[PRIVY COUNCIL.]

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

AND

WAY AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

PRIVY COUNCIL. 1951. *Oct.* 30, 31; *Dec.* 10. Lords Normand, Oaksey and Radcliffe.

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 whom he was one, certain moneys and securities to be held by them on certain conditions. By cl. 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 the 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 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 and therefore should not be deemed to be included in his estate for death-duty purposes.

Decision of the High Court: *Way* v. *The Commissioner of Stamp Duties (N.S.W.)*, (1949) 79 C.L.R. 477 (reversing the decision of the Supreme Court of New South Wales: *In re Gillespie*, (1949) 49 S.R. (N.S.W.) 331; 66 W.N. 179), affirmed.

Burrell v. *Attorney-General*, (1937) A.C. 286, and *Rabett* v. *Commissioner of Stamp Duties (N.S.W.)*, (1929) A.C. 444, discussed.

APPEAL from the High Court to the Privy Council.

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 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 thereinafter 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

PRIVY COUNCIL. 1951. COMMISSIONER OF STAMP DUTIES (N.S.W.) v. WAY.

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 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 purpose 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 identures 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 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
„ „	10,000	„ Mungo Scott Pty. Ltd.	10,000 0 0
„ „	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

PRIVY COUNCIL. 1951. COMMISSIONER OF STAMP DUTIES (N.S.W.) v. WAY.

11. None of the said shares were acquired at sums fixed in accordance with valuations as required by the provisions of cl. 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 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 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 High 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.

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

in the Court below (1) 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 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 the moneys the subject of the trusts in buying from the settlor 625 shares in two companies.

The High Court allowed an appeal from the decision of the Supreme Court, set aside the order of the Supreme Court and in lieu thereof answered question (1) No; question (2) £74,915 4s. 4d.; and question (3) by the Commissioner of Stamp Duties. The Court ordered that the sum of £26,049 5s. 8d. and the sum paid in as security for costs be repaid by the Commissioner of Stamp Duties to the trustees, and the commissioner was also ordered to pay the costs of the proceedings in the Supreme Court and in the High Court: *Way v. Commissioner of Stamp Duties (N.S.W.)* (2).

From that decision the Commissioner of Stamp Duties appealed, by leave, to the Privy Council.

The relevant statutory provisions are sufficiently set forth in the judgment hereunder.

Sir *Frank Soskice* K.C. and *F. Gahan*, for the appellant.

G. E. Barwick K.C. and *J. H. A. Sparrow*, for the respondents.

Their Lordships took time to consider the advice which they would tender to His Majesty.

Dec. 10.

LORD RADCLIFFE delivered the judgment of their Lordships as follows:—

This appeal relates to a claim for death duties on the death of one Robert Winton Gillespie who died on 2nd August 1945. The property which is said to be subject to the claim consists of certain

(1) (1949) 49 S.R. (N.S.W.), at p. 333; 66 W.N., at p. 180.

(2) (1949) 79 C.L.R. 477.

PRIVY COUNCIL. 1951. COMMISSIONER OF STAMP DUTIES (N.S.W.) v. WAY.

funds which at the date of his death were held upon the trusts of a settlement for charitable purposes made by him many years previously. Two clauses in that settlement are founded upon by the appellant, the Commissioner of Stamp Duties for the State of New South Wales, as bringing the trust funds within the charge to duty imposed by the *Stamp Duties Act* 1920-1949 (to use its current citation), of New South Wales.

The material section for the purposes of the claim is s. 102 of that Act. Alternative claims are preferred under sub-s. 2 (a), sub-s. 2 (c), each of the three sub-divisions of which is relied upon, and sub-s. 2 (d). The relevant portions of the section are thus as follows, it being common ground that if these trust funds fall within any of the categories there described they will be liable to a charge for duty.

" 2. (a) All property which the deceased has disposed of . . . by will or by a settlement containing any trust in respect of that property to take effect after his death . . .

Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.

* * * * * *

(c) 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.

(d) Any property comprised in any gift made by the deceased at any time . . . 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 . . . "

At first sight it is not easy to see what there is in the settlement made by Sir Robert Gillespie which could bring its funds within the charging provisions of this section. The settlement, which was made on 5th September 1928, was a trust disposition under which Sir Robert, as settlor, transferred and assigned to himself and two other gentlemen certain specified funds and property to be held upon the trusts and subject to the conditions and provisions set out in the deed. In effect the trust fund was to be held by the trustees upon trust to pay and apply it and its annual income towards lawful charitable purposes under the heads of "(*a*) educational, (*b*) the relief of poverty in Australia, and (*c*) the general benefit of the community in Australia not falling under the preceding head", but subject to such provisions and conditions as were set out in later portions of the document.

Two of such provisions are put forward as bringing the property within the charge of s. 102. The first is a clause, cl. 3, which immediately follows the declaration of the charitable purposes. It runs :—

"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."

The appellant argues that the effect of this clause is that on the settlor's death, when his power of direction and approval necessarily determined, a trust took effect after his death within the meaning of s. 102 (2) (a), because a new trust arose for the objects of the charity, those objects being thereafter selected by the existing trustees freed from the settlor's power of direction and approval.

The second provision, cl. 24, occurs, inappropriately, in a chapter of the deed entitled "Application of Income". It immediately precedes a clause dealing with the trustees' powers of investment and it runs as follows :—

"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

PRIVY COUNCIL. 1951. COMMISSIONER OF STAMP DUTIES (N.S.W.) v. WAY.

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."

The appellant argues that the effect of this clause is to reserve to the settlor some interest in or benefit out of or connected with the trust property or a right to reclaim or to restore it to himself, and that by one or other of the roads offered by s. 102 (2) (c) and (d) the appellant is entitled to succeed in his claim for duty.

It will be convenient to deal first with cl. 3 and s. 102 (2) (a) and to defer consideration of cl. 24, the effect of which depends, primarily, upon a conclusion as to the construction that ought to be placed upon its words.

The appellant's argument upon s. 102 (2) (a) succeeded with the majority of the Supreme Court of New South Wales: it was rejected on appeal by the High Court of Australia. The basis of the Supreme Court's decision was that the settlement contained two trusts, one for those recipients of charitable bounty whom the settlor might select during his life, the other, "to take effect after his death", for those recipients whom the trustees might select in the period following upon his death.

The situation was thus likened to that which arose in *Burrell* v. *Attorney-General* (1), although it must be observed that *Burrell's Case* (1) was a decision as to what constitutes a "passing" of property for the purposes of s. 1 of the *Finance Act* 1894 of the United Kingdom and it has no direct bearing on the meaning of the words "to take effect after death" in the *Stamp Duties Act* of New South Wales. The High Court, on the other hand, treated the settlement as creating one trust and one trust only, a trust for charitable purposes; and this trust, in their view, took effect immediately the settlement was created and continued as one despite the fact that during its continuance different persons might have the right or duty of deciding in what manner the trust funds were to be applied.

Their Lordships agree with the view of the High Court. Firstly, this trust was not in any true sense a trust for different groups of beneficiaries. It was from beginning to end a trust for charity or specified charitable purposes, and those persons who may from time

(1) (1937) A.C. 286.

to time receive payments or other benefits out of the trust funds are less beneficiaries than objects of the charitable purpose. This circumstance alone distinguishes the case from that of *Burrell* v. *Attorney-General* (1), in which the situation that had to be considered was one where there were two groups of beneficiaries, changing in their composition upon the occasion of a death, though including persons common to each group. The real issue was whether the trust fund as a whole ought to be treated as passing notwithstanding the continuing membership of those persons. Here there was no separate trust for any new group of owners that took effect after the settlor's death.

But, secondly, it is apparent from the judgment of *Jordan* C.J., which expresses the views of the majority of the Supreme Court, that the two trusts which he extracted from the provisions of cl. 3 consisted as much of the powers of selection exerciseable first by the settlor and then by the remaining trustees as of the trusts properly called for the charitable purposes which the trust deed defined. To look at the matter in this way is to treat a mere right or duty of exercising a discretion or taking a decision in the course of the administration of the trust as if it were itself a trust to take effect after the death within the meaning of s. 102 (2) (a). Their Lordships do not think that this is a sound construction of that sub-section : nor do they think that the decision of the Board in *Rabett* v. *Commissioner of Stamp Duties* (*N.S.W.*) (2), which clearly weighed with the Supreme Court in their decision, ought to be regarded as an authority for such a proposition.

In *Rabett's Case* (2) the settlement to be considered was a marriage settlement of personalty in common form. The death which was said to attract duty was that of the husband and settlor and, since the wife had been given the first life interest in the settled fund, the situation of affairs as at the husband's death was that the wife's life interest, already in possession, continued to subsist and, as there were surviving children of the marriage, their interests in reversion remained interests in reversion but subject to the effect of any appointment which the wife might make in exercise of the special power of appointment among children and remoter issue created by the settlement. Even if the children's interests alone were to be considered it would be difficult to say of such a settlement that it did not contain a trust to take effect after the settlor's death.

Nor was such an argument preferred until the case came to be argued before the Board. Until then it had been assumed that a

(1) (1937) A.C. 286. (2) (1929) A.C. 444.

PRIVY COUNCIL. 1951. COMMISSIONER OF STAMP DUTIES (N.S.W.) v. WAY.

claim for duty did arise, the issue being whether the whole value of the settled property ought to be included in the dutiable estate or only so much of that value as exceeded the value of the widow's life interest. That indeed was the sole question which the Commissioner of Stamp Duties had submitted for the consideration of the Court.

Lord *Buckmaster*, who delivered the opinion of the Board, dealt with the appeal without strictly distinguishing between the two lines of argument. The foundation of his decision is to be found in the words which occur (1) in the report and are as follows :— " but the words of the section do not provide that the duty only attaches to property in respect of which the trust arises or takes effect on the death of the Settlor but after his death, and their Lordships see no escape from the conclusion that property of the deceased settled by an instrument which contains trusts that take effect after and by reference to his death is to be deemed part of the estate." This conclusion was sufficient to dispose of the appeal.

Difficulty has arisen because of certain words that Lord *Buckmaster* went on to use in meeting one branch of the argument that even if the settled property itself was deemed to pass the value of the widow's life interest ought to be deducted from the dutiable estate.

What he said was :—" Nor can their Lordships assent to the view that as the testator might, had he thought fit, have given his wife in cash the present value of her life interest and then settled the remainder, the result is the same when he adopted a different method of disposition.

The section assumes that the testator has disposed of the property, and the only condition required for duty to attach is that the Settlement contains trusts to take effect after his death. In the present case the trusts that took effect after his death were : (1) a trust enabling his widow alone to sell and vary investments ; (2) a trust enabling her if the joint power was unexercised to appoint among the children by deed or will ; and (3) a trust for the benefit of the children in default of appointment and subject to their mother's life interest ; and these trusts affected the whole settled property, and not that part only which would be left if the value of the wife's life interest were taken away ".

Their Lordships have given careful attention to this passage, but they are satisfied that it ought not to be taken as a decision that each of the three provisions which are listed under the heads (1), (2) and (3) constitutes by itself a trust to take effect after the

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

death for the purposes of s. 102 (2) (a). What Lord *Buckmaster* was concerned to establish was that there was a trust within the meaning of the section that affected the whole settled property and not merely the " value " represented by the value of the reversions. This is plainly right. So long as there was one such trust, it did not matter whether there were others as well, and it is only fair to assume that had Lord *Buckmaster* intended to give a binding decision as to the status of each of the " trusts " that he entions he would have been altogether more precise in his language. On the contrary, he seems to have been at no pains to state them accurately. (1) was neither a trust nor even a power. Under the settlement, a copy of which has been made available to their Lordships in this appeal, the widow had nothing but the usual right to give or withhold her consent to a proposed change of investment. (2) was not a trust. It was the usual special power of appointment among children or remoter issue. No doubt, had there been an appointment, there would have been a trust for the appointees and Lord *Buckmaster's* language may have been intended to extend to such a trust. (3) was, of course, a trust.

Having regard to these considerations their Lordships are of opinion that the first branch of the appellant's argument must fail.

Clause 24 of the trust deed is not in itself a complete piece of machinery. But the mere fact that it is formally incomplete is no reason for reading into it more than the provisions of the clause actually contain. Its main purport, at least, is reasonably clear. It is to afford authority for the use or application of trust funds for certain purposes or in certain ways that would not otherwise be permissible. It is thus something analogous to but not the same as the investment clause which immediately follows. The second half of the clause is designed to authorize the use of trust funds for the purpose of acquiring property from the settlor who was in the inception and was no doubt likely to remain one of the trustees. But for the power of direction given to the settlor the nature of the clause would be quite plain. But there has been engrafted upon the authority thus given to the trustees a right for the settlor during his lifetime to require that trust funds shall be applied to the purpose of such an acquisition and it is argued that this right to control the action of the trustees brings the trust property within one or other of the categories of s. 102 (2) (c) and (d). This contention prevailed with all the members of the Supreme Court of New South Wales, who held that an interest in the settled

PRIVY COUNCIL. 1951. COMMISSIONER OF STAMP DUTIES (N.S.W.) v. WAY.

property had been reserved to the settlor during his life. It was rejected by the High Court partly on the ground that the power of direction given to the settlor was a fiduciary power to be exercised only for the benefit of the settlement and partly because, whatever the power was, it did not amount to a reservation to the settlor of an interest in the settled property or of a right to reclaim or restore it to himself.

Their Lordships are of opinion that the views of the High Court are well founded, and it is unnecessary to make any material addition to what is said in the judgment of *Williams* J. which gives the reasons of the Court. The settlor's power of direction is to be taken as fiduciary because in its context it is merely a right to secure that his views would, in the event of disagreement, prevail over the views of the other trustees. It was not, of course, inevitable that he would always remain a trustee during his life, but the circumstances were such that it was natural to assume that he would. Even if he did not, the question that he was given power to decide was the question how trustees should apply their trust funds, and in the absence of express provision to the contrary the presumption would be that his decision was to be given for the benefit of the settlement, not of himself. Indeed he had inserted in the clause a stipulation that, if the trust did acquire property from him, it must be on terms that would be to his own pecuniary disadvantage and to the trust's advantage. It was argued that the presence of this stipulation showed that his direction was regarded as non-fiduciary, since otherwise it would not need to be controlled by this limitation. But this can hardly be. The stipulation operates even if the trustees acquire property from him without a direction, so it is not aimed at his special power of direction : and it seems a curious way of establishing that a power is beneficial to show that by its terms it cannot be exercised in a way that affords a benefit.

If the power of direction is, as their Lordships think, a fiduciary one, there is no ground for regarding it as the kind of benefit or interest with which s. 102 (2) (c) and (d) are concerned. Apart from that, however, the power is not one that amounts to an interest in or benefit out of or connected with the trust property. It does not extend far enough to reach the trust property. All that it could do would be to substitute the settlor's decision that trust funds should be used to acquire property from himself for a resolution of the other trustees to the same effect. Given the achievement of that resolution, the settlor would have no power under the clause to decide what items of the trust fund should be

used for that purpose. The decision on that point would lie with the trustees generally: and, if they decided to proceed by way of exchange, not of purchase, it would be for them again to decide at what value they would be prepared to release the item or items selected in exchange for the settlor's property valued as the trust deed requires. All this goes to show that, whether the settlor's power of direction was fiduciary or not, it was not in any event such a power as gave him any hold over the trust funds Their Lordships were pressed with the consideration that the settlor could at least achieve this much: by tendering property of his own worth five per cent more than the value of the whole trust property (assuming that to be capable of undisputed appraisement) and by exercising his power of direction he could make sure of recovering any single item of the trust funds since he would be entitled to get back the lot. But this is at best to describe an incidental consequence of the power of direction rather than to describe the nature of the power itself: and it does nothing to establish that a right is a benefit when it can only be exercised to the detriment of its holder. Whether or not a power having such a possible consequence could properly be described as a right to restore to the holder or to reclaim the settled property within the meaning of sub-s. 2 (c) (iii) it cannot amount to such a right if the settlor can only act by way of effecting a change of investment in the interests of the settlement.

Their Lordships will humbly advise His Majesty that the appeal from the order of the High Court of Australia dated 18th August 1949 should be dismissed. The appellant must pay the costs of this appeal.

Appeal dismissed with costs.

Solicitors for the appellant, *Light & Fulton*, by *F. P. McRae*, Crown Solicitor for New South Wales.

Solicitors for the respondents, *Ashurst, Morris, Crisp & Co.*, by *Sly & Russell.*

J. B.