1947

June 2
Sept. 3

BETWEEN:

WENDELL THOMAS FITZGERALD, Administrator with the will annexed of the Estate of GEORGE V. STEED, deceased, ... } APPELLANT,

AND

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

AND BETWEEN:

WENDELL THOMAS FITZGERALD, Administrator with the will annexed of the Estate of JAMES KENNETH RAEBURN, deceased ..... } APPELLANT,

AND

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

AND BETWEEN:

WALTER WILLIAM WALSH, on his own behalf, and as sole surviving Executor of the will of KATHERINE WYLIE WILLIAMS, deceased, and as administrator with the will annexed, de bonis non, of the Estate of BONNIE I. R. STEED, deceased, ... } CLAIMANT,

AND

HIS MAJESTY THE KING, ... RESPONDENT,

AND

WENDELL THOMAS FITZGERALD, Administrator with the will annexed, of the Estate of GEORGE V. STEED, deceased, and Administrator with the will annexed of the Estate of JAMES KENNETH RAEBURN, deceased, and the OFFICIAL ADMINISTRATOR of the County of Vancouver, in the Province of British Columbia ..... } INTERVENANTS

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

Revenue—Succession Duties—Dominion Succession Duty Act, 4-5 Geo. VI, c. 14, ss. 6 (b), 2 (m) (k)—"Property" a chose in action—Situs of chose in action—Unadministered residuary legacy is a chose in action and its situs is where the claim to it is enforceable—Chose in action recoverable in California is not property in Canada—No succession of property in Canada within the meaning of s. 6 (b) of the Dominion Succession Duty Act—Appeals allowed.

W. domiciled in the Province of British Columbia, Canada, by his will bequeathed to his wife "the sum of one hundred and fifty thousand dollars or one-half of my estate whichever may be the larger sum". W. died in Vancouver, British Columbia, on September 3, 1921, leaving a net estate of $125,807.37. His widow, also domiciled in British Columbia, died on July 15, 1924, and by her will bequeathed "the rest and residue of my property, both real and personal, to Bonnie S.", domiciled in California, U.S.A. who by her will left her property to her husband George S. domiciled in California. He died August 16, 1944, and left his estate to his nephew R., also domiciled in California. R. died in 1944 leaving portions of the estate bequeathed by George S. to members of his family. The estate of W. in Vancouver, British Columbia, consisted chiefly of real property and the distribution of the gift to his widow was dependent upon the sale of this realty which did not take place until November 5, 1945, when the sum of $250,000 was realized therefrom. The appellant Fitzgerald is the administrator with will annexed of Bonnie S. and by virtue of Power of Attorney from him the claimant Walsh was appointed ancillary administrator of the estate of Bonnie S. in British Columbia. He is also the sole surviving executor of the will of W.'s widow. The administrator of the estates of Bonnie S., George S. and R. is domiciled in the State of California. The Minister of National Revenue assessed duties on the succession to R. and on the succession from R. to his family. The administrator appealed to this Court.

Held: That a proprietary interest in an estate not fully administered is a chose in action situated where the claim to it is naturally and properly enforceable against the executors, administrators or trustees concerned.

2. That as the executors of the will of Bonnie S. could only be sued in California the money from the sale of real property in Canada deposited in a bank in Canada is not taxable under s. 6 (b) of the Dominion Succession Duty Act because there was not a succession of property in Canada.

APPEALS under the provisions of the Dominion Succession Duty Act.

The appeals were heard before the Honourable Mr. Justice O'Connor at Toronto.

C. F. H. Carson, K.C. and *Allen R. Finlay* for Claimant;

E. G. Gowling, K.C. for Appellant Intervenant;

J. W. Pickup, K.C. and *J. J. Connolly* for Respondent.

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

O'CONNOR J. now (September 3, 1947) delivered the following judgment:

These are appeals from assessments made under the Dominion Succession Duty Act 1940-41, Statutes of Canada, c. 14, in the estate of George V. Steed, deceased, and the estate of James Kenneth Raeburn, deceased. The same question arises in the two appeals and in the proceedings in which W. W. Walsh is the claimant, His Majesty the King respondent, and W. T. Fitzgerald as intervenant and all proceedings were consolidated.

The question is whether, in the George Steed estate, the succession of James Kenneth Raeburn deceased, under the will of George V. Steed is dutiable under the Dominion Act and in the James Kenneth Raeburn estate, whether the successions of Nan Raeburn, Thomas W. Raeburn, Elizabeth Ellen and William Raeburn, under the will of James Kenneth Raeburn, are dutiable under the Dominion Act.

The Dominion Act came into force on the 14th June, 1941.

The determination of the question depends on whether there was a succession of property within the Dominion of Canada under Section 6 (*b*) of the Dominion Act.

It was agreed by counsel that if there is a liability for duty the amount of duty will be determined later.

The facts are not in dispute and are set out in the first forty pages of the record of the trial.

They are summarized as follows:—

Adolphus Williams was domiciled in British Columbia. His will was dated 15th January, 1919, and he made two codicils, one 12th May, 1919, and one on the 18th March, 1920. He appointed his wife, Katherine Wylie Williams, and Walter William Walsh the executors and trustees of his will and directed payment of debts. He bequeathed to his wife his personal goods, house, life insurance policies and, in addition:—

I further bequeath to my wife the sum of one hundred and fifty thousand dollars, or one-half of my estate, whichever may be the larger sum, to be paid to her by my trustees as hereinafter mentioned, free of

1947

FITZGERALD
v.
MINISTER OF
NATIONAL
REVENUE

O'Connor J.

succession duty: and I direct that the bequest to my wife shall be the first and prior charge on my estate and shall not be subject to any abatement whatsoever.

Then follow two pecuniary bequests.

All real and personal estate not otherwise disposed of is devised to his trustees. He directs that the trustees shall sell and convert into money, and out of the money to pay the debts, the bequests under the will and codicils and the amount to his wife. And the sale fund, which became a trust fund, was to be divided into ten equal parts to be given to different relatives.

He postponed conversion and authorized the executors, if they agreed, to convey to his wife real estate in satisfaction of his bequest, if she so requested, and, if in her interest so to do, as a desirable investment for her.

By the first codicil he added another executor and by the second he directed his trustees "to pay to my said wife, in equal consecutive monthly instalments" to commence immediately after his death, interest at 5% per annum on the above mentioned legacy, or such portion thereof as shall from time to time remain unpaid. He directed that the interest payable to his wife, as well as the legacy, shall be a first charge on his estate and shall not be subject to any abatement whatsoever.

Mr. Williams died in Vancouver on the 3rd September, 1921. Letters probate were issued on the 25th October, 1921, and according to the inventory the estate included part of the Castle Hotel situated on Lots 11 and 12, Block 53 D.L. 541 in the city of Vancouver, valued at that time at $175,000, and other assets. The total assets were valued at $267,508.46 and the liabilities totalled $141,701.09: leaving a net estate of $125,807.37.

Katherine Wylie Williams was domiciled in British Columbia. She died on the 9th April, 1924. She executed a will on 15th July, 1922, which was proved on 27th June, 1924. By her will she directed payment of her debts and made a bequest of $5,000 to John Walter Walsh, and the "rest and residue of my property, both real and personal" was given to her sister, Isabella Steed, known as Bonnie Steed. By a codicil dated the 2nd November, 1923, she

revoked the legacy to John Walter Walsh. The inventory sworn on the 19th June, 1924 includes the following item:—

Legacy $150,000 with accrued interest amounting to $7,577.16 and life insurance moneys used by the executors of Adolphus Williams Estate amounting to $6,250, plus share of executor's fees owed by Adolphus Williams Estate $201.35. All dependent for payment upon the value of the assets of the Adolphus Williams Estate. (For details of accounts of Adolphus Williams Estate as at 9th April, 1924, see attached schedules.) $129,763.25.

Then on the list attached the assets are valued as at 9th April, 1924, at $256,415.97, and liabilities of $126,652.72, leaving the net at $129,763.25. That figure of $129,763.25 is not the value of the legacy but merely the net value of the estate of Adolphus Williams. The value of the legacy could not be ascertained until the hotel had been sold because until then it could not be determined whether Katherine Wylie Williams' estate would get $150,000 or half the value of the estate.

Mr. Walsh is the survivor of the two executors named in the will.

Bonnie Steed was domiciled in California and died at Los Angeles on the 10th January, 1941. She made a will on the 8th December, 1924, leaving her property to her husband, George V. Steed, and naming him executor. Letters Probate (Exhibit 7) were granted in British Columbia to the executor limited to the estate in British Columbia. Exhibit 7 is described as Ancillary Letters Probate, but this appears to be the first grant of probate of the will and limited to the assets in British Columbia. In the inventory of the Bonnie Steed estate (Exhibit 8) there is this memorandum:—

Re legacy from Adolphus Williams, deceased, to Katharine Wylie Williams, see Adolphus Williams Will Probate issued 9th November, 1921.

Said legacy bequeathed to Isabella Steed by Will of Katharine Wylie Williams. See Katharine Wylie Williams Will Probate issued 10th of February, 1925.

(Should be 27th June, 1944).

The unpaid balance of the said legacy at the 10th of January, 1941, the date of the death of Isabella Steed, was $141,717.03. The value of this legacy at the 10th of January, 1941, as far as can reasonably be calculated is $75,000. My calculation is based on the following facts:

1. The present assets of the estate, all real estate are assessed by the City of Vancouver Assessor at $180,160

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

O'Connor J.

2. There is a mortgage on the Castle Hotel one of the assets, in favour of the North British and Mercantile Insurance Company Limited (Royal Trust Co. agents) for ..... $ 46,000
Leaving a balance of 134,160

It is obvious that the present balance of the legacy, namely $141,717.03, cannot be paid in full and further I am informed and verily believe that owing to the War and present real estate conditions in British Columbia it would be impossible to find cash purchasers for the real estate.

3. Even if purchasers could be found on terms of small cash payments and long deferred yearly instalments which is doubtful, the payments would be so long deferred that sales of these deferred payments would have to be made at heavy discounts, if sales could be made at all.

4. The legacy is subject to the mortgage for $46,000 in favour of the North British & Mercantile Insurance Company and consequently is a second charge on the estate, and securities by way of second charges such as this legacy are subject to heavy discounts in all markets even under normal conditions and in normal times.

5. The fact that I live in the United States compels me to accept heavy exchange deductions on all payments to be received by me and the further fact of severe War time Canadian currency regulations and restrictions seriously limits the transmission of funds to me.

(Sgd.) George V. Steed.

This memorandum shows that the value of the legacy as at the 10th January, 1941, "so far as can reasonably be calculated is $75,000." The legacy is, of course, from Katherine Wylie Williams, and the executor George V. Steed, placed a value on something that was coming to Bonnie Steed from the Katherine Wylie Williams estate, but which had not yet come.

The executor, George V. Steed, who was domiciled in California died in California on the 16th August, 1944.

The Castle Hotel in Vancouver was sold for $250,000 on the 5th November, 1945.

On the 11th January, 1946, letters of administration, with the will annexed of Bonnie Steed, were granted by an Order of the Superior Court of California, appointing W. T. Fitzgerald as administrator. The Order (part of Exhibit 7) recites in part:—

Isabella Steed, who was also known as Bonnie I. R. Steed, died on January 10, 1941, and, at the time of her death was a resident of the City and County of San Francisco, State of California, and left certain property therein, to wit: Personal property of a value in excess of Ten Thousand Dollars ($10,000).

Said decedent left a will in writing dated December 8, 1924. After the death of said decendent, such proceedings were had and taken in and by the Supreme Court of British Columbia in probate that on April 1, 1941 said will was admitted to probate in said Court as and for the last will and testament of said decedent, and George V. Steed, who was named in said will to be executor thereof, was appointed as executor

thereof by said Court in British Columbia. Said petitioner has filed herein a copy of said will and of the order or decree admitting it to probate as aforesaid, duly authenticated.

Said George V. Steed died on August 16, 1944, leaving a last will and testament which has heretofore been admitted to probate in this Court and of which estate petitioner herein has heretofore been appointed and is now the duly appointed, qualified and acting administrator with the will annexed thereof.

Under the said last will and testament of said Isabella Steed all of her personal property, of whatsoever kind and wherever situated, was given, devised and bequeathed to said George V. Steed, and under the will of said George V. Steed all of his property, including all the property belonging to said Isabella Steed in her estate, are given, devised and bequeathed to one James Kenneth Raeburn.

Said James Kenneth Raeburn died during the month of December, 1944, from wounds received in battle against the Japanese. Said James Kenneth Raeburn left a last will and testament, dated October 11, 1944, which said will has heretofore been admitted to probate in and by the above styled Court, and petitioner herein has been appointed to be administrator with the will annexed of the estate of said James Kenneth Raeburn, deceased.

.....

Wherefore, by reason of the law and findings aforesaid, it is Ordered, Adjudged and Decreed:

1.....

2. That the document dated December 8, 1924, heretofore admitted to probate by the Supreme Court of British Columbia as the last will of said decedent, a duly authenticated copy of which has heretofore been filed herein, be and the same is hereby admitted to probate herein as and for the last will and testament of said decedent.

3. That said petitioner W. T. Fitzgerald, whose full legal name is Wendell Thomas Fitzgerald, be and he is hereby appointed Administrator with the will annexed of the estate of said decedent.

4. .....

On the 21st January, 1946, W. T. Fitzgerald executed a Power of Attorney authorizing the appointment of Walter William Walsh as ancillary administrator in British Columbia of the estate of Bonnie Steed. On 6th February, 1946, Letters of Administration with the will annexed were granted to Walter William Walsh of all the unadministered estate within British Columbia.

Under the will of George V. Steed, dated 4th February, 1941, he appointed J. Kenneth Raeburn, a nephew of his wife, Bonnie Steed, to be the executor of his will with power to sell the property. The will provided:—

All my property of whatsoever kind and wherever situated I give, devise and bequeath to the said J. Kenneth Raeburn, nephew of my late wife, Bonnie I. R. Steed. I make this disposition of my property for the reason that all my property has come to me by inheritance from my said wife, and I feel it to be fitting and proper that this property be

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

O'Connor J.

left to a member of my wife's family. In addition, said J. Kenneth Raeburn has for many years last past been a loyal friend to me and to my late wife and at all times has enjoyed our greatest respect and affection. I make no provision for any member of my own family, feeling as I do that my property should revert to my wife's family, but I wish to assure my kindred that my failure to make provision for them does not indicate a lack of affection for them.

By an Order of the Court in California, dated 22nd December, 1944, (Exhibit 12) the will of George V. Steed was admitted to probate and Letters Testamentary were granted to the executor, J. Kenneth Raeburn. This was done without knowledge that J. Kenneth Raeburn had been killed in action in the Pacific on the 14th December, 1944.

By an Order of the Court in California, dated 12th March, 1945, in the George V. Steed estate, Letters of Administration with will annexed were granted and W. T. Fitzgerald appointed administrator.

James Kenneth Raeburn was domiciled in California. The Court in California on the 28th November, 1945, granted Letters of Administration with will annexed and appointed W. T. Fitzgerald administrator.

The will of James Kenneth Raeburn is dated October 11, 1944, and takes the form of a letter addressed to his sister, Nan Raeburn, and includes a letter written by George V. Steed to him dated 4th February, 1941, and is as follows:

My dear Kenneth: I have today made my Will, leaving all my property to you. It is my desire, however, that after you have received the net sum of $50,000 (exclusive of any interest received by you from the estate of Adolphus Williams (deceased)) and after the payment of all expenses of administration and death taxes, you should distribute the balance of my property, if any, in the following proportions to the following named persons:

Then follows a list of the names in proportions which added up to 94/100.

The letter from J. Kenneth Raeburn to his sister is as follows:—

Dear Nan: Since inheriting Uncle George's estate, I have been giving quite a bit of thought to the possibilities of the days ahead and decided to write to you on the subject of my Will.

To you, Nan Raeburn, I leave one-half of the afore-mentioned estate inherited by me from the late George V. Steed, my insurance policy and any cash left in my account with the California Bank, North Hollywood, California.

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

O'Connor J.

To my father, Thomas W. Raeburn, I leave one-sixth of the said Estate left to me by my Uncle George V. Steed.

To my sister, Elizabeth W. R. Allan, I leave one-sixth of the said Estate left to me by my Uncle George V. Steed.

To my brother, William J. M. Raeburn, I leave one-sixth of the said estate left to me by my Uncle George V. Steed.

These three-sixths mentioned above comprise one-half of the estate left to me by my Uncle George V. Steed.

In addition to this, I bequest that the instructions left to me in a letter now in the hands of the law firm of Morrison, Hohfeld, Foerster, Shuman and Clark of San Francisco, California, by the late George V. Steed be carried out as he desired.

Correspondence exchanged between the solicitors (Exhibit 14) disclosed in part:—

Following the death of Adolphus Williams the Executors proceeded to administer the estate which consisted, for the main part, of real estate and as the latter was being held by the Executors to obtain a more satisfactory price there were insufficient liquid assets to pay the pecuniary legatees provided for in the Will. It was not, therefore, until 1928 that the consent of the main pecuniary legatee having been obtained, the three minor pecuniary legatees were paid.

On the 10th of August in that year, the legacy to the testator's niece, Mattie Martindale, was paid in the sum of $3,247.85, representing principal of $2,500 and accrued interest. The same facts apply in the case of the legacy to the testator's god-daughter, Hoddie Jackson, being a legacy of a similar amount. The sum of $1,295 was paid to the testator's god-son, Eddie Godfrey, being principal of $1,000 and accrued interest.

Mrs. Williams, the pecuniary legatee mentioned in the Will for $150,000, received no payment of principal during her lifetime but was paid various payments on account of interest accruing on the said legacy. After her death, in 1924, payments were continued to be made into her estate, and thence from time to time distributed to her sister, Mrs. Steed, who is the sole beneficiary of her estate. This practice continued until September 1930 and thereafter payments were made direct to Mrs. Steed by the executors of the Adolphus Williams estate. Mr. Walsh, one of the executors, has informed the writer that the reason that the practice was changed was to save expense and costs of remuneration by paying the money through one estate instead of two. On Mrs. Steed's death, in 1941, payments were made into her estate until September 1943 when the payments were made direct to George V. Steed, the sole beneficiary of his wife's estate, the same reason applying, namely, the payment through one estate instead of through three. No payments whatsoever have been made since the death of George V. Steed as a personal representative was not appointed until some time after his death and there were still insufficient liquid assets in the Adolphus Williams estate to pay the amount of the pecuniary legatee.

We are now in the process of winding up the estate of Adolphus Williams by distributing the residuary estate to the legatees entitled. Two interim distributions have already been made to these legatees on account, as shown on the enclosed excerpt from the final accounts which we are preparing. There are certain minor adjustments to be made

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

O'Connor J.

in the estate as between the pecuniary legatee and the residuary legatee but we hope to distribute shortly to the latter a further $36,000 in the same proportions as set out in the excerpt. As soon as the pending litigation over the Succession Duties has been settled, the executor of the Katherine Wylie Williams estate will distribute the residue of that estate.

With regard to the question of distribution of the Katherine Wylie Williams estate, the whole of her estate was left to her sister, Isabella Steed, and as mentioned above, payments were made into her estate from time to time on account of principal and interest on the legacy and was distributed thereout to Mrs. Steed until September 1930. At that time the account was closed in her estate and payments made direct to Mrs. Steed from the Adolphus Williams estate. On the 5th of November 1945, however, when funds became available for the payment of the pecuniary legacy and interest, the full amount was paid into the estate of Katherine Wylie Williams and a special trust account was opened in the Royal Bank of Canada, Vancouver Branch, in Mr. Walsh's name in trust and the funds deposited therein where they still remain.

It was agreed by counsel that the statement, "the full amount was paid in to the estate of Katherine Wylie Williams", meant that in the books of Walsh, Houser & Company this amount had been credited to the Katherine Wylie Williams estate and charged to the Adolphus Williams estate.

The correspondence states that no payments have been made since the death of George Steed and that:—

With reference to the distribution in the Bonnie I. R. Steed Estate, payments of principal and interest on the pecuniary legacy were made directly from the Adolphus Williams estate into her estate and from time to time distributions were made therefrom to Mr. George V. Steed, her sole executor and beneficiary. As mentioned above, from and after September 1943 payments were made direct to George V. Steed by the Adolphus Williams estate. It should be noted in this regard, however, that Mr. Steed had taken out an Ancillary Grant of Letters Probate to his wife's estate in British Columbia.

Enclosed with the correspondence and forming part of Exhibit 14 is an excerpt from a letter from the appellant, Fitzgerald, as follows:—

In the Raeburn Estate I have not attempted to file an inventory and appraisement as is our usual procedure because of the fact that it has heretofore been impossible to determine the value of the Raeburn estate's interest in the estate of George V. Steed. Apart from that interest the only asset which he had was a small bank account amounting to $351.96 with the North Hollywood Branch of the California Bank.

You will note that in the Steed inventory on page 4 mention is made of the Adolphus Williams legacy, but when the inventory was made and filed it was not yet known by me that Mr. Walsh had distributed the Williams property and was in a position to pay the legacy. The letter from Mr. Walsh conveying this news to me was dated November 20, 1945, which was some days after the inventory had been filed.

Needless to say, the statement in the inventory that I did not expect that payment to me in these proceedings was based upon the assumption that the Williams property would not be sold, and that consequently there would be no payment to me, however after I was apprised of the availability of the money it became my legal duty to attempt to reduce it to my possession, if that is possible.

With regard to the statement of distribution, here again I can furnish no court document for the simple reason that no distribution has been made either in the estate of George V. Steed or in the estate of James Kenneth Raeburn. When distribution takes place the estate of Isabella Steed will be distributed to the estate of George V. Steed which in turn will be distributed to the estate of James Kenneth Raeburn, and that estate in turn will be distributed to the legatees and devisees named in the will of James Kenneth Raeburn and the letter which was admitted to probate as a part of the will from George V. Steed to James Kenneth Raeburn.

In short the proceedings looking toward the distribution of the three estates here have come to a halt until I know what assets will be available from Canada to the estate of Isabella Steed.

After the hotel was sold Mr. Walsh moved for the advice and direction of the Court in British Columbia, and notice was given to the Dominion Succession Duties authorities and to the Provincial Succession Duties authorities and they both appeared on the motion. Mr. Justice Manson on the return of the motion made an Order authorizing the administrator, Mr. Walsh, to pay the moneys in question to Mr. Fitzgerald, the California domiciliary administrator and authorized the main branch of the Royal Bank of Canada holding the funds to permit the transfer. The respondent applied for and obtained a Writ of Extent and Mr. Walsh undertook to hold the moneys until the matter had been settled.

After the issue of the Writ of Extent, Mr. Walsh filed a Plea claiming in his capacity as sole surviving executor of the Katherine Wylie Williams estate and as administrator with will annexed of Bonnie Steed estate for a declaration that the sum of $159,347.33 forms part of the residue of the estate of Katherine Wylie Williams, deceased, or in the alternative for a declaration that the said sum forms part of the residue of the estate of Bonnie Steed, deceased, within the Province of British Columbia, and that it is held by the claimant in trust as administrator with will annexed de bonis non of the said estate limited to the assets thereof within the Province of British Columbia and for a declaration that this sum is not subject to taxation under the Dominion Act.

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

O'Connor J.

Notice of assessment dated the 23rd March, 1946, was sent to W. T. Fitzgerald, administrator of the estate of George V. Steed that duty of $21,204.91 was assessed upon the succession of James Kenneth Raeburn derived from George V. Steed, valued at $155,347.33.

On this notice is this statement:—

The property in this succession consists of money on deposit with the main branch of the Royal Bank of Canada at Vancouver, British Columbia, Canada, standing in the name of Walter William Walsh in trust.

Notice of assessment dated the 29th March, 1946, was sent to W. T. Fitzgerald, administrator of the estate of James Kenneth Raeburn that duties were assessed upon the succession valued at $141,205.29 derived from James Kenneth Raeburn, of Nan Raeburn, Thomas W. Raeburn, Elizabeth W. R. Allan and William J. M. Raeburn in the various amounts set out.

From both assessments Mr. Fitzgerald appealed.

An Order was made consolidating the proceedings that arose on the issue of the Writ of Extent and the filing of the Plea by Mr. Walsh with the appeals from the assessments in the George V. Steed estate and in the James Kenneth Raeburn estate.

Under the Dominion Act duties on successions are imposed by section 6.

6. Subject to the exemptions mentioned in section seven of this Act, there shall be assessed, levied and paid at the rates provided for in this the First Schedule to this Act, duties upon or in respect of the following successions, that is to say,—

Both George Steed and James Kenneth Raeburn were domiciled in California. The relevant subsection is, therefore:—

(*b*) Where the deceased was at the time of his death domiciled outside of Canada, upon or in respect of the succession to all property situated in Canada.

Succession is defined by Section—

2 (*m*). "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, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitute limitation, and every devolution.....

"Deceased person" is defined by Section 2 (*d*) to mean a person dying after the coming into force of the Act.

Bonnie Steed died before the Act came into force but George Steed and James Kenneth Raeburn died after the Act came into force.

Property is defined by Section—

2 (*k*). "Property" includes property, real or personal, movable or immovable, of every description, and every estate and interest therein or income therefrom capable of being devised or bequeathed by will or of passing on the death and.....

The tax, if any, accrued at the death of George Steed so that all matters in relation to the taxation are to be determined by the facts then existing. Quigg on Succession Duties 2nd., p. 66.

The character and local situation of an asset in George Steed's estate, is not as to duty arising on his death, affected by the realization of the assets in the Adolphus Williams' estate made subsequent to the death of George Steed.

At the death of George Steed the facts then existing were:—

1. Adolphus Williams' estate was in the process of administration. The Castle Hotel had not been sold. It was not known then whether the executors of Katherine Wylie Williams would receive $150,000 or a larger sum or a lesser sum. Until there had been a realization of the assets the amount could not be determined. Even after the sale there remained the payment of the balance of the executors' fees which had been fixed and then the payment of the legacy to Katherine Wylie Williams.

2. In the Katherine Wylie Williams' estate the administration could not proceed until the legacy had been received from the executors of Adolphus Williams' estate. After this had been received the fees of the executors would have to be fixed and deducted and payment of the balance made to the executor of Bonnie Steed estate.

3. The estate of Bonnie Steed was not capable of administration until her executor received everything coming to her under the will of Katherine Wylie Williams. When this happened the fee of the executor would be fixed and deducted and then and not until then, could the administration be completed and the amount to which the estate of George Steed was entitled be ascertained.

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

O'Connor J.

While there was a charge in favour of Mrs. Williams on all the assets of the estate of Adolphus Williams, there was, however, no charge on the assets of Bonnie Steed's estate. The administration of the George Steed estate depended on all these things and so did the estate of James Kenneth Raeburn plus the administration of George Steed's estate.

Bonnie Steed, George Steed and James Kenneth Raeburn were all domiciled in California and their estates are being administered in California.

The question then is, in the circumstances here, what was the claim of George Steed in the estate of Bonnie Steed and is the situs of that claim British Columbia or California.

Because it is the succession of that claim from first, George Steed to James Kenneth Raeburn and, second from Raeburn to his heirs, that the respondent contends is dutiable under the Dominion Act.

In the circumstances here, the principle applicable to the case of a specific legacy is not applicable in this case; namely that assent of an executor to a specific legacy when once given relates back to the death of the testator and vests in the legatee the property in the specific legacy from that date.

Neither George Steed nor his administrator could claim the assets in the estate of Adolphus Williams in specie or for that matter the money in the Royal Bank of Canada.

Counsel agree that the "property" in question is a chose in action and that the situs of that chose in action was where it can be enforced. But they do not agree on what the chose in action is or where it can be enforced.

After carefully considering the argument of counsel and the authorities cited, I am of the opinion that the principles applicable here were those first laid down *In the Goods of Ewing* (1). In that case W. Ewing died possessed of property of small value in England and entitled under the will of his uncle, J. O. Ewing, to large assets in Scotland, which were being duly administered there. The executors of W. Ewing proved his will in Scotland only. G. W. Hope, a legatee under W. Ewing's will, applied for a grant of administration of the estate of W. Ewing in England and the Court refused the application.

(1) (1881) 6 P.D. 19.

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

O'Connor J.

The President, Sir James Hannen, said p. 22:—

It is not disputed that the deceased, J. O. Ewing, was a domiciled Scotchman, and that his will was properly proved in Scotland, and is being administered there in accordance with Scotch law. The claim of the executors of W. Ewing in respect of the interest of their testator under his uncle's (J. O. Ewing) will, is a claim on the executors of the uncle duly to administer his estate and to pay the legacy to W. Ewing out of the funds which may be applicable to that purpose. It cannot be disputed that this claim or interest in the estate of the uncle constitutes an asset of the estate of the deceased W. Ewing, because it is recoverable by the executors of W. Ewing *virtute officii,* but it appears to me that it is an asset in Scotland and not in England:

He points out that the Scotch confirmation has been produced in the principal registry in England and sealed with the seal of the Court so that it then has the like effect as if probate had been granted in England and adds, p. 23:—

.....but the place where the business of administering and winding up the estate of J. O. Ewing is being carried on is Scotland and any acts done in England by the executors of J. O. Ewing are only ancillary to the administration which is taking place in Scotland.

After pointing out that the analogies that lead to the conclusion that Scotland is the local situation of this asset of W. Ewing he states, p. 23:—

And the fact that some of the assets of J. O. Ewing were situate in England does not appear to make any difference. And if I were to constitute the applicant administrator with the will annexed of W. Ewing he could not in that character take possession of or recover the outstanding assets of the uncle's estate, he could not claim those assets themselves *virtute officii,* his only remedy would still be through and by means of his claim upon the executors of the uncle to have his estate duly administered.

In *Attorney-General* v. *Sudeley* (1), the testator who died domiciled in England bequeathed his estate to English executors directing them to pay legacies, and *inter alia,* a one-fourth share of his residuary real and personal estate to his wife absolutely. His estate included mortgages on real estate in New Zealand. The wife died before the testator's estate had been fully administered or the clear residue ascertained and no appropriation had been made to any share of the residue. It was held that she died possessed, not of a part of New Zealand mortgages in specie, but of a chose in action, i.e., to require her husband's executors

(1) (1897) A.C. 11.

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

O'Connor J.

to administer his estate and to receive from them one-fourth part of the clear residue and that this was an English asset of the wife's estate.

In *Sudeley case* in the Divisional Court (1), (Lord Russell of Killowen C.J., and Charles J.,) gave judgment in favour of Lord Sudeley. In the course of the judgment Lord Russell said that the claim of the Crown was mainly rested upon the authority of the case *in re Ewing.*

In the Court of Appeal (2), the appeal was allowed. The judgment of Lord Hannen in the Ewing case was approved by Lopes L.J., and Kay L.J., Lord Esher M. R., (dissenting) did not place the same interpretation on Lord Hannen's judgment and said that if that was the proper interpretation, it was contrary to all other authority.

On appeal to the *House of Lords,* the decision of the Court of Appeal was unanimously affirmed and the judgment of Lopes, L.J., was approved and adopted by Lord Halsbury and Lord Macnaghten.

Lopes L.J. (*supra*) said at p. 363:—

The material facts are as follows: Algernon Gray Tollemache by his will, after bequeathing various specific legacies, devised and bequeathed the residue of his real and personal estate to trustees to pay the income thereof in the events that have happened to his wife Frances Louisa for her life, and by a codicil he gave one-fourth of the entire residue to his wife absolutely. The husband died domiciled in England, and his will was duly proved in England. At the time of his death he was possessed of personal estate, including large sums invested on mortgage of real estate in New Zealand. While the estate under the will was in course of administration, and before the amount of the clear residue was ascertained, his wife Frances died, having by her will appointed the defendants her executors, who duly proved her will in England. At the date of her death the New Zealand mortgage securities remained unrealized, and no portion of them had been appropriated to any particular share of the ultimate residue.

It is to be observed that neither Frances nor her executors could claim any part of this estate in specie: the executors of her husband were not trustees of the estate for her—all she was entitled to was her proportion of the proceeds of her husband's estate after realization. Neither Frances nor her executors had any claim against the mortgagees to recover the mortgage debt or any portion of it; that was a claim enforceable only by the executors of Algernon. The right of the executors of Frances as against the executors of her husband is a right to have his estate administered. Administered where? The husband was domiciled in England, his will was proved in England, his executors are in England, and his estate is being administered in England, and the money recoverable will be brought to England. The executors of the

(1) (1895) 2 Q.B.D. 526. (2) (1896) 1 Q.B.D. 354.

husband can only be sued in the English Courts by the executors of Frances. It is an English chose in action, recoverable in England, and is, in my opinion, an English and not a foreign asset, and as such is subject to probate duty here. *In the Goods of Ewing, 6 P.D. 19* is in point —a case which I think is rightly decided.

The principle laid down in the *Sudeley* case (*supra*) was followed by Romer, J., in *Re Smyth* (1), and affirmed again in the House of Lords in *Dr. Barnardo's Homes* v. *Special Income Tax Commissioners* (2), and considered in *Skinner* v. *Attorney-General* (3).

In the *Sudeley* case (*supra*), Lord Herschell said that while it was unnecessary to say what would have been the case if the estate had been administered he certainly was very far from thinking, as at present advised, that it would have made any difference. Lord Shand suggested, p. 20, that the case might have been different if the whole estate had been held for one beneficiary. But as is pointed out in 2nd ed., Green on Death Duties, p. 589, this suggestion does not accord with the principles laid down in the majority judgment of Lopes, L.J., and Kay L.J., adopted in the House of Lords by Lord Halsbury and Lord Macnaghten.

In *Barnardo's Homes* v. *Special Income Tax Commissioners* (*supra*), Viscount Finlay said, p. 8:—

> It appears to me that the present case is really decided by the decision of this House in Lord Sudeley's case. It was pointed out in that case that the legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete.

Lord Atkinson at page 11 said:—

> .....on the erroneous assumption that a certain principle applicable to the case of a specific legacy applied to a bequest of the residue of a testator's estate—namely, that the assent of an executor to a specific legacy when once given relates back to the death of the testator and vests in the legatee the property in the specific legacy from that date. That principle has no application whatever and could not in the nature of things have any application whatever, to a legacy of the residue, which is, as its name indicates, only the property or fund which remains after all claims upon the testator's estate have been satisfied. The case of *Lord Sudeley* v. *Attorney-General*, (1897) A.C. 11, decided in this House conclusively established that until the claims against the testator's estate for debts, legacies, testamentary expenses etc., have been satisfied, the

(1) (1898) 1 Ch. D. 89.
(2) (1921) 2 A.C. 1.
(3) (1940) A.C. 350.

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

O'Connor J.

residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained.

In *Skinner* v. *Attorney-General* (*supra*), Lord Russel of Killowen in considering the *Sudeley* case (*supra*), said at p. 358:—

> They (the executors of the testator's widow) sought to establish that the widow, had a proprietary interest in, and was the owner of, a share of the mortgages, i.e., of property situate in New Zealand. They failed because the mortgages did not, nor did any share in them, constitute an asset of the widow's estate. The testator's estate had not been administered, nor had any appropriation to the widow's share been made. The whole point of the decision was that the widow did not own any part of the mortgages. As Lord Herschell pointed out in his speech Ibid. 18, the whole fallacy of the argument of the widow's executors rested on the assumption that she or they were entitled to any part of the mortgages as an asset—she in her own right or they as executors. "I do not think", he said "that they have any estate, right, title or interest, legal or equitable, in these New Zealand mortgages *so as to make them an asset of her estate*". My Lords, I emphasize the last ten words of that sentence, which show clearly that the interest which was being repudiated was a proprietary interest. The case is not in any way a decision that the widow or her executors had no interest in the mortgages, and it is certainly no authority against the view that an annuitant whose annuity is charged on the estate of a testator "has an interest" in the different items of which that estate from time to time consists.

In this case, the estates of Adolphus Williams, Katherine Wylie Williams and Bonnie Steed were all in the course of administration and the amount that the estate of Bonnie Steed would become entitled to could not be ascertained until the other estates had been fully administered.

In those circumstances, the statement of Lord Herschell is applicable here. In my opinion the administrator of George Steed had no estate, right, title or interest, legal or equitable in the assets of the estate of Adolphus Williams or in the money in the Royal Bank of Canada, that constituted an asset in the estate of George Steed, and therefore James Kenneth Raeburn did not become beneficially entitled to such an asset under George Steed's will on Steed's death.

While Lord Russel of Killowen in the *Skinner* case (*supra*), p. 358, said that the *Sudeley* case (*supra*) was not in any way a decision that the widow or her executors had no interest in the mortgages, he points out that the interest that was repudiated was a proprietary interest.

The proprietary interest which George Steed possessed in the Bonnie Steed estate is described in the 9th ed., (1946) Hanson's Death Duties, p. 105 as:—

> A proprietary interest in an estate not fully administered is a chose in action and situate where the claim to it is naturally and properly enforcible against the executors, administrators or trustees concerned.

As Lord Halsbury pointed out in the *Sudeley* case (*supra*) p. 15, that it is idle to use such phrases as "that this was what the person was 'entitled'—that she had an 'interest' in this estate". And that while those phrases are perfectly true in a general way of speaking, they are not applicable to the particular discussion. What the executors of the widow in that case had was a right as against the executors of her husband's estate to have his estate administered.

What the administrator of George Steed had in this case was a right as against the executors of the Bonnie Steed estate to have her estate administered. Both George Steed and Bonnie Steed were domiciled in California and both their estates are being administered in California.

The executors of the Bonnie Steed estate can only be sued in the California Courts by the executors of George Steed. It is, in my opinion, a California chose in action recoverable in California and is a California asset and not a British Columbia asset.

It is not, therefore, property in Canada.

Counsel for the respondent contends that administration of both the estates of George Steed and James Kenneth Raeburn must be taken out in British Columbia, so that the discharge can be given first to the administrator of the Bonnie Steed estate and then to a British Columbia administrator of the George Steed estate. I do not agree with that contention.

The duty of the ancillary administrator is to administer the assets under his control and he may safely, and in fact, be compelled to transmit the residue to the domiciliary administrator. *De la Viesca* v. *Lubbock* (1), approved and followed in *Eames* v. *Hacon* (2).

(1) (1840) 10 Sim. 629.

(2) (1881) 18 Ch. D. 347, 352.

1947

FITZGERALD v. MINISTER OF NATIONAL REVENUE

O'Connor J.

In a recent decision in *Re Miller's Agreement Uniacke* v. *Attorney-General* (1), Wynn-Parry, J., said that beneficially "entitled" in Section 2 of the Succession Duty Act, 1853, necessarily implied that the person entitled had a right to sue for and recover the property in question.

It is clear that James Kenneth Raeburn had no right to sue for and recover any property in Canada. If James Kenneth Raeburn had been appointed administrator with the will annexed of George Steed, in British Columbia, he could not in that character take possession of or recover the outstanding assets in the Bonnie Steed estate, his only remedy would still be through and by means of his claim upon the executors of the Bonnie Steed estate in California. Per Lord Hannen in the *Ewing* case (*supra*).

In my opinion the succession of James Kenneth Raeburn under the will of George Steed is not dutiable under the Dominion Act, because there was not a succession of property in Canada within the meaning of Section 6 (*b*) of the Dominion Act. For the same reason the succession of Nan Raeburn, Thomas W. Raeburn, Elizabeth Ellen and William Raeburn, under the will of James Kenneth Raeburn are not dutiable under the Dominion Act.

Both appeals will be allowed and the claimant is entitled to a declaration that the sum in the Royal Bank of Canada is not subject to taxation under the Dominion Act.

The appellant and the claimant are entitled to costs.

Judgment accordingly.

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(1) (1947) W. N. 194.