34, 1953

In the Privy Council.

No. 36 of 1952.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

NORMAN CLYDE OAKES ... ... *Appellant*

AND

COMMISSIONER OF STAMP DUTIES OF THE STATE OF NEW SOUTH WALES ... ... *Respondent.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE

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AND

COMMISSIONER OF STAMP DUTIES OF THE STATE OF NEW SOUTH WALES ... ... *Respondent.*

RECORD OF PROCEEDINGS

No. 1.

Case Stated.

In the Full Court of the Supreme Court of New South Wales.

No. 1. Case Stated, 20th March, 1951.

IN THE SUPREME COURT OF NEW SOUTH WALES.

Term No. 75 of 1951.

IN THE MATTER of the Estate of LESLIE WILLIAM FRIEND late of Jerry's Plains in the State of New South Wales, deceased.

AND IN THE MATTER of the Stamp Duties Act, 1920–1940.

AND IN THE MATTER of the Appeal of NORMAN CLYDE OAKES executor of the Will of the said deceased against the assessment by the Commissioner of Stamp Duties of death duty payable in respect of the said estate.

1.—The abovenamed Leslie William Friend (who is hereinafter called " the testator ") died on the seventeenth day of October 1947 domiciled within the State of New South Wales.

2.—Probate of the last Will of the testator dated the twenty-first day of June 1945 was duly granted on the fifth day of April 1948 by the Supreme Court of New South Wales in its Probate Jurisdiction to Walter Goldsmith Lumby and Norman Clyde Oakes the executors therein named. The said Walter Goldsmith Lumby has since died and the surviving executor the said Norman Clyde Oakes is hereinafter called " the Appellant."

In the Full Court of the Supreme Court of New South Wales.

No. 1. Case Stated, 20th March, 1951— *continued.*

3.—By a deed made on the first day of September 1924 the testator declared that as from the first day of July 1924 he had held and thenceforth would hold certain lands described in the First and Second Schedules thereto (subject to certain encumbrances mentioned therein) and the rents issues and profits thereon upon the trusts and with and subject to the powers and provisions thereinafter expressed concerning the same.

4.—A true copy of the said Deed is hereunto annexed marked " A " and forms part of this case.

5.—The said lands described in the Schedules to the said Deed constituted a grazing property known as " Ellerston." The said lands were purchased by the testator early in the year 1924 with his own moneys and for his own benefit and up to the thirtieth day of June 1924 were used by him for his own benefit.

6.—Thereafter the testator as Trustee under the said Deed managed and controlled the said lands and conducted thereon the business of a grazier until in the year 1928 he sold the said lands and discharged the encumbrances thereon.

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

8.—At the date of the said Deed the children of the testator named as beneficiaries in Clause 2 thereof were infants under the age of twenty one years but at the date of the death of the testator all but one of the said children had attained the age of twenty-five years and that one has since attained that age.

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

10.—The testator from the execution of the said Deed until his death received out of the income of the said trust funds the amounts hereinafter set forth, which amounts he fixed from time to time as being the amounts which should be received by him pursuant to Clause 4 (j) of the said Deed as remuneration for the work done by him in managing and controlling the property forming part of the said trust fund and in carrying on the business of a grazier or pastoralist in the course of his administration of the said fund, that is to say :—

(a) For the years 1925 to 1930 inclusive : £3,000 0s. 0d. per year.
(b) For the year 1931 : Nil.
(c) For the year 1932 : £1,000.
(d) For the years 1933 to 1944 inclusive : £500 per year.
(e) For the years 1945 to 1947 inclusive : £100 per year.

11.—The profits and income of the properties subject to the Trusts of the said Deed after deducting therefrom all outgoings and expenses (includ-

ing the said remuneration retained by the testator) were divided by the testator into five equal shares and the testator 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 testator for or towards the maintenance and education of such child or were paid to the mother of such child for or towards his or her maintenance and education or were paid to such child after he or she had come of age.

12.—At the date of the death of the testator the properties and funds held by him upon the trusts of the 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 0s. 0d. and £4,000, moneys in bank accounts and certain debts due to the trust at the date of the testator's death, less certain liabilities.

13.—The Commissioner of Stamp Duties assessed the death duty payable in respect of the 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 of the whole of the property which was at the date of the testator's death subject to the trusts of the said Deed.

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

15.—The Appellant has paid the death duty as assessed by the Commissioner of Stamp Duties and has deposited the sum of £20 0s. 0d. as security for costs and has by notice in writing required the Commissioner of Stamp Duties to state a case for the opinion of the Supreme Court of New South Wales.

16.—If the Appellant is correct in his contention the amount of death duty payable in respect of the said estate will be reduced by £15,285 17s. 7d.

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

(1) Should the whole of the property which was at the date of the death of the testator subject to the trusts of the said Deed be included in his estate for the purposes of the assessment and payment of death duty ?

(2) How should the costs of this case be borne and paid ?

Dated this 20th day of March, 1951.

E. T. WOODS,
Commissioner of Stamp Duties.

In the Full Court of the Supreme Court of New South Wales.

No. 1 (a). Annexure, Deed of Trust, 1st September, 1924.

No. 1 (a).

Annexure, Deed of Trust.

KNOW ALL MEN BY THESE PRESENTS that I LESLIE WILLIAM FRIEND of Ellerston near Scone in the State of New South Wales Grazier being the registered proprietor for an estate in fee simple of the lands described in the First Schedule hereto subject nevertheless to Memorandum of Mortgage registered No. from myself to Henry Luke White, Victor Martindale White, and Arthur George White and being the registered holder of the Conditionally Purchased lands described in the Second Schedule hereto subject to the payment to the Crown of the balance of purchase money unpaid in respect thereof and subject to Deed of Mortgage registered No. Book from myself to the Mortgagees abovenamed. HEREBY DECLARE that as from the first day of July one thousand nine hundred and twenty four I have held and henceforth will hold the said lands described in the First and Second Schedule hereto (subject to the encumbrances aforesaid) and the rents issues and profits thereof upon the trusts and with and subject to the powers and provisions hereinafter expressed concerning the same that is to say :—

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

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

3.—That without limiting the generality of the Trustee's discretion under clause 1 hereof to invest upon such securities as he should think fit, the Trustee may at any time or times lay out the trust fund (including any

accretions thereto) or any part thereof in the purchase of land of any tenure within the Commonwealth of Australia and of stock plant or other personal property of what nature or kind soever within the said Territory and of any value whether exceeding the amount of the trust fund or not, upon such terms as regards the payment of the whole or any part of the purchase money and conditions of sale as the Trustee may in his discretion think fit and with liberty to allow the purchase money or any part thereof to remain secured on mortgage from the Trustee to the Vendor for such period at such rate of interest and with such powers including full powers of sale in favour of the Mortgagee and provisions as the Trustee may think fit and as the Mortgagee shall reasonably require and that the Mortgagee shall be under no responsibility to enquire into the purpose for which the mortgage is being given or whether the same is within the powers hereby conferred, and that the Trustee shall stand possessed of any property to be purchased as aforesaid upon trust that he shall resell the same or any part thereof when or as he might think fit and shall hold the money to arise from such resale after payment thereout of any mortgage or other debt that may be owing in respect thereof and of the expenses of sale upon the same trusts and with the same powers as are herein declared and contained concerning the trust fund including the aforesaid power of purchasing property and shall in the meantime and until such resale pay and apply the rent or income arising from the property to be purchased as aforesaid to the person or persons and in the manner to whom and in which the income of the money laid out in the purchase of such property would for the time being be payable under the trusts of these presents if such purchase had not been made with liberty from time to time to pay or apply the whole or such part as the Trustee may think fit of the said rent or income in or towards reduction or discharge of any mortgage or other debt for the time being owing in respect of the premises or any part thereof.

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

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

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

In the Full Court of the Supreme Court of New South Wales.

No. 1 (*a*). Annexure, Deed of Trust, 1st September, 1924— *continued.*

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

d. Upon the sale of all or any part of the property comprising the trust fund to sell either subject to or discharged from any mortgage for the time being subsisting thereon and to allow any purchaser such time and upon such security as the Trustee may think fit for payment of the purchase money or any part thereof.

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

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

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

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

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

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

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

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

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

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

In the Full Court of the Supreme Court of New South Wales.

No. 1 (*a*). Annexure, Deed of Trust, 1st September, 1924—*continued.*

o. To convey appropriate or dedicate any part or parts of the property comprising the trust fund for public or charitable purposes either gratuitously or for such consideration as the Trustee may think proper to accept.

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

(THE FIRST AND SECOND SCHEDULES REFERRED TO CONTAIN DETAILED PARTICULARS OF ALL THE DEEDS RELATING TO "ELLERSTON" STATION WHICH HAS SINCE BEEN SOLD.)

SIGNED SEALED AND DELIVERED by the above-named LESLIE WILLIAM FRIEND in the presence of Norman C. Oakes, Solicitor, Sydney. } L. W. FRIEND.

This and the preceding pages constitute the annexure marked "A" referred in the Case Stated by me this 20th day of March 1951 the matter of the estate of Leslie William Friend deceased.

E. T. WOODS,
Commissioner of Stamp Duties.

No. 2. Rule of the Supreme Court of New South Wales, 13th September, 1951.

No. 2.

Rule of the Supreme Court of New South Wales

IN THE SUPREME COURT OF NEW SOUTH WALES.

Term No. 75 of 1951.

IN THE MATTER of the Estate of LESLIE WILLIAM FRIEND late of Jerry's Plains in the State of New South Wales, deceased.

AND IN THE MATTER of the Stamp Duties Act, 1920–1940.

AND IN THE MATTER of the Appeal of NORMAN CLYDE OAKES executor of the Will of the said deceased against the assessment by the Commissioner of Stamp Duties of death duty payable in respect of the said estate.

Thursday the thirteenth day of September in the Year One thousand nine hundred and fifty-one.

THE CASE STATED herein coming on to be heard on the Twenty-eighth day of June and the Tenth day of July last past WHEREUPON AND UPON

In the Full Court of the Supreme Court of New South Wales.

No. 2. Rule of the Supreme Court of New South Wales, 13th September, 1951—*continued.*

READING the case stated under the provisions of the Stamp Duties Act, 1920–1940 and filed on the second day of April last past AND UPON HEARING what was alleged by Mr. G. E. Barwick of King's Counsel with whom was Mr. C. D. Monahan of Counsel on behalf of the Appellant and by Mr. Gordon Wallace of King's Counsel with whom was Mr. Cyril Walsh of Counsel on behalf of the Respondent THIS COURT DID ORDER that the matter stand for judgment and the same standing in the list this day for judgment accordingly THIS COURT DOTH ORDER that the first question submitted in the said case, namely :—

1. Should the whole of the property which was at the date of the death of the testator subject to the trusts of the said Deed be included in his Estate for the purposes of the assessment and payment of death duty

be and the same is hereby answered as follows :

1. Yes.

AND IT IS FURTHER ORDERED that the cost of the Respondent of and incidental to this case stated be taxed by the proper officer of this Court and that such costs when so taxed and allowed be paid by the Appellant to the Respondent or to F. P. McRae, Esq., Crown Solicitor.

By the Court for the Prothonotary,

R. T. BYRNE,
Chief Clerk.

No. 3.

Judgments.

No. 3 (*a*). Judgment of The Chief Justice, 13th September, 1951.

IN THE SUPREME COURT OF NEW SOUTH WALES.

Coram : STREET, C.J.
MAXWELL, J.
OWEN, J.

13th September, 1951.

Oakes *v.* Commissioner of Stamp Duties.

(a) The Chief Justice.

STREET, C.J. :

In this case one Leslie William Friend, who died on 17th October, 1947, by deed of trust dated the 1st September, 1924, declared that he held certain lands therein described, and which were held and used by him as a

In the Full Court of the Supreme Court of New South Wales.

No. 3 (*a*). Judgment of The Chief Justice, 13th September, 1951— *continued.*

grazing property, upon certain trusts and upon certain terms and conditions to which it will be necessary to refer presently. In 1928 this property was sold and the proceeds thereof were invested in another grazing property which was carried on in the same fashion and subject to the same trusts until the testator's death in 1947. At this time the value of the assets covered by the trusts of the deed amounted to the sum of £71,900, nearly the whole of which was attributable to the grazing property.

The question is whether the gifts made by the deed of trust were made under such circumstances that the trust property was excluded from the testator's estate or whether the same should be included for the purpose of assessment and payment of death duty, the answer to this question depending upon the application of the provisions of Section 102 (2) (d) of the Stamp Duties Act, 1920–1940 to the facts of the present case.

In dealing with the argument presented to the Court in *Perpetual Trustee Co. (Ltd.)* v. *Commissioner of Stamp Duties (N.S.W.)* (64 C.L.R. 492), Starke, J., at p. 506 said :

> " The contention on the part of the Commissioner that " Section 102 (2) (d) is necessarily attracted whenever the donor " appoints himself or himself and others a trustee or trustees of the " property comprised in the gift appears to me to be too absolute, " as is also the opposite proposition that the section is necessarily " excluded whenever the donor appoints himself or himself and " others a trustee or trustees of the property comprised in the gift " if he does not receive or derive any benefit from the property " given. The circumstances of each particular case must be " considered. It is for this reason that I prefer to decide the " question whether the donor was or was not excluded entirely " from the possession and enjoyment of the property and of any " benefit whatsoever to him upon its own facts and leave other " cases to be decided upon their facts as and when such cases " arise."

I therefore turn my attention to the question propounded by His Honour, whether the donor was or was not entirely excluded from any benefit whatsoever to himself arising out of the gifts contained in the deed of trust.

The declaration in the deed provided that the lands in question and the rents, issues and profits thereof were to be held by the donor as sole trustee, with power to retain and use the said lands or at the trustee's absolute discretion at any time to sell the same and invest the proceeds in other securities, real or personal, upon trust as to the capital and income of the trust fund for himself and his four named children as tenants in common in equal shares. Wide general powers of investment were given to the trustee, and by Clause 4 (a) of the deed he was given the further power to manage the real and personal property the subject of the trust and to carry out all necessary works and improvements thereon as he might see fit in his own uncontrolled discretion and as if he were the absolute owner thereof, and for any of those purposes to make any outlay from capital or income.

The trustee was then given further specific powers of leasing, and power also to raise money on mortgage and to give and receive effectual discharges in relation thereto, and numerous other detailed powers were given to which I do not think it necessary to refer. By Clause 4 (j) it was provided that, in addition to reimbursing himself for all expenses incurred by him in the administration of the trust, he as the sole trustee should be entitled to remuneration for all work done by him in managing and controlling the trust fund or carrying on the business of a grazier or pastoralist or any other business in the same manner and as fully in all respects as if he were not a trustee. He was also given power to purchase any property comprising the trust fund or any part thereof under certain terms and conditions, and by Clause 4 (l) he was authorised to carry on or join in carrying on in all its branches every class of business relating to grazing, farming or pastoral pursuits, and for this purpose to breed, raise, fatten, purchase, sell, lease, use and otherwise deal in all kinds of live and dead stock or any other pastoral or agricultural produce.

Under the powers conferred upon him, the testator as sole trustee under the deed, managed and controlled the lands comprised in the trust and conducted thereon the business of a grazier. At the date of the deed all the children were infants under the age of 21 years, and from that date until his death he was at all times the sole trustee of the trust property and he managed the properties and funds which were the subject of the declared trusts. From time to time he fixed the amount to be paid to and received by himself as remuneration for the work done by him in managing the property, and after payment of these sums and all other necessary outgoings and expenses the net profits and income were divided by the trustee into five equal shares, he crediting himself with one share and each of his said children with a similar equal share. The amounts credited to each child were paid or applied by the testator for or towards the maintenance and education of such child or were paid to the mother of the child for or toward his or her maintenance and education until each child reached the age of 21 years, when the share was paid to that child directly. It would also appear from information conveyed to the Court during the course of argument that the trustee resided on the grazing property in question and, so far as outward and visible signs were concerned, controlled, managed, used and administered the same as if he were the absolute owner thereof, the resulting income from each year being divided amongst the beneficiaries entitled thereto.

In my view on those facts it appears clear that the donor was not entirely excluded from benefits which accrued in part from gifts made by the deed. 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 it is clear that each beneficial interest obtained a very real advantage from its unbroken

In the Full Court of the Supreme Court of New South Wales.

No. 3 (*a*). Judgment of The Chief Justice, 13th September, 1951—*continued.*

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. It needs no elaborate consideration to appreciate the fact that this necessarily resulted in an advantage to each share, including his own, and looking to the realities of the situation and quite apart from the fact that the donor had retained for himself the right to fix the amount which he was to receive as remuneration for managing the property and that he in fact paid himself such remuneration, I think it is clear that he 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. It does not appear to me that it would assist to consider at length the numerous cases which have been decided each depending upon its own facts, for in the present case, to adopt the phraseology used by the Privy Council in *The Commissioner of Stamp Duties (N.S.W.)* v. *The Perpetual Trustee Co., Ltd.* (1943 A.C. 425) at p. 445 " the whole transaction reeks of benefits to the donor " arising out of the property assigned by way of gift to the donees. In no real sense can it be said that the donees assumed and retained possession of their respective gifts to the entire exclusion of any benefit to the donor arising out of the same.

For these reasons therefore, I am of opinion that the question submitted in the case stated should be answered in the affirmative, and the Appellant should pay the costs of the appeal.

No. 3 (*b*). Judgment of Maxwell J., 13th September, 1951.

(b) Maxwell J.

MAXWELL, J. :

I concur with the judgments of the Chief Justice and Owen, J., and have nothing to add.

No. 3 (*c*). Judgment of Owen J., 13th September, 1951.

(c) Owen J.

OWEN, J. :

I agree with the learned Chief Justice that the question asked should be answered in favour of the Respondent Commissioner.

Apart from other considerations to which the circumstances of the case give rise, I think the fact that the grazing property, the subject of the trust was at all times worked as one property makes it impossible to say that the settlor was, after the date of the gift, entirely excluded from any benefit arising out of it, or collateral to it.

I would add that I find it difficult to see how a donor who creates a trust in favour of himself and another or others as tenants in common can ever claim with success that the gift is not caught by Section 102 (2) (d) of the Act. The unity of possession and enjoyment which is the mark of tenancy in common seems to me to be entirely inconsistent with the idea of exclusive possession and enjoyment by one only of such tenants.

No. 4.

Notice of Appeal.

In the Full Court of the High Court of Australia.

No. 4. Notice of Appeal, 3rd October, 1951.

No. 51 of 1951.

IN THE HIGH COURT OF AUSTRALIA.
NEW SOUTH WALES REGISTRY.

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES.

Between

NORMAN CLYDE OAKES ... ... *Appellant*

and

COMMISSIONER OF STAMP DUTIES ... ... *Respondent.*

TAKE NOTICE that the High Court of Australia will be moved by way of Appeal at the first sitting of the High Court for hearing appeals to be held in Sydney after the expiration of one month from the due institution of this appeal or so soon thereafter as counsel can be heard, by counsel on behalf of the abovenamed appellant for an order that the judgment or order of the Full Court of the Supreme Court of New South Wales given and pronounced on the thirteenth day of September instant whereby the first question submitted in a case stated by the Respondent on the twentieth March 1951 for the opinion of the Full Court in an appeal Term No. 75 of 1951 instituted by the Appellant against an assessment of death duty made by the Respondent in the estate of the late Leslie William Friend, was answered in the affirmative, and whereby the Appellant was ordered to pay the Respondent's costs of the said Stated Case, be set aside and reversed, and that in lieu thereof the said first question be answered " No " AND FURTHER for such order as to the costs of this appeal and the costs of the said proceedings in the Supreme Court as the High Court shall deem fit AND FURTHER TAKE NOTICE that the grounds upon which the Appellant intends to rely in this appeal are as follows :—

1. That the said judgment and order is erroneous in law : and without prejudice to the generality of the foregoing ground,
2. That upon the facts set out in the Case Stated the said Full Court was wrong in holding that the case fell within the provisions of Section 102 (2) (*d*) of the Stamp Duties Act (N.S.W.) 1920–1940.
3. That upon the facts set out in the case stated the Full Court should have held that the children of the settlor mentioned in the deed referred to in the Case Stated
   (a) assumed *bona fide* possession and enjoyment of the property comprised in the gift immediately upon the making of the settlement ; and

In the Full Court of the High Court of Australia.

No. 4. Notice of Appeal, 3rd October, 1951—*continued.*

(*b*) thenceforth retained it to the entire exclusion of the settlor and of any benefit to the settlor of any kind whatsoever.

4. That upon the facts set out in the Case Stated the first question thereby submitted to the said Full Court should have been answered " No."

Dated this Third day of October, 1951.

C. D. MONAHAN,
Counsel for the Appellant.

This Notice of Appeal is filed by Messieurs Oakes and Sagar, Solicitors, 1–7 Bent Street, Sydney, Solicitors for the Appellant.

No. 5. Order of the High Court of Australia, 8th May, 1952.

No. 5.

Order.

No. 51 of 1951.

IN THE HIGH COURT OF AUSTRALIA.
NEW SOUTH WALES REGISTRY.

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES IN TERM NO. 75 OF 1951.

Between

NORMAN CLYDE OAKES ... ... *Appellant*

and

COMMISSIONER OF STAMP DUTIES ... ... *Respondent.*

Before their Honours :

Mr. Justice DIXON,
Mr. Justice WILLIAMS,
Mr. Justice WEBB,
Mr. Justice FULLAGAR and
Mr. Justice KITTO.

Thursday the Eighth day of May One thousand nine hundred and fifty-two.

WHEREAS on the third day of October, 1951 the above-named Appellant filed a Notice of Appeal to this Court against the whole of the Judgment and Order of the Full Court of the Supreme Court of New South Wales given and made on the thirteenth day of September, 1951 in matter Term

No. 75 of 1951 AND the said Appeal coming on to be heard before this Court on the twenty-seventh and twenty-eighth days of November, 1951 WHEREUPON AND UPON READING the Appeal Book filed herein AND UPON HEARING Mr. G. E. Barwick of King's Counsel with whom was Mr. C. D. Monahan of Counsel on behalf of the Appellant and Mr. G. P. Stuckey of King's Counsel with whom was Mr. C. A. Walsh of Counsel on behalf of the Respondent THIS COURT DID ORDER that the said Appeal should stand for judgment and the same standing in the list for judgment this day accordingly THIS COURT DOTH ORDER that this Appeal be and the same is hereby dismissed AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the Respondent of and incidental to this Appeal AND that such costs when so taxed and certified be paid by the Appellant to the Respondent or to his solicitor, Mr. F. P. McRae, Crown Solicitor for the State of New South Wales within fourteen days after service upon the Appellant of an office copy of the Certificate of Taxation.

In the Full Court of the High Court of Australia.

No. 5. Order of the High Court of Australia, 8th May, 1952—*continued.*

By the Court.

F. C. LINDSAY,
District Registrar.

No. 6.

No. 6 (*a*). Judgment of the Chief Justice, 8th May, 1952.

Judgments.

(a) Reasons for Judgment of His Honour the Chief Justice (Sir Owen Dixon).

This is an appeal from an order of the Supreme Court of New South Wales determining a question submitted by special case under Section 124 of the Stamp Duties Act 1920–1940. The question concerns property the subject of trusts declared by Leslie William Friend who died on 17th October 1947. The trusts were declared by a deed which was made 1st September 1924 but took effect as from 1st July 1924.

The question submitted by the special case is whether the whole of the property which was, at the date of the death of the deceased, subject to the trusts of the deed should be included in his estate for the purposes of the assessment of death duty. By the order under appeal the Supreme Court answered this question in the affirmative. The answer means that in the opinion of the Supreme Court the case fell within Section 102 (2) (d) of the Stamp Duties Act. That provision requires that for the purposes of the assessment and payment of death duty the estate of a deceased person shall be deemed to include any property comprised in any gift made by the deceased, at any time, of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth

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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 question for our decision is whether the circumstances of the case bring it within this provision, with the consequence that the whole property subject to the trusts is dutiable. It is a question, as I think, depending much more on the view taken of the facts than upon any question of law. The provision is one the meaning and application of which has created much difficulty but it has been elucidated by the decisions of the Privy Council in *Munro's* case, 1934, A.C. 61, *Hall's* case (*Commissioner of Stamp Duties, N.S.W.* v. *Perpetual Trustee Co., Ltd.*) 1943 A.C. 425 and *Commissioner of Stamp Duties, N.S.W.* v. *Way*, 1951, 2 T.L.R. 1239 and by the opinions delivered in the House of Lords upon the analogous provision contained in Section 43 (2) of the Finance Act, 1940, in *St. Aubyn* v. *Attorney General*, 1952, A.C. 15; 1951, 2 A.E.R. 473. As a result there are certain propositions which are removed from doubt. In the first place the property comprised in a gift of which the provision speaks is the estate or interest given. What you are to consider is the beneficial interest or interests created by the deceased. What he keeps back is no part of his gift. "A "person who declares trusts of property only gives the beneficial interests "covered by the trusts everything else he retains and does not give." (*Hall's* case, 1943, A.C., at p. 441.)

In the second place it is the beneficial interests so given of which *bona fide* possession and enjoyment must be assumed by the donee; and the entire exclusion of the deceased which the provision requires is from such possession and enjoyment of the interests assured to or created in the donee, that is to say there must be no impairment of or detraction from the full possession and enjoyment of the beneficial interests given. Any benefit to the deceased which involves or amounts to any such impairment or detraction must likewise be excluded. In the third place the possession and enjoyment which must be assumed is to be understood as that kind of possession and enjoyment of which the interest given is susceptible or capable according to its character and incidents. Accordingly if the donor has already saddled the property with an encumbrance or created an interest therein before he makes the gift it is immaterial that he obtains a benefit therefrom. The gift is subject to the interest. In the fourth place possession and enjoyment mean beneficial possession and enjoyment, and it is nothing to the purpose that in a representative or fiduciary capacity only the deceased holds possession of the subject of the gift or exercises dominion or rights over or in respect of it which, if he were not a fiduciary, would amount to enjoyment of the property or would involve some impairment of or detraction from enjoyment.

Although the foregoing propositions are now clear enough it is not yet possible to define with any certainty the limits of the operation of the provision contained in Section 102 (2) (d) in making property dutiable because the deceased obtains from the donee a benefit of some kind or in some manner which is not, at all events in form, a reservation out of the

estate or interest given, but is collateral thereto and yet is so connected therewith as to impair trench upon prejudice diminish derogate from or compromise the possession and enjoyment of the gift. The decision of the Court of Appeal in *Attorney General* v. *Worrall*, 1895, 1 Q.B. 99, stands, although it is not to be extended: cf. *St. Aubyn's* case, 1952 A.C. at p. 25–26, where the present Lord Chancellor said that it cannot in face of that decision be denied that it is possible for possession and enjoyment of property not to be retained by the donee to the entire exclusion of the donor or any benefit to him by contract or otherwise though the donor himself no longer has any sort of interest in it. Lord Radcliffe (at p. 47) explained what precisely was decided and saw nothing wrong in the decision. His Lordship said: " For my part I see nothing in the decision of *Worrall's* case that " cannot readily be accepted as good law. But what did it decide ? A " father had made a present to his son of a sum of about £24,000 secured on " mortgage and the son had bought in the equity of redemption for a small " sum ; in return for his father's gift the son had covenanted to pay him an " annuity of £735 per annum during his life. In effect the son was returning " to the father the income on the property given during the remainder of the " father's life. It seems to me reasonable enough for a court to hold in those " circumstances that the son had not obtained the enjoyment of what was " given free from a contractural benefit to the father which encumbered the " enjoyment of the very thing that was given. To hold otherwise would " have been to stop at the mere form of the transaction." Even so it is clear enough that the case affords an example of a collateral benefit not forming part of the estate or interest given or reserved thereout. " But," said Lord Radcliffe, " I think it is a very mistaken form of reasoning to deduce from a " decision that a benefit, to be within the mischief of the section, need not " necessarily be by way of reservation out of the subject-matter of a gift the " general proposition that all benefits are within the mischief of the section, " whether they are by way of reservation out of the subject-matter of the " gift or not. To deny the validity of one general proposition is not to assert " the general validity of its opposite."

There is thus left, so to speak, some middle ground, ill defined, where property comprised in a gift made by a deceased is dutiable because of a benefit to him, although the benefit is not reserved out of the gift. The test of liability to duty in such cases can hardly be other than ill defined, because it depends on the benefit having such a connection with the gift that it lessens or impairs the enjoyment of the estate or interest given, that is to say lessens or impairs the enjoyment of which it is susceptible according to its character. This connection has been described by Lord Tomlin by the word " referable," and by Lord Russell by the word " attributable," a benefit referable or attributable to the gift. *Munro's* case 1934, A.C. at p. 67. *Hall's* case, 1943, A.C. at p. 440 cf. *St. Aubyn's* case, 1952, A.C., at p. 29, 1952, 2 A.E.R. at p. 483 per Lord Simonds and 1952 A.C. at p. 47, 1952, 2 A.E.R. at p. 483 per Lord Radcliffe. As I understand it these expressions are intended to cover benefits to the deceased which, even if collateral to the gift, are taken by him at the expense, in fact if not in law, in substance if not

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in form, of the full and complete beneficial enjoyment of the estate or interest given of which it is susceptible.

It must be remembered that in the corresponding enactment the words are " to the entire exclusion . . . . of any benefit to him by contract or otherwise " and that the expression " or otherwise " has been construed as covering only benefits *ejusdem generis* with benefits by contract and accordingly legally enforceable. *Attorney General* v. *Seccombe*, 1911, 2 K.B. 688 at p. 703 cf. *Attorney General* v. *Sandwich*, 1922, 2 K.B. 500, at p. 519. But Section 102 (2) (d) is expressed in words which make such a limited construction impossible. It reaches to benefits which are not enforceable at law or in equity. It must also be borne in mind that to avoid liability to duty it is necessary that from the time of the gift onwards the donor or any benefit to him must be excluded.

The facts upon which the present appeal turns are stated, somewhat barely, in the special case, which annexes the deed of trust.

Under Section 124 (7) the Court is 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 from them if proved at a trial. We are told by the special case that the deceased early in the year 1924 purchased certain lands constituting a grazing property known as Ellerston and that he did so with his own moneys and for his own benefit. Up to 30th June, 1924, the date as from which the trusts of the deed dated 1st September 1924 took effect, he used them for his own benefit. He had four infant children, three boys and a girl. By the deed, which described him as of Ellerston and gave his occupation as grazier, he declared that since such date he had held and thenceforth would hold the lands and the rents issues and profits thereof upon the trusts and with and subject to the powers and provisions thereinafter expressed concerning the same. The first clause described the deceased or other the trustee of the instrument as " the trustee " and conferred upon the trustee a discretionary power to retain or use the lands or to convert them and invest the proceeds upon such securities real or personal as the trustee in his uncontrolled discretion should think fit.

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

" forming part of the trust fund to or towards the share of any person or " persons therein under the trusts," and the power goes on to confer upon the trustee a number of incidental or auxiliary authorities.

There is an ample power to carry on every class of business relating to grazing farming or pastoral pursuits worked out with full ancillary powers. Included in the clause is a power enabling the deceased to purchase, notwithstanding that he is a trustee, all or any property comprising the trust fund or any part thereof by public auction or by private contract, provided in the latter case that the sale should be conducted by a specified pastoral company at a price and upon terms approved by the company or its nominee. The only other power that need be mentioned is one perhaps more closely touching the question for decision. It is contained in a paragraph providing that the trustee, in addition to reimbursing himself all expenses incurred in the administration of the Trust, should be entitled to remuneration for all work done by him in managing and controlling any property forming part of the trust fund or carrying on the business of a grazier or pastoralist or other business in the course of his administration of the fund in the same manner and as fully in all respects as if he were not a trustee of the deed.

It appears from the special case that from 30th June 1924 until some time in 1928 the deceased as trustee managed and controlled the property called Ellerston and conducted upon it the business of a grazier. But no live stock or plant is mentioned in the trust deed as part of the property vested in the deceased concerning which the trusts were declared and it does not appear how or from what resources it was acquired so as to become part of " the trust-fund." Nor does it definitely appear whether the deceased resided with his family upon the property Ellerston although it may be surmised that he continued to do so. In 1928 however the deceased sold Ellerston and discharged the encumbrances upon it. A small proportion of the net proceeds of the sale he invested upon mortgage but the greater part he invested in a grazing property called Glendon. He remained the sole trustee and he managed and controlled the property and the rest of the " trust fund." In his reasons for judgment given in the Supreme Court Street C.J. says " It would also appear from information " conveyed to the Court during the course of argument that the trustee " resided on the grazing property in question and, so far as outward and " visible signs were concerned, controlled, managed, used and administered " the same as if he were the absolute owner thereof, the resulting income " from each year being divided amongst the beneficiaries entitled thereto." After deducting outgoings and expenses including remuneration retained by the deceased the profits and income were divided by him into five equal shares. The special case says that he credited (which I take to mean credited in the account books of the trust), each of his four children with one equal share, crediting the fifth share to himself. The amounts credited to each such child were paid or applied by the deceased for or towards the maintenance and education of such child or were paid to the mother of such child for or towards his or her maintenance and education or were paid to such child after he or she had come of age. It would have been

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more satisfactory to know with more particularity what this meant in practice, but for the purposes of our decision it must be treated as excluding the deceased from all benefit from the application or expenditure of the children's shares of net income, all benefit that is other than the advantage of being relieved *pro tanto* of a father's duty to maintain and educate his children.

Under the clause relating to the trustee's remuneration the deceased received out of the income certain amounts which, says the special case, he fixed from time to time as being the amounts which should be received by him pursuant to that provision of the deed as remuneration for the work done by him in managing and controlling the property forming part of the trust fund and in carrying on the business of a grazier or pastoralist in the course of his administration of the trust fund. This statement appears to assume that the clause conferred upon the deceased as trustee a discretionary power to fix his own remuneration so that the quantum would not be open to review. But it is more than doubtful whether that effect should be given to the clause, which probably would be considered to contain no words clear enough for the purpose. However that may be the clause does authorise the deceased as trustee to deduct a remuneration and, unless the quantum of what he deducts is attacked as excessive, to retain it.

During the first six years of the trust the deceased deducted remuneration at the rate of £3,000 a year. In the depression year of 1931 he took no remuneration. In 1932 he deducted £1,000. During the next twelve years he deducted £500 a year and during the last three years of his life £100 a year. At the time of his death the net value of the trust fund was £71,900 of which £6,650 represented investments on mortgage and the rest comprised the grazing property called Glendon the stock plant and furniture the moneys at the credit of bank accounts and bookdebts.

On the foregoing facts it appears to me that the deceased did more than remain in possession and occupation of the Glendon property and the assets therewith for the purpose of performing his duties as trustee. He used the trust premises as the dwelling place of himself and his family, at the same time he obtained from the revenue consisting of the returns from the station a very substantial income as a remuneration for his management of the trust and he applied so much of the net income after providing for such remuneration as represented his children's four fifths interest in relief of his paternal obligations to maintain and educate them. This course of dealing represents what may be called a total indivisible situation, which for my part I do think ought to be broken up into component parts to be separately examined for the purpose of ascertaining whether possession and enjoyment of the interests given was assumed and retained to the entire exclusion of the deceased or of any benefit to him referable or attributable to the gift. At the same time I do not think that such analysis would make any difference in the result. But the fact is that the deceased placed himself in a position in which he enjoyed almost all the advantages and amenities that ordinarily flow from carrying on a sheep or cattle station from a homestead upon the property where the

owner dwells with his family. He obtained those advantages at the expense of limiting his own personal drawings in the first instance to the definite amounts he fixed as his own salary, dividing the net balance of profits into five parts and treating one only of them as his own to expend or apply at his pleasure and applying the others scrupulously to the maintenance education and benefit of his children or committing the money to his wife to do so, the consequence being, whether accidental or designed, that his paternal responsibilities were relieved or discharged *pro tanto.* Placing this complexion upon the facts, as I do, it does not appear to me material to inquire whether the trusts of the deed contemplated the deceased occupying such a position or whether the remuneration is, or is to be taken as, no more than a fair reward of his services or than would have been paid or payable to some other trustee. It can hardly be said that to be remunerated is not a benefit even if the remuneration is earned. Still less can it be said that to occupy as a dwelling the homestead of a sheep or cattle station which you carry on outwardly as if it were your own is no benefit. These are things which advantaged him beneficially. He did not hold them or derive them for others as a fiduciary.

Now the gift to his children seems to me to have consisted in the creation of an equitable tenancy in common in which he and they were the equitable tenants in common in equal shares. It is true that it was qualified or conditioned by powers of management in him as trustee including a power to charge remuneration. But it does not seem to me to be possible to work out a theory of the gift which would make it a gift of only an innominate and anomalous equitable right to call for one fifth each of the residue of the income and corpus after the deceased had enjoyed all the benefits which I have described, and by this means to treat such benefits as antecedent to the gift and incapable of being regarded as impairing or derogating from the gift or of being " referable " or " attributable " to it. To do this must do violence as well to the trusts contained in the deed as to the realities of the case. Further under the provision of the New South Wales Act it is beside the point that the benefits or part of them may have been taken or enjoyed in fact rather than derived from the terms of the trusts. What does matter is that the benefits do impair or derogate from the possession and enjoyment of the gift. And that leads to the final and decisive question namely whether it can be said of the undivided equitable shares of the children that possession and enjoyment of the kind of which the interest admitted was assumed and retained by the donee, to the exclusion &c. Of course in deciding this question the trusts for management and the provision for remuneration must steadily be borne in mind and so must the fact that net income was credited and applied as described. Further, while the relief *pro tanto* of the paternal obligation to maintain the children formed in this case part of what I have called the total indivisible situation created by the deceased, it must be borne in mind that the fact that a gift results in relieving the donor of parental responsibility is not in itself such a benefit as the provision contemplates. But I cannot think that the full possession of the station property, coupled with residence in the homestead, by the

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deceased and a preliminary salary from the returns before the ascertainment of divisible net profits, are indispensable conditions precedent to the possession and enjoyment by the donees of undivided equitable interests as tenants in common. In other words while the donor reaps such benefits such interests are not possessed and enjoyed to the full by the donees. That the benefits all come from the property, that is are a charge on or involve an abatement of the income thereof, seems plain enough.

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

I think that the appeal should be dismissed with costs.

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(b) Reasons for Judgment of Williams J.

This is an appeal from an order of the Full Supreme Court of New South Wales answering in the affirmative a question asked in a case stated under Section 124 of the Stamp Duties Act, 1920–1940 (N.S.W.). The question is whether the whole of the property which was at the date of the death of Leslie William Friend on 17th October 1947 subject to the trusts of a deed poll made on 1st September 1924 should be included in his estate for the purposes of the assessment and payment of death duties under that Act. The Supreme Court held that the property was dutiable because it fell within the provisions of Section 102 (2) (d) which provides that the dutiable estate shall include " any property comprised in any gift made by the " deceased at any time, whether before or after the passing of this Act, of " which *bona fide* possession and enjoyment has not been assumed by the " donee immediately upon the gift and thenceforth retained to the entire " exclusion of the deceased, or of any benefit to him of whatsoever kind or " in any way whatsoever whether enforceable at law or in equity or not and " whenever the deceased died." The meaning of this paragraph has been recently considered by the Privy Council in *Munro* v. *Commissioner of Stamp Duties*, 1934, A.C. 61 and in *Commissioner of Stamp Duties N.S.W.* v. *Perpetual Trustee Co., Ltd.*, 1943, A.C. 425, and the meaning of the equivalent English provision has been the subject of an even more recent decision of the House of Lords, *St. Aubyn (L.M.) & Ors* v. *Attorney General (No. 2)*, 1951, 2 A.E.R. 473. In these decisions the Privy Council and the House of Lords have adopted the meaning placed upon the legislation by the Irish Courts in *In Re Cochrane*, 1905, 2 Ir. 626, 1906 2 Ir. 200, and particularly the judgment of Palles, C.B., in the lower court. A short analysis of the facts and effect of the decisions in the two cases in the Privy Council appear in the speech of Lord Simonds in the *St. Aubyn* case at pp. 481–483, and it is unnecessary to travel through them again. Referring to *Cochrane's* case in the *Perpetual Trustee* case at p. 441, Lord Russell said " Palles, C.B., " thought that the Crown's contention would be right if the subject-matter " of the gift was the entire equitable interest in the £15,000. The question " was whether that was correct in law, a question which turned on the " word ' gift.' Gift in the context meant beneficial gift. A person who

" declares trusts of property only gives the beneficial interests covered by " the trusts. Everything else he retains and does not give ; and there is an " entire exclusion of the donor from the property taken under the " disposition of the gift. Sir Henry Cochrane obtained no benefit either by " way of reservation out of the gift, or collaterally in reference to the gift." At pp. 445, 446, Lord Russell, after giving reasons why *Cochrane's* case was distinguishable from *Grey (Earl)* v. *A.G.*, 1900 A.C. 124, said " There is " nothing laid down as law in that case (that is *Grey (Earl)* v. *A.G.*) which " conflicts with the view that the entire exclusion of the donor from " possession and enjoyment which is contemplated . . . . is entire exclusion " from possession and enjoyment of the beneficial interest in property which " has been given by the gift, and that possession and enjoyment by the " donor of some beneficial interest therein which he has not included in the " gift is not inconsistent with the entire exclusion from possession and " enjoyment which the sub-section requires." This passage from the judgment of Lord Russell is cited with approval in the speeches of Lord Simonds and Lord Radcliffe in the *St. Aubyn* case. Of the equivalent English legislation Lord Radcliffe, after referring to *Munro* v. *Commissioner of Stamp Duties*, 1934, A.C. 61, the *Perpetual Trustee Co., Ltd.* case and *Cochrane's* case, said at p. 497, " All these decisions proceed on a common " principle, namely, that it is the possession and enjoyment of the actual " property given that has to be taken account of, and that if that property " is, as it may be, a limited equitable interest or an equitable interest " distinct from another such interest which is not given or an interest in " property subject to an interest that is retained, it is of no consequence for " this purpose that the retained interest remains in the beneficial enjoyment " of the person who provides the gift."

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

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lease it or any part thereof, to sell it or any part thereof, to mortgage it or any part thereof, to exchange it or any part thereof, and to appropriate and partition any part of it to or towards the share of any beneficiary and for that purpose to fix the value of such real or personal property so appropriated as the trustee should think fit and to charge any share with such sums by way of equality of partition as he might think fit.

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

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

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

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

If this was the true nature and extent of the gifts to the children, bona fide possession and enjoyment of their income, to the extent to which they could possess and enjoy such a gift, was assumed by them immediately upon the gift and thenceforth retained to the entire exclusion of the settlor. The shares of the children in each distribution of income were credited to their separate accounts and became their absolute property. The fact that the settlor was able to apply this income for or towards their maintenance and education whilst they were under twenty-one would not make the property dutiable. The settlor was thereby relieved, at least to some extent, of a moral obligation to provide for them until they attained twenty-one and of a legal obligation to do so under the Deserted Wives and Childrens Act 1901, until they were over sixteen. The power so to apply the income was an advantage to the settlor, *Jodrell* v. *Jodrell*, 14 B. at p. 413. At the date of the deed no such power existed. The deed itself was silent and the income of property of an infant which had vested but was liable to be divested was not income within the meaning of Section 18 of the Trustee Act, 1898 (N.S.W.), *In re Buckley's Trusts*, 22 Ch. Div. 583; *Parker* v. *Dowling*, 16 S.R. (N.S.W.) 234. Power so to apply the income was later conferred by Section 43 of the Trustee Act, 1925 (N.S.W.). But the advantage to the settlor flowing from this statutory power was not a benefit within the meaning of Section 102 (2) (d) of the Stamp Duties Act. The benefits which the section contemplates are benefits which are in some way referable (to use Lord Tomlin's word in the *Munro* case) or attributable (to use Lord Russell's word in the

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Perpetual Trustee case) to the gift the settlor has made, per Lord Simonds in the *St. Aubyn* case at p. 483. Any advantage derived by the settlor from the use of Section 43 of the Trustee Act, 1925, was an advantage derived from an independent title and not a benefit referable or attributable to the gifts to the children. So too, on this construction of the deed, any benefit the settlor could derive from exercising his power to purchase the trust property would be something that the settlor had retained out of his previous absolute ownership not forming part of the gifts to the children and something to which the gifts to the children were subject. And any other benefit which it was possible for the settlor to derive from his use of other powers contained in the deed could be placed in the same category.

But, in my opinion, that is not the true construction of the deed. Its true effect was to create an immediate equitable tenancy in common between the settlor and the children in the subject land in equal shares. The children were infants at the time. At the date of the death of the settlor all but one had attained the age of twenty-five years and that one has since attained that age. The deed made no provision for the distribution of the income amongst the beneficiaries. It made no provision for the distribution of the capital amongst them apart from the power of appropriation at the discretion of the trustee already mentioned. The rights of the beneficiaries to income and capital flowed from the creation of the tenancy in common and were incidental to that relationship. The children became from the date of the execution of the deed equitable tenants in common of the land in the fullest sense. Whilst the lands remained undivided the legal estate remained in the trustee for he had powers of sale and management, etc., the exercise of which, if he chose to exercise them, required that he should have the legal estate.

But each of the children had from the date of the execution of the deed an absolute right under the Partition Act, 1900 (N.S.W.) to apply to the Court for partition or for a sale in the discretion of the Court in lieu of partition. The right of one tenant in common to apply to the Court of Equity for a partition was an absolute right before there was any Partition Act. Before the Act the Court had no discretion to refuse partition or to order a sale. Difficulty in making a partition was no objection to the decree, *Warner* v. *Baynes* (1750) Ambler 589 ; *Parker* v. *Gerard* (1754) Ambler 236. In the first mentioned case the manifest inconvenience of partitioning a cold bath for public use did not deter the Court. The Partition Act, 1900, gave the Court a discretion to order a sale in lieu of partition. A tenant in common still had an absolute right to an order for partition unless the Court in its discretion ordered a sale : *Mayfair Property Co.* v. *Johnson*, 1894 1 Ch. D. 508 at pp. 513, 514. The equitable interest of the children under the deed were defeasible if they died under twenty-five without leaving issue surviving, but this was no bar to an immediate suit, *Greenwood* v. *Percy*, 26 B. 572, *Hurry* v. *Hurry*, L.R. 10 Eq. 346. The Partition Act, 1900, was repealed by Section 17 (2) of the Conveyancing Amendment Act, 1930 (N.S.W.), and its place was taken by Part IV, Division 6, of the Conveyancing Act,

1919–1930 (N.S.W.), giving co-owners a right to apply to the Court to have property other than in chattels vested in trustees upon the statutory trust for sale.

Co-owners would appear to be in a stronger position under this Act than they were under the Partition Act. The Court had no jurisdiction to make an order for partition or sale under the Partition Act where the instrument contained overriding trusts to manage the property and divide the profits, *Taylor* v. *Grange*, 15 Ch. D. 165, or a subsisting imperative trust for sale which in equity converted the property into personalty, *Biggs* v. *Peacock*, 22 Ch. D. 284. It would seem that under Part IV, Division 6, of the Conveyancing Act co-owners may apply to the Court in spite of such obstacles and that, if the Court makes an order, the order will override the trusts of the instrument, *Re B. Cordingley*, 48 S.R. (N.S.W.) 248. But even under the Partition Act a discretionary power of sale was not a bar: *Boyd* v. *Allen*, 24 Ch. D. 622.

The present deed contained no active management trust. It contained a mere power to carry on business or not at the discretion of the trustee. By the deed the settlor declared that he or other the trustee or trustees for the time being should hold the land upon trust either to retain and use it or at the absolute discretion of the trustee to sell it and invest the proceeds of sale. Although these provisions were in the form of a trust, they conferred upon the trustee an absolute discretion to retain the land or to sell it and they were in reality powers in the form of trusts giving the trustee an absolute discretion whether to sell or not: *In re Hotchkys*, 32 Ch/D. 408 at p. 416. There was therefore no imperative trust for sale. The powers conferred by the trustee by the deed were subsidiary to the rights of the children as tenants in common to allow the property to remain undivided or to bring about a partition or sale and division of the proceeds.

On this construction of the deed, which is to my mind the true one, it contained benefits for the settlor referable and attributable to the gifts to the children. In particular the settlor retained the right to manage the trust property including the undivided shares of the children and to fix his own remuneration within reason for doing so. In New South Wales Section 86 of the Wills Probate and Administration Act, 1898–1947, authorises the Probate Court to remunerate trustees of wills for their pains and troubles in administering the estate, but there is no statute authorising the Court to remunerate the trustees of deeds. The deed itself must authorise such remuneration. Otherwise the trustee must carry out his duties without remuneration. The authority contained in the deed for the trustee to remunerate himself was in the nature of a beneficial gift to the settlor: *Commissioner of Stamp Duties* v. *Pearse*, 1951 A.L.R. 684. It was an authority to manage the property he had given the children and remunerate himself for doing so. It was payable as to four-fifths out of the income of the property which he had given the children. It was a benefit to the settlor directly referable and attributable to the gift.

One such benefit is sufficient to make the property comprised in the gifts to the children part of the notional estate of the deceased. The power

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of the settlor so to remunerate himself was the most important benefit referable and attributable to these gifts. Another was the power of the settlor to purchase the trust property which included the property given to the children at public auction or by private contract. At a sale by public auction properly advertised and conducted the settlor would have to pay full value and the deed contained provisions directed to ensuring that he would also have to pay a proper price if he purchased by private contract. But a power for a trustee to purchase trust property would be a benefit to him although he had to pay full value. In the present case the decision whether to sell by public auction or private contract rested with the settlor. The decision whether to sell the whole or part of the trust property also rested with him. He had in effect a right of preemption. Apart from the clause the settlor, whilst he remained a trustee, could not have purchased any part of the trust property. The clause was unlike the provision under discussion in *Way* v. *Commissioner of Stamp Duties (N.S.W.)*, 79 C.L.R. at pp. 495–496 (and on appeal in the Privy Council). For there the settlor had no right to acquire any part of the trust property. He had a right to sell his own property to the trust but only at a discount. The benefit from the exercise of that power was a benefit to the settlement and not to the settlor. It was a power which, as Lord Radcliffe pointed out in the Privy Council, did not extend far enough to reach the trust property. The present power was a power to purchase the trust property. Clearly, therefore, it reached it, and the authorities cited in *Re Pearse*, *supra*, show that a dispensation in a trust instrument which authorises a trustee to obtain a payment out of the trust property, and a fortiori to purchase part of it, even for full value, is a benefit to the trustee ; *Edwards* v. *Edwards*, 1 Jur. 654, at p. 655. The learned judges of the Supreme Court found other benefits but it is unnecessary to seek further.

I would dismiss the appeal.

No. 6 (*c*). Judgment of Webb J., 8th May, 1952.

(c) Reasons for Judgment of Webb J.

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

As appears from *Munro* v. *Commissioner of Stamp Duties* (1934 A.C. 61 at 67) ; *Commissioner of Stamp Duties* v. *Perpetual Trustee Co., Ltd.* (1943 A.C. 425 at 440) ; and *St. Aubyn (L. & M.) & Ors.* v. *A.G. (No. 2)* (1952 A.C. 15 at 29), and the authorities referred to in those cases, the position is that a gift is not brought for duty purposes within the estate of the donor on his death unless some benefit was reserved to him *out of or referable or attributable to the gift.* If a whole was given but a part reserved the whole is part of the estate for duty purposes. This is perhaps easy to state, but it is difficult to apply in some cases, the difficulty being to determine from the words used in making the gift exactly what was given, and what was retained.

Now by clause 2 of this deed of trust the children were made equitable tenants in common of the capital and interest of the trust fund : they were

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

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

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

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

I would allow the appeal.

(d) Reasons for Judgment of Fullagar J.

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

(e) Reasons for Judgment of Kitto J.

The Appellant is the executor of the estate of one Leslie William Friend, deceased, who died in 1947. In 1924 the deceased by deed declared himself a trustee of certain lands constituting a grazing property known

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as Ellerston and the rents issues and profits thereof for himself and his four named children as tenants in common in equal shares, with a provision that if any child should die under twenty five without leaving a child or children him or her surviving the original and any accrued share of the child so dying should be held upon trust for the others of the named children and the deceased as tenants in common in equal shares. The children were all infants at the date of the deed, but three of them attained twenty five before the death of the deceased and the fourth has attained that age since.

The deceased remained until his death the sole trustee of the deed, and as such he was invested by the deed with a number of express powers, some of which should be mentioned. He was empowered either to retain and use the trust lands or to sell them and invest the proceeds upon such securities, whether authorised trustee investments or not, as he should in his uncontrolled discretion think fit; to purchase land and stock, plant or other personal property; to manage any property the subject of the trust; to appropriate and partition any property forming part of the trust fund to or towards the share of any person under the trusts of the deed, fixing values as he should think fit; to remunerate himself for all work done by him in managing and controlling any property forming part of the trust fund or carrying on the business of a grazier or pastoralist or other business in the course of his administration of the trust fund in the same manner and as fully in all respects as if he were not a trustee; to purchase, notwithstanding that he was a trustee, all or any property comprising the trust fund or any part thereof by public auction or private contract, provided that the sale should be conducted by a specified company or made at a price and upon terms and conditions approved by that company or by a valuer or nominee appointed by it; to carry on every class of business relating to grazing, with power to retain and employ in any such business the capital of the trust fund or any part thereof; to employ any person at such remuneration as he should think proper and generally to act in all matters relating to any such business as if he were absolutely entitled thereto; and to convey appropriate or dedicate any part or parts of the trust property for public or charitable purposes either gratuitously or for such consideration as the trustee might think proper to accept.

The deceased did not at any time exercise the power to make an appropriation or partition to or towards the share of any person, the power to purchase any part of the trust property, or the power to convey, appropriate or dedicate property for public or charitable purposes. But the other powers I have mentioned he did exercise. He retained Ellerston and conducted a grazing business thereon until 1928; and when in that year he sold the property, he invested the proceeds, partly in another grazing property, Glendon, which he managed until his death, and partly on mortgage. He fixed his own remuneration from time to time for managing and controlling the properties and carrying on the grazing business of the trust thereon. The income of the properties (after deducting all outgoings and expenses including his remuneration) was divided into five parts, and

one such part was credited to each of the four children and one to the deceased. The amounts credited to each child while an infant were paid or applied by the testator, or paid to the child's mother, for or towards the maintenance and education of the child, and the amounts credited to adult children were paid to them.

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

The ground, and the only ground, upon which the Commissioner relied was that the beneficial interests which passed from the deceased by the deed were, within the meaning of Section 102 (2) (d) of the Stamp Duties Act, 1920–1940, property comprised in gifts made by the deceased of which *bona fide* possession and enjoyment was not assumed by the donee immediately upon the gifts 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.

It follows from *Commissioner of Stamp Duties* v. *Perpetual Trustee Co.* (*Hall's* case) 1943 A.C. 425, and it was not disputed on this appeal, that no property can be said to have been comprised in a gift made by the deceased by the deed of 1924, except the beneficial interests which the children of the deceased took by the operation of that deed. *Hall's* case finally established that "gift" in Section 102 (2) (d) means beneficial gift, and that therefore, where a gift is made by means of the creation of a trust, only the beneficial interests which pass under the trust to persons other than the donor are to be regarded as property comprised in the gift. That being so, the crucial question in this case must be whether each of the donees, the four children, assumed and retained *bona fide* possession and enjoyment, to the entire exclusion of the deceased and of any benefit to him, of the beneficial interest which he or she took by the operation of the deed.

This question is not to be answered in the negative simply because it is possible to point to benefits to the deceased connected in some way with the trust property, or even to benefits connected with interests in the trust property which were the subject matter of the gifts. The cases establish that benefits which the deceased in fact enjoyed after the date of the gift do not attract Section 102 (2) (d) unless, having regard to the nature and incidents of the property given, possession and enjoyment of that property was capable of being so assumed and retained by the donee as to deny those benefits to the donor. In other words, the provision

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applies only where the deceased enjoyed benefits which impaired in some manner or degree the full and untrammelled assumption and retention of that possession and enjoyment of the property given of which its character admitted : *Munro* v. *Commissioner of Stamp Duties*, 1934 A.C. 61 ; *Hall's* case, supra ; *St. Aubyn* v. *Attorney General*, 1952 A.C. 15.

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

The proposition that in every case of property held in undivided shares the owner of each share derives a benefit from each of the other shares is one which I should not have thought self-evident. It seems to be assumed that the case is analogous to that of two houses divided by a party wall. But suppose that this is so ; if the owner of both houses makes a gift of one and retains the other, it may be said that the donor thereafter derives, by reason of the party wall, a benefit from the property given ; but I suppose no one would suggest that on that account alone the case would fall within Section 102 (2) (d). With great respect to their Honours, the view they have expressed in this case appears to me to overlook the force of the word " exclusion." From what must there be an entire exclusion of the donor and any benefit to him ? Lord Sumner gave the answer in *Attorney General* v. *Seccombe* (1911), 2 K.B. 688 at 699–700, when he pointed out that the word " exclusion " in the provision refers to the bona fide possession and enjoyment of the property given, just as the word " assumed " does. That is why the only benefit that matters for the purposes of Section 102 (2) (d) is a benefit which interferes with or encroaches or trenches upon that possession and enjoyment of which the property given is capable. It follows that it is quite immmaterial that benefits have accrued to the deceased, if it is nevertheless true that there was exclusive assumption and retention by the donee of all the possession

and enjoyment of the subject matter of the gift which in the nature of things could be had; the section comes into play only where the benefits have been such that possession and enjoyment by the donee was, because of them, not full and exclusive. The most ample possession and enjoyment that can be had of an undivided interest in property must necessarily leave co-owners in enjoyment of whatever benefits may be produced by their own interests as interests in an undivided whole. Those benefits cannot be regarded as benefits which bring the case within Section 102 (2) (d).

I turn, then, to the second ground upon which the Commissioner sought to bring the case within Section 102 (2) (d). That was that the deceased, in exercise of the power in that behalf conferred upon him by the deed, retained remuneration out of the gross income of the trust for his management of the grazing businesses. Perhaps the benefit relied upon might be more accurately described as the remunerative employment the deceased gave himself by exercising his power as sole trustee to retain Ellerston for some years, and later to buy Glendon, and to carry on grazing businesses on those properties, remunerating himself out of trust moneys for his work of management. That there was in all this a benefit to the deceased I would not deny. But did it trench upon the possession and enjoyment of the equitable interests to which the deed of 1924 entitled the four children ? I should have thought not. There is nothing to suggest that the deceased exercised his powers at any point in a manner different from that in which an independent trustee would have exercised them, or that he awarded himself a greater remuneration on any occasion than he would have had to pay to an independent manager or than his own services were worth. Nor did the power which the deed gave him extend to awarding himself remuneration beyond the value of his services, for he could not under the provisions of the deed bind the beneficiaries by any determination of his remuneration which he might make; *In re Fish* (1893), 2 Ch. 413. 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 my opinion should be given to the Commissioner's contention on this part of the case may be stated quite shortly. It is that whatever benefit the deceased got in the way of remuneration was a benefit out of the gross income of the trust property; that, so far as appears, the remuneration never exceeded what was a proper deduction to be made from gross income in order to ascertain the net income; that the receipt of it by the deceased therefore did not diminish the net income; and that, so long as the deceased was completely excluded from a full four-fifths of the net income derived and ascertained in accordance with the deed, the possession and enjoyment which it was possible for the donees to assume and retain, having regard to the nature of the property given, was entirely unimpaired by the taking of remuneration by the deceased.

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

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

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

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

Finally it was said on behalf of the Commissioner that the deceased excluded his children from the physical possession of the grazing properties which at different times were subject to the trusts of the deed, and that Section 102 (2) (d) is applicable for that reason. What is referred to, I presume, is the state of affairs mentioned in the judgment of Street, C.J., as having been described to the Supreme Court during the course of argument, namely that the deceased " resided on the grazing property and, so far as " outward and visible signs were concerned, controlled, managed, used and " administered the same as if he were the absolute owner thereof." That, of course, is what a managing trustee would necessarily do ; and it is exactly what the deceased would have had to employ someone else to do if he had

not managed the property himself. Even if the statement made to the Supreme Court had been incorporated in the stated case, it would not have justified an inference, nor, presumably, was it made for the purpose of suggesting, that the deceased derived a benefit from the property otherwise than conformably with the provisions of the deed. If the Commissioner had intended to make any such suggestion he would surely have made a specific allegation so as to give the Appellant, as a matter of elementary fairness, an opportunity to dispute the allegation and have an issue directed to be tried under Section 124 (6). Since he did not do this, it would not be right to decide the case on any other footing than that the benefits relied upon accrued to the deceased from the due exercise of his fiduciary powers and not otherwise.

By the residence and so forth which the deceased enjoyed within the limits of his powers under the deed he undoubtedly derived benefits. If the property comprised in the gift had consisted of four one-fifths of the fee simple of the trust property (whether legal and equitable or only equitable), and the donees, pursuant to a collateral agreement or otherwise, had allowed the deceased to have the benefits which in fact he enjoyed, the case would have fallen clearly enough within Section 102 (2) (d). But it seems to me that, in order to hold that four-fifths of the fee simple was the property comprised in the gift, one would have to construe the deed, not as a whole, but as if it were divided into two sections, effecting two quite distinct transactions ; the first transaction being a disposition in equity of aliquot parts of the fee simple, and the second transaction consisting of a set of provisions operating to exact from the disponees a power for the disponor to derogate from the possession and enjoyment which an undivided share of the equitable fee simple enables the owner of it to have and keep to himself. I cannot construe the deed in that way. It was a deed poll, and the benefits which the deceased derived in accordance with its provisions were benefits which the donees neither permitted him to derive nor had any power to deny him. They were in this position of impotence, not by their own choice, but because the deceased, in exercise of his right to give exactly what interests he liked and withhold exactly what he liked, had chosen to give them interests so hedged about as not to enable them to exclude him from those benefits. It was for him, when framing his deed, to delimit the interests he was parting with ; and he did delimit them, not by any one part of the deed considered by itself, but by the entirety of its provisions. The donees had no voice in deciding to what extent their interests should be subject to rights, powers or privileges retained by the deceased. They got interests which were limited *ab initio*, by the terms of their creation ; and the limits were such that the interests were inherently insusceptible of being so possessed and enjoyed as to preclude the deceased from deriving those benefits which in fact he derived.

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

In the Privy Council.

No. 7. Order in Council granting Special Leave to Appeal, 18th July, 1952.

No. 7.

Order in Council granting Special Leave to Appeal.

AT THE COURT AT BUCKINGHAM PALACE.

The 18th day of July, 1952.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT. MR. PEAKE.
MR. MACMILLAN. MR. LENNOX-BOYD.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 9th day of July, 1952 in the words following, viz. :—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Norman Clyde Oakes in the matter of an Appeal from the High Court of Australia between the Petitioner Appellant and Commissioner of Stamp Duties of New South Wales Respondent setting forth (amongst other matters) : that the Petitioner desires special leave to appeal from a Judgment dated the 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 Act 1920–1940 : that the questions involved relate to the incidence of death duty upon the creation by a father of equitable interests in a grazing property in favour of his children : that the Testator (who died on the 17th October 1947) had on the 1st September 1924 executed a Declaration of Trust concerning certain lands then being the property of and being worked as an entirety by the Testator on his own behalf as a grazing property known as "Ellerston" in New South Wales : that the Testator 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 : that from 1928 until his death the Testator as sole trustee managed the Glendon property and carried on the business of a grazier or pastoralist and received out of the income certain remuneration fixed by himself : that the profits and income of the properties subject to the Trusts of the Deed after deducting therefrom all outgoings and expenses (including the remuneration retained by the Testator) were divided by the Testator into five equal shares and the Testator credited each of his four children with one such equal share crediting

the fifth share to himself: that the Commissioner of Stamp Duties for the purpose of assessing the death duty included in the Testator's estate the whole of the property which was at his death subject to the trusts: that the Petitioner contended that there should have been included one-fifth only of the net value of such property and a Case was stated for the opinion of the Supreme Court of New South Wales which on the 13th September 1951 upheld the assessment of the Commissioner: that the Petitioner appealed to the High Court of Australia which on the 8th May 1952 gave Judgment by a majority dismissing the appeal: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the High Court of Australia dated 8th May 1952 and such further or other relief as to Your Majesty in Council may seem meet:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the High Court of Australia dated the 8th day of May 1952 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

F. J. FERNAU.

In the Privy Council.

No. 36 of 1952.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

NORMAN CLYDE OAKES ... *Appellant*

AND

COMMISSIONER OF STAMP DUTIES OF THE STATE OF NEW SOUTH WALES *Respondent.*

RECORD OF PROCEEDINGS

STEPHENSON HARWOOD & TATHAM,
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