Montreal
1966

June 7

Ottawa
Oct. 28

BETWEEN:

THE ROYAL TRUST COMPANY, JAMES REID SARE, JAMES GEMMILL WILSON, Executors of the Estate of AGNES HENRY WILSON .... APPELLANTS;

AND

THE MINISTER OF NATIONAL REVENUE .... RESPONDENT.

Estate tax—Estate Tax Act, R.S.C. 1958, c. 29, ss 3(1)(a), (2)(a), 58(1)(i)—Competency to dispose of property—Meaning of "general power" of appointment—Whether deceased competent to dispose of property bequeathed and settled on her behalf under trusts.

The late James Reid Wilson, who died some 49 years before his daughter Agnes Henry Wilson, left a will under which she had inherited a portion of the residue of his estate.

During her lifetime, only the income therefrom was payable to her and the disposition of the capital upon her death depended on whether she was survived by husband and children As she was in fact survived by issue "which lived to be six months old", as stipulated, the late Agnes Henry Wilson was given the power to dispose of her share of the capital "after her death in such a manner as she might direct by will".

In the Minister's contention, Agnes Henry Wilson had a general power to dispose of this property within the meaning of ss. 3(1)(*a*), (2)(*a*), and 58(1), so that the property therefore formed part of her estate.

The late James Reid Wilson, her deceased father, has also, by a deed of donation, dated the 11th of December, 1912, given a life interest in certain property to his daughter, together with the power to dispose of it by will "in such manner as she might deem advisable". The Minister also construed this property as passing on the death of the deceased.

Held, That sufficient material has been adduced to conclude that the deceased, Mrs. Agnes Henry Sare, "immediately prior to her death" and long before, had "such general power" and authority to appoint and dispose of the property bequeathed and donated to her by her father the late James Reid Wilson, as enabled her to exercise, in a will, this general power, "as she saw fit" in her own right and not in a fiduciary capacity.

2. That this appeal be dismissed.

APPEAL from an assessment of the Minister of National Revenue.

John de M. Marler, Q.C. and *T. O'Connor* for appellant.

Alban Garon for respondent.

DUMOULIN J:— This is an appeal from the respondent's confirmation of a reassessment, on August 25, 1965, levying an Estate Tax in the net amount of $250,390.60, in respect of the Estate of the late Agnes Henry Wilson, in her lifetime of the City of Montreal, wife of Robert George Sare of the same place.

Mrs. Agnes Henry Wilson-Sare (hereinafter called "the deceased") died on January 26, 1963, leaving a Last Will and Testament dated June 15, 1945, executed, in authentic form, before Dakers Cameron and colleague, Notaries (Ex. C).

By said Will, the deceased appointed the appellants and her husband, Robert George Sare, as her Testamentary Executors. Mr. Sare died on September 24, 1965, and has not been replaced as an Executor.

The instant litigation concerns, 1) the property valued, when the deceased died, at $986,593.11, being her share in the estate of her father, the late James Reid Wilson, a wealthy metal merchant of the City of Montreal, and 2) certain other property valued, at date of death, at $113,-054.03, given (*inter vivos*) by Deed of Donation to the Royal Trust Company in trust for the deceased; said Deed executed before J. A. Cameron, Notary, on December 17, 1912.

Paragraph 3 of the Notice of Appeal imparts the material information as follows:

3. The deceased's father, the late James Reid Wilson...who died on 11th May, 1914, left a Last Will and Testament dated 11th December, 1912, executed before John Fair and colleague, Notaries, by which, after

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bequeathing certain particular legacies, he bequeathed the residue of his property to his children, in equal shares, thereby instituting them his universal residuary legatees, adding, however, that the share of each of his daughters should be retained in the hands of his Executors (i.e., his wife, their son, John Wilson, Mr. James M. Robertson and the Royal Trust Company; *cf.* exhibit A, thirteenth clause) during her lifetime and only the revenue thereof paid to her and, with respect to the share of his daughter the deceased, he provided as follows: (The eighth paragraph of the tenth clause, exhibit A)

> The capital of the share of my daughter, AGNES HENRY WILSON (Mrs. R. G. SARE), shall be disposed of after her death in the following manner:—Should she die without issue surviving her, one fourth of her share shall belong to her husband, if living, and the remaining three-fourths shall belong to her brothers and sisters, in equal shares. *Should she die leaving issue surviving her which live to be six months old, the capital of her share shall be disposed of after her death in such manner as she may direct by will,* or should she die intestate it shall belong to her heirs-at-law. The donation to be made by me to THE ROYAL TRUST COMPANY for the benefit of my said daughter, AGNES HENRY WILSON, shall be considered as a payment to my daughter in advance on account of her share in my estate and in the division of my estate the TRUST PROPERTY mentioned in said Deed, or the securities representing the same at the time of my death, shall be considered as of the value of FIFTY THOUSAND DOLLARS.

The fifth clause of the Deed of Donation, for all purposes an appendix to the late James Reid Wilson's Last Will and Testament, provides that:

> *In the event of the said Dame Agnes Henry Wilson* (Mrs. R G. Sare) *surviving said Donor, she shall have the absolute right to dispose of the said Trust Property by her Will in such manner as she may deem advisable,* and, failing so doing, the same shall at her death pass to her heirs-at-law.

(Italicized words throughout these notes not in original text.)

On appellant's behalf, it is contended that the deceased never was competent to dispose of her property mentioned in paragraphs 5 and 8 of the Notice of Appeal, within the meaning of the *Estate Tax Act,* and, also, "that in any event, the deceased was not, immediately prior to her death, competent to dispose of said property".

As could be expected, the respondent takes a categorically opposite view of the matter, assuming that (*cf.* Reply to Notice of Appeal):

> 9. ...
>
> (*a*) Agnes Henry Wilson was, immediately prior to her death, competent to dispose of her share of the capital mentioned in Clause 10 of the Will made by her father, dated December 11, 1912,

(*b*) Agnes Henry Wilson was, immediately prior to her death, competent to dispose of the trust property referred to in Clause 5 of the Deed of Donation made by her father and dated December 17, 1912.

Both parties rest their case on the differing interpretation each attaches to sections 3(1)(*a*), 3(2)(*a*) and 58(1)(*i*) of the *Estate Tax Act*, 1958, 7 Elizabeth II, c. 29, enacting that:

3. (1) There shall be included in computing the aggregate net value of the property passing on the death of a person the value of all property, wherever situated, passing on the death of such person, including, without restricting the generality of the foregoing,

(*a*) All property of which the deceased was, immediately prior to his death, competent to dispose;

. . .

3. (2) For the purposes of this section,

(*a*) a person shall be deemed to have been competent to dispose of any property if he had such an estate or interest therein *or such general power* as would if he were *sui juris*, have enabled him to dispose of that property.

. . .

58. (1) In this Act,

(i) "general power" includes any power or authority *enabling the donee or other holder thereof to appoint, appropriate or dispose of property as he sees fit, whether exercisable by instrument 'inter vivos' or by will or both,* but does not include any power exercisable in a fiduciary capacity under a disposition not made by him, or exercisable as a mortgagee.

Obviously, the undersigned's sole research consists in determining whether or not the means of disposal, bestowed upon the deceased by her father's will and deed of donation, vested Agnes Henry Wilson with that general power of disposition defined in the Act.

Since the deceased survived her father by no less than 49 years and, at her death, left three children, respectively 52, 50 and 48 years old, my investigation narrows down to the appraisal of the latitude or freedom of action extended to Mrs. Agnes Henry Wilson-Sare by such clauses, as in her author's will: "Should she die leaving issue surviving her which live to be six months old, *the capital of her share shall be disposed of after her death in such manner as she may direct by will...*" and in the deed of donation, as: "In the event of the said Dame Agnes Henry Wilson surviving said Donor (her father, James Reid Wilson) *she shall have*

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the absolute right to dispose of the said Trust Property by her Will in such manner as she may deem advisable."

It would seem to me that no feat of imagination is required to read into those plain, unambiguous directives the conference on the donee and heir-to-be of an untrammelled liberty, *a general power*, under the conditions prescribed, of bequeathing such property by will and testament *"as she saw fit"*. And we have just seen that the enabling requirements: survival and living issue, were fully realized.

Yet, I do not intend disposing of the case in this summary fashion, especially after the decision of the Supreme Court, reversing me, *in Re: Montreal Trust Company, et al. v. The Minister of National Revenue*[1], Estate Robert Newmarch Hickson. Furthermore, it might be apposite to attentively peruse prior decisions of the Courts, and also some of the text writers' views of the qualifying conditions inherent in a "general power".

In the case above, Robert Newmarch Hickson's mother, Lady Hickson, predeceased him leaving a will in notarial form, article IX of which expressed the following condition:

> I direct that one-half of the share of my son Robert Newmarch Hickson in the residue of my Estate, less the sum of Forty Thousand Dollars which I have given him some years ago, shall belong to him in absolute ownership, and the other half of his share I give and bequeath the usufruct thereof during his lifetime to my said son Robert Newmarch Hickson and the ownership to the children of my said son, and if he leaves no children, to his heirs, *legal or testamentary.*

Domiciled in the Province of Quebec, Robert N. Hickson died in June, 1960, survived by his widow, but leaving no issue as the marriage had remained childless. He left a will in authentic or notarial form, executed on October 27, 1959, appointing the Montreal Trust and others his executors. With the exception of a few particular legacies, Hickson gave the residue of his property to Dame Orian Hays, his widow. The pertinent clause was drafted in these words:

> And all the rest, residue and remainder of the property real and personal, moveable and immoveable of every sort, nature and description of which I may die possessed or in which I may have any interest, or over which I may have the power of appointment or disposal (including any lapsed legacies) I give and bequeath to my wife, the said Dame Orian Hays Hickson as her absolute property.

[1] [1964] S.C.R. 647 at 648-649-650-651-652.

The legal consequences of those successive testamentary dispositions were, by the Supreme Court's decision, held to be that:

> . . . Robert Newmarch Hickson was the institute of the substitution; that its opening took place at his death, and that had he left children him surviving they would have been the substitutes.

Mr. Justice Cartwright, speaking for the Court, next pursued:

> With respect, I am unable to agree with the learned trial judge that the substitution lapsed. The will of Lady Hickson provided for the possibility of the institute dying without children and in that event, which happened, named as substitutes "his heirs legal or testamentary".
>
> By the residuary clause of his will, quoted above, his widow was constituted the testamentary heir of Robert Newmarch Hickson; the character of the gift to her in this clause is that of a universal legacy... His widow, as substitute, took the fund directly from the grantor, Lady Hickson, and not from the institute her husband.

Accordingly, Robert N. Hickson having constituted his wife universal legatee and, therefore, his testamentary heir, this lady took the fund "not through the exercise of any power given to Robert Newmarch Hickson, but because Lady Hickson has designated as substitute his testamentary heir".

Presently, the circumstances are at complete variance with those above-stated.

There is not, in any of the provisions revealing the testator-donor's intentions, the faintest trace of a substitution, nothing else than, in James Reid Wilson's testament, "*...the capital of her share shall be disposed of, after her death, in such manner as she may direct by will*"; and in the deed of donation, the unlimited grant of "*...the absolute right to dispose of the said Trust Property by her will in such manner as she may deem advisable...*".

Any anticipation, in each of the covenants, of the possibility of Mrs. Agnes Henry Wilson dying intestate, in which event the property would belong to her heirs-at-law, merely is a redundant repetition of the general law, formulated by article 597 of the *Civil Code*.

Although such empowering terms leave but little room for doubting that they were intended to invest the deceased, in the fullest measure, with that general power of disposition required by s. 3(2)(*a*) and defined by s. 58(1)(*i*) of the Act, I will, nevertheless, add to these obvious reasons the comments of two well-known authors.

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I am now quoting from Loffmark's *Estate Taxes*[1]:

> For purposes of the *Estate Tax Act*, a power is general if the donee can make the subject-matter his own or if he is competent to dispose of property "as he sees fit"..... It would also appear that the words in section 58(1)(*i*) "as he sees fit", refer to the disposal of the property and not to the form of disposal; so that a power for this purpose, would not be the less a general power because some special reference to the power was required, or because the date at which the appointment was to take effect was fixed by the donor of the power.

We read in Jameson's *Canadian Estate Tax*[2], that:

> A power which is given to a person who may appoint in favour of anyone, including himself, is general. A special power is one in which the donee of the power is limited in the exercise of the power to appoint only in favour of persons in a limited class or group or certain specified individuals.

It should be noted that "General Power", as outlined in s. 58(1)(*i*), makes no specific mention of the donee's or property holder's right of appointing to himself, which, necessarily, could not arise in connection with a testament. The statute decrees that a "general power" includes any authority to dispose of property as the donee or holder sees fit, such power exercisable, as in the instant case, by will.

The aforesaid treatise next goes on to say that:

> In the case of a general power it is considered by the legislature that such a power in the hands of the donee (or holder of property) amounts *to ownership of the property comprised in the power.*

The following lines apply perfectly to the matter at bar:

> *A donor in creating a power may state that the power may be exercised by will or by deed inter vivos, but the exercise of a power by will is none the less general with that limitation, for although the donee is unable to bring the property into his own possession during his lifetime, he has complete power of disposal of it upon his death.* In *Prov. Sec.-Treas. of N.B. v. Schofield*, a testator devised property to his sister for life, and after her death to such person or persons as she should by will appoint. It was held that the sister had a general power of appointment as the objects of the power derived their benefit from the sister and not from the testator, and consequently they were taxable in the sister's estate.

What precedes offers instances of the current application, rather self-evident should I say, of a general power, or, better still, of the literal exercise of s. 58(1)(*i*). The interpretation obtaining extends, however, far beyond these

[1] Loffmark: *Estate Taxes*, 1960, pp. 163-164

[2] Jameson: *Canadian Estate Tax*, 1960, pp. 118, 120, 121.

clear-cut precedents, according to the writer's opinion and authorities referred to in, again, Jameson's *Canadian Estate Tax* (*supra*) (pages 120-121):

> But a power may still be general if the consent of some person is required to the act of exercising it. In *Re Phillips* the donee had a power to appoint trust funds to such persons as he should designate, subject to the consent of the trustees, the appointment to take effect upon his death It was held that the consent of the trustees did not fetter the donee's selection of objects of the power, and it was a general power. But if the consent required relates to the selection of the objects of the power, then it is a special power and not within the terms of the section.
>
> In *Drake v. A.-G.* a case under s 7 of the English *Legacy Duty Act, 1796,* it was held that the exclusion by the donor of certain persons from the benefit of the exercise of an otherwise general power did not prevent the power from being general.

Sufficient material has been adduced, I humbly believe, to conclude that the deceased, Mrs. Agnes Henry Wilson-Sare, "immediately prior to her death" (and long before) had "such general power". And authority to appoint and dispose of the property bequeathed and donated to her by James Reid Wilson, her father, as enabled her to exercise, in a will, this general power "as she saw fit", *in her own right* and not in a fiduciary capacity.

For the reasons above this appeal is dismissed and the respondent entitled to recover all legal costs after taxation.