[HIGH COURT OF AUSTRALIA.]

JOHN IRWIN DENT AND ANOTHER . . APPELLANTS;

AND

THE COMMISSIONER OF STAMP DUTIES . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Dec.* 15, 17.

Griffith C.J., O'Connor and Isaacs JJ.

*Stamp Duty—Stamp Duties Act* 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *sec.* 49—*Stamp Duties* (*Amendment*) *Act* 1904 (*N.S.W.*) (*No.* 24 *of* 1904), *secs.* 21, 22—*Death duty—Voluntary settlement—Rate of duty payable on property settled and property belonging to testator—Aggregation of settled property and property passing under will.*

The provision in sec. 22 (*f*) of the *Stamp Duties* (*Amendment*) *Act* 1904 that, "for the purpose of assessing the amount of the duty, the estate shall be deemed to be the estate of the person dying," refers to the duty payable in respect of property passing under a voluntary settlement, under sec. 49 (2) (*e*) of the *Stamp Duties Act* 1898. It does not refer to the duty payable on the estate which belonged to the testator at his death.

*Heward* v. *The King*, 3 C.L.R., 117, followed.

*Stamp duty—Stamp Duties Act* (*N.S.W.*) 1898 (*No.* 27 *of* 1898), *sec.* 49 (2) (*e*)—*Stamp Duties* (*Amendment*) *Act* 1904 (*No.* 24 *of* 1904), *sec.* 22—*Voluntary settlement of station property and stock—Life interest reserved to settlor—Increase of stock between date of settlement and death of settlor—Assessment of duty—Value of property at death of settlor.*

In the case of property passing under a voluntary settlement under sec. 49 (2) (*e*) of the *Stamp Duties Act* 1898 where the settled property consists of a station and live stock, duty is payable upon the value of the property at the death of the settlor in its then condition, including the increase, if any, in the live stock upon the station between the date of the settlement and the death of the settlor. So *held* by *Griffith* C.J. and *O'Connor* J., *Isaacs* J. dissenting.

Decision of the Supreme Court of New South Wales, *Dent* v. *Commissioner for Stamps*, 9 S.R (N.S.W.), 180, reversed on the first point, and affirmed on the second point.

APPEAL from the decision of the Supreme Court of New South Wales upon a case stated by the Commissioner of Stamps.

John Dent, of Oma, died on 23rd June 1907, having made his will on 9th May 1906, by which he appointed the appellants, J. I. Dent and R. Halls, his executors and trustees, and he devised to them all his property to be equally divided between his son and three daughters. Probate of the will was granted to the executors on 6th August 1907. The net value of the estate passing under the will was £27,294 0s. 8d. By deed of settlement, dated 26th April 1906, the testator vested in and transferred to the appellants as trustees the station property known as Oma, consisting of certain freeholds, leaseholds and licences, together with all lands which might afterwards be acquired as part of Oma, and all rights and privileges appurtenant thereto, and also all and singular the sheep, cattle and horses and other live stock, brands, marks, utensils, plant, machinery, and effects mentioned in the third schedule to the said deed, and all those the cattle and live stock and their increase progeny and produce, upon trust (*inter alia*), to carry on the business as a station property, and to do all acts incidental thereto, and to negotiate purchases, sales and exchanges of male and female stock, either for stud, store or fattening purposes, and also from time to time to slaughter, boil down, freeze, remove, destroy, or otherwise treat, deal with or manage the stock, and to pay the settlor an annuity of £500 out of the rents and profits, and to divide the residue of the rents and profits after payment of expenses amongst the settlor's children during his lifetime, and after his death to stand possessed of the settled property on trust for J. I. Dent, subject to certain charges in favour of the settlor's wife and daughters. The expression "settled property" was defined to mean and include "all and singular the lands, hereditaments, live stock, plant, machinery, furniture, chattels, policy of assurance, mortgage securities, moneys and premises now or thereafter acquired or intended to be covered by these presents, and the deed provided that "these presents shall be taken to include not only the property therein expressly

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mentioned, but also all other land, cattle, and other live and dead stock, goods, chattels and effects which the settlor or the trustees might thereafter purchase or become entitled to by way of addition or substitution for or otherwise in connection with the settled property."

The landed property comprised in the settlement was duly transferred to the trustees by various transfers and indentures of the same date as the deed of settlement.

By another deed it was provided that another property called the Ercaldine estate should be sold, and the proceeds held upon certain trusts. No question as to this property was raised in the present appeal.

The total sum on which in the opinion of the Commissioner stamp duty was payable was the sum of £157,135 18s. 4d. made up as follows:—

| | £ | s. | d. |
|---|---|---|---|
| (*a*) Value of the estate of which John Dent deceased died possessed .. ... ... ... ... ... | 27,294 | 0 | 8 |
| (*b*) Value at date of John Dent's death of the property comprised in the Oma settlement ... ... ... | 117,724 | 5 | 10 |
| (*c*) Unexpended balance of proceeds of sale of the Ercaldine property .. .. ... ... ... | 5,127 | 19 | 7 |
| (*d*) Value at date of John Dent's death of increase of live stock between the date of the Oma settlement and the date of death ... ... ... ... ... | 3,571 | 10 | 0 |
| (*e*) Income from settled properties between date of settlement and death of testator ... ... ... ... | 3,418 | 2 | 3 |
| | £157,135 | 18 | 4 |

The Commissioner assessed the duty payable upon the estate of the testator at the rate of 10 per cent. upon the said sum of £157,135 18s. 4d. Deducting from the duty the sum already paid as *ad valorem* duty on the settlements hereinbefore referred to, namely, £468, the duty actually charged was £15,245 12s.

The Commissioner was of opinion that the increase of live stock referred to in item (d) became by force of the definition of settled property in the Oma settlement part of the settled property, and liable to duty as if in existence at the date of and originally comprised in such settlement; and that the settled property and the unexpended balance and the increase and the income hereinbefore referred to was the estate of the said John Dent within the meaning of the Acts relating to stamp duty.

Although duty had only been claimed from the appellants in their character of executors, they asked the Court to assess the duty chargeable against them in their character of trustees, but without prejudice to their contention that the estate passing under the will could not be added to the settled estate for the purpose of fixing the rate at which duty was payable upon property passing under the will of the testator.

The decision of the Supreme Court, so far as material to the present appeal, was—(1) That the increase of stock, whether by purchase or breeding, upon the Oma station property between the date of the settlement and the death of the settlor, was part of the settled property, and that the value thereof was chargeable with duty; (2) that estate which is liable to probate duty under sec. 49 (2) (*e*) of 1898 No. 27 as passing under a voluntary settlement by which a life interest is reserved to the settlor, is by sec. 22 (*f*) of 1904, No. 24, deemed to be the estate of the person dying, and that the value thereof might be added by the Commissioner to the value of the property passing under the will of the testator, and duty charged upon the sum so aggregated under sec. 49 (1) of 1898, No. 27 (1).

The appellants appealed from this decision upon the grounds: —1. That the Supreme Court ought to have held that the increase of live stock was not part of the settled property, and was not subject to the payment of duty. 2. That the Supreme Court ought to have held that the estate which passed under the will of the testator was not liable to be assessed at the rate of 10 per cent., and could not be added by way of aggregation to the settled estate for the purpose of assessing the rate at which duty should be payable on the estate passing by will.

The material sections of the Acts are cited in the judgments hereunder.

*Cullen* K.C. and *Brissenden*, for the appellants. The Court below were wrong in holding that the estate which passed by the will could be added to the settled estate for the purpose of assessing the rate of duty payable by the appellants as executors of the will. By the *Stamp Duties Act* 1898 (No. 27), as

(1) 9 S.R. (N.S.W.), 180.

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amended by the *Probate Duties (Amendment) Act* 1899 (No. 45), where the value of an estate exceeds £26,000, but does not exceed £28,000, the duty is $5\frac{3}{5}$ per cent. Where the estate is over the value of £100,000, the duty payable is 10 per cent. By sec. 1 (2) of 1899 (No. 45), where the value of the estate does not exceed £50,000, and the widow, or the widow and children, or the children of the testator, are the only persons entitled under the will, the duty is calculated at one-half the percentage mentioned in the Schedule to the Act. If therefore in the present case the value of the estate for probate purposes was £27,294, as the widow and children were the only persons entitled under the will, the duty payable will be one-half $5\frac{3}{5}$ per cent. or $2\frac{4}{5}$ per cent. on £27,294. If, on the other hand, the property comprised in the settlement is added to the estate passing under the will, the estate will be over the value of £100,000, and duty will be payable at 10 per cent. Sec. 22 (*f*) of 1904 (No. 24), provides that "for the purpose of assessing the amount of the duty, the estate shall be deemed to be the estate of the person dying," but that refers to the duty payable by a beneficiary or trustee on the settled property, and has no reference to the duty payable by the executors upon property included in the will. That is to say that, for the purpose of assessing the duty payable upon the settled property, the value of the settled property is added to the value of the property passing under the will. This is clear from the earlier parts of the section read in conjunction with sec. 21. It does not mean that for the purpose of assessing the duty payable upon the property passing under the will the value of this property is to be added to the value of the settled property.

[GRIFFITH C.J. referred to *Heward* v. *The King* (1).]

That case was decided upon an analogous section, and supports the argument on this point. Upon the second point, the appellants, as trustees of the settlement, contend that they are not liable to pay duty upon the increase of stock on the Oma property between the date of the settlement and the death of the testator. Whether such increase is the progeny of the stock which passed by the settlement, or is the result of subsequent purchases, it is not part of the property conveyed by the deed of

(1) 3 C.L.R., 117.

settlement, but is profit or income accruing by virtue of the settlement, and income is not taxable as part of the settled property.

*Langer Owen* K.C. and *Harvey*, for the respondent. As to the second point, the Commissioner was entitled to assess the duty on the settled property at its value at the date of the death of the testator. For the purpose of stamp duty the settled property is dealt with as if the testator had not disposed of it during his lifetime: 1904 No. 24, sec. 22 (*f*). The settlement is regarded as in the nature of a testamentary disposition, and the intention of the Act is to tax everything that, but for this disposition, would have passed under the will. If the settlor has not completely divested himself of all interest in the property it still remains liable to duty. The legislature says, in effect, we will not interfere with your powers of disposition, but we include this settled property as part of your estate, and duty must be paid upon it at its value at your death. The object of the Statute is to prevent a voluntary conveyance, where a life interest is reserved to the settlor, from operating so as to deprive the Crown of those duties, which, but for the conveyance, would have been payable on the death of the settlor: *Crossman* v. *The Queen* (1); *Attorney-General* v. *Gosling* (2). As to the question of aggregation, the relevant words in the section upon which the decision in *Heward* v. *The King* (3) is based were—"shall . . . be deemed to have made the property . . . chargeable . . . as though part of the estate of the donor." These words are more favourable to the appellants' contention than the words "deemed to be the estate of the person dying" in sec. 22 (*f*) of 1904 No. 24. Part 3 of this Act, which includes sec. 22, is headed "Duties on Estates of Deceased Persons." The Act of 1904 was an extension and elaboration of the principle of assessment adopted in the Act of 1898. The legislature says where property is dealt with under sec. 49 (2) it shall be deemed to be the property of the person dying, the whole estate shall be liable to aggregation, and the executors primarily responsible for payment

(1) 18 Q.B.D., 256, at p. 262. (2) (1892) 1 Q.B., 545, at p. 550.
(3) 3 C.L.R., 117.

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of duty. The words "with respect to the estate of any person dying" in sec. 24 of the Act of 1904 support this construction, as they assume that an aggregation of the whole of the estate was contemplated by sec. 22. The intention of the Act was that the whole of the estate should be pooled together and regarded as one property upon which duty could be recovered from the executor.

*Cullen* K.C., in reply. With regard to the increase of stock, it is admitted that the relevant date for the purpose of valuation is the date of the death of the testator. The stock valued must be either the original stock on the station at the date of the settlement, or stock which have since been substituted for them. Increase of stock in (*d*) means the increase over and above the stock on the station at the date of the settlement.

[GRIFFITH C.J.—Increase of stock on a station may be regarded either as capital or income. That will depend on the course of management of the station.]

The proper course of management would be to keep the stock up to the normal standard. In the case of a drought it has been held that the loss of stock must be replaced, subject to adjustment of the rights of the beneficiaries and the life tenant. To entitle the Commissioner to recover he must show that the increase is part of the corpus.

*Cur. adv. vult.*

December 17.

GRIFFITH C.J. Two questions are submitted to the Court for determination upon this appeal, both arising upon sec. 22 of the *Stamp Duties* (*Amendment Act*) 1904, which relates to duties on estates of deceased persons. The Principal Act of 1898, by sec. 49, specifies the duties to be collected upon the estates of deceased persons. It provides:—"The duties . . . shall be according to the duties mentioned in the Third Schedule to this Act; and such duties shall be charged and chargeable upon and in respect of all estate, whether real or personal, which belonged to any testator or intestate dying after the commencement of this Act." The relevant words are "estate which . . . belonged to" any testator.

The second paragraph of the same section provides that duties shall also be collected upon various subject matters specified. The first (*a*) is an estate which a person has disposed of by will or settlement containing any trust to take effect after his death, with authority enabling that person to dispose of the same by will or deed; (*b*) is property taken under a voluntary disposition made after the specified date by such person purporting to operate as an immediate conveyance or gift *inter vivos*, whether by way of conveyance, transfer, delivery, declaration of trust, or otherwise, which has not been *bonâ fide* made twelve months before the death of such person; (*c*) is property which such person, having been absolutely entitled thereto, has, before or after the date mentioned, voluntarily caused to be conveyed, transferred to, or vested in himself and any other person jointly, whether by disposition or otherwise, so that the beneficial interest therein or in some part thereof passes or accrues by survivorship on his death to that other person; (*d*) is the case of property being a purchase or investment by such person made either by himself alone, or in concert with, or by arrangement with, any other person, before or after the day last aforesaid, with property or the proceeds of property to which he was absolutely entitled, in the name of himself and any other person jointly, so that the beneficial interest therein, or in some part thereof, passes or accrues by survivorship on his death to that other person. The next paragraph (*e*) is the case with which we are more particularly concerned, namely, property passing under a voluntary settlement made by deed or any other instrument not taking effect as a will, whereby an interest in that property or the proceeds of sale thereof for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor, or whereby the settlor may have reserved to himself the right, by the exercise of any power, to restore to himself, or to reclaim the absolute interest in that property or the proceeds of sale thereof.

The rates of duty are now specified in the Third Schedule as amended by the *Probate Duties (Amendment) Act* 1899. By the Act of 1904 a new provision is made with respect to property which is described in the second paragraph of sec. 49 of the

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Principal Act. Sec. 21 deals with the cases mentioned in paragraphs (*a*) and (*b*), and provides that in those cases the estate specified shall for the purposes of the Stamp Acts be deemed to be the estate of the person dying. That is, for all the purposes of those Acts. I have already pointed out what those cases were. Shortly it may be described as property appointed under power, and property not *bonâ fide* conveyed more than 12 months before death. Sec. 22, under which the question more immediately arises provides:—"Where, under sub-sec. 2 of sec. 49 of the Principal Act, as amended by the *Probate Duties (Amendment) Act* 1899, duty is payable in respect of any estate, the following provisions shall (except in the case provided for in the last preceding section) have effect." These are in substance that any person who acquires possession as beneficiary or trustee under the instrument in question must deliver to the Commissioner of Stamps within three months after the death of the deceased a full and true account, verified by oath, of such estate. The Commissioner is to assess the duty, if satisfied with the account, on the footing of that account, and the duty so assessed is to be paid. If he is dissatisfied with the amount he may have an independent account taken, and he is to assess the duty on the footing of that account, and the duty so assessed is to be paid, subject to appeal under the provisions of the Principal Act. The section enacts that: "Any person affected by this section shall within one month after assessment be liable to pay the duty, which shall be a charge upon the estate, and for the purposes of assessing the amount of the duty the estate shall be taken to be the estate of the person dying."

In the present case the testator died leaving property, which, in the words of sec. 49 of the Principal Act, "belonged to him" at the date of his death, of the value of less than £30,000. More than twelve months before his death he had made a voluntary settlement of property to the value of nearly £120,000. The property consisted of real and personal estate and stock. The estate was valued, and the value, as found by the Commissioner of Stamps, of the property comprised in the settlement was put down at £117,000, and further, the value at the date of his death of the increase of the live stock mentioned in the settlement

between the date of the settlement and the date of his death was estimated at £3,571 10s. *Primâ facie*, that looks as if that sum might have been counted twice over, but we are told that this is not so.

Two questions are raised for decision; first, whether for the purpose of assessing the amount of the duty payable on the property which belonged to the testator, which is valued at £27,000, the property comprised in the settlement is to be deemed part of his estate. In that event the rate of duty would be 10 per cent. on the aggregate amount. If, on the other hand, there is no aggregation, the duty payable would be at the rate of $2\frac{4}{5}$ per cent. only, making a difference of about £2,000. The question depends entirely upon the construction of sec. 22 (*f*), which provides, as I have stated, that "for the purpose of assessing the amount of the duty, the estate shall be deemed to be the estate of the person dying." What is the legislature speaking of? In order to ascertain that we have to go back to the first part of the section which provides that "where under sub-sec. 2 of sec. 49 of the Principal Act as amended by the *Probate Duties (Amendment Act* 1899, duty is payable in respect of any estate, the following provisions shall (except in the case provided for in the last preceding section) have effect":—In such cases "for the purpose of assessing the amount of the duty, the estate shall be deemed to be the estate of the person dying." It appears to me that the only possible construction of that section is that for the purpose of assessing the amount of the duty payable on the estate comprised in the settlement, the estate comprised in the settlement is to be deemed to be the estate of the person dying. The section is silent as to the amount of the duty payable on the estate which belonged to the testator. So far as a decision upon a section in another Act can be regarded as an authority upon the meaning of this section, it seems to me that this case is concluded by the decision of this Court in *Heward* v. *The King* (1). The words there were not identical, but are not substantially different from the words of sec. 22. I am unable to find in sec. 22 anything suggesting a reference to the duty payable upon the estate which is estimated to belong to the testator.

(1) 3 C.L.R., 117.

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The learned Judges in delivering the judgment of the Court said the provisions of the section are "for the purpose of assessing the amount of the duty." I agree. But the duty on what? The property which did not belong to the testator, but which passed by the settlement. As far as that point is concerned I think the appeal must be allowed.

The other point arises in this way: Ought the value of the increase—which I understand to mean the natural increase of the stock comprised in the settlement which came into existence as separate entities after the settlement—to be taken into account in assessing the value of the settled estate? The appellants rely on the words of sec. 49. The relevant words are "property passing under any voluntary settlement." Those words are *primâ facie* more particularly applicable to property continuing in the same condition from the date of the settlement to the date of the death, but I am not at all sure that is the only possible construction. It seems to me there are two constructions open, one, that it means all property which is conveyed *eo instanti* on the execution of the deed; the other, that it means all property the title to which is immediately derived from the deed.

In the case of real estate the first construction would be sufficient. But when you are dealing with personal estate, in which the trust estate is substantially the same, although it changes from day to day as to some of its subjects, the other construction may be admissible.

Having regard to the words in (*e*) of sec. 49 relating to powers of revocation, I think that the latter view must be adopted. What would happen if the settlor had reserved the power of revocation and had revoked the settlement in the middle of the lambing? Would the lambs which happened to be born a day or two before the revocation not have been affected by the revocation? It seems to me it is clear they would. What is meant by property passing is property which is for the time subject to the trust of the settlement by its immediate operation.

I am unable to accept the deductions of the Commissioner adopted by the Supreme Court. They relied upon the words in the deed itself. I do not think they can govern the matter. Whatever doubt there may be as to the construction of the words

of sec. 49 (2) (*e*), the words were open to both constructions, and I think that the legislature by subsequent legislation intended to show in what sense they intended the words to be read in future.

It was quite competent to them to say that, in assessing the duty payable in respect of property comprised under a deed of settlement, a particular rule of valuation should be adopted, and I think they have done so. They have said that on the death of the settlor an account is to be taken of the property of the settlee, which is to be valued in the same condition as at the date of the death of the settlor, and duty is to be paid according to the value so arrived at. I think the intention is that the settled property in its then condition should be valued for purposes of taxation. No doubt difficulties may be presented under this view. There might be a case where the settled property has ceased to exist. It might have been sold. But the fact that there may be difficulties is no reason why this construction should not be adopted in a case where difficulties do not arise.

It seems to me that, in cases of pastoral property of this sort where the value fluctuates, the property passing by the settlement was intended to be taxed at the value of the property found to be subject to it at the time of the death of the testator. I think, therefore, that on that point the judgment of the Supreme Court was right.

O'CONNOR J. read the following judgment:—

Out of the several questions submitted by the Commissioner to the Supreme Court, two only have come to this Court for decision. The first is whether for the purpose of assessing duty on the testator's estate the Commissioner is entitled to add to it the value of property comprised in a deed of settlement executed by the testator in his lifetime, and coming within the provisions of sec. 49 (2) (*e*) of the *Stamp Duties Act* of 1898. It is claimed that the aggregation is justified by sec. 22, sub-sec. (*f*) of the *Stamp Duties* (*Amendment*) *Act* 1904, it being admitted that in that section alone, if at all, is to be found the power which the Commissioner has exercised. The sub-section is as follows:—"For the purpose of assessing the amount of duty, the estate shall be deemed to be the estate of the person dying." What is the duty

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with which the sub-section is dealing? Under the Stamp Acts two classes of duty are imposed which may be called "death duties":—First, those chargeable on the testator's estate, whether his estate actually or merely deemed to be so for the purpose of charging it with duty. Secondly, duties chargeable on property disposed of by him in his lifetime, but yet made subject to payment of stamp duty in the hands of the trustees or other persons who are in possession or control of it at the testator's death. This former class of duties are payable by the executors or administrators out of the testator's estate, the latter are payable by the trustees of the property settled or other persons in control of it as mentioned in sub-sec. (*a*) of sec. 22 of the *Stamp Act* of 1904. Sec. 22 is dealing with the latter class of duties only: no portion of it refers to the former class. On the contrary the previous section expressly, and in strong contrast, directs the value of settlements described in paragraphs (*a*) and (*b*) of sec. 49, sub-sec. (2) to be aggregated with the testator's estate for the purpose of adding to the amount of duty to be paid in respect of the estate by the executors, but makes no provision of that kind in respect of the other classes of settlement mentioned in that sub-section. I am therefore of opinion, construing sub-sec. (*f*) in its ordinary grammatical sense, that it permits the value of the settled estate to be added to that of the testator's estate for the purpose of fixing the amount of duty payable in respect of the settled estate, and for that purpose only. That interpretation is, I think, confirmed by a consideration of secs. 21 and 22 and the whole scheme of death duties legislation. On that part of the case, therefore, I am of opinion that the Supreme Court came to a wrong conclusion and that the appellants must succeed.

The second question is whether, in assessing the value of station property comprised in a settlement coming under sec. 49 sub-sec. 2 of the *Stamp Duties Act* of 1898, the increase of live stock between the date of the settlement and the testator's death can be included in the value assessed for the purposes of the tax. The appellants rely upon the words of sub-sec. 2 of sec. 49 and on paragraph (*e*) of that sub-section. Reading only the material words the section directs that duties shall be charged and chargeable upon and in respect of all estate real or personal passing

under any voluntary settlement of the class described in paragraph (*e*). That was the provision which imposed the tax in the Act of 1898, and the only one which at that time made it payable, and it will be noticed that there is no express enactment as to the person by whom the tax is to be paid. If the Commissioner's powers had rested there I think he might have had some difficulty in maintaining the position he has taken up. Ordinarily speaking, property passing under a settlement is the property then actually existent which passes by the transfer. Strictly construed the words of the section would not include the increase of stock taking place after the date of the settlement. It is debateable to what extent, having regard to the nature of the property included in the settlement, stock bought or bred in the ordinary course of station management to keep the number of stock up to that existing at the date of the settlement might be regarded as part of the property passing by the settlement. But in my opinion the *Stamp Act* of 1904, which was passed to supply many deficiencies and clear up many obscurities in the earlier Stamp Acts, relieves us from the consideration of any such questions. Sec. 22 of the Act of 1904 is the first enactment which in express language directs the tax to be paid by any person. Its various sub-sections make clear what is to be taxed, how the tax is to be assessed, and who is to pay. Sub-sec. (*a*) directs the trustee or other person mentioned to deliver a full and true account of the estate. The account contemplated can only be delivered after the testator's death, and it is to be, in my opinion, an account of the estate as it was at the testator's death, not as it was at the date of the settlement. By sub-sec. (*b*), if the Commissioner is satisfied with the account, he may assess the duty payable in respect of the estate on the footing of the account, and the duty so assessed shall be paid. Grammatically construed, the estate which the Commissioner is to assess, and upon which the tax is to be paid, is the estate of which the trustee or beneficiary must deliver to the Commissioner a full and true account at the time of the testator's death. It is that same estate which under sub-sec. (*f*) is deemed for the purposes of taxation part of the testator's estate. Such a construction will best carry out the policy apparent on the face of these enact-

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ments. What that policy is appears very clearly from the provisions of the Acts. Property settled by the testator in his lifetime, in such a way as to come under sec. 49, sub-sec. 2, is for taxation purposes to be still counted in with his estate. Some classes of such settlements are expressly directed to be taxed as part of the testator's estate. As to other classes, their value is directed to be aggregated with the testator's estate for the purpose of obtaining the tax, not from his estate, but from the trustee or other holders of the settled property. In all cases the Act empowers the Commissioner to keep his hand on the estate which was the testator's until, from his estate in some cases, and from the trustee or beneficiary of the settled property in other cases, the tax based on the value of the whole estate at the time of the testator's death is ascertained and paid. In my opinion, therefore, the Commissioner rightly valued the property in question as it was at the death of the testator, including the increase in stock which had taken place between the date of the settlement and the testator's death. As to that question, therefore, the appeal must fail.

ISAACS J. read the following judgment :—

There are two questions in this case. One is whether the true meaning of sec. 22 (*f*) of the *Stamp Duties (Amendment) Act* 1904 is this : That in assessing the amount of duty on a deceased person's own estate you consider it as aggregated with an estate within the meaning of sec. 49 (*e*) of the Act of 1898. The primary meaning of the language of sub-paragraph (*f*) is opposed to that construction, because, unless the first part of that sub-paragraph be rejected, namely, the limitation to the one particular purpose specified, you cannot arrive at the conclusion suggested on behalf of the Commissioner. That declared purpose is to assess the amount of the duty which, by reference to antecedent words, means the duty on the estate in sec. 22 (*e*) of the earlier Act. Besides the difficulty of extending the primary meaning of the words, the contrast between them and the language of sec. 21 (*a*) of the Act of 1904 is so marked as to confirm the ordinary signification of the paragraph now under consideration.

It is, as observed by the Privy Council, in *Harding* v. *Com-*

*missioners of Stamps for Queensland* (1), a well established canon of construction that, as against a person sought to be affected by a Statute imposing a liability, it must be clearly shown to affect him. My opinion is therefore against the respondent on this point.

As to the second question, I apply the same canon of construction.

What property passed under the settlement? That is, what passed from the settlor to the trustees upon the trusts of the settlement? I apprehend that nothing then passed but what he then had; and, as to the future-acquired property, the well known rule applies, which I may quote from the speech of Lord *Fitzgerald*, in *Thomas* v. *Kelly* (2): "An assignment of non-existent property, that is, of property which might or might not be acquired in the future, was at common law inoperative; but if for value, it was in equity regarded as a contract of which specific performance might be enforced when (if ever) the thing came into actual existence."

Here we are not concerned with property afterwards acquired by Dent and brought by him into the trust estate. But the property in dispute consists of accretions to the trust estate, either by natural increase of stock or by purchase by the trustees. The Crown must make out a clear case, and must show that the facts render the property liable to the tax. Now, in order to ascertain the full meaning of the phrase "passing under the settlement," we have, it is true, to be guided by the intention of the legislature. But one rule has always appealed to me with the greatest force, and that is you must find the intention from the language used. Lord *Watson* said, in *Salomon* v. *Salomon & Co.* (3): "'Intention of the legislature' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a Court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to

(1) (1898) A.C., 769, at p. 776. (2) 13 App. Cas., 506, at p. 515.
(3) (1897) A.C., 22, at p. 38.

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enact, either in express words or by reasonable and necessary implication."

The ordinary meaning of the phrase, "property passing under the settlement," would not include the natural increase, and I can find nothing in the Act to overcome its primary import. On the contrary I find much to support it. For instance, sec. 49 (2) (*b*) says: "Taken under a voluntary disposition." Suppose this same property given not upon a trust with a reservation of interest, but by gift *inter vivos* six months before the testator's death, what property would be taxable? The sub-section assumes that the disposition operates as an immediate conveyance or gift. What then would happen to the natural increase? I apprehend the Act does not affect title, nor, except where it declares that something that is not the fact is to be deemed to be the fact, are we at liberty to alter the facts as they actually exist. If, in the case supposed, which is transparently clear to me, you would not tax the accretions, why must it be done here? In sub-section (*e*) itself, I find the reference to the nature of the interest reserved is an interest "in that property or the proceeds of sale thereof." Again, suppose instead of any interest the settlor had under the same sub-section reserved a power of revocation which he never exercised, when did the property pass? I should say at the date of the deed. What property then passed? I should answer such property as he then possessed and was described in the deed. If he had revoked this question could not, I think, well arise, because the property would either be part of his actual estate or not. But there would be no trust estate.

As for the accretions, they never were his. He never gave them, and they never "passed"; they were from the first moment of their existence the property of the then owner of the principal property—that is, the settlee. That is what would be held if there were no Stamp Act, and that Act does not alter that fact.

No doubt, the valuation must be made as at the date of the death. The trustee must under sec. 22 of the Act of 1904 deliver an account of the estate—not the whole trust estate, but the estate as defined by the Act. But still the property is fixed. It must be the property which *passed* so far as it exists, and in whatever form it exists. The phrase "proceeds of sale," as dis-

tinguished from the identical property, somewhat weakens the Crown case in this respect, but still I assume the words are sufficient to comprise the property assigned, into whatever shape it may have been transmuted, so long as it remains substantially the representative of the property actually transferred.

To say the best for the Crown here, this is not proved; rather, I infer it is new property that never was at any moment in John Dent's ownership or possession, that never could have been and never was *passed* by him to anyone, and therefore is outside the sub-sec. (*e*) of sec. 49 (2). The sub-sec. (*e*) is an arbitrary rule, making liable to duty on the death of the settlor whatever property he has voluntarily settled, at any time since 22nd May 1894, if he retained the smallest interest in it or retained the power of revocation. It may operate justly or unjustly. It is a hard thing that where he has many years before his death given away nineteen-twentieths of his interest in the property, retaining one-twentieth part, the whole should be taxable as if he had retained the full unqualified ownership. But the legislature has chosen to say so, by drawing a hard and fast line, which may work harshly in some cases, but calls for no effort to broaden it. I see very strong reason for not straining the words beyond their natural and legal effect. In *Commissioner of Stamp Duties* v. *Stephen* (1) Lord *Lindley*, speaking for the Privy Council, referred to sec. 49 (2) as relating to properties which once belonged to the deceased. That properly describes them in substance. In other words the Act taxes what the deceased once had and parted with, not what else he might have had if he had not parted with the property he had, and if he had employed the same exertion, skill and expenditure as the settlee. If the latter had improved the property given, it may be that it must under the Act be valued as at the date of the testator's death as being the property given, but if the identity of the new property is distinct from that of the old, that technical reason disappears, and justice may operate. The testator's debts (sec. 53 of the Act of 1898 and sec. 1 (2), and the Schedule to the Act of 1899) may be deducted. But I cannot see where any deduction is allowed for the settlee's expenditure or debts in creating or maintaining

(1) 1904 A.C., 137.

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the additions. This adds enormously to the injustice of taxing one man in respect of his own property, because another one gave him other property which contributed to the production of the new. I should require very distinct words to lead me to such a result.

Reference to Schedule 1 of the Act of 1904 seems to me to confirm the view I have taken. In that Schedule a settlement or voluntary conveyance is dutiable as on a conveyance or sale. How would such a settlement be assessed? Would it be assessed upon the actual property or on that and the progeny? And the Schedule proceeds: "but the duty hereunder may be deducted from any duty under sec. 49 of the Principal Act and the *Probate Duties (Amendment) Act* 1899 if on the death of the settlor such duty be leviable and collected in respect of the property included in such settlement or voluntary conveyance." Now, the property included in such settlement, as *Thomas* v. *Kelly* (1) points out, cannot be future property, and looking at the language of the Act wherever it can throw any light on the subject, I come to the conclusion the appellants are right on this point too.

*Appeal allowed in part and dismissed in part.*

Solicitors, for appellants, *Crommelin, Bertie & Co.*, Grenfell, by *Ellis & Button.*

Solicitor, for respondent, *J. V. Tillett*, Crown Solicitor.

C. E. W.

(1) 13 App. Cas., 506.