

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
10 MAY 1973  
25 RUSSELL SQUARE  
LONDON W.C.1

IN THE PRIVY COUNCIL

No. 20 of 1972

O N A P P E A L  
FROM THE HIGH COURT OF AUSTRALIA NEW SOUTH WALES  
REGISTRY

IN THE MATTER of the ESTATE of MILTON SPENCER ATWILL  
Deceased

- and -

IN THE MATTER of the STAMP DUTIES ACT 1920 - 1964

B E T W E E N :

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THE COMMISSIONERS OF STAMP DUTIES of the  
STATE OF NEW SOUTH WALES

Appellant

- and -

ALAN CAVAYE ATWILL  
MILTON JOHN NAPIER ATWILL  
AND DAVID NAIRN REID

Respondents

CASE FOR THE RESPONDENTS

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1. This is an appeal brought by special leave granted on the 24th day of May, 1972 from a Judgment and Order of the High Court of Australia dated the 3rd day of December, 1971. The High Court allowed an Appeal by the Respondents, Alan Cavaye Atwill, Milton John Napier Atwill and David Nairn Reid, executors of the Will of the late Milton Spencer Atwill (hereinafter called "the deceased") from a Judgment and Order of the Court of Appeal of the Supreme Court of New South Wales given and made on the 27th day of November, 1970 on a case stated by the Appellant for the opinion of

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pp.71-73

pp.32-33

pp. 1-10

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the said Court of Appeal under section 124 of the Stamp Duties Act 1920-1964 of the State of New South Wales.

pp. 4-10

2. On the 27th day of November 1953, the deceased paid to himself and to the said Alan Cavaye Atwill and Milton John Napier Atwill the sum of £200.0.0. to be held upon trusts declared by a deed made on the same day between the deceased of the one part and the deceased and the said Alan Cavaye Atwill and Milton John Napier Atwill (therein called "the Trustees") of the other part whereby, inter alia, the deceased directed and declared that the Trustees and their successors in office should stand possessed of the said sum of £200.0.0. upon the trusts therein declared subject to the discretions powers and provisions therein contained.

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3. The Trustees, in exercise of the powers conferred upon them by the said Deed, invested the said sum of £200.0.0. in the acquisition, by application and allotment, of twenty shares in the capital of Langton Pty. Limited, a company incorporated in the State of New South Wales. Thereafter they continued to hold the said shares until the date of the death of the deceased.

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4. The deceased died on the 24th day of November 1965 domiciled in the State of New South Wales. At the said date the value of the said shares was \$276,458.00. Probate of his Will was granted to the executors by the Supreme Court of New South Wales in its Probate Jurisdiction on the 2nd day of March, 1966.

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5. The Appellant included the said shares in the dutiable estate of the deceased and assessed death duty payable in respect of the said estate in the sum of One hundred and twenty four thousand nine hundred and thirty eight dollars and six cents (\$124,938.06). If the said shares had not been so included the death duty payable in respect of the estate of the said deceased would have been the sum of Forty seven thousand and twelve dollars and two cents (\$47,012.02).

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6. The relevant provisions of the Stamp Duties Act 1920-1964 are contained in section 102

paragraph (2) (a) and are as follows :-

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

. . . . .

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(2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by Will or by a Settlement containing any trust in respect of that property to take effect after his death, including a Will or Settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person:

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Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust.

. . . . . "

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7. The executors, being dissatisfied with the assessment of death duty by reason of the inclusion of the said twenty shares in the dutiable estate of the deceased, requested the Appellant to state and sign a case for the opinion of the Court of Appeal of the Supreme Court of New South Wales pursuant to the provisions of Section 124 of the said Act, the relevant part of which is as follows:-

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"124(1) Any person liable to the payment of duty in respect of any instrument, and any administrator or other person liable to the payment of death duty, who is dissatisfied with the assessment of the Commissioner may, within thirty days after the date of the assessment in the

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case of an instrument and within thirty days after notice of the assessment has been given to the administrator or other person in the case of death duty, and on payment of duty in conformity with the assessment, and of the sum of forty dollars as security for costs, deliver to the Commissioner a notice in writing requiring him to state a case for the opinion of the Court of Appeal.

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.....

(4) On the hearing of the case the Court of Appeal shall determine the question submitted, and shall assess the duty chargeable and also decide the question of costs.

..... "

8. The Appellant thereupon stated and signed a case on the 3rd day of April, 1970 in which the Court of Appeal was asked to answer three questions, namely :-

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pp. 1-10  
p.3 line 33  
to  
p.4 line 5

(1) Whether the twenty shares in Langton Pty. Limited should be included in the dutiable estate of the deceased for the purposes of the assessment and payment of death duty.

(2) Whether the amount of death duty which should properly be assessed in respect of the estate of the deceased is -

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- (a) \$124,938.06; or
- (b) \$47,012.02; or
- (c) some other, and if so what, amount.

(3) How are the costs of the case to be borne and paid.

9. The case so stated, in which the executors were appellants, came before the said Court of

Appeal (Asprey, Moffitt and Mason JJ.A.) on the 29th day of October, 1970. The Court delivered its Judgment on 27th November, 1970, unanimously answering the questions raised by the said case in the following manner, namely :-

p.33 lines  
7-14

- "(1) Yes;  
(2) \$124,938.06;  
(3) By the Appellants."

10 10. The Executors appealed to the High Court of Australia from the said Judgment and Order of the said Court of Appeal on the 17th day of December 1970. The appeal came on to be heard and was heard by the High Court (Barwick C.J. and Menzies, Windeyer, Owen and Walsh JJ.) on the 24th and 25th days of August, 1971. The High Court delivered its Judgment on the 3rd day of December, 1971 and by a majority (Barwick C.J., Windeyer J. and Owen J., Menzies and Walsh JJ. dissenting) allowed the Appeal and answered  
20 the questions in the case stated as follows:-

pp.33-36

pp.45-49  
pp.54-61  
pp.62-65  
pp.49-53  
pp.65-71

- (1) No.  
(2) (a) No.  
(b) Yes.  
(c) Unnecessary to answer.  
(3) By the Commissioner of Stamp Duties.

p.72 line 28  
to  
p.73 line 7

30 11. It was conceded by the Executors both in the said Court of Appeal and in the High Court that by the said Deed dated the 27th day of November, 1953 the deceased disposed of property namely the said sum of \$200.0.0. by a settlement containing a trust in respect of that property to take effect after his death.

12. The executors (now Respondents to this Appeal) contend and submit :-

- (a) that the Judgment of the said High Court is correct for the reasons stated in the reasons for Judgment of the majority of the members of that Court, and  
40  
(b) in addition that the legislative history of the said section 102 paragraph (2)(a) and judicial

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pronouncements on it and on the earlier legislative forms of it support the interpretation given to it by the said majority.

13. The majority of the Members of the High Court held that paragraph (2) (a) of Section 102 operated to bring to account as part of the dutiable estate of a deceased person only so much of the actual property as was disposed of by him by a settlement containing a trust to take effect after his death as was in existence and was still subject to the trusts of the settlement at the date of his death. They regarded the proviso to the paragraph as a true proviso and applied it accordingly.

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14. Barwick C.J. held that the function of the proviso is "merely to protect the estate of a deceased against the unqualified operation of the opening part of the section" and that if the legislature "intended to bring to duty property which never formed part of the deceased's estate in his lifetime and did not form part of it at his death it must do so in clear words". His Honour agreed with the conclusion to which Owen J. came and with the reasons given for that conclusion.

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p.48 lines  
21-23

p.48 lines  
39-43

p.46 lines  
20-23

p.54 lines  
1-4

15. Windeyer J. agreed with the conclusion and generally with the reasons for Judgment of Barwick C.J. and Owen J. and characterised the property disposed of by the deceased and settled by him as "a fund of money" which in law the trustees could invest as they saw fit.

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p.56 lines  
6-7

He proceeded :-

p.56 lines  
17-24

"They invested it in the Langton shares. They did not get those shares from the settlor. They got them because in the exercise of their discretion they applied for them and the Company allotted them - I hereby adapt and adopt remarks of Lord Morton of Henryton in his speech in *Sneddon v. Lord Advocate*, 1954 A.C. 257 at page 264".

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Windeyer J. also compared paragraphs (2) (b) and (2) (a) of the section 102 noting that while paragraph (2) (b) by implication and definition imported "a concept of

- alienation" by a deceased, (and he referred to Commissioner of Stamp Duties v. Gale 101 C.L.R. 96 at 107), paragraph (2) (a) expressed a requirement of alienation by the plain words "property which the deceased has disposed of" and concluded that the proviso to section 102 paragraph (2) (a) "subjects to duty the property that the deceased had disposed of by the settlement, or so much of it as was still subject to the trusts when he died".
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16. Owen J., held "that the second part of paragraph (2) is a true proviso designed to limit the operation of the first part of the paragraph so that when the paragraph is read as a whole, it operated only upon so much of the property disposed of by the deceased as remains subject to the trusts of the settlement at the time of his death." He came to this conclusion upon the grounds that :-
- 20
- (a) the substantive part of the paragraph was the first part thereof and that it would be "odd" to regard a proviso as in substance a fresh enactment adding to and not merely qualifying that which went before it.
- (b) such a construction was supported by authority (Estate of W.O.Watt Deceased, 25 S.R. N.S.W. 457 and 38 C.L.R. 12).
- 30
- (c) The general notion behind section 102 (2) was to bring to account for duty purposes property in respect of which a deceased person had during his lifetime exercised a power of disposition and which, had he not done so, might on his death have formed part of his actual estate.
17. Menzies J. was of the opinion that the proviso clearly deemed property, which at the time of the settlor's death was subject to the trusts of the settlement, to be included in his estate and that, unless the proviso itself was subject to an "unexpressed limitation", such property was included in his estate though it was never his property during his life. He could find no such limitation.
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- Record  
p.56 line 36  
to  
p.61 line 4
- p.64 lines  
17-24
- p.64 lines  
1-6
- p.64 lines  
24-43
- p.65 lines  
6-12
- p.52 line 48  
to  
p.53 line 22
- p.53 lines  
23-29

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- p.53 lines 23-29 He considered it "highly unlikely" that any change in the investment of property subject to the trust would take that property beyond section 102(2)(a).
- p.65 line 27 to p.66 line 1 18. Walsh J. agreed in general with Menzies J. though he was not prepared to hold that an accretion to the settled property "from an outside source" would necessarily become part of the dutiable estate. He pointed out that in two cases before the Privy Council and in one case in the High Court, the contention raised by the executors was open but had not been raised and indeed had not been raised in any reported case since paragraph 2(a) with its proviso was enacted in 1920. 10
- p.68 line 48 to p.71 line 5
19. In the Court of Appeal of the Supreme Court of New South Wales -
- (a) Asprey J.A. held that the proviso to paragraph (2)(a) "adds a further class of notional property to the class of property which is notionally to be included in the estate of a deceased person by virtue of the opening paragraph of the sub-section" but nevertheless was included in the dutiable estate. 20
- p.17 lines 36-41
- (b) Mason J.A. held that in the construction of the paragraph "paramount effect is given to the specific direction contained in the proviso". 30
- p.30 lines 21-26
- (c) Moffitt J.A. held that "it would be placing a limitation on the words used where none reasonably exists if there were imported words which had the effect of limiting the property subject to the trust to such part of it, if any, as is common to the property formerly disposed of and the property at death subject to the trust".
- p.22 lines 13-19
20. The Respondents submit that section 102 (2)(a) plainly deals with property of the deceased which he has disposed of. In this case it is property disposed of, not by Will or by a settlement made in exercise of a 40



10 general power of appointment but, by a  
settlement of his own property, namely, the  
sum of \$200,000. The settlement contained  
a trust to take effect after his death in  
respect of that property. The proviso in  
referring to "the property" refers to the  
property which he has disposed of, i.e. in  
this case the property which was formerly his.  
The proviso by using the words "deemed to be  
included" referentially identifies the class of  
property mentioned in the introductory words of  
section 102 (2) viz., "deemed to include and  
consist of" and therefore means "property of  
the deceased" which he "has disposed of"; and  
the words "deemed to be included" in the  
proviso do not refer to property which the  
deceased has not disposed of, but which by  
derivation from some source other than his  
disposition has become subject to the trusts  
20 of the settlement before his death.

21. The Respondents submit that the proviso  
is a qualification or limitation in respect of  
property of the deceased which he has settled  
and is not an enlarging provision so as to  
include all property which may at the date of  
his death be subject to the trusts which he set  
up by the settlement. The Respondents rely  
upon the principles relative to enactments  
in the form of provisos which are established  
30 and which are referred to in such cases as *West  
Derby Union v. Metropolitan Life Assurance  
Company* 1897 A.C. 647; *R. v. Dibdin* 1910  
P. 57. The Respondents contend that the  
proviso does not refer to "all property  
whatever" which is subject to the trusts of  
the settlement at the time of his death. It  
would therefore be a wrong interpretation  
of the proviso to give it an effect of adding  
to the property described in the substantive  
40 part of section 102(2)(a).

22. The Respondents also submit that the  
earlier versions of section 102(2)(a) and the  
decisions thereon support, or at the least  
are not inconsistent with, the interpretation  
given to that section by the majority of the  
High Court. In this respect they refer to  
Section 49 of the Stamp Duties Act 1898 of

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New South Wales and to the following decisions, Commissioner of Stamp Duties v. Stephen 1904 A.C. 117; Perpetual Trustee Co. v. Commissioner of Stamp Duties 10 S.R. (N.S.W.) 550; and reference is also made to two cases on the corresponding legislation of the State of Victoria (though not in identical terms) namely Rosenthal v. Rosenthal 11 C.L.R. 87 and re Currie's Settlement 21 C.L.R. 157.

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23. The Respondents submit that the reasons for the judgments of the minority of the High Court and the Judgments of the Court of Appeal are not correct. They further submit that though the interpretation of the proviso for which they contend had not previously been raised, that only means it had not been judicially considered or determined. If it has been assumed that the proviso applies as the Appellant contends, such an assumption though judicially made does not stand in the way of the contention now raised. Even a wrong decision in taxation law, though of long standing, will not be allowed to stand if it is incorrect, cf. Governors of Campbell's College (Belfast) v. Commissioner of Valuation for Northern Ireland 1964 2 All. E.R. 705. The Respondents in addition submit that the effect of the proviso for which they contend is not inconsistent with the opinion of the Privy Council expressed in Thompson v. Commissioner of Stamp Duties 1969 A.C. 320 at 333-4.

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24. The Respondents respectfully submit, for the reasons hereinbefore stated, that Your Lordships will advise Her Majesty that this Appeal should be dismissed with costs.

A. B. KERRIGAN

W. E. REDDY

No.20 of 1972

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE HIGH COURT OF AUSTRALIA  
NEW SOUTH WALES REGISTRY

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IN THE MATTER of the ESTATE of  
MILTON SPENCER ATWILL Deceased

- and -

IN THE MATTER of the STAMP DUTIES  
ACT, 1920-1964

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B E T W E E N:

THE COMMISSIONER OF STAMP DUTIES  
of the STATE OF NEW SOUTH WALES  
Appellant

- and -

ALAN CAVAYE ATWILL  
MILTON JOHN NAPIER ATWILL  
and DAVID NAIRN REID Respondents

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CASE FOR THE RESPONDENTS

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