1946

Mar. 7 & 8
Nov. 27

BETWEEN:

THE NATIONAL TRUST COMPANY LIMITED, Executor of the Last Will and Testament of Edward Rogers Wood, deceased, ... } APPELLANT;

AND

MINISTER OF NATIONAL REVENUE, ... } RESPONDENT.

Revenue—Succession Duties—Succession—The Dominion Succession Duty Act, 4-5 Geo. VI, c. 14 as amended by 6 Geo. VI, c. 25, secs. 2 (a), (e), (j), (k), (m), 3, 6, 10 & 11—Settlement by grantor—Gift of equitable interest in securities—Bona fide possession and enjoyment of securities assumed by trustees for donee immediately upon making of the gift—Retention by trustees to entire exclusion of donor of any benefit—Exemptions under the Act—Subject matter of duty—"Predecessor"—"Gift"—Operation of Act limited to certain kinds of property—Appeal from assessment for duty allowed.

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By deed of settlement made in 1930 between E. R. Wood as settlor and two trustees it was declared that the trustees should hold certain securities of which the settlor was the owner and which were transferred to the trustees, in trust, to pay the annual income therefrom to the settlor's daughter during his lifetime and, upon his death, to transfer the securities then representing the Trust Fund and the accumulated income to the daughter for her own absolute use and benefit: it was also declared that the settlor had power to direct investments and to change trustees and the trustees had power to accept securities from the settlor in substitution of those in the Trust Fund provided they were of the same value and that they yielded the same annual income and substitutions were in fact made: the trustees also had power to appoint the settlor as their attorney to vote as their proxy in respect of the securities.

The Dominion Succession Duty Act. 4-5 Geo. VI, c. 14 was assented to on June 14, 1941. It was amended by 6 Geo. VI, c. 25, the provisions of the Act applying retrospectively to successions derived from persons dying on or after June 14, 1941. The settlor died on June 16, 1941, domiciled in the Province of Ontario. Appellant is executor of the will of the settlor.

The respondent assessed succession duties on the value of the securities in the Trust Fund at the death of the settlor and from such assessment the executor appealed to this court.

Held: That the subject matter of the duty under the Dominion Succession Duty Act is the disposition and not the property and the value of a disposition is the value of the property in the disposition.

2. That taxation is only imposed on the death of the "predecessor" as defined by s. 2 (*j*) of the Act.

3. That the operation of the Act is limited to (*a*) property owned by the deceased at the time of his death and (*b*) property described in s. 3 of the Act.

4. That s. 2 (*m*) of the Act deals only with property which the deceased owned at the time of his death.

5. That s. 2 (*m*) and s. 3 (1) of the Act are mutually exclusive.

6. That the second part of s. 3 (1) (a) is not separate and apart from the first part but refers to a transfer made in contemplation of the death of the grantor. *Cowan* v. *Attorney General* (1925) 2 D.L.R. 647 at 653, followed.

7. That the settlement is a "gift" within the meaning of "gift" in s. 3 (1) (*d*) and 7 (1) (*g*) of the Act and the interest of the daughter under the settlement in the shares and accumulated income was not an absolute vested interest but a conditional interest, the condition being a condition subsequent and vested subject to being divested, she being given an immediately vested interest, her interest being defeasible if she predeceased the settlor.

8. That the property in the gift was the equitable interest in the securities and such beneficial interest was vested in the donee from the inception of the trust and therefore the gift was made prior to April 29, 1941, and the actual and bona fide possession and enjoyment of the property in the gift were assumed by the trustees for the donee immediately upon the making of the gift.

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9. That a contingent reversion is not reserved out of the gift, but is something not comprised in the gift and the provision for reversion contained in the settlement did not render the gift one in which possession and enjoyment have not been assumed and retained to the entire exclusion of the settlor or of any benefit to him whether voluntary or by contract or otherwise within the meaning of s. 3 (1) (*d*) of the Act. *Commissioner for Stamp Duties of New South Wales and Perpetual Trustee Co. Ltd.* (1943) A.C. 425; *Re Cochrane* (1905) 2 I.R. 626, (1906) 2 I.R. 200; *Helvering* v. *Hallock* 309 U.S.R. 106; referred to.

10. That neither the power of the settlor to direct investments and to change trustees nor the power of the trustees to accept securities from the settlor in substitutions and to appoint the settlor their proxy to vote the securities in the Fund renders the gift one in which possession and enjoyment were not assumed and retained by the trustees for the donee to the entire exclusion of the settlor or of any benefit to him, wehther voluntary or by contract or otherwise within the meaning of s. 3 (1) (*d*) and s. 7 (1) (*g*) of the Act. *Reinecke* v. *Northern Trust Co.* 278 U.S.R. 339 referred to.

11. That the disposition is not within s. 2 (*m*) or s. 3 (1) of the Act and is exempt under s. 7 (1) (*g*) of the Act.

APPEAL under the provisions of the Dominion Succession Duty Act.

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

Wilfred Judson for appellant.

J. W. Pickup, K.C. and *S. Quigg* for respondent.

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

O'Connor J., now (November 27, 1946) delivered the following judgment:

This is an appeal from one item in an assessment dated 17th July, 1945, made under the Dominion Succession Duty Act, 1940-41, Statutes of Canada, chap. 14, as amended. The item in dispute consists of certain securities in a trust fund established by a deed of settlement, made on the 8th of December, 1930, to take effect on the 1st January, 1931, between Edward Rogers Wood (referred to as the settlor) and Messrs. Fisher and Hastie, as trustees and the daughter of the settlor, Mildred P. S. Fleming (now Gilchrist) referred to as the donee. The deed of settlement was amended by an agreement dated 1st February, 1937.

The Dominion Act was assented to on the 14th June, 1941.

The settlor died on the 16th June, 1941, domiciled in the Province of Ontario.

An amendment to the Dominion Act 1942, chap. 42 was assented to on the 1st August, 1942, and the provisions of the amending Act were made to apply retrospectively to successions derived from persons dying on or after the 14th June, 1941.

The Dominion Act must, therefore, be considered in the form in which it stood at the date of the settlor's death, namely the Dominion Succession Duty Act 1941 as amended by Act of 1942.

The deed of settlement provided in part:—

WHEREAS the Settlor is desirous of making provision for the maintenance and benefit of his daughter, the Beneficiary herein;

AND WHEREAS the Settlor being the absolute owner of the securities specified in Schedule "A" hereto has transferred the same to the Trustees to hold as a Trust Fund upon the Trusts hereinafter expressed;

NOW THIS DEED WITNESSETH that in consideration of the natural love and affection which the Settlor has for his said Daughter, the Beneficiary herein, and for divers good causes and considerations, the Settlor hereby directs and has agreed and declared as follows:—

1. The Trustees shall hold the securities transferred to them and set forth in Schedule "A" hereto, hereinafter called the "Trust Fund", on trust to pay the annual income arising therefrom after the 1st day of January 1931 to the Beneficiary in quarterly instalments on the 1st days of January, April, July and October in each year, commencing on the 1st day of April 1931, for and during the lifetime of the Settlor and upon his death shall transfer the securities then representing the Trust Fund and the accumulated income therefrom to the Beneficiary for her own absolute use and benefit; provided that in the event of the Beneficiary dying in the lifetime of the Settlor the Trustees shall transfer such securities then representing the Trust Fund and the accumulated income therefrom to the Settlor for his own absolute use and benefit.

First as to the subject matter of the tax. Rose, C.J., H.C., in re *Flavelle Estate* (1) said:—

In Kerr v. Superintendent of Income Tax and the Attorney-General for Alberta, Kerwin J., with whom Taschereau and Gillanders JJ., concurred, has drawn attention to the fact that Lord Thankerton's statement in Provincial Treasurer of Alberta v. Kerr, that the identification of the subject-matter of the tax is naturally to be found in the charging section of the statute, was made in the course of the consideration of the question whether the tax was imposed on property or a transmission. The fact that the statement was made in that connection led Kerwin J., to the conclusion that it afforded no assistance in the determination of the

(1) (1943) O.R., 167 at 182.

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question with which the Supreme Court of Canada had to deal, but it is to my mind of prime importance in connection with the point under discussion.

Under the Dominion Act, however, in the charging provisions, Part III, section 10 imposes an initial duty at a rate dependent on "the aggregate net value", and section 11 imposes an additional duty at a rate dependent on "the dutiable value" on each succession described in section 6.

Section 6 which is not in the charging provisions levies duties on successions:—

6. 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;

(*b*) where the deceased was at the time of his death domiciled outside of Canada, upon or in respect of the succession to all property situated in Canada.

"Succession" is defined under the Act as:—

2 (*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.

The effect then of the charging provisions 6, 10 and 11 and the statutory meaning of succession is that duty is levied upon dispositions of property, devolutions of property and dispositions of property deemed (by section 3 (1)) to be included in a succession.

While 2 (*m*), which defines succession, has been taken from section II of the English Succession Duties Act, 1853, dispositions under 2 (*m*) do not, as they do under section II of the English Succession Duties Act, confer successions, i.e., property chargeable with duty, on successors.

"Succession" under 2 (*m*) is not "property" to which any person has or shall become beneficially entitled upon the death of any deceased person by reason of any past or future disposition, but every past or future "disposition of

property" by reason whereof any person has or shall become beneficially entitled to any property, and it is any "disposition of property" and not "property" that is deemed under section 3 (1) to be included in a succession.

Under section II of the Finance Act of 1894 certain "properties" set out in the subsections are deemed to be included in property passing on the death of the deceased.

While section 3 of the Dominion Act has been taken in part from this section, yet under section 3 of a succession shall be deemed to include, not "property" but the following "dispositions of property".

Rose, C.J., H.C., in re *Flavelle Estate* (*supra*), held that under section 9 (*c*) of the Succession Duty Act of Ontario, R.S.O., 1937, chap. 26:—

> 9 (*c*). Every disposition of any property (other than realty situate outside Ontario) made within Ontario by the deceased person during his lifetime on or after July 1, 1892;

the subject matter of the taxation imposed was the disposition and not the property or the disponee.

I am of the opinion that in the Dominion Act, the subject matter of the tax (applicable in this case) is the disposition and not the property.

Under section 10 an initial duty is levied upon each succession at a rate determined by the aggregate net value, which, as defined by section 2 (*a*), is the value of—(*a*) the property of the deceased, and the value of—(*b*) all property described in section 3, after the debts and allowances are deducted. The duty is then levied at that rate upon each succession, i.e., disposition of property. But no provision has been made by which the value of the disposition can be ascertained. In the Ontario Succession Duty Act, 1937, referred to above, it was provided by section 12 that for the purposes of that Act, the value of a disposition shall be the fair market value of the property in respect of which such a disposition is made . . . While no similar provision is contained in the Dominion Act, in my opinion it can reasonably be inferred from the whole Act, and particularly from the definitions of "aggregate net value" and "dutiable value", that the value of the disposition is the value, at the date of the death of the settlor, of the property in the disposition.

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Under the English Succession Duties Act, 1853, the person whose death gives rise to the liability to succession duty may be anyone and need not be, and often in fact is not, the predecessor. *7th Ed., Hanson Death Duties, p. 42.*

Under section 2 (*j*) of the Dominion Act, "predecessor" means the person dying after the date of the coming into force of this Act from whom the interest of a successor in any property is or shall be derived. Taxation under the Dominion Act is, therefore, only imposed on the death of the predecessor. So that while under the Succession Duties Act, 1853, taxation is imposed when a life interest or something equivalent to it, terminates and the remainder interest falls into possession, that is not the case under the Dominion Act.

The first question is whether or not the disposition of property in this case falls within section 2 (*m*).

The Dominion Act is clearly limited to dispositions of two kinds of property and two kinds only. The initial duty under section 10 is levied at the rate which is determined by the "aggregate net value" which in turn is defined as—

> 2 (*a*). "Aggregate net value" means the fair market value as at the date of death, of all the property of the deceased, wherever situated, together with the fair market value, as at the said date, of all such other property wherever situated, mentioned and described in section three of this Act, as deemed to be included in a succession or successions, as the case may be, from the deceased as predecessor, after the debts, incumbrances and other allowances are deducted therefrom as authorized by section eight of this Act.

Aggregation is described in Wooley on Death Duties 5th ed., p. 57 as the combining together of all classes of property, which become liable to duty, for the purpose of arriving at the rate of duty on all or any of them. From such aggregate value is deducted the debts, incumbrances and allowances leaving the aggregate net value defined by section 2 (*a*).

The value then of dispositions and devolutions of *all* classes of property, which become liable to duty, under the Act consists of the fair market value, as at the date of death of:—

(*a*) all the property *of the deceased* and of

(*b*) all such other property described in section 3.

Property is defined by:—

2 (*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.

Property capable of being devised or bequeathed by will or of passing on death is—(*a*) property which the deceased owned at the time of his death. And any right or benefit under section 3 is—(*b*) property described in section 3.

So that property *of the deceased* in 2 (*a*) "aggregate net value" is property which the deceased owned at the time of his death.

The Dominion Act is, therefore, limited to dispositions of two kinds of property—

(*a*) Property which the deceased owned at the time of his death.
(*b*) Property described in section 3.

As section 3 deals with dispositions of the property described in that section, then 2 (*m*) can only deal with dispositions of property which the deceased owned at the time of his death, because that is all that remains for it to deal with.

The settlor in 1930 transferred all his interest, both legal and equitable, to the trustees so that at the date of his death he had no interest of any kind in the securities in the trust fund. The possibility that the securities might revert to him in the event the daughter predeceased him, is not an interest in property.

As the settlor had no interest in the securities at the time of his death, and as the operation of section 2 (*m*) is limited to dispositions of property which the deceased owned at the time of his death, the disposition in this case does not, in my opinion, fall within section 2 (*m*).

Decisions under the English Succession Duties Act, 1853, are of little assistance in cases under the Dominion Act, for while section 2 (*m*) is taken from part of section II of the Act of 1853, it has been placed in an entirely different context and in my opinion is limited in its operation to dispositions of property owned by the deceased at the time of his death. In addition, as I have already pointed out,

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taxation under the Dominion Act is only imposed on the death of the predecessor, while this is not the case under the Succession Duties Act, 1853.

Mr. Pickup contended that the last part of section 3 (1) (*a*) was ancillary to and clarified section 2 (*m*).

But section 2 (*m*) is a pure succession and in my view is limited to disposition of property which the deceased owned at the time of his death. Section 3 (1) deals with dispositions of property which the deceased once had but parted with in one of the ways described in the subsections but which, for the purposes of the Act, are deemed to be included in a succession. Far from being ancillary, sections 2 (*m*) and 3 (1) are mutually exclusive, just as sections 1 and 2 of the Finance Act of 1894 are mutually exclusive. Under the Finance Act of 1894 section 1 of the Act sets out the property passing on death, and section 2 sets out property deemed to be included in property passing on death. In *Cowley* v. *Commissioners of Inland Revenue* (1), Lord MacNaghten said:—

> Now if the case falls within section 1 it cannot also come within section 2. The two sections are mutually exclusive.

In my opinion the disposition, therefore, cannot be within both sections 2 (*m*) and 3 (1).

The next question to be determined is whether this disposition falls within section 3 (1).

Counsel for the Respondent contends that the case is also within the second part of section 3 (1) (*a*):—

> 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:—
>
> (*a*) property and income therefrom voluntarily transferred by grant, bargain or gift, or by any form or manner of transfer made in general contemplation of the death of the grantor, bargainor or donor, and with or without regard to the imminence of such death, or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise, or the effect of which is that any person becomes beneficially entitled in possession or expectancy to such property or income.

That is, that it is property voluntarily transferred by grant, bargain or gift or by any form or manner of transfer . . . made or intended to take effect in possession or enjoyment

(1) (1899) A.C., 198 at 210.

after such death to any person in trust or otherwise . . . Counsel did not contend that the settlement was made "in contemplation of death", and it is clear that in no proper sense can the settlement be said to have been made in contemplation of death. I am of the opinion that the second part of the section "or made or intended to take effect in possession or enjoyment after such death to any person in trust or otherwise" is not something separate and apart from the first part of the section, and the words in the subsection, "after such death" refer quite clearly to a transfer made "in general contemplation of the death of the grantor, bargainor or donor, and with or without regard to the imminence of such death . . ." See judgment of Beck, J., in *Cowan* v. *Attorney-General* (1). The settlement is not, in my opinion, within section 3 (1) (*a*).

Section 3 (1) does not include property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of interest such as 2 (1) (*b*) of the English Finance Act, 1894, and also in a number of the Provincial Acts.

The disposition is either within section 3 (1) (*d*) or it does not attract taxation at all because it is not, in my opinion, within any of the other subsections of section 3 (1). The Appellant contends that the disposition is, in any event, exempt under section 7 (1) (*g*). It is clear, of course, that if the disposition attracts taxation under section 3 (1) (*d*) it would not, for the same reasons, be exempt under section 7 (1) (*g*).

Gifts with reservations of benefits are deemed to be included in a "succession" under:—

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:—

(*d*) property taken under a gift whenever made of which actual and bona fide possession and enjoyment shall not have been assumed by the donee or by a trustee for the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise.

The exemption section is:—

7 (1). From the dutiable value of any property included in a succession the following exemptions shall be deducted and no duty shall be leviable in respect thereof:—

(1) (1925) 2 D.L.R. 647 at 653.

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(*g*) in respect of any gift made by the deceased prior to the twenty-ninth day of April, one thousand nine hundred and forty-one, where actual and bona fide possession and enjoyment of the property, the subject matter of the gift, has been assumed by the donee or by a trustee for the donee immediately upon the making of the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him, whether voluntary or by contract or otherwise.

The questions to be determined are:—

(1) Was there a gift within the meaning of sections 7 (1) (*g*) and 3 (1) (*d*)?

(2) What was the property comprised in the gift? Was it the securities themselves or only a particular kind of interest in the securities?

(3) Had bona fide possession and enjoyment been assumed by the donee or by a trustee for the donee immediately upon the gift?

(4) Had bona fide possession and enjoyment been thenceforward retained by the donee or by a trustee for the donee to the entire exclusion of the settlor and to the entire exclusion of any benefit to him, whether voluntary or by contract or otherwise?

These same questions were determined in *Commissioner for Stamp Duties of New South Wales* and *Perpetual Trustee Co., Ltd.*, (1), hereinafter referred to as the *New South Wales case*, and which is directly in point.

In that case the facts taken from the headnote were:—

By an Indenture of Settlement made in 1917 between the settlor and five trustees, of whom the settlor himself was one, it was declared that the trustees should hold certain company shares transferred by the settlor, who was the owner, to the trustees in trust, to apply during the minority of his son, the whole or any part of the income or corpus as the trustees should think fit for the maintenance, advancement or benefit of the son, and on his attaining the age of twenty-one years, to transfer to him as his absolute property, all the assets and property whatsoever, including accumulations of income. From the date of the Settlement, the settlor never exercised any voting powers in respect of the shares. No part of the income was applied towards the infant's maintenance, any balance which might have been so applied being accumulated and invested. The son attained the age of twenty-one years in 1931, when the assets comprised in the Settlement were transferred to him. A claim was made by the revenue authorities that on the death in 1921 of the settlor, the shares, the subject of the Settlement, had formed part of the settlor's dutiable estate by virtue of s. 102, ss. 2 (*d*) of the New South Wales Stamp Duties Act, 1920.

(1) (1943) A.C. 425.

After reviewing the opinions expressed in the Supreme Court and in the High Court of Australia as to what was the property comprised in the gift and whether or not bona fide possession and enjoyment was assumed by the donee immediately upon the gift, the judgment delivered by Lord Russell of Killowen states, page 439:—

> There is no gift of corpus to the son except in the direction to the trustees to transfer to him on his attaining twenty-one. What have then (and only then) to be transferred are described as "all the property and assets whatsoever including the accumulations of income and all investments held by the trustees", and they are then to be transferred to him "as his absolute property". Until that event had happened they were not, in their Lordships' opinion, his absolute property; until that event had happened he had only a contingent interest. He was only to be absolutely entitled to corpus if and when he attained his age of twenty-one years.
>
> For the reasons hereinafter appearing their Lordships are in agreement with the decision of the High Court in this case. In their opinion the property comprised in the gift was the equitable interest in the eight hundred and fifty shares, which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust, i.e., by transferring the legal ownership of the shares to trustees, and declaring such trusts in favour of the son as were co-extensive with the gift which the settlor desired to give. The donee was the recipient of the gift; whether the son alone was the donee (as their Lordships think) or whether the son and the body of trustees together constituted the donee, seems immaterial. The trustees alone were not the donee. They were in no sense the object of the settlor's bounty. Did the donee assume bona fide possession and enjoyment immediately upon the gift? The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. This question therefore must be answered in the affirmative, because the son was (through the medium of the trustees) immediately put in such bona fide beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted.

The language in the New South Wales judgment can be adopted in this case because what was said there applies with equal force here.

There is no gift of the corpus, except in the direction to the trustees to transfer the securities to the donee on the death of the donor.

What have then to be transferred were "the securities then representing the trust fund and the accumulated income therefrom", and they are then to be transferred to her "for her own absolute use and benefit". Until that event had happened they were not her absolute property.

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Until that event happened her beneficial interest was conditional. It was not contingent as in the *New South Wales case*. There was no condition precedent to vesting, but if she died before the death of the settlor, the interest would be taken away. The condition then was a condition subsequent and her conditional interest was, therefore, vested subject to be divested. There was a gift of income until the death of the settlor so that the gift of the corpus does not stand alone. The gift amounts, in substance, to a vested interest divided into two portions for the purpose of protracting, not the vesting, but the possession only. The donee was given, in the language of Lord Russell of Killowen in *Adamson* v. *Attorney-General* (1), an immediately vested interest but her interest was defeasible, i.e., if she died before the settlor.

"Gift" is not defined in the Dominion Act, the Finance Act of 1894, nor in the New Zealand Death Duties Act 1921. It is defined in the New South Wales Stamp Duties Act 1920.

A settlor who declares trusts of property only gives a beneficial interest. The Dominion Act contemplates a gift of a beneficial interest because section 7 (1) (*g*) and section 3 (1) (*d*) expressly provide for possession and enjoyment of a gift being assumed by the donee or *by a trustee for the donee*. The corresponding provisions of the other acts mentioned do not contain the words "or by a trustee for the donee". Moreover section 3 (1) (*c*) provides for a gift "inter vivos whether by way of transfer, delivery, declaration of trust or otherwise . . ."

In this case, in my opinion, there was a gift within the meaning of "gift" in section 3 (1) (*d*) and section 7 (1) (*g*), not of the securities in the trust fund, but of the equitable interest in the securities, and that beneficial interest was vested in the donee from the inception of the trust and the gift was therefore one prior to the 29th April, 1941.

The donee was the recipient of the gift and bona fide possession and enjoyment was assumed by the trustee for the donee immediately upon the gift.

The judgment in the *New South Wales case* held that the resulting trust in that case did not render the gift one in

(1) (1933) A.C., 257 at 290.

which possession and enjoyment had not been retained to the entire exclusion of the donor or of any benefit within the meaning of section 102, subsection 2 (*d*) of the Stamp Duties Act 1920 New South Wales, and in doing so expressly affirmed the decision in the *Cochrane case* (1), in which it was held that an express provision for reversion did not render the gift one in which the donor was not excluded from possession and enjoyment or of any benefit within the meaning of Clause (a) of the Customs and Inland Revenue Act 1881; section 38 (2) as amended by section 11 of the Customs and Inland Revenue Act 1899, and the Finance Act 1894—Clause (*c*) (2). The result of the judgment in the *Cochrane case* is stated in *2nd., ed., 13 Halsbury, 240*:—"That a contingent reversion, reserved to the donor in the corpus of property given upon trusts, is not reserved out of the gift, but is something not comprised in the gift". In the *Adams case* (2), cited in the argument in the New South Wales case, Ostler, J., held that as the provision for reversion in the settlement in that case procured no further result than would follow operation of law on the exhaustion of the objects of the trust that it did not render the gift one in which the settlor was not excluded from a "benefit" by contract or otherwise within the meaning of section 5 (1) (*c*) of the New Zealand Death Duties Act 1921.

The sections of these three acts which correspond with the relevant provisions section 3 (1) (*d*) and section 7 (1) (*g*) of the Dominion Act are in very similar words and there is no difference in substance. The provisions in the New Zealand, New South Wales and Dominion Act have all been taken from the Customs and Inland Revenue Act as amended.

There is no doubt, however, that the majority judgment of the Supreme Court of the United States in *Helvering* v. *Hallock* (3), which overruled its own judgment in the *St. Louis Trust case* (4), held that a provision for reversion rendered the transfer incomplete and reserved an interest in the gift to the settlor which only terminated on the death of the settlor.

(1) (1905) I.R., 626;
(1906) I.R., 200.
(2) (1932) N.Z.L.R., 741.
(3) 309 U.S.R., 106.
(4) 296 U.S.R., 39.

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The majority judgment was delivered by Mr. Justice Frankfurther. In his reasons for judgment the following is of interest in this case:—

> The law of contingent and vested remainders is full of casuistries . . . The importation of these distinctions and controversies from the law of property into the administration of the estate tax precludes a fair and workable tax system. Essentially the same interests, judged from the point of view of wealth, will be taxable or not, depending upon elusive and subtle casuistries which may have their historic justification but possess no relevance for tax purposes. These unwitty diversities of the law of property derive from mediaeval concepts as to the necessity of a continuous seisin. Distinctions which originated under a feudal economy when land dominated social relations are peculiarly irrelevant in the application of tax measures now so largely directed toward intangible wealth.

I am of the opinion, notwithstanding the judgment in *Helvering* v. *Hallock* (*supra*) that a contingent reversion is not reserved out of the gift, but is something not comprised in the gift, and that the provision for reversion contained in this settlement did not render the gift one in which possession and enjoyment have not been assumed and retained to the entire exclusion of the settlor or of any benefit to him within the meaning of the sections 3 (1) (*d*) and 7 (1) (*g*).

There are certain provisions in this settlement which must be considered in determining the answer to the last question, viz., had bona fide possession and enjoyment been thenceforward retained by the donee or by a trustee for the donee to the entire exclusion of the donor or of any benefit to him, whether voluntary or by contract or otherwise?

The deed of settlement (1930) with the amendments under the agreement (1937) further provided:—

> 2. The Trustees shall have power to hold the securities set forth in Schedule "A" hereto or any securities substituted therefor as hereinafter provided, notwithstanding that the said securities may not be securities in which trustees are authorized by law to invest trust funds, and shall from time to time upon the direction in writing of the Settlor.

(Amended by the agreement by adding after the word "Settlor"—"and National Trust Company, Limited and/or any Chartered Bank in the Dominion of Canada".)

> During his lifetime sell, call in and convert into money the said securities or any part thereof, and invest the moneys thereby produced in such securities or investments as the Settlor may from time to time direct and notwithstanding that the said securities or investments may not be securities or investments in which trustees are authorized by law to invest trust funds, and shall have power upon the direction in writing

of the Settlor during his lifetime to accept from the Settlor in substitution in part or in toto of the said securities set forth in Schedule "A" hereto other securities in respect of which the Settlor shall certify in writing that the securities so substituted are of a value at least equal to the value of the securities for which the same are to be substituted, and the securities so substituted together with the securities to be retained by the Trustees and constituting the Trust Fund shall yield at the date of such substitution a net income of at least Twenty-four Thousand Dollars ($24,000) per annum after allowing from the gross income from such securities for the payment of all taxes payable by the Beneficiary in respect of the income from such securities which may be assessed or levied by the Dominion of Canada or Province of Ontario, or any other taxing authority.

The Trustees shall be entitled to accept the hereinbefore referred to certificate of the Settlor as the conclusive evidence of the truth of any statement of facts therein contained, and the Trustees shall be completely protected in relying and acting upon any such certificate.

(Amended by the agreement by striking out this paragraph and substituting the following:—)

The Trustees shall be entitled to accept the hereinbefore referred to Certificates of the Settlor and National Trust Company, Limited, or any Chartered Bank in the Dominion of Canada as conclusive evidence of the truth of any statement of facts therein contained, and the Trustees shall be completely protected in relying and acting upon any such Certificates.

5. The Settlor may from time to time and at any time reduce or increase the number of Trustees or substitute any one or more Trustees for either or both of the Trustees and may appoint a new Trustee or Trustees in the event of the death, absence, refusal or incapacity to act of any Trustee or in case any Trustee desires to be released or is discharged by the Settlor from the trusts hereof.

(Under the amending agreement the following proviso was added:—)

Provided, however, and it is expressly understood and agreed that the Settlor shall not be appointed a Trustee hereunder.

The Trustees shall have power to appoint the Settlor or any person named by him as their attorney in their names, places and stead to vote at all meetings and otherwise to act as their proxy or representative in respect of all shares, bonds and other securities which may at any time be held by the Trustees under the terms hereof, with all the powers the Trustees could exercise if personally present.

(Under the amending agreement this provision was struck out and cancelled.)

There was no evidence before me as to whether or not the trustees had ever exercised their power to appoint the settlor as their proxy, nor whether the settlor had as their proxy, voted in respect of any shares or securities in the trust fund.

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In any event this power to the trustees was cancelled approximately five years before the Dominion Act came into force, because by the amending agreement, dated 1st February, 1937, this paragraph was struck out and cancelled.

In the New South Wales case the settlor had the power to vote the shares in the fund, but this does not appear to have affected the decision. It is not mentioned in the judgment.

There is no doubt that under the provision (paragraph 2) the settlor had the power to direct the investment of the trust fund. The Trustees had only the power to hold the securities, and

> . . . *shall* from time to time upon the direction in writing of the settlor during his lifetime, sell . . . and invest the money thereby produced in such securities or investments as the settlor may from time to time direct . . .

Because of the expert knowledge in securities of the settlor, the fund would undoubtedly benefit as a result of his directions of the investments. The power of investment, however, would not prevent the settlor from being regarded as excluded from any benefit.

It was the trustees, however, and not the settlor who had the power to accept substitutions (Paragraph 2):—

> and (the trustees) shall have power upon the direction in writing of the settlor during his lifetime to accept from the settlor in substitution in part or in toto of the said securities set forth in Schedule A hereto, other securities . . .

Paragraph 7 provides:—

> The Trustees shall as regards all the trusts, powers and authorities vested in them herein have absolute and uncontrolled discretion as to the exercise thereof whether in relation to the manner or as to the mode of and time for the exercise thereof.

The effect of these two sections is that the trustees could, in their absolute and uncontrolled discretion, exchange the first securities placed in the fund, for securities which the settlor might have, provided these securities fulfilled the requirements set out in the section.

The result of this provision was merely to release the trustees from any liability that might otherwise arise.

The evidence as to the substitutions that were effected showed that they were effected not for the benefit of the settlor, but, on the contrary, for the benefit of the donee, in order to maintain her net income at $24,000 per year.

That was no doubt the purpose for which the provision was intended. When the companies, whose securities were held in the trust fund, refunded those issues at lower rates of interest, the settlor would either have to put additional capital into the fund to buy more securities in order to maintain the income, or if he had securities which would yield a higher income, the trustees could exchange securities with him.

When the T. Eaton Realty Limited refunded its bonds, the trustees could have turned in the bonds in the old issue, bearing interest at 5% for bonds in the new issue, bearing interest at 4%, but the beneficiary would have lost the difference of 1% in the income. The settlor held bonds of the new issue and the trustees exchanged bonds to the amount of $100,000, bearing interest at 5%, for bonds in the amount of $125,000, bearing interest at 4%, which the settlor had. This substitution was not a benefit to him because it cost the settlor $25,000. This was done to maintain the income of the beneficiary. The same thing is true in the first substitution. The evidence given by one of the trustees was that the value of the Dominion of Canada bonds was obviously more than the value of the shares which the settlor took in exchange. In addition the Dominion of Canada bonds were tax free, so that the net income of the beneficiary would be increased.

In *Reinecke* v. *Northern Trust Company,* (1), the Supreme Court of the United States dealt with the power of a settlor to supervise and direct investments. The facts as set out in the headnote at page 340, and in the judgment at page 344 were:—

> The settlor in that case reserved to himself power to supervise the reinvestment of trust funds; the power to require the trustee to execute proxies to his nominee to vote shares of stock held by the trustee; to control all leases executed by the trustee, and to appoint successor trustees.

The late Chief Justice Stone, then Mr. Justice Stone, in delivering the opinion of the Court said:—

> Nor would the reserved power of management of the trust save to decedent any control over the economic benefits or the enjoyment of the property. He would equally have reserved all these powers and others had he made himself the trustee, but the transfer would not for that reason have been incomplete.

(1) 278 U.S.R., 339.

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In the *New South Wales case* before the Privy Council, counsel advanced the argument, page 432, that having regard to the relationship of the parties and the fact that the settlor was one of the trustees and the settlement gave the trustees the right to delegate all their powers to one of the trustees (which could have been the settlor), the settlor would have a very distinct say in how the trust was to be administered, and there was reason for it to be administered, and administered properly, in such a way that distinct advantages would or might accrue to the settlor.

This argument was clearly rejected by the Board, page 440, and the judgment goes on to state that this (that the settlor received no benefit) was ultimately conceded by the appellant.

A similar contention has been advanced in this case. That is, that because of these powers and the relationship of the parties, the fund could be administered, and administered properly, in such a way that benefits could or would accrue to the settlor.

I do not agree with this contention, because I do not think that it is possible and I am of the opinion that those are not benefits within the meaning of the sections.

Counsel for the Respondent also contended that the settlor had power to substitute securities and that this then placed the trustees in a position where they were holding the securities not for the donee alone but for both the settlor and the donee, and that, therefore, it could not be said that the donee assumed and retained possession and enjoyment to the entire exclusion of the donor. This is not the construction that I place on the section for the reasons which I have already given, and as the settlor had no power to substitute securities, the trustees held the securities only for the donee.

There is no provision in the Dominion Act which would prohibit the settlor from administering the fund through the trustees such as there is in the Quebec Succession Duty Act, R.S.Q., 1925, chap. 29:—

> (*a*) Gift . . . where the donor has not reserved to himself, in whole or in part, *the control, administration,* ownership or enjoyment of the property . . .

Nor is there in the Dominion Act any provision which prohibits a settlor from exercising any power of control

over investment, substitution etc., of the securities, such as there is in section 3 (2) (*f*) of the Nova Scotia Succession Duty Act (supra):—

3 (2) (*f*). Property passing under any settlement whereby the settlor is authorized *to exercise any power of control over alteration, conversion, investment, purchase or sale, substitution, etc.*

There is no justification for reading these provisions into the Dominion Act.

In my opinion these provisions in the settlement did not give the settlor possession or enjoyment or benefit such as is contemplated by these sections 7 (1) (*g*) and 3 (1) (*d*), and the question must be answered in the affirmative.

For the reasons indicated, I am of the opinion that there was a gift made by the deceased prior to the 29th April, 1941, and that actual and bona fide possession and enjoyment of the property, the subject matter of the gift, was assumed by the trustees for the donee immediately upon the making of the gift and thenceforward retained to the entire exclusion of the donor, or of any benefit to him, whether voluntary or by contract or otherwise. Therefore, the disposition is not within section 3 (1) (*d*) and is, in any event, exempt under 7 (1) (*g*). The assessment as to this item was erroneously made and the appeal must be allowed with costs.

Judgment accordingly.