Privy Council Appeal No. 33 *of* 1955

George Johnson and others, Trustees of the Will of Frank Johnson deceased – – – – – – – – *Appellants*

v.

The Commissioner of Stamp Duties – – – – – *Respondent*

and between

The Commissioner of Stamp Duties – – – – – *Appellant*

v.

George Johnson and others – – – – – – *Respondents*

Privy Council Appeal No. 34 *of* 1955

Perpetual Trustee Company (Limited), the Trustee of the Will of Andrew John Brady deceased – – – – – *Appellant*

v.

The Commissioner of Stamp Duties – – – – – *Respondent*

Privy Council Appeal No. 35 *of* 1955

Frank Barton Forster and another, the Trustees of the Will of Charles Edward Forster deceased – – – – – *Appellants*

v.

The Commissioner of Stamp Duties – – – – – *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 31ST JANUARY, 1956

Present at the Hearing:
VISCOUNT SIMONDS
LORD OAKSEY
LORD REID
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW

[*Delivered by* LORD KEITH OF AVONHOLM]

These appeals raise certain questions as to the validity of assessments to death duty made by the Commissioner of Stamp Duties, under the Stamp Duties Act 1920–1952 of the State of New South Wales. The Supreme Court of New South Wales, on cases stated by the Commissioner, in the first case in part upheld and in part rejected the assessment and in the other two cases upheld the assessments in whole. The judgment of the Court in the first case determined the result in the other two cases.

Appeal by Johnson's Trustees

The material facts can be briefly stated. Frank Johnson (hereinafter called the testator) died on 20th August, 1936, being then domiciled in the State of New South Wales and leaving property within that State. Probate of his will and three codicils thereto was granted on 29th December, 1936, to the appellants, the executors named in the will and codicils and the present trustees thereof. By his will the testator after the bequest

of certain pecuniary legacies, gave devised and bequeathed all his real and personal estate upon trust to sell, with power to postpone; to pay his debts funeral and testamentary expenses, State Probate, Federal Estate and all other duties and the said legacies; to invest and to stand possessed of the investments and to hold the net income from the residuary estate upon trust to pay one-third of the income to his wife Sarah Johnson during her life and to divide the residue of the income (including after the death of his wife the income to which she was entitled) into four equal parts and to hold such income upon trust to pay one of such parts to each of his four children for life with gifts over of the income of a child dying before the distribution of the residuary estate, and upon trust as to the corpus of the residuary estate for such of the issue of the four children of the testator as should be living at the death of such children respectively and should attain the age of twenty-one years, in equal shares per stirpes as tenants in common.

The said Sarah Johnson (hereinafter called the deceased) died on 8th December, 1952, being then domiciled in the State of New South Wales and leaving property within the said State. At the date of the death of the deceased the executorial duties in respect of the estate of the testator had been carried out and the residuary estate vested in the appellants comprised (excluding real estate in Queensland which is not affected by this appeal) real estate in New South Wales, valued at the date of death of the deceased at £15,000 and personal estate consisting of shares in public companies and Commonwealth Inscribed Stock and debts due by a proprietary company to the appellants. The total value of the said property and assets at the date of death of the deceased was £97,639 14s. 9d. It is unnecessary to particularise further the personal estate beyond saying that part of it was located in New South Wales and part in the State of Victoria. At the date of the death of the deceased two of the appellants, namely George Johnson and George Edgerley Johnson, were domiciled and resident in the State of New South Wales. The third appellant, Perpetual Trustee Company (Limited), was incorporated and carried on business in the said State. The children of the testator were all living at the date of the death of the deceased and in consequence of her death are each entitled for their respective lives to one-fourth of the income of the estate of the testator, having previously been each entitled to one-fourth of two-thirds of the said income. The children are all domiciled and resident in the State of New South Wales.

On the basis of these facts the Commissioner included in the dutiable estate of the deceased the whole of the property and assets of the estate of the testator to the extent to which a benefit accrued or arose by cesser of the interest therein of the deceased limited to cease on her death and valued such benefit at one-third of the principal value of the said property and assets, namely after a certain immaterial adjustment, £32,297. For the purpose of assessing death duty on the estate of the deceased the Commissioner treated the said property and assets, to the extent to which a benefit accrued or arose by cesser of the interest therein of the deceased, as an estate by itself and separately assessed duty thereon in the sum of £3,633 8s. 3d.

The Commissioner of Stamp Duties stated the following questions for the determination of the Supreme Court:—

(1) Whether any part of the property included in the estate of the testator in which Sarah Johnson had an interest limited to cease on her death was liable to duty under and by virtue of the provisions of the Stamp Duties Act, 1920–1952?

(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 the said Act?

The Supreme Court answered the questions as follows: (1) Yes; (2) (*a*) Such of the said property as was situate at the date of the death of Sarah Johnson in the State of New South Wales; and found it unnecessary to

answer (2) (*b*). Against this judgment the trustees of the will of Frank Johnson have appealed and the Commissioner of Stamp Duties has cross-appealed to their Lordships' Board.

The deceased died on the 8th December, 1952, and the Stamp Duties Act 1920–1952 is the relevant statute. It will be convenient to set forth some of the most relevant provisions of the Act. These run as follows:

"101D.—(1) In the case of every person who dies after the commencement of the Stamp Duties (Amendment) Act, 1939, whether in New South Wales or elsewhere, and who was at the date of his death domiciled in New South Wales, duty (hereinafter called death duty) at the rates mentioned in the Seventh Schedule to this Act, shall subject to this section be assessed and paid upon the final balance of the estate of the deceased as determined in accordance with this Act . . .

101E. In the case of every person who dies after the commencement of the Stamp Duties (Amendment) Act, 1939, whether in New South Wales or elsewhere, and who was at the date of his death domiciled outside New South Wales, duty (hereinafter called death duty) at the rate or rates mentioned in the Eighth Schedule to this Act shall be assessed and paid upon the final balance of the estate of the deceased as determined in accordance with this Act . . .

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:—

(1) (*a*) All property of the deceased which is situate in New South Wales at his death.

And in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death . . . to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased.

(2) . . . . . .

(*g*) (i) Any property in which the deceased or any other person had, at any time either before or after the commencement of the Stamp Duties (Amendment) Act, 1952, an estate or interest limited to cease on the death of the deceased or at a time determined by reference to the death of the deceased (in this Act referred to as the 'limited interest') to the extent to which a benefit accrues or arises by cesser of the limited interest, whether or not the limited interest has been surrendered, assured, divested or otherwise disposed of, whether for value or not, to or for the benefit of a person entitled to an estate or interest in the property in remainder or reversion expectant upon the determination of the limited interest. Provided that where the limited interest was so surrendered, assured, divested or disposed of not less than three years before the death of the deceased, and bona fide possession and enjoyment of the property was assumed immediately after the limited interest was so surrendered, assured, divested or disposed of, and thereafter retained to the entire exclusion of the person theretofore entitled to the benefit of the limited interest, and of any benefit to such person, whether enforceable or not, the property shall not be deemed part of the estate.

The value of the benefit accruing or arising from the cesser of the limited interest shall—

(*a*) if the limited interest extended to the whole of the income or benefits of the property, be the principal value of that property; and

(*b*) if the limited interest extended to less than the whole of the income or benefits of the property, be the principal value of an addition to the property equal to the income or benefits to which the limited interest extended.

In the application of this subparagraph to and in respect of a limited interest which is an annuity the property out of which or out of the income or proceeds of which the annuity is payable shall be deemed to be held for an estate or interest in remainder or reversion expectant upon the determination of the annuity.

. . . . . .

(2A) All personal property situate outside New South Wales at the death of the deceased, when—

(*a*) the deceased dies after the commencement of the Stamp Duties (Amendment) Act, 1939 ; and

(*b*) the deceased was, at the date of his death, domiciled in New South Wales ; and

(*c*) such personal property would, if it had been situate in New South Wales, be deemed to be included in the estate of the deceased by virtue of the operation of paragraph (2) of this section.

105A.—(1) Any property which is deemed to be included in the estate of any deceased person solely by virtue of the operation of subparagraph (*g*) of paragraph (2) of section one hundred and two of this Act or of that subparagraph as extended in its application by paragraph 2 (*a*) of that section (in this Act referred to as 'non-aggregated property') shall not be aggregated with the balance of the estate of the deceased but shall be separately assessed and shall for that purpose be an estate by itself ;

Provided that the aggregate of all non-aggregated property included in the dutiable estate consequent upon the cesser of limited interests which were created by the same person shall be separately assessed and shall for that purpose be an estate by itself. . . .

114A.—(1) Death duty separately assessed in respect of non-aggregated property shall constitute a debt payable to Her Majesty out of the non-aggregated property and such duty shall be paid accordingly out of the non-aggregated property by the person in whom the non-aggregated property is vested.

(2) For the purpose of paying the duty the person in whom the non-aggregated property is vested, if a trustee, may raise the amount of the duty by mortgage or sale of the non-aggregated property.

(3) The person in whom the non-aggregated property is vested shall not be liable for any duty in excess of the assets constituting the non-aggregated property.

115A.—(1) Death duty separately assessed in respect of non-aggregated property shall become due and payable on the assessment thereof by the Commissioner, or if not duly so assessed within six months from the death of the deceased then on the expiration of that period of six months ;

(2) Such duty shall constitute, as from the death of the deceased, a charge upon so much of the non-aggregated property as is situated in New South Wales, but no such charge shall effect the title of a bona fide purchaser for value (whether before or after the death of the deceased) without notice.

(3) In case the duty is not paid within the prescribed time the Commissioner may apply to the Supreme Court, which may order that a sufficient part of the non-aggregated property so situated be sold and the proceeds of such sale applied in payment of the duty and of the costs consequent thereon.

(4) Where any property has been sold under any such order the Supreme Court may make a order vesting the property in the purchaser.

. . . . . .

120.—(1) Where any property which is or the value of which is included in the dutiable estate of a deceased person is vested in any person other than the administrator, the duty payable in respect thereof

(other than death duty separately assessed in respect of non-aggregated property) shall be paid by the persons entitled thereto according to the value of their respective interests therein, to the administrator.

(2) Every person who as beneficiary, trustee, or otherwise acquires possession or assumes the management of any such property (including non-aggregated property), shall upon retaining the same for his own use, or distributing or disposing thereof, and in any case within three months after the death of the deceased, deliver to the Commissioner a full and true account vertified by oath of such property, together with a valuation thereof by a competent valuer: Provided that the time for delivering the account or valuation may be extended by the Commissioner.

(3) Any person directed by this section to deliver an account of any property shall upon the assessment of the duty payable in respect thereof be liable to pay such duty (including death duty separately assessed in respect of non-aggregated property) and interest thereon at the rate of eight pounds per centum per annum from the date of the expiration of the period of six months after the death of the deceased or if administration has been first granted out of New South Wales, from the date of the expiration of the period of twelve months after the death of the deceased, and if a trustee may raise the same by mortgage or the sale of the property.

(5) In case the account and valuation is not lodged within the time abovementioned, or if the duty is not paid within one month after assessment, the Commissioner or any person interested may apply to the Supreme Court, which may order that a sufficient part of such property be sold, and the proceeds of such sale applied in payment of the duty and of the costs consequent thereon.

(6) Where any property has been sold under any such order the Supreme Court may make an order vesting the property in the purchaser.

. . . . . ,"

Their Lordships would observe that, while section 102 (1) deals with property of the deceased to which any person becomes entitled by will or on intestacy of the deceased and so is property of which he died possessed, section 102 (2) includes a large number of categories of dutiable estate (not set out above) consisting mainly of property of which the deceased had disposed, or rights which he had created in third parties, during his life time, or within three years of his death, without full consideration. Most, if not all, of these cases are familiar in corresponding British legislation and have been compendiously referred to in various cases in the Australian Courts as notional property of the deceased. They are cases which differ in origin and nature from the property described in paragraph (*g*) of section 102 (2) which need have been at no time the property of the deceased and the limited interest in which will normally not have been created by the deceased.

The question at issue on the appeal may now be stated. To quote the words of the Supreme Court:—

"The Legislature of New South Wales is a subordinate legislature. Its powers are to be found in the Constitution Act, 1902, section 5 of which, so far as material, provides that:—

'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.'

Legislation on any subject matter which has no relevant territorial connection whatever with New South Wales falls outside the power of the legislature of New South Wales (see *Attorney-General* v. *Australian Agricultural Company*, 34 S.R. 571, and the *Commissioner of Stamp Duties* v. *Millar*, 48 C.L.R. 618).

One must examine the Stamp Duties Act, therefore, to see whether there is a relevant nexus between the property dealt with in paragraph (*g*) and the State of New South Wales, bearing in mind that under paragraph (*g*) property is brought into the estate of the deceased whom, for convenience, we will call the life tenant, although, of course, paragraph (*g*) has a wider application than merely to cases where the deceased was a life tenant. It is brought in only for the purpose of it thereupon being segregated and treated as a separate estate; it is brought in wherever the life tenant died and wherever he was domiciled (section 101/101E). It is so brought in wherever the remaindermen, or in the case of equitable estates, the trustee, resides or is domiciled, and without regard to the system of law by reference to which the instrument creating the limited interest or regulating the rights of the remaindermen was executed, or to which it owes its force, or by reference to which it would be administered. On these grounds it is said that no relevant connection with the State of New South Wales appears from the legislation."

On the question thus posed the Supreme Court reached the conclusion that section 102 (2) (*g*) extended only to property within New South Wales and that so construed it had sufficient relevant territorial connection with New South Wales to withstand the challenge of invalidity. In their Lordships' view the Supreme Court were right. While the Statute in its present form is the result of a period of growth through legislative amendments made on the original Act over a long period of years, the broad statutory scheme of the Act as it now stands seems fairly plain. The Act has regard first of all to persons dying domiciled in New South Wales and to persons dying domiciled outside New South Wales (101D and 101E *supra*). By subsection (1) of section 102 the estate of a deceased person is deemed to include and consist of (*a*) his property situate in New South Wales at his death and in addition (*b*) his personal property situate outside New South Wales at his death where he died domiciled in New South Wales. The person who is domiciled in New South Wales and the person who is not so domiciled are alike caught under (*a*) but the person who is not so domiciled escapes under (*b*). It would be a remarkable thing if the statute when it comes to deal with the various very special categories of property brought in for purposes of death duty by subsection (2) of section 102 cast the net wider than was done under subsection (1), by including under subsection (2) property inside and outside New South Wales, irrespective of whether the deceased died domiciled there or not. In their Lordships' view this would be an unreasonable construction to place upon the statute. That it was not so intended would, indeed, seem to follow from the addition of subsection (2A) which would be otiose if property under subsection (2) already included property inside and outside New South Wales. But as regards paragraph (*g*) the matter is, in their Lordships' judgment, concluded by references in sections 102A, 105A and 112E to subparagraph (*g*) "as extended in its application by paragraph (2A)". The only extension made by (2A) was to bring in property situate outside New South Wales where the deceased died domiciled in New South Wales. The natural reading is that paragraph (*g*) of itself is confined to property inside New South Wales. This view is in harmony with decisions of the High Court of Australia, when dealing with other paragraphs of subsection (2) of section 102, in *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (1926) 38 C.R.L. 12 and *Vicars* v. *Commissioner of Stamp Duties N.S.W.* (1945) 71 C.L.R. 309. In reaching their conclusion that the statute should be so read, their Lordships have found no occasion to invoke section 17 of the Interpretation Act of 1897.

It is contended, however, that even if paragraph (*g*) be limited to property within New South Wales that is not sufficient to create a territorial nexus with New South Wales when regard is had to the subject matter of paragraph (*g*). Everything it is said which is contemplated by paragraph (*g*) may take place outside New South Wales. The limited interest may be created outside New South Wales; the person with the limited interest

may be a foreigner living outside New South Wales; he may hold the interest pur autre vie that is of the deceased who is also living outside New South Wales; the trust administration and the remainderman may be outside New South Wales; the limited interest may be surrendered or disposed of outside New South Wales; and the only connection may be that the property has subsequently been brought into New South Wales before the death of the deceased. Their Lordships assume, however, that the property in which the limited interest was had can be clearly identified as being in New South Wales at the death of the deceased. If so there is, in their judgment, a sufficient territorial connection with New South Wales. It is the benefit derived through the property by the cesser of the life interest that is taxed and if the property is inside the jurisdiction at the date of death it is immaterial what are the circumstances attendant on the creation and enjoyment of the limited interest. The presence of property within a State's jurisdiction has always been regarded as a cogent reason for recognising the right and power to tax that property. The property enjoys the protection of the State's laws and in their Lordships' judgment fiscal legislation taxing that property can be regarded as a law for the peace welfare and good government of that State.

Their Lordships were referred to several cases decided by the High Court of Australia dealing with this question. They find it sufficient to mention only two. In *Commissioner of Stamp Duties* v. *Millar* (1932) 48 C.L.R. 618 a provision of the Stamp Duties Act of New South Wales (now repealed) imposed death duty on shares of any company, registered or incorporated within or without New South Wales and carrying on mining, or agricultural, or timber, business in New South Wales, belonging to a deceased person. In the case in question the deceased had died resident and domiciled outside New South Wales and the company was incorporated out of and had no share register within that State. The Court held by a majority of three to two that the enactment was not confined to companies whose sole business was in New South Wales and that the enactment was beyond the legislative power of the State. The shares held by the deceased could not be regarded as situate in New South Wales and what was taxed was not the advantage to the deceased from the operations of the company in New South Wales but the whole value of the shares which might be due in part and perhaps entirely to operations conducted outside New South Wales. As expressed in the judgment of the majority the legislature in taxing the share out of the jurisdiction had adopted "a connection which is too remote to entitle its enactment to the description of a law 'for the peace, welfare and good government of New South Wales'. . . or to state the matter in another way, although some connection between the shareholder and New South Wales may be discovered in the existence there of part of the company's undertaking, the enactment goes beyond legislating in respect of that connection." In contrast with this decision is the decision in *Broken Hill South Ltd.* v. *Commissioner of Taxation* (1937) 56 C.L.R. 337 where in the matter of certain income tax legislation of New South Wales it was held that income tax on a foreign company in respect of interest of money secured by mortgage of property in New South Wales was within the constitutional power of the State legislature. Latham, C.J. said: "The circumstance in respect of which the law operates must be something which really appertains to New South Wales," and Dixon, J. said: "But it is within the competence of the State legislature to make any fact, circumstance, occurence, or thing, in or connected with the territory the occasion of the imposition upon any person concerned therein of a liability to taxation, or of any other liability". In their Lordships' opinion these judgments proceeded on right principle and are in accordance with the conclusion which their Lordships have reached in the present case. In this connection their Lordships would also refer to a sentence in the speech of Lord Loreburn, L.C. in the case of *Winans* v. *Attorney-General* [1910] A.C. 27 which was concerned with the imposition of estate duty under British legislation upon bearer bonds situate in the United Kingdom belonging to a foreigner domiciled abroad. Referring to property in the United Kingdom whether

of a domiciled Englishman or of a foreigner he said: "In both cases the property received the full protection of British laws—which is a constant basis of taxation—and can only be transferred from the deceased to other persons by the authority of a British Court." This passage is as applicable to a subordinate legislature like that of New South Wales as to a supreme legislature like the British Parliament.

Lastly it was suggested that legislation that taxed property in the circumstances covered by paragraph (*g*) was contrary to the comity of nations. Their Lordships are aware of no comity that applies to such a case, even if such were a relevant consideration. But here also authority is against the appellants. In *Winans* v. *Attorney-General,* already cited, Lord Atkinson said: "There does not appear, *a priori,* to be anything contrary to the principles of international law, or hurtful to the polity of nations, in a State's taxing property physically situated within its borders, wherever its owner may have been domiciled at the time of his death. That principle is not however acted upon in the case of legacy and succession duties, wide as is the language of the statutes imposing them. In these cases the principle of *mobilia sequuntur personam* is applied." Lord Shaw of Dumfermline expressed himself to a similar effect: "I know no reason" he says, "either under the law of nations, by the custom of nations, or in the nature of things, why property within the jurisdiction of this country, possessed and held under the protection of its laws, should not, upon transfer from the dead to the living pay the same toll which would have been paid by property enjoying the same protection but owned by a deceased British subject."

Cross-Appeal by the Commissioner of Stamp Duties

As already indicated some of the personal property of the testator was outside New South Wales at the death of the deceased and the Supreme Court have held that this is not dutiable estate. The Commissioner relies on the terms of section 102 (2A) as bringing this property into charge in respect that the deceased was, at the date of her death domiciled in New South Wales. In their judgment the Supreme Court say: "In our opinion the suggested nexus is completely irrelevant and, consequently, in so far as section 102 (2A) purports to extend the operation of the paragraph (*g*) it is, we think, invalid". In their Lordships' opinion the Supreme Court arrived at a right conclusion.

The case is not that of a deceased dying possessed of personal estate, or a case of a deceased who has given away property shortly before his death without valuable consideration. The deceased's only interest was a limited interest ceasing on her death and it is not her estate that is brought into charge. If the presence of the property in the State at the death of the deceased is lacking, every other incident or circumstance associated with the limited interest may also find its place, as has already been exemplified, outside New South Wales. The domicile of a deceased within New South Wales at the date of his death is, in their Lordships' judgment, a quite insufficient ground by itself to make good the lack of any other connection with the State. In the succinct language of the Supreme Court: "The case may be exemplified as being one in which a duty is levied on or in respect of the property of A because of the domicile in the jurisdiction of B."

The Solicitor-General referred to other sections of the Act and particularly to sections 5, 114A, 115A and 120 to show that the legislature contemplated exacting the duty only against the property, or from the person vested in the property, if within the jurisdiction and that accordingly the provisions of subsection (2A) were not in their practical effect so drastic as to be beyond State competence. But no enactment can be enforced without effective jurisdiction to do so and to make a virtue of necessity cannot save a bad enactment. The enactment must be valid before it can be enforced.

Reliance was next placed on section 144 of the Act, to save subsection (2A) in its application to paragraph (*g*), in those cases where some other element than domicile was present which would give a sufficient nexus

with the State, such as the presence of the remainderman, or person in whom the property was vested, within the State. Section 144 runs as follows: "This Act shall be read and construed so as not to exceed the legislative power of the State to the intent that where any enactment thereof would, but for this section, have been construed as being in excess of that power, it shall nevertheless be a valid enactment to the extent to which it is not in excess of that power". Similar clauses have been considered in numerous cases in the Commonwealth and State Courts of Australia and in the United States of America. It has been said that they reverse the presumption that the legislature intended its will on any particular matter as expressed in the statute to operate in its entirety and had no intention that something less should be law. So legislation found partially invalid must be treated as distributable, or divisible unless it appears affirmatively that it was not part of the legislative intention that so much as might have been validly enacted should become operative without what was bad (*The King* v. *Poole* (1939) 61 C.L.R. 634 per Dixon J. at 651). Reliance was placed on two cases where this distributive, or divisible, principle was applied. In *Carter* v. *Potato Marketing Board* (1951) 84 C.L.R. 460 a Queensland statute imposed a penalty on any one who, inter alia, received potatoes from any person other than the Potato Marketing Board. The transaction in that case was carried out wholly in Queensland and it came under the words of the enactment. The validity of the enactment was challenged as being an attempted impairment of the freedom of trade, commerce and intercourse among the States in respect that the general languge of the enactment given a literal application would include transactions of inter-state commerce. The statute however included a provision corresponding to section 144 and it was held that the enactment was capable of receiving distributive effect so as to be valid in respect of intra-state trade though it would be bad in so far as it interferred with inter-state trade. A similar decision was reached in *Newcastle and Hunter River Steamship Co. Ltd.* v. *Attorney-General for the Commonwealth* (1921) 29 C.L.R. 357 in upholding the validity of a Commonwealth Navigation Act, in so far as it affected ships engaged in inter-state and foreign trade, though in so far as it prescribed for ships engaged in domestic trade within the confines of one of the constituent States it was in excess of the power of the Commonwealth Parliament.

In their Lordships' opinion these cases are distinguishable. The elements of divisibility or distributiveness lay within the framework of the enactments. The enactments applied to all transactions of a particular kind and to all persons who engaged in such transactions, or prescribed requirements for all ships of defined categories. In certain cases coming within the enactments no objection could be taken to the validity of the legislation if these had been the only type of case to which the enactment applied, though in other types of cases the enactment would be bad. In the present case there is no scope for the application of any such distributive principle. The enactment prescribes for only one thing, the imposition of duty on property outside New South Wales where the deceased dies domiciled in that State and the property would be liable if it were inside New South Wales. There is no way of splitting that up into good and bad in its application to paragraph (2) (*g*). It is wholly bad. It applies solely to property outside New South Wales which, ex hypothesi, the domicile of the deceased in New South Wales is insufficient of itself to subject to charge. To invoke the presence in New South Wales of the person liable to the duty, in order to save the enactment in part, is to bring in something from outside the enactment, to write the enactment up rather than to read it down. This is a provision to confer taxing jurisdiction and it is not legitimate to introduce into the subsection, to eke out its deficiencies, factors which are not already there. That in their Lordships' judgment is not a permissible way of applying section 144. In their Lordships' judgment the Cross-Appeal accordingly fails.

Appeal by Brady's Trustee

This also is a paragraph (*g*) case. It differs from the case of Johnson's trustees in that the whole property of the testator was at the death of the holder of the limited interest situated in New South Wales. It also differs in that the person in enjoyment of the limited interest (as to the whole of the testator's estate) died domiciled in England, though leaving property in New South Wales, and that some of the remainder-men are domiciled outside New South Wales. These latter differences do not affect the principles on which the case falls to be decided. The Supreme Court held that all the property of the testator was liable to duty, being all situated in New South Wales, and, for the reasons already given, their Lordships are of opinion that the Supreme Court were right.

Appeal by Forster's Trustees

The relevant facts here are similar to those in *Johnson's* case except that all the property of the testator was at the death of the holder of the life interest situated in New South Wales. It follows that the whole of the property of the testator is liable to duty, as the Supreme Court has held.

The Board will humbly advise Her Majesty in the case of Johnson's trustees that the appeal and the cross-appeal should both be dismissed; and that in the cases of Brady's trustee and Forster's trustees the respective appeals should be dismissed. The appellants in the appeal and cross-appeal in the first of these cases must bear the costs of their respective appeals. The appellants in the other two cases must also pay the costs of their appeals but their Lordships direct that, on taxation, these appellants' costs shall not be increased by the fact that at the hearing the appeal and the cross-appeal in the first case were heard at the same time.

(39561 Wt. 8064—69 200 2/56 D.L.

In the Privy Council

GEORGE JOHNSON AND OTHERS, TRUSTEES OF THE WILL OF FRANK JOHNSON DECEASED

v.

THE COMMISSIONER OF STAMP DUTIES

and between

THE COMMISSIONER OF STAMP DUTIES

v.

GEORGE JOHNSON AND OTHERS

PERPETUAL TRUSTEE COMPANY (LIMITED), THE TRUSTEE OF THE WILL OF ANDREW JOHN BRADY DECEASED

v.

THE COMMISSIONER OF STAMP DUTIES

FRANK BARTON FORSTER AND ANOTHER THE TRUSTEES OF THE WILL OF CHARLES EDWARD FORSTER DECEASED

v.

THE COMMISSIONER OF STAMP DUTIES

DELIVERED BY LORD KEITH OF AVONHOLM

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