REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[PRIVY COUNCIL.]

COMMISSIONER OF STAMP DUTIES OF NEW SOUTH WALES . . . . . } APPELLANT ;

AND

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED . . . . } RESPONDENT.

[DAVIES' CASE.]

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

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1956.
May 16.

Viscount Simonds, Lords Morton of Henryton, Cohen, Keith of Avonholm and Somervell of Harrow.

Death Duty (N.S.W.)—Property dutiable—Assets notionally included in estate—Gifts by deceased in lifetime to daughter—Deceased not wholly excluded from benefit thereof—Settlement—Loans to deceased from trust fund—Appeal—Method — Stated case — Quaere, satisfactory — Finding of fact — Inference — Stamp Duties Act 1920-1940 (*N.S.W.*), *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, of D.'s daughter, C., until she should attain the age of thirty years. C., on attaining thirty years, was to be entitled to the corpus. C. lived with D. until 1st July 1938, when she married. From 1926 to 1931, when C. attained twenty-one years, the company made payments to D. out of the trust income for the maintenance of C. From 1931 to June 1937, the company, at C.'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 C. Throughout the whole period from 1926 to the date of her marriage, C. was maintained by D. In December 1938, D., in pursuance of a scheme propounded by him and with C.'s consent, 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 C. In letters to the company in December 1938, C. authorized it to take instructions from D. in all matters regarding her trust and authorized D. to operate on her account. In January 1939, C. instructed the company to pay into the account " any money coming in from my trust ". Between

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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 C. At his death in January 1946, D. still owed C. £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 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 that estate.

Held that in the circumstances the conclusion was irresistible that C., who at the material times was the sole beneficiary under the settlement, did not retain bona fide possession and enjoyment of the trust property to the entire exclusion of D. or of any benefit to him. The transaction must be viewed as a whole and it was irrevelant whether D. was or was not under an obligation to repay moneys drawn by him from the account. The obligation to repay only affected the *quantum* of the benefit obtained by him. It followed that by the operation of s. 102 (2) (d) of the *Stamp Duties Act* 1920-1940 (N.S.W.) the value of the trust assets formed part of D.'s dutiable estate.

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

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

Decision of the High Court: *Permanent Trustee Co. of New South Wales Ltd.* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1954) 91 C.L.R. 1, reversed.

APPEAL from the High Court of Australia.

This was an appeal from a judgment of the High Court of Australia (*Webb*, *Kitto* and *Taylor* JJ.; *Dixon* C.J. and *Fullagar* J. dissenting) (1) allowing the appeal of the respondent from the judgment of the Full Court of the Supreme Court of New South Wales (2).

G. Wallace Q.C., *A. Cripps* and *J. S. Hobhouse*, for the appellant.

Sir *Garfield Barwick* Q.C. and *J. G. Le Quesne*, for the respondent.

Their Lordships took time to consider what advice they should tender to Her Majesty.

May 16. VISCOUNT SIMONDS delivered the judgment of their Lordships as follows:—

Arthur Henry Davies, who will be called " the testator ", died on 28th January 1946, domiciled in New South Wales. The question for their Lordships' determination is whether by virtue of s. 102 (2) (d) of the *Stamp Duties Act* 1920-1940, his estate is for the purpose of

(1) (1954) 91 C.L.R. 1.

(2) (1953) 53 S.R. (N.S.W.) 319; 70 W.N. 213.

assessment and payment of death duty to be deemed to include certain trust funds which were then subject to the trusts of a deed of settlement made by him on 13th August 1924.

The relevant section is in the following terms :—

" 102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided the estate of a deceased person shall be deemed to include and consist of the following classes of property :—

(2) (d) Any property comprised in any gift made by the deceased at any time whether before or after the passing of this Act of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died ".

The deed of settlement of 13th August 1924, purported to be made between the testator of the first part Muriel Norah Davies, his daughter, of the second part and the respondent, the Permanent Trustee Co. of New South Wales of the third part but was executed by the testator and the respondent company only. Its principal provisions were as follows (the daughter being referred to as " the beneficiary " and the respondent as " the trustee ") :—

(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

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trustee may resort to the accumulations of any preceding year or years and apply the same for any of the purposes hereinafter mentioned for the benefit of the beneficiary.

(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 accumulations 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.

The daughter was born on 22nd February 1910, and came of age on 22nd February 1931. During her minority the respondent company made payments of £1,000 annually from 1926 to 1930 to the testator while he was maintaining and educating her and also made two further such payments in 1931 and 1932 and at her request further similar payments in each of the years 1933 to 1937. On 1st July 1938, she married one Jackaman at Alexandria in Egypt. On 22nd February 1940, she attained the age of 30 and it has been assumed and is common ground that she then became absolutely entitled to the corpus of the trust funds.

Before however that event happened, the series of transactions began which are decisive for the determination of this case. In stating them their Lordships rely on the facts and documents in the special case to be presently mentioned, such inferences as arise from those facts and documents and the findings on the trial of the issues, also to be mentioned.

The story begins with a letter which the testator wrote to his daughter on 2nd November 1938, addressing her as " Dear Cherry " by which name she was commonly known. After referring to a benefit that he took under his father's will and stating that he proposed to deal with it in such a way that the principal would pass to her account in New South Wales while he in the meantime benefited by any interest that was made, he said that he was seeing the respondent trustee company that day and would advise her what she

should write to them in the matter of instructions regarding transferring income abroad. There he broke off his letter and continued it later saying that he had seen the trustee company and arranged with them to await her letter. He then proceeded, " 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 ". Then after explaining why he was opening this account he said that he wanted her to sign a cheque and also the letter of authority to the bank and also a specimen signature and send them out by the first mail to him so that he could hand them to the bank there. He then further explained the reason for his action thus, " 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. . . . I am enclosing therefore as mentioned above one cheque . . . for your signature Cherry Jackaman, one letter to the manager of the Bank of New South Wales and two slips 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 finally he said that it was his 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 him suddenly.

The daughter appears to have followed her father's instructions faithfully. On 1st December 1938, she wrote to the respondent company authorizing them to take instructions from her father in all matters regarding her trust and in the new account he was opening in her name in the Bank of New South Wales and saying that the authority was to be a continuing one until withdrawn by her in writing. On 29th December 1938, she wrote to the Bank of New South Wales authorizing her father to operate on her account in the fullest possible manner and on 9th January 1939, she wrote to the respondent company instructing them from then until further instructions from her to pay into her account at the bank any money coming in from her trust.

It is convenient at this stage to refer to two questions and answers upon the trial of issues subsequently directed, viz. :

" Question 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

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thereon without first obtaining the approval of the said Muriel Norah Jackaman to any particular withdrawal ?

Answer. Yes.

Question 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 ?

Answer. He received the authority prior to the time when he opened the account."

The account of the transactions may be continued in the words of the testator to be found in a memorandum addressed by him to his daughter, which was not dated but can be attributed to June or July 1939. He refers to a letter from the trustee company and to the amount of income from the settlement and proceeds :—" 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 five shillings 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 moneys 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."

The practice thus begun was continued. All the income of the trust fund was duly paid into the daughter's account at the bank and no other money was paid into it. Up to 4th April 1943, the testator drew out practically the whole of the moneys paid into the account and used by far the greater part of them for his own purposes. In December 1945, a further sum of £2,000 was withdrawn and applied for the benefit of the daughter. It does not appear that she at any time herself drew on her account nor did she revoke any authority that she had given before the testator's death which as already stated took place on 28th January 1946.

Though it was at one time disputed, it is now common ground that the sums thus withdrawn by the testator from the daughter's account are to be regarded as loans made by her to him without interest. There has been no finding of fact whether they were repayable at death or on demand or at some other time. In their Lordships' opinion the proper inference is that they were repayable out of the testator's estate on his death, but this appears to them to be an immaterial circumstance for the purpose of determining this case.

Upon the footing that the sums in question were loans the appellant in assessing the death duty payable in respect of the estate of the testator included therein (a) the sum of £38,162 13s. 7d. being the value at the date of his death of the trust property and (b) the sum of £5,025 which he had paid into her bank account when it was opened on 29th December 1939. The respondent as executor of the testator's will claimed that both items were wrongly included : the contention in regard to £5,025 was abandoned, that in regard to the larger sum remained and remains.

The appellant accordingly on 20th November 1951, stated a case under s. 124 of the *Stamp Duties Act* 1920-1940, by which he submitted for determination by the Supreme Court of New South Wales *inter alia*, the question whether the said sum of £38,162 should be included in the dutiable estate of the testator. On 10th March 1952, the Full Court ordered that issues of fact agreed upon by the parties should be filed and tried before a judge sitting in the Equity Jurisdiction without a jury and that all findings of such judge should be made subject to the right of either party to argue their relevance.

Issues of fact were duly agreed and filed and after hearing oral evidence the Chief Judge in Equity made his findings. The questions and answers have for the most part already appeared expressly or implicitly in the narrative which has been given. But this further question and answer may be stated :—

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" ISSUE 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 ?

FINDING : 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 Company of New South Wales Limited 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 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."

On 1st June 1953, the Full Court of the Supreme Court (*Street* C.J., *Owen* and *Clancy* JJ.) (1) unanimously held that the sum in question was rightly included in the dutiable estate. The respondent appealed from this decision to the High Court of Australia which by a majority reversed it (2). The learned Chief Justice and *Fullagar* J. dissented, and it appears to their Lordships that their view is to be preferred.

Section 102 (2) (d) of the *Stamp Duties Act* has been the subject of much judicial discussion as have been the corresponding provisions of the United Kingdom *Finance Acts*, but in the present case the difference of opinion in the High Court is due not to any difficulty in ascertaining the law but to that of correctly appreciating the facts to which the law is to be applied, a difficulty which, as has on more than one occasion been pointed out in the High Court, is not diminished by the transparent defects of the procedure by way of case stated. But, whatever limitations this procedure may impose upon an investigation of the facts, it appears to their Lordships that the inference is not only open but inevitable that from 1939 onward the testator was (to use the words of the Chief Justice) " master of the income as it was paid over by the trustee ". He was too in a position to ensure that it was so paid over. His dual authority from his daughter which enabled him on the one hand to direct the trustee how her money should be disposed of and on the other to

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

(2) (1954) 91 C.L.R. 1.

deal with it when it reached the bank, placed him in a position of unchallengeable control, unless and until it was revoked. And it was not revoked. In these circumstances the conclusion is irresistible that the daughter, who at material times was the sole beneficiary under the settlement did not retain bona fide possession and enjoyment of the trust property to the entire exclusion of her father or of any benefit to him. Here it does not seem that any nice question arises whether it was from the subject matter of the gift that the donor (the testator) was excluded or, alternatively, from any benefit, nor whether it is necessary that the benefit taken by the donor should impair the possession and enjoyment by the donee of the subject matter of the gift. For here the design and the result of the arrangement were that the daughter's possession and enjoyment were reduced and impaired precisely by the measure of the testator's use and enjoyment of her income.

It was argued for the respondent that this was not the way in which the whole transaction should be regarded. It was said that when the testator, armed with the authority given by the daughter's letter of 1st December 1938, directed the trustee to pay the trust income to her bank account, he acted in a fiduciary capacity and that when he drew upon that account for his own purposes, he was not using the trust income but was borrowing from her money which had lost its identity. She chose, it was said, to lend it to him : she might equally well have lent it to a stranger. In the joint judgment of *Kitto* and *Taylor* JJ., (in which *Webb* J. concurred) this is the decisive point. It would, they say, be difficult to resist this conclusion (i.e., a conclusion favourable to the appellant) if the testator, when he took moneys out of his daughter's bank account, had taken them free from any obligation of repayment. In that case, though the same relationship of creditor and debtor had been established between the bank and the daughter, the trust income presumably retained its identity so far at least that for the purpose of the section it could not be said that the donee had retained exclusive possession and enjoyment of the subject matter of the gift. But this does not appear to their Lordships to be a valid distinction. The transaction must be viewed as a whole and, since an integral part of it was that the testator before the account was opened was authorized to draw on it for his own purposes, it is irrelevant whether, when he did draw on it, he was or was not under any obligation to repay. Gift or loan, he for his own advantage used her money, paying no interest for it, and by so much reduced her enjoyment of what was her trust income and nothing else. The obligation to

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repay affected the *quantum* of the benefit obtained by him : it did no more.

If this is the right view of the transaction, as their Lordships think it is, the case falls into line with *O'Connor* v. *Commissioners of Succession Duties* (*S.A.*) (1), the correctness of which decision has not been questioned.

For these reasons which are substantially those of the Chief Justice and *Fullagar* J., their Lordships are of opinion that this appeal should be allowed. The judgment of the High Court must be set aside and the judgment of the Supreme Court of New South Wales restored. Their Lordships will humbly advise Her Majesty accordingly.

There will be no order as to costs.

Appeal allowed. Judgment of the High Court set aside and the judgment of the Supreme Court of New South Wales restored. No order as to costs.

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

Solicitors for the respondent, *Bell, Broderick & Glay*, agents for *Norton, Smith & Co.*

J. B.

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