[HIGH COURT OF AUSTRALIA.]

OSBORNE AND OTHERS . . . . . APPELLANTS;

AGAINST

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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SYDNEY, *April* 13.

Knox C.J., Gavan Duffy and Rich JJ.

Estate Duty—Assessment—Estate of deceased person—Surrender of life estate within one year of death—Property deemed to be part of estate of deceased—Corpus of estate or life interest—Estate Duty Assessment Act 1914-1916 (*No.* 22 *of* 1914 —*No.* 29 *of* 1916), *sec.* 8 (4) (*a*).

Sec. 8 (4) of the *Estate Duty Assessment Act* 1914 provides that "Property (*a*) which passed from the deceased person by any gift *inter vivos* or settlement made before or after the commencement of this Act within one year before his decease, or, being property comprised in a settlement under which he was tenant for life, the life interest of which was surrendered by him to the remaindermen within one year before his decease, . . . shall for the purposes of this Act be deemed to be part of the estate of the person so deceased."

Held, that the effect of that provision with respect to property the life interest in which has been surrendered by a deceased life tenant to the remaindermen within one year before his decease is that the life interest of the deceased in the property, and not the property itself, is to be deemed to be part of the estate of the deceased.

CASE STATED.

On the hearing of an appeal by Henry Stuart Osborne, Frederick Bushby Wilkinson and Frank Marshall Osborne from an assessment of them as executors and trustees of the will of George Osborne deceased by the Federal Commissioner of Taxation under the *Estate Duty Assessment Act* 1914, *Knox* C.J. stated a case, which was substantially as follows, for the opinion of the Full Court:—

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1. This matter is an appeal by the above-named appellants, who are the executors and trustees of the will of George Osborne deceased (hereinafter called the testator), against the assessment made by the respondent under the provisions of the *Estate Duty Assessment Act* 1914 of estate duty payable by the appellants in respect of the estate of the said testator.

2. The said testator on 24th April 1918 duly made his last will and testament whereby he appointed the appellants executors and trustees thereof, and on 13th July 1919 made a codicil thereto which did not alter or affect such appointment.

3. The said testator on 29th March 1920 died without having altered or revoked his said will, and on 22nd April 1920 probate thereof was granted to the appellants by the Supreme Court of New South Wales in its probate jurisdiction.

4. At the dates of his will and death the testator was domiciled in Australia, and was entitled to considerable real and personal property situated in Australia.

5. By an indenture of marriage settlement made 15th August 1865 between the said testator of the first part, his late wife Sophia Ann Kate Osborne (then Towns, a spinster) of the second part, Robert Towns of the third part and Henry Hill Osborne and Alick Osborne (trustees) of the fourth part, the said testator conveyed certain hereditaments and premises therein described, being amongst others the lands now contained in certificate of title, vol. 1960, fol. 136, dated 8th April 1909, issued under the provisions of the *Real Property Act*, unto and to the use of the said trustees, their heirs and assigns upon trust after his marriage to permit the said testator and his assigns to receive the rents, issues and profits thereof during his life without impeachment of waste, and immediately after his decease to stand possessed of the said hereditaments and premises in trust for all and every, or such one or more exclusively of the other or others, of the child or children, grandchild or grandchildren of the said testator by the said Sophia Ann Kate Towns to be born in the lifetime of the said George Osborne or Sophia Ann Kate Towns or the survivor of them or any future wife with whom he might intermarry, at such age, day or time, or respective ages, days or times, for such estate or estates or interest or

interests, and, if more than one, in such shares or proportions and subject to such powers, provisoes, conditions, restrictions, limitations and remainders over, and charged and chargeable with such sum and sums of money either annual or in gross being for the benefit of some one or more of his said children and grandchildren, and in such manner as the said testator should by any deed or instrument or instruments in writing with or without power of revocation and new appointment or by his last will and testament or any codicil or codicils thereto direct or appoint, and in default of such direction or appointment or so far as any direction or appointment should not extend upon trust for all and every the children or child of the testator by the said Sophia Ann Kate Towns or any future wife as tenants in common if more than one and their several and respective heirs, the share of each child to be vested in interest on his or her attaining the age of twenty-one years, and upon certain further trusts in certain events not material to be herein set forth; and it was thereby provided that notwithstanding the said trusts the said testator might appoint or devise to or in favour of any wife who might survive him the whole or any part of the income of the said hereditaments and premises for the life of such wife or for any interest determinable on or before her death; and it was thereby further provided that the trustees should with the consent in writing of the said testator during his life and after his decease at their or his own discretion have power to sell any of the said hereditaments and premises and with such consent as aforesaid to invest the proceeds of any such sale and to hold the said investments upon the same trusts as therein declared in respect of the said hereditaments and premises.

6. The contemplated marriage in respect of which the said indenture of marriage settlement was made duly took place. The said Sophia Ann Kate Osborne (formerly Towns) died on 8th June 1901.

7. Prior to 27th September 1906 the said hereditaments and premises other than the lands contained in the said certificate of title had been sold by the said trustees, and the proceeds of sale had been invested in various mortgages, war loan bonds and other investments of personal property.

8. By a deed poll made 27th September 1906 the said testator, after reciting the said indenture of marriage settlement, duly directed

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and appointed all and singular the lands, hereditaments and tenements comprised in the said indenture of marriage settlement and also all and singular the moneys, stocks, funds, securities, income, rents, dues and profits arising therefrom upon trust for his children Nina O'Hara, Robert Towns Osborne, Jeanie Throsby, the appellant Henry Stuart Osborne, Mary Dorothy Wilkinson, D'Arcy Wentworth Towns Osborne, the appellant Frank Marshall Osborne, and Sara Ann Kathleen Osborne in equal shares as tenants in common. The said children were the children of the said marriage and had all attained the age of twenty-one years prior to the said 27th September 1906 except the last named, who attained that age prior to 1916.

9. On or about 24th January 1914 the said testator married a second time.

10. By an indenture of release made 27th June 1919 between the said testator of the first part, the appellants Frederick Bushby Wilkinson and Henry Stuart Osborne of the second part, and the said Nina O'Hara, Charlotte Osborne (widow of the said Robert Towns Osborne deceased), the said Jeanie Throsby, the appellant Henry Stuart Osborne, the said Mary Dorothy Wilkinson, D'Arcy Wentworth Towns Osborne, the appellant Frank Marshall Osborne and the said Sara Ann Kathleen Bovill (formerly Osborne) of the third part, after reciting the said indenture of marriage settlement, and that part of the said lands had been sold, and that the then present trustees of the said indenture of marriage settlement hold the investments set forth in the schedule thereto and being the said investments representing the said proceeds of the sale, and that the unsold lands were the said lands contained in the said certificate of title, and also reciting the said deed poll of 27th September 1906, and further reciting, as the fact was, that one of the said eight children, namely, Robert Towns Osborne, had died on 24th October 1916 having by his will dated 16th May 1916 devised and bequeathed all his property to his widow, the said Charlotte Osborne, whom he appointed executrix with one William Deuchar Gordon as executor, and that probate of the said will had been granted to the said executor and executrix, and that all the debts of the said Robert Towns Osborne had been paid, and that the said executor and executrix had assented to the said devise and bequest to the said Charlotte Osborne, and

further reciting that the said testator (George Osborne) was desirous of surrendering and extinguishing all his remaining life interest and his power to appoint and any other powers in or over the investments and lands then subject to the trusts of the said indenture of marriage settlement to the persons entitled in remainder: It was witnessed that, in pursuance of the premises and in consideration of the natural love and affection of the said testator for his said children and daughter-in-law, he the said testator did thereby release all the said investments and lands held subject to the trusts of the said indenture of marriage settlement from the power of appointment in favour of any wife surviving him and all other powers, if any, vested in him under the said settlement, to the intent that the said power might be absolutely extinguished; and it was also witnessed that the said testator did for the same consideration thereby surrender and release unto and to the use of the said trustees, their heirs, executors, administrators and assigns all the income thereafter to arise from and the life interest or other the claim or demand of him the said testator in the said investments and lands to hold upon trust as to one-eighth thereof for each of the parties thereto of the third part, to the intent that the same life interest should merge and coalesce with their absolute remainders and that one-eighth of the said investments and land should immediately become an estate in possession in equity in each of the said parties thereto of the third part and in his or her heirs, executors, administrators and assigns for an absolute interest or fee simple in possession.

11. Between the said 27th June 1919 (the date of indenture of release) and the said 29th March 1920 (the date of the said testator's death) the trustees of the said indenture of marriage settlement distributed as capital to the said eight parties of the third part the sum of £6,640 and as income to the same persons the sum of £1,059 16s. 8d.

12. The respondent duly caused an assessment to be made in respect of the estate of the said testator.

13. The appellants contended that according to the true construction of the *Estate Duty Assessment Act* 1914 estate duty should not be assessed nor payable upon the sum of £35,013 12s. 6d., which is the amount at which the assets comprised in the said indenture of

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marriage settlement were assessed by the respondent, as the same did not form part of the estate of the said testator within the meaning of the said Act and should be eliminated from the said assessment.

14. The respondent, however, assessed the value of the said estate for the purposes of estate duty under the said Act at £88,013, and in such assessment included the same sum of £35,013 12s. 6d., the assessed value of the assets comprised in the said indenture of marriage settlement; and on the said assessed value assessed the duty payable by the appellants in respect of the said estate at £8,801 6s.

15. The appellants duly and within the prescribed time caused to be lodged with the respondent an objection in writing against the said assessment so far as the same relates to the said sum of £35,013 12s. 6d.

16. The Commissioner duly gave the appellants written notice of his decision disallowing the said objection.

17. The appellants, being dissatisfied with the said decision, within the prescribed time duly lodged and served a notice of appeal from the said assessment praying this Honourable Court to order that the assessment should be made on a dutiable value of £52,999 7s. 6d., being the said sum of £88,013 less the said sum of £35,013 12s. 6d.

18. I have thought fit to state this case for the opinion of the Full Court upon the following questions arising in the appeal, which are, in my opinion, questions of law, namely:—

(1) Does the property the subject of the said indenture of marriage settlement or any and, if so, what portion thereof constitute portion of the estate of the said testator within the meaning of the *Estate Duty Assessment Act* 1914-1916?

(2) Should estate duty under the said Act be assessed or payable upon the said sum of £35,013 12s. 6d. or any and, if so, what portion thereof?

(3) Should the said sum of £35,013 12s. 6d. be eliminated from the said assessment?

Leverrier K.C. (with him *J. A. Browne*), for the appellants.

Weston (with him *Braddon*), for the respondent.

[During argument reference was made to *Horsfall* v. *Commissioner of Taxes (Vict.)* (1); *Attorney-General* v. *Beech* (2); *Attorney-General* v. *De Préville* (3); *National Trustees, Executors and Agency Co. of Australasia* v. *Federal Commissioner of Taxation* (4); *Jackson* v. *Federal Commissioner of Taxation* (5).]

The judgment of the COURT, which was delivered by KNOX C.J., was as follows:—

The questions submitted by this case turn entirely on the construction of section 8 (4) (*a*) of the *Estate Duty Assessment Act* 1914-1916, and that section must be construed in the light of the provisions of the Act taken as a whole. This Court has laid down in several cases, including the case of *Jackson* v. *Federal Commissioner of Taxation* (5), to which my brother *Rich* has referred, that the scheme of the Act was to tax the estate of a deceased person in respect of all property which that person owned at the date of his death, and also in respect of all property which he had previously owned but had disposed of under circumstances which, in the opinion of the Legislature, indicated that he had disposed of it in order to avoid payment of the duty which would have been payable if he had retained it up to the time of his death. We are satisfied that that is the scheme of the Act, and, if the words of the section under consideration can fairly be read consistently with that scheme, it is proper so to read them.

The sub-section itself is not from any point of view very artistically expressed. Mr. *Weston* very fairly admits that on his construction of the sub-section the words "being property" are redundant. We see no reason why, having regard to the scope and object of the Act, the words "which passed from the deceased person," which are found at the beginning of the sub-section, should not govern, as we think they were intended to govern, both the property mentioned in the latter part of the sub-section and that mentioned in the former part. As a matter of grammar they are capable of being read in this way, and so reading them the sub-section falls into line with

(1) 24 C.L.R., 422.
(2) (1899) A.C., 53.
(3) (1900) 1 Q.B., 223.
(4) 22 C.L.R., 367.
(5) 27 C.L.R., 503.

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the rest of the Act. Where a life tenant does not dispose of his life estate before his death no duty would be payable in respect of the life interest under this Act, but to put upon the sub-section the construction contended for by Mr. *Weston* would lead to the absurd result that if the life tenant during the last year of his life made a voluntary disposition of his life interest his estate would be liable to pay duty not merely on the value of his life interest but also on the capital value of the settled property of which he was not in any sense the owner.

For these reasons we think that the corpus of the property comprised in the settlement is not liable to duty under the Act, and that the questions should be answered : (1) No ; (2) No ; (3) Yes.

Questions answered accordingly.

Solicitors for the appellants, *Wilkinson & Osborne.*

Solicitor for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.