[HIGH COURT OF AUSTRALIA.]

OAKES . . . . . APPELLANT;

AND

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

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1951. *Nov.* 27, 28.

1952. *May* 8.

Dixon C.J. Williams, Webb, Fullagar and Kitto JJ.

Death Duty (N.S.W.)—Gift made by deceased in his lifetime—Declaration of trust—Deceased not entirely excluded from benefits—Assessment—Stamp Duties Act 1920-1949 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 37 *of* 1949), *ss.* 102 (2) (*d*),* 124.

By a deed of trust made in 1924, F. declared that he would hold certain grazing lands and the rents and profits thereof upon certain trusts for himself and his four named children as tenants in common in equal shares, and wide powers were given to F. as trustee, *inter alia*, to sell, invest, manage, lease, mortgage and purchase the trust property as well as to reimburse himself for all expenses incurred, and to receive remuneration for work done, in the administration of the trust. In 1928 the property was sold and the proceeds invested in another grazing property subject to the same trusts. Under the powers so conferred upon him F., until his death in October 1947, managed the trust property on which he resided and conducted a grazing business, fixed and received amounts as remuneration of his management, and after

* Section 102 (2) (d) of the Stamp Duties Act 1920-1949 (N.S.W.) provides that:—"102. 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) (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."

[EDITOR'S NOTE.—On the 9th day of July, 1952 the Judicial Committee of the Privy Council granted special leave to appeal from this decision].

allowing these sums and other necessary expenses, divided the net income between himself and the four children in equal shares.

Held, by *Dixon* C.J., *Williams* and *Fullagar* JJ. (*Webb* and *Kitto* JJ. dissenting), that, as F. was not entirely excluded from the benefits which accrued in part from the gifts made under the deed, those gifts were made under such circumstances that the trust property should be included in F.'s estate for the purpose of assessment and payment of probate duty under the provisions of s. 102 (2) (d) of the *Stamp Duties Act* 1920-1949 (N.S.W.).

Decision of the Full Court of the Supreme Court of New South Wales: *Oakes* v. *Commissioner of Stamp Duties*, (1951) 51 S.R. (N.S.W.) 383; 68 W.N. 278, affirmed.

APPEAL from the Supreme Court of New South Wales.

A case stated under the provisions of s. 124 of the *Stamp Duties Act* 1920-1949 (N.S.W.) by the Commissioner of Stamp Duties (N.S.W.) in respect of matters arising in the estate of Leslie William Friend, late of Jerry's Plains, New South Wales, deceased, was substantially as follows :—

1. The above-named Leslie William Friend (who is hereinafter called " the testator ") died on 17th October 1947, domiciled within the State of New South Wales.

2. Probate of the last will of the testator dated 21st June 1945, was duly granted on 5th April 1948, by the Supreme Court of New South Wales in its Probate Jurisdiction to Walter Goldsmith Lumby and Norman Clyde Oakes the executors therein named. Walter Goldsmith Lumby has since died and the surviving executor the said Norman Clyde Oakes is hereinafter called " the appellant ".

3. By a deed made on 1st September 1924, the testator declared that as from 1st July 1924 he had held and thenceforth would hold certain lands described in the first and second schedules thereto (subject to certain encumbrances mentioned therein) and the rents issues and profits thereof upon the trusts and with and subject to the powers and provisions thereinafter expressed concerning the same.

4. A true copy of the said deed was thereunto annexed and formed part of the case. The deed is set out hereunder.

5. The lands described in the schedules to the deed constituted a grazing property known as " Ellerston ". These lands were purchased by the testator early in the year 1924 with his own moneys and for his own benefit and up to 30th June 1924 were used by him for his own benefit.

6. Thereafter the testator as trustee under the deed managed and controlled these lands and conducted thereon the business of

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a grazier until in the year 1928 he sold the lands and discharged the encumbrances thereon.

7. The net proceeds of the sale of the lands were invested by the testator as trustee under the deed (a) in a grazing property known as " Glendon " and (b) in the mortgages hereinafter mentioned.

8. At the date of the deed the children of the testator named as beneficiaries in cl. 2 thereof were infants under the age of twenty-one years, but at the date of the death of the testator all but one of these children had attained the age of twenty-five years and that one had since attained that age.

9. From the date of the deed until his death the testator was at all times the sole trustee thereof and managed the properties and funds which were from time to time subject to the trusts thereof.

10. The testator from the execution of the deed until his death received out of the income of the said trust fund the amounts hereinafter set forth, which amounts he fixed from time to time as being the amounts which should be received by him pursuant to cl. 4 (j) of the deed as remuneration for the work done by him in managing and controlling the property forming part of the trust fund and in carrying on the business of a grazier or pastoralist in the course of his administration of that fund, that is to say :— (a) for the years 1925 to 1930 inclusive, £3,000 per year ; (b) for the year 1931, nil ; (c) for the year 1932, £1,000 ; (d) for the years 1933 to 1944 inclusive, £500 per year ; (e) for the years 1945 to 1947 inclusive, £100 per year.

11. The profits and income of the properties subject to the trusts of the deed after deducting therefrom all outgoings and expenses (including the remuneration retained by the testator) were divided by the testator into five equal shares and the testator credited each of his children with one such equal share crediting the fifth share to himself pursuant to cl. 2 of the deed. The amounts credited to each such child were paid or applied by the testator for or towards the maintenance and education of such child or were paid to the mother of such child for or towards his or her maintenance and education or were paid to such child after he or she had come of age.

12. At the date of the death of the testator the properties and funds held by him upon the trusts of the deed were of the net value of £71,900 9s. 7d. They comprised the said grazing property known as " Glendon ", stock, plant and furniture on that property, two mortgages securing respectively the principal sums of

£2,650 and £4,000, moneys in bank accounts and certain debts due to the trust at the date of the testator's death, less certain liabilities.

13. The Commissioner of Stamp Duties assessed the death duty payable in respect of the estate upon the basis that the final balance of the estate as determined in accordance with the *Stamp Duties Act* 1920, as amended, was £178,929, having included therein the net value of the whole of the property which was at the date of the testator's death subject to the trusts of the deed.

14. The appellant contended that there should have been included in the estate of the testator for the purposes of the assessment and payment of death duty one-fifth only of the net value of the property which was at the date of the death of the testator subject to the trusts of the deed and that the Commissioner of Stamp Duties was in error in including in such estate the net value of the whole of such property. The appellant did not otherwise dispute the correctness of the assessment.

15. The appellant had paid the death duty as assessed by the Commissioner of Stamp Duties and had deposited the sum of £20 as security for costs and had 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.

16. If the appellant was correct in his contention the amount of death duty payable in respect of the estate would be reduced by £15,285 17s. 7d.

The deed was as follows :—

" Know all men by these presents that I Leslie William Friend of Ellerston near Scone in the State of New South Wales Grazier being the registered proprietor for an estate in fee simple of the lands described in the First Schedule hereto subject nevertheless to Memorandum of Mortgage registered No. .... from myself to Henry Luke White, Victor Martindale White, and Arthur George White and being the registered holder of the Conditionally Purchased lands described in the Second Schedule hereto subject to the payment to the Crown of the balance of purchase money unpaid in respect thereof and subject to Deed of Mortgage registered No. .... Book .... from myself to the Mortgagees abovenamed.

Hereby declare that as from the first day of July one thousand nine hundred and twenty four I have held and henceforth will hold the said lands described in the First and Second Schedule hereto (subject to the encumbrances aforesaid) and the rents issues and profits thereof upon the trusts and with and subject to the powers

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and provisions hereinafter expressed concerning the same that is to say :—

1. Upon trust that I or other the Trustee or Trustees for the time being of these presents (hereinafter called the Trustee) shall either retain and use the said lands or at the Trustee's absolute discretion at any time or from time to time sell and convert into money the same or any part thereof and invest the proceeds of such sale and conversion upon such securities real or personal and whether authorised by law for the investment of trust funds or not (and with liberty from time to time to vary and transpose the investments) as the Trustee shall in his uncontrolled discretion think fit. The said lands and proceeds of sale thereof and the securities upon which the same may from time to time be invested are hereinafter called ' the trust fund '.

2. That the capital and income of the trust fund shall be held by the Trustee upon trust for the said Leslie William Friend and his children Henry James Friend, Donald Stuart Friend, Terence Maxwell Friend, and Gwynneth Ailsa Friend as tenants in common in equal shares ; and if and so often as any such child shall die under the age of twenty five years and without leaving a child or children him or her surviving then as well as to the original share of the child so dying as to any share or shares which shall have accrued to him or her by virtue of this present limitation upon trust for the others of such children and the said Leslie William Friend as tenants in common in equal shares.

3. That without limiting the generality of the Trustee's discretion under clause 1 hereof to invest upon such securities as he should think fit, the Trustee may at any time or times lay out the trust fund (including any accretions thereto) or any part thereof in the purchase of land of any tenure within the Commonwealth of Australia and of stock plant or other personal property of what nature or kind soever within the said Territory and of any value whether exceeding the amount of the trust fund or not, upon such terms as regards the payment of the whole or any part of the purchase money and conditions of sale as the Trustee may in his discretion think fit and with liberty to allow the purchase money or any part thereof to remain secured on mortgage from the Trustee to the Vendor for such period at such rate of interest and with such powers including full powers of sale in favour of the Mortgagee and provisions as the Trustee may think fit and as the Mortgagee shall reasonably require and that the Mortgagee shall be under no responsibility to enquire into the purpose for which the mortgage is being given or whether the same is within the powers hereby

conferred, and that the Trustee shall stand possessed of any property to be purchased as aforesaid upon trust that he shall resell the same or any part thereof when or as he might think fit and shall hold the money to arise from such resale after payment thereout of any mortgage or other debt that may be owing in respect thereof and of the expenses of sale upon the same trusts and with the same powers as are herein declared and contained concerning the trust fund including the aforesaid power of purchasing property and shall in the meantime and until such resale pay and apply the rent or income arising from the property to be purchased as aforesaid to the person or persons and in the manner to whom and in which the income of the money laid out in the purchase of such property would for the time being be payable under the trusts of these presents if such purchase had not been made with liberty from time to time to pay or apply the whole or such part as the Trustee may think fit of the said rent or income in or towards reduction or discharge of any mortgage or other debt for the time being owing in respect of the premises or any part thereof.

4. That the Trustee shall have the following further powers and discretions namely :—

a. To manage any real and personal property the subject of this trust and to demand sue for and receive the rents and profits thereof and to employ such servants or agents and at such remuneration as the Trustee may think fit and to erect construct pull down repair alter or improve such buildings fences dams tanks plant machinery or works or improvements of any kind whatsoever upon any such property as the Trustee in his uncontrolled discretion and as if he were the absolute owner thereof may consider proper and to make any outlay from capital or income for any of the purposes aforesaid.

b. To lease all or any part of the property comprising the trust fund for such term at such rent and for such purposes whether mining agricultural pastoral trade residential or otherwise and either in possession or in future and upon such conditions in all respects as the Trustee shall deem expedient.

c. To make allowances to and arrangements with tenants and to accept surrenders of any leases or tenancies and to exercise all the powers and remedies of a landlord in respect thereof.

d. Upon the sale of all or any part of the property comprising the trust fund to sell either subject to or discharged from any mortgage for the time being subsisting thereon and to allow any

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purchaser such time and upon such security as the Trustee may think fit for payment of the purchase money or any part thereof.

e. To raise on mortgage of the premises or any part thereof such moneys as the Trustee may consider advisable for any of the purposes mentioned in sub-clause (a) or for discharging any mortgage or encumbrance on the premises or any part thereof or otherwise at the Trustee's discretion for the protection or benefit of the trust property and to secure the repayment of any moneys so raised with interest at such rate as the Trustee may think proper by mortgage of the premises or any part thereof and upon such terms in all respects as the Trustee may deem expedient without any responsibility on the mortgagee to enquire into the purposes for which the mortgage moneys are being raised or to see to the application of the same.

f. To receive and give an effectual discharge for all moneys paid by any person on the sale mortgage lease exchange or other dealing with the premises or any part thereof and no person paying any money to the Trustee shall be concerned to see to the application thereof.

g. To exchange the property comprising the trust fund or any part thereof for any other real or personal property of what kind or nature soever and upon such terms and conditions as the Trustee should in his discretion think fit.

h. To appropriate and partition any real or personal property forming part of the trust fund to or towards the share of any person or persons therein under the trusts hereinbefore contained and for that purpose to fix the value of such real or personal property so appropriated as the Trustee shall think fit and to charge any share with such sums by way of equality of partition as he may think fit and every such appropriation valuation and partition shall be binding upon all persons interested in the trust fund provided always that as regards any share of the said trust fund not absolutely vested any such appropriation shall be without prejudice to the exercise of any powers hereby expressly or impliedly given to the Trustee.

i. To raise any part or parts not exceeding one half of the share of capital of any child of mine in the trust fund notwithstanding that the same may be liable to be divested under the provisions hereof and apply the same for his or her benefit or advantage.

j. In addition to reimbursing himself all expenses incurred by the Trustee in the administration of the Trust the Trustee shall be entitled to remuneration for all work done by him in managing and controlling any property forming part of the trust fund or carrying on the business of a grazier or pastoralist or other business in the

course of his administration of the said fund in the same manner and as fully in all respects as if he were not a trustee hereof.

k. To purchase notwithstanding that he is a trustee hereof all or any property comprising the trust fund or any part thereof by public auction or by private contract provided in the latter case that the sale shall be conducted by Goldsbrough Mort and Company Limited or be made at a price and upon terms and conditions approved by that Company or by a Valuer or other nominee appointed by the said Company.

l. To carry on or join in carrying on in all its branches every class of business relating to grazing farming or pastoral pursuits and for this purpose to breed raise fatten purchase sell lease use and otherwise deal in all kinds of live and dead stock wool hides skins tallow or any other pastoral or agricultural produce and to purchase take on lease or in exchange hire or otherwise acquire any real or personal property with power to retain and employ in any such business the capital of the trust fund or any part thereof and to introduce any person as a partner therein and to engage or employ any person or persons at such remuneration as the Trustee shall think proper and generally to act or concur in acting in all matters relating to any such business as if the Trustee were absolutely entitled thereto and to delegate all or any of the powers vested in the Trustee in relation to any such business to any person or persons whom the Trustee may think fit and with power for the Trustee to form or join with any partner in any such business in forming a Company with liability limited by shares to take over any such business and to accept payment of the purchase money either in cash or fully paid shares or partly in one way or partly in another and the Trustee shall be free from all responsibility and be fully indemnified out of the trust fund in respect of any loss arising in relation to any such business.

m. In respect of any property comprising the trust fund or any part thereof to enter into and carry into effect share farming agreements of such character and upon such terms as the Trustee may think fit.

n. To sell any land for the time being comprised in the trust fund in subdivision and to lay out form make and dedicate any roads streets drains or channels over through or near any such land and to execute and do all other acts and things which the Trustee may consider advisable in or about affecting the subdivision and sale of the premises.

o. To convey appropriate or dedicate any part or parts of the property comprising the trust fund for public or charitable pur-

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poses either gratuitously or for such consideration as the Trustee may think proper to accept.

In witness whereof I the said Leslie William Friend hereunto set my hand and seal this first day of September, 1924."

(The first and second schedules referred to contained detailed particulars of all the deeds relating to "Ellerston" station which has since been sold.)

"Signed sealed and delivered by the abovenamed Leslie William Friend in the presence of: Norman C. Oakes, Solicitor Sydney. } L. W. Friend."

The questions for determination by the Full Court of the Supreme Court of New South Wales were :—

1. Should the whole of the property which at the date of the death of the testator subject to the trusts of the deed be included in his estate for the purposes of the assessment and payment of death duty ?

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

The Court (*Street* C.J., *Maxwell* and *Owen* JJ.) answered question 1. in the affirmative : *Oakes* v. *Commissioner of Stamp Duties* (1).

From that decision the executor appealed to the High Court.

G. E. Barwick K.C. (with him *C. D. Monahan*), for the appellant. The result of the modern authorities is that regard must be had to the terms of the transaction (in this case the deed) and thus ascertain what was given. The question which then arises for solution is : Was the donor excluded from all benefit which retracted from or reduced the possession and enjoyment of what was given? *Attorney-General* v. *Worrall* (2) is capable of explanation on the basis that although the reservation was of a collateral benefit, in reality its source was the thing given. In *Attorney-General* v. *Earl Grey* (3) ; on appeal (4) the reserved annuity issued out of the land given. *St. Aubyn* v. *Attorney-General* (5) makes it clear that to be caught by the section the reserved benefit either cuts down the enjoyment of the asset given or compromises it in some way. In *In re Kerrigan* (6) *Jordan* C.J. accurately set out the effect of *Commissioner for Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (*Hall's Case*) (7), although it is conceded that the

(1) (1951) 51 S.R. (N.S.W.) 383 ; 68 W.N. 278.
(2) (1895) 1 Q.B. 99.
(3) (1898) 2 Q.B. 534.
(4) (1900) A.C. 124.
(5) (1952) A.C. 15.
(6) (1946) 47 S.R. (N.S.W.) 76, at p. 84.
(7) (1943) A.C. 425 ; 64 C.L.R. 492.

proposition may need some qualification in the light of the decision in *Attorney-General* v. *Worrall* (1). In this case it is clear that the settlor did not derive any benefit out of the equitable interests which he gave to the beneficiaries.

G. P. Stuckey K.C. (with him *C. A. Walsh*), for the respondent. The deed created equitable interests in the settlor's children liable to be defeated by death under the age of twenty-five years without leaving a child surviving. If the accruer clause operated the settlor took equally with his surviving children the share, original or accruing, of the child so dying. The settlor's undivided one-fifth share became a distinct equitable interest from the legal estate he held in the whole property. For example, upon the appointment of a new trustee the whole legal estate would vest but the settlor's equitable interest would not. Under the deed the settlor had powers of management, exchange, appropriation and partition as he thought fit, to raise one-half share of a child's capital and apply it for his or her benefit, to pay himself remuneration, to purchase trust property, to carry on the business of grazing as if he were the owner free from all responsibility and indemnified against loss; to convey, appropriate or dedicate any part or parts of the property for public or charitable purposes gratuitously or for such remuneration as he thought fit. The settlor could not be called upon to account for his use of the property as trustee in accordance with the deed. A gift was made of the beneficial interest in four undivided fifths in the property. An equitable interest in land is capable of actual possession and enjoyment by the owner. In the case of a simple trust the equitable owner is entitled to possession. None of the donees took possession. The possession or benefit is the circumstance which makes the gift dutiable. The value of the property given is the measure of the liability. The words "any benefit" are of wide import (*Lowther* v. *Bentinck* (2); *Commissioner of Stamp Duties (N.S.W.)* v. *Thompson* (3); *Hall's Case* (4)). The settlor had rights of gift over; residence; remuneration irrespective of loss; maintenance for his children; repurchase; use of all undivided shares with him as a whole; exclusion of co-tenants from possession; and appropriation to strangers. Those were powers which enabled the settlor to affect the interests created by the deed. Those rights and powers were "benefits" (see *Attorney-General*

(1) (1895) 1 Q.B. 99.
(2) (1874) L.R. 19 Eq. 166, at p. 169.
(3) (1927) 40 C.L.R. 384, at p. 419.
(4) (1943) A.C. 425; 64 C.L.R. 492.

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v. *Earl Grey* (1), as explained in *Hall's Case* (2)). It was a benefit to be relieved of the burden of maintaining children (*Re Cochrane's Settlement Trusts* ; *Cochrane* v. *Turner* (3) ; *Butler* v. *Freeman* (4) ; *Hulme Estate Co. Ltd.* v. *Inland Revenue Commissioners* (5)). The court does not look to subsequent events. An assurance against liability to account is a benefit (*Attorney-General* v. *Worrall* (6)). There was not any independent right to exchange the property (*Way* v. *Commissioner of Stamp Duties* (*N.S.W.*) (7) ; on appeal (8) ; *In re Kerrigan* (9)). Guardians are not liable to account for money expended on maintenance (*Countess of Bective* v. *Federal Commissioner of Taxation* (10)). The accruer clause amounted to a reservation of an interest (*In re Kerrigan, St. Aubyn's Case, Earl Grey's Case* and *In re Cochrane's Settlement Trusts*). The interests of the children were not indefeasibly vested (*Way* v. *Commissioner of Stamp Duties* (*N.S.W.*) (11)). The case is within the operation of s. 102 (2) (c) (iii) of the *Stamp Duties Act* (*Way* v. *Commissioner of Stamp Duties* (*N.S.W.*) (12)). The matter of a purchase by a trustee under express power is discussed in *Williams, Vendor and Purchaser*, 4th ed. (1936).

G. E. Barwick K.C., in reply. There is not any room for the contention that the case is within s. 102 (2) (c) (iii) of the Act. That sub-section speaks of the exercise of a power. There is not any such power reserved to the settlor in this case. As to par. (d) of s. 102 (2) what was given to each child was an equitable interest only : see cll. 1 and 2 of the deed. Even if cl. 2 cuts down a previously given interest the real gift is to the children who attain the age of twenty-five years or die under that age leaving a child or children. If the terms of the accruer clause operate in favour of the settlor he takes before the child in question has an interest or when the interest of the child ceases. The settlor's interest is never co-incident nor does it cut down the enjoyment of what was given. *Rudd* v. *Commissioner of Stamp Duties* (13) is distinguishable because in that case the settlor had the right to withhold consent to any sale. As to the settlor's right of management there are two points : (i) this was not personal to the settlor but fiduciary, and (ii) it was something he reserved from the gift. As to the settlor's right of remuneration, again this was not a benefit

(1) (1900) A.C. 124.
(2) (1943) A.C., at pp. 442, 443.
(3) (1945) Ch. 285, at p. 291.
(4) (1743) 3 Atk. 58 [26 E.R. 836].
(5) (1946) 2 All E.R. 516.
(6) (1895) 1 Q.B. 99.
(7) (1949) 79 C.L.R. 477.
(8) (1952) A.C. 95 ; (1951) 83 C.L.R. 570.
(9) (1946) 47 S.R. (N.S.W.) 76.
(10) (1932) 47 C.L.R. 417.
(11) (1949) 79 C.L.R., at p. 496.
(12) (1949) 79 C.L.R., at p. 495.
(13) (1937) 37 S.R. (N.S.W.) 366.

out of what was given. It was reserved from the gift because the beneficiaries got only the net residue of the income in due course of management. Again the right to remuneration was not personal to the settlor, but attached to him in his fiduciary position as trustee and only when he was trustee. It was not the same as the right given by a will to a solicitor to charge profit costs, which was considered a legacy. The remuneration allowed to a trustee was for his pains and trouble and was compensation for work done. The profit element was absent. The right conferred on the settlor to purchase the trust property was not an interest in property. A right to purchase at a price to be agreed on was not a benefit known to the law. The argument that the settlor, by maintaining the infant children out of their income under the settlement, escaped a moral obligation to maintain the children, is shortly answered by the fact that there is not any maintenance provision in the deed. As to the realities of the situation referred to by *Street* C.J. in the Court below, it was only the accident of the settlor being the trustee which gave the appearance of there being no change in ownership, management or enjoyment.

Cur. adv. vult.

May 8, 1952.

The following written judgments were delivered :—

DIXON C.J. This is an appeal from an order of the Supreme Court of New South Wales determining a question submitted by special case under s. 124 of the *Stamp Duties Act* 1920-1949 (N.S.W.). The question concerns property the subject of trusts declared by Leslie William Friend, who died on 17th October 1947. The trusts were declared by a deed which was made 1st September 1924 but took effect as from 1st July 1924.

The question submitted by the special case is whether the whole of the property which was, at the date of the death of the deceased, subject to the trusts of the deed should be included in his estate for the purposes of the assessment of death duty. By the order under appeal the Supreme Court answered this question in the affirmative. The answer means that in the opinion of the Supreme Court the case fell within s. 102 (2) (d) of the *Stamp Duties Act*. That provision requires that for the purposes of the assessment and payment of death duty the estate of a deceased person shall be deemed to include 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

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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.

The question for our decision is whether the circumstances of the case bring it within this provision, with the consequence that the whole property subject to the trusts is dutiable. It is a question, as I think, depending much more on the view taken of the facts than upon any question of law. The provision is one the meaning and application of which has created much difficulty, but it has been elucidated by the decisions of the Privy Council in *Munro* v. *Commissioner of Stamp Duties* (1); *Hall's Case* (*Commissioner of Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.*) (2); and *Commissioner of Stamp Duties N.S.W.* v. *Way* (3); and by the opinions delivered in the House of Lords upon the analogous provision contained in s. 43 (2) of the *Finance Act* 1940 in *St. Aubyn* v. *Attorney-General* (4). As a result there are certain propositions which are removed from doubt.

In the first place the property comprised in a gift of which the provision speaks is the estate or interest given. What you are to consider is the beneficial interest or interests created by the deceased. What he keeps back is no part of his gift. "A person who declares trusts of property only gives the beneficial interests covered by the Trusts. Everything else he retains and does not give" (*Hall's Case* (5)).

In the second place it is the beneficial interests so given of which bona-fide possession and enjoyment must be assumed by the donee; and the entire exclusion of the deceased which the provision requires is from such possession and enjoyment of the interests assured to or created in the donee, that is to say, there must be no impairment of or detraction from the full possession and enjoyment of the beneficial interests given. Any benefit to the deceased which involves or amounts to any such impairment or detraction must likewise be excluded.

In the third place, the possession and enjoyment which must be assumed is to be understood as that kind of possession and enjoyment of which the interest given is susceptible or capable according to its character and incidents. Accordingly, if the donor has already saddled the property with an encumbrance or created an interest therein before he makes the gift it is immaterial that he obtains a benefit therefrom. The gift is subject to the interest.

(1) (1934) A.C. 61.
(2) (1943) A.C. 425.
(3) (1952) A.C. 95; (1951) 83 C.L.R. 570.
(4) (1952) A.C. 15.
(5) (1943) A.C., at p. 441.

In the fourth place possession and enjoyment mean beneficial possession and enjoyment, and it is nothing to the purpose that in a representative or fiduciary capacity only the deceased holds possession of the subject of the gift or exercises dominion or rights over or in respect of it which, if he were not a fiduciary, would amount to enjoyment of the property or would involve some impairment of or detraction from enjoyment.

Although the foregoing propositions are now clear enough it is not yet possible to define with any certainty the limits of the operation of the provision contained in s. 102 (2) (d) in making property dutiable because the deceased obtains from the donee a benefit of some kind or in some manner which is not, at all events in form, a reservation out of the estate or interest given, but is collateral thereto and yet is so connected therewith as to impair, trench upon, prejudice, diminish, derogate from, or compromise the possession and enjoyment of the gift. The decision of the Court of Appeal in *Attorney-General* v. *Worrall* (1) stands, although it is not to be extended : cf. *St. Aubyn's Case* (2), where the present Lord Chancellor said that it cannot in face of that decision be denied that it is possible for possession and enjoyment of property not to be retained by the donee to the entire exclusion of the donor or any benefit to him by contract or otherwise, though the donor himself no longer has any sort of interest in it. Lord *Radcliffe* (3) explained what precisely was decided and saw nothing wrong in the decision. His Lordship said : " For my part I see nothing in the decision of *Worrall's Case* (1) that cannot readily be accepted as good law. But what did it decide ? A father had made a present to his son of a sum of about £24,000 secured on mortgage and the son had bought in the equity of redemption for a small sum ; in return for his father's gift the son had covenanted to pay him an annuity of £735 per annum during his life. In effect the son was returning to the father the income on the property given during the remainder of the father's life. It seems to me reasonable enough for a court to hold in those circumstances that the son had not obtained the enjoyment of what was given free from a contractual benefit to the father which encumbered the enjoyment of the very thing that was given. To hold otherwise would have been to stop at the mere form of the transaction ". Even so, it is clear enough that the case affords an example of a collateral benefit not forming part of the estate or interest given or reserved thereout. " But ", said Lord *Radcliffe*, " I think it a very mistaken form of

(1) (1895) 1 Q.B. 99.
(2) (1952) A.C., at pp. 25, 26.
(3) (1952) A.C., at p. 47.

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reasoning to deduce from a decision that a benefit, to be within the mischief of the section, need not necessarily be by way of reservation out of the subject-matter of a gift the general proposition that all benefits are within the mischief of the section, whether they are by way of reservation out of the subject-matter of the gift or not. To deny the validity of one general proposition is not to assert the general validity of its opposite ".

There is thus left, so to speak, some middle ground, ill defined, where property comprised in a gift made by a deceased is dutiable because of a benefit to him, although the benefit is not reserved out of the gift. The test of liability to duty in such cases can hardly be other than ill defined, because it depends on the benefit having such a connection with the gift that it lessens or impairs the enjoyment of the estate or interest given, that is to say, lessens or impairs the enjoyment of which it is susceptible according to its character. This connection has been described by Lord *Tomlin* by the word " referable ", and by Lord *Russell* by the word " attributable ", a benefit referable, or attributable to the gift: *Munro's Case* (1); *Hall's Case* (2); cf. *St. Aubyn's Case* (3), per Lord *Simonds* and (4) per Lord *Radcliffe*. As I understand it, these expressions are intended to cover benefits to the deceased which, even if collateral to the gift, are taken by him at the expense, in fact if not in law, in substance if not in form, of the full and complete beneficial enjoyment of the estate or interest given of which it is susceptible.

It must be remembered that in the corresponding English enactment the words are " to the entire exclusion . . . of any benefit to him by contract or otherwise " and that the expression " or otherwise " has been construed as covering only benefits *ejusdem generis* with benefits by contract and accordingly legally enforceable (*Attorney-General* v. *Seccombe* (5); cf. *Attorney-General* v. *Sandwich* (*Earl*) (6)). But s. 102 (2) (d) is expressed in words which make such a limited construction impossible. It reaches to benefits which are not enforceable at law or in equity. It must also be borne in mind that to avoid liability to duty it is necessary that from the time of the gift onwards the donor or any benefit to him must be excluded.

The facts upon which the present appeal turns are stated, somewhat barely, in the special case, which annexes the deed of trust. Under s. 124 (7) the Court is at liberty to draw from the facts

(1) (1934) A.C., at p. 67.
(2) (1943) A.C., at p. 440.
(3) (1952) A.C., at p. 29.
(4) (1952) A.C., at p. 47.
(5) (1911) 2 K.B., at p. 703.
(6) (1922) 2 K.B. 500, at p. 519.

and documents stated in the case any inference whether of fact or law which might have been drawn from them if proved at a trial.

We are told by the special case that the deceased early in the year 1924 purchased certain lands constituting a grazing property known as Ellerston and that he did so with his own moneys and for his own benefit. Up to 30th June 1924, the date as from which the trusts of the deed dated 1st September 1924 took effect, he used them for his own benefit. He had four infant children, three boys and a girl. By the deed, which described him as of Ellerston and gave his occupation as a grazier, he declared that since such date he had held and thenceforth would hold the lands and the rents, issues and profits thereof upon the trusts and with and subject to the powers and provisions thereinafter expressed concerning the same. The first clause described the deceased or other the trustee of the instrument as " the trustee " and conferred upon the trustee a discretionary power to retain or use the lands or to convert them and invest the proceeds upon such securities real or personal as the trustee in his uncontrolled discretion should think fit.

It described the lands, the proceeds of sale and the securities upon which the same might be invested as " the trust fund ". The second clause expressed a trust of the capital and income of the trust fund for the deceased and his four infant children as tenants in common in equal shares, with a gift over in the case of the death of a child before attaining twenty-five leaving no children. In that event the child's share, original and accrued, was to be held upon trust for the others of such children and the deceased as tenants in common in equal shares. The third clause proceeded to amplify the power of investment so as to enable the trustee to lay out the trust fund in the purchase of land and of stock, plant, or other personal property. The fourth clause conferred a number of powers upon the trustee. These included full but very general powers of management of " any real and personal property the subject of this trust ", and of, and in connection with, the leasing, sale, mortgaging and exchange of such property. There is power " to appropriate and partition any real or personal property forming part of the trust fund to or towards the share of any person or persons therein under the trusts ", and the power goes on to confer upon the trustee a number of incidental or auxiliary authorities.

There is an ample power to carry on every class of business relating to grazing, farming, or pastoral pursuits worked out with

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full ancillary powers. Included in the clause is a power enabling the deceased to purchase, notwithstanding that he is a trustee, all or any property comprising the trust fund or any part thereof by public auction or by private contract, provided in the latter case that the sale should be conducted by a specified pastoral company at a price and upon terms approved by the company or its nominee. The only other power that need be mentioned is one perhaps more closely touching the question for decision. It is contained in a paragraph providing that the trustee, in addition to reimbursing himself all expenses incurred in the administration of the trust, should be entitled to remuneration for all work done by him in managing and controlling any property forming part of the trust fund or carrying on the business of a grazier or pastoralist or other business in the course of his administration of the fund in the same manner and as fully in all respects as if he were not a trustee of the deed. It appears from the special case that from 30th June 1924 until some time in 1928 the deceased as trustee managed and controlled the property called Ellerston and conducted upon it the business of a grazier. But no live stock or plant is mentioned in the trust deed as part of the property vested in the deceased concerning which the trusts were declared, and it does not appear how or from what resources it was acquired so as to become part of "the trust-fund". Nor does it definitely appear whether the deceased resided with his family upon the property Ellerston, although it may be surmised that he continued to do so. In 1928, however, the deceased sold Ellerston and discharged the encumbrances upon it. A small proportion of the net proceeds of the sale he invested upon mortgage, but the greater part he invested in a grazing property called Glendon. He remained the sole trustee and he managed and controlled the property and the rest of the "trust fund". In his reasons for judgment given in the Supreme Court *Street* C.J. says: "It would also appear from information conveyed to the court during the course of argument that the trustee resided on the grazing property in question and, so far as outward and visible signs were concerned, controlled, managed, used and administered the same as if he were the absolute owner thereof, the resulting income from each year being divided amongst the beneficiaries entitled thereto" (1). After deducting outgoings and expenses including remuneration retained by the deceased, the profits and income were divided by him into five equal shares. The special case says that he credited (which I take to mean credited in the account books of the trust), each of

(1) (1951) 51 S.R. (N.S.W.), at p. 385.

his four children with one equal share, crediting the fifth share to himself. The amounts credited to each such child were paid or applied by the deceased for or towards the maintenance and education of such child or were paid to the mother of such child for or towards his or her maintenance and education or were paid to such child after he or she had come of age. It would have been more satisfactory to know with more particularity what this meant in practice, but for the purposes of our decision it must be treated as excluding the deceased from all benefit from the application or expenditure of the children's shares of net income, all benefit that is other than the advantage of being relieved *pro tanto* of a father's duty to maintain and educate his children.

Under the clause relating to the trustee's remuneration the deceased received out of the income certain amounts which, says the special case, he fixed from time to time as being the amounts which should be received by him pursuant to that provision of the deed as remuneration for the work done by him in managing and controlling the property forming part of the trust and in carrying on the business of a grazier or pastoralist in the course of his administration of the trust fund. This statement appears to assume that the clause conferred upon the deceased as trustee a discretionary power to fix his own remuneration so that the quantum would not be open to review. But it is more than doubtful whether that effect should be given to the clause, which probably would be considered to contain no words clear enough for the purpose. But however that may be the clause does authorize the deceased as trustee to deduct a remuneration and, unless the quantum of what he deducts is attacked as excessive, to retain it. During the first six years of the trust the deceased deducted remuneration at the rate of £3,000 a year. In the depression year of 1931 he took no remuneration. In 1932 he deducted £1,000. During the next twelve years he deducted £500 a year and during the last three years of his life £100 a year.

At the time of his death the net value of the trust fund was £71,900, of which £6,650 represented investments on mortgage, and the rest comprised the grazing property called Glendon, the stock, plant and furniture, the moneys at the credit of bank accounts and book debts.

On the foregoing facts it appears to me that the deceased did more than remain in possession and occupation of the Glendon property and the assets therewith for the purpose of performing his duties as trustee. He used the trust premises as the dwelling place of himself and his family, at the same time he obtained from

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the revenue consisting of the returns from the station, a very substantial income as a remuneration for his management of the trust and he applied so much of the net income after providing for such remuneration as represented his children's four-fifths' interest in relief of his paternal obligations to maintain and educate them. This course of dealing represents what may be called a total indivisible situation, which for my part I do not think ought to be broken up into component parts to be separately examined for the purpose of ascertaining whether possession and enjoyment of the interests given was assumed and retained to the entire exclusion of the deceased or of any benefit to him referable or attributable to the gift. At the same time I do not think that such analysis would make any difference in the result. But the fact is that the deceased placed himself in a position in which he enjoyed almost all the advantages and amenities that ordinarily flow from carrying on a sheep or cattle station from a homestead upon the property where the owner dwells with his family. He obtained those advantages at the expense of limiting his own personal drawings in the first instance to the definite amounts he fixed as his own salary, dividing the net balance of profits into five parts and treating one only of them as his own to expend or apply at his pleasure and applying the others scrupulously to the maintenance, education and benefit of his children or committing the money to his wife to do so, the consequence being, whether accidental or designed, that his paternal responsibilities were relieved or discharged *pro tanto*. Placing this complexion upon the facts, as I do, it does not appear to me material to inquire whether the trusts of the deed contemplated the deceased occupying such a position or whether the remuneration is, or is to be taken as, no more than a fair reward of his services or than would have been paid or payable to some other trustee. It can hardly be said that to be remunerated is not a benefit even if the remuneration is earned. Still less can it be said that to occupy as a dwelling the homestead of a sheep or cattle station which you carry on outwardly as if it were your own is no benefit. These are things which advantaged him beneficially. He did not hold them or derive them for others as a fiduciary.

Now the gift to his children seems to me to have consisted in the creation of an equitable tenancy in common in which he and they were the equitable tenants in common in equal shares. It is true that it was qualified or conditioned by powers of management in him as trustee including a power to charge remuneration. But it does not seem to me to be possible to work out a theory of the

gift which would make it a gift of only an innominate and anomalous equitable right to call for one-fifth each of the residue of the income and corpus after the deceased had enjoyed all the benefits which I have described, and by this means to treat such benefits as antecedent to the gift and incapable of being regarded as impairing or derogating from the gift or of being " referable " or " attributable " to it. To do this must do violence as well to the trusts contained in the deed as to the realities of the case. Further, under the provision of the New South Wales Act it is beside the point that the benefits or part of them may have been taken or enjoyed in fact rather than derived from the terms of the trusts. What does matter is that the benefits do impair or derogate from the possession and enjoyment of the gift. And that leads to the final and decisive question, namely, whether it can be said of the undivided equitable shares of the children that possession and enjoyment of the kind of which the interest admitted was assumed and retained by the donee, to the exclusion &c. Of course, in deciding this question the trusts for management and the provision for remuneration must steadily be borne in mind and so must the fact that net income was credited and applied as described. Further, while the relief *pro tanto* of the paternal obligation to maintain the children formed in this case part of what I have called the total indivisible situation created by the deceased, it must be borne in mind that the fact that a gift results in relieving the donor of parental responsibility is not in itself such a benefit as the provision contemplates. But I cannot think that the full possession of the station property, coupled with residence in the homestead, by the deceased and a preliminary salary from the returns before the ascertainment of divisible net profits, are indispensable conditions precedent to the possession and enjoyment by the donees of undivided equitable interests as tenants in common. In other words, while the donor reaps such benefits such interests are not possessed and enjoyed to the full by the donees. That the benefits all come from the property, that is, are a charge on or involve an abatement of the income thereof, seems plain enough.

For the foregoing reasons I am of opinion that the conclusion of the Supreme Court was right.

I think that the appeal should be dismissed with costs.

WILLIAMS J. This is an appeal from an order of the Full Supreme Court of New South Wales answering in the affirmative a question asked in a case stated under s. 124 of the *Stamp Duties Act* 1920-1949 (N.S.W.). The question is whether the whole of the property

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which was at the date of the death of Leslie William Friend on 17th October 1947 subject to the trusts of a deed poll made on 1st September 1924 should be included in his estate for the purposes of the assessment and payment of death duty under that Act. The Supreme Court held that the property was dutiable because it fell within the provisions of s. 102 (2) (d), which provides that the dutiable estate shall include " 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 ". The meaning of this paragraph has been recently considered by the Privy Council in *Munro* v. *Commissioner of Stamp Duties* (1) and in *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd.* (2), and the meaning of the equivalent English provision has been the subject of an even more recent decision of the House of Lords, *St. Aubyn* v. *Attorney-General* (3). In these decisions the Privy Council and the House of Lords have adopted the meaning placed upon the legislation by the Irish Courts in *In re Cochrane* (4), and particularly the judgment of *Palles* C.B. in the lower court. A short analysis of the facts and effect of the decisions in the two cases in the Privy Council appear in the speech of Lord *Simonds* in the *St. Aubyn Case* (2), and it is unnecessary to travel through them again. Referring to *Cochrane's Case* (4) in the *Perpetual Trustee Case* (5), Lord *Russell* said : " *Palles* C.B. thought that the Crown's contention would be right if the subject-matter of the gift was the entire equitable interest in the £15,000. The question was whether that was correct in law, a question which turned on the word ' gift '. Gift in the context meant beneficial gift. A person who declares trusts of property only gives the beneficial interests covered by the trusts. Everything else he retains and does not give ; and there is an entire exclusion of the donor from the property taken under the disposition of the gift. Sir Henry Cochrane obtained no benefit either by way of reservation out of the gift, or collaterally in reference to the gift ". Lord *Russell*, after giving reasons why *Cochrane's Case* (4) was distinguishable from *Grey (Earl)* v. *Attorney-General* (6), said : " There is nothing laid down as law in that case (that is, *Grey (Earl)* v. *Attorney-*

(1) (1934) A.C. 61.
(2) (1943) A.C. 425.
(3) (1952) A.C. 15.
(4) (1905) 2 Ir. 626 ; (1906) 2 Ir. 200.
(5) (1943) A.C., at p. 441.
(6) (1900) A.C. 124.

General), which conflicts with the view that the entire exclusion of the donor from possession and enjoyment which is contemplated . . . is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and that possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the sub-section requires" (1). This passage from the judgment of Lord *Russell* is cited with approval in the speeches of Lord *Simonds* and Lord *Radcliffe* in the *St. Aubyn's Case*. Of the equivalent English legislation Lord *Radcliffe*, after referring to *Munro* v. *Commissioner of Stamp Duties* (2), the *Perpetual Trustee Co. Ltd. Case* and *Cochrane's Case*, said: "All these decisions proceed on a common principle, namely, that it is the possession and enjoyment of the actual property given that has to be taken account of, and that if that property is, as it may be, a limited equitable interest or an equitable interest distinct from another such interest which is not given or an interest in property subject to an interest that is retained, it is of no consequence for this purpose that the retained interest remains in the beneficial enjoyment of the person who provides the gift" (3).

The facts of the present case are that by the deed poll in question the settlor, Leslie William Friend (referred to in the case stated as the testator), after reciting that he was the registered proprietor for an estate in fee simple of certain lands and the registered holder of certain other conditionally purchased lands, subject to certain encumbrances, declared that as from 1st July 1924 he held and henceforth would hold those lands, subject to these encumbrances, and the rents, issues and profits thereof upon the trusts and with and subject to the powers and provisions hereinafter expressed concerning the same. He first declared that he or other the trustee or trustees for the time being should either retain and use those lands or at the trustee's absolute discretion sell and convert them or any part thereof into money and invest the proceeds of sale and conversion as therein mentioned. He then declared that the capital and income of the trust fund should be held by the trustee upon trust for himself and four named children as tenants in common in equal shares; and if and so often as any such child should die under the age of twenty-five years without leaving a child or children surviving the original share of such child and any accruing shares should be held upon trust for

(1) (1943) A.C., at pp. 445, 446.
(2) (1934) A.C. 61.
(3) (1952) A.C., at p. 49.

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the others of such children and himself as tenants in common in equal shares. He also declared that the trustee should have certain powers and discretions, including power to manage the trust property, to lease it or any part thereof, to sell it or any part thereof to mortgage it or any part thereof, to exchange it or any part thereof, and to appropriate and partition any part of it to or towards the share of any beneficiary and for that purpose to fix the value of such real or personal property so appropriated as the trustee should think fit and to charge any share with such sums by way of equality of partition as he might think fit.

The deed provided that, in addition to reimbursing himself all expenses incurred by the trustee in the administration of the trust, the trustee should be entitled to remuneration for all work done by him in managing and controlling any property forming part of the trust fund or carrying on the business of a grazier or pastoralist or other business in the course of his administration of the trust fund in the same manner and as fully in all respects as if he were not a trustee thereof. The deed empowered the trustee to purchase, notwithstanding that he was a trustee thereof, all or any property comprising the trust fund or any part thereof by public auction or by private contract provided in the latter case that the sale should be conducted by Goldsbrough Mort & Co. Ltd. or be made at a price and upon terms and conditions approved by that company or by a valuer or other nominee appointed by it.

The lands originally subject to the trusts of the deed constituted a grazing property known as Ellerston. These lands were purchased by the settlor early in the year 1924 with his own moneys and for his own benefit. Thereafter the settlor as trustee under the deed managed and controlled these lands and conducted thereon the business of a grazier until in the year 1928 he sold them and discharged the encumbrances thereon. The net proceeds of sale were invested (a) in a grazing property known as Glendon and (b) in certain mortgages. At the date of his death the properties and funds held by the settlor upon the trusts of the deed were of the net value of £71,900 9s. 7d. They comprised the grazing property known as Glendon, stock, plant and furniture on that property, two mortgages securing respectively the principal sums of £2,650 and £4,000, moneys in bank accounts and certain debts due to the trust, less certain liabilities.

From the date of the deed until his death the settlor was at all times the sole trustee thereof and managed the properties and funds which were from time to time subject to its trusts. He received from time to time out of the income of the trust funds

certain amounts which he fixed from time to time as being the amounts which should be received by him as remuneration for the work done by him in managing and controlling the trust funds and in carrying on the business of a grazier or pastoralist in the course of his administration of those funds. The profits and income of the trust funds after deducting therefrom all outgoings and expenses (including the above remuneration retained by the settlor) were divided by him into five equal shares, one share being credited to each of his children and the fifth share to himself. The amounts credited to each child were paid or applied by the settlor for or towards the maintenance and education of such child or were paid to the mother of such child for or towards his maintenance or education or were paid to such child after he or she had come of age.

Two problems arise on the appeal. The first is to determine what the settlor gave the children. The second is to determine whether the children, to the extent to which the gift was capable of immediate possession and enjoyment, immediately assumed bona-fide possession and enjoyment of the gift and thenceforth retained it to the entire exclusion of the deceased or of any benefit to him of whatsoever kind or in any way whether enforceable at law or in equity or not. A person who declares trusts of property only gives the beneficial interests covered by the trusts. The interests of the children under the deed were equitable. The question is what beneficial interests were created by the trusts. It was contended for the appellant that the equitable interests of the children consisted merely of the residual benefits which flowed in the shape of income or capital from the exercise by the trustee of the powers of management and other powers conferred upon him by the deed. Unless and until the settlor in the exercise of his discretion chose to appropriate part of the capital in or towards the share of a child, each child was only entitled to an equal share of the net income of the trust fund remaining after the expenses of administering the trust, including the remuneration of the trustee, had been deducted. If the settlor sold the trust property the children were only entitled to a share of the proceeds of sale, after these proceeds had been derived from a sale to the settlor if he chose to exercise his power to purchase the trust property conferred upon him by the deed. So the argument ran.

If this was the true nature and extent of the gifts to the children, bona-fide possession and enjoyment of their income, to the extent to which they could possess and enjoy such a gift, was assumed by them immediately upon the gift and thenceforth retained to

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the entire exclusion of the settlor. The shares of the children in each distribution of income were credited to their separate accounts and became their absolute property. The fact that the settlor was able to apply this income for or towards their maintenance and education whilst they were under twenty-one would not make the property dutiable. The settlor was thereby relieved, at least to some extent, of a moral obligation to provide for them until they attained twenty-one and of a legal obligation to do so under the *Deserted Wives and Children Act* 1901-1939 (N.S.W.) until they were over sixteen. The power so to apply the income was an advantage to the settlor (*Jodrell* v. *Jodrell* (1)). At the date of the deed no such power existed. The deed itself was silent and the income of property of an infant which had vested but was liable to be divested was not income within the meaning of s. 18 of the *Trustee Act* 1898 (N.S.W.) (*In re Buckley's Trusts* (2) ; *Parker* v. *Dowling* (3)). Power so to apply the income was later conferred by s. 43 of the *Trustee Act* 1925-1942 (N.S.W). But the advantage to the settlor flowing from this statutory power was not a benefit within the meaning of s. 102 (2) (d) of the *Stamp Duties Act*. The benefits which the section contemplates are benefits which are in some way referable (to use Lord *Tomlin's* word in the *Munro Case*) or attributable (to use Lord *Russell's* word in the *Perpetual Trustee Case*) to the gift the settlor has made, per Lord *Simonds* in the *St. Aubyn's Case*. Any advantage derived by the settlor from the use of s. 43 of the *Trustee Act* was an advantage derived from an independent title and not a benefit referable or attributable to the gifts to the children.

So too, on this construction of the deed, any benefit the settlor could derive from exercising his power to purchase the trust property would be something that the settlor had retained out of his previous absolute ownership not forming part of the gifts to the children and something to which the gifts to the children were subject. And any other benefit which it was possible for the settlor to derive from his use of other powers contained in the deed could be placed in the same category.

But, in my opinion, that is not the true construction of the deed. Its true effect was to create an immediate equitable tenancy in common between the settlor and the children in the subject land in equal shares. The children were infants at the time. At the date of the death of the settlor all but one had attained the age of twenty-five years and that one has since attained that age.

(1) (1851) 14 Beav. 397, at p. 413 [51 E.R. 339, at p. 345].
(2) (1883) 22 Ch. D. 583.
(3) (1916) 16 S.R. (N.S.W.) 234.

The deed made no provision for the distribution of the income amongst the beneficiaries. It made no provision for the distribution of the capital amongst them apart from the power of appropriation at the discretion of the trustee already mentioned. The rights of the beneficiaries to income and capital flowed from the creation of the tenancy in common and were incidental to that relationship. The children became from the date of the execution of the deed equitable tenants in common of the land in the fullest sense. Whilst the lands remained undivided the legal estate remained in the trustee for he had powers of sale and management &c. the exercise of which, if he chose to exercise them, required that he should have the legal estate.

But each of the children had from the date of the execution of the deed an absolute right under the *Partition Act* 1900 (N.S.W.) to apply to the Court for a partition or for a sale in the discretion of the Court in lieu of partition. The right of one tenant in common to apply to the Court of Equity for a partition was an absolute right before there was any Partition Act. Before the Act the Court had no discretion to refuse partition or to order a sale. Difficulty in making a partition was no objection to the decree (*Warner* v. *Baynes* (1); *Parker* v. *Gerard* (2)). In the first-mentioned case the manifest inconvenience of partitioning a cold bath for public use did not deter the court. The *Partition Act* 1900 gave the court a discretion to order a sale in lieu of partition. A tenant in common still had an absolute right to an order for partition unless the court in its discretion ordered a sale: *Mayfair Property Co.* v. *Johnston* (3). The equitable interests of the children under the deed were defeasible if they died under twenty-five without leaving issue surviving, but this was no bar to an immediate suit (*Greenwood* v. *Percy* (4); *Hurry* v. *Hurry* (5)). The *Partition Act* 1900 was repealed by s. 17 (2) of the *Conveyancing (Amendment) Act* 1930 (N.S.W.), and its place was taken by Part IV., Div. 6, of the *Conveyancing Act* 1919-1930 (N.S.W.) giving co-owners a right to apply to the court to have property other than in chattels vested in trustees upon the statutory trust for sale.

Co-owners would appear to be in a stronger position under this Act than they were under the *Partition Act*. The court had no jurisdiction to make an order for partition or sale under the *Partition Act* where the instrument contained overriding trusts to manage the property and divide the profits (*Taylor* v. *Grange* (6)),

(1) (1750) Amb. 589 [27 E.R. 384].
(2) (1754) Amb. 236 [27 E.R. 157].
(3) (1894) 1 Ch. D. 508, at pp. 513, 514.
(4) (1859) 26 Beav. 572 [53 E.R. 1019].
(5) (1870) L.R. 10 Eq. 346.
(6) (1880) 15 Ch. D. 165.

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or a subsisting imperative trust for sale which in equity converted the property into personalty, *Biggs* v. *Peacock* (1). It would seem that under Part IV., Div. 6, of the *Conveyancing Act* co-owners may apply to the court in spite of such obstacles and that, if the court makes an order, the order will override the trusts of the instrument (*Re B. Cordingley* (2)). But even under the *Partition Act* a discretionary power of sale was not a bar (*Boyd* v. *Allen* (3)).

The present deed contained no active management trust. It contained a mere power to carry on business or not at the discretion of the trustee. By the deed the settlor declared that he or other the trustee or trustees for the time being should hold the land upon trust either to retain and use it or at the absolute discretion of the trustee to sell it and invest the proceeds of sale. Although these provisions were in the form of a trust, they conferred upon the trustee an absolute discretion to retain the land or to sell it and they were in reality powers in the form of trusts giving the trustee an absolute discretion whether to sell or not (*In re Hotchkys* ; *Freke* v. *Calmady* (4)). There was therefore no imperative trust for sale. The powers conferred upon the trustee by the deed were subsidiary to the rights of the children as tenants in common to allow the property to remain undivided or to bring about a partition or sale and division of the proceeds.

On this construction of the deed, which is to my mind the true one, it contained benefits for the settlor referable and attributable to the gifts to the children. In particular the settlor retained the right to manage the trust property, including the undivided shares of the children, and to fix his own remuneration within reason for doing so. In New South Wales, s. 86 of the *Wills, Probate and Administration Act* 1898-1947 authorizes the Probate Court to remunerate trustees of wills for their pains and troubles in administering the estate, but there is no statute authorizing the court to remunerate the trustees of deeds. The deed itself must authorize such remuneration. Otherwise the trustee must carry out his duties without remuneration. The authority contained in the deed for the trustee to remunerate himself was in the nature of a beneficial gift to the settlor (*Commissioner of Stamp Duties (N.S.W.)* v. *Pearse* (5)). It was an authority to manage the property he had given the children and remunerate himself for doing so. It was payable as to four-fifths out of the income of the property which he had given the children. It was a benefit to the settlor directly referable and attributable to the gift.

(1) (1882) 22 Ch. D. 284.
(2) (1948) 48 S.R. (N.S.W.) 248; 65 W.N. 119.
(3) (1883) 24 Ch. D. 622.
(4) (1886) 32 Ch. D. 408, at p. 416.
(5) (1951) 84 C.L.R. 490, at p. 521.

One such benefit is sufficient to make the property comprised in the gifts to the children part of the notional estate of the deceased. The power of the settlor so to remunerate himself was the most important benefit referable and attributable to these gifts. Another was the power of the settlor to purchase the trust property, which included the property given to the children, at public auction or by private contract. At a sale by public auction properly advertised and conducted the settlor would have to pay full value, and the deed contained provisions directed to ensuring that he would also have to pay a proper price if he purchased by private contract. But a power for a trustee to purchase trust property would be a benefit to him although he had to pay full value. In the present case the decision whether to sell by public auction or private contract rested with the settlor. The decision whether to sell the whole or part of the trust property also rested with him. He had in effect a right of preemption. Apart from the clause the settlor, whilst he remained a trustee, could not have purchased any part of the trust property. The clause was unlike the provision under discussion in *Way* v. *Commissioner of Stamp Duties (N.S.W.)* (1) (and on appeal in the Privy Council (2)). For there the settlor had no right to acquire any part of the trust property. He had a right to sell his own property to the trust but only at a discount. The benefit from the exercise of that power was a benefit to the settlement and not to the settlor. It was a power which, as Lord *Radcliffe* pointed out in the Privy Council, did not extend far enough to reach the trust property. The present power was a power to purchase the trust property. Clearly, therefore, it reached it, and the authorities cited in *Pearse's Case* (3), show that a dispensation in a trust instrument which authorizes a trustee to obtain a payment out of the trust property, and *a fortiori* to purchase part of it, even for full value, is a benefit to the trustee (*Edwards* v. *Edwards* (4)). The learned judges of the Supreme Court found other benefits but it is unnecessary to seek further.

I would dismiss the appeal.

WEBB J. The question to be decided, the evidence and statutory provisions, so far as material, and the authorities are set out in the judgments of the Chief Justice and *Williams* J.

(1) (1949) 79 C.L.R. 477, at pp. 495, 496.
(2) (1951) 83 C.L.R. 570.
(3) (1951) 84 C.L.R. 490.
(4) (1837) 1 Jur. 654, at p. 655.

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Webb J.

As appears from *Munro* v. *Commissioner of Stamp Duties* (1); *Commissioner of Stamp Duties* v. *Perpetual Trustee Co. Ltd.* (2); and *St. Aubyn* v. *Attorney-General* (3) and the authorities referred to in those cases, the position is that a gift is not brought for duty purposes within the estate of the donor on his death unless some benefit was reserved to him *out of or referable or attributable to the gift.* If a whole was given but a part reserved the whole is part of the estate for duty purposes. This is perhaps easy to state, but it is difficult to apply in some cases, the difficulty being to determine from the words used in making the gift exactly what was given and what was retained.

Now by cl. 2 of this deed of trust the children were made equitable tenants in common of the capital and interest of the trust fund: they were not made tenants in common of the particular assets comprising that fund. They were given no right to those assets, which, on the contrary, could be varied from time to time by the trustee as he saw fit (cl. 1). He could sell or exchange them; he could employ them in business; he could give them to charities (cl. 4). If he did employ them in business, then, in taking money for his services, he was not taking back something which he had given to his children. Again, in buying such assets he was not purchasing any equitable interest of a child, and one asset, money, replaced another. If he appropriated assets to a child (cl. 4 (h)) the appropriation took the asset out of the trust fund and so placed it beyond the trustee's right or dispensation to purchase, which was confined to assets still part of the trust fund (cl. 4 (k)).

It is true that cl. 4 (h) provided that, as regards any share of the trust fund not absolutely vested, such appropriation should be without prejudice to the exercise of any powers expressly or impliedly given by the trust deed to the trustee; but the trustee had other powers not confined to the trust fund, as in cl. 4 (a)—and, perhaps, cl. 4 (c). These other powers extended to any real or personal property "the subject of this trust", including an appropriated share not absolutely vested. They were not confined to the trust fund as it existed from time to time. The powers in cl. 4 (a) and (c), that is, to manage and like powers, would not have been inconsistent with such an appropriation, as would the right or dispensation to purchase given to the trustee by cl. 4 (k). Because of this inconsistency I think we should not hold that this right or dispensation extended to any such appropriation, if any other conclusion is open, as I think is the case.

(1) (1934) A.C. 61, at p. 67.
(2) (1943) A.C., at p. 440.
(3) (1952) A.C., at p. 29.

In my opinion the deceased reserved nothing out of the interests he gave to his children. He obtained no benefit referable or attributable to the equitable interests which he gave his children, who as equitable tenants in common were not given the whole of any particular asset, but only residues, although such residues might have proved small.

It may also be true that the transaction reeked with benefits to the trustee. But still it does not follow that he reserved or secured anything out of what he gave, or might have given to the donees, whether by way of equitable interests or of appropriations, vested or non-vested.

I would allow the appeal.

FULLAGAR J. In my opinion, this appeal should be dismissed. I agree with the judgment of the Chief Justice, and have nothing to add.

KITTO J. The appellant is the executor of the estate of one Leslie William Friend deceased, who died in 1947. In 1924 the deceased by deed declared himself a trustee of certain lands constituting a grazing property known as Ellerston and the rents, issues and profits thereof for himself and his four named children as tenants in common in equal shares, with a provision that if any child should die under twenty-five without leaving a child or children him or her surviving the original and any accrued share of the child so dying should be held upon trust for the others of the named children and the deceased as tenants in common in equal shares. The children were all infants at the date of the deed, but three of them attained twenty-five before the death of the deceased and the fourth has attained that age since.

The deceased remained until his death the sole trustee of the deed, and as such he was invested by the deed with a number of express powers, some of which should be mentioned. He was empowered either to retain and use the trust lands or to sell them and invest the proceeds upon such securities, whether authorized trustee investments or not, as he should in his uncontrolled discretion think fit; to purchase land and stock, plant or other personal property; to manage any property the subject of the trust; to appropriate and partition any property forming part of the trust fund to or towards the share of any person under the trusts of the deed, fixing values as he should think fit; to remunerate himself for all work done by him in managing and controlling any property forming part of the trust fund or carrying on the business

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of a grazier or pastoralist or other business in the course of his administration of the trust fund in the same manner and as fully in all respects as if he were not a trustee; to purchase, notwithstanding that he was a trustee, all or any property comprising the trust fund or any part thereof by public auction or private contract, provided that the sale should be conducted by a specified company or made at a price and upon terms and conditions approved by that company or by a valuer or nominee appointed by it; to carry on every class of business relating to grazing, with power to retain and employ in any such business the capital of the trust fund or any part thereof; to employ any person at such remuneration as he should think proper and generally to act in all matters relating to any such business as if he were absolutely entitled thereto; and to convey appropriate or dedicate any part or parts of the trust property for public or charitable purposes either gratuitously or for such consideration as the trustee might think proper to accept.

The deceased did not at any time exercise the power to make an appropriation or partition to or towards the share of any person, the power to purchase any part of the trust property, or the power to convey appropriate or dedicate property for public or charitable purposes. But the other powers I have mentioned he did exercise. He retained Ellerston and conducted a grazing business thereon until 1928; and when in that year he sold the property, he invested the proceeds, partly in another grazing property, Glendon, which he managed until his death, and partly on mortgage. He fixed his own remuneration from time to time for managing and controlling the properties and carrying on the grazing businesses of the trust thereon. The income of the properties (after deducting all outgoings and expenses including his remuneration) was divided into five parts, and one such part was credited to each of the four children and one to the deceased. The amounts credited to each child while an infant were paid or applied by the testator, or paid to the child's mother, for or towards the maintenance and education of the child, and the amounts credited to adult children were paid to them.

The dutiable estate of the deceased admittedly included his beneficial interest in the property which at his death was subject to the trusts of the deed of 1924; but a controversy arose between the Commissioner of Stamp Duties and the executor as to whether the dutiable estate included, not that beneficial interest only, but the whole of the trust property as it stood at the date of death. This question was submitted to the Supreme Court of New South

Wales by stated case, and was answered by that Court favourably to the commissioner. The Supreme Court's answer is challenged by this appeal.

The ground, and the only ground, upon which the commissioner relied was that the beneficial interests which passed from the deceased by the deed were, within the meaning of s. 102 (2) (d) of the *Stamp Duties Act*, 1920-1949, property comprised in gifts made by the deceased of which bona-fide possession and enjoyment was not assumed by the donees immediately upon the gifts and thereforth 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.

It follows from *Commissioner of Stamp Duties* v. *Perpetual Trustee Co.* (*Hall's Case*) (1), and it was not disputed on this appeal, that no property can be said to have been comprised in a gift made by the deceased by the deed of 1924, except the beneficial interests which the children of the deceased took by the operation of that deed. *Hall's Case* finally established that " gift " in s. 102 (2) (d) means beneficial gift, and that, therefore, where a gift is made by means of the creation of a trust, only the beneficial interests which pass under the trust to persons other than the donor are to be regarded as property comprised in the gift. That being so, the crucial question in this case must be whether each of the donees, the four children, assumed and retained bona-fide possession and enjoyment, to the entire exclusion of the deceased and of any benefit to him, of the beneficial interest which he or she took by the operation of the deed.

This question is not to be answered in the negative simply because it is possible to point to benefits to the deceased connected in some way with the trust property, or even to benefits connected with the interests in the trust property which were the subject matter of the gifts. The cases establish that benefits which the deceased in fact enjoyed after the date of the gift do not attract s. 102 (2) (d) unless, having regard to the nature and incidents of the property given, possession and enjoyment of that property was capable of being so assumed and retained by the donee as to deny those benefits to the donor. In other words, the provision applies only where the deceased enjoyed benefits which impaired in some manner or degree the full and untrammelled assumption and retention of that possession and enjoyment of the property given of which its character admitted (*Munro* v. *Commissioner of*

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

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Stamp Duties (1); *Hall's Case* (*supra*); *St. Aubyn* v. *Attorney-General* (2)).

In this case the commissioner contends that after the date of the gift the deceased enjoyed a variety of benefits any one of which would suffice to attract the provisions of s. 102 (2) (d). The learned judges of the Supreme Court confined their attention almost entirely to one suggested benefit, although the Chief Justice thought that the whole transaction reeked of benefits to the deceased arising out of the property assigned by way of gift to the donees. The view of the court in the main was that the beneficial interest which the deceased retained for himself in the trust property remained (as the Chief Justice expressed it) " linked with the other four beneficial interests and enabled the property to be managed and controlled as one undivided entity, each share having the advantage of being worked and used in conjunction with the other shares ". Thus, their Honours considered, the deceased obtained " a substantial and a material benefit by reason of the continuous association of his one-fifth share with the other four-fifths which were the subject matter of the gifts made under the deed ". The point to which this reasoning logically led was acknowledged by *Owen* J., who said that he found it difficult to see how a donor who creates a trust in favour of himself and another or others as tenants in common can ever claim with success that the gift is not caught by s. 102 (2) (d).

The proposition that in every case of property held in undivided shares the owner of each share derives a benefit from each of the other shares is one which I should not have thought self-evident. It seems to be assumed that the case is analogous to that of two houses divided by a party wall. But suppose that this is so: if the owner of both houses makes a gift of one and retains the other, it may be said that the donor thereafter derives, by reason of the party wall, a benefit from the property given; but I suppose no one would suggest that on that account alone the case would fall within s. 102 (2) (d). With great respect to their Honours, the view they have expressed in this case appears to me to overlook the force of the word " exclusion ". From what must there be an entire exclusion of the donor and any benefit to him? Lord *Sumner* gave the answer in *Attorney-General* v. *Seccombe* (3) when he pointed out that the word " exclusion " in the provision refers to the bona-fide possession and enjoyment of the property given, just as the word " assumed " does. That is why the only benefit

(1) (1934) A.C. 61.
(2) (1952) A.C. 15.
(3) (1911) 2 K.B. 688, at pp. 699, 700.

that matters for the purposes of s. 102 (2) (d) is a benefit which interferes with or encroaches or trenches upon that possession and enjoyment of which the property given is capable. It follows that it is quite immaterial that benefits have accrued to the deceased, if it is nevertheless true that there was exclusive assumption and retention by the donee of all the possession and enjoyment of the subject matter of the gift which in the nature of things could be had; the section comes into play only when the benefits have been such that possession and enjoyment by the donee was, because of them, not full and exclusive. The most ample possession and enjoyment that can be had of an undivided interest in property must necessarily leave co-owners in enjoyment of whatever benefits may be produced by their own interests as interests in an undivided whole. Those benefits cannot be regarded as benefits which bring the case within s. 102 (2) (d).

I turn, then, to the second ground upon which the commissioner sought to bring the case within s. 102 (2) (d). That was that the deceased, in exercise of the power in that behalf conferred upon him by the deed, retained remuneration out of the gross income of the trust for his management of the grazing businesses. Perhaps the benefit relied upon might be more accurately described as the remunerative employment the deceased gave himself by exercising his power as sole trustee to retain Ellerston for some years, and later to buy Glendon, and to carry on grazing businesses on those properties, remunerating himself out of trust moneys for his work of management. That there was in all this a benefit to the deceased I would not deny. But did it trench upon the possession and enjoyment of the equitable interests to which the deed of 1924 entitled the four children? I should have thought not. There is nothing to suggest that the deceased exercised his powers at any point in a manner different from that in which an independent trustee would have exercised them, or that he awarded himself a greater remuneration on any occasion than he would have had to pay to an independent manager or than his own services were worth. Nor did the power which the deed gave him extend to awarding himself remuneration beyond the value of his services, for he could not under the provisions of the deed bind the beneficiaries by any determination of his remuneration which he might make (*In re Fish*; *Bennett* v. *Bennett* (1)). The property comprised in the gift to each child, his or her equitable interest under the trusts of the deed, admitted of no more extensive possession and enjoyment during the period which elapsed before the donor's death

(1) (1893) 2 Ch. 413.

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than the receipt of a full one-fifth share of the net income of the trust. The answer which, in my opinion, should be given to the commissioner's contention on this part of the case may be stated quite shortly. It is that whatever benefit the deceased got in the way of remuneration was a benefit out of the gross income of the trust property; that, so far as appears, the remuneration never exceeded what was a proper deduction to be made from gross income in order to ascertain the net income; that the receipt of it by the deceased therefore did not diminish the net income; and that, so long as the deceased was completely excluded from a full four-fifths of the net income derived and ascertained in accordance with the deed, the possession and enjoyment which it was possible for the donees to assume and retain having regard to the nature of the property given, was entirely unimpaired by the taking of remuneration by the deceased.

Then it was said for the commissioner that it was a benefit to the deceased that the income to which his infant children became entitled under the trust was paid or applied by him for their maintenance and education or paid to their mother for those purposes, because he was thereby exonerated from an expenditure which otherwise he would have been at least morally obliged to meet. The answer is, in my opinion, that in so far as the deceased was in any sense benefited, the benefit, far from precluding or prejudicing a full and exclusive retention of possession and enjoyment by the children, was actually an incidental result, a by-product, of just such a retention.

Next it was said for the commissioner that the deceased had a relevant benefit because under the accruer clause in the deed some part of the interests given to his children would have come back to him had events turned out in a particular way. The short answer, given again and again in the cases, is that a beneficial interest, though it be contingent only, which a donor keeps for himself forms no part of the property comprised in the gift, and the benefit accruing to the donor from such an interest therefore cannot be one which adversely affects the full possession and enjoyment of the property given.

The commissioner then pointed to the powers which the deceased had as trustee of the deed to appropriate and partition any part of the trust fund on the basis of values fixed by himself, and to convey, appropriate, or dedicate property for public or charitable purposes. These were powers fiduciary in their nature, not admitting of an exercise benefiting the deceased personally at the expense of his children. I fail to see how the existence of

such powers can be regarded as encroaching upon the possession and enjoyment of the children's equitable interests.

The commissioner also placed some reliance upon the provision of the deed relieving the trustee from the ordinary disqualification of a trustee in respect of purchasing the trust property. It may be true to say that during the deceased's trusteeship this provision was a benefit to him, and a benefit with respect to the trust property; but, if so, I am quite unable to see how it detracted from the possession and enjoyment by the donees of their beneficial interests.

Finally it was said on behalf of the commissioner that the deceased excluded his children from the physical possession of the grazing properties which at different times were subject to the trusts of the deed, and that s. 102 (2) (d) is applicable for that reason. What is referred to, I presume, is the state of affairs mentioned in the judgment of *Street* C.J. as having been described to the Supreme Court during the course of argument, namely, that the deceased "resided on the grazing property and, so far as outward and visible signs were concerned, controlled, managed, used and administered the same as if he were the absolute owner thereof". That, of course, is what a managing trustee would necessarily do; and it is exactly what the deceased would have had to employ someone else to do if he had not managed the property himself. Even if the statement made to the Supreme Court had been incorporated in the stated case, it would not have justified an inference, nor, presumably, was it made for the purpose of suggesting, that the deceased derived a benefit from the property otherwise than conformably with the provisions of the deed. If the commissioner had intended to make any such suggestion he would surely have made a specific allegation so as to give the appellant, as a matter of elementary fairness, an opportunity to dispute the allegation and have an issue directed to be tried under s. 124 (6). Since he did not do this, it would not be right to decide the case on any other footing than that the benefits relied upon accrued to the deceased from the due exercise of his fiduciary powers and not otherwise.

By the residence and so forth which the deceased enjoyed within the limits of his powers under the deed he undoubtedly derived benefits. If the property comprised in the gift had consisted of four one-fifths of the fee simple of the trust property (whether legal and equitable or only equitable), and the donees, pursuant to a collateral agreement or otherwise, had allowed the deceased to have the benefits which in fact he enjoyed, the case would have fallen clearly enough within s. 102 (2) (d). But it seems to me

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that, in order to hold that four-fifths of the fee simple was the property comprised in the gift, one would have to construe the deed, not as a whole, but as if it were divided into two sections, effecting two quite distinct transactions, the first transaction being a disposition in equity of aliquot parts of the fee simple, and the second transaction consisting of a set of provisions operating to exact from the disponees a power for the disponor to derogate from the possession and enjoyment which an undivided share of an equitable fee simple enables the owner of it to have and to keep to himself. I cannot construe the deed in that way. It was a deed poll, and the benefits which the deceased derived in accordance with its provisions were benefits which the donees neither permitted him to derive nor had any power to deny him. They were in this position of impotence, not by their own choice, but because the deceased, in exercise of his right to give exactly what interests he liked and withhold exactly what he liked, had chosen to give them interests so hedged about as not to enable them to exclude him from those benefits. It was for him, when framing his deed, to delimit the interests he was parting with; and he did delimit them, not by any one part of the deed considered by itself, but by the entirety of its provisions. The donees had no voice in deciding to what extent their interests should be subject to rights, powers or privileges retained by the deceased. They got interests which were limited *ab initio* by the terms of their creation; and the limits were such that the interests were inherently insusceptible of being so possessed and enjoyed as to preclude the deceased from deriving those benefits which in fact he derived.

In my opinion s. 102 (2) (d) is for these reasons inapplicable, and the appeal should be allowed.

Appeal dismissed with costs.

Solicitors for the appellant, *Norman C. Oakes & Sagar.*

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

J. B.