

Privy Council Appeal No. 43 of 1928.

Percy Arundel Rabett and others - - - - - *Appellants*
v.
The Commissioner of Stamp Duties - - - - - *Respondent*

FROM

THE SUPREME COURT OF THE STATE OF NEW SOUTH WALES.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 31ST JANUARY, 1929.

Present at the Hearing :

THE LORD CHANCELLOR.
LORD BUCKMASTER.
VISCOUNT SUMNER.
LORD BLANESBURGH.

[*Delivered by* LORD BUCKMASTER.]

The questions raised on this appeal depend upon the true construction of Section 102 of the Stamp Duties Act, 1920-1924, which declares what classes of property are to be deemed to be included in the estate of a deceased person for the purpose of duties and arise out of the following circumstances.

By a marriage settlement, dated the 16th November, 1876, Sir William Cooper settled £30,000 upon trust to pay the income to his wife for life, after her death to himself for life, and after the death of the survivor of them upon trust for the children or remoter issue of the marriage as he and his wife should by deed jointly appoint, or in the absence of such appointment as the survivor should by deed or will appoint, and in default of appointment among the children of the marriage as therein provided. Sir William Cooper died on the 2nd September, 1925, without having exercised the joint power of appointment, leaving his wife and children him surviving and having made a will appointing as his executors the appellants by whom the will was duly proved. The Commissioner of Stamp Duties in assessing the duties payable

upon the settlor's death claimed that the whole value of the settled property ought to be included in the estate and made subject to duty. The executors, on the other hand, contended that the value of the widow's life interest ought to be deducted and, before this Board, apparently for the first time, urged alternatively that the whole settled estate was exempt. The Commissioner, who had decided that the whole property was subject to duty, stated a special case for determination of the point by the Supreme Court of New South Wales, and they by a majority affirmed the decision of the Commissioner, and from their judgment the executors have brought this appeal.

The point for determination depends wholly upon the true construction of the New South Wales Stamp Duties Act No. 47, 1920, as amended by the statutes No. 20 of 1922, No. 16 of 1924, and Nos. 32 of 1924. These Acts deal with Stamp Duties generally. Part IV of the Act of 1920 is set apart for the duties on death and Section 101 provides that

"In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere, and wherever the deceased was domiciled, duty, hereinafter called death duty, at the rate mentioned in the Third Schedule to this Act, shall be assessed and paid—

"(a) upon the final balance of the estate of the deceased, as determined in accordance with this Act."

Section 102 defines the property which is to be recognised as the estate of a deceased person and states it shall be "deemed to include" among other property:—

"(2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person:

"Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust."

It is by virtue of this provision that the duty has been assessed in the present case upon the settled property.

The appellants urge that the interpretation placed upon the statute is not only not justified by the actual words, but that the general scope of the Act shows the settled property ought not to be included. They contend that the statute by Section 101 only imposes duty on the actual estate of the deceased and that property validly taken out of the estate before death cannot rightly be included. This argument would have weight but for the words of Section 102, which provide that the estate shall be "deemed to include" certain properties, and the meaning of these words is that if the enumerated property is not in fact part of the estate, it must be considered as though it were, and in these circumstances it is little use dwelling on the similarity between

the Act in question and Probate and other Acts which deal directly with the actual estate of the deceased.

Now the first words of the sub-section (2) (a) include property which before the death of the deceased has been completely taken away from his estate by a settlement containing any trust in respect of the property "to take effect after his death." The appellants urge that this cannot refer to the life interest of the wife, since that had already vested in possession and had been taken away and no subsequent trust arose until after her death, but the words of the section do not provide that the duty only attaches to property in respect of which the trust arises or takes effect *on* the death of the settlor but *after* his death, and their Lordships see no escape from the conclusion that property of the deceased settled by an instrument which contains trusts that take effect after and by reference to his death is to be deemed part of the estate. It is argued that the use of the words "by will" conflict with this construction, for it is impossible that a will can contain anything but provisions to take effect on and after the death of the testator, but their Lordships think that this difficulty is resolved by construing the qualifying words as applicable only to the settlement, and this in their view is the true interpretation of the section. The argument which excludes the value of the wife's life interest would equally apply to the interest of the children, for that also, if the joint power of appointment had not been exercised, would have been entirely taken away from the testator.

Ferguson, J., in his dissenting judgment faces this difficulty, and resolves it by concluding that if the testator's life interest had been first reserved, then the whole estate would have been subject to duty, but not otherwise: this conclusion depends on the assumption that the Act only relates to property subject to trusts that arise on the testator's death; but this is not the wording of the statute.

Nor can their Lordships assent to the view that as the testator might, had he thought fit, have given his wife in cash the present value of her life interest and then settled the remainder, the result is the same when he adopted a different method of disposition.

The section assumes that the testator has disposed of the property, and the only condition required for duty to attach is that the settlement contains trusts to take effect after his death. In the present case the trusts that took effect after his death were:—

- (1) a trust enabling his widow alone to sell and vary investments;
- (2) a trust enabling her if the joint power was unexercised to appoint among the children by deed or will; and
- (3) a trust for the benefit of the children in default of appointment and subject to their mother's life interest:

and these trusts affected the whole settled property, and not that part only which would be left if the value of the wife's life interest were taken away.

Their Lordships think the same conclusion must be reached by considering the effect of Section 102 (2) (c) (i). This is clause in the following terms :—

“(2) (c) Any property passing under any Settlement, Trust, or other disposition of property made by the deceased whether before or after the passing of this Act—

“(i) by which an interest in or benefit out of or connected with that property, or in the proceeds of the sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person;”

Now there can be no doubt that in this settlement made by the testator there was a life interest reserved to him, and it is not in accordance with the true conception of such a settlement to say that it was a life interest in the residue of the property after the value of the previous life interest had been deducted.

On both sections, according to the main argument of the appellants, the amount of duty would vary according to whether or no the testator's wife predeceased or survived him, but they can find nothing in the words of the statute to support that view.

For these reasons their Lordships think that this appeal should be dismissed with costs, and they will humbly advise His Majesty accordingly.

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DELIVERED BY LORD BUCKMASTER.

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