cons & Not Followed [1986] 5 NSWLR 292

REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED } APPELLANT;

AND

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

[DAVIES' CASE]

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1954.

SYDNEY, *April* 7, 8; *Aug.* 19.

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

Death Duty (N.S.W.)—Property dutiable—Assets notionally included in estate—Deceased not entirely excluded from benefit—Gifts by deceased in lifetime—Settlement—Loans to deceased from trust fund—Appeal—Method—Stated case—Quaere, satisfactory—Findings of fact—Inference—Stamp Duties Act 1920-1940, *ss.* 102 (2) (*d*), 124.

By a settlement made in 1924 various assets owned by D. were vested in a company on trust to apply the whole or part of the income in such manner as it might think proper for the maintenance, education and general support of D.'s daughter until she should attain the age of thirty years or marry with the written consent of her parents or the survivor of them. The daughter, on attaining thirty years, was to be entitled to the corpus. The daughter lived with D. until 1st July 1938, when, at the age of twenty-eight years, she married and went to live abroad. Her parents' consent to the marriage was not evidenced in writing. From 1926 to 1931, when the daughter attained twenty-one years, the company made payments to D. out of the trust income for the maintenance, education and general support of his daughter. From 1931 to June 1937, the company, at the daughter's request, made further annual payments to D. and between November and the date of her marriage, the company paid £1,548 out of the trust income to D's daughter. Throughout the whole of the period from 1926 to the date of her marriage, the daughter was maintained, educated and supported by D. In December 1938, D., with

reversed: 1956 AC 512.

reversed: 1956 95 CLR 1.

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

his daughter's consent and approval, opened an account with a bank in her name and paid in £5,025 of his own money; D., on the same day, drew out £5,000 by a cheque signed by his daughter. In a letter to the bank, the daughter authorized D. to draw cheques and to operate on the account. In January 1939, the daughter instructed the company by letter to pay into the account "any money coming in from my trust". Between February 1939 and April 1943, D., from time to time, drew moneys out of the account by way of loan and deposited the moneys in his own account, thus reducing his overdraft, and in this way he borrowed £10,940, including the opening loan of £5,000. All these moneys except the £5,000 were drawn from the account by cheque signed by D. under the authority given him by his daughter. At his death in January 1946, D. still owed his daughter £8,926 18s. 7d. Apart from the opening deposit of £5,025 the moneys which were paid into the account throughout the whole of the period came from the trust funds. The Commissioner of Stamp Duties claimed that the value of the trust assets at the date of D.'s death and the sum of £5,025 were part of D.'s dutiable estate, The executor did not dispute that the sum of £5,025 formed part of D.'s dutiable estate.

Held, by *Webb*, *Kitto* and *Taylor* JJ. (*Dixon* C.J. and *Fullagar* J. dissenting), that s. 102 (2) (d) of the *Stamp Duties Act* 1920-1940 did not make the value of the trust assets part of the dutiable estate of D. because the daughter, by directing the trustee to pay the trust income into her own bank account, thereby acquired full control of its disposition. The fact that D., with his daughter's authority, subsequently withdrew these moneys as a loan did not mean that the benefit which he obtained from the loan was a benefit cutting into the possession and enjoyment which the daughter might otherwise have had of the trust property.

O'Connor v. *Commissioner of Succession Duties (S.A.)* (1932) 47 C.L.R. 601 distinguished.

The method of appeal by way of case stated under s. 124 of the *Stamp Duties Act* 1920-1940, discussed.

Decision of the Full Court of the Supreme Court of New South Wales: *Permanent Trustee Co. of New South Wales Ltd.* v. *Commissioner of Stamp Duties* (1953) 53 S.R. (N.S.W.) 319; 70 W.N. 213, reversed.

APPEAL from the Supreme Court of New South Wales.

A case stated under the provisions of s. 124 of the *Stamp Duties Act* 1920-1940 (N.S.W.) by the Commissioner of Stamp Duties (N.S.W.) in respect of matters arising in the estate of Arthur Henry Davies, late of Sydney, New South Wales, deceased, was substantially as follows:—

1. The above-named deceased, Arthur Henry Davies (hereinafter called the testator) died on 28th January 1946 domiciled in the State of New South Wales.

2. Probate of the will of the testator was duly granted by the Supreme Court of New South Wales to Permanent Trustee Co. of New South Wales Ltd.

3. By a deed made on or about 13th August 1924 between the testator of the first part, Muriel Norah Davies, his daughter (therein called the beneficiary) of the second part, and Permanent Trustee Co. of New South Wales Ltd. of the third part a trust was created by the testator in respect of certain shares, property and investments, described in the schedule to that deed and it was declared that the Permanent Trustee Co. of New South Wales Ltd., the trustee under the deed, should hold and be entitled to the shares, property and investments, and to the investments upon which the proceeds of the sale of those shares or other property or any part thereof might be invested, and to the income arising therefrom upon the trusts and with and subject to the powers and provisions expressed in the deed concerning the same. The deed contained, *inter alia*, the following clauses, that is to say :

> " (1) The Trustee shall stand possessed of the Trust Fund whether there shall or shall not be any other fund applicable to the maintenance and education of the beneficiary or any person bound by law to provide for such maintenance and education upon trust : (a) To apply the whole or such part as the Trustee shall think fit of the income arising from the Trust Fund for or towards the maintenance education and general support of the Beneficiary in such manner in all respects as the Trustee may think proper until such Beneficiary attains the age of thirty years or marries with the written consent and approval of her parents the said Arthur Henry Davies and Muriel Davies or of the survivor of them provided that in case the Beneficiary shall marry during the lifetime of her parents without such consent as aforesaid the Trustee shall continue to apply the income in manner aforesaid until the Beneficiary attains the age of thirty years. (b) To accumulate the residue (if any) of the same income which in the judgment of the Trustee may not be required for the purposes aforesaid or any of them in the year in which such income may have arisen by way of compound interest by investing the same and the resulting income therefrom for the benefit of the Beneficiary or other the person or persons who under the trusts hereinafter contained shall have become entitled to the Trust Fund Provided that the Trustee may resort to the accumulation of any preceding year or years and apply the same for any of the purposes hereinafter mentioned for the benefit of the Beneficiary.

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

(2) In case of the marriage of the Beneficiary without such consent as aforesaid before attaining the age of thirty years the Trustee may with the written consent of her parents or the survivor of them at any time after such marriage pay over to the Beneficiary one half of the Trust Fund together with any accumulation of income then in the hands of the Trustee.

(3) On the Beneficiary attaining the age of thirty years the Trustee shall pay over to her the balance of the Trust Fund or the whole of such Trust Fund if still in the hands of the Trustee together with all the accumulations of income then in hand for her sole and separate use.

(4) In case the Beneficiary shall attain the age of twenty-one years or marry under that age with such consent as aforesaid the Trust Fund shall be held by the Trustee upon Trust for such person or persons and in such manner in all respects as the Beneficiary shall by Will or Codicil appoint ".

5. Muriel Norah Davies married on 1st July 1938.

6. Muriel Norah Jackaman attained the age of thirty years on 22nd February 1940.

8. On 29th December 1938, the testator caused to be opened with the Bank of New South Wales at its head office, an account in the name of the said Muriel Norah Jackaman and deposited to the credit of that account the sum of £5,025 of his own moneys.

9. On the same date the testator presented a cheque drawn in his favour by Muriel Norah Jackaman on that account for the sum of £5,000 0s. 0d. and received that sum.

10. After the opening of that bank account the trustee from time to time made payments of the trust income into the bank account until 24th March 1943.

11. Prior to the opening of that account, namely, on 2nd November 1938 the testator wrote a letter to his daughter in which he requested her to sign an authority addressed to the trustee of the said deed to take his instructions in all matters regarding the said trust, or regarding the new account which, he stated, he was opening in the Bank of New South Wales in her name under the title " Cherry Jackaman " . . . In the same letter he requested her to sign a cheque in his favour for the sum of £5,000 0s. 0d. and a letter of authority to the said bank authorizing him to operate on the said new account, and a specimen signature to be handed to the said bank.

12. Muriel Norah Jackaman duly signed that cheque and duly signed the authorities to the trustee of the deed and to the bank.

14. Pursuant to a written instruction given by the said Muriel Norah Jackaman on 9th January 1939, the trustee of the deed thereafter paid to the credit of the account the income received by it as trustee of the deed.

16. Between 29th December 1938 and 4th April 1943 the testator operated on the account by signing cheques drawn thereon and by that means withdrew therefrom certain sums of money. After 4th April 1943 that account was not further operated upon by the testator.

24. The value of the assets which were, at the date of the death of the testator, held by the Permanent Trustee Co. of New South Wales Ltd. under the trusts of the said deed, was £38,162 13s. 7d.

25. For the purpose of the assessment of death duty payable in the estate of the testator, the Commissioner of Stamp Duties included in the dutiable estate of the testator the following sums, namely:—

(a) The sum of £38,162 13s. 7d. being the value of the assets subject to the trusts of the deed at the date of the death of the testator,

(b) The sum of £5,025 as being the amount of a gift made by the testator to Muriel Norah Jackaman on 29th December 1938.

The commissioner claims that both the said amounts are included in the dutiable estate of the testator.

26. The commissioner in assessing death duty payable in the said estate allowed as a deduction, pursuant to s. 107 of the *Stamp Duties Act* 1920-1940, a debt due by the testator to the said Muriel Norah Jackaman of an amount of £8,926 18s. 7d. being the amount claimed by her to be owing in respect of a loan of £5,000 made on 29th December 1938, and in respect of moneys being part of the income of the said trust withdrawn by the testator from the account of Muriel Norah Jackaman and paid into his own bank account. The Commissioner of Stamp Duties refused to allow as a debt due by the testator any interest on the said sum of £5,000 0s. 0d. or on any of the sums withdrawn by the testator from the said bank account of Muriel Norah Jackaman.

27. The Permanent Trustee Co. of New South Wales Ltd. as executor of the will of the testator, has notified the Commissioner of Stamp Duties that it is dissatisfied with the assessment of death duty in the said estate on the following grounds, namely :—

(i) the assets of the settlement executed by the testator on 18th August 1924, are wrongly included in the assessment as forming part of the dutiable estate of the testator ;

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

(ii) that interest on the sum of £8,926 13s. 7d. claimed by Muriel Norah Jackaman against the said estate other than on the sum of £5,000 0s. 0d. included therein, should be allowed by the commissioner as a debt against the estate.

(iii) that the assessment is excessive.

The Permanent Trustee Co. of New South Wales Ltd. required the Commissioner of Stamp Duties to state a case for the opinion of the Supreme Court of New South Wales, and duly paid the sum of £20 0s. 0d. as security for costs.

28. In the assessment of death duty the commissioner treated the dutiable estate of the testator as being of the total value of £191,380 0s. 0d. and assessed duty thereon at the sum of £52,435 7s. 6d. If the contentions of the executor of the will were held to be correct, the amount of duty assessed on the estate would be reduced by the sum of £10,492 9s. 4d.

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

(i) should the said sum of £38,162 13s. 7d. have been included in the dutiable estate of the testator,

(ii) should any interest on the sum of £8,926 18s. 7d. have been allowed as a debt due and owing by the testator to the said Muriel Norah Jackaman and deducted from the dutiable estate of the testator,

(iii) if question (ii) be answered in the affirmative, upon what sum or sums should such interest have been allowed as a debt and at what rate,

(iv) what is the amount of death duty payable in respect of the said estate,

(v) how should the costs of this case be borne and paid.

Issues of fact agreed upon by the parties under s. 124 (6) of the *Stamp Duties Act* 1920-1940 were as follows :—

1. Was the sum of £5,025 deposited by the testator in the Bank of New South Wales, head office, on 29th December 1938 a gift by him to his daughter Muriel Norah Jackaman ?

2. Was the amount of £5,000 withdrawn by the testator from the said account on 29th December 1938 a loan of that sum by Muriel Norah Jackaman to the testator ?

3. If issue of fact No. 2 is answered in the negative, was the said withdrawal by the testator made in circumstances which required him to account to his said daughter for the said sum ?

4. After the opening of the said account on 29th December 1938, did the testator have authority to withdraw money from time to time from the said account by drawing cheques thereon, without

first obtaining the approval of the said Muriel Norah Jackaman to any particular withdrawal ?

4A. If the answer to Question 4 is Yes, did the testator receive such authority prior to or at the time when he opened the said account, or subsequently ?

5. Were the sums withdrawn by the testator from the said account after the said 29th December 1938 until and including 4th April 1943, withdrawn by him (a) with the authority of Muriel Norah Jackaman ; or (b) without such authority ?

6. If the answer to issue of fact No. 5 (a) is in the affirmative, were the said sums (other than the four amounts mentioned in par. 19 of the case) loans by the said Muriel Norah Jackaman to the testator ?

7. If the answer to issue of fact No. 5 (b) is in the affirmative, were the said sums withdrawn by the testator from the said account in circumstances which required the testator to account for the same to the said Muriel Norah Jackaman ?

8. Was any agreement made by the testator with the said Muriel Norah Jackaman for the payment of interest upon the said sums from the respective dates of withdrawal to the date of repayment and, if so, at what rate per annum ?

9. Were the said four amounts, or any of them, mentioned in par. 19 of the case, paid by the testator to or at the request or on behalf of the said Muriel Norah Jackaman and if not all but only some, which of them ?

10. Did the testator repay any of the sums or any part thereof withdrawn by him from the said bank account to the said Muriel Norah Jackaman, or pay any of them or any part of them to any other person at her request or on her behalf and if so, which of the said sums or part thereof ?

11. What were the motives of the testator in opening the said account and depositing therein the sum of £5,025 and what were his intentions as to the manner in which the said account should be operated upon ?

Oral evidence by Muriel Norah Jackaman was taken before *Roper* C.J. in Eq., whereupon his Honour submitted to the Full Court of the Supreme Court the undermentioned answers to the issues of fact so agreed upon by the parties :—

Question 1, Yes ; Question 2, Yes ; Question 3, Does not arise ; Question 4, Yes ; Question 4A, He received the authority prior to the time when he opened the account ; Question 5 (a), Yes ; Question 6, Yes ; Question 7, Does not arise ; Question 8, No ; Question 9, As to the first and second of the said four amounts

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

"Yes" and as to the other two, "No"; Question 10, Of the sums so withdrawn by him the testator did in effect repay to the said Muriel Norah Jackaman or pay to some other person at her request or on her behalf the four amounts mentioned in par. 19 of the case and in effect repaid to her the sum of £2,000 which was invested by him in shares in Davison Paint Co. Pty. Ltd. in her name; Question 11, The motives of the testator in opening the said account and depositing the said sum of £5,025 were his natural love and affection for the said Muriel Norah Jackaman and his intentions as to the manner in which the said account should be used were:—(a) To deposit therein an amount of £5,025 as a gift from him to the said Muriel Norah Jackaman; (b) To withdraw from that amount with her concurrence the sum of £5,000 as a loan from her to him; (c) To arrange that the Permanent Trustee Co. of New South Wales Ltd. should pay into the said account with her concurrence the income from the assets held upon the trusts of the deed executed by him in 1924; (d) To withdraw with her concurrence so much of that income as he from time to time wished to be used by him to be used by him as he wished but subject to an obligation on his part to repay to her the amounts not applied for her benefit or at her request.

The questions raised in the case stated were answered by the Full Court of the Supreme Court of New South Wales (*Street* C.J., *Owen* and *Clancy* JJ.) as follows:—1. Yes; 2. No.; 3. Does not arise; 4. £52,435 7s. 6d.; 5. By the appellant (*Permanent Trustee Co. of New South Wales Ltd.* v. *Commissioner of Stamp Duties* (1)).

From that decision the trustee appealed to the High Court.

Sir *Garfield Barwick* Q.C. (with him *F. J. D. Officer*), for the appellant. The gift was a gift of a beneficial interest in a fund or group of assets. Upon the execution of the deed the beneficial interest went into, and has remained throughout in, the trustee and the beneficiary respectively. Possession by the beneficiary was taken on the execution of the deed, and it was not parted with—it was retained. The only question is: was that interest retained by the beneficiary so retained to the exclusion of the donor. The money was lent without interest. It is now clearly established (i) that the only relevant benefit is one which not only advantages the donor but also disadvantages the donee's possession of the interest given (*Oakes* v. *Commissioner of Stamp Duties of New South Wales*) (2)); and (ii) that the matter cannot be taken by and large,

(1) (1953) 53 S.R. (N.S.W.) 319; 70 W.N. 213.

(2) (1953) 89 C.L.R. 37, at p. 49.

but that each alleged benefit must be separately examined. In this case the benefit is the borrowing of money without interest repayable on demand. Although the borrowing without interest may have been a benefit to the donor, it was not a benefit taken at the expense of the possession of the donee of the interest given. The payment by the trustee to the account of the donee of the income of the trust was the end point of the possession and enjoyment by the donee of the interest given. As the money was lent and not given to the donor the possession and enjoyment of it remained with the donee. The exaction of interest for the loan could not have made any difference. A loan at interest trenches no more and no less on the possession and enjoyment of the capital than a loan without interest. In order to make the subject of the gift, that is the settlement, dutiable under s. 102 (2) (d) of the *Stamp Duties Act* 1920, as amended, it is necessary that there must be either—(a) a benefit amounting to a reservation, or (b) a benefit such as to encumber the enjoyment of the property the subject of the gift (*Oakes* v. *Commissioner of Stamp Duties of New South Wales* (1)). The benefit must be of such a kind as to impinge upon the possession of the thing given. It is not enough to find a benefit; it must be taken at the expense of the possession and enjoyment of the thing given. In this case the thing given was the beneficial interest in the fund, the money. The fact that the daughter did not take any interest cannot have any bearing on the matter. Her lending of the money was in fact an exercise of the possession and enjoyment. There is nothing in *St. Aubyn* v. *Attorney-General* (2) which can be said to turn on the contractual aspect. In that case (3), *Attorney-General* v. *Worrall* (4) was treated by Lord *Simonds* as authority for the view that the benefit need not be out of the thing given. To be a collateral benefit it must be part of a bargain. On the other hand Lord *Radcliffe* (5), by a mathematical comparison of the amount of the annuity with interest on the purchase price of the mortgage finds that the benefit of the donor was in substance out of the thing given. The observations by Lord *Radcliffe* in *St. Aubyn* v. *Attorney-General* (6) were adopted by the Privy Council in *Oakes* v. *Commissioner of Stamp Duties of New South Wales* (7). There is a contrast between cases where there is a bargain and cases where there is not any bargain. A lending of money by the donee is not necessarily a detriment to her possession and enjoyment. The gift became the property of the donee. The fact that the money

(1) (1953) 89 C.L.R., at pp. 44-48.
(2) (1952) A.C. 15.
(3) (1952) A.C., at pp 25-30.
(4) (1895) 1 Q.B. 99.
(5) (1952) A.C., at pp. 47, 50.
(6) (1952) A.C., at p. 47.
(7) (1953) 89 C.L.R., at p. 45.

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

was lent " soon " does not make any difference. All the elements vital to *O'Connor* v. *Commissioner of Succession Duties* (*S.A.*) (1) are absent from this case. In this case (a) there was not any reservation; (b) in the light of *Oakes* v. *Commissioner of Stamp Duties of New South Wales* (2), receipt of moneys for maintenance and education do not amount to a benefit which will attract the section; and (c) use by the deceased of part of the income does not attract the section because although that may have been a benefit to the deceased—(i) it was income only which was used; (ii) it was not the whole of the income which was used; (iii) the deceased's authority to use the income was terminable at will; and (iv) the moneys having been found to be a loan from the donee to the donor, there was not any fixed term for repayment, they were repayable at will. The making of the loan did not substract from the enjoyment and possession of the gift. For those reasons any benefit to the deceased did not encumber, in the hands of the donee, enjoyment of the assets the subject of the gift.

G. Wallace Q.C. (with him *R. C. Smith*), for the respondent. Three possible questions arise, namely :—(i) whether a loan without interest is a relevant benefit to the donor; (ii) if so, is such benefit one which impairs or entrenches upon the complete and exclusive enjoyment by the donee of the thing given; and (iii) is it material when such benefit and impairment arise out of an independent transaction subsequent to the gift transaction? If the answers to (i) and (ii) are in the affirmative the appeal should be dismissed. The subject arrangement is an ambiguous arrangement whereby the donor took back a part of what he purported to have disposed of. He did indeed take back by way of loan what he had purported to give, and thereby prejudiced the possession and enjoyment of the donee. The fact that he got it " interest free " is an important feature. The three propositions stated above show the real nature of the transaction. It is significant that the loan was not to be called up in the donor's lifetime. This case is similar to *O'Connor* v. *Commissioner of Succession Duties* (*S.A.*) (1). Regard should be had to the whole substance of the transaction and not to its form. An alternative issue is—irrespective of whether the donor received the relevant " benefit " he nevertheless was not excluded from possession and enjoyment of the subject matter of the gift. An analysis of the section shows that the donee must assume possession and enjoyment and that such possession and enjoyment must be thenceforth retained for the entire exclusion of, firstly, the donor,

(1) (1932) 47 C.L.R. 601. (2) (1953) 89 C.L.R. 37.

and, secondly, of any benefit of a relevant nature of the donor. The facts as stated reveal that subsequent to the gift transaction and as a result of an independent arrangement between the donor and the donee, the donor received an interest-free loan of the income of the subject matter of the gift. The obtaining of a loan is a commercial benefit. If a loan without interest is a relevant benefit the main question is whether it entrenches upon the possession and enjoyment. The granting of an interest-free loan is a benefit in the same way as remuneration to a manager-trustee for services rendered was considered to be a benefit in *Oakes* v. *Commissioner of Stamp Duties of New South Wales* (1). In *St. Aubyn* v. *Attorney-General* (2) both Lord *Radcliffe* and Lord *Tucker* considered that a loan was a relevant benefit even though their Lordships were dealing with the wording of a particular statute. The view was expressed in *Lang* v. *Webb* (3) that a loan even at full value was a relevant benefit. The stated case shows that the income of the trust fund went per medium of the bank account, specially opened for that purpose, to the donor. But the receipt of the income was something to which the donee was entitled (*O'Connor* v. *Commissioner of Succession Duties* (*S.A.*) (4)). The bare receipt by the donee of the income does not end the matter. Regard must be had to the substance of the transaction (*St. Aubyn* v. *Attorney-General* (5) ; *Oakes* v. *Commissioner of Stamp Duties of New South Wales* (6) ; *Lang* v. *Webb* (7) ; *Attorney-General* v. *Worrall* (8)). If the argument for the appellant be correct, the donee could have returned the gift immediately without prejudicing her possession and enjoyment. The opening words of s. 102 of the *Stamp Duties Act* 1920-1940 (N.S.W.) only deal with property which a testator has. *Worrall's Case* (9) was a gift back of the income that was given ; whether it be " fruit " or *corpus* is immaterial. Alternatively, the donor did not thenceforth retain enjoyment and possession of the subject matter of the gift. Looking at the substance of the matter the donor obtained possession of part of the subject matter of the gift, that is to say the income. It is not to the point that the donor was under an obligation to repay the loan—he was still in possession of the income. The section is so worded that no questions of degree are permissible to be canvassed : see *Attorney-General* v. *Seccombe* (10). In the circumstances the daughter did not have possession. *Oakes* v. *Commissioner of Stamp Duties*

(1) (1953) 89 C.L.R. 37.
(2) (1952) A.C., at pp. 57, 58.
(3) (1912) 13 C.L.R., at p. 517.
(4) (1932) 47 C.L.R., at p. 614.
(5) (1952) A.C., at p. 47.
(6) (1953) 89 C.L.R., at p. 43.
(7) (1912) 13 C.L.R., at p. 514.
(8) (1895) 1 Q.B., at p. 104.
(9) (1895) 1 Q.B. 99.
(10) (1911) 2 K.B. 688.

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

of New South Wales (1); *O'Connor* v. *Commissioner of Succession Duties* (*S.A.*) (2) and *St. Aubyn* v. *Attorney-General* (3) show that possession and enjoyment are separate: see also *Lang* v. *Webb* (4); *Union Trustee Co. of Australia Ltd.* v. *Webb* (5) and *Rudd* v. *Commissioner of Stamp Duties* (6). The obtaining by the donor of possession and enjoyment of part of the property given is irreconcilable with bona fide possession and enjoyment by the donee. Both the benefit and the possession taken by the donor were referable to the subject matter of the gift (*Munro* v. *Commissioner of Stamp Duties* (7); *St. Aubyn* v. *Attorney-General* (3); *Oakes* v. *Commissioner of Stamp Duties of New South Wales* (1); *Munro* v. *Commissioner of Stamp Duties* (7); *Commissioner for Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (*Hall's Case*) (8) and *In re Cochrane* (9) are all cases where the court was considering what was the subject matter of the gift. Exclusion of the gift was another matter. Enjoyment and possession and benefit are different matters. The only difference between this case and *O'Connor* v. *Commissioner of Succession Duties* (*S.A.*) (2) is that in this case there was an obligation to repay, but the obligation to repay is irrelevant. Analysis of any question of degree is not permitted by the section. Regard should be given to the real effect of what happened between the donor and the donee.

Sir *Garfield Barwick* Q.C., in reply.

Cur. adv. vult.

Aug. 19, 1954.

The following written judgments were delivered:—

DIXON C.J. This is an appeal against an order of the Supreme Court of New South Wales answering in favour of the respondent Commissioner of Stamp Duties certain questions submitted for the determination of the Court by a case stated under s. 124 of the *Stamp Duties Act* 1920-1940. The effect of the answers was to confirm an assessment of death duty by which the property comprised in a settlement by the deceased was included as part of his dutiable estate. The deceased was one Arthur Henry Davies who died on 28th January 1946. The settlement was made on 13th August 1924 and the beneficiary who formed the primary object of the trusts was the deceased's daughter Muriel Norah Davies, called in the family "Cherry". The property subject to the settlement was held to be part of the dutiable estate of the deceased

(1) (1953) 89 C.L.R. 37.
(2) (1932) 47 C.L.R. 601.
(3) (1952) A.C. 15.
(4) (1912) 13 C.L.R. 503.
(5) (1915) 19 C.L.R. 669.
(6) (1937) 37 S.R. (N.S.W.) 366.
(7) (1934) A.C. 61.
(8) (1943) A.C. 425.
(9) (1905) 2 I.R. 626; (1906) 2 I.R. 200.

on the ground that, within s. 102 (2) (d) of the Act, it was property comprised in a gift made by the deceased of which bona fide possession and enjoyment had 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. The value placed upon the property subject to the settlement was £38,162.

The facts of the case are unusual. The decision of the appeal must depend upon the precise complexion placed upon the dealings they disclose with certain moneys having their source in the income from the trust fund under the settlement. For this reason it becomes necessary to state the circumstances in some detail. It is as well to begin with the relevant particulars concerning Muriel Norah Davies. She was born on 22nd February 1910. She thus came of age on 22nd February 1931. She was married at Alexandria in Egypt on 1st July 1938 and became Muriel Norah Jackaman. Afterwards she went to Kenya where she lived with her husband until April 1940. About that time he joined the armed forces in England and she also went to England where she resided until November 1943. She then returned to Australia. The settlement was expressed in a deed of which her father as settlor was the party of the first part; she was described as "the beneficiary" and was the party of the second part, and the now appellant, the Permanent Trustee Co. of New South Wales Ltd., under the description of "the trustee", was the party of the third part. The deed recited that the settlor had transferred to or caused to be vested in the trustee shares, property and investments, short particulars of which were set forth in a schedule, and had directed the trustee to hold them upon the trusts and with the powers thereinafter set forth for the benefit of his daughter, "the beneficiary". The property comprised in the schedule consisted of shares in trading companies, government stock and deposits with trading companies at interest. These assets and the investments by which they might be replaced were described as the trust fund. The trusts of the instrument were to the following effect: (1) To apply the whole or such part as the trustees should think fit of the income arising from the trust fund for or towards the maintenance, education and general support of the beneficiary in such manner and in all respects as the trustee might think proper until she should attain the age of thirty years or marry with the written consent and approval of her parents. By a proviso it was made clear that if she married during the lifetime of her parents without such consent,

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Dixon C.J.

the income should continue to be applicable in the aforesaid manner until she attained the age of thirty years. (In fact she married with the approval and consent of her parents but the consent and approval was not reduced to writing. As to this see *Lord Strange* v. *Smith* (1) and *Worthington* v. *Evans* (2) per *Leach* V.C.). (2) To accumulate the residue, if any, of the income not so applied by way of compound interest by investing the sum and the resulting income thereof for the benefit of the beneficiary or other the persons who should take under the trust. (3) In case of the marriage of the beneficiary without such consent before attaining the age of thirty, the trustee was empowered with the written consent of the parents or the survivor of them to pay over to the beneficiary one half of the trust fund together with the accumulation of income. (4) On the beneficiary attaining the age of thirty years upon trust to pay over to her the balance of the trust fund in the hands of the trustee together with all the accumulations of income then in hand for her sole use and benefit. The settlement gave Muriel Norah, upon her attaining twenty-one or marrying under that age with the consent of her parents, a general power of testamentary appointment over the fund. There were gifts over if she should die without issue before attaining a vested interest. Strangely enough, there appears to be an omission from the trusts of the settlement of any express direction as to the application of income between the time of the beneficiary's marrying and of her attaining the age of thirty in the event of her marrying under that age with the written consent of her parents. As the consent was not in writing perhaps the omission proved immaterial. During the minority of Muriel Norah the trustee made payments to the father of £1,000 annually from 1926 to 1931. In 1932 it made another such payment. Then the trustee seems to have secured from her a request or requests to continue making payments to the deceased. The payments made to him amount to £1,000 in each of the years 1933 to 1937. The first such request was contained in a letter of 12th December 1932. By that letter she noted a statement made by the trustee about making an allowance to her father on her behalf of £1,000 a year and confirmed and approved the payments. She also approved the continuance of the payments to her father saying that she would look to him for her own personal allowance. The other such request was contained in a letter dated 3rd April 1936 and consisted of a simple statement that she thereby confirmed all payments the trustee had made to her father out of her trust,

(1) (1755) Amb. 263 [27 E.R. 175].

(2) (1823) 1 Sim. & St. 165, at p. 172 [57 E.R. 66, at p. 69].

and would be pleased if the trustee would continue to make payments in the future as in the past.

On 29th December 1938, the deceased opened a bank account in his daughter's name in the Bank of New South Wales and into it he paid a sum of £5,025. This sum was paid out of his own resources. It appears that under the will of his grandfather which had been proved twenty years earlier, it was found that he was entitled to an unexpected share of corpus subject to a life interest which had fallen in. In the deceased's view it was intended that his children and not he himself should receive this money. To give effect to his view he placed £5,025 to the credit of his daughter's account in the bank. It was a gift from him, but at the same time he arranged with his daughter that he should withdraw £5,000 of this money as a loan. The arrangement was made by a letter of 2nd November 1938 which he sent to her in Kenya. By his letter he requested her to address a letter to the trustee giving the trustee authority to take his instructions in all matters regarding her trust or the new account he said he was opening in the Bank of New South Wales in her name :—" The next thing I want you to do is to write on a separate sheet, addressed to them, giving them the authority to take my instructions in all matters regarding your trust or the new account I am opening in the Bank of New South Wales in your name. This account will be entitled Cherry Jackaman. I am having this account opened in the Bank so that when I receive the money from the old man's estate I will instruct the Trustee Company to pay it straight into your account and therefore it will not go through my books at all. On the other hand I want you to sign a cheque also the letter of authority to the Bank and also the specimen signature and send these out by the first mail to me, so that I can hand them to the Bank here. As I do not anticipate the payment being made before about a month's time this will give ample time for your letter to get back here. The reason why I want you to sign the cheque is that your Account will then loan to me the amount and this in turn will reduce my overdraft with the Bank by a like amount and by doing so will reduce the amount of interest I have to pay the Bank. Of course, you realise that this amount from the old man's estate is really mine, but as I feel that it would have been yours if the Will had been drawn up correctly, I consider it best to pay it into your account in your name right at the beginning instead of leaving it to come to you on my death. I am enclosing therefore as mentioned above one cheque for £5,000 for your signature Cherry Jackaman, one letter to the Manager of the Bank of New South Wales, and two slips

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Dixon C.J.

for your specimen signature, but please do not date the letter or the cheque, as these will not take effect until I open the account and this will not be opened until such time as the Trustees are ready to pay the money over. It is my intention from time to time to pay more money into this account and by so doing relieve my account of such amounts if anything should happen to me suddenly ".

Muriel Norah acted on these instructions. By a letter to the bank dated 29th December 1938, she authorized and empowered her father, whose signature was attached, to draw cheques, make, accept and endorse in her name and on her behalf, promissory notes, bills of exchange, bills of lading, drafts and other instruments, either for the purpose of security or otherwise, and to operate on her account in the bank as fully and effectually to all intents and purposes as she could if personally present. She also signed a letter dated 1st December 1938, addressed to Permanent Trustee Co. of New South Wales Ltd. as trustee by which she authorized the trustee to take instructions from her father in all matters regarding the trust and in the new account he was opening in her name in the Bank of New South Wales. On 9th January 1939 she addressed another letter to the trustee referring to the previous letter. It is sufficient to quote the following passage :—" From now on until further instructions from me, will you kindly pay into my account in the Bank of New South Wales, Head Office, Sydney, Australia, any money coming in from my trust ".

Subsequently, by a memorandum which, although undated, must have been made about or shortly after the end of June 1939, he gave her an account of what he had done. The material part is as follows :—" On 29th December I opened an account with the Bank of New South Wales for Cherry Jackaman and this is the account I required your signature for and your authority to work on, which you sent me some time ago. You will see from the accompanying statement, which shows the position of this account of yours with my books, that the account was opened up just at the end of last year by my paying into it an amount of £5,025 of my own money. Since when, up to date, the Trustees have paid in £1,552 12s. 10d. This is because I told them that whenever any funds from your investments reach £100 they should be paid into this account, so the total amount at present which has been paid into your account is £6,577 12s. 10d., but withdrawn from it has been £6,400 5s. 0d. This amount is made up of £5,000 which I withdrew (on the day I deposited the £5,025) together with refunds of £750, £150, £200, £300 to myself and an amount of 5/- for a

cheque book. The reason why I opened the account when I did was that this £5,025, a gift from me, would be free of probate if I live beyond three years of the date. All these withdrawals in my books naturally stand as a credit to you, which in the event of my dying my estate would have to pay them back before my nett worth for probate purposes was assessed. It is necessary for these monies to be 'loaned' to me so that I can make the advances to you through my London account per the medium of Letters of Credit and such like".

This course of dealing went on until April 1943, when Mrs. Jackaman returned to Australia. The trustee paid into the bank the income of the estate and the deceased drew cheques. In the result over a period between 29th December 1938 and 1st February 1943 the amount drawn, including the £5,000, amounted to £10,940. As against this he had made two payments on her behalf amounting to £2,012 1s. 5d., leaving a balance of £8,926 18s. 7d. He had kept an account debiting himself with interest at $3\frac{1}{2}$ per cent. That interest calculated from the respective periods when the moneys were withdrawn to 28th January 1946 amounted to £2,351 13s. 0d., of which sum £1,239 7s. 8d. represented the interest on the sum of £5,000 withdrawn on 29th December 1938. The authority under which he acted in withdrawing the moneys consisted in the letter to the bank of the same date, namely 29th December 1938.

It is on these facts that the claim of the Commissioner for Stamp Duties rests.

Under s. 124 (6) the Supreme Court settled issues, which were in fact agreed upon by the parties. These issues were tried before the Chief Judge in Equity, who made the following findings: (1) That the sum of £5,025 deposited by the deceased in the Bank of New South Wales on 29th December 1938 was a gift by him to his daughter; (2) that the sum of £5,000 withdrawn by the deceased from that account on 29th December 1938 was a loan of that sum by Mrs. Jackaman to him; (3) that after the opening of the bank account on 29th December 1938 the testator did have authority to withdraw money from time to time from the said account by drawing cheques thereon without first obtaining the approval of Muriel Norah to any particular withdrawal; (4) that the deceased did receive such authority prior to the time when he opened the account; (5) that the sums withdrawn by the testator from the account after 29th December 1938 until and including 4th April 1943 were withdrawn by him with the authority of Mrs. Jackaman; (6) that the said sums, with certain immaterial exceptions, were loans by

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Dixon C.J.

her to the deceased; (7) that no agreement was made by the testator with her for the payment of interest upon the said sums.

A further finding was made concerning the motives of the testator in opening the bank account and depositing the sum of £5,025 and concerning his intentions as to the manner in which the bank account should be used. It was found that his motives in opening the account and making a deposit were his natural love and affection for his daughter. It was found that his intentions as to the manner in which the account should be used were—first, to deposit the amount of £5,025 as a gift to her; next, to withdraw from that account with her concurrence the sum of £5,000 as a loan from her to him; then to arrange that the Permanent Trustee Co. of New South Wales Ltd. should pay into the account with her concurrence the income from the assets held upon the trusts of the deed, and lastly to withdraw with her concurrence so much of that income as he from time to time wished to be used by him but subject to an obligation on his part to pay to her the amounts not applied for her benefit or at her request.

The appellant as executor of the deceased claimed to deduct from the dutiable amount of the estate the moneys drawn by the testator and treated as a loan from her together with interest. The respondent commissioner does not dispute that the amount treated as a loan should be deducted as a liability of the estate, but does dispute the claim to deduct interest, and in view of the findings that claim has failed. The claim by the respondent commissioner to apply s. 102 (2) (d) extended to the £5,025 deposited by the deceased as well as to the property subject to the trust deed.

It is not now disputed by the appellant, that in view of the withdrawal of the £5,000, s. 102 (2) (d) does apply to the deposit of £5,025. This means that the view is not contested that the donee did not retain the gift of £5,025 to the entire exclusion of the deceased or of any benefit to him. On the other hand, in supporting his case that the "gift" of the trust property effected by the trust deed is caught by s. 102 (2) (d) the respondent commissioner passes by the payments amounting to £1,000 a year to the deceased during the minority of Mrs. Jackaman and afterwards until February 1939, when he began to operate on the account opened in the bank on 29th December 1938 by the deposit of £5,025. The commissioner does not contest the view that these payments were made to the deceased for the maintenance of his daughter and were not more than adequate for the purpose. True it is that as a person entrusted with funds to be expended in the maintenance and support of a member of his family he was not liable to account as a trustee. He

was under no duty in equity to vouch the items of his expenditure. It was enough that he fulfilled the obligation of maintenance in a manner commensurate with the income available to him for the purpose and that being so he was not accountable: see *Countess of Bective* v. *Federal Commissioner of Taxation* (1). Doubtless it is because he did maintain his daughter in a manner commensurate with the funds he is treated as having obtained no benefit from the payments. It is therefore considered true so far that the gift had been retained by the donee through the trustee to the entire exclusion of the deceased or of any benefit to him. But according to the respondent commissioner it ceased to be true once the bank account was placed entirely under the deceased's control and was fed with the income from the trust property. For, by means of the account, into which no other moneys went, the deceased was designedly placed in a position to use the income paid in for his own purposes, even if it was upon condition that he should in the end repay the amount drawn or that his executors should do so. This meant, according to the contention, that the deceased obtained a benefit at the expense of the donee's enjoyment of the gift.

In applying s. 102 (2) (d) many difficulties usually arise. The very terms of the section make it anything but easy to determine whether a given case comes within its application. But the difficulties appear to me to have been increased by too ready an assumption that the final words with which the provision in the New South Wales Act ends have but little effect on the meaning and operation of the whole. It seems to me that the words " 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 " give to the whole provision an operation differing appreciably from that of the English provision whence it was adapted, whether as it is found in 52 Vict. c. 7, s. 11 (1) or in 63 Vict. c. 7, s. 11 (1) or in 3 & 4 Geo. VI. c. 29, s. 43 (2) (a). The words in the English legislation are " to the entire exclusion of the person who had the interest and of any benefit to him by contract or otherwise ". But the word " otherwise " has been interpreted as *ejusdem generis* with " contract ". *Hamilton* J. said of these words in *Attorney-General* v. *Seccombe* (2): " There is no reason why the rule of ejusdem generis construction should not apply to these words. The enactment might have stopped at the words ' or of any benefit to him ', or it might have said ' of any benefit to him of whatsoever kind '. It has not done so. The words ' by contract or otherwise ' indicate a genus of which contract is one species, and all other

(1) (1932) 47 C.L.R. 417, at p. 420. (2) (1911) 2 K.B. 688.

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Dixon C.J.

species are intended to be swept in. I do not see the difficulty of saying that there is a genus of which contract is a species. There are two points to notice about the word 'contract' as used in this connection. In the first place it points to a legal obligation; and in the next place it points to a contract between the same persons as were parties to the gift. Hence I think that the words 'by contract or otherwise' are aimed at any contract between the parties to the deed of gift or any contract with third parties having the effect of conferring a benefit on the donor, and also any transaction enforceable at law or in equity which, though not in the form of a contract, may confer a benefit, such as a lien. It is therefore not necessary to give any unusual or exceptional construction to the words" (1).

To place this construction upon the final words of the provision inevitably means that it was not enough that a benefit should be enjoyed by the donor at the expense of the donee's possession or enjoyment of the subject of the gift. That would not be enough unless the benefit was the product of a legal or equitable right. Such a conception must reflect back and affect the interpretation of the earlier words of the provision. However, the distinction does not appear to have been emphasized or maintained and now s. 102 (2) (d) is encrusted with a coating of authoritative exposition which makes it almost impossible to have recourse to the literal sense of the words in which it is expressed.

In the present case, however, the difficulties are more of fact than of law. It seems clear enough that the deceased received a benefit when he was placed in a position to withdraw moneys from his daughter's bank account and to treat the withdrawals as a loan to himself repayable at his death without interest in the meantime. The finding of the Chief Judge in Equity that the sums were loans says nothing of the terms of repayment. But it can hardly be doubted that the correct interpretation of the deceased's dealings with his daughter's bank account is that the loans were repayable at his death and not earlier. For his letter or memorandum of about the end of July 1939, already set out, said that the withdrawals would stand as a credit to her which in the event of his dying his estate would have to pay back before the net worth of his estate could be ascertained for probate purposes. The plan was to create a debt to her repayable on his death so as to give her a benefit on that event forming no part of his dutiable estate, while in the meantime he had the advantage of the use of the moneys. It seems undeniable that a loan without interest repayable at death (or for

(1) (1911) 2 K.B., at p. 703.

that matter on demand) is a benefit and a benefit of a pecuniary or a proprietary kind. Again if this benefit was obtained out of the income of the property given it would seem clear enough, notwithstanding all the limitations judicially placed upon the operation of the provision, that the benefit obtained by the father would have been a benefit of a kind which, if the condition expressed in s. 102 (2) (d) is to be satisfied, must be excluded by the possession and enjoyment assumed by the donee and retained by her.

The critical question in the case appears therefore to be whether, for the purposes of s. 102 (2) (d) the moneys from which he obtained the loans without interest are to be considered part of the income of the trust fund, that is of the property given by the trust deed. At this point, however, the very clumsy procedural provisions of the Act obtrude themselves. The Supreme Court sits not as a tribunal of fact and law to elucidate every constituent element upon which depends a question of dutiability under the *Stamp Duties Act*. Its jurisdiction arises under s. 124. The procedure is primarily by case stated and the commissioner states and signs the case. He is to set forth the facts before him on making his assessment and the question to be decided : sub-s. (2). The court on the hearing of the case is to determine the question submitted and to assess the duty chargeable : sub-s. (4). So far it would be supposed that the court had no jurisdiction over the facts, but by sub-s. (7) on the hearing of the case the court is to be at liberty to draw from the facts and documents stated in the case any inference whether of fact or law which might have been drawn therefrom as proved at the trial. It will be noticed from what has been already said in the earlier part of this judgment that the commissioner has included in the case stated not a little material that, strictly speaking, is only evidentiary. It may be supposed that under s. 124 (2) it was his duty to state the ultimate and not the evidentiary facts : see per *Isaacs* J. in *Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1), where his Honour said : " It cannot be too clearly understood that on a ' case stated ' the facts stated are to be taken as the ultimate facts for whatever purpose the case is stated " (2). The power given by s. 124 (7) to draw inferences of facts is a familiar extension of the restricted authority of a court upon a case stated, but it does not go very far. Then by sub-s. (6) it is provided that if it appears to the court that the facts necessary to enable the questions submitted to be determined are not sufficiently set forth in the case or that such facts are in dispute, the court may direct all such inquiries to be made or issues to be tried as it deems

(1) (1920) 28 C.L.R. 373.

(2) (1920) 28 C.L.R., at p. 381.

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

DIXON C.J.

necessary in order to acertain such necessary facts, and, if it deems fit, may amend the case. The sub-section goes on to say that the inquiry may be made before, *inter alios*, a judge of the Supreme Court with or without a jury. It was under this authority that in the present case the Chief Judge in Equity tried the issues. It seems that the findings of fact made under sub-s. (6) take their place with the rest of the facts in the case stated, either as ultimate facts or ascertained facts from which ultimate facts may be inferred under sub-s. (7). If this be right, it follows that in the present case the Supreme Court could not re-examine the facts stated or the facts found and we in our turn cannot do so. We must accept the facts as they appear in the case stated and in the findings of fact made by the Chief Judge in Equity as they are expressed in the determination of the issues. The one qualification is that we may draw inferences therefrom but these inferences must be consistent therewith. We are therefore bound to take it to be the fact that there was a contract of loan between Mrs. Jackaman and her father and that he acted under her authority in withdrawing the moneys from her bank account and in doing so drew the moneys as loans. To a court of fact and law, unencumbered by procedural limitations, the case would probably present little difficulty. Such a court would clearly be entitled to find that Mrs. Jackaman had in fact placed the income of the trust under the disposal of her father for the purpose of his beneficial enjoyment, whatever terms may have been imposed as to repayment of the total amount by his personal representative after his death. But upon the facts stated and upon the facts found on the issues, the inference seems open that the deceased was placed in a situation in which he was master of the income as it was paid over by the trustee. For the facts stated show that at his instance his daughter had directed the trustee to pay her income into a bank account which, notwithstanding that it stood in her name, she effectually placed under his legal control in such a way as to make the account in substance his. The consequence is that the moneys paid in came into his effective control. Did he receive them in the guise or character of income of the trust estate ? Of course it was in that guise or character that they came into the bank account. For the payments into that account were distributions of income of the trust by the trustee. But does not that mean that the amounts distributed and in that very character were placed under the deceased's effective control for his own use beneficially ? As has been seen, Mrs. Jackaman's authority to the bank gave the deceased unrestricted power over the bank account and over the amounts from time to time placed to the credit of the

bank account. Moreover, the deceased was placed in a position to ensure that the trustee should continue to distribute the income of the trust fund in this manner. Mrs. Jackaman's directions to the trustee required the trustee to give effect to the deceased's instructions in all matters regarding the trust or the banking account. It is no doubt true that she might have revoked her instructions, both to the bank and to the trustee. But she did not do so. It is no doubt equally true that she might have intercepted the deceased's right to draw the moneys from the bank account by anticipating him and drawing them herself by her own cheque. But she did not do so. He was therefore left in complete control. When he drew moneys for his own benefit he acted in his own interest, not in hers. Prima facie these considerations would warrant a conclusion that he obtained a beneficial enjoyment of the income of the trust as and when it was distributed. Unless some countervailing considerations appeared, that would mean a benefit or benefits in derogation of that kind of enjoyment and possession of the subject matter of the gift which the nature of the gift permitted. The same kind of conclusion was drawn in *O'Connor* v. *Commissioner of Succession Duties* (*S.A.*) (1) where, however, there was no condition that amounts used should ever be repaid. The one countervailing consideration lies in the finding that the sums drawn were loans by Mrs. Jackaman to the deceased. Does that circumstance make that conclusion incorrect ? The justification for the finding consists in the general arrangement made by the deceased with his daughter. The finding cannot be taken to mean that each drawing was nothing but a specific loan then and there by the daughter herself and paid over out of her general funds. The general arrangement involved a promise on the deceased's part that his personal representatives would repay on his death the money he withdrew for his use, but left him otherwise entitled to deal as he chose with the income distributed by the trustee. In other words the finding means simply that the promise gave to each sum of money drawn by the deceased for his use the legal complexion of money lent. It was a loan, however, payable on death and, being of this nature, the fact that there was a contract of loan did not deprive the deceased's dealings with the moneys of all beneficial character. Regarded from the point of view of substantial effect as distinguished from legal character, it meant no more than that the deceased had, on withdrawing the moneys, incurred an obligation the fulfilment of which would produce the same result as if he himself had remained in immediate possession

(1) (1932) 47 C.L.R. 601.

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Dixon C.J.

of that income but had made a testamentary gift to his daughter equivalent to the aggregrate amount of the total income of the trust. No doubt it is true that when the deceased withdrew money under the general arrangement and so incurred a debt in the amount withdrawn, his daughter became the owner of a chose in action consisting in the debt. As the chose in action represented the income it may be said that the income, though in a new form, continued to belong as much to Mrs. Jackaman as it did when it lay in the bank. But the chose in action was not an investment of her money capable of any immediate enjoyment by her. Not until her father's death would it mean anything. It was he who enjoyed the use of the moneys and he enjoyed them over an indefinite period of time without giving any compensatory consideration for their use. Subject to his obligation to repay the capital sum upon his death, the deceased was placed by the arrangement with his daughter in possession and enjoyment of the income of the trust estate as such. There is nothing in this conclusion which is incompatible with the findings of the Chief Judge in Equity. The findings ought not to be read or applied apart from the evidence, and when they are read with the evidence it cannot be supposed that they were arrived at on any other footing. Once it is seen that the findings are based upon the general arrangement made between the father and the daughter no reason remains why they should be taken to mean more than that the enjoyment by the deceased of the moneys in the bank was subject to a contract to repay them on death and that the result was to give them the character of money lent.

The result of the foregoing is that the deceased obtained a benefit from the subject of the gift consisting of the receipt over the relevant time of the income thereof subject only to a liability in his personal representatives to repay after his death the amount applied to his own use and without interest and that the donee Mrs. Jackaman to this extent failed to retain enjoyment of the property comprised in the gift to the entire exclusion of any benefit to the deceased.

Accordingly I think that the appeal should be dismissed.

WEBB J. I would answer the questions in the case stated as proposed by *Kitto* and *Taylor* JJ. and for the reasons given by their Honours.

In coming to this conclusion I do not overlook the necessity to take into consideration the substance of the transaction. In *St.*

Aubyn v. *Attorney-General* (1) Lord *Radcliffe*, after stating that we are not to stop at the mere form of the transaction, proceeded to say that he thought that *Attorney-General* v. *Worrall* (2) was rightly decided, although the reservation from the donor's rights as mortgagee which he had assigned to the donee was not expressed to be the interest payable on the loan but an annuity. But in effect the donee was returning to the donor the income of the property given to the donee, i.e. the interest on the loan. Here it is impossible to regard as a payment of the income to the donor by the donee what is unquestionably a loan to the donor by the donee, after the donee, by the payment of the income to her account with the bank, had obtained complete possession and enjoyment of the income of the trust property. *Worrall's Case* (2) dealt with what were apparently two absolute payments, the interest and the annuity, and it was not difficult to identify them as the same payment in substance. But it is impossible to identify this loan with a payment of income outright as there can be no question as to the genuineness of the loan.

I would allow the appeal.

FULLAGAR J. This is an appeal from a judgment of the Supreme Court of New South Wales (Full Court) given on a case stated by the commissioner under s. 124 of the *Stamp Duties Act* 1920-1940. The appellant company is the executor of the will of Arthur Henry Davies, who died on 28th January 1946 and whom I will call the testator. The Supreme Court held that certain property the subject of a settlement made by the testator on 13th August 1934 formed part of his dutiable estate by virtue of s. 102 (2) (d) of the Act which, at the date of the testator's death, provided that 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 deceased or of any benefit to him of whatsoever kind or in any way whatsoever, whether enforceable at law or in equity or not". The value of the property in question at the date of the testator's death was £38,162. The appellant-executor is also the trustee of the settlement.

The beneficiary under the settlement was the daughter and only child of the testator, Muriel Norah Davies, commonly known as Cherry Davies. The daughter was born on 22nd February 1910 and was therefore a little under fourteen years of age at the date of

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

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Fullagar J.

the settlement. The terms of the instrument need be noted only in the barest outline. The fund was to be held on trust to apply the whole or any part of the income to the maintenance, education and general support of the beneficiary until she attained the age of thirty years or married with the written consent of her parents or of the survivor of them. The balance of income was to be accumulated. There were provisions for the event of marriage without the parents' consent in writing. In the events which happened the beneficiary became absolutely entitled to the corpus of the fund on attaining the age of thirty years. In fact she married on 1st July 1938 and attained the age of thirty years on 22nd February 1940.

From the date of the settlement up to 21st June 1937 the trustee company paid out of the income of the settled fund an annual sum of £1,000 to the testator, presumably in the exercise of its discretion to apply income to the maintenance, education and general support of the beneficiary. She was during the whole of this period living with her parents. The commissioner does not rely on the making of these payments as sufficient to bring the case within s. 102 (2) (d). *Dixon* C.J. in *Oakes* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1) said : " 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 " (2). This does not, of course, mean that the creation of a trust for the maintenance of a child can never fall within that provision. But, as *Owen* J. observed in the present case : " During this period the daughter was living with her father and being fed, clothed, educated and maintained by him . . . it is not suggested that the amounts paid to him during this period by the trustee exceeded the amounts expended by him for these purposes " (3). Much more would have to be proved before it could be held that the settled property was brought into the dutiable estate under s. 102 (2) (d) by virtue of the annual payments by the trustee to the testator. It is on what happened after 21st June 1937 that the commissioner relies.

In February 1938 the testator's daughter left Australia on a voyage overseas. For the purposes of the voyage and while she was abroad certain payments out of the income of the trust fund were made to her by the trustee of the settlement. These have no relevance to the present case. On 1st July 1938 she married a Mr. Jackaman at Alexandria and apparently went to live with her husband in Kenya. In April 1940 she accompanied her husband

(1) (1952) 85 C.L.R. 386.
(2) (1952) 85 C.L.R., at p. 405.
(3) (1953) 53 S.R. (N.S.W.) 319, at p. 323 ; 70 W.N. 213, at p. 216.

to London, where he joined the Armed Forces. She was in England until she returned to Australia in November 1943. On 2nd November 1938 the testator wrote to his daughter a letter in which he explained that a sum of £5,000 had come to him under his father's will which would in his opinion, if the will had been drawn properly, have gone to her. He said that he was about to open a new account in the Bank of New South Wales in the name of Cherry Jackaman, that he intended to pay the sum of £5,025 into that account but to draw out again immediately a sum of £5,000 and he enclosed a cheque for £5,000 for her to sign. The letter said : " The reason why I want you to sign the cheque is that your account will then loan to me the amount and this in turn will reduce my overdraft with the bank by a like amount and by doing so will reduce the amount of interest I have to pay to the bank." He also enclosed for his daughter's signature an authority to the bank to honour cheques drawn by him on the new account. Three documents were subsequently signed by Mrs. Jackaman and forwarded to her father. One, which was dated 1st December 1938, was directed to the appellant company and was as follows : " I hereby authorise you to take instructions from my father, Mr. Arthur H. Davies, in all matters regarding my trust and in the new account he is opening in my name in the Bank of New South Wales. This authority is to be a continuing one until withdrawn by me in writing." A second authority was signed on 9th January 1939 and was in the following terms : " From now, until further instructions from me, will you kindly pay into my account at the Bank of New South Wales, Head Office, Sydney, Australia, any money coming in from my trust. My account at the bank is under the name of Cherry Jackaman." The third, which was the authority to the bank and is dated 29th December 1938, was in the following terms : " I hereby authorise and empower my father, Arthur H. Davies, whose signature is at the foot hereof, to draw cheques, make, accept, and indorse in my name and on my behalf, Promissory Notes, Bills of Exchange, Bills of Lading, Drafts and other instruments, either for the purpose of security or otherwise, and to operate upon my account in your Bank as fully and effectually to all intents and purposes as I could if personally present. This authority to be a continuing one until withdrawn by me in writing."

The new bank account in the name of Cherry Jackaman was opened on 29th December 1938. On that date the sum of £5,025 was paid into it and the sum of £5,000 drawn out of it by the testator. After his death the commissioner, in assessing death duty, treated this sum of £5,000 as part of his dutiable estate. This

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Fullagar J.

must have been on the view that the gift fell within s. 102 (2) (d). If the payment into her account were treated as a straight out gift it would not be dutiable because such gifts are subject to duty only if made within three years of the donor's death (s. 102 (2) (b)). The appellant company has not objected to the inclusion of this sum of £5,000 in the estate.

In 1939 and subsequent years the trustee company paid the income of the trust fund from time to time into the Cherry Jackaman account in the Bank of New South Wales. No other moneys were at any material time paid into that account. During the next four years or thereabouts the testator drew out of that account (apart from the £5,000 already mentioned) sums totalling £6,425. The sums varied in amount from £50 to £750. All were drawn in pursuance of the authority to the bank given by the daughter and dated 29th December 1938. The first was drawn on 3rd February 1939 and the last on 4th April 1943. All but four (making a total of £485) of the amounts drawn by the testator were paid into his own account at the Bank of New South Wales. The four sums amounting to £485 were paid to the daughter or applied for her use or benefit. After 4th April 1943 no further sums were withdrawn from the account by the testator.

Mrs. Jackaman said in evidence that during her absence from Australia she received statements of income from the trustee company but received no bank statements. She presumed that these were sent to Mr. Wright, her father's secretary. After her return in November 1943, she said that she drew cheques on the account for private expenses and so on, during the two years or thereabouts which elapsed before her father's death, but that she never knew what the state of the account was and that she did not discover that her father had been " using " the moneys paid into the account until about two months after his death. There is nothing to suggest that the first part of this statement is not true, and the second part of it may, I think, be true also, although there is a memorandum written by the testator and produced by her, from which the contrary could be inferred. The memorandum is itself undated, but it was sent to her with other documents which showed that it must have been written on or about 25th June 1939. It should, I think, be quoted in full. The testator, after stating that since the opening of the account the trustee company had paid into it a total of £1,552 12s. 10d., says : " This is because I told them that whenever any funds from your investments reach £100 they should be paid into this account, so the total amount at present which has been paid into your account is £6,577 12s. 10d.,

but withdrawn from it has been £6,400 5s. 0d. This amount is made up of £5,000 which I withdrew (on the day I deposited the £5,025) together with refunds (*sic*) of £750, £150, £200, £300 to myself and an amount of 5/- for a cheque book. The reason why I opened the account when I did was that this £5,025, a gift from me, would be free of probate if I live beyond three years of the date. All these withdrawals in my books naturally stand as a credit to you, which in the event of my dying my estate would have to pay them back before my nett worth for probate purposes was assessed. It is necessary for these monies to be 'loaned' to me so that I can make the advances to you through my London account per the medium of Letters of Credit and such like. By doing it this way it removes any necessity for you to advise anyone you have an income, because by law a father can legally provide his children with living expenses etc. Of course when I see you I can go further into details, but I guess you can understand there is no need at present for you to know. In fact the less you know the better in case you are asked any questions. The whole thing in fact is a gift from me and not an Income." This letter is far from disclosing any clear conception of what the testator was doing. It certainly shows that he had it in mind that it was necessary or desirable to avoid payment of English income tax on the income of the settled fund. It also makes it clear that he intended his estate to be liable on his death to repay to his daughter what he was taking out of the bank account. This liability he regarded as having the merit of reducing the value of his estate for duty. The word "refund" may mean anything or nothing. If the last sentence of the memorandum may be taken as literally true, it might be decisive in favour of the commissioner in this case, but the whole tenor of the context suggests that it represents a false statement which his daughter is to make, if it becomes necessary, to the revenue authorities in England. The main importance of the memorandum seems to me to be that, if the daughter is to be taken as having acquiesced in what the testator says he has been doing, and presumably proposes to continue to do, there is ground for saying that she has authorized him to use her moneys for his own purposes subject to an obligation on the part of his estate to repay after his death all sums so taken and used.

The commissioner, in assessing duty on the estate, allowed as a deduction the sums (including the £5,000) withdrawn by the testator from the bank account, but less certain sums which had been paid to the daughter or applied for her use or benefit during his lifetime. The appellant claimed to deduct interest on the "loans", but the

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Fullagar J.

commissioner refused to concede this. After the case had been stated under s. 124 of the *Stamp Duties Act*, certain issues were directed to be tried. These came before *Roper* C.J. in Eq., who held that the moneys withdrawn from the bank account by the testator were moneys lent by the daughter to her father but that there was no agreement to pay interest and no interest was therefore payable. There was no express finding as to when the loans were repayable but it must be taken, I think, that they were repayable on the testator's death.

This case illustrates once again the defects and difficulties of the procedure by way of case stated. Here we have selected issues, which are really questions of mixed fact and law, sent before one tribunal, after which the case itself goes before another tribunal, which is faced with formal and probably inadequate answers to questions the real significance of which cannot be grasped until consideration of the case as a whole is undertaken. Here the case came before the Full Court of New South Wales with findings by *Roper* C.J. in Eq. that moneys had been lent by his daughter to the testator but that no interest was payable thereon. While it was necessary for the Full Court to apply and act on these findings, the court was not, in my opinion, called upon to shut its eyes to the circumstances of the case, which are set out in the case stated and the annexures thereto, or to refrain from drawing inferences consistent with those findings from the material thus put before it: see s. 124 (7). On the one hand it was at liberty to draw the inference (which I would draw) that the "loans" were repayable at death and not before. On the other hand it was not bound to look at the case as if the whole of the relevant facts could be expressed in the sentence "Mrs. Jackaman lent to her father without interest some of the moneys paid to her out of the income of the trust estate." If, indeed, that were the whole of the case, it would present little difficulty. I would regard the findings as amounting to no more than that the moneys were withdrawn and applied by the testator in circumstances which created, as between himself and his daughter, the legal relation of borrower and lender. It seems to me to be essentially a decision of a point of law, though it necessarily involves a finding of fact that the sums were withdrawn and used with the concurrence of the daughter.

In order that a gift should escape s. 102 (2) (d) it is necessary not only that bona fide possession and enjoyment should be assumed by the donee immediately upon the gift, but also that bona fide possession and enjoyment should be thenceforth retained by the donee to the exclusion of the deceased or of any benefit to him.

Most of the cases which have arisen under this and similar statutory provisions turn upon the circumstances or conditions attending the making of the gift. In the present case it has been assumed throughout (rightly or wrongly) that bona fide possession and enjoyment were assumed by the daughter immediately on the making of the settlement and were thenceforth retained by her to the exclusion of the testator up to the date of the daughter's going abroad, and thereafter up to the time when she directed the trustee of the settlement to pay the income of the trust into the Cherry Jackaman account at the Bank of New South Wales and authorized her father to withdraw moneys from that account and to use the moneys withdrawn as he wished subject to an obligation to repay after his death moneys so withdrawn and used. When these authorities were acted upon, says the commissioner, there was no longer "entire exclusion of any benefit to the deceased" within the meaning of s. 102 (2) (d).

I think that difficulty attaches to the case arising largely from the unsatisfactory nature of the procedure to which I have referred. But I have not been able to see any substantial answer to the commissioner's arguments. It seems to me that the effect of what was done was that the whole of the income of the settled fund was made directly available to the testator, and that he had the use without interest during his lifetime of so much of that income as he chose to take. In fact he used it to reduce interest on his own bank overdraft, which is the same thing as setting it to earn interest for itself. It seems to me that that was a benefit within the meaning of s. 102 (2) (d). It was a very real advantage to him, even if it was only of a temporary nature. The arrangements made gave him what amounted to direct access to the income of the trust fund, which he was at liberty to use and did use, and it seems to me that, while those arrangements stood, the daughter had not possession and enjoyment of the trust fund to the entire exclusion of any benefit therefrom to the testator. I would myself agree with *Owen* J. that the case is not really distinguishable from *O'Connor* v. *Commissioner of Succession Duties (S.A.)* (1). The language of the relevant South Australian enactment was not identical with that of the New South Wales Act, but no distinction can be based on that fact. *O'Connor's Case* (1) may be admitted to be a stronger case than the present case, because, after the making of what purported to be an absolute gift by father to son, the father under a power of attorney simply collected the whole income of the property for his own benefit and without liability to account.

(1) (1932) 47 C.L.R. 601.

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Fullagar J.

Here, of course, the benefit derived was much less in content. But the enjoyment of an interest-free loan not repayable until after the father's death was to my mind a real benefit of exactly the same kind.

There are two arguments against the view which I have expressed, and I would readily concede that each of them has force. But it has seemed to me that the one gives too much weight to the finding of *Roper* C.J. in Eq. that " loans " were made by the daughter to her father, and that the other gives too little weight to it, if it does not altogether ignore it.

It may be said, in the first place, that when the income was paid into the Cherry Jackaman account at the bank it came actually into the hands of Cherry Jackaman, who was the legal owner of the chose in action evidenced by the bank account. Then out of the money standing to her credit and, in effect in her possession, she made loans from time to time to her father. What her father received was not the income, or any part of the income, of the trust fund, but simply a sum of money which, when once paid into the bank, was the daughter's property and in the daughter's possession, to do what she liked with. That she chose to lend it to her father does not mean that she was in any way foregoing exclusive possession and enjoyment of the trust fund. The position is the same as if she had lent it to a stranger on the same terms. There is, I think, as I have said, much force in this argument. But it does not seem to me to represent the actual position which must be taken to have been created if one looks at the findings of *Roper* C.J. in Eq. in the light of all the circumstances. Even if the income of the trust fund were paid into an account on which the daughter alone could operate, and she drew cheques on that account payable to her father, the regularity of the payments, the period over which they continued, and the fact that she thus disposed of the whole, or almost the whole, of the income, might well be held to warrant the inference that she was really surrendering to her father for the time being possession or enjoyment of that income. Here the account is opened by the father himself while the daughter is abroad and, being maintained by her husband, has no need of the income of the trust fund. During the whole period of her absence the father has authority to operate on the account, is the only person who is practically in a position to operate on it and is the only person who does in fact operate on it. The whole purpose and object of the opening of the account is that the father may have access to, and practical control of, the moneys paid into it. The intention is that the income of the trust fund shall be paid into it.

The whole of that income is in fact paid into it on the father's instructions, and no other moneys (except the initial £5,000) are ever at any material time paid into it. Over a period of more than four years practically the whole of the moneys paid in are drawn out by the father and used for his own purposes. The net annual income is over £1,400 and during the whole of the period the account is never in credit to a greater extent than £418, and at one stage it is over-drawn to a trifling extent. Payment into the account by the trustee company was, of course, as between the company and the daughter, payment to the daughter, and each such payment discharged the company in respect of the sum paid. But in truth and in fact each such payment was intended to have, and did have, the effect of placing a sum of money which was derived from the trust fund at the disposal of the father, and he exercised the power of disposal which his daughter had given him. The circumstances as I see them cannot really be reconciled with the view that the daughter was " retaining " possession and enjoyment to the exclusion of any " benefit " to her father.

The other argument against the view which I have expressed above depends on taking a radically different view of the facts of the case from that which I have hitherto accepted. It may be said that the true inference to be drawn is that the daughter gave to her father authority to give directions to the trustee company and authority to operate on the bank account, not with the intention that he should draw money and use it for his own purposes, but with the intention that he should, and in the belief that he would, invest it or otherwise apply it for her benefit. On this view of the facts it might well be said that the daughter did retain possession and enjoyment to the exclusion of the testator or of any benefit to him, because he was a trustee for her of any moneys which he withdrew. If he committed a breach of trust by using moneys for his own benefit, he could not be said to be receiving a benefit from the trust fund, any more than if he stole money from a safe in which she had placed sums paid to her by the trustee company. I would not regard this as by any means an impossible or even improbable view of the facts. The testator's memorandum of 25th June 1939 may well have been completely misunderstood by his daughter. It is true that he tells her that he has taken four sums out of the account and that these are repayable to her out of his estate, but he does not say anything unequivocal about any future withdrawals. He speaks of having in mind a desirable method of remitting moneys to her and he uses the unexplained (and to me inexplicable) word " refund ". The whole thing may have left a

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Fullagar J.

woman who had no business training or experience with the idea that he was moving in a mysterious way to perform peculiar paternal wonders for her benefit, and without any actual realization that he was using or intended to use her money for his own purposes. Such a view would indeed go far towards reconciling her evidence with the documents which were used against her in cross-examination. On this view interest would, of course, be payable to her by the testator's estate and probably at a higher rate than the $3\frac{1}{2}$ per cent with which he was prepared to credit her. But such a view seems never to have been put, and it is clearly inconsistent with the finding that there was a loan without interest—a finding which seems to me, having regard to the circumstances, necessarily to involve an agreement by the daughter that he should have the use to such extent as he wished of the income of the trust fund for an indefinite period. The whole thing is unsatisfactory, but it cannot be said, I think, that there was no evidence to support the finding actually made. On the finding and the other material evidence I am not able to avoid the conclusion that the case is brought within s. 102 (2) (d).

For these reasons I agree with the judgment of *Owen* J. and I am of opinion that this appeal should be dismissed.

KITTO AND TAYLOR JJ. This case comes before us on appeal from a judgment of the Supreme Court of New South Wales (Full Court) given upon the hearing of a case stated by the Commissioner of Stamp Duties pursuant to s. 124 of the *Stamp Duties Act*, 1920-1940 (N.S.W.). The case stated submitted for decision certain questions which had arisen in respect of the assessment of the death duty payable on the estate of one Arthur Henry Davies, who died on 28th January 1946. When the case first came before the Supreme Court, an order was made under sub-s. (6) of s. 124 directing that a number of issues of fact which had been agreed upon between the parties should be tried by a judge. These issues were thereafter tried and determined; and upon the facts appearing from the case stated as supplemented by the findings made, the court answered the questions in the case favourably to the commissioner.

The main question litigated in the Supreme Court, and the only question which the appeal brings before us, is whether the assets, subject to a certain trust, as they existed at the death of the deceased, formed part of his dutiable estate by virtue of par. (d) of s. 102 (2) of the *Stamp Duties Act*. The trust was created by the deceased in 1924, by means of a deed of trust the parties to which

were the deceased, a daughter of his, and a trustee company. Of the terms of the trust it is sufficient to say that in the events which happened, the daughter became absolutely entitled to the corpus of the trust fund, together with any accumulations of income, when she attained the age of thirty in February 1940, and that in the interval the trustee company had power to apply the whole or such part as it thought fit of the income for or towards her maintenance, education and general support. The parties have treated the case in argument, and it may now be considered, on the basis that the whole beneficial interest in the trust property was comprised in a gift made by the deceased in 1924, and that the daughter was the donee thereof. Moreover, it is common ground between the parties that such bona fide possession and enjoyment of the property given as the nature of that property allowed was assumed by the daughter immediately upon the gift and thenceforth retained to the entire exclusion of the deceased and of any benefit to him, until 3rd February 1939. This was so because the whole of the income of the trust property was, until that date, either paid to the daughter, applied for her benefit, or accumulated so as to form part of the fund to which she ultimately became absolutely entitled on attaining the age of thirty.

On 3rd February 1939, however, the deceased received by way of loan from the daughter a sum of £750, and he received from her twenty-four other loans at later dates. Together with an earlier loan of £5,000 which will be mentioned hereafter, these loans totalled £10,940, the bulk of which, said by the daughter to amount to £8,926 18s. 7d., was still owing to her by the deceased at his death. At first the daughter claimed that interest at $3\frac{1}{2}$ per cent was payable to her upon the balance of these loans outstanding from time to time, and a question which was asked in the case stated was whether any interest on the £8,926 18s. 7d. should have been allowed as a debt due and owing by the deceased to his daughter and deducted from the dutiable estate. It was found, however, when the issues of fact came to be tried, that no agreement had been made for the payment of interest on the amounts lent, and it is now accepted by the appellant executor that all the loans were free of interest. Now, all the loans made on or after 3rd February 1939 were made by means of cheques drawn upon a bank account of the daughter into which payments of income from the trust assets were made from time to time by the trustee company; and because of this the commissioner contends that to the extent of these loans the deceased received the income of the property comprised in his gift of 1924, and that therefore bona

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Kitto J. Taylor J.

fide possession and enjoyment of that property was not retained by the daughter to the entire exclusion of benefits to the deceased.

In order to examine this contention it is necessary to state the established facts in a little more detail. The bank account which has been mentioned was opened by the deceased himself in his daughter's name on 19th December 1938, and on that day he paid to the credit of the account a sum of £5,025 which had come to him as a beneficiary in the estate of his late father. His intention in doing this has been found to be : (a) to make a gift of the £5,025 to his daughter, (b) to withdraw £5,000 with her concurrence as a loan by her to him, (c) to arrange that the trustee company should pay into the account with her concurrence the income from the trust assets, and (d) to withdraw with her concurrence so much of that income as he from time to time wished, to be used as he wished, but subject to an obligation to repay to her the amounts not applied for her benefit or at her request. In pursuance of this intention the deceased withdrew the £5,000 on the same day, by means of a cheque which she had previously given him at his request. She had also signed at his request two other documents. One was a letter addressed to the bank manager, authorizing the deceased to draw cheques and to operate on the account as fully and effectually as she could if personally present. This authority was expressed to be a continuing one until withdrawn in writing. The second document was a letter addressed to the manager of the trustee company, authorizing him to take instructions from the deceased in all matters regarding her trust and the new bank account which he was opening in her name. This also was expressed to be a continuing authority until withdrawn in writing, and it was later supplemented by a letter of 9th January 1939, by which the daughter requested the trustee company until further instructions to pay into her bank account any money coming to her from her trust. Thereafter from time to time the trustee company paid income of the trust into the account. It is stated in the reasons for judgment delivered by *Owen* J. in the Supreme Court, and it was accepted as the fact in the argument in this Court, that apart from the opening deposit of £5,025 the only moneys which were paid into the daughter's bank account throughout the relevant period came from the trust funds. Between 3rd February 1939 and 4th April 1943, the deceased operated on that account by drawing cheques, thirty in all, and thereby withdrawing moneys which, with the £5,000 already withdrawn, amounted in the aggregate to £11,425. Of the amounts thus withdrawn, four, totalling £485, were (it has been found) in effect repaid to the daughter or paid

to some other person at her request or on her behalf. The remaining sums withdrawn are those which have been referred to as the loans totalling £10,940. Of this amount, £2,000 was invested by the deceased in shares in the daughter's name. Thus there was £8,940 outstanding at the death, rather than £8,926 18s. 7d. as claimed by the daughter.

The view taken by the learned judges of the Supreme Court on the only question which has been debated here was that the case was indistinguishable in principle from *O'Connor's Case* (1). Their Honours observed a difference between the facts of that case and the facts of the present in that here the moneys to which the daughter became entitled under the trust were paid by the trustee into a bank account in her name; but they considered that the effect of the instructions given by the daughter to the trustee company and the authority conferred by her on the deceased to operate on the bank account was to place the deceased in a position in which he controlled, used and enjoyed, for his own benefit, moneys derived from the trust assets. Their Honours thought that what occurred might be aptly described by adapting the words in which Lord *Radcliffe* in *St. Aubyn* v. *Attorney-General* (2), summed up the transaction which was the subject of the decision in *Worrall's Case* (3): "In effect the son was returning to the father the income on the property given".

It would be difficult to resist this conclusion if the deceased, when he took moneys out of his daughter's bank account, had taken them free from any obligation of repayment; but the fact that all the moneys he withdrew were retained by him as loans from his daughter introduces considerations which were absent in *O'Connor's Case* (1) and in our opinion it requires a clear distinction to be drawn between that case and the present. That the loans were genuine and not colourable is conclusively established by the findings which were made on the trial of the issues of fact. Not only was it found, as has already been mentioned, that the intention of the deceased was to make withdrawals from his daughter's bank account subject to an obligation on his part to repay the amounts not applied for her benefit or at her request, but in answer to a specific question whether the sums withdrawn (other than the four amounts totalling £485) were loans by the daughter to the deceased the answer returned was Yes. It seems to us to be necessarily involved in this finding that the daughter's instruction to the trustee company to pay her income into her bank account, and

(1) (1932) 47 C.L.R. 601.
(2) (1952) A.C., at p. 47.
(3) (1895) 1 Q.B. 99.

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Kitto J. Taylor J.

the authority she gave to the deceased to withdraw moneys from that account, did not lead to his being found in receipt of the trust income. To say that the payments made out of the daughter's account to the deceased were loans by the daughter to the deceased is to say, first, that the payments of trust income into the account were in reality payments made to the daughter and not to the deceased, and, secondly, that the withdrawals from the account were transactions by which the daughter converted a debt owed to her by the bank into a debt owed to her by the deceased. The latter statement means that the withdrawals did not transfer the income to the deceased; they merely changed the form in which the daughter continued to keep it as her own. Undeterred by the well-known warnings in the speeches delivered in *Inland Revenue Commissioners* v. *Duke of Westminster* (1), counsel for the commissioner sought to find in the distinction between form and substance a warrant for glossing over the fact that there never came a point of time when the daughter did not have in her own exclusive possession and enjoyment the assets, namely the debts, which at the various stages represented the whole of the moneys she received from the trust estate. But it seems to us to be logically impossible, having said in one breath that what the deceased received he received by way of loan from his daughter, to say in the next breath that what the deceased received was the income of the trust estate. It was money which he received from his daughter upon a promise of repayment. It therefore did not constitute any addition to his total net wealth; and by lending it to him the daughter did not reduce that addition to her own wealth which had come to her as income from the trust estate. That addition she always kept in one form or another; and at all times she completely excluded the deceased from possession and enjoyment of the debts which represented that addition in her hands.

It is true that the deceased derived a benefit when he took moneys out of his daughter's bank account under the authority she had given him and applied those moneys, still by her authority, in making loans to himself. It is undoubtedly a benefit to obtain a loan which one desires, and especially to obtain a loan free of interest. The benefit which the deceased derived, in fact, could be stated exactly in terms of money, because the use he made of his borrowings was to keep down his own bank overdraft and thus to save interest. But it has been pointed out over and over again that provisions such as that which is made by s. 102 (2) (d) are not

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

attracted wherever it is found that after the making of a gift by a person since deceased he derived a benefit from or with respect to the property given. Such provisions require that the history of the property from the time of the gift be considered from the point of view of the donee. Did he so assume immediately upon the gift and thenceforth retain such possession and enjoyment of the property as by its nature could be had that the deceased and every benefit to him were entirely excluded from that possession and enjoyment? That is the question to be answered in every case, and it is beside the point to say that after making the gift the deceased had a benefit connected in some way with the property given but not involving his admission to any of the possession and enjoyment which the nature of the property given allowed the donee to have. Unless the benefit is such as to diminish the possession and enjoyment which the donee might otherwise have had, the conditions for the application of s. 102 (2) (d) are not satisfied: *Oakes* v. *Commissioner of Stamp Duties of New South Wales* (1).

How, then, does the present case stand? If the daughter had put the deceased in her place so that he received the income of the trust property as his own, clearly enough the resultant benefit to him would have been in derogation of the possession and enjoyment which the nature of the property allowed her to have, and the case would have been *O'Connor's Case* (2) over again. But she did not do so. She first reduced into posssession each amount of income as it became payable, by having it paid into her bank account, thus acquiring full control over its disposition. The authority she had given the deceased to operate on the account was a revocable authority, and in any case it placed him in a fiduciary position so that he could not use it to withdraw moneys for his own use except by way of loan. Her next step might no doubt have been to invest the money so as to produce income in its turn; but it cannot be maintained that unless she did this she was failing to have the exclusive possession and enjoyment of the trust fund which was the property comprised in the gift. She would clearly have had that exclusive possession and enjoyment if, having received the income, she had spent it on pleasure, or had used it in making donations to charity, or had left it in a non-interest-bearing bank account. There is no room that we can see for a different conclusion where it is found that the use which she chose to make of it was to lend it free of interest. It would not be true to say that by reason of the loan the borrower was admitted to

(1) (1953) 89 C.L.R., at pp. 44, 45; (1954) A.C., at pp. 73, 74, 75.

(2) (1932) 47 C.L.R. 601.

H. C. OF A. 1954.

PERMANENT TRUSTEE CO. OF NEW SOUTH WALES LTD. v. THE COMMISSIONER OF STAMP DUTIES (N.S.W.).

Kitto J. Taylor J.

some part of the possession and enjoyment of the property given, or that the benefit which he got from the loan was a benefit cutting into the possession and enjoyment which the daughter might otherwise have had of that property.

For these reasons we are of opinion that the case is not one to which s. 102 (2) (d) applies, and the first question in the case stated, which was whether the sum of £38,162 13s. 7d. (the value as at the death of the property given in 1924) should have been included in the dutiable estate of the deceased, ought to have been answered No.

It will be seen that this conclusion depends upon the unqualified finding of fact that the sums withdrawn by the deceased from his daughter's bank account were loans by his daughter to him. The procedure provisions of the Act are such that not only must we give full effect to this finding without placing any gloss upon it, but we are not, we think, authorized to take into our consideration the evidence which was given on the trial of the issues of fact. Indeed, we should have thought that the transcript of that evidence ought not to have been included in the appeal book; there was no appeal from the findings, and the evidence upon which they were based formed no part of the material before the Full Court of the Supreme Court. The Act placed that court, and it therefore places us, under the necessity of giving a decision upon material consisting only of the facts and the documents in the special case, such inferences as arise from those facts and documents, and the findings made on the trial of the issues. This position is somewhat artificial. The awkward, expensive, dilatory and generally unsatisfactory method of appeal which the *Stamp Duties Act* provides has often been the subject of protest. Not the least important objection to it is that it does not enable the court which has to decide an appeal to make its own findings of fact, as it can, for instance, in an appeal under the *Income Tax Assessment Act* 1936 (Cth.). It is a comforting reflection that if the deficiencies of the appeal procedure have led to the present case being decided upon a view which might have been displaced had the facts been more fully before us, the loss, for once, does not fall upon the taxpayer.

In our opinion the appeal should be allowed, the order of the Supreme Court should be discharged, in so far as it answered Questions 1, 4 and 5 in the case stated, and those questions should be answered as follows:—

1. No.
4. An amount calculated in accordance with the answers to Questions 1 and 2.
5. By the respondent.

Appeal allowed with costs. Discharge so much of the Order of the Full Court of the Supreme Court of New South Wales as answers questions 1, 4 *and* 5 *submitted for the determination of the Supreme Court by the case stated. In lieu of the answers to questions* 1, 4 *and* 5 *order that such questions be answered as follows*:—1. *No*; 4. *An amount calculated in accordance with the answers to questions* 1 *and* 2; 5. *By the respondent the Commissioner of Stamp Duties.*

Solicitors for the appellant, *Norton, Smith & Co.*

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

J. B.