

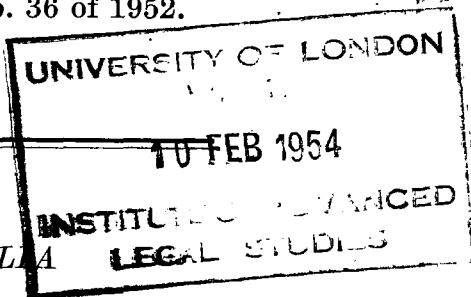
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No. 36 of 1952.

In the Privy Council.



ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

NORMAN CLYDE OAKES Appellant

AND

COMMISSIONER OF STAMP DUTIES OF NEW SOUTH WALES Respondent.

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Case for the Appellant.

1. This is an appeal by special leave from a Judgment dated 8th May 1952 of the High Court of Australia which by a majority of three Judges to two affirmed a judgment of the Supreme Court of New South Wales on a case stated under the New South Wales Stamp Duties Acts 1920-1940.

RECORD. p. 14. p. 8.

2. The question involved in the appeal relates to the incidence of death duty upon certain trust property under a trust established by a Trust Deed dated 1st September 1924 by the deceased one Leslie William Friend who died in 1947.

20 3. Before the execution of the 1924 Trust Deed the deceased was the owner of a grazing property known as "Ellerston" in New South Wales and was working the property as an entirety on his own behalf. By the Trust Deed dated 1st September 1924 the deceased declared that he held the property on the trusts set out in the Deed. The principal provisions of the Trust Deed were as follows :—

p. 2. p. 4.

(A) The deceased, or other the Trustee of the Deed for the time being, should either retain the lands or at the Trustee's discretion sell the same and reinvest in such land or securities as the Trustee should in his uncontrolled discretion think fit.

30 (B) The "Trustee" was defined as meaning the deceased or other the trustee or trustees for the time being of the Deed and the "Trust Fund" was defined as meaning the said lands and proceeds of sale thereof and the securities upon which the same might from time to time be invested.

(C) The capital and income of the Trust Fund should be held upon trust for the deceased and his four named children as tenants in common in equal shares with an accruer clause to the shares of the other tenants in common in respect of the share of any child who should die under the age of 25 years.

(D) The Trustee should have power to manage any real and personal property the subject of the trust and to employ such servants or agents and at such remuneration as the Trustee should think fit.

(E) The Trustee should have power to appropriate any real or personal property forming part of the trust fund to or towards the share of any person or persons therein so as to bind all persons interested provided that as regards any share of the trust fund not absolutely vested any such appropriation should be without prejudice to the exercise of any powers given to the Trustee. 10

(F) The Trustee should have power to raise any part or parts not exceeding one-half of the share of capital of any child in the trust fund notwithstanding that the same might be liable to be divested and to apply the same for his or her benefit or advantage.

(G) In addition to reimbursing himself all expenses incurred the Trustee should be entitled to remuneration for all work done by him in managing and controlling any property forming part of the trust fund or carrying on the business of a grazier or pastoralist or other business in the course of his administration of the said fund in the same manner and as fully in all respects as if he were not a Trustee hereof. 20

(H) The Trustee was given power notwithstanding he was a Trustee to purchase any of the trust property by public auction or private contract provided that in the latter case the sale should be conducted by Goldborough Mort & Company Limited or the price approved by them. 30

(I) The Trustee was given very extensive powers to carry on every class of business relating to grazing farming or pastoral pursuits as if the Trustee were absolutely entitled thereto.

p. 2, l. 15.

4. After the execution of the Declaration of Trust, the deceased managed and controlled the lands at Ellerston until he sold them in 1928 and invested the proceeds in a grazing property known as Glendon and in certain mortgages. From 1928 until his death the deceased as sole Trustee managed the Glendon property and carried on the business of a grazier or pastoralist. He received out of the income by way of remuneration fixed by himself the following sums :—

p. 2, l. 26.

p. 2, l. 37.

For 1925–1930 inclusive	£3,000 per year
For 1931	Nil
For 1932	£1,000
For 1933–1944 inclusive	£500 per year
For 1945–1947 inclusive	£100 per year

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5. The profits and income of the properties subject to the Trusts of the said Deed after deducting therefrom all outgoings and expenses (including the said remuneration retained by the deceased) were divided by the deceased into five equal shares and the deceased credited each of his said children with one such equal share crediting the fifth share to himself pursuant to Clause 2 of the said Deed. The amounts credited to each such child were paid or applied by the deceased for or towards the maintenance and education of such child or were paid to the mother of such child for or towards his or her maintenance and education or were paid to such child after he or she had come of age. By the date of the deceased's death all but one of the deceased's four children had attained the age of 25.

p. 2, ll. 42-43.

p. 3.

6. At the date of the death of the deceased the properties and funds held by him upon the trusts of the said Deed were of the net value of £71,900 9s. 7d. They comprised the said grazing property known as "Glendon," stock, plant and furniture on the said property, two mortgages securing respectively the principal sums of £2,650 and £4,000, moneys in bank accounts and certain debts due to the trust at the date of the deceased's death, less certain liabilities. The Commissioner of Stamp Duties assessed the death duty payable in respect of the said estate upon the basis that the final balance of the estate as determined in accordance with the Stamp Duties Act 1920 (as amended) was £178,929, having included therein the net value as at the date of death of the whole of the property which was at that date subject to the trusts of the said Deed.

p. 3, l. 11.

p. 3, l. 19.

7. The Appellant, who is the surviving executor of the deceased, contended that there should have been included in the estate of the deceased for the purposes of the assessment of death duty one-fifth only of the net value of such property and requested that a Case be stated for the opinion of the Supreme Court of New South Wales, which was accordingly done.

8. The enactment on which the Commissioner's claim for death duty is based is Section 102 (2) (d) of the Stamp Duties Act 1920 (as amended in 1931) which 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."

9. By a judgment dated 13th September 1951 the Supreme Court of New South Wales (Street C.J., Maxwell and Owen J.J.) upheld the assessment of the Commissioner and decided, in effect, that the case fell

p. 8

p. 11, l. 32.

within Section 102 (2) (d). Street, C.J., stated that from information conveyed to the Court during the course of argument the Trustee resided on the grazing property in question. The learned Judge did not specify what precise property was affected or for what period or what was the nature and purpose of the residence, nor was there any evidence on these matters. He then expressed the opinion that the donor was not entirely excluded from benefit. The effect of the Trust Deed was that he and his four children held the whole of the trust fund as equitable tenants in common, not in severalty but promiscuously, and in the administration of the trust the characteristic feature of a tenancy in common, namely, that of an undivided possession of the interests given by the deed was plain and obvious. The result was that the property was carried on as one undivided whole and was managed and controlled as one composite income-producing asset, and under those circumstances each beneficial interest obtained a very real advantage from its unbroken association with the other beneficial interests created by the trust deed. The donor not only retained the legal estate in the whole property, but his beneficial one-fifth interest remained linked with the other four beneficial interests and enabled the property to be managed and controlled as one undivided entity, each share having the advantage of being worked and used in conjunction with the other shares. The learned Judge considered it to be clear that the donor obtained a substantial and a material benefit by reason of the continuous association of his one-fifth share with the other four-fifths which were the subject-matter of the gifts made under the deed. He concluded that the whole transaction reeked of benefits to the donor. Maxwell, J., concurred with the Chief Justice. Owen, J., also concurred and added that he found it difficult to see how a donor who creates a trust in favour of himself and another or others as tenants in common could ever claim with success that the gift is not caught by Section 102 (2) (d) of the Act. The unity of possession and enjoyment which is the mark of a tenancy in common seemed to him to be entirely inconsistent with the idea of exclusive possession and enjoyment by one only of such tenants, that is to say as a donee of an undivided interest.

p. 11, l. 39.

p. 12, l. 29.

p. 12, l. 40.

10. The Appellant appealed to the High Court of Australia and on the 8th May 1952 the High Court gave judgment by a majority (Dixon, C.J., Williams, J. and Fullagar, J.) dismissing the appeal. Webb, J. and Kitto, J. were of the opinion that the appeal should be allowed.

p. 15.

p. 16, l. 43.

Dixon, C.J., in his judgment, first reviewed certain authorities including the English case of *Attorney-General v. St. Aubyn* [1952] A.C. 15 and said that it was not possible to define with certainty the limits of the operation of the provision contained in Section 102 (2) (d) in making property dutiable because the deceased obtains from the donee a benefit of some kind.

The learned Chief Justice proceeded to examine the terms of the Declaration of Trust and the facts. After setting out his view of the facts he said :—

p. 20, l. 38.

“ This course of dealing represents what may be called a total
 “ indivisible situation, which for my part I do not think ought to
 “ be broken up into component parts to be separately examined 50

“ for the purpose of ascertaining whether possession and enjoyment
 “ of the interests given was assumed and retained to the entire
 “ exclusion of the deceased or of any benefit to him referable or
 “ attributable to the gift. At the same time I do not think that
 “ such analysis would make any difference in the result.”

The gift to the children could not in his opinion be considered as a right
 to call for one-fifth of the residue of the income and corpus after the
 deceased had enjoyed benefits in such a manner as to treat those benefits
 as antecedent to the gift and incapable of being regarded as impairing or
 10 derogating from it. The learned Chief Justice considered that the benefits
 enjoyed by the Trustee (that is to say the deceased, although the argument
 would apply equally to any Trustee for the time being) were not indis-
 pensable conditions precedent to the possession and enjoyment by the
 donees of undivided equitable interests as tenants in common. In other
 words, while the donor reaped such benefits, such interests were not
 possessed and enjoyed to the full by the donees.

11. Williams, J., delivered a concurring judgment. After referring
 to a number of cases he said that two problems arose on the appeal :
 the first was to determine what the Settlor gave the children ; the second
 20 was to determine whether the children, to the extent to which the gift
 was capable of immediate possession and enjoyment, immediately assumed
 bona fide possession and enjoyment and thenceforth retained it to the
 entire exclusion of the deceased. He was of the opinion that, no question
 as to the construction of the Deed arising, the effect of the Deed was to
 create what he called an equitable tenancy in common between the
 Testator and his children from which, in his view, the powers reserved
 to the Testator, as Trustee, derogated, and in support of his opinion he
 pointed out that each of the children had an absolute right under the
 Partition Act, 1900, to apply to the Court for partition or for a sale.
 30 He rejected the view that the powers reserved to the Testator were part
 of the limitation of the actual equitable rights or interests given by the
 Deed but continued that if this was the true nature and extent of the
 gifts to the children, bona fide possession and enjoyment of their income,
 to the extent to which they could possess and enjoy such a gift, was
 assumed by them immediately upon the gift and thenceforth retained to
 the entire exclusion of the Settlor. The shares of the children in each
 distribution of income were credited to their separate accounts and became
 their absolute property. The fact that the Settlor was able to apply this
 income for or towards their maintenance and education whilst they were
 40 under twenty-one would not make the property dutiable.

Fullagar, J., agreed with the judgment of Dixon, C.J. p. 29.

12. Webb, J., delivered a dissenting judgment. He held that the
 children were not made tenants in common of particular assets but were
 equitable tenants in common of the capital and interest of the trust fund :
 their interests were subject to the other provisions of the Declaration of
 Trust. In his opinion the deceased reserved nothing out of the interests
 he gave to his children. He obtained no benefit referable or attributable
 p. 28.
 p. 28, ll. 45-46.
 p. 29, l. 1.
 p. 29, l. 27.

to the equitable interests which he gave his children, who as equitable tenants in common were not given the whole of any particular asset, but only residues, although such residues might have proved small.

p. 29.

p. 31, l. 37.

p. 31, l. 46.

p. 32, ll. 1-5.

p. 33, l. 9.

p. 33, l. 36.

p. 34, l. 1.

p. 34, l. 43.

13. Kitto, J., also delivered a dissenting judgment in which he said that the fact that the deceased enjoyed benefits connected with the trust property, or even benefits connected with interests in the trust property which were the subject-matter of the gifts, did not bring the case within Section 102 (2) (d). That provision applied only where the deceased enjoyed benefits which impaired in some manner or degree the full and untrammelled assumption and retention of that possession and enjoyment of the property given of which its character admitted. He then dealt with the contention that the owner of each undivided share receives a benefit from each of the other shares and pointed out, after referring to *Attorney-General v. Seccombe* [1911] 2 K.B. 688 that the "exclusion" required by the Section is exclusion from what is given. The most ample possession and enjoyment that can be had of an undivided interest in property must necessarily leave co-owners in enjoyment of whatever benefits may be produced by their own interests as interests in an undivided whole. Those benefits could not be regarded as benefits which bring the case within Section 102 (2) (d). Next he dealt with the remuneration retained by the Testator. He considered that there was nothing to suggest that the Testator exercised his powers differently from an independent trustee or that he awarded himself a greater remuneration than he would have had to pay an independent manager or than his services were worth. The Declaration of Trust gave him no power to do so. The property comprised in the gift to each child, his or her equitable interest under the trusts of the deed, admitted of no more extensive possession and enjoyment during the period which elapsed before the donor's death than the receipt of a full one-fifth share of the net income of the trust. The answer which in his opinion should be given to the Commissioner's contention on this part of the case might be stated quite shortly. It was that whatever benefit the deceased got in the way of remuneration was a benefit out of the gross income of the trust property ; that, so far as appears, the remuneration never exceeded what was a proper deduction to be made from gross income in order to ascertain the net income ; that the receipt of it by the deceased therefore did not diminish the net income ; and that, so long as the deceased was completely excluded from a full four-fifths of the net income derived and ascertained in accordance with the deed, the possession and enjoyment which it was possible for the donees to assume and retain having regard to the nature of the property given, was entirely unimpaired by the taking of remuneration by the deceased. After referring to certain other alleged benefits and holding that they were not benefits which precluded full possession of what was given, Kitto, J., referred to the question of physical possession, and to the suggestion made in the Supreme Court that the deceased resided on the property. Kitto, J., thought that in any event that was what a managing trustee would do and further said that even if the statement made to the Supreme Court had been incorporated in the stated case, it would not have justified an inference, nor, presumably, was it made for the purpose of suggesting, that the deceased derived a benefit from the property otherwise than conformably with the provisions

of the deed. If the Commissioner had intended to make any such suggestion he would surely have made a specific allegation so as to give the appellant, as a matter of elementary fairness, an opportunity to dispute the allegation and have an issue directed to be tried under Section 124 (6) of the Act. Since he did not do this, it would not be right to decide the case on any other footing than that the benefits relied upon accrued to the deceased from the due exercise of his fiduciary powers and not otherwise. In conclusion, he considered that the Trust Deed could not be severed into two sections, one conferring a benefit and the other taking something back. It must be read as a whole. The donees took the interests given to them, subject to certain rights powers and privileges retained by the deceased, because the deceased had chosen to give them interests which were limited *ab initio* in this way. The limits were such that their interests were inherently unsusceptible of being so possessed and enjoyed as to preclude the deceased from deriving those benefits which in fact he derived. p. 39, l. 39.

14. The Appellant submits that the judgments of Webb, J. and Kitto, J. in the High Court of Australia are right and should be preferred to the judgments of the majority and to the judgments of the Supreme Court of New South Wales :—

(A) As regards the judgments in the Supreme Court of New South Wales the Appellant submits that the proposition, which formed the basis of the judgments, namely that a tenant in common necessarily enjoys benefits by reason of the fact that his share is associated with other shares and that consequently a gift by a donor in trust for himself and others in undivided shares must attract duty, cannot be supported. In such a case the Appellant submits that the donees have, as from the date of the gift, full possession and enjoyment of that which is given, to the exclusion of the donor.

(B) As regards the judgments of the majority of the High Court of Australia, the Appellant first submits that the approach to the question whether there was a benefit reserved to the donor which was adopted by the majority, was false. The learned Chief Justice in particular stated that the situation should be considered as “a total indivisible situation.” To state the issue in this way is however, in the submission of the Appellant, to prejudge the question to be decided which is whether the benefit taken by the donor is referable to or trenches upon the gift. The Appellant submits that the correct approach is to consider what was given to the beneficiaries and then to ascertain whether the benefits or any of them affect the possession and enjoyment of what was given.

(c) The Appellant submits that, taking the Trust Deed as a whole, what was given to the beneficiaries consisted of equitable interests deriving their origin and their limitation from the Trust Deed itself. *Ab initio* and in their nature they were subject to certain limitations, but, such as they were, they were given outright to the beneficiaries and the beneficiaries entered forthwith with full enjoyment of them. The majority of the High Court of Australia in effect regarded the powers given to the Trustee as

reservations out of some larger interest which might have been, but which was not given. The true view, in the submission of the Appellant, is to treat the subject matter of the gift as being the beneficial interests subject to the limitations imposed when the gift was made.

(D) With reference to the actual provisions of the Trust Deed, the fact that the Settlor remained sole trustee and that the trustee (whether the Settlor himself or some other persons or person) had conferred upon him by the Trust Deed extensive powers, some of which may possibly have been beneficial powers, does not involve 10 the consequence that a reservation was made out of or referable to the gift. Such powers were the creation of the Settlor at the time when the gift was made just as were the beneficial interests conferred. If it be asked "how did the deceased come to be in enjoyment of whatever benefits came to him under the deed, whether by reason of his being a trustee or otherwise?" the answer, in Lord Radcliffe's words in *Attorney-General v. St. Aubyn* [1952] A.C., at p. 48, is: "Because he decided to create them and to take them for himself." The Trust Deed in effect amounted to a distribution of the previously 20 concentrated interests in and powers over the property some of which were given and some of which were retained. The Appellant further submits that the right to receive remuneration was merely such a right as would normally have been conferred upon any other managing Trustee and the remuneration could not, under the terms of the deed, be and was not fixed otherwise than by reference to the proper value of the services rendered. Equally, such residence as the Trustee had upon the property must be assumed, in the absence of evidence to the contrary, to have been such as was required to enable the Trustee to carry out his fiduciary responsibilities. The shares of income credited to the beneficiaries 30 were "possessed and enjoyed" by them none the less because they were applied towards their maintenance and education.

15. The Appellant submits that the appeal ought to be allowed, the judgment of the High Court of Australia set aside and a declaration made that there should have been included in the estate of the deceased for the purposes of the assessment and payment of death duty one-fifth only of the net value of the property which was at the date of the death of the deceased subject to the trusts of the said Deed for the following amongst other

REASONS

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- (1) BECAUSE the judgments of Webb, J. and Kitto, J., in the High Court of Australia are right.
- (2) BECAUSE the Supreme Court of New South Wales was in error in holding that the owners of undivided shares necessarily receive a benefit by reason of the existence of other undivided shares and that in any event the existence of such a benefit does not prevent full possession and enjoyment being assumed by the donee of each share.

- (3) BECAUSE the donees under the Trust Deed of 1st September 1924 assumed full possession and enjoyment of the interests given to them to the exclusion of the donor and that consequently Section 102 (2) (d) of the Stamp Duties Act 1920 had no application.
- (4) BECAUSE the judgments of the majority of the High Court of Australia were wrong and ought to be reversed.

G. E. BARWICK.

R. O. WILBERFORCE.

In the Privy Council.

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BETWEEN

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AND

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Case for the Appellant.

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