[HIGH COURT OF AUSTRALIA.]

VICARS AND OTHERS . . . . . APPELLANTS;

AND

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *July* 26, 27; *Aug.* 14, 15.

MELBOURNE, *Oct.* 11.

Latham C.J., Rich, Starke, Dixon and Williams JJ.

Stamp Duties—Probate duty—Gift within three years before death—Settlement on trustee—Payment outside New South Wales—Transfer of shares in New South Wales company—Situs of shares and money—Stamp Duties Act 1920-1940 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 13 *of* 1931—*No.* 50 *of* 1940), *ss.* 100, 102 (2A), (2) (*b*), (2) (*ba*)—*Interpretation Act of* 1897 (*N.S.W.*) (*No.* 4 *of* 1897), *s.* 17.

In May 1939, V., at Canberra, executed a deed of settlement under which he paid to a New South Wales trustee company at Canberra to be held upon certain trusts for specified beneficiaries the sum of £40,100. The payment was by a cheque drawn upon a new bank account opened at Canberra by the transfer of that amount from a Sydney bank for the purpose of enabling the trust to be created at Canberra. The trustee was empowered by the trust deed to invest, *inter alia*, in the purchase of shares in any company. The trustee, although under no legal obligation to do so but as intended by V., applied the trust moneys to the purchase from V. of shares in a New South Wales proprietary company in which V. was largely interested, £100 being paid for stamp duty and £40,000 to V., which he deposited in the Canberra bank. V. thereupon closed his Canberra bank account by transferring the amount standing to his credit there to the Sydney bank from which the moneys had originally been drawn. V. died in October 1940.

Held, by the whole Court, that the sum of £40,000 did not form part of V.'s dutiable estate under the *Stamp Duties Act* 1920-1939 (N.S.W.).

Held, by *Rich*, *Starke*, *Dixon* and *Williams* JJ. (*Latham* C.J. dissenting), that the value of the shares purchased by the trustee did, by the operation of s. 102 (2) (*b*) of that Act, form part of V.'s dutiable estate.

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In re Payne's Declaration, (1939) Ch. 865; (1940) Ch. 576, and *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (*Teare's Case*), (1941) 65 C.L.R. 134, discussed.

In the Estate of W. O. Watt (*Deceased*), (1925) 25 S.R. (N.S.W.) 467; 42 W.N. 191; (1926) 38 C.L.R. 12, discussed and applied.

Decision of the Supreme Court of New South Wales (Full Court): *In the Estate of William Vicars* (*Deceased*), (1944) 45 S.R. (N.S.W.) 85; 62 W.N. 28, in part varied and otherwise affirmed.

APPEAL from the Supreme Court of New South Wales.

At the request of the executors of the will of Sir William Vicars deceased, hereinafter referred to as the deceased, a case was stated by the Commissioner of Stamp Duties (N.S.W.) for the opinion of the Supreme Court of New South Wales pursuant to s. 124 of the *Stamp Duties Act* 1920-1940 (N.S.W.) as to whether a sum of £40,100, or, alternatively, the value of certain shares as at the death of the deceased, should be deemed part of his dutiable estate.

The case stated was substantially as follows. The deceased died on 20th October 1940 and probate of his will was granted on 7th February 1941 to Robert Vicars, John Stuart Thom and Cecil Scott Waine, the executors named therein. At all material times the deceased was domiciled in New South Wales.

On 8th May 1939 the deceased, without any consideration in money or money's worth, and not being bound so to do, paid at Canberra, Australian Capital Territory, the sum of £40,100 to Ngarita Pty. Ltd., a company incorporated in New South Wales and having its registered office at Sydney (hereinafter referred to as the company) to be held by it upon trusts for the benefit of the deceased's wife, daughter, son-in-law and grandchildren as contained in a deed of settlement dated 8th May 1939 and executed that day at Canberra by the deceased prior to the payment referred to above, and by Cecil Scott Waine on behalf of the company at Canberra after the payment. The payment was made in the following manner: On 5th May 1939 the deceased drew a cheque for the sum of £40,100 upon his account with the head office at Sydney of the Commercial Banking Co. of Sydney Ltd. and paid it to the credit of an account in his own name which he opened for the purpose with the branch of that Bank at Canberra. On 8th May 1939 at Canberra the deceased drew a cheque for £40,100 upon the account at Canberra and paid it to the credit of the company's account at the same branch. The trust deed has always been in Canberra. The two accounts at Canberra were closed during the lifetime of the deceased.

At a meeting of the board of directors of the company held on 6th May 1939, at which the deceased was present throughout, it was noted that the deceased was desirous of making a settlement of £40,100, being in terms of a draft deed substantially similar to the deed executed by the deceased on 8th May 1939, and of appointing the company trustee thereof. It was resolved that the company accept the trust and that Cecil Scott Waine be authorized to execute the deed at Canberra on behalf of the company and that the deed when executed be deposited with a bank at Canberra. It was noted at the same meeting that in connection with the settlement the deceased had offered to make available to the company 45,000 fully paid "A" shares and 5,000 fully paid "B" shares in John Vicars & Co. Pty. Ltd. for the sum of £40,000, and it was then resolved that as soon as the deceased as settlor had made available to the company the sum of £40,100, the sum of £40,000 be invested in the purchase from the deceased of the shares, payment therefor to be made at Canberra. It was then resolved that Scott Waine be authorized to accept transfers from the deceased of the shares and to sign the transfers on behalf of the company. The deceased was at that time the registered holder of the shares and the shares at all material times were on the share register in Sydney of John Vicars & Co. Pty. Ltd., a company incorporated in New South Wales.

On 8th May 1939 the deceased accordingly at Canberra transferred the shares to the company and the company paid to the deceased at Canberra the sum of £40,000, being portion of the above-mentioned sum of £40,100, by its cheque on its account at the said branch which the deceased paid to the credit of his account at Canberra and the shares were accordingly transferred by the deceased to the company by transfers executed at Canberra by the deceased and Waine on behalf of the company. The deceased thereupon closed his account at Canberra by transferring the credit to his account with the head office of the bank at Sydney, where it was applied towards satisfying the overdraft created by the drawing of the above-mentioned cheque for £40,100 on 5th May 1939. The balance of the sum of £40,100, namely £100, was applied by the company in paying stamp duty on the transfers to it of the shares referred to above.

On 18th May 1939, at a meeting of the directors of the company, at which the deceased and Scott Waine were present, Scott Waine reported what had happened at Canberra as set forth above. He produced to the meeting a correct and certified copy of the deed of settlement and explained that certain amendments had been made to it at Canberra. It was thereupon resolved that the trusts set out in the deed of settlement with such amendments or alterations

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as were indicated by the certified copy and the acceptance and execution by Scott Waine on behalf of the company, be confirmed.

Thereafter the company became the registered holder of the shares and has ever since continued to hold, and at the date of the stated case still held, them upon the trusts set out in the deed of settlement.

The Commissioner of Stamp Duties (N.S.W.) claimed that for the purposes of the assessment and payment of death duty the estate of the deceased should be deemed to include the sum of £40,100, or, alternatively, the value of the shares as at the death of the deceased.

The final balance of the estate of the deceased in accordance with the first of the Commissioner's claims was £140,955 and the death duty payable in respect thereof was assessed by the Commissioner at £37,973 18s. 8d.

The executors claimed that neither the sum of £40,100, nor the value of the shares, should be deemed to be included in the deceased's estate.

The questions stated for the opinion of the Supreme Court were :—

1. Is the said sum of £40,100 or any, and, if so, what part thereof, to be deemed part of the dutiable estate of the deceased ?

2. Alternatively, is the value of the said shares as at the death of the deceased to be deemed part of his dutiable estate ?

3. How should the costs of this case be borne and paid ?

Upon issues directed by the Supreme Court during the course of the hearing, *Davidson* J. found the following facts :—

1. Early in 1939 the deceased was advised that it would be a wise precaution to settle or dispose of the whole or portion of his estate in order to lessen liability to stamp duty.

2. The deceased eventually decided to settle portion of his estate to the amount of £40,000 instead of a sum of £50,000 as had been suggested.

3. Two proposals were considered, namely (*a*) forming a company at Canberra, which would be equipped with the necessary assets so that its shares might be made the subject of settlement ; and (*b*) paying in Canberra the sum of £40,000 in cash to a company which would purchase assets to be held upon trust according to the terms of settlement.

4. The latter of these proposals was accepted.

5. The deceased was desirous that the assets which should be purchased should be his shares in John Vicars & Co. Pty. Ltd.

6. Before going to Canberra, and at the suggestion of Scott Waine, an assessment was made of the number of shares in John Vicars & Co. Pty. Ltd. that would represent in value the sum of

£40,000. These shares were 45,000 fully paid "A" shares, and 5,000 fully paid "B" shares.

7. At a subsequent meeting the deceased paid at Canberra cash to the amount of £40,100 to the company upon the terms of the deed of settlement in the expectation that the company would apply that money in the purchase of £40,000 in value of his shares in John Vicars & Co. Pty. Ltd., to hold upon the trusts set out in the deed.

8. This expectation was fortified by the fact that an arrangement had previously been made with authorized representatives of the company that it would accept the money and thereafter purchase the shares.

9. There was no binding legal agreement that this course would be adopted by the company.

10. At the meeting duly held at Canberra, the sum of £40,100 was paid to the company and it did purchase the shares.

11. The money paid for the shares represented their true market value. Other shares in John Vicars & Co. Pty. Ltd., but not owned by the deceased, were available to be purchased, if desired.

12. The authorized representatives of the company intended to apply the £40,100 in the purchase of the deceased's shares and in payment of the necessary stamp duty upon the transfer in accordance with the previous arrangement that had been made.

13. There was no concealment of facts in relation to the transaction.

The Supreme Court (*Davidson* and *Halse Rogers* JJ., *Jordan* C.J. dissenting as to Question 1) answered the questions as follows:— 1. Yes, the sum of £40,100; 2. Yes; 3. The costs of the appeal, including the costs of the issues therein, to be paid by the appellants: *In the Estate of William Vicars (Deceased)* (1).

From that decision the executors appealed to the High Court.

Relevant statutory provisions are set forth in the judgments hereunder.

Weston K.C. (with him *McLelland*), for the appellants. The gist of the decision in *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (2) was that, in its form at that time, s. 102 of the *Stamp Duties Act* 1920 (N.S.W.) only dealt with property situate in New South Wales at the time of death. Sub-paragraph ba inserted in s. 102 (2) in 1931 appeared emphatically to accept the decision in *Watt's Case* (2) which, of course, in principle, was not restricted to sub-par. b but referred to all the various

(1) (1944) 45 S.R. (N.S.W.) 85; 62 W.N. 28.

(2) (1926) 38 C.L.R. 12.

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heads of notional property. Section 102 (2) (ba) included "the value (to be ascertained as at the date of the gift) of any property . . . comprised in the gift." In effect, it said it mattered nothing that the money was spent, regard was had to the amount of money given at the date of the gift. Sub-section 2A of s. 102, introduced by Act No. 30 of 1939, is an exhaustive code as to when the estate situate outside New South Wales of a deceased person domiciled in New South Wales shall become liable to duty under the notional provisions. It restricts the liability to property situate outside New South Wales at the date of death and to that existing there at that date. The view, broadly expressed on the facts of the present case, is that the money should be deemed, in s. 102 (2) (b), to be a gift of money and that that money ceased to exist almost instanter. It was not in existence at the date of death and therefore duty was not payable. The sum of £40,000 was a gift of the money to the trustee or the beneficiaries. It was a gift from any point of view followed by a sale of shares. Section 102 (2A) applies *mutatis mutandis* to all the sub-paragraphs in s. 102 (2). Where the critical date is the date of the transaction, s. 102 (2A) (c) applies to the notional situation at the date of the transaction. It applies to all transactions. Section 102 (2A) was intended to be a complete code. The interpretation placed upon s. 102 (2A) by *Davidson* J. in the Court below is correct. Section 102 (2A) has the primary operation of an extension of s. 102 (2) generally. The appellants therefore get the benefit of the amendment to s. 102 (2) (b) by s. 102 (2) (ba) with a mandate that money shall be regarded as money and not as converted into shares: See *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1). There was some extension by s. 102 (2) (ba) but then, having been so extended, the legislature cut down the liability to cases where property was still situate outside New South Wales at the date of death. Section 102 (2A) is to apply to persons domiciled in New South Wales provided only that the property the subject of the transaction is in existence at the date of death and is outside New South Wales. There cannot be any controversy that there took place at Canberra (*a*) the creation of a trust, (*b*) the payment of moneys to be held upon the terms of a trust, and (*c*) in every sense of the expression, a sale by the deceased of shares to the trust company. The shares were, in law and in fact, sold by the deceased and not given by him to the trust company or to the beneficiaries: See *Inland Revenue Commissioners* v. *Duke of Westminster* (2). It was a settlement of money and a purchase by the trustee in the open market of the shares. The same transaction cannot very well

(1) (1941) 65 C.L.R. 134.

(2) (1936) A.C. 1.

constitute a gift and a sale of the same property between the same parties. Even if there had not been a sale of shares, s. 102 (2) (ba) prevents the Court treating the transaction as a gift of shares. It prevents the gift being treated as a gift of shares or as a gift of anything except money. If s. 102 (2) (ba) applies, the Court is prevented from going one step further with the shares. Section 102 (2A) eliminates the money as dutiable because it did not continue to exist as money at the date of death. Section 102 (2) (ba) was applicable to gifts of money from 1931 onwards and, unquestionably, was so applicable from the time of the 1939 amendment onwards. The decision in *Watt's Case* (1) is not applicable to this case by reason, *inter alia*, of the additional matter added to s. 102 (1) (a) in 1931, although it continued to apply in respect of people who died outside New South Wales. If s. 102 (1) (a) had been enacted in 1920 in the form in which it was amended in 1931 the decision in *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (2) would have been applicable. The Court should accept the view that s. 102 (2A) brought this matter into line with the decision in *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (2) and that therefore the interim period does not concern the appellants. Section 102 (2) does not apply to transactions as to property situate outside New South Wales at the date of the transaction, if that be the relevant date, or at the date of death, if that be the relevant date. The primary view is that in 1939 s. 102 (2) did not relate to the gift of money at Canberra, it only related to the gift in 1939 if the money at Canberra continued in existence after the date of death in New South Wales. *In re Payne's Declaration*; *In re Payne*; *Poplett* v. *Attorney-General* (3) is a decision upon an entirely different Act and is utterly inapplicable to this case. All that was decided in *Attorney-General for Ontario* v. *National Trust Co. Ltd.* (4) and Lord *Strathcona* v. *Inland Revenue Commissioners* (5) was that there being no dispute between the parties the value was to be as at date of death.

Kitto K.C. (with him *Bridge* for *Reynolds* on military service), for the respondent. The shares are deemed to be included in the dutiable estate by virtue of s. 102 (2) (b) because :—(i) what was done during May 1939 should be viewed as a whole. There was one transaction within the meaning of par. e of the definition of " disposition of property " in s. 100. To subdivide that transaction into a gift of

(1) (1926) 38 C.L.R. 12.
(2) (1933) 49 C.L.R. 220.
(3) (1939) Ch. 865; (1940) Ch. 576.
(4) (1931) A.C. 818.
(5) (1919) Sess. Cas. 800.

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money and a sale of shares is to overlook the fact that each act done was merely a step in a concerted piece of business the object and result of which were to settle the deceased's shares; (ii) that transaction was entered into by the deceased with the intent mentioned in par. e of the definition, and was therefore a "disposition of property"; (iii) by the transaction the deceased disposed of the shares and received nothing therefor, thus the disposition of the shares was made by him "without full consideration in money or money's worth," and, accordingly, was a "gift" of the shares; (iv) the shares were therefore "property comprised in a gift made by the deceased within three years before his death"; and (v) the shares were situate in New South Wales at all material times. Alternatively, the money paid by the deceased to the company by means of his cheque is deemed to be included in his dutiable estate by virtue of s. 102 (2) (b), because (i) the payment was a gift; (ii) the fact that the payment was made at Canberra is irrelevant; (iii) if the correct view as to the situation of the money at the time of the gift is that it was at Canberra, that fact is irrelevant, because the Act does not expressly or impliedly make the local situation of the property at the date of gift material to the question of dutiability. The only date at which the local situation is material to that question is the date of death (*Watt's Case* (1)); (iv) but in any case the money given was in New South Wales at the date of gift, because there was no effectual gift of money by the deceased otherwise than by incurring a liability to the bank at the moment of, and by reason of, its honouring his cheque; the subtraction from his estate consisted of the incurring by him of a liability to the bank for money lent, and that liability, like any simple contract debt, was from its inception situate where the debtor resided, namely New South Wales; (v) the requirement of *Watt's Case* (2) was satisfied, because the money was in New South Wales at the death of the deceased, not in its original form, but in a concrete identifiable form (*In the Estate of W. O. Watt (Deceased)* (3), *Re Grice* (4), *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (5), *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Saxton's Case)* (6)). Unless it be conceded that the "property comprised in the gift" means the property which at the death of the deceased is the property originally given, either in its original form or in some other identifiable form, *Saxton's Case* (6) was wrongly decided, and there is no liability to duty in any case of a gift of

(1) (1926) 38 C.L.R., at p. 33.
(2) (1926) 38 C.L.R. 12.
(3) (1925) 25 S.R. (N.S.W.) 467, at pp. 492, 502.
(4) (1937) V.L.R. 356.
(5) (1941) 65 C.L.R., at pp. 141, 143, 148.
(6) (1929) 43 C.L.R. 247.

money, unless the money was in the form of notes or coins which remain in the donee's hands at the death of the donor. The principle of traceability is impliedly recognized by the 1939 addendum to s. 102 (2) (b). That addendum cannot be explained on any other footing than that the legislature (i) assumed, in accordance with the suggestion made in *Watt's Case* (1) and acted upon in *Saxton's Case* (2), that money given would be caught by sub-par. b if it existed in New South Wales at the death in identifiable form, and (ii) desired that the money should be brought into the estate, not at the value as at death in the form in which it then existed, but at its original amount. The clue is to be found in the contrast between "money" and "the actual amount of the money" in the addendum. The addendum could not have been enacted in order to catch money given which could not be found in New South Wales at the death in any form, because that had been done in 1931 by the enactment of sub-par. ba. And the addendum served no purpose at all if sub-par. b applies to money only when it is in New South Wales at the death in its original form.

Alternatively, the value of the money paid by the deceased to the company is deemed to be included in his dutiable estate by virtue of s. 102 (2) (ba). If the principle of traceability in regard to sub-par. b is denied, and the money is not included in the estate under sub-par. b, the language of sub-par. ba exactly applies. No doubt sub-par. ba has to be read as subject to some limitation in order to render it constitutionally valid, but the implied limitation is not that the property shall have been in New South Wales at the time of gift. The whole scheme of the section and of the later sections of the Act requires that, for the purposes of inclusion in the dutiable estate, locality is to be considered in relation to one point of time only, namely, the death of the deceased. The limitation to be implied is indicated by amendments made to the Act simultaneously with the enactment of sub-par. ba, namely the amendment to s. 102 (1) (a) and s. 144, and it is that the deceased must have been domiciled in New South Wales at his death. Sub-paragraph ba was enacted to overcome both requirements of *Watt's Case* (1), namely (i) that the property must be in existence at the death, and (ii) that it must be in New South Wales at the death. This case is not affected by s. 102 (2A). That sub-section according to its express terms was intended to extend the operation of those sub-paragraphs of s. 102 (2) which bring into the estate "property"; it does not apply to sub-par. ba which brings into the estate "the value of property." Sub-paragraph ba, having been enacted to overcome *Watt's Case* (1),

(1) (1926) 38 C.L.R. 12. (2) (1929) 43 C.L.R. 247.

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already applied in the case where property was not in existence at the death, and s. 102 (2A) in terms applies only where property is in existence at the death.

Alternatively, the equitable interests created by the settlement are deemed to be included in the dutiable estate by virtue of s. 102 (2) (b), because (i) the " gift " was the " creation of a trust," (s. 100) ; (ii) the equitable interests of the beneficiaries were " the property comprised in the gift " (*Perpetual Trustee Co. (Ltd.)* v. *Commissioner of Stamp Duties (N.S.W.)* (1), cf. *In re Payne* ; *Poplett* v. *Attorney-General* (2)) ; (iii) those equitable interests were always situate in New South Wales, that being the place of residence of the trustee (*Watt's Case* (3)) ; (iv) even if they were to be regarded as situate where the trust property was situate for the time being, that property was in New South Wales at the death.

There was a gift of beneficial interest (*MacCormick* v. *Federal Commissioner of Taxation* (4)). The property comprised in the gift was the beneficial interests of the beneficiaries under the settlement. The gift was (i) a gift of the shares, or (ii) a gift of the money, caught by s. 102 (2) (b) ; or (iii) a gift of the money, caught by s. 102 (2) (ba) ; or (iv) a gift of beneficial interests, caught by s. 102 (2) (b).

Weston K.C., in reply. The problems which arose in *Perpetual Trustee Co. (Ltd.)* v. *Commissioner of Stamp Duties (N.S.W.)* (5) were very different from the problems which arise in this case. In this type of case there is a difference between giving money and giving property (*In re Payne* (6)). Even if *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (7) and *In re Payne* (8) were otherwise applicable, the amendment to s. 102 (2) (b) by s. 102 (ba) prevents them applying because when money is given the money shall be taken to be what was given. What a donee has to get under s. 102 (2) (b) is a voluntary transaction made by the deceased. Whatever be the result, there were two transactions, both at Canberra, one voluntary and one just an ordinary commercial transaction for relevant purposes. If s. 102 (2) (ba) be not restricted to domiciled persons by implication by s. 102 (1) as amended it would not rest upon any constitutional basis and would be invalid. If the view of the Chief Justice in the Court below is correct, there was no territorial restriction

(1) (1941) 64 C.L.R. 492, at pp. 500, 505, 512 ; (1943) A.C. 425, at p. 439.
(2) (1940) Ch., at pp. 586, 587, 589.
(3) (1926) 38 C.L.R., at pp. 30, 35, 36, 44, 45.
(4) *Ante* p. 283.
(5) (1941) 64 C.L.R. 492 ; (1943) A.C. 425.
(6) (1940) Ch., at pp. 589, 596, 602-605.
(7) (1941) 65 C.L.R. 134.
(8) (1939) Ch. 865 ; (1940) Ch. 576.

in 1939. If s. 102 (2) (ba) was extended then s. 102 (2A) is not to be read literally as to property but to all the cases under sub-pars. a to l inclusive of s. 102 (2). It was held by *Isaacs* J. in *Watt's Case* (1) that the act of alienation need not be local. If that be so and s. 102 (2A) was extended independently of domicile it must have rested on the presence of property in New South Wales at the date of death. By the operation of the *Interpretation Act* of 1897 (N.S.W.) " property " in s. 102 is property in and of New South Wales. The contention made on behalf of the respondent would involve, in theory at any rate, double taxation. When there has been a notional transaction and the property has gone out of existence at the date of death the right of recoupment under s. 120 (1) from the person who has had the benefit of the settlement is lost to the administrator although he is held responsible to the Crown (*Union Trustee Co. of Australia Ltd.* v. *Maslin* (2)). *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd.* (*Saxton's Case*) (3) is in line with *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (4).

Cur. adv. vult.

Oct. 11.

The following written judgments were delivered :—

LATHAM C.J. The late Sir William Vicars on 8th May 1939 executed at Canberra a deed of settlement in favour of his wife, daughter, son-in-law and grandchildren. The trust fund constituted under the deed consisted of the sum of £40,100. The trustee was a company entitled Ngarita Pty. Ltd. which was incorporated and carried on business in New South Wales. The beneficiaries under the deed were volunteers. The trustee had power to invest the trust moneys in various ways—on mortgage of real estate in Australia, in certain Government securities, in the purchase of freehold or leasehold property, on fixed deposit, or in the purchase of shares of any company, including John Vicars & Co. Pty. Ltd. The deed was executed on behalf of Ngarita Pty. Ltd. on the same day.

The money was paid to the trustee by a cheque drawn by the deceased on the same day upon an account in the Commercial Banking Co.'s Canberra Branch, an arrangement having been made between the deceased and the bank for an overdraft which made the money available to him at Canberra. The cheque was paid into the account of Ngarita Pty. Ltd. at Canberra. The company on the same day purchased 50,000 shares in John Vicars & Co. Pty. Ltd.

(1) (1926) 38 C.L.R., at pp. 32, 33.
(2) (1940) 41 S.R. (N.S.W.) 26, at p. 30.
(3) (1929) 43 C.L.R. 247.
(4) (1941) 65 C.L.R. 134.

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from Sir William Vicars for £40,000 and held the shares upon the trusts of the settlement. John Vicars & Co. Pty. Ltd. was a company incorporated in New South Wales. The overdraft was paid off by means of the company's cheque.

A case stated by the Commissioner of Stamp Duties under s. 124 of the *Stamp Duties Act* 1920-1940 came before *Davidson* J. who made findings of fact in addition to those stated in the case, including a finding that before the deed was executed there was no binding legal agreement that the company should accept the trusts of the deed, or that it should apply the money to be paid to the company in the purchase of the shares which actually were purchased, though it was expected by the parties that this course would be pursued.

Sir William Vicars died on 20th October 1940—within three years of 8th May 1939.

It could not be expected that such transactions would leave a Commissioner of Stamp Duties unmoved. The Commissioner has claimed death duty under the *Stamp Duties Act* 1920-1940 of New South Wales, and has obtained a favourable decision, based upon varying grounds, from the Supreme Court. *Jordan* C.J. held that what was done at Canberra did not amount to a gift of the sum of £40,100 (s. 102 (2) (b)) nor did it produce the result that the value of the shares should be included in the dutiable estate (s. 102 (2) (ba)). He held that the shares themselves should be deemed to be included in the estate (s. 102 (2) (b)). *Davidson* J. held that there was a gift of £40,100 (s. 102 (2) (b) addendum), and " alternatively if so desired " that the value of the shares (as at the date of the death) should be deemed to be part of the dutiable estate. *Halse Rogers* J. held that the sum of £40,100 was given by Sir William Vicars (s. 102 (2) (b)) and that the value of the shares (as at the date of the death) should be included in the estate, and in his reasons for judgment stated also that the shares themselves should be regarded as part of the estate for the purposes of the assessment of death duty (s. 102 (2) (b)). The executors of the will of the deceased have appealed to this Court.

The *Stamp Duties Act*, s. 100, defines " gift " as meaning " any disposition of property made otherwise than by will whether with or without an instrument in writing without full consideration in money or money's worth." " Disposition of property " is defined as meaning any conveyance, transfer &c. of property, the creation of any trust, and also " (*e*) any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own estate and to increase the value of the estate of any other person." Sections 101, 101A, 101B, 101C, 101D and 101E provide for the assessment and payment of death duties at rates mentioned

in the Third to the Eighth Schedules to the Act. These sections apply different rates, according to the date of death of the deceased person, and according to whether he was domiciled in New South Wales or outside New South Wales. Each provision applies whether the deceased died in New South Wales or elsewhere. It is necessary to refer to these provisions in order to exclude the suggestion that other provisions, particularly those contained in s. 102 (2), should be limited by some implication with respect to domicile or place of death. Domicile is irrelevant for the purposes of determining dutiability under s. 102 (2), but is relevant for the purposes of determining the rate of duty when duty is payable.

Death duty is payable under all the sections mentioned upon the final balance of the estate of a deceased person as determined in accordance with the Act. The final balance is computed as being the total value of the dutiable estate after making authorized allowances—s. 105 (1). Except where otherwise expressly provided, the value of the property included in the dutiable estate is to be estimated as at the date of the death of the deceased—s. 105 (2). The latter provision shows that, unless there is some express provision to the contrary, the property included in a dutiable estate must be property in existence at the date of the death of the deceased. Unless this were the case, it would be impossible to apply s. 105 (2), requiring, as it does, an assessment of the value of property as at the date of his death. One therefore approaches the consideration of the sections which define the dutiable estate in the light of the consideration that unless there is an express provision to the contrary the dutiable estate consists of property which falls within some specific provision of the Act and which exists at the date of the death of the deceased.

Section 102 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 certain classes of property. The first class of property, referred to in sub-s. 1, consists of property which belonged to the deceased at the time of his death. It is described as " property of the deceased." Sub-section 1 (a) includes within the estate all property of the deceased which was situate in New South Wales at his death, and (by an amendment added in 1931) in addition, where the deceased was domiciled in New South Wales, all personal property of the deceased situate outside New South Wales at his death, to which any person became entitled under his will or intestacy, except certain trust property. This provision, dealing with property which the deceased owned at his death, is plainly limited to property which was in existence at his death, because it is

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referred to as either situate in New South Wales at his death, or as being personal property situate outside New South Wales at his death.

Section 102 (2) includes within the dutiable estate property which had belonged to the deceased but of which he had disposed in a particular way, or which he had so owned that upon his death another person, e.g. a joint tenant with him, derived a benefit. Such property is "notionally" regarded as part of the estate. In the case of such notional property, the legislature has not included, either originally or in 1931 (when s. 102 (1) (a) was amended in the manner already stated), any provision relating to the situation of property such as is now included in sub-s. 1 (a). The application of sub-s. 1 is relatively easy, applying as it does only to property which is in existence and which belonged to the deceased at his death. Sub-section 2, however, raises many difficulties. It relates in certain cases, particularly in par. b and par. ba, to property which had belonged to the deceased, but which he had disposed of by gift, so that it no longer belonged to him. The terms of the provisions are so general as to apply to all persons anywhere in the world, and to dispositions made anywhere in the world of property anywhere in the world, even though the person and property concerned may have no association whatever with New South Wales. The legislature of New South Wales has not unlimited powers of legislation. It can only pass laws for the peace, welfare and good government of New South Wales: *Constitution Act* 1902 (N.S.W.), s. 5; *Barcelo* v. *Electrolytic Zinc Co. of Australia Ltd.* (1); *Commissioner of Stamp Duties (N.S.W.)* v. *Millar* (2); *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (3); *Wanganui-Rangitikei Electric Power Board* v. *Australian Mutual Provident Society* (4); *Attorney-General* v. *Australian Agricultural Co.* (5). Accordingly, if the legislation is to be held to be valid, some limitation (in this case other than a limitation depending upon domicile) must be placed upon the general words of the various provisions of s. 102 (2). It is necessary to consider in each case what limitation, if any, is proper.

The Commissioner claims stamp duty in the first place under s. 102 (2) (b), which includes within the dutiable estate of a deceased person "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 . . ."

(1) (1932) 48 C.L.R. 391.
(2) (1932) 48 C.L.R. 618.
(3) (1933) 49 C.L.R., at pp. 230 et seq.
(4) (1934) 50 C.L.R. 581, at pp. 600, 601.
(5) (1934) 34 S.R. (N.S.W.) 571, at pp. 576 et seq.

This provision relates to property, that is, to something which exists as property. It cannot be applied where property which has been given has disappeared by destruction. If, however, the section were construed as applying to any property in existence which had been the subject of a gift by any person within three years of his death, wherever that property was at the time of gift or at the time of death, the legislation would be beyond the territorial competence of the legislature. In *In the Estate of W. O. Watt (Deceased)* (1), on appeal (2), this difficulty was solved by holding that, in order that property should be dutiable as part of the estate under s. 102 (2) (b), the property must be property which existed in New South Wales at the date of the death of the deceased, wherever the gift was made: See per *Isaacs* J. in *Watt's Case* (3)—" 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-s. 2 . . . you must find the 'property' in New South Wales at the essential time. The essential time is shown to be the time of death (ss. 102 (1) (*a*), 103 (2), 105 (2), 107 (1) (debts), s. 110)."

The Commissioner contends that s. 102 (2) (b) applies to the present case. The deceased did make a gift of money to the Ngarita Co. for the benefit of the beneficiaries under the trust deed. But the money which the deceased gave to the company for the benefit of the members of his family was not in New South Wales or anywhere else at the time of his death. The money existed only as a bank credit, and the credit has long ago disappeared. Money in such a form cannot be said to continue to exist unless some theory is adopted of the indestructibility of credit once created. In my opinion it should not be held that the money with which Sir William Vicars dealt at Canberra by the banking transactions mentioned was money which existed in New South Wales at the date of the death of the deceased.

The Commissioner then contends that the shares in John Vicars & Co. Pty. Ltd. were the subject matter of a gift. Here the Commissioner has to meet the difficulty that the testator quite obviously did not give the shares to anybody. He sold them to the Ngarita Co. for a sum of £40,000 which is admitted to have been the full value of the shares. This was a transfer of shares for money, and cannot possibly be regarded as a gift of the shares.

It is said, however, that the definitions of " gift " and " disposition of property " (s. 100), already quoted, cover the case because the transaction at Canberra was entered into by the testator with intent thereby to diminish the value of his own estate and to increase

(1) (1925) 25 S.R. (N.S.W.) 467.
(2) (1926) 38 C.L.R. 12.
(3) (1926) 38 C.L.R., at p. 33.

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the value of the estate of other persons. It is said that therefore it was a disposition of property, and, being a disposition of property without full consideration, was a gift.

Such a provision, however, does not entitle a court to ignore the actual facts of the case, and under the guise of dealing with the substance, as distinct from the form, of a transaction, to look at its final and total effect, irrespective of the method by which it was accomplished: See *Inland Revenue Commissioners* v. *Duke of Westminster* (1). In the present case the testator did diminish the value of his own estate and increase the value of the estate of other persons by the act of giving money to the company to be held upon trust. This was the only transaction which in fact diminished the value of his estate and increased the value of the estate of other persons, or which was intended to operate in that manner. For reasons already stated, that element of the transaction at Canberra was not a disposition by gift which fell within s. 102 (2) (b). Thereafter he sold shares to the company and was paid for them. The shares may be regarded as located in New South Wales at the time of the sale and of the death. But he did not give the shares to the company, and the transaction of sale of the shares was not intended to diminish his estate, and did in fact not diminish his estate. Accordingly, in my opinion, the provision contained in s. 100, par. e of the definition of "disposition of property," does not assist the Commissioner in the present case.

Thus, in my opinion, the only transaction falling within the definition of a gift and of a disposition of property was a transaction in relation to property (viz. £40,100), which was not in New South Wales at the time of the death of the testator, and therefore, on the reasoning of *Watt's Case* (2), the provisions of s. 102 (2) (b) do not apply to this case.

The Commissioner, also, in the alternative, relies upon s. 102 (2) (ba), which was enacted in 1931 after the decision in *Watt's Case* (2). This provision, so far as relevant, includes in the dutiable estate:— "The value (to be ascertained as at the date of the gift) of any property (not being property included in the estate under the provisions of sub-paragraph (b) of this paragraph) 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. . . . Provided that the Commissioner may in his discretion reduce such value by the amount by which the value of the property given would in the ordinary course have depreciated in the hands of the deceased between the date of the gift and the date of his death."

(1) (1936) A.C. 1.

(2) (1926) 38 C.L.R. 12.

In the first place, it may be observed that this provision applies only in cases of property not included in the estate by virtue of s. 102 (2) (b). The provisions are mutually exclusive. It is therefore impossible for both s. 102 (2) (b) and s. 102 (2) (ba) to apply both to "property" and to its "value." Section 102 (2) (ba) does not have the effect of including any "property" in the dutiable estate. It adds to the value of the estate as acertained for the purposes of the Act the "value" of property (not falling within s. 102 (2) (b)) comprised in gifts made three years before death. If the property given still existed in New South Wales and s. 102 (2) (b) applied to it, it would be included in the estate by virtue of that paragraph, and par. 2 (ba) would not apply to it. The latter paragraph applies only to cases where the property no longer exists in New South Wales. The proviso shows that the paragraph includes cases where the property no longer exists, because it allows the Commissioner to reduce the value, not by an amount by which the value of actual property has depreciated, but by the amount by which the value of the property given "would in the ordinary course have depreciated" between the date of the gift and the date of death. The paragraph is therefore evidently referring to the case of property which, if it had continued to exist, would have been included in the estate under par. b, but which has either ceased to exist altogether, or at least no longer exists in New South Wales, so that, on the principles laid down in *Watt's Case* (1), the property itself could not be regarded as part of the dutiable estate.

This provision is also expressed in general language, and in terms it applies, not only to all persons, but also to all gifts, wherever made, of all property wherever situated at the time of the gift or of the death. In order to hold such a provision to be valid, it is necessary to import by construction some territorial limitation which will place it within the power of the legislature of New South Wales. For reasons already stated, no such limitation depending upon domicile can be applied—see ss. 101-101E. It was decided in *Watt's Case* (1) that the place of gift could not be adopted as an intended limitation, for the reason that the whole operation of such provisions could be readily evaded by making gifts outside New South Wales of property in New South Wales: See *Watt's Case* (2). Unless, therefore, the provision is to be regarded as absolutely universal and unlimited in its application in respect of both persons and property (and therefore as invalid), it must be limited, as *Jordan* C.J. has held, to gifts of property which was in New South Wales at the time of the making of the gift.

(1) (1926) 38 C.L.R. 12.

(2) (1926) 38 C.L.R., at p. 33.

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In the present case, the money which was the subject of the gift, whether it be regarded as a cheque or as a chose in action constituted by a claim against the bank, was situated at Canberra at the time of the gift. It has been argued that Sir William Vicars was entitled to have the cheque honoured at any place where the bank carried on business, e.g., in Sydney, but the result of such a view would be that the property would be situated equally at every place in the world where the bank carried on business. Such a view is inconsistent with the authorities relating to the obligations of a bank to its customers:—*Garnett* v. *M'Kewan* (1), per *Bramwell* B.; *Joachimson* v. *Swiss Bank Corporation* (2); *Richardson* v. *Richardson* (3); and see *Halsbury's Laws of England*, 2nd ed., vol. 1, p. 796.

I am of opinion that the claim of the Commissioner cannot be sustained under s. 102 (2) (ba) because the only property which was the subject of gift was not in New South Wales when it was given.

Reference was made in argument to s. 102 (2A) (enacted in 1939), which includes in the dutiable estate:—"All personal property situate outside New South Wales at the death of the deceased, when—(a) the deceased dies after the commencement of the *Stamp Duties (Amendment) Act*, 1939; and (b) the deceased was, at the date of his death, domiciled in New South Wales; and (c) such personal property would, if it had been situate in New South Wales, be deemed to be included in the estate of the deceased by virtue of the operation of paragraph (2) of this section."

This sub-section applies only to bring within the estate property which, if it had been situated in New South Wales, would have been included in the estate by virtue of s. 102 (2), that is, it refers, not to property owned by the deceased at the time of his death, but to the "notional property" referred to in s. 102 (2). It applies, however, only to property situate outside New South Wales at the death of the deceased, and therefore to property in existence at the death of the deceased and situated outside New South Wales. At the time of the death of Sir William Vicars, the money was not in existence anywhere, and the shares were not situated outside New South Wales, and, therefore, this paragraph has no application to the present case. The only importance of the paragraph in the case appears to be that it shows that the legislature, when the section was enacted in 1939, accepted the proposition established by *Watt's Case* (4) that s. 102 (2) applied only to property in existence in New South Wales at the date of the death.

(1) (1872) L.R. 8 Ex. 10, at p. 14.
(2) (1921) 3 K.B. 110, at pp. 127, 129, 130.
(3) (1927) P. 228.
(4) (1926) 38 C.L.R. 12.

The next contention of the Commissioner is that the property is taxable under a provision added to s. 102 (2) (b) in 1939. This addendum follows the principal provision in s. 102 (2) (b) already quoted, and is in these terms :—" Where the property comprised in any such gift consists of money, or money is paid as aforesaid in pursuance of any such covenant or agreement the property to be included in the estate pursuant to this sub-paragraph shall be the actual amount of the money given or paid." It is contended for the Commissioner that in the present case if money was given the addendum produces the result that the actual amount of the money given is to be included in the estate. This argument regards the addendum as intended to deal with the case of a gift of money which can no longer be found as money in New South Wales at the time of death. If it could be so found the principal provision in s. 102 (2) (b) would be applicable because that money would itself be property comprised in a gift made by the deceased. It would be in existence in New South Wales and so would be included in the dutiable estate by virtue of the principle laid down in *Watt's Case* (1). I agree that the addendum applies to the case of a gift of money which, if the money were in existence in New South Wales at the time of the death, would have been included in the estate, though the money has disappeared. But the addendum cannot, if it is to be regarded as valid, be held to have a universal application to all gifts of money, wherever the money was situated at the time of gift, made by any persons at any place in the world. Some territorial limitation must be implied in order to uphold the validity of the provision as New South Wales legislation. For reasons which I have already stated, neither the domicile of the donor nor the place where the gift is made can be implied as a territorial limitation. In this case, as in the case of s. 102 (2) (ba), the only limitation which appears to be available for adoption is a limitation depending upon the place where the money is when the gift is made. Upon any other construction, the provision would apply to all persons in any part of the world who made gifts at any time of money at any place, and whether or not the persons or the money had any connection or association with the State of New South Wales. Thus, in my opinion, this provision must, in order to be valid, be treated as limited to gifts of money situated in New South Wales at the time of the gift. In this conclusion, I agree with the view of *Jordan* C.J. The result is that, as the money when given was not in New South Wales, this provision has no application in the present case. I repeat that, though the shares were at the time of death in New South Wales, the shares in my view were never the subject of a gift, but only of a sale.

(1) (1926) 38 C.L.R. 12.

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But it is finally argued for the Commissioner that, even if the only gift made was a gift of money, which money was not in New South Wales at the time of the gift or of the death, yet the shares may be taken as having been the subject of a gift by the deceased because they represent the money which was the actual subject of the gift, and that, as the shares were in New South Wales at the time of the death, the shares themselves are included in the dutiable estate, and that, for this reason, s. 102 (2) (b) applies to the present case. In my opinion, this view is quite inconsistent with the terms of this provision, which apply only to "property comprised in any gift." Property which was not comprised in a gift cannot fall within the provision. The shares were never given to anybody by the deceased. They were sold for their full value to the company. The argument that the shares represent the money would be equally available if the shares had been bought by the trustees from some other person than the deceased. But surely it could not then have been said that the deceased, at any particular point of time before his death, had made a gift of shares which he had never owned. The trustees, instead of buying shares, might have invested the £40,000 in some other form of permitted investment, e.g., in land in South Australia. If this had been done, the argument for the Commissioner would have been that the deceased had, within three years before his death, made a gift of land in South Australia. Similarly, if the land in South Australia had been sold and the proceeds invested in land in Queensland, the argument would have produced the result that the deceased had made within three years of his death a gift of land in Queensland. I find myself quite unable to adopt this view of s. 102 (2) (b). I can see no justification for saying that in such cases there would have been a gift by the deceased either of shares or of South Australian land or of Queensland land.

The argument, however, is that the money may be "followed" and that anything bought with the money becomes part of the estate. It has not been argued (and indeed could not have been argued) that equitable doctrines of following trust funds (*In re Hallett's Estate*; *Knatchbull* v. *Hallett* (1)) should be imported into the consideration of the construction of the *Stamp Duties Act*. But it is contended that there are two decisions which make it proper to regard a deceased person who creates a voluntary trust as having "given" to the beneficiaries under the trust whatever property may become subject to the trust at a future date. The legislature might have provided that if any person within three years before his death created a voluntary trust and if any property which was subject

(1) (1880) 13 Ch. D. 696.

to the trust was found in New South Wales at the time of his death, duty should be imposed in respect of that property. But the *Stamp Duties Act* contains no such provision and, in my opinion, it is impossible upon ordinary principles of construction to extract such a result from the terms of the legislation.

The cases which are relied upon for the purpose of bringing about this result are *In re Payne's Declaration*; *In re Payne*; *Poplett* v. *Attorney-General* (1), and on appeal (2) and *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (*Teare's Case*) (3). In my opinion, these cases deal with a problem quite different from that which arises in the present case. In neither of them did the question arise whether there had been a gift which made the relevant legislation applicable. Each case dealt with the problem of valuing property as at the time of death where there admittedly had been a gift which fell within the terms of the legislation. In my opinion, there is no justification for using these decisions for the purpose of seeking an answer to the question whether a gift falling within the legislation had in fact been made.

In *Payne's Case* (4), there was no dispute that the deceased person had made a voluntary disposition which fell within the terms of the *Customs and Inland Revenue Act* 1881, s. 38, sub-s. 2. The question was: What property should be valued as representing the property disposed of? Upon this question there was such a difference of opinion that it is, in my opinion, difficult to regard *Payne's Case* (4) as authority for any proposition. The learned primary judge (*Simonds* J.) held (5) that it was "at least clear what the settlor settled," namely a sum of £10,000 with an option to acquire certain shares. He based his decision upon the view that, a voluntary disposition of property having been established, that property could be regarded as having a continuing identity (6) and could be valued for the purposes of estate duty in the form in which it existed at the time of the death. This view as to the possibility of regarding property as having a continuing identity though it has been disposed of and other property has been substituted for it, was founded upon various legislative provisions referred to at pp. 875, 876. There are no such provisions in the Act now under consideration.

In the Court of Appeal, *Scott* L.J. did not agree with the view of *Simonds* J. that the gift was a gift of a sum of money and an option, but said (7) that what was taken as a gift was "the benefit of the equitable right to have the trusts of the settlement executed in

(1) (1939) Ch. 865.
(2) (1940) Ch. 576.
(3) (1941) 65 C.L.R. 134.
(4) (1939) Ch. 865; (1940) Ch. 576.
(5) (1939) Ch., at p. 873.
(6) (1939) Ch., at p. 875.
(7) (1940) Ch., at pp. 586, 587.

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accordance with its terms, which included the discretionary right of the trustees not only to sell the settlor's interest in the patent and other rights, and to invest the proceeds of sale, but also to change the investments as they might think fit." *Luxmoore* L.J. on the other hand was very definitely of opinion that the property settled was not a sum of £10,000 but certain patents and patent rights (1) and he was not prepared to decide what the consequences would have been if the property disposed of had been described simply as a sum of £10,000 (2). *Clauson* L.J. took still a different view of the case. He emphasized that the relevant provision referred to " any property taken under a voluntary disposition &c." and his view was that, under such a provision, the property taken under the disposition was not the property taken by the original disponee, but the property which was " in the hands of the trustee at the material date by virtue of the original disposition of the donor " (3). Upon this view, it became unnecessary to examine what the property was which was initially comprised in the trusts (4) and accordingly his Lordship refrained from discussing that matter. But where, as in the present case, the question which arises is whether a person, at some time within a particular period, made a gift of property, it appears to me to be essential to enquire what property he disposed of by way of gift and to admit that property which he sold cannot be regarded as given away by him.

Payne's Case (5) was decided with respect to legislative provisions which were different from those to be found in the present case and the particular features of which were relied upon by the various learned judges as supporting the conclusions reached. Those conclusions, however, were different in the case of each of the learned judges. Accordingly, in my opinion the case cannot be regarded as an authority for any definite proposition. Further, I repeat that in that case the existence of a voluntary gift falling within the provisions of the statute was undisputed, and the question which arises in the present case, namely whether any gift falling within the statute was ever made, did not there arise.

In *Teare's Case* (6) the provision requiring interpretation referred to " property which passed from the deceased person by any gift *inter vivos* or by a settlement made before or after the commencement of this Act within one year before his decease." The question which arose was what should be valued, as at the time of the death, in a case where such a gift (of money) had plainly been made, but the money

(1) (1940) Ch., at pp. 603, 604.
(2) (1940) Ch., at p. 605.
(3) (1940) Ch., at p. 595.
(4) (1940) Ch., at p. 596.
(5) (1939) Ch. 865; (1940) Ch. 576.
(6) (1941) 65 C.L.R. 134.

held by the trustees under a settlement had been used to purchase shares. The question was simply a question of what in the case of an undisputed gift should be valued, not a question of whether a gift had been made which fell within the Act." See per *Rich* J. (1) and per *Starke* J. (2). The beneficiaries under the settlements held the shares by virtue of the original gift of money and it was held that, in order to apply the admitted principle that the estate (as defined in the Act) should be valued as at the death of the settlor, the shares could be valued as having " passed " by virtue of the gift of money. But the decision has no bearing upon a case where the question is whether any gift of property falling within the Act was ever made.

A contrary view to that which I have taken appears to me to interpret the statute as providing that duty is imposed on any property which is in New South Wales at the time of the death of any person who has, within three years of his death, created a trust to which that property is subject. I summarize my opinion by saying that there is no provision in the *Stamp Duties Act* to that effect, and that the cases relied upon for the purpose of showing that a person should be held to have made a gift of property in which he may never at any time have had any interest whatsoever, but which has been purchased with the proceeds of property which he had previously given, do not support such a proposition.

In my opinion, the appeal should be allowed, it should be held that neither the sum of £40,100 nor any part thereof, nor the shares, nor the value of the shares, are part of the dutiable estate of the deceased, and the questions should be answered accordingly.

RICH J. The questions in this appeal arise upon the notoriously difficult provisions of Part IV. of the *Stamp Duties Act* 1920-1940. The architecture of these provisions may, at their inception, have been harmonious and according to a recognized style. But testators, settlors and others having discovered apertures in the edifice enclosing the death duty, all manner of bulwarks, fences and erections have from time to time been placed against the building to prevent any escape from the inevitable liability it embodies. The result is to bring bewilderment to courts and others who have to say where that liability begins and ends. In the present case, we have the advantage of very full and careful judgments of the Full Court each containing an analysis of the position. The deceased found himself early in 1939 in no mood to pay death duties, but apparently alive to the possibility that the time when the question would arise was no longer remote. His advisers had before them Part IV. of the Act as

(1) (1941) 65 C.L.R., at pp. 140, 141. (2) (1941) 65 C.L.R., at p. 143.

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it existed before the amendments were made by Act No. 30 of 1939. They considered, that under the interpretation placed upon s. 102 (2) (b) by this Court in *Watt's Case* (1), if in his lifetime a deceased person had made a gift, the subject matter of which had ceased to exist before his death, or was not in New South Wales, the clause failed to make the gift or its value part of the dutiable estate of the deceased. Assuming this to be their view, I am disposed to agree in it. The deceased was moved by some such consideration, as I have indicated, to proceed in a manner I shall briefly describe.

In order to bring about the transfer of shares in a company of which he was the chief shareholder to the members of his family, he took these steps. He arranged with his bank to permit him to overdraw to the extent of £40,100. He then caused an account to be opened in his name in the Canberra branch of the bank. Into that account the £40,100 was paid. He caused an account to be opened in the name of a company formed in New South Wales as a trust company. He and the duly authorized representative of the company journeyed to Canberra. Safely out of the jurisdiction, he executed a trust instrument under which the company was trustee, and by cheque drawn on his Canberra account paid the company's representative £40,100 to be held upon the terms of the trust. The representative thereupon paid to him a cheque for £40,000 as the purchase money for a large number of shares in the deceased's company. The deceased handed over signed transfers of the shares. The cheques were then paid into the respective accounts. Great care was exercised to make it clear that the company was under no obligation to buy these shares with the trust fund thus newly created, but did so *sua sponte* in the exercise of its discretionary power of investment conferred by the trust instrument just executed. The parties then returned to Sydney, where the transfers were duly registered. The result of their proceedings was to leave the shares settled under the trust instrument, but to enable the legal representatives of the deceased to contend that he made such a gift of money as ceased to exist in the hands of the donee, and which never came into New South Wales.

To this contention, after a full exposition of the not very coherent provisions of the *Stamp Duties Act*, *Jordan* C.J. gave an answer under the provisions of s. 102 (2) (b) without further recourse to the amendment of the Act of 1939. His Honour treated the clause as still subject to the territorial limitation placed upon it by *Watt's Case* (1), namely, as relating to gifts the subject matter of which is situate in New South Wales. His Honour treated this requirement as relating

(1) (1926) 38 C.L.R. 12.

to the time of death, and not to the time of gift, although having regard to the nature of the settlement instrument this is perhaps an immaterial point. But he held that the effect of the settlement and the transaction at Canberra was to create a trust fund which, irrespective of its form of investment, preserved a continuous identity, and this trust fund was or came to be situate in New South Wales. His Honour said :—" Where the property is given, not out and out but to trustees upon the trusts of a settlement, and the statute draws no distinction between gifts in cash and in kind, it has been held that it is the settled fund, in whatever form it may exist at death, which has to be valued : *In re Payne's Declaration* (1). In *Trustees Executors and Agency Ltd.* v. *Federal Commissioner of Taxation* (*Teare's Case*) (2) this was held to be the position under s. 8 (4) (*a*) of the *Estate Duty Assessment Act* 1914-1928, where a sum of money had been settled and subsequently invested by the trustee in shares. In my opinion, it follows from these authorities that it is the settled fund which must now be regarded as the property comprised in the gift made by the deceased at Canberra, within the meaning of s. 102 (2) (*b*) according to the general criterion laid down by the early part of that sub-paragraph " (3).

I find myself in complete agreement with this view. Mr. *Kitto*, however, put in the foreground of his argument a more simple contention which, if valid, would lead to the conclusion that there was a gift of the money or alternatively of the shares, which is dutiable. It depends wholly on the definition of gift and par. e of the definition of " disposition of property " contained in s. 100 of the *Stamp Duties Act*. The definition of " gift " goes back to and incorporates that of " disposition of property." By par. e it means—" any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own estate and to increase the value of the estate of any other person." It is said that in the present case there was a transaction at Canberra entered into by Sir William Vicars with intent to diminish the value of his estate and increase that of someone else by £40,100 or alternatively by the shares, and in either case without full consideration. It is obvious that, for a gift to be discovered by the aid of this part of the definition section, it is necessary not only that there should be found what is in fact a transaction having a dispository effect, intended to have that effect, and entered into without full consideration, but also that the transaction should be found to comply with the requirements of the Act as to dutiability, including the domicile of the donor and the locus of

(1) (1939) Ch. 865 ; (1940) Ch. 576.
(2) (1941) 65 C.L.R. 134.
(3) (1944) 45 S.R. (N.S.W.), at pp. 94, 95.

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the property at the relevant times. Hence, this part of the definition section lends no assistance to the attempt to make the gift of the money dutiable. As regards the shares, for these to be caught by the part of the definition section now under consideration, there must have been in fact a transaction, and that transaction must have been of the kind provided for. In the present case, there were *ex facie* two transactions, a gift of money and a sale of shares. If it had been found that these were both shams, that the real transaction was a settlement of the shares without consideration with an arrangement to conceal it by a sham voluntary gift of money followed by a sham sale of shares for a money price, the transaction, that is, the real transaction, would clearly be caught, since the shares have always been locally situated in New South Wales. But it is common ground that this was not the real position, that although Sir William Vicars confidently expected that the trustee company would use the money which he gave it in purchasing the shares, it had not agreed to do so and was under no legal obligation to do so. There were two real transactions, not one, a transaction of gift of money, by which Sir William Vicars undoubtedly intended to diminish the value of his estate and increase the value of the estate of the donees of the gift without any consideration, and a transaction of sale, by which he undoubtedly did not intend to diminish the value of his estate or increase that of the company and its *cestuis que trust* without receiving full consideration. Where there are in fact and in law two transactions, one voluntary and one for value, there is nothing in s. 100 which requires or authorizes the Commissioner to treat them as being what in fact and in law they are not, a single transaction without consideration.

For the reasons which I have stated, I think the questions should be answered—(1) No; (2) Yes; and the appeal dismissed.

STARKE J. Sir William Vicars, who died on 20th October 1940, was resident and domiciled in New South Wales. He was a man of considerable wealth. Early in 1939 he resolved to settle portion of his estate in order that he might avoid probate and stamp duty and make provision for his family. After some discussion Sir William resolved to settle £40,000 upon trusts for his wife, daughters, son-in-law and grandchildren, but he was desirous that this sum should be invested in shares which he held in John Vicars & Co. Pty. Ltd. And on 8th May 1939 Sir William, his solicitor and an accountant, who was also a director of the proposed trustee, all repaired to Canberra, the seat of government of the Commonwealth, which had been within the geographical boundaries of the State of New South Wales,

but had been surrendered by it to the Commonwealth (See Constitution s. 125 ; *Seat of Government Act* 1908, No. 24 ; *Seat of Government Acceptance Act* 1909, No. 23 ; *R.* v. *Bamford* (1)). And there the deed of settlement was executed. The scheme for achieving the purposes mentioned was carefully considered and worked out with much care. Sir William drew a cheque on his banker in Sydney for £40,100 and paid the same to the credit of an account in his own name at the branch bank of his banker in Canberra. He then drew a cheque for £40,100 upon the branch bank at Canberra and paid it to the credit of Ngarita Pty. Ltd. (the trustee of the settlement) at the branch to be held upon trust and in expectation that the money would be applied in acquiring shares in John Vicars & Co. Pty. Ltd. The trusts, so far as material, were to hold the trust funds upon trust at the discretion of the trustee to invest the same in any investments authorized by the settlement with power to vary the same and to hold the trust funds and investments for the time being representing the same upon trust for his family declared in the deed. The power of investment included the purchase of shares in John Vicars & Co. Pty. Ltd. The trustee thereupon purchased a considerable number of shares from Sir William which he held in John Vicars & Co. Pty. Ltd. for £40,000 the market value of the shares. Transfers of the shares were duly executed and Sir William received a cheque for £40,000 from the trustee drawn upon the account in its name at Canberra, and paid the same into his account at Canberra and ultimately transferred the credit to his account in Sydney thereby closing his Canberra account. The sum of £100 was applied in paying stamp duty on the transfers of the shares to the trustee. The various operations which have been detailed were but the machinery adopted by Sir William Vicars to give effect to his scheme. The various operations cannot be treated separately but must be treated as a whole and their interaction considered. As was said in another connection in *W. R. Moran Pty. Ltd.* v. *Deputy Commissioner of Taxation for New South Wales* (2) : " The separate parts of a machine have little meaning if examined without reference to the function they will discharge in the machine." The legal effect and operation of the scheme created a trust fund, which could be, and was invested in shares of John Vicars & Co. Pty. Ltd.

The following questions were stated by the Commissioner of Stamp Duties, pursuant to the *Stamp Duties Act* 1920-1940, for the decision of the Supreme Court :—(1) Is the said sum of £40,100 or any, and, if so, what part thereof to be deemed part of the dutiable estate of the

(1) (1901) 1 S.R. (N.S.W.) 337 ; 18 W.N. 294.

(2) (1940) A.C. 838, at p. 849 ; 63 C.L.R. 338, at p. 341.

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deceased ? (2) Alternatively, is the value of the said shares as at the death of the deceased to be deemed part of his dutiable estate ?

And the answer to those questions depends upon the provisions of the *Stamp Duties Act* 1920-1940. So far as material these provisions are as follow :—Section 102 provides : " 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) (*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."

" Gift " by s. 100 means " any disposition of property made otherwise than by will . . . without full consideration in money or money's worth."

And " Disposition of Property " means : " (a) any conveyance, transfer, assignment . . . payment, or other alienation of property whether at law or in equity ; (b) the creation of any trust ; (c) any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own estate and to increase the value of the estate of any other person."

The constitutional power of New South Wales to enact this legislation in respect of persons resident and domiciled in New South Wales, as was Sir William Vicars, is indubitable. Other circumstances may also attract the constitutional authority of New South Wales such as gifts within or property in existence within the territory. So the questions stated depend upon the construction of the provisions of the Acts. But in *Watt's Case* (1) it was said :—" the property, the subject of sub-s. 2 of s. 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 his 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." It is, however, reasonably clear, I think, that the trust funds and the investments for the time being representing the same which were in existence in New South Wales at the time of the death of Sir William Vicars are caught by the provisions of s. 102 (2) (b), already mentioned, and are deemed part of his estate for the purposes of the Act. And this for several reasons.

(1) The property comprised in the deed of settlement was a disposition of property made by the deceased within three years

(1) (1926) 38 C.L.R., at p. 32.

before his death without full consideration in money or money's worth and therefore a gift. The deed, it is true, was executed and is still at Canberra, but that appears to me immaterial to the question of liability for death duty. By the deed Sir William Vicars, a person resident and domiciled in New South Wales, disposed of property which at the time of his death was in existence in New South Wales in the form of shares. The gift was of the trust funds mentioned in the deed for the benefit of his family. Those funds it is true no longer exist in the form in which they were given, but in the form of shares in John Vicars & Co. Pty. Ltd. which are in existence in New South Wales and the trustee is registered as the holder thereof. I venture to repeat what I said in *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (*Teare's Case*) (1) : "Now the property which passed from the deceased . . . does not exist in the form in which it was given or settled ; it has been transmuted into shares. It can, however, be traced, followed, and identified in those shares, or in other words, the subject matter of the gifts and settlements is found in its transmuted and actually existing form, namely, shares."

(2) The transaction entered into by Sir William Vicars, which I have already described, was a connected whole and was entered into by him with intent thereby to diminish directly the value of his own estate and to increase the value of the estate of other persons, his trustee and beneficiaries. It falls within the definition of a gift in the Act. The subject matter of the gift was the trust funds which no longer exist in the form in which they were given, but in the form of shares in existence in New South Wales at the death of Sir William Vicars.

(3) The deed of settlement executed by Sir William Vicars created a trust for the benefit of his family in respect of the trust funds mentioned in the deed and the investments for the time being representing the same. And this trust is administered in New South Wales and the shares in John Vicars & Co. Pty. Ltd. representing the trust funds were, as already mentioned, in existence in New South Wales at the death of Sir William Vicars. It is unnecessary in this case, in the view I take, to pass any opinion upon the meaning or the construction of s. 102 sub-s. 2 (ba) or s. 102 sub-s. 2A.

In my opinion, therefore, the questions stated should be answered in conformity with the opinion given in the case of *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (*Teare's Case*) (1) :—1. No ; 2. Yes ; 3. By the appellants.

(1) (1941) 65 C.L.R., at p. 143.

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DIXON J. For the purpose of the assessment and payment of death duty, s. 102 (2) of the *Stamp Duty Act* (N.S.W.) 1920-1940 includes in the dutiable estate of the deceased, among other descriptions of things belonging to him, all property comprised in any gift made by the deceased within three years before his death. The general words of this provision, which forms part of the first paragraph of clause (h) of sub-s. 2 of s. 102, fail to express any territorial limitation upon its operation. For all it says, it might apply to a gift of property outside New South Wales made by a donor to a donee neither of whom had ever been within the State or had any connection with it.

Section 17 of the *Interpretation Act* of 1897 says that in an Act all references to localities jurisdictions and other matters and things shall, unless the contrary intention appears, be taken to relate to such localities jurisdictions and other matters and things in and of New South Wales. The words " in and of New South Wales " give a very vague test of territorial connection, at all events when applied to most " matters and things." If, in the foregoing provision, " property " must be construed as property in New South Wales, the question still remains as at what time ; at the time of the gift, or at the time of the death, or both ? But, without recourse to s. 17 of the *Interpretation Act*, it has been held that the operation of s. 102 (2) (b) is confined to property in New South Wales at the time of the death of the deceased : *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (1). This interpretation or conclusion rested, I think, on three considerations—(1) on the necessity of implying some territorial restriction ; (2) on the circumstance that, in the case of the deceased's own property, only that situated in New South Wales at the date of the death was included by sub-s. 1, as it then stood, in the dutiable estate ; and (3) on the adoption by the Act of the date of death as the time when value is to be ascertained as well as for other purposes. Further, the policy of sub-s. 2 seemed to be to bring into the dutiable estate as notionally part of the deceased's property assets which would have been included but for some disposition. Accordingly, as situation in New South Wales was a necessary condition of inclusion for duty in the case of property of which the deceased died possessed, it appeared reasonable to imply the same condition in the case of property of which he had disposed.

Since that time amendments have been made of some of the provisions by which the Court was influenced. In particular, sub-s. 1 has been extended to include personal property, which perhaps means movables, situate outside New South Wales if the deceased dies domiciled in the State. This weakens the argument, no doubt,

(1) (1926) 38 C.L.R. 12 ; (1925) 25 S.R. (N.S.W.) 467.

but, on the other hand, the interpretation which the decision placed upon sub-s. 2 (b) may be said to be confirmed, first, by the failure of the legislature to amend either the sub-section or the clause itself, and, secondly, by the amendment made as sub-s. 2A which affirmatively subjects personal property outside New South Wales to the provisions of sub-s. 2 " as if it had been situate in New South Wales " when the testator is there domiciled. Moreover, two paragraphs have been introduced into sub-s. 2, one of them into sub-s. 2 (b) and the other as sub-s. 2 (ba), which are said to deal with one aspect of a necessary consequence of the construction placed upon sub-s. 2 (b). The consequence to which I refer is that, if the subject of the gift is consumed or destroyed before the death of the donor, it cannot, at his death, be situate in New South Wales. It appears to be assumed, and perhaps not unreasonably, that the disposal of the property given would have the like consequence.

I confine myself advisedly to the statement that the two paragraphs are said to deal with an aspect of these consequences, because, as they are in the words of Lord *Tomlin* " directed . . . to stopping an exit through the net of taxation freshly disclosed " (*Neumann* v. *Inland Revenue Commissioners* (1)), their meaning and operation appear to be a matter of inner knowledge not obtainable from a bare perusal of the text, but depending upon an esoteric familiarity with the steadily diminishing exits.

On the whole, I think that the restriction placed by way of interpretation upon the first paragraph of s. 102 (2) (b) stands and that it should be taken as confined to gifts of property found in New South Wales at the date of the deceased's death.

The case before us concerns an attempt to find or use one of the exits in the net of taxation. The deceased was possessed of shares in a family company registered in New South Wales and desired that they should be settled on members of his family before he died. He formed, or had formed, a private company which was registered in New South Wales. Its powers enabled it to act as a trustee. He arranged with his bank at Sydney for an overdraft and opened an account in the branch of the bank at Canberra, into which he paid a cheque for £40,100 drawn on his bank at Sydney. The private company also opened an account at the same branch. A trust instrument was prepared. It was expressed to constitute the private company trustee of a trust fund. On 8th May 1939, the deceased and a duly authorized representative of the company visited Canberra. There the deceased drew a cheque on his Canberra account for £40,100 and paid it into the account of the company as trustee under

(1) (1934) A.C. 215, at p. 222.

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the settlement which was then and there executed. The representative of the trustee company then bought from the deceased his shares in the family company for £40,000, the extra £100 being applied in payment of stamp duty. He took transfers in the name of the company and paid the deceased a cheque for £40,000 drawn on the company's account at Canberra. The deceased paid it into his account at Canberra. All this took place on the same day. The transfer of the shares was afterwards registered in Sydney where the family company had its share register.

These steps were taken openly and without concealment, but the reason for pursuing such a tortuous course lay in the hope that neither the whole nor any part of the transaction would amount to a gift upon which any one of the clauses or paragraphs of s. 102 (2) could operate. Section 102 (2A) had not then been enacted, but in any case that sub-section comes into play only when there is personal property situate outside New South Wales at the death of the deceased, and, at that date, neither money nor shares would exist in the Australian Capital Territory. It is said that clause ba of s. 102 (2) relates to property which does not fall within clause b because it has been consumed or destroyed, or the donee has disposed of it. On that footing, in order to restrain it territorially, it is claimed that the gift must be in New South Wales. Thus the transaction would fall outside that paragraph. Analogous reasoning would exclude the application of the new second paragraph of clause b of sub-s. 2.

Lastly, it was sought to ensure that the gift was one of money and that the money was expended, and all this outside the jurisdiction. The property comprised in the gift would, therefore, never be in New South Wales. Thus, it could not fall within clause b as interpreted.

On the provisions of the Act, all this reasoning may be confessed and avoided, though perhaps the confession should not be without a protestation.

The provisions supplying the grounds of avoidance are those which define "gift." So far as material, the word is defined in s. 100 to mean any disposition of property . . . without full consideration in money or money's worth, and by the same section "disposition of property" is defined. The definition comprises many categories of assurance and disposition. One of them is "the creation of any trust."

In the present case, a trust was created by a trust instrument which recited that the deceased, thereinafter called the settlor, desired to make provision for his wife, daughter, son-in-law and grandchildren and, with that object, had before its execution paid at Canberra the

sum of £40,100 (thereinafter called the trust funds) to be held by the trustee. The instrument then directed the trustee to hold the trust funds and at its discretion to invest the same in any investments thereby authorized, with power to vary and transpose the investments and to hold the trust funds and the investments for the time being representing the same subject to the trusts directions declarations and discretions that followed. There are set out the limitations of the beneficial interests in favour of the settlor's wife, daughter, her husband and her children. Of these it is enough to say that they limit interests in succession and that the ultimate destination of corpus is necessarily postponed for several years.

Next, wide powers of investment are given, shares in the family company being specifically included. Then powers are given for the maintenance, education, benefit and advancement of infant beneficiaries, powers of management, powers of appropriation, powers to pay calls, to take up bonus shares and raise money for the purpose, and kindred powers. There is a provision, too, incorporating, in respect of the trust funds wherever situate, powers conferred on trustees by the law of New South Wales and directing that the rights and liabilities of the trustee and of the beneficiaries and the administration of the trust should be regulated in the same manner as they would be under the law of New South Wales.

It will be seen that the settlor constituted a trust to be administered in New South Wales under the law of that State by a trustee company incorporated in that State. The trust property was to consist in a fund the forms of investment of which would vary from time to time so that its certainty and identity would not depend upon the particular state of the investment at any given time.

The decision of the *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. (Ltd.)* (1) shows that, under the provisions of the Act, the "property comprised in the gift" may be equitable interests created by the trusts (2).

It appears to me that the gift consisted in the creation of a variety of equitable interests in a corpus thereby constituted, a corpus the identity and continuity of which neither depended, nor was intended to depend, upon the form of investment in which it was clothed for the time being. Equitable doctrine never regarded change in the form of investment of trust funds, nor indeed even an unauthorized transformation of the trust property, as affecting its identity. As *Maitland* remarked, in speaking of tracing trust property:—The "result has been obtained under cover of the metaphor of investment—the idea of a 'fund' preserving its identity during any change

(1) (1943) A.C. 425; 67 C.L.R. 234; (1941) 64 C.L.R. 492.

(2) (1943) A.C., at p. 439; 67 C.L.R., at p. 244; (1941) 64 C.L.R., at pp. 500, 505, 510, 512.

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of investment." And again :—" We get the idea of a trust fund as a thing, an incorporeal thing, which can be invested, that is dressed up in one costume or another, but which remains the same beneath all these changes of apparel " (*Equity*, 1st ed. (1909), pp. 175, 173).

An illustration of one application of this conception will be found in *Bakewell* v. *Deputy Federal Commissioner of Taxation* (*S.A.*) (1). Another illustration is to be seen in the treatment of *Payne's Case* (2) by *Simonds* J. and *Scott* L.J. A third is supplied by *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (*Teare's Case*) (3). There the question was the value of property passing from the deceased person by gift or settlement. Having sold his business to a company formed to take it over, he settled part of the purchase money and authorized the trustees of the settlement to apply for some of the shares. It was held that the value of the shares at death must be adopted. *Starke* J. placed his judgment upon the precise ground. He said :—" Now the property which passed from the deceased in the present case does not exist in the form in which it was given or settled ; it has been transmuted into shares. It can, however, be traced, followed, and identified in those shares, or in other words, the subject matter of the gifts and settlements is found in its transmuted and actually existing form, namely shares : cf. *In re Payne's Declaration* (4). The value of the property which passed from the deceased as it actually existed at the date of his death is, therefore, the value of the shares at the date of the death of the deceased " (5).

In the present case, I think it follows that at the time of death the property comprised in the gift was situate in New South Wales. From every point of view it is in New South Wales ; the trust, the trustee, the trust fund and the trust investments.

In the circumstances of the case, I think that the conditions of the application of sub-s. 2 (b) of s. 102 are fulfilled. It is suggested that, under that clause, it cannot be enough if property the subject of a gift quite unconnected with New South Wales happens to be brought into the jurisdiction, even by the donee, just before the death of the donor, who *ex hypothesi* has nothing to do with New South Wales. I regard this case as one in which from beginning to end the trust created was a New South Wales trust, and I think that even if there must, at the inception, be a territorial connection between the gift and the State that circumstance suffices. I am not, however, prepared to hold that not only must the property be in New South

(1) (1937) 58 C.L.R. 743, see particularly at pp. 762, 763 and 769-771.
(2) (1939) Ch. 865 ; (1940) Ch. 576.
(3) (1941) 65 C.L.R. 134.
(4) (1939) Ch., at pp. 874-876 ; (1940) Ch. 576.
(5) (1941) 65 C.L.R., at p. 143.

Wales at the date of death but the gift itself must be made in New South Wales before s. 102 (2) (b) can apply.

There is a second ground for holding that the transaction in this case is dutiable. The last paragraph of the definition makes the meaning of the expression extend to any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own estate and to increase the value of the estate of any other person. That the deceased was animated in the transaction by the requisite intent I think could hardly be disputed. But to bring the case within the paragraph in such a sense that the subject of the gift consists in the shares, it is necessary to treat the course pursued up to and including the transfer of the shares as an entire transaction not completed, for the purposes of this part of the definition of " disposition of property," until the shares were vested in the trustees. After some hesitation, I have come to the conclusion that it possesses this character. In some degree I am influenced by the reasons I have already employed in relation to the trust. It appears to me that the trust was constituted with everything but the form of the trust property provided for in point of law. That was left legally free until the last moment. But in fact there was never any doubt about it. The deceased expected and desired throughout the period of preparation that the money or credit would be transformed into shares and it was part of his plan, in fact it was done on the same day and occasion. For the purpose of carrying out his intent, it was an integral part of the transaction which actually took place.

For the reasons I have given, I think that the second question in the case stated should be answered : Yes. In strictness, I think the first question should be answered : No. Subject to that variation, I would dismiss the appeal.

WILLIAMS J. Sir William Vicars died on 20th October 1940 domiciled in New South Wales. In May 1939 he held 45,000 A shares and 5,000 B shares, all fully paid, in John Vicars & Co. Pty. Ltd., a company incorporated and having its head office and share register in New South Wales, their total value being £40,000. In that month, having arranged the necessary overdraft, he drew a cheque for £40,100 upon his account at the head office of a bank in Sydney, and paid this sum to the credit of an account which he opened with the branch of that bank at Canberra. He then visited Canberra, accompanied by a representative of Ngarita Pty. Ltd., a company incorporated and having its head office in New South Wales, and there drew a cheque upon this branch account for £40,100 which he paid

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to the credit of an account opened by this company in the same branch. In the course of the visit he and the representative on behalf of the company executed in Canberra an indenture of settlement made between himself as settlor and the company as trustee (subsequently ratified by the company) whereby, after reciting that he desired to make provision for his wife, daughter, son-in-law and grandchildren and with that object had paid the sum of £40,100 (thereinafter referred to as " the trust funds ") to the company, the settlor declared that the trustee should invest the trust funds at its discretion in any investments thereby authorized and hold the trust funds and the investments for the time being representing the same upon the trusts for his wife for life and after her death for his daughter, son-in-law and grandchildren as therein mentioned. By the indenture, the trustee was authorized to invest the trust funds, *inter alia*, in the purchase of or upon the security of shares or debentures of any bank or company (including John Vicars & Co. Pty. Ltd. or any company associated or amalgamated therewith). The board of directors of the trustee company had already resolved at a meeting, at which the settlor was present, to invest the sum of £40,100 when received in the purchase of the settlor's shares in John Vicars & Co. Pty. Ltd., and, pursuant to this resolution, the settlor, while still at Canberra, executed a transfer of these shares to the trustee company, and the trustee company paid the sum of £40,000 to the settlor by drawing a cheque on its account at Canberra for that amount, the proceeds of which the settlor applied in reduction of his overdraft at the head office of his bank. The sum of £100, the balance of the sum of £40,100, was applied by the company in paying stamp duty on the transfers of the shares. At the date of the settlor's death, the shares, which were still held by the trustee company on the trusts of the settlement, were worth £40,000.

The questions asked in the case stated are (1) whether the sum of £40,100 or any, and, if so, what part thereof is to be deemed part of the dutiable estate of the deceased; (2) alternatively, whether the value of the shares as at the date of the death of the deceased is to be deemed part of his dutiable estate? In order to determine these questions, it is necessary to refer briefly to the relevant legislation. The principal Act is the *Stamp Duties Act* 1920. This Act was amended on several occasions prior to the date of the settlement and also after that date but prior to the death of the settlor, but it is only necessary to refer to two of the amending Acts, namely the *Stamp Duties* (*Amendment*) *Act* 1931, No. 13, assented to 31st March 1931, and the *Stamp Duties* (*Amendment*) *Act* 1939, No. 30, assented to 7th November 1939. The principal Act, s. 101, provides that, in the

case of every person who dies after the passing of the Act, whether in New South Wales or elsewhere, and wherever domiciled, death duty shall be assessed and paid on the final balance of the estate as determined in accordance with the Act. Section 102 describes the property to be included in the dutiable estate. This falls into two main categories, namely property actually owned by the deceased at the date of death, and property notionally made part of his estate for the purposes of duty. Section 102 (1) (a) provides that the actual estate shall consist of the property of the deceased situate in New South Wales at his death. The categories of property notionally made part of the dutiable estate are enumerated in s. 102 (2), but this sub-section does not contain any provision corresponding to that contained in sub-s. 1 (a) restricting the notional estate to property situate in New South Wales at the date of death. But the *Interpretation Act* of 1897 (N.S.W.), s. 17, provides that in an Act all references to localities, jurisdictions and other matters and things shall, unless the contrary intention appears, be taken to relate to such localities, jurisdictions and other matters and things in and of New South Wales. These vague words appear to be intended to give statutory effect to the rule of construction that, in the interpretation of statutes, the courts will presume, so far as the language admits, that general words should be read subject to accepted rules of international law, and therefore as not intended to apply to persons or things to which in accordance with those rules they should not be made to apply (*Polites* v. *The Commonwealth* (1)). An example of the application of this presumption to taxation laws will be found in *Colquhoun* v. *Brooks* (2). Although the general words of s. 102 (2) are wide enough to apply to notional property at all times situate outside New South Wales and to persons dying anywhere whether domiciled in New South Wales or not, such an extended meaning would not only infringe the provisions of s. 17 and be opposed to this rule of construction but would place the legislation beyond the constitutional power of the State Parliament : *Commissioner of Stamp Duties (N.S.W.)* v. *Millar* (3). But the general words could not, in view of s. 101, be restricted to cases where the deceased was domiciled in New South Wales at the date of death, so that the only limitation open was a limitation to property situate in New South Wales at some appropriate date. In the case of gifts made within three years of death, there was a choice between the date of gift and the date of death. But the latter date was the only appropriate date for other categories of notional property included in the sub-section. Other

(1) (1945) 70 C.L.R. 60.
(2) (1888) 21 Q.B.D. 52.
(3) (1932) 48 C.L.R. 618.

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important considerations pointing in the same direction were that s. 102 (1) (a) confined the liability for duty in the case of the actual estate to property situate in New South Wales at the date of death, s. 105 (2) provided that, save as in the Act expressly provided, the value of the property included in the dutiable estate should be estimated as at the date of death, and the logical basis for including notional property in the dutiable estate is that, but for the disposition in question, the property would have formed part of the actual estate. The Supreme Court, therefore, in *Watt's Case* (1) and on appeal this Court (2), came to the conclusion that the legislature must be taken to have intended that the operation of s. 102 (2) should be confined to notional property existing and situate in New South Wales at the date of death.

One category of notional property discussed in *Watt's Case* (2) was that described in s. 102 (2) (b), namely, "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 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." It was held that certain gifts of money made by the deceased within three years of death situate in New South Wales at that date which did not exist in New South Wales in an identifiable form at the date of death did not form part of his dutiable estate. The Act of 1931 amended s. 102 (1) (a) by providing that, where the deceased was domiciled in New South Wales, the actual estate should also include all personal property of the deceased situate outside New South Wales at his death and by adding the following par. (ba) to s. 102 (2) after par. (2) (b) :—" The value (to be ascertained as at the date of the gift) of any property (not being property included in the estate under the provisions of sub-paragraph (b) of this paragraph) 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 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."

It is to be noted that, despite the territorial restriction placed on the operation of s. 102 (2) by *Watt's Case* (2), the legislature, when expressly extending the operation of s. 102 (1) (a) to include personal

(1) (1925) 25 S.R. (N.S.W.) 467 ; 42 W.N. 191.

(2) (1926) 38 C.L.R. 12.

property situate outside New South Wales at the date of death of a person domiciled in New South Wales, did not make any similar express amendment to s. 102 (2), and in these circumstances the legislature should not, in my opinion, be regarded as having intended by this amendment impliedly to extend the operation of s. 102 (2) so as to include in the notional estate personal property comprised in any of the categories situate outside New South Wales at the date of death when the deceased was domiciled in New South Wales; especially when the legislature subsequently considered it necessary expressly to extend its operation in this manner by s. 102 (2A) inserted by the amending Act of 1939 which provides that the estate of a deceased person shall be deemed to include "All personal property situate outside New South Wales at the death of the deceased, when—(a) the deceased dies after the commencement of the *Stamp Duties (Amendment) Act* 1939; and (b) the deceased was, at the date of his death, domiciled in New South Wales; and (c) such personal property would, if it had been situate in New South Wales, be deemed to be included in the estate of the deceased by virtue of the operation of paragraph (2) of this section."

The Act of 1939 also added the following paragraph after the first paragraph of s. 102 (2) (b):—"Where the property comprised in any such gift consists of money, or money is paid as aforesaid in pursuance of any such covenant or agreement the property to be included in the estate pursuant to this sub-paragraph shall be the actual amount of money given or paid."

The gift in the present case was, in my opinion, a gift of money situate in Canberra. There is no equity to perfect an imperfect gift, but the present gift was perfected in Canberra when the settlor's cheque drawn on his bank account there was met and the proceeds credited to the bank account, also there, of the trustee company. It was this money which constituted the trust funds of which the trustee company became the legal owner to be held and applied in accordance with the trusts and powers contained in the indenture of the settlement. One of these powers was a power to invest the trust funds in shares in John Vicars & Co. Pty. Ltd. The settlor intended that the trustee company should use the money to purchase his shares in this company, although there was no legal obligation upon it to do so, but there were in law two separate transactions, one a payment of money to the trustee company, and the other a purchase of the shares by the company: Cf. *Chamberlain* v. *Inland Revenue Commissioners* (1). The *Stamp Duties Act* 1920-1939, s. 100, defines "gift" to mean any disposition of property made otherwise than by

(1) (1943) 2 All E.R. 200, at pp. 204, 205.

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will, whether with or without any instrument in writing, without full consideration in money or money's worth, and "disposition of property" to mean, *inter alia*, "any payment," "the creation of any trust," and "any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own estate and to increase the value of the estate of any other person," whether in any of these cases the disposition is effected with or without an instrument in writing. The disposition for which there was no consideration and which diminished the value of the estate of the settlor in the present case was the payment of the money to the trustee company. The sale of the shares was for full consideration, and so was not a gift within the meaning of the section. The property comprised in the gift was, therefore, at the date of the gift situate outside New South Wales. But the crucial date is the date of death, and I can see no reason why, although the property comprised in a gift made within three years of death was then situate outside New South Wales, the transaction should not fall within s. 102 (2) (b) if the property was in New South Wales at the date of death. There is nothing in the judgments in *Watt's Case* (1) to suggest that the property must be in New South Wales at the date of gift as well as at the date of death. And I do not think that the addition of par. ba to s. 102 (2) altered the construction of s. 102 (2) (b). It would seem that par. ba was added to the Act to bridge the gap disclosed by the decision in *Watt's Case* (1), so that, since the property there in question was situate in New South Wales at the date of gift, the legislature presumably only had in mind, and was intending only to provide for, cases where property situate in New South Wales at that date could not be included in the dutiable estate, because at the date of death it had ceased to exist in any identifiable form in New South Wales, or, being still in an identifiable form, it was then situate outside New South Wales. The present gift, since it was a gift of property then situate outside New South Wales, is not therefore within s. 102 (2) (ba), and the question is whether it is within s. 102 (2) (b). Subject to the effect of the paragraph added by the Act of 1939 to s. 102 (2) (b), the answer to this question depends upon whether the shares which were purchased with the money and which were situate within New South Wales at the date of death can be described as "property comprised in the gift." If this expression is given a precise meaning, it would only apply to the exact property given, but it is the property comprised in a gift made at any time within a period of three years before the date of death which at that date has to be identified, valued and

(1) (1926) 38 C.L.R. 12.

subjected to the statutory charge for unpaid duty. The definition of a disposition of property in s. 100 includes a payment of money and s. 102 (2) (b) expressly includes such a payment amongst the property which can be comprised in a gift. The donee of money would be unlikely to keep it separate and unused, whether in a receptacle or bank account, during the period which could elapse between the date of the gift and that of death. Where the donee used the money to purchase a particular asset which he still possessed at the date of death, such an asset could be fairly described in a practical sense as the property comprised in the gift. Where, as in the present case, the money is intended to constitute a trust fund so that the investments are from time to time the embodiment of the original gift, there is less difficulty in treating the property which exists at the death as included in the expression than where the money is paid to a donee absolutely entitled. But it is in each case a question of establishing an underlying identity in a practical sense. The necessity of approaching the construction of Taxation Acts in a practical and not in a technical manner has been recently stressed by the House of Lords in *Income Tax Commissioners for City of London* v. *Gibbs* (1); *Latilla* v. *Inland Revenue Commissioners* (2). To borrow what Lord *Wright* said in *Earl Fitzwilliam's Collieries Co.* v. *Phillips* (3): "Its effect must be ascertained by considering the words actually used, interpreted in a fair and reasonable way in the light of the whole tenor of the section read as forming part of the income tax" (in this case death duty) "legislation." And cf. *Hood Barr* v. *Inland Revenue Commissioners* (4). So that I can see no reason to reconsider the correctness of either aspect of the decision in *Teare's Case* (5). I venture to repeat what I said (6):— "Despite the slightly different language no real distinction can be drawn between the legal effect of the relevant portions of s. 8 (4) of the Federal Act" (that is the *Estate Duty Assessment Act* 1914-1928) "and s. 102 (2) (b) of the New South Wales Act."

Teare's Case (5) cannot, in my opinion, be distinguished, as Mr. *Weston* suggested, because the money in that case was within the territorial jurisdiction of the Commonwealth Parliament at the date of gift as well as at the date of death, whereas in the present case it was not within the territorial jurisdiction of the New South Wales Parliament at the date of gift but only at the date of death, seeing that the material date under s. 102 (2) (b) is the date of death.

(1) (1942) A.C. 402.
(2) (1943) A.C. 377, at pp. 383, 384.
(3) (1943) A.C. 570, at p. 580.
(4) (1945) All E.R. 500, at pp. 506, 507.
(5) (1941) 65 C.L.R. 134.
(6) (1941) 65 C.L.R., at p. 148.

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It remains to consider the effect of the paragraph added to s. 102 (2) (b) by the Act of 1939. It provides that where the property comprised in the gift is money, the property to be included in the estate shall be the actual amount of the money given. In view of the previous introduction of s. 102 (2) (ba), which applied where the gift was of money, but that money did not exist in New South Wales at the date of death in some identifiable form, the exact scope of this paragraph is difficult to determine. Its operation would appear to be confined to cases where the conditions exist which are required for the operation of s. 102 (2) (b), namely the existence in New South Wales at the date of death of the property comprised in the gift in an identifiable form. It then requires that the actual amount of the money given or paid, and not the value of the property into which it has been transmuted, shall be included in the estate. The paragraph fixes on the date of gift as the material date, so that its operation must be confined, I think, like s. 102 (2) (ba), to gifts of money then situate in New South Wales. Its introduction assists the construction that the expression "property comprised in any gift" was intended to include property into which the original subject matter of the gift could be followed in the hands of the donee, because it has the effect of preventing this construction in one particular case and of keeping the money "in a hypothetical state of preservation in the condition in which it was given."

For these reasons, I am of opinion that the shares were property comprised in the gift which the settlor made in May 1939, and being situate in New South Wales at the date of his death formed part of his notional estate within the meaning of s. 102 (2) (b), so that the second question asked in the case stated should be answered in the affirmative.

I would therefore dismiss the appeal, but the order of the Supreme Court should be varied by answering the first question No instead of Yes.

Order of Supreme Court varied by striking out the answer to first question and substituting therefor the answer "No." Otherwise appeal dismissed with costs.

Solicitors for the appellants, *J. Stuart Thom & Co.*

Solicitor for the respondent, *A. H. O'Connor*, Crown Solicitor for New South Wales.

J. B.