[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF SUCCESSION DUTIES (SOUTH AUSTRALIA) . . } APPELLANT;
RESPONDENT.

AND

ISBISTER AND ANOTHER . . . . RESPONDENTS.
APPELLANTS,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *March* 5, 6.

Rich A.C.J., Starke, McTiernan and Williams JJ.

Death and Succession Duties—Declaration of trust—Power of revocation reserved by settlor—Power not exercised during settlor's lifetime—Whether trust to take effect on settlor's death—Succession Duties Act 1924-1936 (*S.A.*) (*No.* 1898—*No.* 2293), *sec.* 4.

A settlor, by a deed poll, declared himself a trustee of certain bonds for his daughter for life and after her death upon other trusts, but reserved to himself power to revoke the trusts and appoint new trusts. He died without having exercised the powers of revocation and new appointment, and his daughter survived him.

Held that the deed was not an instrument "containing trusts or dispositions to take effect upon or after the death of the settlor," and accordingly was not chargeable, on the settlor's death, with duty as a "settlement" within the meaning of sec. 4 of the *Succession Duties Act* 1924-1936 (S.A.).

Decision of the Supreme Court of South Australia (Full Court) affirmed.

APPEAL from the Supreme Court of South Australia.

William James Isbister and Annie Marie Gellert, the trustees under two deeds poll dated 12th March 1919 and 16th April 1929, respectively, and executed by the Honourable Sir John Langdon Bonython, K.C.M.G., in favour of his daughter, Edith Annie Bonython, appealed to the Supreme Court of South Australia by way of originating summons against an assessment made by the Commissioner of Succession Duties of South Australia in respect of succession duty

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charged on the above-mentioned deeds on the death of the settlor on 22nd October 1939. In a statement of facts agreed upon between the parties to the appeal, it appeared that by the first deed, the settlor declared himself the trustee, as from 1st January 1919, of certain South-Australian Treasury fixed deposits of a face value of £25,000 upon trust to pay the income therefrom to his daughter, Edith Annie Bonython, during her lifetime, and after her death, to stand possessed of the trust funds, and the income and the accumulations of income thereof, upon trust for her child, children, or remoter issue, at such ages and times (not being earlier than the age of twenty-one years or date of marriage), and in such shares, if more than one, as she should by deed or will appoint, and, in default of appointment, in trust for all her children in equal shares who, being sons, should attain the age of twenty-one years or, being daughters, should attain that age or marry, and, if there should be but one child, then the whole to be in trust for such child, and, if there should be no such child or children, in trust for all his grandchildren who should survive him and, being male, should attain the age of twenty-one years or, being female, should attain that age or marry, in equal shares. Having declared these trusts, the settlor then declared: "I shall have full power at any time by any deed or deeds with or without power of revocation and new appointment to revoke either wholly or partially the trusts and powers hereby declared concerning the trust funds and/or the income and/or accumulations thereof or the moneys or property for the time being representing the same or any part thereof respectively and by the same or any other deed or deeds may appoint and declare any new or other trusts or powers concerning the trust premises to which such revocation shall extend as to me shall seem meet but so that any such new or other trusts or powers shall be for the benefit of the said Edith Annie Bonython or of her husband (if any) and/or of the children or remoter issue of the said Edith Annie Bonython or any other child or children, grandchild or grandchildren of mine." By the second deed, which was indorsed on the first, the settlor declared that he as trustee, as from 20th March 1929, should hold certain described Commonwealth stock of a face value of £75,000 upon the same trusts, and subject to the same powers and provisions, including the power of revocation and new appointment, as were contained in the first deed. The settlor died on 22nd October 1939 without having exercised the powers of revocation and new appointment reserved to him by the deeds, and the value of the trust funds at his death was £101,109 10s. 2d. His daughter, Edith Annie Bonython, was still living and unmarried.

On 6th January 1940 the Commissioner of Succession Duty registered the deed of 12th March 1919 as a settlement under the *Succession Duties Act* 1924-1936 (S.A.), and on 14th June 1940 he made an assessment whereby the sum of £10,752 7s. was assessed as succession duty due and payable under the Act upon the property given or accruing under the deeds, as at the date of death of the settlor. The commissioner contended that the deed poll was a settlement within the definition of sec. 4 of the *Succession Duties Act*.

The trustees under the deeds gave notice of appeal against this contention, and, on the appeal being instituted by originating summons in the Supreme Court of South Australia, *Richards* J., on 23rd August 1940, referred it to the Full Court. On 23rd December 1940 the Full Court allowed the appeal and set aside the assessment.

The Commissioner of Succession Duties appealed to the High Court.

Hannan K.C. (with him *K. J. Healy*), for the appellant. Under the deeds there were two trusts, viz.:—(*a*) The trust to pay the income to the daughter during her life, which was not a life interest during the settlor's lifetime, because, by exercising his power of revocation, he could defeat the daughter's interest. The interest conferred upon her was at the will of the settlor. Her interest could be terminated at any time by the settlor, and there was no intention to create a tenure. (*b*) But on the death of the settlor the daughter's interest became indefeasible and a new trust was created.

[WILLIAMS J. referred to *In re Carne's Settled Estates* (1).]

In determining liability to taxation under a taxing Act, the substance, rather than the form, of the transaction is what is looked at. The court is not bound by the apparent tenor of the instrument but will decide according to the real nature of the transaction (*Commissioner of Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (2)).

[STARKE J. referred to *Davidson* v. *Chirnside* (3).]

It is clear that what was an interest at will became on the settlor's death an indefeasible interest, and it follows that the deeds contained trusts which were to take effect on the settlor's death (*In re Scott's Settlement* (4); *In re Bowman* (5)). In effect, the daughter's interest was contingent on her surviving the settlor (*Adamson* v. *Attorney-General* (6)). If one assessed the value of the daughter's

(1) (1899) 1 Ch. 324.
(2) (1915) 21 C.L.R. 69, at p. 75.
(3) (1908) 7 C.L.R. 324.
(4) (1916) S.A.L.R. 120, at p. 126.
(5) (1937) S.A.S.R. 274, at p. 280.
(6) (1933) A.C. 257, at pp. 268, 277.

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interest during the settlor's lifetime, it was very small, owing to its being at the will of the settlor, but on his death, when it became indefeasible, it became very different and was greatly enhanced in value (*Stanyforth* v. *Inland Revenue Commissioners* (1)). Both the nature of the trust and the value of the daughter's interest were different after the settlor's death, and consequently each deed was a " conveyance, transfer, appointment under power, declaration of trust or other non-testamentary disposition of property . . . containing trusts or dispositions to take effect upon or after the death of the settlor " (*Succession Duties Act* 1924-1936, sec. 4). Succession duty was, therefore, payable on the settlor's death.

Ligertwood K.C. and *Phillips*, for the respondent, were not called upon.

The following judgments were delivered :—

RICH A.C.J. This is an appeal from a judgment of the Supreme Court of South Australia allowing an appeal by the respondents against an assessment for succession duty made by the appellant under the *Succession Duties Act* 1924-1936 (South Australia) upon property settled under certain deeds poll executed by the late Sir Langdon Bonython. By the first deed Sir Langdon declared himself the trustee of certain funds upon trust to pay the income to his daughter, Edith, during her life and after her decease to stand possessed of the trust funds upon limitations which are not material. At the end of the deed he made the following declaration : " I shall have full power at any time by deed or deeds with or without power of revocation and new appointment to revoke either wholly or partially the trusts and powers hereby declared concerning the trust funds and/or the income and/or the accumulations thereof or the moneys or property for the time being representing the same or any part thereof respectively and by the same or any other deed or deeds may appoint and declare any new or other trusts or powers concerning the trust premises to which such revocation shall extend as to me shall seem meet but so that any such new or other trusts or powers shall be for the benefit of the said Edith Annie Bonython or of her husband (if any) and/or of the children or remoter issue of the said Edith Annie Bonython or any other child or children grandchild or grandchildren of mine." The second deed was indorsed on the first, and Sir Langdon thereby declared himself " the trustee as from the 20th March 1929 of Commonwealth inscribed stock amounting to £75,000 upon the same trusts and subject to the same

(1) (1930) A.C. 339, at p. 344.

powers and provisions including the power of revocation and new appointment as were contained in the first deed." Sir Langdon died without having exercised the powers of revocation and new appointment contained in the deeds. His daughter is still living and is still unmarried. The commissioner assessed the deeds to duty in the sum of £10,752 7s. On appeal to the Full Court of South Australia, the court allowed the appeal and set aside the assessment. The commissioner now appeals to this court against this judgment.

In my opinion the judgment was right, and I agree with the opinion expressed by the Chief Justice. However, as Mr. *Hannan* has argued the matter very earnestly, I shall state shortly my own opinion. The appeal involves the construction of the definition "settlement" in sec. 4 of the Act in question. In the events which have happened, the only question for our consideration is whether the subject instruments contain trusts or dispositions to take effect upon or after the death of the settlor. We are not concerned with the death of the tenant for life, who is still living. A perusal of the instruments shows no trust or disposition in the ordinary sense of the term which is affected by the death of the settlor. But the instruments contain a power of revocation and new appointment or resettlement which was never exercised. The sole ground for contending that there is a trust or disposition to take effect after the death of the settlor is that after his death the power of revocation ceased to be exercisable as it was a personal power. It is said that, as the trusts in the instruments were defeasible whilst the power existed and became indefeasible on the death of the settlor, a change took place on his death which constituted the taking effect of a trust or disposition. This confuses a revocation or condition subsequent or defeasance with a trust or disposition. The former are powers to destroy. The cesser or failure of the power to destroy may give greater value to the estate or interest open to destruction, but it is not the creation of a new estate or interest nor is it the taking effect of a trust or disposition.

In my opinion the appeal should be dismissed with costs.

STARKE J. I have had an opportunity of reading the opinion of my brother *Dudley Williams*, and I agree with it.

McTIERNAN J. The instrument does not answer to the description of a settlement of property containing any trust or disposition to take effect upon or after the death of the settlor. The trust or disposition in favour of the settlor's daughter took effect upon the

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making of the settlement. Upon his death it was no longer revocable. But the trust which then became irrevocable was the same trust which took effect upon the making of the settlement. No other trust either in form or in substance took effect upon the death of the settlor. I agree with the judgment of the Acting Chief Justice.

The appeal should be dismissed.

WILLIAMS J. The question whether the settlements became liable to duty on the death of the settlor (Sir Langdon Bonython) depends upon whether they contained a trust to take effect upon his death. The material trusts are to pay the income of the trust funds to his daughter, Edith, for life and after her death upon trust for her children and in default of such children for his grandchildren. The settlements contained a power for the settlor to revoke the existing trusts and make a fresh appointment wholly or partially in favour of his daughter or her husband, if any, and/or the children or remoter issue of his daughter or any other children or grandchildren of his. The settlor died on 22nd October 1939 without having exercised the power of revocation and new appointment.

Counsel for the Commissioner of Succession Duties has contended that, because of the power of revocation, the estate of the daughter during the settlor's lifetime was an estate at will; and that, upon his death, a new trust arose, because she then, for the first time, became indefeasibly entitled to an estate for life.

I think it is plain that the only trust created by the settlements in favour of Edith was an immediate determinable life estate in possession. That estate was liable to be destroyed during the settlor's lifetime by the exercise of the power, but this liability was simply an incident of the one and only trust created in her favour by the settlements. A similar position would arise where property is made subject to a power of appointment and there is a trust in default of appointment. Until the exercise of the power the donee who took in default of appointment would be entitled to the property. A release of the power of appointment would not create a fresh trust in default of appointment. His already existing estate would become indefeasible because it would no longer be liable to be defeated. In that case, as in the present case, the increase in commercial value would arise through an event happening which operated upon an already existing interest to give it added value. It would simply remove a blot on the title. It would not substitute a new and more valuable interest in lieu of an interest which previously

existed. The settlements, therefore, did not contain any trust to take effect upon the settlor's death.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitor for the appellant, *A. J. Hannan*, K.C., Crown Solicitor for South Australia.

Solicitors for the respondent, *Joyner, Phillips & Joyner.*

O. J. G.