IN THE HIGH COURT OF AUSTRALIA

GRUBB & OTHERS.

V.

THE COMMISSIONER OF TAXATION OF THE STATE OF TASMANIA.

REASONS FOR JUDGMENT

Judgment delivered at SYDNEY.

on TUESDAY, 14th December, 1948.

H. E. Daw, Gov. Print., Melb.

C.12280/45

GRUBB & ORS.

v.

THE COMMISSIONER OF TAXES FOR THE STATE OF TASMANIA.

ORDER.

Appeal allowed. Order of Supreme Court discharged. Declare that duty is assessable only in respect of the excess of the amount of the moneys received under a policy over the surrender value of the policy at the time of the death of Percival Beaumont Grubb in proportion to the amount contributed or provided by the said deceased for the provision of the policy. Costs of appellant in Supreme Court to be paid by respondent. No order as to costs of appeal.

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LATHAM C.J.

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REASONS FOR JUDGMENT. LATHAM C.J.

The Deceased Persons Estates Act 1931 (Tas.), sec. 5(10), includes within the estate of a deceased person upon which duty is payable under the Act as "notional estate" -

> "XI Any annuity or interest purchased or provided by such person, 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, and in proportion to the amount, if any, provided or contributed by such person for the purchase or provision of such annuity of interest."

The Commissioner of Taxes has included in the dutiable estate of Percival Beaumont Grubb deceased the proceeds in whole or in part of certain life policies upon his life. Three of the policies were taken out by his wife with the National Mutual Life Association of Australasia Limited. They were:- (1) Policy No. 248854 for £2000 payable on death, with a provision that if upon the death of the life assured the Association should not have notice of anything in any way affecting the assured's (that is the wife's) absolute ownership of the policy, the policy moneys might be applied in payment of duty payable on the issue of probate of the will of the life assured (the husband). This policy was taken out on 5th July 1923 and by arrangement with the Association was converted into a fully paid policy for £144 on 23rd June 1926. The husband paid all the premiums on the policy. The insurance company paid upon his death £309:14:0 under the policy. The whole of this sum has been included by the Commissioner in the dutiable estate.

(2) Policy No. 249049 for £2000 payable on death. This policy contained the same provision as that already mentioned with respect to the payment of probate duty. The husband paid all the

premiums /

premiums on this policy, including a sum of £251:5:0 paid during the three years immediately preceding his death. It is conceded by the appellants that duty is payable in respect of this sum of £251:5:0 under sec. 5(2)II of the Act. The Commissioner has assessed all the proceeds of the policy to duty.

(3) Policy No. 249104 for £2000, payable on death - with no condition as to probate duty. The husband paid all the premiums on this policy up till 1931, amounting to £562:17:5. Subsequently the wife paid £1675 in premiums. The proceeds of the policy were £2900:16:0, and the proportion of the amount attributable to the premiums paid by the husband, namely £974:16:0, has been included by the Commissioner in the dutiable estate.

The evidence shows that the policies were taken out by the wife by arrangement with her husband. She gave security over the policies for the purpose of paying off a debt upon a property owned by her. The amount of the debt was reduced from time to time and ultimately was discharged by a payment of £1000 made to a mortgagee of the policies out of the proceeds of the policies after the death of her husband.

The appellants contend that none of the said moneys except the sum of £251:5:0 should have been assessed to duty.

Upon appeal from the assessment Clark J. held that, though the policies were taken out by the wife and she was the owner of them, the deceased had provided an interest therein by paying premiums, and that to the extent of the beneficial interest which accrued or arose on the death of the deceased the interest in the policies was part of the dutiable estate of the deceased. That beneficial interest was held to be represented by the whole of the policy moneys, but in proportion only to the amount of premiums provided or contributed by the deceased. His Honour applied what Palles C.B. said in Attorney-General v. Robinson, 1901 Ir. Q.B.67, with reference to sec. 2(1)(d) of the Finance Act 1894 (which, except

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for the final words of the Tasmanian provision referring to the proportion of the amount provided or contributed by the deceased, is in the same terms, with an immaterial verbal variation, as the Tasmanian provision) ".... the words 'accruing or arising' .....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 then vesting in another of property which previously had not been existing in anyone. This is an exact description of money secured by a policy of insurance." Accordingly His Honour held that the deceased in concert with his wife provided a beneficial interest which arose upon his death and to the extent to which he provided that interest (determined by the proportion of premiums which he paid) the interest formed part of his dutiable estate. In the case of Policies 248854 and 249049, the result was that the whole amounts of the policy moneys were held to be dutiable, and in the case of the third policy, a proportionate amount, namely £974:16:0, represented the extent of the beneficial interest which so arose.

The case of Attorney-General v. Robinson (supra) has been followed and applied in England: see Attorney-General v. Murray, 1904 1 K.B. 165: Attorney-General v. Pearson, 1924 2 K.B. 375: and see Tennant v. Lord Advocate, 1939 A.C.207, at p. 213, approving Attorney-General v. Pearson (supra).

The principal argument submitted for the appellants was that the wife took out all these policies in her own name and became the absolute owner of the policies. Accordingly, when her husband died nothing more happened than that rights, which had belonged to her for many years, became enforceable. Therefore, it was contended, no beneficial interest accrued or arose to her or to anyone else on the death of the husband. In my opinion there is great force in this argument, but it is not possible to adopt it in face of the decisions in Attorney-General v. Robinson and the other cases already mentioned. In

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support of those decisions it may be observed that the statute applies specifically to cases where some interest has already been provided by the deceased person in his lifetime, and where afterwards, upon his death, a beneficial interest arises or accrues to some other person. Whenever that beneficial interest arises or accrues by virtue of the terms of the original provision made it could be argued that no added interest had been acquired by any person, but that events had happened which, by reason of the anterior provision, changed a contingent interest into a vested interest, or entitled some person to enjoyment or possession of property. Therefore it could be said that no new beneficial interest was created upon the death of the person who had made the provision. But upon such a construction it would be difficult to find any case to which this part of the statute would apply. Upon the authorities it must be held that in this case the deceased provided in whole or in part an interest in the policy moneys and to the extent of the beneficial interest which arose therein on the death of the deceased that interest is to be included in the dutiable estate in proportion to the amount contributed by the deceased.

But that which is to be included is only the beneficial interest which arose or accrued. The wife completely owned the policies before the death of her husband. What then was the extent of the benefit which arose or accrued to her upon his death? This question was decided by the House of Lords in the case of Adamson v. Attorney-General, 1933 A.C. 257, with reference to sec. 2(1)(d) of the Finance Act 1894, which, as already stated, contains the same relevant provision as that nowunder consideration. This was a case where the death of the person who provided the interest had the effect of changing an expectant beneficial interest into an actual interest in possession of a share in a trust fund. Lord Warrington said at p. 277:-

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> "In the present case the interest of each child was unquestionably provided by the deceased, and is therefore to be deemed to be included in the expression 'property passing on the death of the deceased', but only to the extent of the beneficial interest accruing or arising on the death of the deceased. 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."

Thus that which was held to be dutiable was the difference in value between the interest which existed before the death of the deceased person and the interest which accrued upon his death. The same rule was applied in Attorney-General v. Lloyds Bank, 1935 A.C. 382. In Great Britain the Finance Act 1894 was amended in order to meet this position. (The case of Attorney-General v. Lloyds Bank was decided upon the law as it existed before this amendment, the decision of the Court of Appeal, which was affirmed in the House of Lords, having been given on 1st May 1934.) The Finance Act 1934 (12th July 1934), sec. 28, altered the law as declared in Attorney-General v. Adamson (supra) by providing that for the purposes of sec. 2(1)(d) of the Finance Act 1894 the extent of any beneficial interest in an interest purchased or provided by the deceased "shall be ascertained and shall be deemed always to have been ascertainable without regard to any interest in expectancy the beneficiary may have had therein before the death". There is no such provision in the Tasmanian Act. If there had been such a provision the whole of the policy moneys paid under the policy or of the proportion therein provided by the deceased would have been dutiable. But before the death of the deceased the wife had the whole interest in the policies. Under the law as declared in Attorney-General v. Robinson a beneficial

interest /

interest accrued to her when her husband died. The extent of that beneficial interest, however, was measured by the difference between that which she had before the husband's death and that which she had after his death. That which she had before his death was represented by the surrender value of the policies. That which she had after his death was represented by the moneys paid under the policies. Therefore, the extent of the beneficial interest which arose on his death is represented by the difference between these sums. Accordingly, the amount which is dutiable in the case of these policies is determined by ascertaining the difference in each case between the surrender values of policies and the amounts paid under the policies. Where the husband paid the whole of the premiums the whole of the amount of that difference is dutiable. Where he paid part of the premiums a proportionate amount of the difference is dutiable.

It was argued for the Commissioner that there was a resulting trust to the deceased husband in the present case because the presumption of advancement to the wife was rebutted. No attempt was made to make such a case in the Supreme Court, and no evidence was directed to this issue. There is no evidence in the facts before the court which can be effectively relied upon to rebut the presumption of advancement. But if the argument succeeded the only result would be that the policies would be part of the actual, as distinguished from the "notional" estate of the deceased, and the proceeds of the policies would be dutiable.

A question also arises as to another policy taken out by the husband (not by the wife) in 1897 with the Australian Mutual Provident Society. The policy was payable upon death and was for the sum of £250. The policy became fully paid up in 1904 and on 6th November 1923 was assigned by the husband to his wife as a gift. The proceeds of the policy were £654:2:0. The policy moneys were received by Percy Hart, to whom the policy had been assigned by way of security. The Commissioner claimed duty upon the proceeds

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of this polîy under the Deceased Persons Estates Duties Act 1931, sec. 5X. Under this provision the dutiable estate of a person includes any real or personal estate "Which consists of moneys payable upon the death of such person in respect of any policy of insurance effected by him, and kept in force wholly or partially by him and assigned by him by way of gift; but, where such policy has been only partially kept in force by such person, then such proportion only of such moneys as the premiums paid by such person bear to the total premiums paid in respect of such policy." The policy was fully paid up when it was assigned by way of gift to Mrs. Grubb. It was contended for the executors that the provision quoted applied only to policies which had been kept in force after an assignment. But the section applies where a policy satisfies the description of being a policy (a) effected by a person; (b) kept in force wholly or partially by him; and (c) assigned by him by way of gift. This policy satisfies this description. I can see no warrant for limiting the application of the provision to cases where premiums are paid by the person who effected the policy only after the assignment of the policy. In Attorney-General v. Fleming, 1897 A.C.145, the House of Lords considered sec. 11 of the Customs and Inland Revenue Act 1889, under which duty was imposed upon money received under a policy of insurance effected by a person on his life "when the policy is wholly kept up by him for the benefit of a donee...." It was held that a policy of insurance could not be kept up for the benefit of a donee when no donee was in existence. Accordingly, if all premiums had been paid (as in the present case) before the policy was assigned, this provision of the Act would not apply. But the Tasmanian provision is different in terms from sec. 11 of the English Act. There is no reference to the keeping up of a policy for a donee, and the decision in Fleming's case accordingly has no bearing upon the interpretation of the Tasmanian provision. In my opinion the learned judge rightly held that sec. 5(2)X of

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the Tasmanian Act applied to the moneys received under the A.M.P. policy. But here again, in my opinion, the extent of the beneficial interest which arose upon the death is measured by the difference between the moneys paid under the policy and the surrender value.

The provisions in the policies as to the applicability of policy moneys in payment of death duties have no bearing upon the matter to be decided. They affect only the application of the policy moneys when payable, and do not either increase or diminish the extent of the beneficial interest which arises or accrues to some person on the death of the deceased. It may be observed that the statutory provision does not require that the person for whom an interest is provided must be the person to whom a beneficial interest accrues upon the death. That beneficial interest may accrue to any individual and if so duty is payable in respect of the estate of the deceased person in proportion to the extent of the interest so far as it was provided by the deceased.

If, in the present case, the wife had surrendered the policies, no beneficial interest therein would have arisen or accrued to any person upon the death of the deceased. If she had assigned them for value an assignee who obtained a benefit upon the death would have been protected against liability to duty by sec. 15 of the Act. Sec.15 provides that any person taking or deriving a beneficial interest in property deemed to be part of the estate of a deceased person otherwise than as a purchaser in good faith for full consideration in money or money's worth, shall be responsible for the duty payable thereon as part of the estate of the deceased person and may be assessed accordingly. If there had been such an assignment during the husband's life no interest would have arisen or accrued to the wife upon the death - so that no duty would be payable in that case. Here, however, the wife remained the owner of the policies until the

death /

death of the deceased and a beneficial interest therein did accrue to her. The extent of the benefit was obviously not affected by the fact that she had mortgaged the policies.

For the reasons stated, the appeal should be allowed in respect of all the policies so that the difference between surrender values and monies received can be calculated and duty imposed upon the total of the differences in value, the appropriate proportion only (i.e. in proportion to the amount of premiums paid by deceased) of that difference being assessed in the case of policy No. 249104. The assessment is remitted to the Commissioner for amendment in accordance with the law as now declared.

The result is that the appellants have not succeeded in their contention that no duty is payable in respect of the amounts (above the sum of £251:5:0) received under the policies and that the respondent has not succeeded in his contention that duty is payable upon the total of those amounts. Each of the parties unsuccessfully contended for an extreme position, but the appellants have succeeded to a substantial extent upon a point not expressly taken in the notice of appeal. A fair order as to costs is to give the appellants the costs in the Supreme Court and to make no order as to the costs of the appeal.

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I have had the advantage of reading the judgment of the Chief Justice and on the question raised in this appeal I am in substantial agreement with the conclusion at which he has arrived.

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JUDGMENT MCTIERNAN J.

I agree with the judgment of His Honour the Chief Justice.