1953

*Jan. 27
*Jun. 8

DAVID WANKLYN AND OTHERS .....APPELLANTS;

AND

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

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Succession—Effect of will giving income from residue with power to draw from capital—Whether general power of appointment—Whether dutiable succession—Dominion Succession Duty Act, 4 and 5 Geo. VI, c. 4, ss. 4(1), 31.

By her will the testatrix left her estate to her trustees to pay to her husband during his lifetime the income from the residue and "in addition thereto to pay to my said husband from time to time and at any time such portion of the capital of my estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my executors and trustees shall be obliged to account further for any capital sums so paid to my said husband". Upon the death of the husband, the trustees were to dispose of what was left of the capital among designated legatees.

*PRESENT: Rinfret C.J. and Estey, Locke, Cartwright and Fauteux JJ.

The minister took the position that the will conferred a general power of appointment upon the husband over the residue of the estate and that consequently he became by virtue of s. 31 of the *Dominion Succession Duty Act* liable to duty on the same basis as if the residue had been abolutely bequeathed to him. The Minister's assessment was upheld by the Exchequer Court of Canada.

Held: (Rinfret C.J. and Locke J. dissenting), that the appeal should be allowed and the assessment set aside; the dutiable value of the succession to the husband in respect of the residuary estate of the testatrix was the value as of the date of her death of the estimated net revenues from such residuary estate and the residuary legatees were assessable as having on the death of the testatrix become beneficially entitled to the capital of the residue in remainder expectant upon the death of the husband, subject to the appropriate adjustment due to his having received a certain amount from the capital.

Per Estey J.: Assuming that the testatrix created a general power of appointment, it would still appear that no duty upon or in respect to a succession can be imposed to her husband except as to what he has already received from the capital. The giving of a general power of appointment at common law did not of itself constitute a disposition of property. The *Succession Duty Act* does not provide that it constitute a "disposition of property", that is to say, a succession as defined in s. 2(m). It is not included under s. 3(1) which defines those dispositions of property which should be deemed a succession. S. 31 does not contain language that would constitute such a power a disposition of the property. On the contrary, Parliament, in that section, would appear to have accepted the common law in relation to dispositions under a general power. Throughout s. 31, there are no words appropriate to the imposition of a levy that would justify a conclusion that this is a charging section.

Per Cartwright and Fauteux JJ.: The testatrix's husband was not given the power to appoint the capital by will; and even on the assumption that he was given a general power to appoint the capital *inter vivos*, there is no provision in the statute to support the claim that he was liable to pay succession duty in respect of that part of the residuary estate which he did not receive and which upon his death passed under the will of the testatrix to the residuary legatees. S. 31 of the *Act* does not purport to levy any duty or to create or define a succession. It provides only for the manner and time of payment of duty which is assumed to be levied by other provisions. Applying the words of s. 2(*m*) of the *Act*, the husband did not become beneficially entitled to the capital of the estate. A person who is given a power over property does not thereby become beneficially entitled to such property. In the present case, the residuary legatees immediately on the death of the testatrix took not a contingent but a vested remainder in the capital, expectant on the death of the husband, subject to be divested in whole or in part by his exercise of the power to take during his lifetime such portions of the capital as he might wish. So far as the capital of the residue was concerned no part of it became vested in him upon the death of the testatrix or under any disposition made by her.

1953

WANKLYN et al v. MINISTER OF NATIONAL REVENUE

Per Rinfret C.J. (dissenting): The right given to the husband to draw the capital was a general power to appoint equivalent to a bequest of the whole property of the testatrix to her husband and s. 31 of the *Act* covers a situation of that kind. It might even be said that within the definition of s. 2(*m*), the husband succeeded to the whole of the property of his wife.

Per Locke J. (dissenting): The right which accrued to the testatrix's husband upon her death to require the trustees of the estate at any time to pay to him the whole or any part of the capital of the estate, made him competent to dispose of the capital of his wife's estate (*Re Penrose* [1953] 1 Ch. 793: *Re Parsons* [1942] 2 A.E.R. 496); it therefore gave him a beneficial interest in the property and this disposition by the will was a succession within the meaning of s. 2(*m*) of the *Act*. Furthermore, the will gave to the husband a general power of appointment within the meaning of s. 4(1) and s. 31 (*Re Richards* [1902] 1 Ch. 76: *Re Ryder* [1914] 1 Ch. 865: 25 Halsbury 516); consequently, under s. 31, the liability for duty attached as if the capital of the estate over which the power had been given had been the subject of the bequest.

APPEAL from the judgment of the Exchequer Court of Canada, Saint-Pierre, Acting Judge (1), upholding the Minister's assessment.

J. E. Mitchell Q.C. for the appellants.

C. A. Geoffrion and R. G. Decary for the respondent.

The CHIEF JUSTICE (dissenting): I am of the opinion that this appeal should be dismissed.

The will of Mrs. Maud Angus Chipman, wife of Dr. Walter Chipman, contained the following clause:—

(*f*) To pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my Estate and in addition thereto to pay to my said husband from time to time and at any time such portions of the capital of my Estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my Executors and Trustees shall be obliged to account further for any capital sums so paid to my said husband.

By Notice of Assessment for Succession Duties purposes Dr. Chipman was treated as if the property itself had been given to him, in view of the general power to appoint given to him in Clause (*f*). The effect of that clause was to put Dr. Chipman in the position of succeeding to the whole of the estate at his option and upon his sole demand.

On appeal it was submitted that the right given to Dr. Chipman to draw capital was not a general power to

(1) [1952] C.T.C. 68.

appoint within the meaning of section 31 of the *Act*; and even if the right so given was a general power to appoint within the meaning of Section 31 the construction of that Section adopted by the Exchequer Court (1) was erroneous and not in accord with the context in which it is found; and, further, on the true construction of that Section the purpose of the Section is simply to regulate in a particular case the manner and time of payment of duties levied in respect of successions determined by other sections of the *Act*. The appellant submitted that Section 31 does not affect in any way the incidence of duties or purport to create any new succession.

The learned Judge of the Exchequer Court (Saint Pierre J.) (1) decided contrary to the submission of the appellant. He held that section 31 had to be read in conjunction with section 4(1), which reads as follows:—

> 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 *intervivos* 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.

He held that in the present case Dr. Chipman received from his wife the general power by which the Executors of the Estate would pay him from time to time and at any time such portions of the capital of the Estate as he might wish or require and upon his simple demand, he being the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, without he or the Executors and Trustees being obliged to account for any capital sums so paid to him.

In my view this is the equivalent of a bequest of the whole property of the deceased to her husband and Section 31 of *The Dominion Succession Duty Act* duly covers a situation of that kind. In the words of O'Connor J. in *Cossit* v. *Minister of National Revenue* (2):

> There was a succession within section 31. And under section 31, the duty levied in respect of such succession is payable in the same manner and at the same time as if the property itself had been given to the appellant.

(In the present case, Dr. Chipman).

(1) [1952] C.T.C. 68. (2) [1949] Ex. C.R. 339 at 343.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Rinfret C.J.

It might even be said that within the definition of section 2(*m*) of the *Act*, Dr. Chipman succeeded to the whole of the property of his wife.

I would, therefore, dismiss the appeal with costs.

ESTEY, J.:—This is an appeal from a judgment in the Exchequer Court (1) affirming the assessment made in the estate of Maud Mary Angus Chipman by the respondent under the *Dominion Succession Duty Act* (S. of C. 1940-41, 4-5 Geo. VI, c. 14).

The textatrix, Maud Mary Angus Chipman, died January 14, 1946, leaving an estate of a net aggregate value of $1,001,627.96. In computation of the succession duty the parties disagree as to the construction of clause 3(*f*) in the will.

> 3 (*f*) To pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my Estate and in addition thereto to pay to my said husband from time to time and at any time such portions of the capital of my Estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my Executors and Trustees shall be obliged to account further for any capital sums so paid to my said husband.

It is also important to observe that in clause 3(*g*) the testatrix provided that

> Upon the death of my said husband or upon my death should he have predeceased me to dispose of my Estate as it may then exist . . .

Then followed a number of specific directions under which she disposed of the entire estate. Doctor Chipman died on April 4, 1950, and at that time had received capital under the exercise of his power in clause 3(*f*) in the sum of $33,164.41.

There is no dispute as to the amount of the duty relative to the interest and revenues given to the husband Doctor Chipman in the first part of clause 3(*f*). The controversy is with respect to the construction of the latter portion which the respondent has construed as a general power to appoint and, as a consequence, has levied the succession duty in the same manner as if the property had been bequeathed absolutely to Doctor Chipman.

(1) [1952] C.T.C. 68.

There is much to be said in principle for the contention that a power of appointment that permits one to appoint only to himself is not a general power of appointment. However, it seems unnecessary to decide that point as, even if we assume, for the purpose of this decision, that the testatrix, in clause 3(*f*), has created a general power of appointment, it would still appear that respondent, within the meaning of the statute, cannot impose a duty upon or in respect to a succession to Doctor Chipman except as to the sum of $33,164.41.

The statute imposes a duty upon and in respect of a succession (ss. 6, 10 and 11). A succession is defined in s. 2(*m*):

> 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 substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

The giving of a general power of appointment at common law did not of itself constitute a disposition of property.

> A Common Law Power enables the donee to pass the legal estate; but it is the execution, not the creation of the power, which effects the transmutation of estate. The legal estate before the execution remains in the creator of the power, or his grantee, or heir-at-law, as the case may be.

Farwell on Powers, 3rd Ed., p. 2.

When the donee exercised the power the beneficiaries took by virtue of the instrument creating the power, but not by virtue of the exercise thereof. *Attorney-General v. Parker* (1); *Re Lovelace* (2).

The testatrix, in the foregoing clause (3(*f*), under the common law made a disposition by which the legal estate passed to the executors subject to Doctor Chipman's power and then, upon his death, the executors would dispose of the estate, "as it may then exist," as directed in the will. He, as and when and to the extent that he exercised his power, became owner of the capital by virtue of the provisions of the will of the testatrix.

(1) (1898) 31 N.S.R. 202. (2) 4 De G. & J. 340.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Estey J.

The law in the Province of Quebec would appear to be to the same effect and, indeed, this appeal has been presented upon that basis.

The contention of the Crown could only be maintained if the *Succession Duty Act* had provided that the giving of a general power of appointment constituted a "disposition of property" and, therefore, a succession as defined in s. (2*m*). It may first of all be pointed out that the giving of a general power of appointment is not included under s. 3(1), which defines those dispositions of property which should be deemed a succession.

The provisions of s. 4 would be relevant if we were considering Doctor Chipman's estate, but do not appear to be of assistance in considering that of the testatrix.

The Crown relied particularly upon the provisions of s. 31:—

> 31. Where a general power to appoint any property either by instrument inter vivos, or by will, or both, is given to any person, the duty levied in respect of the succession thereto shall be payable in the same manner and at the same time as if the property itself had been given, devised or bequeathed, to the person to whom such power is given.

This section specifically refers to "the duty levied in respect of the succession thereto" (the word "thereto" referring back to the word "property"). It does not contain language that would constitute a general power a disposition of the property. On the contrary, Parliament, in this section, would appear to have accepted the common law in relation to dispositions under a general power. Indeed, throughout the section there are no words appropriate to the imposition of a levy that would justify a conclusion that this is a charging section. In any event, in the latter part the language assumes a levy has been made and provides how the same shall be payable.

Counsel for the respondent argued that the word "manner" in the foregoing section should be read as meaning "amount," or some other word that would support a conclusion that this section imposed a levy. The word "amount," or whatever other word might be inserted, would not change the effect of the word "payable," which is not an appropriate word of imposition or charge. It rather assumes the existence of a charge. In order that counsel's submission might be accepted, the section would have to be

reworded to include some such language as "The duty shall be levied in the same manner and payable at the same time as if the property itself had been given." This would, in effect, be to legislate rather than construe and, therefore, beyond the function of a court. As Lord Macmillan stated in *Altrincham Electric Supply Limited v. Sale Urban District Council* (1):

> A court may construe the language of an Act of Parliament but may not distort it to make it accord with what the court thinks to be reasonable.

The submission that, unless the phrase "in the same manner" is construed as counsel for respondent suggests, it would be equivalent to or synonymous with "at the same time" and, therefore, surplus cannot be maintained. It would rather appear that each of these phrases as used in s. 31 possesses a separate and independent meaning and purpose. The phrase "in the same manner" has reference to such items as interest (s. 25), security (s. 26), extensions of time for payment and other like matters dealt with in other sections of the statute. This view finds support from the use of the word "manner" in s. 28(3) where it appears: " . . . may be paid . . . in the manner provided by" s. 28(4) or 28(6). The former has regard to the consequences of non-payment under s. 24 and the latter provides: " . . . the duty levied . . . if not sooner paid, shall be paid in four equal instalments . . ." It would, therefore, appear that the section as drafted does not support respondent's view.

The appeal should be allowed, the judgment in the Exchequer Court set aside and the matter referred back to the Minister for a reassessment on the basis that upon the death of the testatrix the capital in the residue of her estate passed to the parties named in the will, subject to the amount received by Doctor Chipman in the sum of $33,164.41. The appellants are entitled to their costs both in the Exchequer Court and in this Court.

LOCKE, J. (dissenting):— The will of the late Maude Angus Chipman, after bequeathing the whole of her property to trustees, one of whom was her husband Dr. W. W.

(1) (1936) 154 L.T. 379 at 388.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Locke J.

Chipman, and directing the payment of her debts and making certain specific bequests, directed the said trustees, *inter alia*:—

> To pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my estate and in addition thereto to pay to my said husband from time to time and at any time such portions of the capital of my estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my executors and trustees shall be obliged to account further for any capital sums so paid to my said husband.

Upon the death of the husband, the will provided that the estate, as it might then exist, shall be disposed of among designated legatees.

Subsection (*m*) of section 2 of the *Dominion Succession Duty Act* defines a succession. So far as it affects the present matter, the definition reads:—

> '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.

The language of the subsection is taken, almost without change, from s. 2 of the *Succession Duty Act 1853* (Imp. 16-17 Vict. c. 51). There was, however, added at the conclusion of ss. (*m*) the words:—

> and also includes any disposition of property deemed by this Act to be included in a succession.

"Successor", as in the English Act, is defined as meaning the person entitled under a succession.

Ss. 1 of s. 4 of the *Dominion Act* reproduces, with a change which does not affect the present question, ss. 2(*a*) of s. 22 of the *Finance Act 1894* (Imp. 57-58 Vict. cap. 30) and reads:—

> 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.

Section 6 provides that, subject to the exemptions mentioned in s. 7, there shall be assesed, levied and paid at the rates provided for in the first schedule to the Act, duties

upon or in respect of the following successions, that is to say, where the deceased was at the time of his death domiciled in a province of Canada upon or in respect of the succession to all real or immovable property situated in Canada and all personal property wheresoever situated.

The charging provisions are in Part III of the *Act* and prescribe the rates of duty to be paid in respect of each succession mentioned in s. 6 and define the persons liable for payment. Section 12 included in this part imposes upon every successor liability for the duty levied upon or in respect of the succession to him.

Section 31 of the *Act* is included in Part V with other sections under the heading "Payment of Duties" and reads:—

> Where a general power to appoint any property either by instrument inter vivos, or by will, or both, is given to any person, the duty levied in respect of the succession thereto shall be payable in the same manner and at the same time as if the property itself had been given, devised or bequeathed, to the person to whom such power is given.

When the *Succession Duty Act 1853* was passed, s. 4, with a marginal note which read: "General Powers of Appointment to Confer Successions", provided that where a person was given a general power of appointment over property under any disposition of property taking effect upon the death of any person dying after the time appointed for the commencement of the Act, he should:—

> in the event of his making any Appointment thereunder, be deemed to be entitled, at the Time of his exercising such Power, to the Property or Interest thereby appointed as a Succession derived from the Donor of the Power.

Section 18 of the *Finance Act 1894* provided that the value for the purpose of succession duty of a succession to real property arising upon the death of the deceased person should, where the successor is competent to dispose of the property, be the principal value of the property after deducting the estate duty payable in respect thereof on the said death.

Section 4 of the Act of 1853 was not adopted in the Canadian Act. The question as to whether the right which accrued to Dr. Chipman upon the death of his wife to require the trustees of the estate at any time to pay to him the whole or any part of the capital of the estate was a

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Locke J.

general power to appoint such property, within the meaning of ss. (1) of s. 4 and s. 31, and whether this constituted a succession, within the meaning of ss. (*m*) of s. 2, must depend upon the interpretation to be given to the language of these sections.

By s. 3(1) (i) a succession includes the disposition of property of which the person dying was at the time of his death competent to dispose and the beneficiary of such a disposition is deemed to be a successor. Dr. Chipman was competent to dispose of the capital of his wife's estate, after providing for the debts and the specific legacies within the meaning of s. 3(*i*) (i) and s. 4(1) (*In Re Penrose* (1): *Re Parsons* (2)). As pointed out by Lord Greene, M.R. in *Parson's case,* the phrase "competent to dispose" is not a phrase of art and, taken by itself and quite apart from the definition clause in the Act, conveys the ability to dispose, including the ability to make a thing your own. In my opinion, this right vested in Dr. Chipman by his wife's will gave him a beneficial interest in the property and this disposition by the will was a succession, within the meaning of ss. (*m*) of s. 2.

I am further of the opinion that the disposition gave to Dr. Chipman a general power of appointment, within the meaning of ss. (1) of s. 4 and s. 31.

In *Re Richards* (3), where, by a will, the income of the estate was bequeathed to the wife of the testator for life with a direction that, in case such income should not be sufficient, she might use such portion of the capital as she might deem expedient, Farwell J. held that the wife had a general power of appointment over the capital during her life. This statement of the law was adopted by Warrington J. in *Re Ryder* (4), and in Halsbury's Article on Powers, vol. 25, p. 516.

Under s. 4 of the Act of 1853 the liability for succession duty would attach only when and as the donee exercised the power of appointment. Section 31 of the Canadian Act, however, provides that where a general power to appoint any property is given to any person by will, the duty levied in respect of the succession thereto shall be payable *in the same manner* and at the same time as if the property itself

(1) [1933] 1 Ch. 793 at 807.
(2) [1942] 2 A.E.R. 496.
(3) [1902] 1 Ch. 76.
(4) [1914] 1 Ch. 865 at 869.

had been bequeathed to the person to whom the power is given. The section is not restricted to fixing the *time* of payment of the duties. The words "in the same manner" must, in my opinion, be construed as meaning that the liability for duty attaches as it would if the capital of the estate over which the power is given were the subject of the bequest.

I would dismiss this appeal with costs.

The judgment of Cartwright and Fauteux JJ. was delivered by:—

CARTWRIGHT J.:—The questions raised on this appeal are as to the duties payable under *The Dominion Succession Duty Act* upon the death of the late Maud Mary Angus Chipman (hereinafter referred to as Mrs. Chipman) in respect of successions to her residuary estate.

Mrs. Chipman died, domiciled in the City of Montreal, on January 14, 1946, leaving a will and codicil made in notarial form dated respectively February 7, 1940 and May 26, 1943.

The will recites that Mrs. Chipman is the wife, separate as to property, of Dr. Walter William Chipman, (hereinafter referred to as Dr. Chipman) and by clause "Thirdly" gives the whole of her estate to her executors and trustees in trust:—

(*a*) To pay all my just debts, funeral and testamentary expenses as soon as possible after my death and to pay all succession duties, inheritance taxes, court fees and similar taxation on my Estate out of the capital of the residue of my Estate without charging same to my respective legatees and without the intervention of any of my legatees.

(*b*) is a bequest to a niece;

(*c*) and (*d*) give the use of her residence and its contents to Dr. Chipman for his lifetime;

(*e*) is a legacy to employees.

The will continues:—

(*f*) To pay to my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my Estate and in addition thereto to pay to my said husband from time to time and at any time such portions of the capital of my Estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my Executors and Trustees shall be obliged to account further for any capital sums so paid to my said husband.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Cartwright J.

(*g*) Upon the death of my said husband or upon my death should he have predeceased me to dispose of my Estate as it may then exist as follows, namely:—

1. My jewellery, pictures, household furniture and household effects shall be disposed of in accordance with any memorandum I may leave with respect to the same and failing any such memorandum then the same shall be divided among my residuary legatees hereinafter named in the same manner as the residue of my Estate.

2. To pay to The Royal Institution for the Advancement of Learning (McGill University), of Montreal, the sum of fifty thousand dollars as a special legacy.

3. To pay to the Royal Victoria Hospital, Montreal, the sum of fifty thousand dollars as a special legacy.

4. To pay to The Art Gallery, presently situate at the corner of Ontario Avenue and Sherbrooke Street West, Montreal, the sum of fifty thousand dollars as a special legacy.

5. To pay to The Church of St. Andrew and St. Paul, presently on Sherbrooke Street West, Montreal, the sum of Twenty-five thousand dollars.

The receipt of the treasurer for the time being of each of the foregoing institutions shall be a good and valid discharge to my Executors and Trustees.

6. To divide the capital of the residue of my Estate between my brothers, sisters, niece and nephews as follows:— One-sixth thereto to my brother, D. Forbes Angus, of the City of Montreal; one-sixth thereof to my brother William Forrest Angus of the City of Montreal; one-sixth thereof to my brother, David James Angus, presently of Victoria, British Columbia; one-sixth thereof to my sister, Margaret Angus, wife of Dr. Charles Ferdinand Martin, of the City of Montreal; one-sixth thereof to my sister, Dame Bertha Angus, widow of Robert MacDougall Paterson of the City of Montreal; one-eighteenth thereof to my niece, Gyneth Wanklyn, widow of Durie McLennan, of the City of Montreal; one-eighteenth thereof to my nephew, David A. Wanklyn, of the City of Montreal; and one-eighteenth thereof to my nephew, Frederick A. Wanklyn, presently of Nassau, Bahamas; and I hereby constitute my said brothers, sisters, niece and nephews my universal residuary legatees in the aforesaid proportions.

The will then provides for the possibilities of brothers, sisters, nephews or the niece of the testatrix predeceasing her and defines the powers of the executors and trustees. The only provision of the will or codicil other than those quoted above which it is suggested may have relevance to the inquiry before us is the clause entitled "Fifthly", reading as follows:—

The bequests herein made whether of capital or revenue are intended as an alimentary provision for my legatees and shall be exempt from seizure for their debts except as a result of express hypothecation or pledge. I direct, moreover, that the bequests herein made while in the hands of my Executors and Trustees shall not be capable of being assigned by the beneficiaries.

Dr. Chipman died on April 4, 1950, domiciled in the City of Montreal. During his lifetime pursuant to the terms of Clause 3(*f*), quoted above, he demanded and received payment of $33,164.41 out of the capital of the residue of the estate.

In these circumstances the learned trial judge (1) has held affirming the assessment made by the Minister that under Mrs. Chipman's will a general power of appointment over the capital of the residue was given to Dr. Chipman and that duties should be assessed as if the capital of the residue had been given outright to him. The contention of the appellants, made when Dr. Chipman was still alive, was:—

> that the assessment should be revised on the basis of assessing Dr. Chipman as revenue beneficiary only and assessing the residuary legatees as capital beneficiaries, a suitable reserve being made in the assessment for reviewing the same in the event Dr. Chipman should withdraw capital.

Their submission on this appeal is the same, subject to the modification made necessary by the fact that the amount of capital withdrawn by Dr. Chipman has now been reduced to a certainty.

The first question is as to the proper construction of the relevant clauses of the will. Under the rules of the law of Quebec, which do not appear to differ in this regard from those of the common law, it seems clear that Dr. Chipman was entitled to the income from the residue for life and that on his death the capital was divisible among the residuary legatees, pursuant to clause 3(*g*) of the will, subject to the possibility of part or all of the capital having been paid to Dr. Chipman during his lifetime; and the shares received by the residuary legatees passed to them from Mrs. Chipman and not from Dr. Chipman. The provisions of the *Dominion Succession Duty Act* do not purport to alter this result, but in the submission of the respondent they have the effect of providing that duties shall be levied as if (i) the whole residue had been given outright to Dr. Chipman by the will of Mrs. Chipman, and (ii) the shares of Mrs. Chipman's estate received by the residuary legatees on Dr. Chipman's death had passed to them from him and not from her. It is with the first only of these two questions that we are directly concerned on this appeal. The power

(1) [1952] C.T.C. 68.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Cartwright J.

of Parliament to so provide is not challenged: the question is whether on a proper construction of the Statute it has done so.

For the appellants it is argued that clause 3(*f*) of the will does not give Dr. Chipman any general power of appointment over the capital of the residue. In my opinion no power to appoint any part of the capital of the residue by will was given to Dr. Chipman. The clause contemplates the exercise of judgment by him as to the amount or amounts that he wishes to take from capital and payment thereof to him in his lifetime. It is payment to him that relieves the executors from further liability to account. Under clause (*g*), upon his death, the capital "as it may then exist" falls to be divided under the terms of Mrs. Chipman's will. Be this as it may, counsel for the respondent contends that during Dr. Chipman's lifetime his power is unlimited as to the amounts that he may take, that the obligation of the executors is to pay to him from time to time and at any time, upon his simple demand, such portions of the capital as he may wish or require, and that consequently Dr. Chipman was given a general power to appoint *inter vivos*. If it were necessary to decide this question, careful consideration would first have to be given to the appellant's argument that the wide terms in which the power given to Dr. Chipman is expressed in clause 3(*f*) are modified and restricted by clause "Fifthly", quoted above. Even if the respondent's contention that Dr. Chipman was entitled to take the whole capital be accepted, the power given to him does not at first sight appear to fall within the text-book definitions of a general power. See, for example, Halsbury 2nd Edition, Vol. 25 at page 211:—

> A general power is such as the donee can exercise in favour of such person or persons as he pleases, including himself or his executors or administrators.

We were, however, referred to the following three cases, in which powers similar to that given to Dr. Chipman were held to be general powers to appoint *inter vivos*: *Re Richards, Uglow v. Richards* (1), a decision of Farwell J.; *In re Ryder, Burton v. Kearsley* (2), a decision of Warrington J.; and *In Re Shukers Estate, Bromley v. Reed* (3), a decision of Simonds J. (as he then was). The earliest of

(1) [1902] 1 Ch. 76. (2) [1914] 1 Ch. 865.
(3) [1937] 3 A.E.R. 25.

these decisions is now fifty years old and no authority questioning them has been cited to us. On the other hand it is to be observed that in the last mentioned case Simonds J. indicated that, while he decided he ought to follow *re Richards* and *re Ryder,* his own inclination was to hold that such a power was not a general power of appointment. In the case at bar I do not find it necessary to decide this question, which I regard as difficult and doubtful, because, even on the assumption that the will of Mrs. Chipman gave to Dr. Chipman a general power to appoint the capital of the residue *inter vivos* I have reached the conclusion that the appeal must succeed.

In order to support the claim that Dr. Chipman was liable to pay succession duty in respect of that part of the residuary estate which he did not receive and which upon his death passed under the will of Mrs. Chipman to the residuary legatees named therein, it is necessary to find a provision in the Statute which, on a proper construction, imposes such a liability. In Maxwell on Statutes, 9th Edition, at page 291, the learned author says:—

> It is a well-settled rule of law that all charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties. The subject is not to be taxed unless the language of the statute clearly imposes the obligation.

In *Coltness Iron Company v. Black* (1), Lord Blackburn said:—

> No tax can be imposed on the subject without words in an Act of Parliament clearly shewing an intention to lay a burden on him.

It has been suggested that these statements are subject to some modification by reason of the terms of the *Interpretation Act,* R.S.C. 1927 c. 1, section 15, but even if this be so, to use the words of Rand J. in *In re Fleet Estate, Minister of National Revenue v. The Royal Trust Co.* (2):

> A taxing Statute must make reasonably clear the intention to impose the tax.

The learned trial judge has held that the tax claimed by the respondent is imposed by section 31. The section reads as follows:—

> 31. Where a general power to appoint any property either by instrument *inter vivos,* or by will, or both, is given to any person, the duty levied in respect of the succession thereto shall be payable in the same manner and at the same time as if the property itself had been given, devised or bequeathed, to the person to whom such power is given.

(1) (1881) 6 App. Cas. 315 at 330. (2) [1949] S.C.R. 727 at 744.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Cartwright J.

As a matter of construction, I think it clear that the word "thereto" in the third line of the section refers to the word "property" in the first line. In my view, the section, whether read by itself, or, as it must be, as part of the Act considered as whole, does not purport to levy any duty or to create or define a succession. It provides only for the manner and time of payment of duty which is assumed to be levied by other provisions of the Statute. It is not without significance that section 31 is found in that part of the Statute which deals with the time and manner of the payment of duties but of greater importance is the sharp difference between its language and that employed in the levying sections, 6, 10 and 11:— "there shall be assessed, levied and paid . . ."

It is necessary therefore to examine the charging provisions of the Statute to discover what duty is levied in respect of the succession to the capital of the residue of Mrs. Chipman's estate as that is the property over which, *ex hypothesi*, Dr. Chipman was given a general power of appointment *inter vivos*.

By the applicable words of 6(*a*) (and of sections 10 and 11, which fix the rates) it is provided that there shall be assessed, levied and paid duties upon or in respect of successions to property. Nowhere in the Act is duty imposed except upon or in respect of successions to property. The capital of the residue is, of course, property, and the question is whether within the meaning of the words used in the Statute Dr. Chipman succeeded thereto. The learned trial judge held that while Dr. Chipman was a successor to the capital of the residue under section 31, he was not a successor thereto under section 2(*m*) but it is desirable to examine that provision. It reads as follows:—

> (*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 substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

Applying these words to the case at bar, the "disposition" with which we are concerned is the will of Mrs. Chipman, the "property" is the capital of the residue, the "death of

the deceased person" is the death of Mrs. Chipman, and the question is therefore whether under her will, upon her death, Dr. Chipman became beneficially entitled to that capital "either immediately or after any interval either certainly or contingently and either originally or by way of substitutive limitation." It appears to me that he did not. I am of opinion that upon the death of Mrs. Chipman, Dr. Chipman became beneficially entitled to the income from the residue and the residuary legatees became beneficially entitled to the capital thereof in remainder. I have already indicated my view that the legal effect of the relevant provisions of the will of Mrs. Chipman is the same under the law of Quebec as under the common law, and using the terminology of the latter, the residuary legatees immediately on the death of Mrs. Chipman took not a contingent but a vested remainder in the capital, expectant on the death of Dr. Chipman, subject to be divested in whole or in part by his exercise of the power to take during his lifetime such portion or portions of the capital as he might wish. So far as the capital of the residue was concerned no part of it became vested in Dr. Chipman upon Mrs. Chipman's death or under any disposition made by her. No doubt upon his exercising the power Dr. Chipman became entitled to the part of the capital of the residue in respect of which he exercised it, and became so entitled under Mrs. Chipman's will by the operation of the rule of law that "whatever is done in pursuance of a power is to be referred to the instrument by which the power is created, and not to that by which it is executed as the origin of the gift." (vide Farwell on Powers, 3rd Edition at page 318); but it was only to the extent that he exercised the power that he became beneficially entitled to any portion of such capital and it was conceded that he was liable to pay duty in respect of such portion. The respondent's argument depends upon the proposition that a person who is given a power over property thereby becomes beneficially entitled to such property but in my view this is not the law and no words in the Statute so provide. As is pointed out in Halsbury, 2nd Edition, Vol. 25, page 515:—

> The creation of a power over property does not in any way vest the property in the donee, though the exercise of the power may do so; and it is often difficult to say whether the intention was to give property or only a power over property.

1953

WANKLYN *et al* v. MINISTER OF NATIONAL REVENUE

Cartwright J.

I have already indicated my view that as a matter of construction it is clear that Mrs. Chipman's will gave Dr. Chipman no property in the capital of the residue but only a power over it.

During the argument the terms of sections 3(4) and 4(1) of the *Act* were fully discussed but they appear to deal with the question of what duties are payable upon the death of the donee of a power rather than with the question of the duties payable upon the death of the donor of a power, and their relevance to the question before us is limited to the bearing which they may have upon the proper construction of section 31.

It is suggested that if the view which I have indicated is adopted difficulties will arise by reason of the terms of section 5 of the *Act* owing to the fact that during Dr. Chipman's lifetime it would be impossible to predict how much of the capital he would take and how much would remain at his death; but it would appear that under other provisions of the *Act,* particularly sections 23 and 48, the revenue can be amply safe-guarded.

It is argued for the respondent that unless section 31 is construed as levying duty it is meaningless but I am unable to agree. In the case at bar, on the assumption that a general power to appoint was given to Dr. Chipman, section 31 would seem to have the effect of requiring that all duties be paid in the manner and at the time provided in section 24 and of taking away the right to pay in the manner and at the times provided in section 28 which would otherwise have existed. But for section 31, the duties of the interests in expectancy given by clause (*g*) of the will of Mrs. Chipman might have been paid either within six months of her death (section 24(2)) or within three months of such interests falling into possesion (section 28(4)); and it will be observed that section 28(3) which permits this choice uses the words:— "or *in the manner* provided by subsection four or subsection six of this section." As already indicated, after consideration of all the terms of the Statute, I find myself quite unable to construe the words of section 31 as levying any duty or defining any succession; and I can find no other provision which has the effect of levying the duty which the respondent contends is payable.

For the above reasons, I would allow the appeal, set aside the assessment and order that the matter be referred back to the Minister in order that an assessment may be made upon the basis that the dutiable value of the succession to Dr. Chipman in respect of the residuary estate of Mrs. Chipman was the value as of the date of her death of the estimated net revenues from such residuary estate during the remainder of his lifetime and that the residuary legatees were assessable as having on the death of Mrs. Chipman become beneficially entitled to the capital of the residue in remainder expectant upon the death of Dr. Chipman, subject to the appropriate adjustment made necessary by the fact of Dr. Chipman having received $33,164.41 from such capital. The appellants are entitled to their costs in the Exchequer Court and in this Court.

Appeal allowed with costs.

Solicitors for the appellants: *Dixon, Claxton, Senecal, Turnbull and Mitchell.*

Solicitor for the respondent: *R. G. Decary.*