[HIGH COURT OF AUSTRALIA.]

UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

H. C. OF A 1941.

SYDNEY, *Aug.* 7.

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

Estate Duty (Cth.)—Assets notionally included in estate—Policies of insurance and proceeds thereof—Absolute interest settled on wife but to be held in trust for settlor if wife predecease him—Settlor survived by wife—Estate Duty Assessment Act 1914-1928 (*No.* 22 *of* 1914—*No.* 47 *of* 1928), *sec.* 8 (4) (*c*), (*e*).

A settlor settled two policies of insurance effected on his life, and the proceeds of such policies, upon trust for the settlor's wife for an absolute interest with a proviso that if she predeceased him the policies and proceeds should be held upon trust for the settlor. The settlor predeceased his wife.

Held that the settlement did not contain an interest in the policies and proceeds for the life of the settlor within the meaning of sec. 8 (4) (*c*) of the *Estate Duty Assessment Act* 1914-1928, nor did he have a beneficial interest therein which passed by virtue of the settlement after his decease within the meaning of sec. 8 (4) (*e*); therefore the policies and proceeds did not form part of the estate of the settlor for the purposes of the Act.

CASE STATED.

On 9th November 1917 James Frederick Maslin (hereinafter called the settlor) effected two several policies of insurance on his own life. Each policy contained the following clause: "This policy of assurance is effected by the life assured in pursuance of the *Life, Fire and Marine Insurance Act* 1902 (N.S.W.) for the benefit of his sons . . . should both survive him as tenants in common in equal shares or of the survivor should either die during the life of the life assured." By deed of settlement dated 30th January 1925 the benefit of the policies was with the consent of the surviving son, one having died, resettled in favour of the wife of the settlor.

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By this deed the settlor declared:—"(*a*) That each of the said policies and all the proceeds thereof shall be held by the trustee for the benefit of his wife Alice Thornton Maslin in the same manner as if such policies had been originally effected for her sole benefit . . . : (*b*) Should the said Alice Thornton Maslin predecease the settlor the said policies and premises shall be held by the trustee upon trust for the settlor, his heirs, executors, administrators and assigns."

The settlor continued to pay the premiums which became due from time to time in respect of the policies, until 1933, when the policies were converted into paid-up policies.

The settlor died on 11th January 1940, leaving his wife him surviving. Probate of his will was granted to the Union Trustee Co. of Australia Ltd., the sole executor named therein.

In his assessment of the estate to duty the Federal Commissioner of Taxation treated the proceeds of the policies as part of the estate for the purposes of the *Estate Duty Assessment Act* 1914-1928, and an objection to this assessment was disallowed by the commissioner. The Union Trustee Co. appealed to the High Court from the decision disallowing the objection.

Upon the appeal coming on to be heard before him, *Rich* A.C.J., at the request of the parties, pursuant to sec. 27 of the *Estate Duty Assessment Act* 1914-1928, stated a case for the opinion of the Full Court upon the following question of law:—

> Whether by virtue of the provisions of the *Estate Duty Assessment Act* 1914-1928 the said policies or the proceeds thereof are deemed to be part of the estate of the deceased for the purposes of the said Act.

Sec. 8 (4) of the *Estate Duty Assessment Act* 1924-1928 provides as follows:—"Property— . . . (*c*) comprised in a settlement made by the deceased person under which he had any interest of any kind for his life whether or not that interest was surrendered by him at any time before his decease; or . . . (*e*) being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person, shall for the purposes of this Act be deemed to be part of the estate of the person so deceased."

Weston K.C. (with him *Kitto*), for the appellant. The arrangement made by the deceased was not a settlement within the meaning of sec. 8 (4) of the *Estate Duty Assessment Act* 1914-1928, nor was

any interest reserved thereunder to the deceased during his life. There was created a trust of the whole interest, an absolute interest in the wife, subject to the proviso that if she should predecease her husband the husband would succeed to the property. Her interest was an absolute but defeasible interest. That trust was created when the instrument came into operation and remained unvaried. The trusts in *Rosenthal* v. *Rosenthal* (1) were designed to take effect upon the death of the settlor and his wife, but here the relevant provision is based upon the wife predeceasing the husband, which, by its very nature, must be within the lifetime of the husband. The interest thus taken by the husband would have been an absolute interest and not merely an interest for life.

Alroy M. Cohen, for the respondent. The case stated shows that there was a settlement in fact. Until the moment of death of either party it was uncertain whether the proceeds of the policies would go to the wife or to the husband. Where in respect of a policy of insurance and the proceeds thereof a right in a donee only becomes indefeasibly vested at the death of the settlor property does pass at the death of the settlor (*In re Hodson's Settlement*; *Brookes* v. *Attorney-General* (2)). This case falls entirely within the principles of that case. The husband had a contingent interest by way of resulting trust (*Tennant* v. *Lord Advocate* (3)). There is no warrant in the Act for suggesting that the interest must pass to the executor. Upon the death of the husband the property passed to the wife, the whole interest went to the wife; thus a new interest was created. Where property remains in a settlor until his death it passes on his death. Whatever interest the husband had under clause 1 (*b*) of the deed was, until his death, his to dispose of and entirely within his disposition; upon his death it passed completely from him. There was a vital change in possession of the interest occurring on the death, converting an interest which was liable to be defeated into one which was indefeasibly vested. *Bakewell* v. *Deputy Federal Commissioner of Taxation* (*S.A.*) (4) does not seem to deal with the point.

The following judgments were delivered :—

RICH A.C.J. The question submitted in the case stated is whether by virtue of the provisions of the *Estate Duty Assessment Act* 1914-1928 the policies mentioned in the case or their proceeds are deemed to be part of the estate of James Frederick Maslin deceased for the purposes of the Act.

(1) (1910) 11 C.L.R. 87.
(2) (1939) Ch. 343.
(3) (1939) A.C. 207, at p. 213.
(4) (1937) 58 C.L.R. 743.

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James Frederick Maslin died on 11th January 1940. He was survived by his wife Alice Thornton Maslin.

By deed dated 30th January 1925 the deceased settled two policies of insurance effected on his life and their proceeds and thereby directed the trustee to hold the same upon trust for his wife for an absolute interest with a proviso that if she predeceased him the policies should be held by the trustee upon trust for himself. Mr. *Alroy Cohen* on behalf of the commissioner submitted that the proceeds of the policies are part of the estate of the deceased for the purposes of duty under the Federal *Estate Duty Assessment Act* 1914-1928, basing his contention on two grounds.

In the first place he said that the settlement contained an interest in the policies for the life of the settlor within the meaning of sec. 8 (4) (*c*) of the Act. In my opinion this is unsound. The only interest which the deceased had depended upon his surviving his wife, and this was not an interest of any kind for his life. The only life mentioned in the settlement was that of his wife, but even she did not have an interest of any kind for life. Her interest was an absolute interest with an executory gift over to the settlor absolutely in the event of her death in his lifetime. No life estate of any kind was therefore created by the deed.

In the next place he argued that the settlor had a beneficial interest in the policies or their proceeds which passed by virtue of the settlement after his decease to his wife (sec. 8, sub-sec. 4 (*e*)). But it is plain that his wife did not acquire any new interest on his death. Her interest was created at the date of the deed, and although his death caused that interest to become indefeasible it did not bring into existence any new estate (*Bakewell* v. *Deputy Federal Commissioner of Taxation* (*S.A.*) (1); *Commissioner of Succession Duties* (*S.A.*) v. *Isbister* (2)).

In my opinion the answer to the question should be: No.

STARKE J. I agree.

MCTIERNAN J. I agree.

WILLIAMS J. I agree.

Question answered in the negative. Costs costs in the appeal.

Solicitors for the appellant, *Norman C. Oakes & Sagar.*

Solicitor for the respondent, *H. F. E. Whitlam,* Commonwealth Crown Solicitor.

J. B.

(1) (1937) 58 C.L.R. 743.

(2) (1941) 64 C.L.R. 375.