
BETWEEN: 1949

EDWIN COMSTOCK COSSITT,.....APPELLANT; March 21 July 23

AND

MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Succession Duty—Dominion Succession Duty Act 4-5 Geo. VI, c. 114, s. 31—The Conveyancing and Law of Property Act R.S.O. 1937, c. 152, s. 24—Disclaimer of power to encroach upon capital of an estate—Liability for succession duty determined by lex domicilii of deceased—Appeal from assessment for succession duty allowed.

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COSSITT
v.
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Appellant was bequeathed the income from an estate and the power to use part or all of the capital of such estate. Appellant by instrument in writing disclaimed and refused to accept the portion of the legacy authorizing him to encroach upon the capital of the said estate, or in any way to exercise such power of encroachment. Appellant was assessed for succession duties on the basis that the legacy to him constituted a gift of the entire residue of the estate. He appealed to this Court from such assessment.

The Court found that appellant did not exercise the power to encroach upon the capital nor did he intend to do so. Nor did he by acquiescence accept the power.

Held: That the appellant was given a gift of the income and the power to use the capital and by virtue of The Conveyancing and Law of Property Act, R.S.O. 1937, c. 152, s. 24, he had the right to disclaim the power to use the capital, and the effect of the execution of the disclaimer by appellant was to void *ab initio* the power of appointment and place him as regards his liabilities, burdens and rights in the same position as if no gift had been made to him.

2. That the law of the province in which the deceased was domiciled applies and the provisions of The Conveyancing and Law of Property Act of Ontario are applicable.

APPEAL under the Dominion Succession Duty Act.

The appeal was heard before the Honourable Mr. Justice O'Connor at Ottawa.

J. W. Pickup, K.C. and *A. G. Parish, K.C.* for appellant.

Douglas Watt, K.C. and *I. G. Ross* for respondent.

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

O'CONNOR J. now (July 23, 1949) delivered the following judgment:

This is an appeal from an assessment made under the Dominion Succession Duty Act (1940-41), Statutes of Canada, chapter 14, as amended by chapter 25 of the Statutes of 1942.

The facts are not in dispute. Kate Louise Cossitt, late of the town of Brockville, died on or about the 15th March 1944, and Letters Probate were granted on the 18th April 1944, to the appellant, the executor named in the will of the deceased.

By paragraph 3 of said will, the said Kate Louise Cossitt provided that all of her estate was to be given, devised and

bequeathed to the executor on certain trusts set forth in the said will. The trusts contained in sub-paragraphs (*f*) and (*g*) of said paragraph 3 are in part as follows:—

(*f*). To invest and keep invested the residue of my estate and to pay the net income derived therefrom to my said son Edwin Comstock Cossitt during his lifetime, with power to him at any time to use for his benefit such amount or amounts out of the capital of the said residue as he may wish.

(*g*). Upon the death of my said son, the residue of my estate or the amount thereof remaining shall be held in trust for the issue of my said son or some one or more of them in such proportions and subject to such terms and conditions as my said son may by his last Will direct, provided . . .

On the 20th July 1944, the Inspector of Succession Duties wrote to the solicitors for the appellant enclosing a statement of the estimated succession duty. The estimate was arrived at on the basis of the appellant having only the income of the residue for life. The estimated amount was then paid to the department.

On the 6th March 1947, the respondent, pursuant to section 22(1) of the Act, mailed to the appellant a notice of assessment. The assessment was made on the basis that clause 3(*f*) of the will constituted a gift of the entire residue of the estate to the appellant. The difference between the estimated duty and the duty fixed under the assessment was $26,070.74.

Upon receipt of this assessment the appellant executed a disclaimer, in part as follows:—

AND WHEREAS Paragraph No. 3(*f*) of said Will is in terms as follows:

(*f*). To invest and keep invested the residue of my estate and to pay the net income derived therefrom to my said son, Edwin Comstock Cossitt during his lifetime, with power to him at any time to use for his benefit such amount or amounts of the capital of the said residue as he may wish.

AND WHEREAS the beneficiary named therein, the undersigned Edwin Comstock Cossitt, is desirous of disclaiming the legacy or benefit contained in said paragraph, whereby he is empowered to encroach upon the capital of the said estate.

NOW THIS INDENTURE WITNESSETH that I, the said Edwin Comstock Cossitt, do by these presents hereby disclaim and refuse absolutely to accept the portion of the said legacy authorizing me to encroach, or in any way exercise said power of encroachment so created.

And by letter dated April 28, 1947, (Exhibit 6), the solicitors for the appellant sent the disclaimer to the Department of National Revenue.

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On May 29, 1947, the appellant served upon the respondent a notice of appeal from the assessment.

By a letter dated June 12, 1947, (Exhibit 7), the solicitors for the appellant remitted to the Department the sum of $26,070.74 stating that the assessment had been appealed and that the remittance was made "strictly without prejudice to such appeal."

The respondent pursuant to section 37 of the Act, notified the appellant of his decision, confirming the assessment, whereupon the appellant notified the respondent that he desired his appeal to be set down for trial, and the respondent replied confirming the assessment.

Evidence was given by the appellant that since the death of his mother he had never exercised the power nor had he any intention of so doing.

Subparagraph (*f*) of paragraph 3 of the will provided:

(*a*) and to pay the net income derived therefrom to my said son, Edwin Comstock Cossitt, during his lifetime,

(*b*) with power to him at any time to use for his benefit such amount or amounts out of the capital of the said residue as he may wish.

What was given to the appellant was therefore, (*a*), a gift of the income during his lifetime, and, (*b*), the power to use part or all of the capital.

No question arises as to (*a*). Here we are only concerned with the effect of (*b*).

What the appellant was given under (*b*) was not "property" but "power," and until he exercised such "power" in his own favour he was not "entitled to property" within the meaning of those words in section 2(*m*).

"Entitled" in section 2(*m*), in my opinion, should be given the same meaning set out by Wynn-Parry, J., in *Re Miller's Agreement, Uniacke* v. *Attorney-General* (1), in which after discussing the word "entitled" in section 2 of the Succession Duty Act, 1853, he said at p. 83:—

The word "entitled," as used in this section, appears to me necessarily to carry the implication that, for a person to be entitled to property under this section, it must be capable of being postulated to her that she has a right to sue for and recover such property.

Until the appellant exercised the power in his own favour, he would not have the right to sue for and recover the capital.

(1) (1947) 2 All E.R. 78.

While what was given the appellant was "power" and not "property" yet because the appellant could exercise it in his own favour such "power" was practically the equivalent to "property" and could reasonably be treated as "property" for the purposes of taxation. This was pointed out by Lord Selborne in *Charlton* v. *Attorney-General* (1), in referring to the 4th section of the Succession Duty Act, 1853, under which general powers of appointment confer successions, he said:—

> If, however, the substance of the first branch of the section is regarded, it certainly points to that kind of absolute power which is practically equivalent to property, and which may reasonably be treated as property, for the purpose of taxation. That is the case with a general power exerciseable by a single person in any way which he may think fit.

Such power is treated as property for the purposes of taxation by section 31 of the Dominion Act, which provides:—

> 31. Where a general power to appoint any property either by instrument *inter vivos*, or by will, or both, is given to any person, the duty levied in respect of the succession thereto shall be payable in the same manner and at the same time as if the property itself had been given, devised or bequeathed, to the person to whom such power is given.

The effect of section 31, in my opinion, is that where a general power to appoint any property is given to any person, such person shall be deemed to have derived a succession of such property from the deceased.

In my opinion, there was not a succession within section 2(*m*), but 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.

Counsel for the appellant contended that (*b*) did not give the appellant a general power of appointment, and therefore, it did not come within section 31 of the Act. That while it was something that the Court might consider to be like a power to appoint, or something having the same effect, it was not a power to appoint of any kind, and, in any event, was not a general power of appointment, because there was no power to do anything for the benefit of anyone else. What could be done was solely for the benefit of the appellant himself.

(1) (1879) 4 A.C. 427.

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The authorities on this question, however, are against that contention.

In *Re Richards, Uglow* v. *Richards* (1), Farwell, J., after distinguishing in *Re Pedrotti's Will* (2), held a direction that:—

> in case such income shall not be sufficient she is to use such portion of "the capital" as she may deem expedient.

gave the wife a general power of appointment *inter vivos,* over the capital, but refrained from expressing an opinion as to whether she could exercise it by will.

In *Re Ryder, Burton* v. *Kearsley* (3), Warrington, J., followed the decision in *Re Richards* (*supra*) and held that the provision:—

> I authorize my husband so long as he is entitled to the income of part or of 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.

gave the husband a general power of appointment *inter vivos.*

In *Re Shuker's Estate, Bromley* v. *Reed* (4), Simonds, J., followed the decisions in both *Re Richards* and *Re Ryder* and held that the provision:—

> and 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 or sale proceeds thereof.

conferred a general power of appointment upon the widow.

The basis of these decisions, is, in my opinion, that the party executing the power could execute it for his own benefit. See *Platt* v. *Routh* (5), per Abinger, C.B., at p. 789, followed by Grimmer, J., in *Provincial Secretary-Treasurer* v. *Schofield* (6). Here the appellant could exercise the power in his own favour and this would enable him to dispose of the property as an absolute owner.

But such succession is subject to disclaimer. Green's Death Duties, 2nd ed. points out, first, at p. 371, that:—

> It was long ago laid down that:—"a man cannot have an estate put into him in spight of his teeth." That acceptance of a gift is to be assumed unless the contrary appear. *Thompson* v. *Leach* (1690) 2 V.R.A. 198, 206.

And again at p. 413:—

> The general principle, that duty is chargeable in accordance with the strict legal rights of the parties, without regard to any arrangements

(1) (1902) 1 Ch. 76.
(2) (1859) 27 Beav. 583.
(3) (1914) 1 Ch. 865.
(4) (1937) 3 All E.R. 25.
(5) (1840) 151 E.R. 618, 55 R.R. 777.
(6) (1923) 2 D.L.R. 1144 at 1147.

which they may make amongst themselves, applies to Succession duty as well as Legacy duty, subject to a similar exception in the case of a disclaimer.

2nd ed., 34 Halsbury's Laws of England states at p. 123:

> The donee need not accept the gift (*Thompson* v. *Leach*, (1690) 2 V.R.A. 198, 206; *Townson* v. *Tickell*, (1819) 3 B. & Ald. 31, 37); but unless by the will the duty of doing some act to show his election is put upon him, his acceptance of the gift is presumed, and the property vests in him unless and until he disclaims. (*Townson* v. *Tickell*, (1819) 3 B. & Ald. 31, 37. *Re Arbib and Class's Contract*, (1891) 1 Ch. 601, C.A.)

What happened here, was that the appellant waited for three years before he disclaimed, and then he only did so to avoid the payment of the tax, disclosed by the assessment which was made at that time. The question then I think is this. Did the appellant accept or exercise the power at any time before the disclaimer was executed, or, knowing of the power and having done nothing for three years, has the appellant by acquiescence accepted the power?

The evidence of the appellant was that he had not at any time exercised the power and that he had not at any time any intention of so doing, and I accept his evidence as to this.

He negotiated with both the Succession Duties Branches of the Dominion Government and of the Province of Ontario, at least to the extent of filing Succession Duty Affidavits. As a result of whatever he did, the Succession Duties Branch of the Dominion Government issued a tentative statement of duties based on the appellant having only the income of the residue for life, and the appellant settled the succession duties with the Province of Ontario on the same basis. All this confirms his evidence that he did not exercise the power and that he never had any intention of doing so.

Having settled the duties with the Succession Duties Branch of the Province of Ontario on that basis, and having received a tentative statement of duties from the Succession Duties Branch of the Dominion of Canada on the same basis, there was never any need or object of the appellant executing a disclaimer until he received the assessment from the Department of the respondent.

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I reach the conclusion that the appellant did not exercise the power nor did he intend to do so, nor did he by acquiescence accept the power.

The respondent contends that there were not two distinct gifts given to the appellant which would permit him to take one and disclaim the other, but there was a single and undivided gift and the appellant therefore had to take the whole or none.

What the appellant was given was a gift of the income and the power to use the capital. By reason of the provisions of section 24 of The Conveyancing and Law of Property Act, R.S.O. (1937) c. 152, the appellant had, in my opinion, the right to disclaim the power to use the capital.

Section 24 of the Act provides:—

24(1). A person to whom a power, whether coupled with an interest or not, is given may by deed disclaim or re-release or contract not to exercise the power.

(2). A person disclaiming shall not afterwards be capable of exercising or joining in the exercise of the power, and on such disclaimer the power may be exercised by the other or others or the survivor or survivors of the others of the persons to whom the power is given unless the contrary is expressed in the instrument creating the power. R.S.O. (1927), c. 137, s. 24.

The respondent contends that the provisions of this provincial act are not applicable in determining the liability for duty under the Dominion Succession Duty Act.

The questions here must be determined by the law of the province in which the deceased was domiciled, and the provisions of section 24(1) (*supra*) are applicable, in my opinion.

The position does not differ from that arising under section 19(*c*) of the Exchequer Court Act of Canada. That is a Dominion statute, but the liability of the Crown is determined by the law of negligence of the province in which such alleged negligence occurred. *The King* v. *Armstrong* (1); *Canadian National Railway Company* v. *St. John Motor Line Limited* (2); followed in *The King* v. *Snell* (3).

Referring to section 6(*b*) of the Dominion Succession Duty Act which levies duties where the deceased was at the time of his death domiciled outside of Canada upon

(1) (1908) 40 S.C.R. 229, 248.
(2) (1930) S.C.R. 482, 488.
(3) (1947) S.C.R. 219, 222.

or in respect of the succession to all property situated in Canada, Rand J., in *Minister of National Revenue* v. *Fitzgerald,* (not yet reported), said:—

> The applicable section of the Act is 6 (b) and the duty is based on the operation of the territorial law in vesting a title to property which is within its jurisdiction.

The effect of the execution of the disclaimer by the appellant, was to void *ab initio* the power of appointment and put the donee as regards his liabilities, burdens and rights, in the same position as if no gift had been made to him. *Silcock* v. *Roynon* (1).

The appeal will therefore be allowed and the assessment will be referred back to the Minister for an adjustment of the figures consequential on the allowance of the appeal.

The appellant is entitled to the costs of the appeal.

Judgment accordingly.