Privy Council Appeal No. 36 of 1952

Norman Clyde Oakes - - - - - - - - - *Appellant*

v.

Commissioner of Stamp Duties of New South Wales - - *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD DECEMBER, 1953

Present at the Hearing:

LORD PORTER
LORD MORTON OF HENRYTON
LORD REID
LORD TUCKER
LORD ASQUITH OF BISHOPSTONE

[*Delivered by* LORD REID]

This is an appeal from a judgment of the High Court of Australia dated the 8th May, 1952, affirming by a majority (Dixon, C.J., Williams and Fullagar, JJ.; Webb and Kitto, JJ., dissenting) a judgment of the Supreme Court of New South Wales of the 13th September, 1951. The appellant is the executor under the will of the deceased Leslie William Friend who died in 1947 and the question at issue arises on a case stated under the New South Wales Stamp Duties Act, 1920-1940, and relates to the incidence of death duty on the property held by the deceased as trustee under a trust deed made by him on the 1st September, 1924.

In 1924 the deceased owned a grazing property in New South Wales known as " Ellerston " and carried on the business of grazier there. At that time he had four children all of whom were under twenty-one years of age. By deed poll dated the 1st September, 1924, he declared that as from the 1st July, 1924, he had held and thenceforth would hold the property and the rents, issues and profits thereof " upon the trusts and with and subject to the powers and provisions hereinafter expressed concerning the same that is to say: ".

The first two clauses following thereupon were as follows :—

" 1.—Upon trust that I or other the Trustee or Trustees for the time being of these presents (hereinafter called the Trustee) shall either retain and use the said lands or at the Trustee's absolute discretion at any time or from time to time sell and convert into money the same or any part thereof and invest the proceeds of such sale and conversion upon such securities real or personal and whether authorised by law for the investment of trust funds or not (and with liberty from time to time to vary and transpose the investments) as the Trustee shall in his uncontrolled discretion think fit. The said lands and proceeds of sale thereof and the securities upon which the same may from time to time be invested are hereinafter called ' the trust fund.'

2.—That the capital and income of the trust fund shall be held by the Trustee upon trust for the said Leslie William Friend and his children Henry James Friend, Donald Stuart Friend, Terence Maxwell Friend, and Gwynneth Ailsa Friend as tenants in common in equal

shares; and if and so often as any such child shall die under the age of twenty-five years and without leaving a child or children him or her surviving then as well as to the original share of the child so dying as to any share or shares which shall have accrued to him or her by virtue of this present limitation upon trust for the others of such children and the said Leslie William Friend as tenants in common in equal shares."

Thereafter the deed of trust sets out a number of powers and discretions conferred on the trustee including wide powers of management and in particular powers

"4.—(*h*) To appropriate and partition any real or personal property forming part of the trust fund to or towards the share of any person or persons therein under the trusts hereinbefore contained and for that purpose to fix the value of such real or personal property so appropriated as the Trustee shall think fit and to charge any share with such sums by way of equality of partition as he may think fit and every such appropriation valuation and partition shall be binding upon all persons interested in the trust fund provided always that as regards any share of the said trust fund not absolutely vested any such appropriation shall be without prejudice to the exercise of any powers hereby expressly or impliedly given to the Trustee.

(*j*) In addition to reimbursing himself all expenses incurred by the Trustee in the administration of the Trust the Trustee shall be entitled to remuneration for all work done by him in managing and controlling any property forming part of the trust fund or carrying on the business of a grazier or pastoralist or other business in the course of his administration of the said fund in the same manner and as fully in all respects as if he were not a trustee hereof.

(*k*) To purchase notwithstanding that he is a trustee hereof all or any property comprising the trust fund or any part thereof by public auction or by private contract provided in the latter case that the sale shall be conducted by Goldbrough Mort and Company Limited or be made at a price and upon terms and conditions approved by that Company or by a Valuer or other nominee appointed by the said Company.

(*o*) To convey appropriate or dedicate any part or parts of the property comprising the trust fund for public or charitable purposes either gratuitously or for such consideration as the Trustee may think proper to accept."

In 1928 the deceased as trustee sold "Ellerston" and invested the proceeds in another grazing property known as "Glendon" and in certain mortgages and he continued to manage this trust property until his death. He fixed from time to time amounts to be received by himself as remuneration under clause 4 (*j*) quoted above. He received for each of the first six years £3,000 and thereafter smaller sums; for the last three years before his death he only received £100 per annum. After deducting these and other outgoings and expenses he divided the profits from the trust properties into five equal shares crediting one share to himself and one share to each of his children. As stated by the Commissioner in the case stated, "The amounts credited to each such child were paid or applied by the testator for or towards the maintenance and education of such child or were paid to the mother of such child for or towards his or her maintenance and education or were paid to such child after he or she had come of age". Before his death all his children had come of age and all but one had attained the age of twenty-five.

The value of the trust properties at the date of the deceased's death was £71,900 9s. 7d. The Commissioner of Stamp Duties assessed the death duty payable in respect of this estate on the basis that the final balance of the deceased's estate included the whole value of the trust property. The appellant contended that there should have been included

only one-fifth of the value of the trust property and required the Commissioner to state a case for the opinion of the Supreme Court of New South Wales. A case was duly stated and set out as the question for the determination of the Court:

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

The Supreme Court answered yes to this question and on appeal this decision was affirmed by the High Court of Australia.

The question at issue in this appeal depends entirely upon the applicability to the facts of this case of the provisions of section 102 (2) (*d*) of the Stamp Duties Act, 1920-1940. Those provisions so far as material to this case are as follows:—

> "For the purposes of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property:—
>
> . . . .
>
> (2) (*d*) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

The appellant admits that the value of one-fifth share of the whole trust property was properly included in the final balance of the deceased's estate but contends that the value of four-fifths of that property, being the value of the shares of the four children, ought to be excluded from the final balance as being property comprised in a gift made by the deceased of which *bona fide* possession and enjoyment was immediately assumed by the children and thenceforth retained by them to the entire exclusion of the deceased or of any benefit to him. The respondent contends that there was not entire exclusion from the children's shares of the deceased or of benefit to him and the respondent founds on several advantages to the deceased as being benefits within the meaning of the above section. He founds on the application of the children's income from the trust for the maintenance and education of the children as being of advantage to the deceased in that he was thereby relieved at least in part from his obligation to maintain his children. Then he founds on the deceased having had power to take and having taken remuneration as trustee in accordance with the provisions of the trust deed. He also founds on the provisions of clauses 4 (*h*) and (*k*) as conferring benefits on the deceased. And finally he founds on the deceased having resided with his family on the trust property as a further benefit. The case stated makes no reference to this residence but it appears that this matter was raised in argument in the Supreme Court and it was admitted before their Lordships that the deceased had resided on the property in his capacity as trustee and manager. It appears to their Lordships that it may well be that the property could not have been properly managed unless the manager resided there and that there is nothing to show whether this residence was in itself an advantage to the deceased; moreover it is not clear whether this residence went beyond the rights of the deceased as co-owner of the property. Their Lordships are therefore not prepared to regard this residence as being in itself a benefit to the deceased in any relevant sense.

In all but one respect section 102 (2) (*d*) corresponds with section 11 (1) of the United Kingdom Customs and Inland Revenue Act, 1889, and section 43 (2) (a) of the United Kingdom Finance Act, 1940. The only

substantial difference between them is that section 102 brings in "any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not"; whereas section 11 and section 43 only bring in "any benefit to him by contract or otherwise". But that difference was not founded on in argument and is not material in this case. These sections have given rise to much litigation and British authorities have frequently been cited in Australian cases and *vice versa*. In *St. Aubyn* v. *Attorney-General* [1952] A.C. 15 the earlier cases, including the Australian cases, were fully considered. In their Lordships' judgment it is now clear that it is not sufficient to bring a case within the scope of these sections to take the situation as a whole and find that the settlor has continued to enjoy substantial advantages which have some relation to the settled property: it is necessary to consider the nature and source of each of these advantages and determine whether or not it is a benefit of such a kind as to come within the scope of the section.

Their Lordships will first consider whether the use of the income which accrued to the settlor's children from the settled estate was such as to bring the case within the section. If property comprised in a gift is to be excluded from the estate of the deceased donor the statute requires that *bona fide* possession and enjoyment of the property shall have been assumed and retained by the donee to the entire exclusion of the donor. If property is held in trust for the donee then the trustee's possession is the donee's possession for this purpose, and it matters not that the trustee is the donor himself. The donor is entirely excluded if he only holds the property in a fiduciary capacity and deals with it in accordance with his fiduciary duty. But the statute requires not only exclusion of the donor but also exclusion of any benefit to him, and it was on that matter that the argument turned. It appears from the case that after the children came of age they received payment of their shares of the income: it is not said that that involved any benefit to the deceased. But before they came of age their shares of income were used to pay for their maintenance and education, and it was said that this afforded some relief to the deceased who would otherwise have had to pay out of his own money. Two arguments were submitted. In the first place it was said that spending the children's money in this way was improper or at least disadvantageous to them, and that this combination of advantage to the donor with disadvantage to the donee brought the case within the statute. Their Lordships do not find any sufficient basis in fact for this argument. There is nothing in the case from which it can be inferred that the deceased acted at all improperly in this matter. At least after 1925 this money could properly be spent on the children's maintenance under statutory powers if that was in the best interests of the children. In the absence of anything to indicate the contrary it must be taken that the deceased acted properly in so applying his children's income, that this was in the best interest of the children, and therefore the children must be held to have had full benefit and enjoyment of their money. The case might have been very different if it had appeared that the deceased had so spent his children's shares of the income from the trust not entirely in their interests but wholly or partly for his own benefit in order to relieve himself from the expense of maintaining his children.

Before their Lordships for the first time a further argument of this nature was submitted. It was said that there was no statutory power to spend this money on the children's maintenance until December, 1925, that it appeared from the case that the deceased had so spent his children's money before that date and that therefore at least to this extent the deceased had acted improperly and it could not be said that the children's money had been applied for their benefit. This argument fails because there is nothing in the case to show that any of the children's money was spent before December, 1925. No doubt there was ultimately spent income which accrued in respect of the period before that date; but the trust only operated as from 1st July, 1924, and thereafter income had to be earned, accounts had to be made up, the children's shares had to be credited to them and after that some time may have

elapsed before the money was spent. Their Lordships are not prepared to assume that the money was spent before the date which is crucial for this argument.

Then it was said that even if the income which accrued to the children was properly spent for their maintenance and they are to be held to have had full benefit and enjoyment of it, yet there was also a benefit to the deceased because if it had not been available he would have had to spend more of his own money. The findings in the case are not very specific but their Lordships will assume that there was some advantage to the deceased; but that advantage was not at the expense of the children and did not impair or diminish the value of the gift to them or their enjoyment of it. It is possible for a donee, in the full and unrestrained enjoyment of his gift to use or spend it in a way that happens to produce some advantage to the donor without there being any loss or disadvantage to the donee. But in their Lordships' judgment any such advantage is not a benefit within the meaning of the section. The point is not strictly covered by authority but the contrary view would be difficult to reconcile with what was said in the House of Lords in *St. Aubyn's* case. The facts in that case were complicated and it may be sufficient for present purposes to state that as the result of settlements, the formation of a company and certain transactions the settled property at the relevant date consisted of fifty thousand ordinary shares of the company and sums of £750,000 payable by instalments and £100,000 immediately payable by the company. By virtue of an overriding general power of appointment Lord St. Levan, who had a life interest, vested in himself absolutely the sums payable by the company and surrendered his life interest in the shares so that *bona fide* possession and enjoyment of them was immediately assumed by the persons next entitled. But it was argued that there was not entire exclusion of Lord St. Levan or of any benefit to him by contract or otherwise mainly because of the rights which he retained to receive money from the company. The Crown relied largely on the case of *Attorney General* v. *Worrall* 1895 1 Q.B. 99, and it is in the passages dealing with that case that their Lordships find most help on the question now under consideration. Lord Radcliffe explained the case thus " a father had made a present to his son of a sum of about £24,000 secured on mortgage and the son had bought in the equity of redemption for a small sum. In return for his father's gift the son had covenanted to pay him an annuity of £735 per annum during his life. In effect the son was returning to the father the income of the property given during the remainder of the father's life. It seems to me reasonable enough for a Court to hold in those circumstances that the son had not obtained the enjoyment of what was given free from a contractual benefit to the father which encumbered the enjoyment of the very thing that was given. To hold otherwise would have been to stop at the mere form of the transaction ". Then he added " But I think it a very mistaken form of reasoning to deduce from a decision that a benefit, to be within the mischief of the section, need not necessarily be by way of reservation out of the subject matter of the gift the general proposition that all benefits are within the mischief of the section whether they are by way of reservation out of the subject matter of the gift or not ". And Lord Simonds said " Whatever the words which have appeared in a series of Acts, might have meant to Your Lordships if the matter were *res integra*, it cannot in face of the decision in *Attorney General* v. *Worrall* be denied that it is possible for possession and enjoyment of property not to be retained by the donee to the entire exclusion of the donor or of any benefit to him by contract or otherwise, though the donee himself no longer has any sort of interest in it. But the words, and particularly the word 'exclusion', are singularly inapt to cover a benefit which does not arise by way of reservation out of that which is given and I am not disposed to travel farther than I am constrained by authority along a line of interpretation which appears to me difficult to justify ". On the view of the facts of the case which their Lordships have felt bound to adopt, this alleged benefit neither encumbered the enjoyment of the gift nor arose by way of reservation out of that which was given and their Lordships can find no good reason for holding that it brings this case within the Statute.

For similar reasons their Lordships are not able to accept the ground of judgment of the Supreme Court of New South Wales to the effect that the linking together of the one-fifth beneficial interests of the donor and the donees resulted in a benefit or advantage to each share and that this advantage to the donor brought the case within the section. Even if this linkage was of advantage to the deceased (of which there is no evidence) that advantage did not in any way impair the enjoyment of the gift by the donees or trench upon their rights.

The next advantage to the deceased was of quite a different character. The deceased, under the power which he reserved to himself under Clause (4) (*j*) of the Deed of Trust, took considerable sums as remuneration for his services in managing the trust property. Their Lordships will assume that those sums were reasonable and no more than would have been appropriate remuneration for any other manager. But receiving those sums was clearly an advantage or benefit to the deceased and the question is whether it was a benefit of such a kind as to come within the section. If a donor reserves to himself a beneficial interest in property and only gives to the donees such beneficial interests as remain after his own reserved interest has been satisfied, it is now well established that such reservation of a beneficial interest does not involve any benefit to the donor within the meaning of the section. In *Commissioner for Stamp Duties, New South Wales* v. *Perpetual Trustee Co.* [1943] A.C. 425, Lord Russell of Killowen, having dealt with the earlier cases and in particular *Earl Grey's* case (1900 A.C. 124), said in a passage cited with approval in *St. Aubyn's* case: "There is nothing laid down as law in that case which conflicts with the view that the entire exclusion of the donor from possession and enjoyment which is contemplated by s. 11, sub-s. 1 of the Act of 1889 is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and that possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the sub-section requires".

It follows that if the right to take remuneration could be regarded as a beneficial interest in the property reserved by the deceased when making the Deed of Trust, then his remuneration would not be a benefit within the scope of the section. But their Lordships cannot regard a right to take remuneration for managing property as a beneficial interest in the property. A trustee is not permitted to take remuneration for services performed by him unless he is authorised to do so: in this case the trustee was authorised to do so because the deceased provided in the Deed of Trust that he as trustee or the trustee for the time being should be entitled to remuneration as if he were not a trustee. If the deceased had resigned office and another trustee had taken his place it could hardly have been contended that this provision gave to the new trustee a beneficial interest in the trust property and in their Lordships' judgment the deceased did not reserve to himself a beneficial interest in the property by inserting this provision in the Deed of Trust. Indeed the terms of the Deed of Trust make it clear that the whole beneficial interest in the property passed to the deceased and his children in equal shares so that the subject matter of the gift to each child was one-fifth of the whole beneficial interest in the property. Clause 2 declared that the capital and interest of the trust fund should be held upon trust for the deceased and his first named children as tenants in common in equal shares, and neither the right of the trustee to take remuneration, nor any other right power or discretion conferred on the trustee affected the position of the deceased or his children as tenants in common of the whole beneficial interest in the trust property. Any remuneration taken by the deceased or any other trustee must come out of the trust property and must therefore diminish the amount available for division among the tenants in common for their enjoyment.

But the appellant argued that the children had had all the possession and enjoyment to which they were entitled under the Deed of Trust: they could only possess through the trustee and subject to his rights and

powers and therefore the exercise of his rights by the trustee could not trench on or impair that possession. The appellant founded on another passage in the judgment of Lord Russell in the *Perpetual Trustee Co.* case at p. 440 when he referred to the donee being "put in such bona fide beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted". It was said that in the present case the nature of the gift to the children and the circumstances never permitted the children to have any greater possession or enjoyment than in fact they had. But to understand what Lord Russell meant by these words it is necessary to quote the preceding passage. "In their opinion the property comprised in the gift was the equitable interest in the eight hundred and fifty shares which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust i.e. by transferring the legal ownership of the shares to trustees and declaring such trusts in favour of the son as were co-extensive with the gift which the settlor desired to give. The donee was the recipient of the gift: whether the son alone was the donee (as their Lordships think) or whether the son and the body of trustees together constituted the donee seems immaterial. The trustees alone were not the donee. They were in no sense the object of the settlor's bounty. Did the donee assume bona fide possession and enjoyment immediately upon the gift? The linking of possession with 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. This question therefore must be answered in the affirmative because the son was (through the medium of the trustees) immediately put in such bona fide possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted". Lord Russell was there explaining in general terms how the section is to be interpreted when the subject matter of the gift is an equitable interest. He was not dealing with a case like the present when the donor received money which, if he had not taken it, would have gone to the donee under the terms of the gift. In the *Perpetual Trustee Co.* case the settlor derived no actual benefit from the shares or their dividends. He might have exercised voting powers in respect of the shares but did not do so; and he was one of several trustees and they might have used trust money for the maintenance of the son but did not do so. With the exception of some insurance premiums the whole income was accumulated and the trust fund was paid to the son on his majority. Their Lordships do not read the words on which the appellant founds as modifying or intended to modify the later passage in Lord Russell's judgment which has been quoted above and in which he only refers to reservation by the donor of a beneficial interest in the property.

But, even if there is no authority to support it, the appellant's case requires further examination. The argument is clearly and forcibly stated in the dissenting judgment of Kitto J. in the High Court of Australia where he says:

> "If the property comprised in the gift had consisted of four one-fifths of the fee simple of the trust property (whether legal and equitable or only equitable), and the donees, pursuant to a collateral agreement or otherwise, had allowed the deceased to have the benefits which in fact he enjoyed, the case would have fallen clearly enough within Section 102 (2) (d). But it seems to me that, in order to hold that four-fifths of the fee simple was the property comprised in the gift, one would have to construe the deed, not as a whole, but as if it were divided into two sections, effecting two quite distinct transactions; the first transaction being a disposition in equity of aliquot parts of the fee simple, and the second transaction consisting of a set of provisions operating to exact from the disponees a power for the disponor to derogate from the possession and enjoyment which an undivided share of the equitable fee simple enables the owner of it to have and keep to himself. I cannot construe the deed in that way. It

was a deed poll, and the benefits which the deceased derived in accordance with its provisions were benefits which the donees neither permitted him to derive nor had any power to deny him. They were in this position of impotence, not by their own choice, but because the deceased, in exercise of his right to give exactly what interests he liked and withhold exactly what he liked, had chosen to give them interests so hedged about as not to enable them to exclude him from those benefits. It was for him, when framing his deed, to delimit the interests he was parting with ; and he did delimit them, not by any one part of the deed considered by itself, but by the entirety of its provisions. The donees had no voice in deciding to what extent their interests should be subject to rights, powers or privileges retained by the deceased. They got interests which were limited *ab initio*, by the terms of their creation ; and the limits were such that the interests were inherently insusceptible of being so possessed and enjoyed as to preclude the deceased from deriving those benefits which in fact he derived."

It is true that the deceased did not exact from his children his power to take benefits and that the benefits which he took were benefits which they neither permitted him to derive nor had any power to deny him. But in their Lordships' judgment the question is not whether the donees permitted the donor to take benefits. It is whether the donor took benefit out of that which was given. If a benefit arises by way of reservation out of interests which were given then no doubt the donees' interests are inherently insusceptible of being so possessed and enjoyed as to preclude the donor from taking that benefit, but the section applies because there is not entire exclusion of the donor or of benefit to him from the interests comprised in the gift. The contrast is between reserving a beneficial interest and only giving such interests as remain on the one hand and on the other hand reserving power to take benefit out of or at the expense of interests which are given and for reasons already stated their Lordships are of opinion that the present case is within the latter class.

Two other powers reserved by the deceased were also founded on as benefits—power to appropriate and partition the trust property under Clause 4 (h) and power to purchase it under Clause 4 (k). It may be that the deceased could legitimately have used those powers to his own advantage but in fact he made no use of them at all. So at most there were here potential benefits. As their Lordships have already decided that taking remuneration was a benefit within the scope of the section, they find it unnecessary to deal with these other matters.

Their Lordships will humbly advise Her Majesty that this appeal ought to be dismissed. The appellant must pay the costs of the appeal.

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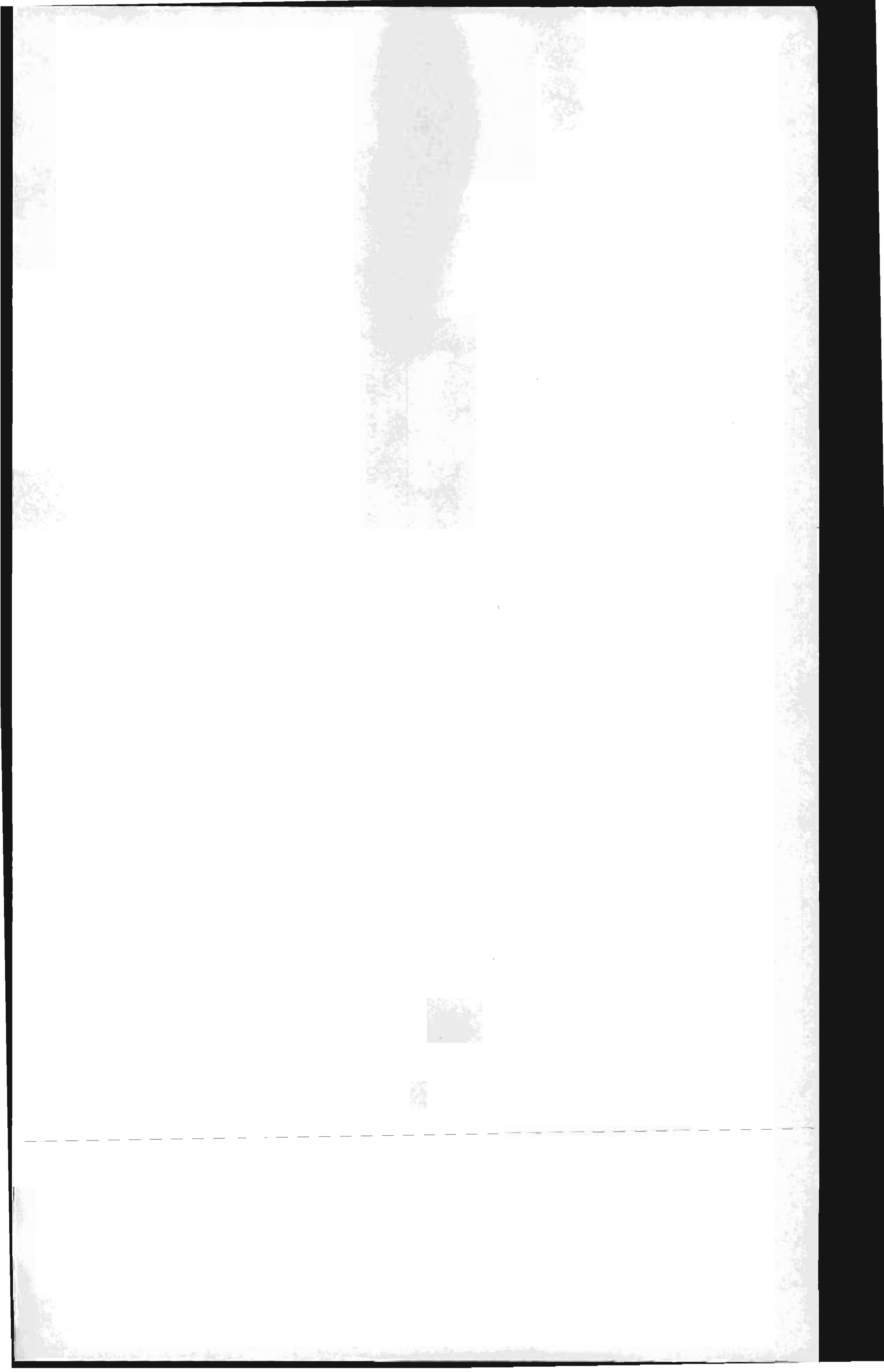

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v.

COMMISSIONER OF STAMP DUTIES OF THE STATE OF NEW SOUTH WALES

DELIVERED BY LORD REID

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