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UNIVERSITY OF LONDON  
W.C.1.  
19 FEB 1957  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

20,1956  
18011

No. 36 of 1955.

In the Privy Council.

ON APPEAL  
FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN—

THE COMMISSIONER OF STAMP DUTIES OF  
THE STATE OF NEW SOUTH WALES  
*Appellant*

— AND —

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PERMANENT TRUSTEE COMPANY OF NEW  
SOUTH WALES LIMITED the Executor of the  
Will of ARTHUR HENRY DAVIES late of Sydney  
in the State of New South Wales, deceased  
*Respondent.*

CASE FOR THE APPELLANT.

RECORD.

1. This is an appeal by special leave from a Judgment dated the 19th August, 1954, of the High Court of Australia which by a majority of three Judges to two allowed an appeal from a unanimous judgment dated the 1st June, 1953, of the Full Court of the Supreme Court of New South Wales on a case stated under the New South Wales Stamp Duties Act, 1920-1940. p. 85.  
p. 58.
2. The question involved in the appeal relates to the incidence of death duty upon certain trust property under a trust established by a Deed of Settlement dated the 13th August, 1924, by the deceased one Arthur Henry Davies who died on the 28th January, 1946, domiciled in New South Wales.
3. The Deed of Settlement purported to be made between the deceased (therein referred to as "the Settlor") of the first part, one p. 9.

Muriel Norah Davies the daughter of the deceased (and therein referred to as "the Beneficiary") of the second part and the Respondent (therein referred to as "the Trustee") of the third part but was executed by the deceased and the Respondent only. The principal provisions of the Deed of Settlement were as follows:—

(1) The Trustee shall stand possessed of the Trust Fund whether there shall or shall not be any other fund applicable to the maintenance and education of the Beneficiary or any person bound by law to provide for such maintenance and education upon trust:

(a) To apply the whole or such part as the Trustee shall think fit of the income arising from the Trust Fund for or towards the maintenance education and general support of the Beneficiary in such manner in all respects as the Trustee may think proper until such Beneficiary attains the age of thirty years or marries with the written consent and approval of her parents the said Arthur Henry Davies and Muriel Davies or of the survivor of them provided that in case the Beneficiary shall marry during the lifetime of her parents without such consent as aforesaid the Trustee shall continue to apply the income in manner aforesaid until the Beneficiary attains the age of thirty years. 10 20

(b) To accumulate the residue (if any) of the same income which in the judgment of the Trustee may not be required for the purposes aforesaid or any of them in the year in which such income may have arisen by way of compound interest by investing the same and the resulting income therefrom for the benefit of the Beneficiary or other the person or persons who under the trusts hereinafter contained shall have become entitled to the Trust Fund Provided that the Trustee may resort to the accumulations of any preceding year or years and apply the same for any of the purposes hereinafter mentioned for the benefit of the Beneficiary. 30

(2) In case of the marriage of the Beneficiary without such consent as aforesaid before attaining the age of thirty years the Trustee may with the written consent of her parents or the survivor of them at any time after such marriage pay over to the Beneficiary one half of the Trust Fund together with any accumulations of income then in the hands of the Trustee.

(3) On the Beneficiary attaining the age of thirty years the Trustee shall pay over to her the balance of the Trust Fund or the whole of such Trust Fund if still in the hands of the Trustee together with all the accumulations of income then in hand for her sole and separate use. 40

(4) In case the Beneficiary shall attain the age of twenty-one years or marry under that age with such consent as aforesaid the Trust Fund shall be held by the Trustee upon trust for such person or persons and in such manner in all respects as the Beneficiary shall by Will or Codicil appoint.

4. Muriel Norah Davies was born on the 22nd February, 1910, and so came of age on the 22nd February, 1931. p. 3, l. 36.

5. During the minority of Muriel Norah Davies the Respondent made payments of £1,000 annually from 1926 to 1930 to the deceased while he was maintaining and educating her and also two further such payments in 1931 and 1932. p. 3, l. 29.

6. The Respondent thereafter in accordance with requests made by Muriel Norah Davies continued payments to the deceased of £1,000 in each of the years 1933 to 1937. p. 3, l. 36.

7. Muriel Norah Davies married at Alexandria in Egypt on 1st July, 1938, and became Muriel Norah Jackaman. p. 3, l. 19.

8. In the events which happened she became absolutely entitled to the Trust Fund on her 30th birthday, the 22nd February, 1940.

9. On the 29th December, 1938, the deceased opened a bank account in Muriel Norah Jackaman's name in the Bank of New South Wales and into it he paid as a gift to her £5,025 out of his own moneys. p. 4, l. 26.

10. Prior to the opening of the said account, namely, on the 2nd day of November, 1938, the Deceased wrote a letter to his said daughter in which he requested her to sign an authority addressed to the Trustee of the said deed to take his instructions in all matters regarding the said trust, or regarding the new account which, he stated, he was opening in the Bank of New South Wales in her name under the title "Cherry Jackaman" . . . . In the same letter he requested her to sign a cheque in his favour for the sum of £5,000 and a letter of authority to the said Bank authorising him to operate on the said new account, and a specimen signature to be handed to the said Bank . . . . p. 4, l. 36.

11. Muriel Norah Jackaman at the deceased's request by letter of the 1st December, 1938, instructed the Respondent to take instructions from the deceased in all matters regarding the trust and in a new bank account which as she thereby informed the Respondent the deceased was opening in her name in the Bank of New South Wales. p. 5, l. 6.  
p. 15, l. 20.

12. On the day of opening her bank account the deceased presented a cheque in his own favour signed by Muriel Norah Jackaman on her bank account for £5,000 which he withdrew as a loan to himself. p. 4, l. 30.

13. By letter dated the 29th December, 1938, Muriel Norah Jackaman authorised and empowered the deceased to operate on her p. 5, l. 6.  
p. 16, l. 1.

bank account in her name and on her behalf as fully and effectually to all intents and purposes as she could if personally present.

p. 5, l. 11.  
p. 16, l. 17.

14. By letter dated 9th January, 1939, Muriel Norah Jackaman requested the Respondent to pay into the said bank account until further instructions from her any money coming in from her trust.

p. 5, l. 14.

15. The deceased pursuant to the authority mentioned in paragraph 11 hereof on behalf of Muriel Norah Jackaman directed the Respondent that whenever any income of the trust fund reached £100, such income should be paid into her said bank account and thereafter all income from the trust fund was so paid. 10

p. 5, l. 17.  
p. 34, l. 9.

16. Upon her marriage in 1938 Muriel Norah Jackaman lived in Kenya and in England until November, 1943, when she returned to Australia.

p. 5, l. 19.  
p. 19, l. 1.

17. Between the 3rd February, 1939 and the 4th April, 1943, the deceased in pursuance of Muriel Norah Jackaman's authority to the bank operated on her bank account by signing cheques drawn thereon whereby during such period he drew out practically the whole of the moneys paid into the account. Moneys so drawn were used by him for his own purposes and he treated these moneys as a loan to himself by Muriel Norah Jackaman. By that means he withdrew from the account as loans to himself sums which with the first withdrawal of £5,000 on the 29th December, 1938, amounted in all to £10,940 of which £13 1s. 5d. was applied for Muriel Norah Jackaman's benefit. In December, 1945, a further £2,000 was so applied. A balance of £8,926 18s. 9d. remained unpaid at his death on the 28th January, 1946. 20

p. 5, l. 25.

p. 22, l. 26.  
p. 23.

18. The only moneys paid into Muriel Norah Jackaman's bank account during this period in addition to the original £5,025 came from the trust funds.

p. 27, l. 10.

19. The Appellant claimed that the property subject to the trusts of the Deed of Settlement at the date of the death of the deceased was liable to death duty as forming part of the deceased's notional estate by virtue of Section 102 (2) (d) of the Stamp Duties Act, 1920-1940 which with the omission of immaterial parts is in the following terms:— 30

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

“(2) (d) Any property comprised in any gift made by the deceased at any time whether before or after the passing of this Act of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any 40

“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.”

20. In assessing death duty payable in respect of the estate of the deceased the Appellant included therein the following sums, namely:—

(a) the sum of £38,162 13s. 7d. being the value of the assets subject to the trusts of the Deed of Settlement at the date of the death of the deceased, and

10 (b) The sum of £5,025, the amount of the gift made by the deceased to Muriel Norah Jackaman on the 29th December, 1938, when her bank account was opened.

21. The Respondent who is the executor of the will of the deceased (in the three paragraphs following referred to as “the testator”) objected to the assessment on the grounds that the assets of the trust and the sum of £5,025 had been wrongly included in the deceased’s estate and on another ground no longer material. The contention on the part of the Respondent that the sum of £5,025 was wrongly included has, however, been abandoned.

20 22. The Appellant on the 20th November, 1951, stated a case under Section 124 of the Stamp Duties Act, 1920–1940 and submitted for the determination of the Supreme Court of New South Wales certain questions of which those now material read as follows:—

(i) Should the said sum of £38,162 13s. 7d. have been included in the dutiable estate of the testator;

(iv) What is the amount of death duty payable in respect of the said estate; and

(v) How should the costs of this case be borne and paid.

30 23. The Full Court of the Supreme Court of New South Wales on the 10th March, 1952, ordered that Issues of Fact agreed upon by the parties should be filed and tried before a Judge sitting in the Equity Jurisdiction without a Jury under Section 124 (6) of the Stamp Duties Act, 1920–1940 and that all findings of such Judge should be made subject to the right of either party to argue their relevance. p. 32, l. 1.

24. Issues of fact agreed upon between the parties were accordingly so filed and Roper Chief Judge in Equity heard oral evidence and made findings thereon. The issues and findings which are now material are:— p. 32, l. 30.  
p. 53, l. 12.

ISSUE 1: Was the sum of £5,025 deposited by the testator in the Bank of New South Wales, Head Office, on 29th December, 1938, a gift by him to his daughter Muriel Norah Jackaman?

40 FINDING: Yes.

ISSUE 2: Was the amount of £5,000 withdrawn by the testator from the said account on 29th December, 1938, a loan of that sum by Muriel Norah Jackaman to the testator?

FINDING: Yes.

ISSUE 4: After the opening of the said account on 29th December, 1938, did the testator have authority to withdraw money from time to time from the said account by drawing cheques thereon without first obtaining the approval of Muriel Norah Jackaman to any particular withdrawal?

FINDING: Yes.

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ISSUE 4A: If the answer to Question 4 is Yes, did the testator receive such authority prior to or at the time when he opened the said account, or subsequently?

FINDING: Prior to the time when he opened the account.

ISSUE 5: Were the sums withdrawn by the testator from the said account after the said 29th day of December, 1938, until and including the 4th day of April, 1943, withdrawn by him

- (a) with the authority of Muriel Norah Jackaman; or
- (b) without such authority?

FINDING: With her authority.

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ISSUE 6: If the answer to Issue of Fact No. 5 (a) is in the affirmative, were the said sums (other than the four amounts mentioned in paragraph 19 of the Case) loans by the said Muriel Norah Jackaman to the testator?

FINDING: Yes.

ISSUE 8: Was any agreement made by the testator with the said Muriel Norah Jackaman for the payment of interest upon the said sums from the respective dates of withdrawal to the date of repayment and, if so, at what rate per annum?

FINDING: No.

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ISSUE 10: Did the testator repay any of the sums or any part thereof withdrawn by him from the said bank account to the said Muriel Norah Jackaman, or pay any of them or any part of them to any other person at her request or on her behalf and if so, which of the said sums or part thereof?

FINDING: In effect £2,000 (in addition to £485 not material to this case).

ISSUE 11: What were the motives of the testator in opening the said account and depositing therein the sum of £5,025 and what were his intentions as to the manner in which the said account should be operated upon?

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FINDING: The motives of the testator in opening the said account and depositing the said sum of £5,025 were his natural love and affection for the said Muriel Norah Jackaman and his intentions as to the manner in which the said account should be used were:—

(a) To deposit therein an amount of £5,025 as a gift from him to the said Muriel Norah Jackaman.

(b) To withdraw from that amount with her concurrence the sum of £5,000 as a loan from her to him.

10 (c) To arrange that the Permanent Trustee Company of New South Wales Limited should pay into the said account with her concurrence the income from the assets held upon the trusts of the deed executed by him in 1924.

(d) To withdraw with her concurrence so much of that income as he from time to time wished to be used by him as he wished but subject to an obligation on his part to repay to her the amounts not applied for her benefit or at her request.

25. On the 1st June, 1953, the Full Court of the Supreme Court of New South Wales (Street C.J., Owen and Clancy JJ.) in a considered judgment delivered by Owen J. unanimously held that the sum of £38,162 13s. 7d. mentioned in the first question was rightly included in the deceased's dutiable estate and that the costs should be borne by the Respondent. p. 54.

26. Owen J. stated that the later transactions whereby the deceased was enabled to and did borrow from Muriel Norah Jackaman large sums of money by exercising the authority given to him by her to operate on her account which was kept in funds solely by deposits made out of the trust funds brought this case within Section 102 (2) (d). He rejected the argument that because there was no agreement or understanding between the deceased and Muriel Norah Jackaman as part of or contemporaneously with the gift of the trust fund (such as there was when the £5,025 was given) that took this case outside the scope of that section. In so far as the Respondent relied on the case of *Rudd v. Commissioner of Stamp Duties* (1937) (37 N.S.W.S.R. 366 at p. 372 *et seq.*), Owen J. held its proposition to be inconsistent with decisions referred to in that case; in his view the present case was for all relevant purposes covered by the case of *O'Connor v. Commissioner of Succession Duties (South Australia)* (1932) 47 C.L.R. 601. Owen J. drew attention to the width of the concluding words of the section as compared with the narrower corresponding English Statutory provisions; and stated that the only distinction between this case and O'Connor's case was that in this case the moneys to which Muriel Norah Jackaman became entitled were paid into a bank account in her name, but that Muriel Norah

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Jackaman's instructions and authority placed the deceased in a position to control, use and enjoy for his own benefit moneys derived from the trust funds. He held this case to be indistinguishable from the interpretation of *A.G. v. Worrall* (1895) 1 Q.B. 99 adopted by Lord Radcliffe when in *St. Aubyn v. A.G.* (1952) A.C. 15 at p. 47 he described the transaction there in question as follows: "In effect the son was returning to the father the income on the property given." Owen J. accordingly held that the Appellant was entitled to treat the trust assets as part of the dutiable estate of the deceased.

p. 58, l. 20.

p. 58, l. 25.

27. The Respondent appealed to the High Court of Australia and on the 19th August, 1954, the High Court gave judgment by a majority (Webb, Kitto and Taylor JJ.) allowing the appeal with costs. Dixon C.J. and Fullagar J. were of the opinion that the appeal should be dismissed.

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p. 82, l. 13.

28. In the reserved judgments of the majority of the High Court Kitto and Taylor JJ. (in a joint judgment) considered that as the moneys withdrawn by the deceased were retained by him as loans this case was distinguishable from the case of *O'Connor v. Commissioner of Succession Duties (South Australia)* (1932) 47 C.L.R. 601. Although Muriel Norah Jackaman gave the instructions and the authority which she did give, these judges held that the deceased was not in receipt of the trust income because it had been first paid into Muriel Norah Jackaman's bank account so that the deceased was only in receipt of loans which were not part of the trust income. These judges considered Muriel Norah Jackaman to have had the trust income in her own exclusive possession and enjoyment at all times. The majority accepted that the deceased derived a benefit, but held that since that benefit did not diminish Muriel Norah Jackaman's possession and enjoyment, it was on the authority of *Oakes v. The Commissioners of Stamp Duties* (1954) A.C. 57 at pp. 73 and 75 not one to which the section applied.

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p. 88, l. 8.

p. 72, l. 4.

29. Webb J. considered it impossible to regard as a payment of the income from the trust funds what was a loan from Muriel Norah Jackaman to the deceased once she had obtained complete possession and enjoyment of the trust funds. He agreed with Kitto and Taylor JJ.

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p. 68, l. 16.

p. 68, l. 27.

30. Dixon C.J. delivered a dissenting judgment in which, after setting out his view of the facts and considering *A.G. v. Seccombe* (1911) 2 K.B. 688 he said:—"It seems clear enough that the deceased received "a benefit when he was placed in a position to withdraw moneys from "his daughter's bank account and to treat the withdrawals as a loan "to himself repayable at his death without interest in the meantime." and later, "The plan was to create a debt to her repayable on his death "so as to give her a benefit on that event forming no part of his dutiable "estate, while in the meantime he had the advantage of the use of the "money. It seems undeniable that a loan without interest repayable at "death (or for that matter on demand) is a benefit and a benefit of a "pecuniary or a proprietary kind. Again if this benefit was obtained

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“out of the income of the property given it would seem clear enough, notwithstanding all the limitations judicially placed upon the operation of the provision, that the benefit obtained by the father would have been a benefit of a kind which, if the condition expressed in Section 102 (2) (d) is to be satisfied, must be excluded by the possession and enjoyment assumed by the donee and retained by her.

10 “The critical question in the case appears therefore to be whether, for the purposes of Section 102 (2) (d) the moneys from which he obtained the loans without interest are to be considered part of the income of the trust fund, that is of the property given by the trust deed.”

The Chief Justice then referred to the procedural difficulties of the section in relation to stated cases and to findings of fact and inferences of fact and continued:—

20 “But upon the facts stated and upon the facts found on the issues, the inference seems open that the deceased was placed in a situation in which he was master of the income as it was paid over by the Trustee. For the facts stated show that at his instance his daughter had directed the Trustee to pay her income into a bank account which, notwithstanding that it stood in her name, she effectually placed under his legal control in such a way as to make the account in substance his. The consequence is that the moneys paid in came into his effective control. Did he receive them in the guise or character of income of the trust estate? Of course it was in that guise or character that they came into the bank account, for the payments into that account were distributions of income of the trust by the Trustee. But does not that mean that the amounts distributed and in that very character were placed under the deceased’s effective control for his own use beneficially?”

30 The Chief Justice then analysed his view of what took place and concluded by saying:—

“The result of the foregoing is that the deceased obtained a benefit from the subject of the gift consisting of the receipt over the relevant time of the income thereof subject only to a liability to his personal representatives to repay after his death the amount applied to his own use and without interest and that the donee Mrs. Jackaman to this extent failed to retain enjoyment of the property comprised in the gift to the entire exclusion of any benefit to the deceased.”

40 31. Fullagar J. also delivered a dissenting judgment in which he agreed with the judgment of the Full Court of the Supreme Court of New South Wales and said, after discussing the procedural difficulties arising out of a case stated, that the effect of what was done was that the whole of the income of the settled fund was made directly available to the deceased who had the user without interest during his lifetime of so

much thereof as he chose to take and this was a benefit within the meaning of Section 102 (2) (d). It was a real advantage to him even if only of a temporary nature. The arrangements made gave him what amounted to direct access to the income of the settled fund and whilst those arrangements stood Muriel Norah Jackaman had not possession and enjoyment of the settled fund to the entire exclusion of any benefit therefrom to the deceased. He agreed with Owen J. that the case was not really distinguishable from *O'Connor v. Commissioner of Succession Duties (South Australia)* (1932) 47 C.L.R. 601.

32. The Appellant submits that the judgments of Dixon C.J. and Fullagar J. in the High Court of Australia and the judgment of the Full Court of the Supreme Court of New South Wales are right and should be preferred to the judgments of the majority of the High Court of Australia. 10

33. The Appellant further submits that the majority of the High Court of Australia were wrong:—

(a) in their application of the decision in *Inland Revenue Commissioners v. Duke of Westminster* (1936) A.C. 1 and in having regard to the form rather than the substance of the transactions which took place, 20

(b) in holding that whilst the deceased admittedly obtained a benefit out of the settled funds such benefit did not impair or diminish the full possession and enjoyment of the gift in the hands of the donee,

(c) in their application of the decision in *Oakes v. Commissioner of Stamp Duties for New South Wales* (1954) A.C. 57 to the facts of the present case,

(d) in distinguishing this case from the case of *O'Connor v. Commissioner of Succession Duties (South Australia)* (1932) 47 C.L.R. 601, 30

(e) in attaching any importance to the fact that the authority given by the donee to the donor to operate on the bank account was revocable, and

(f) in their construction of Section 102 (2) (d) of the New South Wales Stamp Duties Act, 1920–1940 as regards the effect of loans.

34. The Appellant further submits that the appeal should be allowed, the judgment of the High Court of Australia set aside, the judgment of the Supreme Court of New South Wales restored and a declaration made that there should have been included in the estate of the deceased for the purposes of the assessment and payment of death duty the net value, namely £38,162 13s. 7d. of the property which was at the date of the death of the deceased subject to the trusts of the said Deed of Settlement for the following amongst other 40

**REASONS.**

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1. BECAUSE the judgments of Dixon C.J. and Fullagar J. in the High Court of Australia and the judgment of the Full Court of the Supreme Court of New South Wales were right.
2. BECAUSE the donee under the Deed of Settlement of 13th August, 1924, did not retain *bona fide* possession and enjoyment of the interest given to her to the entire exclusion of the donor or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and that consequently Section 102 (2) (d) of the Stamp Duties Act, 1920–1940 is applicable.
3. BECAUSE the donor obtained a benefit from the given property within the meaning of the words in Section 102 (2) (d) “any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity “or not”.
4. BECAUSE the judgments of the majority of the High Court of Australia are wrong and ought to be reversed.

GORDON WALLACE.

In the Privy Council.

**ON APPEAL**

**FROM THE HIGH COURT OF AUSTRALIA.**

BETWEEN—

**THE COMMISSIONER OF STAMP DUTIES  
OF THE STATE OF NEW SOUTH WALES**  
*Appellant*

— AND —

**PERMANENT TRUSTEE COMPANY OF NEW  
SOUTH WALES LIMITED** the Executor of the  
Will of **ARTHUR HENRY DAVIES** late of  
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*Respondent.*

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**CASE FOR THE APPELLANT.**

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