[PRIVY COUNCIL.]

THOMSON AND OTHERS . . . . APPELLANTS;

AND

THE COMMISSIONER OF STAMP DUTIES FOR NEW SOUTH WALES . . } RESPONDENT.

ON APPEAL FROM THE HIGH COURT.

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Stamp Duty (N.S.W.)—Settlement—Exclusion of settlor from any benefit—Trust to take effect after death of settlor—Stamp Duties Act 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *secs.* 49, 58—*Stamp Duties (Amendment) Act* 1914 (*N.S.W.*) (*No.* 3 *of* 1914), *sec.* 36.

A testator owned certain land in New South Wales and held certain conditionally purchased and conditionally leased lands there, the whole forming two station properties on which he and a partner carried on business as pastoralists under a deed of partnership executed in April 1896, under which the partnership was to continue for a term of seven years and the capital of the partnership was to consist of the lease of the lands comprised in the stations and certain stock and plant. In August 1896 the testator transferred the lands comprised in the station to his wife; and on the same day executed an indenture of settlement by which he and his wife declared that the wife should hold the lands upon trust, that the wife should either retain and manage the lands so long as the husband should think fit during his life and so long as the trustees of the settlement should think fit after his death, or at his request during his life and after his death at the discretion of the trustees sell and invest the proceeds of sale, his consent being required to any investment during his lifetime. The settlement then provided that during the joint lives of the testator and his wife she should retain for her sole use and benefit the whole of the rents and profits of the lands and investments and that after the death of either of them the trustee should pay one-fifth of the rents and profits to each of their five daughters during her life, with remainder over as to the corpus in favour of their children. The trustees

* Present—The Lord Chancellor, Lord Shaw of Dunfermline, Lord Carson, Lord Atkin and Sir Charles Sargant.

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were also empowered to grant leases to the testator either solely or jointly with others, but in the event of a lease to the testator the trustees were to fix the rent to be paid. Three weeks after the execution of the settlement the testator's wife granted a lease of the lands to the testator and his partner for seven years. The testator died in 1914 and his wife died in 1923. The testator's wife received the whole of the rents and profits of the lands from the execution of the settlement until the testator's death, and after his death they were paid to the five daughters.

Held, that as the testator predeceased his wife and the destination to the daughters was limited to take effect after the death of either the testator or his wife, at which period the obligation of the trustees of the settlement to pay arose, sec. 58 of the *Stamp Duties Act* 1898 (N.S.W.) applied, and that it was accordingly the duty of the trustees to make a declaration within six months from the testator's death specifying the property settled by the indenture and the value thereof and to pay stamp duty "on such value at the rate specified in the Third Schedule."

Dictum of *Griffith* C.J. in *Rosenthal* v. *Rosenthal*, (1910) 11 C.L.R. 87, at p. 92, approved.

Decision of the High Court: *Commissioner of Stamp Duties for New South Wales* v. *Thomson*, (1927) 40 C.L.R. 394, affirmed.

APPEAL from the High Court to the Privy Council.

This was an appeal by William Herald Thomson, Archibald Currie and Ian Rollo Currie (executors of the will of Archibald Currie, deceased), and by William Herald Thomson and George Edwin Emery (trustees of the indenture of settlement dated 4th August 1896 made between the said Archibald Currie, deceased, and his wife, Jessie Currie), from the decision of the High Court: *Commissioner of Stamp Duties for New South Wales* v. *Thomson* (1).

LORD SHAW OF DUNFERMLINE delivered the judgment of their Lordships, which was as follows:—

This is an appeal, for which special leave was granted, from a judgment of the High Court of Australia dated 10th December 1927 reversing a unanimous decision of the Supreme Court of New South Wales of 1st July 1927. There has been a variety of judicial opinion. The New South Wales Supreme Court was unanimous. The High Court of Australia reversed the judgment—*Isaacs*, *Higgins* and *Powers* JJ. favouring that course, with *Knox* C.J. and *Gavan Duffy* J. dissenting.

(1) (1927) 40 C.L.R. 394.

The facts raising the case are as follows:—By an indenture of settlement dated 4th August 1896 Mr. Archibald Currie of Melbourne settled certain lands upon the trusts about to be mentioned, and the appellants are trustees under that settlement. On 3rd September 1914 Mr. Currie died and the appellants are executors under his will and codicil. His wife died about nine years thereafter, namely, on 13th July 1923. The sole question in the case is whether the property conveyed by the indenture of settlement was liable to duty as part of the deceased's estate in terms of the provisions of the *Stamp Duties Act* 1898 (No. 27 of 1898) of New South Wales, as amended by the *Stamp Duties (Amendment) Act* 1914 (No. 3 of 1914). The New South Wales Supreme Court decided that there was no such liability and the High Court of Australia decided that there was. As will be presently noted, the terms of the destination in the indenture of settlement are somewhat peculiar; and it is important accordingly to make no pronouncement of a wider character on the taxing clauses of these Acts than is required by the application of the relevant provisions of the statute to the exact set of facts as they have arisen. Their Lordships appreciate the analysis given by the learned Judges in the Courts below of sec. 49 of the statute; but as in their judgment the question at issue between the parties is definitely concluded by sec. 58, they rest their judgment upon the interpretation of the last mentioned section.

By the Act, sec. 49, it is provided: "(1) The duties to be levied, collected, and paid as aforesaid, upon the estates of deceased persons 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." By the second part of sec. 49 it is provided, in consequence of the amendment by the Act of 1914, as follows: "All real estate, (including chattels real) passing under a deed of gift or voluntary conveyance, whenever made by any person dying after the commencement of the *Stamp Duties (Amendment) Act* 1914, of which bona fide possession and enjoyment has not been assumed by the donee or person to whom such conveyance has been made immediately upon

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the gift or conveyance and thenceforth retained to the entire exclusion of the donor or the maker of the conveyance or of any benefit to him of whatsoever kind or in any way whatsoever." Then comes sec. 58 (1), which is as follows :—" Within six months after the death of any person who has executed a settlement containing any trust to take effect after his death, or within such further time as the Commissioner may allow, notice of such settlement shall be lodged by the trustee thereof or if there is no such trustee, then by some person interested thereunder, together with a declaration specifying the property thereby settled and the value thereof, and duty shall thereupon be payable on such value at the rates specified in the Third Schedule hereto. If such trustee or any such person fails to so lodge such notice and declaration, he shall be liable to a penalty not exceeding fifty pounds."

These being the statutory provisions, the terms and trust purposes of the indenture of settlement may now be noted. At the date of the settlement Mr. Currie was possessed of certain lands forming the stations of " North Wakool " and " Rankeilour " in New South Wales with the stock thereon. In the indenture of settlement of 4th August 1896 it was narrated that he was desirous " of making a provision for his said wife and five daughters." It is witnessed that he and his said wife " respectively declare that she the said Jessie Currie, her executors or administrators, shall either retain and manage the said land as hereinafter provided so long as the said Archibald Currie during his life and after the death of the said Archibald Currie so long as the trustees or trustee for the time being of these presents shall think fit or shall at the request in writing of the said Archibald Currie during his life and after his death " at the discretion of his trustees have power of sale, and certain consequential powers and discretions. The deed then proceeds in the following terms : " And the said Jessie Currie shall during the joint lives of the said Archibald Currie and Jessie Currie retain for her own sole use and benefit as her separate estate and she shall not have power to dispose or deprive herself of the benefit thereof by anticipation the whole of the rents and profits, interest, dividends and income of the said land, moneys, stocks, funds, investments and securities, and after the death of either of them the said Archibald Currie or

Jessie Currie, the trustees or trustee for the time being shall pay one-fifth part of the rents and profits, interest, dividends and income of the said land, moneys, stocks, funds, investments and securities unto each of the said five daughters of the said Archibald Currie during her life for her separate use." There follows a destination over of the fee.

The true question in the case is what is the period of time at which the destination to the daughters takes effect. Cases are common enough in the shape of a destination which takes effect by way of giving a life interest to the wife and thereafter the fee to the children or of giving a life interest postponed to that of the wife with the fee to the grandchildren or the children's other heirs. This is not a destination of that kind. It comes into operation expressly " after the death of either of them the said Archibald Currie or Jessie Currie " at which period " the trustees or the trustee for the time being shall pay." Accordingly the Board is of opinion that it is to that state of facts and no other that sec. 58 plainly applies. It appears to their Lordships clear that within six months after Mr. Currie's death the duty lay upon his trustees to conform to the provisions of sec. 58 and to make a declaration specifying the property settled by the indenture and the value thereof. Nor does there appear to be any escape from the remaining part of the section that " duty shall thereupon be payable on such value at the rates specified in the Third Schedule." For the reason already stated it is desirable to avoid any further pronouncement as the section so clearly and quite completely covers the situation which has arisen in fact. For the same reason the Board sets aside the argument that one could conjecture a different set of facts ; in particular that the wife should have predeceased the husband and that in that event no duty would then be exigible, the destination having taken effect not after but before the disposer's death. It may quite conceivably be so, but no pronouncement is made on that in the present case which is decided, as the Act was meant to be applied, namely, not on facts reversed but on facts as they stand. Here, as is seen, Act fits fact like hand and glove. The case of *Rosenthal* v. *Rosenthal* (1) was referred to in argument, and one sentence from

(1) (1910) 11 C.L.R. 87.

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the judgment of *Griffith* C.J. may be referred to: "The general intention of the Legislature evidently was that property disposed of by way of voluntary assignment taking effect wholly or in part after the death of the settlor should be placed on the same footing with regard to taxation as property disposed of by will or passing on intestacy" (1). Their Lordships entirely agree. Various authorities were cited which bear upon the meaning to be attached to the words "after the death," the discussion being whether that word "after" was to be confined in construction to immediately after or not. Such discussions are beside the point of the present case. The destination came into effect, of course, after Mr. Currie's death, and it is plain from sec. 58 that the reckoning should be made and even the information should have been given promptly after that event. This was not done, but that makes no difference now. There is no dispute between the parties as to the quantum of the duty and interest charged.

Their Lordships agree with the majority of the High Court of Australia, and will humbly advise His Majesty that the appeal should be refused with costs.

(1) (1910) 11 C.L.R., at p. 92.