

2, 1956

19 FEB 1957

INSTITUTE OF ~~ADVANCED~~ **In the Privy Council.**
LEGAL STUDIES

No. 34 of 1955.

~~SECTION~~ APPEAL FROM THE SUPREME COURT
OF NEW SOUTH WALES

BETWEEN

PERPETUAL TRUSTEE COMPANY (LIMITED) the
Trustee of the Will of ANDREW JOHN BRADY deceased APPELLANT
AND
THE COMMISSIONER OF STAMP DUTIES RESPONDENT.

CASE FOR THE APPELLANT

RECORD

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

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

Whether Section 102 sub-section (2) (g) and Sections 105A, 114A, 115A, and certain ancillary Sections and sub-sections of the Stamp Duties Act are valid enactments of the Parliament of New South Wales.

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

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

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

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p. 9, ll. 40-46

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

p. 2, ll. 2-4

5.—Andrew John Brady (hereinafter called “ the testator ”) died on the 25th day of August, 1927 being then domiciled in the State of New South Wales and leaving property within the said State.

p. 2, ll. 5-7

6.—Probate of the Will of the testator was on the 25th day of October, 1927 granted to Perpetual Trustee Company (Limited) the executor named therein and the present trustee thereof.

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pp. 2-5

7.—By his Will dated the 14th day of December, 1926 the testator after bequests of certain specific and pecuniary legacies which are not relevant to this Appeal gave devised and bequeathed all his real and the residue of his personal property whatsoever and wheresoever situate to his said trustee upon trust to pay all his just debts funeral and testamentary expenses and also all Probate, estate, and legacy duties whatsoever Federal and State and then upon trust to sell and convert with power to postpone conversion and to invest and to stand possessed of the trust funds and the investments for the time being representing the same upon trust as to one-third part or share thereof to pay the income arising therefrom to the wife of the testator, namely, Maude Lilian Brady during her life and from and after her death to hold the same upon trust for all such one or more exclusively of the others or other of his children at such age or time or respective ages or times if more than one in such shares and in such manner as the said Maude Lilian Brady should from time to time by any deed or deeds or by will or codicil appoint and in default and subject to any such appointment upon the same trusts as were declared in the said will concerning the remaining two-thirds of the estate. The testator directed his trustee to stand possessed of the remaining two-thirds of the trust estate upon trust for such of his children as being male should attain the age of twenty-five years or being female should attain the age of twenty-one years or marry if more than one in equal shares as tenants-in-common but subject to the declaration and provision that the share of daughters should be settled.

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p. 5, ll. 18-20

8.—The above mentioned Maude Lilian Brady died on the 16th day of January, 1953, being then domiciled in England and leaving property in the State of New South Wales.

p. 5, ll. 21-25

9.—Probate of the Will and Codicil thereto of the said Maude Lilian Brady was granted by the High Court of Justice in England to Bertha Marian Ada Campbell Watt. No grant of representation of the estate of the said Maude Lilian Brady has yet been made in the State of New South Wales.

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- 10.—At the date of death of the said Maude Lilian Brady the executorial duties in respect of the estate of the testator had been carried out and the estate of the testator in New South Wales vested in the trustees of his Will consisted of shares in public companies, all of which carry on business in the State of New South Wales and of Commonwealth Inscribed Stock which was at the date of the death of the said Maude Lilian Brady recorded in the Registry of Inscribed Stock at Sydney in the State of New South Wales and of a small amount of cash in hand. The value of the said property and assets at the date of death of the said Maude Lilian Brady was £21,123 5s. 1d. The said shares in the companies were registered in the name of the Appellant upon share registers in New South Wales of the respective companies. RECORD
p. 5, l. 26-
p. 6, l. 28
- 11.—The Appellant is a Company incorporated under the law of New South Wales and carries on business in that State. p. 6, ll. 29-30
- 12.—The testator left him surviving three children and no more, namely one son, Irvine Gordon Campbell Brady and two daughters, Bertha Marian Ada Campbell Watt and Moira Maud Campbell Broadhurst who all survived the said Maude Lilian Brady. p. 6, ll. 31-34
- 13.—At the date of the death of the said Maude Lilian Brady the said Irvine Gordon Campbell Brady was resident and domiciled in the State of New South Wales, the said Bertha Marian Ada Campbell Watt was resident and domiciled in England and the said Moira Maud Campbell Broadhurst was resident and domiciled in Scotland. p. 6, ll. 35-39
- 14.—The said Bertha Marian Ada Campbell Watt died on the 21st day of July, 1953 leaving her surviving one child only, namely Felicity Vernon who is resident and domiciled in England. p. 7, ll. 1-3
- 15.—By her Will the said Maude Lilian Brady duly appointed the one-third share of the testator's residuary estate over which she had a special power of appointment under the testator's Will to the above named three children of the testator in equal shares absolutely. p. 7, ll. 4-7
- 16.—On the basis of the foregoing facts the Respondent included in the dutiable estate of the said Maude Lilian Brady the assets of the estate of the testator above mentioned to the extent to which a benefit accrued or arose by cesser of the interest therein limited to cease on the death of the said Maude Lilian Brady and the Respondent Valued such benefit at 500/1116ths of the principal value of such assets, namely at £9,464 0s. 0d. The Respondent treated this proportion of the value of the said assets of the estate of the testator as an estate by itself and separately assessed duty thereon in the sum of £1,072 11s. 9d. p. 7, ll. 11-25
- 17.—Notice of such assessment was issued by the Respondent on the 14th day of April, 1953 addressed to the Appellant and calling upon it to p. 7, ll. 26-39

RECORD

pay the said sum of £1,072 11s. 9d. as death duty properly payable by it. Duty in accordance therewith was duly paid by the Appellant but it being dissatisfied with such assessment delivered to the Respondent notice in writing requiring him to state a case for the opinion of the Supreme Court of New South Wales.

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

pp. 1-8

p. 8, ll. 1-12

- (1) Whether any part of the property included in the estate of the testator in which Maude Lilian Brady had an interest limited to cease on her death was liable to duty under and by virtue of the Stamp Duties Act, 1920-1952 ? 10
- (2) If the answer to question (1) be in the affirmative—
 - (a) what part of such property was liable to duty as aforesaid ?
 - (b) what was the value attributable to such part thereof for the purpose of assessing death duty thereon in accordance with the provisions of such Act ?

19.—The Case Stated by the Respondent came on for hearing before the Full Court of the Supreme Court of New South Wales on the 8th and 9th days of November 1954 before Maxwell, J., Roper, C.J. in Eq., and Herron, J., when it was argued by the Appellant and the Respondent simultaneously with two other Cases Stated by the Respondent, namely, a Case Stated in the matter of the estate of Grace Isabel Forster deceased and a Case Stated in the matter of the Estate of Sarah Johnson deceased. Both the last named Cases Stated involved questions similar to the questions raised in the Case Stated in the present matter. 20

pp. 8-13

20.—On the 20th April 1955, the Supreme Court gave Judgment in all of the three Cases Stated and delivered one Judgment as furnishing the Reasons for its answers to the questions in each of the three cases. In the Case Stated in the Estate of Maude Lilian Brady deceased, the Supreme Court answered the questions which are set out in paragraph 18 above 30

p. 13, ll. 7-8
p. 14, ll. 14-15

- (1) Yes.
- (2) (a) All such property.

21.—The Supreme Court held

p. 10, ll. 26-30

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

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

RECORD

p. 10, ll. 30-33

p. 10, l. 33-
p. 11, l. 7

- 10 (b) That, although the Legislature of New South Wales is a subordinate legislature so that legislation operating on a subject matter which has no relevant territorial connection with New South Wales falls outside its power and although under Section 102 subsection (2) (g) of the Stamp Duties Act property was brought to duty wherever the deceased may have died and wherever he may have been domiciled and wherever the remaindermen or Trustee in whom the property was vested may reside or be domiciled and no matter what the system of law by reference to which the instrument creating the interest or regulating the rights of the remaindermen was executed or to which it owed its force or by reference to which it could be administered, nevertheless, since upon its true construction Section 102 subsection (2) (g) extended only to property situated in the State of New South Wales at the date of the death of the deceased, the mere presence of the property within the jurisdiction was sufficient to empower the imposition of taxation upon it no matter what event was chosen as the reason or occasion for the imposition.
- 20 (c) That Section 102 subsection (2A) insofar as it purported to extend the operation of Section 102 subsection (2) (g) to property situate outside New South Wales in which a person domiciled in New South Wales at his death had an interest limited to cease on his or her death was not a valid enactment of the Parliament of New South Wales, their Honours being of opinion that the domicile of the deceased in the State was irrelevant to the levy of duty on property which was not nor ever had been the property of the deceased person.
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p. 9, ll. 40-46

p. 10, ll. 6-19

p. 10, ll. 26-30

p. 11, ll. 22-32

p. 11, l. 33-
p. 12, l. 5

22.—The Appellant submits that the reasoning of the Supreme Court appears to concede (and, in the Appellant's humble submission, correctly) that if Section 102, (2) (g) as drawn applied to property wherever situate it would be beyond the competence of the Parliament of New South Wales. It is only by a process of construing the statute so as to confine its operation to property within the State of New South Wales at the relevant date that their Honours have reached their conclusion that the Section is valid. The Appellant submits that such a construction is not warranted. The Statute, in the Appellant's submission, evidences an intention to impose

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p. 10, l. 6-
p. 11, l. 32

duty on property wherever situate and disclosed no criterion or standard of reference to which its unqualified language could be reduced so as to apply only to property situate within the State of New South Wales at the date of the death of the deceased that being the occasion on which the duty is sought to be levied.

p. 10, ll. 30-33

The Appellant submits that the Supreme Court's use of the cases referred to in paragraph 21 subparagraph (a) hereof is not justified. The present case is one in which it is sought to levy duty on property which has not at any time been the property of the deceased, whereas in the cases cited the property in question was or had been the property of the deceased over whose estate legislature on the facts of those cases had complete control. 10

p. 10, ll. 30-32

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

23.—The Appellant further submits that in any case even if the Statute can be construed so as to confine its operation to property within the State of New South Wales at the date of the death of the deceased, the mere presence within the State of the property of the remaindermen does not furnish a sufficient nexus with the State of New South Wales to support a Statute levying tax on such property upon death of a deceased wherever the death may take place and wherever the deceased had been resident or domiciled. In this connection the Appellant respectfully points out that the duty is not levied in respect of the presence in New South Wales of the remaindermen's property but solely in respect of the death of the person entitled to a limited interest as defined. The Statute does not make the presence of the property in New South Wales in any sense a criterion of liability. It is only because of the process of construction adopted by the Supreme Court that the circumstance of the presence of the property in New South Wales obtains any significance. 20 30

p. 14, ll. 4-15

24.—The Appellant submits that the Judgment of the Supreme Court upon the Case Stated insofar as it answers questions 1 and 2 (a) in the manner indicated is wrong and ought to be reversed for the following amongst other

REASONS

1. BECAUSE on its true construction Section 102 subsection (2) (g) of the Stamp Duties Act is invalid.
2. BECAUSE upon its true construction Section 102 subsection (2) (g) operates in circumstances and upon property

which furnish no sufficient connection with the State of New South Wales as to make the subsection a law for the peace, order and good government of New South Wales.

3. BECAUSE the reduction of the language of the subsection, or the introduction into it of any qualification or implication, so as to restrict its operation to property within the State of New South Wales at the date of the death of the deceased is unwarranted.
4. BECAUSE the Judgment of the Supreme Court in the respects now appealed from was wrong and ought to be reversed.

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K. S. JACOBS.

In the Privy Council.

No. 34 of 1955.

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BETWEEN
PERPETUAL TRUSTEE COMPANY
(LIMITED) the Trustee of the Will of
ANDREW JOHN BRADY deceased
APPELLANT
AND
THE COMMISSIONER OF STAMP
DUTIES RESPONDENT.

CASE FOR THE APPELLANT

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