THE MINISTER OF NATIONAL REVENUE (RESPONDENT)..... APPELLANT;

1948

*June 7, 8, 9
*Oct. 5

AND

NATIONAL TRUST COMPANY, LIMITED, Executor of the last Will and Testament of Edward Rogers Wood, deceased, (APPELLANT)..... RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Revenue—Succession Duty—Settlement—Trust—Gift of equitable interest in securities—Bona fide possession and enjoyment by donee immediately upon making of gift retained to entire exclusion of donor—The Dominion Succession Duty Act, S. of C., 1940-41, c. 14, (am. S. of C., 1942, c. 25), ss. 2(e), (m), (n), 3 (1) (a), (d), 7 (1) (g), 8, 10, 11, 15 (1), (2), (3), 22, 36.

In 1930 by a deed of settlement, "W" transferred to trustees certain securities in trust to pay the annual income arising therefrom to his daughter "M" during the lifetime of the settlor, and upon his death to transfer the said securities and the accumulated income therefrom to "M" for her absolute use; provided that should "M" die before "W", the trustees should transfer the securities and the accumulated income therefrom to "W" for his absolute use.

The Dominion Succession Duty Act, S. of C., 1940-41, c. 14, came into force on June 14, 1941 and by an amendment, S. of C., 1942, c. 25, the provisions of the Act were made applicable retrospectively to successions derived from persons dying on or after June 14, 1941. "W" died on June 16, 1941 survived by "M". The Crown claimed succession duties under the Act on the value of the securities in the trust fund at the death of "W".

Held: The trust fund was exempt from duty under the provisions of s. 7 (1) (*g*)—such actual and bona fide possession and enjoyment of the property, the subject matter of the gift, was assumed by the donee immediately upon the making of the gift, as the nature of the gift and the circumstances permitted, and was thenceforth retained to the entire exclusion of the donor, or of any benefit to him.

Commissioner for Stamp Duties of the State of New South Wales v. *Perpetual Trustee Co., Ltd.,* [1943] A.C. 425; 1 All E.R. 525, followed.

APPEAL from the judgment of the Exchequer Court of Canada, O'Connor J. (1) allowing an appeal from the decision of the Minister of National Revenue confirming an assessment made under The Dominion Succession Duty Act.

J. W. Pickup K.C. and *Ian G. Ross* for the appellant.

Wilfred Judson K.C. for the Respondent.

*PRESENT: Rinfret C.J., and Kerwin, Taschereau, Rand and Kellock JJ.

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The judgment of the Chief Justice and Kerwin, J. was delivered by:

KERWIN J.: The Minister of National Revenue appeals from a decision of the Exchequer Court (1) allowing an appeal by National Trust Company Limited, executors of E. R. Wood, from an assessment made under *The Dominion Succession Duty Act*, chapter 14 of the Statutes of 1940-1941, as amended by chapter 25 of the Statutes of 1942. The original Act came into force June 14, 1941, and while Mr. Wood died June 16 of that year the question of the liability to assessment depends upon the effect of a settlement dated December 8, 1940, as amended.

By this settlement, Mr. Wood as settlor transferred certain securities to two trustees for the benefit of his daughter Mildred, therein called the beneficiary. Clauses 1, 2, 4 and 5 of the settlement read:—

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.

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 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

(1) [1946] Ex. C.R. 650.

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.

The Trustees shall incur no responsibility whatsoever to the Beneficiary and the Beneficiary shall have no claim whatsoever against the Trustees by reason of the Trustees retaining the securities set forth in Schedule "A" hereto in their present state of investment or selling the same or any part thereof and investing the proceeds therefrom in securities or investments which may not be securities or investments in which Trustees are authorized by law to invest trust funds, or accepting by way of substitution in the manner hereinbefore provided other securities for any or all of the said securities set forth in Schedule "A" hereto.

4. 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.

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.

By a document dated February 1, 1937, clause 2 of the original settlement was amended so as to provide that the power of the trustees to accept from the settlor in substitution in part or *in toto* of the securities should be exercised upon the direction in writing of the settlor, and the National Trust Company Limited, or any chartered bank in the Dominion of Canada instead of upon the direction of the settlor alone. The necessary change was also made in the second paragraph of that clause. Clause 4 was stricken out and clause 5 was amended by adding a proviso at the end by which the settlor should not be appointed a trustee.

Many points were raised before the learned trial judge and argued before us but I find it necessary to deal only with the question as to whether the respondent is entitled, under subsection 1 of section 7 of the Act, to an exemption from the dutiable value of any property that might otherwise have been included in a succession. If that question is answered in the affirmative, it disposes of the matter as section 6 of the Act (so far as relevant) provides that "subject to the exemptions mentioned in section 7," there is to be assessed, levied and paid at the rates provided

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for in the First Schedule, duties upon or in respect of the succession to all real or immoveable property situate in Canada and all personal property wherever situated, when the deceased was at the time of his death domiciled in a Province of Canada. By section 10, there is to be assessed, levied and paid to the Receiver General of Canada, upon or in respect of each succession mentioned and described in section 6, an initial duty at the rate set forth under the heading "Initial rates dependent on aggregate net value" in the First Schedule, which corresponds to the aggregate net value in the Schedule, and the duty so levied is payable by each successor in respect of his succession. By section 11, an additional duty is to be assessed, levied and paid upon or in respect of each succession mentioned and described in section 6 at the rate set forth in the First Schedule, which corresponds to the dutiable value therein.

For our present purpose, we need not refer to the definitions of "aggregate net value" and "dutiable value" except to note that the latter, as it appeared in section 2 of the original Act, was amended by the 1942 statute so that while the original Act excluded the "exemptions and allowances as authorized by sections 7 and 8," the latter exempts the "allowances as authorized by section 8". However, by the same amendment, the opening part of subsection 1 of section 7, "In determining the dutiable value of any property included in a succession, the following exemptions shall be allowed and no duty shall be levied in respect thereof," was repealed and the following substituted therefor:—"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." It is clear that if the present claim falls within an exemption from the dutiable value of any property included in a succession, any initial duty, based on the aggregate net value, as well as any additional duty, must disappear whether there would otherwise be a "succession" within the definition of that term in section 2(*m*) or within the closing words thereof, "and also includes any disposition of property deemed by this Act to be included in a succession." The aggregate net value is of importance only in determining the rate of initial duty since such duty is to be assessed, levied and paid upon or in respect of each succession mentioned in

section 6 and, as we have seen, section 6 is subject to the exemptions mentioned in section 7. The same result, of course, follows even more clearly with respect to additional duty.

In the original Act, clause (*g*) of subsection 1 of section 7 read:— "in respect of any gift made by the deceased prior to the twenty-ninth day of April, one thousand nine hundred and forty-one" but by the amending Act of 1942, which applies retrospectively to successions derived from persons dying on or after June 14, 1941, there was added to these words the following:—

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;

and it is these additional words that cause any difficulty that arises.

That there was a gift by E. R. Wood to his daughter is indisputable, and the gift, in addition to that of the income from the securities to be paid quarterly, is an equitable interest in the corpus and accumulated income contingent upon the daughter surviving her father. So far as the father is concerned the principle is well understood that a contingent reversion reserved to the donor of the property is not reserved out of the gift but is something not comprised in it. "The property, the subject matter of the gift", to use the phraseology of clause (*g*), is the daughter's equitable interest and the daughter assumed such bona fide possession and enjoyment of the property immediately upon the making of the gift as the nature of the gift and the circumstances permitted. In similar circumstances it has been held to be so by the Judicial Committee in *Commissioner for Stamp Duties of New South Wales* v. *Perpetual Trustee Co.* (1) and that decision should be followed. It is true that the word "actual" does not appear in the statute there under review but I am satisfied that, here, the daughter, through the trustees, had actual as well as bona fide possession and enjoyment of the property. In view of the reference to "a trustee for the donee" in clause (*g*), the argument that clause (*g*) applies only to corporeal property capable of manual or physical possession falls

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

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to the ground. Furthermore, this reference and the other references in the Act to equitable interests compel me to disagree with the view presently held by the Supreme Court of the United States as set forth in its decision in *Helvering* v. *Hallock* (1).

The only other condition to be met under clause (*g*) is that the actual possession and enjoyment should be assumed and retained by the daughter "to the entire exclusion of the donor or of any benefit to him." It logically follows from the principle set forth above, that is, that the reversion of the father is something not comprised in the gift to the daughter, that the former was excluded from any benefit in the subject matter of the gift. This was decided by three judges in the King's Bench Division in the Irish case of *In Re Cochrane* (2) and by the three judges in the Court of Appeal (3) where there was an express reversion, and that decision was approved by the Judicial Committee in the *Perpetual Trustee Case,* although in the latter there was no express reversion. The judgment of Lord Russell of Killowen on behalf of the Judicial Committee, after referring to the argument that the *Cochrane Case* was in conflict with the decision of the House of Lords in *Grey (Earl)* v. *Attorney General* (4), proceeds at pages 445-6:—

> There is nothing laid down as law in that case which conflicts with the view that the entire exclusion of the donor from possession and enjoyment which is contemplated by s. 11, sub-s. 1, of the Act of 1889 is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and that possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the sub-section requires.

Finally, on this branch of the case it is contended that there was no entire exclusion of Mr. Wood or of any benefit to him because of the power of substitution of securities in the trust fund. The evidence discloses that what was actually done in this respect certainly did not inure to Mr. Wood's benefit and in any event it cannot be said that the mere power, hedged about as it was, in itself takes the matter outside the provisions of clause (*g*) of subsection 1 of section 7. The argument based on the suggestion that the trustees might be under the control of the settlor since

(1) (1940) 309 U.S. 106.
(2) [1905] I.R. 626.
(3) [1906] I.R. 200.
(4) [1900] A.C. 124.

they were either his employees or employees of a company dominated by him, is even weaker and cannot be upheld.

Two further submissions on behalf of the appellant remain to be noticed. The first is that no appeal has been taken by the daughter and the only appeal being that of the executors, the assessment in question has become final and binding. Under subsection 1 of section 15 of the Act, every heir, legatee, substitute, institution or other successor is to file an inventory of all the property included in the succession. By subsection 2, a similar inventory is to be filed by the executor but by subsection 3, if one of these has complied with the filing requirements, it is unnecessary for the other to do so. In this case a statement was filed by the executors and in accordance with section 22, the Minister assessed the duties he considered to be payable under the Act (including the item in question) and sent a notice of such assessment to the executors. The latter, as a "person who objects to the amount of duty" mentioned in section 36, appealed as provided by that section. They, therefore, are the proper and sufficient parties to that appeal, to the notice of dissatisfaction, and to the appeal to the Exchequer Court. The second submission that the succession duties having been paid by the executors, no refund could be obtained except in proceedings by way of petition of right is without any basis or merit. If, instead of appealing from the assessment, the executors had taken those proceedings, they would probably have been met by the contention that they had failed to avail themselves of the remedies provided by the *Succession Duty Act*.

The appeal should be dismissed with costs.

RAND J.:—The question in this appeal is, in my opinion, answered by section 7(1) (*g*) of the *Succession Duty Act*. That provision "exempts" from duty "*any* gift made by the deceased prior to the 29th day of April, 1941, 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."

I agree with the Crown that the Act distinguishes between the contingency of death of the donor in the lifetime of the

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donee from other contingencies both in the definition of the word "succession", section 2(*m*), and in paragraph (*a*) of section 3(1). But "*any* gift" in section 7(1) (*g*) must be interpreted to embrace all contingencies: *Commissioner for Stamps, New South Wales* v. *Perpetual Trustee Company Limited,* (1) and the same case decides that bona fide possession and enjoyment by the donee to the entire exclusion of the donor is satisfied by a conveyance in trust to vest the *corpus* in the *cestui que trust* upon the happening of the contingency. That is the situation here and it is unaffected by the word "actual"; there is in this case as in the other, to use the words of Lord Russell, such "beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances" permit.

The appeal must then be dismissed with costs.

The judgment of Taschereau and Kellock, JJ. was delivered by:

KELLOCK J.:—Section 6 of the *Dominion Succession Duty Act,* as it stood at the time of the matters here in question, provides for liability to duty subject to the exemptions in section 7. Section 7, so far as material, is as follows:

> 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:—
>
> (*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.

By section 2(*e*) "dutiable value" means, in the case of the death of a person domiciled in Canada, the fair market value, as at the date of death, of all property "included in a succession to a successor". "Property" by section 2(*k*) 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 3. "Succession" by section 2(*m*)

(1) [1943] 1 All E.R. 525.

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 the Act to be included in a succession. "Successor" is defined by clause (*n*) of section 2 as the person entitled under a succession.

The "dispositions" of property deemed by the Act to be included in a succession are set forth in section 3. Paragraph (*d*) of subsection 1 of that section reads as follows:

> (*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;

Under the trust instrument here in question it is recited that the settlor, the late Edward Rogers Wood, "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". Paragraph 1 is 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.

It is argued on behalf of the respondent that the exemption provided for by section 7(1) (*g*) is applicable and that that being so the case does not fall within paragraph (*d*) of section 3(1) nor within any other taxing provision of the Act. It is said that under the express

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provision of the first three lines of section 7(1) it is immaterial whether or not but for clause (*g*) of that subsection the case would otherwise have fallen within either section 2(*m*) or any other provision of section 3; in other words, that the exemption specified by section 7(1) (*g*) is an overriding exemption and it is sufficient to make out appellant's case if it falls within that clause. In my opinion the argument is well founded and the only question is whether or not the present case falls within the provisions of the clause mentioned.

In *Commissioner for Stamp Duties of the State of New South Wales* v. *Perpetual Trustee Co., Ltd.* (1) the Privy Council had to consider a case arising under certain legislation of New South Wales. Section 102 of that legislation read, in part, as follows:

> For the purpose of the assessment and payment of death duty * * * the estate of a deceased person shall be deemed to include and consist of the following classes of property:—
>
> (2) (*d*) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever.

In that case the question was as to whether or not certain shares in a company formed part of the dutiable estate there in question. By an indenture the deceased in his lifetime had settled the shares and they had been transferred into and were registered in the names of five trustees, of whom the deceased himself was one. The trustees were directed to hold the shares upon trust to apply the whole or such part or parts of the income as the trustees should think fit for the benefit of the infant son of the deceased; to invest any surplus income; to apply the income and any accumulations thereof during the minority of the son and the proceeds of sale of any of the said shares, or any sums raised by way of mortgage, for the maintenance, education, advancement or benefit of the son and upon the said son attaining his majority the trustees were directed to transfer to him as his absolute property, the corpus and accumulations of income. While there was not, as in the trust in question in the case at bar,

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an express provision for the transfer of the securities to the settlor in the event of the beneficiary dying in his lifetime, there was a resulting trust in that event.

The judgment of the Judicial Committee was delivered by Lord Russell of Killowen. At page 529 the questions to be determined were set out as follows:

(i) What was the property comprised in the gift; was it the shares themselves or only a particular kind of interest in the shares?

(ii) Had *bona fide* possession and enjoyment been assumed by the donee immediately upon the gift?

(iii) Had *bona fide* possession and enjoyment been thenceforth retained by the donee to the entire exclusion of the settlor, and to the entire exclusion of any benefit to him of whatsoever kind or in any way whatsoever?

I quote the following excerpts from the judgment from page 530 of the report:

In their Lordships' opinion there is no ambiguity in this settlement. There is no gift of *corpus* to the son except in the direction to the trustees to transfer to him upon his attaining 21 years of age. 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 21 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 850 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.

Did he assume it and thenceforth retain it to the entire exclusion of the donor? The answer, their Lordships think, must be in the affirmative, and for two reasons: viz., (i) the settlor had no enjoyment and possession such as is contemplated by the section; and (ii) such possession and

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enjoyment as he had from the fact that the legal ownership of the shares vested in him and his co-trustees as joint tenants was had by him solely on behalf of the donee. In his capacity as donor he was entirely excluded from possession and enjoyment of what he had given to his son.

Did the donee retain possession and enjoyment to the entire exclusion of any benefit to the settlor of whatsoever kind or in any way whatsoever? Clearly, yes. In the interval between the gift and his death, the settlor received no benefit of any kind or in any way from the shares, nor did he receive any benefit whatsoever which was in any way attributable to the gift. Indeed this was ultimately conceded by the appellant.

It was therefore held that the case did not fall within the taxing provisions above set forth.

I find it impossible to distinguish this decision in its application to the proper construction of section 3(1) (*d*) and section 7(1) (*g*) of the Canadian statute. The only distinction suggested by Mr. Pickup is that in the New South Wales legislation the word "actual" was not used and he contended that the presence of that word in the Dominion statute indicates that neither section 3(1) (*d*) nor 7(1) (*g*) can be applied to equitable interests but only to corporeal property capable of manual or physical possession. I find it impossible to accept this contention in view of the definition of "property" itself in section 2(*k*) quoted above. In the language of Lord Russell in the New South Wales' case, already quoted, the beneficiary "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". In my opinion this language is as apt in relation to actual possession of property included in the wide definition of the Act in question as it was to the legislation before the Judicial Committee in that case.

I think therefore section 7(1) (*g*) applies and that in the language of section 7 "no duty shall be leviable in respect" of the subject matter of the present litigation; *In re Adams* (1). I would therefore dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Samuel Quigg.*

Solicitors for the respondent: *Daly, Thistle, Judson & McTaggart.*

(1) [1932] N.Z.L.R. 741.