[HIGH COURT OF AUSTRALIA.]

ANGUS AND OTHERS . . . . . APPELLANTS;

AND

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1930.

SYDNEY, *Aug.* 6, 14.

Gavan Duffy, Rich, Starke, and Dixon JJ.

*Stamp Duties (N.S.W.)—Dutiable estate—Agreement between parents and married daughter as to land—Life estate to daughter, remainder to her children—Remainder to her brothers and sisters—Consideration—Annuity to parents—"Purchased or provided by the deceased"—Family settlement—Not property passing on death under agreement—Stamp Duties Act* 1920-1924 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 32 *of* 1924), *sec.* 102 (2) (*i*), (*k*).*

The purpose of sec. 102 (2) (*k*) of the *Stamp Duties Act* 1920-1924 (N.S.W.) is to bring into the assets charged with death duty, property the destination of which is within the deceased's control, if that control has been so exercised that the property passes upon his death to some object of his bounty, that is to say, someone who takes it for no consideration receivable by the estate, or a consideration less than its full value.

Under an indenture made 27th June 1898 between her deceased father of the first part, her mother of the second part, A. of the third part, and a trustee of the fourth part, A. took an estate for life in certain lands subject to a conditional

* Sec. 102 of the *Stamp Duties Act* 1920-1924 (N.S.W.) provides that "For the purposes of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property:— . . . (2) . . . (*i*) Any annuity or other interest purchased or provided by the deceased, whether before or after the passing of this Act, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased . . . (*k*) Any property which on the death of the deceased passes to any other person under or by virtue of any agreement made by the deceased (whether before or after the passing of this Act) to the extent by which the value of such property exceeds any consideration in money or money's-worth receivable by the estate of the deceased under such agreement."

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limitation upon bankruptcy or attempted alienation, remainder to her children in equal shares as tenants in common with a limitation over in favour of the survivor or survivors of them, in the event of all children dying then a limitation over in favour of A.'s six brothers and sisters in equal shares as tenants in common, with power for a majority of them, if A.'s estate determined in her lifetime, to consent to her receiving the rents and profits nevertheless. A.'s estate did not determine in her lifetime and she died in 1929, leaving six children of full age her surviving. The indenture conferred powers of leasing and other powers upon A. It contained recitals that the father was owner in fee simple, and that he had for the consideration thereinafter mentioned agreed with A. to execute such conveyance and assurance as was thereinafter mentioned, and it witnessed that in consideration of certain covenants on the part of A. he granted the land upon the limitations above referred to. The covenants of A., which were expressed to bind her heirs, executors, administrators and assigns, were to pay an annuity of £30 to her father for life and, on his death, to her mother for her life, and to indemnify her father in respect of the covenants contained in some unexpired leases subject to which he granted the land. A. died on 1st February 1929.

*Held*, (1) that the nature of the transaction was a parent's settlement upon a married daughter and her children with a reservation of an annuity and with a limitation over upon failure of her children to brothers and sisters, and, as such, did not come within sec. 102 (2) (*k*) of the *Stamp Duties Act* 1920-1924 (N.S.W.); (2) that the transaction did not come within sub-sec. 2 (*i*) of that section as there was nothing in the case stated to suggest that the deceased "purchased or provided" the interest which accrued or arose on her death; and (3) that, therefore, the lands comprised in the above-mentioned indenture did not form part of the dutiable estate of A.

Decision of the Supreme Court of New South Wales (Full Court): *Angus* v. *Commissioner of Stamp Duties*, (1930) 30 S.R. (N.S.W.) 253, reversed.

APPEAL from the Supreme Court of New South Wales.

A special case stated by the Commissioner of Stamp Duties for the opinion of the Full Court of the Supreme Court under sec. 124 of the *Stamp Duties Act* 1920-1924 (N.S.W.) set out the following facts :—

1. Ada Angus, deceased, late of Turramurra in the State of New South Wales, died on 1st February 1929, leaving a will probate whereof was on 11th April 1929 granted by this Honourable Court in its probate jurisdiction to the appellants, William Angus, William Reginald Angus, Harry Stuart Angus and Gordon Clarke Thompson, the executors therein named.

2. By indenture made 27th June 1898 between Atkinson Alfred Patrick Tighe, Arabella Vine Tighe (his wife), the said Ada Angus

(his daughter) and Arthur Percy Sparke (thereinafter called trustee), after reciting that the said Atkinson Alfred Patrick Tighe was seised in fee simple of the lands described in the schedule thereto subject to certain leases therein referred to, and that the said Atkinson Alfred Patrick Tighe had for the considerations thereinafter mentioned agreed with the said Ada Angus to execute such conveyance and assurance as was thereinafter contained, the said Atkinson Alfred Patrick Tighe conveyed the said lands unto the said trustee and his heirs to hold the same subject to the said leases to the separate use of the said Ada Angus during her life or until the happening of certain events therein mentioned, and from and after the death of the said Ada Angus or the determination of her life estate by the happening of any of the said events, to the use of all the children of the said Ada Angus then born or thereafter at any time to be born their heirs and assigns in equal shares as tenants in common And if and so often as any such child being a son should die under the age of twenty-one years or being a daughter should die under that age and without having been married then to the use of the others of such children their heirs and assigns in equal shares as tenants in common : and by the said indenture the said Ada Angus for herself her heirs executors and administrators with intent to bind her separate estate covenanted with the said Atkinson Alfred Patrick Tighe his heirs executors administrators and assigns, and, for a separate covenant, with the said Arabella Vine Tighe her executors administrators and assigns that she the said Ada Angus her heirs executors administrators and assigns would at all times during the life of the said Atkinson Alfred Patrick Tighe pay to him or his assigns a yearly sum of thirty pounds from 1st July 1898 by equal half-yearly payments of fifteen pounds each and from and after the death of the said Atkinson Alfred Patrick Tighe would at all times during the life of the said Arabella Vine Tighe pay to her or to her assigns a yearly sum of thirty pounds by equal half-yearly payments of fifteen pounds each : and the said Ada Angus also thereby for herself her heirs executors administrators and assigns covenanted with the said Atkinson Alfred Patrick Tighe his executors and administrators that she would at all times indemnify the said Atkinson Alfred Patrick Tighe his executors and

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administrators from and against all actions suits claims and demands whatsoever in respect of the covenants on the part of the lessor contained in the said recited leases.

3. The life estate of the said Ada Angus under the said indenture did not determine before her death.

4. The said Ada Angus had issue six children and no more, all of whom survived her, and had attained the age of twenty-one years before her death.

5. The Commissioner claims that the whole of the lands comprised in the said indenture forms part of the dutiable estate of the said Ada Angus, deceased, under sec. 102, sub-sec. 2, pars. (*i*) and (*k*), of the *Stamp Duties Act* 1920-1924.

6. The above-named appellants claim that the said lands do not form part of such dutiable estate.

7. The final balance of the estate of the said Ada Angus, deceased, in accordance with the above stated claim of the Commissioner is £42,407, on which sum the Commissioner assessed the death duty at £4,028 13s. 4d., being at the rate of £9 10s. per cent less an amount of £8 5s., being *ad valorem* duty paid under Part III. of the said Act on memorandum of transfer dated 20th August 1928 made between the said Ada Angus, deceased, as transferor and William Reginald Angus and Amy Atkinson Thompson as transferees, the said amount being deducted pursuant to sec. 123 of the said Act.

8. The said appellants have accordingly paid the sum of £4,020 8s. 4d. under protest as to their said claim and, having paid the sum of £20 as security for costs, have called upon the Commissioner to state this case.

The questions for the decision of the Court were as follows:—

(1) Do the lands comprised in the above-mentioned indenture form part of the dutiable estate of the said Ada Angus deceased ?

(2) What is the duty chargeable in respect of the said estate ?

(3) How are the costs of this case to be borne and paid ?

The Full Court held that question 1 should be answered in the affirmative, and that in the circumstances question 2 required no answer : *Angus* v. *Commissioner of Stamp Duties* (1).

(1) (1930) 30 S.R. (N.S.W.) 253.

From that decision William Angus, William Reginald Angus, Harry Stuart Angus and Gordon Clarke Thompson, the executors aforesaid, now appealed to the High Court.

*Maughan* K.C. (with him *Hastings*), for the appellants. The facts are not sufficiently stated to enable the question to be determined, and the Supreme Court should have directed an inquiry under sec. 124 (6) of the *Stamp Duties Act* 1920-1924 as to the facts surrounding the document. This Court should send the case back to the Supreme Court for such facts to be brought before the Court. But even on the facts now before the Court the judgment appealed from is wrong. The Court should look at the substance and not the form of the document. It evidences a family settlement, and cannot be regarded as an agreement for the sale and purchase of the land referred to. A life estate only passed to the deceased, and the dropping of such an estate does not come within the provisions of sec. 102 (2) (*k*) of the Act. The Act is aimed at taxing the estate of a deceased person and certain other property he owned during his lifetime or had disposition over at the time of his death. Sec. 102 (2) (*i*) of the Act refers to property for the first time on the death of the deceased, e.g., policy moneys. The words of the sub-section are quite inapt to describe the mere coming into possession of a remainderman on the death of the life tenant. That is not a " beneficial interest accruing or arising . . . on the death of the deceased " within the meaning of the Act. The sub-section is aimed not at a transaction of the nature involved here but at a transaction where an owner who has sold his land remains in possession until his death. The property did not pass within the meaning of that section at all. There was no agreement between the deceased and her father that the property should pass from one party to the other. The very presence of sub-sec. 2 (*c*) in sec. 102 shows that sub-sec. 2 (*k*) of that section is not to include a settlement as here.

*Hammond* K.C. (with him *Kitto*), for the respondent. On a literal construction of sec. 102 (2) (*k*) this case falls within it. All the deceased contracted to get was a tenancy for life, and after her death the property was to pass to her children. The deed states

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that it is a conveyance made in pursuance of an agreement between the deceased and her father. All the facts necessary for the determination of the questions submitted are before the Court. The Court is not concerned with the adequacy of the consideration; the values must be regarded as at the date of the document, that is to say, 1898. As to property passing, see *Hanson's Death Duties*, 7th ed., pp. 2, 62, 63. The word "passes," means any property which on the death of a person changes hands. Either the property passed under the authority recited in the deed or it passed by virtue of the agreement expressed in the deed. The deed itself is an agreement. As to the meaning of the word "passes" see *In re Lombard* (1), and of the words "passed under" see *Attorney-General* v. *Chapman* (2) and *Attorney-General* v. *Wendt* (3). Those cases show that the word "passes" means it changes hands, and it changed hands on the facts disclosed in the deed itself. The word "property" in sub-sec. 2 (*k*) has the same meaning as in sub-sec. 2 (*c*); it is the physical thing, something outward and visible. There are no words of limitation in the agreement, and there are no words to indicate it is an agreement made with the person to benefit. In the absence of those words and as the language of the section clearly covers the language used by the deceased herself, sec. 102 (2) (*k*) applies. The section does not pre-suppose a consideration. Sec. 102 (2) (*i*) has been judicially interpreted (*Lethbridge* v. *Attorney-General* (4)). By making this arrangement during her lifetime the deceased subtracted from her estate something which was to reappear in the form of a beneficial interest accruing or arising on her death. This sub-section does not refer merely to moneys under a policy of insurance. It does not relate to any one kind of property but sweeps in other interests as well as policies of insurance (*Attorney-General* v. *Dobree* (5)). See also *Hanson's Death Duties*, 7th ed., Part II., and *Little* v. *Commissioner of Stamps* (6). As to the word "accrues" the property referred to in sub-sec. 2 (*f*) is the property which was in existence in the lifetime of the deceased and which on his death passed to someone else. The

(1) (1904) 2 I.R. 621.
(2) (1891) 2 Q.B. 526, at p. 532.
(3) (1895) 43 W.R. 701.
(4) (1907) A.C. 19, at p. 23.
(5) (1900) 1 Q.B. 442, at p. 452.
(6) (1923) N.Z.L.R. 773.

beneficial interest coming to a remainderman is the fee simple, that is to say, the whole of the property, which is to be taxed. As to the general policy of the Act, see *Attorney-General* v. *Ellis* (1). The appellants are estopped by the deed from stating that no arrangement was made to the effect that the property was to pass on a certain consideration.

*Maughan* K.C., in reply. For the sum of £30 per year, referred to in the deed, the deceased got a life estate and therefore the remarks of Lord *Loreburn* in *Lethbridge* v. *Attorney-General* (2) are not applicable. This case does not come within the mischief aimed at by the Legislature in passing the Act.

[DIXON J. referred to *Attorney-General* v. *Robinson* (3).]

The reasoning of *Palles* C.B. in that case was approved of in *Attorney-General* v. *Murray* (4). There was no agreement between the deceased and any person by virtue of which property passed on her death to that person, and therefore the matter does not come within sub-sec. 2 (*k*). The property did not pass on the death of the deceased: it was simply the case of a life estate dropping and a remainderman coming into possession. The construction put upon the sub-section by the Commissioner would result in death duty being paid twice. The "other person" refers to the other person with whom the agreement was made.

*Cur. adv. vult.*

Aug. 14.

THE COURT delivered the following written judgment:—

The controversy in this case is whether certain lands are for the purpose of death duty to be deemed to be part of the estate of Ada Angus, who died on 1st February 1929. Under an indenture, made 27th June 1898, between her father of the first part, her mother of the second part, Ada Angus of the third part and a trustee of the fourth part, Ada Angus took an estate for life in these lands, subject to a conditional limitation upon bankruptcy or attempted alienation, remainder to her children in equal shares as tenants in common

(1) (1895) 2 Q.B. 466, at p. 470.
(2) (1907) A.C., at p. 23.
(3) (1901) 2 I.R. 67, at p. 89.
(4) (1904) 1 K.B. 165, at p. 172.

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with a limitation over to the survivor or survivors of the share (original and accrued) of any child who might die under age and, being female, without having married, and if all such children should so die, to the six brothers and sisters of Ada Angus in equal shares as tenants in common, with power, however, for a majority of them, if the estate of Ada Angus determine in her lifetime, to consent to her receiving the rents and profits nevertheless. In fact Ada Angus left six children of full age her surviving. The indenture conferred powers of leasing, and some other powers upon the tenant for life. It contained recitals that the father was owner in fee simple, and that he had for the consideration thereinafter mentioned agreed with Ada Angus to execute such conveyance and assurance as was thereinafter mentioned, and it witnesses that in consideration of the covenants on the part of Ada Angus thereinafter contained, he granted the land upon the limitations already described. The covenants of Ada Angus, which were expressed to bind her heirs, executors, administrators and assigns, were to pay an annuity of £30 to her father for life and after his death to her mother for life and to indemnify her father in respect of the covenants contained in some unexpired leases subject to which he granted the lands.

The Crown claims that by reason of the transaction expressed in the indenture, the lands must by virtue of par. (*k*) of sec. 102 (2) of the New South Wales *Stamp Duties Act* 1920-1924, or alternatively by virtue of par. (*i*) of that sub-section, be deemed to be part of the estate of Ada Angus. Par. (*k*) makes part of the deceased's estate "any property which on the death of the deceased passes to any other person under or by virtue of any agreement made by the deceased (whether before or after the passing of this Act) to the extent by which the value of such property exceeds any consideration in money or money's-worth receivable by the estate of the deceased under such agreement."

The argument is that the lands are property which, upon the death of Ada Angus, passes to her children under or by virtue of the indenture which, it is said, is an agreement made by the deceased and that the application of the provisions is not limited to cases in which there is some consideration "receivable by the estate of the deceased under such agreement." It is, however, plain that the

purpose of the paragraph is to bring into the assets charged with death duty, property the destination of which is within the deceased's control, if that control has been so exercised that the property passes upon his death to some object of his bounty, that is to say, someone who takes it for no consideration receivable by the estate, or a consideration less than its full value. The dominant words of the provision are "under or by virtue of any agreement made by the deceased." In their context these words express much more than a mere requirement that the deceased shall have agreed or assented to the disposition by which the property passes on his or her death. They mean that the dispositive act shall be the deceased's agreement, or, in other words, that the passing of the property shall proceed from the deceased's volition.

The learned Judges of the Supreme Court took a view of the transaction embodied in the indenture which would bring it within the operation of this provision so construed (*Angus* v. *Commissioner of Stamp Duties* (1)). *Street* C.J., in a judgment with which *Ferguson* and *Halse Rogers* JJ. concurred, expresses the opinion that if the substance of the transaction, as it appears upon the face of the indenture, is looked at, it will be seen that Ada Angus purchased the property from her father for a valuable and—for all the Court knows—a full consideration, but instead of having the fee simple conveyed to her, as she might have done, she had it conveyed by her direction in the manner appearing in the instrument. He considered that all this was done, as appeared by the conveyance, under and by virtue of an agreement made by her with her father; that the disposition of the property which took place by virtue of the agreement with Ada Angus was a disposition made by her as purchaser, and that it was from her, and not from her father, that the successive interests created under the indenture were derived.

We are unable to adopt this view of the instrument, or of the transaction which it embodies. The nature of the consideration given by Ada Angus, and the limitations expressed in the instrument, all point to the character of the transaction, namely, a parent's settlement upon a married daughter and her children with a reservation

(1) (1930) 30 S.R. (N.S.W.) 253.

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of an annuity and with a limitation, upon failure of her children, over to brothers and sisters. There is nothing to suggest any anterior bargain by which she became able to call for or dispose of the fee simple, and there is nothing to show that, for the consideration which she gave, her father was willing to grant the fee simple to her or to make any arrangement other than that expressed by the instrument. The indenture neither contains nor evidences any dispositive act by her. It does not show that the limitations, by which the property passed upon her death, were made by her; that is, proceeded from her volition.

For these reasons we think par. (*k*) does not bring the lands into the assets charged with death duty.

But the Crown relied also upon par. (*i*) of sec. 102 (2). This provides that the estate shall include "any annuity or other interest purchased or provided by the deceased, whether before or after the passing of this Act, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased." In considering the application of this provision to the property included in the indenture, the first question is whether the interest which accrued or arose on the death of Ada Angus was purchased or provided by her. The short answer to this question is that no reason appears upon the face of the deed for supposing it was, and much reason appears for thinking it was not, purchased or provided by her, and that the special case stated by the Commissioner contains nothing which tends to suggest that she purchased or provided that interest. The fact that the agreement recited and the consideration expressed in the indenture relate to the grant of all the estates and interests limited in the indenture does not appear to us to show that Ada Angus "purchased" the interest in remainder for her children within either the technical or the popular meaning of that word, nor that she "provided" that interest. On the contrary, it is quite consistent with the view which is supported by the whole tenor of the instrument that the remainder was limited by the father as an essential part of the scheme formulated by or for him for the benefit of his daughter and her family.

For these reasons the appeal should be allowed with costs, and the order of the Full Court of the Supreme Court discharged. In lieu thereof the first question in the special case should be answered: No. The second question cannot be answered upon the materials contained in the special case. The Commissioner should pay the costs of the proceedings in the Supreme Court.

*Appeal allowed with costs. Order of Full Court discharged. In lieu thereof first question in the special case answered No. No answer to the second question. The Commissioner of Stamp Duties to pay the costs of the proceedings in the Supreme Court.*

Solicitors for the appellant, *Holdsworth, Summers & Garland.*

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

J. B.