Judgment 20 of 1972

20

IN THE PRIVY COUNCIL No. 20 of 1972

ON APPEAL

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

BETWEEN :

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

RECORD OF PROCEEDINGS



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IN THE PRIVY COUNCIL No. 20 of 1972

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA NEW SOUTH WALES REGISTRY

BETWEEN :

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

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

IN THE PRIVY COUNCIL No. 20 of 1972

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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 Stamp Duties Acts 1920 - 1964

BETWEEN :

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

RECORD OF PROCEEDINGS

No. 1

STATED CASE BY THE COMMISSIONER OF STAMP DUTIES

In the Court of Appeal of the Supreme Court of New South Wales

No. 1

Case Stated 3rd April 1970

1. Milton Spencer Atwill (hereinafter called "the deceased") died on 24th November 1965.

2. At the time of his death and at all material times theretofore the deceased was domiciled and resident in the State of New South Wales.

3. Probate of the last Will of the deceased was on 2nd March 1966 granted by the Supreme Court of New South Wales in its Probate Jurisdiction to Alan Cavaye Atwill Milton John Napier Atwill and David Nairn Reid the Executors therein named (hereinafter called "the Appellants").

On 27th November 1953 the deceased paid to himself the said Alan Cavaye Atwill and the said Milton John Napier Atwill (hereinafter called "the

In the Court of Appeal of the Supreme Court of New South Wales

No. 1

Case Stated 3rd April 1970 (continued)

Trustees") the sum of £200.0.0. contemporaneously with the execution by the deceased and by the Trustees of a Deed bearing date 27th November 1953 and made between the deceased of the one part and 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 (which said trusts should be irrevocable) and with and subject to the discretions powers and provisions therein contained. The terms of the said Deed are as set forth in the Schedule hereto which is to be taken as part of this Case.

5. The Trustees, in exercise of the powers conferred on 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, and thereafter continued to hold the said shares as the trust funds referred to in the said Deed until, and so held the same at, the time of the death of the deceased.

6. The value of the said shares at the time of the death of the deceased was $276,458.00.

7. At the time of the death of the deceased and at all material times seventeen of the said twenty shares were registered on the New South Wales Register of Langton Pty. Limited and three of the said twenty shares were registered on the Australian Capital Territory Register of Langton Pty. Limited.

8. The deceased was survived by his Widow Isabella Caroline Atwill, his sons the said Alan Cavaye Atwill and Milton John Napier Atwill, and five grandchildren and no more. The said grandchildren of the deceased were all children of the said Alan Cavaye Atwill or the said Milton John Napier Atwill and were all under the age of twenty one years at the time of the death of the deceased. No grandchildren of the deceased predeceased him.

9. The Commissioner of Stamp Duties in assessing the death duty payable in respect of the estate of the deceased claimed that by virtue of Sections

102(2)(a) and 102(2A) of the Stamp Duties Act, 1920-1964, the said twenty shares in Langton Pty. Limited were included in the dutiable estate of the deceased, and the Commissioner accordingly assessed the death duty payable in respect of the said estate at the sum of one hundred and twenty four thousand nine hundred and thirty eight dollars and six cents ($124,938.06).

10. The Appellants claim that the said twenty shares in Langton Pty. Limited should not be included in the dutiable estate of the deceased.

11. The Appellants being dissatisfied with the said assessment of death duty in respect of the estate of the deceased have pursuant to Section 124 of the said Act and within the time therein limited delivered to the Commissioner a notice in writing requiring him to state a case for the opinion of this Honourable Court and have paid the said duty in conformity with the said assessment and the sum of $40.00 as security for costs in accordance with the said section of the said Act.

12. If the said twenty shares in Langton Pty. Limited are not to be included in the dutiable estate of the deceased, the death duty payable in respect of the said estate will be reduced by the sum of seventy seven thousand nine hundred and twenty six dollars and four cents ($77,926.04), to the sum of forty seven thousand and twelve dollars and two cents ($47,012.02).

13. The questions for the decision of this Honourable Court are :-

(1) Whether the abovementioned 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

(a) one hundred and twenty four thousand nine hundred and thirty eight dollars and six cents ($124,938.06), or

In the Court of Appeal of the Supreme Court of New South Wales

No. 1

Case Stated 3rd April 1970 (continued)

(b) forty seven thousand and twelve dollars and two cents ($47,012.02), or

(c) Some other, and if so what, amount?

(3) How are the costs of this Case to be borne and paid?

DATED this third day of April, 1970.

MAXWELL DOYLE

Commissioner of Stamp Duties.

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No. 2

Schedule to Case Stated - Deed of the 27th November 1953

No. 2

SHEDULE TO CASE STATED OF THE 3rd APRIL 1970

THIS DEED made the Twenty seventh day of November, 1953 BETWEEN MILTON SPENCER ATWILL of "The Astor" 125 Macquarie Street, Sydney in the State of New South Wales, Company Director (hereinafter called "the Settlor") of the one part AND the said MILTON SPENCER ATWILL ALAN CAVAYE ATWILL of 26 Wunulla Road, Point Piper in the said State, Company Manager AND MILTON JOHN NAPIER ATWILL of "The Astor" 125 Macquarie Street, Sydney in the said State, Barrister-at-Law (hereinafter called "the Trustees") of the other part WHEREAS the Settlor is desirous of making provision for the children of his sons the said Allan Cavaye Atwill and the said Milton John Napier Atwill and for that purpose has contemporaneously with the execution hereof paid to the Trustees the sum of Two hundred pounds (£200) (the receipt of which said sum the Trustees do hereby acknowledge) NOW THIS DEED WITNESSETH that in consideration of the natural love and affection which the Settlor bears for the children of his said sons the Settlor doth hereby direct and declare that the Trustees and their successors in office shall stand possessed of the said sum of Two hundred pounds (£200) upon the trusts (which said trusts shall be irrevocable) and with and subject to the discretions powers and provisions hereinafter contained that is to say:-

1. The Trustees (which expression where not repugnant to the context shall include the survivor or survivors of them or other the Trustees for the time being of these presents) shall and do hereby declare that they do subject to the powers provisions and discretions hereinafter conferred stand possessed and hold the said sum of Two hundred pounds (£200) and any investments into which the same or any part thereof may be converted under the powers in that behalf hereinafter contained (all of which said sum and investments are hereinafter called "the trust funds") UPON THE FOLLOWING TRUSTS :-

(a) UPON TRUST during the joint lives of the Settlor, Isabella Caroline Atwill (the wife of the Settlor) and the said sons of the Settlor -

(i) To stand possessed of the whole of the income arising from the investment of the trust fund during each year ending on the 30th day of June for the benefit of such of the children of the said sons as shall be living on the 30th day of June in that year and if more than one equally between them with power for the Trustees to pay or apply the whole or any part of each such child's share during his or her minority to or for his or her benefit and with power to accumulate or invest such part of the share of income of that child not otherwise paid or applied pursuant to the provisions hereof in such investments as are hereinafter provided in respect of the trust funds and from time to time to pay or apply all or any of the share of income so accumulated or invested for the benefit maintenance support education comfort or advancement in life of the child whose share of income has been so accumulated or invested and with liberty to the Trustees to pay any amounts payable to or to be applied for any such child to the guardian or guardians of any such child for the purposes aforesaid without being liable to see to the application thereof and as and from any such child attaining the age of

In the Court of Appeal of the Supreme Court of New South Wales

No. 2

Schedule to Case Stated Deed of the 27th November 1953

(continued)

twenty one years to pay to such child his or her share of the said income together with all accumulations of income derived therefrom

(ii) To stand possessed of the income arising from the investment of any accumulation of the share of income of any such infant child upon the same trusts as are herein provided in respect of the accumulation of income derived from such share. In the event that the Trustees are assessed for Taxation in respect of any income held by them pursuant to the trusts hereof for beneficiaries hereunder not then presently entitled thereto within the meaning of the Income Tax Act to pay out of the share of income accumulated or invested as aforesaid for any such child that proportion of the tax so assessed which that child's share of income (included for the purpose of the assessment) bears to the assessed income.

(iii) In the event of the death of any such child during his or her minority to stand possessed of all accumulation of income (or the investments representing the same) held by the Trustees for the child so dying to the intent that thereafter the same shall merge in and become part of the trust funds and be subject to the trusts in respect of such trust funds.

(b) UPON TRUST after the death of the survivor of the Settlor the said wife of the Settlor and the said sons of the Settlor to divide and pay the trust funds (including any accumulations of which the Trustees then stand possessed pursuant to sub-clause (iii) hereof) to such of the children of the said sons of the Settlor as shall then be living and attain the age of twenty one years and if more than one equally between them on their respectively attaining that age.

2. All moneys liable to be or requiring to be

invested by the Trustees hereunder may at the absolute discretion of the Trustees be invested in any one or more of the following modes of investment :-

(a) Any investment in any State of the Commonwealth for the time being allowed by the law of that State or by Commonwealth legislation for the investment of trust funds.

(b) The purchase of any income producing real estate in New South Wales.

(c) Deposit in any Government Savings Bank within the Commonwealth.

(d) Fixed deposit in anyBank carrying on business within the Commonwealth.

(e) Shares in Langton Pty.Limited and/or any subsidiaries and/or any other company or companies wherein the Settlor or the said wife of the Settlor shall have a controlling interest or shares in any company (other than mining companies) listed on the Sydney and/or Melbourne Stock Exchanges and carrying on business in the Commonwealth of Australia having a paid up capital of not less than Two hundred thousand pounds (£200,000) and having during each of the five years last past before the date of investment paid a dividend on its Ordinary Stocks or shares at a rate at least equivalent to the highest rate of interest offered by the Commonwealth Government in respect of Commonwealth Loans offered to the Public in Australia for subscription during such year (or if no such Loans were offered as aforesaid in any such year then at the rate of interest last offered prior to such year) or any debentures issued by any Company in which at the time of investment it would have been proper to invest in the purchase of stocks or shares.

WITH full power for the Trustees from time to time and at any time to vary or transpose the said investments or any of them into or for another or others of the same or a like nature.

3. The Trustees in addition to any powers in that behalf conferred on Trustees by Statute or by these

In the Court of Appeal of the Supreme Court of New South Wales

No. 2

Schedule to Case Stated Deed of the 27th November 1953

(continued)

presents or otherwise shall have the following additional powers authorities and discretions :-

(a) From time to time to employ the trust funds or any part thereof in carrying on the Company known as Langton Pty. Limited and/or any subsidiaries and/or any other company or companies wherein the Settlor or the said wife of the Settlor shall have a controlling interest and from time to time withdraw the same as the Trustees in their absolute discretion may deem to be in the best interests of the beneficiaries hereunder and to do and concur with any other person or persons as aforesaid in doing any act matter or thing in connection with any such said Company as the Trustees may deem necessary or expedient.

(b) In regard to any lands held by the Trustees under the trusts hereof to manage and improve the same in such manner as in their absolute discretion the Trustees think fit with power to grant leases at such rent and upon such terms and conditions as the Trustees think fit and with power to accept surrenders of leases and tenancies and to make allowances to and arrangements with lessees tenants and others.

(c) Power of altering by Deed any of the trusts powers discretions and authorities herein contained other than the trusts limiting the interests of and defining beneficiaries hereunder which said trusts shall be irrevocable.

(d) To take and act upon the opinion of any Queen's Counsel of the Supreme Court of New South Wales of five years' standing whether in relation to the interpretation of these presents or any other document or Statute or as to the administration of the trusts hereof and/or to act upon the report or advice of any accountant, Stockbroker or any other person engaged in the business or profession for which he may be consulted without being liable to any of the persons beneficially interested in respect of any act done by the Trustees in accordance with such Opinion, report or advice

but nothing in this clause contained shall prohibit the Trustees from applying to the Court if they should think fit or shall prohibit any of the beneficiaries from so doing.

4. In any case where funds held on distinct trusts under the provisions hereinbefore contained shall have become blended the Trustees may allot and apportion the same among the persons entitled thereto in such manner as they may think just and may decide what moneys represent capital and what income and for the purposes aforesaid may ascertain the value of any part of the trust property in such manner as they may think proper and in the event of any question or dispute arising in the execution of the trusts of these presents among any persons interested hereunder may decide and settle such questions or disputes and any and every such allotment appointment valuation or decision as aforesaid shall be final and binding on all parties interested under the provisions of these presents.

5. The Trustees may if and when they shall think fit employ and pay out of the trust funds any person or persons to do any act or acts (including the receipt of money) in connection with the trusts of these presents and including acts which a Trustee could perform personally and shall not be liable for the neglect or default of any agent reasonably employed and any Trustee for the time being of these presents being a person engaged in any profession or business he or any firm of which he shall be a member may if he or they shall in the performance of the trusts or the exercise of the powers hereby created do any act or acts (being an act or acts which a person engaged in that profession or business normally performs in the conduct of his profession or business) make and be paid out of the trust funds the usual professional or business charges for the act or acts done by him or his firm as aforesaid.

6. The power of appointing new Trustees hereunder shall during the life of the said wife of the Settlor be vested in her and in the event of her death during the life of the Settlor be so vested in him during his life and after the death of the Settlor and his said wife it is hereby declared that there shall at all times be at least two Trustees of these presents and if at

In the Court of Appeal of the Supreme Court of New South Wales

No. 2

Schedule to Case Stated Deed of the 27th November 1953

(continued)

any time the number of Trustees be reduced below two then the survivor shall apoint or cause to be appointed a trustee one or more of the following nominees viz. Jocelyn Jean Gaskell and Alexander George Atwill PROVIDED ALWAYS that if neither of such nominees is able or willing to act as such Trustee then such one or more of such nominees as may then be alive may jointly nominate some person (other than a Trustee Company) who is willing to act as the person who shall be appointed a Trustee as aforesaid.

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first hereinbefore written.

SIGNED SEALED AND DELIVERED by the said MILTON SPENCER ATWILL in the presence of :- (sgd) M.S. ATWILL

(sgd) ERNEST ROWE

SIGNED SEALED AND DELIVERED by the said MILTON SPENCER ATWILL in the presence of :- (sgd) M.S. ATWILL

(sgd) ERNEST ROWE

SIGNED SEALED AND DELIVERED by the said ALAN CAVAYE ATWILL in the presence of :- (sgd) A.C. ATWILL

(sgd) ERNEST ROWE

SIGNED SEALED AND DELIVERED by the said MILTON JOHN NAPIER ATWILL in the presence of :- (sgd) J. ATWILL

(sgd) ERNEST ROWE

No. 3

In the Court of Appeal of the Supreme Court of New South Wales

No. 3

Judgment of the Court of Appeal of the Supreme Court of New South Wales (Asprey J.A. Mason J.A. Moffit J.A.)

27th November 1970

JUDGMENT OF THE COURT OF APPEAL OF THE SUPREME COURT OF NEW SOUTH WALES.

IN THE SUPREME COURT
OF NEW SOUTH WALES Term No. 210 of 1970
COURT OF APPEAL

CORAM: ASPREY, J.A.
MASON J.A.
MOFFITT J.A.

Friday, 27th November, 1970

ATWILL & ORS.

v.

THE COMMISSIONER OF STAMP DUTIES.

JUDGMENT

ASPREY, J.A.: In this matter the Court was constituted by my brother Moffitt, by brother Mason and myself.

I am of the opinion that the questions asked in the stated case should be answered as follows :

(1) Yes;

(2) $124,938.06;

(3) By the appellants.

I publish my reasons.

I am authorised by my brother Mason to publish his judgment and he answers the questionsto the same effect.

MOFFITT, J.A.: I answer the questions in the same way, and I publish my reasons.

ASPREY, J.A.: Accordingly, the order of the Court is that the three questions asked in the stated case be answered in the manner which I have announced

In the Court of Appeal of the Supreme Court of New South Wales

No. 4

Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales

(Asprey J.A. Mason J.A. Moffitt J.A.)

27th November 1970

Asprey J.A.

No. 4

REASONS FOR JUDGMENT OF COURT OF APPEAL

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL No. T. 210 of 1970

CORAM: ASPREY, J.A.
MASON J.A.
MOFFITT J.A.

27th November, 1970

ATWILL & ORS. 10

v.

THE COMMISSIONER OF STAMP DUTIES

REASONS FOR JUDGMENT

ASPREY, J.A.: This is a case stated by the Commissioner of Stamp Duites. The case was originally stated on 3rd April, 1970 but at the outset of the hearing of the matter before this Court Counsel for the appellants applied for leave to add to the case stated on 3rd April 1970 a statement of additional facts. Counsel for the respondent 20 Commissioner did not challenge the accuracy of the additional facts but he contended that they were not relevant to the questions posed by the case. The Court, not being able at this stage to rule upon their relevance, gave leave to proceed with the case on the footing that the case was amended pursuant to Section 124(6) of the Stamp Duties Act 1920-1964 (hereinafter called the "Act") by the incorporation in the case of the additional facts. 30

Milton Spencer Atwill (hereinafter called the "deceased") died on 24th November 1965 and at the time of his death and at all material times was domiciled and was resident in the State of New South Wales. Probate of his last will was granted by this Court in its Probate jurisdiction on 2nd March 1966 to the appellants. Langton Pty. Ltd. (hereinafter called "Langton") was incorporated under the Companies Act 1936 on 14th September 1953 with a capital of £12,000 divided into 12,000 40 shares of£1 each. On the incorporation of Langton the deceased and his wife each subscribed for and

were allotted one share of £1 in the capital of Langton and were appointed as its directors. The share so subscribed for by the deceased was held by him in trust for his wife.

On 27th November 1953 his wife sold to Langton for the sum of £98,649.9.3. certain shares and Rural Bank loan bonds owned by her and of an equivalent value and the directors resolved that an account in the wife's name in the books of Langton be credited with that sum. The wife then applied for and was allotted 9,864 ordinary shares of £1 each in the capital of Langton at a premium of £9 per share and the directors of Langton allotted those shares to her and debited her account with the sum of £98,640. Subsequently on 27th November, 1953 at an extraordinary general meeting of the members of Langton special resolutions were passed which divided the capital into 9,866 cumulative preference shares of £1 each and 2,134 ordinary shares of £1 each. The said 9,864 shares allotted to the wife and both shares taken up by original subscription comprised the cumulative preference shares. The effect of the creation of the preference capital may be briefly stated to be calculated to enhance the value of the ordinary shares if the fortunes of Langton prospered.

On 27th November 1953 a deed was executed by the deceased as settlor of the one part and the deceased and the appellants Alan Cavaye Atwill, Milton John Napier Atwill and David Nairn Reid as trustees of the other part and the deceased thereupon paid to the trustees the sum of £200. The deed recited that the deceased was desirous of making provision for the children of his sons the said Alan Cavaye Atwill and Milton John Napier Atwill and settled the said sum of £200 upon certain trusts declared to be irrevocable. I need not discuss the detailed provisions of these trusts as it is common ground that the deed constitutes a settlement within the meaning of Section 102(2)(a) to take effect after the death of the deceased. By clause 2 of the deed the trustees were empowered in their absolute discretion to invest moneys subject to the trusts in various forms of investment including shares in Langton. On 27th November 1953 the trustees applied the said sum of £200 in acquiring by application and allotment 20 ordinary shares in the capital of the Company of £1 each at a premium of £9 per share. The trustees continued to hold the

In the Court of Appeal of the Supreme Court of New South Wales

No. 4
Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales

(Asprey J.A. Mason J.A. Moffitt J.A.)

27th November 1970

Asprey J.A.

(continued)

said shares as such trustees and so held them at the date of the death of the deceased. The investments of Langton at the date of the death of the deceased were of a value of £146,381.7.3. and the value of the shares held by the trustees at the date of the death of the deceased was $276,458. At the date of the death of the deceased 17 of the said 20 shares held in Langton were registered on its N.S.W. register and three of such shares were registered on the Australian Capital Territory register of Langton. The deceased was survived by his wife, his two sons the said Alan Cavaye Atwill and Milton John Napier Atwill and five grandchildren who were all children of Alan Cavaye Atwill or Milton John Napier Atwill and were all under the age of 21 years at the date of the death of the deceased. No grandchildren of the deceased predeceased him.

The respondent Commissioner in assessing the death duty payable in respect of the estate of the deceased has claimed that by virtue of Sections 102(2)(a) and 102(2A) of the Act the 20 shares in Langton held by the trustees were included in the dutiable estate of the deceased but the appellants claim that such shares should not be so included. There is no dispute as to the respective amounts of death duty payable according to whether or not the said 20 shares should be included in the dutiable estate of the deceased. The questions for the decision of this Court are :-

1. Whether the above-mentioned 20 shares in Langton 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 should properly be assessed in respect of the estate of the deceased as

(a) $124,938.06 or

(b) $47,012.02 or

(c) some other and if so what amount.

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

Section 102(2)(a) reads 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:-

(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 any other person:

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."

As mentioned above, the appellants do not dispute that the deed executed by the deceased and the trustees on 27th November 1953 is a settlement of property to take effect after the death of the deceased. The respondent Commissioner concedes that the liability of the estate of the deceased to the amount of death duty assessed by him turns upon the meaning and effect of the proviso to Section 102(2)(a). For present purposes I can leave out of account references in Section 102(2)(a) to dispositions of property by a deceased by will or by a will or settlement made in the exercise of any general power of appointment as these methods of disposition of property do not affect the aspect of construction of Section 102(2)(a) with which I am now concerned. The appellants submit that for the purposes of this case the section in question which speaks of "all property which the deceased has disposed of" must refer to property which the deceased beneficially owned at the date of its disposition by him and that the only property so owned by the deceased which he did dispose of was the sum of £200 in cash which he paid to the trustees on the execution of the deed. Hence, the

In the Court of Appeal of the Supreme Court of New South Wales

No. 4

Reasons for Judgment of the Court of Appeal of the Supreme Court of New South Wales

(Asprey J.A. Mason J.A. Moffitt J.A.)

27th November 1970

Asprey J.A.

(continued)

submission proceeds unless the proviso brings the 20 shares held by the trustees to charge, such shares must be excluded from the deceased's dutiable estate for the purposes of the assessment of death duty. The appellants argue that the proviso should not be construed to enlarge the operation of the first paragraph of Section 102(2)(a) and that the property which it deems to be included in the deceased's estate is the property, namely, the cash sum of £200, which the deceased disposed of when he paid that sum to the trustees. I cannot accept this argument as to the effect of the proviso. For reasons which I hope will become apparent, so to limit its meaning would give to the proviso no different operation than is already achieved by the first paragraph which, with some alterations not material hereto, is derived from a fusion of Sections 49(2)(A)(a) and 58(1) of the Stamp Duties Act 1898. The proviso made its appearance when in 1920 the Act repealed the Stamp Duties Act 1898 as amended. It is a sound rule in the construction of statutes not "to hold any part of an enactment nugatory or needless, if a meaning and purpose can be given to it" (Cooper v. Slade 6 H.L.C. 746 at p.766; 10 E.R. 1488 at p.1496).

The object of Section 102(2)(a) is to bring to charge as part of the estate of a deceased person property which, although not owned by the deceased at the time of his death, is to be notionally regarded as property in his deceased estate for the purpose of computing the amount of death duty which is payable to the respondent. There is no decided case which is directly in point upon the construction of Section 102(2)(a) and, thus unassisted, I propose to approach the problem by endeavouring to ascertain its true construction from the meaning of the words themselves. The first question is: What is the "property" which under the first paragraph of the subsection is deemed to be included in the estate? If the proviso is left out of account, I would be of the opinion that the answer is plainly the sum of £200 which upon the execution of the deed the deceased paid to the trustees. Stopping at the end of the first paragraph of Section

102(2)(a), it could not be possibly said, in my view, that the property disposed of by the settlement was the 20 shares in Langton. The only relevant disposition of property made by the deceased on 27th November, 1953 was in respect of the cash paid by him to the trustees. The deceased never owned those 20 shares in Langton and therefore they could not have been disposed of by any settlement or other form of alienation of property made by him. The trustees acquired those shares when, in the exercise of their absolute discretion as to the investment of the trust funds, they applied for and were allotted 20 ordinary shares in the capital of Langton. Therefore, as the respondent Commissioner concedes, if Section 102(2)(a) had been comprised only of the first paragraph thereof the 20 shares in Langton could not be brought to charge as a notional part of the deceased's estate for the purpose of the assessment of death duties.

Everything turns upon the construction of the proviso in the context in which it is to be found. The words "such trust" can only refer to the trust contained in the settlement by which the deceased disposed of the property originally settled by him. The "property.....which at the time of his death is subject to such trust" was the 20 shares in Langton which the trustees held at the time of the death of the deceased. Those 20 shares constitute "the property deemed to be included in the estate of the deceased", Those words are plain and I see no escape from them, It appears to me that the proviso in Section 102(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 subsection. In my opinion, it is not a question involving the transmutation of the cash sum of £200 disposed of by the deceased into the shares in Langton purchased by the trustees with the moneys received by them from the deceased and it is not a question of applying any doctrine of "tracing".. The proviso itself defines the property which is deemed to be included in the estate.

In the Court of Appeal of the Supreme Court of New South Wales

No. 4

Reasons for Judgment of The Court of Appeal of the Supreme Court of New South Wales

(Asprey J.A. Mason J.A. Moffitt J.A.)

27th November 1970

Asprey J.A.

(continued)

It was argued by the appellants that the decision in Sneddon v. Lord Advocate (1954) A.C. 257 pointed to a conclusion contrary to that which I have arrived. In that case Section 2(1) of the English Finance Act 1894 provided that "property passing on the death of the deceased shall be deemed to include.....(c) property which would be required on the death of the deceased to be included in an account under Section 38 of the Customs and Inland Revenue Act 1881" as amended by Section 11 of the Customs and Inland Revenue Act 1889. Section 38(2)(a) in turn provided that there must be included in such an account "any property taken under" a disposition made by a deceased of a nature which the section proceeded to describe. Section 7(5) of the Finance Act 1894 provided for a valuation of property caught by these provisions to be made at the time of the death of the deceased. The settlor law made a disposition within the meaning of the section and thereby settled the sum of £5,000 upon trustees for his daughter. The trustees invested that sum in the purchase of certain shares which at the death of the settlor had a value of £9,250. It was held that the property deemed to pass on the death of the settlor was the sum of £5,000 and not the shares and accordingly only the sum of £5,000 should be assessed to duty. It was not in contest that the settlor had made a disposition coming within the section and that estate duty was payable on property which was deemed to pass on his death. The question was: what was the property which was deemed to pass? Was it the £5,000 or was it the trust fund constituted by the deed of trust in its state of investment at the death of the settlor. Lord Morton answered these questions by saying (at pp.263-264); "I feel no doubt that the property taken under that disposition was the sum of £5,000. That was the only property which passed from the truster, and it was the only property taken by the trustees from the truster under his disposition. They took that property, of course, as trustees for the beneficiaries under the deed of trust. The truster never owned the 5,000 Creamola shares and, therefore, these shares could not be "taken" under any disposition made by him. As soon as the trustees received the £5,000 it became in their hands a trust fund to be held on the trusts declared by the deed of trust, and

it was, of course, proper for the trustees to invest that sum in some one or more of the numerous investments authorised by the trust deed. They invested it in the Creamola shares, but they did not take these shares under the disposition made by the truster; they took the shares because, in the exercise of their discretion, they decided to apply for them and because the company decided to allot them to the trustees." In my opinion, the combined effect of Section 2(1)(c) of the Finance Act 1894 and Section 38(2)(a) of the Customs and Inland Revenue Act 1881 in essence brings about the same type of result as Section 102(2)(a) would operate to produce if the proviso thereto was omitted therefrom. Leaving out words which are for this purpose non-essential, I see no difference in substance between property of the deceased "taken under a disposition" and property "which the deceased has disposed of by settlement". In the instant case, but for the proviso, I would conclude that the £200 was the property of the deceased disposed of by the settlement dated 27th November, 1953. Under the English legislation with which Sneddon's Case (supra) deals the operation of Section 7(5) of the Finance Act 1894 brings about the result that, if the property brought to charge consisted, as it did in Sneddon's Case, of a sum of money, then that same sum of money would represent the value for the purposes of assessment (and see Gale v. The Federa l Commissioner for Taxation 102 C.L.R.1 per Kitto J. at pp.21-22). If, on the other hand, the property disposed of was a parcel of real estate, then the value of that real estate for the purpose of assessment would be its open market value at the death of the deceased and that value would not necessarily be its value at the date of the disposition of it by the settlor. Sneddon's Case is readily distinguishable from the instant case for the reason that the English legislation with which it is concerned contains nothing which in any way corresponds to the proviso in Section 102(2)(a); and the proviso does not speak of value at all. It creates another classification of notional property. Just as the first paragraph attracts to duty certain property which was not owned by the deceased at the time

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(continued)

of his death but is deemed to be included in his estate for the purposes of the assessment and payment of death duty, so the proviso likewise attracts to duty for the same purposes certain property of another definition which was neither owned by the deceased at the time of his death nor disposed of by him by the type of settlement referred to in the first paragraph. The value of that notional property for the purposes of assessment of duty is to be found elsewhere in the Act (see Section 105(2) and 125). Likewise, Gale v. The Federal Commissioner of Taxation (supra) which dealt with the operation of Section 8(4)(a) of the Estate Duty Assessment Act 1914-1947 is distinguishable from the instant case as that section contains no language equivalent to the proviso in Section 102(2)(a). No argument was addressed to us with reference to Section 102(2A). In the result I think that the contention of the respondent must be upheld.

It is true, as was suggested during the argument, that the operation of the proviso may lead to hardship upon the estate of a deceased person if, as the result of the acumen of the trustees, property disposed of by a settlor is so invested as to produce a large increase in the value of the property which at the time of the settlor's death is subject to the relevant trust. In that event the revenue stands to gain. But as was pointed out by the Privy Council in Attorney General for Ontario v. National Trust Co. Ltd. (1931) A.C. 818 at p. 823: "Such illustrations are to be found pro and con in any statute which touches so many of the manifold and complex aspects of human life and endeavour, as a taxing Act does."

I propose that the questions in the case stated be answered as follows:

(1) Yes

(2) $124,938.06

(3) By the appellants.

MOFFITT, J.A.: The facts and relevant parts of Stamp Duties Act 1920-1964 are set out in the judgments of Asprey, J.A. and Mason J.A.

The question at issue is whether the property, deemed to be included in the estate of the late Milton Spencer Atwill, is the £200, which he paid to the trustees of the settlement in 1953, or the 20 shares in Langton Pty. Limited, which was the property subject to the trusts of the settlement at his death, the £200 having been applied by the trustees to acquire such shares. This limited issue emerges because the appellant concedes that the settlement falls within s.102(2)(a) in that it contains a trust to take effect after the death of the settlor. This concession was made because the £200 was applied by the trustees in 1953 to acquire the shares and because the settlement contained trusts to operate during the joint lives of the settlor, his wife and two sons and further trusts to operate after the death of the survivor of them. The issue for our consideration has been further confined by a concession of the respondent Commissioner that to bring the shares to duty it must be done, if at all, by operation of the proviso to s.102(2)(a). It was conceded that the earlier part of s. 102(2)(a), standing alone, would only have brought the £200 to duty in accordance with Sneddon v. Lord Advocate (1954 A.C. 257).

The critical words of theproviso for present purposes are "the property which, at the time of his death is subject to such trust," which is the property deemed to be part of the estate. The word "such" relates back to a trust "in respect of " the property disposed of by the settlor to take effect after his death. At the death of the settlor, the 20 shares were held by the trustees of the settlement upon the trusts of the settlement and in particular upon a trust which was to take effect after the settlor's death. The plain meaning of the words first quoted refer to the shares. The appellant, however, argues that the context and the general intendment of s.102 require that the words be read otherwise. These submissions can be tested by attempting to substitute precise

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words which would produce the result contended for. In effect it was argued that the words "the property which at the time of his death is subject to such trust" should have a meaning equivalent to "such of the property which the deceased has disposed of by the settlement as is at the time of his death subject to such trust." "Such of the property" on this construction would encompass "such part of the property if any." However, the words are "the" property at death subject to such trust, not part of it and not in some events none of it. 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.

The argument of the appellant directed to the general intendment of s.102 seeks to treat as a general application the principles referred to in Sneddon's case and in Commissioner of Stamp Duties v. Gale (101 C.L.R.96). In each of those cases the condition alone which brought the property to duty was the parting of property by the deceased in his lifetime. However reliance was placed by the appellant on some general observations there made. In this connection, particular reliance was placed upon s.102(2)(a) not being treated as an exception by Isaacs J. in Watt's case (38 C.L.R.12) in his discussion of the basic notions on which dutiability in s.102 was founded and upon reference to such observations of Isaacs J. by Dixon C.J. in Gale's case without comment on s.102(2)(a). Dixon C.J. in the course of dealing with a gift under s.102(2)(b) in the passage which I will now quote, referred first to the definition of "disposition of property" in s.100 and then in a general way to s.102(2) :-

> "To return to the material words in par.(a) of the definition of disposition of property, one must be struck by the fact that those quoted all refer to a process by which the deceased has divested himself of some property right or interest as he invested the donee with the gift. This conforms with what

Isaacs J. in Watt's case described as the basic notions on which the duty is founded. They are said His Honour,'(1) the property in view is only that which formerly belonged to the deceased, and (2) the point of time looked at for determining the true ownership of the property is the time of death. Therefore the property, the subject of sub-s.2 of s.102 (except merely appointed property), is in every case property which was originally property of the deceased and ceased to belong to him by reason of his disposition referred to.' Generalisations should not be pressed too far but prima facie one expects the legislation to bring into the notional estate some right interest or property on the ground that the deceased has parted with it, that is, has parted with it in circumstances of a kind which the legislature decides should lead it to refuse recognition to the alienation for purposes of death duty; not on the ground that a gain has accrued to somebody else, stranger or relative."

Although there is some force in the submissions concerning these dicta, the more important matter is the acceptance by Dixon C.J. of the "basic notions" as prima facie only. This comment gains force when it is put with some observations made in the course of the speeches in the House of Lords in Sneddon's case which in effect accepted that in the case of a disposition of property by a settlement a departure from the "basic notions" referred to, so as to bring to duty the property at death subject to the settlement, would be in no way repugnant to the general scheme and policy of enactments relating to estate duty and would be more just (supra at 268, 278). These observations lead to the inquiry as to the intendment of the provision in question. There is every reason to expect to find duty attaching, according to the basic notions referred to, where the criterion for bringing property to duty is the mere parting by the deceased in his lifetime with his property. There is less reason to expect such basic notions to be applied, where the criteria for bringing property to duty include a trust operating after death and the existence of property

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subject to the trust at death. In this circumstance different notions may exist. The property, which is subject to the trust at his death, originated from him whether it has retained its original form or whether there has been some mutation. It was retained under the control of the trusts dictated by him and exists in identifiable form at his death. The legislature might well deal with the liability for duty by regarding the property as though it had remained with the deceased, so as to be controlled by him until his death and had then been disposed of by him by will (so the gift took effect after his death), rather than being vested in trustees and controlled according to the terms of trusts created by him and operating after his death. The clear words of s.102(2)(b) do just this by making the property the subject of the trust at his death dutiable as if he still retained it and disposed of it by his will.

(1) Yes

(2) $124,938.06

(3) By the appellants

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Mason J.A.

MASON J.A.: This case which has been stated under s.124 of the Stamp Duties Act 1920-1964 presents questions which relate to the interpretation and application of s.102(2)(a) of the Act which includes in the dutiable estate of a deceased person the following property:

> "all property which the deceased has disposed of....by will or by a settlement containing any trust in respect of that property to take effect after his death....:
>
> 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."

The material facts to which the respondent Commissioner seeks to apply to the section are

sufficiently contained in the case stated. The appellants have sought to supplement the facts recited in that case by the inclusion of further facts which have been agreed to by the Commissioner, subject to their relevance, but in my opinion the further facts are not relevant and I find it unnecessary to refer to them.

From the stated case it appears that Milton Spencer Atwill who was at the time of his death and at all material times previously domiciled and resident in this State died on 24th November, 1965. Probate of his last will was granted on 2nd March, 1966, by the Supreme Court of New South Wales in its Probate Jurisdiction to the executors named in the will two of whom are the appellants in this case.

On 27th November, 1953, the deceased paid to himself and the appellants as trustees of the Deed hereinafter mentioned the sum of £200 contemporaneously with the execution by the deceased and by the trustees of a Deed dated 27th November, 1953, made between the deceased of the one part and the trustees of the other part whereby the deceased directed and declared that the trustees and their successors should stand possessed of the sum of £200 and any investments into which sum or any part of it may be converted upon the trusts and subject to the discretions, powers and provisions contained in the Deed.

Clause 1(a) of the Deed sets forth the trusts upon which trust funds are to be held by the trustees during the joint lives of the deceased, his wife and his sons. It is unnecessary to refer to these trusts except to say that they make provision for accumulations during the minority of the children. It is the trusts contained in Clause 1(b) of the Deed that are important because it is by reason of these trusts alone that it is said that the settlement contained a trust to take effect after the death of the deceased. Clause 1(b) is expressed in the following terms:

> "UPON TRUST after the death of the survivor of the Settlor the said wife of the

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Settlor and the said sons of the Settlor to divide and pay the trust funds (including any accumulations of which the Trustees then stand possessed pursuant to sub-clause (iii) hereof) to such of the children of the said sons of the Settlor as shall then be living and attain the age of twenty one years and if more than one equally between them on their respectively attaining that age."

On 27th November, 1953, the trustees in exercise of a power conferred upon them by the Deed applied the sum of £200 in the acquisition of 20 Ordinary shares in the capital of Langton Pty. Limited a company incorporated in New South Wales. The trustees continued to hold the shares in the Trust Fund established by the Deed and so held them at the date of the death of the deceased. The value of the shares at the time of the death of the deceased was $276,458.

The respondent in assessing death duty payable in respect of the estate of the deceased claimed that by virtue of ss.102(2)(a) and 102(2A) of the Stamp Duties Act the 20 shares in Langton Pty. Limited were included in the duty of the estate of the deceased and assessed death duty in respect of the estate at $124,938.06. If the respondent be incorrect in his view that the shares should be included in the dutiable estate the duty payable would be reduced by the sum of $77,926.04 to the sum of $47,012.02.

The questions for decision are :

(1) Whether the abovementioned 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 would properly be assessed in respect of the estate of the deceased is

(a) One hundred and twenty four thousand nine hundred and thirty-

eight dollars and six cents ($124,938.06) or

(b) forty seven thousand and twelve dollars and two cents ($47,012.02) or

(c) Some other, and if so what, amount?

(3) How are the costs of this Case to be borne and paid?

It is conceded by the appellants that the trust created by Clause 1(b) of the Deed is a trust to take effect after the death of the deceased. For the respondent it is said that but for the proviso to s.102(2)(a), that paragraph would not operate so as to impose duty on the assets of the trust at the death of the deceased. The respondent's case therefore rests on the effect of the proviso and the submission that the proviso subjects to duty the assets which are subject to that trust, valued as at the death of the deceased.

No existing authority directly covers the answer to the question which arises on the respondent's argument; nor, so it seems, has the question received consideration in the decided cases. The question is therefore to be resolved on an examination of the language of the provision read in the light of the context in which it appears, due regard being paid to the character of the Act as a taxing Act.

The provision is the first of a series of provisions which are designed to include in the dutiable estate of a deceased person assets in existence at the date of death which are referable to a disposition made by the deceased in his lifetime and which, but for that disposition, might have formed part of his actual dutiable estate. The general rule applicable to all the provisions is that, unless otherwise expressly provided, the property so included in the dutiable estate is to be valued as at the date of death of the deceased (s.105(2)).

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When an examination of the language of S102(2)(a) is made with the object of identifying the property which is included, or deemed to be included, in the dutiable estate of a deceased person, by force of the operation of the provision, it is immediately apparent that the language of the proviso, acoording to its natural and ordinary meaning, seems to answer that inquiry by saying that the property to be so included is the property which is subject to the trust at the time of the death of the deceased person. So much was, I think, conceded by the argument advanced on behalf of the appellants which called in aid countervailing considerations sought to be derived from reading the sub-paragraph as an entire provision, from the character of the proviso as a proviso and from judicial observations made in connection with other sub-paragraphs in s.102(2).

The application of the first part of s.102(2)(a) is not without its difficulties. Clearly enough it is capable of applying to property the subject of a trust taking effect after the death of a deceased person which is contained in a settlement where the deceased has disposed of the property by that settlement. No difficulty arises in circumstances where it is a deed of settlement that effects the disposition of the property and the property disposed of is subject to the trust at the date of the deceased's death, its identity not having changed. If, however, it is sought to apply the first part of the provision in circumstances where the legal title to property passes from the deceased otherwise than by means of a deed of settlement, the deed defining the trusts and the beneficial interests in the property, it is not as apparent that the property has been disposed of by the settlement. But in such a case it is the definition of the word "settlement" contained in s.100 of the Act that enables one to say that property has been disposed of by the settlement. As defined, "settlement" includes any disposition of property whereby any property is settled or agreed to be settled or containing any trust or disposition of any property to take effect after the death of any person, except a will.

There is a second difficulty which is not

met by the first part of s.102(2)(a), if regard is had to that part alone. Were it not for the guidance furnished by the proviso the result might follow, indeed probably would follow, that only that property which was the subject of disposition by the settlement, valued at the date of death in accordance with s.105(2), would form part of the dutiable estate. Whatever the true outcome of that hypothetical question, the significant point is that, but for the existence of the proviso, a difficult problem of interpretation would have arisen, a problem of the kind that has loomed so large in the course of applying other sub-paragraphs of s.102(2) since they were first enacted - see Snedden v. Lord Advocate (1954) A.C. 257; Commissioner of Stamp Duties v. Gale 101 C.L.R. 96; Gale v. Federal Commissioner of Taxation 102 C.L.R. 1.

When the nature of the problem which would have arisen but for the presence of the proviso is fully appreciated, it seems inescapable that its function was to provide a solution for that problem by ensuring that what is to be included or deemed to be included, in the dutiable estate is the property that is the subject of the relevant trust at the date of death. The true role of the proviso as it is thus suggested by the setting in which it is to be found confirms the interpretation which should be accorded to the language of the proviso according to its natural and ordinary meaning.

It is of no little importance that the proviso, as it is expressed, is directed not to the mode of valuation of the property to which it relates, but to a preliminary matter, namely the description or identification of the property itself. Indeed, because it is not suggested that s.102(2)(a) displaces the ordinary rule enunciated by s.105(2), there is no occasion for the sub-paragraph to address itself to the mode of valuation.

It is not a valid criticism of the conclusion which I have reached to say that it accords to a proviso a function which is too extensive in that it enlarges the operation of the principal provision. It is clear enough that on the construction which I

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favour what is denoted by the word "property" in the proviso may differ from that which is denoted by the word in the principal provision. In some cases property which is subject to the trust at the date of death will be more extensive and more valuable than the property which initially was the subject of the disposition, but this will not always be so and in some cases the property subject to the trust will be less extensive than it was formerly. In these circumstances it is not correct to say that the function of the proviso is one of enlargement; its function is that of clarification for it may be said to qualify the operation which might otherwise be given to the principal provision if it stood in isolation.

The clarification provided does produce an apparent disharmony as between the references to "property" in the first part of s.102(2)(a) and in the proviso. In each case the property is included in the dutiable estate, in the first case by the operation of the opening words in s.102. That apparent disharmony which arises from any change in the nature of the trust property between the date of disposition and the date of death is resolved when paramount effect is given to the specific direction contained in the proviso.

The decisions in Sneddon v. Lord Advocate (supra); Commissioner of Stamp Duties v. Gale (supra); Gale v. Federal Commissioner of Taxation (supra); which rejected the application of the doctrine of tracing or transmogrification in the interpretation of statutory provisions similar to s.102(2)(b) and which were relied upon by the appellants, have no relevance to the construction of the proviso. Had the question arisen in the context of a provision expressed in the form of the first paragraph of s.102(2)(a) without the proviso the decisions to which I have referred would have been of major importance. As it is, however, they do no more than illustrate the problem which would have arisen, had the proviso been omitted from s.102(2)(a), and indicate how such a problem should be answered.

One aspect of the appellants' argument remains to be noticed and it is the suggestion that to give literal effect to the proviso would be productive of injustice because it would impose a liability for death duty on a settlor

for an addition to the trust fund in consequence of a gift made by another to the trustees to be held on the same trusts. Counsel for the respondent answered that suggestion by saying, and in my opinion correctly, that in the circumstances it is not proper to regard the property held by the trustees so far as it is referable to the subsequent gifts as forming part of the property subject to the trusts contained in the initial settlement. In truth the gift involves the creation of another trust which is distinct and separate notwithstanding that its terms have been defined or described by reference to the terms of a trust already in existence. I do not consider that the decision of Menzies,J., in Truesdale v. Commissioner of Taxation 44 A.L.J.R. 296 requires me to come to a different conclusion or that it is inconsistent with the view which I have expressed for His Honour was there concerned with the expression "a person has created a trust" in s.102 of the Income Tax Assessment Act 1936 as amended which has a very different context.

The point remains that the assets of a trust may increase substantially in value between the date of disposition and the date of the settlor's death, thereby subjecting the settlor's estate to a substantial liability for duty which may not have been anticipated. Although s.120(1) of the Act may not fully protect the beneficiaries in the settlor's estate from the consequences of including the trust property, valued at the date of death, in the estate, this in itself is no sufficient ground for arriving at a different interpretation of s.102(2)(a).

In the result I am of the opinion that the twenty shares in Langton Pty. Limited are deemed to be included in the dutiable estate by the operation of s.102(2)(a) and I would answer the questions asked as follows :-

1. Yes

2a. Yes.

2b. No.

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2c. Does not arise.

3. The costs of the stated case should be borne and paid by the appellants.

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(continued)

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27th November 1970

No. 5

ORDER OF THE COURT OF APPEAL

IN THE SUPREME COURT OF NEW SOUTH WALES
COURT OF APPEAL

Term No. 210 of 1970

IN THE MATTER of the Estate of MILTON SPENCER ATWILL Deceased

AND IN THE MATTER of the Stamp Duties Act 1920-1964

BETWEEN: ALAN CAVAYE ATWILL
MILTON JOHN NAPIER ATWILL
AND DAVID NAIRN REID — Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES — Respondent

THE twenty seventh day of November, 1970.

UPON APPLICATION made the 29th day of October,

1970 WHEREUPON AND UPON READING the Stated Case herein dated the third day of April, 1970 and UPON HEARING Mr. A.B. Kerrigan of Queens Counsel and Mr. W. Reddy of Counsel for the Appellants and Mr. Forbes Officer of Queens Counsel and Mr. M.H. MacLelland of Counsel for the Respondent IT IS ORDERED that questions one and two in the Stated Case be answered Yes and One hundredand twenty four thousand nine hundred and thirty eight dollars and six cents ($124,938.06) and IT IS ORDERED that the costs of the Respondent of and incidental to this Appeal be paid by the Appellants to the Respondent or his Solicitors.

By the Court
For the Prothonotary,

L. GIBSON
CHIEF CLERK

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Order of the Court of Appeal of the Supreme Court of New South Wales

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No. 6

NOTICE OF APPEAL TO THE HIGH COURT OF AUSTRALIA

IN THE HIGH COURT OF AUSTRALIA No. 108
NEW SOUTH WALES REGISTRY of 1970

ON APPEAL from the Court of Appeal of the Supreme Court of New South Wales

IN THE MATTER of the Estate of MILTON SPENCER ATWILL deceased

AND IN THE MATTER of the Stamp Duties Act 1920-1964

BETWEEN: ALAN CAVAYE ATWILL
MILTON JOHN NAPIER ATWILL
AND DAVID NAIRN REID Appellants

- and -

THE COMMISSIONER FOR STAMP DUTIES Respondent

TAKE NOTICE that the Appellants herein appeal to the High Court of Australia from the judgment

In the High Court of Australia

No. 6

Notice of Appeal to the High Court of Australia

17th December 1970

In the High Court of Australia

No. 6

Notice of Appeal to the High Court of Australia

17th December 1970

(continued)

of the Court of Appeal of the Supreme Court of New South Wales pronounced on the 27th day of November, 1970 which ordered that certain questions submitted to it pursuant to the provisions of Section 124 of the Stamp Duties Act 1920-1964 be answered in the manner following :-

1. That Twenty shares in Langton Pty. Limited should be included in the dutiable estate of Milton Spencer Atwill deceased for the purposes of the assessment and payment of death duty.

2. That the amount of death duty properly payable in respect of the estate of the said deceased is $124,938.06 and

3. That the costs of the case stated should be borne by the Appellants.

UPON the following amongst other grounds namely:-

1. That the Court of Appeal was in error in determining :-

   (i) that the said Twenty shares in Langton Pty. Limited should be included in the dutiable estate of Milton Spencer Atwill deceased for the purposes of the assessment and payment of death duty;

   (ii) that the amount of death duty properly payable in respect of the estate of the said deceased is $124,938.06, and

   (iii) that the costs of the case stated should be borne by the Appellants.

2. That the said Court of Appeal should have held that :-

   (i) The property which the said deceased disposed of by a certain settlement made the 27th day of November 1953 between himself as Settlor of the one part and himself and the Appellants Alan Cavaye Atwill and Milton John Napier Atwill as Trustees of the other part was the sum of Two hundred pounds (£200).

(ii) The only property subject to the trusts of the said settlement deemed to be included in the dutiable estate of the said deceased by virtue of the provisions of Section 102(2)(a) of the Stamp Duties Act 1920-1964 was such of the actual property which the deceased disposed of by the said settlement as was in existence and subject to the trusts of the said settlement as at the date of the death of the said deceased.

(iii) The said sum of Two hundred pounds (£200) referred to in (i) hereof was expended by the Trustees of the said settlement on the 27th day of November 1953 and was not subject to the trusts of the said settlement as at the date of the death of the said deceased.

(iv) By virtue of (i) (ii) and (iii) hereof, none of the property subject to the trusts of the said settlement is liable to be included in the dutiable estate of the said deceased pursuant to the provisions of Section 102(2)(a) of the said Stamp Duties Act.

AND FURTHER TAKE NOTICE that in lieu of the judgment appealed from the Appellants seek the following orders :-

1. That this appeal be allowed.

2. That the judgment and orders of the Court of Appeal of the Supreme Court of New South Wales be set aside and that the questions submitted for the determination of the Court be answered :-

(i) No.

(ii) $47,012.02.

(iii) That the Respondent pay the costs of the Appellants of this appeal and of the appeal before the Court of Appeal of the Supreme Court of New South Wales.

In the High Court of Australia

No. 6

Notice of Appeal to the High Court of Australia

17th December 1970

(continued)

3. That such further and other orders be made as to this Honour able Court shall seem meet.

DATED this seventeenth day of December, 1970.

W. E. REDDY

Counsel for the Appellants

This Notice of Appeal is filed by Kenneth Lovell of 14 Martin Place, Sydney the solicitor for the Appellants Alan Cavaye Atwill, Milton John Napier Atwill and David Nairn Reid.

TO: The Commissioner of Stamp Duties.

AND TO: R.J. McKay,
Crown Solicitor,
Chifley Square,
Sydney.

AND TO: The Registrar of the High Court of Australia New South Wales Registry.

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No. 7

Affidavit by K.E. Lovell in support of Notice of Appeal to the High Court of Australia

17th December 1970

No. 7

AFFIDAVIT OF KENNETH ERIC LOVELL IN SUPPORT OF NOTICE OF APPEAL TO THE HIGH COURT OF AUSTRALIA

IN THE HIGH COURT OF AUSTRALIA
NEW SOUTH WALES REGISTRY No. 108 of 1970

ON APPEAL from the Court of Appeal of the Supreme Court of New South Wales

IN THE MATTER of the Estate of MILTON SPENCER ATWILL deceased

AND IN THE MATTER of the Stamp Duties Act 1920-1964

BETWEEN : ALAN CAVAYE ATWILL
MILTON JOHN NAPIER ATWILL
AND DAVID NAIRN REID Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES Respondent

In the High Court of Australia

No. 7

Affidavit by K.E. Lovell in support of Notice of Appeal to the High Court of Australia

17th December 1970

(continued)

ON THE Seventeenth day of December One thousand nine hundred and seventy KENNETH ERIC LOVELL of 14 Martin Place Sydney in the State of New South Wales Solicitor being duly sworn makes oath and says as follows :-

1. I am the solicitor for Alan Cavaye Atwill, Milton John Napier Atwill and David Nairn Reid the appellants herein.

2. The said appellants are the executors of the will of Milton Spencer Atwill who died on the 24th day of November 1965 and of whose will probate was granted by the Supreme Court of New South Wales in its Probate Jurisdiction on the 2nd day of March 1966.

3. The Commissioner of Stamp Duties for the State of New South Wales included in the dutiable estate of the said deceased Twenty (20) shares in Langton Pty. Limited and as a consequence whereof assessed the duty payable under the Stamp Duties Act 1920-1964 at the sum of One hundred and twenty four thousand nine hundred and thirty-eight dollars and six cents ($124,938.06). The said appellants contend that the said shares should not have been included in the dutiable estate of the deceased and if the same are not included in such dutiable estate the death duty payable in respect of the said estate will be reduced by the sum of Seventy seven thousand nine hundred and twenty six dollars four cents ($77,926.04).

4. The judgment and order of the Court of Appeal of the Supreme Court of New South Wales made herein on the 27th day of November, 1970 is a final judgment or decision and the said judgment or decision was made in respect of a sum or matter in issue amounting to or of the value of more than $3,000 and involves directly a claim demand or question to or respecting property in excess of the value of Three thousand dollars ($3,000).

SWORN by the deponent on the day and year first abovementioned BEFORE ME: ) K.E. LOVELL

A Justice of the Peace

In the High Court of Australia

No. 8

Composite Statement of additional Facts adduced on appeal in the Court of Appeal by Respondents (as Appellants)

No. 8

COMPOSITE STATEMENT OF ADDITIONAL FACTS

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL T. No. 210 of 1970

IN THE MATTER of the Estate o MILTON SPENCER ATWILL deceased

AND IN THE MATTER of the Stamp Duties Act 1920-1964.

BETWEEN : ALAN CAVAYE ATWILL
MILTON JOHN NAPIER ATWILL
AND DAVID NAIRN REID Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES Respondent

COMPOSITE STATEMENT OF FACTS

1. (Paragraph 1 - Stated Case) - Milton Spencer Atwill (hereinafter called "the deceased") died on 24th November 1965.

2. (Paragraph 2 - Stated Case) - at the time of his death and at all material times theretofore the deceased was domiciled and resident in the State of New South Wales.

3. (Paragraph 3 - Stated Case) - Probate of the last Will of the deceased was on 2nd March 1966 granted by the Supreme Court of New South Wales in its Probate Jurisdiction to Alan Cavaye Atwill Milton John Napier Atwill and David Nairn Reid the Executors therein named (hereinafter called "the Appellants").

4. (Paragraph 1 - Statement of Additional Facts) - Langton Pty. Limited (hereinafter called "Langton") was incorporated under the Companies Act (N.S.W.) 1936 (as amended) on the 14th day of September 1953. A copy of the Memorandum and Articles of Association at the date of incorporated is annexure "A". From time to time amendments were made to the said Articles of Association and at the said 24th day of November 1965 the

Articles of Association annexed hereto marked "B" were in force. The deceased and his wife Isabella Caroline Atwill each subscribed for one share of £1.0.0. in the capital of such Company and were the directors of Langton. The share held by the deceased was held by him in trust for the said Isabella Caroline Atwill.

5. (Paragraph 2 - Statement of Additional Facts)- At a meeting of the directors of Langton, held in the forenoon on the 27th day of November 1953 the said Isabella Caroline Atwill sold and Langton purchased from her for the sum of £98,649.9.3. the undermentioned shares and Rural Bank Loan bonds :-

| | | | |
|---|---|---|---|
| 1,691 | Associated Pump and Paper Mills Limited | @ 22/9 ea. | £ 1,923.10.3. |
| 450 | Finney Isles & Co.Limited | @ 38/6 ea. | £ 866. 5.0. |
| 1,000 | (Cum. Pref Shares) Chemical Industries of Aust. & N.Z. Limited | @ 20/- ea. | £ 1,000. 0.0. |
| 5,468 | F.G. Kerr & Company Limited | @ 8/- ea. | £ 2,187. 4.0. |
| 200 | Peters American Delicacy Company (W.A.)Limited | @ 40/- ea. | £ 400. 0. 0. |
| 1,000 | Westeels Limited | @ 14/- ea. | £ 700. 0. 0. |
| 40,000 | Waugh & Josephson Limited | @ 44/6 ea. | £89,000. 0. 0. |
| £3,000 | 3¼% 1964 Rural Bank Homes Conversion Loan per £100.9.0. | @ £85.15.0. | £ 2,572.10. 0. |
| | | | £98,649. 9. 3. |

In the High Court of Australia

No. 8

Composite Statement of additional Facts adduced on appeal in the Court of Appeal by Respondents (as Appellants)

(continued)

The Directors of Langton resolved that an account in the name of the said Isabella Caroline Atwill in the books of the Company be credited with the sum of £98,649,9.3. being the consideration payable by the Company to her in respect of the purchase of the said shares and Rural Bank loan Bonds.

6. (Paragraph 3 - Statement of Additional Facts)- At the said Directors meeting the said Isabella Caroline Atwill applied for and was allotted 9,864 ordinary shares of £1.0.0. each in the capital of the Company at a premium of £9.0.0. per share. Pursuant to such application the Directors passed the following resolutions:-

(a) That 9,864 ordinary shares of £1.0.0. each be allotted to the said Isabella Caroline Atwill

(b) That the account in the name of the said Isabella Caroline Atwill in the books of the Company be debited with the sum of £98,640 in respect of the shares so allotted.

7. (Paragraph 4 - Statement of Additional Facts)- The said Isabella Caroline Atwill informed the said meeting of Directors that it was proposed to convert the ordinary shares held by her and the deceased in the capital of the Company to Cumulative Preference Shares and that it was proposed to convene an extraordinary general meeting of members of the Company for the purpose of passing the necessary Special Resolutions to carry out such conversion and to amend the Articles of Association of the Company accordingly.

8. (Paragraph 5 - Statement of Additional Facts)- Subsequently in the forenoon on the said 27th day of November 1953 an extraordinary general meeting of the members of Langton was held at which the Resolutions set out in the Schedule hereto were passed as Special Resolutions. Thereafter the extraordinary general meeting was closed.

9. (Paragraph 4 - Stated Case) - On 27th November 1953 the deceased paid to himself the said Alan Cavaye Atwill and the said Milton John Napier Atwill (hereinafter called "the

Trustees") the sum of £200.0.0. contemporaneously with the execution by the deceased and by the Trustees of a Deed bearing date 27th November 1953 and made between the deceased of the one part and 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 (which said trusts should be irrevocable) and with and subject to the discretions powers and provisions therein contained. The terms of the said Deed are as set forth in the Schedule hereto which is to be taken as part of this Case.

10. (Paragraph 6 - Statement of Additional Facts and Paragraph 5 - Stated Case) - On the 27th day of November 1953 Milton John Napier Atwill Alan Cavaye Atwill and the deceased the Trustees of the said Deed dated 27th November 1953 in exercise of the powers conferred on them by the said Deed applied the £200 held by them as Trustees under the Deed in the acquisition by application and allotment of twenty ordinary shares in the capital of the Company such shares being issued to them at a meeting of Directors of the Company held after the Extraordinary General Meeting referred to in paragraph 8 hereof such shares being issued at a premium of £9 per share. The Trustees thereafter continued to hold the said shares as the trust fund referred to in the said Deed until, and so held the same at, the time of the death of the deceased.

11. (Paragraph 7 - Statement of Additional Facts)- From the 27th day of November 1953 until the date of the death of the deceased no further shares were issued by Langton nor was any other capital raised by Langton by loan or otherwise.

12. (Paragraph 8 - Statement of Additional Facts)- The investments of Langton at the said 24th day of November 1965 consisted of the following:-

| | |
|---|---|
| £ 3,000 45/8% Rural Bank Home Conversion Loan due 1976 | £ 3,000. 0. 0. |

In the High Court of Australia

No. 8

Composite Statement of additional Facts adduced on appeal in the Court of Appeal by Respondents (as Appellants)

(continued)

| | | |
|---|---|---|
| £ 2,000 | 5% Commonwealth Government Bonds due 1973 | £ 2,000. 0. 0. |
| £ 1,500 | 5% Commonwealth Government Bonds due 1979 | £ 1,500. 0. 0. |
| 2,852 | Ordinary shares Associated Pulp & Paper Mills Limited | £ 4,099.15. 0. |
| 1,760 | Ordinary stock units Clyde Industries Limited | £ 880. 0. 0. |
| 7,500 | Ordinary stock units David Jones Limited | £ 5,458. 1. 3. |
| 5,468 | Ordinary Shares F.G. Kerr & Co. Limited | £ 2,392. 5. 0. |
| 1,000 | 5% Cumulative Preference Shares Imperial Chemical Industries of Australia & New Zealand Ltd. | £ 887.10. 0. |
| 2,640 | Ordinary shares Peters Ice Cream (W.A.) Limited | £ 2,167. 0. 0. |
| 86,510 | Ordinary Stock Units Waugh & Josephson Holdings Limited | £86,510. 0. 0. |
| 38,448 | 7% Unsecured Notes of £2 each convertible at par to Ordinary shares on 30 June 1966 | £37,486.16. 0. |
| | | £146,381. 7. 3. |

13. (Paragraph 9 - Statement of Additional Facts) The investments referred to in paragraph 7 hereof so far as the same differ from the assets set out in paragraph 2 were made by Langton out of income earned by it from reinvestments of the proceeds of the realisation of and accretions to the assets purchased by it from the said Isabella Caroline Atwill as set out in paragraph 2 hereof.

14. (Paragraph 6 - Stated Case) - The value of the said shares at the time of the death of the deceased was $276,458.00.

15. (Paragraph 7 - Stated Case) - At the time of the death of the deceased and at all material times seventeen of the said twenty shares were registered on the New South Wales Register of Langton Pty. Limited and three of the said twenty shares were registered on the Australian Capital Territory Register of Langton Pty. Limited

16. (Paragraph 8 - Stated Case) - The deceased was survived by his Widow Isabella Caroline Atwill his sons the said Alan Cavaye Atwill and Milton John Napier Atwill and five grandchildren and no more. The said grandchildren of the deceased were all children of the said Alan Cavaye Atwill or the said Milton John Napier Atwill and were all under the age of twenty one years at the time of the death of the deceased. No grandchildren of the deceased predeceased him.

17. (Paragraph 9 - Stated Case) - The Commissioner of Stamp Duties in assessing the death duty payable in respect of the estate of the deceased claimed that by virtue of Sections 102(2)(a) and 102(2A) of the Stamp Duties Act 1920-1964 the said twenty shares in Langton Pty. Limited were included in the dutiable estate of the deceased and the Commissioner accordingly assessed the death duty payable in respect of the said estate at the sum of one hundred and twenty four thousand nine hundred and thirty eight dollars and six cents ($124,938.06).

18. (Paragraph 10 - Stated Case) - The Appellants claim that the said twenty shares in Langton Pty. Limited should not be included in the dutiable estate of the deceased.

19. (Paragraph 11 - Stated Case) - The Appellants being dissatisfied with the said assessment of death duty in respect of the estate of the deceased have pursuant to Section 124 of the said Act and within the time therein limited delivered to the Commissioner a notice in writing requiring him to state a case for the opinion of this Honourable Court and have paid the said

In the High Court of Australia

No. 8

Composite Statement of additional Facts adduced on appeal in the Court of Appeal by Respondents (as Appellants)

(continued)

duty in conformity with the said assessment and the sum of $40.00 as security for costs in accordance with the said Section of the said Act.

20. (Paragraph 12 - Stated Case) - If the said twenty shares in Langton Pty. Limited are not to be included in the dutiable estate of the deceased, the death duty payable in respect of the said estate will be reduced by the sum of seventy seven thousand nine hundred and twenty six dollars and four cents ($77,926.04) to the sum of forty seven thousand and twelve dollars and two cents ($47,012.02).

21. (Paragraph 13 - Stated Case) - The questions for the decision of this Honourable Court are:

(1) Whether the abovementioned 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

(a) One hundred and twenty four thousand nine hundred and thirty eight dollars and six cents ($124,938.06)

or

(b) forty seven thousand and twelve dollars and two cents ($47,012.02).

or

(c) Some other, and if so what, amount?

(3) How are the costs of this Case to be borne and paid?

No. 9

In the High Court of Australia

No. 9

Judgment of the High Court of Australia

3rd ~~30th~~ December 1971

## JUDGMENT OF THE HIGH COURT OF AUSTRALIA

Appeal allowed with costs. Order of the Supreme Court of New South Wales (Court of Appeal Division) set aside and in lieu of the answers given by the Supreme Court to the questions one, two and three asked in the stated case those questions be answered as follows -

Question (1) No.

Question (2)(a) No.

(b) Yes.

(c) Unnecessary to answer.

Question (3) By the Commissioner of Stamp Duties.

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No. 10

No.10

Reasons for Judgments by High Court of Australia

(Barwick C.J.
Menzies J.
Windeyer J.
Owen J.
Walsh J.)

3rd December 1971

Barwick C.J.

## REASONS FOR JUDGMENT OF THE HIGH COURT OF AUSTRALIA

3rd December 1971

CORAM: BARWICK C.J.
MENZIES J.
WINDEYER J.
OWEN J.
WALSH J.

BARWICK C.J. : The Commissioner of Stamp Duties included in the dutiable estate of Milton Spencer Atwill deceased the sum of $276,458.00. being the value at the date of his death of 20 shares in Langton Proprietary Limited. These shares were then held by trustees of a deed of settlement made by the deceased which contained a trust to take effect after his death. The shares did not form part of the actual estate ofthe deceased at his death nor had they at any time been his property. They had been purchased by the trustees of the settlement with a sum of money which the deceased had by the said settlement settled on

In the High Court of Australia

No.10

Reasons for Judgments by High Court of Australia

(Barwick C.J. Menzies J. Windeyer J. Owen J. Walsh J.)

3rd December 1971

Barwick C.J.

(continued)

trusts to take effect after his death.

The Commissioner of Stamp Duties claimed that the value of the shares formed part of the notional estate of the deceased by virtue of s.122(2)(a) of the Stamp Act 1920 of the State of New South Wales. At the request of the executors of the deceased the Commissioner of Stamp Duties pursuant to s.124(2) of the Act stated a case for the opinion of the Supreme Court. The Supreme Court was asked whether the shares in Langton Pty. Ltd. should be included in the dutiable estate of the deceased for the purposes of the assessment and payment of death duty. The Supreme Court, Court of Appeal Division, answered in the affirmative. The executors have now appealed to this Court.

I have had the advantage of reading the reasons for judgment prepared by my brother Owen. He there sets out the statutory provision and the contentions of the parties. I entirely agree with the conclusion to which he comes and with the reasons which he gives for that conclusion. I agree that on the proper construction of the section the property to be deemed to be included in the estate of a deceased is the property of which he has disposed in his lifetime by a settlement containing a trust in respect of that property to take effect after his death. If it were not for the proviso the notional estate of a deceased would include the value of property which had been made the subject of such a settlement but which for one reason or another had ceased to be so subject at the date of the death of the deceased. The proviso ensures that notwithstanding that the opening words purport to bring the value of the property into the notional estate because it was disposed of in his lifetime by a settlement of the described kind it will only be so subject if it or part of it is still subject to those trusts at the date of the death of the deceased. The proviso as one might expect of a proviso was in aid of the estate of the deceased as a relaxation of the full extension of the main provision. It would be unusual to treat it as a substantive provision bringing into the notional estate of a deceased property which was never the property of the deceased, although, by reason of the actions of

others than himself, it is subject at his death to the trusts of a settlement which he had made, e.g. accretions due to good husbandry of the trustee of trust property other than that settled by the deceased or accretions due to donations by others than the deceased.

It was submitted in argument that the correct approach to the construction of the section was first to read the words of the proviso as if they were a substantive provision and then to search for words of limitation elsewhere in the section. On this approach the words of the proviso read as a substantive provision were said to be clear and unambiguous. On their plain meaning it was said the whole of the property subject to the trusts of the settlement at the death of the deceased was to be deemed to be part of the dutiable estate. It was then submitted that there was not to be found in the balance of the section any limitation on this clear and unambiguous meaning of the words in the proviso; and that therefore unqualified effect should be given to them.

In my opinion, this is an inadmissible method of construction of a statute. The fact that the paragraph is a proviso cannot be ignored and as a proviso it ought not to be read and construed apart from the terms of the section. It must be read with that to which it is a proviso. It is first necessary to read the substantive part of the section and then to read the proviso in the light of the meaning of that part. To first assign a meaning to the words of the proviso, independently of the provision to which it is affixed, is in my opinion to reverse the proper approach to the construction of what is in terms and intendment a proviso.

The governing words of the whole provision including the proviso are, in my opinion, the opening words which describe the property which is to be deemed to be included in the dutiable estate of a deceased. To use the full description it is "all property which the deceased has disposed of... by a settlement containing any trust in respect of that property to take effect after his death". The reference

In the High Court of Australia

No.10

Reasons for Judgments by High Court of Australia

(Barwick C.J. Menzies J. Windeyer J. Owen J. Walsh J.)

3rd December 1971

Barwick C.J.

(continued)

to "the property" in the first line of the proviso is in my opinion a reference to the same property as that described in the opening words of the section; so is the reference to "the property" in the second last line.

We were referred to the legislative history of the paragraph: but having considered it, I obtain no assistance from it in the construction of the paragraph. Nor do I obtain any such assistance from reported cases on other parts of s.102(2), or from the cases decided on paragraph (a) before Sneddon v. Lord Advocate 1954 A.C. 257 and Gale v. The Federal Commissioner of Taxation 102 C.L.R. 1 in which the point here arising was not discussed.

Paragraph (a) of s. 102(2) may be thought not to be well expressed. Perhaps its meaning is not beyond argument. But I have come to a firm conclusion that the meaning of the proviso is as I have indicated and that its function is merely to protect the estate of a deceased against an operation of the unqualified words of the opening part of the section. I see little profit in conjuring up instances where it might be thought that some item of property not disposed of by the deceased but subject to the trust of his settlement at his death was so related to the property actually disposed of by the deceased that it would be desirable from the point of view of the revenue that it should be treated as part of the notional estate. Nor is there profit in my opinion in considering how on the construction I would give the provision the citizen might so dispose of his affairs as to minimise the impact of such a provision as s. 102(2) upon the amount of death duty payable by his representative. Whether or not any particular property should form part of the dutiable estate is a matter for the legislature to decide. If it intends 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. In my opinion, much clearer words than those used in the paragraph presently under discussion would be necessary to effect an intention to bring into the dutiable estate all the property which for one reason or another might on the death of the deceased be subject to the trusts of a settlement made by him and

satisfying the terms of the paragraph.

In my opinion the appeal should be allowed.

In the High Court of Australia

No. 10

Reasons for Judgments by High Court of Australia

(Barwick C.J. Menzies J. Windeyer J. Owen J. Walsh J.)

3rd December 1971

Barwick C.J. (continued)

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Menzies J.

MENZIES J.: The result of this appeal, from a judgment of the Court of Appeal of the Supreme Court of New South Wales in favour of the Commissioner for Stamp Duties, turns upon the construction to be given to s. 102(2)(a) of the Stamp Duties Act 1920-1964 (N.S.W.), which is in these terms:

"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)(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:

Provided that the property deemed to be included in the estate of the deceased

In the High Court of Australia

No.10

Reasons for Judgments by High Court of Australia

(Barwick C.J. Menzies J. Windeyer J. Owen J. Walsh J.)

3rd December 1971

Menzies J. (continued)

shall be the property which at the time of his death is subject to such trust."

The facts of the case are simple enough. M.S. Atwill deceased had, during his lifetime, paid £200 to the trustees of a settlement made by him which contained the following trust of capital :

> "UPON TRUST after the death of the survivor of the Settlor the said wife of the Settlor and the said sons of the Settlor to divide and pay the trust funds (including any accumulations of which the Trustees then stand possessed pursuant to sub-clause (iii) hereof) to such of the children of the said sons of the Settlor as shall then be living and attain the age of twenty one years and if more than one equally between them on their respectively attaining that age."

It is common ground that there was a trust in respect of the £200 to take effect after the settlor's death. On the day of the settlement the trustees used the £200 to buy from the deceased's wife 20 shares in a family company, Langton Pty. Limited, which the trustees retained and were, at the time of the death of the deceased, $276,458.

The problem is whether the foregoing shares are part of the notional estate of the deceased. The Court of Appeal decided that they are. The appellants contend that they are not, on the simple ground that they were not the property disposed of by the deceased by his settlement. He disposed of £200.

It is, of course, true that the deceased did not dispose of the shares, and, were it not for that part of s.102(2)(a) introduced by the words "Provided that", the shares could not possibly be treated as part of the deceased's notional estate. The shares were, however, property which at the date of the death of the deceased, was subject to the trust to take effect after his death which he had created by his settlement of the £200. The Commissioner

claimed, therefore, that the shares must be "deemed to be included in the estate of the deceased" by virtue of s.102(2)(a) as a whole, including, of course, the opening words of s.102.

In form, the last provision of s.102(2)(a) is a proviso; whether its operation is merely to limit the operation of the sub-section, to property disposed of as provided by the earlier part of the section, which remains subject to the trust at the date of the death of the deceased, is the problem. The sub-section does not so provide in terms. Indeed, in terms it provides clearly enough that the property deemed to be included in the estate of the deceased, by virtue of s.102(2)(a), is "the property which at the time of his death is subject to the trust to be found in the settlement". The shares in question answer this description. Should the provision, however, be read down because the latter part is in form a proviso to an enactment which, without the proviso, would relate only to property which the deceased had disposed of by his settlement?

The purpose of s.102(2)(a) is to bring within the dutiable estate of a deceased person certain property which, at his death, did not belong to him. For the most part, but not exclusively, the sub-section relates to property of which the deceased had disposed during his life. For property falling outside this description see cll. (fa), (g)(i), (h) and (j). Does that part of cl. (2)(a) prefaced by the words "Provided that" bring into the dutiable estate property which not only did not belong to the deceased when he died but of which he had not disposed during his lifetime, simply because when he died the property was subject to a trust of a particular description which the deceased had himself established? The language in which the provision is expressed would require an affirmative answer unless the provision is subject to an unexpressed limitation. The case for the appellants is simply that such a limitation arises from the fact that the provision is introduced by the words "Provided that". This form of enactment, so it is contended, indicates that what follows does no more than except something from the previous enacting part of the enactment, i.e. it is no more than a limitation upon what precedes it.

In the High Court of Australia

No.10

Reasons for Judgments by High Court of Australia

(Barwick C.J. Menzies J. Windeyer J. Owen J. Walsh J.)

3rd ~~First~~ December 1971

Menzies J.

(continued)

There is no doubt that to except is prima facie the operation of a proviso; the question here is whether that is the operation of the words under consideration. To read the provision as no more than a limitation would, I think, require some reconstruction to restrict the meaning of the words used. Of course, it does not refer back to cl. (2)(a) by itself; it refers back to cl. (2)(a) when read with the opening words of the sub-section. The earlier part of s.102(2)(a) refers to property "of which the deceased has disposed" and disregards property subject to the trust at the date of his death. As to property disposed of by the deceased, the provisions of s.105(2) of the Act would apply and, by reason thereof, the value of such property at the time of the disposition would be disregarded. The latter part of s.102 (2)(a) speaks of property subject to the trust at a future time, i.e. the time of the death of the deceased, and employs the verb "shall be" in relation to that property without regard to how the property became subject to the trust. Without any aid of s.105(2) the property would be valued at the date of the death of the deceased. The provision in question would, naturally enough, bring into the dutiable estate property subject to the trust, such as accumulated income upon the trust property which the deceased would himself have received had he not made the disposition. It would also bring into the dutiable estate property transferred by the settlor to the trustees after the original settlement. The circumstance, however, that sets the mind searching for some limitation, is that, without implying some restriction upon its operation, the provision could bring into the dutiable estate of a deceased person property transferred to the trustees of his settlement from sources having nothing to do with him. My search for a limitation, based upon a process of statutory construction, has, however, proved in vain.

I recall that the language of statutes imposing a duty must receive a strict construction; I recall too that an enactment expressed as a proviso is prima facie a limitation rather than a positive enactment; nevertheless, the more I look at s.102(2)(a) I find that the language is clear and unambiguous and requires that property which is, at the date of the death of

a deceased person, subject to a trust to take effect after his death, contained in the settlement whereby he disposed of property, must be included in his dutiable estate. In these circumstances the rule of construction to be applied is the first rule of statutory construction, viz. "If the words of a statute are clear and unambiguous, they themselves indicate what must be taken to have been the intention of Parliament, and there is no need to look elsewhere to discover their intention or their meaning". See Halsbury, 3rd ed., vol. 36, p. 388.

I reflect too, that, had it been intended merely to limit the operation of s.102(2)(a) to property disposed of by the deceased which, at the time of his death, remained subject to the trust contained in his settlement, it is difficult to imagine a choice of words less apt to do this and no more. That the proviso does this as part of its operation, as I think, perhaps explains why it is cast in the form of a proviso.

Furthermore, it seems to me highly unlikely that it was intended that, if a settlor did dispose of property by a settlement containing a trust in respect of that property, to take effect after his death, any change in the investment of the property subject to the trust would take that property beyond s.102(2)(a). Thus, if a deceased person were to have settled $100,000, paid to trustees in cash or by cheque, upon a trust to take effect after his death, with power in the trustees to invest the money, s.102(2)(a) would apply only while the trustees held the cheque or cash and, as soon as they invested it, whatever be the investment, that investment would fall outside the operation of s.102(2)(a) because the property, then subject to the trust, had not been disposed of by the deceased. Counsel for the appellant, quite properly, I think conceded that the adoption of their arguments must lead to such a consequence.

It is for these reasons that I agree with the judges of the Court of Appeal and consider that this appeal should be dismissed.

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(Barwick C.J.
Menzies J.
Windeyer J.
Owen J.
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Windeyer J.

WINDEYER J: I have had an opportunity of reading the judgments that the Chief Justice and Owen J. have written. I agree in their conclusion and generally in their reasons. I would be content to express agreement, except that in this I differ, after much consideration, from the learned and closely reasoned judgments that were delivered in the Supreme Court. I shall therefore explain for myself my reasons for concluding that this appeal should be allowed. I do so with all respect for the views of those who think otherwise, and well appreciating that two views are open. I appreciate too that the view that I take can lead to results that one may suppose that the Legislature of New South Wales did not contemplate, and which if it had done so it would have guarded against. If that be so, it can now amend the law for the future. But this case must depend upon the operation of paragraph (a) of s.102(2) of the Stamp Duties Act (N.S.W.) as it stands and stood at the date of death of the deceased in 1965. The wording of that paragraph contains some inelegancies and obscurities, arising from the reference to property disposed of by will and to powers of appointment. But these do not bear upon the question in this case. The Act must be construed strictly according to its terms. A concern that this may produce anomalies cannot dictate a different construction. And some odd results of the construction for which the appellants contend can be matched by others that would arise if the respondent's construction were adopted. In this situation I take comfort from the remarks of the Privy Council in Attorney-General for Ontario v. National Trust Company Limited, (1931) A.C. 818 at p. 823.

I need not repeat all the facts. It is enough to say that Milton Spencer Atwill, the deceased, settled two hundred pounds upon trusts for the benefit of his grandchildren to take effect after his death. The pow ers of investment in the trust deed were expressed as follows :

> "All moneys liable to be or requiring to be invested by the Trustees hereunder may at the absolute discretion of the Trustees be invested in any one or more of the following modes of investment :-
>
> (a) Any investment in any State of the Commonwealth for the time being allowed by the law of

that State or by Commonwealth legislation for the investment of trust funds.

(b) The purchase of any income producing real estate in New South Wales.

(c) Deposit in any Government Savings Bank within the Commonwealth.

(d) Fixed deposit in any Bank carrying on business within the Commonwealth.

(e) Shares in Langton Pty. Limited and/or any subsidiaries and/or any other company or companies wherein the Settlor or the said wife of the Settlor shall have a controlling interest or shares in any company (other than mining companies) listed on the Sydney and/or Melbourne Stock Exchanges and carrying on business in the Commonwealth of Australia" and having certain specified characteristics which it is unnecessary to quote.

The express reference to Langton Pty. Limited and some transactions within that company, which all occurred on the day, 27th November 1953, on which the deed of settlement was executed and the twenty shares in Langton were allotted, leave no doubt that the execution of the settlement and the trustees' application of the trust fund in the acquisition of these shares were all pursuant to a concerted plan. It may havebeen a device to avoid death duty. The only question is, Was it a successful device? That does not depend upon what the persons concerned set out to achieve, but on the results in law of what they did. The deceased, the settlor, himself and his two sons were the trustees of the fund of £200 that he provided. Probably it was contemplated by them from the outset of the arrangements that the money would be used as it was, to acquire the Langton shares. But, as appears from the passage I have set out, the choice of investments open to the trustees was, within the permitted range, at their "absolute discretion". That they used their discretion in a particular way is in law immaterial.

The case is not like one in which money is given by a settlor to a trustee upon trust to use it in the purchase of some specified property

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to be held upon trusts he created. In a case of that sort it might be said that the settlor had made a voluntary settlement of the specific property which the trustee must buy. But that cannot be said when the property settled is a fund of money which in law the trustee can invest as he sees fit. Nor is this case like one in which - as in Commissioner of Stamp Duties (N.S.W.) v. Way (Gillespie's Case) (1949), 79 C.L.R. 477; [1952] A.C. 95 - the settlor retained an overriding power to direct or require the way in which the trust fund should be applied. The trustees here could have lawfully invested the trust fund in any one or more of the various investments authorised by the trust deed. 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 here adapt and adopt remarks of Lord Morton of Henryton in his speech in Sneddon v. Lord Advocate, [1954] A.C. 257 at p. 264.

Whatever would be the position if the words of the enactment were simply "property settled", the critical words are actually: "property which the deceased has disposed of . . . by a settlement containing any trust in respect of that property to take effect after his death". Thus it is that the paragraph has been said to describe settlements that are substitutes for wills, being dispositions by a man in his lifetime, of property that is his, to take effect after his death. The deceased cannot be said to have disposed of the Langton shares, for they were not his to dispose of. It is important to notice here the difference in the words of paragraph (a), on which this case depends, from the words of paragraph (b) of s.102(2), "any property comprised in any gift made by the deceased". A man only disposes of property when, it being his or its disposition being in his control, he parts with it according to its nature. But a man can be colloquially said to have made a gift of a thing that was not his if he gave another man, the "donee", money expressly to enable him to acquire it, and he did so. Dixon C.J. observed in Commissioner of Stamp Duties v. Gale (1958),

101 C.L.R. 96 at p. 107: "To ask what was given may in its application to many sets of fact be to ask a completely ambiguous question. For it may mean 'What did the donor part with?' On the other hand it may mean 'What did the donee acquire in fulfilment of the donor's desire to benefit him?'. His Honour there held (at p.109) that the word "gift", being defined in s.100 of the Act as meaning "any disposition of property made . . . without full consideration . . .", the scope of the phrase "property comprised in any gift made by the deceased" comes down in the end to the question, What did the deceased alienate? That, his Honour pointed out, conformed with what Isaacs J. in Watt's Case (1926), 38 C.L.R. 12 at p. 32 had seen as a basic notion on which death duty is founded. I have referred to s.102(2)(b) only to emphasise that the notion that the words "property comprised in a gift" although in the Act by implication and definition importing a concept of alienation by the donor, differ from the requirement in s.102(2)(a) expressed by the plain words "property which the deceased has disposed of". I do not think that anything in the definitions in s.100 of the Act of "disposition of property" or of "settlement" would justify reading s.102(2)(a) as covering anything other than the property of a deceased that he had disposed of. I therefore consider that the Langton shares, not being property which the deceased disposed of were not by virtue of s.102(2)(a) included in his dutiable estate. But two answers to this are proposed. One is that the shares are to be identified with the £200 that the deceased disposed of and which was used to acquire them. The other is that the proviso in s.102(2)(a) brings the shares to charge. I shall deal with these propositions in turn.

It is true that the shares held upon the trusts of the settlement at the death of the settlor can in a sense be identified with the £200 by which they were acquired. The trust fund, it can be said, was then represented by the shares. There are cases in which a process of identification of that sort has been relied upon to bring particular property into the notional estate of a deceased. The question posed in such cases has been whether property originally provided by the deceased is to be regarded as

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being at the date of his death in existence in the form of other property into which it had become converted or transmuted. A process analogious to tracing has been adopted in some cases. Sometimes it has been called transmogrification. We heard that word again in this case. But, with respect for those who first introduced it into this context and for those, including the authors of textbooks, who have adopted it, it seems to me to be a barbarous word, ugly and inapt. Doubtless for some centuries, "transmogrify", as a verb, has appeared occasionally in writings. In the Oxford Dictionary it is said to be now "chiefly jocular"; and Fowler, 2nd edition, puts it among "facetious formations" as "long and ludicrous". What does it mean? According to the dictionary a transmogrification is a strange or grotesque transformation. I must say that I doubt whether a word of laboured jocularity, unknown etymology and indefinite denotation can appropriately be used to express or define a legal concept, especially in a field so far removed from jesting as the New South Wales Stamp Duties Act. However that be, whatever vitality the doctrine that the word was used to describe once had, it has come now to the end of its days. In this Court it has been laid to rest by the decision in Gale v. Federal Commissioner of Taxation (1960) 102 C.L.R. 1, following Sneddon v. Lord Advocate, supra. I do not suggest that there cannot be a case in which property disposed of by a settlement can continue to exist as the same subject matter notwithstanding an alteration in its form, when the change was always inherent in it. Take, for example, the case that was supposed in the course of the argument - a settlement by a deceased of government stock that was redeemed before his death and the trustees paid the moneys to their bank account, which at the date of the death of the deceased was thus in credit. Mr. Kerrigan said that consistently with his construction of s.102(2)(a) the bank credit would not be the property that the deceased had settled. But I see no reason for his going so far. It is true that in the case supposed what was settled by the deceased was government stock; and that the proceeds of redemption were represented by a right in the trustees to recover from a bank. Nevertheless

I would regard the ripening of any loan, secured or unsecured, into a claim for repayment as not a change in the nature of property so much as a development of it according to its nature. In somewhat the same way it seems to me that if shares be settled and in the course of time the trustees of the settlement, by virtue of their holding the settled shares, receive bonus shares their total holding can be treated as property that the settlor had settled. That is because the additional shares are an accretion to the settled property, its produce as progeny. The case of Kent v. Commissioner of Stamp Duties (N.S.W.) (1961), 106 C.L.R. 366 is an illustration: there was no suggestion there to the contrary. But cases of that kind are essentially different from cases in which a trustee lawfully converts a trust asset into property of a different kind, its produce in sense, but not its progeny. A trustee may by prudent management or good fortune in dealings with the trust property add new assets to the trust estate. But that does not make what he gains identical with that used to gain it. It is another thing. The servant who in the parable had received five talents "went and traded with the same and made them other five talents". They were a new thing, not the same thing. I reject the argument that the Langton shares can be identified with the money that the deceased disposed of.

I go next to the proviso to paragraph (a) To shew this in its proper perspective I set out here verbatim the relevant parts of the Act:

> "s.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)(a) All property which the deceased has disposed of . . . by a settlement containing any trust in respect of that property to take effect after his death . . .
>
> Provided that the property deemed

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to be included in the estate of the deceased shall be the property which at the time of his death was subject to such trust."

The argument is that this brings to charge the value of the shares at the date of death of the deceased, they being then property subject to the trust that was created by him to take effect after his death. The judgments of the learned members of the Supreme Court were founded mainly on this reading of the proviso, which they treated as turning the scale. I have felt the weight of that; but I am not able to give it the result that their Honours did.

The purpose of the proviso is not to determine that property brought into the dutiable estate by s.102(2)(a) is to be valued for the assessment of duty at the date of death. That is provided for by s.105(2). The proviso prescribes what is to be valued, not when it is to be valued. I do not think that the problem it creates is to be answered by asking whether it is to be regarded as having a limiting or an enlarging effect upon the antecedent words. I prefer the statement of Mason J.A. that "its function is that of clarification for it may be said to qualify the operation which might otherwise be given to the principal provision if it stood in isolation". But it is couched as a proviso and should I consider be construed accordingly. Using two homely metaphors: A dog may be tied by its tail. The tail must not be allowed to wag the dog.

In Watt's Case (1925), 25 S.R. (N.S.W.) 467 at p. 490, Ferguson J., having quoted the proviso, said: "The intention of the Legislature, in my opinion, was that if there was existing in New South Wales some property which the deceased had disposed of, but which at the time of his death was still subject to a trust to take effect after his death . . . then that property was to be deemed part of his dutiable estate". When the case came on appeal to this Court, Higgins J. said that as to that he concurred absolutely with Ferguson J. I consider that the passage I have quoted states the whole effect of the proviso. In other words,

the proviso 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. That, I think, gives the words an ample and sufficient meaning. To read them as making dutiable something that the deceased did not dispose of seems to me to be not to clarify the antecedent words so much as to contradict them. I am not able to construe "all property which the deceased has disposed of ... by a settlement" as meaning property which becoms subject to the trusts of a settlement that he created. That would not be to treat the enactment as designed to catch settlements which are substitutes for wills by which a man disposes of his estate, but to subject his estate to duty arising as a result of transactions by other persons with property that he had disposed of.

Against this construction, which limits the operation of the proviso to cases in which what was disposed of has before the time of death ceased to exist, as for example shares in a company that is wound up, or been in some way diminished in extent, it is urged that this would make the proviso unnecessary. It is said that it must be given a larger operation, otherwise it would be nugatory. It depends, of course, in what sense one uses the word nugatory; but I would not treat it as meaning merely unnecessary. I am not prepared to say that, because read as I would read it, it makes explicit what was already implicit, another meaning must be found for it. Even if one supposes that Parliament does nothing in vain, it seems to me that to clarify its meaning is not something done in vain.

For these reasons I would allow the appeal.

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OWEN J : This appeal raises difficult questions as to the construction and operation of s.102(2)(a) of the New South Wales Stamp Duties Act. The appellants are the executors of one Milton Spencer Atwill (the deceased) who died in November 1965. In November 1953 the deceased paid £200 to the trustees of a deed of settlement which he had executed and which contained trusts to take effect after his death. The trustees, on receipt of the money and pursuant to powers of investment given to them by the deed, immediately invested the money in the purchase of 20 shares in a company, Langton Pty. Ltd., and at the date of the deceased's death these shares, which were then held by the trustees subject to the trust, were valued at $276,458. The question is whether by virtue of s.102(2)(a) of the Act, the shares should be treated as part of the dutiable estate of the deceased for the purposes of the assessment and payment of death duty. The matter came before the Court of Appeal by way of case stated and their Honours decided the questions asked in favour of the respondent Commissioner.

Section 102(2)(a) provides that:

> "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)(a) All property which the deceased has disposed of ... by a settlement containing any trust in respect of that property to take effect after his death...:
>
> 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."

For the appellants it is said that the property which the deceased had disposed of by the settlement was £200; that at the date of his death the moneys were not subject to the

trust since they had been expended in purchasing the shares during the lifetime of the deceased; that at the date of the deceased's death the property which was subject to the trust consisted of the shares but these were not to be treated as being notionally part of his estate because he had not disposed of them by the settlement nor could he have done so; and that in these circumstances neither the shares nor the moneys were, at the date of the deceased's death, deemed to be part of his estate for the purposes of the assessment and payment of death duty.

For the respondent Commissioner it was contended that while the appellants' contention might well have been correct had the first part of s.102(2)(a) stood alone, the second part of the provision operated to deem the shares to be part of the deceased's estate for death duty purposes.

The appellants' argument is that in order to determine whether s.102(2)(a) is applicable it is necessary to enquire:

1. Did the deceased dispose of property during his lifetime?

2. If so, did he dispose of it by a settlement containing a trust to take effect after his death?

3. Was the property the subject of the disposition or any part of it subject to such trust at the date of his death?

And that it is only if each of these questions is answered in the affirmative that s.102(2)(a) operates. The respondent's submission is that if the first two questions are answered "Yes", the only remaining question to be considered is whether at the time of the deceased's death, there was any property subject to the trust. If there was, it is immaterial whether that property consists of the property or any part of the property over which the deceased had exercised a power of disposition by the settlement.

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It seems odd to me that what, on its face, appears in the form of a proviso to the substantive enactment contained in the first part of s.102(2)(a), should be regarded as "in substance a fresh enactment, adding to and not merely qualifying that which goes before" (per Loreburn L.C. in Rhondda Urban District Council v. Taff Vale Railway Company [1909] A.C. 253 at p. 258). If it is itself a substantive enactment then the Legislature has, in the form of a proviso, added to s.102(2) a new category of "notional estate" consisting of property over which the deceased never had any power of disposition. This of course does not conclude the matter but it does, I think, lend support to the construction for which the appellants contend, namely that the second part of paragraph (a) is a true proviso designed to limit the operation of the first part of that paragraph so that when the paragraph is read as a whole it operates 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. Further support is, I think, lent to that construction by what was said by Ferguson J. in Watt's Case 25 S.R. (N.S.W.) 467 although the facts in that case are in no way similar to those in the present case. At P. 490 he said of s.102(2)(a) that :

> "The intention of the Legislature, in my opinion, was that if there was existing in New South Wales some property which the deceased had disposed of, but which at the time of his death was still subject to a trust to take effect after his death... then that property was to be deemed part of his dutiable estate. I agree with Mr. Maughan's submission that if anything done during the testator's lifetime had the effect of removing the property... out of the categories mentioned in the relevant subsections, it thereupon ceased to be part of the estate."

The question raised is not an easy one to answer but on the whole I think s.102(2)(a) should be read in the way submitted on behalf of the appellants and that "the property" to which the second part of paragraph (a) refers should be read as referring back to the property of which

the first part of the paragraph speaks - namely, the "property which the deceased has disposed of". To my mind this is undoubtedly a construction which is open on the language used and it is to be borne in mind that we are called upon to construe a taxing Act and that the general notion behind s.102(2) is to bring to duty property as to which a deceased person has 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. That idea was expressed by Dixon C.J. in Commissioner of Stamp Duties v. Gale (1958) 101 C.L.R. 96 at p. 107 when his Honour said:

> "Generalisations should not be pressed too far but prima facie one expects the legislation to bring into the notional estate some right interest or property on the ground that the deceased has parted with it, that is, has parted with it in circumstances of a kind which the legislature decides should lead it to refuse recognition to the alienation for purposes of death duty ..."

I would allow the appeal and answer the questions in favour of the appellants.

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WALSH J. : I have had the advantage of reading the reasons for judgment prepared by Menzies J. I agree with his conclusion and I am in general agreement with his reasons. I wish to make some further observations upon the problem raised by this appeal, concerning the construction and operation of s.102(2)(a) of the Stamp Duties Act 1920 (as amended) (N.S.W.).

His Honour has stated that unless some limitation can be implied upon the operation of that provision, it would bring into the dutiable estate of a deceased person property transferred to the trustees of a settlement made by him from sources having nothing to do with him. His Honour proceeds to say that he has searched in vain for such a limitation. For my part I do not regard it as necessary to decide in this case whether property so transferred to the trustees would or would not

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form part of the dutiable estate. The question does not arise upon the facts of this case and it is a question which would rarely arise. If property were so transferred, the transfer might be accompanied by an instrument or by a statement which would demonstrate that the transferor was himself creating a trust, defining its terms by reference to the terms of the settlement to the trustees of which the property was being transferred and, in my opinion, this would have the consequence to which the judgment of Mason J.A. in this case referred, namely, that the property so transferred would not become subject to "such trust", that is, to the trust contained in the settlement made by the deceased. I do not say that this would always be so. I am prepared to assume that there could be an accretion from an outside source to the property which is "subject to such trust", But if the provision would operate upon such an accretion, this would rarely occur and the possibility that to that extent the provision may have an operation probably not foreseen or actually intended does not warrant, in my opinion, the adoption of a construction of the provision different from that which would be put upon its language if that possibility did not exist.

In considering the meaning and the effect of the whole provision including the proviso, it should be noticed that ever since the principal Act was enacted in 1920 this paragraph of s.102(2) has remained in the same form, disregarding the amendments not here material by which the words "or special" were omitted and restored and again omitted by amending Acts in 1924, 1931 and 1933. In the 1920 Act and for quite a long period thereafter, par. (b), (c) and (d) of the same subsection were unlike par. (a) in that those other paragraphs contained no special provisions concerning the ascertainment and identification of the property which was brought by them into the dutiable estate. In that part of Watt's Case (In the Estate of W.O.Watt (Deceased) (1925) 25 S.R. (N.S.W.) 467; The Commissioner of Stamp Duties (New South Wales) v. The Perpetual Trustee Company Limited (1926) 38 C.L.R.12) which dealt with a question arising under par. (b) of s.102(2), the important rule was established that if the

"property comprised in any gift" made within three years before the testator's death was no longer in existence when he died or if in existence was not situated in New South Wales, it could not be included in the dutiable estate pursuant to that paragraph. The reasons upon this point given by Ferguson J. in the Supreme Court (25 S.R. (N.S.W.) at p.492) which were approved in this Court make it clear, in my opinion, that the rule to which I have referred was not applicable to par. (b) alone and that is a view which was adopted in subsequent cases in which reference was made to Watt's Case. I think it is clear that if par. (a) had been enacted without the proviso that same rule would have been regarded as applicable, that is to say, the provision would not have operated if at the date of death there was no property to be found in New South Wales which was subject to the relevant trust contained in the settlement. Personal property situated outside New South Wales at the date of death would have been brought, at a later point of time, into the dutiable estate, in the circumstances described in sub-s. (2A) of s.102, but that is not material to the point which I am now making.

I do not doubt that the provision operates in such a way that property which is not at the time of the death subject to the trust is not brought to duty. That conclusion is required by the language of the provision and it is in accordance with what Ferguson J. said in Watt's Case (25 S.R. (N.S.W.) at p.490). The contention on the part of the Commissioner with which his Honour was dealing is there stated. The contention was that once there had been a settlement or disposition of property of the kind mentioned in par. (a) or par. (c), "the position was crystallised, and the property stamped irrevocably with liability to death duty". That contention his Honour rejected and he said that as to par. (a) it was answered by the proviso. So it was. But, in my opinion, the contention would have been wrong even if there had been no proviso. That view accords with the rejection by Ferguson J. of the same contention so far as it related to par. (c) which had no such proviso. Ferguson J. went on to say that the intention of the legislature was that if

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(continued)

there were existing in New South Wales some property which the deceased had disposed of, but which at the time of his death was still subject to a trust to take effect after his death, then that property was to be deemed part of his dutiable estate. That statement should be read having regard to the question with which his Honour was then dealing. He was not dealing with the question whether property subject to the trust at the time of death had to be, if it were to be included in the estate, part of the property with which the settlor had parted. He was dealing with the question whether the provision could operate upon property which had formerly been subject to a trust to take effect after death but which had ceased before the death of the settlor to be subject to any such trust.

Questions have arisen in many cases relating to par. (b) as to whether the "property comprised in a gift" should be found to have been money or to have been property purchased with money provided bythe donor and vested in the donee or in trustees for the donee and as to whether, particularly in relation to gifts made by way of establishment of a trust, the property given could be identified with or was "represented" by property which existed at the date of death in a different form. Cases in which such questions have been debated include Vicars v. The Commissioner of Stamp Duties (New South Wales) (1945) 71 C.L.R. 309, and Commissioner of Stamp Duties v. Gale (1958) 101 C.L.R. 96. See also Gale v.Federal Commissioner of Taxation (1960) 102 C.L.R. 1. There is no need to examine those cases here, nor is it necessary to set out the terms of the legislation which sought to deal with some of those questions, by adding in 1931 a new par. (ba) to s.102(2) and by enacting in 1939 an addendum to par. (b). Such questions have not been agitated in relation to par. (a). No doubt they would have arisen if that paragraph had not contained the proviso. But it seems clear to me that they have been thought to be answered, in relation to that paragraph, by the express terms of the proviso.

It is in my opinion a matter of significance that in cases which have been taken to this

Court and to the Privy Council relating to par. (a) of s.102(2), in which the estate would have escaped duty in whole or in part, if the paragraph operates only upon property which has actually been transferred by the settlor to the trustees, it has been assumed that its operation is not so limited. I propose to refer to three such cases.

In Rabett v. Commissioner of Stamp Duties (1927) 27 S.R. (N.S.W.) 370, a sum of £30,000 had been transferred by a settlor to trustees upon certain trusts. When he died the capital value of the property subject to the settlement at that time was a little over £30,000. The reports of the case do not state what that property was, but it seems plain that it was not simply a sum of money. The Commissioner claimed (see p. 372) that the value of the whole of the property subject to the settlement at the date of death should be included in the dutiable estate. By majority the Supreme Court upheld that claim. An appeal to the Privy Council was dismissed and that decision is reported as Rabett v. Commissioner of Stamp Duties [1929] A.C.444. At p. 447, the judgment set out the terms of par. (a) of s.102(2) and then stated: "It is by virtue of this provision that the duty has been assessed in the present case upon the settled property".

In In re Gillespie (1949) 49 S.R. (N.S.W.) 331, the property which was at the date of the settlor's death subject to the trusts of the settlement was held by a majority in the Supreme Court to have been properly included in the dutiable estate by reason of par. (a) of s.102(2). It was a case in which there had been substantial changes in the nature of the property held by the trustees, who had used money paid to them by cheque by the settlor to buy shares in companies. In this Court it was held that there was no trust to take effect after death within the meaning of par. (a) and therefore that paragraph did not apply: see Way v. The Commissioner of Stamp Duties (New South Wales)(1949) 79 C.L.R. 477. It was not argued that par. (a) could apply only to such property, if any, held by the trustees as was part of the actual property which the settlor had transferred to them. An appeal from the

In the High Court of Australia

No.10

Reasons for Judgment by High Court of Australia

(Barwick C.J. Menzies J. Windeyer J. Owen J. Walsh J.)

3rd December 1971

Walsh J.

(continued)

decision of this Court to the Privy Council was dismissed: see Commissioner of Stamp Duties of New South Wales v. Way (1952) A.C. 95. It was not suggested that even if it were held that there was a trust to take effect after death, par (a) could not apply to the shares, which the settlor had not disposed by the settlement but which were afterwards purchased by the trustees.

In Kent v. Commissioner of Stamp Duties (1960) 61 S.R. (N.S.W.) 440, a settlor had made a declaration that he held 1,000 shares in a certain company upon terms which included a term that he would hold the said shares and the investments for the time being or from time to time representing the same upon certain trusts as to income and as to corpus. When the settlor died the property the subject of the declaration of trust consisted of 3,000 shares in the company. The Supreme Court held by majority that there was a trust to take effect after his death and that the inclusion in the dutiable estate of the value of the 3,000 shares was correct. That decision was confirmed by this Court in Kent v. Commissioner of Stamp Duties (N.S.W.) (1961) 106 C.L.R. 366. In a joint judgment of four members of this Court, their Honours referred to the decision of the Supreme Court from which the executors had appealed and after saying that the appellants conceded that by executing the deed the deceased made a "settlement" of the 1,000 shares, their Honours said (at pp.372-373):

> "The concession is rightly made, since by s.100 'settlement' is defined to include, inter alia, any disposition of property, without consideration, whereby any property is settled. The property which was subject to the trusts of the settlement at the death of the deceased consisted of 3,000 shares in the same company. By virtue of the proviso to sub-par. (a), even if not independently of it, the 3,000 shares are the property with respect to which the question must be considered whether the sub-paragraph applies to the facts of the case".

If the contention of the appellants in the present case is correct the statement in the last sentence in the passage cited is plainly wrong and must be taken to have been made per incuriam.

The three cases to which I have referred, all of which related to par. (a), illustrate the view that has been taken consistently of the meaning and effect of that paragraph in the long period since it was enacted. In my opinion that was not an erroneous view. In the present case, as Menzies J. has said, the shares held by the trustees of the settlement at the date of the settlor's death answered the description which the provision gives of the property which is deemed to be included in the dutiable estate. They constituted "the property which at the time of his death (was) subject to such trust".

In my opinion the appeal should be dismissed.

In the High Court of Australia

No.10

Reasons for Judgment by High Court of Australia

(Barwick C.J. Menzies J. Windeyer J. Owen J. Walsh J.)

3rd December 1971

Walsh J.

(continued)

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No. 11

No.11

Order

ORDER OF THE HIGH COURT OF AUSTRALIA NEW SOUTH WALES REGISTRY

IN THE HIGH COURT OF AUSTRALIA
NEW SOUTH WALES REGISTRY No.108 of 1970

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES (COURT OF APPEAL DIVISION)

IN THE MATTER of the Estate of MILTON SPENCER ATWILL deceased

AND IN THE MATTER of the Stamp Duties Act, 1920-1964

BETWEEN: ALAN CAVAYE ATWILL, MILTON JOHN NAPIER ATWILL and DAVID NAIRN REID
Appellants

AND: THE COMMISSIONER OF STAMP DUTIES
Respondent

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR GARFIELD BARWICK, MR. JUSTICE MENZIES,

In the High Court of Australia

No.11

Order

(continued)

MR. JUSTICE WINDEYER, MR. JUSTICE OWEN AND MR. JUSTICE WALSH

FRIDAY THE THIRD DAY OF DECEMBER ONE THOUSAND NINE HUNDRED AND SEVENTY ONE

THIS APPEAL from the judgment and order of the Supreme Court of New South Wales (Court of Appeal Division) given and made on the 27th day of November 1970 coming on for hearing before this Court at Sydney on the 24th and 25th days of August 1971 UPON READING the Transcript Record of Proceedings AND UPON HEARING Mr. Kerrigan of Queen's Counsel and Mr. Reddy of Counsel for the Appellants and Mr. Officer of Queen's Counsel and Mr. McLelland of Counsel for the Respondent THIS COURT DID ORDER on the said 25th day of August 1971 that this appeal should stand for judgment and the same standing for judgment this day accordingly at Sydney THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that the said order of the Supreme Court of New South Wales (Court of Appeal Division) be and the same is hereby set aside AND that in lieu of the answers given by the said Supreme Court to the questions asked in the case stated by the Respondent on the 3rd day of April 1970 such questions be and the same are hereby answered as follows :-

QUESTION (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.

ANSWER No.

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

(a) one hundred and twenty four thousand nine hundred and thirty eight dollars and six cents ($124,938.06) or

(b) forty seven thousand and twelve dollars and two cents ($47,012.02) or

(c) some other, and if so what amount.

ANSWER

(a) No.

(b) Yes.

(c) Unnecessary to answer.

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

ANSWER By the Commissioner of Stamp Duties.

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 Appellants of this appeal and that such costs when so taxed and certified be paid by the Respondent to the Appellants or to their solicitors AND THIS COURT DOTH BY CONSENT FURTHER ORDER that the sum of one hundred dollars ($100.00) paid into Court as security for the costs of this appeal be paid out to the Appellants or to their solicitors.

BY THE COURT

(sgd) H. CANNON

DISTRICT REGISTRAR

In the Privy Council

No. 12

Order granting special leave to appeal to Her Majesty in Council 24th May 1972

No. 12

ORDER GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

AT THE COURT AT BUCKINGHAM PALACE

The 24th day of May 1972

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 8th day of May 1972 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 the Commissioner of Stamp Duties in the matter of an Appeal from the High Court of Australia between the Petitioner and (1) Alan Cavaye Atwill (2) Milton John Napier Atwill and (3) David Nairn Reid Respondents setting forth that the Petitioner prays for special leave to appeal from a Judgment and Order of the High Court of Australia dated the 3rd December 1971 allowing an Appeal by the Respondents from a Judgment of the Court of Appeal of the Supreme Court of New South Wales dated the 27th November 1970 on a case stated by the Petitioner for the opinion of the Court of Appeal: And humbly praying Your Majesty in Council to grant him special leave to appeal against the Judgment and Order of the High Court of Australia dated the 3rd December 1971 or for further or other relief:

"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 and Order of the High Court of Australia dated the 3rd December 1971:

In the Privy Council

No.12

Order granting special leave to appeal to Her Majesty in Council 24th May 1972

(continued)

"AND Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioner upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

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.

IN THE PRIVY COUNCIL No. 20 of 1972

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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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RECORD OF PROCEEDINGS

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