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THE MINISTER OF NATIONAL REVENUE ..... APPELLANT;

AND

DONALD H. F. BLACK ..... RESPONDENT.

Estate tax—Residuary bequest to widow for life—Gift over to descendants —Whether widow has general power to dispose of residue inter vivos— Estate Tax Act, secs. 3(1)(a) and (2), 58(1)(i)—Quebec Civil Code, art 962.

B, who died in 1957 domiciled in Quebec, by his will gave legacies to his children and the residue to his wife "for her use and enjoyment, comfort and general welfare during the remainder of her lifetime", with a direction to his executors to divide the remaining capital amongst his descendants on her death The widow, who was named executrix, renounced that office immediately on her husband's death and under the will the children thereupon became executors with seisin of the whole property and the usual extended powers of sale etc. The testator's widow died in 1965 domiciled in Quebec. Her estate was assessed to estate tax of $26,430 on the footing that under her husband's will she had a general power within the meaning of s 58(1)(*i*) of the *Estate Tax Act* to dispose *inter vivos* of the property of his estate and that her estate was therefore subject to estate tax on that property under s 3(1)(*a*) and (2) of the *Estate Tax Act.*

Held, the assessment could not stand.

(1) Under the husband's will the portion of his estate not required by his widow "for her use and enjoyment etc" did not become part of her estate His will created not a usufruct but a substitution *de residuo* of that property, which thus passed directly from him to his children on his widow's death. *Quebec Civil Code, art. 962.*

M N R v Smith [1960] S.C R. 478 referred to.

(2) Under the husband's will the widow's right to use the capital of his estate was for a limited purpose only, *viz* for "her use and enjoyment, comfort and general welfare" and was therefore not a general power of disposition within the definition of s 58(1)(*i*) of the *Estate Tax Act* so as to be assessable to estate tax.

Montreal Trust Co v. M N R. (Bathgate Estate) [1956] S.C R. 702; *Montreal Trust Co (Hickson and Yuile) v. M.N.R.* [1964] S C R. 647; *Campion v. Carlin and Cholette* 62 Que. S.C. 43; *Montreal Trust Co. (Scott Estate) v. M N.R.* 60 DTC 1183; *Bowie Estate v. M N.R.* 64 DTC 297; *Rowland Estate v. M.N.R.* 67 DTC 676, referred to.

(3) Moreover, even if the widow had a general power under the will to dispose of the husband's property she could not exercise it following her renunciation as executrix without the intervention of the executors who as ultimate beneficiaries would be presumed to permit disposition of the capital only for her use and enjoyment, comfort and general welfare. The widow therefore was not competent to dispose of the

capital of the estate in the hands of the testator's executors immediately prior to his death, as required by s. 3(1)(*a*).

Com'r of Estate and Succession Duties (Barbados) v. Bowring [1962] A.C. 171; *M.N.R. v. Canada Trust Co. (Maine Estate)* 63 DTC, 791 referred to.

INCOME tax appeal.

Alban Garon, Q.C. and *P. H. Guilbault* for appellant.

Paul Dioguardi and *Pierre Dufour* for respondent.

WALSH J.:—This is an appeal by the Minister from a judgment of the Tax Appeal Board dated August 29, 1968, allowing respondent's appeal from an estate tax re-assessment dated January 26, 1967, levying a tax in the amount of $26,430.41 in respect of the estate of Elizabeth Catharine (Fraser) Black. The parties are in agreement as to the facts of the case which involves the interpretation of the will of the late Harvey H. Black, husband of the late Elizabeth Catharine (Fraser) Black, and an agreed statement of facts was filed in the record. The said Harvey H. Black died domiciled in the Province of Quebec on March 13, 1957, having made a last will and testament in notarial form dated December 6, 1945, leaving as beneficiaries his said widow and three children. His said widow Elizabeth Catharine (Fraser) Black died on August 15, 1965, domiciled in the Province of Quebec, and it is the contention of the appellant that at the time of her death she had a general power within the meaning of Section 58(1)(*i*) of the *Estate Tax Act* to dispose by instrument *inter vivos* of the property inherited from her late husband within the meaning of sections 3(1)(*a*) and 3(2)(*a*) of the *Estate Tax Act*. The relevant sections of the Act read as follows:

> 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 purpose 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)(*i*) In this Act,
>
> "general power" includes any power or authority enabling the donee or other holder thereof to appoint, appropriate or dispose of

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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;

The will directs testator's executors to pay his debts, funeral and testamentary expenses and discharge all particular legacies as soon after his death as convenient. Particular legacies are left to each of his children of the first degree in the amount of $2,000. His wife, the said Elizabeth Catharine Fraser, is named as executrix and given seisin and possession of all testator's property with her powers and seisin extended beyond the year and day limited by law and provision is made that in the event of the death, resignation, refusal or incapacity to act of the said wife she shall be succeeded as executrix by his two sons and daughter or the survivor of them. It is also provided that it shall not be necessary to appoint a curator to any substitution "which may be created by this my will". The executors are given the usual extended powers, including the right to sell or otherwise dispose of the property of the succession and to determine all questions and matters of doubt which may arise in the course of their administration. The important clauses of the will for the purposes of this case read as follows:

> ARTICLE IV. 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 all Policies of Life Insurance and the proceeds thereof whether payable to my wife or to my estate, I give, devise and bequeath to my wife for her use and enjoyment, comfort and general welfare during the remainder of her lifetime.
>
> ARTICLE V. Upon the death of my wife or upon my death if she predecease me, I direct my Executors to divide so much of the capital of my Estate as may then remain (or the whole thereof if my said wife shall have died before me) equally among my children in the first degree with representation in favour of their issue and with accretion in favour of the survivors or survivor of them.
>
> ARTICLE VI. The property hereby given is so given upon the express condition that it shall so long as it may be in the hands of my Executors be exempt from seizure or attachment for the debts of any beneficiary and no beneficiary shall have the right to assign his or her share without the written consent of the Executors. . . .

The first question to be decided is whether the will created a usufruct or a substitution. If it was a usufruct as respondent's counsel contends then the widow Elizabeth Catharnie Black had no rights as owner of the property in question at any time and clearly it could not be taxable as part of her estate. The Quebec Civil Code defines usufruct as follows:

> 443. Usufruct is the right of enjoying things of which another has the ownership, as the proprietor himself, but subject to the obligation of preserving the substance thereof.

The term substitution is not specifically defined but Article 925 in describing the two kinds of substitution reads in part:

> Fiduciary substitution is 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.
>
> Substitution takes its effect by operation of law at the time fixed upon, without the necessity of any delivery or other act on the part of the person charged to deliver over.

Article 928 reads:

> 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.

Article 929 reads in part:

> The disposition which creates the substitution may be conditional like any other gift or legacy.

Article 944 reads:

> The institute holds the property as proprietor, subject to the obligation of delivering over, and without prejudice to the rights of the substitute.

Article 952 reads:

> The grantor may indefinitely allow the alienation of the property of the substitution which takes place in such case only when the alienation is not made.

Article 962 reads in part:

> The substitute takes the property directly from the grantor and not from the institute.

It is necessary to read all the clauses of the will as a whole in order to interpret the testator's true intentions. The disposing clause in Article IV gives the entire residue

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of deceased's estate "to my wife for her use and enjoyment, comfort and general welfare during the remainder of her lifetime". The next clause Article V states that upon the death of his wife his executors are to divide "so much of the capital of my estate as may then remain, equally among my children in the first degree". It appears clear that the testator foresaw the possibility that some of the capital of his estate might be required for the "use and enjoyment, comfort and general welfare" of his wife during her lifetime and that he does not merely confine her interest in the estate to the income as would be the case if a usufruct had been created. It appears equally clear however that she was not given the ownership of the property to use as she deemed fit without restriction. In my view the term "use and enjoyment comfort and general welfare" indicates merely that he wanted her to be able to be maintained in comfort for the remainder of her life according to the standard of living to which they were accustomed, even if this involved some use of the capital of the estate, but that he certainly did not intend her to give away the capital of the estate or any portion thereof during her lifetime, and he clearly sets out in Article V what is to be done with the remainder of the capital, on her death.

Respondent's counsel points out that there are three essential elements in a substitution,

(a) two donations of the same thing, first to the institute and then to the substitute,

(b) in fiduciary substitutions, a successive order,

(c) a time factor for the handing over by the institute to the substitute either expressly or tacitly stipulated.

There would have been no problem here if the testator had simply given the enjoyment and usufruct of his estate to his wife with the ownership to his children, as in this case there would not have been a substitution because there would not have been two successive donations of the ownership. I believe, however, that the wording of the present will creates a substitution *de residuo* of the property not required for the "use and enjoyment comfort and general welfare" of the widow during her lifetime. This portion of testator's estate never passed in ownership to his widow,

but went directly to the children at a period of time determined by the date of the death of his widow. (Article 962 *Quebec Civil Code*). The benefit she received was the income from his entire estate during her lifetime (as if she had been given a usufruct) and a right to such portion of the capital as required for "her use and enjoyment, comfort and general welfare". The ownership of his entire estate did not therefore pass to his children at his death, and there was a lapse of time before the ownership of the unused portion passed to them on the death of his widow, but when it did so pass it passed to them directly from his estate and not from her estate. The will therefore created a substitution *de residuo* and not a usufruct. The fact that there was a clause stating "it will not be necessary to appoint a curator to any substitution which may be created by this will" does not affect this, as this is a standard clause put in many wills to avoid the rather cumbersome procedure set out in the *Civil Code* relating to curators to substitutions which a testator often wishes to avoid, even though he has in fact created a substitution in his will.

The question is definitively dealt with in the Supreme Court judgment in the case of the *Minister of National Revenue v. Smith et al.*[1] where the majority judgment by Chief Justice Kerwin and Justices Abbott and Taschereau held "A fiduciary substitution having been created by the testator's will, the named legatees received the property directly from the testator pursuant to Art. 962 C.C. and consequently that property was excluded from the wife's estate. The three elements necessary to create a substitution were present in the testator's will: two successive benefits were conferred, one to the institute and the other to the substitutes, and there was to be a period between the enjoyment of the institute and the opening of the substitution. The fact that the institute could dispose of the property was no obstacle, as Art 952 provides for a substitution *de residuo*."

An article by Notary Antonin Lefebvre in *La Revue du Notariat*[2] cited by appellant, is to the contrary, indicating that an essential element of a substitution is to conserve the property and to deliver it, and accordingly if the widow can sell or hypothecate the property, then there is no sub-

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

[2] Vol. 47 at page 520.

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stitution but simply a legacy "*de residuo*" and at her death the residue of the property inherited from the husband enters into her succession and not that of her husband, and the children receive the residue not from their father, as they would have if there had been a substitution, but rather from the succession of their mother. This article was however written in 1945, some time before the Smith judgment, and in any event could not be cited as good authority in the light of the judgment in that case. Moreover it dealt with a hypothetical clause giving her the absolute right to dispose of the property, which is not the present case.

The fact that I have concluded, however, that the will created a substitution *de residuo* and not a usufruct, does not by any means mean that the property is taxable under the provisions of section 3(1)(*a*) of the *Estate Tax Act*. It is here that the exact wording of the rights given to the wife under the will becomes of paramount importance and the applicability of the jurisprudence cited by both parties must be carefully examined in the light of the words used in the various wills under review.

In the case of *Montreal Trust Co. v. M.N.R.* (*Bathgate estate*)[3] the testator left the residue of his estate to his trustees to pay the net income to his wife during her lifetime 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". On her death the residuary estate was to be divided equally between his chlidren. It was held that the wife was competent to dispose of the residue of her husband's estate as she had a general power enabling her to appoint or dispose of it and that "when a donee can require the whole of the residue to be paid to him and thereupon dispose of it as he sees fit he has power or authority to dispose of the property as he sees fit within the meaning of section 4(1) of the Act,"[4] (compare sections 3(2)(*a*) and 58(1)(*i*) of *Estate Tax Act*). In that case however it must be noted that the trustees had to pay her whatever she requested or desired, there apparently being no discretion in them to refuse such a request.

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[3] [1956] S.C.R. 702.

[4] Headnote of judgment of Justice Rand.

This case can be compared with that of *Montreal Trust Co., Hickson and Yuile v. M.N.R.*[5] where the mother of the deceased left a share of the residue of her estate in trust for his children, with the provision that if he should die childless this share was to be paid to his testamentary or legal heirs. He died childless and by his will appointed his widow as his universal legatee. It was held that when the substitution opened the deceased's widow, as substitute, took the fund directly from the mother of the deceased and not from the institute, her husband, and also that the argument that the deceased had such a general power to dispose of the fund as to bring the property within section 3 of the Act could not be upheld. Since the deceased could not dispose of the property to anyone but his testamentary heirs, he did not have the power to dispose of it "as he saw fit" within the meaning of section 58(1)(*i*).

The Superior Court case of *Campion v. Carlin & Cholette*[6] did not deal with estates tax but rather with the title to an immoveable sold by the wife. The purchaser himself refused to carry through the transaction, attempting to avoid his obligation by alleging that the plaintiff did not have the right to sell the property under the provisions of the will, as it was subject to a substitution. The will read: "I give, devise and bequeath to my wife..., during her life with power to use such portion thereof for her maintenance and comfort as she may deem advisable" and a further clause provided that "should there remain at the time of her decease any part or portion of the estate hereinabove bequeathed to her" etc. It was held that the substitution created by the will was a substitution *de residuo* but in view of Article 952 permitting the grantor to allow the alienation of the property of the substitution the wife could alienate the property during her lifetime and give good title thereto. In our present case, however, there is considerable doubt as to whether the wife could alienate any of the property of the succession herself and give title thereto, which question I will deal with later.

In the case of *Montreal Trust Co. (Scott Estate) v. M.N.R.*[7] the will provided that the residue of the estate was left to the testator's wife who was to have the right to

[5] [1964] S.C.R. 647.
[6] 62 Que. S.C. 43.
[7] 60 DTC 1183.

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"freely use and dispose of the revenue and capital as long as she lives". On her death whatever had not been disposed of was to pass to testator's daughter. The entire capital of the estate remained in the hands of the executor in the wife's lifetime and none of the capital was touched. It was held however that the property was dutiable as during her lifetime she had the capacity to alienate the property in question even though she could not do so by will. The provisions of the will showed the intention to give the wife unrestricted power to alienate the whole of the capital, and this constituted a general power notwithstanding restrictions as to disposition by will. It is to be noted that the wording of the said will does not restrict her use and disposal of the property in any way, and is clearly distinguishable from the present case.

The case of *Bowie Estate v. M.N.R.*[8], a judgment of the Tax Appeal Board dealt with a situation where the residue of an estate was left to the executors and trustees on certain trusts by one of which they were instructed to pay the income therefrom to deceased's sister for the term of her natural life with a proviso that the sister "is to have the right to encroach upon the principal of the fund hereby set aside should she so desire for any purpose or purposes whatsoever". When she died in assessing her estate the assets standing to the credit of the trust created for her benefit by her brother were included. The appeal against this decision was allowed since, although under the terms of the trust she was to have the right to encroach upon the principal of the fund, that provision did not give her the right to revoke or cancel the trust or demand that the entire assets of the trust created by her brother should be turned over to her, so that she could personally dispose of the trust assets as part of her personal estate. The judgment stated, "From the language used the most that could be inferred was that the testator would be satisfied to have his trustees make encroachments for any purpose or purposes whatsoever which were for the benefit of his sister."

The case *Rowland Estate v. M.N.R.*[9], another judgment of the Tax Appeal Board, dealt with the situation where a trust was created to pay the wife during her lifetime the

[8] 64 DTC 297.

[9] 67 DTC 676.

net income from the estate and "such part or parts of the capital as she in her sole discretion may require from time to time". Upon her death the remaining capital was to go to her son. The appeal from the assessment including the assets of her husband's estate in her estate when she died was allowed and it was held that it appeared that the testator intended that his wife's requirements or needs should be met by payments out of the capital at regular intervals if need should arise. Such needs had not arisen and although she was bequeathed the right to decide the amount of her needs and to receive such amounts from the capital of her husband's estate from time to time during her lifetime if the income of the estate was insufficient, she did not have a general power which would enable her to dispose of all the capital of her husband's estate, and the property should therefore not be included in the taxable value of her estate. This judgment cites with approval the Ontario case of *Agnew v. Canada Permanent Trust Co.*[10] where the will read: "I hereby empower my said wife to draw from the corpus of my estate whatever sums of money she may desire for her own use". Chief Justice Rose held that her executors must account to the beneficiary of the husband's estate, as while she could draw money to spend it for her own use she could not do so for reinvesting in her own name.

Dymond's Death Duties, Volume 1 states at page 96 that "in cases where a life tenant is empowered to appropriate for his own personal maintenance such part of the capital of the settled fund as he may need, he is not regarded as competent to dispose of the part which he does not require. (*Re Pedrotti's Will* (1859), 27 Beav. 583). On the other hand where a life tenant has the power to deal with such part of the capital as he thinks fit, with the remainder over on his death, he is competent to dispose of the whole".

Loffmark on Estate Taxes at page 169 states: "It has been held in England that if a person merely has power during his lifetime to apply for his own use such part of the funds as he may need he is not competent to dispose of that part which he does not need and which thus remains intact at his death. (*Re Richards* [1902] 1 Ch. 76)."

[10] [1933] O.W.N. 80.

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It is clear in our case that if the widow could use capital at all it was only for "her use and enjoyment, comfort and general welfare" and for this limited purpose only and she therefore had no right of disposal. I reject appellant's argument that "enjoyment" might include the right to make donations to third parties of the property, as inconsistent with the context and obvious intention of the clause. The definition of general power in section 58(1)(*i*) quoted above refers to the right to "appoint, appropriate or dispose of property *as he sees fit*" and it is clear that the present will does not give this unlimited right to the widow. She was therefore not competent to dispose of the property within the meaning of sections 3(1)(*a*) and 3(2)(*a*) of the Act.

Even if her use of capital was not restricted by the wording of the will, however, it would have been restricted in practice by the facts in this case. Had Mrs. Black remained as executrix she could have retained seisin of the property in that capacity, and by virtue of the extended powers given to the executor under the will have sold same giving valid title, or alternatively she could have turned over the property to herself as institute under the substitution and then have sold such portion of same as she deemed necessary for "her use and enjoyment, comfort and general welfare". She would be wearing two hats, as executrix under the will and institute under the substitution, and from the practical point of view there would therefore have been no control over her use of this discretion. There has been somewhat conflicting jurisprudence on the subject of the validity of such alienations. The case of *Campion v. Carlin & Cholette* (*supra*) held that she could sell and give valid title basing the finding on Article 952 C.C. Here the disposing clause contained the words "as she may deem advisable" and there was no indication that this right was subject to the control of any executor or trustee. The case of *Ricard v. St. Jean*[11] also permitted the sale of an immoveable by the widow during her lifetime. The holding, however, decided that she was neither a usufructuary nor an institute under a substitution and was therefore under

[11] (1959) 77 Que. S.C. 302.

no obligation to conserve and hand over the property, the will having created a *fideicommis de residuo* without a substitution. A similar finding was made in the case of *Brais v. Fortier et al*[12] but it should be noted that the wife was given the right not only of administration of the property of the succession, but even the disposal of same. The author Antonin Lefebvre in *La Revue du Notariat* (*supra*) would also permit the alienation of the property, but on the basis that there is no substitution if there is no obligation to conserve, but merely a legacy *de residuo*. He is, however, dealing with a hypothetical clause reading as follows:

> Je donne et lègue à mon épouse, tous mes biens, meubles et immeubles, que je délaisserai le jour de mon décès et qui composeront ma succession, pour par elle en jouir et disposer en pleine et absolue propriété à compter de mon décès et comme de chose lui appartenant, cependant je veux et entends que ce qui restera de mes biens lors du décès de madite épouse retourne à mes enfants, et, il en sera de même si ma légataire universelle convole.

which is clearly much wider than the clause in the present will, as it gives the wife the right to enjoy and dispose of the assets in full and absolute ownership as if they belong to her.

On the other hand, the majority judgment in the Supreme Court in the case of *Smith and Montreal Trust Co. v. M.N.R.* (*supra*) held that a fiduciary substitution was created. "The fact that the institute could dispose of the property was no obstacle as Article 952 provides for a substitution *de residuo*". This case was not dealing with the validity of title which the institute could convey by disposing of part of the property during her lifetime, and the actual question of whether she was competent to dispose of the property immediately prior to her death was settled by the fact that she had some 13 years after her husband's death signed a notarial document repudiating any right given her in the will to dispose of the property comprising the rest of the estate and had delivered over to the substitutes under the substitution in anticipation of the term appointed for the opening thereof, the naked ownership of the property in the residue of the estate, but this does not

[12] (1955) Que. S.C. 222.

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diminish the authority of the finding quoted. It is not necessary for the decision of the present case to reach a conclusion as to whether alienations by Mrs. Black would have given valid title to the property if they had not been for her "use and enjoyment, comfort and general welfare", however.

The fact is that in the present case Mrs. Black was at no time in a position to appoint, appropriate or dispose of the property as she saw fit, and certainly she was not so immediately prior to her death. The record discloses that Harvey Black died on March 13, 1957, and that five days later, on March 18, 1957, his widow formally renounced the office of executrix, which she was permitted to do under the terms of the will, and the execution of the will thereupon devolved upon her two sons and daughter or the survivor of them according to the provisions of clause VII of the will. Though she did not formally renounce to the substitution nor hand over the assets thereof to the institute, as in the *Smith* case, it is clear that the seisin of the property of the estate remained vested in the executors. As a matter of interest it might be noted, though I do not believe this affects the decision of the issue, that she had previously named one of her sons, Donald Harvey Fraser Black, as her legal attorney by notarial deed dated February 27, 1957, and it appears that her mental condition was deteriorating to a point where she could no longer manage her own affairs. It can also be noted that none of the capital was in fact ever disposed of for "her use and enjoyment, comfort and general welfare". The judgment of the Tax Appeal Board points out that before dealing in any way with the assets of the estate the executors had to comply with section 46(1) of the *Estate Tax Act* requiring them before transferring, delivering or paying over any property to any successor to pay the amount payable pursuant to or by virtue of the Act as tax or to furnish security for the payment of this. It is clear that during the five-day interval between the death of the testator and her resignation as executrix Mrs. Black could not have legally disposed of any part of the corpus of the estate in any manner whatsoever. Certainly she could not do so immediately prior to her death within the meaning of section 3(1)(*a*) of the *Estate Tax Act*.

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A number of cases have dealt with the situation where seemingly wide powers of disposal (in many cases far less restricted than the powers in the present will) have nevertheless been held to be restricted by the necessity of intervention of executors or trustees so that it has been decided that the beneficiary of the powers was not competent to dispose within the meaning of the Act.

The Privy Council case of *Commissioner of Estate and Succession Duties (Barbados) and Trevor Bowring*[13], dealt with a trust set up in Massachusetts by the donor to pay her the income from it during her lifetime and following her death to her son. There was a clause providing that during her lifetime she should have the right to amend or revoke the trust in whole or in part by an instrument in writing, provided however that this was consented to in writing by the trustees. Under Massachusetts law, where the trust was created, the trustees had the right to consent or refuse to consent to such an amendment. At the date of her death in Barbados, estate duty was claimed on the trust property under provisions in their statutes practically identical to the relevant sections of our *Estate Tax Act*. It was held that the donor, was not, at the date of her death, possessed of a general power making her competent to dispose of the trust property since any amendment or revocation of the trust deed was subject to the consent of the trustees and as a consequence estate duty was not payable.

In the case of *M.N.R. v. Canada Trust Co. (Maine Estate)*[14], the deceased had, under the will of her husband, the income for life on the capital of his estate and the trustees were authorized to make such additional payments out of the capital as from time to time the widow "in her absolute discretion" might deem essential to maintain her as she was accustomed. These were certainly wider powers than given in the present will and the Minister contended that the widow could have, the day after her husband's death, demanded the whole of the trust property. It was held by Jackett P. that, from the context of the whole will, the authority given the trustees to make payments out of the capital of the estate was not overridden by the discretionary

[13] [1962] A.C. 171.

[14] [1964] Ex. C.R. 949; 63 DTC 791.

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powers given to the widow to request such payments. The final decision as to whether such payments would be made was reserved in favour of the trustees and the Minister's appeal was therefore dismissed.

In the Tax Appeal Board case of *Bowie Estate v. M.N.R.* (*supra*), where the trust in favour of deceased's sister permitted encroachment on the capital "should she so desire for any purpose or purposes whatsoever" the finding was nevertheless to the effect that this provision did not give her the right to revoke or cancel the trust or demand that the entire assets of the trust created should be turned over to her so that she could personally dispose of the assets as part of her personal estate. "Neither was it possible to visualize at the time that the trustees would accede to her wholesale demand when the whole tenor of the will was diametrically opposed to revocability or cancellation of the trust. From the language used the most that could be inferred was that the testator would be satisfied to have his trustees make encroachments for any purpose or purposes whatsoever which were for the benefit of his sister but it was evident that the right to encroach should not be regarded as coming within the definition of general power".

A similar finding was made in another Tax Appeal Board case of *Rowland v. M.N.R.* (*supra*). Here the trust was to pay the wife during her lifetime the net income from the estate and "such part or parts of the capital that she in her sole discretion might require from time to time". Here again the powers were clearly wider than those in the present will. The finding was that the testator intended that the wife's requirements or needs should be met by payment out of the capital at regular intervals if need should arise. She was given the right to decide the amount of her needs and to receive such amounts from the capital of her husband's estate from time to time during her lifetime if the income of the estate was insufficient but this did not give her a general power which would have enabled her to dispose of the capital of her husband's estate and that it should therefore not have been included in the aggregate taxable value of her estate. This judgment quoted favourably the *Maine* case previously cited.

Both the *Bathgate* and *Scott cases* (*supra*) can readily be distinguished in that the will in the former case used,

as I have previously indicated, the words "and to pay to my wife the whole or such portion of the capital thereof which she may from time to time and at any time during her life request or desire" so she could require the trustees to pay the whole or any portion of it to her at any time and they would have no discretion to refuse, while in the latter case the beneficiary was given the right "to freely use and dispose of the revenue and capital as long as she lives". Although the capital remained in the hands of the executors without having been touched at the time of her death they could not have refused to turn it over to her on her request as the will also contained a clause stating that this right was "subject always to the seisin, rights and powers hereby conferred upon my executors in respect to such of the property from time to time not used or disposed of by my wife", which makes it clear that the executors only retained seisin of the balance.

To conclude therefore it is abundantly clear in the present case that Mrs. Black did not have a general power within the definition of section 58(1)(i) of the Act to dispose of the property "as she saw fit", and even if she had such power under the will, it could not have been exercised by her without the intervention of the executors following her renunciation as executrix, and the executors, being the same persons who would eventually inherit upon the opening of the substitution, would be presumed to permit disposal of the capital only for "her use and enjoyment, comfort and general welfare" and not for any other purpose. She therefore was not competent to dispose of the capital of the estate which was in the hands of testator's executors at a date "immediately prior to her death" and such property was not taxable as part of her succession. The appeal is therefore dismissed with costs.