THE EFFECT OF A DIRECTION IN A WILL TO PAY SUCCESSION DUTIES

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With the entry of the federal Parliament into the succession-duty field and the gradual enlargement of provincial statutes to cover more and more "property", it is not unnatural to find an increased interest in the subject of succession duties. The purpose of this paper is to examine one aspect of the subject only, the effect of a direction in a will to pay succession duties. It is a field that, in the last five years, has produced cases out of numerical proportion to its apparent importance.

Wills have always been prolific "case-producers". A general principle with regard to them is that the court will seek to discover the testator's true intention; for this reason directions to pay succession duty, as with any other wish, must be carefully prepared to cover the exact devises and bequests the testator intends to relieve of duty. It is hoped that the following survey of the principles involved, with an indication of the cases where directions to pay have failed, will be of use to the conveyancer in preparing a will.

The two charging sections of the Manitoba Succession Duty Act are sections 8 and 10; the former taxing property passing and the latter taxing persons to whom passes personal property outside the Province. It is beyond the competency of a testator to relieve his beneficiaries from the statutory liability in respect of duty imposed by the statute. All a testator can do is to relieve them of the burden of the duty by providing a fund out of which it may be paid. The various attempts to do this that have come to the attention of the courts are my present concern.

It would seem advisable, before examining the cases, to look for a moment at the nature of succession duty, apart from its constitutional aspects and the question whether it is a direct or indirect tax. In *Re Anderson, Canada Permanent Trust Co.* v. *McAdam* Turgeon J.A. said:[1]

> The nature of a legacy duty, or a succession duty, and the effect of a provision granting a legacy free of such duty were set out succinctly, more than one hundred years ago, by Richards, L.C.B., in *Noel* v. *Henley* (1819), 7 Price 241, at p. 253, where he says:
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> 'The legacy duty is a charge upon the legacy, not upon the estate; but where the legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the same fund.'

[1] [1928] 4 D.L.R. 51, at p. 53.

The Manitoba Succession Duty Act has gone further than this; section 9 makes the duties payable a lien on all the property passing on death. However, in the first instance there is no doubt that the duty is a charge upon the actual property passing or upon the person to whom it passes.

Secondly, it should be noted that succession duty is not a debt or part of the testamentary expense. In *Re Bolster*[2] the testator by his will gave numerous specific legacies and then gave the residue of his estate to persons other than the specific legatees. He directed his executors to pay his just debts and funeral and testamentary expenses.

Street J. said:

> But, in my opinion, the Succession Duty Act does not come within the description either of a debt or a part of the testamentary expenses. It cannot be a debt of the testator, for it does not arise as a liability of the testator until after his death. It is not, in my opinion, a part of the testamentary expenses, because it is not payable upon the grant of probate.

Consequently, the usual direction in the will to pay debts and funeral and testamentary expenses is not sufficient to cover payment of succession duties.

Turning now to the necessary elements required to make a direction to pay succession duties effective, the first is, of course, that the will must disclose an intention on the part of the testator that the succession duties are to be paid. However, it has been held and is now definitely determined that a mere direction to pay the succession duty will not succeed because it is simply a direction to the executors to do what they are bound by law to do.

In the case of *Re Kennedy, Corbould* v. *Kennedy*[4] a testator, after giving certain specific and pecuniary legacies and life annuities and making a specific devise, declared that "all legacies, annuities and bequests" bequeathed by his will should be given and paid free of all "death duties".

Warrington L. J. said:

> . . . . I think the provisions of this clause as to payment of debts, legacies, and death duties do not affect the question one way or the other. They are merely administrative provisions telling the trustees to do what it would be their duty to do without such a provision. Moreover, such provisions as these cannot be complied with literally. There are many

[2] (1905), 10 O.L.R. 591.
[3] *Ibid.*, at p. 593.
[4] [1917] 1 Ch. 9.

> payments which in the nature of things cannot be made until after the investment of the proceeds of conversion has been carried out. It would, in my opinion, be wrong to give to the details of such provisions a determining effect on the beneficial interests conferred by the will.[5]

This decision was followed in the British Columbia case of *Re Dixon*,[6] in which the textatrix in her will appointed executors and trustees and then said;

> I direct my executors to pay from and out of my estate, as soon as may be convenient, all my just debts, funeral and testamentary expenses, as well as succession and probate duties (if any) which may be assessable or chargeable against any gift, devise, bequest or legacy herein provided for.

Then followed a number of bequests and devises and the will continued:

> Subject to the bequests of this my will heretofore made I direct my trustees to divide all the rest and residue of my estate, together with any devises or bequests that may lapse, equally among the Salvation Army, and the Crippled Children's Hospital Home. . . .

The court was asked whether the direction in the will amounted to a direction that the devise and bequest were to be made free of succession and probate duty. Robertson J. followed the *Kennedy* case and held that the devises and bequests were to bear their own duty.

These cases demonstrate the proposition that a direction only to pay the duty will not alone be held sufficient. What must the testator do in addition to ensure that his wish is carried out?

The case of *Re Reading*[7] is in point. There the Ontario High Court of Justice was asked to interpret a direction in a will to pay succession duty. The testator gave all his property to his executor upon trusts which were set out in separate paragraphs, each designated by a letter. The first was a specific bequest of chattels and the second a direction for the conversion of his estate into money. They were followed by this clause:

> (c). To pay my just debts funeral and testamentary expenses and all succession duties and inheritance and death taxes that may be payable in connection with any insurance or any gift or benefit given by me to any person either in my lifetime or by survivorship or by this my will or by any codicil hereto.

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[5] *Ibid.*, at p. 15.
[6] [1936] 1 D.L.R. 593.
[7] [1940] O.W.N. 9.

Then followed certain pecuniary legacies. Paragraph (l), which dealt with the residue, began:

> (l). To keep invested the remainder of my estate and to pay the net annual income derived therefrom to. . . .

A life interest with power to encroach on capital was given to a named legatee, and paragraph (m) finally disposed of what was left on termination of the life interest.

Kelly J. pointed out that succession duty was not a debt or a testamentary expense and a direction to pay these does not affect succession duty. He added, however, that in this case there was more than a simple direction to pay succession duty: "When the testator directed his executor to pay succession duties on 'any gift . . . to any person in my lifetime' he directed more than the performance of a statutory duty".[8] Since a gift *inter vivos* never vests in the executor, a direction to pay the succession duty on gifts *inter vivos* "is, therefore, a gift of the amount of the duty", which must be paid out of the funds of the estate.

The same reasoning applies to money payable under a policy of insurance or property given to some person by right of survivorship; these classes of property also never vest in the executor. Of them, Kelly J. said: "In all of those cases the testator's direction to pay duty is in fact a gift out of the funds of the estate of the amount of the duty to those persons by a statute liable to pay". He concluded:

> In the absence of anything in the will to show an intention to distinguish between beneficiaries in the matter of succession duties, and holding that the direction to pay in some cases clearly amounted to a gift, the testator by paragraph (c) [quoted above] sufficiently indicated his intention to make a gift of the amount necessary to pay succession duty to each of his legatees otherwise liable to pay. The executor should not deduct from any such legacy the amount of any duty payable in respect thereof.

This case shows the second element besides the simple direction to pay duty, namely that there must be an intention to make a gift of the duty out of a definite fund. I do not think, however, that the *Reading* case sufficiently emphasizes the importance of a fund to pay duties.

There is a Manitoba case which does emphasize the necessity of such a fund and it contains also a rather refreshing

[8] *Ibid.*, at 11.

judgment by Mr. Justice Adamson. It is *In Re the Will of Katherine Rebecca Johnston deceased.*[9] In her will, the late Mrs. Johnson directed:

> I direct all my just debts, funeral and testamentary expenses and succession duties to be paid and satisfied by my executors hereinafter named, as soon as conveniently may be after my decease.

The next paragraph was concerned with the appointment of an executor and trustee and then followed this direction:

> I give, devise and bequeath all my real estate of every kind and all my personal estate and effects whatsoever unto my Trustee and its successor, upon trust, that my Trustee shall sell, call in and convert into money the same or such part thereof as shall not consist of money and shall, with and out of the monies produced by such sale, calling in and conversion and with and out of my ready money, to pay my funeral and testamentary expenses and debts and succession duties and the legacies bequeathed as follows. . . .

The will continued: "My Trustee shall divide all of the residue of my said estate in two (2) equal shares and shall pay . . . ."

The trustee asked the court from which, if any, of the specific legacies given by the will it should deduct the amounts paid for legacy and probate duty.

Adamson J., after noting that the legacy duty was primarily payable by the legatee, continued:

> It is all very well for Courts and judges to refine about these matters; but we know very well that when a testator directs that his succession duties be paid out of the general body of his estate, he ordinarily intends the specific gifts and bequests will be free from that duty. And when a fund is set up and directions given as here, it seems clear. . . . In my view there is not the slightest doubt that when the testatrix said to pay succession duties and legacies, she never intended that the residue of the estate should recoup itself from each of the bequests for their *pro rata* share of the succession duties. The executors should not deduct the amounts paid for succession duties from any of the specific legacies.[10]

The learned judge also held that bequests made by codicil were likewise to go free of duty. However, as probate duty was not specifically mentioned in the will, he held that each legacy should bear its own probate duty.

He distinguished *Re Kennedy, supra, Re Blowey Estate,*[11] and *Re Dixon, supra,* on the ground that in these cases the duties were payable by the executor.

[9] (1941), 49 M.R. 148.
[10] *Ibid.*, at p. 150.
[11] (1936), 50 B.C.R. 222.

The *Johnston* case represents an attempt by the court to do everything in its power to see that the legacies went free of duty. In other cases to be looked at later, where the residue is insufficient, there is not the same enthusiasm. And apparently the distinction upon which Adamson J. waived aside the other cases is not regarded by all as being foolproof, for in *Cave and Saunders* v. *Day et al.* Macfarlane J. says of the *Johnston* case, "I note the distinction made with reference to the case I have referred to in this Court and, *while that distinction may not be sound*, I do not think . . . . "[12]

Two more recent cases will be sufficient to show that a definite fund must be set up out of which the duties are to be paid. It would seem that this is accomplished if the word "remainder" is used when referring to the balance of the estate after payment of debts, etc. and succession duties.

In *Re Munroe*[13] the testator appointed an executor of his will and estate and gave all his property to the executor on the following trusts:

> 1. To pay my just debts and funeral and testamentary expenses, and Succession Duties, if any, as soon after my death as he can conveniently do so;
>
> 2. To transfer. . . . my home. . . . and my motor car. . . . .to Esther Maud Munroe, and pay her ten thousand dollars;
>
> 3. To pay or transfer all the remainder of my estate to himself, Edwin Bruce Munroe, personally.

Of these provisions Hope J. said:

> In my opinion. . . . it would appear to be abundantly clear that the testator had in mind the creation of a trust fund for certain purposes enumerated by him, to be carried out in the order named. . . ," and he held that succession duty was payable on the devise and bequests out of the residue.

Similarly in the case of *Re Prittie,*[14] where a testator directed his executors to pay *inter alia* "all succession inheritance and death duties and taxes that may be payable in connection with any part of my estate" and then directed the *remainder* of his estate to be invested and the income paid to his wife for life, it was held that the pecuniary legacies were payable in full without deduction of succession duty.

[12] [1945] 3 W.W.R. 481, at p. 483.
[13] [1943] O.W.N. 617.
[14] [1942] 3 D.L.R. 759.

In this case Hope J. said:

> In the will now under consideration, there is no specific charge but in my opinion it is equally clear, reading the will as a whole, . . that it was the testator's intention that the duty should be paid out of his general estate on the particular pecuniary legacies.

That a very different result is reached when there is no fund indicated is shown by the decision in *Re Patterson*.[15] In this case, the will directed that "all my just debts, Funeral and Testamentary expenses and all Succession Duties, if any, [shall] be paid and satisfied by my Executor hereinafter named as soon as conveniently may be after my decease". Then all the testator's property was given to the executor on trust to:

(1) pay certain pecuniary legacies;
(2) keep the whole residue invested and pay the income to certain individuals;
(3) after their death pay the whole balance in gifts of $500. to each of three named charities, and the whole residue was to go to the Institute for the Blind.

Gillanders J. said:

> In connection with the will here, it is to be noted that:
> (1) the general direction for the payment of debts, funeral and testamentary expenses and all succession duties does not indicate in any way from what fund or source payment is to be made;
> (2) the subsequent devise and bequest to the executor is not stated to be of the remainder after any directed payments;
> (3) there is no subsequent mention of the payment of debts or succession duty among the designated 'following purposes' of the trust (in the respect it differs from that in *Re Johnston's Will*.[16]

Then he continued:

> A mere direction to pay succession duties, unaccompanied by anything else in the will indicating the testator's intention as to the source from which they are to be paid, or where such payments are to be charged, or otherwise indicating that the benefits provided by the will are free of duty, is, I think, insufficient.

I take it that by "otherwise indicating that the benefits are free of duty" the learned judge means an intention on the part of the testator to make a gift of the duty.

Re Estate of Arthur George Aldrich, a judgment given in July, 1945, in the Ontario High Court of Justice and reported

[15] [1943] O.W.N. 436.
[16] *Ibid.*, at p. 738.

in the Dominion Succession Duty Reporter at page 16,101, is another recent case in point. Here the will directed that "All my just debts, funeral and testamentary expenses and also my succession duties shall be paid by my executor hereinafter named, as soon as conveniently may be after my decease".

Mackay J. said:

> It appears to be well settled law that a mere direction to pay succession duty unaccompanied by anything else in the will indicating the testator's intention as to the source from which they are to be paid, or whether such payments are to be charged or otherwise indicating that the benefits provided by the will are free of duty, is insufficient to warrant such payments out of the residue.

And he held that the individual bequests and legacies should bear their own duty.

To summarize the decisions on this point, the direction succeeded in *Re Johnston, Re Monroe* and *Re Prittie* because the testator indicated a fund, either expressly or by inference by use of the word "remainder". In *Re Patterson* and *Re Aldrich* the direction failed for lack of some indication of a source or fund out of which the duty might be paid.

Another example of a successful direction in which a fund was not expressly indicated, but in which the testator's intention was held to be sufficiently clear, is the case of *Re Shaw*,[17] decided by the Ontario Court of Appeal. The testator in this case directed as follows:

> I direct all my just debts, funeral and testamentary expenses, succession duties and other taxes to be a *first charge* on my estate and to be paid and satisfied by my executors hereinafter named as soon as conveniently may be after my decease.

The trial judge held that the executors must deduct from the benefits going to any person under the will the succession duty payable in respect of such benefit. In the Court of Appeal, however, Fisher J.A. said:

> Here the testator has directed that before the devises and bequests under his will are to be appropriated, the executors are to make provision out of the whole estate for (*inter alia*) succession duties. It is only after that that the devises and bequests are to be appropriated. The effect of this must be to appropriate first out of the estate the various amounts required to pay the succession duty on the devises and bequests. It is only after this is done that the estate is to be apportioned under the will. This, to my mind, clearly indicates an intention to make an

[17] [1941] O.R. 297.

> additional gift to the beneficiaries of the succession duty for which they are as between themselves and the government primarily liable.[18]

The court held that the succession duties should be paid out of the estate.

The care required in the selection of words when drafting a direction is exemplified by the recent case of *Cave and Saunders* v. *Day et al.*[19] In this case the direction was: "I direct my Executors hereinafter named to pay all my just debts and funeral and testamentary expenses and all Probate and Succession Duties out of the capital of my Estate as soon as conveniently may be after my decease".

Macfarlane J. said:

> The only indication of the source or fund is to be found in the word 'Capital'. If by 'Capital', the testator meant the residue unfortunately he did not say so. The word 'capital' is used in *contra*-distinction to income, not residue. The whole estate here is capital. I do not think in using that word the testator indicates anything more as to the source from which the duties are payable than he does when he directs payment out of the estate.

He felt that the case fell within the decision of *Re Dixon* and *Re Blowey Estate* and that the beneficiaries were not entitled to receive their shares free of duty.

We have now inquired into:

(a) the nature of succession duties;
(b) the effect of a simple direction to pay;
(c) the requirements of a valid direction to pay.

The survey of the cases would not be complete without investigating two more topics:

(a) the effect of a direction to pay duties as it affects other property which, by modern succession duty acts, is deemed to pass under the will; and
(b) the effect of a direction to pay where the estate is insufficient.

Dealing with the first of these, the first case to be considered is the Manitoba case of *Re Girvin Estate*.[20] In this case the will contained the following clause:

> I direct that all succession and other death duties shall be paid by my executors and trustees out of my residuary estate and any and all legacies and annuities given or bequeathed by my said will or any codicil thereto be paid free and clear of succession duty.

[18] *Ibid.*, at p. 302.
[19] [1945] 3 W.W.R. 481.
[20] (1932), 40 M.R. 81.

The question was whether this direction applied to gifts *inter vivos*.

Donovan J. quoted Lord Sands in the case of *Lord Strathcona and Mount Royal* v. *Inland Revenue Commissioners*, wherein it was said:

> It is enough that property which is deemed to pass upon death is upon the same footing as regards liability for estate duty as property which actually passes. . . . for estate duty purposes, the property donated is to be treated just as if it had remained the property of the deceased until his death and has then passed as part of his estate.[21]

Donovan J. remarked:

> The advances [in his lifetime] . . . (but not including moneys payable under the insurance policy) should, as I see it, be considered as covered by and deemed to pass under the will, and, in my opinion, the provisions in the codicil [quoted above] apply to duty payable in respect of gifts *inter vivos* made within the five-year period mentioned in the statute.[22]

And he held that the duties on the gifts *inter vivos* should be paid out of the residuary estate. With regard to the insurance policy, since it was payable under a direction in the policy that was independent of and did not purport to be governed by any provision of the will, he held that the duty on it was not payable by the estate.

Then in 1941 an Ontario case, in which the direction was almost identical, was decided the other way and was affirmed with no reasons given by the Supreme Court of Canada. The Manitoba case of *Re Girvin Estate* was not quoted either by the Ontario Court of Appeal or the Supreme Court. The case is *Re Snowball*.[23] The will here provided:

> I declare that all my estate and succession duties payable upon or in respect of my estate or property shall be paid out of my residuary estate, and that all legacies or gifts bequeathed shall be free from inheritance law.

Note how similar this direction is to that in *Re Girvin*.

Robertson C.J.O. was of the opinion that "The donor of a gift *inter vivos*, by making the gift, assumes no obligation whatsoever to the donee to make any provision for payment of succession duties that may become payable in respect of the gift,

[21] [1929] S.C. 800, at p. 807.
[22] (1932), 40 M.R. 481, at p. 492.
[23] [1941] O.R. 269, affirmed by [1942] S.C.R. 202.

upon his death".[24] He said that if the residuary estate is to bear the duty, it is because the will has said so. It was argued that "my estate or property" should be given the meaning of "property passing on the death" by the Succession Duty Act, but the Chief Justice refused to accept this argument.

Re Snowball was a decision in the Ontario Court of Appeal and apparently it is now the law in Manitoba.

The same court gave a similar decision in the case of *Re Poulin*[25] where the testator in his will directed as follows:

> I empower my Trustees to sell, lease, mortgage or otherwise dispose of the assets of my estate as they, in their discretion, may deem most advantageous, and I direct them to pay such succession duty as may be leviable out of the general funds of my estate.

The Chief Justice of Ontario again delivered judgment. After stating that the testator in the clause quoted was dealing specifically with the assets of his estate, he continued:

> It is quite another matter to make such implication in respect of the testator's gifts *inter vivos*. There is nothing in the will to support any implication that the testator intended to burden his estate with succession duty in respect of such gifts, in relief of the persons who received them.[26]

He consequently decided that the direction to pay duty did not extend to gifts *inter vivos*.

The last case to be discussed under this head, *Re Booth*,[27] concerns property held jointly. Here a testator and his wife held land jointly, which went of course to his wife by right of survivorship on the testator's death. The will read in part:

> I hereby direct my executors. . . . to pay all my just debts and funeral and testamentary expenses as soon as conveniently may be after my decease, and also succession or other duties, my intention being to relieve my wife and other beneficiaries from the payment thereof.

Meredith C.J.C.P. said:

> The testator was dealing, in the will, with that which belonged to him, not with property in which his estate could have no interest. . . . She [testator's wife] was a beneficiary, and to a large extent, under his will; but was not, even to the least extent, a beneficiary as to the land in question; it was hers in her own right. . . .

[24] [1941] O.R. 269, at p. 272.
[25] [1944] 1 D.L.R. 756.
[26] *Ibid.*, at p. 760.
[27] (1926), 30 O.W.N. 73.

He held that the widow and not the estate should pay the succession duty.

The principle clearly indicated by these cases is this: the duty is primarily payable by the beneficiary and, if the testator wishes to relieve the beneficiary of this liability, he must use express words to do so.

On the question of the result where the estate is insufficient to pay the duty, the first case is *Re Bilton*[28] where the testator provided that all his bequests to individuals were to go free from succession duty, such duty as might be payable thereon to be paid by the estate.

Here Middleton J. stated:

> The direction . . . that the bequests to individuals are to be free from succession duty, and that such succession duty is to be paid by the testator's 'estate', fails because there is no estate out of which it can be paid. The 'estate' referred to is evidently something other than that which has been specifically given and which is to be exonerated. It is in effect an additional gift which there are no funds to answer.

This result differs from that in some of the English cases. In *Re Turnbull, Skipper* v. *Wade*[29] there was a direction in the will to pay the legacies "free from duty". However, the estate was not sufficient to pay the legacies and duties in full. Farwell J. held that the legacy duty payable on each legacy must be treated as an additional legacy and be added to the legacy for purposes of abatement. He quoted from the case of *Lord Advocate* v. *Miller's Trustees* where this statement appears:

> Thus, suppose the legacy is one of 100*l.*, upon which 10 per cent is payable, and declared to be duty free. This is in reality a legacy of 110*l.*, But if the estate can only pay one-half of the legacies, the amount to this legatee would be only 55*l.*—10 per cent. on which must go to the Crown, or 5*l.* 10*s.*—thus reducing the sum actually receivable by the legatee to 49*l.* 10*s.*[30]

In *Farrer* v. *St. Catherine's College*[31] Lord Selbourne L.C. said that a gift of legacy duty on a specific or pecuniary legacy was a common pecuniary legacy for the benefit of the specific legatee in the one case, and of the pecuniary legatee in the other; and in the event of the general estate being insufficient the gifts of legacy duty must abate along with the other pecuniary legacies. The value of the specific legacies must therefore be ascertained and the

[28] (1915), 8 O.W.N. 323.
[29] [1905] 1 Ch. 726.
[30] (1884), 21 Sco.L.R. 709, at p. 711.
[31] (1873), 16 Eq. 19.

amounts of legacy duty payable thereon be calculated; such amounts must be treated as pecuniary legacies and abate accordingly.

This rule should be combined with the principle already quoted from *Noel* v. *Henley*, "but where the legacy is given free of duty, it is an increase of the legacy itself, and ought therefore to be paid out of the same fund".[32] It would appear that no case could arise in which you could say that, as there is no estate left out of which to pay the duty, it must be borne by the beneficiaries.

In the Ontario Case of *Re Haig* another proposition was enunciated by Orde J., "If the residue is not sufficient to pay all the succession duties, then, as such duties are primarily payable by the beneficiaries themselves, each beneficiary must make up the proportionate difference out of his legacy or devise".[33]

There would seem, therefore, to be a difference between the English and Canadian decisions, so that the question cannot be, regarded as satisfactorily settled.

[32] (1819), 7 Price 241, at p. 253.
[33] (1925), 57 O.L.R. 129, at p. 134.

WITHDRAWING A JUDGE

I have still a vivid recollection of attending the hearing of the case of the *Franconia*, when Cockburn presided over a court (of Crown Cases Reserved) consisting of fourteen judges. Even his authority, great and undisputed as it was, was insufficient to restrain the copious and often irrelevent interruptions of the argument by some of his many colleagues. I remember hearing Benjamin, who led for the defendant, say to Sir H. Giffard, the Solicitor-General, who appeared for the Crown, in a loud aside: 'If this goes on much longer, Solicitor, I propose that we should agree to withdraw a judge. ('Withdrawing a juror' was in those days a common way of compromising a civil case at Nisi Prius.) (Memories and Reflections: 1852-1927. By the Earl of Oxford and Asquith, K.G. Volume I, pp. 77 and 78. 1928.)