

2, 1956

UNIVERSITY OF LONDON
W.C.1.
18 FEB 1957
INSTITUTE OF ADVANCED
LEGAL STUDIES
No. 33 of 1955

In the Privy Council.

45928

ON APPEAL FROM THE SUPREME COURT
OF NEW SOUTH WALES

BETWEEN

GEORGE JOHNSON PERPETUAL TRUSTEE COMPANY
(LIMITED) and GEORGE EDGERLEY JOHNSON
Trustees of the Will of FRANK JOHNSON (deceased) ... APPELLANTS

AND

THE COMMISSIONER OF STAMP DUTIES RESPONDENT

— AND BETWEEN —

THE COMMISSIONER OF STAMP DUTIES APPELLANT

AND

GEORGE JOHNSON PERPETUAL TRUSTEE COMPANY
(LIMITED) and GEORGE EDGERLEY JOHNSON
Trustees of the Will of FRANK JOHNSON (deceased) ... RESPONDENTS.

CASE FOR THE APPELLANTS

and Case for the Appellant as Respondent to the Cross Appeal.

RECORD

1.—This is an Appeal by the Appellants and a Cross Appeal by the Respondents by leave of the Supreme Court of New South Wales from a Judgment of that Court given on the 20th April 1955. The Appeal and cross Appeal arise upon a Case Stated by the Respondent under Section 124 of the Stamp Duties Act 1920-1952 of the State of New South Wales (hereinafter referred to as "The Stamp Duties Act") and concerns the constitutional validity of certain provisions introduced into that Act by the Stamp Duties Amendment Act 1952 whereby it was sought to levy death duty upon property in which a deceased or any other person had had an estate or interest limited to cease on the death of the deceased or at a time determined by reference to that death.

pp. 17-18

pp. 11-17

pp. 1-10

2.—(1) The question for decision on the Appeal is:—

Whether Section 102 subsection (2) (g) and Sections 105A, 114A, 115A, and certain ancillary sections and subsections of the

RECORD

Stamp Duties Act are valid enactments of the Parliament of New South Wales.

(ii) The question for decision on the Respondents' cross-Appeal is :

Whether Section 102 subsection (2A) of the Stamp Duties Act insofar as it purports to bring to duty property situate outside New South Wales at the date of the death of a deceased person which if it had been situate in New South Wales would be deemed to be included in the estate of such deceased by virtue of the operation of Section 102, subsection (2) (g) of the Stamp Duties Act is invalid.

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3.—The relevant provisions of the Stamp Duties Act are :—

Sections 4, 5, 100 in its definitions of Administrator and Administration, Section 101 (D), 101 (E), Section 102 and paragraph 1 (a) thereof, Section 102 (2), Section 102 (2A), Section 102 A, sub-paragraphs 1, 2, and 3, Section 102 B, Sections 104, 105, 105A, 114, 114A, 115, 115A, 116, 120, 124, 144.

p. 12, ll. 11-17

4.—Section 5 of the Constitution Act 1902 of the State of New South Wales provides :—

“ 5. The Legislature shall, subject to the provisions of the Commonwealth of Australia Constitution Act, have power to make laws for the peace, welfare and good government of New South Wales in all cases whatsoever.”

p. 2, ll. 2-4

5.—Frank Johnson (hereinafter called “ the testator ”) died on the 20th day of August, 1936, being then domiciled in the State of New South Wales and leaving property within the said State.

p. 2, ll. 5-8

6.—Probate of the Will and three Codicils thereto of the testator was granted on the 29th day of December, 1936, to the Appellants the executors named in the said Will and Codicils and the present trustees thereof.

pp. 4-8

7.—By his said Will the testator after the bequest of certain pecuniary legacies which are not material to this Appeal gave devised and bequeathed all his real and personal estate upon trust to sell with power to postpone and to pay his debts funeral and testamentary expenses State Probate Federal Estate and all other duties and the said legacies and to invest and to stand possessed of the investments and to hold the net income from the residuary estate upon trust to pay one-third of the said income to his wife Sarah Johnson during her life and upon trust to divide the residue of the income from his residuary estate (including after the death of the said Sarah Johnson the income to which she was entitled) into four equal parts and to hold such income upon trust to pay one of such parts to his son

George Johnson for his life and to pay another to his daughter Agnes Mary Smith for her life and to pay another of such parts to his daughter Edith Barnett for her life and to pay the remaining part to his daughter Beatrice Sarah Luker for her life with gifts over of the income of a child dying before the distribution of the residuary estate and upon trust as to the corpus of the residuary estate for such of the issue of the said four children of the testator as should be living at the death of such children respectively and should attain the age of twenty-one years in equal shares per stirpes as tenants in common. It is not considered that any other provision of the
10 said Will is relevant to the matters raised in this Appeal.

8.—The testator made three Codicils to his said Will none of the provisions of which are considered relevant to the matters raised in this Appeal. pp. 8-9

9.—The said Sarah Johnson died on the 8th day of December, 1952, being then domiciled in the State of New South Wales and leaving property within the said State. p. 2, ll. 11-13

10.—At the date of death of the said Sarah Johnson the executorial duties in respect of the estate of the testator had been carried out and the residuary estate vested in the Appellants comprise (in addition to certain
20 real estate situate in Queensland which is not material to the matters raised in this Appeal) real estate in New South Wales valued at the date of death of the said Sarah Johnson at £15,000, and personal estate consisting of shares in public companies and Commonwealth Inscribed Stock and debts due by a Proprietary Company to the Appellants. The total value of the said property and assets at the date of death of the said Sarah Johnson was £97,639 14s. 9d. p. 2, ll. 14-26

11.—The said Commonwealth Inscribed Stock was at the date of death of the said Sarah Johnson recorded in the Registry of Inscribed Stock at Sydney in the State of New South Wales. The said debtor of the estate
30 of the testator was at the date of death of the said Sarah Johnson a Company duly incorporated in the State of New South Wales and carrying on business in that State. Of the said shares in public companies certain of them were in public companies incorporated in the State of New South Wales and upon Share Registers situated in New South Wales and certain of them were in public companies incorporated in the State of Victoria and upon share registers in the State of Victoria. In the case of shares in British Tobacco Company (Australia) Limited the said Company was incorporated in the State of Victoria but the shares therein held in the estate of the testator at the date of death of the said Sarah Johnson were upon the Register
40 situated in the State of New South Wales. p. 2, ll. 33-36
p. 3, ll. 1-3
p. 2, ll. 27-32
pp. 9-10
p. 10, l. 13

RECORD

p. 3, ll. 4-7

12.—At the date of death of the said Sarah Johnson two of the Appellants, namely, George Johnson and George Edgerley Johnson were domiciled and resident in the State of New South Wales. The third Appellant, Perpetual Trustee Company (Limited) was incorporated and carried on business in the said State.

p. 3, ll. 8-13

13.—The children of the testator George Johnson, Agnes Mary Smith, Edith Howes and Beatrice Sarah Luker, were all living at the date of the death of the said Sarah Johnson and in consequence of her death are each entitled for their respective lives to one-fourth of the income of the estate of the testator, having previously been each entitled to one-fourth of two-thirds of the said income. The said children are all domiciled and resident in the State of New South Wales. 10

p. 3, ll. 14-23

14.—On the basis of the foregoing facts the Respondent included in the dutiable estate of the said Sarah Johnson the whole of the property and assets of the estate of the testator above mentioned to the extent to which a benefit accrued or arose by cesser of the interest therein of the said Sarah Johnson limited to cease on her death and the Respondent valued such benefit at one-third of the principal value of the said property and assets, namely, at £32,297 0s. 0d. after making a certain adjustment not material to the matters raised in this Appeal. 20

p. 3, ll. 24-29

15.—For the purpose of assessing death duty in the estate of the said Sarah Johnson the Respondent treated the said property and assets to the extent to which a benefit accrued or arose by cesser of the interest therein of the said Sarah Johnson as an estate by itself and separately assessed duty thereon in the sum of £3,633 8s. 3d.

p. 3, l. 30-
p. 4, l. 3

16.—Notice of such assessment was issued by the Respondent on the 17th day of August, 1953, addressed to the Appellants and calling upon them to pay the said sum of £3,633 8s. 3d. as death duty properly payable by them. Death duty in accordance therewith was duly paid by the Appellants but they being dissatisfied with such assessment delivered to the Respondent notice in writing requiring him to state a case for the opinion of the Supreme Court of New South Wales. 30

pp. 1-10

p. 4, ll. 4-15

17.—In accordance with such notice and his obligations under Section 124 subsection (2) of the Stamp Duties Act the Respondent on the 2nd day of September, 1954, stated and signed a case for the opinion of the Supreme Court of New South Wales upon the following questions :—

- (1) Whether any part of the property included in the estate of the testator in which Sarah Johnson had an interest limited to cease on her death was liable to duty under and by virtue of the Stamp Duties Act, 1920-1952 ?

(2) If the answer to question (1) be in the affirmative—

- (a) what part of such property was liable to duty as aforesaid ?
 (b) what was the value attributable to such part thereof for the purpose of assessing death duty thereon in accordance with the provisions of such Act ?

18.—The case stated by the Respondent came on for hearing before the Full Court of the Supreme Court of New South Wales on the 8th and 9th days of November, 1954, before Maxwell J., Roper C.J. in Eq., and Herron J., when it was argued by the parties simultaneously with two other cases stated by the Respondent, namely, a case stated in the matter of the estate of Grace Isabel Forster deceased and a case stated in the matter of the estate of Maude Lilian Brady deceased. Both the last named cases stated involved questions similar to the questions raised in the case stated in the present matter. The case stated in the matter of the estate of Sarah Johnson deceased also involved the question whether, under the provisions of Section 102 subsection (2A) of the Stamp Duties Act property situate outside New South Wales in which a person domiciled in New South Wales had an interest limited to cease on his or her death could validly be included in the estate of such person to the extent to which a benefit accrued or arises by cesser of such limited interest for the purpose of assessment of death duty thereon.

19.—On the 20th April, 1955, the Supreme Court gave Judgment in all of the three Cases Stated and delivered one Judgment as furnishing the Reasons for its answers to the questions in each of the three cases. In the Case Stated in the estate of Sarah Johnson deceased, the Supreme Court answered the questions which are set out in paragraph 17 above as follows :—

- (1) Yes.
 (2) (a) “ Such of the said property as was situate at the date of the death of Sarah Johnson in New South Wales.”

20.—The Supreme Court held

- (a) That Section 102 subsection (2) (g) upon its true construction extends only to property situate in the State of New South Wales and which was so situate at the date of the death of the deceased.

Such a conclusion in their Honours' opinion followed from the decision in *The Commissioner of Stamp Duties v. The Perpetual Trustee Co. (Ltd.)* (Watt's case) (38 C.L.R. page 12) and from that in *Vicars v. The Commissioner of Stamp Duties* (71 C.L.R. page 309) and was greatly strengthened by reference to the provisions of Section 102 subsection (2A) of Section 102 A subsection (1) and to those of Section 105A subsection (1).

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p. 12, ll. 11-22

p. 12, ll. 23-36

p. 12, ll. 43-47

p. 13, l. 39-
p. 14, l. 2

p. 14, ll. 3-22

- (b) That, although the Legislature of New South Wales is a subordinate legislature so that legislation operating on a subject matter which has no relevant territorial connection with New South Wales falls outside its power and although under Section 102 subsection (2) (g) of the Stamp Duties Act property was brought to duty wherever the deceased may have died and wherever he may have been domiciled and wherever the remaindermen or Trustee in whom the property was vested may reside or be domiciled and no matter what the system of law by reference to which the instrument creating the interest or regulating the rights of the remaindermen was executed or to which it owed its force or by reference to which it could be administered, nevertheless, since upon its true construction Section 102 subsection (2) (g) extended only to property situated in the State of New South Wales at the date of the death of the deceased, the mere presence of the property within the jurisdiction was sufficient to empower the imposition of taxation upon it no matter what event was chosen as the reason or occasion for the imposition. 10
- (c) That Section 102 subsection (2A) insofar as it purported to extend the operation of Section 102 subsection (2) (g) to property situate outside New South Wales in which a person domiciled in New South Wales at his death had an interest limited to cease on his or her death was not a valid enactment of the Parliament of New South Wales, their Honours being of opinion that the domicile of the deceased in the State was irrelevant to the levy of duty on property which was not nor ever had been the property of the deceased person. 20

p. 12, l. 23-
p. 14, l. 2

21.—The Appellants submit that the reasoning of the Supreme Court appears to concede (and, in the Appellants' humble submission, correctly) that if Section 102 (2) (g) as drawn applied to property wherever situate it would be beyond the competence of the Parliament of New South Wales. It is only by a process of construing the statute so as to confine its operation to property within the State of New South Wales at the relevant date that their Honours have reached their conclusion that the Section is valid. The Appellants submit that such a construction is not warranted. The Statute, in the Appellants' submission, evidences an intention to impose duty on property wherever situate and discloses no criterion or standard of reference to which its unqualified language could be reduced so as to apply only to property situate within the State of New South Wales at the date of the death of the deceased that being the occasion on which the duty is sought to be levied. 30 40

p. 13, ll. 1-3

The Appellants submit that the Supreme Court's use of the cases referred to in paragraph 20 subparagraph (a) hereof is not justified. The present case is one in which it is sought to levy duty on property which has

not at any time been the property of the deceased, whereas in the cases cited the property in question was or had been the property of the deceased over whose estate legislature on the facts of those cases had complete control.

In any case, the Appellants would respectfully submit that insofar as *The Commissioner of Stamp Duties v. The Perpetual Trustee Co. (Ltd.)* (Watt's case) decided that the Section then under consideration should be construed as limited to property within the State at the date of the death of the deceased and that it was valid on that basis it was incorrectly decided. p. 13, ll. 1-2

10 22.—The Appellants further submit that in any case even if the Statute can be construed so as to confine its operation to property within the State of New South Wales at the date of the death of the deceased, the mere presence within the State of the property of the remaindermen does not furnish a sufficient nexus with the State of New South Wales to support a Statute levying tax on such property upon the death of a deceased wherever the death may take place and wherever the deceased had been resident or domiciled. In this connection the Appellants respectfully point out that the duty is not levied in respect of the presence in New South Wales of the remaindermen's property but solely in respect of the death of the person
20 entitled to a limited interest as defined. The Statute does not make the presence of the property in New South Wales in any sense a criterion of liability. It is only because of the process of construction adopted by the Supreme Court that the circumstance of the presence of the property in New South Wales obtains any significance.

23.—The Appellants submit that the Judgment of the Supreme Court upon the Case Stated insofar as it answers questions 1 and 2 (a) in the manner indicated is wrong and ought to be reversed for the following amongst other p. 16, ll. 26-40

REASONS

- 30 1. BECAUSE on its true construction Section 102 subsection (2) (g) of the Stamp Duties Act is invalid.
2. BECAUSE upon its true construction Section 102 subsection (2) (g) operates in circumstances and upon property which furnish no sufficient connection with the State of New South Wales as to make the subsection a law for the peace, order and good government of New South Wales.
- 40 3. BECAUSE the reduction of the language of the subsection, or the introduction into it of any qualification or implication, so as to restrict its operation to property within the State of New South Wales at the date of the death of the deceased is unwarranted.
4. BECAUSE the Judgment of the Supreme Court in the respects now appealed from was wrong and ought to be reversed.

24.—The Appellant submits that the Judgment of the Supreme Court insofar as it held that Section 102 subsection (2A) of the Stamp Duties Act was ineffective to bring to duty property situate outside New South Wales but in which a person who died domiciled in New South Wales had had a limited interest as defined was correct and should be affirmed and the cross appeal dismissed for the following amongst other

REASONS

- (1) BECAUSE on its true construction Section 102 subsection (2) (g) of the Stamp Duties Act is invalid.
- (2) BECAUSE even if it be assumed that Section 102 10 subsection (2) (g) is valid, it is beyond the legislative competence of the Parliament of New South Wales to levy duty on property outside New South Wales in which a person who dies domiciled in New South Wales had an estate or interest limited to cease on his death or at a time determined by reference to his death.
- (3) BECAUSE in relation to the law constituted by Section 102 subsection (2A) in association with Section 102 (2) (g) the domicile of the deceased person in New South Wales at the date of his death does not furnish a sufficient nexus with the 20 constitutional power of the State.
- (4) BECAUSE the Reasons given by the Supreme Court of New South Wales were right.

K. S. JACOBS.

In the Privy Council.

No. 33 of 1955.

ON APPEAL FROM THE SUPREME COURT OF NEW
SOUTH WALES.

BETWEEN

GEORGE JOHNSON PERPETUAL TRUSTEE
COMPANY (LIMITED) and GEORGE
EDGERLEY JOHNSON Trustees of the Will
of FRANK JOHNSON (deceased) ... APPELLANTS

AND

THE COMMISSIONER OF STAMP DUTIES
RESPONDENT

— AND BETWEEN —

THE COMMISSIONER OF STAMP DUTIES
APPELLANT

AND

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COMPANY (LIMITED) and GEORGE
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CASE FOR THE APPELLANTS
and Case for the Appellant as Respondent to the
Cross Appeal.

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