[HIGH COURT OF AUSTRALIA.]

WEST . . . . . Appellant;

AND

FEDERAL COMMISSIONER OF TAXATION . Respondent.

H. C. of A. 1949.

Melbourne, *Oct.* 27, 28. Sydney, *Nov.* 16.

Latham C.J., Rich and Dixon JJ.

*Estate Duty (Cth.)—Assessment—Dutiable property—"Property . . . comprised in a settlement made by . . . deceased . . . under which he had any interest . . . for his life"—Deceased entitled under will to have property settled on her for her life and after her death on her children—Whether provision in will a mere power or an imperative trust—Title to property in trustees of will—Settlement executed by trustees and deceased—Estate Duty Assessment Act* 1914-1928 (*No.* 22 *of* 1914—*No.* 47 *of* 1928), *s.* 8 (4) (*c*).

A testator by his will declared trusts in specified shares in his trust estate in favour of his sons and daughters, including his daughter H.; this declaration was followed by a proviso by which in effect it was willed and declared that the shares should not vest in the daughters until they attained forty or married under that age. The testator then willed and declared that the share of each daughter should be enjoyed by her as a personal provision and free, when she should be covert, from the control and engagements of her husband "and it is my will and desire that the share . . . of every daughter . . . who . . . shall be about to be married under the age of forty years shall be by deed settled and assured upon her and her children . . . and in such way and manner as my trustees shall in" their "discretion . . . appoint or think best but so nevertheless as not to deprive any such daughter of the annual income arising from her share during her life."

The daughter, H., being about to be married under the age of forty, a settlement of her share was made by an indenture to which the trustees were parties of the first part and H. was party of the second part. It recited, *inter alia*, the desire of the trustees to comply with the "direction and declaration" in the will as to settling daughters' shares on marriage under the age of forty; that "in accordance with such declaration and desire" the trustees "have caused to be prepared such settlement or assurance in such form . . . as hereinafter in these presents expressed"; and that H. was similarly desirous and

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consented to and concurred in the making of the settlement or assurance. H.'s marriage was duly solemnized, and the effect of the indenture was to settle "the said share" on trust to pay the income to H. for life for her separate use without power of anticipation and after her death for such of her children by that or any other marriage as she should appoint with provisions to operate in default of appointment. H. died in 1937, leaving four children.

For the purposes of Federal estate duty on H.'s estate, the commissioner included in his assessment as part of H.'s estate the value of the property the subject of the indenture of settlement.

*Held* that he was not correct in so doing, because the property was not "comprised in a settlement made by" H. within the meaning of s. 8 (4) (*c*) of the *Estate Duty Assessment Act* 1914-1928.

CASE STATED.

On an appeal to the High Court by Reginald William West, the administrator of the estate of Helen Amelia Weston, deceased, against an assessment of the estate of the deceased to Federal estate duty *Latham* C.J. stated for the opinion of the Full Court a case which was substantially as follows :—

1. Albert Terry deceased (hereinafter called "the testator") died on 27th August 1907 leaving a will, probate whereof was duly granted in Victoria on 4th March 1908 to Albert Augustus Terry and Helen Amelia Terry, the executor and executrix named therein.

2. By the will the testator devised and bequeathed his real and residuary personal estate to his executor and executrix upon certain trusts whereby he directed, *inter alia*, that his trustees should hold two thirteenth parts or shares of his residuary estate (hereinafter referred to as "the daughter's share") upon trust for his daughter the said Helen Amelia Terry with a proviso however, so far as material, that such share should not vest in the daughter until she should attain the age of forty years or marry under that age. The will contained the following further provision affecting such share : "It is my will and desire that the share in my trust estate of every daughter of mine under any of the trusts or provisions of this my will who shall be married at the time of my decease or shall be about to be married under the age of forty years shall be by deed settled and assured upon her and her children and so as to be free from the debts or control of any husband and in such way and manner as my trustees shall in the discretion of my trustees appoint or think best but so nevertheless as not to deprive any such daughter of the annual income arising from her share during her life."

3. No share or interest has accrued to "the daughter's share" under the provisions for accruer contained in the said will.

5. Helen Amelia Terry acted as a co-trustee with Albert Augustus Terry of the estate of the testator until 17th March 1910, when she duly retired as a trustee and Robert Fulton, Solicitor, of Melbourne, was appointed in her place. Since such time Albert Augustus Terry and Robert Fulton, both of whom reside and have at all material times resided in Victoria, have continued to act as the trustees of the estate.

6. Towards the end of 1911 Helen Amelia Terry, being about to marry one Philip Stanley Weston and being then under the age of forty years, applied to the trustees for their consent in writing to her marriage in accordance with the terms of the will, and such consent was duly given by the indenture of 29th November 1911 hereinafter referred to.

7. Helen Amelia Terry married Philip Stanley Weston on 3rd January 1912. She was then twenty-five years of age.

8. Prior to and in contemplation of the marriage " the daughter's share " together with a sum of £1,544, being unapplied income thereof then in the hands of the trustees, and any other share or interest whatsoever whether original or accruing or howsoever derived by Helen Amelia Terry under or by virtue of the will were settled upon trusts for the benefit of Helen Amelia Terry for life and thereafter for the benefit of her children and otherwise by an indenture made on 29th November 1911 between Albert Augustus Terry and Robert Fulton of the first part, Helen Amelia Terry of the second part and Philip Stanley Weston of the third part.

9. Helen Amelia Weston died intestate domiciled in England on 29th December 1937. Letters of administration to her Australian estate have been granted in Victoria to the appellant, Reginald William West.

10. Helen Amelia Weston left four children her surviving.

11. " The daughter's share " comprised in the settlement mentioned in par. 8 and the aforesaid unapplied income were property situated in Australia at the death of Helen Amelia Weston.

12. On or about 14th March 1948 a return under the *Estate Duty Assessment Act* was duly furnished by the appellant. In such return the values of the corpus of " the daughter's share " settled as aforesaid and of the said unapplied income were excluded.

13. On 9th October 1948 the respondent served on the appellant a notice of assessment of duty.

14. By the notice the value of the estate for duty was assessed at £32,935. Of that said amount the sum of £29,346 5s. 1d. represents the true value as at the death of Helen Amelia Weston of the corpus of " the daughter's share " settled by the aforesaid indenture

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of settlement and a further £1,544 represents the amount of the unapplied income, which amount is still held by the trustees.

15. On 8th November 1948 the appellant caused to be lodged with the respondent a notice stating that the appellant objected to the assessment on the following grounds :—(*a*) The assessment is wrong in law and is excessive. (*b*) The commissioner has wrongly included in the value of the dutiable estate the value of the property comprised in an indenture of settlement made on 29th November 1911. (*c*) The said settlement was not a settlement made by the deceased within the meaning of s. 8 (4) (*c*) of the *Estate Duty Assessment Act*. (*d*) The property comprised in the said settlement did not form part of the estate of the deceased person and is not deemed to be part of such estate for the purposes of the *Estate Duty Assessment Act*.

16. On 19th November 1948 the respondent notified the appellant that he had disallowed the objection. At the request of the appellant the objection was treated as an appeal and forwarded to the High Court.

17. The appeal coming on for hearing, the appellant admitted that the sum of £1,544 representing the amount of the unapplied income referred to in par. 14 is correctly included in the value of the estate as assessable for duty.

The question for the opinion of the Full Court was as follows :—

Was the respondent correct in including in his assessment of the dutiable estate of Helen Amelia Weston deceased for the purposes of the *Estate Duty Assessment Act* 1914-1928 the value as at the date of her death of the corpus of " the daughter's share " settled by the aforesaid indenture of settlement ?

*Adam*, for the appellant. The deceased was not a settlor under the indenture of 29th November 1911. She had no property to settle. There was no settlement " made by " her. She did not purport to settle the property in which she had an interest under her father's will. The true position was that the trustees were under a duty—or, at least, had the power—to make the settlement, and it was made by them. The trustees were the only settlors under the document ; the deceased merely concurred in it. For property to be dutiable under s. 8 (4) (*c*), it must be property of the settlor in the first instance. The property here in question was not that of the deceased.

*T. W. Smith* K.C. (with him *Winneke*), for the respondent. At the date of the indenture of 29th November 1911 the deceased had

an interest in the corpus of the share bestowed by the will—that is, either a vested or a contingent interest. That interest she intended to, and did, settle by the indenture. [He referred to *Jarman* on *Wills*, 7th ed., p. 1395; also, p. 1327.] The " will and desire " clause in the will is no more than a special power of appointment in the trustees, and no gift in default is to be implied (*Perpetual Trustee Co.* v. *Tindal*; *Public Trustee* v. *Perpetual Trustee Co.* (1)). There is an absolute gift to the deceased cut down by the power of appointment in the trustees (*Jarman*, pp. 842 et seq.). The deceased had an interest in corpus which she was capable of settling subject to the exercise of the power, and circumstances made it necessary for her and the trustees to make the settlement.

*Adam*, in reply. The only effect of the deceased's concurrence in the indenture of settlement was to bind her in respect of property (if any) which the trustees had no power to settle. The " will and desire " clause in the will does not merely confer a power on the trustees; it is a trust. In the events which happened the deceased's children took an executory interest under the will.

*Cur. adv. vult.*

The following written judgments were delivered:— Nov. 16.

LATHAM C.J. The question submitted by this case stated is whether the Commissioner of Taxation was correct in including in his assessment of the dutiable estate of Helen Amelia Weston deceased for the purposes of the *Estate Duty Assessment Act* 1914-1928 the value as at the date of her death of the corpus of " the daughter's share " settled by an indenture of settlement dated 29th November 1911. " The daughter's share " was the share of Mrs. Helen Amelia Weston under the will of her father the late Albert Terry. The testator, after making certain provisions for his widow and one of his sons, directed that his trustees should stand and be possessed of the whole of his estate as to five equal thirteenth parts thereof for three of his sons and as to eight equal thirteenth parts thereof for another son and three daughters in equal shares. Under this provision the daughter's share of Mrs. Weston was an interest in two-thirteenths of the residuary estate left by her father. The will contained a direction that the share of a daughter should not vest until she should attain the age of forty years or marry under that age and that if a daughter died under the age of forty years without being married her share should accrue

(1) (1940) 63 C.L.R. 232.

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to others of the testator's children. These provisions taken by themselves would have given Mrs. Weston a contingent interest in the corpus of two-thirteenths of the residuary estate which interest would have become vested when she attained the age of forty years or married under that age. But what would otherwise have been the result of these provisions is altered in material respects by the following provision:—"AND I ALSO WILL AND DECLARE that the share or provision for each of my said daughters under the trusts of this my Will shall respectively be enjoyed by her as a personal provision and free whensoever she shall be covert from the control and engagements of her husband and so that her receipts alone notwithstanding any coverture shall be sufficient discharges to my Trustees AND it is my Will and desire that the share in my trust estate of every daughter of mine under any of the trusts or provisions of this my Will who shall be married at the time of my decease or shall be about to be married under the age of forty years shall be by deed settled and assured upon her and her children and so as to be free from the debts or control of any husband and in such way and manner as my Trustees shall in the discretion of my Trustees appoint or think best but so nevertheless as not to deprive any such daughter of the annual income arising from her share during her life."

This latter provision is in my opinion clearly an imperative direction by the testator to his trustees. The words "it is my will" cannot be construed as merely permissive, as only creating a power which may or may not be exercised at the will of the trustees. These words impose upon the trustees a duty to settle the daughter's share in the manner stated in the will; that is, upon her and her children free from control by her husband in such way and manner as the trustees should in their discretion think best but so as to give the daughter the right to the annual income during her life. The will contains provisions whereby the value of a daughter's share may be increased; e.g. if a son had died under forty years of age without issue or a daughter had died under forty years of age unmarried or a daughter had married under the age of forty years but without the consent of the trustees. The words in the last quoted provision of the will "the share in my trust estate of every daughter of mine under any of the trusts or provisions of this my will" show that the direction to settle is to apply to any interest of a daughter whether original or accrued. The words "her children" in the phrase "settled and assured upon her and her children" are obviously wide enough to cover the children of any marriage contracted by the daughter.

Thus the position is that the will contained an executory trust in favour of the testator's daughter Helen Amelia and her children. Her interest was a life interest only—an interest in income during her life. She had no interest in the corpus of her share as distinct from the income.

In 1911 Helen Amelia, being twenty-five years of age, proposed to marry Philip Stanley Weston. The trustees consented to the marriage, which took place on 3rd January 1912. On 29th November 1911 an indenture of settlement was executed by the trustees of the will, Messrs. A. A. Terry and Robert Fulton, by Helen Amelia Terry spinster, and Philip Stanley Weston, her intended husband. The indenture recited the relevant provisions of the will and the intended marriage with the consent of the trustees. The indenture also contained a recital stating that the trustees were "desirous of complying with the direction and declaration in the said Will contained that the share in the trust estate of every daughter of the Testator under any of the trusts or provisions of the said Will who should be about to be married under the age of forty years should be by deed settled and assured in accordance with such declaration and direction and in pursuance of such their desire have caused to be prepared such settlement or assurance in such form and to such effect as hereinafter in these presents expressed or contained."

The operative words of the deed are—"they the said Albert Augustus Terry and the said Robert Fulton as the present trustees of the said Will declare that as from the solemnization of the said intended marriage between the said Helen Amelia Terry and the said Philip Stanley Weston they the said Albert Augustus Terry and the said Robert Fulton or other the Trustees or Trustee for the time being of the said Will shall stand possessed of the said share upon trust to pay the income arising therefrom to the said Helen Amelia Terry during her life for her separate use without power of anticipation."

There follows a proviso relating to any insolvency of the daughter, and the provision as to the trust continues—"from and after the death of the said Helen Amelia Terry the said Trustees or Trustee for the time being shall stand possessed of the capital and income of the said share in trust for all or such one or more of the children of the said Helen Amelia Terry whether of the said intended marriage or of any subsequent marriage in such manner and form in every respect as she by deed with or without power of revocation and new appointment or by Will or Codicil may appoint," with provisions in default of appointment in favour of the children, and a further

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provision that if no child qualifies to take the property is to be held upon trust for such person for such purposes as the daughter shall during coverture by will or codicil and when not under coverture by deed or by will appoint and in default of appointment upon trust for the daughter.

Helen Amelia Weston died on 29th December 1937. The commissioner claimed that the property to which the settlement related formed part of her estate for the purpose of the *Estate Duty Assessment Act* 1914-1928. Section 8 (4) (*c*) of the Act provides that property—"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" shall for the purposes of the Act be deemed to be part of the estate of the deceased person. It is contended on behalf of the commissioner that the indenture is a settlement made by Mrs. Weston because she was a party to it, that the property comprised in the settlement was property in which she had an interest for life, and that therefore the property falls within the description contained in s. 8 (4) (*c*).

Mrs. Weston placed on record her concurrence in the terms of the settlement by executing it, and her intended husband did the same thing. But in my opinion neither of these persons settled any property by the settlement in which property Mrs. Weston had a life interest. The property settled was property the title to which was in the trustees. They settled the property in accordance with a direction contained in the will of the testator. The interest of Mrs. Weston under the will was an interest in income to be defined by the settlement to be made in pursuance of the duty imposed by the will upon the trustees. That interest was an interest in income for her life. She did not have any interest in any property of which she made a disposition by means of the settlement. She did not make a settlement of any property. In my opinion, therefore, the question submitted should be answered—No.

RICH J. I would answer the question submitted in the negative and can state my reasons very briefly. The clause in the testator's will that "it is my will and desire that the share in my trust estate of every daughter of mine . . . shall be by deed settled and assured" is not a mere power but an imperative trust which the trustees were bound to execute and they and not the deceased daughter executed the settlement pursuant to the provisions in the will.

Dixon J. The question for decision is whether property subject to the trusts of a settlement dated 29th November 1911 forms part of the notional estate of the deceased for the purpose of estate duty. The Commissioner of Taxation claims that the property is caught by par. (*c*) of sub-s. (4) of s. 8 of the *Estate Duty Assessment Act* 1914-1928. The paragraph provides that property 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 shall for the purposes of the Act be deemed to be part of the estate of the person so deceased. The property in question, which is valued at £29,346, stood settled under the instrument upon trusts which included a life interest in the deceased. The question is whether it was a settlement made by the deceased. The administrator of her estate denies that the settlement was made by the deceased and says that it is a settlement made by the trustees of her late father's estate pursuant to executory trusts contained in his will.

The deceased's father died on 27th August 1907. By his last will he appointed a son and his daughter, who is the deceased, the executor and executrix of his will and constituted them trustees of his real and residuary personal estate. After directing conversion he declared trusts the more material of which are as follows. Subject to certain provisions for life or during her widowhood in favour of his wife and an annuity for a son he willed and declared that the trust estate should be held upon trust as to five thirteenth parts for three named sons and as to eight thirteenth parts for a fourth son and his three daughters in equal shares. We are concerned with the deceased's fourth share under this trust, that is to say the two-thirteenth share of the residuary estate allocated to her.

The declaration was followed by an extensive proviso. The proviso began by willing and declaring that the shares of the sons should not vest in them until they respectively attained forty years and the shares of the daughters should not vest in them until they attained forty or married under that age. The clause proceeded, " so that the share or shares as well original as accruing " of a son dying under forty, or a daughter dying under that age without having married, leaving no issue him or her surviving, should be held upon trust and accrue to the others of them at the like ages and in manner aforesaid. Then followed a trust of the share of a son dying under forty leaving issue, a trust as to a half-part of the share for that issue and as to the other half-part a trust that it should revert to and fall into the trust estate. Next the daughters' shares were dealt with. First the testator willed and declared that

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the share or provision for each daughter should be enjoyed by her as a personal provision and free, whensoever she should be covert, from the control and engagements of her husband and so that her receipts should be sufficient discharges. Then followed the provision on which the appellant's contention rests. It is as well to set it out. "And it is my Will and desire that the share in my trust estate of every daughter of mine under any of the trusts or provisions of this my Will who shall be married at the time of my decease or shall be about to be married under the age of forty years shall be by deed settled and assured upon her and her children and so as to be free from the debts or control of any husband and in such way and manner as my Trustees shall in the discretion of my Trustees appoint or think best but so nevertheless as not to deprive any such daughter of the annual income arising from her share during her life."

The will contained a clause of general application to the effect that if a child of the testator should after his death marry under the age of forty without the previous consent in writing of the trustees, or of a majority of them, to such marriage, then the share of such child under the will should be held upon a discretionary trust to apply the income for the maintenance education or support of any children of such child and after his or her death upon trust as to half the corpus for such children and as to the other half, and in default of such children, the whole, for the other sons and daughters in like proportions and subject to the same conditions as the original shares.

The will also contained a provision that, if a daughter who after the testator's death married under the age of forty should become insolvent by having her estate sequestrated, then the annual income of the share of such daughter in the trust estate otherwise payable to her should cease to be so payable and should be applied by the trustees in their discretion for the maintenance education and support of any children of such married daughter and until such a child should be born the trustees should apply the whole or any part of the income for the benefit of the daughter in such way or manner as the trustees should think fit or accumulate it for the benefit of unborn children.

In the case of one son the will contained a limitation of his share over to the other children if he died without qualifying in a specified profession. It will be seen that in three contingent events shares might accrue to holders of original shares, viz. (1) the death of one of the sons under forty without issue or of one of the daughters under forty without having married; (2) the marriage of a child

of the testator under forty without the consent of the trustees; (3) the death of the above-mentioned son without qualifying for his profession.

Some doubt seems to have been entertained whether the provision with reference to the settlement of the shares of daughters marrying under forty extended to accruing shares or related only to original shares. In the event there was no accrual because none of the contingencies giving rise to an accruer occurred. In 1911 the deceased, being then twenty-five years of age, was about to marry and in pursuance of the provision in the will a settlement of her share in the trust estate was made. It took the form of an indenture in which the trustees (of whom the deceased was no longer one, having retired from the office) were parties of the first part, the deceased party of the second part and her intended husband party of the third part. The indenture recited the relevant provisions of the will and, among other matters, the fact that the deceased was a daughter of the testator named in his will and entitled under the trusts to a share or interest in the trust estate "as well original as accruing as contingent." There was a recital of the intended marriage, of the consent thereto of the trustees and of the desire of the trustees to comply with the "direction and declaration" as to settling daughters' shares on marriage under forty years of age. The recital continued, "in accordance with such declaration and direction and in pursuance of such their desire" (they) "have caused to be prepared such settlement or assurance in such form and to such effect as hereinafter in these presents expressed or contained." Next followed a recital to the effect that the trustees were further desirous that, with the purpose of preventing such doubts (if any) as might otherwise arise, the share to be settled should be deemed to include all or any shares or interests accruing as well as original shares and stated that they should be included in the expression "the said share." The last recital expressed the similar desire of the deceased and her intended husband and the fact that they consented and concurred in the making of such settlement or assurance in such form and to such effect as was afterwards contained in the indenture "as they by their execution of these presents respectively acknowledge and admit."

The operative parts of the indenture on the solemnization of the marriage which duly took place settled "the said share" upon trust to pay the income to the deceased for life for her separate use without power of anticipation and after her death for such of her children by that or any other marriage as she should appoint and

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in default of appointment to such of them as should attain twenty-one or being daughters marry under that age in equal shares and in default of such children then to such persons as she should appoint under a general power and, in default of the exercise of the general power, then for herself her executors administrators and assigns.

The life interest of the deceased was settled subject to a protective trust in case of her insolvency expressed in the same terms *mutatis mutandis* as the protective trust in the will, the substance of which is set out above. The only additional circumstance that should be stated is that at the time of the settlement there was in the hands of the trustees an amount of unapplied income the share of which belonging to the deceased was £1,544. This amount was treated as subject to the settlement. The appellants do not think it worth while to contest the commissioner's claim that this sum is liable to duty.

Upon the foregoing facts the case for the appellants is put very simply. They say that the settlement was made by the trustees in pursuance of an executory trust in the will which they were bound to carry out and that the fact that the deceased joined in the deed is of no significance because it did not result in any disposition on her part.

The answer of the commissioner is that when the deceased became a party to the indenture she did declare trusts of an interest to which she was entitled whether it was vested or contingent and there was a disposition on her part sufficient to support the settlement either wholly or as to some limitations or conditions.

The first contention by which it is sought to sustain this view is that the provision expressing the will and desire of the testator that his daughters' shares should be settled is not an imperative trust but is no more than a power. It is said that the deceased had a vested interest which in virtue of her *jus disponendi* she might settle and that it was impossible to refer the settlement any more to the power of the trustees to settle than to her right of alienation: the settlement was effected by the combination of the power of the one and the right of the other. Even if the deceased's interest were contingent, that, it was said, would still be true.

This argument has in my opinion no basis. The provision in question creates an executory trust of a once familiar kind which the Court would carry into execution. It is a trust which the trustees are under a duty to execute and it qualifies and cuts down the primary gift to the daughters contained in the earlier part of the will. The reliance on the part of the appellant on the use of

the word " desire " is misplaced. It does not point to the provision being a power. The clause is otherwise expressed in a way that shows its imperative character and there is no inconsistency in the use of the word " desire." In any case I am not prepared to accept the view that the interests of the daughters were vested before marrying (or attaining the age of forty). The deceased by joining in the settlement did not " settle " her share, at all events so far as it was an original share. For her interest was subject to the settlement, which was a settlement made by the trustees and giving effect to the directions of the will.

Next it was claimed that her joining in the settlement was necessary to clear up the doubts concerning accruing shares and that she at least settled the contingent right to accruing shares. No shares did accrue and, even if it were so, in the result no property made over to the trustees by her was comprised in the settlement. But I am clearly of opinion that the clause directing the settlement of daughters' shares embraced accruing shares.

Then it was said that the settlement went outside or beyond the will (1) in the inclusion of children by a subsequent marriage ; (2) in depriving her of the annual income in case of insolvency ; (3) in restraining her from anticipation ; and (4) in the inclusion of the sum of £1,544 of unapplied income. There is a very short answer to each of these points.

(1) On the construction of the direction to settle, it is clear that the direction includes children by any marriage. (2) The clause in the settlement relating to insolvency follows the protective provision of the will implicitly. Moreover it is the insolvency that would deprive the deceased of the income and the clause would not produce any privative effect. The settlement in this respect conforms with the directions of the will. (3) A restraint on anticipation is normally introduced in settlements framed by the Court in carrying into effect an executory trust for a settlement on marriage and it does not deprive the married woman of the income—otherwise payable to her. (4) The settlement does not expressly refer to unapplied income and no information is before us of how it came to be treated as subject to the settlement. Presumably it was considered that such was the meaning of both the will and the settlement. The question has not been raised, the appellants preferring to forgo the duty on the sum, but there is much to be said for the view that, under a provision contained in the will by which accumulations of unapplied income are deemed to be accretions of corpus, the unapplied income became part of the share directed to be settled. But in any case the inclusion of the unapplied income, even if

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referable only to the deceased's consent and concurrence expressed in the deed, would not make the other property dutiable, the settlement of which was referable only to the trustees acting in pursuance of the executory trust. That is not the effect of s. 8 (4) (*c*).

In my opinion it was the trustees and not the deceased who made the settlement of the property in question and they did so only in execution of the trusts of the will.

I answer the question in the case stated—No.

*Question answered — No. Case remitted to Latham C.J.*

Solicitors for the appellant: *Blake & Riggall.*

Solicitor for the respondent: *G. A. Watson,* Crown Solicitor for the Commonwealth.

E. F. H.