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In the Privy Council.

No. 43 of 1950.

ON APPEAL FROM THE HIGH COURT
OF AUSTRALIA

BETWEEN

THE COMMISSIONER OF STAMP DUTIES of the State
of New South Wales

AND

FRANCIS HARMSWORTH WAY, GEORGE ROLAND
LOVE (since deceased), WILLIAM GARRICK
WILSON, JOHN CADWALLADER and MILTON
REWI DUNKLEY the Executors of the Will of the
late ROBERT WINTON GILLESPIE Respondents.

UNIVERSITY OF LONDON
W.C.1.

20 JUL 1953

Appellant
INSTITUTE OF ADVANCED
LEGAL STUDIES

RECORD OF PROCEEDINGS

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INSTITUTE OF ADVANCED
LEGAL STUDIES,
25, RUSSELL SQUARE,
LONDON,
W.C.1.

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In the Privy Council.

No. 43 of 1950.

**ON APPEAL FROM THE HIGH COURT
OF AUSTRALIA**

BETWEEN

THE COMMISSIONER OF STAMP DUTIES of the State
of New South Wales *Appellant*

AND

FRANCIS HARMSWORTH WAY, GEORGE ROLAND
LOVE (since deceased), WILLIAM GARRICK
WILSON, JOHN CADWALLADER, and MILTON
REWI DUNKLEY the Executors of the Will of the
late ROBERT WINTON GILLESPIE *Respondents.*

RECORD OF PROCEEDINGS

No. 1.

Case Stated.

Term No. 82 of 1949.

IN THE SUPREME COURT OF NEW SOUTH WALES.

In the
Supreme
Court of
New South
Wales.

IN THE MATTER of the estate of ROBERT WINTON GILLESPIE late of
Sydney in the State of New South Wales, Knight, deceased.

No. 1.
Case stated,
12th
January,
1949.

AND IN THE MATTER of the Stamp Duties Act 1920-1940.

AND IN THE MATTER of the appeal of FRANCIS HARMSWORTH WAY,
GEORGE ROLAND LOVE, WILLIAM GARRICK WILSON, JOHN
CADWALLADER and MILTON REWI DUNKLEY executors of the Will
of the said deceased against the assessment by the Commissioner of
Stamp Duties of death duty payable in respect of the said estate.

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1.—The above-named Robert Winton Gillespie (who is hereinafter
called “the testator”) died on the second day of August 1945 within
the State of New South Wales.

2.—Probate of the last will of the testator dated the twenty-first day
of April 1945 has been duly granted by the Supreme Court of New South
Wales in its Probate Jurisdiction to the executors therein named, namely,
Francis Harmsworth Way, George Roland Love, William Garrick Wilson,

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continued.

John Cadwallader and Milton Rewi Dunkley (hereinafter called the
“ appellants ”).

3.—By an Indenture made the fifth day of September 1928 between
the testator (therein called the Settlor) of the one part and the testator,
George Gillespie, Edward Charles Hadley and Frank Gordon Blair of the
other part it was witnessed that the testator thereby transferred and
assigned unto the parties thereto of the second part all those the
moneys debts securities for moneys and property enumerated in the first
part of the Schedule thereto to the intent that the same should be conveyed
transferred and assigned into the names of the said parties thereto of the
second part and held by them upon the trusts and subject to the conditions
and provisions thereafter set out. 10

4.—The said Indenture contained the following amongst other clauses
that is to say :

“ 2. The said parties hereto of the second part or the
“ survivors of them or other the trustees for the time being
“ of these presents (all of whom are hereinafter included in
“ the expression ‘ the Trustees ’) shall hold the said moneys
“ debts and securities for moneys and property and all other 20
“ the investments securities and property for the time being
“ representing the same hereinafter referred to as ‘ the Trust
“ ‘ fund ’ upon trust out of the corpus to pay any duty or duties
“ the payment of which may be demanded and enforced by the
“ Government of any of the State(s) of the Commonwealth upon
“ the execution of this Indenture and upon further trust on and
“ after the date of these presents to hold the Trust Fund or the
“ balance thereof as the case may be upon trust to apply and
“ appropriate such Trust Fund and the annual income thereof
“ after payment of all salaries expenses costs charges and outgoings
“ hereinafter authorised towards lawful charitable purposes under 30
“ the following heads *vide licet*
“ (a) Educational.
“ (b) The relief of poverty in Australia.
“ (c) The general benefit of the community in Australia not
“ falling under the preceding head
“ but subject to all the provisions and conditions set out in these
“ presents.

“ 3. The time manner and the head or heads under which
“ the application and appropriation of the said Trust Fund and
“ the said income shall be made and all other details and particulars 40
“ as to such application and appropriation shall be in the absolute
“ discretion of the Trustees but during the lifetime of the
“ Settlor subject to his direction and approval and the
“ Settlor places on record his belief that it will be found advisable
“ to have completely distributed the trust fund and wound up
“ the trust within ten or fifteen years.

“24. The Trustees may also apply and appropriate any
 “property belonging to the Trust in its then present condition
 “for any Trust purposes and may also use any of the moneys of
 “the Trust either corpus or income or both in purchasing any
 “land or land and buildings or in erecting buildings or in altering
 “or in improving buildings to be used or applied for any such
 “purpose. The Trustees may whether during the lifetime of the
 “Settlor or afterwards and shall during the lifetime of the Settlor
 “if he so directs apply and appropriate any property including
 “moneys belonging to the Trust for the purposes of acquiring
 “by purchase or exchange from the Settlor or his executors any
 “real or personal property valued for the purposes of such purchase
 “or exchange at a sum at least five per cent. below the valuation
 “of such real or personal property so acquired as ascertained by
 “some independent valuator appointed by the Trustees other
 “than the Settlor.”

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continued.

5.—By an Indenture made the first day of November 1929
 between the same parties the aforesaid Indenture of the fifth day of
 September 1928 was varied as was in the later Indenture provided but was
 20 otherwise confirmed. The said variation related to the property agreed
 to be transferred and assigned by the testator and not to the trusts upon
 which property transferred and assigned by him were to be held.

6.—A true copy of the said Indenture of the fifth day of September
 1928 and a true copy of the said Indenture of the first day of November
 1929 are hereunto annexed marked “A” and “B” respectively and
 form part of this case.

7.—The transfer of the cash deposit mentioned in the first of the
 said Indentures was completed by the testator and the sum of money
 mentioned in the second of the said Indentures was duly paid by him
 30 to the trustees of the settlement constituted by the said Indentures.

8.—From time to time after the execution of the said Indentures
 the testator transferred assigned or paid other property and moneys of
 the testator to the trustees of the said settlement to be held by them upon
 the trusts and subject to the conditions and provisions contained in the
 said Indentures. All such property and moneys were transferred assigned
 or paid to the said trustees more than three years prior to the date of the
 death of the testator.

9.—Immediately prior to the death of the testator the trustees of the
 said settlement were the testator, Jessie Jean Gillespie, Francis Harmsworth
 40 Way, and William Garriek Wilson. The testator was one of the trustees
 of the said settlement at all times up to the date of his death.

10.—During the life of the Testator the trustees of the said settlement
 applied or appropriated moneys belonging to the Trust totalling the sum
 of £52,088 15s. 0d. in the acquisition by purchase from the Testator of

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the undermentioned personal property, being shares in certain companies, on the respective dates and at the respective prices hereunder shown in relation to such purchases:

Date	Property	Price		
		£	s.	d.
1929.				
30th Oct. ...	2,800 shares in Gillespie Bros. Pty. Ltd.	3,150	0	0
30 Nov. ...	2,300 " " " " " " "	2,587	10	0
1930.				
4th February	1,800 " " " " " " "	2,025	0	0
24th May ...	2,250 " " " " " " "	2,531	5	0 10
30th June ...	850 " " " " " " "	956	5	0
1933.				
24th February	20,000 " " " " " " "	20,000	0	0
24th "	10,000 " " Mungo Scott Pty. Ltd.	10,000	0	0
24th "	7,500 " " M. McLeod Pty. Ltd. ...	3,750	0	0
" "	3,000 " " Inverell Milling Co. Pty. Ltd. ...	3,000	0	0
" "	2,096 " " Thorpes Ltd. ...	2,096	0	0
" "	1,000 " " Standard Portland Cement Ltd. ...	446	0	0 20
" "	1,800 " " Ball & Welch Ltd. ...	1,260	0	0
" "	500 " " Otway Coal Co. ...	5	0	0
1945.				
30th June ...	225 " " Hill 50 Gold Mine ...	106	15	0
" " ...	500 " " Great Boulder Ltd. ...	175	0	0

11.—None of the said shares were acquired at sums fixed in accordance with valuations as required by the provisions of clause 24 of the said Indenture of the fifth day of September 1928.

12.—At the date of the death of the testator the value of the property subject to the trusts of the said settlement was £81,403 19s. 6d. 30

13.—For the purposes of the assessment of death duty the Commissioner of Stamp Duties included in the estate of the testator the property which was at the time of his death subject to the trusts of the said settlement.

14.—The Commissioner of Stamp Duties assessed death duty on the estate of the testator on the basis that the final balance of the estate as determined in accordance with the said Act was £319,926, and assessed such death duty at £100,964 10s. 0d.

15.—The appellants contend that the estate of the testator ought not for the purposes of the assessment and payment of death duty to be deemed to include the property which was at the date of his death subject to the trusts of the said settlement or any part thereof but do not otherwise dispute the correctness of the said assessment. 40

16.—The appellants have paid the death duty assessed as aforesaid by the Commissioner of Stamp Duties and have deposited the sum of £20 as security for costs and have by notice in writing required the Commissioner of Stamp Duties to state a case for the opinion of the Supreme Court of New South Wales.

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17.—If the appellants are correct in their contention the amount of death duty payable in respect of the estate of the testator will be reduced by £26,049 5s. 8d.

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continued.

- 18.—The questions for the determination of the Court are :—
- 10 (1) Should the property which was at the date of death of the testator subject to the trusts of the said settlement be deemed to be included in his estate for the purposes of the assessment and payment of death duty thereon ?
- (2) What was the amount of death duty payable in respect of the estate of the testator ?
- (3) How should the costs of this case be borne and paid ?

Dated this Twelfth day of January 1949.

E. T. WOODS,
Acting Commissioner of Stamp Duties.

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Annexure "A" to Case Stated

Annexure
"A."

Settlement dated 5th September, 1928.

Settlement,
dated 5th
September,
1928.

THIS INDENTURE made the fifth day of September One thousand nine hundred and twenty-eight Between ROBERT WINTON GILLESPIE of Sydney in the State of New South Wales Miller (hereinafter called the Settlor) of the one part and the said ROBERT WINTON GILLESPIE GEORGE GILLESPIE of Sydney aforesaid Miller EDWARD CHARLES HADLEY of Sydney aforesaid Company Director and FRANK GORDON BLAIR of Sydney aforesaid Company Director of the other part WITNESSETH as follows that is to say :

30 1.—The said Settlor hereby transfers and assigns unto the parties hereto of the second part ALL THOSE the moneys debts securities for moneys and property enumerated in the first part of the schedule hereto to the intent that the same shall be conveyed transferred and assigned into the names of the said parties hereto of the second part and held by them upon the trusts and subject to the conditions and provisions hereinafter set out.

2.—The said parties hereto of the second part or the survivors of them or other the Trustees for the time being of these presents (all of whom are hereinafter included in the expression "the Trustees") shall hold the
40 said moneys debts and securities for moneys and property and all other

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1949—
continued.

Annexure
"A."

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continued.

the investments securities and property for the time being representing the same hereinafter referred to as "the trust fund" upon trust out of the corpus to pay any duty or duties the payment of which may be demanded and enforced by the Government of any of the State of the Commonwealth upon the execution of this Indenture and upon further trust on and after the date of these presents to hold the Trust Fund or the balance thereof as the case may be upon trust to apply and appropriate such Trust Fund and the annual income thereof after payment of all salaries expenses costs charges and outgoings hereinafter authorised towards lawful charitable purposes under the following heads *vide licet*

- (a) Educational.
- (b) The relief of poverty in Australia.
- (c) The general benefit of the community in Australia not falling under the preceding head

but subject to all the provisions and conditions set out in these presents.

3.—The time manner and the head or heads under which the application and appropriation of the said Trust Fund and the said income shall be made and all other details and particulars as to such application and appropriation shall be in the absolute discretion of the Trustees but during the lifetime of the Settlor subject to his direction and approval and the Settlor places on record his belief that it will be found advisable to have completely distributed the trust fund and wound up the trust within ten or fifteen years.

4.—There shall be three or more Trustees of the said Trust and the first Trustees shall be the said parties hereto of the second part.

5.—The Trust Fund shall be known as "The R.W. Gillespie Trust."

6.—No person shall be qualified to act as Trustee whether upon his first or any subsequent appointment until he shall being a first Trustee have executed these presents or being any other Trustee shall have signed a declaration as prescribed by the regulations hereinafter referred to to the effect that he accepts the office of Trustee and is willing to act in the trusts of this Indenture.

7.—No person being

- (a) A Minister of religion or
- (b) Not a Protestant
- (c) A Manager Secretary or Treasurer of any charitable institution or charitable trust

shall be at any time eligible for election or to act as a Trustee in this Trust.

8.—Meetings of the Trustees shall be held at least quarterly and any Trustee except the Settlor who omits to attend four consecutive ordinary meetings of the Trustees without obtaining leave of absence from the other Trustees shall thereupon cease to be a Trustee.

9.—Any Trustee may with the written consent of all his co-trustees appoint in writing some person of whom they may approve to act in his

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place for such period as they may approve and during the currency of his appointment such person shall have all the powers duties and liabilities of a Trustee and such first mentioned Trustee shall not during the period of such appointment be liable for the acts or defaults of the person so appointed.

In the
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10 10.—Any Trustee who has been requested in writing by all the other Trustees to retire from the trust and fails within seven days to communicate in writing to the Trustees his resignation of the trust or is adjudicated bankrupt or insolvent or makes a composition with his creditors or goes to reside permanently out of New South Wales or becomes incapacitated or ineligible to act or who communicates in writing to the Trustees his resignation of the Trust shall thereupon cease to be a Trustee.

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continued.

Annexure
"A."

20 11.—Upon the occurrence of a vacancy then the Trustees shall at their next ensuing meeting cause a note thereof to be entered as prescribed by the said regulations and they shall upon such vacancy appoint a new Trustee. No person who has ceased to be a Trustee shall by reason of that fact alone be ineligible for re-appointment. If at any time the number of Trustees be reduced to one such Trustee shall apply forthwith to the Settlor or his executors to fill the vacancies as such Settlor is hereby authorised to do.

Settlement,
dated 5th
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continued.

12.—In all cases where a new Trustee is appointed all necessary documents and deeds shall be executed for the purpose of vesting the property of this Trustee in the surviving and continuing Trustees and the new Trustee or Trustees and in the event of there being any difficulty in obtaining such execution or refusal to execute such deeds and documents the continuing Trustees or any two of them may apply to the proper Court for a vesting order or such other order as they may think fit and shall pay the cost of such proceedings out of the income of the Trust.

30 13.—In the event of the Trustees failing or refusing to act as regards appointment of any new trustee or trustees application for that purpose may be made by two or more of the Trustees to the proper Court and the cost of such proceedings shall be paid out of the income of the trust.

14.—The head office of the Trust shall be in Sydney and the Trustees may from time to time if necessary lease suitable premises for any such offices for such term or terms at such rent or rents and subject to such covenants and conditions as they think advisable and pay the rents and outgoings thereunder out of the said income. The Trustees may also from time to time sell or surrender any lease they have obtained and lease other premises for any such offices as aforesaid.

15.—There shall be a quorum when two Trustees are present at any meeting. Pending any vacancy in the office of Trustee the Trustees for the

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No. 1.
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continued.

Annexure
"A."

Settlement,
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continued.

time being not less in number than a quorum may act for all purposes in the administration of this trust or scheme.

16.—The first meeting of the Trustees shall be summoned by the Settlor upon some day to be determined by him within three calendar months from the date hereof or if he shall fail to fix a day then on some day to be fixed by any Trustee.

17.—Every question arising at any meeting of the Trustees shall be determined by the majority of the Trustees present and voting on the question. The Chairman of any meeting shall have a casting vote whether or not he shall have previously voted on the same question but no Trustee shall in any other circumstances give more than one vote. 10

18.—Any resolution of the Trustees may be rescinded or varied from time to time by the Trustees at a special meeting.

19.—Any matter or proposition requiring the decision of the Trustees may be submitted to them by the Secretary or some other person under the direction of the Trustees by letter sent through the post or by telegram and the votes thereon may be given by the Trustees by letter in reply to or by telegram and such votes of the Trustees or the majority of them shall be as binding as a resolution or decision given by the Trustees or a majority of them in general meeting. 20

OFFICERS AND GENERAL MANAGEMENT.

20.—The office of Trustee is to be entirely honorary but the Trustees may from time to time appoint on such terms and conditions as they may think fit a Secretary Auditors Clerks and all such other officers and agents for their assistance in the administration and management of the trust as they may think fit. The Trustees may pay out of the said income to their Secretary and to their other officers and agents such annual salaries or other remuneration as from time to time think fit. Subject as herein provided the Trustees shall from time to time prescribe and appoint the duties to be performed by their officers and agents. 30

21.—Proper accounts shall be kept in proper books of account to be provided for the purpose of all moneys received and paid respectively on account of the Trust. Such books of account shall be made up for each year and shall be from time to time examined and shall be passed by the Trustees at their first ordinary meeting in the ensuing year or at some other meeting appointed for the purpose and shall thereupon be signed by the Chairman of the meeting. All proper accounts in relation to the Trust shall be kept and made out and a balance sheet shall in each year be made out and certified to by one or more qualified accountants and copies thereof transmitted to each Trustee and published within three months of the end of each year in such manner as may be prescribed by the said regulations. 40

APPLICATION OF INCOME.

22.—All the proper costs charges salaries and expenses of and incidental to the administration and management of the Trust including all out of pocket expenses incurred by the Trustees in connection with the Trust shall be first defrayed out of the income of the Trust.

23.—Subject to the payments aforesaid and to the provisions hereof the Trust Fund and/or the yearly income available shall be applied by the Trustees or under their direction according to their discretion within the limits hereby prescribed but it shall not be necessary for the Trustees to 10 apply any part of the Trust Fund or the whole of the income received in any one year in that year and as regards any balance in any year remaining unapplied the Trustees may capitalise same and add it to the Trust Funds or carry such balance forward to the next year for application in that or any other year provided that the benefit of any such capitalisation or carrying forward of unapplied income shall enure for the benefit of the aforesaid charitable purposes in or in respect of which such balance of income remains unexpended.

24.—The Trustees may also apply and appropriate any property belonging to the Trust in its then present condition for any Trust purposes and 20 may also use any of the moneys of the Trust either corpus or income or both in purchasing any land or land and buildings or in erecting buildings or in altering or in improving buildings to be used or applied for any such purpose. The Trustees may whether during the lifetime of the Settlor or afterwards and shall during the lifetime of the Settlor if he so directs apply and appropriate any property including moneys belonging to the Trust for the purposes of acquiring by purchase or exchange from the Settlor or his executors any real or personal property valued for the purposes of such purchase or exchange at a sum at least five per cent. below the valuation of such real or personal property so acquired as ascertained by some 30 independent valuator appointed by the Trustees other than the Settlor.

25.—(1) The Trustees may retain unrealised so long as they may think fit any of the properties or securities hereby assigned or which may hereafter be vested in them by gift bequest or devise and may realise any of them when they think fit and may from time to time invest any moneys part of the Trust Funds available for investment in any one or more of the following investments :

- (a) Upon mortgages of freehold property and of conditional purchase land and conditional leasehold land anywhere within the State of New South Wales.
- 40 (b) In the purchase of or advances on public or government securities of the Commonwealth of Australia or of any State thereof.
- (c) In the purchase of real estate of freehold tenure.

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- (d) In purchasing or otherwise acquiring equities of redemption of any other outstanding interest in respect of any property the subject of a security held by the Trustees under which default has been made.
- (e) On deposit with any Bank carrying on business in the Commonwealth of Australia or with any company of which the Settlor or some person in trust for him is a shareholder.
- (f) In advances upon the security of City Municipal Shire Borough or other rates tolls or dues which may be authorised to be raised or charged by or under the authority of any Act of the Commonwealth of Australia or any State therein. 10
- (g) In the purchase of or advances upon any bonds debentures mortgages or other securities of any city Municipal Shire borough public commissioners or trust public body corporation or company secured upon any undertakings or works or upon the rates tolls dues or revenue leviable or obtainable therefrom provided that the power to carry on or construct such undertakings or works and to issue or give bonds debentures mortgages or other securities in connection therewith has been duly conferred under or by virtue of any Act of the Parliament of the Commonwealth of Australia or of any State thereof PROVIDED FURTHER that in the case of a Company registered under the Companies Act such undertakings or works aforesaid shall have been authorised by some express enactment extending to the Company. 20
- (h) In the shares of any company whose shares are approved by the Settlor.

(2) The Trustees shall have full power to place investments of the trust fund for convenience in the name of any trust or other company approved by the Settlor or his executors and vary any such investments from time to time for any other or others of the kinds prescribed and full power to sell any property or investments so purchased or acquired for money or other valuable consideration and purchase other or others or otherwise invest the proceeds of sale and the Trustees may also leave money for any period at current account with any Bank. 30

26.—The Trustees shall have full power of management of the property of the Trust and may make out of the Trust funds or the income thereof any outlay they may think proper for the benefit of such property and generally manage same as if they were the absolute owners thereof.

27.—Without prejudice to the general powers of management contained in the preceding clause the Trustees shall have and may in their absolute discretion exercise the following powers with regard to the property of the Trust : 40

- | | | |
|----|--|---|
| | (a) Power to repair and insure houses and buildings. | In the |
| | (b) Power to make compromise with or grant indulgences to any tenants or tenant or any person or persons. | Supreme Court of New South Wales. |
| | (c) Power to accept surrenders of leases or tenancies. | — |
| | (d) Power to grant any lease or leases tenancy or tenancies for such term or terms at such rent or rents and generally on such conditions as they think advisable. | No. 1. Case Stated, 12th January, 1949— |
| 10 | (e) Power to enter into arrangements with and erect buildings on any vacant land for any prospective tenant or tenants. | <i>continued.</i> |
| | (f) Power to expend either capital or income or both on repairs to or improvements or additions to buildings or in the development of the property of the Trust. | Annexure "A." |
| | (g) Power to erect buildings. | — |
| | (h) Power to pull down existing buildings and re-erect others. | Settlement, dated 5th September, 1928— |
| | (i) Power to adjust all such expenditure as between capital and income and the decision of the Trustees shall be final and conclusive in respect of any adjustment so made. | <i>continued.</i> |
| | (j) Power to pay any debts of and claims on the trust upon evidence which they shall think sufficient. | |
| 20 | (k) Power to accept any composition or security real or personal for any debt due to the Trust. | |
| | (l) Power to allow any time for the payment of any such debt. | |
| | (m) Power to release without payment any debt or security. | |
| | (n) Power to accept payment of any debt in other than cash value. | |
| | (o) Power to compromise compound or submit to arbitration all debts accounts claims and things whatsoever belonging or relating to the Trust. | |
| 30 | (p) Power for any of the purposes aforesaid to enter into give execute and do such assurances instruments of composition releases and things as the Trustees shall think expedient without being responsible for loss. | |

28.—In exercising the power of sale hereby given the Trustees may sell by public auction or private contract and for cash or on terms or for any valuable consideration and with or subject to any special conditions they may think desirable with full power to dedicate roads or to sell lands in the subdivision and to buy in rescind or vary any contract for sale and resell as aforesaid without being answerable for any loss and generally sell or otherwise deal with any property of the trust in such manner as the Trustees shall in their uncontrolled discretion think fit with all the powers in that behalf of absolute owners.

29.—The receipt of the Trustees for the moneys stocks funds or securities which shall be paid or transferred to them under or in connection

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Annexure
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continued.

with this trust or in the execution thereof shall effectually discharge the person or persons paying or transferring the same from all liability to see to the application thereof and from being answerable for the loss or misapplication thereof.

30.—The Trustees shall be respectively entitled to be recouped and indemnified to the fullest extent in respect of all expenses losses and liabilities whatsoever incurred in the execution of all or any of the trusts or powers hereby imposed on or confided to them.

31.—No trustees shall be liable for any loss to the trust estate not attributable (a) to his own dishonesty or (b) to the wilful commission by him of an act known by him to be a breach of trust or (c) to the wilful omission on his part to do some act known by him to be necessary for the protection of the trust funds. 10

32.—In addition to the indemnity provided for by Section 59 of the Trustee Act 1925 the Trustees shall not be liable for any loss to the trust estate in any matter relating to the trusts or the interpretation of this Indenture in which they have acted upon the written advice of any estate agent broker banker solicitor barrister or other skilled adviser advising in a matter connected with his particular business or profession although the employment of such adviser may not be strictly necessary or expedient. 20
The provisions of this clause of this Indenture shall not be construed as in any way restricting the protection given to the Trustees by the last preceding clause.

33.—For the purpose of carrying the purposes of this Indenture into effect and for regulating the conduct of the business of the Trust the Trustees may from time to time make such regulations as they think fit consistent with the provisions of this Indenture and may from time to time alter add to or cancel the said regulations and such regulations may among other matters provide for the regulation of the following matters :

- (a) the manner in which applications for relief shall be made to the Trustees. 30
- (b) the mode in which signed declarations of acceptance for the trusteeship shall be made and recorded
- (c) the record of the occurrence of any vacancy in the trusteeship
- (d) the mode in which meetings of the Trustees may be summoned and notices may be given to Trustees
- (e) the conduct of meetings of Trustees
- (f) the election of a chairman of the Trustees
- (g) the appointment of advisory committees individual advisers secretaries agents clerks and other officers 40
- (h) the duties of the various officers of the Trustees
- (i) the keeping of minutes of the meetings of the Trustees

- (j) the keeping of the accounts of the Trustees and the deposit of moneys in a bank or banks
 (k) the mode in which the bank account shall be operated on
 (l) the publication of the Trust Indenture and the regulations and other matters of public interest.

In the
 Supreme
 Court of
 New South
 Wales.

34.—The regulations set forth in the second part of the Schedule to this Indenture shall until altered added to or cancelled under the powers herein contained regulate all matters to which they apply.

No. 1.
 Case Stated,
 12th
 January,
 1949—
continued.

35.—The Trustees may in any case in which they see fit dispense with a strict compliance with any of the regulations in the schedule or any further or other regulations from time to time in existence.

Annexure
 "A."

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

Settlement
 dated 5th
 September,
 1928—
continued.

THE SCHEDULE BEFORE REFERRED TO

PART I

LIST OF SECURITIES

10,000 shares fully paid to £1 numbered 1 to 10,000 inclusive in Gillespie Bros. Limited.

£7,500 cash deposit with Mungo Scott Limited.

20

PART II.

REGULATIONS.

1.—A Minute Book shall be provided and kept under the direction of the Trustees.

2.—Signed declarations of the acceptance of the Trusteeship and the entry of an address for service of notices on the Trustee shall be made in the Minute Book upon every appointment of a Trustee. The Trustee shall notify the Secretary of any change of address and the Secretary shall cause such change of address to be noted in the Minute Book.

3.—The occurrence of a vacancy in the Trusteeship shall be entered in the Minute Book.

4.—Minutes of all proceedings of the Trustees shall be entered in the Minute Book and shall be signed by the Chairman of the meeting either at the conclusion thereof or at some future meeting if they have been confirmed.

5.—The Trustees shall at their first ordinary meeting in each year elect one of their number to be chairman of Trustees. Such chairman shall preside at all meetings of the Trustees at which he is present. In case of his absence from any meeting one of the other Trustees may be elected by the other Trustees present at such meeting to preside thereat.

30

In the
Supreme
Court of
New South
Wales.

No. 1.
Case Stated,
12th
January,
1949—
continued.

Annexure
"A."

Settlement
dated 5th
September,
1928—
continued.

6.—In the event of the death or resignation of the Chairman of Trustees or of his ceasing to be a Trustee a new Chairman of Trustees shall be elected in his place to act for the unexpired part of his year of office.

7.—Every Chairman of Trustees shall be eligible for re-election.

8.—The Chairman of Trustees or any two Trustees may at any time summon a special meeting for any cause that seems to him or them to be sufficient.

9.—Notice in writing of every meeting whether general special or adjourned shall be delivered or sent through the post to each Trustee by the Secretary or some other person acting under the direction of the person 10 or persons summoning the meeting four clear days at least before the date of the meeting so far as in the case of an adjourned meeting the interval between the original and adjourned meetings will permit. Every notice of meeting shall state the place day and hour of the meeting and every notice of a special meeting shall further state the matter to be discussed thereat.

10.—If a quorum has not assembled within half an hour after the time appointed for any meeting the Trustee or Trustees present or the Secretary if no Trustee is present may adjourn the meeting. Any meeting may be adjourned by the Chairman thereof upon the adoption of a 20 resolution for its adjournment.

11.—All applications for relief from the Trust Funds shall be made in writing addressed to "The R. W. Gillespie Trust" or to the Secretary at the office of the Trust. Any applications made to the Trustees individually or personal applications made to any officer of the Trust shall render the applicant liable to disqualification from relief.

12.—All applications for individual relief shall furnish with their applications the name of at least one responsible person of whom the Trustees may make such confidential inquiries as they may think fit in order to judge of the propriety or otherwise of granting any relief. 30

13.—The officers of the Trustees may be appointed on such terms and conditions as the Trustees think fit. All applications for employment shall be made in writing addressed to the Trust at the offices of the Trust.

14.—The Trustees may appoint individuals or committees of two or more persons either with or without remuneration to inquire into and report as to any matter the Trustees think fit.

15.—The Trustees may appoint honorary local committees to inquire into and report upon applications for relief from persons in any town or district within the State of New South Wales.

16.—The Secretary shall conduct the correspondence and other 40 business relating to the Trust shall summon attend and keep the minutes of all the meetings of the Trustees shall keep the accounts of the Trust shall prepare and furnish the statements of account and shall perform such

other duties not coming within the province of a professional legal adviser as the Trustees may reasonably require.

17.—Banking accounts for the purpose of the Trust shall be opened and kept with some Bank in Sydney aforesaid or elsewhere in Australia to be from time to time selected by the Trustees. Every sum of money received on account of the Trust shall be forthwith paid to the credit of that account unless otherwise ordered by the Trustees.

18.—All cheques and orders for the payment of money shall be signed and countersigned by such person or persons and in such manner as may from time to time be directed by the Trustees.

19.—The trust deed and regulations shall be printed or otherwise copied and a copy thereof delivered to each Trustee on his appointment.

Signed Sealed and Delivered by the }
said Robert Winton Gillespie in the } R. W. Gillespie.
presence of }
W. Garrick Wilson.

20 Signed Sealed and Delivered by the }
said Robert Winton Gillespie in the } R. W. Gillespie.
presence of }
W. Garrick Wilson.

Signed Sealed and Delivered by the }
said George Gillespie in the presence } George Gillespie.
of }
W. Garrick Wilson.

Signed Sealed and Delivered by the }
said Edward Charles Hadley in the } E. Hadley.
presence of }
W. Garrick Wilson.

30 Signed Sealed and Delivered by the }
said Frank Gordon Blair in the } F. G. Blair.
presence of }
W. Garrick Wilson.

In the
Supreme
Court of
New South
Wales.

No. 1.
Case Stated,
12th
January,
1949—
continued.

Annexure
"A."

Settlement,
dated 5th
September,
1928—
continued.

Annexure " B " to Case Stated.

Deed dated 1st November, 1929.

THIS DEED made the first day of November One thousand nine hundred and twenty-nine BETWEEN ROBERT WINTON GILLESPIE of Sydney in the State of New South Wales Miller (hereinafter called the Settlor) of the one part and the said ROBERT WINTON GILLESPIE, GEORGE GILLESPIE of

Annexure
" B."

Deed,
dated 1st
November,
1929.

In the
Supreme
Court of
New South
Wales.

No. 1.
Case Stated.
12th
January,
1949—
continued.

Annexure
"B."

Deed,
dated 1st
November,
1929—
continued.

Sydney aforesaid Miller, EDWARD CHARLES HADLEY of Sydney aforesaid Company Director and FRANK GORDON BLAIR of Sydney aforesaid Company Director (hereinafter called Trustees) of the other part WHEREAS by Indenture made between the parties hereto of the fifth day of September One thousand nine hundred and twenty-eight the Settlor did thereby agree to transfer and assign unto the Trustees certain moneys, securities for money debts and property enumerated in the first part of the schedule thereto AND WHEREAS the first part of the schedule thereto contained ten thousand shares fully paid to one pound and numbered 1 to 10,000 inclusive in Gillespie Bros. Limited and Seven thousand five hundred pounds (£7,500) cash deposit with Mungo Scott Limited AND WHEREAS the Settlor completed the transfer of the cash deposit of Seven thousand five hundred pounds (£7,500) AND WHEREAS the transfer of the said shares was never completed and the Trustees have never been entered in the Register of Gillespie Bros. Limited as the owners of the said shares AND WHEREAS the Settlor has asked the Trustees to accept in lieu of the said ten thousand shares the sum of eleven thousand two hundred and fifty pounds (£11,250) payable as is hereinafter provided which the Trustees have agreed to accept in lieu of the said shares NOW THIS INDENTURE WITNESSETH as follows :—

20

1.—The said Settlor shall give to the Trustees the sum of eleven thousand two hundred and fifty pounds (£11,250) of which sum eight thousand pounds (£8,000) shall be paid over to the Trustees on or before the twentieth day of June One thousand nine hundred and thirty and the balance sum of three thousand two hundred and fifty pounds (£3,250) shall be paid to the Trustees on or before the twentieth day of December One thousand nine hundred and thirty such sums to be held by the Trustees on the trusts set out in the said Indenture of the fifth day of September One thousand nine hundred and twenty-eight.

2.—The Trustees hereby accept the said sum of eleven thousand two hundred and fifty pounds (£11,250) to be paid in the manner provided for in the preceding paragraph in lieu of the said ten thousand shares fully paid to One pound each agreed to be transferred and assigned to them under the said Indenture of the fifth day of September One thousand nine hundred and twenty-eight, and agree to hold the said sum when received by them on the trusts set out in the said Indenture.

3.—The said Indenture of the fifth day of September One thousand nine hundred and twenty-eight is varied as is hereinbefore provided, but is otherwise confirmed.

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

Signed Sealed and Delivered by the
said Robert Winton Gillespie in the
presence of } R. W. Gillespie.
W. Garrick Wilson.

Signed Sealed and Delivered by the said Robert Wilton Gillespie in the presence of W. Garrick Wilson.	} R. W. Gillespie.	In the Supreme Court of New South Wales.
Signed Sealed and Delivered by the said George Gillespie in the presence of W. Garrick Wilson.	} George Gillespie.	No. 1. Case Stated, 12th January, 1949— <i>continued.</i>
10 Signed Sealed and Delivered by the said Edward Charles Hadley in the presence of W. Garrick Wilson.	} E. C. Hadley.	Annexure " B. "
Signed Sealed and Delivered by the said Frank Gordon Blair in the presence of W. Garrick Wilson.	} F. G. Blair.	Deed. dated 1st November, 1929— <i>continued.</i>

No. 2.

Affidavit of Walter John Charles Forsyth.

20 On the twelfth day of April One thousand nine hundred and forty-nine WALTER JOHN CHARLES FORSYTH of Sydney in the State of New South Wales Solicitor being duly sworn makes oath and says as follows :—	No. 2. Affidavit of Walter John Charles Forsyth, 12th April. 1949.
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1.—I am a partner in the firm of Messieurs Sly & Russell, the Solicitors for the executors of the abovenamed Robert Winton Gillespie, deceased, and as such have the conduct of this matter.

2.—I caused to be written to the State Crown Solicitor a letter dated the seventeenth day of September One thousand nine hundred and forty-eight, which omitting formal parts was in the words and figures following :—
re Estate R. W. Gillespie decd.

30 Case Stated	Your reference HMS/PD
----------------	-----------------------

Further to your letter of the 30th April last, we return herewith draft stated case herein.

The draft has been settled by Counsel and we shall be glad to know whether you approve of the alterations. In particular Counsel considers that Clauses 10 & 11 are irrelevant on the ground that the meaning of the settlement now must be the same as the meaning it bore on the day on which it was executed, namely 5th September 1928. Any facts which occurred after the date of execution are irrelevant.

In the
Supreme
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No. 2.
Affidavit of
Walter
John
Charles
Forsyth,
12th April,
1949—
continued.

The Trustees therefore desire these clauses omitted. If you are not prepared to leave them out we should be glad if at the end of paragraph 11 you would insert the following words:—

“The Executors contend that the facts contained in paragraph 10 and this paragraph are irrelevant to the issue before the Court.”

We await hearing from you.

3.—The State Crown Solicitor replied thereto under date the twenty-ninth day of November One thousand nine hundred and forty-eight which said letter omitting formal parts was in the words and figures following:— 10

“*Re Estate of Sir R. W. Gillespie deceased*

“Referring to your letter of 17th September last, it is considered that the facts set out in paragraphs 10 and 11 should remain in the Case, so as to afford to the Court as much assistance or information as possible. Further, those facts may be considered relevant in view of the provisions of section 102 (2) of the Stamp Duties Act, e.g. paragraphs (c) and (d) if not paragraph (a) as you contend.

“Accordingly, I do not think that the statement which you desire to be added at the end of paragraph 11 in the event of the retention of these paragraphs should be included the contention contained therein 20 could be submitted to the Court.

“In view of the retention of paragraphs 10 and 11 it is not considered that the addition which you suggest to clause 13 should be made. Other parts of section 102 (2) may be involved and the Commissioner desires to be at liberty to rely upon paragraphs (c) and (d), in addition to paragraph (a).

“It is accordingly proposed to prepare and deliver the case on the above basis.”

4.—In reply thereto I caused to be written a further letter to the State Crown Solicitor, dated the eighth day of December One thousand 30 nine hundred and forty-eight which omitting formal parts was in the words and figures following:—

“*Estate of Sir Robert W. Gillespie decd.*

“Your ref. 47/2369

“We are in receipt of your letter of the 29th ultimo and note that you do not agree to our amendments to the Stated Case. In view of this we propose to file the Affidavit after the Case has been filed.

“Would you please file the Case as soon as possible.”

5.—The executors on the advice of their Counsel contend that the contents of Paragraphs 10 and 11 are irrelevant to the issue before the 40 Court.

Sworn by the abovenamed deponent }
on the day first abovementioned at } W. J. C. Forsyth.
Sydney Before me :

N. H. Benson
J. P.

No. 3.
Reasons for Judgment.

In the
Supreme
Court of
New South
Wales.

(a) JORDAN C. J. :

This is an appeal under s. 124 of the Stamp Duties Act 1920 as amended by the executors of the will of the late Sir Robert Winton Gillespie against an assessment by the Commissioner of Stamp Duties of death duty claimed to be payable in respect of the estate of the deceased.

No. 3.
Reasons for
Judgment,
26th May,
1949.

The material facts are as follows. The testator, hereinafter called the settlor, by an indenture made the 5th September, 1928 between himself 10 of the one part, and himself, George Gillespie, Edward Charles Hadley and Frank Gordon Blair, hereinafter called the trustees of the other part, transferred and assigned to the trustees ten thousand fully paid £1 shares in Gillespie Bros. Ltd. and £7,500 cash deposit with Mungo Scott Limited to be held by them upon the trusts and subject to the conditions and provisions thereinafter set out. The indenture contained, *inter alia*, the following clauses :—

(a) Jordan,
C.J.,

20 “ 2. The said parties hereto of the second part or the survivors
“ of them or other the trustees for the time being of these presents
“ (all of whom are hereinafter included in the expression ‘ the
“ ‘ Trustees ’) shall hold the said moneys debts and securities
“ for moneys and property and all other the investments securities
“ and property for the time being representing the same hereinafter
“ referred to as ‘ the Trust fund ’ upon trust out of the corpus
“ to pay any duty or duties the payment of which may be
“ demanded and enforced by the Government of any of the
“ State(s) of the Commonwealth upon the execution of this
“ Indenture and upon further trust on and after the date of those
“ presents to hold the Trust Fund or the balance thereof as the
30 “ case may be upon trust to apply and appropriate such Trust
“ Fund and the annual income thereof after payment of all
“ salaries expenses costs charges and outgoings hereinafter
“ authorised towards lawful charitable purposes under the following
“ heads *vide licet*.
“ (a) Educational.
“ (b) The relief of poverty in Australia.
“ (c) The general benefit of the community in Australia not
“ falling under the preceding head.
“ but subject to all the provisions and conditions set out in these
“ presents.

40 “ 3. The time manner and the head or heads under which
“ the application and appropriation of the said Trust Fund and
“ the said income shall be made and all other details and particulars

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Supreme
Court of
New South
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No. 3.

Reasons for
Judgment.
26th May,
1949

(a) Jordan,
C.J.,—
continued.

“ as to such application and appropriation shall be in the absolute
“ discretion of the Trustees but during the lifetime of the Settlor
“ subject to his direction and approval and the Settlor places on
“ record his belief that it will be found advisable to have completely
“ distributed the trust fund and wound up the trust within ten
“ or fifteen years.

“ 24. The Trustees may also apply and appropriate any
“ property belonging to the Trust in its then present condition
“ for any Trust purposes and may also use any of the moneys of
“ the Trust either corpus or income or both in purchasing any 10
“ land or land and buildings or in erecting buildings or in altering
“ or in improving buildings to be used or applied for any such
“ purpose. The Trustees may whether during the lifetime of the
“ Settlor or afterwards and shall during the lifetime of the Settlor
“ if he so directs apply and appropriate any property including
“ moneys belonging to the Trust for the purposes of acquiring by
“ purchase or exchange from the Settlor or his executors any real
“ or personal property valued for the purposes of such purchase
“ or exchange at a sum at least five per cent. below the valuation
“ of such real or personal property so acquired as ascertained by 20
“ some independent valuator appointed by the Trustees other
“ than the Settlor.”

By an indenture made the 1st November, 1929 the said indenture was varied as to the property agreed to be transferred and assigned but not as to the trusts upon which the property was to be held.

From time to time thereafter, but more than three years prior to the settlor's death, the settlor transferred assigned or paid other property and moneys to the trustees of the settlement constituted by the said indentures, to be held by them upon the trusts and subject to the conditions and provisions contained in the said indentures. 30

Between 30th October, 1929 and 24th February, 1934 the settlor on six occasions paid to the trustees by cheques sums totalling £51,807 as gifts to be held on the trusts of the settlement, and the trustees used the said sums in buying from the settlor in all 50,000 shares in Gillespie Bros. Pty. Ltd. and 25,896 shares in seven other companies. Each of the said six gifts and purchases was made in the following way. The trustees in the first place received a gift from the settlor of a cheque for a certain sum, to be held on the trusts of the settlement. The settlor then intimated that he would make available to the trust certain specified shares, and the trustees resolved to authorise the payment of a sum, which was always the same as 40 the amount of the cheque, to purchase those shares. They were then purchased accordingly.

On 30th June, 1945 about a month before the settlor's death, the trustees used £281 15s. 0d. of moneys the subject of the trusts in buying from the settlor 625 shares in two companies.

None of the shares bought by the trustees from the settlor was acquired in accordance with valuations pursuant to Clause 24 of the indenture of 5th September 1928.

The settlor died on 2nd August, 1945. He was one of the trustees at all times prior to his death, and immediately prior to his death the trustees were himself, Jessie Jean Gillespie, Francis Harmsworth Way, and William Garrick Wilson.

At the date of the settlor's death the value of the property then subject to the trusts of the settlement was £81,403 19s. 6d.

10 The relevant questions for the determination of this Court are—

(1) Should the property which was at the date of the death of the testator subject to the trusts of the said settlement be deemed to be included in his estate for the purposes of the assessment and payment of death duty thereon?

(3) How should the costs of this case be borne and paid?

For the Commissioner it was claimed that the estate of the deceased should be deemed to include and consist of the settled property by reason of the provisions of s. 102(2) (a) or alternatively of s. 102(2) (c) or s. 102(2) (d) of the Stamp Duties Act 1920 as amended.

20 S. 102 provides that for the purposes of the assessment and payment of death duty the estate of a deceased person shall be deemed to include and consist of:—

(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:

30 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 question arising under Clause (a) is whether the settlements constituted by the two indentures, and the subsequent settlements made on the terms of the trusts set out in the indenture of 5th September, 1928, contained any trust in respect of the property thereby settled to take effect after the settlor's death.

40 In *Commissioner of Stamp Duties (N.S.W.) v. Thomson* (40 C. L. R. 394 at 426) it was said by Higgins J. that "It is enough, for the purposes of the section, that the settlement contain *any* trust intended to take effect after his death"; and in *Rabett v. Commissioner of Stamp Duties* (1929 A. C. 444 at 448) the Privy Council said "The section assumes that the testator has disposed of the property, and the only condition required for duty to attach is that the settlement contains trusts to take effect after his death." Their Lordships instanced as trusts which would possess that character trusts taking effect after the settlor's death enabling his widow alone to sell and vary investments, or enabling her, if a joint power

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(a) Jordan,
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continued.

had not been exercised, to appoint to children. Thus, it does not matter whether the trust is a machinery trust for the management of the trust property or a trust for the selection of beneficiaries, so long as it is to take effect after his death.

In *Commissioner of Succession Duties (S.A.) v. Isbister* (64 C. L. R. 375) a settlor by deed poll declared himself trustee of certain property upon trust to pay the income to his daughter for life and after her death upon trust for her children or remoter issue in such shares as she should appoint and in default of appointment for her children upon certain contingencies, and the settlor reserved to himself power to revoke wholly or partially the trusts thereby declared. He died without having exercised his power of revocation. It was held that the fact that his death would prevent him from revoking the trusts did not cause the settlement to contain a trust to take effect after his death. It was true that upon his death the trusts would become indefeasible, but his death would not bring into effect a new trust, it would merely increase the value of an existing trust. 10

If a settlor conveyed property to a sole trustee upon trusts to apply all or any part of the income or corpus thereof for the benefit of such one or more of the six children of X and at such times and in such proportions as the trustee for the time being should think fit and so far as any part of the trust fund should remain unapplied twenty years after the date of the settlement, over, it would be obvious that the value of the interest of each child of X would depend to some extent upon the personality of the trustee for the time being, since each succeeding trustee might have a different conception of what constituted meritoriousness on the part of possible participants, but it could not be said that new trusts came into existence whenever a new trustee was substituted for his predecessor; the trusts would remain the same, notwithstanding that the values, of the interests of the respective beneficiaries were varied. If, however, the settlor conveyed the property to A upon trust during A's life to apply all or any part etc. for the benefit of such one or more of the six children of X and at such times etc. as A should think fit, and upon trust, after the death of A, for the benefit of such one or more of the six children of X, etc. as the trustee of the settlement for the time being should think fit, there would be two trusts for the benefit of the children of X, one intended to be dependent on the discretion of A during his life, and another intended to come into effect on A's death and be dependent on the discretion of whoever might for the time being be the trustee of the settlement; cf. *Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co. Ltd.* (21 C. L. R. 69 at 80-81). *Burrell v. A. G.* 1937 A. C. 286 at 297 and 299-302. 30 40

In the present case, by Clause 2 of the indenture of 5th September, 1928 the trustees were to hold the trust fund upon trust to apply and appropriate the same towards lawful charitable purposes under the heads (a) educational, (b) the relief of poverty in Australia, (c) the general benefit of the community in Australia not falling under the preceding heads, but subject to all the provisions and conditions set out in the indenture. Clause 3 goes on to provide that the time, manner and the head or heads under

which the application and appropriation of the trust fund and income shall be made, and all other details and particulars as to such application and appropriation, shall be in the absolute discretion of the trustees, but during the lifetime of the settlor, subject to his direction and approval. As a matter of construction, I think that this means that during the lifetime of the settlor the application and appropriation of the trust fund, whether beneficially or by way of machinery, are to be subject to the direction and approval of the settlor, and that it is only after his death that the application and appropriation of the trust fund are in the absolute discretion of the

10 trustees. That is to say, during the settlor's lifetime the trusts which take effect depend on his discretion, and it is only after his death that trusts take effect which depend on the discretion of other persons: cf. *Burrell v. A: G.*, 1937 A. C. 286 at 297, 299-302. In these circumstances, I am of opinion that the property which was at the settlor's death subject to the trusts of the settlements must be deemed to be included in his estate for death duty purposes.

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(a) Jordan,
C.J.

—continued.

S. 102(2) (c) brings within the dutiable estate:—

20 (c) Any property passing under any settlement trust, or other disposition of property made by the deceased whether before or after the passing of this Act

- (i) by which an interest in or benefit out of or connected with that property, or in the proceeds of sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or
- (ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or
- 30 (iii) by which the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or reclaim that property or the proceeds of sale thereof.

The first question under this clause is whether by the settlements, which were all made upon the trusts set out in the deed of 5th September, 1928, an interest in or benefit out of or connected with the property settled was reserved either expressly or by implication to the settlor for his life. Clause 24 of the deed provides that the trustees shall during his life if he so

40 directs apply any property belonging to the trust for the purpose of acquiring by purchase or exchange from him or his executors any real or personal property valued for the purpose at a sum of at least 5 per cent. below its value as ascertained by an independent valuator appointed by the trustees other than the settlor. In other words, the settlor expressly reserved to himself for his life the right to take any property the subject of the

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—continued

settlements on his giving in exchange property valued at at least 5 per cent. below its true value. That is to say, if, for example, the trustees held one thousand shares having a market value of £1,000, and the settlor wanted them, he could compel the trustees to transfer them to him on his transferring to the trustees property worth at least £1,050. This right was an interest in the settled property and it was expressly reserved to the settlor for his life. No doubt the life interest was one which enabled him to acquire the settled property for greater than a life estate, and no doubt such an interest could hardly be regarded as having a market value. But this is immaterial. The reservation of an option to purchase, available during the settlor's life, would clearly be hit by the clause, and the clause draws an antithesis between an interest in and a benefit out of; the interest need not be marketable. In these circumstances, it is unnecessary to consider whether s. 102(2) (c) (iii) is restricted in its application to cases in which the deceased has reserved the right to restore the settled property to himself without giving any consideration for it. As at present advised, I am disposed to think that it is not so restricted. For these reasons, I am of opinion that the settlements are caught by Clause (c). 10

As regards s. 102(2) (d) as at present advised I am of opinion that this clause is directed to gifts which are gifts in the ordinary sense or gifts in the sense set out in s. 100, but by reason of matters subsequent specified in the clause are dutiable. There is no evidence of any such matter subsequent in the present case. 20

For the reasons which I have stated, I am of opinion that Question 1 should be answered in the affirmative and that the costs of the case should be borne and paid by the executors.

(b) Maxwell,
J.

(b) MAXWELL J. : I concur.

(c) Owen, J.

(c) OWEN J. :

By deed dated 5th September, 1928, the late Sir Robert Gillespie (hereinafter called the settlor) created a trust fund to be held and applied by trustees, of whom he himself was one, for various charitable purposes. Clause 2 of the deed provided that the trustees should hold the trust fund on and after the date of the deed upon trust to "apply and appropriate it and the annual income thereof . . . towards lawful charitable purposes, under the following heads, *vide licet*, (a) educational; (b) the relief of poverty in Australia; (c) the general benefit of the community in Australia not falling under the preceding head." Clause 3 was in these terms, "The time, manner and the head or heads under which the application and appropriation of the said trust fund and the said income shall be made and all other details and particulars as to such application and appropriation shall be in the absolute discretion of the trustees but during the lifetime of the settlor subject to his direction and approval . . ." Clause 24 provided that "The trustees may, whether during the lifetime of the settlor if he so directs apply and appropriate any property including money belonging to the trust for the purposes of 30 40

- “acquiring by purchase or exchange from the settlor or his executors any
 “real or personal property valued for the purposes of such purchase or
 “exchange at a sum at least five per cent. below the valuation of such
 “real or personal property so acquired as ascertained by some independent
 “valuator appointed by the trustees other than the settlor.” In 1929
 a supplementary deed was executed varying the first deed in certain respects
 not material to this case. By a number of transactions between October,
 1929 and June, 1945 the settlor made substantial additions totalling over
 £50,000 to the Trust Fund. In thirteen of these transactions a similar
 10 procedure was adopted, and I quote one as an example—on November 7th,
 1929 the secretary of the Trust reported to a meeting of the trustees that
 he had received the gift of a cheque for £3,150 from the settlor to be held
 on the terms of the trust set out in the original deed. The settlor, who was
 present at the meeting, thereupon intimated that he would make available
 to the Trust 2,800 shares in Gillespie Bros. Ltd., and the trustees resolved
 to authorise the payment of £3,150 to purchase these shares at 22s. 6d.
 each. In other words, the settlor presented the Trust with 2,800 shares
 in Gillespie Bros. Ltd. In the remaining two instances the trustees
 appropriated sums totalling £281 15s. 0d. belonging to the Trust and
 20 purchased from the settlor shares in two mining companies.
- The Commissioner claims that the whole of the trust property which
 was subject to the Trust at the date of the settlor’s death, amounting to
 £81,403 19s. 6d., is to be included in his estate for the purpose of the
 assessment and payment of death duty, the amount of additional duty
 involved being £26,049 5s. 8d. This claim is based upon the provisions
 of Section 102 (2) (a), (c) and (d) of the Stamp Duties Act.
- Section 102 (2) (a) provides, *inter alia*, that for the purposes of the
 assessment and payment of death duty the estate of a deceased person shall
 be deemed to include property of which he has disposed in his lifetime by
 30 a settlement containing a trust to take effect after his death; and it is
 submitted that the deed in the present case created such a settlement,
 because by Clause 3 it gave the settlor during his life, and if he wished to
 use it, an overriding voice in the choice of beneficiaries, whereas after his
 death they were to be selected by the remaining trustees. It is said that the
 deed thus created two trusts, the first in favour of those whom the settlor
 might select during his life, the second a trust taking effect after his death
 in favour of those who might thereafter be chosen by the remaining trustees.
 The question then is—does the deed create two trusts, or does Clause 3
 merely provide the machinery to give effect to one trust to be found in
 40 Clause 2? My mind has fluctuated, but on the whole I think the latter view
 is the correct one. Reliance was placed by the Commissioner on a passage
 from the judgment of the Privy Council in Rabett’s case (1929 A. C. 444
 at 448) where their Lordships said, “The section assumes that the testator
 “has disposed of the property, and the only condition required for duty
 “to attach is that the settlement contains trusts to take effect after his
 “death. In the present case the trusts that took effect after his death
 “were (1) . . . ; (2) a trust enabling her” (the testator’s widow) “if

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 Supreme
 Court of
 New South
 Wales.

No. 3.

Reasons for
 Judgment,
 26th May,
 1949.

(c) Owen, J.
 —continued.

In the
Supreme
Court of
New South
Wales.

No. 3.
Reasons for
Judgment,
26th May,
1949.

(c) Owen, J.
—continued

“ the joint power was unexercised to appoint among the children by deed or will, and (3) a trust for the benefit of the children in default of appointment” But every judgment must be read in the light of the facts of the particular case and the deed of settlement there under consideration, a copy of which has been made available to us, made clear and express provision for a series of trusts to take effect after the death of the settlor. I recognise the force of the argument that the deed now before us sets up two trusts, one in favour of persons (within the designated classes) chosen by A, and after A’s death a further trust in favour of persons within the same classes chosen by B ; but I think it would be more accurate to describe the settlement as one whereby one trust was declared in favour of such persons or bodies (within a class) as might be chosen at different times by different selectors, the qualifications for selection as a beneficiary being the same in each case. The subsection seems to me to be directed at the disposition of assets during the settlor’s life in such a way that on or after his death and by reference to it the whole, or some limited or potential beneficial interest passes from one person or set of persons to another, and not to a case such as the present where the settlor’s death made no change in the class which was to or might benefit by the settlement. Both before and after the settlor’s death the qualifications of those who might partake in the distribution of the trust fund remained the same. The only alteration which his death occasioned was the replacement of himself as a selector by someone else. I think some light is thrown on the problem by a consideration of the way in which the House of Lords dealt with a not dissimilar question arising under Section 1 of the Finance Act of 1894, in *Burrell & Kinnaird v. Attorney-General* (1937 A. C. 286), a decision which was applied in *Haldane v. Eckford* (1948 1 Ch. 665). The section under consideration in that case was concerned with the liability to duty of property which “ passed ” on the death of a settlor or testator, and the test which their Lordships applied in deciding whether there has been a “ passing ” of settled property on the death of the settlor was whether the class or group, some or all members of which were eligible to benefit after the settlor’s death, differed from the class or group eligible to benefit it before his death. That test, it seems to me, is applicable here and, applying it, it appears that the qualifications necessary to entitle a person to become a potential beneficiary were the same both before and after the settlor’s death. I am of opinion therefore that the Commissioner’s claim based upon Section 102 (2) (a) fails. If I may adapt the words used by Williams J. in *Commissioner for Succession Duties v. Isbister* (64 C. L. R. 375 at 380) I think the method of selecting beneficiaries provided by Clause 3 of the Deed was simply an incident of the one and only trust created by Clause 2.

I have come to the conclusion, however, that by reason of the provisions of both Section 102 (2) (c) (i) and (iii) the Commissioner is entitled to succeed. By the deed the settlor reserved to himself a right exercisable during his life to require the trustees to use trust assets for the purpose of buying property of which he was the owner, or to exchange trust assets for property

of which he was the owner. Now, if the deed had reserved to the settlor an option to purchase trust property, I think it would have been impossible to say that he had not thereby reserved to himself an interest in that property nor could it have been denied that he had reserved to himself the right to reclaim possession of the property settled, and I cannot see any sound distinction in this respect between the reservation of a right to purchase and the reservation of a right to acquire or re-assume possession of trust property by exchange. It is, I think, irrelevant in this connection that the settlor was at pains to ensure that any such purchase from him by the trustees or any such exchange of assets would benefit the Trust and not himself, since in any such transaction the trustees would get the settlor's property at less than its true value. That part of the subsection with which we are now concerned does not make the value of the right reserved to the settlor the test of whether he has for the purposes of the Act completely disposed of property during his life. It is concerned with the question whether or not the disposition is an absolute gift; and if it is found that the settlor has retained an interest in or reserved a right to re-assume ownership of the property given, then for the purposes of the Act and regardless of the value of that interest or right, he is deemed not to have made an out and out gift.

In these circumstances it is unnecessary to decide the argument based upon Section 102 (2) (*d*). It is a provision which has regard not to the terms of the deed but to events occurring afterwards. As at present advised I find some difficulty in seeing in what respect it can properly be said that after the execution of the deed and before his death the settlor in fact came back into possession of any part of the property given. The transactions whereby the Trust was enriched by the settlor do not seem to me to establish the Commissioner's claim, but it is unnecessary and perhaps unwise to enlarge upon the point. The first question asked should be answered in the affirmative, and the second question should be answered "£100,964 10s. 0d."

I think it right to add that from beginning to end of the case no suggestion has, or could have been made, that the settlor was acting otherwise than *bona fide* and for reasons which did him the greatest credit. The case is one in which a public spirited citizen in his lifetime generously provided large sums of money and valuable assets for charitable purposes. Unfortunately, the means adopted to carry out his purpose were such as to leave the settled property part of his estate for the purposes of death duty.

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Supreme
Court of
New South
Wales.

No. 3.
Reasons for
Judgment,
26th May,
1949.

(c) Owen, J.
—continued.

In the
Supreme
Court of
New South
Wales.

No. 4.
Rule.

Term No. 82 of 1949.

No. 4.
Rule.
26th May,
1949.

IN THE MATTER of the estate of ROBERT WILTON GILLESPIE, late of Sydney,
in the State of New South Wales, Knight, deceased.

AND IN THE MATTER of the Stamp Duties Act, 1920-1940.

AND IN THE MATTER of the appeal of FRANCIS HARMSWORTH WAY, GEORGE
ROLAND LOVE, WILLIAM GARRICK WILSON, JOHN CADWALLADER and
MILTON REWI DUNKLEY, executors of the Will of the said deceased
against the assessment by the Commissioner of Stamp Duties of death 10
duty payable in respect of the said estate.

Thursday, the twenty-sixth day of May, One thousand nine hundred and
forty-nine.

THIS MATTER coming on to be heard on the twelfth and thirteenth days of
May instant WHEREUPON AND UPON READING the case stated by the
Commissioner of Stamp Duties the Respondent herein for the opinion of
this Court AND UPON HEARING what was alleged by Mr. Maughan of
King's Counsel with whom was Mr. Windeyer of Counsel on behalf of the
Appellants and by Mr. Wallace of King's Counsel with whom was 20
Mr. Walsh of Counsel on behalf of the Respondent IT WAS ORDERED on the
said thirteenth day of May instant that this matter stand for judgment
and the same standing in the list this day for judgment accordingly IT IS
ORDERED that the questions submitted in the case stated :—

1. Should the property, which was at the date of death of the testator
subject to the trusts of the said settlement be deemed to be included in
his Estate for the purposes of the assessment and payment of death duty
thereon ?

2. What was the amount of Death Duty payable in respect of the
Estate of the Testator.

3. How should the costs of this case be borne and paid ? 30
be and the same are hereby answered as follows :—

1. Yes.
2. Not answered.
3. By the Executors.

AND IT IS FURTHER ORDERED that the costs of the Respondent of and
incidental to this appeal be taxed by the proper officer of this Court and
that such costs when so taxed and allowed be paid by the appellants to
the Respondent or to Mr. Finlay Patrick McRae, the Crown Solicitor.

By the Court

R. E. WALKER, 40
Deputy Prothonotary.

No. 5.

Letter from Crown Solicitor to Respondents' Solicitors, dated 6th July, 1949.

In the High
Court of
Australia.

6th July, 1949. No. 5.

Messrs. Sly & Russell,
Solicitors,
16 Barrack Street,
Sydney.

Letter from
Crown
Solicitor to
Respond-
ents'
Solicitors,
6th July,
1949.

Dear Sirs,

10 WAY AND ORS. *v.* COMMISSIONER OF STAMP DUTIES : *re* SIR R. W.
GILLESPIE, dd. High Court Appeal, No. 29 of 1949.

I have to inform you that the respondent Commissioner intends to contend on the hearing of this appeal to the High Court, not only that the majority of the Full Court were correct in holding that the property was dutiable by reason of the provisions of paragraph (a) of sec. 102(2) of the Stamp Duties Act, and that that Court was correct in holding that the property was dutiable by reason of the provisions of paragraph (c) of sec. 102(2), but also that the property was dutiable by reason of paragraph (d) of sec. 102(2).

Yours truly,
F. P. McRAE,
Crown Solicitor.

20

No. 6.

Joint Reasons for Judgment of their Honours Dixon, McTiernan,
Williams and Webb, JJ.

No. 6.
Joint
Reasons,
18th
August,
1949.

JUDGMENT.

(Reasons prepared by WILLIAMS, J.)

30 This is an appeal by the executors of R. W. Gillespie deceased from an order of the Full Supreme Court of New South Wales answering the first question submitted in a case stated under sec. 124 of the Stamp Duties Act 1920-1940 (N.S.W.) by the respondent the Commissioner of Stamp Duties in favour of the Commissioner.

The question is whether certain trust funds known as the R. W. Gillespie trust of the value of £81,403 19s. 6d. form part of the dutiable estate of R. W. Gillespie, deceased, for the purposes of death duty under the provisions of the Act. The respondent claims that these funds are made part of the notional estate of the deceased by virtue of the provisions of sec. 102(2) (a), or alternatively of sec. 102(2) (c), or alternatively of sec. 102(2) (d) of the Act. Jordan C.J. and Maxwell J. were of opinion that they were made part of the notional estate by both sec. 102(2) (a) and

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sec. 102(2) (c), while Owen J. was of opinion that they were so made by sec. 102(2) (c). The funds in question consisted of the whole of the assets which at the date of the death of the deceased on 2nd August 1945 were still subject to the trusts of a certain indenture of settlement dated 5th September 1928. By this indenture made between the deceased as settlor of the one part and the settlor and three other persons as trustees of the other part, as varied by a subsequent indenture made between the same parties on 1st November 1929, the settlor transferred and assigned certain moneys totalling £18,750 to the trustees of the settlement to be held by them upon the trusts and subject to the conditions and provisions thereinafter set forth. 10

The indenture contained the following clauses :

“ 2. The said parties hereto of the second part or the
“ survivors of them or other the trustees for the time being of
“ these presents (all of whom are hereinafter included in the
“ expression ‘ the Trustees ’) shall hold the said moneys debts and
“ securities for moneys and property and all other the investments
“ securities and property for the time being representing the
“ same hereinafter referred to as ‘ the Trust fund ’ upon trust out 20
“ of the corpus to pay any duty or duties the payment of which
“ may be demanded and enforced by the Government of any of
“ the State(s) of the Commonwealth upon the execution of this
“ Indenture and upon further trust on and after the date of these
“ presents to hold the Trust Fund or the balance thereof as the
“ case may be upon trust to apply and appropriate such Trust
“ Fund and the annual income thereof after payment of all
“ salaries expenses costs charges and outgoings hereinafter
“ authorised towards lawful charitable purposes under the
“ following heads *vide licet* (a) Educational ; (b) The relief of 30
“ poverty in Australia ; (c) The general benefit of the community
“ in Australia not falling under the preceding head ; but subject
“ to all the provisions and conditions set out in these presents.
“ 3. The time manner and the head or heads under which the
“ application and appropriation of the said Trust Fund and the
“ said income shall be made and all other details and particulars
“ as to such application and appropriation shall be in the absolute
“ discretion of the Trustees but during the lifetime of the Settlor
“ subject to his direction and approval and the Settlor places on
“ record his belief that it will be found advisable to have
“ completely distributed the trust fund and wound up the trust 40
“ within ten or fifteen years. 24. The Trustees may also apply
“ and appropriate any property belonging to the Trust in its
“ then present condition for any Trust purposes and may also use
“ any of the moneys of the Trust either corpus or income or both
“ in purchasing any land or land and buildings or in erecting
“ buildings or in altering or in improving buildings to be used or
“ applied for any such purpose. The Trustees may whether

“ during the lifetime of the Settlor or afterwards and shall during
 “ the lifetime of the Settlor if he so directs apply and appropriate
 “ any property including moneys belonging to the Trust for the
 “ purposes of acquiring by purchase or exchange from the Settlor
 “ or his executors any real or personal property valued for the
 “ purposes of such purchase or exchange at a sum at least five per
 “ cent. below the valuation of such real or personal property so
 “ acquired as ascertained by some independent valuator appointed
 “ by the Trustees other than the Settlor.”

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- 10 In addition to the original sums of money mentioned in these indentures the Settlor paid to the trustees of the settlement from time to time further sums of money totalling £51,807 as gifts to be held on the trusts of the settlement and the trustees used these sums in buying from the Settlor in all 50,000 shares in Gillespie Bros. Pty. Ltd. and 25,896 shares in seven other companies. All these moneys were paid to the trustees more than three years prior to the date of the death of the Settlor. On 30th June 1945, about a month before the Settlor's death, the trustees used £281 15s. 0d. of moneys the subject of the trusts in buying from the Settlor 725 shares in two companies. None of the shares bought by the trustees from the
 20 Settlor was acquired in accordance with valuations made pursuant to clause 24 of the indenture. The Settlor was one of the trustees of the settlement from the date of its execution to that of his death.

Before referring to the relevant provisions of the Stamp Duties Act, it will be convenient to discuss the meaning of clauses 2, 3 and 24 of the settlement. There are three objects of the charitable trust, the trustees having a discretion to apply the trust funds both income and corpus for the advancement of these objects. The Settlor in his lifetime had a control over the manner in which the discretion of the trustees should be exercised to the extent that the exercise was subject to his direction and approval.

- 30 Trustees of a charity in the absence of a provision to the contrary in the trust instrument can act by a majority. In this case there is a provision to the contrary, and it may be that the word “direction” would have been sufficient to compel the other trustees to exercise their discretion as the Settlor directed, but the better opinion would appear to be that the effect of the provision was merely to give the Settlor a right of veto, so that the majority could not exercise their discretion in a manner of which the Settlor did not approve. But on either view it would not be correct to construe the settlement as containing two trusts (1) a trust during the
 40 lifetime of the Settlor to distribute the trust funds amongst the charitable objects in accordance with his direction and approval; and (2) a trust after his death to distribute the trust funds amongst such objects in the absolute discretion of the trustees. It is not a trust which can be divided into a trust, like that in *Waldo v. Caley*, 16 V. 206, limited to endure for the life of the Settlor with a further and different trust to take effect on his death. It is a single trust though different persons are to exercise the discretion as to the manner in which the trust funds should be distributed

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amongst the charitable objects during the life of the Settlor and after his death. There is a general charitable intention to benefit the objects of the trust irrespective of the mode by which the gift is to be carried into effect from time to time, and in such a case equity will not allow the trust to fail by reason of the failure of the appointed mode. The trust would therefore have taken effect during the life of the Settlor although he had refused to act as a trustee or had retired or had become for some other reason unwilling or unable to exercise his discretion *A.G. v. Gladstone* 13 Sim.7 ; *In re Willis* 1921 1 Ch. 44 : Halsbury 2nd Edit. vol. 4, p. 192. The settlement contains one trust and one trust only and that is a charitable trust 10 which took effect immediately upon the Settlor handing the initial sum of money to the trustees of the settlement.

The second question of construction relates to the proper meaning of Clause 24 of the settlement. The preceding Clause 23 authorises the trustees to apply so much of the income of the trust fund as they think fit for the purposes of the trust and capitalise the balance, and the succeeding clause 25 authorises the trustees to retain unrealised so long as they might think fit any of the properties or securities then assigned to them or which might thereafter be vested in them by gift, bequest, or devise, and to realise any of them which they might think fit and from time to time to invest any 20 moneys forming part of the trust funds available for investment in a wide range of investments. Clause 24 in the first limb authorises the trustees to apply and appropriate any property for any trust purposes and to use any moneys of the trust in purchasing any land or buildings or in erecting buildings or in altering or improving buildings to be used for the purposes of the trust. It then proceeds in the second limb to authorise the trustees during the life of the Settlor or afterwards to apply and appropriate any property including moneys belonging to the trust for the purposes of acquiring by purchase or exchange from the Settlor or his executors any real or personal property valued for the purposes of such purchase or 30 exchange at a sum at least five per cent. below the valuation of such real or personal property so acquired as ascertained by some independent valuator appointed by the trustees other than the Settlor. It provides that the trustees shall during the lifetime of the Settlor if he so directs apply and appropriate any property including moneys belonging to the trust in this manner. It is a rule of equity that a trustee must not place himself in a position where his interest and duty may conflict. He cannot therefore in the absence of a special dispensation in the trust instrument either sell his own property to the trust estate or purchase any property from the trust estate. The purpose of the second limb is to provide such a 40 dispensation. It authorises the trustees to apply and appropriate trust funds for the purpose of acquiring by purchase or exchange any real or personal property of the Settlor in the manner therein mentioned. The valuations provided for are only valuations of the real and personal property of the Settlor. There is no express provision for valuing the trust assets. The second limb should not be read as meaning that the Settlor may direct the trustees to exchange some particular item of trust property

- for some particular property of his own. The words "or exchange" are only intended to authorize the trustees to acquire the real and personal property of the Settlor not only by the purchase but also by the exchange of some of the trust property for some property of the Settlor. The second limb provides the necessary machinery to enable the trustees of the settlement to acquire property from one of themselves. It also enables the Settlor as one of the trustees to require the other trustees to make such an acquisition. But it does not enable the Settlor to require the other trustees to apply any particular part of the trust property for this purpose, and it does not enable the Settlor to require the trustees to acquire his property by exchange and not by purchase. The discretion as to what part of the trust property shall be used to acquire the Settlor's property and as to whether the acquisition shall be for cash or by way of exchange is a matter for the trustees of the settlement as a whole and if there is a difference of opinion for the majority of those trustees. The words "pay and appropriate any property including moneys belonging to the trust" are intended to remove any doubt that the authority of the trustees to use the trust funds for this purpose extends to the whole trust estate and not to any particular part of it. It would require very clear words to empower the Settlor to compel the trustees to use some particular portion of the trust funds to acquire his property and in particular to exchange some trust asset selected by himself for an asset of his own.
- The contrary view which was accepted by the Supreme Court would be that the clause authorised the Settlor at any time during his life to direct the trustees of the settlement to exchange any asset of the trust for an asset of his own. On this view the Settlor had a sort of floating right of selection exercisable against the assets of the trust which would crystallize against any particular asset upon its exercise. But if this was intended the settlement would have provided for an independent valuation of the trust asset. Further the trust assets from time to time would presumably consist of moneys in the bank and tangible real and personal property. Clause 24 authorises the trustees to purchase land and buildings to be used or applied for the purposes of the trust, so that the tangible property might comprise a school and it could hardly have been intended that the Settlor should have the power to direct the trustees to exchange the school buildings and shut down the school for some shares which he desired to transfer to the trust. It was suggested during the argument that the clause might have been inserted to enable the Settlor to require a transfer of some or all the shares in Gillespie Bros. Ltd. if he desired to increase his voting power in that company. But the Settlor could achieve this object by registering himself as the first joint holder of the trust shares. As a trustee he would have to exercise his vote for the benefit of the trust, but there is no reason to believe that the interests of the trust and his own personal interests would not coincide. The material words of Clause 24 of the settlement are not apt to create a covenant between the Settlor and himself and the other trustees which by virtue of Section 72 of the Conveyancing Act 1919 (N.S.W.) would be construed and capable of being

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enforced in like manner as though the covenant had been made between the Settlor and the other trustees. No particular form of words is necessary to create a covenant but the words must be sufficient to establish an agreement to do a thing: Norton on Deeds 2nd Edit. p. 532. The power to direct the other trustees conferred on the Settlor by Clause 24 is at most a power as a trustee to control the exercise of the discretion by the trustees as a body and it is a fiduciary power which must be exercised in the interests of the trust property. If the other trustees refuse to accede to his direction, the only remedy of the Settlor would be to sue them for breach of trust joining the Attorney General as a party to represent the charities. He could not sue the other trustees for specific performance of a contract to exchange an asset of his own for an asset of the trust. 10

It will now be convenient to consider the relevant provisions of the Stamp Duties Act. There is first section 102(2) (a) which includes in the notional estate all property which the deceased has disposed of by way of settlement containing any trust in respect of that property to take effect after his death. In *Rabett v. Commissioner of Stamp Duties* 1929 A.C. 444 at p. 448, Lord Buckmaster, delivering the judgment of the Privy Council, included in the trusts that took effect after the death of the Settlor in that case a trust enabling his widow alone to sell and vary investments. But it would appear that this machinery trust was included among such trusts *per incuriam*. It is at least clear that the paragraph does not refer to powers but to trusts. It is dealing with dispositions, that is with beneficial interests created in property, and therefore to the beneficial trusts and not to the administrative trusts and powers of a trust instrument. Even if the paragraph does include administrative trusts, there are in the settlement no administrative trusts but only powers. The settlement contains only the one trust, namely the charitable trust for educational purposes, the relief of poverty in Australia and the general benefit of the community in Australia not falling under these heads. This trust took effect in the lifetime of the Settlor and did not in any sense take effect after and by reference to his death. Accordingly, as Owen J. held, the Respondent's claim so far as it is based on sec. 102(2) (a) of the Act, fails. 20 30

The next section is sec. 102(2) (c). This section provides that there shall be included in the dutiable estate of the deceased any property passing under any settlement, trust or other disposition of property made by the deceased (i) by which an interest in or benefit out of or connected with that property, or in the proceeds of the sale thereof, is reserved either expressly or by implication to the deceased for his life or for the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or of any other person; or (iii) by which the deceased has reserved to himself the right, by the exercise of any power, to restore to himself or to reclaim that property or the proceeds of the sale thereof. The first question that arises under the section relates 40

- to the meaning of "any property passing under any settlement" or in other words to the meaning of the words "that property" in the section. It was contended for the Appellants that the property in question was the sums of money which were originally handed to the trustees of the settlement by the Settlor to be held on the trusts of the settlement and the further sums of money which were subsequently handed to the trustees by the Settlor to augment the trust funds. It was contended that paras. (i), (ii) and (iii) could have no operation in respect of these sums of money and the section was therefore inapplicable. On this point counsel for the
- 10 Appellants relied particularly on the judgment of Isaacs J. in *Dent v. Commissioner of Stamp Duties*, 9 C.L.R. 406. There the question arose as to the meaning of property passing under a voluntary settlement for the purposes of sec. 49(2) (e) of the Stamp Duties Act 1898 (N.S.W.). Isaacs J. was of opinion that the property did not include the natural increase in the stock on a station between the date of the settlement and the death of the Settlor. But no such question arises here. The only question is whether the words "that property" refer to the identical property originally settled or to the trust funds as they existed from time to time, and on that point there was no difference of opinion between Isaacs J. and the other
- 20 members of the Court. Griffith C.J. said at p. 416 that the property passing under the settlement means "all property the title to which is immediately derived from the deed." Isaacs J. said at p. 422 that the property in question "must be the property which passed so far as it exists, and in whatever form it exists . . . I assume the words are sufficient to comprise the property assigned, into whatever shape it may have been transmuted, so long as it remains substantially the representative of the property actually transferred." There are remarks of His Honour to the same effect in *Watts Case*, 38 C.L.R. 12 at p. 35. The learned author of *Green on Death Duties* 2nd Edit. p. 86 says, in reference to the corresponding English
- 30 legislation, that the property passing under a settlement does not connote a passing on death but "broadly speaking, it means merely property comprised in the settlement or subject to the trust." The remarks of Dixon J. in *Vicars v. Commissioner of Stamp Duties* 71 C.L.R. 309 at pp. 340 to 343, are to the same effect. The purpose of the Stamp Duties Act is to include in the notional estate of a Settlor for the purposes of death duty property which can be identified and valued at the date of death, and the words "that property" in the section mean the trust fund as it exists from time to time.
- 40 The power of discretion conferred on the Settlor is conferred for his life so that the first question is whether this power is within the meaning of para. (i) an interest in or benefit out of or connected with the trust funds or in the proceeds of sale thereof. These are wide words, but they are not wide enough to apply to the right conferred on the Settlor by Clause 24 of the settlement. This right was at most a right to have his real or personal property purchased with trust moneys or exchanged for trust property on terms advantageous to the trust and only when the Settlor

In the High
Court of
Australia.
No. 6.
Joint
Reasons,
18th
August, .
1949—
continued.

In the High
Court of
Australia.
—
No. 6.
Joint
Reasons,
18th
August,
1949—
continued.

in the exercise of a fiduciary power thought it proper to direct the trustees to acquire his property on these terms. This is not an interest in or benefit out of or connected with the settled funds within the meaning of the paragraph. It is simply a power to alter the investment of the trust funds for the benefit of the trust. The power does not confer on the Settlor any beneficial interest in or the right to receive any payment out of or connected with the income or corpus of the trust as it exists from time to time. To fall within the paragraph such an interest in or benefit out of or connected with the trust fund must confer on the Settlor some legal or equitable right to obtain some benefit in money or moneys worth for his own advantage out of or connected with the trust property. In *A.G. v. Farrell* 1931 1 K.B. 81, the Court of Appeal held, following *A.G. v. Heywood* 19 Q.B.D. 326, that the Settlor had an interest in the property passing under the settlement where he was one of the objects of a discretionary trust during his life. The judgments in *A.G. v. Heywood* and *A.G. v. Farrell* support the view that the kind of interest or benefit to which the section is intended to apply is an advantage of this kind. The interest or benefit must be such that the beneficiaries under the settlement would derive an advantage from the death of the Settlor or some other person. Further, since Clause 24 of the settlement does not create a covenant, it could not be said that the disposition of property made by the Settlor was accompanied by the reservation or assurance of, or a contract for, any benefit to the Settlor for the term of his life within the meaning of para. (ii). There remains para. (iii). The words "restore to himself" and "reclaim" in this paragraph indicate that it is intended to apply to cases where the Settlor has the power to diminish the value of the trust property by freeing it or some part of it from the trusts and appropriating it to his own use without consideration or adequate consideration in money or moneys worth, and it would not therefore apply to an alteration in the investment of the trust assets from which the settlement and not the Settlor derived the advantage. Accordingly the Respondent's claim, so far as it is based upon sec. 102(2) (c), also fails.

The final section of the Act is sec. 102(2) (d). This section provides that there shall be included in the dutiable estate of the deceased "any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died." In *Commissioner of Stamp Duties N.S.W. v. Perpetual Trustee Co.* 1943 A.C. 425, where the Settlor had appointed himself one of the trustees, Lord Russell of Killowen, delivering the judgment of the Privy Council, said at p. 440 that "the trustees alone were not the donee. They were in no sense the object of the Settlor's bounty. . . . The linking of possession and enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated

“ is beneficial possession and enjoyment by the object of the donor's “ bounty.” In the present case the beneficial possession and enjoyment of the donor's bounty was immediately and indefeasibly vested in the objects of the charitable trust. The income and corpus of the trust property could be applied for the benefit of those objects and for no other purposes. The Settlor as donor was therefore entirely excluded *ab initio* from possession and enjoyment of the settled property and had no enjoyment and possession such as is contemplated by the section. Further it follows from what has already been said that the Settlor was excluded from any
 10 benefit of whatsoever kind or in any way whatsoever whether enforceable at law or in equity because the benefit from the exercise of the power contained in Clause 24 was a benefit to the settlement and not to the Settlor. Accordingly the Respondent's claim, so far as it is based upon sec. 102(2) (d) also fails.

In the High Court of Australia.
 No. 6.
 Joint Reasons,
 18th August, 1949—
continued.

The appeal should be allowed with costs. The order of the Supreme Court should be set aside and in lieu thereof an order made answering the first question in the negative, the second question “ £74,915 4s. 4d.,” and the third question “ by the Commissioner of Stamp Duties.” There should be
 20 an order that the sum of £26,049 5s. 8d. and the sum paid in as security for costs be repayed by the Respondent to the Appellant. The Respondent should pay the costs of the proceedings in the Supreme Court.

No. 7.
 Order.

No. 7.
 Order,
 18th August, 1949.
 No. 29 of 1949.

IN THE HIGH COURT OF AUSTRALIA,
 NEW SOUTH WALES REGISTRY.

On Appeal from the Supreme Court of New South Wales.
 Term No. 82 of 1949.

Between

30 FRANCIS HARMSWORTH WAY, GEORGE ROLAND LOVE,
 WILLIAM GARRICK WILSON, JOHN CADWALLADER
 and MILTON REWI DUNKLEY, the Executors of the Will
 of the late Robert Winton Gillespie *Appellants*

and
 THE COMMISSIONER OF STAMP DUTIES *Respondent*

Before Their Honours Mr. Justice DIXON, Mr. Justice McTIERNAN,
 Mr. Justice WILLIAMS and Mr. Justice WEBB.

Thursday, the 18th August, 1949.

40 WHEREAS a case stated by the abovenamed Respondent was filed in the Supreme Court of New South Wales submitting the following questions for the determination of that Court :—

In the High
Court of
Australia.

No. 7.
Order,
18th
August,
1949—
continued.

Question (1). Should the property which was at the date of death of the Testator Robert Winton Gillespie subject to the trusts of the settlement mentioned in the said case be deemed to be included in his estate for the purposes of the assessment and payment of death duty thereon ?

Question (2). What was the amount of death duty payable in respect of the estate of the Testator ?

Question (3). How should the costs of this case be borne and paid ?

AND WHEREAS by order of the Full Supreme Court of New South Wales made on the twenty-sixth day of May, 1949, IT WAS ORDERED that the questions submitted in the case stated be and the same were answered as follows :—

Answer to Question 1. Yes

Answer to Question 2. Not answered.

Answer to Question 3. By the Executors.

AND WHEREAS by Notice of Appeal dated the fifteenth day of June One thousand nine hundred and forty-nine the abovenamed Appellants appealed to this Court from the whole of the judgment and order of the said Full Supreme Court of New South Wales and this appeal coming on for hearing before this Court on the third, fourth and fifth days of August instant WHEREUPON AND UPON READING the certified copy of documents transmitted by the Prothonotary of the said Supreme Court to the New South Wales District Registry of this Court AND UPON HEARING Mr. G. E. Barwick of King's Counsel with whom were Mr. Windeyer of King's Counsel and Mr. Hughes of Counsel for the Appellants and Mr. Gordon Wallace of King's Counsel with whom was Mr. Walsh of Counsel for the Respondent IT WAS ORDERED that the said appeal should stand for judgment and the same standing for judgment this day THIS COURT DOETH ORDER that the said Appeal be and the same is hereby allowed AND THIS COURT DOETH FURTHER ORDER that the Order of the Full Supreme Court of New South Wales appealed from be set aside and that in lieu thereof the questions asked in the said case be answered as follows :—

Answer to Question (1). No.

Answer to Question (2). The sum of seventy-four thousand nine hundred and fifteen pounds four shillings and fourpence (£74,915 4s. 4d.).

Answer to Question (3). By the Respondent Commissioner of Stamp Duties.

AND THIS COURT DOETH FURTHER ORDER that the sum of twenty-six thousand and forty-nine pounds five shillings and eightpence (£26,049 5s. 8d.) and the sum of Twenty pounds (£20) paid in as security for costs be repaid by the Respondent to the Appellants.

AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of the Supreme Court of New South Wales to tax and certify the costs of the Appellants of and incidental to the proceedings in the said Supreme Court and that such costs when so taxed and certified be paid by the Respondent to the Appellants or to Messrs. Sly & Russell their Solicitors 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 and incidental to this appeal and that the amount of such costs when so taxed and certified be paid by the Respondent to the Appellants or to their Solicitors Messrs. Sly & Russell.

In the High Court of Australia.
No. 7.
Order,
18th August, 1949—
continued.

By the Court,

F. C. LINDSAY. (L.S.),
District Registrar.

No. 8.

Order in Council Granting Special Leave to Appeal to His Majesty in Council.

AT THE COURT AT BUCKINGHAM PALACE.

The 26th day of June, 1950.

Present

20 THE KING'S MOST EXCELLENT MAJESTY.

LORD PRESIDENT.

MR. GAITSKELL.

MR. SECRETARY GRIFFITHS.

SIR RONALD IAN CAMPBELL.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 12th day of June, 1950 in the words following, viz. :—

30 " 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 of the State of New South Wales in the matter of an Appeal from the High Court of Australia between the Petitioner Appellant and (1) Francis Harmsworth Way (2) George Roland Love (3) William Garrick Wilson (4) John Cadwallader (5) Milton Rewi Dunkley the Executors of the Will of the late Robert Winton Gillespie Respondents setting forth (amongst other matters): that the Petitioner desires special leave to appeal from a Judgment of the High Court of Australia dated the 18th August 1949 which allowed the Respondent's Appeal from a Judgment of the Supreme Court of New South Wales dated the 26th May 1949 which had held that property which on the 2nd August 1945 (being the date of death of Robert Winton Gillespie Knight) was subject to the trusts of a certain

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In the Privy Council.

No. 8.
Order in Council, granting Special Leave to Appeal to His Majesty in Council, 26th June, 1950.

In the
Privy
Council

No. 8.
Order in
Council
Granting
Special
Leave to
Appeal to
His
Majesty in
Council,
26th June,
1950—
continued.

settlement should be deemed to be included in his estate for the purposes of the assessment and payment of death duty thereon: that the Petitioner submits that the case raises important questions of law of general public importance on the construction of Section 102(2) of the Stamp Duties Act 1920-1940: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the High Court dated the 18th August 1949 and to make such further or other Order as to Your Majesty in Council may seem fit :

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty’s 10
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 of the High Court of Australia dated the 18th day of August 1949 :

“ AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty 20
on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same.”

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His 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.

E. C. E. LEADBITTER.

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Documents copies of which were handed to the Justices of the High Court of Australia during the hearing of the Appeal before that Court and are included in the Record at the request of both parties.

Documents included at request of both parties.

1.—Marriage Settlement Considered in *Rabett v. Commissioner of Stamp Duties*, 1929 A.C. 444.)

1. Marriage Settlement considered in *Rabett v. Commissioner of Stamp Duties*

THIS INDENTURE made the sixteenth day of November One thousand eight hundred and seventy-six BETWEEN WILLIAM CHARLES COOPER of Sydney in the Colony of New South Wales Esquire of the first part ALICE HELEN HILL of Sydney aforesaid Spinster of the second part and
 10 THOMAS BUCKLAND of Sydney aforesaid Merchant and FITZWILLIAM WENTWORTH also of Sydney aforesaid Gentleman hereinafter styled Trustees of the third part WHEREAS a Marriage has been agreed upon and is intended shortly to be solemnized between the said William Charles Cooper and the said Alice Helen Hill AND WHEREAS upon the treaty for the said intended marriage it was agreed that the sum of Thirty thousand pounds now deposited in the Bank of New South Wales and bearing interest at the rate of five per centum per annum sterling money of Great Britain the property of the said William Charles Cooper should be settled upon the trusts and with and subject to the powers and provisions
 20 hereinafter declared and contained concerning the same AND WHEREAS for the purposes of the said intended Settlement the said William Charles Cooper has before the execution of these presents transferred into the names of the said Trustees the said sum of Thirty thousand pounds so deposited NOW THIS INDENTURE WITNESSETH that in consideration of the said intended marriage it is hereby agreed and declared that the said Trustees their executors administrators and assigns shall stand possessed of the said deposit in the Bank of New South Wales of the said sum of THIRTY THOUSAND POUNDS IN TRUST for the said William Charles Cooper until the said intended marriage shall be solemnized And from and after
 30 the solemnization thereof Upon trust that the said Trustees or the survivors or survivor of them or the executors or administrators of such survivor shall either retain the said sum of Thirty thousand pounds in its present state of investment or shall at any time or times with the consent in writing of the said William Charles Cooper and Alice Helen Hill during their joint lives and of the survivor of them during his or her life and after the decease of such survivor at the discretion of the Trustees or Trustee for the time being of these presents sell or dispose of the same or any part thereof and invest the moneys to arise by such sale in the names or name of the said Trustees or Trustee in or upon debentures treasury bills or other
 40 public stocks or funds of the Government of New South Wales Victoria Queensland or South Australia or in the purchase of any messuages lands or hereditaments situate in the City of Sydney aforesaid or upon mortgage of any messuages lands or hereditaments situate as aforesaid or in or upon the shares or stocks of the Bank of New South Wales or the Commercial

Documents
included at
request of
both
parties.

1.
Marriage
Settlement
considered
in *Rabett v.
Commissioner of
Stamp
Duties—
continued.*

Banking Company of Sydney or upon deposit at interest with the Bank of New South Wales the Commercial Banking Company or the Australian Joint Stock Bank AND ALSO shall from time to time with such consent or at such discretion as aforesaid vary and transpose the said investments into or for others of the aforesaid investments AND ALSO shall stand possessed of the said sum of Thirty thousand pounds or the stocks funds shares and securities for the time being representing the same (hereinafter called the said trust premises) upon the trusts following that is to say IN TRUST to pay the income thereof to the said Alice Helen Hill during her life for her separate use free from the control of the said William Charles Cooper and so that she shall not have power to dispose thereof by way of anticipation AND after the decease of the said Alice Helen Hill IN TRUST to pay the income to the said William Charles Cooper during his life AND from and after the decease of the survivor of the said William Charles Cooper and Alice Helen Hill IN TRUST for all or such one or more exclusively of the other or others of the children and remoter issue of the said intended marriage (such remoter issue being born during the life of the said William Charles Cooper and Alice Helen Hill or the life of the survivor of them) at such ages or times age or time in such shares if more than one upon such conditions and in such manner as the said William Charles Cooper and Alice Helen Hill shall by any deed or deeds with or without power of revocation and new appointment jointly appoint AND in default of such appointment and so far as any such appointment if made shall not extend then as the survivor of them the said William Charles Cooper and Alice Helen Hill shall by any deed or deeds with or without power of revocation and new appointment or by his or her will or any codicil thereto shall appoint AND in default of such appointment and so far as any such appointment shall not extend IN TRUST for all the children of the said intended marriage who being a son or sons shall attain the age of twenty-one years or being a daughter or daughters shall attain that age or marry under that age in equal shares and if there shall be but one such child then the whole to be in trust for such one child PROVIDED ALWAYS that no child who or whose issue shall take any part of the said trust premises under any such appointment as aforesaid shall be entitled to any share of the unappointed part of the said trust premises without bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly unless the persons or person making such appointment shall thereby direct the contrary AND UPON FURTHER trust that after the decease of the survivor of them the said William Charles Cooper and Alice Helen Hill the Trustees or Trustee for the time being of these presents shall pay and apply the whole or such part as they or he shall think fit of the income of the share to which any child or remoter issue of the said intended marriage being an infant shall for the time being be entitled in expectancy under the trusts or powers of these presents for or towards his or her maintenance or education with liberty for the said Trustees or Trustee to pay the same to the guardian or any of the guardians of such infant for the purpose aforesaid without being liable to see to the application

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thereof and shall invest the residue if any of the said income and the resulting income thereof from time to time in or upon any such stocks funds shares or securities aforesaid so as to accumulate at compound interest with liberty from time to time to vary the said investments into or for others of the same or a like nature and shall stand possessed of the said accumulations in trust for the person or persons who shall become entitled to the principal of the share from which the same shall have arisen with liberty nevertheless for the said Trustees or Trustee at any time or times to resort to the accumulations of any preceding year or years and to apply the same in any succeeding year or years for or towards the maintenance or education of any child or remoter issue for the time being presumptively entitled thereto PROVIDED ALWAYS AND IT IS HEREBY AGREED AND DECLARED that it shall be lawful for the Trustees or Trustee for the time being of these presents at any time or times with the consent in writing of the said William Charles Cooper and Alice Helen Hill during their joint lives and of the survivor of them during his or her life and after the decease of such survivor at the discretion of the said Trustees or Trustee at any time or times to raise out of the said trust premises any part or parts not exceeding together one moiety of the vested or expectant share of any child or remoter issue of the said intended marriage under the trusts or powers of these presents and either to pay the moneys to be so raised as aforesaid to such child or remoter issue or otherwise apply the same for his or her advancement preferment or benefit in such manner as the said Trustees or Trustee with such consent or at such discretion as aforesaid shall think fit AND IT IS HEREBY AGREED AND DECLARED that in case there shall be no issue of the said intended marriage in whom the said trust premises shall become absolutely vested under the trusts and powers hereinbefore declared and maintained then and in such case and subject to the same trusts and powers the said trust premises shall go remain and be IN TRUST for the said William Charles Cooper his executors administrators and assigns AND IT IS HEREBY AGREED AND DECLARED that if and so often as any of the Trustees hereby appointed or any future Trustee or Trustees of these presents shall die or go to reside abroad or shall desire to retire from or refuse or become incapable to act in the trusts of these presents it shall be lawful for the said William Charles Cooper and Alice Helen Hill during their joint lives and for the survivor of them during his or her life and after the decease of such survivor for the then continuing Trustees or Trustee of these presents or if there shall be no continuing trustee then for the retiring trustees or trustee or the acting executors or administrators executor or administrator of the last acting Trustee to appoint any other person or persons to be a trustee or trustees in the place of the Trustee or Trustees so dying or going to reside abroad or desiring to retire or refusing or becoming incapable to act as aforesaid with liberty upon any such appointment to increase or diminish the original number of Trustees AND upon every such appointment the said trust premises shall be so transferred as to become vested in the new trustee or trustees either jointly with the continuing trustees or trustee or solely as the case may require AND every such new

Documents included at request of both parties.

1.

Marriage Settlement considered in *Rabett v. Commissioner of Stamp Duties*—*continued.*

Documents included at request of both parties.

1.
Marriage Settlement considered in *Rabett v. Commissioner of Stamp Duties*—
continued.

Trustee as well before as after the said trust premises shall have become vested in him shall have all the powers and authorities of the trustee in whose place he shall be substituted PROVIDED ALWAYS AND IT IS HEREBY LASTLY AGREED AND DECLARED that if the said intended marriage shall not be solemnized before the expiration of six calendar months from the date of these presents then and in such case these presents and everything herein contained shall be void and the said sum of Thirty thousand pounds and the stocks funds and securities upon which the same shall be invested shall be repaid and retransferred to the said William Charles Cooper for his absolute use.

IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first within written.

Signed Sealed and Delivered by the }
said William Charles Cooper in the } William Charles Cooper. (L.S.)
presence of }

H. Montague Faithful,
Solicitor, Sydney.

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Signed Sealed and Delivered by the }
said Alice Helen Hill in the } Alice Helen Hill. (L.S.)
presence of }

H. Montague Faithful.

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Signed Sealed and Delivered by the }
said Thomas Buckland in the } Thos. Buckland. (L.S.)
presence of }

H. Montague Faithful.

Signed Sealed and Delivered by the }
said Fitzwilliam Wentworth in the } F. Wentworth. (L.S.)
presence of }

Geo. C. T. Iceton,
Solicitor, Sydney.

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2.
Extracts from Minutes of Meetings of the R. W. Gillespie Trust, 7th November, 1929.

2.—Extract from Minutes of Meetings of the R. W. Gillespie Trust.

Dated Thursday 7th November 1929 :—

Gift Received : Mr. Blair reported to the Trustees that he had received a gift of a cheque from Mr. R. W. Gillespie for £3,150 to be held on the terms of the trust set out in the Indenture of 5th September 1928.

Shares Purchased : Mr. R. W. Gillespie intimated he would make available to the R. W. Gillespie Trust 2,800 shares in Gillespie Bros. Limited

and the Trustees resolved to authorise the payment of £3,150 to purchase these 2,800 shares at 22s. 6d. each.

Dated Monday 2nd December 1929 :—

Gift Received : Mr. Blair reported to the Trustees that he had received a cheque from Mr. R. W. Gillespie for £2,587 10s. 0d. as a gift to the Trust to be held on the terms of the Trust as set out in the Indenture of the 5th September 1928.

10 *Shares Transferred* : Mr. R. W. Gillespie intimated he would make available to the R. W. Gillespie Trust 2,300 shares in Gillespie Bros. Limited and the Trustees resolved and do hereby authorise the payment of £2,587 10s. 0d. to purchase these 2,300 shares at 22s. 6d. each.

Dated Monday 3rd February 1930 :—

Gift Received : Mr. Blair reported to the Trustees that he had received a cheque from Mr. R. W. Gillespie for £2,025 as a gift to the Trust to be held on the terms of the Trust as set out in the Indenture of the 5th September, 1928.

20 *Shares Purchased* : Mr. R. W. Gillespie intimated that he would make available to the R. W. Gillespie Trust 1,800 shares in Gillespie Bros. Limited and the Trustees resolved to buy and do hereby authorise the payment of £2,025 to purchase these 1,800 shares at 22s. 6d. each.

Wednesday 28th May 1930 :—

Gift Received : Mr. Blair reported to the Trustees that he had received a cheque from Mr. R. W. Gillespie for £2,531 5s. as a gift to the Trust to be held on the terms of the trust as set out in the Indenture of 5th September 1928.

30 *Shares Purchased* : Mr. R. W. Gillespie intimated that he would make available to the R. W. Gillespie Trust 2,250 shares in Gillespie Bros. Limited and the Trustees resolved to buy and do hereby authorise the payment of £2,531 5s. 0d. to purchase these 2,250 shares at 22s. 6d. each.

Dated Tuesday 8th July 1930 :—

Gift Received : Mr. Blair reported to the Trustees that he had received a cheque from Mr. R. W. Gillespie for £956 5s. 0d. as a gift to the Trust to be held on the terms of the Trust as set out in the Indenture of 5th September 1928.

Shares Purchased : Mr. R. W. Gillespie intimated that he would make available to the R. W. Gillespie Trust 850 shares in Gillespie Bros. Limited and the Trustees resolved to buy and do hereby authorise the payment of £956 5s. 0d. to purchase these 850 shares at 22s. 6d. each.

Documents included at request of both parties.

2.

Extracts from Minutes of Meetings of the R. W. Gillespie Trust, 2nd December, 1929.

3rd February, 1930.

28th May, 1930.

8th July, 1930.

Documents included at request of both parties.

2.

Extracts from Minutes of Meetings of the R. W. Gillespie Trust, 28th February, 1933.

Dated Tuesday 28th February 1933 :—

Gift Received : Mr. Blair reported to the Trustees that he had received from Mr. R. W. Gillespie a cheque for £10,350 and a further cheque for £29,700 as a gift to the Trust to be held on the terms of the Trust as set out in the Indentures of 5th September 1928.

Shares Purchased : Mr. R. W. Gillespie intimated that he would make available to the R. W. Gillespie Trust the undermentioned shares. The Trustees resolved to buy and do hereby authorise the following payments for shares.

20,000	Gillespie Bros. Ltd.	...	...	@ 20/-	£20,000	10
10,000	Mungo Scott Ltd.	...	...	@ 20/-	10,000	
7,500	M. McLeod Ltd.	...	...	@ 10/-	3,750	
3,000	Inverell Milling Co.	...	...	@ 20/-	3,000	
1,925(A)	Thorpes Ltd.	}	...	...	@ 20/-	2,096
171(B)	"					
1,000	Standard Cement Co.	...	...	@ 8/11	446	
1,800	Ball & Welsh, Ltd.	...	...	@ 14/-	1,260	
500	Otway Coal Co., Ltd.	...	...	@ ?	5	
					£40,557	

3.

Letter, Messieurs Sly and Russell, Solicitors, to the Appellant. 3rd October, 1947.

3.—Letter, Messieurs Sly & Russell, Solicitors, to the Appellant 20

3rd October, 1947.

The Commissioner of Stamp Duties,
Phillip Street,
Sydney.

Dear Sir,

Re Estate late Sir Robert Gillespie.

Stated Case.

We hereby supply you with the further particulars required—

1. No assets were transferred to the R. W. Gillespie Trust by way of gift by the deceased within three years prior to the 30 date of his death.
2. The full names of the Trustees of the R. W. Gillespie Trust immediately prior to the late R. W. Gillespie's death were—

Robert Winton Gillespie
Jessie Jean Gillespie
Francis Harmsworth Way
William Garrick Wilson

3. The deceased was always a Trustee of the R. W. Gillespie Trust up to the date of his death. Documents included at request of both parties.
4. The following is a list of the assets purchased by the R. W. Gillespie Trust from the deceased—

			£	s.	d.	
	30.10.1929	2,800 Shares in Gillespie Bros. Pty. Ltd. ...	3,150	0	0	3.
	30.11.1929	2,300 do. do. ...	2,587	10	0	Letter, Messieurs Sly and Russell.
	4. 2.1930	1,800 do. do. ...	2,025	0	0	
	24. 5.1930	2,250 do. do. ...	2,531	5	0	
10	30. 6.1930	850 do. do. ...	956	5	0	Solicitors, to the Appellant, 3rd October, 1947— <i>continued.</i>
	24. 2.1934	20,000 do. do. ...	20,000	0	0	
Shares in—						
	24. 2.1934	10,000 Mungo Scott Pty. Ltd. ...	10,000	0	0	
	24. 2.1934	7,500 M. McLeod Pty. Ltd. ...	3,750	0	0	
	24. 2.1934	3,000 Inverell Milling Co. Pty. Ltd. ...	3,000	0	0	
	24. 2.1934	2,096 Thorpes, Ltd.... ...	2,096	0	0	
	24. 2.1934	1,000 Standard Portland Cement Ltd. ...	446	0	0	
	24. 2.1934	1,800 Ball & Welch Ltd. ...	1,260	0	0	
	24. 2.1934	500 Otway Coal Co. ...	5	0	0	
20	30. 6.1934	225 Hill 50 Gold Mine ...	106	15	0	
	30. 6.1934	500 Great Boulder Ltd. ...	175	0	0	

Yours truly,

SLY & RUSSELL.

4.—Letter, Acting Commissioner of Stamp Duties to Messieurs Sly & Russell.

Messrs. Sly & Russell,
Solicitors,
14, Martin Place,
Sydney, N.S.W.

13th November 1947.

30 Dear Sirs,

Re Estate of the late Sir Robert W. Gillespie.

I am in receipt of your letter of the 7th instant and in order to proceed with the matter would like to be advised of the following further information:—

- (1) Did the late Sir Robert Gillespie direct the Trustees to apply trust funds for the purpose of acquiring the shares referred to in paragraph 4 of your letter of the 3rd ultimo?

4.
Letter,
Acting
Com-
missioner
of Stamp
Duties to
Messieurs
Sly &
Russell.
13th
November
1947.

Documents included at request of both parties.

- (2) Were the shares acquired from him in accordance with valuations pursuant to the provisions of Clause 24 of the Indenture of 5th September, 1928 ?

Yours faithfully,

E. T. WOODS,
Acting Commissioner of Stamp Duties.

4.
Letter,
Acting
Com-
missioner
of Stamp
Duties to
Messieurs
Sly &
Russell,
13th
November,
1947—
continued.

5.
Letter,
Messieurs
Sly &
Russell
to the
Appellant,
30th
January,
1948.

5.—Letter, Messieurs Sly & Russell to the Appellant.

30th January, 1948.

The Commissioner of Stamp Duties,
166, Phillip Street,
Sydney.

10

Dear Sir,

Re Estate late Sir Robert Gillespie.

We are instructed that the answers to the two questions contained in your letter to us of the 13th November last is 'No.'

Yours truly,

SLY & RUSSELL.

In the Privy Council.

No. 43 of 1950.

ON APPEAL FROM THE HIGH COURT OF
AUSTRALIA.

BETWEEN

THE COMMISSIONER OF STAMP
DUTIES of the State of New South
Wales *Appellant*

AND

FRANCIS HARMSWORTH WAY,
GEORGE ROLAND LOVE (since
deceased), WILLIAM GARRICK
WILSON, JOHN CADWALLADER
and MILTON REWI DUNKLEY
the Executors of the Will of the late
ROBERT WINTON GILLESPIE *Respondents.*

RECORD OF PROCEEDINGS

LIGHT & FULTON,
24 John Street,
Bedford Row,
London, W.C.1,
Solicitors for the Appellant.

ASHURST MORRIS CRISP & CO.,
17 Throgmorton Avenue,
London, E.C.2,
Solicitors for the Respondents.