

H. C. OF A.
1926.
FIRTH
v.
HALLORAN.
Rich J.

for what the Legislature did in the exercise of its constitutional powers, in the absence of express covenant applicable to such an event.
I concur in the opinion that the appeal should be dismissed.
RICH J. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Allen, Allen & Hemsley.*
Solicitors for the respondent, *Minter, Simpson & Co.*

Cons DKL Holding Co (No2) v Commissioner of Stamp Duties (NSW) 149 CLR 431	Appl DKL Holding Co (No2) Pty Ltd v Comr of Stamp Duties 56 ALJR 287	Cons ACT Revenue, Comr for v Perpetual Tru- stee Co (Can- berra) (1993) 118 ACTR 1	Appl Stamp Duties, Chief Commissioner of v Buckle (1998) 72 ALJR 243	Refd to CSD (NSW) v Buckle (1998) 192 CLR 226	Appl Chief Comr of Stamp Duties (NSW) v JSPT Pty Ltd (1998) 41 ATR 29	Appl Comr of State Revenue v Pioneer Concrete (2002) 76 ALJR 1534	B. L. Appl Comr of State Revenue v Pioneer Concrete (2002) 192 ALR 56
--	--	--	--	--	--	---	--

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES }
(NEW SOUTH WALES) }

APPELLANT ;

AND

THE PERPETUAL TRUSTEE COMPANY }
LIMITED }

RESPONDENT.

(QUIGLEY'S CASE.)

ON APPEAL FROM THE SUPREME COURT OF
NEW SOUTH WALES.

H. C. OF A.
1926.
SYDNEY,
Aug. 12, 27.
Knox C.J.,
Isaacs,
Gavan Duffy,
Rich and
Starke JJ.

Stamp Duties—Conveyance—Deed of settlement—New beneficial interest—Trust for settlor for life—Ad valorem duty—Stamp Duties Act 1920-1924 (N.S.W.) (No. 47 of 1920—No. 32 of 1924), secs. 65, 66 (1), 73 (1) (b), (c).
By sec. 66 (1) of the Stamp Duties Act 1920-1924 (N.S.W.) it is provided that “Subject to the provisions of this Act every conveyance is to be charged with ad valorem duty in respect of the value of the property thereby conveyed.” The expression “conveyance” is defined by sec. 65 as including (inter alia) a settlement. Sec. 73 (1) provides that certain instruments are not to be charged

with *ad valorem* duty as conveyances, among them “(b) a conveyance under which no beneficial interest passes in the property conveyed, or made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust (whether expressed or implied) and not made for valuable consideration.”

A person who was beneficially interested in certain real and personal property, subject only to a life interest of another person in part of it, executed a deed of settlement whereby he conveyed the property to a trustee in trust for himself for life with certain remainders over in favour of others.

Held, that the deed of settlement was within sec. 66 (1) and not within the exemption in sec. 73 (1) (b), and was therefore liable to *ad valorem* duty in respect of the value of the whole of the property thereby settled.

Decision of the Supreme Court of New South Wales (Full Court): *Perpetual Trustee Co. v. Stamp Commissioner*, (1926) 26 S.R. (N.S.W.) 303, reversed.

H. C. OF A.
1926.
~
COMMISSIONER OF
STAMP
DUTIES
(N.S.W.)
v.
PERPETUAL
TRUSTEE
CO. LTD.
(QUIGLEY'S
CASE.)

APPEAL from the Supreme Court of New South Wales.

A special case, which was substantially as follows, was stated by the Commissioner of Stamp Duties under sec. 124 of the *Stamp Duties Act 1920-1924* (N.S.W.):—

1. The Perpetual Trustee Co. Ltd. (hereinafter called the Company) presented a deed of settlement dated 16th November 1925 to the Commissioner for assessment.

2. The property which is the subject of the said deed of settlement comprises: (a) the sum of £12,000; (b) an undivided moiety in the trust premises settled by a certain indenture of settlement dated 21st January 1897—the value of such moiety was provisionally accepted as £24,833; (c) an undivided moiety of the trust premises settled by a certain indenture of settlement, dated 25th February 1913—such moiety was at the date of the execution of the deed of settlement and still is subject to the life interest therein of one Kathleen Quigley therein mentioned, and the value of the settlor's reversionary interest therein was provisionally accepted as £30,304.

3. The Commissioner claims that *ad valorem* duty is payable in respect of the said deed of settlement dated 16th November 1925 as a conveyance within the meaning of sec. 65 of the *Stamp Duties Act 1920-1924* at the rate of 15s. for every £100 and every fractional part of £100 of the value of the property thereby settled.

4. The Commissioner accordingly assessed the duty on the values above set out at £504.

H. C. OF A.
1926.

COMMISSIONER OF
STAMP
DUTIES
(N.S.W.)

v.
PERPETUAL
TRUSTEE
CO. LTD.
(QUIGLEY'S
CASE.)

5. The Company duly paid the said sum of £504, together with the sum of £101 by way of fine under the said Act.

6. The Company claims that *ad valorem* duty is not payable in respect of the said deed of settlement, but that a fixed duty of £1 only is payable thereon as a conveyance under which no beneficial interest passes in the property conveyed within the meaning of sec. 73, sub-sec. 1, par. (b), of the said Act; or in the alternative that such instrument is chargeable with *ad valorem* duty as a conveyance only on the value as at its date of the remainder in the property thereby settled expectant on the death of the settlor Roy William Mitchell Quigley.

9. The questions for the determination of the Court were (*inter alia*) as follows :—

- (1) Is the said deed of settlement liable to *ad valorem* duty as a conveyance ?
- (2) If the answer to the previous question is in the affirmative, is the said deed of settlement liable to *ad valorem* duty as a conveyance on the value of the whole of the property thereby settled or on the value of the remainder in such property expectant on the death of the settlor Roy William Mitchell Quigley ?
- (3) What is the duty payable thereon ?

The deed of settlement of 16th November 1925, made between Roy William Mitchell Quigley (the settlor) and the Perpetual Trustee Co. Ltd. (the trustee), recited the deeds of settlement of 21st January 1897 and 25th February 1913. It further recited that the settlor on attaining the age of twenty-one years became entitled under and by virtue of the deed of 21st January 1897 to one moiety of the trust premises thereby settled, and under and by virtue of the deed of 25th February 1913 upon the death of his step-mother Kathleen Quigley, and subject in the meantime to her life interest, became entitled to the other moiety of the trust premises, and that the Company as trustee of those settlements held a sum of £12,000 and upwards in respect of capital and income received by them on behalf of the trust premises which became payable to the settlor on his attaining the age of twenty-one years. The settlor directed that

the trust premises and the settled fund should be held by the trustee upon trust to pay to the settlor until his marriage such portion of the rents and profits as he should from time to time require, and from and after his marriage upon trust "to hold the said trust premises and settled fund and the rents income and profits to be derived therefrom upon such trusts and to and for such ends intents and purposes as he the said settlor shall with the consent and approbation of the Chief Judge in Equity of the Supreme Court of New South Wales for the time being by deed appoint and in default of and until such appointment and so far as any such appointment if made shall not extend Then upon trust to pay such rents income and profits or such portion thereof as aforesaid to him the said settlor during his life And from and after his death to hold the said trust premises and settled fund in trust for all his children who being males shall attain the age of twenty-one years or being females shall attain that age or marry under that age and if more than one in equal shares as tenants in common And in default of any such children on such trusts and to and for such ends intents and purposes as he the said settlor shall by his will direct or appoint But should the said settlor die intestate and without having exercised his aforesaid power of appointment by deed Then in trust to pay such rents income and profits to any wife of the said settlor who shall then be living during her life And after her death or in case the said settlor shall die unmarried Then to hold the said trust premises and settled fund in trust for the said Kathleen Quigley for her own use and benefit absolutely."

H. C. OF A.
1926.

COMMISSIONER OF
STAMP
DUTIES
(N.S.W.)

v.
PERPETUAL
TRUSTEE
CO. LTD.
(QUIGLEY'S
CASE.)

The Full Court answered question 1 in the affirmative, and question 2 by saying that the deed of settlement was liable to *ad valorem* duty as a conveyance on the value of the remainder in the property expectant on the death of the settlor: *Perpetual Trustee Co. v. Stamp Commissioner* (1).

From that decision the Commissioner now appealed to the High Court.

Flannery K.C. (with him *S. A. Thompson* and *Nicholas*), for the appellant. The respondent, being beneficially entitled to the

H. C. OF A.
1926.
COMMISSIONER OF
STAMP
DUTIES
(N.S.W.)
v.
PERPETUAL
TRUSTEE
CO. LTD.
(QUIGLEY'S
CASE.)

absolute ownership of the property subject only to the life interest of his step-mother, by the deed of settlement conveyed the whole of the property to the trustee. The deed is a conveyance within the meaning of sec. 66 (1) of the *Stamp Duties Act* 1920-1924 and falls literally within the terms of that section, and is taxable accordingly. The beneficial interest to the settlor passes under the deed just as does the beneficial interest in remainder. As a beneficial interest passes under the deed, it cannot fall within the exemption in sec. 73 (1) (b). There is no reason for departing from the literal meaning of sec. 66 (1).

[ISAACS J. referred to *Inland Revenue v. Oliver* (1).]

Jordan, for the respondent. Under sec. 66 (1) the instrument is charged with duty in respect of the value of the property thereby conveyed. The beneficial interest during the lifetime of the settlor was not conveyed. It remained after the conveyance where it was before. In the same way the conveyance of a mere legal estate would not be taxable under sec. 66 (1). If the beneficial interest during the lifetime of the settlor remained where it was before, the value of that beneficial interest must be deducted from the value of the property conveyed. Sec. 73 (1) (b) would, in that view, apply to a case such as where a person, instead of executing a power of attorney, conveyed property to a trustee in trust for himself. [Counsel referred to *Baker v. Inland Revenue Commissioners* (2) as to the corresponding section of the English Act 10 Edw. VII. c. 8, sec. 74.] If sec. 66 (1) would prima facie cover the life interest of the settlor, then so far as that life interest is concerned the deed comes within the exemption in sec. 73 (1) (b), the effect of which is that, to the extent that no beneficial interest passed, the property the subject of the conveyance is exempt.

Flannery K.C., in reply. The settlement of 16th November 1925 constitutes a perfectly new charter of interests (*Davidson v. Chirnside* (3)). The whole property passed and every beneficial interest came from the new charter.

(1) (1909) A.C. 427.

(2) (1924) A.C. 270.

(3) (1908) 7 C.L.R. 324, at p. 340.

[STARKE J. referred to *Commissioner of Stamp Duties (Q.) v. H. C. of A. Chaille* (1).]

Cur. adv. vult.

1926.
COMMISSIONER OF
STAMP
DUTIES
(N.S.W.)

v.
PERPETUAL
TRUSTEE
CO. LTD.

(QUIGLEY'S
CASE.)

Aug. 27.

The following written judgments were delivered :—

KNOX C.J., GAVAN DUFFY AND STARKE JJ. The *Stamp Duties Act* 1920 of New South Wales as amended by the Act of 1924, sec. 66 (1), enacts as follows : “ Subject to the provisions of this Act every conveyance is to be charged with *ad valorem* duty in respect of the value of the property thereby conveyed.” The expression “ conveyance ” includes a settlement. Sec. 73 (1) (b) of that Act provides that the following instruments are not to be charged with *ad valorem* duty as conveyances, namely, “ a conveyance under which no beneficial interest passes in the property conveyed, or made to a beneficiary by a trustee or other person in a fiduciary capacity under any trust (whether expressed or implied) and not made for valuable consideration.”

In this case one Quigley was beneficially entitled to certain real and personal property subject only to a life interest in part of it which was vested in his step-mother. In November 1925 Quigley executed a deed of settlement whereby “ he conveyed the property to the Perpetual Trustee Co. in trust for himself for life with certain remainders over in favour of others.” The instrument, in our opinion, falls within the provision of sec. 66 (1) and the property thereby conveyed includes the life interest limited to the settlor (*Davidson v. Chirnside* (2); *Commissioner of Stamp Duties (Q.) v. Chaille* (1)).

The learned Judges of the Supreme Court, however, were of opinion that the life interest limited to the settlor was within the exemption contained in sec. 73 (1) (b) of the Act, because it was a beneficial interest that had previously existed and in substance remained unaffected ; but this is inaccurate unless the limitation of a life interest to the settlor is regarded as a reservation to himself of that interest out of the property conveyed by him to the trustee upon the trusts of the settlement. Neither in form nor, in our opinion, in substance did the settlor make any such reservation. He granted and

(1) (1924) 35 C.L.R. 166.

(2) (1908) 7 C.L.R. 324.

H. C. OF A.
1926.

COMMISSIONER OF
STAMP
DUTIES
(N.S.W.)
v.
PERPETUAL
TRUSTEE
CO. LTD.
(QUIGLEY'S
CASE.)

Knox C.J.
Gavan Duffy J.
Starke J.

assigned unto the trustee the whole of his property, and then proceeded to create new interests including a beneficial interest for himself. He held that interest under the settlement and under no other title. The settlement is what *Griffith* C.J. termed the charter of his rights and obligations in respect of that interest. Consequently, in our opinion, the judgment of the Supreme Court should be reversed, and the question in par. 9 (2) of the special case answered as follows: The deed of settlement is liable to *ad valorem* duty on the value of the whole of the property thereby settled.

ISAACS J. The Commissioner, in my opinion, is entitled to succeed.

The instrument is within sec. 66 (1) of the *Stamp Duties Act*, as amended. That provision says: "Subject to the provisions of this Act every conveyance is to be charged with *ad valorem* duty in respect of the value of the property thereby conveyed." The view taken by the Supreme Court was that where and to the extent that an instrument, being a "conveyance," purports to transfer beneficial interests already in substance existing, it is not dutiable, because exempted by sec. 73. This view was rested on sub-sec. (1) (b) of sec. 73, it being thought that otherwise there would be no additional operation of sub-sec. (1) (c). That conclusion was urged before us for the respondent. It does not appear to me to represent accurately the force of those two sub-sections of sec. 73.

In sec. 66 (1) the word "property" is important. It is a word of variable import, depending here either on context or on statutory definition. In this Act it is defined thus: "'Property' includes real and personal property, and any estate or interest in any property real or personal, and any debt, and any thing in action, and any other right or interest" (Act No. 16 of 1924, sec. 2). It may, therefore, for the purposes of the Act mean either a tangible object—*res*—or some intangible right or rights—*jura*—which exist in relation to the *res*. Consequently, pursuant to sec. 66 (1), unless some other provision is found in the Act to the contrary, the whole of the "estate and interest" of the settlor in the real and personal property dealt with by the settlement is the "property" conveyed,

and therefore dutiable *ad valorem*. Henceforth the settlor's source of title and measure of rights are found in the settlement.

Par. (b) of sub-sec. 1 of sec. 73 refers, in my opinion, to a conveyance that either does not purport to transfer a beneficial interest at all, or, if it does, is made by a person in a recognized fiduciary position under a trust in favour of the transferee. Obviously that provision does not include the present instrument.

With respect to the next paragraph, par. (c), a different class of instrument is at all events primarily and mainly intended. That paragraph contemplates some instrument by which the beneficial interest purports to pass or to be admitted to have passed, and which is made, not by a trustee properly so called but by some one otherwise bound, or thinking himself bound, to execute it in favour of the transferee as an acknowledgement of an existing right.

The settlement is consequently not relieved from the *prima facie* liability created by sec. 66 (1), and so the appeal should be allowed.

RICH J. I agree that the appeal should be allowed.

Appeal allowed. Order appealed from discharged.

Questions answered:—(1) Yes. (2) On the full value of the whole of the property thereby settled. (3) £504, exclusive of fines. Respondent to pay costs in Supreme Court and of this appeal.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Davenport & Mawby*.

B. L.

H. C. OF A.
1926.

COMMIS-
SIONER OF
STAMP
DUTIES
(N.S.W.)

v.
PERPETUAL
TRUSTEE
CO. LTD.

(QUIGLEY'S
CASE.)

Isaacs J.