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Book Review: Ontario Succession Duties, by Micheal B. Jameson

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Book Reviews

Ontario Succession Duties: By Michael B. Jameson, of Osgoode Hall, Barrister-at-Law and Solicitor of the Supreme Court of Ontario and of the Supreme Court of England. Toronto: Butterworth & Co. (Canada) Ltd., 1959. xliii and 449 (with index). $15.00.

After an interval of seventeen years it is most helpful to have a recent text on the law governing succession duties. The word "recent" is more apt in this connection than the phrase "up to date", since changes in the law of taxation are frequent and, as anticipated by the author in his preface, the present session of the provincial legislature has before it a bill changing the tax limits and exemptions to bring the Ontario Succession Duty Act into line with the limits in the new federal Estate Tax Act. It is unfortunate, perhaps, that publication was not delayed to enable these important amendments to be incorporated into the text. Alternatively, one would have preferred to have the book bound to accommodate a pocket supplement for more convenient reference to statutory changes that were anticipated and appeared to be inevitable.

It is more usual with a reference book in this field to read in rather than through it, but I have done both with profit and pleasure. The book represents solid achievement far beyond the modest limits which the author set for himself when it was prepared in the hope that it would serve "to complement the practitioner's own knowledge in this most complex field." A treatment of this subject in three hundred pages, including as it does the text of the sections of the Act which, in the office consolidation, runs to forty-five pages, can scarcely be said to be exhaustive but I am sure it will prove to be a valuable manual of the subject for practitioner and student alike. Reference is made to over four hundred and fifty cases which includes a careful selection of pertinent cases from other jurisdictions where local authority is lacking. The author has been meticulous as well to point out those instances where authorities differ from our own, even though the statutory provisions appear to be in pari materia.

Others may quarrel with the arrangement of the materials inasmuch as the sections of the Act are not discussed in consecutive order. This is not to suggest that there is no order and personally I prefer the order selected. The book is not an annotated act and the author has been considerate enough to include a "Succession Duty Act Table" which enables quick and easy reference to the text of any section and the discussion of it. Where the section is quoted in the text the relevant page reference is printed in heavy type.

After an introductory chapter dealing, inter alia, with jurisdiction to tax, interpretation of taxing statutes and general estate administration procedure, the author in Chapter 2 discusses dutiable successions generally and covers property passing on death (including

property which is deemed to pass on death), transmissions and dispositions. I am not sure that I understand why joint property and insurance are singled out for treatment in this general chapter as opposed to dealing with them in Chapter 3—Dutiable Succession: Special, and as might be expected the author ends up with dealing with aspects of them in both chapters. The result is not too happy a resolution of the matter and indeed on the subject of joint property leads to some confusion.

It is clear from the treatment of joint property in Chapter 2 that if a husband makes a gratuitous transfer of real property into the joint names of himself and his wife, or buys property without any contribution by his wife and takes title in the joint names of himself and his wife, and the property is held in that form on the death of the husband, the whole of the property will be in his gross estate for purposes of succession duty under the provisions of s. 1(p)(i). Duty is levied in respect of the joint property except to such an extent as it can be demonstrated that the survivor contributed to the joint tenancy and here, ex hypothesi, the wife contributed nothing. It does not clarify matters to say, as the author does on page 149, that ". . . the entire property in joint names will be dutiable in the husband's estate *as a disposition under* s. 5(*c*), and the exemption under s. 4(1)(g) will not apply as the husband did not part with complete possession of the one half, particularly as he retains the right of survivorship which is inherent in joint property" [emphasis added].

The question whether or not there has been a dutiable disposition, where property is acquired as aforesaid, only arises to the extent of the value of the property or part of the property taken or converted by the wife during the lifetime of the husband. If the property is sold during the lifetime of the husband and a share of the proceeds taken or converted by the wife for her own use and benefit these monies represent a disposition to the wife and dutiable as such under s. 1(f)(x) unless the appropriation takes place outside the five year period immediately preceding the husband's death, and therefore exempt under the provisions of s. 4(1)(g).

It may be, as the author properly points out, that the husband will be required to pay gift tax by virtue of the provisions of ss. 111 and 112 of the Income Tax Act, R.S.C. 1952, c. 148, and still have the whole of the property in his gross estate at his death for purposes of liability for succession duty, and of course the gift tax credit cannot be applied against the provincial duty. Although the author, on page 27, fn. 9, makes reference to the $10,000 lifetime exemption for gift tax, it is not indicated that the section only applies where there is a gift "of an interest in real property" and would therefore not be available in a case such as *Re Hommel,* [1953] O.R. 64, aff'd 739 where the court held that the gift by the husband to the wife was the "money" representing the down payment and not the "house." For this reason it is perhaps misleading to say as the author does on page 42, fn. 23, that *Re Taylor* and *Re Hume* (1958), 13 D.L.R. (2d) 470 "discussed and confirmed the Hommel decision." Also in view of

Re Taylor and *Re Hume* it is difficult to know what the author means when he states at page 44:

> "It can readily be seen from this case [Re Hommel] that if it had been found that there was a 'disposition' of the house it would have been dutiable at its value at the date of death, namely $43,000.00."

The treatment of life insurance and the application of the premium payment test under the Ontario Act is on the whole very well done. The paragraph on page 34 dealing with declarations is, however, too cryptic and consequently misleading. In view of the decision in *Re Pierce,* [1952] O.R. 828, to which no reference is made, it is not entirely accurate to say:

> "General declarations in wills which direct the proceeds of insurance payable to named beneficiaries to be paid into the general estate are invalid, as the funds would become available to creditors, and also might pass to beneficiaries outside the preferred class. Declarations are permissible directing the insurance to be administered for the benefit of the wife and children upon the same trusts as the will, providing the proceeds do not fall into the general estate."

In *Re Pierce, supra,* the court held, in my opinion extending unjustifiably the decisions in *MacInnes v. MacInnes et al.,* [1935] S.C.R. 200 and *Re Lloyd,* [1941] O.W.N. 429, that an insured cannot make the insurance money part of a mixed fund even though there is no advantage in separating the funds and even though the testator in making the declaration by will does not purport to go outside the preferred class and makes it express that the insurance money is not to be resorted to for payment of legacies, etc., and it is not to be subject to creditor's claims. Admittedly this statement is obiter in *Re Pierce* since by the terminal limitation it was possible for the proceeds to go to persons outside the preferred class.

In my opinion, it would have been helpful when dealing with "annuities and other interests" in Chapter 3, pp. 52 et seq., to have some discussion of or at least a reference to *Re Carr,* [1948] 1 D.C.R. 459, aff'd., [1948] 2 D.L.R. 509 and *Re Hommel,* [1953] 1 D.L.R. 536, and it is hardly adequate to dismiss them, as is done on page 137, in dealing with s. 4(1)(i) with the statement that: "The proceeds of an insurance trust cannot qualify under this section."

The discussion of inter vivos trusts is split between Chapters 2 and 3. In the former chapter the author deals with the taxation of irrevocable inter vivos trusts under s. 1(f), and in the latter with the taxation of revocable inter vivos trusts or those trusts where there is a "reservation of interest under s. 1(p)(viii)."

Since this is a book on taxation and not a discussion of the principles of the law of property as such, the author may be pardoned for not devoting any attention to a discussion of the extent to which revocable, alterable or amendable trusts may fail on the ground that they are testamentary in character. It is now generally accepted that the reservation of a mere power to revoke the trust will not invalidate the instrument on the ground that it is testamentary and not executed in accordance with the formalities prescribed by the Wills Act.

It is not a proper statement of the facts in *Re Cochrane's Settlement Trust,* [1945] 1 All E.R. 660 as the author states on page 67 that "the settlor settled property upon trust to pay the income to his wife for life, and after her death to the settlor." If this statement were true it would not have been necessary for the court to discuss how the income from the trust was applied and the whole of the assets of the trust would have been in the gross estate of the settlor on his death and taxable since he had reserved to himself the reversion in the trust. The true facts were that after the joint life estate of the wife and husband the remainder interest was to pass to the children of the settlor. The inclusion of *National Trust Co., Ltd. (Exors of E. R. Wood) v. M.N.R.,* [1949] S.C.R. 127, is a most helpful illustration of the fact that the reservation of the power to change trustees, direct investments and substitute securities is not a sufficient reservation of an interest to attract tax within the provisions of s. 1(p) (viii) and the gift is retained to the entire exclusion of the settlor within the provisions of s. 4(1) (g). It is admitted that the concluding words of s. 1(p) (viii) "or to otherwise resettle the same or any part thereof" are not free of difficulty and it may be that the true position is, as the author states it to be, that "if the power is merely to adjust benefits within a class of beneficiaries the power might be held not to be a power of resettlement."

Those portions of the book dealing with Situs of Property (Chapter 4) and Valuation for Duty (Chapter 6) are extremely well done. The chapter on valuation will prove particularly valuable to practitioners, containing as it does, a full treatment of the pertinent case law and much helpful material on departmental practice. The author has not hesitated to take issue with these practices where he feels the result is inequitable and not dictated by the statute. I would refer the reader particularly to the discussion on the valuation of debts secured by promissory notes and second mortgages.

The inclusion of the text of related statutes, the rate and annuity tables and the regulations provide opportunity for ready reference, but more helpful still, is the inclusion of *completed* forms.

Understandably, since this is a first edition, a number of minor errors have gone undetected. On page 4, line 19 "dissertation" is misspelled. On page 13, fn. 16 the reference to MacDonald & Sheard on Surrogate Court Practice must surely be to that excellent book Macdonnell & Sheard on Probate Practice. For that persistent blemish "personality" on page 29, line 17 read "personalty." Insert "c." in the reference to the "Manitoba Act, R.S.M. 1940, 201" on page 54, line 3. And although the citations of authorities generally leaves nothing to be desired there are a few slips in punctuation, for example, page 30, fn. 21; page 34, fn. 8 (the Westminster Bank case), and page 43, fn. 25. Though there can be little doubt what is meant, the citation as "U.S. Code" on page 158, fn. 2, would appear to be inadequate whatever system of citation is adopted.

I was delighted to learn from the frequent reference, in the preface and throughout the text, to Jameson on Canadian Estate Tax

that the preparation of this companion piece to Ontario Succession Duties is well advanced. It is to be hoped that it will appear at an early date.

Perhaps one may be permitted, in reviewing a book for a law school journal, to say something about the exorbitant price of legal texts from the standpoint of the student. I appreciate fully that Jameson on Ontario Succession Duties is intended primarily for the legal practitioner and it may be that $15.00 is not an unreasonable price to a practitioner. It certainly is not out of line with the price the practitioners have grown accustomed to pay in recent years for legal texts published in Canada. I hasten to add, too, that in this instance the publisher was extremely generous in granting a discount to students well in excess of the ten percent normally granted. It may be that in a period of rising costs in every phase of book publication and an extremely limited market that we, in Canada, can hope for no better than this. But I am appalled that a text of great value as a reference book in at least two courses on the law school curriculum should be beyond the reach of eighty percent of the students who might be expected to buy it. I refuse to believe that the students of this generation are any the less interested in book purchases than they were in former times. The disappearance of the book buying tradition in my opinion can be attributed directly to lack of sufficient funds. The annual cost of legal education per student is in the neighbourhood of $1,620.00 and second only to that of the medical schools, and yet the financial assistance available to law students is strikingly and deplorably lower than in any other discipline.

And while we are at it let us not forget the bedevilled professional law teacher whose annual expenditures on necessary acquisitions to his library are or should be as high or higher than his brethern in the practicing profession but whose tax relief in this matter is absolutely nil. One wonders if it has ever occurred to the taxing authorities that a greater command of one's field through wider reading may also be reflected in higher salaries and consequently in higher taxes.

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