[HIGH COURT OF AUSTRALIA.]

WAY AND OTHERS . . . . . APPELLANTS;

AND

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

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1949.

SYDNEY, *Aug.* 3-5, 18.

Dixon, McTiernan, Williams and Webb JJ.

Death Duty—Dutiable estate—Notional estate—Charitable trust created by deceased—Conditions—Appropriation of trust property—Direction by settlor—Nature of trust—Time of taking effect—Powers of trustees—Property owned by trustees—Dispensation in trust instrument—"Any property passing under any settlement"—"That property"—"Restore to himself"—"Reclaim"—"Possession and enjoyment"—Stamp Duties Act 1920-1940 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 50 *of* 1940), *s.* 102 (2) (a), (c), (d).*

G., by an indenture made on 5th September 1928, created a trust and transferred and assigned to the trustees of which he was one certain moneys and securities to be held by them on certain conditions. By clause 2 of the indenture, after directing payment of certain charges, the trustees were to hold the fund and to apply the fund and income towards certain charitable purposes. Clause 3 provided that time, manner and head or heads under which the application and appropriation of the trust fund and income should be made, and all other details and particulars as to such application and appropriation, should be in the absolute discretion of the trustees, but during the lifetime of the settlor subject to his direction and approval. Clause 24 provided that the trustees should during G.'s lifetime if he so directed apply any property belonging to the trust for the purposes of acquiring by purchase or exchange from him any real or personal property valued for the purpose at a sum at least five per cent below its value as ascertained by an independent valuator appointed by the trustees other than the settlor.

That indenture was varied by a later indenture as to the property agreed to be transferred and assigned but not as to the trusts upon which the property

* The *Stamp Duties Act* 1920-1940 (N.S.W.) by s. 102 provides:—"For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:— . . . (2) (*a*) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person: Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust. . . . (*c*) Any property passing under any settlement, trust, or other disposition of property made by the deceased whether before or after the passing of

[EDITOR'S NOTE.—On 26th June 1950 the Judicial Committee of the Privy Council granted special leave to appeal from this decision.]

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was held. From time to time thereafter, but more than three years before his death, on 2nd August 1945, G. transferred, assigned or paid other property and moneys to the trustees.

The Commissioner claimed that G.'s estate should be deemed to include and consist of the settled property by reason of the provisions of par. (a), or alternatively of par. (c), or par. (d) of s. 102 (2) of the *Stamp Duties Act* 1920-1940 (N.S.W.).

Held that the property which at G.'s death was subject to the trusts of the settlement was not caught by either par. (a), or (c) or (d) of s. 102 (2) of the *Stamp Duties Act* 1920-1940 (N.S.W.) and therefore should not be deemed to be included in his estate for death-duty purposes.

Decision of the Supreme Court of New South Wales (Full Court): *In re Gillespie*, (1949) 49 S.R. (N.S.W.) 331; 66 W.N. 179, reversed.

APPEAL from the Supreme Court of New South Wales.

A case stated by the Acting 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.) was substantially as follows:—

1. The abovenamed Robert Winton Gillespie (who is hereinafter called "the testator") died on 2nd August 1945 within the State of New South Wales.

2. Probate of the last will of the testator dated 21st April 1945 has been duly granted by the Supreme Court of New South Wales in its Probate Jurisdiction to the executors therein named, namely, Francis Harmsworth Way, George Roland Love, William Garrick Wilson, John Cadwallader and Milton Rewi Dunkley (hereinafter called the "appellants").

3. By an indenture made 5th September 1928 between the testator (therein called the settlor) of the one part and the testator, George Gillespie, Edward Charles Hadley and Frank Gordon Blair of the other part it was witnessed that the testator thereby transferred and assigned unto the parties thereto of the second part all

this Act—(i) by which an interest in or benefit out of or connected with that property, or in the proceeds of the sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (iii) by which the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim that property or the proceeds of the sale thereof. (*d*) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

those the moneys debts securities for moneys and property enumerated in the first part of the schedule thereto to the intent that the same should be conveyed transferred and assigned into the names of the said parties thereto of the second part and held by them upon the trusts and subject to the conditions and provisions hereinafter set out.

4. The said indenture contained the following amongst other clauses that is to say:

"2. The said parties hereto of the second part or the survivors of them or other the trustees for the time being of these presents (all of whom are hereinafter included in the expression "the Trustees") shall hold the said moneys debts and securities for moneys and property and all other the investments securities and property for the time being representing the same hereinafter referred to as "the trust fund" upon trust out of the corpus to pay any duty or duties the payment of which may be demanded and enforced by the Government of any of the State(s) of the Commonwealth upon the execution of this Indenture and upon further trust on and after the date of these presents to hold the Trust Fund or the balance thereof as the case may be upon trust to apply and appropriate such Trust Fund and the annual income thereof after payment of all salaries expenses costs charges and outgoings hereinafter authorised towards lawful charitable purposes under the following heads vide licet

(*a*) Educational

(*b*) The relief of poverty in Australia

(*c*) The general benefit of the community in Australia not falling under the preceding head

but subject to all the provisions and conditions set out in these presents.

3. The time manner and the head or heads under which the application and appropriation of the said Trust Fund and the said income shall be made and all other details and particulars as to such application and appropriation shall be in the absolute discretion of the Trustees but during the lifetime of the Settlor subject to his direction and approval and the Settlor places on record his belief that it will be found advisable to have completely distributed the trust fund and wound up the trust within ten or fifteen years.

24. The Trustees may also apply and appropriate any property belonging to the Trust in its then present condition for

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any Trust purposes and may also use any of the moneys of the Trust either corpus or income or both in purchasing any land or land and buildings or in erecting buildings or in altering or in improving buildings to be used or applied for any such purpose. The Trustees may whether during the lifetime of the Settlor or afterwards and shall during the lifetime of the Settlor if he so directs apply and appropriate any property including moneys belonging to the Trust for the purposes of acquiring by purchase or exchange from the Settlor or his executors any real or personal property valued for the purposes of such purchase or exchange at a sum at least five per cent below the valuation of such real or personal property so acquired as ascertained by some independent valuator appointed by the Trustees other than the Settlor."

5. By an indenture made 1st November 1929 between the same parties the aforesaid indenture of 5th September 1928 was varied as was in the later indenture provided but was otherwise confirmed. The said variation related to the property agreed to be transferred and assigned by the testator and not to the trusts upon which property transferred and assigned by him were to be held.

6. A true copy of the indenture of 5th September 1928 and a true copy of the said indenture of 1st November 1929 were annexed to and formed part of the case.

7. The transfer of the cash deposit mentioned in the first of the indentures was completed by the testator and the sum of money mentioned in the second of the indentures was duly paid by him to the trustees of the settlement constituted by the indentures.

8. From time to time after the execution of the indentures the testator transferred, assigned or paid other property and moneys of the testator to the trustees of the settlement to be held by them upon the trusts and subject to the conditions and provisions contained in the indentures. All such property and moneys were transferred assigned or paid to the trustees more than three years prior to the date of the death of the testator.

9. Immediately prior to the death of the testator the trustees of the settlement were the testator, Jessie Jean Gillespie, Francis Harmsworth Way, and William Garrick Wilson. The testator was one of the trustees of the settlement at all times up to the date of his death.

10. During the life of the testator the trustees of the settlement applied or appropriated moneys belonging to the Trust totalling the sum of £52,088 15s. in the acquisition by purchase from the testator of the undermentioned personal property, being shares in

certain companies, on the respective dates and at the respective prices hereunder shown in relation to such purchases :

Date	*Property*			*Price*		
1929						
30th October	2,800	shares in	Gillespie Bros. Pty. Ltd.	£3,150	0	0
30th November	2,300	,,	,,	2,587	10	0
1930						
4th February	1,800	,,	,,	2,025	0	0
24th May	2,250	,,	,,	2,531	5	0
30th June	850	,,	,,	956	5	0
1934						
24th February	20,000	,,	,,	20,000	0	0
24th ,,	10,000	,,	Mungo Scott Pty. Ltd.	10,000	0	0
24th ,,	7,500	,,	M. McLeod Pty. Ltd.	3,750	0	0
,, ,,	3,000	,,	Inverell Milling Co. Pty. Ltd.	3,000	0	0
,, ,,	2,096	,,	Thorpes Ltd.	2,096	0	0
,, ,,	1,000	,,	Standard Portland Cement Ltd.	446	0	0
,, ,,	1,800	,,	Ball & Welch Ltd.	1,260	0	0
,, ,,	500	,,	Otway Coal Co.	5	0	0
1945						
30th June	225	,,	Hill 50 Gold Mine	106	15	0
,, ,,	500	,,	Great Boulder Ltd.	175	0	0

11. None of the said shares were acquired at sums fixed in accordance with valuations as required by the provisions of clause 24 of the indenture of 5th September 1928.

12. At the date of the death of the testator the value of the property subject to the trusts of the settlement was £81,403 19s. 6d.

13. For the purposes of the assessment of death duty the Commissioner of Stamp Duties included in the estate of the testator the property which was at the time of his death subject to the trusts of the settlement.

14. The Commissioner of Stamp Duties assessed death duty on the estate of the testator on the basis that the final balance of the

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estate as determined in accordance with the said Act was £319,926 and assessed such death duty at £100,964 10s.

15. The appellants contend that the estate of the testator ought not for the purposes of the assessment and payment of death duty to be deemed to include the property which was at the date of his death subject to the trusts of the settlement or any part thereof but do not otherwise dispute the correctness of the assessment.

16. The appellants have paid the death duty assessed as aforesaid by the Commissioner of Stamp Duties and have deposited the sum of £20 as security for costs and have by notice in writing required the Commissioner of Stamp Duties to state a case for the opinion of the Supreme Court of New South Wales.

17. If the appellants are correct in their contention the amount of death duty payable in respect of the estate of the testator will be reduced by £26,049 5s. 8d.

18. The questions for the determination of the Court are :—

(1) Should the property which was at the date of death of the testator subject to the trusts of the said settlement be deemed to be included in his estate for the purposes of the assessment and payment of death duty thereon ?

(2) What was the amount of death duty payable in respect of the estate of the testator ?

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

The Full Court of the Supreme Court answered the questions submitted as follows :—1. Yes. 2. Not answered by the majority, but was answered by the other member of the Court, £100,964 10s. 3. By the executors : *In re Gillespie* (1).

During the hearing of the appeal the Court was informed that par. 10 of the case stated did not adequately set out the transaction. A minute book was handed to the Court which showed the position to be, as stated in the judgment of *Jordan* C.J. in the Court below (2) as follows :—Between 30th October 1929 and 24th February 1934, the settlor on six occasions paid to the trustees by cheques sums totalling £51,807 as gifts to be held on the trusts of the settlement, and the trustees used the said sums in buying from the settlor in all 50,000 shares in Gillespie Bros. Pty. Ltd. and 25,896 shares in seven other companies. Each of the said six gifts and purchases was made in the following way. The trustees in the first place received a gift from the settlor of a cheque for a certain sum, to be held on the trusts of the settlement. The settlor then intimated that he would make available to the trust certain specified shares, and the trustees resolved to authorize the payment of a sum, which was always the

(1) (1949) 49 S.R. (N.S.W.) 331 ; 66 W.N. 179.

(2) (1949) 49 S.R. (N.S.W.), at p. 333 ; 66 W.N. at p. 180.

same as the amount of the cheque, to purchase those shares. They were then purchased accordingly.

On 30th June 1945, about a month before the settlor's death, the trustees used £281 15s. of moneys the subject of the trusts in buying from the settlor 625 shares in two companies.

The relevant statutory provisions sufficiently appear in the judgment hereunder.

G. E. Barwick K.C. (with him *W. J. V. Windeyer* K.C. and *T. E. F. Hughes*), for the appellants. Clauses 2 and 3 of the 1928 agreement constitute a trust for charitable purposes and cannot be read as a trust for such charitable bodies or such persons who are proper objects of lawful charity as the trustees may select. The trust took effect upon the money coming into the hands of the trustees because the purposes were annexed to the charitable purpose and the whole application was complete. *Burrell* v. *Attorney-General* (1) and *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd.* (2) are cases of a trust for individuals. The three charitable purposes specified in clause 2 of the agreement state the perimeter in totality a description of the area possible to be covered. The right of the settlor in respect of trust property is discussed in *Halsbury's Laws of England*, 2nd ed., vol. 4, pp. 92 et seq., and *Tudor* on *Charities*, 4th ed. (1906), p. 357; see also *Allan's Executors* v. *Allan* (3). It is a trust on its proper construction impressing the money of the trust for a purpose final and complete at the date of the agreement, and changes in the person who is to do the choosing of the particular participants in the bounty of the agreement do not amount to changes in the effect or the taking effect of the trust. There is not any place where there is not any *cestui que trust*. The discretion of the trustees is the operative matter. A decision made by the trustees not at the direction or under the approval of the settlor would be quite operative, and the settlor could not complain. He would not have any right to bring a suit. The agreement does not change on the death of the settlor, the identity of the person whose decision administers the trust. On the true construction of the document there is not a change in the identity of the person whose discretion is operative in the selection of the immediate objects of the distribution of the fund. If there be a change, a removal of the necessity for approval of the decisions of the trustees by the death of the settlor, that effects no change in the trust: see *Commissioner of Succession Duties (S.A.)* v. *Isbister* (4). The words " that property " in s. 102 (2) (c) (i) of the *Stamp Duties Act* 1920-1940 (N.S.W.) mean the property which passed from the

(1) (1937) A.C. 286.
(2) (1915) 21 C.L.R. 69.
(3) (1908) Sess. Cas. 807.
(4) (1941) 64 C.L.R. 375.

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settlor under the settlement, in this case, to the trustees. If "property passing" means in this case money and not the properties which the trustees have acquired subsequently, then the option to buy the properties cannot transfer an interest in that property. As far as the clause gave to the settlor the right to require the trustees to buy some property from him for money, that creates no interest in the money which he gave. The purchase price he received is in no sense identified with the money he gave and no one created an interest in it. The word "passing" and as to what does pass were considered in *Dent* v. *Commissioner of Stamp Duties (N.S.W.)* (1) and also in *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (2). There was an immediate trust. Clause 24 was not a clause for the benefit of the settlor; it was a clause clearly for the benefit of the fund and it was a provision which enabled the settlor to require exercise of the power which will remain none the less a fiduciary power. He could not require them to commit a breach of trust. It was a power in the interests of the trust and there was authority given to the settlor to require the trustees to exercise their fiduciary power. The settlor did not have the right to call for a specific piece of property from the trust (*Commissioner of Stamp Duties (N.S.W.)* v. *Thomson* (3)). The clause means that during his lifetime the settlor could require the trustees to use their funds and, if need be, to sell a property to provide the funds for investment in assets which were his, provided the price was not above the amount that he fixed; but the question of which property was to be purchased from him and the final price were matters of negotiation between the two of them as vendor and purchaser, the trustees and himself. The clause was for the benefit of the trust. It was an investment provision and was merely a clause which required the settlor to set aside a fund and gave him no right in any instance to nominate a property which was to be sold by the trustees. The trust was complete at the date of the instrument. "Property" as used in s. 102 (2) (c) (i) of the Act refers to property that left the settlor.

G. Wallace K.C. (with him *K. E. Walsh*), for the respondent. The fact that the trust is a charitable trust has nothing to do with the case. As such it is not in any way exempt from the provisions of s. 102 (2) (a) of the Act. If only one out of several trusts, or subtrusts, or directions amounting to trusts, in a deed fall within the definition then the section operates. That is the true construction of the phrase "any trust to take effect." The phrase is a wide phrase.

(1) (1909) 9 C.L.R. 406, at pp. 416, 418, 421, 423.

(2) (1926) 38 C.L.R. 12, at pp. 30, 35, 44.

(3) (1927) 40 C.L.R. 394, at p. 421.

Within the major trust or general trust there was a trust which took effect after death. There is not any difference between nominating different beneficiaries as between the lifetime of the settlor and his death on the one hand and in the case of a very large field of possible beneficiaries nominating a different method of selection during those respective periods. The type of trust is immaterial so long as there is any one trust which takes effect (*Commissioner of Stamp Duties* (*N.S.W.*) v. *Thomson* (1)). Whether it be a trust relating to a change in the life estate, a gift over after life which is only one out of a number of trusts, whether it be a trust relating to variation in the benefits or the class of benefits, or a selection out of a large class, or whether it be a trust relating to sale or conversion or whatever it may be, so long as there is any one trust which operates or takes effect on the death, then the section operates (*Rabett* v. *Commissioner of Stamp Duties* (*N.S.W.*) (2)). It would appear that in that case it was not a trust but a power, but that is immaterial. Within the true meaning of s. 102 (2) (a) there is a very crucial difference. The crucial part of the trust is that the method of ascertaining the class is different. The discretion is more than a discretion in the mere administration; it is a discretion which goes to the method of selecting the head or class of beneficiary. Where there is a very large class and a different method of selection during life and after life, then that amounts in substance to the same thing. The trust is one trust but it contains a number of trusts within it. One of the most important of the trusts is the selection of beneficiaries or objects of bounty out of a very wide field; there are different methods or the result is the same as if there were different methods of selecting out of that wide field, therefore after the settlor's death a different trust took effect from the view-point of who were to be the objects of his bounty (*Commissioner of Stamp Duties* (*N.S.W.*) v. *Thomson* (3)). Section 102 (2) (c) of the Act was correctly construed and applied by the members of the Court below. The property which passed under the settlement included not only the actual choses in action represented by the cheques but the property as found in the settlement in accordance with its terms and as existing at the date of the settlor's death. Where a settlor has reserved an interest in that property, not in the technical choses in action which change title, but the actual property to which it was converted within the terms, that is sufficient. The phrase "interest in or benefit out of" means not a financial advantage to be measured by some mathematical yardstick, but some proprietary interest in the property settled. The Court is not concerned with inquiring into the extent, if any, of the

(1) (1927) 40 C.L.R., at p. 426.
(2) (1929) A.C. 444, at p. 448.
(3) (1927) 40 C.L.R., at p. 426.

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ultimate financial benefit. "Passing" means passing at the time of the settlement (*Dent* v. *Commissioner of Stamp Duties (N.S.W.)* (1)). Clause 24 is an obligation arising under covenant by the trustees and is a mandatory duty on their part to fulfil the requirements of the settlement as and when required from time to time. It is a personal benefit to the settlor upon which he could sue or obtain specific performance in the exchange of real estate or shares as the case might be. The property was settled subject to a reservation in favour of the settlor. Clause 24 does not place the settlor in a fiduciary position. His interest and his duty would not conflict. The covenant is clear and unambiguous and places the settlor outside the trust altogether. For the purpose of that clause he is not a trustee at all. A right to exchange property indicates a right or interest in the property to be exchanged. The word "interest" is a word of very wide import (*Jarrett* v. *Barclay's Bank* (2); *Ex parte Coote* (3); *Craig* v. *Federal Commissioner of Taxation* (4)). If the property be regarded as a conglomerate mass then an interest in any part of that mass is an interest in the whole of it. Alternatively, upon the true construction of clause 24 the settlor is given an interest in the whole because any part must mean the whole. The natural inference, having regard to the document as a whole, is that clause 24 is a benefit to the settlor.

[DIXON J. referred to *Vicars* v. *Commissioner of Stamp Duties (N.S.W.)* (5).]

The terms of pars. (i), (ii) and (iii) of s. 102 (2) (c) are complied with. The property passing under the settlement is the property comprised in the settlement or subject to the trust (*In re Payne's Declaration*; *Poplett* v. *Attorney-General* (6); *In re Payne*; *Poplett* v. *Attorney-General* (7); *Attorney-General* v. *Chapman* (8); *Green* on *Death Duties*, 2nd ed. (1947), pp. 82, 85, 86). The settlor retained the right to obtain restoration or reclamation of the given property within the meaning of par. (iii) of s. 102 (2) (c). This was a benefit within the meaning of s. 102 (2) (d). The members of the Court below were in error in indicating that it was only by reason of matters subsequent that clause 24 became operative (*Revenue Commissioners* v. *O'Donohoe* (9); *Attorney-General* v. *Worrall* (10); *Grey (Earl)* v. *Attorney-General* (11)).

[DIXON J. referred to *Re Cochrane* (12).]

(1) (1909) 9 C.L.R. 406.
(2) (1947) Ch. 54, at p. 65; on appeal, at p. 187.
(3) (1948) 49 S.R. (N.S.W.) 179; 66 W.N. 29.
(4) (1945) 70 C.L.R. 441, at p. 446.
(5) (1945) 71 C.L.R. 309, at p. 341.
(6) (1939) Ch. 865.
(7) (1940) 1 Ch. 576, at p. 591.
(8) (1891) 2 Q.B. 526, at p. 533.
(9) (1936) I.R. 342.
(10) (1895) 1 Q.B. 99.
(11) (1900) A.C. 124, at p. 126.
(12) (1906) 2 I.R. 200.

G. E. Barwick K.C., in reply. The argument addressed to the Court on behalf of the respondent in respect of s. 102 (2) (a) that the trust takes effect but that each administrative decision constitutes a trust, is quite insupportable. The argument as to the various benefits the settlor might have got out of the trust is similar to the argument used on behalf of the unsuccessful appellant in *Commissioner for Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd.* (1). "Benefit" under s. 102 (2) (c) must arise out of the property itself. A person in a fiduciary position cannot require his co-trustees to exercise their fiduciary powers for his benefit; something he cannot do himself. *In re Payne*; *Poplett* v. *Attorney-General* (2) supports, if anything, the view that the natural way to read the words "property passing" is, as held by *Isaacs* J. in *Dent* v. *Commissioner of Stamp Duties (N.S.W.)* (3) as that which passed from the settlor. If it be not an interest or benefit under s. 102 (2) (c) then the respondent cannot succeed under s. 102 (2) (d) because the benefit under (d) is not a benefit which is not property. It was indicated in *In re Kerrigan*; *Ex parte Jones* (4) that a reservation of a contractual benefit would be a benefit under s. 102 (2) (d), and that (d) is not limited to a mere enjoyment of a benefit subject to an instrument or a gift.

Cur. adv. vult.

Aug. 18.

The COURT delivered the following written judgment.

These reasons for judgment were prepared by *Williams* J. This is an appeal by the executors of R. W. Gillespie deceased from an order of the Full Supreme Court of New South Wales answering the first question submitted in a case stated under s. 124 of the *Stamp Duties Act* 1920-1940 (N.S.W.) by the respondent the Commissioner of Stamp Duties in favour of the commissioner.

The question is whether certain trust funds known as the R. W. Gillespie trust of the value of £81,403 19s. 6d. form part of the dutiable estate of R. W. Gillespie, deceased, for the purposes of death duty under the provisions of the Act. The respondent claims that these funds are made part of the notional estate of the deceased by virtue of the provisions of s. 102 (2) (a), or alternatively of s. 102 (2) (c), or alternatively of s. 102 (2) (d) of the Act. *Jordan* C.J. and *Maxwell* J. were of opinion that they were made part of the notional estate by both s. 102 (2) (a) and s. 102 (2) (c), while *Owen* J. was of opinion that they were so made by s. 102 (2) (c). The funds in question consisted of the whole of the assets which at the date of the death of the deceased on 2nd August 1945 were still subject to the trusts of a certain indenture of settlement dated 5th

(1) (1943) A.C. 425, at pp. 430-433.
(2) (1940) 1 Ch., at pp. 589, 591, 595, 602, 605.
(3) (1909) 9 C.L.R., at p. 422.
(4) (1946) 47 S.R. (N.S.W.) 76; 63 W.N. 288.

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September 1928. By this indenture made between the deceased as settlor of the one part and the settlor and three other persons as trustees of the other part, as varied by a subsequent indenture made between the same parties on 1st November 1929, the settlor transferred and assigned certain moneys totalling £18,750 to the trustees of the settlement to be held by them upon the trusts and subject to the conditions and provisions thereinafter set forth.

The indenture contained the following clauses: "2. The said parties hereto of the second part or the survivors of them or other the trustees for the time being of these presents (all of whom are hereinafter included in the expression 'the Trustees') shall hold the said moneys debts and securities for moneys and property and all other the investments securities and property for the time being representing the same hereinafter referred to as 'the trust fund' upon trust out of the corpus to pay any duty or duties the payment of which may be demanded and enforced by the Government of any of the State(s) of the Commonwealth upon the execution of this Indenture and upon further trust on and after the date of these presents to hold the Trust Fund or the balance thereof as the case may be upon trust to apply and appropriate such Trust Fund and the annual income thereof after payment of all salaries expenses costs charges and outgoings hereinafter authorized towards lawful charitable purposes under the following heads vide licet (*a*) Educational (*b*) The relief of poverty in Australia (*c*) The general benefit of the community in Australia not falling under the preceding head but subject to all the provisions and conditions set out in these presents. 3. The time manner and the head or heads under which the application and appropriation of the said Trust Fund and the said income shall be made and all other details and particulars as to such application and appropriation shall be in the absolute discretion of the Trustees but during the lifetime of the Settlor subject to his direction and approval and the Settlor places on record his belief that it will be found advisable to have completely distributed the trust fund and wound up the trust within ten or fifteen years. 24. The Trustees may also apply and appropriate any property belonging to the Trust in its then present condition for any Trust purposes and may also use any of the moneys of the Trust either corpus or income or both in purchasing any land or land and buildings or in erecting buildings or in altering or in improving buildings to be used or applied for any such purpose. The Trustees may whether during the lifetime of the Settlor or afterwards and shall during the lifetime of the Settlor if he so directs apply and appropriate any property including moneys belonging to the Trust for the purposes of acquiring by purchase or exchange

from the Settlor or his executors any real or personal property valued for the purposes of such purchase or exchange at a sum at least five per cent below the valuation of such real or personal property so acquired as ascertained by some independent valuator appointed by the Trustees other than the Settlor." In addition to the original sums of money mentioned in these indentures the settlor paid to the trustees of the settlement from time to time further sums of money totalling £51,807 as gifts to be held on the trusts of the settlement and the trustees used these sums in buying from the settlor in all 50,000 shares in Gillespie Bros. Pty. Ltd. and 25,896 shares in seven other companies. All these moneys were paid to the trustees more than three years prior to the date of the death of the settlor. On 30th June 1945, about a month before the settlor's death, the trustees used £281 15s. of moneys the subject of the trusts in buying from the settlor seven hundred and twenty-five shares in two companies. None of the shares bought by the trustees from the settlor was acquired in accordance with valuations made pursuant to clause 24 of the indenture. The settlor was one of the trustees of the settlement from the date of its execution to that of his death.

Before referring to the relevant provisions of the *Stamp Duties Act*, it will be convenient to discuss the meaning of clauses 2, 3 and 24 of the settlement. There are three objects of the charitable trust, the trustees having a discretion to apply the trust funds both income and corpus for the advancement of these objects. The settlor in his lifetime had a control over the manner in which the discretion of the trustees should be exercised to the extent that the exercise was subject to his direction and approval. Trustees of a charity in the absence of a provision to the contrary in the trust instrument can act by a majority. In this case there is a provision to the contrary, and it may be that the word " direction " would have been sufficient to compel the other trustees to exercise their discretion as the settlor directed, but the better opinion would appear to be that the effect of the provision was merely to give the settlor a right of veto, so that the majority could not exercise their discretion in a manner of which the settlor did not approve. But on either view it would not be correct to construe the settlement as containing two trusts (1) a trust during the lifetime of the settlor to distribute the trust funds amongst the charitable objects in accordance with his direction and approval; and (2) a trust after his death to distribute the trust funds amongst such objects in the absolute discretion of the trustees. It is not a trust which can be divided into a trust, like that in *Waldo* v. *Caley* (1), limited to endure

(1) (1809) 16 Ves. Jun. 206 [33 E.R. 962].

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for the life of the settlor with a further and different trust to take effect on his death. It is a single trust though different persons are to exercise the discretion as to the manner in which the trust funds should be distributed amongst the charitable objects during the life of the settlor and after his death. There is a general charitable intention to benefit the objects of the trust irrespective of the mode by which the gift is to be carried into effect from time to time, and in such a case equity will not allow the trust to fail by reason of the failure of the appointed mode. The trust would therefore have taken effect during the life of the settlor although he had refused to act as a trustee or had retired or had become for some other reason unwilling or unable to exercise his discretion (*Attorney-General* v. *Gladstone* (1); *In re Willis* (2); *Halsbury's Laws of England*, 2nd ed., vol. 4, p. 192). The settlement contains one trust and one trust only and that is a charitable trust which took effect immediately upon the settlor handing the initial sum of money to the trustees of the settlement.

The second question of construction relates to the proper meaning of clause 24 of the settlement. The preceding clause 23 authorizes the trustees to apply so much of the income of the trust fund as they think fit for the purposes of the trust and capitalize the balance, and the succeeding clause 25 authorizes the trustees to retain unrealized so long as they might think fit any of the properties or securities then assigned to them or which might thereafter be vested in them by gift, bequest, or devise, and to realize any of them which they might think fit and from time to time to invest any moneys forming part of the trust funds available for investment in a wide range of investments. Clause 24 in the first limb authorizes the trustees to apply and appropriate any property for any trust purposes and to use any moneys of the trust in purchasing any land or buildings or in erecting buildings or in altering or improving buildings to be used for the purposes of the trust. It then proceeds in the second limb to authorize the trustees during the life of the settlor or afterwards to apply and appropriate any property including moneys belonging to the trust for the purposes of acquiring by purchase or exchange from the settlor or his executors any real or personal property valued for the purposes of such purchase or exchange at a sum at least five per cent below the valuation of such real or personal property so acquired as ascertained by some independent valuator appointed by the trustees other than the settlor. It provides that the trustees shall during the lifetime of the settlor if he so directs apply and appropriate any property including moneys belonging to the trust in this manner. It is a

(1) (1842) 13 Sim. 7 [60 E.R. 3]. (2) (1921) 1 Ch. 44.

rule of equity that a trustee must not place himself in a position where his interest and duty may conflict. He cannot therefore in the absence of a special dispensation in the trust instrument either sell his own property to the trust estate or purchase any property from the trust estate. The purpose of the second limb is to provide such a dispensation. It authorizes the trustees to apply and appropriate trust funds for the purpose of acquiring by purchase or exchange any real or personal property of the settlor in the manner therein mentioned. The valuations provided for are only valuations of the real and personal property of the settlor. There is no express provision for valuing the trust assets. The second limb should not be read as meaning that the settlor may direct the trustees to exchange some particular item of trust property for some particular property of his own. The words " or exchange " are only intended to authorize the trustees to acquire the real and personal property of the *settlor* not only by the purchase but also by the exchange of some of *the trust property* for some property of the settlor. The second limb provides the necessary machinery to enable the trustees of the settlement to acquire property from one of themselves. It also enables the settlor as one of the trustees to require the other trustees to make such an acquisition. But it does not enable the settlor to require the other trustees to apply any particular part of the trust property for this purpose, and it does not enable the settlor to require the trustees to acquire his property by exchange and not by purchase. The discretion as to what part of the trust property shall be used to acquire the settlor's property and as to whether the acquisition shall be for cash or by way of exchange is a matter for the trustees of the settlement as a whole and if there is a difference of opinion for the majority of those trustees. The words " pay and appropriate any property including moneys belonging to the trust " are intended to remove any doubt that the authority of the trustees to use the trust funds for this purpose extends to the whole trust estate and not to any particular part of it. It would require very clear words to empower the settlor to compel the trustees to use some particular portion of the trust funds to acquire his property and in particular to exchange some trust asset selected by himself for an asset of his own.

The contrary view which was accepted by the Supreme Court would be that the clause authorized the settlor at any time during his life to direct the trustees of the settlement to exchange any asset of the trust for an asset of his own. On this view the settlor had a sort of floating right of selection exercisable against the assets of the trust which would crystallize against any particular asset upon its exercise. But if this was intended the settlement would

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have provided for an independent valuation of the trust asset. Further the trust assets from time to time would presumably consist of moneys in the bank and tangible real and personal property. Clause 24 authorizes the trustees to purchase land and buildings to be used or applied for the purposes of the trust, so that the tangible property might comprise a school and it could hardly have been intended that the settlor should have the power to direct the trustees to exchange the school buildings and shut down the school for some shares which he desired to transfer to the trust. It was suggested during the argument that the clause might have been inserted to enable the settlor to require a transfer of some or all the shares in Gillespie Bros. Ltd. if he desired to increase his voting power in that company. But the settlor could achieve this object by registering himself as the first joint holder of the trust shares. As a trustee he would have to exercise his vote for the benefit of the trust, but there is no reason to believe that the interests of the trust and his own personal interests would not coincide. The material words of clause 24 of the settlement are not apt to create a covenant between the settlor and himself and the other trustees which by virtue of s. 72 of the *Conveyancing Act* 1919 (N.S.W.) would be construed and capable of being enforced in like manner as though the covenant had been made between the settlor and the other trustees. No particular form of words is necessary to create a covenant but the words must be sufficient to establish an agreement to do a thing: *Norton* on *Deeds* 2nd ed. (1928), p. 532. The power to direct the other trustees conferred on the settlor by clause 24 is at most a power as a trustee to control the exercise of the discretion by the trustees as a body and it is a fiduciary power which must be exercised in the interests of the trust property. If the other trustees refuse to accede to his direction, the only remedy of the settlor would be to sue them for breach of trust joining the Attorney-General as a party to represent the charities. He could not sue the other trustees for specific performance of a contract to exchange an asset of his own for an asset of the trust.

It will now be convenient to consider the relevant provisions of the *Stamp Duties Act*. There is first section 102 (2) (a) which includes in the notional estate all property which the deceased has disposed of by way of settlement containing any trust in respect of that property to take effect after his death. In *Rabett* v. *Commissioner of Stamp Duties* (1) Lord *Buckmaster*, delivering the judgment of the Privy Council, included in the trusts that took effect after the death of the settlor in that case a trust enabling his

(1) (1929) A.C., at p. 448.

widow alone to sell and vary investments. But it would appear that this machinery trust was included among such trusts *per incuriam*. It is at least clear that the paragraph does not refer to powers but to trusts. It is dealing with dispositions, that is with beneficial interests created in property, and therefore applies to the beneficial trusts and not to the administrative trusts and powers of a trust instrument. Even if the paragraph does include administrative trusts, there are in the settlement no administrative trusts but only powers. The settlement contains only the one trust, namely the charitable trust for educational purposes, the relief of poverty in Australia and the general benefit of the community in Australia not falling under these heads. This trust took effect in the lifetime of the settlor and did not in any sense take effect after and by reference to his death. Accordingly, as *Owen* J. held, the respondent's claim, so far as it is based on s. 102 (2) (a) of the Act, fails.

The next section is s. 102 (2) (c). This section provides that there shall be included in the dutiable estate of the deceased any property passing under any settlement, trust or other disposition of property made by the deceased (i) by which an interest in or benefit out of or connected with that property, or in the proceeds of the sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (iii) by which the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim that property or the proceeds of the sale thereof. The first question that arises under the section relates to the meaning of " any property passing under any settlement " or in other words to the meaning of the words " that property " in the section. It was contended for the appellants that the property in question was the sums of money which were originally handed to the trustees of the settlement by the settlor to be held on the trusts of the settlement and the further sums of money which were subsequently handed to the trustees by the settlor to augment the trust funds. It was contended that pars. (i), (ii) and (iii) could have no operation in respect of these sums of money and the section was therefore inapplicable. On this point counsel for the appellants relied particularly on the judgment of *Isaacs* J. in *Dent* v. *Commissioner of Stamp Duties* (1).

(1) (1909) 9 C.L.R. 406.

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There the question arose as to the meaning of property passing under a voluntary settlement for the purposes of s. 49 (2) (e) of the *Stamp Duties Act* 1898 (N.S.W.). *Isaacs* J. was of opinion that the property did not include the natural increase in the stock on a station between the date of the settlement and the death of the settlor. But no such question arises here. The only question is whether the words " that property " refer to the identical property originally settled or to the trust funds as they existed from time to time, and on that point there was no difference of opinion between *Isaacs* J. and the other members of the Court. *Griffith* C.J. said that the property passing under the settlement means " all property the title to which is immediately derived from the deed " (1). *Isaacs* J. said that the property in question " must be the property which *passed* so far as it exists, and in whatever form it exists . . . I assume the words are sufficient to comprise the property assigned, into whatever shape it may have been transmuted, so long as it remains substantially the representative of the property actually transferred " (2). There are remarks of his Honour to the same effect in *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (3). The learned author of *Green* on *Death Duties* 2nd ed., (1947), p. 86 says, in reference to the corresponding English legislation, that the property passing under a settlement does not connote a passing on death but " broadly speaking, it means merely property comprised in the settlement or subject to the trust." The remarks of *Dixon* J. in *Vicars* v. *Commissioner of Stamp Duties* (4) are to the same effect. The purpose of the *Stamp Duties Act* is to include in the notional estate of a settlor for the purposes of death duty property which can be identified and valued at the date of death, and the words " that property " in the section mean the trust fund as it exists from time to time.

The power of discretion conferred on the settlor is conferred for his life so that the first question is whether this power is within the meaning of par. (i) an interest in or benefit out of or connected with the trust funds or in the proceeds of sale thereof. These are wide words, but they are not wide enough to apply to the right conferred on the settlor by clause 24 of the settlement. This right was at most a right to have his real or personal property purchased with trust moneys or exchanged for trust property on terms advantageous to the trust and only when the settlor in the exercise of a fiduciary power thought it proper to direct the trustees to acquire his property on these terms. This is not an interest in or benefit

(1) (1909) 9 C.L.R., at p. 416.
(2) (1909) 9 C.L.R., at pp. 422, 423.
(3) (1926) 38 C.L.R., at p. 35.
(4) (1945) 71 C.L.R., at pp. 340-343.

out of or connected with the settled funds within the meaning of the paragraph. It is simply a power to alter the investment of the trust funds for the benefit of the trust. The power does not confer on the settlor any beneficial interest in or the right to receive any payment out of or connected with the income or corpus of the trust as it exists from time to time. To fall within the paragraph such an interest in or benefit out of or connected with the trust fund must confer on the settlor some legal or equitable right to obtain some benefit in money or money's worth for his own advantage out of or connected with the trust property. In *Attorney-General* v. *Farrell* (1) the Court of Appeal held, following *Attorney-General* v. *Heywood* (2), that the settlor had an interest in the property passing under the settlement where he was one of the objects of a discretionary trust during his life. The judgments in *Attorney-General* v. *Heywood* (2) and *Attorney-General* v. *Farrell* (1) support the view that the kind of interest or benefit to which the section is intended to apply is an advantage of this kind. The interest or benefit must be such that the beneficiaries under the settlement would derive an advantage from the death of the settlor or some other person. Further, since clause 24 of the settlement does not create a covenant, it could not be said that the disposition of property made by the settlor was accompanied by the reservation or assurance of, or a contract for, any benefit to the settlor for the term of his life within the meaning of par. (ii). There remains par. (iii). The words "restore to himself" and "reclaim" in this paragraph indicate that it is intended to apply to cases where the settlor has the power to diminish the value of the trust property by freeing it or some part of it from the trusts and appropriating it to his own use without consideration or adequate consideration in money or money's worth, and it would not therefore apply to an alteration in the investment of the trust assets from which the settlement and not the settlor derived the advantage. Accordingly the respondent's claim, so far as it is based upon s. 102 (2) (c), also fails.

The final section of the Act is s. 102 (2) (d). This section provides that there shall be included in the dutiable estate of the deceased "any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died." In *Commissioner of Stamp Duties of New South Wales* v. *Perpetual Trustee Co.*

(1) (1931) 1 K.B. 81. (2) (1887) 19 Q.B.D. 326.

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Ltd. (1) where the settlor had appointed himself one of the trustees, Lord *Russell of Killowen*, delivering the judgment of the Privy Council, said (2) that "the trustees alone were not the donee. They were in no sense the object of the settlor's bounty. . . . The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty." In the present case the beneficial possession and enjoyment of the donor's bounty was immediately and indefeasibly vested in the objects of the charitable trust. The income and corpus of the trust property could be applied for the benefit of those objects and for no other purposes. The settlor as donor was therefore entirely excluded *ab initio* from possession and enjoyment of the settled property and had no enjoyment and possession such as is contemplated by the section. Further it follows from what has already been said that the settlor was excluded from any benefit of whatsoever kind or in any way whatsoever whether enforceable at law or in equity because the benefit from the exercise of the power contained in clause 24 was a benefit to the settlement and not to the settlor. Accordingly the respondent's claim, so far as it is based upon s. 102 (2) (d), also fails.

The appeal should be allowed with costs. The order of the Supreme Court should be set aside and in lieu thereof an order made answering the first question in the negative, the second question "£74,915 4s. 4d.", and the third question "by the Commissioner of Stamp Duties." There should be an order that the sum of £26,049 5s. 8d. and the sum paid in as security for costs be repaid by the respondent to the appellants. The respondent should pay the costs of the proceedings in the Supreme Court.

Appeal allowed with costs. Order of Supreme Court set aside and in lieu thereof order answering first question in the negative, second question "£74,915 4s. 4d.", and third question "by the Commissioner of Stamp Duties." Order that the sum of £26,049 5s. 8d. and the sum paid in as security for costs be repaid by the respondent to the appellants. Respondent to pay the costs of the proceedings in the Supreme Court.

Solicitors for the appellants, *Sly & Russell.*

Solicitor for the respondent, *F. P. McRae,* Crown Solicitor for New South Wales.

J. B.

(1) (1943) A.C. 425.

(2) (1943) A.C., at p. 440.