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*May 28
*Jun. 27

THE MONTREAL TRUST COMPANY ..APPELLANT;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Succession duty—Will—Bequest of life income—Power to request payment of capital—Power never exercised—Whether competent to dispose of capital—General power to appoint or dispose of property—The Dominion Succession Duty Act, 1940-41 (Can.), c. 14 as amended, ss. 3(1)(i), 3(4), 4(1) and 6(1).

*PRESENT: Kerwin C.J., Taschereau, Rand, Cartwright and Fauteux JJ.

By his will the husband of the deceased left the residue of his estate to his trustees to pay the net income thereof to his wife during her lifetime and "to pay to my wife . . . the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire". Upon the death of the wife the residuary estate was to be divided equally between his children. The wife never made any request or expressed any desire to be paid any of the corpus nor did she ever receive any portion of it. Following her death on March 8, 1953, the Minister, in computing the value of her estate, included therein the amount then comprising the residue of her husband's estate on the ground that by virtue of s. 3(4) of the *Dominion Succession Duty Act*, since the wife had at the time of her death a general power to appoint or dispose of the corpus, there was deemed to be a succession in respect of such corpus. The appellant contended that the wife did not have a general power of appointment but only a special restricted power to require the residue to be paid to her. The Exchequer Court held that she had a general power of appointment.

Held: The appeal should be dismissed.

Per Kerwin C.J. and Taschereau and Fauteux JJ.: The wife was "competent to dispose" of the residue of her husband's estate within s. 3(1)(i) of the Act, because she had a general power to dispose of it, since "general power" includes under s. 4(1) of the Act "every power or authority enabling the donee . . . to appoint or dispose of the property as he thinks fit". By virtue of s. 3(4) there was deemed to be a succession when a deceased held such a power. (*In re Penrose*, [1933] Ch. 793, referred to).

Per Rand J.: When a donee can require the whole of the residue to be paid to him and thereupon dispose of it as he sees fit, he has power or authority to dispose of the property as he thinks fit within the meaning of s. 4(1) of the Act.

Per Cartwright J.: *Semble*, the power given to the wife was not strictly speaking a general power of appointment but she was "competent to dispose" of the residue of her husband's estate.

APPEAL from the judgment of the Exchequer Court of Canada (1), Ritchie J., affirming the assessment made by the Minister.

A. E. Johnston, Q.C., and *D. L. Swancar*, for the appellant.

J. A. MacAulay, Q.C., D. C. McGarvin and *A. L. De Wolfe*, for the respondent.

The judgment of Kerwin C.J. and Taschereau and Fauteux JJ. was delivered by

THE CHIEF JUSTICE:—This is an appeal from a decision of the Exchequer Court (1) dismissing an appeal from an assessment by the Minister of National Revenue of succession duty in respect of alleged successions arising on the death of Mrs. Emily Rhoda Bathgate. As she died March 8, 1953, the applicable statutory provisions are those of the

(1) [1955] Ex. C.R. 312.

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Dominion Succession Duty Act, 1940-41, c. 14, as amended down to that date. The question to be determined is whether, under the terms of her husband's will, Mrs. Bathgate had a general power of appointment or disposition. The appellants admit that if this point is decided adversely to them there were successions and that the assessment made by the Minister was proper.

By paragraph (i) of subs. (1) of s. 3 of the Act of 1940 Parliament enacted that a "succession" shall be deemed to include:—

> (i) property of which the person dying was at the time of his death competent to dispose.

Subsection (1) of s. 4 provides:—

> 4. (1) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition but made by himself, or exercisable as mortgagee.

Subsection (4) of s. 3 was added in 1944-45 but was repealed in 1952 by c. 24, s. 2 and the following substituted therefor:—

> (4) Where a deceased person had at the time of death a general power to appoint or dispose of property, there shall be deemed to be a succession in respect of such property and the person entitled thereto and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

These statutory conditions are to be applied in the following circumstances. Mrs. Bathgate's husband died before there was any *Dominion Succession Duty Act* and by his will left the residue of his estate to his executors and trustees "upon trust . . . to pay the net income thereof to my wife". There was a further trust "to pay to my wife . . . the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire". Upon the death of his wife his residuary estate was to be "divided equally between my children".

His will provided for the vesting of the shares of his estate given to his children in the following words:—

> I further declare that although the time at which a child of mine shall be entitled to receive a share in my estate may be deferred until he or she has attained a stated age or that the amount thereof may not be deter-

minable until the death of my wife as herein declared, yet any share to which a child of mine is entitled in my estate under the terms of this my Will shall be deemed to vest and shall vest in him or her immediately at my death.

Mrs. Bathgate never had any control or possession of any of the assets of her husband's estate and, under the terms of his will, she acted as an executrix in an advisory capacity only. She never made any request or expressed any desire to her husband's executors to be paid any of the corpus of his estate and did not receive any portion of the corpus.

Notwithstanding the matters mentioned in the preceding paragraph which were relied on by the appellants, Mrs. Bathgate was "competent to dispose" of the residue of her husband's estate (subs. 1 (i) of s. 3), because she had a general power to dispose of it since "general power" includes "every power or authority enabling the donee . . . to appoint or dispose of property as he thinks fit" (subs. 1 of s. 4). By subs. 4 of s. 3 there was deemed to be a succession in respect of property where the deceased person had at the time of death not merely the general power or authority to "appoint", but also to "dispose of" property. Although this subs. 4 of s. 3 was added only in 1952, the provisions of subs. 1 of s. 4, stating who is to be deemed "competent to dispose" apply to it. By the terms of the trust the executors and trustees of the husband were to pay Mrs. Bathgate "the whole or such part of the corpus thereof as she may from time to time and at any time during her lifetime request or desire". This power or authority to "request or desire" is sufficient to bring her within the terms of the statute.

In *In re Penrose* (1), a wife gave a power of appointment to her husband in favour of a limited class which, on construction, was held to include the husband. He purported to exercise the power in favour of himself with respect only to part of the property and died without any general exercise of the power. Luxmoore J. held that there was nothing to prevent the husband as donee of the power from also being an object and appointing the whole property to himself. It is unnecessary to consider all the implications of that decision, but, so far as the point under consideration is concerned, I agree so unreservedly with the

(1) [1933] Ch. 793.

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reasoning of Luxmoore J. where he is dealing with comparable provisions of the Imperial Finance Act, 1894, that I transcribe the relevant paragraph which appears at pp. 807-8 of the report:—

> It is argued that the power in the present case is a limited power and does not authorize the donee to appoint or dispose of the property subject to it as he thinks fit. It is said that if he appoints to himself he only acquires the property but does not dispose of it, and that his power to dispose of it as he thinks fit does not arise under the power but after he has exercised it in his own favour. In my judgment this is too narrow a construction to place on the words of the definition. A donee of a power who can freely appoint the whole of the fund to himself and so acquire the right to dispose of the fund in accordance with his own volition, is, in my judgment, competent to dispose of that fund as he thinks fit, and it can make no difference that this can only be done by two steps instead of by one—namely, by an appointment to himself, followed by a subsequent gift or disposition, instead of by a direct appointment to the object or objects of his bounty. If under a power the donee can make the whole of the property subject to it his own, he can by exercising the power in his own favour place himself in the position to dispose of it as he thinks fit. The power to dispose is a necessary incident of the power to acquire the property in question. In my judgment, the word "power" in the phrase "a power to appoint or dispose of as he thinks fit," is not used in the definition section in the strict legal sense attaching to it when used with reference to a power of appointment, but in the sense of capacity; and I think this is made clear by the use of the words "or dispose of" in addition to the words "to appoint," because otherwise the words "or dispose of" would be mere surplusage.

The decision in *Wanklyn* v. *The Minister of National Revenue* (1), is not in conflict with this conclusion: There the majority of the Court expressed doubts as to whether, on the proper construction of the will of Mrs. Chipman, a general power of appointment had been conferred on her husband, but arrived at their conclusion on another basis. What was sought to be assessed to succession duty was the property over which the Minister had argued the husband had a general power of appointment, although he had not exercised it except with respect to a small portion. The Minister sought to make his estate liable as if the power had been completely exercised.

The appeal should be dismissed with costs.

(1) [1953] 2 S.C.R. 58.

RAND J.:—The issue in this appeal is whether the following clause of a will creates a general power of appointment within the meaning of the *Dominion Succession Duty Act*, statutes of 1940-41, c. 14:—

> Sixthly: UPON TRUST as to all of my residuary estate including lapsed legacies, should my wife, Emily Rhoda Bathgate, survive me, to pay the net income thereof to my wife, Emily Rhoda Bathgate, for the term of her natural life, and to pay to my wife, Emily Rhoda Bathgate, the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire; . . . .

This was followed by a provision declaring that the remainder interests of the residue given to the children should be deemed to vest immediately on the testator's death.

Sections 3(4) and 4(1) of the Act read:—

> 3. (4) Where a deceased person had at the time of death a general power to appoint or dispose of property, there shall be deemed to be a succession in respect of such property and the person entitled thereto and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.
>
> 4. (1) A person shall be deemed competent to dispose of property if he has such an estate or interest therein or such general power as would, if he were *sui juris*, enable him to dispose of the property and the expression "general power" includes every power or authority enabling the donee or other holder thereof to appoint or dispose of property as he thinks fit, whether exercisable by instrument *inter vivos* or by will, or both, but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself, or exercisable as mortgagee.

Mr. Johnston's argument is that in the ordinary definition of the expression "general power of appointment" there must be an unlimited discretion as to appointees, including the donee of the power, either by instrument *inter vivos* or by will or both and that as the donee here could appropriate only to herself, that is, that on her request the money would be paid to her, the definition is not satisfied. What the clause does, the contention goes, is to give a power to appropriate the corpus as distinguished from the power to appoint.

I will assume that the definition so stated is right but I think the question is disposed of by s. 4(1). By that language the expression used in s. 3(4) includes "every power or authority enabling the donee or other holder to appoint or dispose of the property as he thinks fit". If the language were "to appoint as he thinks fit" that would, no doubt, express the general understanding of such a power

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but the "authority to dispose of property as he thinks fit" must obviously be given independent meaning and if it is then it necessarily effects an enlargement of the ordinary scope of the expression. "Authority to dispose of" contemplates ultimate alienation. The technical conception of an appointment is that the property is deemed to pass from the donor of the power to the appointee, but with authority to dispose there is added the case such as is before us where the donee can admittedly require the whole of the residue to be paid to her and thereupon dispose of it as she sees fit. That was the view of similar language taken by Luxmoore J. in *In re Penrose* (1), and I think it is the right view.

I would, therefore, dismiss the appeal with costs.

CARTWRIGHT J.:—The facts, the provisions of the will of the late James Loghrin Bathgate and the statutory provisions relevant to the determination of the question raised in this appeal are set out in the reasons of the Chief Justice.

The question to be determined is whether the corpus of the residue of the estate of James Loghrin Bathgate forms part of the estate of Emily Rhoda Bathgate for purposes of succession duty.

Ritchie J. was of opinion that the will of James Loghrin Bathgate conferred on Mrs. Bathgate a general power of appointment in respect of the residue of his estate. The clause of Mr. Bathgate's will which the learned judge construed as giving this power is as follows:—

> Sixthly: UPON TRUST as to all of my residuary estate including lapsed legacies, should my wife, Emily Rhoda Bathgate, survive me, to pay the net income thereof to my wife, Emily Rhoda Bathgate, for the term of her natural life, and to pay to my wife, Emily Rhoda Bathgate, the whole or such portion of the corpus thereof as she may from time to time and at any time during her life request or desire; and I further direct that upon the death of my said wife, Emily Rhoda Bathgate, my said residuary estate (including undistributed income) or so much thereof as shall not have been paid to my wife during her lifetime shall be divided equally between my children Mary Loghrin Calder and William Campbell Bathgate, or the same shall go wholly to one if only one of such children shall survive me, subject to the provision that if either of my said children shall have predeceased me leaving issue who shall be living at my death, such issue shall take, and if more than one equally among them, the share which such deceased child would have taken had such deceased child been living at my death.

(1) [1933] Ch. 793.

While it is not necessary to express a final opinion on the point, it is my present view that the power given to Mrs. Bathgate to obtain payment to herself at any time during her life of the whole or such portion of the corpus of the residuary estate as she might desire was not, strictly speaking, a general power of appointment. However, for the reasons given by the Chief Justice I agree with his conclusion that under s. 4(1) of the *Dominion Succession Duty Act* Mrs. Bathgate must be deemed to have been competent to dispose of the fund in question, which, accordingly, became subject to duty by the combined effect of ss. 3(1)(i) and 6(1) of the Act.

I would dispose of the appeal as proposed by the Chief Justice.

Appeal dismissed with costs.

Solicitors for the appellant: *Johnston, Jessiman, Gardner and Swancar.*

Solicitor for the respondent: *A. A. McGrory.*