[HIGH COURT OF AUSTRALIA.]

COMMISSIONER OF STAMP DUTIES (N.S.W.) APPELLANT; APPLICANT,

AND

BRADHURST AND OTHERS . . . RESPONDENTS. RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 8-10.

MELBOURNE, *June* 8.

Latham C.J., McTiernan, Williams, Webb and Fullagar JJ.

Death and Succession Duties (N.S.W.)—Declaration of trust—Beneficiary to attain age of twenty-one years or marry—Power of revocation reserved by settlor—Power not exercised during settlor's lifetime—Beneficiary attained majority and married subsequent to death of settlor—Trust fund—Beneficiary—"Beneficial interest"—Quaere, whether beneficial interest in fund accrued or arose to beneficiary on death of settlor—Stamp Duties Act 1920-1940 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 50 *of* 1940), s. 102 (2) (*i*).

By an indenture a settlor declared that the trustees were to hold certain property upon trust if and when his grand-child C. should attain the age of twenty-one years or marry under that age whichever should first happen to pay and transfer the trust property to her absolutely, provided that in case C. should die under that age unmarried the trustees should hold the trust property in trust for the settlor his executors, administrators and assigns. The indenture also reserved a power to the settlor to vary or revoke the trusts. By a deed poll the settlor in exercise of this power revoked the trusts declared by the indenture in his favour in case C. should die under the age of twenty-one years, and declared that in that event the trust property should be held upon trust for the brothers and sisters of C. The settlor further declared that the power of revocation reserved to him in the indenture should be in effect deleted and he substituted therefor a power of revocation by deed or by will for the purpose only of permitting him to declare new trusts for the benefit of any of the brothers and sisters of C. The settlor never exercised the special power reserved by the deed poll. On the date of the settlor's death C. was under the age of twenty-one years and unmarried, but she married some years later.

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Held, by *McTiernan*, *Williams*, *Webb* and *Fullagar* JJ. (*Latham* C.J. dissenting), that though the interest of C. under the indenture was provided by the settlor, no beneficial interest accrued or arose on the death of the settlor within the meaning of s. 102 (2) (i) of the *Stamp Duties Act* 1920-1940 (N.S.W.).

Adamson v. *Attorney-General*, (1933) A.C. 257, and *Attorney-General* v. *Lloyds Bank Ltd.*, (1935) A.C. 382, distinguished.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.), affirmed.

APPEAL from the Supreme Court of New South Wales.

A motion was brought under ss. 115 and 120 of the *Stamp Duties Act* 1920-1940 (N.S.W.) in the equitable jurisdiction of the Supreme Court of New South Wales by the Commissioner of Stamp Duties for an order directing the sale and the vesting in the purchaser or purchasers of a sufficient part of certain property, said to be included in the dutiable estate of Sir William Charles Cooper deceased, to meet the unpaid balance of the death duty assessed under that Act, upon the final balance of the estate of the deceased, with certain interest.

Sir William Charles Cooper died on 2nd September 1925, in England, and probate of his will and five codicils as contained in an exemplification of probate granted by the High Court of Justice in England, was granted in the Supreme Court of New South Wales to Tom Raine and Joseph Beresford Grant, and, later, in pursuance of leave reserved, to Percy Arundel Rabett, they being three special executors whose appointment was limited as to the testator's real and personal estate and effects situated in the Commonwealth of Australia. The dutiable estate of the testator for the purposes of the Act was very large, and certain death duty was assessed under the Act and subsequently paid. Thereafter certain further duties were assessed in respect of the estate and paid. The commissioner subsequently made a further assessment of duty in respect of assets comprised in an indenture of settlement made by the testator on 4th February 1910. This further assessment not having been paid, the motion was brought to enforce the payment thereof by the sale of assets which were settled under that indenture or of assets which had replaced or accumulated from and augmented the settled assets from time to time.

The indenture of settlement recited that in consideration of the natural love and affection of the testator for his granddaughter Joyce Mabel Cooper he had transferred certain property, referred to as the trust fund, to trustees upon trust during the minority of

the said Joyce Mabel Cooper to accumulate the income arising from the trust fund at compound interest by investing it and the resulting income thereof in any of the investments thereby authorized, and upon further trust if and when the said Joyce Mabel Cooper should attain the age of twenty-one years or marry under that age whichever should first happen to pay and transfer the trust fund and the accumulation of the interest thereof to Joyce Mabel Cooper absolutely provided that in case Joyce Mabel Cooper should die under the age of twenty-one years without having been married then the trustees should hold the trust fund and the accumulations of the income thereof in trust for the testator, his executors, administrators and assigns. The indenture of settlement contained the further proviso that it should be lawful for the testator at any time by deed or will or codicil expressly referring to that power or the property subject thereto to declare such new or other uses and trusts of and concerning the trust fund and the accumulations of the income thereof or any part or parts thereof as he might think fit for the benefit of himself his heirs executors or administrators or any other person or persons and for that purpose wholly or partially to revoke and make void the uses trusts powers and provisions therein declared and contained of and concerning the trust fund and the said accumulations.

By a deed poll made on 1st June 1922, the testator, in exercise of the power conferred upon him by the indenture of settlement revoked the trusts declared by that indenture in his favour in case Joyce Mabel Cooper should die under the age of twenty-one years, and declared that in that event the property should be held in trust for the brothers and sisters of Joyce Mabel Cooper. In the deed poll the testator further declared that the power of revocation reserved to him in the indenture of settlement should be read and construed as if it were deleted and there was substituted for it a power of revocation by deed or by will for the purpose only of enabling him to declare new trusts for the benefit of any child or any of the children of his son William George Daniel Cooper other than Joyce Mabel Cooper.

Joyce Mabel Cooper was born on 29th August 1909. She survived the testator and was unmarried at his death, but, in 1934, had married one Scott. The property subject to the trusts of the indenture of settlement was, at the date of the testator's death, valued at £9,759. On 27th November 1930, Joyce Mabel Cooper, having then attained the age of twenty-one years, executed a release in favour of the then trustees of the indenture of settlement, and on 10th August 1931, by indenture, she settled the whole of

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the assets which had been held on the trusts of the indenture of settlement upon trustees who were residing in England and empowered those trustees to allow any stocks and securities in the Commonwealth of Australia to stand in the names of any persons whom they might nominate as agents on their behalf. At the date of the motion the trustees of the indenture of 10th August 1931, namely Christopher E. Fuller, Francis Edwin Dusgate and Joyce Mabel Scott, still lived in England and were respondents to the motion. They had nominated Walter Symonds Bradhurst and Reginald Lee Rex Rabett as their agents in Australia to hold the stocks, shares and securities and held a considerable amount of property in their names as such agents which either was or was derived by accumulation from the property originally held under the trusts of the indenture of settlement of 4th February 1910.

By the assessment which it was sought to enforce the commissioner included in the testator's dutiable estate the sum of £9,659 in respect of the assets which were subject to the trusts of the indenture of settlement of 4th February 1910, at the date of the testator's death, that sum being the then value of the whole of those assets, less £100. The effect of the inclusion of that sum in the dutiable estate was to increase the duty payable by £1,931 16s. 0d. and the payment of that sum and interest on it was sought on the motion. The testator had made a number of other settlements on other grandchildren on somewhat similar lines to that made by him in the indenture of settlement, so that, in some sense, this case was a test case to determine the dutiability of the property affected by those settlements.

In making the assessment the commissioner acted upon the view that the property subject to the indenture of settlement of 4th February 1910 at the date of the testator's death should be deemed to be included in his estate under the provisions of s. 102 (2) (i) of the *Stamp Duties Act* 1920 (N.S.W.), as amended.

Evidence was given on behalf of the commissioner of actuarial valuations of a contingent interest before and after the death of the settlor, and, on behalf of the respondents, of the beneficial interest under the indenture of settlement of Joyce Mabel Cooper immediately before and immediately after the date of the testator's death. A son of the testator deposed that the testator was in considerable pain by reason of the nature of his illness and during the last few days of his life he collapsed and became unconscious and accordingly was incapable of revoking the settlement made in favour of Joyce Mabel Cooper and it was in full force and virtue at the time of his death.

Roper C.J. in Eq. held that the motion failed because no beneficial interest in the property accrued or arose on the death of the testator and so no duty was properly assessable in respect of it. The motion was dismissed with costs.

From that decision the commissioner appealed to the High Court.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

C. A. Weston K.C. and *G. Wallace* K.C. (with them *A. Bridge*), for the appellant.

C. A. Weston K.C. The property of which the respondent Scott was the beneficiary under the indenture was, under s. 102 (2) of the *Stamp Duties Act* 1920 (N.S.W.), as amended, deemed, for the purpose of duty, to be the property of the deceased. There was an interest provided by the deceased alone; a beneficial interest created on his death. A new beneficial interest accrued or arose upon his death, and a question for determination is as to the extent of that interest. At the date of the deceased's death the respondent Scott had a contingent interest. This matter is completely covered by the decision in *Adamson* v. *Attorney-General* (1). Section 2 of the *Finance Act* 1894 (Imp.) considered in that case is indistinguishable from s. 102 (2) (i) of the *Stamp Duties Act* 1920, as amended. That case did not rest upon a change of possession as stated by the court below and was similar to this case where also there was not any change of possession. When valuing the interest the experts called on behalf of the respondent ignored the possibility that many years prior to his death the deceased might have exercised his power of revocation. The interest which ceased to be subject to revocation was a beneficial interest arising or accruing upon the deceased's death (*Adamson* v. *Attorney-General* (2)). An interest liable to be defeated by a power of appointment is a beneficial interest accruing or arising upon the death of the appointor.

[LATHAM C.J. referred to *Trustees, Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (3)].

In *Adamson's Case* (4) unless and until the settlor died no one had a real interest—in that sense no one had an interest which was readily abandoned. When the settlor died that interest became more valuable.

(1) (1933) A.C. 257.
(2) (1933) A.C., at pp. 260, 261, 266-268, 276-278.
(3) (1944) 69 C.L.R. 270.
(4) (1933) A.C. 257.

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G. Wallace K.C. The crucial factor in *Adamson* v. *Attorney-General* (1) was not, as stated by the judge of first instance, the coming into possession. In interpreting that case in that limited manner the judge was in error. The crucial factor could be put under one of two heads, namely, an increase in commercial value or because the nature of the interest had changed to some extent. The real issue is: what is meant by the phrase "beneficial interest arising or accruing". "Beneficial interest" in that sense has a wider construction than a mere technical construction. A real increase in value is sufficient, or, secondly, the nature of the interest in the property, even though not in a strict legal sense of a change of title or a change in the legal interest in the strict sense. The section is broad enough in its terms to cover a case where defeasance disappears. Before the death of the settlor such an interest as the respondent Scott had was not an interest which could be defeated by the exercise of the power of revocation; it was also contingent upon her attaining the age of twenty-one years or marrying. After the death it was still subject to the latter condition, but it was no longer subject to the exercise of the power of revocation on that. The interest subject to such a defeasance was a different interest not subject to such a defeasance. It was not property passing but was a valuable right or benefit acquired. The nature of such a revocation was stressed in *Stanyforth* v. *Inland Revenue Commissioners* (2). It matters not whether it be a vested interest which has defeasance removed and thereby becomes vested, though not in possession, or if it becomes in possession with the defeasance removed, or if it be a contingent interest which has the defeasance removed. There is not any difference in any of those three cases. The phrase "extent of the beneficial interest" was not directed towards strict legal phraseology but was directed towards the question of differences in commercial value, but, no doubt, including some material change in the nature of the proprietary interest. On the question of value, the evidence given by the appellant's experts contains facts which are consistent with principle. From those facts it can be clearly elicited that the assessment was correct. The real test is: What is the actual value of the interest in the eyes of the vast majority of the public? The possibility of the power of revocation being in existence undermines the whole existence of the interest. It was a mere expectancy for all practical purposes. The cesser of the power of revocation synchronizing with the death of the deceased attracted the section. A somewhat analogous factor

(1) (1933) A.C. 257.

(2) (1930) A.C. 339, at pp. 344, 345.

arose in *In re Aschrott; Clifton* v. *Strauss* (1). In determining values regard may be had to after events (*In re Bradberry* (2), *Willis* v. *The Commonwealth* (3)). This case is another type and is similar to *In re North Settled Estates* (4). In that case *Williamson* v. *John I. Thorneycroft & Co. Ltd.* (5) and *In re Bradberry* (2) were referred to and discussed.

D. Maughan K.C. (with him *W. J. V. Windeyer* K.C. and *R. W. L. Austin*), for the respondents Bradhurst and Rabett. Two questions arise, namely, (i) was the interest in issue purchased or provided by the deceased, and (ii) did a beneficial interest accrue or arise on the death of the deceased? The assets were provided by the deceased. The trust in this case was vastly different, not merely in length but in principles, from the settlement dealt with in *Adamson* v. *Attorney-General* (6) and *Attorney-General* v. *Lloyds Bank Ltd.* (7). The trust does not contain any reference to the death of the deceased. There was only one continuing trust. From beginning to end there was the one beneficiary, contingently interested in the income which was accumulating, and there was not any change in the trustees. Under the settlement the respondent Scott had a contingent interest which accrued or arose to her on the execution of the settlement, and she had a vested interest which accrued or arose to her on the date she attained the age of twenty-one years. Where a future beneficial interest is liable to be defeated on the happening of either of two specified contingencies and when it becomes impossible for one of those contingencies to happen, then no interest accrues or arises within the meaning of s. 102 (2) (i) when such an impossibility occurs. The words "accruing" and "arising" in par. (i) of s. 102 (2) only refer to interests which vest in possession immediately upon the settlor's death, and do not refer to interests which are reversionary or are only to come into possession at some future date unconnected with death. The question arose on the first point in *Adamson* v. *Attorney-General* (6). The failure of the power of revocation does not result in trusts taking effect on the death. It is a misuse of language to say that by the death of the deceased a beneficial interest accrued or arose. What happened was that an interest which already existed merely increased in value. The bulk of the judgments in *Adamson* v. *Attorney-General* (6) dealt with the question of whether property passed,

(1) (1927) 1 Ch. 313.
(2) (1943) Ch. 35.
(3) (1946) 73 C.L.R. 105.
(4) (1946) 1 Ch. 13.
(5) (1940) 2 K.B. 658.
(6) (1933) A.C. 257.
(7) (1935) A.C. 382.

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which is not the point in this case. On that point their Lordships did not consider whether interest accrued or arose at all. Two of the lords stated that in that case an interest did accrue or arise, and one lord stated otherwise. That case was deliberately decided not only on the power of appointment ceasing by that date but on the fact that the settlor said that on the death the trusts should come to an end. In this case there was not any set of trusts created by the settlor to take effect on his death, whereas in *Adamson* v. *Attorney-General* (1) the words "indefeasibly" and "absolute" and the phrase "absolute and indefeasible" were used. The very *ratio decidendi* of that case was that a defeasible interest became indefeasible on the death of the settlor and therefore an interest accrued or arose. There was one set of trusts up to the death and another set of trusts immediately after the death. That is an important difference from the position in this case. In *Adamson* v. *Attorney-General* (1) the interest became absolute but it does not become absolute in this case. Having regard to the reasons expressed therein that case is in no way against the contentions put forward on behalf of the respondents in this case. *Attorney-General* v. *Lloyds Bank Ltd.* (2) is important for two reasons. It emphasizes that there is not necessarily any excess on the death of a settlor who had power to revoke. But where it is important and fatal to the appellant is that the court only brought into charge the interest that came into possession on the settlor's death—that was the accrued and not the future interest—the interest in reversion—which did not accrue then. Each child had two interests—life, which became indefeasible on the settlor's death, and a remainder—which was future and defeasible—if she had children. Only an interest in possession, and never a contingent interest, could be caught up by the section. Relevant text-books are *Hanson* on *Death Duties*, 9th ed. (1946), pp. 67, 99, 152, 362; *Green* on *Death Duties*, 2nd ed. (1947), p. 898, and *Harrison* on *Death Duties* (1941). Mere failure or defeasance does not cause a passing within the meaning of the expression "pass on the death" (*Adamson* v. *Attorney-General* (1)). The failure of a power to revoke does not cause a trust to take effect on death. The very point arose in *Commissioner of Succession Duties (S.A.)* v. *Isbister* (3); see also *Union Trustee Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (4). The words "take effect upon or after death" in the section there under consideration have the same meaning as the words "accrue on death" in s. 102 (2)

(1) (1933) A.C. 257.
(2) (1935) A.C. 382.
(3) (1941) 64 C.L.R. 375.
(4) (1941) 65 C.L.R. 29.

of the *Stamp Duties Act*. The observations made in *Isbister's Case* (1) are applicable to this case. The trust which continued to run after the death of the deceased was the same trust which took effect on the making of the settlement, and nothing accrued or arose. This case does not come within s. 102 (2) (i). Value is a question of fact (*Spencer* v. *The Commonwealth* (2)). The court does not reject the evidence of what are actual facts subsisting at the relevant date, no matter when they were discovered. Whenever the court makes a valuation it admits evidence on all the facts subsisting at the relevant date, that is, the moment of valuation, even if those facts only came to knowledge at a later date (*Weldon* v. *Union Trustee Co. of Australia Ltd.* (3); *Trustees, Executors and Agency Co. Ltd.* v. *Commissioner of Taxes* (*Vict.*) (4); *McCathie* v. *Federal Commissioner of Taxation* (5); *Commissioner of Succession Duties* (*S.A.*) v. *Executor, Trustee and Agency Co. of South Australia Ltd.* (6); *In re North Settled Estates* (7)). In this case it is a question of the admissibility of contemporaneous events—knowledge of which may, perhaps, have been acquired at a later date. The facts, which are admissible, establish that for about a week before his death the deceased had lapsed into that state of coma or unconsciousness which made it impossible for him to exercise the power of revocation. The possibility of revocation by deed or will thus came to an end about a week before his death. Therefore, taking the test that the Government Actuary said was the position, the fact then was that at the moment before death the settlement on the respondent Scott was not subject to revocation by either deed or will. The value of her interest at that moment was the same as the value after death, that is, one hundred per cent of the value of the contingent interest. The facts show that the matter does not come within s. 128 of the Act (*Inland Revenue Commissioners* v. *Mackinlay's Trustees* (8); *Commercial Structures Ltd.* v. *Briggs* (9); *In the Estate of James Anderson Murdoch* (10)).

W. J. V. Windeyer K.C. (with him *R. W. L. Austin*), for the respondents Scott and Dusgate. The argument just addressed to the Court is adopted on behalf of these respondents. Two arguments are capable of being founded on the state of health of the

(1) (1941) 64 C.L.R., at pp. 378-380.
(2) (1907) 5 C.L.R. 418, at p. 432.
(3) (1925) 36 C.L.R. 165, at p. 169.
(4) (1941) 65 C.L.R. 33, at p. 40.
(5) (1944) 69 C.L.R. 1, at p. 16.
(6) (1947) 74 C.L.R. 358, at pp. 361, 370.
(7) (1946) 1 Ch. 1.
(8) (1938) Sess. Cas. 765, at p. 771.
(9) (1948) 2 All E.R. 1041.
(10) (1947) 48 S.R. (N.S.W.) 213; 65 W.N. 60.

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deceased: (i) because of that state of health no duty arises at all, and (ii) that it affected the value immediately before death. The first matter goes not only to value but to dutiability, because the section only applies where the beneficial interest accrues or arises on death, and if it be a correct interpretation of *Adamson* v. *Attorney-General* (1)—which is disputed—to say that an increase of value arises as soon as the power of revocation ceases. The power of revocation may cease in various ways, e.g., as the result of death, or of incurable insanity. In this case it ceased as the result of the deceased becoming incompetent and never regaining his competence. The increasing value was the result of a cesser of the power of revocation and not of death. Some other test as to value than a hypothetical vendor and purchaser, as in *Spencer* v. *The Commonwealth* (2), should be found.

C. A. Weston K.C. in reply. The respondent Scott's interest at the moment of the deceased's death was not a marketable commodity. It had a value, perhaps merely nominal, but what the value was was not easy to determine.

[WILLIAMS J. referred to *Westminster Bank Ltd.* v. *Attorney-General* (3).]

Adamson v. *Attorney-General* (1) was considered in *Grubb* v. *Commissioner of Taxes (Tas.)* (4). It is true that there was not a change in the trust, but there was a change in the facts to which the trust was applicable. *Commissioner of Succession Duties (S.A.)* v. *Isbister* (5) has nothing to do with this case. It was not stated in *Attorney-General* v. *Lloyds Bank Ltd.* (6) that the interest was the same before and after the death of the settlor. The real ground for the decision in *Adamson* v. *Attorney-General* (1) was the distinction between vested interest and vested possession.

Cur. adv. vult.

The following written judgments were delivered :—

June 8.

LATHAM C.J. This is an appeal from an order of *Roper* C.J. in Eq. dismissing an application under s. 120 of the *Stamp Duties Act* 1920-1940 (N.S.W.) for an order that a sufficient part of property, being portion of the estate of the late Sir William Daniel Cooper, should be sold so that the proceeds might be applied in payment of duty assessed and of costs. Sir William Cooper died on 2nd September 1925. He had made a settlement on 4th

(1) (1933) A.C. 257.
(2) (1907) 5 C.L.R. 418.
(3) (1939) Ch. 610.
(4) (1948) 79 C.L.R. 412.
(5) (1941) 64 C.L.R. 375.
(6) (1935) A.C. 382.

February 1910, the terms of which were afterwards varied, under which a grandchild, Joyce Mabel Cooper, now Joyce Mabel Scott, was a beneficiary. Death duty was assessed under the *Stamp Duties Act* on 26th May 1926 and the duty was paid. Further assessments were made on 15th July 1926, on 12th November 1934 and 9th May 1935. In 1943 duty was assessed in respect of the interest of Mrs. Scott under the settlement of 4th February 1910 as varied. This proceeding relates to the assessment of duty upon her interest. The commissioner assessed duty upon what he claimed to be the value of Mrs. Scott's beneficial interest in the trust fund accruing or arising on the death of the testator. This assessment was made upon the basis that s. 102 (2) (i) of the *Stamp Duties Act* was applicable.

Section 102 (2) provides—"For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:— . . . (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." The commissioner assessed the duty upon a sum of £9,659 as representing the extent to which the value of the beneficial interest in the trust fund situated in New South Wales of Mrs. Scott upon the death of the testator exceeded the value of her expectant beneficial interest prior to such death. The value of the assets constituting the trust fund was estimated by the commissioner at £9,759. Accordingly the value of the beneficial interest of Mrs. Scott in that fund before the death was estimated at £100 and after the death at £9,659. This assessment was based upon the fact that by the settlement as varied the settlor had reserved to himself a power of revocation of the trust in favour of Joyce Mabel Cooper and that upon his death the exercise of that power had become impossible so that in the view of the commissioner a beneficial interest arose or accrued upon the death of the settlor. The value of her interest had increased from £100 to £9,659 by reason of the fact that it was no longer subject to the power of revocation.

By the indenture of 4th February 1910 the settlor transferred property to trustees upon trust during the minority of Joyce Mabel Cooper to accumulate the income and upon further trust "if and when the said Joyce Mabel Cooper shall attain the age of twenty-one years or marry under that age whichever shall first

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happen to pay and transfer the said Trust Fund and the accumulation of the interest thereof to the said Joyce Mabel Cooper absolutely". The indenture provided that if Joyce Mabel Cooper should die under the age of twenty-one years without having been married the trust fund and the accumulations of the income thereof should be held in trust for the settlor, his executors, administrators and assigns. The indenture also included a provision that it should be lawful for the settlor at any time or times by deed or deeds revocable or irrevocable or by will or codicil to declare new or other uses and trusts concerning the trust fund and the accumulations of income for the benefit of himself or any other person or persons and for that purpose wholly or partially to revoke and make void the trusts declared in the trust deed.

In pursuance of the latter power on 1st June 1922 the settlor revoked the trust declared by the earlier indenture in his favour which took effect if Joyce Mabel Cooper died under the age of twenty-one years, and declared that in that event the trust fund and accumulations of income should be held in trust for her brothers and sisters upon certain conditions. This deed also provided that the settlor might at any time or times by any deed or deeds revocable or irrevocable or by will or codicil declare substituted or new or other uses and trusts of and concerning the trust fund and accumulations of income thereof as he might think fit for the benefit of any of his grandchildren other than Joyce Mabel Cooper. Thus the settlor in 1922 reserved to himself a power to deprive Joyce Mabel Cooper of all benefit under the indentures.

As already stated the settlor died on 2nd September 1925. Joyce Mabel Cooper was born on 29th August 1909. She was unmarried at the death of the testator but married thereafter. *Roper* C.J. in Eq. held that s. 102 (2) (i) of the *Stamp Duties Act* was not applicable, being of opinion that though the interest of Joyce Mabel Cooper under the indentures was provided by the settlor, that interest did not vest in possession on the death of the settlor and that for this reason no beneficial interest accrued or arose on the death of the settlor.

The relevant words of s. 102 (2) (i) are "Any . . . interest . . . provided by the deceased . . . to the extent of the beneficial interest accruing or arising . . . on the death of the deceased". It is not disputed that the interest of Joyce Mabel Cooper in the trust fund was provided by the settlor.

It is argued on behalf of the appellant that in order that the quoted provision should become applicable there must be a springing up of a new interest, that is, of an interest which did not formerly

exist. Only such an interest, it is said, can be "a beneficial interest accruing or arising". There is authority for this view, e.g., in the frequently cited case of *Attorney-General for Ireland* v. *Robinson* (1). The "interest" is made dutiable "to the extent of (such) beneficial interest". If what was said in this case is regarded as a complete and exhaustive interpretation of the section the result would be that in every case to which the section could apply the whole of the interest would be dutiable. Thus the words "to the extent of the beneficial interest accruing or arising" would be deprived of significance because in all cases upon this view it would be only the whole of an interest which could arise or accrue.

Section 102 (2) (i) deals with separate interests arising or accruing to individuals. What is dutiable is an interest to the extent of the beneficial interest arising or accruing. This language suggests that, at least in some cases, the whole of the interest would not be dutiable.

In my opinion two questions arise—(1) whether a beneficial interest accrued or arose to Joyce Mabel Cooper on the death of the settlor ? (2) To what extent did it so arise ?

The relevant provision is not that the estate of a deceased person shall be deemed to include "any interest provided by a deceased person accruing or arising on the death of the deceased". Much of the argument submitted to the court appeared to me to assume that that was the meaning of the section. The section in my opinion does not provide that an interest provided by the deceased shall be dutiable where it accrues or arises on the death, but that such an interest shall be dutiable to the extent to which a beneficial interest arises or accrues on the death. Therefore the section is intended to include not only the case of the coming into existence of a new interest but also the case of an increase in the extent of an existing interest by reason of the death of the deceased so that the beneficial interest becomes a greater or more valuable interest than before such death.

The application of s. 102 (2) (i) involves a comparison between what a person had before the death of the deceased and what he had afterwards. In the present case, before the settlor died, the position was that Joyce Mabel Cooper had an interest in the trust fund contingently on attaining the age of twenty-one years or marrying under that age, but subject to the power of revocation for which the later deed provided. After the settlor died her interest was still contingent on her attaining twenty-one years of

(1) (1901) 2 Ir. R. 67.

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age or marrying under that age, but it was no longer subject to the risk of being destroyed by the exercise of the power of revocation.

When a contingent interest becomes vested the vested interest then arises—there is a vested interest for the first time. If the event bringing about the vesting is the death of a person then an interest, namely a vested interest, arises on the death of that person. When a defeasible interest becomes indefeasible the indefeasible interest then arises. There is an indefeasible interest for the first time. An interest may become indefeasible by reason of the death of a person, e.g. where a settlor has power to determine an interest in one person and establish an interest in another person by the exercise of a power of appointment and dies without exercising the power (as in *Adamson* v. *Attorney-General* (1)) or where a person has power to determine an interest in one person and establish an interest in another person by the exercise of a power of revocation of a trust and dies without exercising the power (as in *Attorney-General* v. *Lloyds Bank Ltd.* (2)). An interest of a beneficiary in a fund, which interest is subject to the risk of being destroyed only if the beneficiary fails to attain twenty-one years of age or to marry before attaining that age, is in my opinion an interest which is different from an interest in a fund which is so subject but which can also be destroyed by a settlor revoking the trust under which the interest arises.

In my opinion this case is covered by binding authority, namely *Adamson* v. *Attorney-General* (1) and *Attorney-General* v. *Lloyds Bank Ltd.* (2). In these cases the House of Lords considered two provisions in the *Finance Act* 1894. Section 1 of that Act provided for the levying of duty upon property which " passes on the death " of a person. Section 2 (1) provided that property passing on the death of a person should be deemed to include certain other property, that is to say " (d) any annuity " &c. in the same terms as s. 102 (2) (i) of the *Stamp Duties Act* 1920-1940. In *Adamson's Case* (1) the House of Lords established two propositions—(1) Property did not " pass " on the death of a person within the meaning of s. 1 where what had happened was that a contingent interest became a vested interest or a defeasible interest became an indefeasible interest. The effect of the decision was stated in *In re Hodson's Settlement* (3), in the following words :— " On the death, although (various) possibilities of defeasance ceased, nothing more happened, and in particular, the property

(1) (1933) A.C. 257.
(2) (1935) A.C. 382.
(3) (1939) Ch. 343, at p. 349.

did not 'pass' within the meaning of s. 1 of the Finance Act 1894." This part of the decision has no bearing upon the question arising in this appeal. (2) But an interest "arose or accrued" within the meaning of s. 2 (1) (d) when an interest which was contingent became vested on the death of a person or when an interest which was defeasible became indefeasible on the death of a person. In *Adamson's Case* (1) the question arose with regard to the interests of the son and daughters of a settlor. The relevant provisions in the settlement, as interpreted by the Court, were that after the death of the settlor the trust funds were to be held in trust for all or any of the settlor's children living at his death as he should by deed or will appoint and in default of appointment as to two-fifths to his son and as to the remaining three-fifths in equal shares to all the other children of the settlor living at his death. The settlor died without having exercised this power of appointment by either deed or will. Therefore on his death his son and his three daughters acquired an absolute interest replacing a contingent interest and an indefeasible interest replacing a defeasible interest. As already stated it was held that no property passed upon the death of the testator. All that had happened on the death of the settlor was that an interest previously contingent on a child being living at the death of the settlor became vested and that an interest previously defeasible by the exercise of the power of appointment became indefeasible. In this court the same principle was applied in determining the meaning of the words "containing trusts or dispositions to take effect upon or after the death of the settlor". It was held that the fact that an instrument contained powers of revocation and of new appointment which were never exercised did not show that the instrument took effect upon or after the death of the person in whom those powers were vested (*Commissioner of Succession Duties* (*S.A.*) v. *Isbister* (2)).

Thus in *Adamson's Case* (1) it was clearly held that the death of a person who had a power of appointment did not bring about a passing of the property to persons who could have been deprived of an interest by the exercise of the power. The fact that a contingent interest became a vested interest or that a defeasible interest became indefeasible did not amount to a passing of property. But it was equally clearly held that if on the death of a person a contingent interest became vested and a defeasible interest became indefeasible there was an arising or accruing of a beneficial interest, so that s. 2 (1) (d) which, as already stated, is in identical terms with s. 102 (2) (i) of the *Stamp Duties Act* 1920-1940, became applicable.

(1) (1933) A.C. 257.

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

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In *Adamson's Case* (1) before the death of the settlor (to take the interest of the son as an example) the son had an interest which was subject to two risks. (1) He might die before the settlor, and (2) the settlor could destroy his interest by exercising his power of appointment. When the settlor died both of these risks were removed and it was expressly held that the removal of these risks amounted to an arising or accrual of a beneficial interest within the meaning of the relevant section. The two elements, contingency and defeasibility, both changed by the death, are most specifically stated as the grounds of the decision. They are separate and independent grounds. They cannot possibly be regarded as cumulative. I refer to what was said by Lord *Buckmaster* in dealing with this question :—" The interest here provided by the deceased was materially changed at his death from being an interest liable to be divested and contingent into an interest absolute and undefeatable, and that new interest arose on the death of the deceased." (2)

Lord *Blanesburgh*, Lord *Wright* and Lord *Warrington* agreed, the latter stating the reasons for his decision in the following words :—" Before his death each child had a beneficial interest, but one that might be destroyed either by an exercise of the power of appointment or by the death of the child in the lifetime of the deceased ; on his death without exercising his power the beneficial interest of each child became absolute and indefeasible. The value of this beneficial interest, of course, exceeded the value if any of that interest to which the child was entitled previously to the death of the deceased, and to the extent of that excess such beneficial interest is, in my opinion, to be deemed to be property passing on the death and would under s. 1 [misprint for s. 2 (1)] be charged with duty accordingly." (3)

The effect of the decision can be clearly appreciated by reference to the words in which Lord *Russell* expressed his dissent. He said that what happened on the death was not that they (the interests) " accrued or arose, but that they ceased to be defeasible " (4). In his Lordship's view a cesser of defeasibility did not amount to the accruing or arising of an interest. This proposition, which his Lordship denied, is the proposition which the decision of the majority affirmed.

The decision in *Adamson's Case* (1) was followed in *Attorney-General* v. *Lloyds Bank Ltd.* (5). In that case it was held by the

(1) (1933) A.C. 257.
(2) (1933) A.C., at p. 268.
(3) (1933) A.C., at p. 277.
(4) (1933) A.C., at p. 285.
(5) (1935) A.C. 382.

learned judge of first instance and by the Court of Appeal and by the House of Lords that an interest arose or accrued when the death of a settlor (see (1)) made it impossible for him to exercise a power of revocation of existing interests. The contrary proposition was not even argued in the House of Lords (2), and the point of *Adamson's Case* (3) was stated in a unanimous judgment to be that " a possibility of defeasance came to an end with the death " (4). In the case now before the court the existence of the power of revocation should be held to bring about the same result as in the two cases cited.

After the decisions of the House of Lords in the two cases cited the law was altered by the *Finance Act* 1934, but only in respect of the method of determining the value of the extent of a beneficial interest in respect of which duty is chargeable under s. 2 (1) (*d*) of the *Finance Act* 1894. Otherwise the law as stated in those cases was not altered.

For the reasons which I have stated I am of opinion that a beneficial interest in the trust funds accrued or arose to Joyce Mabel Cooper on the death of Sir William Cooper so that her interest, to the extent of the beneficial interest, was chargeable with duty under s. 102 (2) (i). My brethren are of a contrary opinion and therefore no object would be served by expressing my opinion as to the extent of that interest.

McTIERNAN J. This appeal raises the question whether death duty became payable to the State of New South Wales under cl. (i), sub-s. (2), s. 102, of the *Stamp Duties Act* 1920-1940 (N.S.W.) on the date of the death of the deceased in respect of the interest of Joyce Mabel Cooper in the fund settled by him in his lifetime upon her.

The word " interest " in cl. (i) refers to an " individual interest " (*Adamson* v. *Attorney-General* (3)).

This individual interest is an interest in property : the subject of death duty is the " beneficial interest " (*Attorney-General for Ireland* v. *Robinson* (5)).

It was said by *Palles* C.B. in the last-mentioned case that in the context to which he was referring, which is similar to clause (i), the words " accruing or arising " are used in contradistinction to the word " passing." No interest in the fund passed to Joyce Mabel Cooper on the death of the deceased.

(1) (1935) A.C., at p. 385.
(2) (1935) A.C., at p. 388.
(3) (1933) A.C. 257.
(4) (1935) A.C., at p. 397.
(5) (1901) 2 Ir. R. 67.

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The present question arises upon the words "accruing or arising". *Palles* C.B. said in the same case in regard to these words: "They indicate, not the transfer upon death to another of something which the deceased or some other person had before or at the death, but the springing up, upon the death and the then vesting in another, of property which previously had not been existing in any one" (1).

Section 102 says that the estate of the deceased shall be deemed to include various "classes of property". Clause (i) describes one of those classes of property. The clause does not operate to bring any interest within the ambit of death duty which is not property.

The only interest provided by the deceased which clause (i) could sweep into the estate of the deceased would be the beneficial interest accruing to or arising in Joyce Mabel Cooper on the death of the deceased, if there were such a beneficial interest. It would be necessary that the beneficial interest was property and that it did not exist before death in Joyce Mabel Cooper but accrued to, or arose in, her on the death of the deceased.

The interest to which she was entitled immediately before the death of the deceased was a future equitable interest in the whole fund. This interest was created by the trusts of the settlement. The deceased postponed the vesting of the fund in her until she attained the age of twenty-one years or married. Neither of these events happened in his lifetime and some time elapsed after his death before she became absolutely entitled to the fund in accordance with the terms of the settlement. Until then she was not entitled to any interest other than the future equitable interest which arose when the trusts were declared.

Her interest was subject to the power of revocation reserved by the deceased. That power existed until his death. He could have destroyed her interest at will by exercising this power because her interest did not absolutely vest during his lifetime. The power came to an end at his death. Her interest was from death not subject to revocation. His death removed the possibility of the destruction of her interest.

It is necessary to consider whether the alteration of her interest from revocable to irrevocable is the accruing or arising of a beneficial interest.

The power of revocation was not an interest which the deceased had in the fund; his death did not result in the cesser of any interest; Joyce Mabel Cooper did not become entitled on his

(1) (1901) 2 Ir. R., at p. 90.

death to any new right, title or interest in the fund. Her interest immediately after his death was the equitable interest which arose upon the declaration of the trusts.

The interest which Joyce Mabel Cooper had in the fund before death is not the subject of death duty. It is necessary to find an interest which is the beneficial interest provided by the deceased accruing or arising on his death. That interest, if it exists, is the subject of death duty. The alteration of the interest which the deceased created in favour of Joyce Mabel Cooper from a destructible to an indestructible interest was not the accruing or arising of an interest. The interest which became indestructible on the death of the deceased was the interest which she had before his death.

This interest became more valuable than it was before the death of the deceased because from then it was indestructible. The appreciation of the value of an interest is not in the ordinary meaning of the words which have to be applied, "the accruing or arising" of an interest. Clause (i) does not bring into the estate value as such. No interest existed from the death of the settlor answering to the description contained in the words "the beneficial interest accruing or arising . . . on the death of the deceased."

It is necessary to compare the present case with *Adamson* v. *Attorney-General* (1). There the settlor directed his trustees during his lifetime to apply the capital and income of the settled fund for all of his children living at the date of the settlement, or born afterwards, in such proportions as he should direct; after his death the trustees were directed to stand possessed of the trust funds which were not so applied in trust for all or any one or more of the children of the settlor living at his death and in such manner as the settlor should by deed or will appoint. In default of appointment a share equal to two-fifths of the fund was to be paid to his son and the remaining three-fifths were to be divided equally among all the other children of the settlor living at his death.

The interest of each of the settlor's children, namely the son and the three daughters, under these trusts prior to his death, was described in the declaration made in *Adamson* v. *Attorney-General* (1) as an "expectant beneficial interest".

That being the nature of the interest of each child before death, it is necessary to ascertain what his or her interest was after the settlor's death. The settlor did not exercise the power of appointment; when he died the class entitled to share in the division of the three-fifths of the trust funds was limited to the three daughters

(1) (1933) A.C. 257.

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living at his death. After the settlor's death each of the children was immediately entitled to the enjoyment of a divisible share of the trust funds: the son's share was two-fifths and each daughter's share was one-fifth; each of these shares was a beneficial interest.

Prior to the settlor's death the son's interest was not the beneficial interest in two-fifths of the trusts: and the interest of each daughter was not a beneficial interest in one-fifth of the trust funds. The interest of each was nothing but an expectant beneficial interest in the trust funds. Apart from everything else which made the interest expectant, it was impossible to determine what would be the share to which any of the children would become entitled after the settlor's death if his or her expectancy were realized.

In the present case the interest of Joyce Mabel Cooper in the fund prior to the death of the deceased was an equitable future interest in the whole fund and the accumulations; the vesting of her interest was postponed until she married or attained the age of twenty-one years. This was not an expectant interest. It was subject to the power of revocation while the deceased was alive. It was not an interest expectant on his death or the coming to an end of his power of revocation.

The present case is not comparable with *Adamson* v. *Attorney-General* (1).

The words used to describe the interest of each child under the settlement in that case before death could not possibly apply to the interest of Joyce Mabel Cooper before the death of the deceased.

Lord *Buckmaster* said:—"Before that event (the death of the settlor) there was no interest under the settlement which that (a child in whose favour the settlor might have appointed the whole property by will) or any child could enjoy except the prospect of what might happen when the settlor died. It is true that all the children together might have made a title supported by policies of insurance, but no one child could possibly do so" (2). He said "It (the title) might have been in one, or more, or in all of the children" (3). Lord *Buckmaster* described the interest of each child after the death of the settlor as a "new interest".

Lord *Blanesburgh* said: "From the moment of the execution of the deed (the settlement) down to the moment of the settlor's death the titles which had respectively passed gave no one of them (the four children) anything that could be reckoned." (4) And

(1) (1933) A.C. 257.
(2) (1933) A.C., at p. 266.
(3) (1933) A.C., at p. 267.
(4) (1933) A.C., at pp. 269, 270.

he said: "Although the title to the entirety was contingently under the deed amongst all the children for the time being alive, no one of them so long as the settlor lived had any right to say that his or her title gave him a right to anything at all . . . Technically it would not, I suppose, be correct to describe the interest of any child as a *spes successionis* only. But many a *spes successionis* has at its initiation had a fuller promise of enjoyment." (1) He further said: "In my judgment no thing worth that name in the world of reality passed here until the death of the settlor. The metamorphosis of the situation effected by that event has been shown. It was total" (2).

The words of Lord *Warrington of Clyffe* (3) describing the interest of each child before death and after death depict the difference between an expectant beneficial interest, on one hand, and an absolute and indefeasible beneficial interest, on the other hand.

The case of *Adamson* v. *Attorney-General* (4) does not support a construction of cl. (i), sub-s. (2), s. 102, which would cause it to extend to the interest of Joyce Mabel Cooper under the present trusts.

As death duty is not exigible it is not necessary to consider the question of value.

In my opinion the appeal should be dismissed.

WILLIAMS J. This is an appeal in proceedings brought in the Supreme Court of New South Wales under s. 120 (5) or alternatively s. 115 (3) of the *Stamp Duties Act* 1920-1940 (N.S.W.) to obtain an order for the sale and vesting in the purchaser of a sufficient part of the property comprised in an indenture of settlement of 4th February 1910 to meet the unpaid death duty alleged to be payable in respect of this property as part of the dutiable estate of Sir William Charles Cooper deceased. The motion came on for hearing before *Roper* C.J. in Eq. and was dismissed with costs. The Commissioner of Stamp Duties, the applicant on the motion, has appealed to this Court from the order of his Honour. The appellant contends that the property in question forms part of the notional estate of the deceased within the meaning of s. 102 (2) (i) of the *Stamp Duties Act* because the property in question was an interest provided by the deceased in which a beneficial interest accrued or arose by survivorship on the death of the deceased. A decision on this point adverse to the appellant would dispose of the appeal but a favourable decision would necessitate a finding

(1) (1933) A.C., at p. 270.
(2) (1933) A.C., at pp. 271, 272.
(3) (1933) A.C., at p. 277.
(4) (1933) A.C. 257.

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upon the extent of the beneficial interest which accrued or arose by survivorship. It is common ground that the property comprised in the indenture was an interest provided by the deceased, and the question at issue is whether a beneficial interest in this property accrued or arose by survivorship on his death. *Roper* C.J. in Eq. held that no such interest accrued or arose and I am of opinion that he was right.

By the indenture the settlor, Sir William Charles Cooper, declared that the trustees were to hold certain property which he had transferred to them upon trust if and when his grandchild Joyce Mabel Cooper should attain the age of twenty-one years or marry under that age whichever should first happen to pay and transfer the trust fund and the accumulation of the interest thereof to her absolutely, provided always that in case she should die under that age without having been married the trustees should hold the trust fund and accumulations in trust for the settlor his executors administrators and assigns. The indenture also provided that it should be lawful for the settlor at any time or times by deed or will to declare such new or other uses or trusts of the trust fund and accumulations of the income or any part or parts thereof as he might think fit for the benefit of himself, his heirs executors or administrators or any other person or persons and for that purpose wholly or partially to revoke and make void the uses trusts powers and provisions therein declared and contained concerning the trust fund and accumulations.

By a deed poll of 1st June 1922, the settlor revoked the trust declared by the indenture in his favour in case Joyce Mabel Cooper should die under the age of twenty-one years and declared that in that event the trustees should hold the trust fund and accumulations in trust for her brothers and sisters males at twenty-one or females at that age or marriage and if more than one in equal shares, and in case Joyce Mabel Cooper should die under the age of twenty-one years and no brother or sister should live to attain a vested interest in trust for his son William George Daniel Cooper his executors administrators or assigns. The deed poll also provided that it should be lawful for the settlor by deed or will to declare such substituted or new or other uses or trusts of the trust fund and the accumulations as he might think fit for the benefit of the children of William George Daniel Cooper other than Joyce Mabel Cooper and for that purpose only to wholly or partially revoke and make void the uses trusts powers and provisions therein declared concerning the trust fund and accumulations.

The settlor never exercised the special power of appointment reserved by the deed poll, so that the trusts in default of appointment contained in the indenture of 4th February 1910 as varied by the deed poll of 1st June 1922 were still operative at his death on 2nd September 1925. Joyce Mabel Cooper, now Mrs. Scott, was on that date under the age of twenty-one years and unmarried. Accordingly she was then entitled to the whole of the settled property contingently on attaining twenty-one or marrying under that age. No fresh trust in her favour arose on the death of the settlor. The existing trust was still liable to be defeated if she died under twenty-one and unmarried. But it was freed from the risk that it might be defeated by the settlor revoking this trust and appointing the property for the benefit of the other children of William George Daniel Cooper.

It is contended for the appellant that the cesser of this risk caused a beneficial interest to accrue on the death of the settlor in favour of Joyce Mabel Cooper when she survived him. This cesser did no doubt cause her contingent interest substantially to increase in value but it did nothing more. Section 102 (2) (i) only applies where a beneficial interest accrues or arises in the annuity or other interest provided by the deceased and it must accrue or arise on his death. The word interest is capable of a wide meaning and is used in a popular and not in a technical sense. It includes contingent as well as vested interests (*Craig* v. *Federal Commissioner of Taxation* (1); *Westminster Bank Ltd.* v. *Attorney-General* (2)). But it must be at least an interest known to the law and to comply with the sub-section must be a beneficial interest (*In re Miller's Agreement* (3)). An increase in the value of an existing beneficial interest cannot in itself be a beneficial interest which accrues or arises. Such an interest must be a new beneficial interest. It must "spring into being" on the death of the provider (*Westminster Bank Ltd.* v. *Attorney-General* (4)). No beneficial interest whatever accrued or arose under the trusts of the indenture on the death of the settlor. No fresh property became subject to the trusts. A new beneficial interest could only accrue or arise when Joyce Mabel Cooper attained twenty-one or married or died under twenty-one and unmarried. Apart from authority I would not think that the settled property was caught by s. 102 (2) (i) of the *Stamp Duties Act*.

(1) (1945) 70 C.L.R. 441.
(2) (1939) Ch., at p. 618.
(3) (1947) 1 Ch. 615, at p. 618.
(4) (1939) Ch. 610.

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But it is contended that the question at issue is concluded in favour of the appellant by the decisions of the House of Lords in *Adamson* v. *Attorney-General* (1) and *Attorney-General* v. *Lloyds Bank Ltd.* (2). The controversy in both these cases was whether duty was leviable under s. 1 of the English *Finance Act* 1894 on property subject to a settlement as property which passed on the death of the deceased or alternatively under s. 2 (1), which provides that property passing on the death of the deceased shall be deemed to include (d) (then follows a provision in the same terms as s. 102 (2) (i) of the New South Wales Act). We are concerned with these cases only so far as they relate to s. 2 (1) (d) of the *Finance Act*. *Adamson's Case* (1) is the more important because the House of Lords simply followed it in *Attorney-General* v. *Lloyds Bank Ltd.* (2), and if we are not forced by *Adamson's Case* (1) to decide in favour of the appellant there is nothing in *Attorney-General* v. *Lloyds Bank Ltd.* (2) which compels us to do so. The trusts of the settlement in *Adamson's Case* (1) were altogether different from the trusts of the indenture and deed poll in the present case. They are summarized and explained by Lord *Russell of Killowen* (3). Under the trusts in default of the exercise of the special power of appointment the son, during the lifetime of the settlor, had a vested interest which was liable to be divested if he died before the interest vested in possession on the death of the settlor. The daughters had interests contingent upon their surviving the settlor. There were other trusts operative during the life of the settlor and neither the son nor the daughters could derive any benefits during his lifetime from the trusts which became operative on his death. On the death of the settlor the son and daughters all acquired vested interests in possession. These interests also became indefeasibly vested at the same time because they could no longer be defeated by the exercise of the special power of appointment.

In the case of trusts which are to operate from a future date, there is no real distinction between a vested interest liable to be divested on the happening of a certain event and an interest contingent on the non-happening of that event prior to the future date. There was no real distinction therefore between the beneficial interests conferred upon the son and the daughters under the trusts in default of appointment. Each had to survive the settlor to acquire a vested interest. A new beneficial interest in the settled property therefore accrued or arose in the case of each child

(1) (1933) A.C. 257.
(2) (1935) A.C. 382.
(3) (1933) A.C., at pp. 279, 280.

on the death of the settlor. These were beneficial interests which accrued or arose and which could only accrue or arise in the event of the son and daughters surviving the settlor. They accrued or arose under the trusts in default of appointment and their extent, that is their value, was substantially increased because they were no longer subject to defeasance by the exercise of the power of appointment. But the mere failure to exercise a power of appointment cannot add a beneficial interest to those already existing under the trusts in default of appointment. The exercise of a power of appointment divests, wholly or partially according to the terms of the appointment, the estates limited in default of appointment and creates new estates. Accordingly the only way in which a new beneficial interest could arise or accrue to those existing under the trusts in default of appointment would be by the exercise of the power of appointment. In my opinion, if there is a settlement which contains trusts in default of appointment and a power of appointment is reserved to the settlor to appoint by deed or will, but the power is not exercised, no beneficial interest can arise or accrue on the death of the settlor unless it does so under the trusts in default of appointment. In *Adamson's Case* (1) beneficial interests did so accrue or arise under these trusts. In the present case no beneficial interests accrued or arose on the death of Sir William Charles Cooper.

In *Adamson's Case* (2), Lord *Buckmaster* said " the interest here provided by the deceased was materially changed at his death from being an interest liable to be divested and contingent into an interest absolute and undefeatable, and that new interest arose on the death of the deceased." Lord *Warrington of Clyffe*, with whom Lord *Blanesburgh* agreed, said " before his death each child had a beneficial interest, but one that might be destroyed either by an exercise of the power of appointment or by the death of the child in the lifetime of the deceased ; on his death without exercising his power the beneficial interest of each child became absolute and indefeasible. The value of this beneficial interest, of course, exceeded the value if any of that interest to which the child was entitled previously to the death of the deceased and to the extent of that excess such beneficial interest is, in my opinion, to be deemed to be property passing on the death and would under s. 1 be charged with duty accordingly " (3). (Presumably his Lordship meant s. 2, sub-s. (1) (d).) Lord *Wright* said " it is clear that the children's interests became increased in present value when the

(1) (1933) A.C. 257.
(2) (1933) A.C., at p. 268.
(3) (1933) A.C., at p. 277.

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risks of defeasance and of failure to survive ceased to affect them, as happened on the settlor's death " (1).

Under s. 102 (2) (i) of the *Stamp Duties Act* and the corresponding provision of the English *Finance Act*, there are really two matters to be decided, (1) whether a beneficial interest accrues or arises on the death and (2) what is its extent. The words of every judgment must be read *secundum subjectam materiam* and I am of opinion that the remarks of their Lordships in *Adamson's Case* (2) which I have quoted must be read in relation to the trusts in default of appointment in the settlement which provided for the interests of the son and daughters becoming vested interests in possession on the death of the settlor. I venture to think that the remarks which I have quoted were intended to be compendious descriptions of the nature of the beneficial interests which accrued or arose and of their extent. Lord *Buckmaster* said that the new interest arose on the death of the deceased, and this must refer to the interest that arose under the trusts in default of appointment. I do not think that any of their Lordships meant that a beneficial interest could accrue or arise on the death of a person merely because of the cesser of a power of revocation and new appointment. A benefit is not a beneficial interest, and it is a beneficial interest and not a mere benefit which must accrue or arise on the death. In my opinion the reasoning of this Court in *Commissioner of Succession Duties (S.A.)* v. *Isbister* (3) is applicable *mutatis mutandis* to the present case, and does not conflict with anything that fell from their Lordships in the cases relied upon.

For these reasons I would dismiss the appeal.

WEBB J. I think the judgment of *Roper* C.J. in Eq. was right for the reasons given by *Williams* J.

The contingent interest to Joyce Mabel Cooper remained contingent until she attained twenty-one and that was five years after the death of the settlor. Nothing happened on his death except that his power of revocation ceased, with the result that this contingent interest became indefeasible. Had the facts in *Adamson* v. *Attorney-General* (2) been the same as in this case I see no reason to conclude that their Lordships would not have held, as Lord *Russell of Killowen* held (4), that no beneficial interest arose or accrued on the death of the settlor, but that all that happened on his death was that an interest which was already in existence ceased then to be defeasible.

I would dismiss this appeal.

(1) (1933) A.C., at p. 288.
(2) (1933) A.C. 257.
(3) (1941) 64 C.L.R. 375.
(4) (1933) A.C. at p. 285.

FULLAGAR J. In this case I have had the advantage of reading the judgment of my brother *Williams*. I agree with it, but I desire to add a few words.

An " interest " had doubtless been " provided " by the deceased when he executed the settlement. But it seems to me that that interest was precisely the same in nature and character before and after his death. After his death, as before, Joyce Mabel Cooper had an interest contingent on her attaining the age of twenty-one years or marrying under that age. It is true that after the death a power of revocation, which was reserved by the settlement, could no longer be exercised. But the interest itself remained unchanged. No new or different " beneficial interest " could, I think, be said to " accrue or arise by survivorship or otherwise " on the death. In *Commissioner of Succession Duties (S.A.)* v. *Isbister* (1) a different statutory provision was under consideration, but the reasoning of the judgments in that case is, in my opinion, exactly applicable to the present case. In that case, as here, a trust, which before death was revocable, became by the death irrevocable. " But ", as *McTiernan* J. said, " 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 " (2).

So far as the facts of the two cases are concerned, *Adamson* v. *Attorney-General* (3) and *Attorney-General* v. *Lloyds Bank Ltd.* (4), seem clearly enough distinguishable from the present case. In each of those cases a new and different interest did arise on the death of the settlor. In *Adamson's Case* (3) the settlor had what amounted to a power of appointment in respect of capital during his lifetime, and that power ceased with his death. But, apart altogether from that, the death of the settlor was fixed by the settlement as an event upon which an existing trust changed its character. So, in *Attorney-General* v. *Lloyds Bank Ltd.* (4), on the death of the settlor a trust for accumulation of income came to an end and new life interests commenced according to the terms of the settlement, and it was held that the commencement of the life interests involved the arising or accruing of a beneficial interest.

I have felt considerable difficulty both about *Adamson* v. *Attorney-General* (3) and about *Attorney-General* v. *Lloyds Bank Ltd.* (4), but I think that the true explanation of those cases is that

(1) (1941) 64 C.L.R. 375.
(2) (1941) 64 C.L.R., at p. 380.
(3) (1933) A.C. 257.
(4) (1935) A.C. 382.

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which I have given above. In both cases the main question argued was whether property "passed" under the settlement on the death so as to become dutiable under s. 1 of the *Finance Act* 1894, a provision which does not occur in the Act of New South Wales. In each case it seems to have been held that property did not "pass" on the death, because the beneficial interest under the settlement was in the same persons before and after the death. In *Attorney-General* v. *Lloyds Bank Ltd.* (1), Lord *Tomlin* said: "If the only persons beneficially interested in the fund immediately before the death are also the only persons beneficially interested in the fund immediately after the death . . . where is any 'passing' or 'shifting' to be found?" But, though no property passed on the death, yet there was a change in the character of the beneficial interests held, and that change constituted an arising or accruing of a beneficial interest. In *Attorney-General* v. *Lloyds Bank Ltd.* (2) duty was held to be payable in respect of the life interests in the settled fund which came into existence on the death, and it was payable on the amount of the excess (if any) of the value of the interest accruing over the value of the interest held before the death. In *Adamson's Case* (3) the children, having survived their father, took interests vested in possession instead of what Lord *Warrington* described as "expectant" interests, interests expectant on the death of the settlor.

The difficulty in both cases is occasioned by the references to a previously "defeasible" interest having become "indefeasible" or "undefeatable". In each case the settlement in question contained, as does the settlement in the present case, a power of revocation, which was not exercised in the lifetime of the settlor, and could not, of course, be exercised after his or her death. And the argument was that the references to the conversion of a defeasible interest into an indefeasible interest were references to the removal by death of the possibility of revocation of the interests given by the settlement. The relevant passages in the opinions of their Lordships in *Adamson's Case* (3) are set out in the judgment of *Williams* J.: to them may be added a reference to the argument of Mr. *Wilfrid Greene* K.C. (as he then was) in *Attorney-General* v. *Lloyds Bank Ltd.* (4). But in *Adamson's Case* (3) there was "defeasibility" apart altogether from the existence of the power of revocation. And in *Attorney-General* v. *Lloyds*

(1) (1935) A.C., at p. 396.
(2) (1935) A.C. 382.
(3) (1933) A.C. 257.
(4) (1935) A.C., at p. 387.

Bank Ltd. (1) two things strike me as significant. In the first place, although Lord *Tomlin* (2) refers to the existence of the power of revocation merely as a fact, he nowhere else refers to it. And, in the second place, the interest " arising or accruing " was regarded as being the life interest which arose under the terms of the settlement on the death of the settlor. It seems to me that, if the power of revocation was the vital thing, the material " interest " must have been the prima-facie absolute interest which, on the construction adopted by their Lordships, was created by the settlement. I entirely agree with *Williams* J. that, in such a case as this, it is vital to remember that judicial utterances must always be read *secundum subjectam materiam*, and I am unable to regard the references to " defeasibility " in *Adamson's Case* (3) as referring exclusively or decisively to the power of revocation contained in the settlement.

I should perhaps add one thing. The provision contained in par. (i) of sub-s. (2) of s. 102 of the *Stamp Duties Act* 1920-1940 (N.S.W.) is identical with that contained in s. 2 (1) (d) of the English *Finance Act* 1894, and I have assumed, as everybody has assumed throughout this case, that the same construction and effect are to be given to both provisions. I think the assumption correct, but I also think that the difficulty which I have felt in connection with the two leading English cases is largely caused by the fact that s. 1 of the *Finance Act* 1894 is always considered alongside s. 2 (1) (d), and s. 1 is not in force in New South Wales. In England it is evident that s. 2 (1) (d) has been regarded as more or less complementary to s. 1, and this fact has probably led to the making of certain assumptions in argument and judgment which we cannot make here where the provision (s. 102 (1)), which corresponds to the English s. 1, is based on a different primary basis of taxation. Section 2 (1) (d) fits in with the primary conception of a basis of taxation embodied in s. 1. Section 102 (2) (i) does not fit in with the primary conception of a basis of taxation embodied in s. 102 (1). But, be all this as it may, I do not think that either *Adamson's Case* (3) or *Attorney-General* v. *Lloyds Bank Ltd.* (1) is inconsistent with the view which I should have taken without hesitation in the absence of relevant authority. My view seems to be in accordance with the view expressed in the latest edition of *Hanson* on *Death Duties*. The learned author (9th ed. (1946), p. 99) says : " The fact that the deceased's death puts an end to

(1) (1935) A.C. 382.
(2) (1935) A.C., at p. 391.
(3) (1933) A.C. 257.

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the possibility of defeasance by appointment, and so increases the value of A's interest, is not sufficient to attract duty ".

In my opinion the judgment of *Roper* C.J. in Eq. was correct, and the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant: *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for the respondents: *Stephen, Jaques & Stephen.*

J. B.