1958
June 17
1959
July 3

BETWEEN:

JOHN HYSLOP McCARTER AND DOROTHY JOAN RUSZNYAK . APPELLANTS;

AND

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

Revenue—Succession Duty—Dominion Succession Duty Act R.S.C. 1952, c. 89, s. 4(1) and R.S.C. 1952, c. 317, s. 2 enacting s. 3(4)—Succession—"General Power" to appoint or dispose of property—"Exclusive of any power exercisable in a fiduciary capacity."

[1] [1892] A.C. 150. [2] 16 Tax A.B.C. 333.

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Margaret Jane McCarter was predeceased by her husband and at the time of her death was the sole executrix and trustee under his will, by which the testator gave the whole of his estate to his trustee from time to time as thereinbefore provided, upon trust, to pay his sister $50 per month from the date of his death for her lifetime and to pay the income from the rest, residue and remainder of the estate to his wife the aforesaid Margaret Jane McCarter for her life. He fixed the period of distribution of the corpus of his estate at the death of the survivor of him or his wife and directed his surviving trustee to thereupon dispose of the rest, residue and remainder of his estate to certain grandchildren. By paragraph 6 the will also authorised the trustees "if in their own control and discretion they deem advisable at any time and from time to time to pay to or use for the benefit of my wife or any issue of mine such part or parts of the capital of the prospective share of such beneficiary or of the share of my estate from which for the time being such beneficiary is entitled to income as in their uncontrolled discretion my trustees deem advisable." Up to the time of her death there had been no exercise of the authority so conferred.

In assessing the estate of Margaret Jane McCarter for succession duty the Minister of National Revenue added to the aggregate value of her assets the value of the whole of the capital of the estate of the husband which remained in her hands at the time of her death and assessed accordingly.

The executors of the will of Margaret Jane McCarter appealed from such assessment to this Court.

Held: That the power given to Margaret Jane McCarter as trustee by paragraph 6 of her husband's will to pay to herself or for her own benefit the capital of the residue of the husband's estate was a general power to dispose of his estate within the meaning of s. 3(4) of the *Dominion Succession Duty Act* as enacted by R.S.C. 1952, c. 317, s. 2 and not a power exercisable in a fiduciary character as provided in s. 4(1) of the Act, and a succession in respect of such residue dutiable under the Act is deemed to have occurred.

2. That the amount of money necessary to pay the annuity to the sister of the deceased husband should not be included in the assessment.

APPEAL under the *Dominion Succession Duty Act.*

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

J. D. Arnup, Q.C. for appellants.

G. D. Watson, Q.C. and *A. L. DeWolf* for respondent.

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

THURLOW J. now (July 3, 1959) delivered the following judgment:

This is an appeal by the executors under the will of Margaret Jane McCarter, deceased, from an assessment of succession duties made by the Minister of National

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Revenue on or about April 10, 1956, and confirmed by him on November 21, 1956, in respect of successions to property arising on the death of the said deceased. The issue raised is whether or not assets which formed part of the estate of her deceased husband and which remained in her hands as trustee under his will, with a power to convert to her own use, were properly included in assessing duties in respect of successions arising upon her death.

The deceased died on January 8, 1955, and at the time of her death was the sole executrix and trustee under the will of her deceased husband, John Baxter McCarter, who had died in January, 1945. In what follows I shall refer to him as the testator and to Mrs. McCarter as the deceased. The paragraph of the testator's will, by which the deceased was appointed, was as follows:

2. I NOMINATE, CONSTITUTE and APPOINT my wife, MARGARET JANE McCARTER, to be the sole Executrix and Trustee of this my Will, but should my said wife predecease me, or depart this life before my estate is completely administered and wound up, thereupon I appoint The Canada Permanent Trust Company to be the Executor and Trustee of this my Will in her place and stead, and, in such event, all reference herein made to my "Executrix" and to my "Trustee" shall apply to the said The Canada Permanent Trust Company as equally and as fully as to the said Margaret Jane McCarter, and each of my Trustees shall have and enjoy from time to time and while Trustee of my estate, all rights, powers, discretions and authority hereinafter conferred upon my "Trustees".

By paragraph 3, the testator gave the whole of his estate "unto my said Trustee from time to time as hereinbefore provided, upon the following trusts, namely. . . ." There followed clauses containing directions relating to conversion and postponement of conversion, investment, payment of debts, funeral and testamentary expenses and succession duties, several specific bequests, and then clauses (*f*), (*g*), and (*h*) provided as follows:

(*f*) To pay to my sister, AGNES McCARTER, presently of Bassano, Alberta, the sum of Fifty Dollars ($50.00) per month from the date of my death and continuing for and during her life.

(*g*) To pay the income derived from the rest, residue and remainder of my estate unto my said wife, MARGARET JANE McCARTER, in at least quarterly payments, for and during her life.

(*h*) I fix the period of distribution of the corpus of my estate (subject as hereinbefore provided) at the death of the survivor of me and my wife and I direct my surviving Trustee to thereupon dispose of the rest, residue and remainder of my estate as follows: . . .

In the sub-clauses that followed, the capital of the residue was given to three grandchildren of the testator, with provisions that, in the event of the death of any of them, leaving issue, prior to the date of distribution, such issue should take his share.

Paragraphs 4 and 5 contained further provisions respecting the administration of shares of the residue to which persons under 21 years of age might become entitled. Paragraph 7 was a direction that the benefits given to the deceased should, if accepted, be in lieu of dower. Paragraphs 6 and 8 were as follows:

6. NOTWITHSTANDING anything in this my Will contained I expressly authorize my said Trustees if in their own control and discretion they deem advisable at any time and from time to time to pay to or use for the benefit of my wife or any issue of mine such part or parts of the capital of the prospective share of such beneficiary or of the share of my estate from which for the time being such beneficiary is entitled to income as in their uncontrolled discretion my Trustees deem advisable.

8. NOTWITHSTANDING anything hereinbefore contained I HEREBY DECLARE that it is my Will that my wife, MARGARET JANE McCARTER, shall not be required to account to any person, persons or Corporation for or in respect to her administration of my Estate as Executrix and Trustee, and my substitutionary Executor and Trustee, The Canada Permanent Trust Company shall not be required to enquire into the said administration of my estate by my wife, but shall be fully protected on taking the assets of my estate which may be in the hands of my wife upon her death.

Up to the time of her death, there had been no exercise by the deceased of the authority conferred by paragraph 6.

In making the assessment under appeal, the Minister added to the aggregate value of the assets of the deceased, as declared in the succession duty return filed by the apellants, the value of the whole of the capital of the estate of the testator which remained in the hands of the deceased at the time of her death and assessed accordingly. His reason for so doing, as set out in his decision confirming the assessment, was

that the said Margaret Jane McCarter was at the time of her death competent to dispose of the property which she was given power to appropriate by the will of the late John Baxter McCarter, and the said property has been properly subjected to duty under the provisions of subsection 4 of section 3 of the Act.

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Section 3(4), as enacted by R.S.C. 1952, c. 317, s. 2, was as follows:

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.

By s. 4(1) of the Act, it was further provided:

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 question to be determined in the appeal is whether or not in the circumstances the power given to the deceased as trustee by paragraph 6 of the testator's will was a general power to dispose of the residue of his estate within the meaning of s. 3(4). If so, upon the death of the deceased, a succession in respect of such residue dutiable under the Act is deemed by that subsection to have occurred. The appellant's contention is that the power given by paragraph 6 of the will was not a general power because it was exercisable only by the trustee, that accordingly it was exercisable in a fiduciary capacity and fell within the exception mentioned at the end of the definition of general power contained in s. 4(1).

Section 4(1) has been in the *Dominion Succession Duty Act* without amendment since the enactment of that statute in 1941, and a similarly worded section has been in effect in England since 1894 as s. 22(2) of the *Finance Act*, 1894, but neither in this country nor in England does there appear to be any decided case on what is meant in their context by the words, "but exclusive of any power exercisable in a fiduciary capacity under a disposition not made by himself." It is, however, stated in *Green's Death Duties*, Fourth Edition, p. 66, that

The statutory exception in regard to fiduciary powers was doubtless inserted *ex cautela*. A fiduciary power would not enable the holder to dispose as he thought fit.

There is, I think, support for this view in the judgment of Luxmoore J. in *Re Penrose*[1], where he said at p. 805:

> It is next said that the form of the power itself suggests that the donee must be excluded from among the objects, first, because the form is that usually employed when conferring what lawyers generally call a special or limited power and such a power is in its nature fiduciary. This argument really begs the question, because the power can only be fiduciary if the donee is not an object.

But whether the view stated in *Green's Death Duties* is the true view of the scope of the exception or not, the question that arises on the definition in this case is: was the power which the deceased had at the time of her death to pay to herself or use for her own benefit the capital of the residue of the testator's estate "a power exercisable in a fiduciary character" within the meaning of the exception? If so, it is not a general power of the kind referred to in s. 3(4). On the other hand, if it was not a power exercisable in a fiduciary capacity, since it was exercisable by the deceased in her own favour it would, I think, fall within the definition and a succession would be deemed by s. 3(4) to have occurred. See *Montreal Trust Co. (Bathgate Estate) v. Minister of National Revenue*[2].

In determining whether or not a power is exercisable in a fiduciary capacity, I am of the opinion that, if the power is such that the holder can dispose of the property to himself, to be used as his own without any restriction as to the circumstances in which he may so exercise it, and without responsibility to any other person, the fiduciary feature contemplated by the exception is lacking, and I think this is so whether or not the power is incident to or derived from the holding of a position or office which under other circumstances would by itself imply a fiduciary relationship. This, I think, is what Simonds J. (as he then was) had in mind when he said in *Re Shuker*[3] at p. 29:

> Accordingly, I must hold that the language of the will in the present case was sufficient to confer a general power of appointment, and not the less so because the widow was the "sole executor and trustee."

[1] [1933] 1 Ch. 793. [2] [1956] S.C.R. 702.
[3] [1937] 3 All E.R. 25.

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In that case, a power to a widow to appoint in her own favour was held to be general, notwithstanding that, under the will which gave her the power, she was the sole trustee and the exercise of the power would divest persons of their rights in property which she held as trustee.

In the present case, paragraph 6 of the will contains a number of powers exercisable by the trustee, and I think it is clear that they are powers annexed to that office, rather than powers given to any particular person or persons. Had the deceased renounced that office or been removed from it, the power conferred by paragraph 6 would, I think, have passed from her. What effect that might have had for the purposes of the *Dominion Succession Duty Act,* it is unnecessary for me to consider, because the fact is that at all material times the deceased was the sole trustee. Of the various powers contained in paragraph 6, the only one which need be considered is that exercisable in favour of the deceased. That power during her lifetime was a power vested in herself, she being the trustee, to take or to use for her own benefit the portion of the capital of the residue of the testator's estate from which she was entitled to the income. If there was any restriction upon her power under this provision to dispose to herself of the whole of such capital, it must, I think, be found in the words, "if in [my trustee's] own control and discretion [she] deems advisable," and in the words, "as in [her] uncontrolled discretion my trustee deems advisable." Now, nowhere in this does there appear to me to be any limitation upon or definition of the sort of reasons which the trustee should have upon which to deem it advisable, nor is there any requirement that she have a reason. There is nothing to require that her judgment be anything but arbitrary, nor that the interests or wishes of anyone else be considered. Nor is there any other person to whom she would have been responsible in exercising the power. Lacking any limitation on the reason or object for which or the circumstances in which, during her lifetime, she might pay to herself or use for her own benefit and having regard to paragraph 8, I do not think the power, while she held it, was subject to any restriction whatever. In this context, the word "discretion" itself is drained of its

usual meaning. Lacking anyone to whom the deceased was answerable in the exercise of the power, the word "trustee" as well is shorn of its ordinary implications. In this situation, there is, in my opinion, no real or practical sense in which the term "fiduciary capacity" could be applied to any exercise she might have made of the power, and I have accordingly come to the conclusion that the power held by the deceased was a general power within the meaning of the statutory definition and that it was not a power exercisable in a fiduciary capacity within the meaning of the exception to the definition. It follows that, on the main point, the appeal fails.

A further point, however, arises in connection with the gift by the testator to his sister in view of the fact that the Minister has included in the assessment the whole value of the assets of the testator's estate, which remained in the hands of the deceased at the time of her death. It was stated on the hearing of the appeal that the testator's sister had survived him and had survived the deceased as well, but there was neither any statement nor evidence as to what amount would be required to pay the annuity. Nor was argument directed to the question, which is open on the pleadings, whether the amount necessary to pay the annuity provided for her by the testator was included in the residue which the deceased had power to take or use for her own benefit. On drawing this point to the attention of counsel since the hearing, I have been advised that the Minister concedes that the amount necessary to pay the annuity should not be included in the assessment and that the parties are in agreement on a valuation of the annuity at $15,000. The appeal will, therefore, be allowed and the assessment referred back to the Minister to be revised accordingly.

In the circumstances, there will be no costs to either party.

Judgment accordingly.