1963
May 22
Aug. 6

BETWEEN:

MONTREAL TRUST COMPANY, DAME ORIAN HAYS HICKSON AND RALPH DOUGAL YUILE .. APPELLANTS;

AND

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

Revenue—Succession duty—Succession—Will—When usufruct in share of estate gives to donee such general power to appoint, appropriate or dispose of property as is deemed to make him, immediately prior to his death, competent to dispose of the property—Estate Tax Act, S. of C. 1958, c. 29, ss. 3(1)(a), 3(2)(a) and 58(1)(i)—Testamentary substitution—Lapse of substitution and reversion of substituted property to institute—Civil Code, Arts. 900, 901, 925, 928, 930, 933 and 957.

By articles VIII and IX of her will dated April 22, 1931, Catherine Dow Hickson bequeathed one-fifth of the residue of her estate to her son, Robert Newmarch Hickson, directing that one-half of the said share, less $40,000 previously given to him be given to him absolutely and the usufruct of the other one-half of his share be given to him during his lifetime, the ownership of the said one-half of his share being bequeathed to his children, "and if he leaves no children to his heirs, legal or testamentary".

The said Robert Newmarch Hickson died without issue on June 19, 1960, leaving a will by the terms of which he bequeathed his estate, less certain specific legacies, to his wife. On his death the Minister of National Revenue assessed estate duty tax against the said one-half of his share in his mother's estate, the usufruct of which had been bequeathed to him for life, claiming that it was part of his estate by virtue of the *Estate Tax Act* ss. 3(1)(*a*), 3(2)(*a*) and 58(1)(i).

Held: That whenever the substitute is incapable of inheriting, the substituted property reverts to the institute in full ownership. Here, on the death of the institute, Robert Newmarch Hickson, the substitution failed because he died without issue, and he, the institute, accordingly profited by the lapse of the substitution, the substituted property reverting to his estate in full ownership.

2. That the lapse of the substitution conferred upon the said Robert Newmarch Hickson a general power "to appoint, appropriate or dispose of (this) property as he sees fit . . . by will . . .".

3. That the property in question was properly included in the estate of the late Robert Newmarch Hickson for the purpose of computing its aggregate net value under the *Estate Tax Act*.

APPEAL under the provisions of the *Estate Tax Act*.

The appeal was heard before the Honourable Mr. Justice Dumoulin at Montreal.

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John Marler, Q.C. and *T. O'Connor* for appellants.

Paul Boivin, Q.C. and *Paul Ollivier* for respondent.

The facts and questions of law raised are stated in the reasons for judgment.

DUMOULIN J. now (August 6, 1963) delivered the following judgment:

This is an appeal from the confirmation by respondent, on October 31, 1962, of a Succession Duty assessment, dated June 16, 1961, wherein a tax in the sum of $226,841.69 was levied on the estate of Robert Newmarch Hickson, late of Montreal, Province of Quebec.

The chronological sequence of facts out of which the instant difficulty arises are the following:

Lady Catherine Dow Hickson, mother of Robert Newmarch Hickson, made, in Montreal, an authentic will on April 22, 1931, articles VIII and IX whereof enact that:

> VIII. . . . I bequeath the rest residue and remainder of my Estate, real and personal, moveable and immoveable of every kind, nature and description, to my five children (the heirs are then mentioned among which is R. N. Hickson) . . . to be divided between them in equal shares, . . . but the share of my son, Robert Newmarch Hickson, and the share of my daughters to be subject to the conditions hereinafter expressed.
>
> IX. 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.*

The italicized words constitute the vexed question, but of this, more later.

Lady Hickson deceased many years ago; then on June 19, 1960, Robert Newmarch Hickson died, domiciled in Montreal, leaving a Last Will and Testament, dated October 27, 1959, executed before H. B. McLean and colleague, Notaries.

Robert Newmarch Hickson left no issue. By his will he appointed the appellants as his executors and, after numerous particular legacies, bequeathed the remainder of his property to Mrs. Orian Hays Hickson, his wife, one of the appellants.

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At the death of R. N. Hickson, June 19, 1960, his mother's executors, pursuant to article IX of her will, held property of a value of $363,702.19 against which respondent proceeded to assess an Estate Duty Tax, on the ground submitted in paragraph 6 of its Reply to Notice of Appeal:

6. . . . that by reason of *the general power of* appointment which Robert Newmarch Hickson had upon the capital of the Estate of Lady Catherine D. Hickson, according to the provisions of the Estate Tax Act and more particularly according to paragraph (*a*) of subsection (1) and paragraph (*a*) of subsection (2) of section 3, and paragraph (i) of subsection (1) of section 58 of the Act, said capital amounting to $363,702.19 was included in the net value of the Estate of the deceased.

To this interpretation of the Act, the appellants take categorical exception, arguing in paragraphs 10, 11 and 12 of the Notice of Appeal that:

10. The deceased (i e. Robert Newmarch Hickson) could not and did not have a *general power,* as defined in said Section 58(1)(i) or otherwise, over the property in question.

11. The deceased was not competent to dispose of the property in question within the meaning of the said Sections above quoted or otherwise.

12. In particular, the deceased was not competent to dispose of said property immediately prior to his death.

Thus circumscribed by the concise assertion of a taxing right and its flat denial, the litigations' solution must be looked for in the provisions aforesaid of our *Estate Tax Act,* thus worded:

3(1)(*a*).

(1) There shall be included in computing the aggregate net value of the property passing on the death of the 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)

(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*—"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

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include any power exercisable in a fiduciary capacity under a disposition not made by him, or exercisable as a mortgagee.

Let us now examine how these legal prescriptions compare with appellants' standpoint in the case, summarized as follows at page 6 of their Notes and Authorities:

> . . . Appellants thus submit that Hickson was not at any time *competent to dispose* of the property; alternatively, that, if he was, he was not so competent immediately prior to his death; or if he was so competent immediately prior to his death or even at the time of his death, *he could not appoint or dispose of the property as he saw fit;* and that for each of these reasons no Estate Tax is exigible on or in respect of the property.

The difficulty, it would appear, narrows down to the donee's testamentary power of disposal should he die childless.

In other words was Hickson's right to dispose by will of the property, affected to his lifelong usufruct, limited by article IX; was he, when inditing his testamentary legacies, a mere fiduciary or an absolute owner in full exercise of his untrammelled liberty? What is the specific qualification attaching to article IX of Lady Hickson's Testament: simple usufruct of a fiduciary substitution?

Article 925 of the Civil Code mentions two kinds of substitution, the vulgar and the fiduciary, this latter being:

> 925. . . . that in which the person receiving the thing is charged to deliver it over to another either at his death or at some other time.

Article 928 elaborates the matter in these words:

> 928. A substitution may exist although the term "usufruct" be used to express the right of the institute. In general the whole tenor of the act and the intention which it sufficiently expresses are considered, rather than the ordinary acceptation of particular words, in order to determine whether there is substitution or not.

In a typical affair: *Lussier v. Tremblay*[1], a substitution created by act *inter vivos,* conveyed lands donated by husband and wife, common as to property, to their two sons and daughter as institutes, the donors stipulating that: *"Les donateurs n'entendent pas par là créer une vraie substitution . . .".* Despite this subjective expression of intent Mr. Justice Taschereau, as he then was, speaking for the

[1] [1952] 1 S.C.R. 389 at 404, 406.

majority of the Supreme Court, imparted to that clause an objective meaning quite different; I quote:

> Je crois qu'il ne fait pas de doute que, malgré les termes employés dans l'acte de donation, *"Les donateurs n'entendent pas par là créer une vraie substitution", il s'agit bien tout de même d'une vraie substitution.* Les parties l'admettent, et si l'on s'est servi de ces termes, c'est probablement parce que les appelés à la substitution n'étaient pas individuellement désignés.

This omission of individually designating the substitutes (les appelés) in the *Lussier* case, whatever its cause, was, for Lady Hickson, a physical impossibility since her son—the deceased—never had any children.

Ancestral solicitude for the welfare of unborn descendants prompted the testatrix to reserve for their future benefit one-half of the estate bequeathed in usufruct to their eventual father (*pater in potentia*).

Such a hypothetical legacy bears the characteristic traits of a fiduciary substitution, according to the text of the Civil Code, to doctrine and jurisprudence. It is natural that Lady Hickson's parental care did not extend beyond the direct line of parenthood, the more so since her other children were amply provided for.

Concerning the ownership of half of the legacy made to her son, the donor preferred her grandchildren to be born of the latter's marriage, but should he die childless, she then would prefer him to any other.

In default of this mandatory condition at R. N. Hickson's death how does the pertinent law deal with the lapsed substitution? The applicable texts suffer no ambiguity and the consensus of doctrinal opinion summarized in P. B. Mignaults' treatise "Le Droit civil canadien", is clearer still. Whenever the substitute is incapable of inheriting, the substituted property reverts to the institute in full ownership. A correlation of five articles in the Quebec Civil Code allows of no other conclusion; those articles read as hereunder:

> 933. The rules concerning legacies in general (substitutions fall in this category) also govern in matters of substitution, in so far as they are applicable, save in excepted cases. Substitutions by gift inter vivos, like those created by will, are subject to the same rules as legacies, as to their opening and after they have opened. . . .

Those rules prescribe that:

> 900. Every testamentary disposition (such as clause IX of the testatrix's will) lapses if the person in whose favor it is made do not survive the testator.

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901. Every testamentary disposition made under a condition which depends on an uncertain event lapses if the legatee die before the fulfilment of the condition.

In the case at bar the condition foresaw the survival of issue at the time of R. N. Hickson's demise. And, here, a melancholy paraphrase of Milton may be in point: "As no children had seen the light of day, none were blinded by the darkness of death". Two final dispositions in chapter (IV) on Substitutions will close this review.

930 (partim). The revocation of a substitution, (including the substitute's inability to avail himself of the disposition) when it is allowed, cannot prejudice the institute or his heirs *by depriving them of the possible benefit of the lapse of the substitution* or otherwise. On the contrary, and although the substitute might have received but for the revocation, *such revocation goes to the profit of the institute and not of the grantor,* unless the latter has made a reservation to that effect in the act creating the substitution.

Article IX of the Testament contains no reservation of any reversionary right.

957. The substitute who dies before the opening of the substitution in his favor, *or whose right to it has otherwise lapsed,* does not transmit such right to his heirs, any more than in the case of any other unaccrued legacy.

To whom this right reverts, the late Mr. Justice Mignault indicates in these limpid terms: (P. B. Mignault, Droit civil canadien, Tome 5, p. 121.)

Des effets de la Caducité:— Je viens d'indiquer les effets de la caducité lorsqu'elle provient de la personne du grevé. *Lors, au contraire, qu'elle vient de la personne de l'appelé, elle efface la charge de rendre. Donc le grevé demeurera propriétaire incommutable des biens substitués,* et les droits qu'il a consentis sur ces biens seront definitifs. *L'appelé,* sauf le cas où la représentation est admise exceptionnellement, *ne transmettra aucun droit à ses héritiers, car son droit s'évanouit avec lui.*

It not infrequently happens in substitutions to unborn infants that the institute, usually of course the father to be, is invested with a right of designating by a will the particular substitutes, whose class, however, is specified in the deed of substitution. In such event the legatee or institute becomes a simple trustee prevented from transgressing the directions imported by the grantor. The *Lussier v. Tremblay* case, above, especially at pages 406 and 407, instances an occurrence of this nature. But, again, it does seem impossible to read even a shade of a restriction in the plain words

of clause IX. ". . . I give and bequeath . . . the ownership to the children of my said son, and if he leaves no children, *to his heirs,* legal or *testamentary*".

I must therefore reach the conclusion that the substitution in favour of grandchildren, unborn at its opening, has lapsed, thereby investing Robert Newmarch Hickson with full proprietorship of the second half of his share in his mother's estate, and conferring upon him a general power *"to appoint, appropriate or dispose of (this) property as he sees fit . . . by will . . .".*

R. N. Hickson was empowered by his mother, Lady Hickson, to make a perfectly valid will, provided that, at his death, his matrimonial union had proved childless as it did.

For the reasons outlined the appeal is dismissed and the Estate Duty assessed by respondent, on June 16, 1961, in respect of Robert Newmarch Hickson's succession was levied in accordance with the law. The respondent is entitled to recover all costs after taxation.

Judgment accordingly.