invested the corpus of the balance of the proceeds of the said policies (the said corpus being hereafter referred to as the "Trust Estate") and to pay the net annual income derived from the Trust Estate to the Party of the Second Part (at least once every three months) during her lifetime for her sole use and benefit without power

of anticipation and upon the death of the Party of the Second Part and subject as hereinafter provided to pay the said Trust Estate and any accrued and unpaid income derived therefrom in one sum to Richard K. Wurtele and Anna Lloyd Wurtele, children of the Insured and the Party of the Second Part share and share alike or to the survivor.

There next follow the customary dispositions of this Trust Estate in the eventualities of predecease of either of the relatives concerned, with or without issue.

Clause 5 of the covenant provides for the eventual borrowing "on the security of the said policies...for the benefit of the Goderich Salt Company Limited only (obviously the Insured's business), sums not exceeding in the aggregate the sum of Thirty Thousand Dollars ($30,000.00)...".

Clauses 6 and 8 put on record that:

> 6. The Insured hereby covenants and agrees with the Party of the Second Part and the Trustee *to pay all premiums on the said policies and the principal of and interest on any amounts borrowed by him as aforesaid* as and when the same become due and payable respectively, provided, in the event of default of payment by the Insured of the said premiums and the said principal and interest, the Trustee shall not be bound to pay the said premiums and the said principal and interest.
>
> 7. . . .
>
> 8. The Insured will not, by his will or otherwise, make any change in the beneficiary of said policies or any of them except as hereinbefore provided, will not surrender the said policies or any of them for the cash surrender values thereof, will not permit the said policies or any of them to lapse and will not . . . so deal with the said policies or any of them that the full amount of the proceeds thereof shall not be payable to the Trustee on the death of the Insured . . .

Furthermore, clause 9 enforces upon the Insured the usual delivery of the policies to the Trustee who will retain possession of them.

Since the transactional settlement, exhibit 3, legally entered into by Charles Wurtele and his consort, cannot be seriously challenged, no more need be said about that most dubious Court Report of September, 1922 (exhibit 2), insofar as it attempts to deal with matters dehors the judicial instructions contained in exhibit 1.

When Wurtele died, October 12, 1957, he was survived by his wife, (still alive as this case came up for hearing, June 1, 1960) and his two children. The insurance moneys were paid to the Trustees who, thereupon proceeded to pay $20,000.00 to the widow and are now holding the remainder in accordance with the mandatory terms of the

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Trust deal. The Respondent's claim to a $49,062.67 succession duty tax, a decision affirmed by him under Section 38 of the *Dominion Succession Duty Act* (R.S.C. 1952, ch. 89), is succintly formulated in paragraph 6 of the Statement of Defence, thus:

> 6. . . . The interest of Richard K. Wurtele and Anna Lloyd Wurtele in the money received under the policies of insurance on the life of the said deceased came to them as successors by a Succession from the deceased as predecessor within the meaning of Sections 3(1)(*g*), 3(1)(*f*) and 3(1)(*h*) of the Succession Duty Act, Revised Statutes of Canada, 1952, Chapter 89 and amendments thereto.

To this enunciation of fact and law the Appellants retort as follows in paragraph 13 of their Statement of Claim:

> 13. The said remainder of the proceeds of the policies of insurance (deduction made of $20,000.00 paid outright to Mrs. Wurtele) is not dutiable under the provisions of Section 3(1)(*h*) for the following reasons:
>
> (*a*) the children are not "donees" within the meaning of the said Section;
>
> (*b*) the assignment of the said proceeds for the benefit of the children was made for valuable consideration moving to the deceased;
>
> (*c*) the policies of insurance were kept up by the deceased for his own benefit pursuant to an obligation imposed on him by law and were not therefore kept up for the benefit of an existing or future donee;
>
> (*d*) the children did not and will not receive any money under a policy of insurance. All proceeds of the aforesaid policies of insurance were payable to Trustees.

A careful and protracted probing of this moot question leads the Court to believe that one section only of the Act, more precisely Section 3 (1) and its s-s (*h*) should provide the required solution. The latter text enacts that:

> 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:—
>
> . . .
>
> (*h*) money received or receivable under a policy of insurance effected by any person on his life, or effected on his life by a personal corporation, whether or not such insurance is payable to or in favour of a preferred beneficiary within the meaning of any statute of any province relating to insurance, where the policy is wholly kept up by him or by such personal corporation for the benefit of any existing or future donee, whether nominee or assignee, or for any person who may become a donee, or a part of such money in proportion to the premiums paid by him or by such personal corporation where the policy is partially kept up by him or by such personal corporation for such benefit.

The doctrine of the stringent word for word applicability of fiscal statutes is so well known as to defy repetition. Conformably then to these dictates of the law, and since the text above clearly foresees something in the nature of a gift or donation, let us look into the transaction and inquire whether or not it evinces the distinguishing traits of benevolence, free and spontaneous. In order to do this, one must step back many years to 1930, when Mrs. Lily Wurtele, reproaching her husband with grievous moral delinquencies, sued him for alimony (cf. exhibit 4), and set up her own establishment after recovery of a consent judgment before the Supreme Court of Ontario (cf. exhibit 1). When this conjugal rift occurred, Mrs. Wurtele, according to an averment found in the opening paragraph of exhibit 3, had been previously designated as the beneficiary of the seven insurance policies taken out by her husband on his life. We have seen, *supra*, the essential changes effected regarding those policies and that for "...*valuable consideration* the Insured and the Party of the Second Part agree that the proceeds of the said policies shall be held by the Trustee and they (the estranged couple) hereby irrevocably direct the Trustee to hold the said proceeds when received by it on the following trusts", etc.

Unquestionably we are confronted, in this bickering separation deal, with an arms' length transaction, if ever there was one, wherein nothing was given, but everything contentiously liquidated in the bitter atmosphere of matrimonial wreckage. Alarmed, and justifiably so, at the possible loss of her rights as original beneficiary, not to mention her children's expectations, Mrs. Wurtele bartered those rights against a $20,000 payment upon the Insured's demise, the receipt during her lifetime of the net annual income derived from the remainder or Trust Estate, then, as a devoted mother, she *stipulated* the devolution to her son and daughter, at her death, of the Trust Estate accruing from the insurance fund. A tacit renunciation to ulterior benefits of her husband's property, beyond the terms of the deed (exhibit 3), was another "valuable consideration" paid out, if I may say so, by Mrs. Wurtele. This understanding of the prompting motives and circumstances of the separation agreement, although unwritten, is clear to anyone possessed of professional experience in that melancholy order of things. Moreover, Charles Wurtele

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contracted the formal obligation of keeping in force the insurance policies, waived all possibility of their surrender or of any substitution of beneficiaries, which expression designates the Trusteeship set up in the transactional covenant exhibit 3.

Also, it will be remembered that this same man reserved a borrowing power of $30,000 for his company, Goderich Salt, "on the security of said policies". In the light of each and every pertinent fact it can hardly be held that the insured's children will truly receive "under a policy of insurance effected by any person on his life...since their right to the Trust Estate arose in 1938, nineteen years before the father's death, and will materialize only when their mother passes on. And it can no more be successfully argued that these policies were *wholly kept up* by Wurtele "for the benefit of any existing or future donee". Here again this condition is defeated by the retention of a borrowing provision and other above mentioned dealings.

I would therefore admit as sound the Appellant's submission that "...the policies were kept up by the wife, by Mrs. Wurtele..." who might have legal recourse for the enforcement of her husband's categorical promises, which from June 29, 1938, he was powerless to alter, vary or revoke.

The definitions attempted by authoritative lexicons do not tally with the word "donee" of subsection (*h*) of section 3(1), nor with the notion of "gift" thereby conveyed. In the Shorter Oxford Dictionary "donee" is defined as:

"One to whom anything is given especially in law", and further down: "One to whom anything is given gratuitously".

Jowett's Dictionary of English Law suggests this definition of "donee":

"One to whom a *gift* is made".

Next, the Shorter Oxford Dictionary in turn defines "gift" as:

"A transfer of property in a thing *voluntarily and without any valuable consideration*".

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Black's Law Dictionary, 4th ed. 1951, lends additional emphasis on the voluntary and gratuitous characteristics of a gift, I quote:

Gift: "A voluntary transfer of personal property without consideration. A parting by owner with property *without pecuniary consideration. A voluntary conveyance* of land, or *transfer of goods,* from one person to another, *made gratuitously,* and not upon any consideration of blood or money".

In the Court's view none of these essential factors qualify the *ab irato* separation settlement reached by the quarrelling couple.

Several English precedents were cited, mainly by Appellant's counsel, among which that of *D'Avigor-Goldsmid v. Inland Revenue Commissioners*[1] offers some worthwhile similitude. The reported facts read as hereunder:

> By a marriage settlement, made in 1907, a settlor settled a policy on his life for 30,000 £ with profits, dated May 3, 1904. On June 10, 1930, a resettlement of the policy was made by the settlor and his eldest son under joint powers of appointment. On November 10, 1934, the settlor and the son, under a joint power of appointment conferred by the resettlement, appointed the policy and other settled property, known as No. 27 Wood Street, London, to the son absolutely. From the date of that appointment the premiums previously paid by the deceased were paid by the son, but to the extent of the income from No. 27 Wood Street, premiums so paid were by s. 30 of the Finance Act, 1939, attributed to the deceased. The settlor died in 1940, and the son received under the policy the sum of 48,765 £. The Estate Duty Office claimed to be entitled to charge duty, alternatively under paras. (*c*) and (*d*) of s. 2, subs-s. 1 of the Finance Act, 1894, and a summons was taken out by the son to have determined whether estate duty was payable as claimed by the Inland Revenue Commissioners.

The judgment of the Court was read by Evershed, Master of Rolls, who, *inter alia,* said that:

> . . . In this court Mr. Tucker sought to sustain the judgment of Vaisey, J., on this part of the case, by taking a point not taken in the court below, namely, that, assuming in favour of the Crown that the plaintiff's right to the policy moneys was referable to the settlement of 1907, nevertheless he was not a "donee" within the relevant paragraph of the section, since the settlement was made on the marriage of the deceased, and the plaintiff as a child of such marriage, was within the marriage consideration; and this point became the main issue on the claim to charge under s. 2, sub-s. 1 (*c*). As we have stated, it appeared possible that the argument for the view that the settlement of 1907 had been superseded by the resettlement of 1930 might be adopted by Mr. Upjohn as an alternative to his main submission; since on that hypothesis he could say that the relevant disposition, being post-nuptial, was without

[1] [1951] L.R., Ch. D. 1038 at 1039, 1052.

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consideration. But Mr. Upjohn expressly disclaimed the argument and was content that his claim under s. 2, sub-s. 1(*c*) should stand or fall on the basis that the plaintiff's right to the policy moneys was referable to the settlement of 1907. The issue being so defined, we have come to the conclusion . . . that Mr. Tucker's new argument is well founded and should defeat the claim to charge under s. 2, sub-s. 1(*c*).

The explanation follows that:

> Marriage settlements, no less than marriage articles, have always been treated as made for good consideration so that not only the spouses but also the issue of the marriage (as being within the "marriage consideration") can enforce them.

Needless to say an abyss yawns between a marriage contract and a separation settlement, but this long quotation stresses the impossibility of a donation or gift ever flowing from a transactional covenant for *valuable consideration.* In a marriage settlement such good or valuable consideration enjoys the irrebuttable presumption of the law; elsewhere it must be proved as in the instance at bar.

In order to complete this exhaustive perusal, I might point out the irrelevancy of s. 3(1), sub-s. (*f*) concerned merely, and such is not the case actually, with:

> (*f*) Property passing to a beneficiary upon or in consequence of *the death of the deceased* . . . .

The property involved here will pass on to the Wurtele children from the Trust Estate on the death of their mother.

Sub-section (*g*) is also of no relevancy as the insurance moneys cannot adequately be likened to "any annuity or other interest purchased or provided by the deceased...".

For the reasons outlined this Court doth adjudge and decide:

1) That, in the present phase of the case, it has no jurisdiction to make any pronouncement in relation with paragraph (*b*), article 15 of the Appellants' claim;
2) that the Appellants' appeal on the remainder should be allowed, and the value of the said estate for succession duty purposes be reduced by the sum of $49,062.67, as claimed in paragraph (*a*) of article 15.

The Appellants will recover their taxable costs.

Judgment accordingly.