[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (QUEENSLAND) . . . . . } APPELLANT;
RESPONDENT,

AND

DONALDSON AND OTHERS . . . RESPONDENTS.
PETITIONERS,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

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BRISBANE, *June* 21, 22.

SYDNEY, *Aug.* 15.

Isaacs A.C.J., Higgins and Rich JJ.

Succession Duty (Q.)—Settlement—Beneficial interests determined by settlor—Income payable to settlor for certain period—Power of settlor to extend period—Death of settlor preventing further extension—Contingent interest converted into absolute interest—Succession and Probate Duties Acts 1892 *to* 1918 (*Q.*) (56 *Vict. No.* 13—9 *Geo. V. No.* 16), *sec.* 4.

By sec. 4 of the *Succession and Probate Duties Acts* 1892 *to* 1918 it is provided that every disposition of property by reason of which any person "shall become beneficially entitled to any property or the income thereof upon the death of any person . . . either immediately or after any interval, either certainly or contingently, . . . shall be deemed . . . to confer on the person entitled by reason of such disposition . . . a 'succession.'"

By indenture dated 6th May 1916 a settlor transferred real and personal property to trustees in trust for himself, his children and his sister in certain proportions. By the indenture it was provided (in substance) that during five years from the date of the indenture and during such extended period or periods (not exceeding in all twenty-one years from the date of the indenture) as the settlor might from time to time resolve, the whole of the profits from the trust premises should be paid to the settlor; and that subject thereto the profits should be divided between all the beneficiaries in proportion to their interests. In April 1921 the settlor duly extended the period during which those profits should be paid to him for a period of five years from 6th May 1921. On 16th December 1924 the settlor died.

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Held, by *Isaacs* A.C.J. and *Higgins* J. (*Rich* J. dissenting), that upon the death of the settlor the surviving beneficiaries became entitled under sec. 4 to a "succession" in respect of a sum representing the value as at the death of the settlor of the income from the interests of the surviving beneficiaries under the settlement for the period of eleven years beginning 6th May 1926 and ending 5th May 1937, and that duty was payable upon that sum: on the death of the settlor that income became payable to the surviving beneficiaries during that period, whereas, until his death, he might have excluded them from any right to that income during that period.

Decision of the Supreme Court of Queensland (Full Court): *In re Donaldson's Settlement*, (1927) S.R. (Q.) 116, reversed.

APPEAL from the Supreme Court of Queensland.

John Clark Donaldson executed on 6th May 1916 what purported to be an irrevocable settlement of certain real and personal property, deemed to be of a capital value of £24,000. Of that sum realty represented £1,250. The personalty consisted of £15,000 in the Queensland Government Savings Bank; £600, Queensland Government Savings Bank stock; £2,200 in the Queensland National Bank; £2,890, Queensland National Bank inscribed stock; £2,120, shares and stock; £300, being the settlor's interest in the estate of his deceased wife; £200, due to the settlor under a mortgage. Under the settlement the whole of the property was vested in trustees (the settlor himself and Miles Ross Fox and Stephen Bain Dods), and was divided into 24,000 shares of a nominal value of £1 each, of which 2,000 were called "A" shares and the balance, 22,000, were called "B" shares. Under what were called "the articles" in the settlement the 2,000 "A" shares were vested in the settlor, while of the 22,000 "B" shares 10,500 were vested in the settlor's sister and those of his children who were *sui juris*, and 11,500 in trustees for his infant children. The articles also made provision for a Board of Management, which had extensive powers and whose directions had to be carried out by the trustees. The settlor was the Board of Management and remained so until his death. By clause 19 of the articles it was provided that during the first five years and such extended period (not exceeding twenty-one years from the date of the settlement) as the holders of the "A" shares should resolve, the profits derived from the trust property should be divided among the holders of the "A" shares in proportion

to the number held by them. Otherwise the profits were to be divided among all the beneficiaries in proportion to the number of shares held by them respectively, whether "A" or "B" shares. On 21st April 1921 the settlor, as owner of the "A" shares, extended by resolution the time during which profits were to be divided among the holders of the "A" shares to the exclusion of the holders of the "B" shares, by a period of five years from 5th May 1921. As holder of the "A" shares and pursuant to the resolution already stated, the settlor received the income and profits from the property comprised in the settlement, with the exception of a certain sum outstanding at his death and owing to him at death.

The settlor died on 19th December 1924. By his will he appointed John Frederick Donaldson and the above-mentioned Miles Ross Fox and Stephen Bain Dods the executors thereof. They disclosed as a succession arising on the death of the settlor, in addition to the other estate owned by him at death, the 2,000 "A" shares in the settlement, at a valuation of £3,640, which valuation was made on the basis that such shares were entitled to the income provided under the settlement up to 5th May 1926. The amount owing to the deceased at death, in respect of the income on the said 2,000 "A" shares, was also included as part of the estate of the testator disclosed by the executors for succession duty purposes. The Commissioner of Stamp Duties accepted the above valuation of the "A" shares, and, after a revision of the valuations of certain other assets disclosed, placed a net valuation of £14,979 14s. 7d. on the deceased's estate, subject as hereinafter stated. The executors were satisfied with this valuation, together with the sum of £923 11s. included by the Commissioner in respect of gifts made by the deceased within the period of two years preceding death. The Commissioner also called for a valuation of the whole of the settlement assets as at the date of death, which was furnished by the executors, and accepted by the Commissioner at the amount of £24,354 6s. 5d. After deducting from this amount the valuation of the "A" shares, as above set forth, namely, the sum of £3,640, the Commissioner included in his assessment for succession duty, in the estate of the deceased, the balance of £20,714 6s. 5d. as constituting successions arising on the death of the deceased and

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derived from the deceased as predecessor. For determining the rate of succession duty payable the Commissioner aggregated, so as to form one estate, the value of the property passing under the will and codicil and the said gifts, and the said sum of £20,714 6s. 5d. The Commissioner assessed succession duty accordingly, and issued a notice of assessment thereof. The executors appealed to the Supreme Court by petition under sec. 50 of the *Succession and Probate Duties Acts* 1892 *to* 1918, contending (1) that no succession upon the death of the deceased arose under the settlement; (2) that succession duty was not payable in respect of the said sum of £20,714 6s. 5d. included by the Commissioner as successions arising on the death of the deceased; (3) that the said sum of £20,714 6s. 5d. should not be aggregated with the assets passing under the will and codicil of the deceased for the purpose of determining the rate of duty payable in respect of the successions arising on the death of the deceased; (4) that the assessment of the Commissioner was contrary to law, and excessive in amount.

The Full Court of the Supreme Court, by a majority (*Macrossan* and *O'Sullivan* JJ., *Webb* J. dissenting), held that at the date of the settlor's death a disposition of the "B" shares had been made, and this disposition operated independently of his death, and that there was no succession within the meaning of sec. 4 of the *Succession and Probate Duties Acts* 1892 *to* 1918, and no succession duty was payable in respect of the sum of £20,714 6s. 5d.: *In re Donaldson's Settlement* (1).

From that decision the Commissioner of Stamp Duties now appealed to the High Court.

Henchman (with him *Walsh*), for the appellant. On the true construction of sec. 4 of the *Succession and Probate Duties Acts* 1892 *to* 1918 property is taxable as soon as the enjoyment of the interest in it comes into possession. Enjoyment is defined in sec. 20. During the settlor's lifetime the holders of the "B" shares possessed only a limited power to transfer. On the settlor's death all restrictions and limitations were removed, and the beneficiaries' interest under the settlement, which had hitherto been only a

(1) (1927) S.R. (Q.) 116.

contingent interest, was converted into an absolute interest. The settlement was therefore a disposition of property by reason of which the beneficiaries became entitled to the property and income upon the death of the settlor. [Counsel cited *Attorney-General* v. *Noyes* (1); *Attorney-General* v. *Gell* (2); *Ring* v. *Jarman* (3); *In re Goggs* (4); *Attorney-General* v. *Robertson* (5); *Lord Saltoun* v. *Advocate-General* (6); *Duke of Northumberland* v. *Attorney-General* (7).]

McGill, for the respondents. To bring the case under sec. 4 the beneficial interest has to be acquired upon the death of the settlor. That is not the position here. Immediately on the execution of the deed the " B " shareholders became instantly entitled to the corpus, although the settlor was to have the income for five years, with the right to extend that period for a further period of sixteen years. Before the settlor's death the holders of the " B " shares had a vested right to the income of the shares from 5th May 1926, subject only to a power under clause 19 (a) of the deed in the settlor to postpone their enjoyment of the income. The settlor's death gave the " B " shareholders nothing which they did not have before his death. [Counsel referred to *Partington* v. *Attorney-General* (8); *Attorney-General* v. *Earl of Selborne* (9); *Attorney-General* v. *Eyres* (10).]

Henchman, in reply, referred to *Grayson* v. *Grayson* (11).

Cur. adv. vult.

Aug. 15.

The following written judgments were delivered :—

ISAACS A.C.J. This is an appeal by the Queensland Commissioner of Stamp Duties against a decision of the State Supreme Court on a petition by the present respondent under sec. 50 of the *Succession and Probate Duties Acts* 1892 *to* 1918. Some careful attention must be given to the precise question which is raised by the judgment

(1) (1881) 8 Q.B.D. 125.
(2) (1865) 3 H. & C. 615, at p. 630.
(3) (1872) L.R. 14 Eq. 357.
(4) (1909) S.R. (Q.) 27.
(5) (1892) 2 Q.B. 694.
(6) (1860) 3 Macq. 659, at p. 671.
(7) (1905) A.C. 406, at pp. 410, 411.
(8) (1869) L.R. 4 H.L. 100, at p. 122.
(9) (1902) 1 K.B. 388, at p. 396.
(10) (1909) 1 K.B. 723, at p. 733.
(11) (1922) S.R. (Q.) 155.

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under consideration. The formal order of the Supreme Court is thus stated: "This Court is of opinion that succession duty is not payable in respect of the sum of £20,714 6s. 5d., being the amount referred to in par 19 (*b*) of the said petition." When the proceedings are examined it will be seen that the judgment really means that succession duty is not payable in respect of the property represented by the sum mentioned—which is the value of the full interest in the property—either to the full extent of that sum, or for any lesser sum representing a limited interest in that property.

John Clark Donaldson died on 19th December 1924 testate. The Commissioner assessed the executors of the deceased for succession duties. For the purpose of determining the rate of succession duty payable, the Commissioner has aggregated so as to form one estate, first, the value of the property passing under the will and, next, the amount of £20,714 6s. 5d., at which he has valued gifts made by the deceased by a deed of settlement on 6th May 1916, and which he claims to have passed on the death of the settlor. The executor's petition contested by its terms the Commissioner's right to include the gifts as succession at all and also contested the amount. The view taken by the majority of learned Judges in the Supreme Court being that the gifts were entirely free from duty rendered it unnecessary for them to enter upon the question of amount or to separate corpus from income or to delimit interests in the property. That is the reason the formal order of the Court is stated in the general negative terms quoted. *Webb* J., however, from the primary conclusion he formed, naturally pursued the controversy further in order to determine the property on which the duty is chargeable, and came to the conclusion that the corpus was chargeable on its total value, which was represented by the sum of £20,714 6s. 5d. as stated. The arguments before us have raised not merely the question whether the majority view is correct —which would at once end the matter—but also whether, even if it be wrong, the successions chargeable are the total value of the corpus, or some lesser interest in that corpus.

1. The accuracy of the Full Court decision is therefore the first question to consider. The short ground on which that decision is rested is that no part of the beneficial interest, the subject of

the settlement, came to the beneficiaries "upon the death" of the settlor in December 1924, because (1) "his death vested nothing which was not already vested" (1); and (2) "had he lived" until 6th May 1926, "the result would have been the same . . . unless," said the majority of the Supreme Court, "he made another disposition with which we have not to deal." Both the reasons stated contain a somewhat elusive fallacy. As to the first, it is not a question as to what is vested "by" death, but what is vested "upon" death. As to the second, the words of the proviso are words which refer to the power to make a new "disposition," as it is termed, as distinguished from the effect of rights under an existing disposition. The matter depends entirely on (*a*) the meaning of the words "upon the death of any person" in sec. 4 of the Act; and (*b*) the substantial effect of the deed of settlement in relation to the circumstances in which it in fact operated.

(*a*) The words "upon the death of any person" refer to a *period* and not a condition. The judgment under appeal appears to me, with great deference, to overlook this fundamental consideration: "Death," no doubt, is an "event," but it is for the purposes of the section an event marking a point of time, and not marking a "cause" or even an "occasion," other than a temporal one. To come within sec. 4 so as to be "conferred" as a "succession," the property must "by reason of" the disposition—that is, by reason of the terms of the deed relevant to that property—have passed to another at the given moment, namely, "upon the death" of the relevant person. It is in antithesis to passing during the lifetime of that person. In *Baron Wolverton* v. *Attorney-General* (2) Lord *Halsbury* said: "The whole scope and meaning of the Act points to a distinction between alienation between living persons and a succession which death has opened to a successor." That the words mark *a period* at which the property—whether "immediately or after any interval, either certainly or contingently," — passes is definitely shown by *Attorney-General* v. *Beech* (3). It is property which, in the circumstances, "changes hands on death" (*Wolverton's*

(1) (1927) S.R. (Q.), at p. 124.
(2) (1898) A.C. 535, at p. 543.
(3) (1899) A.C. 53, at pp. 56, 57, 61.

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Case (1) and *Earl Cowley* v. *Inland Revenue Commissioners* (2)). In *Lord Advocate* v. *Macalister* (3) Viscount *Cave* speaks of "the moment when the succession is conferred—namely, at the date of entitlement." That simplifies the matter to this extent: that there is no competition between "death" and "a new disposition," but between two periods of time, namely, "upon death" or "before death." If it be true that "on death" there was nothing vested not already vested (except what passed under the will, which is on this branch of the case immaterial), then all that is now vested (except by the will) was vested before death. To ascertain that, we must proceed to the second point of inquiry, the provisions of the deed as they operated on the circumstances.

(*b*) The deed itself tells its own story up to a certain point. On 6th May 1916 John Clark Donaldson was possessed of property, both real and personal, estimated to be worth £24,000. Of that sum the realty represented only £1,250. The personalty included about £15,000 in money in the Queensland Savings Bank and £600 inscribed stock in the same bank, £2,200 in the Queensland National Bank, about £2,890 inscribed stock in that bank, shares to about £2,120, and other pecuniary interests up to £500. By the deed of that date, Donaldson, after reciting his ownership to the property, declared his desire "irrevocably to settle the same to and upon the uses and trusts and in manner hereinafter mentioned." By the first clause he transferred all the property to named trustees "upon trust for the settlor and his children and sister mentioned in the second schedule hereto and their respective executors administrators and assigns in the respective shares and proportions particularized in the same schedule and further upon the trusts *and with and subject to the powers provisions agreements and restrictions* set forth respectively in the said second schedule *and in the articles* comprised in the third schedule hereto *or such modification of the said articles as may for the time being be in force.*" The words I have just italicized are of high importance and considerably affect the recited irrevocability, as will presently be seen. The first schedule sets out the property and values. The second schedule

(1) (1898) A.C., at pp. 543-544. (2) (1899) A.C. 198, at p 211.
(3) (1924) A.C. 586, at p. 591.

sets out the names and number and description of "shares" of the beneficiaries: the settlor was set down at 2,000 "A" shares, the rest of the beneficiaries being set down at their respective numbers of "B" shares. The third schedule set out the *articles*, which divided the property into 24,000 shares of £1 each and stated that 2,000 "A" shares were vested "absolutely" in the settlor, and 10,500 "B" shares absolutely in the children and sister of the settlor, and 11,500 "B" shares in the trustees for two daughters under age, which were given to them respectively upon attaining twenty-one years of age. The object of placing that clause among the articles, and not in the earlier part, will be unmistakable in a moment. There follow a series of involved provisions, creating a Board of Management, and conferring on the Board of Management supreme power to direct and control the trustees "in all respects as if the Board of Management were the sole and absolute proprietors and owners of the trust premises," save that there must always be trustees (art. 9). By the 10th article the Board of Management had power (*inter alia*) "to appoint any person or persons or company or companies to be trustees . . . either in substitution for or in addition to" the named trustees, "provided . . . there shall always be two trustees or a trustee company to perform the trusts"; also to sell or otherwise deal with the property as the Board thought fit. A register of beneficiaries was provided for. But the "B" shares were not to "be transferable except with the sanction in writing of the Board of Management *until the holders thereof become entitled to participate in the profits and dividends under this trust.*" Clause 19 was in these terms:— "Profits and Dividends.—The profits derived from the trust premises shall be applicable in order of priority and in manner following: (a) During the period of five years from the date of these presents and for and during such extended period or periods (if any) (not exceeding in the case of an extended period or extended periods twenty-one years from the date of these presents) as the holders for the time being of the 'A' shares by resolution passed in accordance with these articles during the continuance of the said period of five years or any such extension as is herein authorized shall from time to time resolve the said profits shall be divided

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amongst the holders of the 'A' shares in proportion to the number of 'A' shares held by them respectively Provided always that such resolution shall not be effective unless and until the settlor by writing signed by him *personally* shall assent thereto; (b) *subject as aforesaid* the profits of the trust premises shall be divided between all the beneficiaries in proportion to the number of shares held by them respectively whether 'A' or 'B' shares." (The italics are mine.) This clause, it was urged for the respondents, at all events vested in the "B" shareholders instantly and irrevocably on the execution of the deed all the profits attributable to the "B" shares as from twenty-one years after the date of the deed. That must be considered with another clause further on. For the period intervening between the first five years and the expiry of twenty-one years—that is, for sixteen years—the "B" shareholders' rights, even as the clause stands, are "subject," that is, "subordinate," to the primary trust for the "A" shareholders at their will. Clause 20 provides: "Any extension or extensions as aforesaid of the period during which the said profits shall be divisible amongst the holders of the 'A' shares to the exclusion of the holders of the 'B' shares shall not be for a less period than four years at any one time and shall not exceed in the aggregate twenty-one years from the date of these presents." We have then a group of sections dealing with general meetings. The "A" shareholders had one vote for every share, but, while excluded from the profits, the "B" shareholders had one vote for every 30 shares. After being entitled to participate in the profits, every beneficiary was to be entitled to one vote for every share. Art. 29 is perhaps the most astutely conceived of all the artistically fashioned forms of camouflage which cover and, as I think, sometimes overpower the effect, and sometimes enable a modification of the disposition so as to overpower the effect, as I have no doubt they were intended to do, of some ordinary expressions of settlement which now are relied on. Now that Donaldson is dead, these camouflage accompaniments have served their purpose, and away do go, like the Wall in "Pyramus and Thisby." But while he was alive they were potent to conserve within his hands all real power over the property. And among them clause 29, read with the words I

italicized in the primary declaration of trust, is of great interpretative significance. It is as follows: "All or any of the provisions of these articles may from time to time be altered by special resolution passed in manner hereinafter mentioned and the beneficiaries may in like manner make new regulations to the exclusion of or in addition to all or any of the regulations comprised in these articles and any regulations so made by special resolution shall be of the same validity as if they had been originally contained in these articles and in like manner may be altered or modified by any subsequent special resolution." Irrevocability has rather a hollow sound in presence of art. 29. That article is followed by clauses facilitating the process at the supreme will of the settlor, and I need not quote them further. The Board of Management was the settlor, and he had the sole power of selecting the Board until the "B" shareholders became entitled to participate in the dividends.

What, then, is the real effect of all this elaborate example of word-spinning? On examination it means that the "B" beneficiaries are entirely at the mercy of the settlor as long as he lives:—He holds the "A" shares and he is the Board of Management, he controls the trustees, he can remove the trustees, he can substitute trustees, he can sell the property on any terms he likes, he takes the profits in any case for five years, he can also take them for sixteen years more, that is, up to 1937, without altering clause 19 (as is seen), he can even alter clause 19 and so extend the twenty-one years, or so as to appropriate to the shares any desired proportion of the profits; he outvotes the "B" shareholders as long as he wants to, that is, as long as he draws all the profits; he may even by alteration of the articles exclude the "B" shareholders from their nominal recognition at a general meeting under clause 24. In short, except for the rule against perpetuities and the ultimately irresistible domination of death, John Clark Donaldson remained after his execution of the deed as much the supreme lord of the property as he was the instant before. He did not in fact choose to alter his original disposition. But he acted upon the 19th clause by extending for a second term of five years, the five years term specified by the clause itself: that definitely attached to himself the equitable right to the profits for the period beginning 6th May

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1921 and ending 5th May 1926. While that period was still current, that is, on 19th December 1924, the settlor died. What "property" had the "B" shareholders in the circumstances on 19th December 1924, (1) the instant before the settlor's death and (2) the instant after? There is no doubt that the instant after the settlor's death the "B" shareholders in the events which had happened, had no right whatever to the profits which would arise between 20th December 1924 and 6th May 1926. But they had on 20th December 1924 the absolute right (free from any interest of the settlor) to a proportionate share of the profits which would arise on and after 6th May 1926. They had that absolute indefeasible right in interest, though of course not yet in possession. Whether they had further rights I shall discuss later. But as to their clear and unqualified right to profits as from 6th May 1926 to 5th May 1937 (eleven years) is it accurate to say, as the majority in the Supreme Court have said, that this was vested in the "B" shareholders as much before the settlor's death as after? It is, of course, accurate that the settlor had not passed a resolution and had not therefore assented in writing to a resolution of extension as required by par. (a) of art. 19. But the existing "disposition" gave him the right to do so at any time before 6th May 1926, and this right—so long as he lived—was a distinct "interest" in the settled property, and was itself "property." "By interest in a thing every benefit and advantage arising out of or depending on such thing, may be considered as being comprehended" (per *Lawrence* J. in *Lucena* v. *Craufurd* (1)). It was a fragment of ownership—equitable ownership—which by so much diminished the dominion which the "B" shareholders otherwise would have had in respect of the profit of their own shares in the assets. Lord *Langdale* M.R. in *Jones* v. *Skinner* (2) said: "It is well known, that the word 'property' is the most comprehensive of all the terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have." A little further on, the Master of the Rolls says the "word 'property' . . . would carry any interest the testator might have in any property, or over which he had any control." (See also

(1) (1806) 2 B. & P. (N.R.) 269, at p. 302.

(2) (1835) 5 L.J. Ch. (N.S.) 87, at p. 90.

In re Prater; *Desinge* v. *Beare* (1).) Now here, Donaldson, being in 1916 the sole owner of certain property, conferred interests, but "subject" to rights and interests and powers which he retained as part of the dominion he originally had, and the part he did not relinquish. It is true he couched his retention of interest in terms requiring the voting of a resolution and the personal assent to it, but at the time of his death it was he who possessed the sole power to pass that resolution notwithstanding any opposition, as well as to assent. The power to vote is itself a property right (*Osborne* v. *Amalgamated Society of Railway Servants* (2)). But the power to vote and to assent so as to appropriate profits as a primary and dominant right before anything whatever can be held in trust for others, is a distinct interest in the assets, and altogether beyond a bare power over another person's property. With that right intervening as a paramount interest until the moment of the settlor's death on 19th December 1924, how can it be accurately said that there was nothing vested in the " B " shareholders on 20th December that was not already vested in them before the death on 19th December ? It seems to me incontestable that " upon the death " of the settlor there passed to the " B " shareholders the fragment of dominion in relation to the profits for the period 1926-1937 which had up to his death been withheld from them and which had always resided in the settlor and which he had never parted with. A very practical test is suggested in *Earl Cowley's Case* (3) by Lord *Macnaghten*, who says : " If property passes you can put a value on it by considering what it would fetch in the open market." The comparative selling values of the " B " shareholders' rights on 18th December and 20th December to the profits for the eleven years' period would be substantially different. Now, what event marked the transition from a chance to a certainty ? *Nothing but the settlor's death.* It was contended that the " event " was the non-exercise of the power to resolve and assent contained in art. 19 (a). It was urged that if either by volition or paralysis or other cause during life there had been a non-exercise of the right, so that sub-clause (a) was not satisfied, the same result would have

(1) (1888) 37 Ch. D. 481, per Lord *Halsbury* L.C. at p. 483, *Cotton* L.J. at p. 486.
(2) (1911) 1 Ch. 540.
(3) (1899) A.C., at p. 213.

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followed. The obvious answer is that in that case the property would have vested absolutely *inter vivos*, and therefore not "upon the death," and the conditions of the Act would not have been met. But the fact that the same practical result *might* have been reached by some other road does not get rid of the legal consequence of its actual attainment by this road. The *period* being different, the legal consequence is different (*Attorney-General* v. *Noyes* (1)). The non-exercise of the power for any period beyond 5th May 1926 was undoubtedly one of the circumstances existing at the time of the death and one of the circumstances on which the disposition operated. By reason of the disposition the "B" shareholders in the existing circumstances succeeded on 20th December 1924 to an absolute unfettered right to the profits beginning eighteen months ahead. But that right arose and was vested completely in interest "upon the death" of the settlor. The beneficiaries did not have to wait until 6th May 1926 to see if the power was not exercised. There could no longer be any existing right or interest to which the exercise of the power could be referred. There could not be any interest residing in a dead man, and his interest while living was personal. At the moment of his death, and by force of his death, the words in art. 19 (b) "subject as aforesaid" were rendered nugatory; so were all the preceding words, that is, as to the eleven years period. I am therefore of opinion there were successions on the death of the settlor by reason of the dispositions of the deed.

2. As to what those successions were, very great care is needed in reading the verbose and labyrinthine deed in order to answer the first prayer of the petition. It is claimed on behalf of the respondents that though the profits were absolutely vested as from 1937, the "B" beneficiaries' interest in the corpus was absolutely vested not only in 1916 but also as from 1916. If that be so, all attempts to restrain alienation or enjoyment, including art. 19 (a), are repugnant (*In re Dugdale*; *Dugdale* v. *Dugdale* (2); and *Wharton* v. *Masterman* (3)). In that case also there would be no succession, whether by reason of death or otherwise; for all passed in 1916.

(1) (1881) 8 Q.B.D. 125.
(2) (1888) 38 Ch. D. 176, at p. 180.
(3) (1895) A.C. 186, at p. 192.

My reading of the deed as a whole, however, leads me to the conclusion that the trust for the " B " beneficiaries was, both as to corpus and income, to operate only as from the time the settlor was willing or was compelled to release his personal hold on the property, that is, as from the time the " B " shareholders became entitled to share the profits. That period was 1937 at latest as the deed stood originally and as it stood at the time of the death. Art. 29, as I have stated, gave a power to the settlor to vary the articles, which included arts. 2 and 19, and therefore it amounted to a power to alter the disposition. That is a very different thing from the power contained in art. 19 (a), which was a power within and in pursuance of the terms of the existing disposition. Art. 29 gave a power outside and in variance of the dispositions like a constitutional power to amend the Constitution as distinguished from a power to legislate or act within it. That, however, was not done, and 1937 stood as the extreme limit of exclusion from enjoyment of the profits. That connotes that the vesting of the corpus was also as from that date, as an extreme limit. When " on death " the events gave the " B " beneficiaries in addition the profits for the eleven preceding years, the corpus also, and necessarily so, vested in possession as for the same period. But that period was the only period not covered by the *inter vivos* vesting. The " succession," then, is limited to that period. It was " conferred " by reason of the disposition of 19th December 1924, though possession did not happen until 6th May 1926. The value of the succession should be limited to that period of eleven years, both as to corpus and income. The amount of that is not £20,714 6s. 5d., which represents the entire value of the shares. Nor is it necessarily limited to the amount of profits. Its business value might be different. Whatever beneficial interest passes " on death," that interest is dutiable, even though, as I have said, the same beneficial interest might, under other circumstances, have passed to the beneficiary in some other way (*Attorney-General* v. *Noyes* (1); *Attorney-General* v. *Robertson* (2)). The value for the eleven-year period is not stated or found. But there is, by sec. 50 of the Act,

(1) (1881) 8 Q.B.D. 125.

(2) (1893) 1 Q.B. 293.

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under which this proceeding originated, power in the Court to give directions as to any inquiry, valuation or report.

The appeal should therefore be allowed, the order of the Supreme Court discharged, and instead thereof it should be declared that succession duty is payable in respect of whatever sum was the value on 20th December 1924 of the income from the "B" shares for the period of eleven years, beginning 6th May 1926 and ending 5th May 1937; and this case should be remitted to the Supreme Court of Queensland to be further dealt with consistently with this judgment.

HIGGINS J. I am of opinion that succession duty is payable on a succession, by reason of this settlement, but not on the amount of £20,714 6s. 5d. as claimed by the Commissioner.

The learned Judges of the Supreme Court have addressed themselves to the question whether there was *any* succession upon the death of the settlor within the meaning of sec. 4, but not to the question as to the *amount* of the assessment of value for duty if there was such a succession. No argument seems to have been addressed to the Supreme Court as to the latter question; and in his notice of appeal to this Court the Commissioner even treats the amount of the assessment as unquestionable, if there was a succession on the death. The words of the declaration which the Commissioner impugns are "the succession duty is not payable in respect of the sum of £20,714 6s. 5d. being the amount referred to in par. 19 (b) of the said petition"; and, if the amount is wrong, as I think it is, the declaration impugned is literally right, on its face. But it does not follow that it is the proper declaration for the Supreme Court to make under the petition; and this Court has power, under sec. 37 of the *Judiciary Act*, to give such judgment as the Supreme Court ought to have given in the first instance.

It is necessary therefore for us to deal with the question asked by the petition—"(1) in respect of *what assets* succession duty should be assessed upon the death of the said deceased." We must face the question, was there any such succession on the death of the settlor; and, if so, in respect of what assets?

That question turns on the meaning and applicability of sec. 4 of the Act. My opinion is that sec. 4 is applicable to the beneficial interests which the beneficiaries took, by reason of the settlement, in the profits of the property as from 5th May 1926 until 5th May 1937 (the expiration of the twenty-one years from the date of the settlement—5th May 1916). But what the Commissioner has assessed duty on is not these profits only but the whole corpus value of the assets in the settlement less the value of the "A" shares which belonged to the settlor at his death (see par. 15 of the petition).

I concur with *Webb* J. in his view that upon the death of the settlor, 19th December 1924, the "B" shareholders (so called) became entitled beneficially to something which they had not before, and by reason of the provisions of the settlement, but I do not think that they became entitled at that moment, upon that death, to the corpus of the assets in the settlement to the extent of the full 22,000 "B" shares out of the 24,000 shares into which the interests in the assets were deemed to be divided. The "B" shareholders had their interest in the corpus already, before the death of the settlor; but on the death of the settlor they gained the certainty that the profits as from the expiration of the existing period of five years would belong to them. This gain was merely possible previously; but as from the death, and by reason of the terms of the settlement, they became indefeasibly entitled to all the profits from 5th May 1926. They were already indefeasibly entitled to all the profits as from 5th May 1937.

This settlement is of a very unusual character, involving an attempt to apply to a family settlement the machinery of a trading company under the Companies Acts. The "trust premises"—lands, moneys in bank, stocks, &c.—are deemed to be of the value of £24,000, and deemed to be divided into 24,000 shares of £1 each. Of these shares 2,000 are called "A" shares, vested in the settlor himself absolutely; and 22,000 are called "B" shares, and as to 10,500 vested in his adult children and his sister in certain proportions; and as to 11,600, vested in the trustees for the infant children on their attaining twenty-one years. There was to be a register of the shares, and the registered holder was to be deemed

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to be the absolute owner (clause 4 of third schedule). The trustees were to carry out in every respect the directions of the Board of Management (clause 5 and clause 9); the Board of Management can purchase any property on any terms; and the settlor was the Board of Management until his death (clause 6). The "A" shares were transferable at the will of the holder—the settlor (clause 12); but the "B" shares were not transferable except with the sanction of the Board (the settlor) until the holders became entitled to share in the profits. Under clause 19, the profits were, for a period of five years from 5th May 1916, to be divided amongst the holders of the "A" shares—that is to say, were payable to the settlor; and the period of five years might be extended from time to time up to 5th May 1937 by resolution of the holders of the "A" shares—that is, by resolution of the settlor. But subject to these provisions the profits were to be divided among all the beneficiaries in proportion to their shares. Therefore, the beneficiaries had, independently of the death of the settlor, what one might call a vested estate in remainder—vested in title though not in possession or enjoyment—in the profits accruing from 5th May 1937. The only period as to which the right to enjoy the profits remained uncertain, before the death of the settlor, was the period before 5th May 1937. As to voting powers, so long as the holders of the "A" shares (that is to say, the settlor) were entitled to all the profits, they were entitled to one vote for every share at any meeting of the beneficiaries; whereas the holders of the "B" shares were entitled to only one vote for every 30 shares. The provisions of the articles might be altered by "special resolution"; but a "special resolution" means a resolution passed by a two-thirds majority of the beneficiaries confirmed by a resolution of a majority of the votes of the respective classes of beneficiaries: so that the settlor, being a class in himself, could prevent any special resolution.

Such provisions need no comment. During his life, the settlor had entire control of the whole trust property, and of such property as he chose to substitute therefore.

What happened was that when the first five years were about to expire, the period during which the profits were to be paid to the settlor as the holder of all the "A" shares was extended by him

to 5th May 1926; and the holders of the "B" shares had no right to any of the profits before that date; and they might, at the will of the settlor, have no right to any of the profits since that date up to 5th May 1937. The settlor died on 19th December 1924; and from the moment of his death the *possible* right of the beneficiaries to the profits as from the end of the existing period of five years—5th May 1926—became an *actual* right. In my opinion, the death of the settlor was the critical moment at which the interest of the beneficiaries included first, for a certainty, the right to the profits as from 5th May 1926; and anyone willing to buy or lend on the security of the interest of a beneficiary would look to a proportion of the profits as from 5th May 1926 to 5th May 1937 as being indefeasibly included in that interest. We have here facts which accurately fit the words of sec. 4—a "disposition of property, by reason of which any person has become . . . beneficially entitled to any property *or the income thereof* upon the death of any person dying . . . either immediately or after *any interval*, either *certainly or contingently*, and either originally or by way of substitutive limitation."

Personally, I have felt difficulty in bringing the provisions of the settlement within known legal categories. But so far as I can see, without the assistance of argument on the subject, I think that the beneficiaries had—notwithstanding the phraseology as to shares—an equitable interest as tenants in common in the undivided concrete assets in the proportions of their respective shares: e.g., Mrs. Turnbull, the sister, holding 1,000 shares, held $\frac{1000}{24000}$ of the settled assets in equity—or $\frac{1}{24}$th of those settled assets. It is, therefore, doubtful whether the restrictions on transfer, on alienation, were valid and binding. The analogy as to restrictions on the transfer of shares in a company fails; for it has to be remembered that such restrictions as to a company's shares are the result of an Act of Parliament. The Companies Act (1863 to 1913, sec. 21), following the English Act of 1862, provides expressly that "the shares or other interest of any member in a company . . . shall be personal estate capable of being transferred in manner provided" by the articles (English Act, sec. 22). It has been held therefore that the provisions against the transferability of shares contained in

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a company's articles are not valid under the rule against perpetuities, or are void as being *repugnant to the absolute ownership conferred*, The articles of a company are expressly made mutual covenants entered into by all the shareholders (sec. 15); and "the contract contained in the articles of association is one of the original incidents of the share" (*Borland's Trustee* v. *Steel Brothers & Co.* (1)). But even if we treat the provisions against transfer of shares in this settlement as being invalid, there is no reason for treating the provisions conferring the interest in profits under this settlement as being invalid; and the change in the interest in the profits under this settlement, the change which occurred upon the death of the settlor, from a possibility to a certainty, appears to me to be sufficient to establish a "succession" to the extent of the profits —the income from 5th May 1926 to 5th May 1937.

I am glad to find that in this conclusion—that there was a succession on the death of the settlor to the extent of the income from 5th May 1926 to 5th May 1937—I am in accord with the view of my learned brother *Isaacs*. But what is to be our order? This Court has not been supplied with the material necessary for saying what is the true value of the income between these dates. The order proposed by my brother *Isaacs* seems, however, to do substantial justice—Allow the appeal, discharge the order, declare that succession duty is payable on the value of the said income, remit the case to the Supreme Court to deal with the case under the Act (see sec. 50) consistently with the judgment of this High Court.

Perhaps I ought to add that even if the duty ought to be assessed on the corpus as well as on the income (limited as I have stated), I am by no means satisfied that the assessment of the value is not, on its face, unfair to the beneficiaries. To deduct the value of the "A" shares from the value of the concrete assets as a whole is not a fair criterion of the value of individual shares under such a deed as this.

RICH J. I agree with the judgment of the majority of the Supreme Court, and think the appeal ought to be dismissed.

In this case there was not a disposition of property by which a person became beneficially entitled to property or the income

(1) (1901) 1 Ch. 279, at p. 288.

thereof upon the death of any person. The beneficiaries became entitled because the term was extended only to 5th May 1926 and would have become so entitled whether the settlor died or not if for any reason the term was not extended.

Appeal allowed. Order of Supreme Court discharged. Declare that succession duty is payable upon whatever sum was the value on 20th December 1924 *of the income from the "B" shares for the period of eleven years beginning 6th May* 1926 *and ending 5th May* 1937. *Case remitted to Supreme Court of Queensland to be further dealt with consistently with this judgment.*

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

Solicitors for the respondents, *Macnish & Macrossan.*

B. J. J.