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UNIVERSITY OF LONDON
W.C.1.
19 FEB 1957
TECHNICAL STUDIES

In the Privy Council.

No. 36 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

10019

BETWEEN

THE COMMISSIONER OF STAMP DUTIES ... APPELLANT

AND

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED ... RESPONDENTS.

CASE FOR THE RESPONDENTS

RECORD

1.—This is an appeal from an Order, dated 19th August, 1954, of the High Court of Australia (Webb, Kitto and Taylor, JJ., Dixon, C.J. and Fullagar, J. dissenting), allowing an appeal from a Rule, dated 1st January, 1953, of the Supreme Court of New South Wales (Street, C.J., Owen and Clancy, JJ.), answering certain questions in a case stated by the Appellant for the opinion of the Supreme Court.

pp. 85-86
pp. 58-61
pp. 1-31

2.—The case was stated by the Appellant under the Stamp Duties Act, 1920-1940, Section 124. The provisions of that Act relevant to this appeal are the following :—

10 102. For the purposes of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property :—

(2) (d) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which " bona fide " possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died.

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124. (1) Any person liable to the payment of duty in respect of any instrument, and any administrator 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 case of an instrument and within thirty days after notice of the assessment has been given to the administrator in the case of death duty and on payment of duty in conformity with the assessment, and of the sum of twenty pounds as security for costs, deliver to the Commissioner a notice in writing requiring him to state a case for the opinion of the Supreme Court.

(2) The Commissioner shall thereupon state and sign a case accordingly, setting forth the facts before him on making the assessment, the assessment made by him and the question to be decided, and shall deliver the case so signed to the person by whom the same is required (hereinafter referred to as the Appellant). 10

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

(6) If it appears to the Court that the facts necessary to enable the questions submitted to be determined are not sufficiently set forth in the case or that such facts are in dispute, the court may direct all such inquiries to be made or issues to be tried as it deems necessary in order to ascertain such necessary facts, and, if it deems fit, may amend the case. Any such inquiry may be made before a judge of the Court or the Master in Equity, and any such issue may be tried by any such judge or a judge of any District Court sitting either with or without a jury as the Court may direct. 20

(7) On the hearing of the case the Court shall be 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 therefrom if proved at a trial.

3.—This appeal concerns the estate of one ARTHUR HENRY DAVIS (hereinafter called “the deceased”). The facts, as set out in the stated case and the annexures thereto, were as follows :— 30

p. 1, li. 12-14

(1) The deceased died on the 28th January, 1946, domiciled in New South Wales. He had a daughter, whose married name is MURIEL NORAH JACKAMAN (hereinafter called “the beneficiary”), born on the 22nd February, 1910. On the 13th August, 1924, a Deed was made between the deceased, the beneficiary and the Respondents. By this Deed the deceased transferred to the Respondents certain shares, property and investments, to be held by them upon certain Trusts set out in the Deed. Those Trusts, so far as relevant to this appeal, were as follows :— 40

pp. 2-3, 9-12

To stand possessed of the Trust Fund and to apply the whole or such part of the income as the Respondents should think fit for the maintenance, education and general support of the

beneficiary until she should attain the age of thirty or marry with the written consent of her parents, and on her attaining the age of thirty to pay over to her the balance of the Trust Fund with all accumulations of income for her sole and separate use.

RECORD

- 10 (II) In 1938 the beneficiary married with the consent of her parents. Up to that time the Respondents had paid to the deceased various sums for the maintenance and education of the beneficiary, with respect to which sums no question arises. After her marriage in 1938 the beneficiary went abroad with her husband, and did not return to Australia until November, 1943.
- 20 (III) On the 29th December, 1938, the deceased caused to be opened in the Bank of New South Wales an account in the name of the beneficiary. Into that account he paid £5,025 of his own money. On the 2nd November, 1938, he had written to the beneficiary a letter asking her to sign an authority addressed to the Respondents, an authority addressed to the Bank of New South Wales, and a cheque for £5,000 drawn on that Bank. The beneficiary sent her cheque for £5,000 as asked. The authority addressed to the Respondents authorised them to take instructions from the deceased in all matters regarding the Trust, and that addressed to the Bank of New South Wales authorised the deceased to operate the beneficiary's account as fully and effectually as she could have done if personally present. On the 9th January, 1939, the beneficiary wrote again to the Respondents asking them to pay into that account all the income of the Trust Fund.
- (IV) On the 29th December, 1938, the deceased presented to the Bank the cheque for £5,000 in his favour signed by the beneficiary, and received that sum from the Bank.
- 30 (V) Between that date and April, 1943, the deceased drew out of the account from time to time various sums, amounting in all to £6,425. There were found among his documents various papers in the handwriting of his secretary in which these sums were treated as loans from the beneficiary to him (the deceased). With the exception of four sums expended by him on behalf of the beneficiary, all the sums drawn by the deceased out of this account were paid into his account at the Bank of New South Wales.
- 40 (VI) After the death of the deceased the beneficiary submitted to the Appellant a claim that the estate of the deceased owed her the sum of £8,926 18s. 7d., made up of the various sums drawn by the deceased out of her account less certain repayments, and interest on that sum amounting to £2,338 12s. 5d.
- (VII) The value of the Trust Funds in the hands of the Respondents at the death of the deceased was £38,162 13s. 7d.

p. 3, ll. 18-22

pp. 3-4

p. 5, ll. 17-18 ;

p. 34, ll. 14-16

p. 4, ll. 26-29

p. 4, l. 36

p. 5, l. 3

p. 5, l. 4

p. 15

p. 16

p. 16

p. 4, ll. 30-32

p. 5, ll. 19-23 ;

p. 19

p. 5, l. 25

p. 6, l. 28 ;

pp. 20-21

p. 6, ll. 29-34 ;

pp. 22-23

p. 7, ll. 15-17

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(VIII) In answer to requisitions made by the Appellant the beneficiary stated :—

p. 26, ll. 10-23

(a) That the sum of £5,025 was given to her by the deceased in 1938 because the Courts had placed upon her grandfather's will an interpretation which led to certain monies being paid to the deceased which, in his opinion, morally belonged to her. These monies made up the sum of £5,025.

p. 26, l. 24—
p. 27, l. 6

(b) She had made no arrangements with the deceased when the account was opened about withdrawal of money and payment to her of money withdrawn by him, but as he was her father she had naturally given the Bank authority to allow him to draw cheques. She had not known at the time that he was borrowing money for his own purposes, but was quite happy that he should do so provided it was on a business basis.

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p. 7, ll. 18-28

(IX) For the purpose of assessing the death duties payable on the deceased's estate, the Appellant included in that estate both the sum of £38,162 13s. 7d. and the sum of £5,025. He allowed as a deduction the sum of £8,926 18s. 7d., being the debt claimed by the beneficiary, but did not allow anything by way of interest thereon.

p. 7, ll. 29-40

p. 8, ll. 24-36

(X) The questions submitted to the Court were :—

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- (i) Should the sum of £38,162 13s. 7d. have been included in the dutiable estate of the deceased ;
 - (ii) Should any interest on the sum of £8,926 18s. 7d. have been allowed as a deduction from the dutiable estate ;
 - (iii) If so, upon what sum and at what rate should it have been allowed ;
 - (iv) What was the amount of death duty payable ;
 - (v) How should the costs of the case be borne.
- Questions (ii) and (iii) do not now arise.

p. 32

4.—When the matter came before the Supreme Court of New South Wales the Court ordered that issues of fact should be tried before a Judge of the Court. Issues were agreed between the parties and were tried before the Chief Judge in Equity, before whom the beneficiary gave evidence. The findings of the learned Chief Judge, so far as now relevant, were as follows: The sums withdrawn by the deceased from the beneficiary's account between the 29th December, 1938, and the 4th April, 1943, were loans by the beneficiary to the deceased, and the deceased had repaid in effect £2,000 ; his motive in opening the account and depositing the sum of £5,025 had been his natural love and affection for the beneficiary, and his intentions for the use of the account had been to deposit therein £5,025 as a gift to the beneficiary ; to withdraw with her concurrence £5,000 as a loan from her to him ; to arrange that the Respondents should, with her

pp. 32-3
pp. 34-53
pp. 53-54

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concurrence, pay into the account the income of the Trust Fund, and to withdraw with her concurrence so much of the income as he wished from time to time, subject to an obligation to repay the amounts not applied for her benefit or at her request.

5.—The case came before the Supreme Court of New South Wales on the 14th and 15th May, 1953. On the 1st June, 1953, the Court delivered a reserved Judgment, holding that the sum of £38,162 13s. 7d. should have been included in the dutiable estate of the deceased. pp. 54-58

6.—Owen, J. (in whose Judgment Street, C.J. and Clancy, J. concurred) set out the facts and said that the payments made by the Respondents to the deceased up to the time of the beneficiary's marriage were not benefits within the meaning of Section 102 (2) (d) of the Act. However, the later transactions, whereby the deceased borrowed from the beneficiary by exercising his authority to operate her Bank account, did seem to the learned Judge to bring the case within that section. The arrangement that the loan should be made had not been a term or condition of the gift of the Trust Fund, but that, in his view, was immaterial. The learned Judge regarded *O'Connor's Case*, 47 C.L.R. 601 as identical with the present case. In that case the income from the property given had been received directly by the donor who held a Power of Attorney from the donee. The only distinction in the present case was that the monies had been paid into a Bank account in her name, but the effect of her instructions to the Respondents and to the Bank had been to place the deceased in a position in which he controlled, used and enjoyed for his own benefit monies derived from the Trust Fund. In the learned Judge's opinion the beneficiary had been returning to the deceased the income on the property given. p. 55, l. 1—
p. 57, l. 23
p. 57, ll. 23-28
p. 57, ll. 28-41
p. 57, ll. 41-43
p. 58, ll. 7-20
p. 58, ll. 23-24

7.—By a Notice dated 22nd June, 1953, the Respondents appealed to the High Court of Australia. The appeal was heard on the 7th and 8th April, 1954, and Judgment was given on the 19th July, 1954, allowing the appeal and holding that the sum of £38,162 13s. 7d. should not have been included in the dutiable estate of the deceased. pp. 61-84

8.—Kitto and Taylor, JJ. stated the facts, and said that because the loans made to the deceased had been made by cheques drawn on the beneficiary's Bank account, into which the income of the Trust Fund had been paid, the Appellant contended that the deceased received the income of the property given in 1924, and therefore "bona fide" possession and enjoyment of that property was not retained by the beneficiary, to the entire exclusion of benefits to him. The learned Judges in the Supreme Court had held that the case was indistinguishable from *O'Connor's Case*, and that the words used by Lord Radcliffe in *Saint Aubyn v. A. -G.* (1952), A.C. 15, 47, describing, *A. -G. v. Worrall* (1895), 1 Q.B. 99, were applicable: "In effect the son was returning to the father the income of the property given." *O'Connor's Case*, however, was clearly distinguishable because p. 80-81
p. 81, l. 42—
p. 82, l. 10
p. 82, ll. 11-16

RECORD

p. 82, ll. 16-28

p. 82, l. 28—
p. 83, l. 7

p. 83, li. 8-32

p. 83, l. 33—
p. 84, l. 11

p. 84, ll. 12-13

pp. 71-72

pp. 62-66

p. 68, ll. 19-20

p. 68, ll. 30-42

p. 69, l. 33—
p. 70, l. 24

the monies withdrawn were in the present case retained by the deceased as loans from the beneficiary. The findings made on the trial of the issues established conclusively that the loans were genuine and not colourable. It followed from this that the deceased had not received the Trust income. The payments of the Trust income into the account had been payments to the beneficiary and not to the deceased, and by his withdrawals from that account the beneficiary had converted a debt owed to her by the Bank into a debt owed to her by the deceased. In other words, these withdrawals merely changed the form in which the beneficiary continued to keep the income as her own. There never came a time at which the beneficiary did not have in her own exclusive possession and enjoyment the debts representing the whole of the income of the Trust Fund. What the deceased received was not that income, but money received from the beneficiary upon a promise of repayment. The deceased had derived a benefit when he took monies out of the beneficiary's Bank account and with them made loans to himself; but Section 102 (2) (d) did not apply unless after the making of a gift the donor had a benefit which diminished the donee's possession and enjoyment. In the present case this had not happened. The beneficiary had first reduced into possession the income of the Trust Fund. She would clearly have had exclusive possession and enjoyment if she had then spent it on pleasure or given it to charity; the same conclusion followed when in fact she had chosen to lend it free of interest. Therefore, Section 102 (2) (d) did not apply.

9.—Webb, J. agreed with the conclusion and the reasons of Kitto and Taylor, JJ. It was, he said, impossible to regard as a payment of income to the deceased what was unquestionably a loan to him by the beneficiary after she had obtained complete possession and enjoyment of the income by payment of it into her Bank account. The loan could not be identified with a payment of income outright, because there could be no question about the genuineness of the loan.

10.—Dixon, C.J. dissented. He first set out the facts and the findings made by the Chief Judge in Equity. These findings said nothing about the terms of repayment, but it could hardly be doubted that the loans were repayable at the death of the deceased and not earlier. It seemed to the learned Chief Justice undeniable that a loan without interest repayable at death (or on demand) was a pecuniary benefit, and the critical question was whether the monies from which the deceased had obtained the loans were to be considered part of the income of the Trust Fund. The Court was bound to accept the facts as they appeared in the stated case and the findings of the Chief Judge, but they were entitled to draw inferences from those facts. The learned Chief Justice thought that the inference was open that the deceased was so placed as to be master of the income as it was paid over by the Respondents. The monies paid into the account came into his effective control. These monies came into the Bank account in

the character of income of the Trust Fund ; the deceased had unrestricted power over the Bank account, and could ensure that the Respondents continued to pay the income into the account ; he was therefore in complete control. Unless some countervailing consideration appeared, this meant, in the learned Chief Justice's opinion, a benefit in derogation of the beneficiary's enjoyment of the gift. The one countervailing consideration was the finding that the sums withdrawn were loans by the beneficiary to the deceased. This finding meant simply that each sum withdrawn had the legal complexion of money lent ; but, being payable on death, this did not deprive the deceased's dealings with the money of beneficial character. In substantial effect it meant only that the result was the same as it would have been if he had remained in immediate possession of the income, and had left to the beneficiary by his will the amount of the total income of the Trust. The beneficiary continued to own a chose in action consisting of the debt but until the deceased's death this meant nothing. The deceased, in the view of Dixon, C.J., obtained a benefit from the gift consisting of the receipt of the income, subject only to a liability in his personal representatives to repay after his death without interest the amount applied to his own use, and to this extent the beneficiary failed to retain enjoyment of the gift to the entire exclusion of any benefit to him.

RECORD

p. 70, l. 28--
p. 71, l. 1

p. 71, ll. 1-14

p. 71, ll. 29-35

11.—Fullagar, J. also dissented. Having set out the facts and the Chief Judge's findings, he said he thought it must be taken that the loans were repayable on the deceased's death. He could see no substantial answer to the Appellant's arguments. The whole income of the Trust Fund had been made, he said, directly available to the deceased, and he had had the use of so much of it as he wanted, without interest. Under these arrangements the beneficiary had not had possession and enjoyment of the Trust Fund to the entire exclusion of any benefit to the deceased. The learned Judge thought that *O'Connor's Case* was not really distinguishable. It was said that when the income was paid into the account it came into the hands of the beneficiary, and what the deceased received was a sum of money which was the beneficiary's property ; by lending it to the deceased she was not foregoing exclusive possession and enjoyment of the Trust Fund. In all the circumstances of the case, however, the learned Judge thought the inference could be drawn that the beneficiary had really surrendered to the deceased for the time being possession or enjoyment of the income.

pp. 72-76

p. 77, ll. 10-34

p. 77, l. 40--
p. 78, l. 38

12.—The Respondents respectfully submit that the Trust Fund is not dutiable under Section 102 (2) (d) unless it can be shown that the deceased retained either a benefit amounting to a reservation, or obtained such a benefit as diminished the beneficiary's possession and enjoyment of the gift. There was no reservation, and the deceased derived no benefit from the Trust Fund between 1939 and 1943, or none which diminished the possession and enjoyment of the beneficiary.

13.—The Respondents respectfully submit that the learned Judges in the High Court were right in holding themselves to be bound by the findings of fact made by the Chief Judge in Equity. The learned Chief Justice and Fullagar, J., however, went beyond any legitimate process of inference and in effect disregarded the finding that the sums withdrawn constituted loans. Further, the inference that the monies were repayable only on death was unwarranted. The Respondents submit that *O'Connor's Case* is distinguishable, and it is impossible to hold that what the deceased received was in this case the income of the Trust Fund. In *O'Connor's Case* the donor retained possession of the Title Deeds of the Fund, he had direct receipt of the income with no intervention of a Trustee, and he had beneficial enjoyment of the income with no obligation to account for it. In this case, on the other hand, the income was paid by Trustees to the beneficiary, it came to the deceased only out of the beneficiary's Bank account and by her authority, and he received it as a loan for which he in his lifetime, and after his death his personal representatives, were accountable to the beneficiary. 10

14.—The Respondents respectfully submit that the learned Chief Justice and Fullagar, J. were wrong in treating the deceased as having been placed in possession and enjoyment of the income of the Trust Fund, in ignoring the proper implications of the findings that the withdrawals were loans and (as far as Fullagar, J. was concerned), in treating *O'Connor's Case* as not being distinguishable. 20

15.—The Respondents respectfully submit that the Order of the High Court of Australia was right and ought to be affirmed, and this appeal ought to be dismissed, for the following (amongst other)

REASONS

1. BECAUSE "bona fide" possession and enjoyment of the Trust Fund was assumed by the beneficiary in 1924 and thenceforth retained by her to the entire exclusion of any benefit to the deceased of any kind. 30
2. BECAUSE if the deceased did derive any benefit from the Trust Fund it was not a benefit which diminished the beneficiary's exclusive possession and enjoyment of that Fund.
3. BECAUSE what the deceased received was not the income of the Trust Fund but money lent to him by the beneficiary out of her own Bank account.
4. BECAUSE the withdrawals made by the deceased merely converted a debt payable to the beneficiary by the Bank into a debt payable to her by him. 40
5. BECAUSE of the other reasons contained in the Judgments of Webb, Kitto and Taylor, JJ.

G. E. BARWICK.
J. G. LE QUESNE.

In the Privy Council.

No. 36 of 1955.

ON APPEAL FROM THE HIGH COURT
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BETWEEN

THE COMMISSIONER OF STAMP
DUTIES APPELLANT

AND

PERMANENT TRUSTEE COM-
PANY OF NEW SOUTH
WALES, LTD. RESPONDENTS.

CASE FOR THE RESPONDENTS

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