1954
Feb. 24
May 10

BETWEEN:

THE ROYAL TRUST COMPANY AND DR. J. R. FRASER in their quality as executors and trustees of the late WALTER WILLIAM CHIPMAN .. APPELLANTS;

AND

MINISTER OF NATIONAL REVENUE .. RESPONDENT.

Revenue—Succession Duty—The Dominion Succession Duty Act, S. of C. 1940-41, as amended, c. 14, ss. 3(1)(i), 3(4), 4(1) and (2)—Power to draw from capital of an estate—Competency to dispose of property—Meaning of the word "disposition" in s. 3(1)(i) of the Act—Failure by donee to exercise power to dispose of property—Taking of beneficial interest in the property as a result of donee's failure to exercise power to dispose of it deemed to be succession—Appeal from Minister's assessment allowed.

The Dominion Succession Duty Act, S. of C. 1940-41, c. 14, as amended, ss. 3(1)(i) and (4), 4(1) and (2) provided then as follows:

3.(1) A "Succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property;

(i) property of which the person dying was at the time of his death competent to dispose.

3.(4) Where, upon the death of a person having a general power to appoint or dispose of property a person takes a beneficial interest in the property as a result of the failure of the deceased to exercise the power, the taking of the interest in the property shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

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;

(2) A disposition taking effect out of the interest of the deceased shall be deemed to have been made by him whether the concurrence of any other person was or was not required.

By her will Mrs. Maude M. Chipman who died in 1946 left her estate to her trustees to pay her husband, Dr. W. W. Chipman, during his lifetime the income from the residue and "in addition thereto to pay to my said husband from time to time and at any time such portion of the capital of my estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner

of withdrawing the same, and neither my said husband nor my executors and trustees shall be obliged to account further for any capital sums so paid to my said husband". Upon the death of Dr. Chipman the trustees were to dispose of what was left of the capital among designated legatees. The will also provided that all the bequests were intended as an alimentary provision and exempt from seizure for debts except in certain cases and that while in the hands of the Executors they may not be assigned by the beneficiaries. Following the death of his wife Dr. Chipman received the net interest and revenues from the residue of her estate and he demanded and received payments out of the capital thereof. Dr. Chipman died in 1950 and the appellant company and Dr. J. R. Fraser are the executors and trustees of his estate. To the net value of Dr. Chipman's estate at the time of his death the Minister, in his assessment, added the residue of Mrs. Chipman's estate as an asset of her husband's estate on the ground that Dr. Chipman was at the time of his death competent to dispose of property which he was given power to appropriate by the will of his wife and this property was dutiable under the provisions of the Dominion Succession Duty Act. From the assessment appellants appealed to this Court contending that s. 3(1)(i) and (4) of the Act do not apply to the facts of the case and that there is no provision in the Act which authorizes the inclusion of the residue of Mrs. Chipman's estate as an asset of her husband's estate.

Held: That Dr. Chipman at the time of his death was competent to dispose of the capital of his wife's estate. Under clause 3(f) of her Will, he at any time up to the moment of his death could have made the capital his own. *Parson's case* [1942] 2 A.E.R. 496 at 497; *In re Penrose, Penrose* v. *Penrose* [1933] 1 Ch. 793 at 807 referred to.

2. That "disposition" in s. 3(1) of the Dominion Succession Duty Act means a disposition by the deceased—here Dr. Chipman. The word cannot be disregarded. It involves the action of disposing. There is no succession under s. 3(1)(i) unless there has been a disposition by the deceased. This is further evidenced by a consideration of the provisions of s. 3(4) of the Act which seem to have been designed to apply where there was no "disposition" by the deceased. If mere "competency to dispose" resulted in a "succession" without an actual *disposition* by the deceased, there would have been no necessity for enacting s. 3(4). Here, Dr. Chipman made no disposition whatever of the principal of the residue of Mrs. Chipman's estate. Therefore, there was no "succession" in respect to that residue under s. 3(1)(i) so far as Dr. Chipman's estate is concerned.

3. That s. 4(1) of the Dominion Succession Duty Act does not purport to create a statutory succession in all cases in which the donee of the general power to appoint or dispose of property fails to exercise that power. It is only in cases "where . . . *a person takes a beneficial interest in the property as a result of the failure to exercise,* that the taking of that interest in the property is deemed to be a succession". The majority decision in *Wanklyn et al* v. *Minister of National Revenue* [1953] S.C.R. 58 indicates that the beneficiaries of the principal of the residue of Mrs. Chipman's estate did not *take* beneficial interests in the property *as a result* of the failure of Dr. Chipman to exercise the power, but took them directly from the provisions of Mrs. Chipman's will.

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4. That the inclusion of the words "the taking of the interest in the property as a result of the failure of the deceased to exercise the power" creates a condition which must be found to exist before there is deemed to be a succession; there must be a *taking* of a beneficial interest by the successor and that taking must follow as a result of the donee of the power failing to exercise it. Here the beneficiaries took the beneficial interests in the property at the death of Mrs. Chipman. They took no beneficial interest on Dr. Chipman's death, but merely retained what they already had, namely, a vested remainder in the capital, relieved by Dr. Chipman's death of the possibility of being divested thereof which had existed during his lifetime. *A. G.* v. *Lloyd's Bank Ltd.* [1935] A.C. 382; *Scott et al* v. *C.I.R.* [1937] A.C. 174 referred to.

APPEAL under the Dominion Succession Duty Act, S. of C. 1940-41, Geo. VI. c. 14.

The appeal was heard before the Honourable Mr. Justice Cameron at Montreal.

James A. Mitchell Q.C. for appellants.

Antoine Geoffrion and *Raymond Décary* for respondent.

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

CAMERON J. now (May 10, 1954) delivered the following judgment:

This is an appeal taken under the provisions of Part VI of the Dominion Succession Duty Act (Statutes of Canada, 1940-41, ch. 14 as amended) from an assessment dated February 13, 1951, in respect of the estate of Dr. Walter William Chipman (hereinafter to be called "the Testator") who died on April 4, 1950, domiciled in the City of Montreal, having duly executed his will in notarial form dated March 21, 1950.

The appellants, the Royal Trust Company and Dr. J. R. Fraser, are the surviving executors and trustees of the Testator's estate. By his will the Testator gave the whole of the property which he possessed and to which he was entitled, to his executors upon trust: (*a*) to pay his debts, testamentary expenses, succession duties and the like; (b) to pay certain specific bequests; (*c*) to provide certain annuities for the appellants, Miss J. G. Sime and John Bath; and (*d*) to deliver the capital of the residue of his estate to his cousin, the appellant, Agnes MacMillan McLaughlin.

It is now agreed that the aggregate net value of the property of which the Testator was the owner at the time of his death was $132,045.16. In his assessment, however, the Minister placed the aggregate net value at $531,391.12 and assessed the duties payable at $81,371.50, and interest. The respondent's reason for increasing the aggregate net value of the estate as set out in his decision, following the Notice of Appeal, was as follows:

The Honourable the Minister of National Revenue having duly considered the facts and reasons set forth in the Notice of Appeal and matters thereto relating hereby affirms the said assessment as having been in accordance with the provisions of the Act and in particular on the ground that the said Walter William Chipman was at the time of his death competent to dispose of property which he was given power to appropriate by the Will of the late Maude M. Chipman and the said property has been properly subjected to duty under the provisions of paragraph (i) of subsection (1) of section 3 and subsection (4) of the said section 3 of the Act.

The said Maude M. Chipman, who died on January 14, 1946, domiciled in the City of Montreal, was the wife of the Testator. In her last will and codicil, made in notarial form and dated respectively February 7, 1940, and May 26, 1943, and after reciting that she was the wife, separate as to property, of Dr. W. W. Chipman, by Clause "Thirdly" she gave the whole of her estate to her executors and trustees on trust:

"(*a*) To pay all my just debts, funeral and testamentary expenses as soon as possible after my death and to pay all succession duties, inheritance taxes, court fees and similar taxation on my Estate out of the capital of the residue of my Estate without charging same to my respective legatees and without the intervention of any of my legatees."

(*b*) is a bequest to a niece;

(*c*) and (*d*) give the use of her residence and its contents to Dr. Chipman for his lifetime;

(*e*) is a legacy to employees.

The will continues:—

"(*f*) To pay my husband, the said Walter William Chipman, during the remainder of his lifetime, the net interest and revenues from the residue of my Estate and in addition thereto to pay to my said husband from time to time and at any time such portion of the capital of my Estate as he may wish or require and upon his simple demand, my said husband to be the sole judge as to the amount of capital to be withdrawn by him and the times and manner of withdrawing the same, and neither my said husband nor my Executors and Trustees shall be obliged to account further for any capital sums so paid to my said husband.

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(*g*) Upon the death of my said husband or upon my death should he have predeceased me to dispose of my Estate as it may then exist as follows, namely:—

1. My jewellery, pictures, household furniture and household effects shall be disposed of in accordance with any memorandum I may leave with respect to the same and failing any such memorandum then the same shall be divided among my residuary legatees hereinafter named in the same manner as the residue of my Estate.

2. To pay to The Royal Institution for the Advancement of Learning (McGill University) of Montreal, the sum of fifty thousand dollars as a special legacy.

3. To pay to the Royal Victoria Hospital, Montreal, the sum of fifty thousand dollars as a special legacy.

4. To pay to The Art Gallery, presently situate at the corner of Ontario Avenue and Sherbrooke Street West, Montreal, the sum of fifty thousand dollars as a special legacy.

5. To pay to The Church of St. Andrew and St. Paul, presently on Sherbrooke Street West, Montreal, the sum of Twenty-five thousand dollars.

The receipt of the treasurer for the time being of each of the foregoing institutions shall be a good and valid discharge to my Executors and Trustees.

6. To divide the capital of the residue of my Estate between my brothers, sisters, niece and nephews as follows:—One-sixth thereto to my brother, D. Forbes Angus, of the City of Montreal; one-sixth thereof to my brother William Forrest Angus of the City of Montreal; one-sixth thereof to my brother, David James Angus, presently of Victoria, British Columbia; one-sixth thereof to my sister, Margaret Angus, wife of Dr. Charles Ferdinand Martin of the City of Montreal; one-sixth thereof to my sister, Dame Bertha Angus, widow of Robert MacDougall Paterson of the City of Montreal; one-eighteenth thereof to my niece, Gyneth Wanklyn, widow of Durie McLennan, of the City of Montreal; one-eighteenth thereof to my nephew, David A. Wanklyn, of the City of Montreal; and one-eighteenth thereof to my nephew, Frederick A. Wanklyn, presently of Nassau, Bahamas; and I hereby constitute my said brothers, sisters, niece and nephews my universal residuary legatees in the aforesaid proportions."

The will then provides for the possibilities of brothers, sisters, nephews or the niece of the testatrix predeceasing her and defines the powers of the executors and trustees. The only provision of the will or codicil other than those quoted above which it is suggested may have relevance to the inquiry before me is the clause entitled "Fifthly", reading as follows:—

"The requests herein made whether of capital or revenue are intended as an alimentary provision for my legatees and shall be exempt from seizure for their debts except as a result of express hypothecation or pledge. I direct, moreover, that the bequests herein made while in the hands of my Executors and Trustees shall not be capable of being assigned by the beneficiaries."

Following the death of his wife, the Testator received the net interest and revenues from the residue of her estate as provided for in the opening words of Clause 3(*f*) of her Will; and under the remaining provisions of the said clause, he demanded and received payment of $33,164.41 out of the capital of the residue of her estate. It is agreed that at the Testator's death the aggregate value of the residue of the estate of Mrs. Chipman in the hands of her trustees was $517,140.21. After making certain deductions, exemptions and corrections in respect thereof, the Minister added to the aggregate net value of the Testator's estate the sum of $393,533.11, relying, as he now does also, on s. 3(1)(i) and s. 3(4) of the Dominion Succession Duty Act, which were then as follows:

3.(1) A "succession" shall be deemed to include the following dispositions of property and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to such property;

(i) property of which the person dying was at the time of his death competent to dispose.

3.(4) Where, upon the death of a person having a general power to appoint or dispose of property a person takes a beneficial interest in the property as a result of the failure of the deceased to exercise the power, the taking of the interest in the property shall be deemed to be a succession and the beneficiary and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

Then s. 4 is in part 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;

(2) A disposition taking effect out of the interest of the deceased shall be deemed to have been made by him whether the concurrence of any other person was or was not required.

The appellants, among whom are included the beneficiaries in the residue of Mrs. Chipman's estate or their legal representatives, ask that the assessment be declared invalid on the ground that s. 3(1)(i) and s. 3(4) do not apply to the facts of this case and that there is no provision in the Act which authorizes the inclusion of the residue of Mrs. Chipman's estate as an asset of the estate of the Testator. They ask for an order directing the respondent to fix the

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aggregate net value of the successions derived from the Testator at the sum of $132,045.16, the agreed net aggregate value of the Testator's own assets.

At the hearing, counsel for the respondent conceded that the residuary beneficiaries of the principal of the residue of Mrs. Chipman's estate took their legacies under her will and not from the Testator's estate. He also admitted that as to these legacies, there was no "succession" within the definition of that word in s. 2(m) of the Act in the Testator's estate.

I shall first consider the applicability of s. 3(1)(i) to the facts of this case. Counsel for the appellants submits that in order to uphold the assessment under this subsection, it must be shown that the Testator was competent to dispose of the principal of the residue of Mrs. Chipman's estate and that he did, in fact, dispose of it. I am in agreement with that submission. Then he says that the Testator was not competent to dispose of that principal and that even if he were so competent, he did not in fact dispose of it.

In my opinion, the Testator at the time of his death was competent to dispose of the capital of his wife's estate. Under Clause 3(f) of her will, the Testator at any time up to the moment of his death could have made the capital his own. On this point it is not necessary to consider whether her will gave him a general power of appointment or to refer to the extended meaning of "competent to dispose" in s. 4(1). As pointed out by Lord Greene, M.R. in *Parson's case* (1):

> The phrase "competent to dispose" is not a phrase of art, and, taken by itself and quite apart from the definition clause in the Acts, conveys to my mind the ability to dispose, including, of course, the ability to make a thing your own. The husband, in the present case, from the moment of death was able to make the legacy his own; in fact, if he had done nothing but had proceeded to die, his executors would have been entitled to that legacy from the mere fact that he had not disclaimed it. During the period between death and disclaimer, he was unquestionably to my mind "competent to dispose" within the meaning of those words, which I think are wide and in a sense popular in meaning.

Reference may also be made to *In re Penrose, Penrose* v. *Penrose* (2).

(1) [1942] 2 A.E.R. 496 at 497. (2) [1933] 1 Ch. 793 at 807.

That, however, does not conclude the matter. Under The Finance Act, 1894 (Eng.), it would probably not be necessary to go further. Under that Act, estate duty is levied on the value of property "which passes on the death" (s. 1); by s. 2 property passing on the death of the deceased is deemed to include property of which the deceased was competent to dispose; and by s. 22(2)(a) "competent to dispose" and "general powers" are defined, that subsection being almost identical with s. 4(1) of The Dominion Act. Under the English Act, therefore, an estate duty is levied on the value of property of which the deceased was competent to dispose.

S. 3(1)(i) of our Act does not purport to do that. Here it is the "*disposition* of property of which the deceased was at the time of his death competent to dispose" that is deemed to be a succession and therefore subject to duty. (I think that "disposition" as used in the opening words of s. 3(1) means a disposition by the deceased—in this case the Testator.) It is suggested by counsel for the respondent that to restrict the meaning of "disposition" in that way would be to render s. 3(1)(i) completely ineffectual, for if the deceased had disposed of it, then at his death there would be nothing of which he was still "competent to dispose". One answer to that—and there are many others—is, of course, a case in which he had a general power of appointment over the corpus by will and had disposed of it by his will.

The word "dispositions" cannot be disregarded. It involves the action of disposing. In Hanson's Death Duties, 9th Ed., p. 31-2, the author points out that to create a succession there must be a transfer, the effect of which is to make some person beneficially entitled upon the death, and that the transfer may be either by disposition or by devolution. At p. 32 he states:

> A disposition comprises any sort of conveyance, will, assignment, covenant, undertaking, contract, act, or obligation by which one person confers a beneficial interest in property on another, otherwise than for money or money's worth.

I am strengthened in my opinion that there is no succession under s. 3(1)(i), unless there has been a disposition by the deceased (in this case—the Testator), by considering the provisions of s. 3(4) which seem to have been designed

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to apply to certain situations in which the donee of a general power to appoint or dispose of property, has in fact failed to exercise the power—where there was no "disposition" by the deceased. If mere "competency to dispose" resulted in a "succession" without an actual *disposition* by the deceased, there would have been no necessity for enacting s. 3(4).

Now, in the instant case, Dr. Chipman made no disposition whatever of the principal of the residue of Mrs. Chipman's estate. For the reasons which I have stated, I am of the opinion, therefore, that there was no "succession" in respect to that residue under s. 3(1)(i) so far as the Testator's estate is concerned.

Counsel for the appellant further submits that s. 3(4) (*supra*) has here no application, his submission being that the Testator had no general power to appoint or dispose of the residue of Mrs. Chipman's estate within the meaning of the Act or of the general law; and in any event because even if he had such alleged general power, the residuary legatees of Mrs. Chipman's estate *took no beneficial interest* in the residue thereof upon Dr. Chipman's death *as a result of his failure to exercise any power.* Ss. (4) was added to s. 3 by Statutes of Canada, 1944-5, c. 37, s. 2. It would seem that the general intention of the draftsman may have been to provide that in certain cases where the donee of a general power to appoint or dispose of property (the meaning of "general power" being amplified in s. 4(1)) died, without having exercised the power and a person took a beneficial interest in the property, the taking of the interest in the property would be deemed to be a succession. It could be assumed, perhaps, that a person holding such a general power of appointment over property is in effect in the same position as the actual owner, as he could at any time exercise the power in his own favour and make the property his own. Upon his death, therefore, it might be logical to regard him as being the predecessor of the persons thus benefiting. If he had exercised the power, I think it would have been such a disposition as to come within s. 3(1)(i). Such a provision as I have suggested may have been in the mind of the draftsman, would have filled in the gap where there

was a failure to exercise the power and therefore no disposition. The power of Parliament to so provide is not challenged and the question is whether on a proper construction of the section it has done so.

Now the subsection is limited to cases in which the person dying has a general power to appoint or dispose. As I have said, counsel for the appellant submits that there was here no such power. It becomes necessary at this point to refer to certain other proceedings in which the provisions of Mrs. Chipman's will and the nature of the interests thereby conferred on Dr. Chipman and on the residuary beneficiaries in her will were under consideration.

Following Mrs. Chipman's death, an assessment to succession duties was made upon her estate on the basis that under her will a general power of appointment over the principal of the residue thereof was given to Dr. Chipman, and that duties were assessable as if the capital of the residue had been given to him outright. Upon appeal to this Court, Saint Pierre, D.J. affirmed the assessment (1). A further appeal was taken to the Supreme Court of Canada (*Wanklyn et al* v. *Minister of National Revenue* (2)), and by a majority the appeal was allowed. It was held:

That the appeal should be allowed and the assessment set aside; the dutiable value of the succession to the husband in respect of the residuary estate of the testatrix was the value as of the date of her death and the estimated net revenues from such residuary estate and the residuary legatees were assessable as having on the death of the testatrix become beneficially entitled to the capital of the residue in remainder expectant upon the death of the husband, subject to the appropriate adjustment due to his having received a certain amount from the capital.

(It should perhaps be noted here that at the time the assessment was made in Mrs. Chipman's estate, Dr. Chipman was still living; but at the time the appeal was heard in the Supreme Court of Canada he had died. It is agreed that succession duties in Mrs. Chipman's estate have been paid on the basis of the judgment of the Supreme Court of Canada.)

The majority judgments were delivered by Cartwright and Fauteux, JJ. and by Estey, J. They did not find it necessary to reach a concluded opinion as to whether the

(1) [1952] Ex. C.R. 219. (2) [1953] S.C.R. 58.

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power conferred on Dr. Chipman was or was not a general power, being of the opinion that in either case the appeal must succeed.

Estey, J. said:

> There is much to be said in principle for the contention that a power of appointment that permits one to appoint only to himself is not a general power of appointment.

Cartwright and Fauteux, JJ. stated that they regarded this question as difficult and doubtful, and added:

> If it were necessary to decide this question, careful consideration would first have to be given to the appellant's argument that the wide terms in which the power given to Dr. Chipman is expressed in clause 3(*f*) are modified and restricted by clause 'Fifthly' quoted above. Even if the respondent's contention that Dr. Chipman was entitled to take the whole capital be accepted, the power given to him does not at first sight appear to fall within the text-book definitions of a general power. See, for example, Halsbury, 2nd Ed., Vol. 25 at p. 211:
>
> > "A general power is such as the donee can exercise in favour of such person or persons as he pleases, including himself or his executors or administrators."

Had I to reach a conclusion on this point, it would be necessary to give careful consideration to the terms of the will. It is clear that the power conferred on the Testator was to appoint to himself. Clause "Fifthly" states that all bequests are intended as an alimentary provision, that they are exempted from seizure for debts except in certain cases and that while in the hands of the executors they may not be assigned by the beneficiaries.

In the instant case I am also of the opinion that it is unnecessary to determine that question, since I have reached the conclusion that the appeal, must succeed, even if it were held that a general power to appoint or dispose of property was conferred on the Testator.

S. 4(1), as I interpret it, does not purport to create a statutory succession in all cases in which the donee of the general power fails to exercise that power. It is only in cases "where . . . *a person takes a beneficial interest in the property as a result of the failure to exercise the power,* that the taking of that interest in the property is deemed to be a succession." The majority decisions of the Supreme Court of Canada in the *Wanklyn* case, it seems to me, indicates that the beneficiaries of the principal of the residue did not *take* beneficial interests in the property *as a result* of the failure of the Testator to exercise the power, but took them directly from the provisions of Mrs. Chipman's will.

In construing the relevant clauses of the will, Cartwright and Fauteux, JJ. stated at p. 71:

The first question is as to the proper construction of the relevant clauses of the will. Under the rules of the law of Quebec, which do not appear to differ in this regard from those of the common law, it seems clear that Dr. Chipman was entitled to the income from the residue for life and that on his death the capital was divisible among the residuary legatees, pursuant to clause 3(g) of the will, subject to the possibility of part or all of the capital having been paid to Dr. Chipman during his lifetime; and the shares received by the residuary legatees passed to them from Mrs. Chipman and not from Dr. Chipman. The provisions of the Dominion Succession Duty Act do not purport to alter this result, but in the submission of the respondent they have the effect of providing that duties shall be levied as if (i) the whole residue had been given outright to Dr. Chipman by the will of Mrs. Chipman, and (ii) the shares of Mrs. Chipman's estate received by the residuary legatees on Dr. Chipman's death had passed to them from him and not from her. It is with the first only of these two questions that we are directly concerned on this appeal. The power of Parliament to so provide is not challenged: the question is whether on a proper construction of the Statute it has done so.

Then, after quoting the definition of "succession" as found in s. 2(m) of the Act, the judgment continues:

Applying these words to the case at bar, the "disposition" with which we are concerned is the will of Mrs. Chipman, the "property" is the capital of the residue, the "death of the deceased person" is the death of Mrs. Chipman, and the question is therefore whether under her will, upon her death, Dr. Chipman became beneficially entitled to that capital "either immediately or after any interval either certainly or contingently and either originally or by way of substitutive limitation." It appears to me that he did not. I am of opinion that upon the death of Mrs. Chipman, Dr. Chipman became beneficially entitled to the income from the residue and the residuary legatees became beneficially entitled to the capital thereof in remainder. I have already indicated my view that the legal effect of the relevant provisions of the will of Mrs. Chipman is the same under the law of Quebec as under the common law, and using the terminology of the latter, the residuary legatees immediately on the death of Mrs. Chipman took not a contingent but a vested remainder in the capital, expectant on the death of Dr. Chipman, subject to be divested in whole or in part by his exercise of the power to take during his lifetime such portion or portions of the capital as he might wish. So far as the capital of the residue was concerned no part of it became vested in Dr. Chipman upon Mrs. Chipman's death or under any disposition made by her. No doubt upon his exercising the power Dr. Chipman became entitled to the part of the capital of the residue in respect of which he exercised it, and became so entitled under Mrs. Chipman's will by the operation of the rule of law that "whatever is done in pursuance of a power is to be referred to the instrument by which the power is created, and not to that by which it is executed as the origin of the gift" (*vide* Farwell on Powers, 3rd Edition at page 318); but it was only to the extent that he exercised the power that he became beneficially

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entitled to any portion of such capital and it was conceded that he was liable to pay duty in respect of such portion. The respondent's argument depends upon the proposition that a person who is given a power over property thereby becomes beneficially entitled to such property but in my view this is not the law and no words in the Statute so provide. As is pointed out in Halsbury, 2nd Edition, Vol. 25, page 515:

> "The creation of a power over property does not in any way vest the property in the donee, though the exercise of the power may do so; and it is often difficult to say whether the intention was to give property or only a power over property."

I have already indicated my view that as a matter of construction it is clear that Mrs. Chipman's will gave Dr. Chipman no property in the capital of the residue but only a power over it.

During the argument the terms of sections 3(4) and 4(1) of the Act were fully discussed but they appear to deal with the question of what duties are payable upon the death of the donee of a power rather than with the question of the duties payable upon the death of the donor of a power, and their relevance to the question before us is limited to the bearing which they may have upon the proper construction of section 31.

Then, after considering the provisions of s. 31 of the Act and reaching the conclusion that it could not be construed as levying any duty or defining any succession, and that there was no other provision which had the effect contended for by the Minister, the judgment continued:

for the above reasons, I would allow the appeal, set aside the assessment and order that the matter be referred back to the Minister in order that an assessment may be made upon the basis that the dutiable value of the succession to Dr. Chipman in respect of the residuary estate of Mrs. Chipman was the value as of the date of her death of the estimated net revenues from such residuary estate during the remainder of his lifetime and that the residuary legatees were assessable as having on the death of Mrs. Chipman become beneficially entitled to the capital of the residue in remainder expectant upon the death of Dr. Chipman, subject to the appropriate adjustment made necessary by the fact of Dr. Chipman having received $33,164.41 from such capital. The appellants are entitled to their costs in the Exchequer Court and in this Court.

In a separate judgment Estey, J. reached the same conclusion and for substantially the same reasons. In allowing the appeal, he directed "that the matter be referred back to the Minister for a reassessment on the basis that upon the death of the testatrix the capital in the residue of her estate passed to the parties named in the will, subject to the amount received by Dr. Chipman in the sum of $30,164.41."

The opinion of the majority of the judges in the *Wanklyn* case indicates that in relation to the principal of the residue of Mrs. Chipman's estate (excluding, of course, that part which his Testator had appropriated to himself):—

(1) there was no "succession" under the Act to Dr. Chipman;

(2) that under the rules of the law of Quebec and of the common law the shares received by the residuary legatees passed to them from Mrs. Chipman and not from the Testator;

(3) the residuary legatees immediately on the death of Mrs. Chipman took not a contingent but a vested remainder in the capital expectant on the death of Dr. Chipman subject to be divested in whole or in part by his exercise of the power to take during his lifetime such portion or portions of the capital as he might wish;

(4) that no part of it became vested in Dr. Chipman upon Mrs. Chipman's death or under any disposition made by her;

(5) that it was only to the extent that Dr. Chipman exercised the power that he became benecially entitled to any portion of such capital; and

(6) that Mrs. Chipman's will gave Dr. Chipman no property therein but only a power over it.

It seems to me that the inclusion of the words "the taking of the interest in the property as a result of the failure of the deceased to exercise the power" creates a condition which must be found to exist before there is deemed to be a succession; there must be a *taking* of a beneficial interest by the successor and that taking must follow as a result of the donee of the power failing to exercise it. Here the beneficiaries took the beneficial interests in the property at the death of Mrs. Chipman. They took no beneficial interest on the Testator's death, but merely retained what they already had, namely, a vested remainder in the capital, relieved, it is true, by the Testator's death, of the possibility of being divested thereof which had existed during his lifetime.

It is of interest to refer to the judgment in *A. G.* v. *Lloyd's Bank, Ltd.* (1), as explained by Lord Russell of Killowen in *Scott et al* v. *C.I.R.* (2). In the latter case he said at p. 183 in referring to the former case:

I would like, however, as one of the majority in that case, and in view of observations recurring (if not concurring) elsewhere, to state in fuller detail the foundation of that decision. The fund under consideration was the fund as it existed at the moment of the settlor's death —namely, the original capital increased by accumulations of so much of the income as had not been paid or applied under clause 4 of the settlement, but less so much capital as had been applied under clause 3 of the settlement. The question to be answered was had *that* fund passed on the death of the settlor. To answer that question a comparison must be made between the persons beneficially interested in *that* fund the moment before the death, and the persons so interested the moment after the

(1) [1935] A.C. 382. (2) [1937] A.C. 174.

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death. The only persons beneficially interested in *that* fund immediately before the death were the son and the daughters, though their interests were liable to be altered or defeated by some act of the settlor, or by the happening of some event in his lifetime. His death merely rendered any such act or event an impossibility. The son and daughters remained beneficially interested in the same shares and to the same extent as before, but their interests were no longer subject to alteration or defeat. They claimed under the same title as before. There was no changing hands. Therefore the fund in question did not pass on the death.

The question under consideration there was whether there was a passing on the death and that judgment, of course, is not directly applicable to the instant case. The explanation, however, does establish that the mere cesser of the possibility of the alteration or defeat of beneficial interests does not result in a changing of hands, that the parties beneficially entitled remain beneficially interested in the same property and to the same extent as before; and that they claim under the same title as before. It would seem to follow, therefore, that in the instant case there was no taking of any beneficial interest as a result of the failure to exercise the power.

Counsel for the respondent submits that the provisions of ss. (4) should not be interpreted in any technical or strictly legal manner. He suggested that while the section may have been poorly drawn, the intention was to create a succession in every case where there was a general power of appointment which had not been exercised. To interpret the subsection in that way would be to disregard entirely the clear words of the subsection itself which, as I have said, import a necessary condition—the taking of the interest in the property—a condition which I find does not here exist. The appeal must succeed on this ground also.

It may be noted that subsection (4) as it existed at the death of the Testator was repealed by s. 2(3) of c. 24, Statutes of 1952, and a new subsection substituted therefor. It is unnecessary to consider its provisions, the parties hereto being in agreement that it has no bearing on the instant case.

For these reasons the appeal will be allowed, the assessment will be set aside and the matter referred back to the respondent to reassess the duties in the estate of the Testator, omitting therefrom all entries relating to the residue of

the estate of Mrs. Chipman and to her residuary legatees and fixing the aggregate net value of the successions derived from the Testator at $132,045.16.

The appellants are also entitled to their costs after taxation.

Judgment accordingly.