1940 *Present :* **Moseley S.P.J. and de Kretser J.**

PUNCHIMAHATMAYA *v.* THE ATTORNEY-GENERAL.

35—D. C. (Inty.)

Stamp duty—deed conveying right to possess lands—Reservation of life interest to donor—Prohibition against alienation—Meaning of the words "value of the property"—Stamp Ordinance, Schedule B. Part I, item 32 (3) (b) (Cap. 189).

By a deed dated May 8, 1937, the appellant conveyed to his wife the right to possess certain lands reserving to himself a life interest in them. There was a prohibition against alienation after the death of the donor.

The donee had the right to reside and receive the rents and profits but after her death the lands were to be subject to the terms and conditions of the donor's will.

The donor valued the interest conveyed by the deed at Rs. 15,000 and paid stamp duty on that value under item 32 (3) (*b*) of Part I, Schedule B, of the Stamp Ordinance.

The Commissioner of Stamps determined that the stamp duty was payable on the unencumbered value of the lands. The appellant thereupon applied for the opinion of the Commissioner of Stamps under section 29, acting through a firm of proctors.

Held, that the appellant had the right of appeal, the application under section 29 having been made by the firm of proctors as his agents.

Held, further, that the deed had been duly stamped. The words "value of property" in item 32 (3) (*b*) do not mean the value of the land free from all encumbrances.

APPEAL from an order of the Commissioner of Stamps. The facts appear from the head-note.

H. H. Basnayake, C.C., raised a preliminary objection to the appeal being entertained on the ground that the appeal should have been preferred by the party who made the application to the Commissioner of Stamps for his opinion under section 29 (1) of the Stamp Ordinance. It was argued that the application had been made by the proctors and that therefore the appeal should have been preferred by them.

The Court overruled the objection.

J. E. M. Obeyesekere, for the appellant.—The deed in question only conveys the right to possess the properties in question for a certain period of time. This is less than the full dominium in the property. The deed must be stamped under item 32 (3). In assessing the Stamp Duty payable the "property" must be valued. The word "property" here is not the same as the land. It is the interest in the land which has been conveyed. That interest has been valued at Rs. 15,000. The Commissioner of Stamps does not contest these values.

Counsel referred to *Croos v. Attorney-General*[1], where it was held that in the case of a gift of the property subject to a lease a deduction should be made in respect of the leasehold interest in assessing the value of the property.

Counsel also referred to *I. L. R. 44 Allahabad 339.*

H. H. Basnayake, C.C., for the Attorney-General.—The deed purports to gift a life interest reserving a life interest. In such a case the dominium should be regarded as having passed to the donee—*Voet Bk. VII, Tit. I, paragraphs 9 and 10.* The instrument should therefore be stamped under item 32 (3) of Schedule A, Part I, of the Stamp Ordinance. For the purpose of stamping under that item the actual value of the property has to be ascertained. The value set forth in the instrument is not the amount on which duty has to be calculated. The words "set forth in such instrument" which occur in item 32 (1) do not occur in item 32 (3). The Allahabad case cited by Counsel does not apply.

Cur. adv. vult.

July 4, 1940. MOSELEY J.—

The appellant by a deed dated May 8, 1937, gave to his wife the "right to possess" certain lands, reserving to himself a life interest in the said lands. There was a further condition that after the death of the donor the lands should not be "sold, mortgaged, or leased for a period exceeding five years". The donee had the right "to reside and receive the rents and profits" but after her death the lands were to be subject to the terms and conditions set out in the donor's will.

This right to possess conferred upon the donee was valued in the deed, at Rs. 15,000, and the deed was stamped with stamps to the value of Rs. 532 as provided by item 30 (*c*) of Schedule B, Part I., of the Stamp Ordinance (now item 32 (3) (*b*)). For the sake of convenience I shall refer to sections of the Ordinance and items in the schedule by their present enumeration.

[1] *(1930) 32 N. L. R. 78.*

Later, the appellant applied in terms of section 29 of the Ordinance for the opinion of the Commissioner as to the duty with which the instrument is chargeable and the Commissioner determined that the duty payable under item 32 (3) (*b*) was Rs. 1,435, and called upon the appellant to pay the deficiency, *i.e.*, Rs. 903 and a further like sum as penalty. Against that finding by the Commissioner this appeal is brought.

Counsel for the respondents took the preliminary point that section 31 confers the right of appeal only upon the person who, by virtue of section 29, makes the application for the Commissioner's opinion, and that in this case it was not the appellant who made the application, but a firm of proctors. Section 29 (1) is as follows :—

> "When any instrument, whether executed or not and whether previously stamped or not, is brought to the Commissioner of Stamps, and the person bringing it applies to have the opinion of that officer as to the duty (if any) with which it is chargeable, and pays a fee of five rupees, the Commissioner of Stamps shall determine the duty (if any) with which in his judgment the instrument is chargeable."

If this section is construed rigidly the effect would be that only the person who physically brings an instrument to the Commissioner has a right of appeal against his determination. This seems to me much too narrow an interpretation to place upon the word "person bringing". Moreover, in the present case, the appellant has sworn in his affidavit filed in these proceedings that he applied to the Commissioner. The natural, and indeed only, inference that can be drawn is that the firm of proctors was acting on behalf of the petitioner since they themselves could have no more than a vicarious interest in the matter. The objection must therefore, in my opinion, fail.

Counsel for the appellant contended that the word "property" where it occurs in item 32 connotes interest in property, which in the present case is a right to possess, and that the dominium in the property does not pass by the deed to the donee ; that the donor has valued that right to possess at Rs. 15,000 and that the Commissioner has no power to go beyond the value expressed in the deed ; that section 25 requires that the consideration must be fully and truly set out, and section 64 provides a penalty for a breach of this requirement. Moreover, if the Commissioner so desires he has the power, under section 29 (2), for the purposes of arriving at his determination, to call for an affidavit or other evidence, which in this case he has not done.

The Commissioner apparently based his determination upon a "Government valuation of the lands affected by the deed" which is set out as Rs. 40,750, and this sum, says Counsel for the appellant, is the value, not of the right to possess, but of the unencumbered land which is something which the deed does not give.

On the other hand Counsel for the respondents contends that, since the donor has reserved to himself no more than a life interest, he has parted with the dominium and that the latter cannot remain in suspension and must therefore be vested in the donee. In support of this contention he

brought to our notice the following passage from *Voet, Bk. VII, Tit. I, paragraphs 9 and 10* :—

"But in more than one case a doubt arises whether usufruct only must be taken to have been bequeathed or full right of dominium. For what if a house fixed and determined as to its limits and site were bequeathed to inhabit or enjoy, or an estate were bequeathed for aliment ? In these cases not usufruct but rather full ownership would seem to be bequeathed . . . . Again, if we find a usufruct either of a single thing or a whole inheritance bequeathed with the burden of restoring the thing or estate to a third person after the death of the legatee, in this case when there is a doubt the ownership with the burden of *fidei commissum* must be considered bequeathed rather than the usufruct ; for reason does not admit of the burden of restoring only a usufruct being imposed on the legatee ; since by his death, he loses the whole right of usufruct *ipso jure,* to such an extent that nothing remains to be restored . . . . Again, if a usufruct of property be given to a wife or any other person, with the addition of a prohibition against alienation . . . . we must consider nothing less than full ownership to be bequeathed . . . ."

Even so, assuming that the dominium has passed to the donee, it seems to me that the "value of the property" where the words appear in item 32 (3) cannot mean the value of the land free from all encumbrances. Counsel for the respondents, indeed, concedes that the words mean the true value, that is to say, the price which a purchaser would be prepared to give in view of the restrictions and encumbrances. It may be that in this case it is impossible to estimate such value with any degree of accuracy. The value may be nil, if the donee predeceases the donor.

The value set upon the lands by the Government valuer, if it is the value free from encumbrances, is clearly wrong. On the other hand the donor has assessed the value at Rs. 15,000 which may indeed be a very fair valuation. In any case the Commissioner has not shown that it is an under-valuation.

I would therefore allow the appeal with costs.

Appeal allowed.