

No. 812.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—  
18TH AND 19TH NOVEMBER, 1929.

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COURT OF APPEAL.—14TH, 15TH AND 16TH JULY, 1930.

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HOUSE OF LORDS.—13TH AND 16TH NOVEMBER AND 15TH DECEMBER,  
1931.

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LORD WOLVERTON *v.* THE COMMISSIONERS OF INLAND REVENUE.

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*Super-tax—Life assurance premiums paid out of income of settled funds—Whether income for Super-tax purposes of beneficiary entitled for life to income of the funds.*

*The Appellant was entitled to the income for life of settled property after certain sums had been provided for other persons by accumulations out of the income. Before the sums in question had been wholly accumulated, the Appellant, acting under powers conferred by a private Act, mortgaged the income arising from the settled property during his life to raise the necessary balances. The mortgages were protected by policies upon the life of the Appellant. The Act provided that every mortgage effected under its powers should pass an estate or interest for the Appellant's life in priority to all existing interests.*

*The mortgages were subsequently consolidated and later the consolidating mortgage was (under powers provided by another private Act) taken over by the trustees of the settled property. This second Act, inter alia, provided that the premiums on the life assurance policies should be a first charge on the income of the settled property and specifically directed the trustees to retain the necessary amounts out of the income and to pay the premiums as and when due.*

*The Commissioners of Inland Revenue contended that the amounts applied in payment of the premiums formed part of the Appellant's income for Super-tax purposes.*

*Held, that the income out of which the premiums were paid was not income of the Appellant, and that the amounts applied in payment of premiums did not form part of his income for Super-tax purposes.*

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#### CASE

Stated by the Commissioners for the Special Purposes of the Income Tax Acts under the Income Tax Act, 1918, Section 7 (6) and 149, for the opinion of the High Court.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at York House, Kingsway, London, on 14th February, 1929, for the purpose of hearing appeals, the

Right Honourable Lord Wolverton (hereinafter called "the Appellant") appealed against additional assessments made upon him to Super-tax in the following amounts:—

For the year to 5th April, 1923, in the sum of	£5,517
"    "    "    "    "    "    1924    "    "    "    "    "	£5,149
"    "    "    "    "    "    1925    "    "    "    "    "	£4,983
"    "    "    "    "    "    1926    "    "    "    "    "	£4,983
"    "    "    "    "    "    1927    "    "    "    "    "	£4,828

1. The question raised in the appeal was whether certain moneys applied in payment of the life insurance premiums hereinafter mentioned formed part of the income of the Appellant for the purposes of Super-tax.

2. In 1896 and 1921 there were passed the Wolverton Estate Acts, 1896 and 1921, copies of which are hereto annexed and may be referred to as part of this Case.<sup>(1)</sup>

The events leading up to the passing of these Acts are set out in the preamble to the second Act. They may be very shortly summarised as follows:—

George Grenfell, the second Baron Wolverton, died in 1887, and by his will left his residuary estate to his widow for life, and, upon her death, to his nephew Henry, the third Baron, absolutely, but if he predeceased her, which event happened in 1888, to his (the second Baron Wolverton's) right heir at common law. The second Baron Wolverton's heirs at common law were five daughters, the only children of his next brother who had predeceased him, and the Appellant (who is the fourth Baron and a younger brother of the third Baron), in these circumstances, came into the title without, it was apprehended, being entitled to any part of the testator's residuary estate, contrary to the supposed intention of the testator. To fulfil what was believed to have been such intention, a family arrangement was entered into during the lifetime of the widow, with her consent and with the consent of all the other parties interested, and this arrangement was embodied in a deed of settlement of 31st December, 1888. Under this deed, the interests of all parties to the estate were subject to a life interest reserved to the widow assigned to trustees who were (*inter alia*) to pay the Appellant an annuity of £15,000 and to accumulate five sums of £100,000 each for the benefit of the co-heiresses and subject as aforesaid, and when and so soon (but not otherwise) as the several sums of £100,000 and all duty and certain costs and claims should have been respectively paid and satisfied, the trustees were to stand possessed of the settled property upon trust for sale, conversion and investment in land to be limited to the use of the Appellant for

<sup>(1)</sup> Not included in the present print.

life with remainders over, but his life interest was determinable on alienation. The trustees were given power to postpone the sale and conversion, but, in the meantime, the income was to be applied as if it were rents and profits of the land directed to be purchased. The widow died in 1894 and the accumulated fund at that time amounted to £226,000.

3. By the Wolverton Estate Act, 1896, it was provided (*inter alia*) as follows :—

“ 3. (1) It shall be lawful for Frederic Lord Wolverton  
 “ at any time after the passing of this Act and from time to  
 “ time to raise on the security of a Mortgage of all or any part  
 “ of the dividends interest income rents and profits arising  
 “ from the settled property during his life any sum or sums  
 “ not exceeding altogether the amounts which may be from  
 “ time to time required for the purposes of this Act and to  
 “ charge all or any part of such dividends interest income  
 “ rents and profits with the payment of the principal moneys  
 “ so raised (whether by instalments or otherwise) and of the  
 “ interest thereon and of the premiums and other moneys  
 “ required to be paid for effecting and keeping on foot any  
 “ policy or policies of assurance effected on his life to an  
 “ amount not exceeding in the aggregate the amount required  
 “ by the persons advancing the principal moneys raised under  
 “ the powers of this Act by way of further security for the  
 “ same and the interest thereon.

“ (2) Every mortgage or charge effected by Frederic  
 “ Lord Wolverton under the powers of this Act at whatever  
 “ date effected shall operate to pass an estate or interest for  
 “ the whole life of Frederic Lord Wolverton in priority to and  
 “ free from and overriding all the trusts and provisions in  
 “ the said Indenture of the 31st day of December 1888 con-  
 “ tained and at the date of such mortgage or charge subsisting  
 “ and capable of taking effect and all payments under such  
 “ trusts and provisions or any of them.”

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“ (4) The Trustees of the settled property shall at any  
 “ time after the passing of this Act and from time to time  
 “ upon the request in writing of Frederic Lord Wolverton  
 “ such request to be made to them within five years after the  
 “ passing of this Act raise by sale of the investments specified  
 “ in the second part of the schedule to this Act or any of them  
 “ or of any investments for the time being representing the  
 “ said investments or any of them such sum or sums not  
 “ exceeding altogether the amount which may be from time to  
 “ time required for the purposes of this Act and shall advance  
 “ or retain the sum or sums so raised on the security to be  
 “ taken by them of a mortgage as by this Act authorised

“ made by Frederic Lord Wolverton of the said dividends  
 “ interest income rents and profits and policies of assurance  
 “ on his life to an adequate amount.”

\* \* \* \* \*

“ (12) Subject to the provisions contained in this Act  
 “ and to any and every exercise of the powers conferred thereby  
 “ the trustees of the settled property shall stand possessed  
 “ thereof upon the trusts and with and subject to the powers  
 “ and provisions in the said Indenture of the 31st day of  
 “ December 1888 contained and declared concerning the same  
 “ or such of the same trusts powers and provisions as shall for  
 “ the time being be subsisting or capable of taking effect.”

4. In pursuance of the above-mentioned powers conferred by the Act of 1896, the Appellant, in 1896, mortgaged the income of the estate to arise during his life and borrowed from the North British and Mercantile Insurance Company a sum of £150,000. The trustees also, under the powers given to them by the Act of 1896, sold certain investments and out of the proceeds advanced on mortgage to the Appellant a further sum of £126,000. The Appellant, out of these and other moneys which he had, paid to the five co-heiresses their respective sums of £100,000 each.

5. The several mortgages under which moneys were raised for the above-mentioned and other purposes, as described in the Act, were protected by policies upon the life of the Appellant. These mortgages may be referred to for the purpose of this case: the first (the “ North British mortgage ” referred to in the Wolverton Estate Act, 1921) is dated the 30th June, 1896, the second (the “ trustees’ mortgage ” referred to in the Wolverton Estate Act, 1921) is also dated the 30th June, 1896, and the third (the “ trustees’ second mortgage ” referred to in the Wolverton Estate Act, 1921) the 30th January, 1901. These mortgages were consolidated into one mortgage in 1913 when the North British and Mercantile Insurance Company, the first mortgagees, took over the trustees’ mortgages and consolidated them with theirs. The consolidating mortgage is dated the 24th April, 1913. This mortgage may be referred to for the purpose of this case.

The estate was re-settled by a deed of re-settlement dated 31st December, 1918, following a disentailing deed dated 30th December, 1918, but without interfering with any of the estates or interests hereinbefore mentioned.

The Wolverton Estate Act, 1921, was passed with the object (*inter alia*) of further removing the restriction against alienation by the Appellant and to enable the trustees of the 1888 settlement to take over the consolidating mortgage, and the Act, by clause 7, enabled the trustees to take an assignment to themselves of all the mortgages and policies then outstanding. This power was exercised in January, 1923; the insurance company was paid off by the

trustees, and the trustees, by deed dated the 28th November, 1923, which may be referred to for the purpose of this case, took a transfer of the North British mortgage and the consolidating mortgage and an assignment of the mortgaged policies.

6. Section 9 of the said Act provides as follows:—

“ From and after any such assignment of the policies to  
“ the trustees of the settled property the premiums payable  
“ in respect of all the said policies so assigned shall during  
“ the life of Lord Wolverton be a first and paramount charge  
“ on the rents and profits, dividends, interest and income  
“ arising from the settled property. And the trustees of the  
“ settled property shall accordingly from time to time retain  
“ and pay out of the said rents and profits, dividends interest  
“ and income all moneys from time to time required for the  
“ payment of such premiums as and when they become due.”

7. There was no covenant by the Appellant in the trustees' mortgage that the Appellant would pay the premiums of the policies which were taken out to protect them, but there was such a covenant in the mortgage to the life insurance company which lent the remainder of the moneys, and there was a similar covenant in the consolidating mortgage of 1913.

8. On behalf of the Appellant it was contended :

- (1) That immediately prior to the Act of 1896, the Appellant was not entitled in possession to a life estate in the settled property, but only to an annuity of £15,000.
- (2) That the life estate in possession of the Appellant never included the moneys required to answer the premiums payable in respect of the policies, in that under the Act of 1896 the premiums were payable out of an estate, created under Section 3 of that Act for the purposes of the mortgages, in priority to the life estate of the Appellant.
- (3) That the moneys payable as premiums for the service of the loans never formed part of the income of the Appellant.
- (4) That the estate created by Section 3 of the Act of 1896 was not disturbed by the Act of 1921, and that after 1923, the trustees, as sole mortgagees, were entitled to the benefit of that estate, and by Section 9 of the Act of 1921 were themselves required to pay the premiums.
- (5) That the case of the *Earl Howe v. Commissioners of Inland Revenue*<sup>(1)</sup> was distinguishable, the income in that case

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(1) 7 T.C. 289.

being admittedly the income of Lord Howe, and the question there being whether the premiums were annual payments within the meaning of the Income Tax Acts.

9. On behalf of the Commissioners of Inland Revenue it was contended (*inter alia*) :

- (a) That in arriving at the total income of the Appellant for the purposes of Super-tax for all the years in question, the amounts of the life insurance premiums did not fall to be excluded.
- (b) That the assessments were rightly made and should be confirmed.

10. We, the Commissioners who heard the appeal, held that the Appellant must be treated for the years in question as being in possession of a life interest in the whole of the estate, and that the trustees were accordingly to be regarded as paying the premiums under Section 9 of the Act on his behalf out of his money. We accordingly confirmed the assessments.

11. Immediately upon our so determining the appeal, the Appellant declared to us his dissatisfaction therewith as being erroneous in point of law, and in due course required us to state a Case for the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

W. J. BRAITHWAITE, { Commissioners for the  
N. ANDERSON, { Special Purposes of the  
Income Tax Acts.

York House,  
23, Kingsway,  
London, W.C.2.

21st August, 1929.

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The case came before Rowlatt, *J.*, in the King's Bench Division on the 18th and 19th November, 1929, and on the latter date judgment was given in favour of the Crown, with costs.

Mr. A. M. Latter, K.C., and Mr. J. H. Bowe appeared as Counsel for the Appellant and the Attorney-General (Sir W. A. Jowitt, K.C.), Mr. J. H. Stamp and Mr. R. P. Hills for the Crown.

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## JUDGMENT.

**Rowlatt, J.**—In this case the question, broadly stated, is whether the mortgage interest and premiums on the life policies which support the mortgage are to be looked at as payable out of a present estate of Lord Wolverton, or whether they are to be looked at as payable by virtue of a limitation prior to Lord Wolverton's interest, with which he has nothing to do. I think that broadly states the question. If the former is the right answer, then the premiums, of course, cannot be deducted. If the latter is the answer I think also it is clear that the premiums can be deducted. Therefore, I think it really depends upon an appreciation of the position—I was going to say in point of fact; it is in point of fact, really—under the limitations.

Under the will of the second Baron, the present Lord Wolverton, in respect of this property, these funds, only had an interest expectant on the failure of the whole of the lives of five ladies, who must have been then quite young, before the death of their aunt, so that his prospects were very remote. As it obviously had not been intended that the bearer of the title should be in that position, the deed of arrangement of 1888 was come to, and, to cut a long story short without, I hope, being for any material purpose inaccurate, it came to this, that instead of their interests being contingent upon their surviving their aunt, these five ladies took a provision under which £100,000 was to be accumulated out of the income for each of them, and, subject to that, the property was to be invested in lands which were to be settled to the use of the present Baron Wolverton for life without impeachment of waste, with remainders over. The years went on. The Dowager Lady Wolverton died, but a good deal of the road had still to be traversed before the £500,000 would be accumulated. Therefore it was desired to adopt a plan by which the £500,000 could be provided for and the estate set free, among other things, from the bar which there had been in the deed of arrangement preventing the Baron Wolverton from alienating his life estate. That may be one of the cases or one of the necessary steps, but at any rate it was desired to provide for this £500,000 and, therefore, by the Act there was a provision made for raising the £500,000 by mortgage, and, in order to do that, the material provisions of section 3 of the Act were enacted. By that it was provided that it should be lawful for Lord Wolverton to raise on the security of a mortgage of all or any parts of the dividends, interest, income, rents and profits arising from the settled property during his life—that is how it is worded—the sums necessary for the purposes of the Act and to charge the income with the payment of the principal monies, the interest and the premiums necessary on the policy. It seems to me that that is really only clearing out of the way this provision for the accumulation of this £500,000. The interest on the loan or, I will say, the premiums on the policies—because that is the

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important part for the present purpose—did not come out of any interest of the ladies; they simply came out of, and *pro tanto* diminished, what would be left for Lord Wolverton. That is how it strikes me. It is simply an operation by which Lord Wolverton's life estate, which, to put it quite broadly, was burdened with the antecedent provision of accumulating this £500,000, was liberated from that requirement to accumulate the income; the amount was raised by mortgage and Lord Wolverton's interest had to find the interest on the mortgage and it had to find the premiums. Of course, it was liberated for the purpose by the disappearance of the annual accumulation. That is how it strikes me, broadly, but Mr. Latter laid great stress—and it really is the whole point of the case—on the terms of sub-section (2) of section 3, which are referred to again in the mortgages, and so on, whereby it was provided that the mortgage and charge effected by Lord Wolverton should operate to pass an estate or interest for the whole life of Frederic Lord Wolverton in priority, and free from and overriding all the trusts and provisions of the indenture subsisting and taking effect, and so on. Mr. Latter says that is a charge which creates an interest anterior to Lord Wolverton's, and therefore these premiums are payable under, and, I suppose, out of that interest and not out of Lord Wolverton's interest at all. But the answer to that is, as it seems to me, that this prior estate is only created by way of mortgage and if the mortgage was paid off—I do not know how it would work in strict conveyancing language—either it would vanish, or else it would belong to Lord Wolverton and merge, I suppose, in the life estate which he possessed subject to it. But this prior estate is an artificial thing which, for all practical purposes and for all the purposes of this case, only exists for the purposes of the mortgage. The truth of the matter remains that this is nothing more or less than premiums paid out of the interest accruing during Lord Wolverton's life, which he raised really in respect of being life tenant.

Under those circumstances, if that is the right view to take of the sections, there is no other difficulty in the case, and I think the appeal of Lord Wolverton must be dismissed with costs.

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An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Greer and Romer, *L.JJ.*) on the 14th, 15th and 16th July, 1930, and on the last-mentioned date judgment was given against the Crown, with costs (Greer, *L.J.*, dissenting), reversing the decision of the Court below.

Mr. A. M. Latter, *K.C.*, and Mr. J. H. Bowe appeared as Counsel for the Appellant and the Attorney-General (Sir W. A. Jowitt, *K.C.*), Mr. J. H. Stamp and Mr. R. P. Hills for the Crown.

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## JUDGMENT.

**Lord Hanworth, M.R.**—This is a difficult case as is attested by the fact that the majority of this Court differ from the decision reached by Mr. Justice Rowlatt and the fact that this Court is not unanimous in the decision which we are now intending to deliver. It is obvious, therefore, that in such a case there is room for wide divergence of judicial opinion. It cannot be stated with confidence that the case is a clear one.

The facts of the case are these: the Crown contends that they are entitled to make additional assessments in respect of Super-tax upon the present Lord Wolverton, who is the fourth holder of that title, for the years ending 5th April, 1923, to 5th April, 1927. They have thus to show that they are entitled to charge him with Super-tax under Section 4 of the Income Tax Act, 1918, whereby in addition to the Income Tax charged at the rate prescribed in any year there shall be charged levied and paid for that year in respect of the income of any individual the total of which reaches a certain sum . . . The Crown therefore claim that in these successive years there was an income received by Lord Wolverton which is the income of him as an individual and thus falls within the charge under Section 4. Lord Wolverton contends that the sum in respect of which these additional assessments have been levied is no part of his income, and the question raised before the Commissioners, in the Court below and in this Court is whether certain moneys applied in payment of life insurance premiums form part of the income of the Appellant in those successive years for the purpose of Super-tax. It is necessary, therefore, to state quite shortly the facts out of which the claims fall to be made. The second Lord Wolverton made a will and gave an interest to his widow and the ultimate remainder was to his rightful heirs at common law. He had several brothers but the next brother to him had five children, daughters, and the rightful heirs of the second Lord Wolverton were his nieces, the daughters of the brother next in age to him. The result of that was that the whole of the estate, the money which was originally intended to be attached to the title, would pass away from the holder of the title, for the title went to the son of another brother of his and successively to the present Lord Wolverton, who is brother of the third Lord Wolverton. In fact the second Lord Wolverton died in November, 1887. His nephew, the third Lord Wolverton, died in July, 1888, with the result that the present Lord Wolverton became entitled to the peerage in the July of 1888, but was not in a position to maintain the title. The widow lived on until 1894. The family came to an arrangement which reflects honour on all of them, in order to carry out what was they felt obviously the intention of the second Lord Wolverton; at any rate they made some provision for the maintenance of the holder of the title. It will be seen on that bare statement of the facts that as the matter stood before what we have called the indenture of 1888 was entered into, the present Lord Wolverton had no

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interest of any sort in the estate of the second Lord Wolverton. I will say that because I think Mr. Stamp agreed that the interest, if any, was negligible. He might in certain remote events possibly have had some interest, but for practical purposes the contingent interest was so remote that it may be neglected and it may be fairly stated that the present Lord Wolverton had no interest at all. The family arrangement that was made in 1888 was of this nature: The deed of arrangement is dated 31st December of that year. The events that are of importance subsequent to the date of the death of the widow of the second Lord Wolverton are these; from and after the death of that Lady Wolverton, these are the provisions which took effect. The intention was to raise a sum of £100,000 for each of the nieces who were the rightful heirs at common law of the second Lord Wolverton—to give them £100,000 apiece, and subject thereto there was to be a provision whereby an annual payment, an annuity of £15,000, was to be paid to the present Lord Wolverton, Frederic Baron Wolverton, and that sum was paid under what is known as a protected trust. After that £15,000 there was to be a payment to the nieces, as I call them, of interest at 4 per cent. on the £100,000, or the unpaid balance of that, which broadly speaking would mean £4,000 a year to each of them. Then after that there was to be the accumulation of a sum of £50,000 in every year, and with that £100,000 there was to be accumulated a sum out of which these portions of £100,000 apiece should be ultimately paid to the nieces. It will thus be seen that for the purpose of carrying out those trusts, it would be necessary that there should be an income of £15,000 plus £20,000, plus £50,000, or a total of £85,000 a year. Unfortunately the income of the estates did not reach so high a figure and it was not possible to complete the accumulation of the sum required to pay off the nieces as it had been contemplated might be done. When that accumulation had been made and the nieces had been paid in full, then it was provided by clause 7: “ Subject and without prejudice “ to the trusts and provisions hereinbefore contained ” and so on, that the trustees should invest the proceeds arising from the sale of a certain amount of funds in their hands, and to purchase lands and so on of freehold tenure; and then it was provided: “ that “ the hereditaments so to be purchased as aforesaid shall be limited “ settled and assured to the uses and upon the trusts following “ (that is to say) To the use of the said Frederic Baron Wolverton “ during his life ” and to the strict entail. In effect therefore, as and when the nieces had been paid off, there would be a life estate coming to Lord Wolverton. But let it be noted that if that deed had been worked out, the sums which had been accumulated and taken out of income would have inured to the payment of these several sums of £100,000, and would not have inured in any way to the benefit of Lord Wolverton. At the conclusion of the accumulations he would have received the estate as it then stood,

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although a considerable time had elapsed since he had become the fourth Baron Wolverton. There was a provision under clause 10 whereby the interest that he would take as tenant for life was a protected interest and if in any way he charged or deprived himself of the personal enjoyment and so on, then there was a gift over, and there was power to the trustees if his life interest should cease and determine and so on, with the usual consequential provisions.

In that position it was obvious that a long time would elapse before there would be a possibility of Lord Wolverton coming into his own, if I may use that colloquial expression. The accumulations began, but owing to the income not being sufficient or not being as high as was contemplated when Lady Wolverton died, as she did in 1894, the accumulations amounted to a sum of £226,000 and no more. That left the sum of £274,000 still to be raised for the purpose of paying off the nieces before Lord Wolverton could be placed in possession or come into his own. That being the position an Act of Parliament was passed which was called: "An Act to confer upon Frederic Lord Wolverton and the Trustees of the property settled by a deed of arrangement dated the 31st day of December 1888 in relation to the residuary real and personal estate of the late George Grenfell Lord Wolverton respectively powers to raise money for the more speedy carrying out of certain of the objects of the said deed and to enable the grant of a jointure and portions by Frederic Lord Wolverton and for other purposes." The title is worth noting, because it is not in order to put Lord Wolverton immediately in possession as tenant for life of the property settled by the deed of arrangement, but it is to give him power to raise money for the more speedy carrying out of certain of the objects of the deed.

At that time, before this Act was passed, Lord Wolverton was in receipt of the £15,000 a year; but Mr. Stamp says, and rightly I think, that that sum that he received is not of importance at all in the matters that we have to consider at the present time—it was a mere annuity received by him. Section 2 is a definition clause and speaks of "the settled property" as meaning and including all stocks, shares, securities and so on and all other the residuary estate of George Grenfell the second Baron Wolverton.

Under clause 3: "It shall be lawful for Frederic Lord Wolverton at any time after the passing of this Act and from time to time to raise on the security of a mortgage of all or any part of the dividends interest income rents and profits arising from the settled property during his life any sum or sums not exceeding altogether the amounts which may be from time to time required for the purposes of this Act and to charge all or any part of such dividends interest income rents and profits with the payment of the principal moneys so raised (whether by instalments or otherwise) and of the interest thereon and of the

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“ premiums and other moneys required to be paid for effecting and  
“ keeping on foot any policy or policies of insurance effected on his  
“ life.” That is the way in which that is provided for. Then sub-section (2) of section 3 says this: “ Every mortgage  
“ or charge effected by Frederic Lord Wolverton under the powers  
“ of this Act at whatever date effected shall operate to pass an  
“ estate or interest for the whole life of Frederic Lord Wolverton  
“ in priority to and free from and overriding all the trusts and  
“ provisions in the said Indenture of the 31st day of December  
“ 1888 contained and at the date of such mortgage or charge  
“ subsisting and capable of taking effect and all payments under  
“ such trusts and provisions or any of them.”

Then under clause 7 the mortgage and charge of the income is not to work a forfeiture as otherwise under clause 10 of the deed it would have worked a forfeiture. I take those clauses as they stand. The purpose is to raise the money: the purpose is to give a chance of the more speedy carrying out of certain of the objects of the deed of 1888: and there is the special provision that the effect of clause 10 of the deed is laid aside. There is no statement in the Act that the means provided for carrying out these objects is to make Lord Wolverton tenant for life of the whole of the settled property. All that we are told is that for the purpose of the mortgage or charge that mortgage or charge shall operate to pass an estate or interest for the whole life of Lord Wolverton in priority and so on. It appears to me that a close examination of clause 3 compels one to reject the view that Lord Wolverton had become and had been made the dominus of the situation as tenant for life. His duty was to raise the money, and to enable him to do that, just as clause 10 of the deed was set aside, so every mortgage or charge was to operate to pass an estate or interest for the whole time: that is the mortgage or charge is to operate in that way. Lord Wolverton is not to remain as a tenant, given the powers of a tenant for life as dominus and able to exercise his volition in respect of this matter.

After that Act had been passed the property was mortgaged. The story of the mortgage is told in the Case, but I need not refer to it. What does seem to me of importance is that when one looks at the substance of the matter, as one does in these cases and not merely at the terms that were used, either in the Act or the deed, and when one puts the question: was Lord Wolverton made by this statute the tenant for life of the settled property? one is compelled, after examination of the statute to answer No, he was given certain powers, and ancillary to those powers the mortgage effected by him was under the terms of the statute to operate in a particular way: but looking at it, as I say, from the point of view of the substance of the case Lord Wolverton's hands were tied, his

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duty was laid down and only for the purpose of carrying out that duty was the mortgage to operate to pass an estate for the whole life of Lord Wolverton.

I need not refer again to the details of the mortgage. Ultimately there was a consolidation and the trustees exercised their powers. In January, 1923, the insurance company provided the bulk of the moneys that were paid over, and the trustees by deed dated 28th November, 1923, took a transfer of the mortgage, a consolidated mortgage and an assignment of the insurance policies. The result of that was that the trustees of the settled property are now holding those mortgages, and if Lord Wolverton dies, upon his death that sum, the payment of which is insured by those policies, will come into the hands of the trustees and make good the sums which have been borrowed. The total sum required to be accumulated has now been found and the nieces have been paid off. But before we can answer the Crown and say that they are entitled to make this further assessment they must show that Lord Wolverton is in possession during the years in question of this money which has to be used in payment of premiums on the policies, and that the devotion of the money for the payment of those premiums is at the instance or is to be deemed to be at the instance and for the purposes of Lord Wolverton.

Referring to the second Act which was passed in 1921 there are certain clauses there, 7, 8, 9, 10 and 13, which I need not refer to in detail. Suffice it to say that clause 13 is: "Subject to the provisions contained in this Act and to any and every exercise of the powers conferred thereby the trustees of the settled property shall stand possessed of the settled property upon the trusts and with and subject to the powers and provisions in the 1888 Settlement." It is thus seen that the 1888 settlement is still treated as the root of the trusts which are exercisable by the trustees subject only to such modifications which have been imposed upon them by the two statutes of 1896 and 1921.

Some question arises as to whether or not clause 9 of the Act of 1921 applies in the circumstances of the present day. As it stands it provides that premiums paid on the policies are to be a first charge on Lord Wolverton's life estate. I do not myself think it would be conclusive either way if the question which is disputed was cleared up, but what I think is clear from the events which have happened and the powers which have been given under the statute is this; that Lord Wolverton did not at the time when those policies were taken out enter into them solely for his own purposes and pay the premiums out of the income of the settled estates for his own purposes as a tenant for life, but they were paid for the purpose of the statute and whatever the character of those payments were that character they still held. They have not changed in

**(Lord Hanworth, M.R.)**

character because there has been a transfer of the policies to the trustees of the settled estate. What they were in the beginning they remain now. Lord Wolverton says that he came into possession of the life estate after there had been this charge upon it or deduction made from it, namely, for the purpose of the payment of the premiums of those policies—that that was not done by him or for his purpose as the tenant for life but it was done in order to and, in fact, did deplete the sum of which he became tenant for life. It is not, therefore, a case, he claims, such as the *Mersey Docks & Harbour Board v. Lucas*<sup>(1)</sup> in which there has been a sum accruing to him of which there has been a devotion for his purposes, and in that sense to his use—it is a case in which he never received and could not have received and is not intended to receive, the full income of the said estate but only the income after there had been those deductions made.

The case of *Lord Howe*<sup>(2)</sup> does not appear to me to afford any principle or guide which is applicable to the present case. In that case there is no question that Lord Howe was the tenant for life; there is no question that the payments of the premiums on the policies were made in his interest and were made at his volition. What he claimed in that case was that as one of the deductions which a subject may make in ascertaining his statutory income he was entitled to include among the deductions the premiums he paid on these policies of insurance. It was decided that those premiums were not an allowable deduction. A deduction from what? A deduction from his income. The question that we have to decide arises at an earlier point. What was the income of which Lord Wolverton became the tenant for life?

After careful consideration of the matter, and much assisted by the arguments on both sides, by Mr. Latter and by Mr. Stamp, I have come to the conclusion that the deductions of these premiums were made under the powers of the statute, and although it may be said that the effect of them and of raising the money was to bring the date at which Lord Wolverton should come into possession of his own earlier, yet when one considers what he did come into at that earlier date it is necessary to hold that he came into possession of the life estate out of which and from which had already been taken the sum necessary for the payment of the premiums upon the policies.

Under these circumstances it would appear that the sums so paid did not form at any time a part of the income of which Lord Wolverton is the tenant for life, and thus they do not form a part of the income of an individual under Section 4, and these assessments are not justified.

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(1) 2 T.C. 25.

(2) *Earl Howe v. Commissioners of Inland Revenue* 7 T.C. 289.

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I may say that in taking this view it would appear that there was some justification in the merits for that view, because it cannot be said that at any time or under any circumstances could Lord Wolverton have expressed his view as to payment of these sums, and that he was at no time in receipt of the moneys out of which the premiums were paid, but that the premiums were first taken out of the sums before they were handed over to Lord Wolverton.

In my view therefore the appeal should be allowed and the assessments discharged.

**Greer, L.J.**—This appeal involves questions as to the right application of rules of law relating to Super-tax and incidental questions of conveyance, and I would naturally hesitate to differ from my Lord and Lord Justice Romer on questions of that kind, but I have formed a definite opinion in this appeal which is different from that which they have formed, and it is my duty to give expression to it, although it will have no effect upon the result of this appeal so far as this Court is concerned.

I approach this question by considering what the position was of Lord Wolverton in relation to his income in the years of tax which began with the year 5th April, 1923, and ending with the year ending on the 5th April, 1927. I find that in all those years Lord Wolverton was either legally or equitably, it does not matter which, tenant for life of the settled estates and was the only beneficial owner of the income arising from those settled estates, subject to a mortgage which he himself had created under the powers given to him by Act of Parliament, and of course having undertaken in those mortgages to pay the interest on the mortgages, and to pay the premiums of insurances without which the mortgages would have been of no value. He is under an obligation to pay that interest and to pay those premiums, but under an obligation which, in my judgment, is no different from the obligation that any mortgagor is under to pay the interest on his mortgage and the premiums on the policies of insurance. There are special provisions in the Revenue Acts which entitle him to a deduction in respect of what a mortgagor pays by way of interest, but it has been decided in *Earl Howe's* case<sup>(1)</sup> and other cases that a mortgagor is not entitled to make any deduction in respect of premiums of insurance which he pays for the purpose of adding to the value of the mortgage which he has given; and that is a position which has been created by the law. It seems to me not quite reasonable, fair or right, because in every case of the mortgage of a life interest, the taking out of a policy is just as essential and the payment of the premiums is just as essential on giving the security as is the execution of a charge on the property and the undertaking to pay

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(1) *Earl Howe v. Commissioners of Inland Revenue* 7 T.C. 289.

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the interest. However, that is a matter for Parliament and not a matter for this Court. It is said that if you look at the history of the way in which the position which I have mentioned of Lord Wolverton arose in the years of tax you find that that makes a very great difference between his position and the position of an ordinary mortgagor, because it is said the result of the deed of arrangement and of the statutes that were passed is this: that Lord Wolverton never became tenant for life of the whole of the settled estates; all he became entitled to was the balance of the income of the settled estates after the interest on the mortgage had been paid and the premiums of insurance had been paid. If I had come to the conclusion that that was the result of the legislation which was passed, I should be of the same opinion as My Lords, but I have come to the conclusion that there is nothing in the statutes which brings about any situation of this kind and that the taxpayer, in this case Lord Wolverton, is in a similar position to the taxpayer in the case of *Baker v. Archer Shee*<sup>(1)</sup> in 1927 Appeal Cases; that is to say, he, and he alone, is interested in the annual profits of the settled estate and that his interest is not confined to that which arises after the payment of the mortgage interest and the premiums; his interest is in the whole sum, and as was said in *Archer Shee's* case, as soon as the rents and profits are received they are his rents and profits and nobody else's.

The material facts of this case so far as I need deal with them begin with the deed of arrangement, which was a family arrangement to put right to some extent an injustice which in the judgment of those interested had arisen by the failure on the part of those who drew up the will under which this property passed, to appreciate the events which did, in fact, happen and deprived the owner of the title of any interest in the property. The ladies interested and Lord Wolverton quite sensibly and with considerable generosity on the part of the ladies interested, entered into a deed of arrangement which is dated 31st December, 1888. Under clause 2 of that deed, Lord Wolverton was assured of an income of £15,000 a year for the time being, and the balance of the income of the settled estates was to be accumulated until a sum of £500,000 was obtained by those accumulations and then the nieces who were the interested parties were each to receive £100,000; and, in the meantime, were to receive interest at 4 per cent. out of the income of the estate. Then there were certain other trusts during the life of Lady Wolverton which I need not specify. Then clause 7 provided that after the moneys had been accumulated the estate was to be vested in trustees upon trust for Frederic Baron Wolverton, the taxpayer in this case, the Appellant, during his life without impeachment of waste with remainder, and there were the not uncommon restrictions on alienation whereby if he ceased to be

(1) 11 T.C. 749.



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the owner himself of his life interest, then his life interest was to cease. So that if matters had remained as provided for by this deed of arrangement, Lord Wolverton would have had an income of £15,000 a year during the accumulation of the fund for the purpose of paying off the nieces, and when the nieces had been paid off in accordance with the deed, he would have been tenant for life of the settled estates and nobody else would have had any interest during his life in the income of the settled estates. It is said by Mr. Latter that the provisions of section 7 have no application to the position of Lord Wolverton, if payments are made not by accumulation—if the ladies are paid off in some other way. I cannot read the deed which is kept alive by this statute as meaning that. I think, as I understand Lord Justice Romer thinks, that if by some means Lord Wolverton had been able to pay off the £500,000, to add something to the accumulated funds, and with the consent of the parties interested, had paid off at an earlier date the £500,000 which was to be paid before his life interest came into possession, his life interest would have come into possession when the £500,000 was paid, even though some of it had come from other sources than the accumulations. But, however, the position did not remain as settled by that deed, because it was found that the value of the property included in the settled estates did not increase, but rather diminished, and expectations of an earlier date at which the £500,000 would be paid off did not materialise. No doubt everybody concerned was anxious that Lord Wolverton, being a married man with issue, should be put in a position in which he and those who were to come after him would be able to settle their estates in the wise way in which it had been the custom of large land owners to settle their estates in this country for a long period of time. In consequence of that, I have no doubt by agreement, an Act of Parliament was promoted in the year 1896 in order to enable the £500,000 to be paid off at an earlier time than it could otherwise be paid off, and by section 3 of that Act power was given to Lord Wolverton to raise money; “on the security of a mortgage of all or any part of the dividends “interest income rents and profits arising from the settled property “during his life any sum or sums not exceeding altogether the “amounts which may be from time to time required for the “purpose of this Act”—that is to say, for the purpose of raising the £500,000 and other moneys which in the meantime would have to be paid by way of interest to the ladies. It is to be noticed that it is only a power given to Lord Wolverton—he is not under any obligation to raise the money, but he is given the power to raise the money; and that seems rather to indicate that the object of the Act was for the benefit of Lord Wolverton, to give him a power which he could not exercise for at least two reasons: he could not exercise the power for one reason because he was not then tenant for life in possession; the interests of the ladies remained, and

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without the power given by this statute, he could not have given any immediate mortgage of the rents and profits arising from the settled property; but could only have given a mortgage of what I may call his reversionary rights. Possibly those who are more accustomed to conveyancing terms do not think "reversion" is the right name for the interests that he had, which were then vested, but which would come into his possession in future. Another reason why he could not grant a mortgage was because of the restraint the deed had put upon him from parting with his life interest; and in order to get over this and some other difficulties he was given a power, the effect of which was, that if he gave a mortgage, that mortgage was made a valid mortgage by the statute, notwithstanding the fact that he was mortgaging in part some other person's property as well as his own; and also in order to prevent it from being said that the mortgagee got no title, because as soon as he executed the mortgage his own interest in the property ceased.

It is necessary to refer to one or two other provisions of the statute. There is a clause of section 10 which has some bearing on the subject, which is in these words: "when and so soon as the moneys so remaining due and payable in respect of the said several sums of £100,000 and the duties (if any) thereon and all such costs as in section 9 sub-section (1) of this Act mentioned shall have been fully paid and satisfied pursuant to the provisions of this Act the trusts powers and provisions for the payment and satisfaction of the said several sums of £100,000 declared and contained in the said indenture shall absolutely cease and determine and the settled property and every part thereof shall be released from such trusts." I am not sure that it was necessary to put those provisions in because I think the same result would have followed by reason of a clause in the deed of arrangement; but be that as it may, statutory effect is given to it by those words that I have read. So that the trusts for accumulation and for doing anything with the rents and profits of the settled estate except accounting to Lord Wolverton, came to an end as soon as the money was paid off. It does not seem to me to make any difference that the money was paid off by the help of a mortgage which Lord Wolverton had power to enter into, and was not paid off in the manner provided for by the deed of arrangement of 1888.

Then the Act also provides, by section 12: "Subject to the provisions contained in this Act and to any and every exercise of the powers conferred thereby the trustees of the settled property shall stand possessed thereof upon the trusts and with and subject to the powers and provisions in the said indenture of the 31st day of December 1888 contained and declared concerning the same or such of the same trusts powers and provisions as shall for the time being be subsisting or capable of taking effect."

(Greer, L.J.)

The only trusts capable of taking effect after the ladies had been paid off were the trusts in favour of the life interest of the tenant for life, Lord Wolverton. I think the effect of that Act is merely to hasten the time when Lord Wolverton would come into possession as tenant for life of the settled estates and would become entitled to receive the whole of the income; though he would be bound, of course, to use it for the purpose of any mortgage in respect of which he may have undertaken obligations. Two years after the Act was passed, on the 30th June, 1896, a mortgage was entered into for the purpose of carrying the Act into effect. Of course in the meantime the interest of Lord Wolverton was postponed, and we are not concerned with what might have been the position if, during this interregnum, a question of Super-tax had arisen. The question of Super-tax arose in this case after the interregnum was over. By the mortgage which, under the powers of the Act, he is entitled to enter into, Lord Wolverton is described as the mortgagor. It is he and he alone who undertakes to pay the principal money—he undertakes the debt of the principal money; he alone it is who undertakes to pay the interest on the mortgage to the mortgagee; he alone it is who undertakes to take out the policies and to pay the premiums on the policies; and he was then under exactly the same legal obligation as if he had been tenant for life at the time he executed the mortgage and had made a mortgage to the same effect and with the same undertakings. That mortgage was followed by another mortgage; the two mortgages were afterwards consolidated, but under the consolidating mortgage Lord Wolverton is in the same position as he was under the mortgage which I have already mentioned.

Under those circumstances the money was raised by mortgage and the ladies were paid off. Then, it seems to me, Lord Wolverton entered into his tenancy for life in possession but subject of course to the obligations he had himself expressly undertaken by the mortgage; but the fact that a man has mortgaged his income does not prevent it from being his income for the purpose of tax.

There are only two other matters that it seems to me necessary to mention, and they are these: later, another Act of Parliament was passed, and in the result the mortgages were transferred to the trustees and they became Lord Wolverton's mortgagees. The only difference that made was this, as it seems to me: that they were then in a better position to enforce their rights as mortgagees; because they would in the first instance in all probability, though it is not stated, receive the rents and profits of the property and hand them over to Lord Wolverton, and they were in the position of saying: Here is some of your income which we have got, but we will not hand it over to you whereby you may be enabled to pay that which you have undertaken to pay, namely, the interest on the mortgage, but we will pay those premiums and we will pay

(Greer, L.J.)

that interest and pay you over the balance; but that does not seem to me to create the position that the only thing Lord Wolverton owned was the balance after those payments had been made. Unless there is a provision in the statute of 1921 which makes a difference, it seems to me that is the right way in which the facts of this case have to be regarded, but there is a difficulty created by several sections of the statute of 1921 under the powers of which the trustees were enabled to take over the mortgage.

Section 7 of that Act gives power to the trustees to "raise by sale of the settled property . . . such sum or sums as may be required to pay the principal money for the time being owing on the security of the North British mortgage and the consolidating mortgage and the costs of and incidental to such sale and payment and shall apply the moneys so raised in payment of the said principal moneys and costs and shall either (A) take a transfer and assignment to themselves of such mortgage or mortgages and the property and securities held by the North British Company or (B) discharge the said principal moneys upon having an assignment to them the trustees of the settled property of the policies of assurance on the life of Lord Wolverton which shall for the time being be and remain subject to the North British mortgage and the consolidating mortgage or either of them."

If they took a transfer of the mortgages, it is quite clear they would be entitled as of right to a transfer of the policies of insurance and the mortgage, and would be entitled to insist on Lord Wolverton paying out of his own moneys the interest he had undertaken to pay and the premiums on the policies that he had undertaken to pay, but they were given also power, instead of taking a transfer of mortgages, to discharge the mortgages and to take a transfer of the policies of insurance only, and if they took a transfer of the policies of insurance only, it was necessary to make provision as to how they were to be recouped or how they were to be secured against any failure on the part of Lord Wolverton to pay the sums due for premiums from time to time.

Section 8 of the Act reads as follows:—"The trustees of the settled property shall as the case may be either (A) stand possessed of the said mortgages and property and securities so transferred or assigned"—that would be if they took a transfer in that way of the mortgage and the policies of insurance—"or (B) if the said principal moneys are discharged of the policies which shall be so assigned to them as aforesaid and of all moneys which shall be payable thereunder upon the trusts and with and subject to which powers and provisions upon with and subject to which capital moneys arising from the sale of the freehold hereditaments described and comprised in the First Part of the First Schedule to this Act would be applicable under the Settled Land Acts 1882 to 1890."

(Greer, L.J.)

That, of course, would add to the estate of which they were trustees any money they got under the policies, and render that money subject to the same trusts as the rest of the settled estates.

Then clause 9 is in these words—and it is clause 9 which creates the only difficulty which occurs to me in the way of the Respondents' case: "From and after any such assignment of the policies to the trustees of the settled property the premiums payable in respect of all the said policies so assigned shall during the life of Lord Wolverton be a first and paramount charge on the rents and profits dividends interest and income arising from the settled property And the trustees of the settled property shall accordingly from time to time retain and pay out of the said rents and profits dividends interest and income all moneys from time to time required for the payment of such premiums as and when they become due."

There are, in my judgment, two answers to the argument founded on that section. The first is that I think "such assignment" means the assignment mentioned in (B) and does not include the assignment which naturally would be included in an assignment of the mortgages. The words are not "any assignment" but "any such assignment", and that seems to refer back to and qualify the words "any assignment" and to refer to some class of assignment; and I think it refers to the assignment as to which it was necessary to make this provision, namely, the assignment referred to in (B) which would follow the payment off by the trustees of the mortgages. The trustees did not pay the mortgages off: they took an assignment of the mortgages.

Another answer to that argument would, in my judgment, be this: that section 7 merely gives the trustees a charge upon the rents and profits, and does no more than would have been done if Lord Wolverton had himself given them as a security that he would do what he had undertaken to do, namely, pay the premiums and give them a charge upon his income so that they could, when they got hold of that part of the income, pay the premiums themselves. It is no more than an equitable mortgage of his interest to secure his performance of the obligations which he had undertaken in the deeds.

Subject to one other matter with which I have to deal, with regard to the Act of 1896, that concludes all I have to say about the history of the case. In dealing with section 3 of the Act of 1896 I ought to have mentioned the words of sub-section 2, because the main argument in support of the appeal was rested on sub-section 2 of section 3.

Sub-section 2 is in these words: "Every mortgage or charge effected by Frederic Lord Wolverton under the powers of this Act at whatever date effected shall operate to pass an estate or

(Greer, L.J.)

“ interest for the whole life of Frederic Lord Wolverton in priority  
“ to and free from and over-riding all the trusts and provisions in  
“ the said indenture of the 31st day of December 1888 contained  
“ and at the date of such mortgage or charge subsisting and capable  
“ of taking effect and all payments under such trusts and provisions  
“ or any of them.”

I need not read sub-section 3. It is said that that carves out of the settled estates an estate and puts it by statute in the hands of the mortgagees, because it says that the mortgage shall pass an estate or interest for the whole life of Frederic Lord Wolverton.

It seems to me the effect of that sub-section is merely this : If Lord Wolverton had been at the time tenant for life without any restraint on what he could do with the property, he could have passed an estate or interest for his whole life to a mortgagee ; but inasmuch as he was not the tenant for life in possession at the time, and inasmuch as he was subject to restrictions, it was necessary for the protection of the mortgagee to say that the mortgagee should get an estate from somebody who could give him an estate ; but it did not mean thereby that that was carved out as an intervening trust between the position as it was before the Act and the trusts in favour of Lord Wolverton when his life estate came into operation.

For these reasons I think Mr. Stamp was right in saying that the history of how the position was created as it existed in the years of taxation does not make any difference to the result. The result is exactly the same as it would have been if Lord Wolverton had had the power to raise the money on mortgages, which he did raise, and to execute the mortgages which he did, if he had had that power independent of the statute, the statute only being there for the purpose of giving him power to do, but not the obligation to do, that which he in fact did, not by the Act but by the mortgages which he executed under the power given him by the Act.

For these reasons I think the judgment of the learned judge below was right, and if it depended upon my judgment, this appeal would be dismissed.

**Romer, L.J.**—After giving the matter the best consideration I can, I have arrived at the conclusion that this appeal should be allowed, and I will endeavour to state as clearly as possible the reasons which have led me to that conclusion. Looking at the deed of 1888 it is, of course, obvious that until the £500,000 has been provided by means of an accumulation of the income of the settled estates, Lord Wolverton would receive no income from that, with the exception of the £15,000 annuity. True it is that, subject to the trusts for providing the £500,000 by accumulation of the income, Lord Wolverton is given a vested interest for his life in the settled estate. But notwithstanding that, no one could contend

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that until the £500,000 has been raised Lord Wolverton was liable to pay the Super-tax upon the income arising from the settled estates, that is to say, the income which had to be accumulated. The only thing that is necessary further to call attention to in the deed of 1888 is the forfeiture clause which provides in certain events for the forfeiture of the life interest of Lord Wolverton and of the subsequent life interests that may arise under the trusts of the deed. It is clause 10, and it is in these terms: "If any person hereby made tenant for life of the settled property shall become bankrupt or shall charge alien or part with or attempt to charge alien or part with his life estate in all or any part of the settled property or any part of such life estate or if any other event shall happen whereby if such life estate belonged to him absolutely he would be wholly or partially deprived of the personal enjoyment thereof then the beneficial right of such person to the possession or receipt of the rents and profits of the settled property shall cease and determine."

I will only call attention to it for the purpose of pointing out that the forfeiture arises not only upon a charging or alienating of the life interest, but on the happening of any other event by which, if such life estate belonged to the tenant for life absolutely he would be wholly or partially deprived of the personal enjoyment thereof. That was the state of affairs on the execution of the deed of the 31st December, 1888, down to the death of Lady Wolverton in the year 1894, and, as appears from the recitals in the Act of 1896, the accumulation of the income from the settled estates had at that time produced only the sum of £226,000. It further appears from the recitals in the Act that the income of the settled property had seriously depreciated, and that if the trust for accumulation of the income of the settled estates and the raising in that way of £500,000 was to continue, years and years might elapse before ever Lord Wolverton would come into possession of any income from the settled estates other than the annuity of £15,000. In those circumstances it seems to have occurred to the parties interested that, if money could be raised by mortgage on the rents and profits to accrue during the life of Lord Wolverton which otherwise would have to accumulate, instead of accumulating that, inasmuch as the money required for the service of the loan would be less than the rents and profits of the estate, a surplus could be produced for the benefit of Lord Wolverton and the persons to come after him. The result of that scheme would be that Lord Wolverton would be liable to pay Super-tax upon any part of the rents and profits that were so set free for his benefit, but it would be somewhat extraordinary if the result of the scheme were that he became liable to pay Super-tax upon that part of the rents and profits which were required for the service of that loan and which were not set free for his benefit under the scheme.

(*Romer, L.J.*)

It is said, however, by Mr. Stamp and Mr. Hills on behalf of the Crown, that the only effect of the Act of 1896 is to put Lord Wolverton into immediate and uncontrolled possession of his life estate for the purposes of enabling him to borrow, if he so thought fit, a sum of money sufficient to pay off the £500,000 or so much of it as remained unpaid, and that having been put into immediate and uncontrolled possession of the life estate in that way he mortgaged the policies upon his life in the same way and with the same result as Lord Howe had mortgaged his life interest in the case to which we were referred<sup>(1)</sup>, and that just as Lord Howe in that case was held not to be entitled to deduct the premiums on the policies from the income, for the purpose of ascertaining the amount on which he was to be charged for Super-tax, so here Lord Wolverton cannot deduct the premiums on the policies which were taken out on his life for the purpose of securing the loan which he in fact created, for the purpose of ascertaining his income liable to Super-tax. If that had been the object of the Act nothing would have been easier than for the legislature to have said so. All that it would have been necessary to do would be to provide that if Lord Wolverton were to create a mortgage on his life estate for the purposes of providing money sufficient to pay off the £500,000, the forfeiture clause should not thereby come into operation, and the mortgage so created should rank in priority to the trusts for raising the £500,000. That is all that would have been necessary.

Now let me look at the Act to see what it in fact did. Before going to section 3, which is the most important section of all, I will refer to two of the recitals in the preamble. There is one on page 24 which is in these terms: "whereas in the circumstances "herein-before set forth"—those are the circumstances in relation to the accumulation of the sum of £224,000 and the diminution in income of the settled estate—"it is improbable that for some years "to come any portion of the annual income of the settled property "other than the annuity of £15,000 now payable to him thereout "under the trusts of the said indenture of the 31st day of December "1888 will be available for the benefit of Frederic Lord Wolverton "contrary to what was contemplated by the provisions of such "indenture and would have been the case but for the diminution "of such annual income before referred to."

Then there is another recital a few pages further on, on page 28, to this effect: "whereas in the circumstances hereinbefore set "forth it is fit and proper and for the benefit not only of Frederic "Lord Wolverton but of the persons who will after his death "succeed to the Barony of Wolverton and of the persons entitled "in remainder after the death of Frederic Lord Wolverton to the "hereditaments to be purchased with the proceeds of the sale "calling in and conversion of the settled property that the present

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(<sup>1</sup>) *Earl Howe v. Commissioners of Inland Revenue* 7 T.C. 289.



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“ payment and satisfaction ”—and also certain other sums which I need not refer to—“ should be forthwith provided for and that “ for that purpose a sufficient sum should be raised either by a “ mortgage of the dividends interest income rents and profits “ arising from the settled property during the life of Frederic Lord “ Wolverton ”—not be it observed by a mortgage of his life interest —“ or that the trustees of the settled property should by sale of a “ sufficient portion of the investments specified in the second part “ of the schedule to this Act provide all or some part of the money “ to be so raised by mortgage of such dividends interest income “ rents and profits or partly by one and partly by the other of such “ methods.”

Now I pass to section 3, which provides as follows : “ It shall “ be lawful for Frederic Lord Wolverton at any time after the “ passing of this Act and from time to time to raise on the security “ of a mortgage of all or any part of the dividends interest income “ rents and profits arising from the settled property during his life “ any sum or sums not exceeding altogether the amounts which “ may be from time to time required for the purposes of this Act “ and to charge all or any part of such dividends interest income “ rents and profits with the payment of the principal moneys so “ raised (whether by instalments or otherwise) and of the interest “ thereon and of the premiums and other moneys required to be “ paid for effecting and keeping on foot any policy or policies of “ insurance effected on his life to an amount not exceeding in the “ aggregate the amount required by the persons advancing the “ principal moneys raised under the powers of this Act by way of “ further security for the same and the interest thereon.” Pausing there, it will be observed that the sub-section gives power to Lord Wolverton to raise money by means of a charge—a mere charge—on the rents and profits arising during his life.

Then we come to sub-section (2) : “ Every mortgage or charge “ effected by Frederic Lord Wolverton under the powers of this Act “ at whatever date effected shall operate to pass an estate or interest “ for the whole life of Frederic Lord Wolverton in priority to and “ free from and over-riding all the trusts and provisions in the said “ indenture of the 31st day of December 1888 contained and at the “ date of such mortgage or charge subsisting and capable of taking “ effect and all payments under such trusts and provisions or any “ of them.” Now it will be observed that this estate or interest— it must be “ estate or interest ”—in the mortgagee or chargee is to arise not merely if Lord Wolverton effects the mortgage or assignment of any interest he has, but if he effects a mere charge on any of the rents and profits of the property during his life and it is to create an estate for his life, it is not to operate so as to vest only Lord Wolverton's estate. The words are rather unusual —“ an estate for life ”—“ an estate or interest for the whole life “ of Frederic Lord Wolverton.”

(Romer, L.J.)

Now let me turn at once to clause 10. I need not read the whole of it, but merely read that portion of it to which Lord Justice Greer has just referred, that part which provides that so soon as the several sums, five several sums of £100,000 and the other money referred to in the Act, have been provided, fully paid and satisfied—"the trusts powers and provisions for the payment " and satisfaction of the said several sums of £100,000 declared " and contained in the said indenture shall absolutely cease and " determine and the settled property and every part thereof shall " be released from such trusts."

Then the only other relevant section for the moment is section 12, which provides as follows: "Subject to the provisions " contained in this Act and to any and every exercise of the powers " conferred thereby the trustees of the settled property shall stand " possessed thereof upon the trusts and with and subject to the " powers and provisions in the said indenture of the 31st day of " December 1888 contained and declared concerning the same or " such of the same trusts powers and provisions as shall for the " time being be subsisting or capable of taking effect."

As I read section 3 of this Act, it provides really no more than this: that Lord Wolverton should have a power to charge rents and profits which under the indenture of 1888 are subjected to a trust for accumulation with the capital sum of money; and for the purposes of securing that money, to limit, by virtue of the operation of section 3, an estate to the mortgagees or chargees for his life. A very usual way of doing it—a more usual way, perhaps, of doing it—would have been to give him a power to create a term of, say, 99 years, if he should so long live. In my opinion, the effect of section 3 is exactly the same as though that had been the course adopted.

Let me consider what the position of affairs would be if, in pursuance of this power, Lord Wolverton had raised £100,000 at once, leaving the raising of the rest of the £500,000 to stand over for the moment. The position then surely would have been this: First of all, affecting the settled estates, would come the charge for £100,000, the rights of the mortgagees or chargees out of the rents and profits to receive the interest and the premiums on the policies of insurance; and next to the rights of the mortgagees would come the trusts for accumulation; and after the trusts for accumulation would come the life interest of Lord Wolverton.

In those circumstances would it have been possible for anybody to say that that part of the income which could be applied in payment of interest on the money raised or on the premiums of the policies effected formed any part of the income of Lord Wolverton so that he was liable to pay Super-tax in respect of it? In my opinion it would be clearly impossible.

(Romer, L.J.)

Let me assume that Lord Wolverton raises further sums until the whole of the £500,000 has been raised. What is his position then? By virtue of the deed of 1888 and this Act the trust for accumulation of the income had come to an end; but subject to that, the position is precisely the same as that which I have just been referring to. First would come the right of the mortgagees to receive the interest and the premiums, and next would come the life interest of Lord Wolverton. He becomes, indeed, entitled to receive rents and profits, but he does not become entitled to receive the whole of the rents and profits: he only becomes entitled to receive such rents and profits as are left over after providing for the interest on the mortgage and the premiums payable in respect of the policies.

In my opinion, Lord Wolverton is not intended by this Act, and never in fact under the Act became entitled, when the £500,000 had been paid off, to receive the whole of the rents and profits of the estate. In my opinion, the interest on the mortgage and the premiums, that part of the rents and profits which is applied in payment of interest on the mortgage and the premiums on the policies, is not any part of his income at all: it is that part of the rents and profits which is being truly applied in providing for the £500,000 for the five nieces, as, but for the Act, it would have been applied under the trust for accumulation.

For these reasons I have come to the conclusion that this money which it is sought to charge upon Lord Wolverton in respect of his liability for Super-tax, does not really form any part of his income at all.

In those circumstances it becomes unnecessary for me to refer to the subsequent Act of 1921 or to any of the authorities which have been cited; and I will only add this: that in my opinion the fact that, when raising the money, Lord Wolverton entered into a covenant for payment of the interest and the premiums does not really affect the matter. What he gave by means of his covenant was merely a collateral security, and inasmuch as, in my opinion, Lord Wolverton is entitled to deduct these premiums from the total income of the estate, not because of his entering into any covenant or being under any liability to pay the money or anything of that kind, but because the premiums do not form part of his income, and in my opinion, the fact that he entered into this covenant is not a matter that need be further considered.

For these reasons I am of opinion that this appeal should be allowed, with the consequences the Master of the Rolls has mentioned.

**Mr. Spens** (for Mr. Latter).—My Lord, my friend Mr. Latter has asked me to mention one thing on his behalf. I understand some tax had been overpaid, and he asks that there should be an order for repayment of the tax overpaid with interest at the usual rate.

**Lord Hanworth, M.R.**—Is that right, Mr. Stamp?

**Mr. Stamp.**—I think the Court fixes the rate as a rule. I am told the rate of interest is in the discretion of the Court.

**Lord Hanworth, M.R.**—What has been done lately?

**Mr. Stamp.**—I am told that  $4\frac{1}{2}$  per cent. has been usual. It is sometimes  $4\frac{1}{2}$  per cent. and sometimes 5 per cent.; but there is no settled practice.

**Lord Hanworth, M.R.**—We think that it had better be 5 per cent. at this time of day.

**Mr. Spens.**—If that is fair, we ask for 5 per cent.

**Mr. Stamp.**—Very well.

**Lord Hanworth, M.R.**—I thought as a matter of fact, Mr. Stamp, it had been settled at 5 per cent.; but I cannot charge my memory with the actual orders made.

**Mr. Stamp.**—I have no personal knowledge of it, my Lord.

**Lord Hanworth, M.R.**—I do not want to put the responsibility on you for it, but my recollection is that it was 5 per cent.; but at any rate, it shall be 5 per cent. now.

**Mr. Stamp.**—If your Lordship pleases.

The Crown having appealed against the decision in the Court of Appeal, the case came before the House of Lords (Lord Buckmaster, Lords Warrington of Clyffe, Tomlin, Macmillan and Atkin) on the 13th and 16th November, 1931, when judgment was reserved. On the 15th December, 1931, judgment was given unanimously against the Crown, with costs, confirming the decision of the Court below.

The Attorney-General (Sir W. A. Jowitt, K.C.), Mr. J. H. Stamp and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. J. H. Bowe for Lord Wolverton.

#### JUDGMENT.

**Lord Buckmaster.**—My Lords, the decision in this case will be of no assistance to anyone who in the future may be caught in the tangled web of taxation. It must relate to the special and peculiar conditions in which this dispute has arisen, and these conditions are not likely to recur.

The actual claim arises out of an assessment made by the Commissioners upon the Respondent, Lord Wolverton, whereby they sought to increase his assessment for the five years ending 5th April, 1923, to 5th April, 1927, by sums that had been applied in payment of certain premiums on policies of life insurance taken out in circumstances which I will shortly relate.

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The Commissioners for the Special Purposes of the Income Tax confirmed the assessment, Mr. Justice Rowlatt upheld their decision, and the Court of Appeal by a majority of two to one reversed the judgment of Mr. Justice Rowlatt.

The case depends upon the true interpretation of certain documents and private Acts of Parliament, beginning with the will of the second Lord Wolverton dated 19th January, 1885. By this will, omitting all conditions and limitations which, by the happening of events or otherwise, are not material, the testator gave the whole of the residue of his estate to trustees upon trust for his wife for life, and after her death to his nephew Henry Richard Glyn (who was the next successor to the barony), if he should be living at the time of his wife's death, and, if he should then be dead, upon trust for the person who should then be the testator's right heir at common law for his absolute right and benefit.

The testator died on 6th November, 1887, his nephew Henry Richard Glyn on 2nd July, 1888, and his widow on 10th July, 1894. The Respondent succeeded to the barony upon the death of Henry Richard Glyn, and it is not unreasonable to assume that the testator had intended his estate to devolve with the barony, but, owing to the interference of the law, it was realized too late that the testator's right heir at common law were his five nieces, the daughters of his second brother, and not the son of one of his younger brothers.

In these circumstances a family arrangement was come to and incorporated in a deed of 31st December, 1888, to which all persons interested were made parties. By this deed all the interests in the residuary estate were assigned to trustees upon trust, during the life of the widow, to pay £15,000 a year to the Respondent, Lord Wolverton, then to pay £35,000 a year to another set of trustees; and then, after sundry unimportant payments, to pay the balance as the widow, Lady Wolverton, should appoint. The £35,000 a year was to be accumulated by the trustees to whom it was to be paid until the sum of £100,000 should be provided for each of the five nieces or the persons to whom their share and interest belonged.

Lady Wolverton immediately appointed the residue in her own favour and no further question arises on the trusts during her life. It is the trusts after the death of Lady Wolverton which are critical in the present case. These trusts were, after payment of duties, to pay the annuity of £15,000 to Lord Wolverton; to pay interest at four per cent. per annum on the balance unpaid of the several sums of £100,000; then to pay £50,000 a year to the trustees of the fund which was to be accumulated for payment of the five sums of £100,000; and, out of the residue of the income, to pay to the person holding the title of Lord Wolverton such sums as the trustees in

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their absolute discretion thought fit, and subject thereto to pay the balance to the trustees of the fund accumulated for the purpose of paying the five sums of £100,000.

Subject and without prejudice to these trusts, the trustees were to convert the whole property and invest the proceeds in freehold lands and houses, the property so purchased to be limited and settled to the use of the Respondent, Lord Wolverton, during his life, without impeachment of waste with remainders over.

All the interests given to the Respondent were subject to provisions designed to restrict any alienation thereof.

At the death of Lady Wolverton the accumulated fund had realized £226,000, the further trusts for accumulation consequently provided on her death had to continue until the four per cent. per annum interest on the balance and the capital sum of £274,000 had been produced.

Unfortunately, the income from and after the death of Lady Wolverton was insufficient by a considerable sum to pay the interest and the annual sum of £50,000, and in consequence the cesser and determination of the trusts for accumulation would necessarily be postponed for a considerable period. In order to meet this difficulty, it was contemplated it would be for the interest of all parties if moneys could be raised to discharge the whole of the five sums of £100,000 and so accelerate the life interest of Lord Wolverton.

To effect this, recourse was had to an Act of Parliament which was passed in 1896 called the Wolverton Estate Act. Before considering what it actually enacted, it is well to summarize what Lord Wolverton's position was. Until the five sums of £100,000 were provided, apart from the £15,000 which he was entitled to receive, he was the object of a discretionary trust possessed by the trustees which could only operate after the £15,000 had been paid and the interest and the annual sums discharged, but if the five sums of £100,000 were paid he became entitled to a protected life estate, but to raise a sum necessary to clear the prior claims either a mortgage or a sale of the property was essential, and this apart from statute there was no power to effect.

The statute, by section 3, enabled the money to be raised by mortgage. The terms of this section are important. They are as follows: " 3. (1) It shall be lawful for Frederic Lord Wolverton " at any time after the passing of this Act and from time to time " to raise on the security of a mortgage of all or any part of the " dividends interest income rents and profits arising from the " settled property during his life any sum or sums not exceeding " altogether the amounts which may be from time to time required " for the purposes of this Act and to charge all or any part of such " dividends interest income rents and profits with the payment of

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“ the principal moneys so raised (whether by instalments or otherwise) and of the interest thereon and of the premiums and other moneys required to be paid for effecting and keeping on foot any policy or policies of assurance effected on his life to an amount not exceeding in the aggregate the amount required by the persons advancing the principal moneys raised under the powers of this Act by way of further security for the same and the interest thereon. (2) Every mortgage or charge effected by Frederic Lord Wolverton under the powers of this Act at whatever date effected shall operate to pass an estate or interest for the whole life of Frederic Lord Wolverton in priority to and free from and overriding all the trusts and provisions in the said Indenture of the 31st day of December, 1888, contained and at the date of such mortgage or charge subsisting and capable of taking effect and all payments under such trusts and provisions or any of them.”

Power was also given to the trustees to sell part of the settled property and advance it on the security of a similar mortgage made by Lord Wolverton, and clause 7 provided that the operation of the Act should not be impeded by any of the restrictions contained in the deed relating to Lord Wolverton's interests. The moneys so raised to be paid to the trustees who were to apply them in the first instance in payment of the moneys remaining due in respect of the five sums of £100,000.

Two mortgages were, accordingly, executed on 30th June, 1896, the one to the North British Insurance Co. for £150,000 and interest, and the other to the trustees for £126,000, and in each case policies on the life of Lord Wolverton were taken out in the North British Insurance Company and assigned to the mortgagees with covenants by Lord Wolverton for the payment of the premiums, and the charge on the income for the premiums until paid.

A further small mortgage was effected in January of 1901, and on 24th April, 1913, the trustees' mortgage was consolidated and transferred to the North British Insurance Company.

In 1921 it appears to have been thought desirable that the trustees should take over the mortgage and also that provisions should be made by the Respondent during the life of his elder son, and provisions for his wife, and the Act provided that this could be done and that after the assignment to the trustees of the policies :  
“ 9. From and after any such assignment of the policies to the trustees of the settled property the premiums payable in respect of all the said policies so assigned shall during the life of Lord Wolverton be a first and paramount charge on the rents and profits dividends interest and income arising from the settled property. And the trustees of the settled property shall accordingly from time to time retain and pay out of the said rents and

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“ profits dividends interest and income all moneys from time to time  
“ required for the payment of such premiums as and when they  
“ become due.”

Accordingly the mortgage in the North British Insurance Company was transferred in 1923, and the trustees, in pursuance of a power given them by the statute, paid the premiums on the life policies then existing out of the income of the estate.

It is this payment which it is sought to include in the assessment for Super-tax for the years that I have mentioned. Mr. Justice Rowlatt appears to have thought that such payments in fact came out of Lord Wolverson's life estate and treated the case as similar to that of *Lord Howe v. The Commissioners of Inland Revenue*<sup>(1)</sup>, [1919] 2 K.B. 336.

In my opinion this view is mistaken. At the date of the Act of 1896 the only immediate interest that Lord Wolverson had in the estate was the discretionary trust to which I have referred, and until all the charges were satisfied he had no other immediate interest in the income and dividends. The statute of 1896 expressly did not enable Lord Wolverson to assign his life interest. It gave him power to execute a mortgage the effect of which was to pass an estate for the whole of his life. Had it merely removed the restriction against alienation and nothing more, his actual interest was subject to the balance unpaid of the five sums of £100,000. The statute expressly enabled the arrangement to be carried out by authorising Lord Wolverson to do something which, even had there been no restriction upon his powers of alienation, he could not have done under the deed at all without the consent of every person having a prior interest.

It is nowhere stated in the Act that it is his life estate that is to be mortgaged.

This is to my mind a critical consideration, for, in my opinion, its result is that the life interest which, if the transactions were carried out, would become immediate in favour of Lord Wolverson, was one that came into possession after the contemplated mortgages had been executed and the sum of £500,000 had been paid. The real essence of the transaction was that the mortgages and all the moneys paid to secure them took the place of the five sums of £100,000 and stood in their place in priority to Lord Wolverson's life estate.

As part of such mortgages, no doubt it was essential there should be life policies and equally essential that there should be a covenant for payment of the premiums, but the power given in the Act was to charge the income with the payment of these premiums, and it was only from and after these payments being made that he received the income of the estate.

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(<sup>1</sup>) 7 T.C. 289.



(Lord Buckmaster.)

If this be so, the premiums were never paid out of the income to which he was entitled, and it consequently is not a case of taking premiums from his income at all; it is that his income only arises after the premiums have been discharged.

It is said that none the less he covenanted to pay the premiums, and that as in fact the trustees paid them, this must be regarded as a benefit that he received from the estate which must be included for purposes of Super-tax but the covenant was only ancillary to the establishment of the mortgage which the Act of Parliament enabled him to create, and if, as I think, the charge of the premiums preceded the interest in the estate, and was not taken out of his interest in the estate then the fact that he covenanted for payment does not appear to me to effect any alteration in the matter.

It is for this reason that I think that the judgment of the Court of Appeal is correct, and that this appeal should be dismissed with costs.

**Lord Warrington of Clyffe** (read by Lord Macmillan).—My Lords, the question in this appeal is whether, on the true construction and effect of a deed of family arrangement (hereinafter called the deed of settlement) dated the 31st December, 1888, and of the Wolverton Estates Acts of 1896 and 1921, the total income of the Respondent in the years of assessment included the whole of the income from the settled property on the footing that the Respondent was entitled to such income as tenant for life, or whether a certain estate created by virtue of a power contained in the Act of 1896 for the purpose of securing the principal moneys and interest due under certain mortgages, and the premiums on certain policies effected by way of further security, took precedence of any estate of the Respondent, in which case the interest and premiums were payable by virtue of such precedent estate and the income expended for such purpose formed no part of the total income of the Respondent.

The Special Commissioners of Income Tax decided the question in favour of the Crown, and their decision was affirmed by Mr. Justice Rowlatt. The Court of Appeal, however, by a majority (Lord Hanworth, Master of the Rolls, and Lord Justice Romer) Lord Justice Greer dissenting, reversed this decision. Hence this appeal.

The relevant years are 1923 to 1927 inclusive.

Shortly stated, the effect of the provisions of the deed of settlement subsisting after the death in 1894 of the Dowager Lady Wolverton, which provisions alone are relevant to the present question, was as follows. Certain settled funds constituting the residuary estate of the second Baron Wolverton who died in 1887 were vested in trustees in trust out of the income to pay an annuity

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of £15,000 a year to Lord Wolverton and then to accumulate five sums of £100,000 each for the benefit of the co-heiresses of the testator, and when and so soon as the said several sums and all duty and certain costs and claims had been paid and satisfied the trustees were to stand possessed of the settled property upon trusts for sale and conversion and investment in land to be limited to the use of Lord Wolverton for life, with remainder over in strict settlement, but his life interest was subject to forfeiture on alienation. In the meantime and until investment in land the income was to be applied as if it were rents and profits of the land directed to be purchased. At the death of Lady Wolverton and under the trusts in force in her lifetime a fund of £226,000 had been accumulated towards the total sum of £500,000 provided for by the deed of settlement.

The Estate Act of 1896 contained the following material provisions :—

“ Section 3. (1) It shall be lawful for Frederic Lord Wolverton  
“ at any time after the passing of this Act and from time to time  
“ to raise on the security of a mortgage of all or any part of the  
“ dividends interest income rents and profits arising from the settled  
“ property during his life any sum or sums not exceeding altogether  
“ the amounts which may be from time to time required for the  
“ purposes of this Act and to charge all or any part of such  
“ dividends interest income rents and profits with the payment of  
“ the principal moneys so raised (whether by instalments or other-  
“ wise) and of the interest thereon and of the premiums and other  
“ moneys required to be paid for effecting and keeping on foot any  
“ policy or policies of assurance effected on his life to an amount  
“ not exceeding in the aggregate the amount required by the  
“ persons advancing the principal moneys raised under the powers  
“ of this Act by way of further security for the same and the  
“ interest thereon.

“ (2) Every mortgage or charge effected by Frederic Lord  
“ Wolverton under the powers of this Act at whatever date effected  
“ shall operate to pass an estate or interest for the whole life of  
“ Frederic Lord Wolverton in priority to and freed from and over-  
“ riding all the trusts and provisions in the said Indenture of the  
“ 31st day of December 1888 contained and at the date of such  
“ mortgage or charge subsisting and capable of taking effect and all  
“ payments under such trusts and provisions or any of them.”

Under section 4 the trustees were authorised to raise any money for the purpose of the said Act by sale of part of the trust funds and to advance or retain the sum so raised on the security of a mortgage as by the Act authorised and of policies of assurance on the life of Lord Wolverton.

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The purposes for which under the Act the moneys raised were to be applied were substantially the same as those of the accumulated fund to be raised under the trusts of the deed of settlement.

The effect of this Act appears to me to be to give to Lord Wolverton a special power to create in favour of mortgagees, or of the trustees, as the case may be, an estate for his life prior to the trusts and provisions of the deed of settlement, including in particular the life interest of Lord Wolverton in the land to be purchased under the ultimate trust contained in the deed.

The money required for the purposes of the Act of 1896 was originally raised by a mortgage in favour of the North British and Mercantile Insurance Company and by two mortgages in favour of the trustees. All these mortgages comprised certain policies on Lord Wolverton's life. They contained a personal covenant by Lord Wolverton to pay the premiums, but if not so paid such premiums were to be a charge on the income of the settled fund as provided by the Act.

These mortgages were subsequently consolidated, the North British Company taking a transfer of the trustees' mortgage.

Under powers conferred by the Wolverton Estate Act, 1921, the trustees took a transfer to themselves of the North British mortgage and the consolidating mortgage and an assignment of the mortgaged policies.

This Act contained the following provision in section 9 (1) :—

“ From and after any such assignment of the policies to the trustees of the settled property the premiums payable in respect of all the said policies so assigned shall during the life of Lord Wolverton be a first and paramount charge on the rents and profits dividends interest and income arising from the settled property. And the trustees of the settled property shall accordingly from time to time retain and pay out of the said rents and profits dividends interest and income all moneys from time to time required for the payment of such premiums as and when they become due.”

It is under this provision that the premiums now in question have been paid.

In my opinion the true effect of the several transactions above-mentioned is that the trustees paid the premiums out of income of their own vested in them by virtue of the estate for the life of Lord Wolverton created by the Act of 1896 and the exercise of the powers thereby conferred upon him, and not out of income payable to Lord Wolverton himself by virtue of the life estate to which he would become entitled on the full satisfaction of the prior trusts of the deed of settlement. The scheme created by the Act and the

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charges effected thereunder were in my view substituted for the provisions contained in the deed anterior to Lord Wolverton's life interest, and the latter did not take effect till these charges had been fully satisfied.

It is suggested by the Crown that inasmuch as the mortgages contained a covenant by Lord Wolverton to pay the premiums such payment was for his benefit. If it were necessary to decide the point I should be of opinion, in accordance with the view of Lord Justice Romer, that as between Lord Wolverton and the trustees his covenant was not intended to create any primary liability in him. But I think the contention on the part of the Crown is not compatible with section 9 of the Act of 1921, which was in force during all the years of assessment now in question.

In my opinion the income out of which the premiums were paid was not income of Lord Wolverton and the premiums therefore cannot be treated as part of his income for the purposes of Super-tax.

For these reasons I am of opinion that the appeal fails and must be dismissed with costs.

**Lord Tomlin** (read by Lord Thankerton).—My Lords, as I understand the argument presented to your Lordships' House on behalf of the Appellants their case is put in two ways. First it is said that the effect of the Act of 1896 and of the mortgages created by the Respondent in exercise of the powers conferred by the Act was to place the Respondent in the same position as that occupied by a tenant for life creating a mortgage on his life interest and on policies on his life taken out to support the security and accordingly that the income applied in paying the premiums in respect of the life policies on the Respondent's life cannot be excluded in arriving at his total income for the purposes of Super-tax for the years in question (see *Howe v. Commissioners of Inland Revenue*<sup>(1)</sup>, [1918] 2 K.B. 584 and [1919] 2 K.B. 336); and, secondly, that even if this is not so the income applied in paying the premiums is money applied for the Respondent's benefit and must be treated as part of his income upon the principle of such cases as *Miller v. Commissioners of Inland Revenue*<sup>(2)</sup>, [1930] A.C. 222.

In my opinion neither branch of the argument is well founded.

The effect of the Act of 1896 was to empower the Respondent to raise by way of mortgage the moneys required to pay off the several sums of £100,000 which would otherwise have had to be provided out of accumulations of income and for this purpose to charge the income of the settled property with the payment of the principal moneys and interest thereon and of the premiums and other moneys required to be paid for effecting and keeping on foot any policies of insurance on his life by way of further security.

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(1) 7 T.C. 289.

(2) 15 T.C. 25.

(Lord Tomlin.)

The Act provided that every mortgage or charge effected by the Respondent under the Act should operate to pass an estate or interest for the whole life of the Respondent in priority to and free from and overriding all the trusts and provisions contained in the deed of the 31st December, 1888, and at the date of such mortgage or charge subsisting and capable of taking effect.

It is plain that the estate or interest of the mortgagee under any mortgage created under the power was an estate or interest, continuing for the whole life of the Respondent, having priority to all the estates and interests subsisting under the deed including the protected life interest of the Respondent. By the exercise of the power the Respondent was enabled to do that which he could never have done as owner of his life interest, and it is out of the income attributable to this prior estate or interest created by the mortgages and not out of the income of the Respondent's life interest that the interest under the mortgages and the premiums payable in respect of the policies fall to be paid.

As a matter of conveyancing, therefore, the position of the Respondent was not that of a tenant for life who has mortgaged his life interest in exercise of the ordinary powers of ownership.

It is said, however, that it is the substance and not the form which must be looked at. I confess to doubts whether any meaning can be attached to this phrase in a case where the rights of the parties depend upon the legal effect of a valid formal document. At any rate, if substance is to be sought for behind form, the substance of the transaction here was that by means of the statutory power and the mortgages created under it something was done which could not otherwise have been done, namely, the charges created by the mortgages, including the charge of premiums, were substituted in front of all the trusts and provisions of the deed in the place of the trust to accumulate the income for satisfaction of the sums of £100,000. The income or part of the income which would otherwise have been accumulated went to satisfy the charges thus created. Neither the income which was accumulated nor the income which went to satisfy the substituted charges was ever the income of the Respondent. It was not his when the mortgages were created and it never could become his so long as the mortgages subsisted.

The second branch of the Appellants' argument does not appear to me to have any greater validity than the first. It is based upon the fact that the Respondent undertook a personal liability to pay the premiums. It ignores the fact that the Respondent's position in relation to his liability to pay premiums is in effect that of a surety. If he pays the premiums he has a right to be recouped by the trustees out of the income mortgaged which is not and never has been his income.

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This branch of the argument would, if valid, justify treating the amounts paid for interest as well as the amounts paid for premiums as part of the Respondent's income, but admittedly the interest cannot be so treated.

The result of this case in my view depends upon a proper appreciation of its facts, which are unusual and are not likely to recur. It does not seem to me to be illustrative of any principle.

My Lords, in my opinion the appeal fails and should be dismissed with costs.

**Lord Macmillan.**—My Lords, I concur.

**Lord Buckmaster.**—My Lords, my Lord Atkin desires me to say that he concurs in the opinion I have expressed.

*Questions put :*

That the judgment appealed from be reversed.

*The Not Contents have it.*

That this appeal be dismissed with costs.

*The Contents have it.*

[Solicitors : Bircham & Co. ; Solicitor of Inland Revenue.]

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