[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . . APPELLANT;

AND

THE PERPETUAL TRUSTEE COMPANY LIMITED . . . . . RESPONDENT.

(WATT'S CASE.)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1926.

SYDNEY, *April* 12-15.

MELBOURNE, *June* 2.

Knox C.J., Isaacs, Higgins, Gavan Duffy, Rich and Starke JJ.

Stamp Duties—Estate of deceased person—Dutiable estate—Accretion of capital—Station property—Wool acquired by Imperial Government—Distribution of Commonwealth's half share of profits—Distribution of Bawra shares after death and before probate—Property passing under settlement by testator—Life interest reserved—Surrender of life interest—Interest limited to cease on death of testator—Gift—Money—Steamboat ticket—Subject matter of gift not in New South Wales at time of death—Stamp Duties Act 1920 (*N.S.W.*) (*No.* 47 *of* 1920), *secs.* 100, 102 (2) (*a*), (*b*), (*c*), (*g*)*, 104, 105.

The Central Wool Committee, referred to in *John Cooke & Co. Pty. Ltd.* v. *Commonwealth* ((1922) 31 C.L.R. 394; (1924) 34 C.L.R. 269) and in the regulations contained in the Second Schedule to the *Commercial Activities Act*

* Sec. 102 of the *Stamp Duties Act* 1920 (N.S.W.) provides that "For the purposes of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property:— . . . (2) (a) All property which the deceased has disposed of . . . by will or by a settlement containing any trust in respect of that property to take effect after his death . . . : Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust. (b) Any property comprised in any gift made by the deceased within three years before his death . . . including any money paid or other property conveyed or transferred by the deceased within such period in pursuance of a covenant or agreement made at any time by him without full consideration in money or money's-worth. (c) Any property passing under any settlement, trust, or other disposition of property made by the deceased . . . (i.) by

1919, had made profits in administering the wool scheme sanctioned by those regulations or by corresponding regulations. Wool produced on two stations carried on by partnerships of which W. was a member and on a station carried on by W. had been delivered to the Central Wool Committee pursuant to that scheme. Subsequently and during the lifetime of W. a company was formed to which the Commonwealth and the Central Wool Committee agreed to transfer all their rights in their share of the profits, and the company undertook to issue shares, priority certificates and cash, representing such share of the profits, to such companies, firms and persons as the Central Wool Committee might nominate. After the death of W. and before probate was granted, shares, priority certificates and cash were delivered to the partnerships and to the executor of W. respectively as representing their proportion of the shares, &c., based on the wool which had been delivered by the partnerships and W. respectively to the Central Wool Committee.

Held, by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Rich* and *Starke* JJ., that neither the shares, priority certificates and cash received by W.'s executor, nor those received by the partnerships to the extent of W.'s share therein as a partner, formed part of the dutiable estate of W. for the purposes of the *Stamp Duties Act* 1920 (N.S.W.).

Per Higgins J.: The probability or possibility at the time of W.'s death that the distribution of shares, priority certificates and cash would be made should be taken into account in assessing the value of his dutiable estate both with regard to his interest in the partnerships and with regard to the wool delivered from his own station.

By a marriage settlement made in 1902 W. vested certain property in trustees upon trust to pay the income to his wife and after her death to W., and after the death of both upon trust for their children. On the wife obtaining a divorce in 1913 W., by indenture of settlement, assigned his life interest under the marriage settlement to the trustees to the intent that his life estate might be extinguished and directed the trustees to hold the property upon the same trusts as if such life estate had been determined by the death of W. in the lifetime of his wife. W. died in 1921.

which an interest in or benefit out of or connected with that property, or in the proceeds of the sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; . . . (g) any property in which the deceased or any other person had an estate or interest limited to cease on the death of the deceased notwithstanding that that estate or interest has been surrendered, assured, divested, or otherwise disposed of . . . whether for value or not, to or for the benefit of any person entitled to an estate or interest in remainder, or reversion in such property, unless:— (i.) such disposition was bona fide made or effected within three years before the death of the deceased; and (ii.) bona fide possession and enjoyment of the property was assumed thereunder immediately upon the disposition and thenceforward retained to the entire exclusion of the person who had the estate or interest limited to cease as aforesaid, or of any benefit to him of whatsoever kind or in any way whatsoever" &c.

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

Held, by the whole Court, that on the death of W. the property the subject of the marriage settlement did not form part of his estate under par. (a) or (c) or (g) of sec. 102 (2) of the *Stamp Duties Act* 1920.

Portion of the property the subject of a settlement in which W. had an interest consisted of British war bonds which, at the date of his death, were in England.

Held, by the whole Court, that the war bonds should be taken into account in estimating the value of W.'s interest in the property the subject of the settlement for the purposes of the *Stamp Duties Act* 1920.

Within a year before his death W. applied a sum of money for the benefit of a friend who was going abroad. He paid portion of the sum for a steamship ticket and gave the balance to the friend, who took it abroad and spent it there.

Held, by *Knox* C.J., *Isaacs*, *Gavan Duffy*, *Rich* and *Starke* JJ. (*Higgins* J. dissenting), that the sum of money did not form part of the dutiable estate of W. within sec. 102 (2) (b) of the *Stamp Duties Act* 1920.

Decision of the Supreme Court of New South Wales (Full Court): *In the Estate of W. O. Watt*, (1925) 25 S.R. (N.S.W.) 467, in part affirmed and in part reversed.

APPEAL from the Supreme Court to the High Court.

The Commissioner of Stamp Duties for New South Wales stated, for the opinion of the Supreme Court, a case which was substantially as follows:—

1. Walter Oswald Watt, late of Howlong Station, Carrathool, in this State, died on 21st May 1921 leaving a will and codicil, probate whereof was on 10th October 1921 granted by this Court to the Perpetual Trustee Co. Ltd. (hereinafter called the Trustee Company), the executor in the said will named.

2. Prior to and up to the time of his death the deceased was carrying on in partnership two station properties in this State known as Goonal and Llanillo. Such stations were the properties of the said partnerships carrying on the same.

3. The share of the deceased in the two several partnerships carrying on the said stations was as to Goonal one-sixth and as to Llanillo one-fourth.

4. On or about 30th July 1921 there was issued to Gilchrist, Watt & Co. Ltd. of Sydney, as agents for the said two station partnerships, by the Commonwealth Central Wool Committee

(hereinafter called the Committee) for and on behalf of the Commonwealth Government certain shares in the British Australian Wool Realisation Association Ltd. (hereinafter referred to as the Company) and certain priority certificates and cash as hereunder, namely (the details were set out).

5. The circumstances under which the said shares, certificates and cash were issued are as follows :—

(*a*) Under certain regulations made in pursuance of the provisions of the Federal *War Precautions Acts* 1914-1916 the wool produced on the said stations for the years 1916-17, 1917-18, 1918-19, 1919-20, was delivered to the Committee on behalf of the Commonwealth Government and was duly appraised.

(*b*) The said partnerships received for the said wool the full appraised value as determined by the appraisers appointed under the said regulations.

(*c*) A large amount of the wool acquired by the Imperial Government from the Commonwealth Government in the said years was not used by the Imperial Government for naval or military purposes, and the profits from the sale thereof by the Imperial Government were by reason of the arrangement made between the Imperial Government and the Commonwealth Government divisible equally between the two Governments.

(*d*) On 27th January 1921 the Company was registered in Victoria as a limited company with a capital of £25,000,000 divided into 25,000,000 shares of £1 each. The Company has never had a share register in this State for any purpose whatever.

(*e*) The objects of the Company are (*inter alia*) :—(1) To acquire and take over (a) one half share of or interest in all Australian wool bought by the British Government through the Government of the Commonwealth of Australia and still undisposed of, and in all real or personal property acquired in connection therewith and still undisposed of ; (b) one half share of or interest in any surplus profit on resale of Australian wool so bought still undistributed : also to take over and assume one half of all or any liabilities and obligations connected with and chargeable to such wool property and surplus profits not yet liquidated. (2) To acquire and take over any wool or real or personal property of any kind and wherever

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

situate from any Government, company, person or authority (and in particular from the Government of the Commonwealth of Australia and the Commonwealth of Australia Central Wool Committee and the State Wool Committees), and to assume any liabilities or obligations in connection with such wool or real or personal property. (3) To issue shares and/or debentures or any other form of acknowledgment representing the interest of any Government, company, person or authority in any of the before-mentioned wool or real or personal property or surplus profits and/or to acquire such interest for cash or on such terms as the Company may consider reasonable. (4) To carry on business (*inter alia*) as a realization company and to nurse, use, employ, manage and develop in such manner as may be deemed expedient all or any of the property of the Company.

(*f*) On 22nd February 1921 a letter in the words and figures following was sent by the Prime Minister to the Chairman of the Committee :—" Prior to the formation of the British Australian Wool Realisation Association Ltd., certain negotiations took place between the British Government and the Commonwealth Government, as a result of which it was agreed that the assets due to Australian woolgrowers in connection with the contracts for the sale of Australian wool to the British Government ascertained to exist on the agreed settling day should be handed to the Commonwealth Government which should in turn hand the same to the Association on account of the Australian woolgrowers entitled to the proceeds thereof in final settlement of all obligations under the contracts. The half of carry-over Australian wool in the Commonwealth and elsewhere owned by the British Government is also to be handed over for disposal to the Wool Realisation Association as agents for the British Government and as directed by them pending settlement of agency terms. The Association has now been incorporated, and in accordance with such agreement I have, on behalf of the Commonwealth Government, to request that the Central Wool Committee transfer and hand over to the Association as on and from the first day of January 1921 such assets as belong to Australian woolgrowers, who will constitute the shareholders of the British Australian Wool Realisation Association Ltd., and also to transfer and hand over

as on and from the same date such assets as belong to the British Government to the Wool Realisation Association as agents for that Government and as directed by them pending settlement of agency terms."

(*g*) By an agreement in writing made 1st April 1921 between the Government of the Commonwealth of Australia (thereinafter called the Commonwealth Government) of the first part and the Company of the other part, after reciting that pursuant to certain telegrams, letters and other documents which have passed between the British Government and the Commonwealth Government, commencing in the year 1916, the British Government had purchased from or through the Commonwealth Government a large quantity of Australian wool for the year 1916 and subsequent years up to and including 30th June 1920 And that it was part of the terms arranged between the British Government and the Commonwealth Government that any profits derived by the British Government from the resale of such wool for civilian purposes should be divided in equal shares between the British Government and the Commonwealth Government And that the Department of Raw Materials, Ministry of Munitions, of the British Government had administered the purchase and sale of such wool on behalf of the British Government And that balance-sheets and statements of accounts of the transaction in question had been prepared and audited by Messrs. Heselton and Butterfield, chartered accountants, Bradford, England, for periods respectively ended the 31st March 1918, 31st March 1919 and 31st March 1920, and these successive statements of accounts had been accepted as correct by the Commonwealth Government, and part of the profits shown thereby had been divided between the British Government and the Commonwealth Government to their mutual satisfaction And that the Company had been incorporated in Victoria, Australia, with the object of taking over from the Commonwealth Government with the consent of the British Government the half share of the Commonwealth Government in the undistributed profits (including half of the unsold wool) held by the said Department of Raw Materials for account of the Commonwealth Government the result of the aforesaid transaction And that the Company had shares in capital £25,000,000 divided

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

into 25,000,000 shares of £1 each it was agreed as follows :—(1) The Commonwealth Government with the consent of the British Government hereby agrees to transfer and make over to the Company all the rights of title, estate and interest of the Commonwealth Government under the said agreement and arrangement with the British Government to the intent that the Company shall be entitled to the half share of the Commonwealth Government arising out of the aforesaid transaction so far as such share has not already been paid to the Commonwealth Government (2) The Company shall ratify, confirm and accept as binding on it all settlements, arrangements and accounts already made and agreed to between the Commonwealth Government and the British Government (3) The Commonwealth Government shall formally notify the British Government of the transfer hereby agreed to be made and that the Company is now fully empowered and entitled to settle and adjust all accounts with the British Government relating to the said half profits aforesaid and to receive and give a good discharge to the British Government for any part of such profits and assets not already paid to the Commonwealth Government by the British Government (4) The Company shall indemnify and save harmless the Commonwealth Government from and against all liability, claims and demands of and in connection with the said matters and transactions or in any way arising out of same (5) In consideration of the premises the Company shall issue to the Commonwealth Government or to such companies, firms and persons as the Commonwealth of Australia Central Wool Committee for and on behalf of the Commonwealth Government may nominate 12,000,000 ordinary shares of £1 each in the capital of the Company and £10,000,000 priority wool certificates all fully paid up Provided that the said shares and certificates may be reduced in number by payments to any such companies, firms or persons in lieu of such shares and certificates.

(*h*) On 19th April 1921 the Committee passed two resolutions in the words and figures following :—(1) A letter dated 22nd February 1921 from the Prime Minister of the Commonwealth of Australia was read and considered at a meeting of the Central Wool Committee held on 19th April 1921, and it was resolved in accordance with the

request contained therein that all assets belonging to Australian woolgrowers in connection with the contracts for the sale of their wool to the British Government or to the proceeds of which they are entitled be transferred and handed over as on 1st January 1921 to British Australian Wool Realisation Association Ltd., and also that such assets in the hands or under the control of the Committee as belong to the British Government be transferred and handed over as on the same date to the above Association as agents for the British Government in accordance with the terms of an agreement made between the British Government and the Association, and further that the Chairman of the Committee be empowered to sign or execute all documents necessary in connection with such transfer and handing over and for vesting the said assets in the Association. (2) That in accordance with an agreement dated 1st April 1921 made between the Government of the Commonwealth of Australia and the British Australian Wool Realisation Association Ltd. the Association be requested to issue in the names of such companies, firms and persons as this Committee (for and on behalf of the Commonwealth Government) may nominate—in the proportions to which they are respectively entitled in accordance with the books of the Committee —12,000,000 ordinary shares of £1 each fully paid up in the capital of the Association and £10,000,000 priority wool certificates, except as the number of such shares and certificates may be reduced by any payments to this Committee (for and on behalf of the Commonwealth Government) in respect of any such companies, firms or persons in lieu of any of such shares and certificates and that the Association be also requested to hand the scrip for such shares and certificates and to make any such payments to this Committee (for and on behalf of the Commonwealth Government) which will distribute such shares, certificates and payments.

(*i*) On 11th May 1921 the Company passed a resolution in the words and figures following:—That pursuant to agreement with the Commonwealth Government the Association issue in the names of such companies, firms and persons, as the Commonwealth of Australia Central Wool Committee (for and on behalf of the Commonwealth Government) shall nominate 12,000,000 ordinary shares of £1 each in the capital of the Association, and £10,000,000

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

priority wool certificates all fully paid up and the scrip for such shares and certificates be handed to the said Committee (for and on behalf of the Commonwealth Government) Provided that the said shares and certificates may be reduced in number by payments to the said Committee (for and on behalf of the Commonwealth Government) in respect of any such companies, firms or persons in lieu of such shares and certificates.

(*j*) On 11th May 1921 two letters were written and sent by the Committee to the Company in the words and figures following:— (1) "A letter dated 22nd February 1921, from the Prime Minister of the Commonwealth of Australia, was read and considered at a meeting of the Central Wool Committee held on 19th April 1921, and it was resolved in accordance with the request contained therein that all assets belonging to Australian woolgrowers in connection with the contracts for the sale of their wool to the British Government or to the proceeds of which they are entitled, be transferred and handed over as on 1st January, 1921, to British Australian Wool Realisation Association Ltd., and also that such assets in the hands or under the control of the Committee as belong to the British Government be transferred and handed over as on the same date to the above Association as agents for the British Government in accordance with the terms of an agreement made between the British Government and the Association, and further, that the Chairman of the Committee be empowered to sign or execute all documents necessary in accordance with such transfer and handing over and for vesting the said assets in the Association. This will be done in due course." (2) "We request that as agreed by your Association with the Commonwealth Government, you will please make out and hand to us (for and on behalf of the Commonwealth Government) 12,000,000 ordinary shares of £1 each in the capital of the Association, and £10,000,000 priority wool certificates, all fully paid up, in the names of such companies, firms and persons as we (for and on behalf of the Commonwealth Government) will nominate. The shares and certificates may, however, be reduced in number by payments from the Association to us (for and on behalf of the Commonwealth Government) in respect of any such companies, firms or persons in lieu of such shares and certificates."

(*k*) On 12th July 1921 the Committee wrote and sent to the Company a letter in the words and figures following :—" Referring to our letter of the 11th of May last we now (for and on behalf of the Commonwealth Government) nominate the companies, firms and persons whose names are set out in the lists enclosed as being entitled to the shares and priority wool certificates mentioned in such letter, and we request you to allot shares and priority wool certificates to such companies, firms and persons in the proportions respectively set out opposite their names in such lists ; provided that, in the case of such of the said companies, firms and persons the aggregate quantity of whose wool, according to such lists, is of the appraised value of £100 and under, we request you to pay to us for and on behalf of the Commonwealth Government the amounts to which such last mentioned companies, firms and persons are entitled, in lieu of such shares and certificates. Please hand the scrip, certificates and cheques to us for distribution in due course."

(*l*) The said letter was written by the Chairman of the Committee on behalf of the Commonwealth Government and contained the names of the companies, firms and persons nominated by the Commonwealth Government to receive its half share of the said profits mentioned in par. (*c*) hereof.

(*m*) Subject to the matters mentioned in pars. 6, 7 and 8 hereof, the general scheme followed by the Commonwealth Government in compiling the list mentioned in the said letter was to allot shares, cash and priority certificates proportionately amongst some suppliers of wool in proportion to the amount of wool supplied by them in the seasons 1916-17, 1917-18, 1918-19 and 1919-20, and amongst other suppliers of wool in proportion to the amount supplied by such last-mentioned suppliers in the seasons 1916-17 and 1917-18.

(*n*) On 22nd July 1921 the Company wrote and sent to the Committee a letter in the words and figures following :—" Referring to your letter of 11th May 1921, certificates (two) for 12,000,000 ordinary shares of £1 each in the capital of the Association, and £10,000,000 priority wool certificates, all fully paid up, are hereby handed to you for and on behalf of the Commonwealth Government. On receipt of transfer forms duly completed, these certificates will

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

be cancelled and certificates issued in the names of such companies, firms and persons as may be nominated by you."

(*o*) On 23rd July 1921 the Committee wrote and sent to the Company a letter in the words and figures following :—" Referring to your letter of 22nd July 1921, enclosing certificates for 12,000,000 ordinary shares of £1 each in the capital of the British Australian Wool Realisation Association Ltd., and £10,000,000 priority wool certificates, all fully paid up, transfer forms duly completed are attached, and I request that shares and priority wool certificates may be issued to the companies, firms and persons in the proportions set out opposite their names in the lists forwarded with my letter of 12th July 1921 ; provided that, in the case of such of the said companies, firms and persons, the aggregate quantity of whose wool, according to such lists, is of the appraised value of £100 and under, I request you to hand to this Committee (for and on behalf of the Commonwealth Government) the amounts to which such last mentioned companies, firms and persons are entitled, in lieu of such shares and certificates. Please hand the scrip, certificates and cheques to the Committee for distribution in due course."

(*p*) Pursuant to the agreements and documents hereinbefore in this paragraph set out all wool then unsold and all assets and moneys then held or employed in or in connection with the said scheme were vested in and came into the possession of the Company.

(*q*) On or about 30th July 1921 the Committee by letter notified the firm of Gilchrist, Watt & Co., whose name appeared upon the lists mentioned in the said letters set out in sub-pars. (*k*) and (*j*) of this paragraph, that the said firm was entitled in accordance with the books of the Committee to certain shares in the Company, and certain cash and priority certificates representing the share of the said firm in such distribution as aforesaid.

(*r*) The said firm duly received such shares, cash and priority certificates of which the shares, cash and priority certificates mentioned in par. 4 of this case were calculated proportionately to the wool clips of the said stations of the said partnerships so delivered to the Committee as aforesaid.

10. In arriving at the value of the interest of the deceased in the said two partnerships, the said shares, cash and priority certificates

were apportioned as follows :—(The details of the apportionment were set out).

11. The Commissioner claims that the afore-mentioned shares, priority certificates and cash, being assets of partnerships carried on in New South Wales, should be included in estimating the value of the deceased's interests in the said partnerships, and that such interests are locally situated and liable to duty under sec. 102, sub-sec. 1 (a), or sec. 104 of the *Stamp Duties Act* 1920.

12. The Trustee Company claims that the said shares, cash and certificates do not form part of the dutiable estate of the deceased.

13. During the years 1916-17, 1917-18, 1918-19 and 1919-20 the deceased was the sole owner of Howlong station, and in the said years the deceased in accordance with the said regulations made under the provisions of the *War Precautions Acts* 1914-1916 delivered his wool clip from the said station for appraisement, and in due course received the full appraised value thereof.

14. The following shares, priority certificates and cash in respect of the said Howlong wool, namely (the details were set out), were included in the said letter of 30th July 1921 mentioned in par. 5 (*q*) hereof. The said shares, priority certificates and cash were calculated proportionately to the wool clips of the said Howlong Station delivered to the Committee as mentioned in par. 13 hereof. The Company subsequently issued the said shares, priority certificates and cash to the executors of the deceased.

15. The Commissioner claims that the said shares, priority certificates and cash, which for assessment were together valued at £4,442 2s. 9d., form part of the estate of the deceased for the purposes of death duty under sec. 102, sub-sec. 1 (a), or sec. 104 of the *Stamp Duties Act* 1920.

16. The Trustee Company claims that the said shares, cash and priority certificates do not form part of the dutiable estate of the deceased.

18. By an indenture of marriage settlement dated 26th September 1902 the deceased (the settlor) vested in the Trustee Company (the trustee) certain shares and moneys upon trust to pay the income therefrom to his wife, and after her death to the deceased, and after his death and that of his wife (his wife him surviving) upon trust

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

for the children of the said marriage as therein provided, and in the event of all such children dying under the age of twenty-one years without issue, then upon trust for the deceased or in case he should have predeceased his wife upon trust for such persons as he should by will appoint and in default of appointment for his next-of-kin.

19. There was issue of the said marriage one child and no more, namely, James Oswald Watt, born in the year 1905.

20. On 17th September 1913 a decree nisi for dissolution of the said marriage was made by this Court on the suit of the wife of the deceased.

21. By an indenture dated 30th October 1913 made between the deceased of the first part his wife of the second part and the Trustee Company of the third part, after reciting the above-mentioned marriage settlement, the said decree nisi, and an agreement between the deceased and his wife that in consideration of her refraining from applying to the Court for alimony the deceased would make further provision for her and their said child and would surrender his life interest under the said marriage settlement and would settle the sum of £45,000 in the manner thereinafter mentioned, it was witnessed that the Trustee Company should hold the said fund on trust to apply the income thereof for the maintenance of the said child, James Oswald Watt, and in payment to the wife, provided that in case the said child should die under the age of twenty-one years in the lifetime of the wife the sum of £6,000 part of the said fund should be paid to the deceased, and it was thereby further provided that after the death of the wife and subject as aforesaid the Trustee Company should hold the said fund and the income thereof (a) as to one half on trust for the said child, James Oswald Watt, on his attaining the age of twenty-one years, and, in the event of his dying under that age leaving issue who should attain twenty-one, then in trust for such issue and, in the event of his dying without leaving such issue, then so much of the said one-half share and the income thereof as should not have been applied under the powers of maintenance and advancement thereinafter contained in trust for the deceased, and (b) as to the other half in trust for the deceased; and the deceased thereby assigned and surrendered to the Trustee

Company his said life interest in the trust property settled by the said indenture of marriage settlement, to the intent that such life estate might be extinguished and the said Trustee Company should hold such trust property upon the same trusts as if such life interest had been determined by the death of the deceased in the lifetime of his said wife.

22. The Commissioner claimed that, subject as in the next succeeding paragraph mentioned, the property subject to the trusts of the said indenture of marriage settlement at the death of the deceased formed part of the estate of the deceased for the purpose of death duty under sec. 102, sub-sec. 2, pars. (a) and (c), of the *Stamp Duties Act* 1920.

23. The value of the property subject to the trusts of the said settlement at the death of the deceased is £24,626 6s. 9d., but of such sum £6,040 7s. 6d. represents the value of 506 shares in the Union Bank of Australia Ltd., which shares are locally situate out of this State; and deducting the value of these shares the amount on which the Commissioner claimed duty is £18,585 19s. 3d.

24. The Trustee Company claims that duty is not payable on any part of the property subject to the trusts of the said settlement.

25. The funds subject to the trusts of the indenture of 30th October 1913 mentioned in par. 16 hereof consist of British war bonds in London of the face value of £28,500 and assets in New South Wales of the value of £15,895. The present trustee of the said indenture is the said Trustee Company, and the interest on the said war bonds is by its instructions paid by its agents in England to the beneficiary, who resides in England. The Commissioner claims that the value of the interest of the deceased in the said funds at the date of his death is £1,229 17s. 6d. and that that amount should be included in his dutiable estate.

26. The Trustee Company claims that the said war bonds do not form part of the dutiable estate of the deceased and that after excluding the said bonds the value of the said interest is £447 5s. 6d., and that that amount only should be so included.

27. In the month of July 1920 the deceased paid to Mr. H. B. Jamieson the sum of £200, and requested him to apply the same by way of gift in the purchase of a steamship ticket to America for a

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

friend of the deceased and in payment of the balance to such friend; and the said sum was applied by the said Mr. H. B. Jamieson as to £109 in the purchase of such ticket and as to the balance in payment to such friend. The said sum was so applied, and the balance of the moneys was taken to America and wholly expended by such friend prior to the date of the death of the deceased.

28. The Commissioner claims that the said sum of £200 forms part of the dutiable estate of the deceased under sec. 102, sub-sec. 2, par. (b), of the *Stamp Duties Act* 1920.

29. The Trustee Company claims that the said sum does not form part of such dutiable estate.

The questions for the decision of the Court were (*inter alia*):—

(1) Do the said shares in the Company, cash and priority certificates received by the Trustee Company as executor of the will and codicil of the deceased in respect of the said wool (a) from Howlong, and (b) from Goonal and Llanillo to the extent of the deceased's share therein as a partner, form part of the dutiable estate of the deceased?

(2) Does the property the subject of the said indenture of marriage settlement form part of such dutiable estate?

(3) Should the British war bonds mentioned in par. 25 hereof be taken into account in estimating the value of the interest of the deceased in the funds subject at the date of his death to the trusts of the said indenture of 30th October 1913?

(4) Does the said sum of £200 the subject of the said gift or any portion thereof form part of such dutiable estate?

The Full Court answered each of those questions in the negative: *In the Estate of W. O. Watt* (1).

From that decision the Commissioner now appealed to the High Court.

Brissenden K.C. and *S. A. Thompson*, for the appellant. As to question 1:—At the time of the death of the testator one of his assets was a right to receive from the Commonwealth Government a proportionate share of a fund then in the hands of the Government as the fruit of the transaction which led to the establishment of

(1) (1925) 25 S.R. (N.S.W.) 467.

the Company ordinarily known as "Bawra" (see *John Cooke & Co. Pty. Ltd.* v. *Commonwealth* (1)). There was a trust created in respect of that fund by the resolution of 11th May 1921 and the communication of that resolution to Bawra, in favour of the wool-growers. The beneficiaries under the trust are made certain because of the condition in the resolution under which they can be made certain. The shares, &c., which came to the hands of the partnership and of the executor before probate was granted are accretions within the meaning of sec. 104 of the *Stamp Duties Act* 1920 (N.S.W.). In the case of the partnerships, the accretion is an enhancement in value, and, in the case of the station of which the testator was owner, is an accretion to capital of a concrete character. As to what is an accretion, see *Dent* v. *Commissioner of Stamp Duties* (2); *Doe d. Richards* v. *Evans* (3); *Partington* v. *Attorney-General* (4); *Long* v. *Watkinson* (5); *Inland Revenue Commissioners* v. *Blott* (6).

[KNOX C.J. referred to *Bell* v. *Master in Equity* (*Vict.*) (7).

[RICH J. referred to *Lee* v. *Neuchatel Asphalte Co.* (8); *Lubbock* v. *British Bank of South America* (9); *Verner* v. *General and Commercial Investment Trust* (10).]

As to question 2:—The marriage settlement falls within either par. (c) or par. (g) of sec. 102 (2). The word "settlement" in par. (c) includes a settlement even if it has been revoked before the settlor's death, the property being taxable as at the time it passes from the settlor to the trustees. The effect of par. (g) is that if a testator gets rid of his life estate within three years before his death, it is not taxable, but if he gets rid of it before that time, it is taxable (see *Mackay* v. *Commissioner for Stamps* (11)). As to question 3:—The interest of the testator in the trust estate was an interest which was situated in New South Wales where the trust was to be administered. The trustees being there and the trust being capable of being administered there, the asset is there (*Favorke* v. *Steinkopff* (12); *In re Smyth*; *Leach* v. *Leach* (13); *Lord Sudeley* v. *Attorney-General* (14)).

(1) (1922) 31 C.L.R. 394, at pp. 403, 419.
(2) (1909) 9 C.L.R. 406, at p. 422.
(3) (1847) 10 Q.B. 476.
(4) (1869) L.R. 4 H.L. 100.
(5) (1852) 17 Beav. 471.
(6) (1921) 2 A.C. 171.
(7) (1877) 2 App. Cas. 560.
(8) (1889) 41 Ch. D. 1, at p. 27.
(9) (1892) 2 Ch. 198, at p. 201.
(10) (1894) 2 Ch. 239, at p. 265.
(11) (1911) 11 S.R. (N.S.W.) 286.
(12) (1922) 1 Ch. 174, at p. 177.
(13) (1898) 1 Ch. 89.
(14) (1897) A.C. 11.

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

[ISAACS J. referred to *Attorney-General* v. *Johnson* (1).]

As to question 4 :—The gift falls within the clear meaning of the words of sec. 102 (2) (b) and the definition of a gift in sec. 100. [Counsel also referred to *Blackwood* v. *The Queen* (2); *Hansen's Death Duties*, 7th ed., pp. 80, 285; *In the Will of Rutherford* (3).]

Flannery K.C. (with him *Wickham* and *Weston*), for the respondent. As to question 1 :—None of the letters written or resolutions passed before the distribution of the shares, &c., by Bawra constituted a trust in favour of anyone. Until that distribution there was nothing to alter the position that the Government had no legal obligation to anyone in respect of the half share of the profits. Giving full effect to the clear meaning of secs. 104 and 105, the word "accretion" cannot mean an added value arrived at by a revaluation. The word means a new asset added to the estate in such a way that it can be called an accretion, and that word connotes that one must be able to point to something which was not in existence at the death of the testator—a new asset arising from an original asset. In the case of the shares, &c., which came to the partnerships there was nothing more than an increase of the value of the testator's interest in them. In the case of the shares, &c., which came to the executor in respect of the station carried on by the testator alone, the word "accretion" does not include something which came to the executors by way of bounty from someone else. As to question 2 :—For the purposes of pars. (a) and (c) of sec. 102 (2) the position must be looked at as at the date of the testator's death. At that time there was no trust to take effect after the testator's death, nor was there any interest reserved to the testator. Par. (g) also contemplates something in existence at the time of the testator's death. The word "within" should be read as "without" (*Halsbury's Laws of England*, vol. XXVII., pp. 146-147). As to question 3 :—The testator had no right to have the fund in question administered as was the case in the authorities cited. He had a vested right in remainder in the bonds, and that gave him no right to administration. As to question 4 :—Looking at the history of

(1) (1907) 2 K.B. 885.
(2) (1882) 8 App. Cas. 82.
(3) (1882) 3 N.S.W.L.R. (L.) 176.

par. (b) of sec. 102 (2), in order to make a gift taxable under it the subject matter of the gift must be in existence in New South Wales at the time of the testator's death. As to the steamer ticket, to arrange a contract for a person's benefit is not a gift. The gift must, under sec. 105 (2), be something upon which a value can be placed at the time of the testator's death.

[KNOX C.J. referred to *National Trustees, Executors and Agency Co. of Australasia* v. *Federal Commissioner of Taxation* (1).]

Brissenden K.C., in reply, referred to *Horsfall* v. *Commissioner of Taxes* (*Vict.*) (2).

Cur. adv. vult.

The following written judgments were delivered :—

June 2.

KNOX C.J. AND GAVAN DUFFY J. The questions raised by this appeal relate to the assessment of death duty under Part IV. of the *Stamp Duties Act* 1920 in respect of the estate of Walter Oswald Watt deceased. The respondent is the executor of his will.

The appellant stated a special case for the opinion of the Supreme Court on the following questions :—(1) Do the said shares in the Company, cash and priority certificates received by the Trustee Company as executor of the will and codicil of the deceased in respect of the said wool (a) from Howlong, and (b) from Goonal and Llanillo to the extent of the deceased's share therein as a partner, form part of the dutiable estate of the deceased ? (2) Does the property the subject of the said indenture of marriage settlement form part of such dutiable estate ? (3) Should the British war bonds mentioned in par. 25 hereof be taken into account in estimating the value of the interest of the deceased in the funds subject at the date of his death to the trusts of the said indenture of 30th October 1913 ? (4) Does the said sum of £200 the subject of the said gift or any portion thereof form part of such dutiable estate ? The Supreme Court decided each of these questions in favour of the respondent, and this appeal is brought from that decision.

We agree in the conclusions at which the Supreme Court arrived on each question except (3). The appellant contends that in

(1) (1916) 22 C.L.R. 367.

(2) (1918) 24 C.L.R. 422, at p. 438.

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

Knox C.J. Gavan Duffy J.

estimating the value of the interest of the deceased in the property comprised in the settlement of 1913 the value of certain British war bonds in which part of the trust fund was invested should be taken into account. The respondent contends that as the bonds in question were not within the State of New South Wales their value should not be taken into account, the duty imposed by the Act being imposed only in respect of property of the deceased locally situate in New South Wales.

In our opinion, the appellant should succeed on this question. The interest of the deceased under the settlement was not an interest in the specific property in which the trust funds were for the time being invested, but a right to call on the trustees of the settlement to account to him as a beneficiary under the settlement. The trustees were resident in New South Wales and not elsewhere, and the interest of the testator was a chose in action enforceable by action against the trustees. The Courts of New South Wales were the proper forum for the enforcement by the deceased or by his representatives of his claim as a beneficiary, and his interest under the settlement was, therefore, a New South Wales asset. The decisions in *Favorke* v. *Steinkopff* (1); *Lord Sudeley* v. *Attorney-General* (2), and *In re Smyth*; *Leach* v. *Leach* (3), appear to us to be in point.

In our opinion the order of the Supreme Court should be varied by directing that question 3 be answered in the affirmative.

ISAACS J. The solution of the rather complicated questions that arise in this case is, I think, materially assisted by bringing to the construction of the Act first some fundamental considerations, and then some general principles of interpretation. Sec. 101 is the main section, because it imposes the duty, and the other sections of Part IV. are really referential as amplifications and as machinery provisions to carry out the declarations of sec. 101. That section declares (1) the persons affected, (2) the taxable subject matter and (3) the duty imposed. The persons affected are completely described, the taxable subject matter is also described, but referentially, and the duty is described by reference to the Third Schedule. It is the taxable subject matter which directly concerns

(1) (1922) 1 Ch. 174.
(2) (1897) A.C. 11.
(3) (1898) 1 Ch. 89.

this case, but the description of the persons affected is of the highest importance in elucidating the questions directly at issue. Sec. 101 taxes the property of "every person who dies after the passing of this Act, whether in New South Wales or elsewhere, and wherever the deceased was domiciled." That is to say, the "persons" to be affected are the population of the whole world, even though utter strangers personally to the State. It is therefore manifest that the duty to be valid must be imposed on property over which the State has territorial jurisdiction (*Macleod* v. *Attorney-General for New South Wales* (1)). Then, as to the subject matter taxed, it is described in sec. 101 as "the final balance of the estate of the deceased" and "all property" to be separately assessed. Unless the remaining sections, explanatory of and referential to sec. 101, are incapable of harmonizing with sec. 101 as constitutionally construed, they must be interpreted as relating to property within or subject to the territorial jurisdiction of New South Wales, either actually or by force of some acknowledged principle of international law. Apart from property to be separately assessed, which is immaterial here, it is to be remembered that it is "the estate of the deceased" which is to be finally balanced and, as sec. 101 says "as determined in accordance with this Act." Secs. 102, 103 and 104 are the relevant sections for ascertaining what the Act calls "the dutiable estate of the deceased," which is the same thing as "the estate of the deceased as determined in accordance with this Act." Secs. 102 and 103 describe the classes of property which statutorily may constitute the dutiable estate of a deceased person: First, and naturally, there is all property of the deceased which is situate in New South Wales at his death (sec. 102, sub-sec. 1 (a)); next, all property of the deceased which, though not in all respects within the territory, is so connected with the territory as to be in some way controllable by the State. As to the first class, it is manifest—but important to remember—that property removable by the deceased in his lifetime would, on the clear construction of sec. 102 (1) (*a*), if removed from New South Wales, even a day before he died, entirely escape this taxation. The fact that domicil is made immaterial

(1) (1891) A.C. 455.

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE)

ISAACS J.

brings into clear application the principles and authorities referred to in *Dicey and Keith's Conflict of Laws*, 3rd ed., at pp. 347, 348.

So far, the Legislature has designated only property actually belonging to the deceased. Long experience, however, has disclosed various expedients for escaping taxation of this nature by dispositions which, *ex facie* real, are sometimes genuine and sometimes colourable, and, where colourable, the property disposed of is still in truth, though secretly, the property of the deceased at the time of his death. To meet these expedients the Legislature has from time to time framed provisions to treat, for taxation purposes only, the property nominally, but not really, disposed of as still the property of the deceased at his death. Difficulties of proof and the necessity of certainty, both for the Treasury and the individual, have led to the adoption of more or less rigid standards as simple and definite and, on the whole, reasonable working tests of genuineness. These are what we find in sub-sec. 2 of sec. 102, except, of course, as to property merely appointed. The one important observation of a general nature is that, since the recognized office of these artificial standards is as a test of genuineness of disposition, the basic notions on which the duty is founded are unchanged. They are: (1) the property in view is only that which formerly belonged to the deceased, and (2) the point of time looked at for determining the true ownership of the property is the time of death. Therefore the property, the subject of sub-sec. 2 of sec. 102 (except merely appointed property), is in every case property which was originally property of the deceased and ceased to belong to him by reason of his disposition referred to; and therefore, also, property not in existence in New South Wales at the time of the death—and which for that reason, if still retained by the deceased, would not form part of his estate—is not intended by the Act to be made part of his "dutiable estate" merely because he had parted with it. If the Act did so intend, then, in my opinion, having regard to the persons described in sec. 101, it would be an invalid intention. If a person be personally a stranger to New South Wales and outside its jurisdiction, and if property not his be outside that jurisdiction, the mere fact that at a former time, when the property was his, a transaction, say of gift or sale by him or by his authority, took place within New

South Wales, would not, in my opinion, attract territorial jurisdiction to tax him in respect of that property. I do not think that the dispositions referred to are necessarily local. Local dispositions are independently taxed in other parts of the Act. The property which a person has and which is situate in New South Wales may be sold, settled or given by transactions outside the State, and those transactions, after his death, fall within the terms of sec. 102 (2). Otherwise the sub-section, and also sec. 103 (1) (a), could easily be rendered futile. The same intention as to the necessary presence of the property in New South Wales, must be attributed in all cases to the property described in each several class of sub-sec. 2, and I see no possibility of separability of the word "property." The actual intention of the Legislature appears to accord with what I have said as to the "property" contemplated being situate in New South Wales at the date of the death. Sub-sec. 1 (a) of sec. 102 is express; sub-sec. 1 (b), referring to sec. 103, assumes it, as is evident from the concluding words of sub-sec. 1 (a) and from the elaborate provisions of the rest of the sub-section and sub-secs. 2 and 3. Sec. 108 (2) is really legislative interpretation to that effect. I agree, therefore, with the view expressed by the learned Judges of the Supreme Court that you must find the "property" in New South Wales at the essential time. The essential time is shown to be the time of death (secs. 102 (1) (a), 103 (2), 105 (2), 107 (1) (debts), sec. 110).

With these general principles established, I proceed to consider the several questions raised in order.

(1) *Howlong.*—The property sought to be included consists, as ultimately contended, of certain priority certificates issued by the Company, usually styled "Bawra." These were, by direction of the Commonwealth Government, handed on 30th July 1921 to the executor of the deceased for the benefit of his estate. The deceased had died on 21st May 1921. It is accepted as a settled fact by the Commissioner that the certificates were a gift from the Commonwealth. But it is said, first, that the gift really antedates the death by reason that, in communications between the Commonwealth and its Wool Committee on the one hand and Bawra on the other, there had been definitely allocated to the deceased before his death

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

Isaacs J.

a right to have the certificates referred to. On an examination of those communications the contention is not borne out. There was no allocation before 12th July at the earliest. Up to that date, at all events, the Commonwealth retained the full dominion in respect of the surplus profits. Then it is said that under sec. 104 they are, when allocated, an accretion to the capital. Whatever else may be said of that expression, it is clear that the gift in this instance does not come within the phrase. It was an entirely independent addition to the trust fund, and in no way legally arising out of or, in any business sense, dependent upon any asset belonging to the deceased at his death. The appeal fails as to Howlong.

(2) *Goonal and Llanillo.*—The same result follows with respect to these partnerships, unless the gift additions to the partnership assets in July so affected the partnership shares, as they stood as assets in the testator's estate at the time of his death, as to constitute accretions to the capital of the estate. Probably the trust estate is richer for the gift. But the gift was made at a time when the deceased was not a member of either partnership, because he was dead. For the purpose of liquidating the deceased's share of surplus, after satisfying partnership liabilities, the firms' assets must be regarded as realized at his death (see per Lord *Sumner* (when *Hamilton* J.) in *Attorney-General* v. *Boden* (1)). The partnership articles may have contained provisions for what was to happen after his death. But there is nothing to inform the Court whether the right of the trust estate to share the enhancement of the donee partnership properties arises by reason of the partnership rights of the deceased at the time of his death, or from any equity arising since or in any other way, and possibly for all that appears subject to contra liabilities. If it appeared that by reason of the partnership articles the asset of the gift was to be taken in as one of the partnership capital assets in order to ascertain the partnership surplus, and then the testator's share of that surplus—I am not prepared to say there was not an "accretion to capital" even in the narrower sense. But, for the reason given, there is no material on which the necessary conclusion of fact can be reached, so as to attract the statutory provision in either that or the broader sense. This part of the appeal fails also.

(1) (1912) 1 K.B. 539, at p. 555.

(3) *Marriage Settlement.*—The Commissioner contends that, as in 1912 certain shares and money of the deceased passed under a marriage settlement to trustees on certain trusts, and as by the settlement the settlor reserved an interest for his life, the property answers the precise description of the class in sec. 102, sub-sec. 2 (c). The answer given is that the property did not pass till the settlor died, and at that time the only settlement in existence being the settlement of 1902 as altered by the indenture of 1913, it could not be said at his death that a life interest in him "is reserved" by the settlement. The indenture of 1913 extinguished the life estate by assigning and surrendering it to the trustee of the settlement of 1902. I do not agree with the contention that the "passing" contemplated by the sub-section is at the settlor's death: in my opinion it is at the date of the settlement, unless some other period is thereby provided. But I think that the settlement must be that which exists at the date of the death of the deceased, and as it then exists. If, as in the present case, the settlement as modified does not reserve a life interest in the settlor, then not only are the words literally read inapplicable, but the mischief aimed at does not exist. There is no condition of things with reference to the property which could possibly be a nominal alienation but a virtual retention. The matter, therefore, is not struck by sub-sec. 2 (c) of sec. 102. It is then sought to bring the property under sub-sec. 2 of that section. It is trite law that, when fairly construed, a taxation enactment must be unambiguous. I have tried to find some intelligible meaning in par. (g) of the sub-section and have failed. I am glad to say it is repealed, and replaced by an understandable sub-section. This particular claim to tax, therefore, cannot be sustained on either ground advanced.

(4) *British War Bonds.*—Under the deed of 1913, a sum of money was settled by the deceased on certain trusts, including certain interests vested and contingent of the deceased. As to this, the asset—that is, the property—belonging to the deceased at the time of his death was a New South Wales chose in action (see *Lord Sudeley* v. *Attorney-General* (1); *In re Smyth*; *Leach* v. *Leach* (2),

(1) (1897) A.C. 11. (2) (1898) 1 Ch. 89.

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

Higgins J.

and *Attorney-General* v. *Johnson* (1)). The Commissioner should succeed as to this.

(5) *The Gift in* 1920.—The real gift to the donee was, as I regard the matter, a passage ticket to America and £91. Recipient, ticket and money, all left Australia, and have not, so far as appears, ever returned. For reasons already fully stated, this transaction does not fall within sub-sec. 2 (b) of sec. 102. On this, the appeal fails.

HIGGINS J. Appeal by way of special case from an assessment made by the New South Wales Commissioner of Stamp Duties as to the death duty in the estate of Walter Oswald Watt.—The Full Supreme Court has decided in favour of the appellant on five points; and the Commissioner now appeals to this Court from that decision.

I. As to the shares, certificates and cash received by the executor of the testator in respect of the wool from Goonal and Llanillo (the surplus profits):—

It is unnecessary for me to restate the facts which appear so clearly in the judgment of *Ferguson* J., or the legal position resulting therefrom as appearing in the judgment of this Court as affirmed by the Privy Council in *John Cooke & Co. Pty. Ltd.* v. *Commonwealth* (2). As to these surplus profits "there was no contract by the Imperial Government with the wool-owners of any kind"; and "the distribution of the moneys . . . had been left by the Commonwealth . . . to the wisdom, fairness and discretion of the Central Wool Committee."

I concur with the Full Supreme Court in the view that these surplus profits must be treated as a gift made after the death of the testator, 21st May 1921. The position is as if there were a gift of assets to the firms, persons and companies nominated by the Committee. At the date of the death, the firms in which the testator was a partner neither owned any of these assets nor had they any valid claim enforceable at law or in equity with regard thereto. I also think that, by virtue of sec. 105 (2) of the *Stamp Duties Act*, the value of the property included in the dutiable estate is to be estimated as at the date of the death. It is true that sec. 105 (2) is enacted "subject to the preceding section" (sec. 104); but sec.

(1) (1907) 2 K.B., at p. 895. (2) (1922) 31 C.L.R. 394; (1924) 34 C.L.R. 269.

104 does not deal with value ; it deals with the assets to be included in the dutiable estate. Sec. 104 adds to the dutiable estate as defined in secs. 102 and 103 any income due or accruing due or payable in respect of the estate after the death and before the grant of probate. I may call these accretions to *income* before probate, as the section goes on to add to the dutiable estate " all accretions to the *capital* thereof including the progeny of live-stock after the death " (before probate). I regard the word " capital " as contrasted in the section with " income " and to have the same effect as if the word " corpus " were used ; and I take " accretions " to mean concrete accessions or additions to the corpus coming organically (if that is the correct word—not by mere gift) before probate. The word " accretions " would include an increase of property by the formation of alluvium, or the increase of a legacy by lapse ; and many other things—as well as include the progeny of sheep (which is expressly included by sec. 104).

On the question of gift, however, it has seemed to me that sufficient attention has not been given in the argument to the deed of 1st April 1921—before the death of the testator Watt. The case states that an agreement was made on 1st April 1921 between the Commonwealth Government and the Company (" Bawra ") ; and by clause 1 the Government agreed to transfer and make over to the Company all the rights of the Government under the arrangement with the British Government to the intent that the Company shall be entitled to the half share of the Commonwealth Government. This agreement seems intended to vest in the Company the equitable right to receive the half share. But the Company was not to take the half share beneficially ; for, by clause 5, the Company agrees to issue the shares, certificates and cash (representing the half share in the surplus profits) to the Commonwealth Government or to such companies, firms and persons as the Central Wool Committee on behalf of the Government might nominate. The Central Wool Committee did not nominate until 12th July 1921, after the death ; and until the Committee nominated there was no appropriation of the surplus profits to any objects of the gift. For a complete and enforceable trust in such a case, the objects of the gift had yet to be ascertained. Taking it now that the right to receive the half

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

Higgins J.

share was vested in the Company as from 1st April 1921, the memorandum and articles of the Company have to be examined to see whether the Company has any duty to distribute to defined objects. There are provisions in the articles allowing distribution of assets among shareholders *in specie*; but the names of the shareholders are not given, and the Committee is not, so far as I can find, under a duty to nominate to shareholders only. Who had the beneficial interest in the half share before nomination? I have had doubt whether the two firms had not, before the death, a right enforceable in equity against the Company and the Committee, but liable to be divested by the nomination. But the point has not been argued; and, inasmuch as it is not necessary to decide it in my view of the case, I treat the nomination by the Committee as being essential, notwithstanding the deed of 1st April 1921, to the creation of the trust of the half share.

But the matter does not end here. The nomination was made by the Committee on 12th July (par. 5 (*k*)); and the persons, firms and companies nominated appeared in a list enclosed with the letter of nomination (par. 5 (*b*)). The general scheme adopted in compiling the list was (as stated in par. 5 (*m*)) to allot shares, cash and priority certificates proportionally amongst some suppliers of wool in proportion to the amount of wool supplied by them in the seasons 1916-17, 1917-18, 1918-19 and 1919-20; and, amongst others, suppliers of wool in proportion to the amount of wool supplied by these latter suppliers in the seasons 1916-17 and 1917-18. Shares, cash and priority certificates were accordingly issued on 30th July 1921 by the Wool Committee to Gilchrist, Watt & Co. of Sydney "*as agents for the two station partnerships*"—that is to say, as agents for the two partnerships of Goonal and Llanillo which the testator Watt carried on in partnership with others (pars. 2, 3 and 4). It appears that the name of this firm of agents, Gilchrist, Watt & Co., appeared in the list of nominations, and that on the same date this firm was notified (par. 5 (*q*)), and that this same firm received the shares, cash and priority certificates for the said two partnerships of Goonal and Llanillo, "calculated proportionally to the wool clips of the said stations of the said partnerships" (par. 5 (*r*)).

It is clear that Gilchrist, Watt & Co. received these shares, cash

and certificates as agents and on trust for the partnerships; and it is surely clear also that, although, the testator being dead, the surviving partners would be entitled to receive these assets, they would be bound to account to the executors of the testator in respect thereof—would be bound, in adjusting final accounts with the executors of the testator, to treat these assets as assets of the firm as it existed during his life. These assets were attributable to the operations of the firm during his life; the benefit of the gift was obviously not meant for the surviving partners, but for the firm as a whole; and the surviving partners have no right to claim the assets under such circumstances for themselves only. There is a trust for all the members of the late partnership. There is nothing in the case as stated to show that the surviving partners dispute this position; but the Trustee Company, as executor of the deceased partner, claims that the shares, cash and certificates which have been apportioned (by the Commissioner?) to the deceased do not form part of his dutiable estate (par. 12). Question 1 (par. 32 (a) of special case), as asked, speaks of the shares, cash and priority certificates as "*received* by the Trustee Company as executor of the will and codicil of the deceased in respect of the said wool . . . from Goonal and Llanillo to the extent of the deceased's share therein as a partner." The interest of the deceased in the partnership is increased by reason of the gift of these assets to the partnership; but it is urged that the value of that interest as at the death is not to be taken into consideration in assessing the dutiable estate, although the dutiable estate includes "*all* property of the deceased which is situate in New South Wales at his death" (*Stamp Duties Act* 1920, sec. 102, and secs. 101, 105).

I am wholly unable to understand why this enforceable interest of the testator existing at his death, his right to share in the assets of the firm on final accounting and distribution, should not be treated as part of his New South Wales estate at his death, and, for the purpose of the Stamp Duties Acts, valued as at his death with all its chances and prospects, and the value included in his dutiable estate. If the testator's interest were sold on the day of his death, the purchaser would naturally allow the prospects as to the amount of that interest to influence his price. If tenders were called for

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

Higgins J.

the interest of the deceased, the persons tendering would take into account the chances in favour of the surplus profits being brought into the firm's account, as well as the prospect that the payment of the testator's final share would not be an immediate payment. The tender for the interest of the testator in such a case would be influenced in the same fashion as a bid for shares on the Stock Exchange. The death duty has to be assessed and paid on the "final balance" of the estate (sec. 101 (a)); and the final balance is to be computed as being the "total *value*" of the dutiable estate (sec. 105 (1)). The applicant for probate has to lodge with his application an affidavit of *value* (sec. 117 (1)); and he has to furnish the Commissioner with valuations of competent valuers, as required, to enable the Commissioner to ascertain all the property liable to death duty "and the value thereof."

"The value of a thing is just as much as it will bring"; and, in my opinion, the interest of the testator in each of the two partnerships has to be brought into the list of dutiable estate of the testator; and, in ascertaining the value of that interest, the problem is to find what the interest would fetch at the death, not excluding from consideration any probability or possibility of an increase in the amount coming to the testator's estate from each firm, and of an increase in the assets coming to the firm in respect of the surplus profits.

Some comment has been made on the omission of the deeds of partnership from the special case stated by the Commissioner. But it is stated in the case that the two stations, Goonal and Llanillo, were the properties of the partnerships carrying on the same; and that the share of the deceased in the Goonal partnership was one-sixth, and in the Llanillo partnership was one-fourth. These proportions of one-sixth and one-fourth apply prima facie to capital as well as income; and, in the absence of any statement of any peculiar provision that would negative the presumption, it must be presumed that the testator's estate has a right to share in the ultimate residue of assets in these proportions in the final accounting as between partners (*Partnership Act* 1892, sec. 44).

I presume that there can be no doubt that the surviving partners would have to account to the executors of the deceased partner for

the benefit accruing from this gift to the part. (That it was a gift to the partnership which included the testator appears from pars. 2, 3 and 4 of the case stated, apart from the correspondence.) The words of the New South Wales *Partnership Act* 1892 are copied from the English *Partnership Act* 1890; and under sec. 29 "(II.) Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or for any use by him of the partnership property, name, or business connection. (II.) This section applies also to transactions undertaken after a partnership has been dissolved by the death of a partner, and before the affairs thereof have been completely wound up, either by any surviving partner or by the representatives of the deceased partner." Under sec. 42 (I.) when any member of a firm dies, and the surviving partners carry on the business of the firm without any final settlement of accounts as between the firm and the deceased or his estate, then, in the absence of any agreement to the contrary, the deceased or his estate is entitled to such a share of the profits made since the dissolution as the Court may find to be attributable to the use of his share of the partnership assets. Under sec. 24 the interests of partners in the partnership property and their rights and duties in relation to the partnership shall be determined, subject to any agreement expressed or implied between the partners, by certain rules; and the first rule is that "all the partners are entitled to share equally in the capital and profits of the business." Under sec. 31 (II.), in case of a dissolution of partnership any assignee of a portion is entitled to receive the share of the partnership assets to which the assignor is entitled as between himself and the other partners, and for the purpose of ascertaining that share, to an account as from the date of dissolution; and under sec. 33 (I.) (subject to any agreement) any partnership is dissolved as regards all the partners by the death of any partner. Under sec. 43, subject to any agreement between the partners, the amount due from surviving partners to the representatives of a deceased partner in respect of the deceased partner's share, is a debt accruing at the date of the dissolution or death; and under sec. 44 in settling accounts between the partners after a dissolution of partnership the assets are to be applied (after payment of liabilities,

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

Higgins J.

advances by partners and capital) in dividing the ultimate residue among the partners in the proportion in which profits are divisible.

My view may be summarized thus, as to Goonal (e.g.): The death duty is imposed on the value of the final balance of the dutiable estate of the deceased at his death; that dutiable estate includes as an asset the interest of the deceased in the partnership of Goonal; the interest of the deceased is the sum payable to him on the final adjustment of the partnership accounts between the deceased and the surviving partners, after satisfaction of all external and internal liabilities of the partnership; in the final adjustment the shares, cash and certificates given by the Government for Goonal must be treated as an asset of the partnership (not of the surviving partners only); and the value of the interest has to be ascertained by finding, as nearly as possible, what a purchaser of the whole interest of the deceased knowing all the circumstances, would be likely to give for it as at the date of the death.

A direct answer Yes to question 1, as it is framed, would seem to sanction the error of supposing that the Government gave any of the shares, &c., to the estate of the deceased; whereas a direct No would seem to sanction the error of supposing that this great asset of the deceased is not to be treated as a dutiable asset at all (see par 32 (a) of special case). The question implies, however, that the executor has "received" certain shares, &c., as representing part (at least) of the deceased's interest in the partnership; and the question though imperfectly stated, can be substantially answered so as to fit both the law and the facts.

II. As to the shares, certificates and cash received by the executor of the testator in respect of the wool from Howlong:—

The case as to Howlong is much simpler, inasmuch as the testator was sole owner. If we accept the position that, as between the testator on one side and the Company (or the Commonwealth Government) on the other, these assets were a gift to the testator, still, all the testator's assets, including Howlong and what comes to him in respect of Howlong, have to be valued as at his death; and in assessing the value the probabilities and possibilities incident to the ownership of Howlong (and to the sale of the wool to the British Government) are not to be excluded from the computation.

There are two keys to the position—as to the partnerships and as to Howlong: (1) that the duty is imposed on the *value* of the dutiable estate (sec. 105 (1)), and (2), that in computing the value of these parts of the estate any probability of enhancement of value in the eyes of purchasers must not be excluded. The surviving partners do not appropriate all the benefit of the gift to the partnerships; the Trustee Company does not appropriate the benefit of the gift to the testator as owner of Howlong. The true position is somewhat obscured by the form of question 1 (par. 32 (a) of special case), which is pointed to specific shares, cash and certificates instead of to the interest of the testator at his death—his chose in action as against the surviving partners and his right as to Howlong.

III. As to the property the subject of the marriage settlement of 1902:—

So far as regards sec. 102 (2) (a), it is my opinion that the property included in the marriage settlement (the property had all belonged to the testator) is excluded from the dutiable estate because the testator surrendered his life interest by the new settlement of 1913; and, under the proviso to the sub-section, the property deemed to be included in the estate is to be the property which at the time of the death is subject to the trust to take effect after the settlor's death. I concur with *Ferguson* J. as to this sub-section, absolutely.

So far as regards sec. 102 (2) (c), the matter is not so easy. There is no such proviso; but probably the form of words did not make the proviso necessary. The form of words used excludes this property as the facts stood at the death: "Any property passing under any settlement . . . made by the deceased . . . by which an interest in or benefit out of or connected with that property, or in the proceeds of the sale thereof, *is reserved* . . . to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person." I think that on the surrender of the testator's life interest in 1913 the settled property *ceased* to be "reserved . . . to the deceased for his life," &c., and that the description in the sub-section ceased to be applicable to his property. There is nothing in the sub-section or in the context to the effect that if the

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

Higgins J.

settlor completely lost his interest in the property it was still to be regarded as part of his dutiable estate. The broad intention of the numerous clauses of sec. 102 (2) appears to be that if at the time of his death the testator retains any interest in or control or possession or enjoyment of property which he has assumed to dispose of, or if he has retained such interest, &c., until very shortly before his death, that property is to form part of his dutiable estate for taxation. In my opinion, sec. 102 (2) (c) does not make the property in the marriage settlement dutiable.

But sec. 102 (2) (g) is very puzzling and anomalous. Construing it in the most favourable way as referring only to property which had once belonged to the testator, and in which he " or any other person " *had* an interest limited to cease on the death of the testator, we find that although the interest had been surrendered or disposed of the property is dutiable, unless (1) " such disposition was bona fide made or effected *within* three years before the death of the deceased." One would have thought that *beyond* three years would have been more appropriate. We cannot treat the word " unless " as a mistake for " if " ; for " unless " is evidently the appropriate word for sec. 102 (2) (g) (ii.). We are reduced, I think, to the dilemma of treating the word " within " as a mistake for " without " or " beyond," or of treating the provision as unintelligible ; and in either case the provision does not make this property dutiable. This is a taxing Act and it is not to be strained in favour of the State.

IV. As for the British war bonds (for £28,500) included in the funds settled by the new settlement of 30th October 1913 :—

The executor does not dispute that the other funds in the new settlement are dutiable, because the testator had an interest under the settlement. But he says that in the eyes of the law these bonds were properly situate in England at the time of the death. The bonds were then in England, and the interest thereon was being paid by the executor's instructions to the beneficiary. But even assuming (what is not clear) that the Act applies only to New South Wales property, counsel for the Commissioner has, I think, succeeded in showing that this property must be treated as situate in New South

Wales ; for the beneficiary has to look to a New South Wales trustee to carry out the trust (*Favorke* v. *Steinkopff* (1)).

In my opinion the British war bonds must be taken into account in estimating the value of the dutiable estate.

V. On the facts as stated in par. 27 of the case (we have power to draw inferences) it is my opinion that the £200 was a gift made by the testator within three years before his death within sec. 102 (2) (b) : " any property comprised in *any gift* made by the deceased within three years before his death, and whether made before or after the passing of this Act, including any *money* paid . . . within such period in pursuance of a covenant or agreement made at any time by him without full consideration in money or money's-worth." The sub-section expressly includes money as well as other property. I do not feel justified in saying that the sub-section applies only to property in existence at the death—that it does not apply to spent money. The result must be absurd, of course, if all gifts of money made within three years are to be treated as dutiable ; but it is for the legislators to make the laws, not for us to whittle away the meaning of plain words. In my opinion the £200 must be taken into account.

RICH J. I agree with the conclusion arrived at by the Supreme Court with regard to all the questions except the settlement which concerns the British war bonds. The settlement in question is a New South Wales settlement. It was executed by the deceased who was domiciled in New South Wales. The Trustee Company under whose legal control the trust property is, is a company registered in New South Wales. The proper forum for the administration of the trusts relating to the property is a New South Wales Court. These circumstances bring the deceased's interest in the property within the purview of the *Stamp Duties Act* 1920. The principles which govern this case are discussed as to wills in *Lord Sudeley* v. *Attorney-General* (2), and as to settlements in *Attorney-General* v. *Jewish Colonization Association* (3).

(1) (1922) 1 Ch. 174.
(2) (1897) A.C. 11.
(3) (1901) 1 K.B.. 123.

H. C. OF A. 1926.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. PERPETUAL TRUSTEE CO. LTD. (WATT'S CASE.)

Starke J.

STARKE J. The appellant conceded during the argument that no part of the profits made by the Central Wool Committee in administering the wool scheme referred to in the *Skin Wool Case* (1) formed any part of the estate of the deceased. We have not, in this case, to consider whether that concession was right or wrong; but the appellant insisted that the arrangements made with the British Australian Wool Realisation Association, or " Bawra " as it is called, for taking over certain assets and the profits from the wool scheme in the hands of the Commonwealth or the Central Wool Committee constituted a declaration of trust in favour of woolgrowers of whom the deceased was one.

This trust, it was argued, was constituted on 19th April or 11th May 1921. On 19th April the Central Wool Committee passed a resolution that all assets belonging to Australian woolgrowers, in connection with the contracts for the sale of their wool to the British Government or the proceeds to which they were entitled, be transferred or handed over as on 1st January 1921 to Bawra, and that, in accordance with an agreement dated 1st April 1921 made between the Commonwealth and Bawra, the Association be requested to issue in the names of such companies, firms and persons as the Committee nominated certain shares and wool certificates in the proportion to which they were respectively entitled in accordance with the books of the Committee. These resolutions were communicated to Bawra on 11th May 1921 and ultimately acted upon.

The deceased died on 21st May 1921, and I agree with the Supreme Court that at that date no trust was created in his favour by these arrangements. The distribution of the shares and wool certificates in respect of the profits depended on that date as much upon the wisdom and discretion of the Central Wool Committee as had the distribution of the profits themselves.

On the question raised as to the British war bonds the Supreme Court apparently acted upon the rule that the locality of a specialty debt is the place where the specialty is found at the time of the creditor's death (*Toronto General Trusts Corporation* v. *The King* (2)). That view, however, leaves out of sight the fact that the deceased

(1) (1922) 31 C.L.R. 394; (1924) 34 C.L.R. 269.
(2) (1919) A.C. 679, at p. 683.

was not entitled to the war bonds but had a beneficial interest in a trust fund created under a settlement made in New South Wales and with a trustee there resident. It is true that the trust fund was invested, in part at all events, in the war bonds, but the deceased's right was to go to the trustees and ask them to discharge their duties under the settlement. The right or interest of the deceased in this fund was situate, in my opinion, in New South Wales (*Favorke* v. *Steinkopff* (1)).

On the other matters raised by the case I assent to the opinion pronounced by *Ferguson* J. in the Supreme Court.

Appeal allowed. Order appealed from varied by directing that question 3 be answered in the affirmative.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor for the respondent, *E. S. Dunhill.*

B. L.

(1) (1922) 1 Ch., at pp. 177-178.