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MONTREAL TRUST COMPANY, ROBERT OREM TORRANCE and MURRAY LAWRENCE DOWDELL, Executors of the Last Will and Testament of SAMUEL OREM TORRANCE, Deceased ..... APPELLANTS;

AND

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

Revenue—Succession duty—The Dominion Succession Duty Act, S. of C. 1940-41, c. 14, ss. 2(a)(k)(m)(n), 6, 7, 7(1)(d), 12—"Successor"—"Succession"—"Property"—Bequest to charitable organizations conditioned on payment of all succession duties is a succession to the other beneficiaries of the amount of succession duties assessed to each beneficiary—Legatees are successors to the condition and all rights pertaining to it—Appeal from Minister's assessment dismissed.

A testator by his will bequeathed all of his property to his trustees upon trust to convert the residue into money and after payment of certain legacies to divide the remainder of the residue into twelve equal shares, with which to set up three trust funds, known as the Wife's Fund, the Annuitants Fund and the Charities Fund. The beneficiaries of the Wife's Fund and the Annuitants Fund were persons required to pay succession duty by the *Dominion Succession Duty Act*, S. of C. 1940-41, c. 14. The trustees were required to hold the Charities Fund for two charitable organizations, successions to whom are exempt from succession duty under the Act, but receipt by them of the benefits bequeathed to them was conditioned upon these organizations paying all succession duties and inheritance and death taxes payable in connection with any insurance, gift or benefit given by the testator in his lifetime or by his will. Upon failure or refusal of the charities to pay the duties the trustees were required to apply the Charities Fund in payment of the duties adding any balance remaining after payment thereof to the Annuitants Fund. The respondent contended that the provision for payment of duties constituted an additional dutiable succession to each taxable beneficiary, equal in value to the

amount of the duties payable on succession to him and assessed accordingly, from which assessment of duties the executors appealed to this Court.

Held: That from the moment of the testator's death the right of the charities to the Charities Fund was but a right to the fund on their discharging the duties and until the condition is complied with the charities cannot get the fund and the trustees are obliged to hold it: the right passing to the charities is less than a complete and perfect right to the fund.

2. That the legatees are under the will the beneficiaries of the condition and are the successors to it, as well as to all rights pertaining to it.
3. That the effect of the condition is to attribute the Charities Fund to the payment of the duties and to create a charge for this purpose upon the Charities Fund in favour of the legatees.
4. That the right which the condition gives rise to in favour of the trustees is a form of security upon the fund itself to insure payment of the duties and it is an interest in the Charities Fund within the meaning of the expression "Property" as defined by s. 2(*k*) of the Act, and it is a right to which the legatees became entitled *by reason of* the disposition of the Charities Fund made by the testator and the disposition thus made was a succession within the meaning of that expression as defined in the Act: it is a right in the fund to have the fund held as a security for payment of the duties until the duties are paid, and the value of the right is equal to the amount of the duties, limited by the value of the Charities Fund itself.
5. That each of the legatees succeeded to an additional interest in property equal in value to the amount of the duties on his successions and that such successions were dutiable successions under the Act, and the appeal must be dismissed.

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

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

J. De M. Marler, Q.C. and *Norman Seagram, Q.C.* for appellant.

D. W. H. Henry, Q.C. and *A. L. Dewolf* for respondent.

THURLOW J.:—This is an appeal by the executors of the will of Samuel Orem Torrance, deceased, from an assessment of succession duties made by the Minister of National Revenue on or about June 2, 1955 and confirmed by him on December 8, 1955 in respect of successions to property under the will of the said deceased. At the time of the testator's death, the *Dominion Succession Duty Act,* Statutes of Canada 1940-41 c.14 as amended, was in effect.

The testator, Samuel Orem Torrance, by will gave certain benefits to persons who are by the Act required to pay duty, and he also made certain provisions for two

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charitable organizations, successions to which are exempt from duty under the Act. The bequest to the charitable organizations was expressly conditioned upon these organizations paying all succession duties and inheritance and death taxes payable in connection with any insurance, gift, or benefit given by the testator in his lifetime or by his will. The question raised in the appeal is whether or not under the terms of the will the provision so made for payment of duties constituted an additional dutiable succession to each taxable beneficiary, equal in value to the amount of the duties payable on successions to him.

The testator, who was domiciled in Ontario, died on April 26, 1952, and his will, which is dated February 28, 1952, was admitted to probate on June 11, 1952. By it, he gave the whole of his property to his trustees upon trust after paying his debts and funeral and testamentary expenses and delivering certain specific articles of personal property to his wife and his two children, to convert the residue into money, to pay therefrom certain pecuniary legacies, and then to divide the remainder of such residue into twelve equal shares, with which the trustees were required to set up three trust funds.

The first of these funds was to be known as "the Wife's Fund". It was comprised of four of the shares and was to be administered as set out in the will for the benefit, first, of the testator's widow, then for his two children, and ultimately for certain of his grandchildren.

The second fund was to be known as "the Annuitants Fund". It was comprised of five shares and its beneficiaries were the testator's two children and ultimately certain of his grandchildren.

The third fund was to be made up of the remaining three shares and was to be known as "the Charities Fund". The provisions of the will with respect to this fund are as follows:

> IV. I give, devise and bequeath the whole of my property . . . to my trustees to hold upon the undermentioned trusts, namely
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> * * *
>
> (4) To sell, call in and convert into money all the rest and residue of my estate . . .
>
> * * *

(6) Upon my death to divide all the rest, residue and remainder of my residuary estate into twelve equal shares and to deal with such shares as follows

* * *

(*c*) My Trustees shall set aside the remaining three (3) of such shares as a trust fund to be known as "the Charities Fund" and shall invest and keep such fund invested and subject to the acceptance and performance by both the charitable organizations hereinafter named of the conditions hereinafter mentioned my Trustees shall divide the Charities Fund equally between the EAST TORONTO GENERAL HOSPITAL of Toronto and the FIRST AVENUE BAPTIST CHURCH of Toronto (to be used and applied for the general purposes of the said Church); the payment to the said Hospital, including any income then accrued on its share, to be made in one lump sum and the payment to the said Church, including any income accrued on its share or portion thereof to the time or times of payment to be made in three (3) equal annual instalments, commencing not later than one year after my death.

The bequests to the said EAST TORONTO GENERAL HOSPITAL and the FIRST AVENUE BAPTIST CHURCH hereinbefore contained and set forth are absolutely conditional upon both of the said charitable organizations agreeing within the period of six (6) months immediately following my death to pay, and upon each of them paying, respectively, to the complete exoneration of my Trustees and my estate, one-half of all succession duties and inheritance and death taxes, whether imposed by or pursuant to the law of this or any province, state, country, or jurisdiction whatsoever, that may be payable in connection with any insurance on my life or any gift or benefit given by me either in my lifetime or by survivorship or by this my Will or any Codicil thereto, and whether such duties and taxes be payable in respect of estates or interests which fall into possession at my death or at any subsequent time.

In the event of the refusal or failure of either or both of the aforementioned charitable organizations to accept and to perform the conditions hereinbefore set out in this paragraph (6)(*c*) imposed on them, then the bequests in their favour hereinbefore contained and set forth shall lapse and determine absolutely, and my Trustees shall hold and stand possessed of the said Charities Fund upon trust, firstly, to pay out of the said fund all succession duties and inheritance and death taxes whether imposed by or pursuant to the law of this or any province, state, country or jurisdiction whatsoever, that may be payable in connection with any insurance on my life or any gift or benefit given by me either in my lifetime or by survivorship or by this my Will or any Codicil thereto, and whether such duties and taxes be payable in respect of estates or interests which fall into possession at my death or at any subsequent time; and I hereby authorize my Trustees to pay any such duty or tax prior to the due date thereof or to commute the duty or tax on any interest in expectancy; and secondly, to add any balance of the Charities Fund remaining in their hands after making such payments of duties and taxes to the Annuitants Fund as a part thereof and thereafter to deal with the Annuitants Fund

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as so augmented in the same manner as the said Annuitants Fund is hereinbefore directed to be dealt with in paragraph (6) (*b*) of this Clause IV of my Will.

It has been agreed between the parties to the appeal that the testator, when referring in his will to the "East Toronto General Hospital of Toronto" intended the Toronto East General and Orthopedic Hospital and that both the Toronto East General and Orthopedic Hospital and First Avenue Baptist Church are charitable organizations within the meaning of s. 7(1)(*d*) of the *Dominion Succession Duty Act*. For the sake of convenience, I shall hereinafter refer to them as "the charities" and to the testator's widow, children, sisters, brother, and the grandchildren mentioned in the will as "the legatees".

It has also been agreed between the parties to the appeal that the aggregate net value of the testator's estate as defined in s. 2(*a*) of the *Dominion Succession Duty Act* was $938,175.72. Of this amount, the remainder of the residue which was to be divided into twelve equal shares and administered as above mentioned amounted to $843,177.22 and the three-twelfths comprising the Charities Fund was thus $210,794.31.

Following the death of the testator, the charities, after applying to the Supreme Court of Ontario for directions, accepted the bequest made to them in the testator's will, limiting their liability in so doing, however, to an amount not exceeding their prospective shares in the residue of the estate.

In making the assessment under appeal, the Minister first calculated the duties that would be payable by the several legatees upon their successions to property comprised in the specific bequests, the pecuniary legacies, the Wife's Fund, and the Annuitants Fund on the basis of these successions being the dutiable successions to the legatees and thereby arrived at a total amount of $176,699.45 in duties. He next proceeded to add to the dutiable value of the successions to each legatee from the above sources the amounts which he calulated to be the Ontario, Quebec, and Dominion succession duties and United States inheritance taxes payable by each legatee, on the assumption that the testator by his will had provided an additional gift for each legatee equal in value to the

amount of such duties and taxes payable by such legatee and that there had been a succession to each legatee of such additional gift. He then re-calculated the duties in the case of each legatee upon such higher amount. The effect was to increase both the dutiable values of the successions to each legatee and the rates of duty applicable thereto, and on this calculation the total Dominion Succession Duties amounted to $237,929.58. It is from the assessment of duties thus made that this appeal is taken.

The charging section of the Act is s. 6, by which it is provided as follows:

6. (1) Subject to the exemptions mentioned in section seven of this Act, *there shall be assessed, levied and paid* at the rates provided for in the First Schedule to this Act *duties upon* or in respect of *the following successions*, that is to say,—

(*a*) where the deceased was at the time of his death domiciled in a province of Canada, upon or in respect of the succession to all real or immovable property situated in Canada, and all personal property wheresoever situated;

Section 12 further provides:

12. (1) Every successor shall be liable for the duty by this Act levied upon or in respect of the succession to him provided that the duty in respect of any gift or disposition *inter vivos* to a successor shall also be payable by and may be recovered from the executor of the property of the deceased but such liability shall be in his capacity as executor only and for an amount not exceeding the value of the interest of the successor in the property administered by the executor.

(2) Subject to the provisions of subsection one of this section all the duties assessed and levied under this Act shall be payable by and may be recovered from the executor of the property of the deceased, provided that the liability of any executor under this subsection shall be a liability in his capacity as executor only and for an amount not exceeding the value of the property administered by him.

The primary liability for duty is thus imposed on the successor. The executor is also made liable, but liability is imposed on him only in his capacity as an executor. In practice, it may be that in most cases it is the executor who makes the payment, but it is important not to forget that what the executor uses to pay the duties is not his own property but the successor's property, that when the executor pays the duties he does so on behalf of the successor, and that the liability that is discharged when the duties are paid is primarily the successor's liability.

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The definitions contained in s. 2 of the Act include the following:

(*n*) "successor" means the person entitled under a succession.

(*m*) *"succession" means* every past or future *disposition of property, by reason whereof any person has or shall become beneficially entitled to any property* or the income thereof upon the death of any deceased person, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any such deceased person, to any other person in possession or expectancy, and also includes any disposition of property deemed by this Act to be included in a succession;

(*k*) *"property" includes* property, real or personal, movable or immovable, of every description, and *every estate and interest therein* or income therefrom capable of being devised or bequeathed by will or of passing on the death, and any right or benefit mentioned in section three of this Act;

The appellants contend that the method of assessment followed by the Minister is wrong. They submit that, by setting up the Charities Fund, the testator made a disposition, or more specifically a contingent disposition, to the charities of three-twelfths of the residue of his estate, that this disposition was a succession as defined in s. 2(*m*) of the Act, and that it is wholly exempt from duty under s. 7(1)(*d*) of the Act, both of the charities admittedly being charitable organizations within the meaning of that clause. They further submit that there was no disposition by the testator of the amount required to pay succession duties as, in the event of acceptance by the charities of the bequest to them of the Charities Fund, which event has occurred, the money required to pay the duties was not to be taken from the testator's estate at all but from the charities, and there could be no succession in respect of moneys which never belonged to the testator. In support of this submission, the appellants point to the words "by reason whereof" in s. 2(*m*) of the Act and argue that, even if it can be said that individual legatees became beneficially entitled to have the duties on their legacies paid by the charities, they did not become so entitled *by reason of* the disposition made by the testator or by that alone, but *by reason of* the acceptance of the Charities Fund and the payment of the duties by the charities, which introduced an entirely new or at least an additional reason by which the legatees became so entitled. As to this, it

may be noted that the argument applies equally well to answer the appellants' first submission that there was a succession to the charities of the whole of the Charities Fund as, if the argument is sound, the charities cannot have become entitled "by reason of" the disposition made by the testator alone but *"by reason of"* the disposition made by the testator plus the payment to be made by the charities. The appellants also contend that none of the legatees ever had any right to any of the duty moneys because none of the legatees could sue or recover the duties from anyone and thus never became beneficially entitled to any of them within the meaning of s. 2(*m*) of the Act.

The position taken by the Minister is that the testator disposed of his property in such a way as to provide for each legatee who, or whose gift, would be liable to be taxed, an additional legacy, the value of which is measured by the amount of duties and taxes that would be payable by that legatee in respect of, or from, his main legacy, that the additional legacy so provided in the case of each legatee is one to which the legatee is beneficially entitled and that the provision of it by the testator is a disposition falling within the definition of "succession" in s. 2(*m*) of Act.

It was not questioned that the legatees would ultimately benefit from the provisions made in the will with respect to the payment of succession duties, regardless of whether the duties were paid by the charities to exonerate the trustees from the payment of them or by the trustees, who would then obtain reimbursement from the charities, or by the application of the alternative provisions of the will in the event of the charities failing to pay.

In my opinion, the correct approach to determine the question whether or not there was an additional gift to each legatee equal in value to the amount of duties payable in respect of his succession lies in considering what it was that the testator, by his will, did with what he called the Charities Fund, with a view to determining what proprietary rights in this fund arose upon his death by virtue of the provisions of his will. The trustees have not had occasion to invoke what I shall call the alternative provisions of the will under which they are to apply the

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Charities Fund in payment of the duties, and as the charities have accepted the provision in their favour no occasion to apply the alternative provision may arise. Accordingly, the appeal falls to be decided upon the basis of the provision in favour of the charities being applicable.

In whom, then, was the ownership of the Charities Fund immediately after the death of the testator? Immediately prior to the testator's death, the fund belonged to him. Upon his death the whole property in it passed to some one or more persons. It was at that moment that the *Dominion Succession Duty Act* applied, if it applied at all, to the succession to this fund. It was at that moment that liability to tax arose if any became payable upon the succession to this fund or to any interest in it. If the testator by his will *disposed* of the Charities Fund in such a way that *by reason thereof* persons, whose successions are liable to tax under the Act, *became beneficially entitled* to the fund or to an *interest therein* the disposition of such interest would, in my opinion, be a succession within the plain meaning of that expression as defined in the Act and would accordingly be liable to tax.

Assuming that the charities ultimately pay the duties, their title to the Charities Fund will relate back and take effect from the time of the death of the testator and, in that event, their title will be a title to the whole of the Charities Fund, but I do not think it necessarily follows that no other person has or will have had any rights in or to the Charities Fund or any interest therein, pending compliance by the charities with the condition. In my opinion, upon and from the moment of the testator's death, the right of the charities to the Charities Fund was and has been subject to a very important exception or restriction. They can obtain the fund only by complying with the condition. Theirs is but a right to the fund on their discharging the duties. Until the condition is complied with, the charities cannot get the fund and the trustees are obliged to hold it. The right which passed to the charities on the testator's death by reason of the disposition of the fund made in the will is thus something less than a complete and perfect right to the fund.

Who then succeeded to the remaining rights in the fund? I have said that the appeal falls to be determined on the basis of the provisions of the will in favour of the charities being applicable. It does not follow, however, that all of the provisions of the will, including the alternative provision with respect to the Charities Fund, may not be read to aid in interpreting the disposition as a whole. Under the alternative provision, in the event of refusal or failure of the charities to perform the condition, the bequests in their favour were to lapse and the trustees were required to hold the fund, to pay the duties from it and to add any balance to the Annuitants Fund. Accordingly, had the event occurred, such balance, if any, of the Charities Fund would have provided an additional legacy to each beneficiary of the Annuitants Fund. But whether or not any balance remained to be added to the Annuitants Fund, I think it is also clear that there would have been dutiable successions to the whole of the Charities Fund. Both in principle and on authority, there would have been an additional legacy to each legatee equal to the amount of duties in respect of his successions. *Re Arlow* (1). In the event above assumed, viz. the refusal of the charities to accept the provision in their favour, the amounts required to pay the duties would be derived from the Charities Fund and would, at the testator's death, have been part of that fund. On his death each of those parts of his property passed to someone pursuant to the provisions of the will. That someone, in the case of the amount required to pay duty, could only be the legatee or the government levying the duties. I cannot think that it was the testator's intention on the terms of the will in question to confer a benefit upon the government, be it dominion, provincial, or foreign. Nor, in my opinion, does the will have any such effect since the governments concerned acquire their rights under or by virtue of their respective taxing statutes, rather than by virtue of a gift contained in the will. As I interpret the will, the provision for payment of duties is simply part of the testator's method of providing for the distribution of his property among the objects of his bounty, and in imposing the trust to pay the duties from

(1) [1954] Ex. C.R. 420.

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the Charities Fund the objects of the testator's bounty are not the governments but the persons for whose benefit the duties are to be paid; that is, the legatees. I think, therefore, that the legatees, and not the governments claiming duty, are the *cestuis que trust* under the alternative provisions for payment of duties from the Charities Fund.

Turning now to the provision in favour of the charities, it will be observed that the trustees are directed to *set aside* three shares as a trust fund and to invest and keep such fund invested and, subject to performance of the condition, to divide the fund equally between the charities, the payment to the hospital including any interest *then accrued* on its share to be paid in one lump sum. The expression *then accrued* refers to the time of division and its use indicates the testator's expectation that there would be an interval between his death and the time of division. The will does not expressly say for whose benefit the fund is to be *set aside* and held in the interval, but it is clear that the persons who benefit by performance of the condition are the same persons who would have benefited had the alternative provision been applicable, though in the latter event some of them might have benefited to a greater extent. Consequently, finding that the same persons are to benefit in the same way and much to the same extent in each of the two events provided for, it is an easy step to the conclusion that, despite the failure of the will to say so expressly, the legatees are under the will the beneficiaries of the condition and the successors to it, as well as to all rights pertaining to it. In this view, the fund is set aside and held during the interval upon trust for the legatees, as well as the charities.

The next point is to determine what right, if any, in the fund accompanied the benefit of the condition.

In *Jarman on Wills,* 8th Ed., p. 1448, the following statement appears:

> . . . In equity, words which require the devisee or legatee to pay money to third persons, or which give third persons a right to be paid money, are treated either as creating a charge on the property given, or as creating a personal liability on the devisee or legatee, or as declaring a trust in favour of the third persons; in every case it is a matter of construction of the particular language used.

Thus, in *Re Cowley*, 53 L.T. 494, a testator gave certain leasehold property to his son "subject to payment of debts, funeral and testamentary expenses", and it was held that those words were apt to create a charge on the property given but not to create any personal liability.

In the case cited, Kay J. said at p. 495:

In the absence of authority, I am not prepared to say that the gift of specific legacies contained in the present will, "subject to payment of debts, funeral and testamentary expenses", means anything but that the testator gives this property and the other property subject to payment of his debts, funeral and testamentary expenses. It does not seem to me at all intended that, whether or not the property is enough, the legatee is to pay the debts. It is commonly expressed in very different terms—"he paying the debts". Here I take the words only as amounting to a charge by the testator between that property and the other property. I think that the testator's son must be deemed to have elected to accept the legacies, subject to payment of the debts, funeral and testamentary expenses, but that he is not personally liable to pay such debts, funeral or testamentary expenses, or any part thereof.

The case is interesting as well in that the charge was enforced, not by creditors claiming the debts or expenses, but by the beneficiaries on whose legacies the burden of paying the debts would otherwise have fallen.

In *Wigg v. Wigg* (1), the testator had devised certain lands to his second son, Thomas, upon condition that he, the said Thomas, or his heirs should pay certain sums to some of the testator's grandchildren (children of Thomas), and in default of payment of all or part there was a clause of entry and distress. Thomas died in the lifetime of the testator. The eldest son of the testator entered on the lands as heir at law and sold the lands to a purchaser for a valuable consideration. The question raised was whether the provision for the grandchildren was a continuing charge on the lands in the hands of the purchaser. The Lord Chancellor, Lord Hardwicke, said at p. 382:

. . . It manifestly appears that the testator intended not only to make a provision for *Thomas* and his heirs, but also to make a provision for the six children who were then in being; and it would be very unfortunate, if not only *Thomas's* heirs should lose the benefit intended, but the six children also lose their small provision by the act of God; and this is such a construction as the court never will make but when necessitated to do it. But on the contrary the present is a case so circumstanced, as will induce a court of law, as well as equity to make as strong a construction as possible to support such a charge.

The defendants insist that this is only a condition annexed to the estate of *Thomas*, and his estate not taking effect, is void.

(1) (1794) 1 Atk. 381.

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But this is not a mere condition, but a conditional limitation, there being an express limitation over to the legatees in case of non-payment, who were to enter and hold in the nature of tenants by *elegit;* and there are many nice distinctions on these conditions arising by wills. *A.* devises lands to *B.* on condition to pay *C.* a sum of money, and no clause of entry; this is no charge on the estate to give the legatee of the money a lien on the lands, but the *heir at law* shall enter and take advantage of the breach of the condition, and yet in this court he shall be considered only as a trustee for the legatee.

But then the question will be, As *Thomas* died in the testator's life-time, and the estate descended to the heir at law, if the charges continue on the lands?

I think it is the same thing; whoever entered, it was to be only till payment of the legacy, and the heir at law might in this court redeem them, but the court will not put the legatees to such a circuity, but permit them to bring a bill to have the lands sold and the money raised.

This has been compared to a defective surrender of a copyhold pursuant to a will; but here it is different, for there the will is void, but sure a man may, by will, make an equitable as well as a legal charge on his estate, and this court will maintain it against the heir at law, and therefore the children are intitled.

In *Re Kirk* (1), a testator had devised land to one of his sons on the express condition that the son, his executors or administrators should, within three months after the testator's death, relinquish all claim to a sum of £3,400 due to him by the testator. The son died in the lifetime of the testator, leaving no issue, and a question arose as to whether the land included in the lapsed devise or the residuary personal estate should bear the onus of discharging the debt. It was held that the condition bound the land, notwithstanding the lapse of the devise, and that the debt of £3,400 must be discharged out of it.

Fry J., who tried the case, based his decision on the intention, as shown by the will, that the residuary estate should not bear the debt and that it was intended by the testator that the lands included in the devise should bear the debt, whether the devise was effective or not.

In the Court of Appeal, it was argued that the principle of *Wigg v. Wigg* was not applicable because in that case there was a legatee named who was to have the benefit of the condition and, therefore, there was a constructive trust for his benefit, but that in the case under appeal there was no legatee for whose benefit the condition was imposed, the only beneficiary being the estate generally.

(1) 21 Ch. D. 431.

This argument was rejected. Jessel, M. R., at p. 437, after referring to the will and observing that the testator directed that the debt should not be paid out of his residuary estate and that the question was whether or not the £3,400 was charged upon the land included in the lapsed devise, proceeded:

> Now the question has been argued with reference to certain authorities, but I should like to say first what my view of the authorities is. My view of those authorities is this, that though the words "on condition" may be used by a testator, he does not mean to leave it to the choice of the devisee to say whether or not the person who is to take the benefit which is the subject of the condition, is to have it or not. The form looks like it, but the substance is not so. The substance is that he intends the legatee or devisee to perform the condition, and the person who takes the benefit of it is to have it in any event. In other words, it is that he does not intend the devisee, by refusing to perform the condition, to disappoint the person whom I will call the legatee, nor does he intend the death of the devisee to disappoint the legatee.
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> Well, if that is the principle, the only question left is this, is there any sound distinction between a condition to pay a sum of money to a legatee, or an annuity to a legatee, or a condition to give a valuable thing to a legatee, and a condition that his personal estate shall be exonerated from a debt? I think there is no sound distinction. I think a direction to exonerate his personal estate from a debt is equivalent in substance to a gift to the person who would be entitled to the personal estate. It does not appear to me that this is to be limited to a residuary legatee, but that it extends to everyone, to creditors, to general legatees, to residuary legatees, and to whoever will get the benefit of the sum of money from which the personal estate is exonerated.
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> I think that is the substance of it, and I should therefore have come to the same conclusion as Mr. Justice *Fry* if there had been nothing in the will except the direction that *Robert* should exonerate the personal estate from the £3,400.

He then referred to several additional features appearing from the will and concluded by upholding the judgment under appeal. Brett, L. J. concurred and added:

> . . . I should have supposed that this case was governed by the case of *Wigg v. Wigg*, 1 Atk. 382, even if there had been no words of exception in the residuary clause. I cannot help thinking that the decision in the case of *Wigg v. Wigg* was that if a person leave an estate subject to the payment of an annuity, or a sum of money in this way, he attributes the estate to the payment of the annuity, and because he attributes the estate to the payment of the annuity, he charges the estate with the payment of the annuity. Therefore it seems to me here that the testator has attributed this particular estate to the payment of his debt, and if he has attributed this estate to the payment of his debt, he has thereby charged the estate with the payment of the debt, and therefore it comes precisely within the principle of *Wigg v. Wigg*.

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Cotton, L. J., after reviewing the will, proceeded:

> . . . when we take all these together I think we cannot but say that the testator's will shews that he intended that the son taking the estate should give up the £3,400 for the benefit of the persons interested in the personal estate. That is really just the same as if he had given this sum of £3,400 to somebody else not having any previous claim at all. Then that being so neither the wish of the devisee not to comply with the condition, nor his death so that the devise could not take effect, ought, in my opinion, to defeat what is the expressed intention of the testator on the face of his will, that his real estate should be charged with the £3,400 for the benefit of those interested in the personal estate; and that being so, although there is a lapse, yet the charge still remains in exoneration, in my opinion, of the personal estate.

Applying the same reasoning to the present case, it may be observed that the will clearly shows that it was the testator's intention that the various initial bequests to the legatees were not to bear the burden of the duties. The apparent intention is that the duties should be paid by the charities to whom the testator gives the Charities Fund. But the testator does not attempt to impose on the charities any enforceable personal obligation to pay the duties. Instead, he provides for the manner in which the duties are to be paid in the event that the charities do not pay them, and that manner is by paying them from the Charities Fund. And in the meantime, the trustees are to hold the fund. Accordingly, in my opinion, the effect of the condition is to *attribute* the Charities Fund to the payment of the duties and to create a charge for this purpose upon the Charities Fund in favour of the legatees.

In my opinion, the condition can also be construed as creating a trust in favour of the legatees. In *Jarman on Wills* at p. 1449 is the following statement:

> The Court has frequently construed a condition annexed to a devise or legacy, requiring the devisee or legatee to pay money to a third person, as a trust, particularly in order to enable the third person to claim the money notwithstanding the failure of the original devise or legacy.

In *Re Frame* (1), at p. 703 Simonds J. says:

> . . . A devise, or bequest, on condition that the devisee or legatee makes certain payments does not import a condition in the strict sense of the word, but a trust, so that, though the devisee or legatee dies before the testator and the gift does not take effect, yet the payments must be made; for it is a trust, and no trust fails for want of trustees.

(1) [1939] Ch. 700.

The foregoing is, I think, in accord with what is stated in *Wigg v. Wigg*.

But in either case, whether the right which the condition gives rise to in favour of the legatees is more properly described as a charge or as a trust, it is, in my opinion, a form of security upon the fund itself to insure payment of the duties, and it is an interest in the Charities Fund within the meaning of the expression "property" as defined in s. 2(*k*) of the Act.

This right is co-extensive with the difference between the whole property in the fund and the right conferred on the charities. It is a right to which, in my opinion, the legatees became entitled *by reason of* the disposition of the Charities Fund made by the testator and, in my opinion, the disposition thus made was a succession within the meaning of that expression as defined in the Act. The right is not, however, a right to the duties. It is a right in the fund to have the fund held as a security for payment of the duties until the duties are paid. But I think it is obvious that the value of the right is equal to the amount of the duties—limited, of course, by the value of the Charities Fund itself.

It follows from the foregoing that each of the legatees succeeded to an additional interest in property equal in value to the amount of the duties on his successions and that such successions were dutiable successions under the Act. Having so determined the main question, in my opinion, the method of calulation of the duties which the Minister followed and which was approved by this Court in *Re Arlow Estate* (*supra*) and *Re J. F. Weston Estate* (1) is not unfavourable to the appellants or any of the persons interested in the estate and affords them no ground for appeal.

The foregoing is, in my opinion, sufficient to dispose of the appeal, but in accordance with the suggestion made by counsel at the argument, if counsel wish to raise any question as to the arithmetical calculation of the duties,

(1) [1954] Ex. C.R. 445.

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leave is reserved to them to speak to the matter before the judgment is entered. Subject to this, the appeal will be dismissed with costs.

Judgment accordingly.