1955
Sept. 12
Nov. 7

BETWEEN:

MONTREAL TRUST COMPANY *et al.* (Emily Rhoda Bathgate Estate) ..... APPELLANTS;

AND

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

Revenue—Succession duty—The Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended, ss. 3(4), 6(1)(a)—Will—Power to draw from capital—General power to appoint or dispose of property—Appeal from Minister's assessment dismissed.

By his will one Bathgate left his estate to his trustees to pay to his wife during her lifetime the net income thereof 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 two children. Mrs. Bathgate died in 1953. In assessing the value of the successions arising on her death the Minister included the amount then comprising the residue of Mr. Bathgate's estate on the ground that under his will his widow had at the time of her death a general power to appoint or dispose of property within the meaning of s. 3(4) of the Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended. On an appeal from the assessment this Court

Held: That although the power held by Mrs. Bathgate was exercisable only in favour of herself and not in favour of such person or persons as she pleased the will of her husband conferred on her a general power of appointment in respect of the residue of his estate. *Re Richards, Uglow* v. *Richards* [1902] L.R., 1 Ch. D. 76; *Re Ryder, Burton* v. *Kearsley* [1914] L.R., 1 Ch. D. 865; *Re Shuker's Estate, Bromley* v. *Reed* [1937] 3 A.E.R. 25; and the opinions of Rinfret C.J. and Locke J. dissenting in *Wanklyn* v. *Minister of National Revenue* [1953] 2 S.C.R. 58 at page 60 and following, referred to and followed.

APPEAL under the Dominion Succession Duty Act, R.S.C. 1952, c. 89.

The appeal was heard before the Honourable Mr. Justice Ritchie at Winnipeg.

A. E. Johnston, Q.C. for appellants.

J. A. MacAulay, Q.C., D. C. McGavin and *A. L. DeWolf* for respondent.

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

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RITCHIE J. now (November 7, 1955) delivered the following judgment:

This is an appeal from an assessment made by the Minister of National Revenue levying succession duty in respect of the estate of Emily Rhoda Bathgate and the successions arising therefrom.

The appellants Montreal Trust Company, successor to The Northern Trusts Company, and Mary Loghrin Calder and William Campbell Bathgate, in their representative capacities, are the executors and trustees under the last will and testament of Emily Rhoda Bathgate (herein referred to as "Mrs. Bathgate"), late of the city of Winnipeg and the widow of James Loghrin Bathgate (herein referred to as "Mr. Bathgate"), who also was resident in Winnipeg.

The Montreal Trust Company is the successor to The Northern Trusts Company by reason of having absorbed The Northern Trusts Company and taken over its business.

By "An Act Respecting Montreal Trust Company and the Northern Trusts Company", Chapter 61, Statutes of Manitoba, 1954, the Montreal Trust Company, as of March 25, 1954 ,was substituted, in the place and stead of The Northern Trusts Company, as executor and trustee in respect of the last wills and testaments of Mr. and Mrs. Bathgate and the letters probate of their respective wills.

The appellants Mary Loghrin Calder and William Campbell Bathgate, in their personal capacities, are respectively the daughter and the only son of Mr. and Mrs. Bathgate.

Mr. Bathgate died at Winnipeg on or about October 5, 1934 and letters probate of his last will and testament on October 12, 1934 were issued to The Northern Trusts Company and to Mrs. Bathgate, the executors named therein.

Mrs. Bathgate, then the lawful widow of Mr. Bathgate, died at Winnipeg on or about March 8, 1953 and letters probate of her last will and testament were issued on April 11, 1953 to The Northern Trusts Company and Mary Loghrin Calder and William Campbell Bathgate, the executors named therein.

At the time of the death of Mrs. Bathgate there were in the hands of Mr. Bathgate's executors assets of his estate totalling $170,045.30, of which $1,032.99 was in revenue account and $169,012.31 was in capital account.

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In computing the value of the successions arising on Mrs. Bathgate's death, the Minister of National Revenue included in his computation the $170,045.30 then comprising the residue of Mr. Bathgate's estate and, under a notice of assessment dated September 29, 1953, levied succession duties in respect thereof.

On November 4, 1953, the succession duties demanded by the Minister were paid by Mrs. Bathgate's executors, but under protest, conditionally and with a denial of liability in respect to the succession duties levied on the said sum of $170,045.30 and the interest upon the succession duties levied thereon which, including interest, totalled $65,702.

Under date of November 17, 1953 the appellants appealed to the Minister from the assessment. The Minister affirmed the assessment by his decision dated April 21, 1954.

The paragraphs of Mr. Bathgate's will which deal with the appointment of his executors and trustees and dispose of the residue of his estate and which have the most relevance to this appeal read as follows:

I appoint The Northern Trusts Company and my wife, Emily Rhoda Bathgate, to be executors and trustees of this my last will and testament, desiring, however, that The Northern Trusts Company shall take upon itself the burden of the actual administration of my estate and the trusts hereafter created and shall have the custody of all the assets of my estate, that my wife, Emily Rhoda Bathgate, shall be consulted by the said The Northern Trusts Company and shall act in advisory capacity only without incurring the responsibility of collecting in, managing and administering my estate, and that the administration of the trusts thereof shall rest with the said The Northern Trusts Company.

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.

Eighthly: I further direct that any share in my residuary estate to which a child of mine shall become entitled under this my will, shall, subject to any right as to income and/or corpus herein given for the benefit of my wife, be paid to such child as he or she shall respectively

attain the age of thirty-five years; and in the meantime subject to any right as to income and/or corpus herein given to my wife a child of mine shall be entitled to receive the income on his or her share of my residuary estate.

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 determinable 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.

Harold R. Parker, the manager of estates of the Winnipeg branch of the Montreal Trust Company, who formerly was general manager of The Northern Trusts Company, testified that the latter company assumed the burden of the administration of Mr. Bathgate's estate and the trusts created by his will and held the assets of his estate in its custody but consulted Mrs. Bathgate when considered necessary. Mr. Parker also testified that no part of the capital of Mr. Bathgate's estate was paid to his widow and that at no time did Mrs. Bathgate request the executors to pay any part of the corpus of her husband's estate to her or indicate any desire that they do so.

The claim of the Minister to levy succession duty on the residue of his estate which, on the death of his widow, passed to his children, Mary Loghrin Calder and William Campbell Bathgate, is based on sections 6(1)(*a*) and 3(4) of the Dominion Succession Duty Act, chapter 89, R.S.C. 1952, which read:

6. (1) Subject to the exemptions mentioned in section 7, there shall be assessed, levied and paid at the rates provided for in the First Schedule duties upon or in respect of the following successions, that is to say,

(*a*) 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;

3. (4) When 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.

Section 3(4), in the above form, was enacted by section 2(3) of chapter 317, Revised Statutes, 1952.

The Minister contends that under the paragraphs of Mr. Bathgate's will his widow had at the time of her death a general power to appoint or dispose of property.

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The appellants take the position that the terms of Mr. Bathgate's will did not confer on Mrs. Bathgate a general power of appointment or a general power of disposition in respect to the residue of his estate, that Mrs. Bathgate had only a special restricted power to require that the residue of the estate, in whole or in part, be paid to her and that the residue of Mr. Bathgate's estate had, on Mr. Bathgate's death, vested in Mary Loghrin Calder and William Campbell Bathgate, subject only to the right of Mrs. Bathgate to exercise the special or limited power held by her.

It was conceded by counsel for the appellants that if the right of Mrs. Bathgate to require a payment to her of the whole or a portion of the residue of Mr. Bathgate's estate fell within section 3(4) succession duty could be levied as contended by the Minister.

The question for determination, therefore, is whether at the time of her death Mrs. Bathgate had a general power to appoint or dispose of the property comprising the residue of Mr. Bathgate's estate.

At page 8 of *Farwell on Powers*, 3rd Edition, it is said:

> Powers may be either general or limited. General powers are such as a donee can exercise in favor of such person or persons as he pleases, including himself. Limited powers, which are sometimes also called special powers, are such as a donee can exercise only in favor of certain specified persons or classes.

And at page 9:

> The donee of a general power may appoint to himself.

In Halsbury, 2nd Edition, Volume 25, at page 516, it is said:

> A gift of income for life, with liberty to use the capital if the income is not sufficient, creates a general power of appointment by deed or writing, but probably not by will, over the capital, where the word "sufficient" means sufficient for the desires of the beneficiary, but not where it means sufficient for his needs.

In *Re Richards, Uglow* v. *Richards* (1) Farwell J. dealt with a bequest of the income of an estate to the testator's wife for life with a direction that

> In case such income shall not be sufficient she is to use such portion of my said real and personal estate as she may deem expedient.

and held that the wife had a general power of appointment over the capital of the estate during her lifetime.

(1) [1902] L.R., 1 Ch. D. 76.

In *Re Ryder, Burton* v. *Kearsley* (1) Warrington J. held that under a clause in a will reading

> I authorize my husband so long as he is entitled to the income of part or the whole of my estate to apply such portion of the corpus of my estate as he shall think fit for his own use and benefit.

there was conferred on the husband power to appoint such portion of the estate as he should think fit for his own use and benefit during his lifetime.

Re Shuker's Estate, Bromley v. *Reed* (2) is a case where a testator gave all his property, both real and personal, to his wife, upon trust,

> to retain the income thereof for her own use and benefit absolutely with power to convert to her own use from time to time such part or parts as she may think fit of the capital of my said real and personal estate or the investments of sale proceeds thereof.

After the death of the wife the real and personal property, or so much thereof as had not been converted by the wife to her own use, was devised and bequeathed to trustees for the benefit of themselves and other nephews and nieces. Upon the death of the testator the widow made a declaration that she had converted the whole of the property to her own use. Simonds J. held that a general power of appointment had been given to the widow and that she had duly and validly exercised that power and made the property her own.

Wanklyn v. *Minister of National Revenue* (3) is a case where the Supreme Court of Canada had to deal with a clause in a will reading as follows:

> (*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.

The question of whether, under the terms of his wife's will, Dr. Chipman acquired a general power of appointment in respect to the residue to her estate, was considered, but the majority of the Court held it was not necessary to decide the point in order to dispose of the appeal. Rinfret C.J.C.

(1) [1914] L.R., 1 Ch. D. 865. (2) [1937] 3 A.E.R. 25.
(3) [1953] 2 S.C.R. 58.

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and Locke J. were of the opinion that a general power of appointment had been conferred on Dr. Chipman, but the majority of the Court (Estey, Cartwright, and Fauteux JJ.) were doubtful.

Rinfret C.J.C., at page 61, said:

> The learned Judge of the Exchequer Court (Saint Pierre J.) . . .. 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 or 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* (1949) Ex. C.R. 339 at 343:
>
> > 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.

Locke J., at page 68, said:

> 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,* (1933) 1 Ch. 793 at 807: *Re Parsons,* (1942) 2 A.E.R. 496). 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.

Estey J., at page 63, said:

> 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 judgment of Cartwright and Fauteux JJ. contains, at page 72, the following paragraph:

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. Chipmans' 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,* (1902) 1 Ch. 76, a decision of Farwell J.; *In re Ryder, Burton* v. *Kearsley,* (1914) 1 Ch. 865, a decision of Warrington J.; and *In Re Shukers Estate, Bromley* v. *Reed,* (1937) 3 A.E.R. 25, a decision of Simonds J. (as he then was). The earliest of 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.

The three English cases, each of which is the decision of a single judge, were rendered in the Chancery Division by Farwell J. in 1901, by Warrington J. in 1914 and by Simonds J. in 1937. The three judgments are not binding but the earliest, as remarked by Cartwright and Fauteux JJ., is now fifty years old and no authority questioning them has been cited.

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While the power held by Mrs. Bathgate was exercisable only in favour of herself and not in favour of such person or persons as she pleased, I have decided to follow the three English cases and the opinions expressed by Chief Justice Rinfret and Mr. Justice Locke in the Wanklyn case and hold that the will of Mr. Bathgate conferred on Mrs. Bathgate a general power of appointment in respect to the residue of his estate.

The appeal therefore will be dismissed. The respondent is entitled to the costs of the appeal, to be taxed.

Judgment accordingly.