BETWEEN:

1960
May 30, 31
Aug. 16

MONTREAL TRUST COMPANY, MARJORIE HELEN SMITH and GERALD MEREDITH SMITH, Executors under the Will of MARY ANDERSON SCOTT, Deceased, and MARJORIE HELEN SMITH, Personally .....APPELLANTS;

AND

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

Revenue—Succession Duty—General power to dispose of capital—Power never exercised—Whether a succession—Meaning of "power" "general power" "competent to dispose"—The Dominion Succession Duty Act, R.S.C. 1952, c. 89 as amended, ss. 3(1)(i), 3(4) and 4(1).

S., who died domiciled in the Province of Quebec on December 14, 1940, prior to the coming into force of the *Dominion Succession Duty Act*, by his will left the residue of his estate to his wife to freely dispose of the revenue and capital and upon her death the residue not disposed of to go to his daughter upon similar terms for her life and upon her death the residue not disposed of to vest in certain others. The wife made no disposition of the capital during her lifetime. Following her death on October 9, 1955, the Minister in assessing her estate for succession duty added to the declared value thereof the value of the residuary estate of her husband as well as the interest accrued to the date of her death on some bearer bonds in her husband's estate. In an appeal from the assessment it was contended that under the *Civil Code* the will of S created a substitution of his property whereby his widow became the institute and his daughter the first substitute and upon the death of the widow the right of the daughter in the assets forming the residue of the estate of S arose under the terms of his will and not by any disposition made by the widow. The Minister submitted that the property in question had been properly included in making the assessment as the wife at the time of her death had a general power

1960

MONTREAL TRUST CO. *et al.* v. MINISTER OF NATIONAL REVENUE

to dispose of the property within the meaning of s. 3(4) of the *Dominion Succession Duty Act* as enacted by R.S.C. 1952, c. 317, s. 2(3) and that accordingly a succession to the property was deemed to have arisen.

Held: That the definition of "general power" in s. 4(1) of the *Dominion Succession Duty Act* must be taken to apply to s. 3(4) of the Act, and the word "power" in the expression "general power to appoint or dispose of property" in s. 3(4) must be interpreted as referring to the capacity of the holder to alienate the property, rather than as having the narrower meaning of strict legal usage.

2. That at the time of her death the widow of S had a general power to dispose of the residue of his estate within the meaning of s. 3(4) of the Act and that the value thereof had been properly included in the successions.

3. That the value of the accrued interest on bonds of the testator's estate was properly included in computing the value of the property included in the successions since the widow of S had a general power to dispose of the assets of his estate which included the bonds with any accretions to their value.

APPEAL under the *Dominion Succession Duty Act.*

The appeal was heard before the Honourable Mr. Justice Thurlow at Ottawa.

J. de M. Marler, Q.C. for appellants.

Maurice Paquin, Q.C. and *Roger Tassé* for respondent.

THURLOW J. now (August 16, 1960) delivered the following judgment:

This is an appeal by the executors of the will of Mary Anderson Scott, deceased, and by Marjorie Helen Smith, personally, from an assessment under the *Dominion Succession Duty Act* of duties in respect of successions arising on the death of the said deceased. There are two issues raised in the appellants' statement of claim, the first being whether in computing the value of the property included in the successions the value of property in the hands of the executors of the estate of the late Honourable Gordon W. Scott, deceased, and forming the residue of that estate, was properly added and included by the Minister, and the other whether certain minor sums of interest which had accrued but which were not yet payable on bonds held in that estate and forming part of its assets were also properly included.

The late Honourable Gordon W. Scott died domiciled in the province of Quebec on December 14, 1940, prior to the coming into force of the *Dominion Succession Duty Act,*

S. of C. 1940-41, c. 14, leaving a will by which, after making several specific bequests and directions, he provided in clauses Seventh and Eighth as follows:

SEVENTH:

All the rest, residue and remainder of my property, movable and immovable, real and personal, of whatsoever the same may consist and wheresoever the same may be situate, and any property or properties acquired in replacement thereof or of any part thereof and representing the same at any time, I give, devise and bequeath all such property to my wife, Mary Edith Anderson, who may freely use and dispose of the revenue and capital thereof as she may determine, subject always to the seizin, rights and powers hereby conferred upon my Executors in respect of such of the property from time to time not used or disposed of by my wife; and, upon the death of my said wife, or in case my wife predeceases me, I give, devise and bequeath the rest, residue and remainder of such property as has not been so used or disposed of by my wife during her lifetime, to my daughter Marjorie Helen Smith (nee Scott) who may freely use and dispose of the revenue and capital thereof during her lifetime as she may determine, subject always to the seizin, rights and powers hereby conferred upon my executors in respect of such of the property from time to time not used or disposed of by my daughter; and, upon the death of my said daughter, she having survived my wife, or in case she predeceases me and/or my wife, the rest and residue of said property then remaining, if any, in the hands of my Executors shall at such time be and become vested in the then surviving descendants *par souche* of my said daughter, and, if my daughter should die without descendants her surviving, then such property, if any, as may then remain shall devolve to my said two sisters in equal shares or to their descendants *par souche* subject, however, in all cases to the rights of my wife during her lifetime.

EIGHTH:

All property bequeathed by this Will is given as alimony and upon the condition that the same, both in capital and income, shall be at all times exempt from seizure, provided that nothing herein contained shall prohibit any heir or legatee under this Will from voluntarily alienating or hypothecating such property, and also that this provision shall be without effect as regards my Executors and any of their acts, rights and powers under this my Will.

In subsequent clauses, he appointed executors, extended their powers and the duration of their authorities as such beyond the year and day limited by law and until all the capital of his estate should be paid over by them to the persons entitled thereto, and gave them various powers to borrow, lease, sell, alienate, dispose of, and invest for the purposes of the administration of the estate.

Following the death of the Honourable Gordon W. Scott and until her death on October 9, 1955, his widow, Mary Anderson Scott, received such income as was received by the executors of her late husband's estate and had the use of his residence in Westmount, but at all times after her

1960

MONTREAL TRUST CO. *et al.* *v.* MINISTER OF NATIONAL REVENUE

Thurlow J.

husband's death the entire capital of his estate remained in the hands of the executors of his will, and she never made any disposition of any such capital.

It is common ground that the seventh clause of the will created with respect to the residue of the estate of the Honourable Gordon W. Scott, deceased, a fiduciary substitution *de residuo,* the deceased Mary Anderson Scott during her lifetime being the institute, and the appellant Marjorie Helen Smith, the first substitute, and that, upon the death of the deceased Mary Anderson Scott, the right or rights of Marjorie Helen Smith in the assets forming the residue of the estate of the Honourable Gordon W. Scott, deceased, arose under the terms of his will and not by virtue of any disposition to that end made by the deceased Mary Anderson Scott.

The Minister's case for including the property in question in making the assessment is that the deceased Mary Anderson Scott "at the time of her death had a general power to appoint or dispose of" the property in question, within the meaning of s. 3(4) of the *Dominion Succession Duty Act,* R.S.C. 1952, c. 89, as that subsection is enacted by R.S.C. 1952, c. 317, s. 2(3). The subsection is as follows:

> (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.

By s. 4(1), it is also provided 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 *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.

The expression "competent to dispose" is found in s. 3(1)(i), and both that clause and s. 4(1) have been in the statute unchanged since it was enacted in 1941 by S. of C. 1940-41, c. 14. At that time, there was no s. 3(4), such a subsection having first been enacted by S. of C. 1944-45, c. 37, s. 2. Sections 3(1)(i) and 4(1) have wording comparable to provisions of the *Finance Act,* 1894 (Imp.), which

have been interpreted in a number of cases. So far as I am aware, there is no Imperial provision corresponding to s. 3(4).

The appellants' first submission was that the definition of "general power" in s. 4(1) relates only to that expression as used in the earlier part of the same subsection, which defines "competent to dispose", and not to the expression "general power" in s. 3(4), which was not in existence when s. 4(1) was enacted, that, as used in s. 3(4), the word "power" is a term of art not to be confused with the dominion which a person has over property which he owns, and that the subsection does not apply where the deceased was at the time of death the owner of the property. From this position it was argued that at the time of her deah Mrs. Scott was the owner of the property comprising the residue of her late husband's estate and that she had no mere power over it.

The case submitted on behalf of the Minister was that the word "power" in s. 3(4) is not a term of art and that, while a power to dispose may be distinct from ownership, it does not follow that ownership does not involve and include a power to dispose, within the meaning of s. 3(4). While not conceding that Mrs. Scott during her lifetime had full ownership of the property in question—since she lacked the right to dispose of it by her will—it was submitted that, under the terms of her deceased husband's will, she had power to dispose of the property by act *inter vivos* and that such power was a power to dispose of the property within the meaning of s. 3(4).

That there is a distinction between a power over property and ownership of property is, no doubt, well established (*vide Freme v. Clement*[1], *Ex parte Gilchrist, In re Armstrong*[2], *Commissioner of Stamp Duties v. Stephen*[3]), the term "power" in general being associated in legal usage with the description of an authority in respect to property or an interest in property which does not itself belong to the person holding the power. Even when a power to dispose of property is wide enough to enable the holder of the power to exercise it in favour of himself the power itself, in the

[1] (1880) 18 Ch. D. 499. [2] (1886) 17 Q.B.D. 521.
[3] [1904] A.C. 137.

1960

MONTREAL TRUST CO. *et al.* *v.* MINISTER OF NATIONAL REVENUE

Thurlow J.

absence of any exercise of it, is not regarded as equivalent to ownership of the property. Conversely, one scarcely refers to an owner either in ordinary or technical usage as "a person having a general power to appoint or dispose of" his property. But an owner undoubtedly has the right and, in that sense, the "power" to dispose of his property.

In which sense, then, is the word "power" used in s. 3(4)? In *The Montreal Trust Company (Bathgate Estate) v. The Minister of National Revenue*[1], Kerwin C.J., with whom Taschereau and Fauteux JJ. concurred, said at p. 705:

> Notwithstanding the matters mentioned in the preceding paragraph which were relied on by the appellants, Mrs. Bathgate was "competent to dispose" of the residue of her husband's estate (subs. 1(i) of s. 3), because she had a general power to dispose of it since "general power" includes "every power or authority enabling the donee . . . to appoint or dispose of property as he thinks fit" (subs. 1 of s. 4). By subs. 4 of s. 3 there was deemed to be a succession in respect of property where the deceased person had at the time of death not merely the general power or authority to "appoint", but also to "dispose of" property. Although this subs. 4 of s. 3 was added only in 1952, the provisions of subs. 1 of s. 4, stating who is to be deemed "competent to dispose" apply to it. By the terms of the trust the executors and trustees of the husband were to pay Mrs. Bathgate "the whole or such part of the corpus thereof as she may from time to time and at any time during her lifetime request or desire". This power or authority to "request or desire" is sufficient to bring her within the terms of the statute.
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> In *In re Penrose*, [1933] Ch. 793, a wife gave a power of appointment to her husband in favour of a limited class which, on construction, was held to include the husband. He purported to exercise the power in favour of himself with respect only to part of the property and died without any general exercise of the power. Luxmoore J. held that there was nothing to prevent the husband as donee of the power from also being an object and appointing the whole property to himself. It is unnecessary to consider all the implications of that decision, but, so far as the point under consideration is concerned, I agree so unreservedly with the reasoning of Luxmoore J. where he is dealing with comparable provisions of the Imperial Finance Act, 1894, that I transcribe the relevant paragraph which appears at pp. 807-8 of the report:
>
> It is argued that the power in the present case is a limited power and does not authorize the donee to appoint or dispose of the property subject to it as he thinks fit. It is said that if he appoints to himself he only acquires the property but does not dispose of it, and that his power to dispose of it as he thinks fit does not arise under the power but after he has exercised it in his own favour. In my judgment this is too narrow a construction to place on the words of the definition. A donee of a power who can freely appoint the whole of the fund to himself and so acquire the right to dispose of the fund in accordance with his own volition, is, in my judgment, competent to dispose of that fund as he thinks fit, and it can make no difference that this can only be done by two steps instead of by one—namely, by an appointment to himself, followed by a subsequent

[1] [1956] S.C.R. 702.

gift or disposition, instead of by a direct appointment to the object or objects of his bounty. If under a power the donee can make the whole of the property subject to it his own, he can by exercising the power in his own favour place himself in the position to dispose of it as he thinks fit. The power to dispose is a necessary incident of the power to acquire the property in question. In my judgment, the word "power" in the phrase "a power to appoint or dispose of as he thinks fit", is not used in the definition section in the strict legal sense attaching to it when used with reference to a power of appointment, but in the sense of capacity; and I think this is made clear by the use of the words "or dispose of" in addition to the words "to appoint", because otherwise the words "or dispose of" would be mere surplusage.

Rand J. also said at p. 707:

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

I will assume that the definition so stated is right but I think the question is disposed of by s. 4(1). By that language the expression used in s. 3(4) includes "every power or authority enabling the donee or other holder to appoint or dispose of the property as he thinks fit". If the language were "to appoint as he thinks fit" that would, no doubt, express the general understanding of such a power but the "authority to dispose of property as he thinks fit" must obviously be given independent meaning and if it is then it necessarily effects an enlargement of the ordinary scope of the expression. "Authority to dispose of" contemplates ultimate alienation. The technical conception of an appointment is that the property is deemed to pass from the donor of the power to the appointee, but with authority to dispose there is added the case such as is before us where the donee can admittedly require the whole of the residue to be paid to her and thereupon dispose of it as she sees fit. That was the view of similar language taken by Luxmoore J. in *In re Penrose,* [1933] Ch. 793, and I think it is the right view.

From the foregoing, I think it is apparent, first, that the definition of "general power" in s. 4(1) must be taken to apply to s. 3(4) and, second, that the word "power" in the expression "general power to appoint or dispose of property" in s. 3(4) must be interpreted as referring to the capacity of the holder to alienate the property, rather than as having the narrower meaning of strict legal usage. In the *Bathgate* case (*supra*), the deceased, a widow, had under the terms of her husband's will a right to income for life and an unrestricted right to call upon the trustee to pay to her the corpus of her husband's estate, and the Court held that the right of the widow to call for the corpus was sufficient to

1960

MONTREAL TRUST CO. *et al.* *v.* MINISTER OF NATIONAL REVENUE

Thurlow J.

bring the case within the terms of the statute. In that case, what Mrs. Bathgate had at the time of her death was a power in the strict sense and a power alone, for she had not called for any of the corpus of her deceased husband's estate, and counsel for the appellants distinguished the case on the ground that here what Mrs. Scott had during her life was not such a power but ownership of the property. However, even assuming that there is a distinction between the two situations in that, in Mrs. Bathgate's case, disposal by her of the corpus of her husband's estate would have involved initially an exercise of a power to make the property her own and a subsequent disposal as owner, while only the latter step would have been involved in any disposal by Mrs. Scott, since she was already the owner of the property, the matter appears to me to be concluded at least for this Court by the judgment of the Supreme Court of Canada in *Minister of National Revenue v. Montreal Trust Company (Smith Estate)*[1]. In that case, a similar argument had been advanced on behalf of the taxpayer, but the case differed from the present one in that the institute, Mrs. Smith, had before her death executed a document purporting to operate as a renunciation of her rights in the capital of her husband's estate. The majority of the Court held that this renunciation was valid and that s. 3(4) did not apply. Taschereau J., with whom the Chief Justice concurred, said at p. 487:

> La seule conclusion logique qui, à mon sens, s'impose, est qu'à son décès, l'épouse n'avait pas *un pouvoir general de désignation ou de disposition de biens,* parce qu'elle y a renoncé irrévocablement en 1951.

Abbott J. expressed his agreement with the reasons of Taschereau J. and, at p. 503, said:

> The institute, some three years prior to her death, having effectively renounced any right to dispose of the substituted property, section 3(4) of the *Dominion Succession Duty Act* could have no application.

Fauteux J. (with whom Judson J. concurred) dissented as to the effect of the renunciation and, in the course of his reasons, said at p. 491:

> A la clause 10, le testateur a prévu l'éventualité du pré-décès de son épouse et la caducité de la clause 9 en résultant. Il a aussi prévu l'éventualité où, dans le cas de la survie de cette dernière, elle n'aurait pas, de son vivant, disposé suivant son pouvoir général et absolu de ce faire, du

[1] [1960] S.C.R. 477.

résidu à elle légué par la clause 9. Il a alors pourvu à la distribution et répartition de tout ce résidu, dans le cas de pré-décès, ou, au cas de survie, de ce qui pourrait en rester lors du décès de son épouse.

Il résulte des clauses 9 et 10 que, de son vivant, Madame Smith avait droit de jouir et de disposer en tout ou en partie du résidu, comme propriétaire absolue. Elle ne pouvait, cependant, en disposer par voie de testament. De son vivant, et comme tout propriétaire, elle pouvait à son gré aliéner ces biens à titre onéreux ou à titre gratuit. Elle avait donc, au sens de l'article 3(4) de la loi précitée, d'après les clauses 9 et 10 du testament de son époux, un pouvoir général de disposition des biens mentionnés . . .

Later, at p. 494, the learned judge dealt with the argument as follows:

L'article 3(4) de la loi. Comme dernier moyen (iii), quant à l'interprétation, les intimés se sont contentés d'affirmer que le pouvoir d'aliénation de Madame Smith découle de son droit de propriété et n'equivaut pas à un pouvoir général de disposition au sens de l'article 3(4) de la *Loi fédérale sur les droits successoraux*. Ce pouvoir général de disposition est accordé à Madame Smith aux termes mêmes du testament de son époux où il est prévu qu'à défaut de l'exercer de son vivant, les personnes mentionnées en la clause 10 recueilleront ce qui pourra en rester à son décès. C'est là une des situations prévues au paragraphe 3(4) de la loi.

At p. 497, he also said:

Aussi bien et en tout respect pour les tenants de l'opinion contraire, je suis d'avis que si on écarte de la considération l'existence du DEED OF DECLARATION AND ACCEPTANCE,—comme l'ont fait les intimés pour les fins de cet argument,—il ne fait aucun doute qu'au sens de ces articles de la Loi fédérale, il y a eu, au décès de Madame Smith, une succession venant d'elle en ce qui concerne les biens qui lui furent légués par son époux.

And at p. 498, after discussing the result which would, in his opinion, follow on the assumption that the renunciation was effective, he said:

Si, au contraire, il n'y a pas eu de transfert ou de délivrance résultant du DEED OF DECLARATION AND ACCEPTANCE, il s'ensuit que Madame Smith n'ayant pas autrement disposé de ces biens, de son vivant, les intimés les ont recueillis à son décès et non le 24 août 1951; et, dans cette alternative, c'est l'article 3(4) qui reçoit son application et il y a succession.

On the question whether what Mrs. Smith had had prior to the renunciation was a "power" within the meaning of s. 3(4), I see no conflict between the opinion of Fauteux and Judson JJ. and the opinions of the other members of the Court but even if, as suggested in argument, the majority should not be taken as having determined the question since, having found that the renunciation was effective, it was no longer necessary to the result to determine the

1960

MONTREAL TRUST CO. *et al.* *v.* MINISTER OF NATIONAL REVENUE

Thurlow J.

nature of what had been renounced, I would regard the opinion of Fauteux and Judson JJ. as one that should be followed in this Court on the particular point. The subsection 3(4) considered in the *Smith* case was the earlier subsection 3(4), as consolidated in R.S.C. 1952, c. 89, but that, in my opinion, makes no difference for this purpose since that subsection, as well, referred to "a general power to appoint or dispose of property". The appellants' submission on this point, accordingly, fails.

The next submission put forward on behalf of the appellants was that, if Mrs. Scott did hold a power to dispose of the property in question, it was not a general power within the meaning of s. 3(4) and that, accordingly, that subsection does not apply. In support of this position, counsel pointed first to the extensive provisions contained in the will dealing with the disposal of the property after Mrs. Scott's death; secondly, to the fact that the testator gave Mrs. Scott no power to dispose of the property by her will; thirdly, to the fact that the words "if any" do not appear in the description of the property which the first substitute, Marjorie Helen Smith, is to take upon Mrs. Scott's death, though they do appear in the description of property which subsequent substitutes might take, and finally, to the provisions of clause 8, by which the testator declares that all the property bequeathed by his will is given as alimony. From these, it was submitted that it appeared that it was not the intention of the testator that Mrs. Scott was to have unrestricted power to alienate the whole of the capital of the residue of his estate. Whilst the considerations mentioned may go so far as to suggest that the testator thought it unlikely that his widow would, by the time of her death, have disposed of the whole of the residue of his estate, I do not think they indicate that he intended that she should not have power to do so, and even if they tend to suggest that conclusion, in my opinion, they cannot prevail over the express wording of the seventh clause of the will. This clause refers to the residue of the testator's estate in the widest of terms and gives such residue to his wife "who may freely use and dispose of the revenue and capital thereof as she may determine". The clause also makes clear that what is given to the first substitute, Marjorie Helen Smith, is not the whole residue but "the rest, residue, and

remainder of such property as has not been so used or disposed of by my wife during her lifetime". And finally, after expressing the provisions in favour of the substitutes, the clause ends with the words "subject, however, in all cases to the rights of my wife during her lifetime". The rights given to the wife during her lifetime were to "freely use and dispose of the residue and capital thereof as she may determine" and, save that it is restricted to disposal to others by act *inter vivos*, this, in my opinion, is as broad and general as it is possible to conceive. The only doubt I have had as to the generality of the power arises from the inability of Mrs. Scott to so exercise it in her own favour as to complete her own title and thus free herself from the limitation upon her ability to dispose of it by her will or to have it pass to her heirs or representatives upon her dying intestate, but in this respect the case is not distinguishable from the *Smith* case, where, even if the determination of the generality of the power held by Mrs. Smith prior to the renunciation was not involved in the judgment of the majority, Fauteux and Judson JJ. considered that the power which Mrs. Smith had had was a general power within the meaning of s. 3(4). Nor, in my opinion, were the rights of Mrs. Scott restricted by the provision of clause 8 of the will. *Vide* the discussion on this point by Fauteux J. in *Minister of National Revenue v. Smith* (*supra*) at p. 491. The appellants' submission on this point as well, accordingly, fails.

The next submission was that, if Mrs. Scott had a general power, she did not have it at the time of her death, which is what s. 3(4) requires. In making this submission, counsel conceded that, if s. 4(1) applies to s. 3(4), his argument must fail, and I am of the opinion that this point is resolved against the appellants by the judgment of the Supreme Court in the *Bathgate* case, as indicated in the passages quoted above from the judgment of Kerwin C.J. and Rand J.

Finally, it was argued that, as Mrs. Scott never received and could never receive the accrued interest which had not yet fallen due on bonds held by the executors of the testator's will, the amount of such interest was improperly included in computing the value of the property included in the succession. If, as I have found, the value of the

1960

MONTREAL TRUST CO. *et al.* *v.* MINISTER OF NATIONAL REVENUE

Thurlow J.

capital of the testator's estate was properly included because the deceased had a general power to dispose of it, she (the deceased) obviously had the same power to dispose of the assets, including bonds, with whatever accretions pertained to them at the moment of their disposal and, the problem being one of the value of the property to be included in making the assessment, the value of such accretions at the time of death is thus, in my opinion, properly taken into account.

The appeal will be dismissed with costs.

Judgment accordingly.