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Feb. 12, 13

Dec. 13

BETWEEN:

EDMUND HOWARD SMITH AND MONTREAL TRUST COMPANY, Executors under the Will of HELEN RICHMOND DAY SMITH, CECIL ERNEST FRENCH, ISABEL BEATRICE DAY, GRACE VALENTINE DAY, CHARLOTTE A. SMITH, GARDNER HOWARD SMITH, ROBERT HOWARD SMITH, HELEN LAYTON SMITH, GERALD MEREDITH SMITH, JR., HENRY LEIGHTON SMITH, LOUIE SMITH LAWRENCE, JOSEPHINE SMITH GOODHUGH, ALEXANDER E. SMITH, MARGUERITE SMITH HASKELL AND ELDRED CARTMER, JR. ..... APPELLANTS;

AND

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

Revenue—Succession duty—Dominion Succession Duty Act, 1941, S. of C. 1940-41, c. 14, s. 3, s-s. 4—Residue of estate bequeathed by testator to wife or certain named legatees—Deed of disclaimer of power of disposal executed by wife—Testator's estate not to be included in that of wife for succession duty purposes—No successors of wife—Appeal allowed.

A testator bequeathed the residue of his estate to his wife and to the extent that she had not disposed of it at the time of her death to his collateral relatives and connections named in his will. Immediately following the death of the testator all the income from his estate was paid or credited to his wife and continued to be so paid or credited until her death, no part of the capital of the estate being paid or credited to her. The wife died possessed of a substantial estate in her own right and in assessing her estate for succession duty the residue of the husband's estate was added to her own personal estate. An appeal from such assessment was taken to this Court.

Held: That a deed of disclaimer executed by the wife is valid and does not constitute a gift *inter vivos,* and brought to an end any power or right of disposal of the corpus of the estate which the wife may have had and the delivery over of the property by the wife in conformity with the directions and wishes of the testator should be regarded as the fulfilment of a duty and not as a gift.

2. That the residuary estate of the testator is not included in the estate of the wife for succession duty purposes and since a succession is deemed to have occurred at the time of the death of the party having a general power of disposal within s-s. (4) of s. 3 of the *Succession Duty Act* none of the appellants can be deemed to be the successors of the wife.

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APPEAL under the *Dominion Succession Duty Act.*

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

J. DeM. Marler, Q.C. and *Julian Chipman* for appellants.

Guy Favreau, Q.C. and *M. Paquin, Q.C.* for respondent.

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

KEARNEY J. now (December 13, 1957) delivered the following judgment:

This is an appeal taken from an assessment amounting to $129,374.65 made by the respondent, under the *Dominion Succession Duty Act* (1940-1941), c. 14 and amendments. The appellants were advised thereof by notice dated May 30, 1955, and duly objected thereto, whereupon on review the respondent affirmed the said assessment. It arose in consequence of the death on June 20, 1954, of Helen Richmond Day Smith, hereinafter sometimes called "Mrs. Smith," widow of Edgar Maurice Smith, both in their lifetime of the City of Montreal. Mrs. Smith executed a will in notarial form on December 5, 1947, wherein she appointed the appellants, Edmund Howard Smith and Montreal Trust Company, as executors. Her will, however, is immaterial in this appeal, save for the purpose of explaining the status of the two aforesaid appellants.

The assessment in question stemmed from the will, dated Feb. 23, 1938, (Ex. 3), of Edgar Maurice Smith, hereinafter sometimes called "the testator," who died on September 4, 1938. In his will, after making to others a gift of some particular legacies, the testator bequeathed the residue of his estate to his wife and, to the extent that she had not disposed of it at the time of her death, to his collateral relatives and connections named in his will, who are the other appellants in the present case.

The respondent assessed in the hands of Mrs. Smith the residuary estate of the testator who died before the coming into force of the Act, on the ground that at her death it was deemed to form part of her estate and a succession from her to her husband's heirs was deemed to have occurred, within the meaning, respectively, of s-ss. (1)(*i*) and (4) of s. 3 of the *Dominion Succession Duty Act.* I think the facts may be regarded as uncontested. The parties admit that, immediately following the death of the

testator, all the income from his estate was paid or credited to Mrs. Smith and continued to be so paid or credited until her death; that during the aforesaid period no part of the capital of the said estate was paid or credited to her. The record discloses that Mrs. Smith died possessed of a substantial estate in her own right, and there is no dispute about the succession duty which would be payable thereon if taken by itself. The assessment complained of occurred because of the addition of the residue of her husband's estate to her personal estate. This additional amount also attracted a higher rate of duty since most of the appellants entitled to receive it, though heirs and collateral relatives of her husband, were looked upon by the respondent, for succession duty purposes, as her heirs and they were assessed as strangers.

The more important provisions of the testator's will are as follows:

Ninth.—As to the rest, residue and remainder of my Estate and property, real and personal, moveable and immoveable, including any Life Insurance payable to my Estate, and not specifically distributed or apportioned, I hereby will, devise and bequeath the same to my dear wife, the said DAME HELEN RICHMOND DAY, to have, hold, use, enjoy and dispose of the same as fully and freely as if the next following disposition had not been contained in this my Last Will and Testament.

Tenth.—IN THE EVENT that my said dear wife, DAME HELEN RICHMOND DAY, should predecease me, or to the extent that my said dear wife has not during her lifetime disposed of the residue of my Estate hereinabove bequeathed to her, I will and bequeath to ..... (Here follow the names of the particular legatees.) .....; and the then rest, residue and remainder of my Estate and property to the following persons ..... (Here follow the names of the other appellants herein, being collateral relatives and connections of the testator.)

Counsel agree that clauses ninth and tenth of the will created a substitution under the civil law of the Province of Quebec, wherein Edgar Maurice Smith was the testator or grantor, his wife the institute, and the relatives and connections of the testator entitled to receive his residuary estate were the substitutes.

Counsel for the appellant submitted that the assessment under appeal, to the extent that it imposed a duty on the residuary estate of the testator, was illegal because, even if at one time Mrs. Smith had a general power of disposal, within the meaning of s-s. (4) of s. 3 of the Act, such power had ceased long before her death by reason of her disclaimer thereof and her anticipated delivery of the

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ownership of the substituted property, as set out in the Deed of Declaration and Acceptance (Ex. 1), hereinafter called the deed. This deed was executed before Dakers Cameron, N.P., on August 24, 1951, to which were parties Mrs. Smith, both in her quality of institute and executor under the will of her late husband, the other executors under the said will, and his collateral relatives and connections who were allegedly substitutes thereunder. Leaving out its declaratory clauses, the body of the deed reads as follows:

1. The Party of the First Part hereby disclaims, refuses to accept and repudiates purely and simply, with effect as from the death of the said Testator, any and all right granted to her or which she might have under the provisions of the said Last Will and Testament or by law to dispose of the property comprising the residue of the Estate of the said Testator or any part of the said residue, and the Parties of the First, Second and Third Parts agree that this disclaimer, refusal and repudiation shall be and remain irrevocable.

2. The Party of the First Part hereby delivers over to the Substitutes under the said substitution in anticipation of the term appointed for the opening thereof the naked ownership of the property comprising the residue of the Estate of the said Testator, and the Parties of the Second and Third Parts acknowledge to have received and accept the said delivery.

3. The Parties of the Second Part hereby consent to the foregoing delivery in anticipation and agree to hold the said substituted property for the Substitutes under the said substitution during the lifetime of the Party of the First Part and to pay to her the net revenues to be derived therefrom during her lifetime.

Counsel for the respondent submitted that the deed is illegal, null and void, or alternatively that, if it could be held to be valid, it would constitute a disposition operating or purporting to operate as a gift *inter vivos* made within three years prior to the death of Mrs. Smith and taxable under s. 3(1)(*c*) of the Act. This the appellants denied.

Apart from relying on the validity of the deed, counsel for the appellants submitted among alternative arguments that, even if it were held to be invalid and even if Mrs. Smith at the time of her death were competent to dispose, her power in this connection was not a general power of disposal but only a limited one, since her alleged power of disposal was restricted to alienation by onerous title for the sole purpose of her own maintenance and support (Ex. 3, clause thirteenth); her power was not exclusive as her husband's will gave a power of disposal also to the executors thereof and they, and not she personally, were

given possession of the substituted property (Ex. 3, clause fifteenth); to the extent that Mrs. Smith had a right to alienate, it was attributable to her ownership of or dominion over the property, as distinct from any general power to dispose, within the meaning of the Act.

Counsel for the respondent dealt with these alternative submissions by referring to Art. 944 C.C. and pointed out that an institute only "holds the property *as proprietor*" and is not *the proprietor* or owner in the true sense of the term (Art. 406 C.C.); that the institute had been granted by the will a wide power of disposal during her lifetime, which exceeded that provided in Art. 949 C.C. and constituted a general power to dispose; and that, the substituted property having been made exempt from seizure, it did not follow that the institute could dispose of it only by onerous title for her own maintenance.

The foregoing alternative submissions, which are neither devoid of interest nor free from difficulty, were ably argued by counsel on both sides, but I do not find it necessary to deal with them.

Subsection (4) of s. 3 of the Act, on which the respondent mainly rests his case, states:

> When a deceased person had at the time of death a general power to appoint or dispose of property, there shall be deemed to be a succession in respect of such property and the person entitled thereto and the deceased shall be deemed to be the "successor" and "predecessor" respectively in relation to the property.

I think it is of first importance to determine if Mrs. Smith had *any* power of disposal *at the time of her death,* and this depends on the validity of the deed because it unmistakably purported to put an end to any such power. If valid, whether Mrs. Smith prior to the date of the deed had a limited or general power of disposal becomes immaterial.

Because both the testator and his wife were domiciled in the Province of Quebec, I think it is the law of that province which will apply in the present case, except to the extent that the *Dominion Succession Duty Act* is deemed to apply, (*Cossitt v. Minister of National Revenue*[1]).

[1] [1949] Ex. C.R. 339 at 346.

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The deed, being notarial in form, constitutes one of the authentic documents referred to in Arts. 1207 and 1208 C.C. *Prima facie,* I think it must be regarded as valid, and the burden of proving it is defective rests on the respondent, (*Veilleux v. Langlois*[1]). The respondent first made reference to Art. 960 C.C., which reads as follows:

> The institute may, but without prejudice to his creditors, deliver over the property in anticipation of the appointed term, unless the delay is for the benefit of the substitute.

He then submitted that, though the deed in question purports to constitute a delivery over of the substituted property in anticipation of the appointed term, in accordance with the said article, it fails to do so and is illegal, null and void on three counts: because all the substitutes in existence at the time it was signed were not parties to the deed; it was signed at a time when all intended substitutes were not yet definitely identifiable; and because the time appointed for delivery by the testator was established for the benefit of the substitutes.

The last mentioned cause of nullity is the only one contemplated by the said article, and I propose to deal with it first. In so far as the substitutes are concerned, whether considered jointly or severally, I think that any anticipated opening, far from being disadvantageous to them, was for their benefit. Counsel for the respondent urged that a power of disposal in the broadest possible terms was given to Mrs. Smith under her husband's will. The wider such power, the more it was, I think, to the advantage of the substitutes that the institute deliver over the property to them as early as possible. By the anticipated delivery, they became assured that the whole of the residuary estate of the grantor would be divided among them instead of possibly being wholly or in part disposed of by the institute before her death. The delay is usually in favor of the institute, (Langelier *Cours de Droit Civil* Vol. 3, 307) and I can see nothing in the testator's will which would indicate that he wished to favor the substitutes (his collateral relatives), or any one of them, rather than his wife.

[1] (1926) 32 R. de J. 122.

Counsel for the respondent referred to the case of *Gadoua et al v. Pigeon*[1], in which it was held that a delivery by anticipation to some substitutes who had only a part interest in an immoveable property, which was wholly subject to a substitution, was not legal because it was not certain that they would be the substitutes having the right to take the property at the date fixed by the will for the opening of the substitution. In my opinion, the case cited is readily distinguishable from the present one. In the *Gadoua* case, there were three institutes, all children of the testator who stipulated in his will that the substitution in favor of his grandchildren must not open until the death of the last surviving institute. Substitutions may, of course, be appended to dispositions that are universal or by general title and the testator may make such dispositions conditional (Art. 929 C.C.). In the *Gadoua* case, there was such a prohibitory condition applicable to the institutes who refused to respect it. The rights of creditors and of a purchaser in good faith were also in issue. In the present case, no such condition or issue is involved, and there is only one institute. The testator could nevertheless have inserted a stipulation prohibiting his wife from disclaiming her power to dispose of the property or from delivering it over in anticipation of her death. In the absence of such a stipulation or prohibition, I think the institute is entitled under Art. 960 C.C. to effect an anticipated delivery and I cannot accept the respondent's suggestion that Mrs. Smith, in signing the deed, violated the terms or intentions expressed in her husband's will.

It is claimed that the omission to mention at least three parties, namely, Cecil Ernest French, Isabel Beatrice Day and Grace Valentine Day, who were named beneficiaries under the testator's will, vitiated the deed. With immaterial words omitted, the passage in the will concerning them is as follows:

> . . . to the extent that my wife has not during her lifetime disposed of the residue of my Estate . . . I will and bequeath . . . to CECIL ERNEST FRENCH, nephew of my said wife, and to ISABEL BEATRICE DAY and to GRACE VALENTINE DAY, nieces of my said wife, each the sum of Two thousand Dollars ($2,000) . . .

[1] (1887) 16 Revue Légale 498.

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In my opinion, the said beneficiaries were particular legatees but not substitutes, and it was only to the latter that Mrs. Smith was charged to deliver over the capital of what remained of her husband's estate. Similarly, any other parties as were mentioned in the testator's will but omitted from the deed were not substitutes and therefore not essential to the deed, the validity of which was in no way affected by such omission. I might also observe that the respondent is in the position of invoking third party rights by reason of the omission from the deed of three particular legatees who are among those contesting the respondent's assessment and upholding the legality of the deed.

I will now consider whether the deed was a nullity because at the time it was signed it was impossible to know with certainty or identify the substitutes who would be entitled to receive the property in issue at the time of Mrs. Smith's death. The impossibility, it is said, might arise because one or more of the immediately designated substitutes might die between the date of the deed and the date of Mrs. Smith's death, in which case alternative substitutes named in the will would replace them. The difficulty of determining who such alternative substitutes might be is augmented since some of them might not as yet have been born when the deed was executed. There is no suggestion that any of the said possible eventualities took place, but it is true, as stated by respondent's counsel, that in August 1951, when the deed was signed, it was impossible for anyone to know exactly who, among the substitutes, would be living nearly three years later, at Mrs. Smith's death. It should be observed that the testator himself in 1938 had even less idea of who among the substitutes would be alive at his wife's death. Nevertheless, if he had wished to try to favor the youngest or any particular substitute, he could have attached appropriate conditions in respect of the opening of the substitution, but he did not choose to do so.

It is more important, I think, to consider the effect of an anticipated opening upon the rights of the institute, rather than its effect on the rights of the substitutes. Not infrequently, as in the present case, the institute does not have possession of the substituted property, and physical

delivery thereof becomes impossible. The deed mentions both a renunciation of the institute's right of disposal and what amounts to a constructive delivery over of the substituted property. This renunciation, in my opinion, is not to be confused with the renunciation of a succession (Art. 651 C.C.) or the repudiation of a legacy (Art. 866 C.C.). It is a renunciation or disclaimer equivalent to a delivery over as contemplated in Art. 960 C.C. Mignault (*Droit Civil*, vol. 5, p. 129), referring to the extraordinary opening of a substitution, speaks of "l'abandon anticipé" to describe it. Jules Jéraute (*Vocabulaire juridique* 1952 ed.) translates "abandon" in relation to property or rights by surrender, renunciation or relinquishment. The exact translation of the words "abandon anticipé" is only relatively important, but it should be noted that Mignault says that their effect is to put an end definitely to the institute's power of disposal over the substituted property. In so far as the institute is concerned, in the opinion of Mignault, the substitution has opened and the institute's powers over it have come to an end. So much is this so that, even if he should survive the substitution in whose favor the renunciation was made, he could not regain control over the property.

The crux of the issue, I think, is whether the deed in question terminated any power of disposal which the institute previously possessed. I consider that, regardless of what effect an anticipated opening of the substitution might have on the rights of substitutes, such opening is legal and binding on the institute who brought it about.

Contrasting the effect of the opening, with respect to the substitutes, Mignault, at pp. 129 and 130 (*supra*), states in substance that such opening is only provisional as regards substitutes who may be born subsequently to the anticipated surrender and before the normal date fixed for the opening of the substitution, and that the rights of such substitutes are in no way prejudiced by the anticipated opening. After reviewing the controversial question of what occurs when a substitute dies between the anticipated and normal dates of opening of the substitution, he favors the view that the rights of a deceased substitute accrue to the other substitutes and not to his heirs. The contrary view is well stated by the late Professor Philibert Beaudoin in

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his commentary on Art. 960 C.C. (*Revue Légale* N.S. (1899) vol. 5, 1 at 6). This difference of opinion, in relation to the present case, is only of academic interest as the testator made the following provision in his will (Ex. 3, p. 6):

> UNLESS otherwise specified, if any of the foregoing bequests of such residue shall lapse in consequence of any of the said beneficiaries predeceasing me and/or my said wife, or for any other reason, then the amount of such lapsed legacy or legacies shall be divided amongst my surviving residuary legatees in the proportions in which they are to share respectively in such residue.

Furthermore, the deed provides that the residuary estate of the testator will remain in the possession of the executors until the death of Mrs. Smith.

The respondent who is attacking the validity of the deed has not offered any proof that the anticipated opening brought about effects different from those which would have resulted from a normal opening. Ordinarily in fiduciary substitutions *de residuo,* when an institute delivers over the property, the income therefrom is also surrendered (Art. 965 C.C.). Private agreements may contain any provisions which are not contrary to public order or good morals (Art. 13 C.C.). In the present case all essential parties to the deed consented that Mrs. Smith continue to receive the revenue from her husband's estate until her death. The respondent is interested only in the corpus and not the revenue from the estate and, in my opinion, the deed brought to an end any power over or right to dispose of the corpus of the estate, which the institute may have had. For the foregoing reasons I find that the deed should be regarded as valid and effective from the date of its signature.

I do not consider, as contended by counsel for the respondent in his alternative submission, that, if the deed were valid at all, it could only be so because it constituted a gift *inter vivos.* Mignault, in describing the surrender made by an institute under Art. 960 C.C., writes that it is not regarded as a sale or a donation by the institute to one or more of the substitutes. (*Vide Droit Civil*, vol. 5, p. 124.) In my opinion, the delivery over of the substituted property by the institute, in conformity with the directions

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and wishes of the grantor of the substitution, should be regarded as the fulfilment of a duty and not as a gift. Moreover, a gift implies that the donor is free to choose the recipient.

As observed by Thévenot d'Essaule, (*Traité des Substitutions* Mathieu Ed. Nos. 50 and 423) the institute in a fiduciary substitution receives the property on trust and must deal with it in good faith. I would add the more implicit the trust, the more is good faith expected. Mrs. Smith, in my opinion, could not, without violating her husband's intention, make a gift of the substituted property to her own relatives or to others instead of delivering it over to the persons designated in her husband's will. One does not speak of making a gift of something to a person who is entitled to receive it. A substitute, although having only a contingent right, is entitled to receive the substituted property on the happening of the contingency. He can dispose of his right under Art. 956 C.C., something which is not permitted to an ordinary heir under Art. 658 C.C. For the reasons mentioned above, I consider that the deed did not constitute a gift.

In concluding his argument, counsel for the respondent suggested that the anticipated delivery mentioned in Art. 960 C.C. could be exercised only in ordinary fiduciary substitutions, as described in the second paragraph of Art. 925 C.C., which reads as follows:

> 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.

Such delivery, he continued, is not susceptible of application to a substitution where the grantor, as provided in Art. 952, may indefinitely allow the alienation of the substituted property, as was done in the present case. Although there is a difference between an ordinary substitution, wherein there is an obligation to conserve the substituted property, and a substitution *de residuo,* wherein no such obligation to conserve exists, I find nothing in the Civil Code to support the respondent's contention and, in my opinion, so long as a substitution *de residuo* is veritably fiduciary in nature, no such distinction is warranted. If, instead of the institute being required by the will to hand over any remaining property, it was left to her discretion

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to do so, the situation would be different. If the testator's will had stated that at her death Mrs. Smith should deliver over what remains of the property, if she wished, there would be no trust imposed and consequently no substitution. (Mignault, *Droit Civil,* vol. 5, quoting Thévenot d'Esseule, note (*a*), p. 92). The present substitution is not open to such objection and, in my opinion, is no different from that described in the case of *Chaussé et al. v. Boucher*[1], as appears particularly from the following notes of Walsh J.:

> The heir, under a fiduciary substitution *de residuo* (*fideicommis de eo quod supererit*) receives his bequest from the testator; but he can only claim it at the death of the legatee. The right is not conditional; its operation is merely suspended, in conformity with the intention of the testator. Though the latter bequeaths something certain, he also curtails it, because he makes such bequest *de eo quod supererit* subordinate to the right of the universal legatee: to alienate, and even to reduce the succession to nothing. Nevertheless, though eventual, the bequest, such as it will be, belongs to the estate of its beneficiary. This bequest *de residuo* does not altogether depend on the will of the universal legatee; because, if any property remains, he must transmit it, whether he likes it or not . . .

In the case of *Deguire et al. v. Despatie and Marsolais et al.*[2], Demers J. held that, while a fiduciary substitution wherein the institute is under no obligation to conserve the residue is not an ordinary substitution, and in France would not be considered a substitution at all, nevertheless in Quebec it is a fiduciary substitution because the obligation to deliver over subsists as in an ordinary substitution. Accordingly, in my opinion there is no justification for saying that Art. 960 C.C. applies only to a simple fiduciary substitution *de residue,* as contemplated in Art. 952 C.C.

Since s-s. (4) of s. 3 of the Act provides that a succession is deemed to have occurred at the time of death of the party having a general power of disposal and does not contain, as it might have done, the words "or at any time within three years prior thereto," in my opinion it must be said that none of the appellants herein can be deemed to be successors of Mrs. Smith. Consequently, for succession duty purposes they inherit "directly from the grantor and not from the institute," as provided in Art. 962 C.C.

For the above-mentioned reasons I find that the residuary estate of the testator should not have been included for succession duty purposes in the estate of the

[1] [1941] R.J.Q. 71 B.R. 67 at 72. [2] [1944] C.S. 1.

late Helen Richmond Day Smith. I therefore allow the appeal and refer the record back to the Minister of National Revenue for re-assessment accordingly. The appellants will be entitled to their costs.

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Judgment accordingly.