[HIGH COURT OF AUSTRALIA.]

ARCHIBALD . . . . . APPELLANT;

AND

THE COMMISSIONER OF STAMP DUTIES (QUEENSLAND) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1930.

BRISBANE, *June* 16.

MELBOURNE, *Oct.* 16.

Isaacs C.J., Rich and Starke JJ.

Stamp Duty (Q.)—Assignment of life assurance policies—Gift—Gift duty—Settlement—Ad valorem stamp duty—Two assessments—Stamp Acts 1894-1926 (*Q.*) (58 *Vict. No.* 8—17 *Geo. V. No.* 10), *sec.* 59 (1)*—*Gift Duty Act* 1926 (*Q.*) (17 *Geo. V. No.* 23), *sec.* 10 (1)*.

By two several indentures a person who had insured his life with two life assurance companies, assigned the two policies and all moneys payable in respect thereof to trustees to hold the same and pay Commonwealth and State succession, estate, probate and other duties. It was then declared in both documents that subject as aforesaid the assignments were on trust for the assured's wife should she become a widow, failing which, the assignments were on trust for the children of the assured, and in the event of failure of the trusts, then upon such trusts as the assured should by deed or will direct. The indentures provided that failing any such direction the trustees were to pay the moneys to the assured's executors or administrators as part of his estate. The two documents were assessed for gift duty under the *Gift Duty Act of* 1926 (Q.), and the Commissioner of Stamps claimed to assess them for *ad valorem* stamp duty as settlements under sec. 59 (1) of the *Stamp Acts* 1894 *to* 1926 (Q.).

* It is provided by sec. 59 (1) of the *Stamp Acts* 1894 *to* 1926 (Q.) that "where any money which may become due or payable upon any policy of life insurance . . . is settled . . . the instrument whereby the settlement is made . . . is . . . charged with *ad valorem* duty," &c.

Sec. 10 (1) of the *Gift Duty Act of* 1926 (Q.) provides "Notwithstanding anything to the contrary in the *Stamp Acts* . . . the stamp duty chargeable on any instrument of gift . . . shall be ten shillings, but this stamp duty shall be in addition to and not in substitution for any other stamp duty to which the instrument is liable so far as it operates otherwise than exclusively as an instrument of gift."

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Held, that the indentures did not operate otherwise than exclusively as instruments of gift, and were not settlements within the meaning of the *Stamp Acts* 1894 *to* 1926 and were not chargeable with stamp duty beyond that specified in the *Gift Duty Act of* 1926.

APPEAL from the Supreme Court of Queensland.

The facts, which were set out in a special case stated by the Commissioner of Stamp Duties for the opinion of the Supreme Court of Queensland, were substantially as follows :—

1. On 8th March 1927 Robert John Archibald (the appellant) effected a policy of insurance on his life with the Australian Mutual Provident Society for the sum of £10,000, at a yearly premium of £508 6s. 8d. payable in advance, and duly paid the first premium on 8th March 1927.

2. On 15th March 1927 the appellant executed an indenture by which he assigned the insurance policy and all moneys payable in respect thereof to trustees to hold upon certain trusts. (The material parts of this indenture are set out in the judgment hereunder.) On 15th March 1927 the appellant indorsed upon the policy a memorandum of transfer which was duly registered by the Australian Mutual Provident Society.

3. The appellant caused to be produced at the office of the Commissioner of Stamp Duties the indenture and memorandum of transfer, and tendered the sum of 10s. for stamp duty in respect of each document, which was stamped accordingly.

4. On 15th March 1927 the appellant insured his life with the Mutual Life and Citizens Assurance Co. Ltd. for the sum of £5,000, at a yearly premium of £247 5s. 10d. payable in advance, and duly paid the first premium on 24th March 1927.

5. On 16th March 1927 the appellant executed an indenture, similar to that of 15th March 1927, in respect of the policy with the Mutual Life and Citizens Assurance Co. Ltd., and also indorsed upon the policy a memorandum of transfer, which was duly registered by the company.

6. This indenture and memorandum of transfer were subsequently stamped at 10s. each stamp duty.

7. On 18th July 1927 the appellant made a gift by the transfer of 1,191 fully paid up £1 shares.

8. On 25th July 1927 the appellant, pursuant to the provisions of the *Gift Duty Act of* 1926 (Q.), delivered to the Commissioner a statement of particulars of all gifts made by the appellant within the twelve months preceding the gift of shares.

9. In respect of gifts disclosed in the statement the Commissioner assessed the appellant to gift duty in the sum of £40 0s. 6d.

10. In arriving at this amount the Commissioner did not take into calculation any amount whatsoever in respect of the indentures and memorandum of transfer.

11. On 14th November 1927 the Commissioner assessed the two indentures to stamp duty under the *Stamp Acts* 1894 *to* 1926 (Q.) in the respective sums of £500 and £250.

12. The appellant, being dissatisfied with the assessment, required the Commissioner to state a case for the Supreme Court.

13. The appellant contends that the policies had a calculable value in money on the respective date of the relevant indenture and that, whether such calculable value was nil or some greater amount, each of the said indentures is an instrument of gift in respect of which gift duty under the *Gift Duty Act of* 1926 is payable, and that by virtue of the provisions of the said Act stamp duty on each of the indentures is 10s.

14. The Commissioner does not admit the contentions of the appellant, and contends that each of the indentures is a settlement of moneys which may become due or payable upon a policy of life insurance, and that by virtue of the provisions of the *Stamp Acts* 1894 *to* 1926 each of the indentures is liable to stamp duty to be assessed on the amount of money which may become due and payable upon the policy, and that the indentures operate otherwise than exclusively as an instrument of gift.

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

(1) Is the indenture in par. 2 hereof set out chargeable with stamp duty in accordance with the said assessment ?

(2) If not, with what amount of stamp duty is the indenture chargeable ?

(3) Is the indenture in par. 5 hereof set out chargeable with stamp duty in accordance with the said assessment ?

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(4) If not, with what amount of stamp duty is the indenture chargeable ?

(5) In what manner and by whom should the costs of this case be borne and paid ?

The special case came on for hearing before the Full Court of Queensland on 12th May 1930, when, with the consent of both parties, *pro forma* judgment was given for the Commissioner of Stamp Duties, the appeal being dismissed.

The appellant now appealed to the High Court.

Macgregor, for the appellant. In passing the *Gift Duty Act of* 1926 the Crown abrogated certain rights it had under the *Stamp Acts* 1894 *to* 1926. If the indentures operate exclusively as instruments of gift, they are not liable to *ad valorem* duty under the *Stamp Acts* 1894 *to* 1926. The disposition of property by means of a trust comes within the definition of " gift " in the *Gift Duty Act of* 1926. Even though the trusts amount to settlements under the *Stamp Acts*, yet, because the instruments creating the trusts have no operation otherwise than exclusively as instruments of gift, only 10s. stamp duty is payable on each. The insurance policies have a value, and disposing of them without consideration makes the transactions gifts.

Macgroarty A.G. for Q. and *Fahey*, for the respondent. Under sec. 10 of the *Gift Duty Act of* 1926 a document may be liable to both gift duty and stamp duty. Instruments of gift are not defined in the *Gift Duty Act of* 1926, and may or may not attract duty under that Act, but they are defined under the *Stamp Acts* 1894 *to* 1926 and are liable for duty thereunder. Sec. 10 of the *Gift Duty Act* is designed to cover the case where an instrument attracts duty as a gift under the *Stamp Acts* and may or may not attract duty under the *Gift Duty Act*. If it does, both duties are payable. The indentures as deeds of gift attract duty under the *Gift Duty Act*, and, being settlements within the meaning of the *Stamp Acts*, attract also stamp duty. Such duty will be *ad valorem* duty on the face value of the policy. [Counsel referred to *Duke of Northumberland* v. *Inland Revenue Commissioners* (1).]

(1) (1911) 2 K.B. 1011, at p. 1016.

Macgregor, in reply. Under sec. 10 of the *Gift Duty Act of* 1926 an instrument of gift is chargeable with stamp duty at 10s. It is then necessary to ascertain whether it comes under the *Gift Duty Act* as a gift. If it does and the instrument operates as a gift only, it is not necessary to consider whether the instrument comes under the *Stamp Acts* 1894 *to* 1926 for *ad valorem* duty.

Cur. adv. vult.

Oct. 16.

The following written judgments were delivered :—

ISAACS C.J. AND STARKE J. On 8th March 1927 Robert John Archibald insured his life with the Australian Mutual Provident Society for £10,000, at a yearly premium of £508 6s. 8d., and paid the first premium. On 15th March 1927 he insured his life with the Mutual Life and Citizens' Assurance Co. Ltd. for £5,000, at a yearly premium of £247 5s. 10d., and paid the first premium. By two several indentures, dated respectively 15th March 1927 and 16th March 1927, he assigned and transferred to the Queensland Trustees Ltd. the two policies of insurance and all moneys to become payable in respect thereof, to hold the same (subject to any appropriation of surrender value towards overdue premiums and interest penalties or other lawful charges thereon) upon certain trusts.

That policies of insurance fall within the expression " property " in the statutory definition of " gift " in sec. 2 of the *Gift Duty Act*, is definitely settled by *Caldwell* v. *Dawson* (1) and *Potter* v. *Commissioners of Inland Revenue* (2).

The first, second, third and fourth trusts of the instruments were to pay Commonwealth and State succession, estate, probate and other duties, and then it was declared that the assignments were " Subject as aforesaid :—(a) Upon trust for Lilian Amy Archibald the wife of the assured should she become his widow, failing which then (b) upon trust for all or any of the children or child of the assured who being male attain the age of twenty-one years or being female attain that age or marry and if more than one in equal shares as tenants-in-common And (c) in so far as

(1) (1850) 5 Ex. 1 ; 155 E.R. 1.
(2) (1854) 10 Ex. 147, at pp. 153, 154 ; 156 E.R. 392, at p. 394.

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there shall be a failure of the trusts aforesaid then upon such trusts and with and subject to such powers and provisions as the assured shall from time to time by deed or deeds revocable or irrevocable or by his last will and testament direct limit or appoint and failing any such direction limitation or appointment then to pay the said moneys in respect of which there shall be a failure of the trusts aforesaid to the executors or administrators of the assured as part of his estate." No other portions of the instruments are material to this case. Each instrument in respect of the trusts quoted is both an "instrument of gift" under the *Gift Duty Act of* 1926, and also a "settlement" or "deed of gift," that is, operating only as a gift under the consolidated *Stamp Acts* 1894 *to* 1926. It is unnecessary to say whether they are settlements for common law reasons.

Sec. 10 of the first mentioned Act says: "(1) Notwithstanding anything to the contrary in the *Stamp Acts* 1894 *to* 1918, or any Act amending or in substitution for the same, the stamp duty chargeable on any instrument of gift in respect of which gift duty is payable shall be ten shillings, but this stamp duty shall be in addition to and not in substitution for any other stamp duty to which the instrument is liable so far as it operates otherwise than exclusively as an instrument of gift."

This case concerns only stamp duty, and therefore it is clear that whether either of the instruments in question is chargeable with any stamp duty beyond 10s., depends entirely upon whether "it operates otherwise than exclusively as an instrument of gift." That means otherwise than as "an instrument of gift" within the meaning of the *Gift Duty Act*; that is to say, whether it is called an "instrument of gift" or "a settlement" or "a deed of gift," its true operation is by way of gift only. Neither instrument in question operates "otherwise than exclusively as an instrument of gift" (sec. 10), and consequently it follows that the instruments are not chargeable with stamp duty beyond 10s.

The first and third questions should therefore be answered in the negative. The second and fourth are each answered, Ten shillings. As to the fifth question, the Commissioner should pay the taxed costs of the appellant.

This appeal should be allowed, the judgment of the Supreme Court of Queensland be discharged, and the questions in the appeal case answered as above stated.

RICH J. The decision in this case depends upon sec. 10 (1) of the *Gift Duty Act of* 1926. The object of this section is to adjust the incidence of stamp duty under the *Stamp Acts* 1894 *to* 1926, and of gift duty in respect of the same transaction. Sec. 10 (1) is necessarily referential because it relates to the operation of the *Stamp Acts* and the meaning and application of referential legislation is notoriously dark and difficult. Unfortunately the difficulty has not been lessened and the darkness illuminated by the form in which sec. 10 (1) is expressed. It says: "Notwithstanding anything to the contrary in the *Stamp Acts* 1894 *to* 1918, or any Act amending or in substitution for the same, the stamp duty chargeable on any instrument of gift in respect of which gift duty is payable shall be ten shillings, but this stamp duty shall be in addition to and not in substitution for any other stamp duty to which the instrument is liable so far as it operates otherwise than exclusively as an instrument of gift." Apparently the words "so far as it operates otherwise than exclusively as an instrument of gift" although they are a mere qualification of the statement that stamp duty shall not be substitutional but additional are an incomplete expression of an affirmative provision to the effect that an instrument which does operate exclusively as an instrument of gift shall not be exposed to stamp duty because in that case gift duty and the stamp duty of 10s. imposed by sec. 10 (1) are substitutional for it. It is, I think, clearly implied that the stamp duty of 10s. imposed by sec. 10 (1) is substitutional for the stamp duty imposed by the *Stamp Acts* in the case of an instrument liable to gift duty so far as it operates exclusively as an instrument of gift. The question in this case is whether certain instruments purporting to transfer life policies upon trusts first to pay the transferor's succession, probate and estate duty on his death and next for relatives are liable to be stamped as settlements with *ad valorem* duty pursuant to sec. 59 (1) of the *Stamp Acts* 1894 *to* 1926. Plainly they are so liable unless they obtain the immunity conferred by the provision of sec. 10 (1). The

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first step is, therefore, to consider whether the instruments are chargeable with gift duty and so come within the liability imposed by sec. 10. This depends upon the question whether they contain or express a gift. "Gift" is defined by sec. 2 of the *Gift Duty Act* in very wide terms. It means and includes "any disposition of property which is made otherwise than by will (whether with or without an instrument in writing) without fully adequate consideration in money or money's-worth passing from the disponee to the disponor." The expression "disposition of property" is also very widely defined. It means and includes (*inter alia*) "any . . . settlement or other alienation of property; . . . the creation of a trust of property;" and "the grant or creation of any . . . interest in property." "Property" includes "personal property and every interest in property" and therefore includes policies of life insurance (*Caldwell* v. *Dawson* (1); *Potter* v. *Commissioners of Inland Revenue* (2)). Although the instruments in question purport to assure the legal interest in the policies to the trustees, sec. 41 of the *Life Assurance Companies Act of* 1901 deprives it of any efficacy as an assignment of the policies. The policies were, however, assigned in the statutory form by an indorsement and thus the property subject to the trust declared by the instruments was formally vested in the trustees. If no trusts were declared by these instruments or otherwise, the trustees who took the legal interest by these indorsed statutory assignments would hold the policies upon a resulting trust for the assignor. It follows that the specification and declaration of the trusts upon which the policies so assigned were to be held operated to create the equitable interests and impart them to the cestuis que trust. This was done, but these trusts were declared, and declared only by the instruments. It follows that in so far as the trusts were in favour of persons other than the assignor these instruments alienated property, created a trust of property, and granted or created an interest in property. I think also they were settled property. In *Duke of Northumberland* v. *Inland Revenue Commissioners* (3) *Hamilton* J. (as he then was), speaking of the English *Stamp Act* of 1891, says :—"No definition

(1) (1850) 5 Ex. 1; 155 E.R. 1.
(2) (1854) 10 Ex., at p. 154; 156 E.R., at pp. 394, per *Parke* B.
(3) (1911) 2 K.B. 343, at p. 356: (1911) 2 K.B. 1011 (C.A.).

of 'settlement' is given anywhere. In the Schedule the word 'settlement' is the index word to a paragraph which imposes tax upon any instrument 'whereby any definite and certain principal sum of money is settled or agreed to be settled.' The test of 'settlement' and 'settled' appears to be what is done, not the classifications of conveyancers. Is it an instrument 'whereby any definite and certain principal sum of money is settled'? The definition of 'settlement' which is a statutory one, in the *Settled Land Act* of 1882, sec. 2, proceeds upon the same methods: 'A deed or other instrument is a settlement under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession,' though a settlement within the *Stamp Act* 1891 is a term applying to instruments of very much wider scope than the instruments within the *Settled Land Act* of 1882."

In the present case, after providing for payment of his succession, probate and estate duty, the assignor directed that the balance of the proceeds of his policies, which necessarily did not mature until his death, should be held upon trust for his widow or, failing that, upon trust for such of his children who attained twenty-one years or, being female, married, if more than one as tenants in common in equal shares, and upon failure of these trusts upon such trusts as he should appoint by will or deed. This, I think, is a settlement within the common understanding of conveyancers. Fully adequate consideration in money or money's-worth did not pass from these disponees nor, of course, from the trustees. It follows that the instruments come within the liability to stamp duty imposed by sec. 10 as instruments of gift in respect of which gift duty is payable. The question remains whether they operate exclusively as an instrument of gift within the meaning of the concluding part of sec. 10 (1) which excludes from the general stamp duty instruments of gift so far as they operate exclusively as instruments of gift. This question appears to involve an inquiry whether, when all the indicia or elements which bring the instruments within the statutory definition of gift contained in sec. 2 of the *Gift Duty Act* are put on one side or eliminated from consideration, the remaining characteristics which the instruments exhibit would suffice to expose them to

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stamp duty as settlements. No real definition of settlement is contained in the *Stamp Acts* 1894 *to* 1926. For that which occurs in sec. 2 merely extends the description of instrument by which property is settled or agreed to be settled. Now, while in general it is not difficult to say whether a particular instrument is or is not a settlement it is by no means so easy to single out and define the attributes which make a given instrument a settlement. But on the whole it appears to me that the elements in the instruments under discussion which go to make them settlements are these: (1) they constitute trustees of property intended to be assured to them; (2) there is an absence of valuable consideration; (3) there are alternative trusts which take effect at a future time in respect of the balance of the policy moneys. In law the trust to pay probate, estate and succession duty must be considered as one in respect of which the settlor is himself the beneficiary. For although it arises upon his death it is for the discharge of the liability imposed upon his estate, which his executors would be obliged to meet out of his assets. A living man's executors are contained within himself. But the three elements I have selected as the indicia by reason of which the instrument is a settlement are substantially identical with those which brought the transaction within the definition of gift duty. It is true that the definition is multifarious and its descriptions are cumulative, but they must be taken collectively in considering whether an instrument to which they apply in combination operates exclusively as an instrument of gift. Indeed, it might be enough to say that, by virtue of the definition of the expression "disposition of property," the word "gift" included a settlement of property without consideration passing from the disponee to the disponor, and it was only because the instruments in the present case answered this description that they fell within the expression "settlement" in the *Stamp Acts* 1894 *to* 1926. But in any case if the factors which make the transaction expressed in the instruments gifts are all excluded from consideration the remaining characteristics of the instruments could not expose them to stamp duty as settlements under the *Stamp Acts* 1894 *to* 1926. It follows that sec. 10 (1) operates to relieve the instruments of the duty which would otherwise be incurred under the *Stamp Acts* 1894 *to* 1926.

The result is that, in my opinion, the order of the Full Court of the Supreme Court of Queensland should be discharged, and in lieu thereof an order should be made answering the first and third questions No. The second and fourth questions inquire in the case of each instrument what amount of stamp duty is chargeable thereon. Counsel for the Commissioner did not contend before us that they were dutiable under the *Stamp Acts* 1894 *to* 1926 under any category but settlements. These questions should therefore be answered, Ten shillings. Costs both here and below should be paid by the Commissioner of Stamp Duties.

Appeal allowed. Judgment of the Supreme Court discharged. The first and third questions answered in the negative. The second and fourth questions each answered, Ten shillings. The respondent to pay the costs of the appellant in the Supreme Court and the High Court.

Solicitors for the appellant, *Thynne & Macartney.*

Solicitor for the respondent, *H. J. H. Henchman*, Crown Solicitor for Queensland.

B. J. J.