

[HIGH COURT OF AUSTRALIA.]

THE REGISTRAR OF PROBATES (SOUTH }
AUSTRALIA) } APPELLANT ;

AND

ANGAS AND OTHERS RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF
SOUTH AUSTRALIA.

Succession Duty—Liability—Repeal of statute—Exception from repeal—General H. C. OF A.
power of appointment—Exercise of power by will—Succession of appointor— 1921.
Probate and Succession Duty Act 1876 (S.A.) (No. 35), secs. 4, 23, 31, 56—
Succession Duties Act 1893 (S.A.) (No. 567), sec. 3. ~~~~~
ADELAIDE,

Sept. 19, 20,
22.

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Knox C.J.,
Rich and
Starke JJ.

The *Probate and Succession Duty Act 1876 (S.A.)*, by sec. 4 and the First and Second Schedules, imposes duties on probates of wills and letters of administration and duties on successions to real and personal estate. Sec. 23 provides that "Where any person shall have a general power of appointment over property under any disposition of property taking effect upon the death of any person dying after the coming into operation of this Act, he shall, in the event of his making any appointment thereunder, be deemed to be entitled at the time of his exercising such power to the property or interest thereby appointed as a succession derived from the donor of the power." The *Succession Duties Act 1893 (S.A.)*, by sec. 3, provides that "The Acts mentioned in the First Schedule hereto" (which includes the *Probate and Succession Duty Act 1876*) "are hereby repealed from and after the coming into operation of this Act, except so far as regards the applicability of such Acts to the estates of persons dying, or to successions becoming chargeable with duty, before the day when this Act shall come into operation. This repeal shall not affect— (a) the past operation of any Act hereby repealed; . . . nor (b) any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment hereby repealed;" &c.

Held, that the exception from repeal contained in sec. 3 of the Act of 1893 "so far as regards the applicability of such Acts to the estates of persons

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dying . . . before . . . this Act shall come into operation" did not preserve the liability to duty under the Act of 1876 of a succession to property which had formed part of the estate of a person dying after the Act of 1876, and before the Act of 1893, came into operation, where the succession did not become chargeable with duty until after the Act of 1893 came into operation.

Held, therefore, that, if under sec. 23 of the Act of 1876 a person who, having under the will of a testator who died after that Act came into operation a general power of appointment by deed or will over certain property of the testator, exercised that power by will, took a succession upon his own death (as to which *quære*), succession duty was not payable when the appointor died after the Act of 1893 came into operation.

Decision of the Supreme Court of South Australia affirmed.

APPEAL from the Supreme Court of South Australia.

George Fife Angas, who died on 15th May 1879, by his will dated 11th December 1871, after certain specific devises and bequests, devised all his real and personal estate to trustees in trust (*inter alia*) to stand possessed of one fourth part of his residuary real and personal estate for John Howard Angas for life with remainder to such person or persons as John Howard Angas should by deed or will appoint. Succession duty under the provisions of the *Probate and Succession Duty Act 1876* (S.A.) upon the life interest of John Howard Angas in the one fourth part of the residuary estate of George Fife Angas was duly assessed and paid. John Howard Angas, who died on 17th May 1904, by his will dated 23rd November 1900 exercised the general power of appointment over the one fourth part of the residuary estate of George Fife Angas conferred upon him by the will of George Fife Angas. Succession duty under the provisions of the *Succession Duties Act 1893* (S.A.) in respect of the one fourth part of the residuary estate of George Fife Angas as and for property over which John Howard Angas had a general power of appointment was duly assessed and paid by the trustees of the estate of John Howard Angas, namely, Charles Howard Angas, John Alexander Thomson and Leonard William Bakewell. The Registrar of Probates made a further assessment, purporting to be made under the *Probate and Succession Duty Act 1876*, of succession duty in respect of the succession of John Howard Angas to the one fourth part of the residuary estate of George Fife Angas

upon the exercise by John Howard Angas by his will of the general power of appointment. The trustees of John Howard Angas then appealed to the Supreme Court from that assessment by a petition praying for a declaration that no succession or other duty was due or payable under the *Probate and Succession Duty Act* 1876 or the Acts amending the same in respect of the exercise by John Howard Angas by his will of the general power of appointment over the one fourth part of the residuary estate of George Fife Angas. The petition was heard by the Full Court, which made a declaration in the terms prayed, holding that any provisions of the *Probate and Succession Duty Act* 1876 which might have imposed the succession duty in question were repealed by the *Succession Duties Act* 1893, and leaving open the question whether the provisions of the Act of 1876, if unrepealed, did impose that succession duty.

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From the decision of the Supreme Court the Registrar of Probates now appealed to the High Court.

Cleland K.C. (with him *Ziesing*), for the appellant. The succession duty claimed under the *Probate and Succession Duty Act* 1876 is properly claimed; for the provisions of that Act which impose the liability to such a duty come within the exception from the repeal enacted by sec. 3 of the *Succession Duties Act* 1893 as regards "the applicability of such Acts to the estates of persons dying" before the *Succession Duties Act* 1893 came into operation. *In re Hamilton* (1) was wrongly decided. The Act of 1876 imposed two classes of duty in respect of the estates of deceased persons, namely, probate duty in respect of the aggregate value of the estate and succession duty in respect of any portion of the estate of a deceased person to which another person succeeded. It also imposed a succession duty where there was no estate of a deceased person to which there was a succession (sec. 21)—for example, a succession under a settlement *inter vivos*. The first exception from repeal in sec. 3 of the Act of 1893 covers both probate duty and succession duty in respect of estates of deceased persons who died before the Act came into operation; and the second exception, that is, "successions becoming chargeable with duty" before the Act came into operation, was

(1) (1900) S.A.L.R., 43.

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intended to cover those successions which were not in respect of estates of deceased persons. Reading the words of the first exception literally, it cannot be said that the provisions of the Act of 1876 with regard to succession duty do not apply to the estate of George Fife Angas. The provision in sec. 3 (a) that the repeal is not to affect "the past operation of any Act hereby repealed" covers this case; for the term "past operation" means an operation which at the time the Act of 1893 came into force was ready to take effect on the happening of a particular event. Under sec. 23 of the Act of 1876 John Howard Angas, at the time he exercised the power of appointment, was to be deemed to be entitled to a succession derived from George Fife Angas, and therefore the succession duty now claimed was properly claimed. The words "taking effect" in that section refer back to "a general power of appointment," and not to "any disposition of property" (*In re Lovelace* (1); *In re Stewart* (2)). The person in whose favour John Howard Angas appointed would take a succession under sec. 20.

[STARKE J. referred to *Hanson's Death Duties*, 6th ed., p. 666.

[RICH J. referred to *In re Gray* (3).]

Isbister K.C. and *Moulden*, for the respondents. Under the Act of 1876 a person who takes under a general power of appointment takes a new estate as a succession from the appointor and not as a succession from the donor of the power (*Attorney-General v. Earl of Selborne* (4); *Duke of Northumberland v. Commissioners of Inland Revenue* (5)). The will of George Fife Angas, therefore, did not create a succession in respect of the person who took under the appointment. John Howard Angas did not take a taxable succession on the exercise of his power of appointment, for although under sec. 23 he was to be deemed entitled to the property appointed on the exercise by him of the power he did not come into possession, and sec. 31 is an answer to the claim for duty (*In re Chapman's Trusts* (6)). A person cannot take a succession on his own death (*Hanson's Death Duties*, 6th ed., p. 56). Even if under the Act of 1876 the duty claimed would have been payable, the Act of 1893

(1) 4 DeG. & J., 340, at p. 348.

(2) (1910) S.A.L.R., 108, at p. 116.

(3) (1899) S.A.L.R., 68.

(4) (1902) 1 K.B., 388.

(5) (1911) 2 K.B., 343, at p. 354.

(6) 2 H. & M., 447.

repeals the Act of 1876 so far as it would support the claim. *In re Hamilton* (1) was correctly decided, and is precisely in point. These being taxing Acts, it must be shown by clear and unambiguous words that the tax is imposed (*Attorney-General v. Milne* (2); *Commissioners of Stamps (Qd.) v. Wienholt* (3)). The decision in *In re Hamilton* has stood for twenty years, and property has been dealt with on the assumption that the decision was correct, and the Court should not now interfere with it. Where one system of taxation is repealed and another substituted, in the absence of clear words to the contrary it would be reasonable to suppose that double taxation was not intended.

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Cleland K.C., in reply. Sec. 31 of the Act of 1876 applies only to cases when the same interest is transmitted from one successor to another by death. If the other view is correct sec. 23 has no application to appointments by will. [He referred to *In re Blackburn*; *Smiles v. Blackburn* (4); *In re Hayes*; *Turnbull v. Hayes* (5).]

Cur. adv. vult.

THE COURT delivered the following written judgment:—

Sept 22.

This is an appeal from a decision of the Supreme Court declaring that no succession or other duty is payable in respect of the exercise by John Howard Angas, by his will, of a general power of appointment given to him by the will of George Fife Angas deceased over one quarter of the residuary estate of the said George Fife Angas. George Fife Angas died in the year 1879, having by his will devised his residuary real and personal estate to his trustees on trust as to one quarter thereof for John Howard Angas for life with remainder to such person as the said John Howard Angas should by deed or will appoint. John Howard Angas died in the year 1904, having by his will exercised the general power of appointment given him by the will of George Fife Angas. It was in respect of the "succession" created by the exercise of this power of appointment that the Commissioner

(1) (1900) S.A.L.R., 43.

(2) (1914) A.C., 765, at p. 781.

(3) 20 C.L.R., 531.

(4) 43 Ch. D., 75.

(5) (1901) 2 Ch., 529, at p. 532.

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claimed that duty was payable under sec. 23 of the *Probate and Succession Duty Act* 1876. That Act was repealed by the *Succession Duties Act* 1893, which, however, contained a saving clause in the following words:—"The Acts mentioned in the First Schedule hereto are hereby repealed from and after the coming into operation of this Act, except so far as regards the applicability of such Acts to the estates of persons dying, or to successions becoming chargeable with duty, before the day when this Act shall come into operation. This repeal shall not affect—(a) the past operation of any Act hereby repealed; nor anything done or suffered under any enactment hereby repealed; nor (b) any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment hereby repealed; nor (c) any penalty, forfeiture, or punishment incurred in respect of any offence committed against any enactment hereby repealed; nor (d) any investigation, legal proceeding, or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture, or punishment, as aforesaid. Any such investigation, legal proceeding, and remedy may be carried on as if this Act had not been passed." The appellant contends that these words preserve the liability to succession duty in respect of all successions derived from George Fife Angas, and that John Howard Angas, by reason of sec. 23, was to be deemed to be entitled to the property in question as a succession derived from George Fife Angas and consequently that his executor was liable to succession duty thereon. On the argument before us Mr. *Cleland* did not seek to support the assessment on any of the provisions of sec. 3 other than the words "except so far as regards the applicability of such Acts to the estates of persons dying . . . before the day when this Act shall come into operation." He contended that these words preserved the liability to succession duty of all property which had formed part of the estate of a person dying after the Act of 1876, and before the Act of 1893, came into operation. In our opinion this is not the proper interpretation of the words relied on. Their effect is to preserve the liability to duty of the *estate* of a person so dying. This may be illustrated by reference to the provisions of the Act of 1876. By that Act a probate duty was imposed on the estates of persons dying after the commencement of the Act payable by the executor

or administrator out of the assets coming to his hands as such; while the succession duty imposed was only payable by the person who took beneficially property under the will or intestacy (sec. 56). The facts show clearly that the duty claimed in this case was not a duty upon the estate of George Fife Angas.

This, in substance, was the decision of the learned Judges in the Supreme Court, and we agree with it. It may be observed that the property in question is taxable and duty has in fact been paid on it under the Act of 1893 (sec. 7 (b)).

Mr. *Isbister* contended that sec. 23, even if saved by the later Act, did not apply because a person could not take a succession on his own death. In the view we take of this case it is unnecessary for us to express an opinion on this point.

The appeal is dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *F. W. Richards*, Crown Solicitor for South Australia.

Solicitors for the respondents, *Moulden & Sons*.

B. L.

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