Judgment 21, 1956

In the Privy Council.

No. 36 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

THE COMMISSIONER OF STAMP DUTIES OF THE STATE OF NEW SOUTH WALES ... ... *Appellant*

AND

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED the Executor of the Will of ARTHUR HENRY DAVIES late of Sydney in the State of New South Wales deceased ... ... *Respondent.*

RECORD OF PROCEEDINGS

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In the Privy Council.

No. 36 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

THE COMMISSIONER OF STAMP DUTIES OF THE STATE OF NEW SOUTH WALES ... ... *Appellant*

AND

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED the Executor of the Will of ARTHUR HENRY DAVIES late of Sydney in the State of New South Wales deceased ... ... *Respondent.*

RECORD OF PROCEEDINGS

No. 1.
Case Stated.

In the Supreme Court of New South Wales.

No. 1. Case Stated, 20th November, 1951.

Term No. 315 of 1951.

IN THE SUPREME COURT OF NEW SOUTH WALES.

IN THE MATTER of the Estate of ARTHUR HENRY DAVIES late of Sydney in the State of New South Wales, deceased

AND IN THE MATTER of the Stamp Duties Act 1920–1940

AND IN THE MATTER of the Appeal of Permanent Trustee Company of New South Wales Limited, executor 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.

1.—The abovenamed deceased, Arthur Henry Davies (hereinafter called the testator) died on the 28th day of January, 1946 domiciled in the State of New South Wales.

2.—Probate of the Will of the testator was duly granted by the Supreme Court of New South Wales in its Probate Jurisdiction to Permanent Trustee Company of New South Wales Limited, the executor of the said Will, on the 22nd day of July, 1946, with leave reserved to Muriel Davies, an executrix named in the said Will to come in and prove.

In the Supreme Court of New South Wales.

No. 1. Case Stated, 20th November, 1951— *continued.*

3.—By a deed made on or about the 13th day of August, 1924, between the testator of the first part, Muriel Norah Davies, his daughter (therein called the beneficiary) of the second part, and Permanent Trustee Company of New South Wales Limited of the third part a trust was created by the testator in respect of certain shares, property and investments, described in the Schedule to the said deed and it was declared that the Permanent Trustee Company of New South Wales Limited, the Trustee under the said deed, should hold and be entitled to the said shares, property and investments, and to the investments upon which the proceeds of the sale of the said shares or other property or any part thereof might be invested, and to the income arising therefrom upon the trusts and with and subject to the powers and provisions expressed in the said deed concerning the same. The said deed contained, *inter alia*, the following clauses, that is to say :

(1) The Trustee shall stand possessed of the Trust Fund whether there shall or shall not be any other fund applicable to the maintenance and education of the beneficiary or any person bound by law to provide for such maintenance and education upon trust :

(a) To apply the whole or such part as the Trustee shall think fit of the income arising from the Trust Fund for or towards the maintenance education and general support of the Beneficiary in such manner in all respects as the Trustee may think proper until such Beneficiary attains the age of thirty years or marries with the written consent and approval of her parents the said Arthur Henry Davies and Muriel Davies or of the survivor of them provided that in case the Beneficiary shall marry during the lifetime of her parents without such consent as aforesaid the Trustee shall continue to apply the income in manner aforesaid until the Beneficiary attains the age of thirty years.

(b) To accumulate the residue (if any) of the same income which in the judgment of the Trustee may not be required for the purposes aforesaid or any of them in the year in which such income may have arisen by way of compound interest by investing the same and the resulting income therefrom for the benefit of the Beneficiary or other the person or persons who under the trusts hereinafter contained shall have become entitled to the Trust Fund Provided that the Trustee may resort to the accumulation of any preceding year or years and apply the same for any of the purposes hereinafter mentioned for the benefit of the Beneficiary.

(2) In case of the marriage of the Beneficiary without such consent as aforesaid before attaining the age of thirty years

the Trustee may with the written consent of her parents or the survivor of them at any time after such marriage pay over to the Beneficiary one half of the Trust Fund together with any accumulation of income then in the hands of the Trustee.

(3) On the Beneficiary attaining the age of thirty years the Trustee shall pay over to her the balance of the Trust Fund or the whole of such Trust Fund if still in the hands of the Trustee together with all the accumulations of income then in hand for her sole and separate use.

(4) In case the Beneficiary shall attain the age of twenty one years or marry under that age with such consent as aforesaid the Trust Fund shall be held by the Trustee upon Trust for such person or persons and in such manner in all respects as the Beneficiary shall by Will or Codicil appoint.

4.—A copy of the said Deed is annexed hereto marked " A " and forms part of this case.

5.—The said Muriel Norah Davies, who was frequently known as Cherry Davies, the beneficiary under the said deed, married on the first day of July, 1938. It does not appear that any written consent and approval of her parents or either of them was given in respect of the said marriage, but her parents were present at it and in fact approved it. Upon her marriage Muriel Norah Davies became Muriel Norah Jackaman.

6.—The said Muriel Norah Jackaman attained the age of thirty years on the twenty second day of February 1940.

7.—The Trustee of the Deed applied income of the trust property by making payments to the Testator with whom the beneficiary lived of the following amounts and on the following dates :—

31.7.1926	£1,000
20.9.1927	£1,000
20.7.1928	£1,000
4.7.1929	£1,000
7.7.1930	£1,000
21.7.1931	£1,000
6.7.1932	£1,000

Muriel Norah Davies attained the age of twenty one years on the 22nd day of February 1931 and at her request the Trustee made the following payments to the Testator on the dates set forth hereunder :—

11.7.1933	£800
24.7.1933	£200
6.7.1934	£1,000
15.7.1935	£1,000
22.6.1936	£1,000
21.6.1937	£1,000

In the Supreme Court of New South Wales.

No. 1. Case Stated, 20th November, 1951— *continued.*

The said request was contained in two letters signed by Muriel Norah Davies dated respectively 12th day of December 1932 and 3rd day of April, 1936, true copies whereof are hereunto annexed and marked " B1 " and " B2 " respectively and form part of this case. Throughout the whole period from the creation of the trust until the date of the last payment from the income of the trust property to the Testator abovementioned Muriel Norah Davies was maintained educated and supported by the Testator. After the last mentioned date, namely the 21st day of June, 1937, and until the opening of the bank account hereinafter mentioned the Trustee made the following and no other payments out of the trust income and for the purposes set forth :

29.11.1937	Bank of New South Wales for credit to Cherry Davies	Allowance on account of income	£100.0.0
17.2.1938	Bank of New South Wales for a letter of credit in favour of Miss Cherry Davies	Payment of part expenses of her tour abroad	£125.8.9
17.2.1938	The Oceanic Steamship Co.	Payment of part of passage money for tour abroad by Miss Davies	£68.3.7
21.6.1938	The Bank of New South Wales for cable to Miss Davies in London ...	On account of income ... £1,000 Exchange ... 255	
			£1,255.0.0

Surplus income was accumulated and became part of the trust fund.

8.—On the 29th day of December 1938, the testator caused to be opened with the Bank of New South Wales at its head office, an account in the name of the said Muriel Norah Jackaman and deposited to the credit of the said account the sum of £5,025 of his own moneys.

9.—On the same date the testator presented a cheque drawn in his favour by the said Muriel Norah Jackaman on the said account for the sum of £5,000.0.0 and received that sum.

10.—After the opening of the said Bank Account the Trustee from time to time made payments of the trust income into the said Bank Account until the 24th day of March, 1943.

11.—Prior to the opening of the said account, namely, on the 2nd day of November, 1938 the testator wrote a letter to his said daughter in which he requested her to sign an authority addressed to the Trustee of the said deed to take his instructions in all matters regarding the said trust, or regarding the new Account which, he stated, he was opening in the Bank of New South Wales in her name under the title " Cherry Jackaman " . . . . In the same letter he requested her to sign a cheque in his favour for the

sum of £5,000.0.0 and a letter of authority to the said Bank authorising him to operate on the said new account, and a specimen signature to be handed to the said Bank. . . .

12.—The said Muriel Norah Jackaman duly signed the said cheque (which was the cheque by which the said sum of £5,000.0.0 was withdrawn from the said account as hereinbefore stated) and duly signed the said authorities to the Trustee of the said deed and to the said Bank. A copy of the said authority to the trustee is annexed hereto and marked " C " and forms part of this case. A copy of the said authority to the Bank is annexed hereto marked " D " and forms part of this case.

13.—The said Muriel Norah Jackaman on the 9th day of January 1939 gave a further authority to the Trustee a true copy whereof is hereunto annexed and marked " E " and forms part of this case.

14.—Pursuant to the said authorities, the Trustee of the said deed thereafter paid to the credit of the said account the income received by it as Trustee of the said deed. . . .

15.—The said Cherry Jackaman, the beneficiary, was absent from Australia throughout the whole period from December 1938 to April 1943.

16.—Between the 29th day of December 1938 and the 4th day of April 1943 the testator operated on the said account by signing cheques drawn thereon and by that means withdrew therefrom the sums of money set out in the schedule marked " F " and annexed hereto on the dates shown opposite such amounts in the said schedule. After the 4th day of April 1943 the said account was not further operated upon by the testator.

17.—Found among the Testator's documents was a paper in the handwriting of his Secretary now deceased in the following words and figures.

MRS. CHERRY JACKAMAN

In account with Arthur H. Davies.

Interest on loans to 30th June, 1940.

Date	Amount of Loan	Period to 30/6/40 Years	Days		Interest at 3½% p.a.
1938					
Dec. 29	£5,000	Offset by A. H. D.'s deposit with B.N.S.W. Head Office for £5,025.			
1939					
Feb. 3	725	1	148	...	35.13.3
22	150	1	129	...	7. 2.1
Mch. 14	200	1	108	...	9. 1.5
May 29	300	1	32	...	11. 8.5
Oct. 13	400	—	262	...	10. 1.0
Nov. 4	300	—	240	...	6.18.1
Dec. 28	300	—	186	...	5. 7.0
1940					
Apl. 12	300	—	79	...	2. 5.5
May 20	200	—	41	...	15.9

In the Supreme Court of New South Wales.

No. 1. Case Stated, 20th November, 1951—*continued.*

18.—In the books of the testator kept for him by his Secretary now deceased and under the heading " Mrs. Cherry Jackaman " appear the entries set out in the annexure hereto marked " G " the words and figures appearing in the said books being in the proper handwriting of the Testator's deceased Secretary.

19.—The records of the Testator's account at the bank of New South Wales Head Office during the period mentioned in paragraph 16 hereof and which was throughout such period in overdraft shows deposits of amounts corresponding with those withdrawn from the account of Mrs. Cherry Jackaman as above mentioned save and except the four amounts hereinafter specified. The total amount of such withdrawals and corresponding deposits was £5,940.0.0. During the said period, the balance of the credit of the said account of Mrs. Cherry Jackaman fluctuated from time to time, the highest credit any time being £418.6.10 and the said account being at one stage overdrawn to the extent of £35.7.11.

The four amounts withdrawn from the Bank Account of Mrs. Cherry Jackaman for which there are no corresponding deposits in the Testator's Bank Account were :

(a)	1939 August 4	£100	
(b)	1942 „ 25	85	(London Cheque)
(c)	1942 December 16	100	
(d)	1942 April 4	200	

Mrs. Cherry Jackaman has stated that the amount (a) was a gift made at her request to a friend Miss Helen Hughes ; (b) was a remittance to herself in London for medical expenses ; (c) and (d) were utilised by the Testator for the purchase of Treasury Bonds for herself and in her own name.

20.—The said Muriel Norah Jackaman subsequently claimed that the testator was indebted to her at the date of his death in the sum of £11,265.11.0 which sum was made up as is set forth in a Schedule annexed to a Statutory Declaration made by her on the 16th day of July, 1947. A copy of such Statutory Declaration and Schedule is hereunto annexed and marked " H " and forms part of this case. This claim was afterwards amended by her, and by her claim as amended she claimed the sum of £10,039.3.11 and such claim as amended did not include any claim for interest on the said sum of £5,000.0.0.

21.—On the 13th day of February 1948 the said Muriel Norah Jackaman made a further statutory declaration a true copy whereof is hereunto annexed and marked " J " and is part of this case.

22.—On the 26th day of November, 1948 the said Muriel Norah Jackaman made a further statutory declaration to which was annexed

(a) a copy of a letter dated 2nd November, 1938 from the testator to her (omitting irrelevant parts) (b) a copy of an undated Memorandum from the Testator to her, (c) a copy of a letter from Permanent Trustee Company of New South Wales Limited dated 29th May, 1939 and (d) a Statement of Account dated 25th June, 1939. Annexed hereto and marked " K," " K1," " K2," " K3 " and " K4 " respectively are copies of the said Statutory Declaration and of the said documents which were annexed to it, and such declaration and documents form part of this case.

23.—In addition to the Statutory Declarations mentioned in paragraphs 20, 21 and 22 hereof, the said Muriel Norah Jackaman made two other statutory declarations relating to the transactions of the testator, these being made respectively on the 24th day of December, 1947, and the 17th day of January, 1949. Such Declarations are annexed hereto and marked " L " and " M " and form part of this case.

24.—The value of the assets which were, at the date of the death of the Testator, held by the Permanent Trustee Company of New South Wales Limited under the trusts of the said Deed, was £38,162.13.7.

25.—For the purpose of the Assessment of death duty payable in the estate of the Testator, the Commissioner of Stamp Duties included in the dutiable estate of the Testator the following sums, namely :—

(a) The sum of £38,162.13.7 being the value of the assets subject to the trusts of the said deed at the date of the death of the testator ;

(b) The sum of £5,025 as being the amount of a gift made by the testator to the said Muriel Norah Jackaman on the 29th day of December, 1938.

The Commissioner claims that both the said amounts are included in the dutiable estate of the testator.

26.—The Commissioner in assessing death duty payable in the said estate allowed as a deduction, pursuant to Section 107 of the said Act, a debt due by the testator to the said Muriel Norah Jackaman of an amount of £8,926.18.7 being the amount claimed by her to be owing as set forth in the said Schedule to her said Statutory Declaration, a copy of which is hereunto annexed and marked " G " in respect of a loan of £5,000 made on the 29th day of December 1938, and in respect of monies being part of the income of the said trust withdrawn by the testator from the account of Muriel Norah Jackaman and paid into his own Bank Account. The Commissioner of Stamp Duties refused to allow as a debt due by the testator any interest on the said sum of £5,000.0.0 or on any of the sums withdrawn by the testator from the said bank account of Muriel Norah Jackaman.

In the Supreme Court of New South Wales.

No. 1. Case Stated, 20th November, 1951— *continued.*

27.—The Permanent Trustee Company of New South Wales Limited, as executor of the Will of the Testator, has notified the Commissioner of Stamp Duties that it is dissatisfied with the assessment of death duty in the said estate on the following grounds, namely :—

(i) the assets of the settlement executed by the testator on the 18th day of August 1924, are wrongly included in the assessment as forming part of the dutiable estate of the testator :

(ii) that interest on the sum of £8,926.13.7 claimed by Muriel Norah Jackaman against the said estate other than on the sum of £5,000.0.0 included therein, should be allowed by the Commissioner as a debt against the said estate ;

(iii) that the assessment is excessive.

The said Permanent Trustee Company of New South Wales Limited has required the Commissioner of Stamp Duties to state a case for the opinion of the Supreme Court of New South Wales, and has duly paid the sum of £20.0.0 as security for costs.

28.—In the said assessment of death duty the Commissioner treated the dutiable estate of the testator as being of the total value of £191,380.0.0 and assessed duty thereon at the sum of £52,435.7.6. If the said contentions of the executor of the said Will were held to be correct, the amount of duty assessed on the said estate would be reduced by the sum of £10,492.9.4.

29.—The questions for the determination of the Court are :

(i) Should the said sum of £38,162.13.7 have been included in the dutiable estate of the testator,

(ii) Should any interest on the sum of £8,926.18.7 have been allowed as a debt due and owing by the testator to the said Muriel Norah Jackaman and deducted from the dutiable estate of the testator,

(iii) If question (ii) to be answered in the affirmative, upon what sum or sums should such interest have been allowed as a debt and at what rate,

(iv) What is the amount of death duty payable in respect of the said estate,

(v) How should the costs of this case be borne and paid.

Dated this 20th day of November, 1951.

E. T. WOODS,
Commissioner of Stamp Duties.

Annexure " A " to Case Stated.

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure " A " Copy Settlement, 13th August, 1924.

COPY SETTLEMENT BETWEEN ARTHUR HENRY DAVIES, MURIEL NORAH DAVIES AND PERMANENT TRUSTEE CO. OF N.S.W. LTD.

THIS DEED made the thirteenth day of August One thousand nine hundred and twenty four BETWEEN ARTHUR HENRY DAVIES of Sydney in the State of New South Wales Merchant (hereinafter called the " Settlor ") of the first part MURIEL NORAH DAVIES daughter of the said Arthur Henry Davies of the second part and THE PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED (hereinafter called the " Trustee ") of the third part WHEREAS the Settlor has transferred to or caused to be vested in the Trustee the shares property and investments short particulars of which are set forth in the Schedule hereto which he directed the Trustees to hold upon the trusts and with the powers hereinafter set forth for the benefit of his daughter the said Muriel Norah Davies NOW THIS DEED WITNESSETH that in consideration of the natural love and affection of the Settlor for his said daughter the said Muriel Norah Davies (hereinafter called the " Beneficiary ") and for divers other good causes and consideration The Settlor DOTH hereby declare that the Trustee shall and the Trustee hereby declares that it will hold and be entitled to the said shares property and investments particulars whereof are set forth in the Schedule hereto and of the investments upon which in exercise of the powers hereinafter contained the proceeds of the sale of the said shares or other property or any part thereof may be invested (hereinafter called the " Trust Fund " which term shall include the constituents of that fund for the time being) and to the income arising therefrom upon the trusts and with and subject to the powers and provisions hereinafter expressed concerning the same :

1.—THE Trustee shall stand possessed of the Trust Fund whether there shall or shall not be any other fund applicable to the maintenance and education of the beneficiary or any person bound by law to provide for such maintenance and education upon trust :

(a) To apply the whole or such part as the Trustee shall think fit of the income arising from the Trust Fund for or towards the maintenance education and general support of the Beneficiary in such manner in all respects as the Trustee may think proper until such Beneficiary attains the age of thirty years or marries with the written consent and approval of her parents the said Arthur Henry Davies and Muriel Davies or of the survivor of them provided that in case the Beneficiary shall marry during the lifetime of her parents without such consent as aforesaid the Trustee shall continue to apply the income in manner aforesaid until the Beneficiary attains the age of thirty years.

(b) To accumulate the residue (if any) of the same income which in the judgment of the Trustee may not be required for the

In the Supreme Court of New South Wales.

No. 1.
Case Stated.

Annexure "A" Copy Settlement, 13th August, 1924—*continued.*

purposes aforesaid or any of them in the year in which such income may have arisen by way of compound interest by investing the same and the resulting income therefrom for the benefit of the Beneficiary or other the person or persons who under the trusts hereinafter contained shall have become entitled to the Trust Fund Provided that the Trustee may resort to the accumulations of any preceding year or years and apply the same for any of the purposes hereinafter mentioned for the benefit of the beneficiary.

2.—In case of the marriage of the Beneficiary without such consent as aforesaid before attaining the age of thirty years the Trustee may with the written consent of her parents or the survivor of them at any time after such marriage pay over to the Beneficiary one half of the Trust Fund together with any accumulation of income then in the hands of the Trustee.

3.—On the Beneficiary attaining the age of thirty years the Trustee shall pay over to her the balance of the Trust Fund or the whole of such Trust Fund if still in the hands of the Trustee together with all the accumulations of income then in hand for her sole and separate use.

4.—In case the Beneficiary shall attain the age of twenty one years or marry under that age with such consent as aforesaid the Trust Fund shall be held by the Trustee upon trust for such person or persons and in such manner in all respects as the beneficiary shall by Will or Codicil appoint.

5.—In case the Beneficiary shall die without issue before attaining a vested interest in the Trust Fund or intestate as to the whole or any part of such Fund the Trustee shall stand possessed of the Trust Fund Upon Trust to divide the same into one hundred equal parts or shares and to stand possessed thereof upon the following trusts :—

(a) As to twenty parts thereof upon trust to pay the income arising therefrom to the Settlor's Wife's Nephew John Irvine Toohey during his life and after his death for such of his children as being male shall attain the age of twenty one years or being female shall attain that age or previously marry and if more than one in equal shares as tenants in common.

(b) As to twenty parts thereof upon similar trusts *mutatis mutandis* for the benefit of the Settlor's Wife's Niece Gertrude Pargiter and her children as are hereinbefore declared with respect to the share of John Irvine Toohey.

(c) As to five parts thereof upon trust for the Settlor's sister-in-law Nellie Toohey.

(d) As to five parts thereof upon trust for the Settlor's sister-in-law Hilda Weston.

(e) As to ten parts thereof upon trust for the Settlor's cousin Captain David Lewis Davies.

(f) As to ten parts thereof upon trust for Florence Orford daughter of Joseph Orford of Liverpool England.

(g) As to ten parts thereof upon trust for Settlor's brother Sydney Edward Davies.

(h) As to five parts thereof upon trust for George Parsons Lock.

(i) As to five parts thereof for Jack Egginton of Liverpool.

(j) As to one part thereof upon trust for Emily Lucas.

(k) As to the remaining nine parts thereof upon trust to divide the same between the persons employed at the time of the Settlor's death by Davies & Davies Limited and by Davies & Fehon Motors Limited in such shares and proportions as the Trustees may think proper.

6.—THE TRUSTEE shall have the following powers in addition to all other powers vested in it by law or otherwise :

(a) To determine all cases of doubt whether any moneys coming to the Trustee are to be considered as capital or income and to apportion or partition blended funds and any such determination apportionment or partition shall be binding upon the Beneficiary and all other persons interested hereunder as if the same have been made under the authority of a Court of competent jurisdiction in that behalf.

(b) To lend and advance upon such terms and conditions and security if any as the Trustee may think fit the Trust Fund or any part thereof to the Trustees of the Will of the Settlor for any purpose connected with the administration of his Estate including the payment of probate or other duty.

(c) With the consent of the Settlor during his life and after his death at its sole discretion to sell and convert the Trust Fund or any part thereof from time to time and to invest any moneys in its hands for investment in any of the investments hereinafter specified namely :—

(i) In or upon any of the Public Stocks Funds Debentures Treasury Bills or Securities of Great Britain or the Commonwealth of Australia or of any of the States thereof or the Dominion of New Zealand.

(ii) In or upon the purchase of freehold land in the Commonwealth of Australia or Great Britain.

(iii) In building upon or otherwise improving any freehold land forming part of the Trust Fund.

(iv) In or upon any freehold securities or upon Mortgages over Station properties comprising freehold conditionally purchased land or conditionally leased land in Great Britain or in the Commonwealth of Australia.

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure "A" Copy Settlement, 13th August, 1924— *continued.*

(v) Upon the shares or debentures of any joint stock Company carrying on business in the said Commonwealth or in Great Britain including power to take up any new shares to which the trustee may become entitled by virtue of its holding shares in any Company.

(vi) Temporarily on deposit or on short loan for periods not exceeding two years with any Bank or Company carrying on business in the said Commonwealth.

(d) To manage and order all the affairs of the Trust Fund or any part thereof as regards letting occupation repairs insurance against fire receipts of rent indulgences and allowances to tenants and all other matters in such manner as the Trustee shall think fit with power to accept surrenders of leases and to sell the Trust Fund or any part thereof either by Public auction or private contract for cash or on terms and generally on such conditions as the Trustee shall think proper.

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

THE SCHEDULE HEREINBEFORE REFERRED TO.

1,000 shares of £1 each in MOTOR TRACTORS LTD. paid up to 10/- per share.
10,000 shares of £1 each in Davies & Davies Ltd. paid up to 12/- per share.
6,975 shares of £1 each in ALLIED MOTOR INTERESTS LTD. paid up to £1.
1,091 shares of £1 each in DAVIES & DAVIES LTD. fully paid up.
£2,935 N.S.W. 5½% Funded Stock due 10th August, 1931.
£3,000 War Loan 4½% due 1927.
£700 temporarily deposited with Davies & Davies Limited carrying interest at 6%.
£2,590 deposited with The Permanent Trustee Co. of N.S.W. Ltd. bearing interest at 4½%.
£39.18.2 cash in the hands of the Trustee.

SIGNED SEALED AND DELIVERED by the said ARTHUR HENRY DAVIES in the presence of: ARTHUR H. DAVIES (S)

D. W. ROXBURGH,
Solicitor,
Sydney.

THE COMMON SEAL OF THE PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED was hereunto affixed by Order of the Board of Directors of the said Company in the presence of two of such Directors whose signatures are set opposite hereto and also in the presence of: ALFRED G. MILSON, JAMES MOIR *Directors* (S)

J. W. BARNES,
Manager.

Annexure " B 1 " to Case Stated.

In the Supreme Court of New South Wales.

No. 1.
Case Stated.

Annexure " B 1 "
Copy letter Cherry Davies to Permanent Trustee Co. of N.S.W. Ltd., 12th December, 1932.

COPY LETTER CHERRY DAVIES TO PERMANENT TRUSTEE CO. OF N.S.W. LTD.

Sydney.
12th December, 1932.

The Manager,
Permanent Trustee Co. of N.S.W. Ltd.,
25 O'Connell Street,
Sydney.

Dear Sir,

re My Settlement.

I have received your letter of even date giving me the particulars in connection with the Deed of Settlement made by my father in my favour dated 13th August, 1924.

I note from your letter that you say you have been making my father an allowance of £1,000 a year on my behalf and I write to say that I confirm such payments and approve thereof.

In consequence of the reduction in the income from the investments, I understand the Trustees propose to reduce the allowance to my father to say, £800 a year and I approve of this proposal and request a continuance of the payments to my father as I will look to him for my own personal allowance.

I also note that in terms of the Deed of Trust I can now execute a Will exercising my power of appointment over the Trust Fund.

Yours faithfully,
(Sgd.) CHERRY DAVIES.

Annexure " B 2 " to Case Stated.

Annexure " B 2 "
Copy letter Cherry Davies to Permanent Trustee Co. of N.S.W. Ltd., dated 3rd April, 1936.

COPY LETTER CHERRY DAVIES TO PERMANENT TRUSTEE CO. OF N.S.W. LTD.

25 Albert Hall Mansions,
Kensington Gore,
London, S.W.7.
3rd April, 1936.

The Manager,
Permanent Trustee Co.,
Sydney, N.S.W.

Dear Sir,

As my father has mislaid the draft letter you sent for me to sign I hereby confirm all payments you have made to him out of my trust and will be pleased if you will continue to make payments in the future as in the past.

Make the payments on the 1st July each year or as close to that date as possible. If there is any need for my signature other than this, kindly send documents to the above address.

Yours faithfully,
(Sgd.) CHERRY DAVIES.

In the Supreme Court of New South Wales.

No. 1.
Case Stated.

Annexure "K 1" Copy letter Arthur Henry Davies to Muriel Norah Jackaman, dated 2nd November, 1938.

Annexure "K 1" to Case Stated.

COPY LETTER FROM ARTHUR HENRY DAVIES TO MURIEL NORAH JACKAMAN.

2nd November, 1938.

Dear Cherry,

. . . . The matter of the old man's estate came up before the Court at the end of last week, although it had been listed in the Law Notices for at least a couple of months. The Judge had decided in the way the Counsel said he would, namely, that the Residuary Beneficiaries, namely the children are out of Court, but that the benefits to the original three, namely the life interests to Loo, Lily and myself hold good. The position now being therefore, that the portion that Loo had has to be divided up, but Sidney and Blanche's estate come in. This means the division now will be 1/5 each to my interests, Lily's Syd's Blanche's and Loo's.

It will not affect the total received so far as Lily and my interests are concerned because under the old will Loo's youngsters got 3/5ths, whereas now they will only get 1/5 which therefore leaves the 2/5 to pay Syd and Blanche.

I do not anticipate this matter, although settled by the judge, will be cleaned up for another five or six weeks, but when it is I propose to deal with it in such a way that the principal will pass into your account out here, myself in the meantime benefitting by any interest being made. That, however, is a matter which I will deal with and advise you of later.

I am seeing the Permanent Trustee Co., to-day and will advise you what you have to write to them in reference to the matter of instructions regarding transferring income abroad.

Since I dictated the previous page I have seen the Permanent and have arranged with them to await your letter enclosing in it the Marriage Certificate. As it is possibly almost impossible to get an actual copy from Alexandria I think that all that is necessary will be to have same copied and certified to by a Justice of the Peace or a Solicitor at Nairobi. Of course, I can also give them a declaration.

The next thing I want you to do is to write on a separate sheet, addressed to them, giving them the authority to take my instructions in all matters regarding your trust or the new account I am opening in the Bank of New South Wales in your name. This account will be entitled Cherry Jackaman.

I am having this account opened in the Bank so that when I receive the money from the old man's estate I will instruct the Trustee Company to pay it straight into your account and therefore it will not go through my books at all.

On the other hand I want you to sign a cheque also the letter of authority to the Bank and also the specimen signature and send these out by the first mail to me, so that I can hand them to the Bank here.

As I do not anticipate the payment being made before about a month's time this will give ample time for your letter to get back here.

The reason why I want you to sign the cheque is that your Account will then loan to me the amount and this in turn will reduce my overdraft with the Bank by a like amount and by doing so will reduce the amount of interest I have to pay the Bank. Of course, you realise that this amount from the old man's estate is really mine, but as I feel that it would have been yours if the Will had been drawn up correctly, I consider it best to pay it into your account in your name right at the beginning instead of leaving it to come to you on my death.

I am enclosing therefore as mentioned above one cheque for £5,000 for your signature Cherry Jackaman, one letter to the Manager of the Bank of New South Wales and two slips for your specimen signature, but please do not date the letter or the cheque, as these will not take effect until I open the account and this will not be opened until such time as the Trustees are ready to pay the money over.

It is my intention from time to time to pay more money into this account and by so doing relieve my account of such amounts if anything should happen to me suddenly. . . .

Your loving Dad.

Annexure " C " to Case Stated.

COPY LETTER CHERRY JACKAMAN TO PERMANENT TRUSTEE CO. OF N.S.W. LTD.

P.O. Box 601,
Nairobi,
Kenya Colony.

1st December, 1938.

To the Manager,
The Permanent Trustee Co. of N.S.W. Ltd.,
Sydney, Australia.

Dear Sir,

I hereby authorise you to take instructions from my father, Mr. Arthur H. Davies, in all matters regarding my trust, and in the new account he is opening in my name, in the Bank of New South Wales.

This authority is to be a continuing one until withdrawn by me in writing.

Yours faithfully,

(Sgd.) CHERRY JACKAMAN.

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure " D " Copy letter Cherry Jackaman to Bank of New South Wales, dated 29th December, 1938.

Annexure " D " to Case Stated.

COPY LETTER CHERRY JACKAMAN TO BANK OF NEW SOUTH WALES.

29th Decr., 1938.

The Manager,
Bank of New South Wales,
Sydney.

Sir,

I hereby authorise and empower my father, Arthur H. Davies whose signature is at the foot hereof, to draw cheques, make, accept, and endorse in my name and on my behalf, Promissory Notes, Bills of Exchange, Bills of Lading, Drafts and other instruments, either for the purpose of security or otherwise, and to operate upon my account in your Bank as fully and effectually to all intents and purposes as I could if personally present.

This authority to be continuing one until withdrawn by me in writing.

Yours faithfully,
(Sgd.) CHERRY JACKAMAN.

Annexure " E " Copy letter Cherry Jackaman to Permanent Trustee Co. of N.S.W. Ltd., dated 9th January, 1939.

Annexure " E " to Case Stated.

COPY LETTER CHERRY JACKAMAN TO PERMANENT TRUSTEE CO. OF N.S.W. LTD.

P.O. Box 601,
Nairobi,
Kenya Colony.

9th January, 1939.

The Manager,
Permanent Trustee Co. of
N.S.W. Ltd.

Dear Sir,

With reference to your letter of the 28th Sept. 1938 A.D./S. regarding the payments to me from my settlement.

From now, until further instructions from me, will you kindly pay into my account at the Bank of New South Wales, Head Office, Sydney, Australia, any money coming in from my trust.

My account at the Bank is under the name of Cherry Jackaman.

Thanking you for your trouble.

Yours faithfully,
(Sgd.) CHERRY JACKAMAN.

Annexure " K 4 " to Case Stated.

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure " K 4 " Copy letter Permanent Trustee Co. of N.S.W. Ltd. to Arthur Henry Davies, dated 29th May, 1939

COPY LETTER PERMANENT TRUSTEE CO. OF N.S.W. LTD. TO ARTHUR HENRY DAVIES.

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LTD.

29th May, 1939.

A. H. Davies, Esq.,
Sydney.

Dear Sir,

Mrs. M. N. Jackaman Settlement.

At the request of Mr. J. Wright per telephone recently, we give you the following information :—

Gross Annual Income from all investments held by the above Settlement	£1,540
Less : Income Taxes, this Company's Commission, etc.	140
Net annual income	£1,400

We trust that this is what you require.

Yours faithfully,

Annexure " K 2 " to Case Stated.

Annexure " K 2 " Copy Memorandum Arthur Henry Davies to Muriel Norah Jackaman, undated.

COPY MEMORANDUM ARTHUR HENRY DAVIES TO MURIEL NORAH JACKAMAN.

Enclosed is a letter from Permanent Trustee Co. dated 29th May, which was sent to me, after Wright had telephoned to them on my behalf.

From this letter you will see that the Gross Annual Income from your settlement is approximately £1,540. After deducting Income Taxes and the Company's commission etc. it leaves a nett annual Income of approximately £1,400.

On 29th December I opened an account with the Bank of New South Wales for Cherry Jackaman and this is the account I required your signature for and your authority to work on, which you sent me some time ago. You will see from the accompanying statement, which shows the position of this account of yours with my books, that the account was opened up just at the end of last year by my paying into it an amount of £5,025 of my own money. Since when, up to date, the Trustees have paid in £1,552.12.10. This is because I told them that whenever any funds from your investments reach £100 they should be paid into this account, so the total amount at

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure "K 2" Copy Memorandum Arthur Henry Davies to Muriel Norah Jackaman, undated—*continued.*

present which has been paid into your account is £6,577.12.10, but withdrawn from it has been £6,400.5.0. This amount is made up of £5,000 which I withdrew (on the day I deposited the £5,025) together with refunds of £750, £150, £200, £300 to myself and an amount of 5/- for a cheque book.

The reason why I opened the account when I did was that this £5,025, a gift from me, would be free of probate if I live beyond three years of the date. All these withdrawals in my books naturally stand as a credit to you, which in the event of my dying my estate would have to pay them back before my nett worth for probate purposes was assessed.

It is necessary for these monies to be "loaned" to me so that I can make the advances to you through my London account per the medium of Letters of Credit and such like.

By doing it this way it removes any necessity for you to advise anyone you have an income, because by law a father can legally provide his children with living expenses etc. Of course when I see you I can go further into details, but I guess you can understand there is no need at present for you to know. In fact the less you know the better in case you are asked any questions. The whole thing in fact is a gift from me and not an Income.

Annexure "K 3" Copy Statement of Account in name of Mrs. Cherry Jackaman, 25th June, 1939.

Annexure "K 3" to Case Stated.

COPY STATEMENT OF ACCOUNT IN NAME OF MRS. CHERRY JACKAMAN.

MRS. CHERRY JACKAMAN

A/C opened 29.12.1938 Receipts & Payments (Bank of New South Wales)

1938		*Paid Out*	*Received*
Dec. 29	By Deposit by Mr. A. H. Davies ...		5,025. -. -
„ 29	To refund to Mr. A. H. Davies (from Bank)	5,000.-.-.	
1939			
Feb. 3	By Deposit by Per't. Trustee Co. ...		850. -. -
„ 20	„ „ „ „ ...		150. -. -
Mch. 12	„ „ „ „ ...		100. -. -
Apl. 12	„ „ „ „ ...		82.12.10
May 19	„ „ „ „ ...		250. -. -
June 21	„ „ „ „ ...		120. -. -
Feb. 3	To refund to Mr. A. H. Davies ...	750.-.-	
„ 6	To Cheque Book	5.-	
„ 22	To Refund to Mr. A. H. Davies ...	150.-.-	
Mch. 14	„ „ „ „ ...	200.-.-	
May 29	„ „ „ „ ...	300.-.-	
		£6,400.5.-	£6,577.12.10

25/6/39 Today's Credit Balance £177/12/10

Annexure " F " to Case Stated.

In the Supreme Court of New South Wales.

No. 1.
Case Stated.

Annexure " F "
Schedule showing amounts withdrawn from bank account in the name of Muriel Norah Jackaman by late A. H. Davies

SCHEDULE SHOWING AMOUNTS WITHDRAWN FROM BANK ACCOUNT IN THE NAME OF MURIEL NORAH JACKAMAN BY LATE A. H. DAVIES.

MRS. CHERRY JACKAMAN
Account—Bank of New South Wales

	Date	*Debit*
	1939	
	Feb. 3	£750
	Feb. 22	£150
10	Mar. 14	£200
	May 29	£300
	Aug. 4	£100
	Oct. 13	£400
	Nov. 2	£300
	Dec. 28	£300
	1940	
	Apr. 12	£300
	May 20	£200
	June 26	£150
20	Sepr. 3	£250
	Sepr. 26	£140
	Nov. 22	£250
	1941	
	Feb. 7	£150
	Mar. 18	£100
	June 2	£200
	July 3	£150
	Aug. 29	£200
	Sepr. 25	£100
30	Dec. 2	£300
	1942	
	Apr. 6	£100
	Apr. 6	£50
	June 30	£250
	Aug. 25	£85
	Dec. 15	£200
	Dec. 16	£100
	1943	
	Mar. 4	£300
40	Apr. 3	£150
	Apr. 4	£200
		£6,425

Annexure " G " to Case Stated.

Entries Appearing in Books of Late Arthur Henry Davies under the Heading " Mrs. Cherry Jackaman "

ESTATE LATE A. H. DAVIES

Copy of Ledger Account—Mrs. Cherry Jackaman (True copy certified by Allard Way & Hardie. Original Books Destroyed).

Ledger No. 8

			OL						OL			
1938							1938					
Dec.	29	To Cash B.N.S.W.	82	5,025	0	0	Dec. 29	By Cash B.N.S.W.	82	5,000	0	0
1939							1939					
June	30	,, Balance		1,375	0	0	Feb. 3	,, ,, Mrs. C. J.	,,	750	0	0
								22 ,, ,, ,,	,,	150	0	0
							Mch.	14 ,, ,, ,,	,,	200	0	0
							May	29 ,, ,, ,,	,,	300	0	0
				£6,400	0	0				£6,400	0	0
1940							1939		OL			
Mar.	13	To Cash Valerie Hughes £10 stg. 9		13	1	5	July	1 By Balance	82	1,375	0	0
							Oct.	13 ,, Cash Mrs. C. J.	3	400	0	0
1941												
July	1	,, Transfer to Ledger	L9 88	4,251	18	7	Nov.	4 ,, ,, ,,	4	300	0	0
							Dec.	28 ,, ,, ,,	5	300	0	0
							1940					
							Apl.	12 ,, ,, ,,	9	300	0	0
							May	20 ,, ,, ,,	10	200	0	0
							June	26 ,, ,, ,,	11	150	0	0
							Sept.	3 ,, ,, ,,	13	250	0	0
								26 ,, ,, ,,	14	140	0	0
							Nov.	22 ,, ,, ,,	15	250	0	0
							1941					
							Feb.	7 ,, ,, ,,	19	150	0	0
							Mar.	21 ,, ,, ,,	20	100	0	0
							June	2 ,, ,, ,,	23	200	0	0
								25 ,, ,, ,,	25	150	0	0
				£4,265	0	0				£4,265	0	0

In the Supreme Court of New South Wales.

No. 1.
Case Stated.
—continued.

Annexure "G" Entries appearing in books of late Arthur Henry Davies under the heading "Mrs. Cherry Jackaman."

Copy from Ledger No. 9 Folio 88.

Mrs. Cherry Jackaman—Cash A/c.

Credit Interest on these loans @ 3½%
Credit Interest Yearly or half yearly

													Vide A. H. D. 16.10.39	
1941							1941				OL			
							July	1	By transfer from		82		4,251	18 7
							Aug.	29	,, Cash refund		5		200	0 0
Sep.	9	To Cash remittance to London	5		483	18 7	Sept.	25	,, Cash Refund		6		100	0 0
		Stg. 385. 12. 0					Dec.	2	,, ,, ,,		11		300	0 0
		98. 6. 7					1942							
							Apl.	6	,, ,, ,,		18		150	0 0
1944							1942							
July	1	To Transfer to N/Ledger	54		5,418	0 0	June	30	,, ,, ,,		22		250	0 0
							Dec.	15	,, ,, ,,		28		200	0 0
							1943							
							Mar.	4	,, ,, ,,		31		300	0 0
							Apr.	1	,, ,, ,,		31		150	0 0
					£5,901	18 7							£5,901	18 7

Copy from Ledger No. 10 Folio 54

Mrs. Cherry Jackaman

1945							1944						
Dec.	5	To Cash Davidson Paints Pty. Ltd. 2000 × F/pd. 6% Pref. Shares	13		£2,000	0 0	July	1	By Transfer		OL 88		£5,418 0 0

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure " H " Copy Statutory Declaration of Muriel Norah Jackaman, dated 16th July, 1947 and Annexure.

Annexure " H " to Case Stated.

COPY STATUTORY DECLARATION OF MURIEL NORAH JACKAMAN AND ANNEXURE

STATUTORY DECLARATION

I, (Mrs.) MURIEL NORAH JACKAMAN of 67 Elizabeth Bay Road, Elizabeth Bay in the State of New South Wales do hereby solemnly and sincerely declare that :

(1) That the amount of £5,025 given to me by my late father, Mr. Arthur H. Davies in December, 1938 was a gift by him as certain moneys representing a share in his Father's Estate, legally became due to him, but in his opinion the amount morally belonged to me.

(2) That the £5,000 lent by me to my late Father in December 1938 being practically all of the above £5,025 is due to the fact that I was not in need of moneys as I was outside of the country and being maintained by my Husband. My late Father was attending to the whole of my financial affairs whilst I was outside of Australia, and he had my full authority to deal with my financial affairs.

(3) As my late Father was attending to the whole of my financial affairs, the question of paying me Interest on moneys advanced by me to him had never been discussed with me, but his records had indicated that Interest at the rate of 3½% per annum was to be paid to me on all advances. It was therefore evident that his intention was to credit me with interest and, therefore, bona fide possession and enjoyment of the £5,025 Gift by my late Father to me in December 1938 and subsequently lent by me to my late Father in December 1938 was assumed by me.

(4) Attached hereto and marked Schedule " A " are details of all moneys received by my late father as Loans from me and which amounts, other than the first amount of £5,000 came from the income of my Settlement. Interest has been calculated thereon at 3½% as set out.

(5) I had not refunded to my late Father on the 22nd February, 14th March and 29th May 1939 amounts of £150, £200 and £300 respectively, these amounts being loans by me to my late Father, the moneys coming from my Settlement.

(6) The Settlement was executed by my father, the Trustees thereof being the Permanent Trustee Co. of N.S.W. Ltd.

(7) My late Father did not make any Gifts to me other than the £5,025 in December, 1938.

(8) I loaned money to my late Father as per Schedule " A " attached.

(9) My late Father operated on my Bank Account under Full Authority.

(10) Income Tax Returns were regularly lodged by my Taxation Agents, the Permanent Trustee Co. of N.S.W. Ltd.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Oaths Act 1900.

Subscribed and declared at Sydney this 16th day of July, One thousand nine hundred and forty-seven before me

CHERRY JACKAMAN

R. HALING, J.P.,
Justice of the Peace for New South Wales.

SCHEDULE A.

STATEMENT OF AMOUNT OWING BY THE LATE A. H. DAVIES TO MRS. M. N. (CHERRY) JACKAMAN.

Amounts due to Mrs. Jackaman

Date.		*Amount.*	*Period to 28th January, 1946.*	Interest thereon calculated at 3½% *Amount.*
29th December 1938	Loan by Mrs. Jackaman to A. H. Davies	£5,000	7 years and 30 days	£1,239 7 8
3rd February 1939	Moneys of Mrs. Jackaman received by the late A. H. Davies	750	6 years and 359 days	183 6 4
22nd February 1939	" " "	150	6 years and 340 days	36 7 10
14th March 1939	" " "	200	6 years and 320 days	48 2 8
29th May 1939	" " "	300	6 years and 244 days	70 0 4
13th October 1939	" " "	400	6 years and 107 days	88 2 1
4th November 1939	" " "	300	6 years and 85 days	65 8 10
28th December 1939	" " "	300	6 years and 31 days	63 17 9
12th April 1940	" " "	300	5 years and 291 days	60 17 5
20th May 1940	" " "	200	5 years and 253 days	39 17 0
26th June 1940	" " "	150	5 years and 216 days	29 7 1
3rd September 1940	" " "	250	5 years and 147 days	47 5 6
26th September 1940	" " "	140	5 years and 124 days	26 3 3
22nd November 1940	" " "	250	5 years and 67 days	45 7 1
7th February 1941	" " "	150	4 years and 355 days	26 2 2
21st March 1941	" " "	100	4 years and 313 days	17 0 0
2nd June 1941	" " "	200	4 years and 240 days	32 12 0
25th June 1941	" " "	150	4 years and 217 days	24 2 5
29th August 1941	" " "	200	4 years and 152 days	30 18 3
25th September 1941	" " "	100	4 years and 125 days	15 4 0
2nd December 1941	" " "	300	4 years and 57 days	43 12 9
6th April 1942	" " "	150	3 years and 297 days	20 0 5
30th June 1942	" " "	250	3 years and 212 days	31 6 8
15th December 1942	" " "	200	3 years and 44 days	21 16 10
4th March 1943	" " "	300	2 years and 330 days	30 9 10
1st April 1943	" " "	150	2 years and 302 days	14 16 10
		£10,940 0 0		£2,351 13 0
Less Repayment on 13th March 1940		13 1 5	5 years and 321 days	2 13 6
Utilised to take up 2000 shares in Davisons Paint Co. Pty. Ltd. on 5th December 1945		2,000 0 0	54 days	10 7 1
		2,013 1 5		13 0 7
Total amount owing as at 28th January 1946		£8,926 18 7	Plus Interest 28th January 1946	£2,338 12 5

Witness: R. HOLING, J.P.
16th July 1947 A Justice of the Peace for New South Wales.

(Sgd,) CHERRY JACKAMAN.

In the Supreme Court of New South Wales.

No. 1.

Case Stated.

Annexure "H" Copy Statutory Declaration of Muriel Norah Jackaman, dated 16th July, 1947 and Annexure—*continued.*

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure " L " Copy Statutory Declaration of Muriel Norah Jackaman, dated 24th December, 1947.

Annexure " L " to Case Stated.

COPY STATUTORY DECLARATION OF MURIEL NORAH JACKAMAN.

I, MURIEL NORAH JACKAMAN of 67 Elizabeth Bay Road, Elizabeth Bay Sydney in the State of New South Wales do solemnly and sincerely declare

1. I am the claimant on the Estate of the late Arthur H. Davies for the amount of £8926.18.7 being monies advanced to him at various times and interest thereon at 3½% from date of advance until 28th January 1946.

2. A true statement of the various loans so made, detailing amounts, dates, interest payments, repayments and showing how the said sum of £8926.18.7 is made up is hereunto annexed and marked with the letter " A."

3. The amounts so advanced were withdrawn by my father from my bank account at the Bank of New South Wales Sydney on the dates shown in the said statement pursuant to my written authority dated the 29th December 1938 a true copy whereof is hereunto annexed and marked with the letter " B."

4. The bank account referred to in paragraph 3 hereof was opened by my father on the 29th December 1938 with my full authority as at that time I was living outside Australia and my father was in charge of all my financial affairs.

5. On the 29th December 1938 my father paid into the said account the sum of £5025.0.0. This amount was a gift from my father, but one which he considered he was morally obliged to make, as certain moneys representing a share in his father's estate legally became due to him but in his opinion such monies morally belonged to me.

6. The gift referred to in paragraph 5 hereof was the only gift made to me by my father from such date until date of his death.

7. All other monies paid into my bank account were income arising from my own separate property, and none of such payments to my account were gifts from my father.

8. During this period and until November 1943 I was living abroad with my husband who was maintaining me and consequently I had no use

for any income arising from my Australian investments. Accordingly my father invested this money on my behalf in whatever manner he thought fit.

9. During this period my father informed me of his activities on my behalf and that he was borrowing my money and I fully acquiesced and approved thereof. At no time did I give my father any instructions as to the investment or disposal of my monies being quite content to leave the matter in his hands.

10. As my late father was attending to the whole of my financial affairs the question of paying me interest on monies so advanced to him was never discussed between us; however his records indicate his intention to credit my account with interest on all advances.

11. In my father's books at the top of the ledger account in my name there is a pencil note in the handwriting of my father's secretary as follows, " Credit interest on these loans at 3½% per annum. *Vide* AHD 16/10/1939. Credit interest half yearly or at 30th June yearly."

12. In my Australian records which were kept for me by my father's secretary the interest on such loans as had been then made at 3½% was credited to my account.

13. With the exception of £2000 utilised to take up Davison Paints Pty. Ltd. 6% Preference Shares on the 5th December 1945, none of the monies so lent to my father have been repaid.

And I make this solemn declaration by virtue of the Statutory Declarations Act 1911 conscientiously believing the statements contained therein to be true in every particular.

Declared at Sydney the twenty-fourth day of December, 1947, before me } (Signed) CHERRY JACKAMAN.

W. BRECKENRIDGE, J.P.

NOTE.

Annexure " A " to the above Statutory Declaration (not printed) is identical with Schedule attached to Annexure " H " printed on page 23.

Annexure " B " to the above Statutory Declaration (not printed) is identical with Annexure " D " printed on page 16.

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure " J " Copy Statutory Declaration of Muriel Norah Jackaman, dated 13th February, 1948.

Annexure " J " to Case Stated.

COPY STATUTORY DECLARATION OF MURIEL NORAH JACKAMAN.

I, MURIEL NORAH JACKAMAN generally known as Cherry Jackaman of " Darnley Hall " Onslow Avenue, Elizabeth Bay in the State of New South Wales do hereby solemnly and sincerely declare that :—

1. I am the daughter of the late Arthur Henry Davies.

2. In answer to the requisitions made by the Commissioner of Stamp Duties for New South Wales in a communication addressed to Messrs. Norton Smith & Co. I make the following :—

(1) *Question :* What were the circumstances surrounding the gift of £5025 by the deceased to his daughter and what arrangements were entered into ?

Answer : The Trustees of my grandfather's will, i.e., my father's father's will first placed a construction on the terms of that will which gave me a substantial interest thereunder and later owing to certain advice received by those Trustees my share was considerably curtailed and my father told me that he considered that I was morally entitled to the share as originally construed by the Trustees even if the legal position did not permit of my receiving it and on that account he told me he would make up to me the amount to which he considered I was morally entitled. It is this amount which he estimated to be £5,025 and which he gave to me as a present. There were no arrangements between my father and myself with regard thereto : it was a plain gift of a sum of money.

(2) *Question :* What arrangements were entered into by the deceased and his daughter at the time of opening the account in her name regarding withdrawals and payment to her of money withdrawn by him? At what intervals were accountings to be made and when were such accountings made ?

Answer : No arrangements were entered into by me with my father at the time of opening the account in question. As he was my father I naturally gave the Bank Authority to permit him to draw cheques from my account. This was a general authority not restricted in any way and was given on the understanding that he would remit money to me from time to time if I wanted it or invest any moneys which may have accumulated therein and it even permitted him to withdraw money from my account on loan to himself although at the time that certain money was drawn out by my father and used by him for his purposes I was unaware that he had borrowed it but I was quite happy that he should do so if he wanted a private loan provided it was on a business basis and that I received in due course the current rate of interest payable on such loans. The books kept by my father's secretary show that the money drawn by my

father from my account was dealt with on a business basis and that interest was payable to me.

There was no agreement about accountings but I did receive from my father a statement showing the position a little time after the sum of £5025 had been paid in to my account which showed the amount drawn out by him.

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure " J " Copy Statutory Declaration of Muriel Norah Jackaman, dated 13th February, 1948—*continued.*

(3) *Question :* What was the source of the moneys other than the £5025 lodged to the credit of the daughter's account and how and when did she acquire the assets which produced such income ? Give details.

Answer : The source of moneys lodged through the credit of my account other than the abovementioned gift by my father was a settlement under which the Trustees had a discretion to pay the income from the Trust Fund for the " Maintenance education and general support of myself " until I attained the age of thirty years." I became absolutely entitled to the Trust Fund upon reaching the age of thirty which age I reached in the year 1940.

(4) *Question :* On what grounds is it claimed that interest amounting to £2338.12.5 was legally due and payable on the debt as claimed ? There appears to be no contract *re* same. Query, any authority.

Answer : Interest is claimed by me on the debt due to me by my father on the grounds—

(*a*) That I did not agree to lend my father any money free of interest.

(*b*) That I never actually except so far as it can be implied from my giving him complete control of my bank account agree to lend him any money at all.

(*c*) My father's books and records show quite clearly that he had as my agent lent himself some money belonging to me and that he regarded it, as I would have expected him to have regarded it, as a business transaction on which I was to receive a current rate of interest.

(*d*) Alternatively, if the view mentioned in (*c*) by any chance were not accepted, I have a legal claim against my father's estate for damages for negligent handling of my affairs because as I have already said I never at any time agreed to lend him money free of interest. The amount of my damages would be the return that I could have got on the money used by my father had it been invested in the normal way and this I suggest would be equivalent to the ordinary rate of interest on loans although as this one was unsecured I might be entitled to a larger rate than my father's books showed he

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure "J" Copy Statutory Declaration of Muriel Norah Jackaman, dated 13th February, 1948—*continued.*

had allowed me and I reserve the right to claim this larger sum should my claim to the amount shown in my father's books be not recognised.

(5) *Question :* Produce daughter's pass book covering years 1938–1946 (inclusive).

Answer : This will be produced.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Oaths Act 1900.

Subscribed and declared at Sydney this thirteenth day of February One thousand nine hundred and forty-eight before me } CHERRY JACKAMAN.

A. F. FORD, *J.P.*

Annexure "K" to Case Stated.

Annexure "K" Copy Statutory Declaration of Muriel Norah Jackaman, dated 26th November, 1948.

COPY STATUTORY DECLARATION OF MURIEL NORAH JACKAMAN.

I, MURIEL NORAH JACKAMAN of 67 Elizabeth Bay Road, Elizabeth Bay, Sydney in the State of New South Wales Married Woman, do hereby solemnly and sincerely declare as follows :—

1.—That I am a daughter of the late Arthur H. Davies and a claimant on the Estate of my late Father.

2.—I have previously made Statutory Declarations setting out the facts as I understood them at the time of making the said Declarations which said Declarations were made on the Sixteenth day of July One thousand nine hundred and forty-seven, the Twenty-fourth day of December One thousand nine hundred and forty-seven and in February, one thousand nine hundred and forty-eight.

3.—Since making the said Declarations there has come into my possession an original letter dated the Second day of November One thousand nine hundred and thirty-eight from my father to me ; also an undated Memorandum from my Father to me which enclosed with it a letter from the Permanent Trustee Company dated the twenty-ninth day of May One thousand nine hundred and thirty-nine and a Statement of Account dated the Twenty-fifth day of June One thousand nine hundred and thirty-nine. A copy of the said letter omitting the irrelevant part, a copy of the said Memorandum with enclosed Statement and letter from the Permanent Trustee Company are hereunto annexed marked respectively "A," "B," "C" and "D."

4.—The documents referred to above were apparently placed by me in a Deed Box which stood in my Father's name in the Bank of New South

Wales, London shortly after I arrived in that City in April, One thousand nine hundred and forty, a fact which I had not remembered at the time of making my aforementioned Statutory Declarations. I was able to place these documents in my Father's Deed Box because at the time I held a Power of Attorney from him.

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure "K" Copy Statutory Declaration of Muriel Norah Jackaman, dated 26th November, 1948 — *continued.*

5.—Subsequent to the date of my Father's death I approached the Bank of New South Wales whilst I was in London and asked to be allowed to take out of the Deed Box any papers belonging to me as I had remembered putting certain papers there but not the details of them. The Bank refused to let me touch the Deed Box without authority from my Father's Executors or Trustees.

6.—Upon my returning to Australia in May One thousand nine hundred and forty-eight I arranged with the Permanent Trustee Company Limited, the Executor and Trustee of my Father's Estate to authorise the Bank of New South Wales to allow me or my representative access to the said Deed Box and the said Permanent Trustee Company Limited so instructed the Bank of New South Wales, London.

7.—I then wrote to my Husband who was then in London asking him to open the said Deed Box and to bring with him to Australia the whole of the contents of it. My said Husband arrived in Australia in August last and amongst the contents of the said Deed Box which he handed to me were the documents attached to this declaration.

AND I MAKE this solemn Declaration conscientiously believing the same to be true and by virtue of the Provisions of the Oaths Act 1900.

SUBSCRIBED AND DECLARED at Sydney this 26th day of November One thousand nine hundred and forty-eight Before me :— } CHERRY JACKAMAN.

T. KENNEDY, *J.P.*

Annexure "M" to Case Stated.

Annexure "M" Copy Statutory Declaration of Muriel Norah Jackaman, dated 17th January, 1949.

COPY STATUTORY DECLARATION OF MURIEL NORAH JACKAMAN.

I, MURIEL NORAH JACKAMAN usually known as Cherry Jackaman of 67 Elizabeth Bay Road, Elizabeth Bay, Sydney in the State of New South Wales, Married Woman, do hereby solemnly and sincerely declare as follows :—

1.—Other than the sum of £5,000 referred to in my father's letter to me of the 2nd November, 1938, I did not agree to lend my father any money and I only learnt of the fact that he had borrowed it on my return to Australia in 1943.

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure "M" Copy Statutory Declaration of Muriel Norah Jackaman, dated 17th January, 1949 — *continued.*

2.—Although there was no agreement between myself and my father with regard to interest, I would have expected those in Australia in charge of my money, namely the Permanent Trustee Company of New South Wales Limited, my father and Mr. Wright, his secretary, not to have allowed any money belonging to me, whether capital or income, to remain idle and that it would have been invested in some manner so as to produce some income for me, especially as the amount was not inconsiderable.

3.—With regard to the £5,000; I could have asked for this money back at any time and had I done so my father would have paid it to me and I would have expected him to have tendered me some interest on the money covering the period that he had the use of it and that he intended to pay me some interest is supported by the entry in the books kept by Mr. Wright which must have been made at my father's direction, namely that interest at the rate of $3\frac{1}{2}\%$ was to be credited to me on the amounts owing to me.

4.—With regard to the sum of £5,000, I did not regard this as a gift in the ordinary sense as I regarded it, if not legally, then morally, mine as the following facts will disclose.

Under my grandfather's Will which was proved in 1918, my Uncle Lewis was to receive the income from a certain share and on his death it was to be divided amongst all the grandchildren of which there were five; three of them being the children of my said Uncle Lewis, one the daughter of my Aunt, Mrs. Warhurst, and myself, this Deponent. The four grandchildren other than myself were to receive their shares absolutely, but I was to receive the income only from my share, the capital of which amounted to approximately £5,025. The probate of my grandfather's Will was granted in 1918 and was administered by the Executors and Trustees appointed by the Will until my Uncle Lewis died in 1936. After the death of my said Uncle Lewis I received two payments on account of income from the said capital sum. Shortly after the death of my said Uncle Lewis, the other four grandchildren considered that I should have my share absolutely the same as they had received theirs and the matter was taken up with the Solicitors who discovered a mistake in the wording of the Will. The whole matter went to Court where it was decided that my grandfather's Will was bad as it infringed the rule against perpetuities and that he had therefore died intestate. This meant that my father and his two brothers and two sisters became entitled, as next of kin, to the whole of my grandfather's estate and the grandchildren would get nothing. The five grandchildren then discussed the question of appealing from the Court's decision. Mrs. Warhurst and my father only having one child each said to their respective children that if they refrained from appealing which might only mean additional costs and might possibly not change the Judge's decision, then they would hand to their respective children that share of my grandfather's estate which would come to them and which, but for the Judge's decision, would have gone to the grandchildren. That is to say my father said to me, "If you will refrain from appealing from the Judge's

" decision, I will give you the money which you would have got had the " Judge decided that you should have received the capital sum from which " you were to receive the interest under your grandfather's Will had it been " held to be good." It will be seen, therefore, that I considered I was entitled to the £5,025 which my father ultimately got as his share of my grandfather's estate in which my Uncle Lewis had a life interest.

In the Supreme Court of New South Wales.

No. 1. Case Stated.

Annexure " M " Copy Statutory Declaration of Muriel Norah Jackaman, dated 17th January, 1949—*continued.*

5.—So far as income tax is concerned, I was domiciled in Kenya where I arrived on July 17th 1938 and where I remained with my husband until April 1940. In the latter month we went to London for my husband to join one of the services. I left London at the end of 1943 and came to Australia. During the period of my stay in London, I made enquiries about income tax and was advised that a special Section of the British Income Tax Act provided that servicemen and their wives who came to England especially to join the Crown Forces were only to be taxed in England on the amount of the salary or income earned in England plus that proportion of their income from sources outside of England which was actually brought into England. So that I was not obliged from the English income tax point of view to include in my return any interest on the moneys borrowed from me by my father as no portion of it was brought into England.

6.—So far as my taxation in Australia is concerned, I left this entirely to The Permanent Trustee Company of New South Wales Limited and my father and at the time of making this declaration I am unable to say whether any interest credited to me in the books kept by my father's secretary, Mr. Wright, was included in my taxation returns. If it was not then it was through no direction of mine and possibly through the Permanent Trustee Company of New South Wales Limited not being advised of the interest payable by my father to me. This omission could be due to one or two facts, namely that I did not know what interest, if any, was being credited or paid to me by my father and my father was under no obligation to advise the Trustee Company of the fact, although had he remembered it I feel sure he would have done so.

7.—I was married in Alexandria on the 1st July 1938 and I became thirty (30) years of age on the 22nd February 1940.

And I Make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the Oaths Act 1900.

Subscribed and declared at Sydney this 17th day of January One thousand nine hundred and forty-nine.

Signed
CHERRY JACKAMAN.

Before me :

Signed J. P.

In the Supreme Court of New South Wales.

No. 2.

Rule.

Term No. 315 of 1951.

No. 2. Rule, 10th March, 1952.

IN THE SUPREME COURT OF NEW SOUTH WALES.

IN THE MATTER of the Estate of ARTHUR HENRY DAVIES late of Sydney in the State of New South Wales deceased.

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

AND IN THE MATTER of the Appeal of Permanent Trustee Company of New South Wales Limited, executor 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.

Monday the Tenth day of March One thousand nine hundred and fiftytwo.

UPON this matter coming on to be heard this day in pursuance of a case stated under the provisions of Section 124 of the Stamp Duties Act 1920–1940 and filed herein the 20th day of November 1951 WHEREUPON AND UPON HEARING what was alleged by Mr. C. A. Weston of Queen's Counsel with whom was Mr. A. B. Kerrigan of Counsel for the Appellant and by Mr. G. Wallace of Queen's Counsel with whom was Mr. C. A. Walsh of Counsel for the Respondent THIS COURT DOTH ORDER that Issues of Fact agreed upon by the parties under Section 124 (6) of the Stamp Duties Act 1920–1940 and to be filed herein be tried before a Judge of this Court sitting in the Equity Jurisdiction without a Jury AND THIS COURT DOTH FURTHER ORDER that all findings of such Judge are to be made subject to the right of either party to argue their relevance before this Court.

By the Court
For the Prothonotary,
R. T. BYRNE,
Chief Clerk.

No. 3. Agreed Issues of Fact.

No. 3.

Agreed Issues of Fact.

1.—Was the sum of £5,025 deposited by the Testator in the Bank of New South Wales, Head Office, on 29th December 1938 a gift by him to his daughter Muriel Norah Jackaman ?

2.—Was the amount of £5,000 withdrawn by the Testator from the said account on 29th December 1938 a loan of that sum by Muriel Norah Jackaman to the Testator ?

3.—If Issue of Fact No. 2 is answered in the negative, was the said withdrawal by the Testator made in circumstances which required him to account to his said daughter for the said sum ?

4.—After the opening of the said account on 29th December 1938, did the Testator have authority to withdraw money from time to time from the said account by drawing cheques thereon, without first obtaining the approval of the said Muriel Norah Jackaman to any particular withdrawal ?

4A.—If the answer to Question 4 is Yes, did the Testator receive such authority prior to or at the time when he opened the said account, or subsequently ?

5.—Were the sums withdrawn by the Testator from the said account after the said 29th day of December 1938 until and including the 4th day of April 1943, withdrawn by him (a) with the authority of Muriel Norah Jackaman ; or (b) without such authority ?

6.—If the answer to Issue of Fact No. 5 (a) is in the affirmative, were the said sums (other than the four amounts mentioned in paragraph 19 of the Case) loans by the said Muriel Norah Jackaman to the Testator ?

7.—If the answer to Issue of Fact No. 5 (b) is in the affirmative, were the said sums withdrawn by the Testator from the said account in circumstances which required the Testator to account for the same to the said Muriel Norah Jackaman ?

8.—Was any agreement made by the Testator with the said Muriel Norah Jackaman for the payment of interest upon the said sums from the respective dates of withdrawal to the date of repayment and, if so, at what rate per annum ?

9.—Were the said four amounts, or any of them, mentioned in paragraph 19 of the Case, paid by the Testator to or at the request or on behalf of the said Muriel Norah Jackaman and if not all but only some, which of them ?

10.—Did the Testator repay any of the sums or any part thereof withdrawn by him from the said bank account to the said Muriel Norah Jackaman, or pay any of them or any part of them to any other person at her request or on her behalf and if so, which of the said sums or part thereof ?

11.—What were the motives of the Testator in opening the said account and depositing therein the sum of £5,025 and what were his intentions as to the manner in which the said account should be operated upon ?

These are the Issues of Fact agreed upon by the parties mentioned and referred to in the Rule of the Supreme Court made herein the 10th day of March 1952.

(Sgd.) NORTON SMITH & CO.,
Solicitors for the Appellant.
(Sgd.) F. P. McRAE,
Solicitor for the Respondent.

In the Supreme Court of New South Wales.

No. 4. Oral Evidence.

Muriel Norah Jackaman. Examination.

No. 4.

Oral Evidence taken before His Honor the Chief Judge in Equity.

MURIEL NORAH JACKAMAN

Sworn, and examined as under :

Mr. WESTON : You were frequently known, I think as Cherry Jackaman ?—*A.* Yes.

Q. You were the daughter of Mr. A. H. Davies, the deceased ?—*A.* Yes.

Q. When did you marry ?—*A.* On the 1st July, 1938.

Q. After your marriage you went abroad, to England ?—*A.* I was married in Africa.

Q. You went from Africa to England ?—*A.* No, I went to Kenya.

Q. Where next did you go ?—*A.* I lived in Kenya.

Q. Did you ultimately reach London ?—*A.* Yes, in 1940.

Q. Can you tell His Honor how long it was that you were out of Australia until your return ?—*A.* I was out of Australia from February, 1938 until November, 1943.

Q. During the time that you were out of Australia, leaving out a small sum of £60 for medical expenses, was your husband in such a position and so treat you that you had no need to call upon your Australian Moneys ? — *A.* That is correct.

Q. Leaving out the £60 for medical expenses, did you ever draw any moneys at all from Australia during your absence abroad ?—*A.* I did not draw any.

Q. Were any transmitted to you by your father, either out of your account or maybe out of his own moneys ?—*A.* Not for me personally.

Q. You might explain to His Honor just what you mean by not to you personally ?—*A.* There was one sum, I think, of £300 odd sent to me. I had bought something for my father in England and he reimbursed me for the money I had paid, £300 and something. That was sent to me.

Q. Do you recollect whether that sum was £385 12s. 0d. sterling ?— *A.* No, I do not.

Q. Your recollection is something in the region of £300 ?—*A.* £300 odd.

Q. You and your father corresponded, I understand, quite regularly ? — *A.* Every week.

Q. Did you keep any copies of your letters ?—*A.* Of some yes.

Q. Where are those letters ?—*A.* They are destroyed now.

Q. I presume you do not know whether your father kept any copies of letters he sent you ?—*A.* He did keep copies.

Q. What happened to those ?—*A.* The Permanent Trustee Co. found them in his office after he died.

Q. In the letters which your father sent to you, leaving out that letter about the £5,025, was any mention ever made of your moneys ? (*Objected to : argument : allowed.*)

Q. Did any of the letters which your father sent to you, leaving out those letters relating to this £5,025, give you any information as to what was happening to your moneys in that bank account which you have already mentioned ?—*A.* No.

Q. I am not sure whether I did ask you ; did your letters to him refer to that ?—*A.* No.

Q. You heard me read to His Honor the letter of your father relating to this £5,025 ?—*A.* Yes.

Q. That is in accordance with your recollection ?—*A.* Yes.

Q. You remember that incident ?—*A.* Yes.

Q. And you remember the authorities which you sent, two to the Trustee Co. and one to the bank ?—*A.* Yes.

Q. Did you know what money was being deposited during your absence by the Trustee Co. ?—*A.* No.

Q. What amount, I mean, into the bank ?—*A.* No.

Q. You knew, of course, it was income from your trust property ?—*A.* Yes.

Q. The amounts you were not apprised of from time to time ?—*A.* Sometimes I did get statements of what my income was from the settlement.

Q. What your income was or the amount paid into the bank ?—*A.* No, what the income was.

Q. You were not informed specifically how much was paid into the bank, is that so ?—*A.* No, not that I remember.

Q. I have not asked you about the Davidson Paint shares and I do not think I need because Mr. Wallace says they were bought out of your father's own moneys. Is that within your knowledge, that those Davidson paint shares were bought for you in your name by your father out of his own moneys ?—*A.* I thought they were bought out of my moneys.

Q. You did not know they had been bought, did you, until you returned to Australia ?—*A.* I think I was in Australia when they were bought, I am not sure.

Q. Did you have any conversation with your father about it ?—*A.* No.

Q. When did you learn that they had been bought in your name ?—*A.* I think he mentioned one day that he had bought some for me and I was under the impression they were bought with my money.

Q. You are not in a position to say definitely that that was so ?—*A.* No.

Q. When you came back you had a cheque book on this account ?—*A.* Yes.

Q. And you drew on it from time to time ?—*A.* Yes.

Q. Did you take any steps to ascertain what your credit at the bank was ?—*A.* No.

Q. You might perhaps explain to His Honor why you drew cheques without inquiring what your credit was ?—*A.* I drew cheques for everyday living and the statements were sent to my father's secretary Mr. Wright.

In the Supreme Court of New South Wales.

No. 4.
Oral Evidence.

Muriel Norah Jackaman.
Examination—
continued.

Q. Mr. Wright was your father's secretary ?—*A.* Yes. I just drew cheques on it. If I had been drawing too much he would have informed me. He would have seen it from the statements that were sent to him.

Q. That is your reason why you did not inquire yourself ?—*A.* I had no reason to inquire really.

Q. While you were away to whom were the bank statements sent, do you know ?—*A.* I presume to Mr. Wright.

Q. But you did not receive them ?—*A.* I did not receive them.

Q. You say you think some were sent to you in England but the balance were not ?—*A.* Not bank statements.

Q. The amount of income due to you ?—*A.* Statements from the Permanent Trustee Co.

Q. When did you first discover that your father, using a neutral word for the moment, had been using your moneys in that bank ?—*A.* About two months after his death when the estate was going through the books.

Q. Then you consulted accountants ?—*A.* Yes.

Q. And ultimately consulted Mr. Simpson senior of Messrs. Minter Simpson & Co. ?—*A.* Yes.

Q. You know in six declarations there were paragraphs describing these withdrawals as being loans by you to your father. Will you explain why you made those declarations ?—*A.* I was told by various advisers who were advising me at the time that certain moneys were owing to me from my father's estate and my accountant worked out what he thought were the amounts and, I think, helped me or prepared the first statutory declaration which I signed. One seemed to follow after the other.

Q. I do not know whether you remember—I think it was the first declaration that the accountant drew ?—*A.* That is correct.

Q. And the others were prepared by Mr. Telford Simpson were they not ?—*A.* I am not sure. There might have been one in between that was not prepared by him. I am not sure.

Q. Either the accountant or Mr. Telford Simpson prepared the declarations which you have made ?—*A.* Yes, that is correct, I think. It is a long time ago, I am afraid, and I cannot remember.

Q. That is your recollection, is it ; you cannot do more than that ?—*A.* That is my recollection.

Q. You may not be able to answer this question. With what view were your consulting, say, Mr. Telford Simpson about these moneys ? You might not have known ?—*A.* To try and get the position clarified, I suppose.

Q. Did you know the point of these declarations at which they were aimed ?—*A.* No, I did not know the point. Actually it was Mr. Shaw of the Permanent Trustee who said to me " You had better go to a solicitor " —just " go to a solicitor over that."

Cross-examination.

CROSS-EXAMINATION.

Mr. WALLACE : Have you had only the one firm of solicitors in connection with these matters ?—*A.* Yes.

Q. Would you tell me, to the best of your recollection, when did you

first see your senior counsel in the matter ?—*A.* It would be about a year, I should think, probably, or perhaps longer, or 18 months ago.

Q. Was it before or after you swore the last declaration ?—*A.* I am sorry, I do not remember.

Q. Your husband, I take it, Mr. Jackaman, was a wealthy man ?—*A.* Not wealthy, but able to——

Q. Comfortably off ?—*A.* Moderately.

Q. The fact of the matter is that, with the exception of the £300 which you spent on your father's behalf when you were in England, for which he recouped you, you had during your years in England no money from the settlement ?—*A.* That is correct.

Q. Either when you were in Kenya or in England, you received no income in fact from the settlement ?—*A.* From the date of marriage.

Q. You remember your senior counsel, Mr. Weston, referring His Honor at the opening of this matter half an hour ago to annexure " F " which sets forth the payments, or rather withdrawals, made out of this Cherry Jackaman account by your father ?—*A.* Yes.

Q. I think that shows £2,500 in 1939, £1,290 in 1940, £1,200 in 1941, £785 in 1942, and £650 in 1943, being a total of £6,425 ?—*A.* Yes.

Q. You have had a good education in life, have you not ?—*A.* Yes.

Q. And considerable money was spent on your education, no doubt ?—*A.* Correct.

Q. I suppose you know and have always known the gravity of taking an oath ?—*A.* Yes.

Q. There is no doubt that in the preparation and making of these six declarations you went before a Justice of the Peace, did you not ?—*A.* Correct.

Q. And took the Bible in your hand and solemnly declared the contents, to be true ?—*A.* I swore them to be true ? I do not think there was a Bible in signing before the Justice of the Peace. Still, I swore them to be true.

Q. Are you a substantial beneficiary under your father's will ?—*A.* I have a life interest.

Q. It is very much to your advantage that the duty be not payable on this settlement under your father's will, you realise that ?—*A.* I suppose so, yes.

Q. Indeed, you realise or you have been told, have you not, that the amount of duty at stake in this matter runs into a considerable number of thousands of pounds ?—*A.* Yes.

Q. Would it be correct to say that when you were making this series of declarations your mind was concentrating on having the loans, as you call them in your declarations, subtracted from the dutiable value of the estate so as to make it smaller ?—*A.* No, I was trying to state what I thought were facts at the time.

Q. Let me see if I can refresh your memory. The accountant advised you to see a firm of solicitors in the first instance ; is that the sequence ?—*A.* No, I saw an accountant.

In the Supreme Court of New South Wales.

No. 4. Oral Evidence.

Muriel Norah Jackaman. Cross-examination — *continued.*

Q. And he took certain action with you and ultimately advised you to go to solicitors ?—*A.* No.

Q. I am sorry, I thought you said that ?—*A.* I said Mr. Shaw of the Permanent Trustee advised me.

Q. The Trustee Co. advised you to go to solicitors, when you were seeing Mr. Shaw—no doubt you saw him on several occasions about this period ?—*A.* Very many.

Q. You were discussing with him, were you not, these loans made to your father ?—*A.* Yes.

Q. And as between you and Mr. Shaw shortly after your father's death these moneys were referred to as loans and not otherwise.

HIS HONOR: Referred to by whom ?

Mr. WALLACE: Referred to by both the deponent and Mr. Shaw to her.

Mr. WESTON: I object to the question then. What Mr. Shaw says does not bind this lady.

Mr. WALLACE: I will take it step by step.

Q. Would this be the position, that you had several conversations with Mr. Shaw relating to your father's and your affairs shortly after your father's death ?—*A.* Very many.

Q. Your father died in November, 1946 ?—*A.* No, my father died in January, 1946.

Q. I suppose you would agree that in January, 1946, your recollection of the matters and activities which had taken place between you and your father would have been much fresher and more reliable than your recollection today. That is fairly obvious isn't it ?—*A.* Yes.

Q. The passage of time, six years, tends to dim the memory, doesn't it ?—*A.* Yes.

Q. And isn't this the position, that in those many discussions which took place between you and Mr. Shaw you referred to these payments as loans and so did he, with your acquiescence ?—*A.* I do not think I really discussed that with Mr. Shaw. My conversations with Mr. Shaw were on general matters in my father's estate.

Q. Did you not yield me an answer a few minutes ago, just before Mr. Weston objected, which indicated your concurrence with the suggestion that loans were discussed, these moneys were referred to as loans ? (*Objected to—allowed.*)

Q. Did you not a few minutes ago concede to me that these moneys had been discussed between you and Shaw as loans ?—*A.* I was making a claim against the Permanent Trustee. I was discussing them from that angle.

Q. That is not quite an answer to my question, but I will press on. I will ask you this question in a very direct way. Will you deny on your oath here today that when you were discussing these matters with Mr. Shaw you referred to these payments of money or these takings of money by your father out of this account as loans ?—*A.* I might have mentioned the word, yes.

Q. By that answer you mean you did mention the word, don't you ?—*A.* Probably.

Q. And you will now concede that in all those discussions you and Shaw, with your acquiescence, treated these moneys so received by your father as loans : Isn't that the truth ?—*A.* I do not know what Mr. Shaw did.

Q. What did you say throughout those discussions ; did you not consistently refer to them as loans ?—*A.* If I did then I was probably in error in doing it.

Q. I am not asking you if you were in error ; I am just seeking the fact. Will you not admit now ?—*A.* Yes, I admit that I wrote in my declaration——

Q. Is it not the truth in 1946 when you were discussing these payments with Shaw you referred to the payments as loans and not otherwise ?—*A.* I am sorry, I do not know that I discussed them with Shaw as loans.

Q. I beg your pardon ?—*A.* I do not know that I discussed them as loans with Shaw.

Q. Didn't you admit a moment ago that probably you did call them loans ?—*A.* Probably.

Q. There is not the slightest doubt, is there, that you and your father were on very affectionate terms with one another ?—*A.* Very.

Q. You had complete trust and confidence in him and he had great affection for you ?—*A.* Yes.

Q. Were you the only daughter ?—*A.* Yes.

Q. And he always treated you as a kind and affectionate father ?—*A.* Very.

Q. This, I think, follows from something you said earlier would it not, that by and large from the time of making that settlement by your father in 1924 up to the time of his death you did not receive any moneys under the settlement : That is substantially accurate, isn't it ?—*A.* Yes.

Q. And I put this to you, that during your father's lifetime—listen carefully, will you please—during your father's lifetime and without, shall I say, the benefit or whatever you like to call it, the prompting or suggestions of any outside people or persons, if anyone had suggested to you that your father had misappropriated any of your moneys you would have hotly resented it would you not ?—*A.* Yes.

Q. And in your father's lifetime, in respect of this account, you were well content to allow your father, whose bounty you had received, whose affections you had, to do whatever he pleased with that account ; is that the truth ?—*A.* I allowed him to operate on that account.

Q. I suppose that is an answer thank you. And in any such way as he might in his absolute discretion think fit ? (*Objected to : argument : allowed.*)

Q. You were well content during his life to allow your father to operate on the account in such way as he thought fit, weren't you ?—*A.* Yes.

Q. And, as a matter of fact, you did not take the slightest interest in that account or what your father was doing with it, did you ?—*A.* No.

In the Supreme Court of New South Wales.

No. 4. Oral Evidence.

Muriel Norah Jackaman. Cross-examination—*continued.*

Q. I want to come to your declarations. You remember telling me a little while ago that you realised the gravity of swearing evidence on oath ?—*A.* Yes.

Q. Swearing declarations. I want to ask you—just at random I will take one passage from one of these declarations. I will take the declaration marked " L " attached to the stated case. You swore a declaration on the 24th December, 1947—you can assume that date to be correct ?—*A.* Yes.

Q. Which, I think, was the second, I hand you the original statutory declaration sworn by you in this matter on the 24th December, 1947, sworn in connection with the investigation of the stamp duty payable (*handed to Witness*). Would you look at para. 8—" During this period and until " November, 1943 I was living abroad with my husband who is maintaining " me and consequently I had no use for any income arising from my " Australian investments. Accordingly my father invested this money " on my behalf in whatever manner he thought fit." Was that the truth when you swore it ?—*A.* I thought it was the truth at the time.

Q. Para. 9—" During this period my father informed me of his " activities on my behalf and that he was borrowing my money and I fully " acquiesced and approved thereof." Was that the truth when you swore it ?—*A.* I am just looking to see what time this is referring to. " During " this period," what period ?

Q. Would you prefer to read it all through before you answer the question ? With His Honor's permission I suggest you go right through the declaration ?—*A.* It is what I believed to be true at the time or I would not have sworn it, so there is no use reading it through.

Q. There may be some point yet. Your answer is, at the time you swore this declaration you believed that to be true ?—*A.* Yes.

Q. And now you believe it to be untrue, is that the position ?—*A.* At the time I swore this——

Q. No, do you now believe it to be untrue ?—*A.* Yes.

Q. By the way, it is a fairly clear unequivocal statement would you not agree ?—*A.* Yes.

Q. At the time you swore it you knew that was going to the Stamp Commissioner ?—*A.* Yes.

Q. And you swore it, I suggest, for the purpose of ensuring that these moneys would be deductible from the value of the deceased's estate because they were moneys due and owing to you ; that is obvious, isn't it ?—*A.* I believed them to be true at the time I swore them.

Q. You concede, do you not, that the reason why you were making these declarations, the first five of them, was because you were endeavouring to establish with the Commissioner that these were loans and therefore deductible from the dutiable value of the estate of your father from which you were a beneficiary ; is not that perfectly obvious to you ?—*A.* Yes, possibly.

Q. Not only possibly but, I suggest, indubitably ; is not that true ?—*A.* I say possibly.

Q. That is as far as you will go ?—*A.* Yes.

Q. Then I suggest to you that later there came a stage when it was revealed to you that far bigger issues were at stake and it was far more important to get the settlement excluded from the dutiable estate than a few thousand loans ; that became known to you, didn't it ?—*A.* Yes.

Q. And it was not until that became known to you that you changed your tune and these were no longer loans ; is not that the clear position ?—*A.* No.

Q. Reverting to para. 9 of your declaration on which I was examining you a few moments ago, you said the first sentence you believed to be true at the time you swore it. Do you remember saying that ?—*A.* The first sentence of para. 9 ?

Q. Yes ?—*A.* Yes.

Q. Let us examine that. You said, " During this period my father " informed me," etc. " and that he was borrowing my money." If you believed that to be true, what were you going on when you believed it to be true, what were you relying on ?—*A.* I should think the letter he wrote me—when was it—December, 1938, wasn't it, when he opened the account ?

Q. Anything else ?—*A.* No, that was all I had to go on.

Q. You have told His Honor that your father wrote quite a number of letters to you during this period didn't he ?—*A.* Every week.

Q. So he wrote hundreds of letters to you ?—*A.* About 70 I think.

Q. Over a number of years ?—*A.* Yes.

Q. Are copies of those all down at the Permanent Trustee Co. today ?—*A.* I do not know.

Q. Have you ever seen the copies ?—*A.* Yes, I have seen them.

Q. When did you last see them at the Permanent ?—*A.* Three or four years ago perhaps.

Q. Who was it helped you to prepare this declaration, who drafted this declaration ?—*A.* I do not know, I am sorry.

Q. Was it either Mr. Shaw or some accountant or the solicitor ?—*A.* What date is this ?

Q. The 24th December, 1947 ?—*A.* It would be the solicitor, I should think, at that date. Wait a minute—December, 1947. I should think it is the solicitor, but I am not sure.

Q. You do not suggest, do you, that, with your father writing every week, only on one occasion did he tell you that he was borrowing money from you ?—*A.* Yes.

Q. Only on one ? So, if we get these copies, if we are able to get them, you are confident that none of them refer to these moneys as loans ?—*A.* I do not think they do. Not to my recollection. I had one or two occasions when he mentioned my affairs broadly, but not with borrowing something.

Q. It is perfectly obvious at that time, December, 1947, you had no doubt that they were loans, did you ?—*A.* I thought they were loans at the time.

Q. When was it you first changed your belief on that aspect ?—*A.* I do not remember.

In the Supreme Court of New South Wales.

No. 4. Oral Evidence.

Muriel Norah Jackaman. Cross-examination. *continued.*

Q. Could you assist me in any way by trying to compute approximately when it was you changed your belief ?—*A.* Yes, I think it would be when I was asked when I had told my father that I would lend him these moneys and I said I had never told him.

Q. When was it you were asked that ?—*A.* With Mr. Simpson in his Office, I think it was.

Q. How long ago was that ?—*A.* I do not remember, three or four years. I am sorry, I do not remember the times. It might be two years.

Q. Let me ask you this with regard to your declaration of the 24th December, 1947. In para. 11 thereof—would you be good enough to look at it ?—*A.* Yes.

Q. You refer to some books of your father's containing certain pencil notes in the handwriting of your father's secretary, do you remember that ?—*A.* Yes.

Q. It even refers to the crediting of interest and you had seen that entry before you made this declaration, hadn't you ?—*A.* Yes.

Q. Is it now the position that you regard that entry as false or inaccurate ?—*A.* The entry in his books ?

Q. Yes ?—*A.* It is not false, no.

Q. Inaccurate ?—*A.* It could be inaccurate.

Q. You are now, through your counsel, claiming that your father misappropriated your moneys, aren't you ?—*A.* Yes.

Q. That is what you are claiming in this Court. You must realise, therefore, do you not, that if your present claim is correct these entries were fraudulent entries, part of a scheme to deceive, entries about loans and interest in your father's books. You must see that that is logical, isn't it ?—*A.* Who was trying to deceive who, though ?

Q. Your father keeping a record in his books, wasn't he, of loans and interest at a time when you now claim he was misappropriating, stealing your money. That is what it boils down to, doesn't it ?—*A.* I do not quite see who was trying to deceive who.

Q. You know this, that in his books and in writings of his secretary—you have told us his name was Mr. Wright—there are references to these loans as loans, aren't there ?—*A.* I do not know whether they are written in as loans or not in the books.

Q. Look at your own declaration, para. 11. Let me remind you—" In my father's books there is a pencil note in handwriting ' Credit interest " ' on these loans ' " ?—*A.* Yes, that is correct.

Q. If your present claim is correct that your father was misappropriating, he was either deceiving Mr. Wright or the two of them were putting down a record of something which was false, weren't they ?—*A.* I do not know.

Q. They cannot be loans and misappropriations both, can they ?—*A.* No.

Q. At the time your father was taking the moneys, if they were making records of them in books as loans when you believed them to be misappropriations, then the references to loans were fraudulently and falsely made, weren't they ?—*A.* Probably.

Q. You are saying now of your father and Mr. Wright that they were making false and fraudulent references in their books in order to cover up stealing of your money ?—*A.* No not wittingly they would not be.

Q. Misappropriation means knowing, the wilful taking of other people's moneys. Do you follow that ? I want you to assume that ?—*A.* Yes.

Q If your father was wilfully and knowingly stealing your money he could not unconsciously and innocently make a record of it being a loan, could he ? The two are quite inconsistent, aren't they ?—*A.* Yes.

Q. Therefore you will agree, and I want to test it later, that if your present claim is correct, not only did your father misappropriate your money but he deliberately made or caused to be made false entries in his books. That is obvious, isn't it ?—*A.* Well, yes.

Q. You mean yes, don't you ?—*A.* All right, yes.

Q. Knowing your father over all the years, knowing his attitude towards you, knowing what you meant to him and he meant to you, do you for one moment believe that your father would steal moneys from you and make false entries in the books to cover it up ?

Mr. WESTON : Would you put that in two parts ?

Mr. WALLACE : Do you believe that your father would misappropriate or steal your money ?—*A.* No, I did not think he would, no.

Q. Do you believe your father would make a false entry in his books in order to cover up thefts ?—*A.* I would not have thought so.

Q. You would think such a thing quite hopelessly improbable, wouldn't you ?—*A.* I would think so.

Q. Your father was an honest man, wasn't he ?—*A.* Yes.

Q. I will come to another declaration. Would you be good enough to look at a declaration sworn by you on the 16th July, 1947, being, I think, the first of this series ? (*Handed to witness.*) This is annexure " H " to the case. Would you kindly read the whole of that declaration through before I begin to ask you questions ?—*A.* Yes, I have read it.

Q. First of all, I invite your attention to the fact that you have sworn that the £5,025 was a gift. That is Question 1 of the issues of fact. I do not think Mr. Weston disputes it was a gift. In the second paragraph you have stated that the £5,000 was lent by you to your late father and that also seems to be common ground. Do you follow that ?—*A.* Yes.

Q. The third paragraph—I will at least, ask you the first—it shows that your mind was being directed towards stamp duty issues, wasn't it ? —*A.* Not then, no.

Q. You knew the declaration was being prepared in connection with your father's estate ?—*A.* No.

Q. Just think ?—*A.* No.

Q. Who prepared this declaration ?—*A.* My accountant, Mr. Salenger.

Q. Why did he prepare it ?—*A.* Because we considered that my father's estate owed me money. It was the first time we had worked it out.

Q. Why did you have to make a declaration ?—*A.* Because the trustees would not just hand money over to me because I said they owed it to me.

In the Supreme Court of New South Wales.

No. 4. Oral Evidence.

Muriel Norah Jackaman. Cross-examination—*continued.*

Q. Have you got a good memory, by the way ?—*A.* Moderate.

Q. Let me just see whether you will maintain that recollection. Would you go with me to para. 3 ? Do you see how it reads, the second sentence, " It was therefore evident that his intention was to credit me " with interest and therefore bona fide possession and enjoyment of the " £5,025 gift by my late father to me in December, 1938 and subsequently " lent by me to my late father in December, 1938 was assumed by me." Do you follow that ?—*A.* Yes.

Q. Was it within your knowledge that that contains wording identical word for word with a certain section of the Stamp Duties Act ?—*A.* No, I do not know.

Q. If I were to tell you and ask you to assume that it does, does that not refresh your memory that whoever drafted that declaration drafted it in connection with the stamp duty aspect of your father's affairs ?—*A.* I do not think they did.

Q. It could have been, though, couldn't it ?—*A.* Anything could be.

Q. It is quite possible in this case ?—*A.* No, I do not think so, not in this particular declaration.

Q. What makes you so confident that Mr. Shaw or Mr. Salenger drafted this one ?—*A.* Because I went to him to try and find out about these moneys that my father's estate, I thought owed me. He was my accountant and he worked it out. I thought he drafted it because it follows this is his at the back.

Q. Was this for presentation to the Trustee Co. ?—*A.* Yes.

Q. Why then would you insert para. 10, because they would know all about that, " Income Tax returns were regularly lodged by my taxation " agent, the Permanent Trustee Co." Why would you address them with such a paragraph ?—*A.* My accountant was probably trying to fill in all the facts.

Q. Don't you realise that would be more apposite if you were addressing a third person, such as the Stamp Commissioner, a paragraph such as para. 10 ?—*A.* I think he probably was trying to cover all the facts.

Q. Take para. 6, " The settlement was executed by my father the " trustees thereof being the Permanent Trustee Co. of N.S.W. Ltd." Why should you put such a paragraph as that in a document which you now say was prepared to give to the Trustee Co. : would not that be redundant ? —*A.* It is the same one as para. 10, isn't it ?

Q. Would you realise that in para. 3 and 4 you make express reference to these moneys having been loaned ? Take para. 3 ?—*A.* Yes.

Q. " The question of paying me interest on moneys advanced by me, " to him had never been discussed." Do you follow that ?—*A.* Yes.

Q. Whilst in para. 4 you attach hereto and mark it as Schedule A " Details of all moneys received by my late father as loans from me." Did you believe that to be true when you swore the declaration ?—*A.* I would have believed it to be true or I would not have sworn it.

Q. Do you see the annexure ?—*A.* Yes.

Q. " Amounts due to Mrs. Jackaman," and you follow there a long list of moneys and then in the second main column set out the period of time and the amount of interest calculated, apparently, at $3\frac{1}{2}\%$?—*A.* Yes.

Q. Your Justice of the Peace had that in front of him when you were swearing it and in fact you signed it yourself ?—*A.* Yes.

Q. On this 16th July, 1947 you were representing on your oath that these were all loans, weren't you ?—*A.* Yes.

Q. And you now say that you were mistaken ?—*A.* Yes.

Q. What makes you think you were mistaken and your father did this unconscionable thing ?—*A.* What makes me think ?

Q. What makes you think now that you are mistaken and, far from being loans, they were thefts or misappropriations of your moneys ?—*A.* I never authorised him to borrow any money from me. I never believed he was borrowing money for his own use from me.

Q. When did you suddenly realise that ? In the light of these declarations when did you suddenly realise that and become prepared to swear on your oath that your father stole from you ?—*A.* When I realised I had never told him he could take any moneys from me.

Q. Just because somebody pointed that out to you did you at once become ready to jettison these declarations and to make these charges against your father so as to save duty ?—*A.* No, it was pointed out and had to be understood by me. I am not very knowledgeable on these things.

Q. Is it your belief now that because you did not expressly authorise them as loans therefore your father must have misappropriated the money ?—*A.* He took moneys and used them for his benefit without my knowing it.

Q. You have actually made a claim against the estate for these amounts, haven't you ?—*A.* I did, yes.

Q. You formally lodged a claim for moneys owing to you because of moneys lent and not repaid by your father ?—*A.* Or moneys taken.

Q. Moneys lent. You made the claim as money lent, didn't you ?—*A.* I do not know what I claimed from them exactly. I said moneys owing to me. I do not know if I actually said lent or taken from me.

Q. And you actually claimed interest on account of moneys lent, did you not ?—*A.* I claimed interest on moneys he had of mine.

Q. I just want to take you quickly through one or two other matters. May I just invite your attention now to annexure " J " ? Would you be good enough to look at annexure " J "—take that and glance through it before I begin to ask you questions ? (*Handed to Witness.*)

Mr. WALLACE : I would not like it thought because I am asking this lady questions about interest that I concede for one moment that interest was part of the transaction.

HIS HONOR : I thought you were asking her to indicate that her view was that it was a loan.

(Short adjournment.)

Mr. WALLACE : *Q.* At least it follows clearly from your evidence, does it not, that never at any time during your father's life did you ever ask for

In the Supreme Court of New South Wales.

No. 4. Oral Evidence.

Muriel Norah Jackaman. Cross-examination—*continued.*

interest on these moneys nor at any time during his life did you demand repayment of these moneys ?—*A.* No.

Q. Nor at any time during his life did you expect interest on these moneys whether they were loans or misappropriations ?—*A.* I do not know about these moneys.

Q. The next matter is this—I had invited your attention to your statutory declaration of 13th February, 1948, being annexure " J." This is two years after your father's death we are up to now, aren't we, the 13th February—over two years after your father's death ?—*A.* Yes.

Q. Would you be good enough to go to para. 2—" Question 2 "— these are requisitions by the Stamp Duties Commissioner, do you follow ?—*A.* Yes.

Q. So there is not the slightest doubt that as regards this declaration at all events your mind was on the death duty position, wasn't it ?—*A.* Yes.

Q. I put this to you, that at this time you were intent in relation to the Stamp Commissioner on reducing the dutiable value of the estate by the amount of these payments on the basis that they were loans ; isn't that clear ?—*A.* Yes, they say so here.

Q. Over two years after your father's death, and you gave in answer to the following question, namely, " What arrangements were entered into " by the deceased and his daughter at the time of opening the account in " her name regarding withdrawals and payment to her of money withdrawn " by him ; at what intervals were accountings to be made and when were " such accountings made " the following answer, did you not—I will leave out irrelevant parts—" This was a general authority not restricted in any " way and was given on the understanding that he would remit money to " me from time to time if I wanted it or invest any moneys which may " accumulate therein and it even permitted him to withdraw money from " my account on loan to himself although at the time that certain money " was drawn out by my father and used by him for his purposes I was " unaware that he had borrowed it, but I was quite happy that he should " do so if he wanted a private loan, provided it was on a business basis " and that I received in due course the current rate of interest payable on " such loan." Do you remember that ?—*A.* Yes.

Q. Did you believe that to be true when you swore it ?—*A.* Yes.

Q. You now believe it to be inaccurate, do you ?—*A.* Yes.

Q. What has made you form the view that is inaccurate ?—*A.* When I realise that they could not be loans unless I told him he could borrow money, which I have never done.

Q. When did you realise that ?—*A.* On going through it and looking into the affairs generally.

Q. Prompted by somebody, perhaps ?—*A.* Probably pointed out by different people, yes, advisers of mine.

Q. Again I will ask you. Your change of view first came when the question of including £38,000 under the settlement in the notional value of your father's estate arose fairly and squarely. Is that true or not ?—*A.* The change of view came when various things were pointed out to me, yes.

Q. About the settlement ?—*A.* Everything generally.

Q. About the settlement also ?—*A.* The settlement would be included.

Q. Then you say this : in this very declaration in answer to question 4 you say " (d) Alternately, if the view mentioned in (c) by any chance is not " accepted "—(c) is that it was a loan and that is still your main view— " if by any chance it were not acceptable I have a legal claim against my " father's estate for damages for negligent handling of my affairs because, " as I already said, I never at any time agreed to lend him money free of " interest." So even at that stage you were only putting a somewhat modified view of your present claim as an alternative to your main claim, weren't you ?—*A.* Yes.

Q. Finally I will ask you to look at your statutory declaration of 26th November, 1948, being annexure " K " (*handed to witness*). Would you have a glance through that, please, to refresh your memory ?—*A.* Yes.

Q. Before I take you to the annexures, K/2 in particular I would like to ask you this : when you were preparing this declaration you did not in fact nor did you intend, did you, to cast the slightest doubt on your father's bona fides when writing the matters in K/1 and K/2, the annexures ?—*A.* Which is K/1 and 2 ?

Q. I will just show you the annexures. I would like you just to have the briefest glance at the first annexure, a two-page document, but I would like you to read a little more carefully the second document marked Annexure " B " (*handed to witness*) ?—*A.* The memorandum you want particularly ?

Q. Yes, the last one marked " B," a single page document ?—*A.* Yes.

Q. Before I ask a question on that memorandum " B," which we know as K/2, I want to ask you a preliminary question. Do you remember a few minutes ago you told me that in fact you received no moneys whatever from the time the settlement was made in 1924 up to the date of your father's death, out of the settlement ? You remember that, don't you ?—*A.* I did not quite say that, I don't think.

Q. With the exception of £300 we know of ?—*A.* And there was £1,200 Australian sent to me in 1938.

Q. What occasion was that ? I do not remember that. There was a £1,200 sum sent in 1938, was there, by your father ?—*A.* No, by the trustees.

Q. From the time of the opening of the account onwards you received nothing out of the settlement except the £300 which we know about ?—*A.* I am sorry, but I do not think the £300 came out of the settlement.

Q. I omit it altogether because it has nothing at all to do with the case. Will you agree with this, that you knew from your discussions with your father and writings passing between you that the whole arrangement in relation to that settlement was such that he wanted to have and retain practically the whole of the income therefrom during his life and you were to get the capital sums when he died ?—*A.* No.

Q. Then we will go to memorandum " B." You see your father has written you material about this account and the £5,000 etc., hasn't he ?—*A.* Yes.

In the Supreme Court of New South Wales.

No. 4. Oral Evidence.

Muriel Norah Jackaman. Cross-examination — *continued.*

Q. And you do not suggest that at the time your father wrote this he was in any way whatsoever trying to deceive you in what he wrote here ?—*A.* No.

Q. You agree that this faithfully represent his wishes and views and, so far as it relates to facts, it is true to the best of your father's knowledge ; you agree with all that ?—*A.* Yes.

Q. He says in the fourth paragraph, having dealt with the £5,000 and so on, and having in the last two lines of the third paragraph said, " Together " with refund of £750, £150, £200, £300 to myself and an amount of 5s. for " a cheque book "—in the fourth paragraph he says " The reason why " I opened the account when I did was that this £5,025, a gift from me, " would be free of probate if I lived beyond three years of the date. All " these withdrawals in my books naturally stand as a credit to you which, " in the event of my dying, my estate would have to pay them back before " my nett worth for probate purposes was assessed." You remember reading that at the time, don't you ?—*A.* Yes.

Q. And being an educated woman you had some knowledge of what it meant, didn't you ?—*A.* Yes.

Q. Then he goes on " It is necessary for these moneys to be ' loaned ' " to me so that I can make the advance to you through my London account " per medium of letters of credit and such like. By doing it this way it " removes any necessity for you to advise anyone you have an income " because by law a father can legally provide his children with living " expenses. Of course, when I see you I can go further into details but " I guess you can understand there is no need at present for you to know. " In fact, the less you know the better in case you are asked any questions. " The whole thing in fact is a gift from me and not an income." You understood the tenor of that when you read it, didn't you ?—*A.* Yes.

Q. Having told me a moment ago that you now say your father was not in any way being deceptive but was giving you with complete frankness the real position in that document, do you now still say that your father stole money from you ?—*A.* I say he misappropriated money.

Q. In the light of that document you are still claiming he misappropriated it, are you ?—*A.* Yes.

Q. And you did see him before he died, didn't you ?—*A.* Yes.

Q. After writing that document ?—*A.* Yes.

Q. And saw a good deal of him, didn't you ?—*A.* A lot.

Q. And continued on affectionate terms with him ?—*A.* Yes.

Q. And discussed, amongst other things, from time to time, this account ?—*A.* No.

Q. Will you just look at memorandum " A," the two page one ?—*A.* Yes.

Q. Do you see the third paragraph there, beginning, ' I do not " anticipate this matter "—do you follow that ?—*A.* Yes.

Q. " When it is I propose to deal with it in such a way that the principal " will pass into your account out here, myself in the meantime benefiting " by any interest being made." Did you understand " Benefiting by any

" interest being made " to refer to his father's estate ?—*A.* I do not know what——

Q. Did you understand this from that writing, that he was going to get the benefit of the share of his own father's estate and ultimately you were to get the capital of it ; he was to receive the benefit of any interest which might accrue from his interest in his father's estate but ultimately you would get what he thought morally belonged to you ?—*A.* Yes, he says so in the letter I think.

RE-EXAMINATION.

Mr. WESTON : *Q.* You said—I will leave out the point of time to which you were referring—that you would have felt a resentment had anyone suggested to you that your father was misappropriating moneys ?—*A.* I would.

Q. Did that position, that is to say your attitude to such a charge, change ?—*A.* No, I still resent it really, but it changed—I think he did take moneys from me which he should not have taken from me ; my attitude changed in that way.

Q. If anyone had said that to you after these facts were known, would you resent it ?—*A.* I do not know about resent it, but I think he did take moneys. I realised after he did take moneys that I had no knowledge he had taken and I do not think he should have taken.

Q. There is annexure " L." Have you the statutory declaration " L " before you ?—*A.* No, I haven't got it. (*Annexure " L " handed to witness.*)

Q. Look at para. 9, the first sentence, " During this period my father " informed me of his activities on my behalf." By what means ?—*A.* That memorandum I was looking at I think was the only one I ever had from him about it.

Q. Did you get that memorandum in England ?—*A.* I got it when I was in Kenya.

Q. Which memorandum do you mean, because there are at least two called " Memorandum " ?—*A.* " B " it was there.

Q. That is described as K/2. Are the activities mentioned in that memorandum " B," K/2, the only activities you referred to or meant to refer to in para. 9 of this declaration ?—*A.* Yes, because they were all I ever had from him.

Q. Did you mean it to include withdrawals of moneys by your father subsequent to the withdrawal of the £5,000 ?—*A.* No, because I did not know he was withdrawing money.

Q. This might be general—" He informed me of his activities." You now tell His Honor you did not know of the withdrawals except the £5,000 and the activities you had in mind when you swore that declaration were the initial arrangement ?—*A.* This would refer to that document there I think.

HIS HONOR : *Q.* But this document shows other withdrawals, does it not ?—*A.* I am sorry.

Q. This document shows total withdrawals of £6,400 ?—*A.* Yes, I think it did.

In the Supreme Court of New South Wales.

No. 4. Oral Evidence.

Muriel Norah Jackaman. Re-examination—*continued.*

Q. And the only money that went in, according to this document, was £5,025 of your father's own money which was intended as a gift or intended as a replacement of what you had lost because of the decision with regard to your grandfather's estate ?—*A.* Yes.

Q. And £1,552 which was income under the settlement ?—*A.* Yes. I do not know what the other withdrawings shown there really mean.

Q. They are described as refunds ?—*A.* That does not make sense to me, I am afraid. I do not know what that means. I never had money sent over when I was living abroad.

Mr. WESTON : *Q.* I want you to look at that memorandum K/2, " B," (*handed to witness*). Will you tell His Honor do you think you fully understand the last three paragraphs ? Read them carefully ?—*A.* The last three paragraphs ?

Q. Yes. Take them one by one. I do not think I need trouble you about the first of the last three. Do you understand why your father or whoever wrote this letter on his behalf said " It is necessary for these " moneys to be 'loaned' to me so that I can make the advance to you through " my London account per the medium of letters of credit and the like." Have you the least idea why " loaned " is put in inverted commas ?—*A.* No, none.

Q. Do you understand the motive now, or did you, of the last paragraph, " by doing it this way "—that is to say by " loaning," which is not the same, I suggest, as loans without inverted commas—" by doing " it in this way it removes the necessity for you to advise anyone you have " an income because by law a father can legally provide his children with " living expenses," etc. He did not in fact after you left Australia, give you any living expenses at all, did he ?—*A.* No.

Q. Nor did he remit to you abroad any of your income ?—*A.* No.

Q. " Of course, when I see you I can go further into details." Did you understand what this meant " but I guess you can understand there is no " need at present for you to know " ?—*A.* No.

Q. Did you understand what this meant " or the reason behind it. " In fact, the less you know the better in case you are asked any questions." Did you understand what that meant ?—*A.* No.

Q. Did you understand what questions your father was alluding to or what possible questions he was alluding to ?—*A.* I suppose taxation. I do not know, that is what I would assume.

Q. " The whole thing in fact is a gift from me and not an income." Of course, apart from the £5,025 you told His Honor there was no gift to you ?—*A.* I think the war upset—the war came. I would have seen him perhaps and had them explained sooner except for the war.

Q. Anyway, your present recollection is that you did not understand those three paragraphs fully ?—*A.* I do not. The first is fairly clear, the £5,000.

Q. The last two you say you do not think you understood them fully when you received this document and you do not understand them now ?—*A.* I do not know.

Q. Have you got before you statutory declaration " H " ?—*A.* No, " L " and " K " I have.

Q. Would you look at " H " (*handed to witness*).

MR. WESTON: Might I as a matter of convenience during re-examination tender copy letter from the Chief Trust Officer of the Permanent Trustee Co. to Mrs. Jackaman ? It is directed to this—Mr. Wallace cross-examined to suggest that this declaration could not have been prepared from internal evidence by the Trustee Co. This letter, if Your Honor admits it after my friend has seen it, indicates quite clearly that the Trustee Co. did for some reason propound six questions which are covered by these answers 5 to 10.

(Above letter dated 24th June, 1947 tendered and marked Ex. A ; the following portion was read :

" 3. To satisfy the requisition by the Commissioner of " Stamp Duties for full particulars of your claim and for evidence " of proof of the debt, you should be requested to make a statutory " declaration for submission to the Commissioner setting out " particulars of the moneys advanced by you to your late father " and of the respective dates of such advances and of the " arrangement for payment of interest on the loans, excluding " the amount of £5,025 abovementioned.

" They have also advised that the following questions should " be submitted to you :

" (a) What did the amounts refunded to the late Mr. Davies " refer to in the statement of account forwarded by him " to you with the memorandum sent with his letter dated " 28th June, 1939 represent ? This refers to items " shown as ' Refunded to Mr. A. H. Davies ' on " 22nd February, 14th March and 20th May, 1939 and " amounting to £150, £200 and £300 respectively.

" (b) Was any settlement executed in your favour ?

" (c) Did your late father make any gifts to you ?

" (d) Did you lend any money to your late father ?

" (e) Did he operate on your bank account under a power of attorney or authority signed by you ?

" (f) Did you make any income tax returns ? ")

Q. Would you look at " J " please (*handed to witness*) ? I want you to look at your answer to (2) and I will read part of that and then put a question to you. " No arrangements were entered into by me with my " father at the time of opening the account in question. As he was my " father I naturally gave the bank an authority to permit him to draw " cheques on my account. This was a general authority not restricted in " any way." Are you referring to the written authority to the bank ?—*A.* Yes.

Q. And no other authority ?—*A.* No.

In the Supreme Court of New South Wales.

No. 4. Oral Evidence.

Muriel Norah Jackaman. Re-examination—*continued.*

Q. " And was given on the understanding he would remit moneys to " me from time to time if I wanted it." You say " on the understanding." Was that ever expressly mentioned ?—*A.* No.

Q. It is your view of the effect of the authority you gave to the bank, is it ?—*A.* Yes.

Q. And nothing else ?—*A.* No.

Q. " Or invest any moneys which may have accumulated therein." That is the same, that is your view of the effect of that authority ?—*A.* Yes.

Q. " And it even permitted him to withdraw money from my account " on loan to himself." Is that your view—is this declaration expressing your view of the authority to the bank ?—*A.* Yes, he had a full authority.

Q. I want you to attend more particularly. Is the justification for you saying he could lend himself money simply that authority given to the Bank of N.S.W. ?—*A.* Yes.

Q. And nothing else ?—*A.* No.

Q. Would you look at K/1, " A " ?—*A.* Would that be his letter to me ?

Q. Yes, of the 2nd November ?—*A.* Yes.

Q. The third paragraph—" I do not anticipate this matter although " settled by the Judge will be cleaned up for another five or six weeks, " but when it is I propose to deal with it in such a way that the principal " will pass into your account out of here, myself in the meantime benefiting " by any interest being made." What did you understand " in the meantime " to mean ?—*A.* That he would be getting the benefit while I was taking——

Q. What is " the meantime "—what is the beginning and end of the meantime, did you think ?—*A.* I do not really know that I thought about it very much.

Q. Did you think that Mr. Wallace has suggested to you, that that meant he was to have the interest on this sum of £5,025 until he died and then you were to get the principal ; did you understand that ?—*A.* Yes, I thought I would get some benefit out of it.

Q. That is not quite an answer to my question. I will put it two ways. One view of that may be that the minute the money got into the bank you would have a benefit for your capital and whether you got interest from the bank would depend on whether it was fixed deposit or current account ?—*A.* Yes.

Q. It has been suggested clearly, I think by Mr. Wallace that he intends to argue that that meant you did not get the £5,025 in any way until he died ?—*A.* But I should have got——

Q. Do you think it meant that ?—*A.* No, I should have got a benefit.

Mr. WALLACE : I had in mind issues of fact Nos. 9 and 10 to which neither Mr. Weston nor myself has directed express questions. I think the answers I elicited from the lady have answered them, but may I ask a question ?

HIS HONOR : Yes.

Mr. WALLACE : *Q.* It is quite clear, is it not, from your evidence that

from the time the account was opened you received no moneys out of it prior to your father's death ; that is clear, isn't it ?—*A.* Yes.

Q. Nor did you give any direction or instruction to your father regarding payment of any sum out of such account ?—*A.* Only one small one for £100.

Q. Was it £100 or £10 ?—*A.* £100.

Q. Was that to Valerie Hughes ?—*A.* Helen Hughes.

Q. Apart from that you gave no instructions or directions to your father at all ?—*A.* No, and to send some money, £60 odd, to England for medical expenses.

(Witness retired.)

No. 5.

Findings of His Honor the Chief Judge in Equity.

I find the issues agreed upon between the parties by answering the questions submitted as follows :—

Question 1. Yes.
Question 2. Yes.
Question 3. Does not then arise.
Question 4. Yes.
Question 4A. He received the authority prior to the time when he opened the account.
Question 5A. Yes.
Question 6. Yes.
Question 7. Does not then arise.
Question 8. No.
Question 9. As to the first and second of the said four amounts " Yes " and as to the other two " No."
Question 10. Of the sums so withdrawn by him the testator did in effect repay to the said Muriel Norah Jackaman or pay to some other person at her request or on her behalf the four amounts mentioned in para. 19 of the case and in effect repaid to her the sum of £2,000 which was invested by him in shares in Davison Paint Co. Pty. Ltd. in her name.
Question 11. The motives of the testator in opening the said account and depositing the said sum of £5,025 were his natural love and affection for the said Muriel Norah Jackaman and his intentions as to the manner in which the said account should be used were :—

(*a*) To deposit therein an amount of £5,025 as a gift from him to the said Muriel Norah Jackaman.

In the Supreme Court of New South Wales.

No. 5. Findings of the Chief Judge in Equity, 12th November, 1952— *continued.*

(*b*) To withdraw from that amount with her concurrence the sum of £5,000 as a loan from her to him.

(*c*) To arrange that the Permanent Trustee Co. of N.S.W., Ltd. should pay into the said account with her concurrence the income from the assets held upon the trusts of the deed executed by him in 1924.

(*d*) To withdraw with her concurrence so much of that income as he from time to time wished to be used by him as he wished but subject to an obligation on his part to repay to her the amounts not applied for her benefit or at her request

I will submit those answers to the Full Court.

In the Full Court of the Supreme Court of New South Wales.

No. 6. Reasons for Judgment, 1st June, 1953.

No. 6.

Reasons for Judgment.

Coram : STREET, C.J.
OWEN, J.
CLANCY, J.

Monday, 1st June, 1953.

(*a*) The Chief Justice.

STREET, C.J. : In this matter I have had the opportunity of reading the order proposed to be made by my brother Owen and his reasons therefor. I agree both with the suggested order and the reasons, and have nothing to add for myself.

(*b*) Clancy, J.

CLANCY, J. : I agree with the suggested order and the reasons, and have nothing to add.

(*c*) Owen, J.

OWEN, J. : In my opinion, the questions should be answered as follows :

1. Yes.
2. No.
3. Does not arise.
4. £52,435 7s. 6d.
5. By the Appellant.

I publish my reasons.

STREET, C.J. : The order of the Court will be as announced by my brother Owen.

OWEN, J.: The question for decision is whether the assets of a settlement made by one Arthur Henry Davies, who died on the 28th January, 1946, should be brought into account as part of his estate for the purposes of death duty. By the settlement made in 1924 various assets then owned by the deceased were vested in the Permanent Trustee Co. of N.S.W. Ltd., on trust to apply the whole or part of the income in such manner as it might think proper for the maintenance, education and general support of the deceased's daughter until she should attain the age of thirty or should marry with the written consent of her parents or the survivor of them. In the event of her marriage without such consent the trustee was to continue to apply the income in its discretion for the daughter's maintenance, education and general support. On attaining the age of 30 years the daughter was to be entitled to the corpus. The daughter who was 14 years old at the date of the settlement, lived with the deceased until 1938, when she married and went to live abroad with her husband. Her parents in fact consented to the marriage, but the consent was not evidenced by writing. From 1926 until 1931, when the daughter attained the age of 21, the trustee paid the deceased the sum of £1,000 per annum out of the trust income for the maintenance, education and general support of the daughter. From 1931 up to the date of her marriage on 1st of July 1938 the trustee, at the daughter's request, made further annual payments to the deceased, ranging from £200 to £1,000. Throughout the whole of the period from 1926 to the date of the marriage the daughter was maintained, educated and supported by the deceased, and it is not suggested that the cost of this was less than the amounts paid to him by the trustee. Between November 1937 and the date of the marriage the trustee made payments out of the trust income, totalling about £1,548 to the daughter. In December, 1938, the deceased opened an account in the Bank of New South Wales in the daughter's name and paid into it the sum of £5,025 of his own money. On the same day he drew out £5,000 by a cheque signed by his daughter. The £5,025 paid into the account represented moneys which the deceased had been held to be entitled to receive from his father's estate. The deceased took the view, however, that this was contrary to his father's real testamentary intention, which had been to benefit the daughter, although this intention had been frustrated by some mistake in the father's will. The deceased explained this state of affairs to his daughter in a letter of 2nd November, 1938, in which he went on to say that he proposed to open a bank account in her name and pay into it the £5,025 from his father's estate to which he was entitled and then to borrow £5,000 from her out of the moneys thus credited to the account. Accordingly he asked her to sign a cheque for £5,000 on the account into which the £5,025 was to be paid in order to carry this transaction into effect. The daughter agreed with the proposal and signed the cheque. At the same time and at the deceased's request, she signed two letters. The first, dated 1st December, 1938, was directed to the trustee authorising it " to take instructions from the deceased " in all matters regarding my trust and in the new account he is opening " in my name in the Bank of New South Wales," and stating that the

In the Full Court of the Supreme Court of New South Wales.

No. 6. Reasons for Judgment. 1st June, 1953. (c) Owen, J. —*continued.*

authority was to continue until withdrawn by her in writing. The second letter, dated 29th December, 1938, was directed to the Bank of New South Wales and authorised the deceased to draw cheques and operate on the account, this authority also being a continuing one. On 9th January, 1939, the daughter wrote a further letter to the trustee instructing it to pay into the account "any money coming in from my trust." Pursuant to this instruction the trustee made a number of payments into the account between 1939 and 1943, and the deceased from time to time, and with the daughter's concurrence, drew moneys out of the account by way of loan and deposited the moneys so withdrawn in his own account, thus reducing his overdraft. The amount borrowed by the deceased in this way between February 1939, and April 1943, including the opening loan of £5,000, appears to have totalled £10,940. With the exception of the first withdrawal of £5,000, all these moneys were drawn from the account by cheques signed by the deceased under the authority given to him by the daughter. Of the amount of £10,940 so borrowed, the sum of £2,013 1s. 5d. was, in effect, repaid to the daughter by the deceased before his death leaving a balance owed by the deceased of £8,926 18s. 7d. Apart from the opening deposit of £5,025, the only moneys which were paid into the account throughout the whole period came from the trust funds.

In these circumstances the Respondent Commissioner claims that the sum of £38,162 13s. 7d., representing the value of the trust assets at the date of the deceased's death, and the sum of £5,025, representing the amount paid into the daughter's account by the deceased, form part of the latter's dutiable estate. The amounts drawn by the deceased from the daughter's account by way of loan, and not repaid at the date of death, have, of course, been allowed as deductions in arriving at the net value of the estate for purposes of duty.

At an earlier stage of the case the Appellant claimed that a further deduction should be allowed, representing interest on the amount of the loans, and an enquiry was directed under S. 124 (6) of the Act to ascertain whether any agreement had been made by the deceased with his daughter to pay interest. The learned Chief Judge in Equity who made the enquiry found this issue against the Appellant with the result that the latter no longer presses its claim that this deduction should be allowed. The only question, therefore, is whether, in the light of the transactions set out above, S. 102 (2) (d) of the Stamp Duties Act operates so as to make the sum of £5,025 given by the deceased to his daughter and the settled assets part of the deceased's dutiable estate.

As to the item of £5,025, I am of opinion that the facts clearly bring it within the sub-section. The deceased made a gift to his daughter of £5,025 and as his letter of November 2nd, 1938, plainly shows, the gift was made on terms that the amount given, or the greater part of it, should immediately be lent back by the donee to the donor so that he might utilise it to reduce his overdraft. It is impossible, in my opinion, to say that in these circumstances the gift was retained by the donee to the entire exclusion of the donor or of any benefit to him. Had the donor handed £5,025 in

cash to the donee and the donee then handed back £5,000 of it to the donor by way of loan, S. 102 (2) (d) would undoubtedly have applied. It can make no difference, in my opinion, that the amount given was used to open a bank account in the name of the donee, thus making the bank her debtor, and that she then, by signing a cheque on that account, directed the debtor to pay to the deceased £5,000 of the debt which it owed her.

I turn then to the facts upon which reliance is placed by the Respondent Commissioner to bring the settled assets into the estate of the deceased for purposes of duty. I do not think that the payments made to the deceased by the trustee up to the time of the daughter's marriage were benefits such as the sub-section contemplates. During this period the daughter was living with her father and being fed, clothed, educated and maintained by him. As I have already said, it is not suggested that the amounts paid to him during this period by the trustee exceeded the amounts expended by him for these purposes, or that the trustee did not properly and wisely exercise the discretionary powers given to it by the trust instrument. In *Oakes* v. *Commissioner of Stamp Duties* (85 C.L.R. 386 at p. 405), Dixon, C.J., pointed out that the fact that a gift may have the effect of relieving a father of the moral or legal responsibility which rests upon him to maintain and educate his child, does not confer upon him a benefit such as would bring the sub-section into play. Indeed if it were otherwise, it would be unnecessary in the present case to look further than the mere making of the settlement itself. But the later transactions whereby the deceased was enabled to and did borrow from his daughter large sums of money by exercising the authority, which she had given him, to operate upon her account, an account which was kept in funds solely by deposits made by the trustee out of the trust funds, seem to me to bring the case within the section. These transactions differ from the loan of £5,000 only in that, in the latter case, the arrangement that the loan should be made was, in effect, a term or condition of the transaction of gift, but that distinction is, I think, immaterial. In this connection Counsel for the Appellant placed reliance on the judgment of Davidson, J., in *Rudd's* case (37 S.R. 366) and, if I rightly understood his argument, submitted that in the absence of some agreement or understanding made between donor and donee as part of, or contemporaneously with, the transaction of gift whereby the donor was to obtain some benefit from the thing given or from some other source, S. 102 (2) (d) had no application. If that is what the learned Judge intended to convey in his judgment then, with all respect, I think now, as I thought then, that the proposition is inconsistent with a number of the decisions of the High Court to which reference was made in *Rudd's* case. In particular I think it is contrary to the decision in *O'Connor's* case (47 C.L.R. 601) which is, to my mind, for all relevant purposes identical with the present case. It should, perhaps, be added that in considering many of these cases the width of the concluding words of S. 102 (2) (d) of our Act, as compared with those in the corresponding provision of the English Act and of some of the similar Acts in other States of the Commonwealth, must be borne in mind. In argument some emphasis was laid on Munro's case (1934 A.C. 61), but no question arises here, such

In the Full Court of the Supreme Court of New South Wales.

No. 6. Reasons for Judgment, 1st June, 1953. (c) Owen, J. —*continued.*

as was raised by that case, as to what it was that was given and whether what the donor was later found to be possessed of or enjoying, was part of that which was given or something which was never included in the gift. Nor are we concerned here with the problems which would necessarily have arisen had the daughter's bank account, on which the deceased operated been fed by moneys from sources other than the trust fund.

In *O'Connor's* case the income from the property given was directly received by the donor who held a full power of attorney from the donee. The donor was, to use the words of Starke, J., at page 617, " allowed the " full control, dominion, use and enjoyment of the property ceded or given," and, in these circumstances the donee had not retained the possession and enjoyment of the property given to the entire exclusion of the donor or of any benefit to him. The only distinction between that case and the present one seems to me to be that here the moneys to which the daughter became entitled under the settlement were paid by the trustee into a bank account in her name. But the effect of the instructions given by the donee to the trustee by her letters of December 1st, 1938, and of January 9th, 1939, and of the authority conferred by her upon the deceased to operate on her bank account, was to place him a position in which he controlled, used and enjoyed, for his own benefit, moneys derived from the settled assets. In *St. Aubyn* v. *Attorney General* (1952 A.C. 15 at p. 47) Lord Radcliffe, after stating the facts in *Worrall's* case (1895 1 Q.B. 99) said of them, " In effect " the son was returning to the father the income on the property given." That, it seems to me aptly describes what occurred in the present case.

For these reasons I am of opinion that the Commissioner is entitled to treat the trust assets as part of the dutiable estate of the deceased.

The questions should be answered as follows :—

1. Yes, 2. No, 3. Does not arise, 4. £52,435.7.6 and 5. By the Appellant.

No. 7. Rule, 1st June, 1953.

No. 7.
Rule.

Term No. 315 of 1951.

IN THE SUPREME COURT OF NEW SOUTH WALES.

IN THE MATTER of the Estate of ARTHUR HENRY DAVIES late of Sydney in the State of New South Wales, deceased.

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

AND IN THE MATTER of the Appeal of Permanent Trustee Company of New South Wales Limited executor 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.

Monday the First day of June, One thousand nine hundred and fifty-three. UPON this matter coming on to be heard on the Fourteenth and Fifteenth days of May last in pursuance of the case stated under the provisions of

Section 124 of the Stamp Duties Act 1920–1952 and filed herein the Twentieth day of November, 1951, in which case stated the following questions were submitted for the determination by the Court :

1. Should the said sum of £38,162.13.7 have been included in the dutiable estate of the testator.
2. Should any interest on the sum of £8,926.18.7 have been allowed as a debt due and owing by the testator to the said Muriel Norah Jackaman and deducted from the dutiable estate of the testator.
3. If question 2 be answered in the affirmative upon what sum or sums should interest have been allowed as a debt and at what rate.
4. What is the amount of death duty payable in respect of the said estate.
5. How should the costs of this case be borne and paid.

AND UPON READING the following issues of fact agreed upon by the parties mentioned and referred to in the Rule of the Supreme Court of the Tenth day of March, 1952 and the answers to such issues found by His Honour the Chief Judge in Equity such issues of fact and answers thereto being in the following terms :

Question 1. Was the sum of £5,025 deposited by the Testator in the Bank of New South Wales, Head Office, on 29th December, 1938 a gift by him to his daughter Muriel Norah Jackaman ?

Answer : Yes.

Question 2. Was the amount of £5,000 withdrawn by the Testator from the said account on 29th December 1938 a loan of that sum by Muriel Norah Jackaman to the Testator ?

Answer : Yes.

Question 3. If Issue of Fact No. 2 is answered in the negative, was the said withdrawal by the Testator made in circumstances which required him to account to his said daughter for the said sum ?

Answer : Does not then arise.

Question 4. After the opening of the said account on 29th December, 1938, did the Testator have authority to withdraw money from time to time from the said account by drawing cheques thereon, without first obtaining the approval of the said Muriel Norah Jackaman to any particular withdrawal ?

Answer : Yes.

Question 4A. If the answer to Question 4 is Yes, did the Testator receive such authority prior to or at the time when he opened the said account, or subsequently ?

Answer : He received the authority prior to the time when he opened the account.

In the Full Court of the Supreme Court of New South Wales.

No. 7. Rule, 1st June, 1953— *continued.*

Question 5. Were the sums withdrawn by the Testator from the said account after the said 29th day of December 1938 until and including the 4th day of April, 1943, withdrawn by him :

(*a*) with the authority of Muriel Norah Jackaman, or

(*b*) without such authority ?

Answer : With the authority of Muriel Norah Jackaman.

Question 6. If the answer to Issue of Fact No. 5 (*a*) is in the affirmative, were the said sums (other than the four amounts mentioned in paragraph 19 of the case) loans by the said Muriel Norah Jackaman to the Testator ?

Answer : Yes.

Question 7. If the answer to Issue of Fact No. 5 (*b*) is in the affirmative were the said sums withdrawn by the Testator from the said account in circumstances which required the Testator to account for the same to the said Muriel Norah Jackaman ?

Answer : Does not then arise.

Question 8. Was any agreement made by the Testator with the said Muriel Norah Jackaman for the payment of interest upon the said sums from the respective dates of withdrawal to the date of repayment and, if so, at what rate per annum ?

Answer : No.

Question 9. Were the said four amounts, or any of them, mentioned in paragraph 19 of the Case, paid by the Testator to or at the request or on behalf of the said Muriel Norah Jackaman and if not all but only some, which of them ?

Answer : As to the first and second of the said four amounts " yes " and as to the other two " no."

Question 10. Did the Testator repay any of the sums or any part thereof withdrawn by him from the said Bank account to the said Muriel Norah Jackaman or pay any of them or any part of them to any other person at her request or on her behalf and if so which of the said sums or part thereof ?

Answer : Of the sums so withdrawn by him the testator did in effect repay to the said Muriel Norah Jackaman or pay to some other person at her request or on her behalf the four amounts mentioned in para. 19 of the case and in effect repaid to her the sum of £2,000 which was invested by him in shares in Davidson Paint Co. Pty. Ltd. in her name.

Question 11. What were the motives of the Testator in opening the said account and depositing therein the sum of £5,025 and what were his intentions as to the manner in which the said account should be operated upon ?

Answer : The motives of the testator in opening the said account and depositing the said sum of £5,025 were his natural love and affection for the

said Muriel Norah Jackaman and his intentions as to the manner in which the said account should be used were :

(*a*) To deposit therein an amount of £5,025 as a gift from him to the said Muriel Norah Jackaman.

(*b*) To withdraw from that amount with her concurrence the sum of £5,000 as a loan from her to him.

(*c*) To arrange that the Permanent Trustee Co. of N.S.W. Ltd. should pay into the said account with her concurrence the income from the assets held upon the trusts of the deed executed by him in 1924.

(*d*) To withdraw with her concurrence so much of that income as he from time to time wished to be used by him as he wished but subject to an obligation on his part to repay to her the amounts not applied for her benefit or at her request.

WHEREUPON AND UPON HEARING what was alleged by Mr. C. A. Weston of Queens Counsel with whom was Mr. Forbes Officer of Counsel for the Appellant and by Mr. G. Wallace of Queens Counsel with whom was Mr. C. A. Walsh of Counsel for the Respondent THIS COURT DID ORDER that this Appeal should stand for judgment and the same standing in the list this day for judgment accordingly THIS COURT DOTH ORDER that the questions which were referred to the Court for determination should be answered as follows :—

1. Yes.
2. No.
3. Does not arise.
4. £52,435.7.6.
5. By the Appellant.

By the Court
For the Prothonotary,
R. T. BYRNE,
Chief Clerk.

No. 8.

Reasons for Judgment.

(a) DIXON, C.J.

This is an appeal against an order of the Supreme Court of New South Wales answering in favour of the Respondent Commissioner of Stamp Duties certain questions submitted for the determination of the Court by a case stated under Sec. 124 of the Stamp Duties Act 1920–1940. The effect of the answers was to confirm an assessment of death duty by which the property comprised in a settlement by the deceased was included as part of his dutiable estate. The deceased was one Arthur Henry Davies who died on 28th January 1946. The settlement was made on 13th August 1924 and the beneficiary who formed the primary object of the trusts was

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the deceased's daughter Muriel Norah Davies, called in the family " Cherry." The property subject to the settlement was held to be part of the dutiable estate of the deceased on the ground that, within Sec. 102 (2) (d) of the Act, it was property comprised in a gift made by the deceased of which bona fide possession and enjoyment had 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. The value placed upon the property subject to the settlement was £38,162.

The facts of the case are unusual. The decision of the appeal must depend upon the precise complexion placed upon the dealings they disclose with certain moneys having their source in the income from the trust fund under the settlement. For this reason it becomes necessary to state the circumstances in some detail. It is as well to begin with the relevant particulars concerning Muriel Norah Davies. She was born on 22nd February 1910. She thus came of age on 22nd February 1931. She was married at Alexandria in Egypt on 1st July 1938 and became Muriel Norah Jackaman. Afterwards she went to Kenya where she lived with her husband until April 1940. About that time he joined the armed forces in England and she also went to England where she resided until November 1943. She then returned to Australia. The settlement was expressed in a deed of which her father as settlor was the party of the first part; she was described as " the beneficiary " and was the party of the second part, and the now Appellant, the Permanent Trustee Coy. of N.S.W. Ltd., under the description of " the trustee," was the party of the third part. The deed recited that the settlor had transferred to or caused to be vested in the trustee shares, property and investments, short particulars of which were set forth in a schedule, and had directed the trustee to hold them upon the trusts and with the powers thereinafter set forth for the benefit of his daughter, " the beneficiary." The property comprised in the schedule consisted of shares in trading companies, government stock and deposits with trading companies at interest. These assets and the investments by which they might be replaced were described as the trust fund. The trusts of the instrument were to the following effect: (1) To apply the whole or such part as the trustees should think fit of the income arising from the trust fund for or towards the maintenance, education and general support of the beneficiary in such manner, and in all respects as the trustee might think proper until she should attain the age of thirty years or marry with the written consent and approval of her parents. By a proviso it was made clear that if she married during the lifetime of her parents without such consent the income should continue to be applicable in the aforesaid manner until she attained the age of thirty years. (In fact she married with the approval and consent of her parents but the consent and approval was not reduced to writing. As to this see *Lord Strange* v. *Smith*, 1755 Ambler 263: 27 E.R. 175, and *Worthington* v. *Evans*, 1823 1 Sim. & St. 165; 172; 57 E.R. 66: 69, per Leach V.C.). (2) To accumulate the residue, if any, of the income not so applied by way of compound interest by investing the

sum and the resulting income thereof for the benefit of the beneficiary or other the persons who should take under the trust. (3) In case of the marriage of the beneficiary without such consent before attaining the age of thirty, the trustee was empowered with the written consent of the parents or the survivor of them to pay over to the beneficiary one half of the trust fund together with the accumulation of income. (4) On the beneficiary attaining the age of thirty years upon trust to pay over to her the balance of the trust fund in the hands of the trustee together with all the accumulations of income then in hand for her sole use and benefit. The settlement gave Muriel Norah upon her attaining twenty-one or marrying under that age with the consent of her parents a general power of testamentary appointment over the fund. There were gifts over if she should die without issue before attaining a vested interest. Strangely enough, there appears to be an omission from the trusts of the settlement of any express direction as to the application of income between the time of the beneficiary's marrying and of her attaining the age of thirty in the event of her marrying under that age with the written consent of her parents. As the consent was not in writing perhaps the omission proved immaterial. During the minority of Muriel Norah the trustee made payments to the father of £1,000 annually from 1926 to 1931. In 1932 it made another such payment. Then the trustee seems to have secured from her a request or requests to continue making payments to the deceased. The payments made to him amount to £1,000 in each of the years 1933 to 1937. The first such request was contained in a letter of 12th December 1932. By that letter she noted a statement made by the trustee about making an allowance to her father on her behalf of £1,000 a year and confirmed and approved the payments. She also approved the continuance of the payments to her father saying that she would look to him for her own personal allowance. The other such request was contained in a letter dated 3rd April 1936 and consisted of a simple statement that she thereby confirmed all payments the trustee had made to her father out of her trust and would be pleased if the trustee would continue to make payments in the future as in the past.

On 29th December 1938 the deceased opened a bank account in his daughter's name in the Bank of New South Wales and into it he paid a sum of £5,025. This sum was paid out of his own resources. It appears that under the will of his grandfather which had been proved twenty years earlier it was found that he was entitled to an unexpected share of corpus subject to a life interest which had fallen in. In the deceased's view it was intended that his children and not he himself should receive this money. To give effect to his view he placed £5,025 to the credit of his daughter's account in the bank. It was a gift from him, but at the same time he arranged with his daughter that he should withdraw £5,000 of this money as a loan. The arrangement was made by a letter of 2nd November 1938 which he sent to her in Kenya. By his letter he requested her to address a letter to the trustee giving the trustee authority to take his instructions in all matters regarding her trust or the new account he said he was opening

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in the Bank of New South Wales in her name: "The next thing I want "you to do is to write on a separate sheet, addressed to them, giving them "the authority to take my instructions in all matters regarding your "trust or the new account I am opening in the Bank of New South Wales "in your name. This account will be entitled Cherry Jackaman. I am "having this account opened in the Bank so that when I receive the money "from the old man's estate I will instruct the Trustee Company to pay it "straight into your account and therefore it will not go through my books "at all. On the other hand I want you to sign a cheque also the letter of "authority to the Bank and also the specimen signature and send these "out by the first mail to me, so that I can hand them to the Bank here. "As I do not anticipate the payment being made before about a month's "time this will give ample time for your letter to get back here. The "reason why I want you to sign the cheque is that your Account will then "loan to me the amount and this in turn will reduce my overdraft with the "Bank by a like amount and by doing so will reduce the amount of interest "I have to pay the Bank. Of course, you realise that this amount from the "old man's estate is really mine, but as I feel that it would have been yours "if the Will had been drawn up correctly, I consider it best to pay it into "your account in your name at the beginning instead of leaving it "to come to you on my death. I am enclosing therefore as mentioned "above one cheque for £5,000 for your signature Cherry Jackaman, one "letter to the Manager of the Bank of New South Wales, and two slips "for your specimen signature, but please do not date the letter or the "cheque, as these will not take effect until I open the account and this "will not be opened until such time as the Trustees are ready to pay the "money over. It is my intention from time to time to pay more money "into this account and by so doing relieve my account of such amounts "if anything should happen to me suddenly."

Muriel Norah acted on these instructions. By a letter to the Bank dated 29th December 1938 she authorised and empowered her father, whose signature was attached, to draw cheques, make, accept and endorse in her name and on her behalf, promissory notes, bills of exchange, bills of lading, drafts and other instruments, either for the purpose of security or otherwise, and to operate on her account in the bank as fully and effectually to all intents and purposes as she could if personally present. She also signed a letter, dated 1st December 1938, addressed to Permanent Trustee Co. of N.S.W. Ltd. as trustee by which she authorised the trustee to take instructions from her father in all matters regarding the trust and in the new account he was opening in her name in the Bank of New South Wales. On 9th January 1939 she addressed another letter to the trustee referring to the previous letter. It is sufficient to quote the following passage: "From now on until further instructions from me will you kindly pay into "my account in the Bank of New South Wales Head Office, Sydney, "Australia, any money coming in from my trust."

Subsequently, by a memorandum which, although undated, must have been made about or shortly after the end of June 1939, he gave her

an account of what he had done. The material part is as follows: " On " 29th December I opened an account with the Bank of New SouthWales " for Cherry Jackaman and this is the account I required your signature " for and your authority to work on, which you sent me some time ago. " You will see from the accompanying statement, which shows the position " of this account of yours with my books, that the account was " opened up just at the end of last year by my paying into it an amount " of £5,025 of my own money. Since when, up to date, the Trustees have " paid in £1,552 12s. 10d. This is because I told them that whenever any " funds from your investments reach £100 they should be paid into this " account, so the total amount at present which has been paid into your " account is £6,577 12s. 10d., but withdrawn from it has been £6,400 5s. 0d. " This amount is made up of £5,000 which I withdrew (on the day I deposited " the £5,025) together with refunds of £750, £150, £200, £300 to myself and " an amount of 5s. for a cheque book. The reason why I opened the " account when I did was that this £5,025, a gift from me, would be free " of probate if I live beyond three years of the date. All these withdrawals " in my books naturally stand as a credit to you, which in the event of my " dying my estate would have to pay them back before my nett worth for " probate purposes was assessed. It is necessary for these monies to be " 'loaned' to me so that I can make the advances to you through my London " account per the medium of Letters of Credit and such like."

This course of dealing went on until April 1943, when Mrs. Jackaman returned to Australia. The trustee paid into the bank the income of the estate and the deceased drew cheques. In the result over a period between 29th December 1938 and 1st February 1943 the amount drawn, including the £5,000, amounted to £10,940. As against this he had made two payments on her behalf amounting to £2,012 1s. 5d., leaving a balance of £8,926 18s. 7d. He had kept an account debiting himself with interest at 3½%. That interest calculated from the respective periods when the moneys were withdrawn to 28th January 1946 amounted to £2,351 13s. 0d., of which sum £1,239 7s. 8d. represented the interest on the sum of £5,000 withdrawn on 29th December 1938. The authority under which he acted in withdrawing the moneys consisted in the letter to the bank of the same date, viz. 29th December 1938.

It is on these facts that the claim of the Commissioner for Stamp Duties rests.

Under Sec. 124 (6) the Supreme Court settled issues, which were in fact agreed upon by the parties. These issues were tried before the Chief Judge in Equity, who made the following findings: (1) That the sum of £5,025 deposited by the deceased in the Bank of New South Wales on 29th December 1938 was a gift by him to his daughter (2) that the sum of £5,000 withdrawn by the deceased from that account on 29th December 1938 was a loan of that sum by Mrs. Jackaman to him; (3) that after the opening of the bank account on 29th December 1938 the testator did have authority to withdraw money from time to time from the said account by drawing cheques thereon without first obtaining the approval of Muriel

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Norah to any particular withdrawal; (4) that the deceased did receive such authority prior to the time when he opened the account; (5) that the sums withdrawn by the testator from the account after 29th December 1938 until and including 4th April 1943 were withdrawn by him with the authority of Mrs. Jackaman; (6) that the said sums, with certain immaterial exceptions, were loans by her to the deceased; (7) that no agreement was made by the testator with her for the payment of interest upon the said sums.

A further finding was made concerning the motives of the testator in opening the bank account and depositing the sum of £5,025 and concerning his intentions as to the manner in which the bank account should be used. It was found that his motives in opening the account and making a deposit were his natural love and affection for his daughter. It was found that his intentions as to the manner in which the account should be used were— first, to deposit the amount of £5,025 as a gift to her; next, to withdraw from that account with her concurrence the sum of £5,000 as a loan from her to him; then to arrange that the Permanent Trustee Company of New South Wales Limited should pay into the account with her concurrence the income from the assets held upon the trusts of the deed, and lastly to withdraw with her concurrence so much of that income as he from time to time wished to be used by him but subject to an obligation on his part to pay to her the amounts not applied for her benefit or at her request.

The Appellant as executor of the deceased claimed to deduct from the dutiable amount of the estate the moneys drawn by the testator and treated as a loan from her together with interest. The Respondent Commissioner does not dispute that the amount treated as a loan should be deducted as a liability of the estate, but does dispute the claim to deduct interest, and in view of the findings that claim has failed. The claim by the Respondent Commissioner to apply Sec. 102 (2) (d) extended to the £5,025 deposited by the deceased as well as to the property subject to the trust deed. It is not now disputed by the Appellant, that in view of the withdrawal of the £5,000, Sec. 102 (2) (d) does apply to the deposit of £5,025. This means that the view is not contested that the donee did not retain the gift of £5,025 to the entire exclusion of the deceased or of any benefit to him. On the other hand, in supporting his case that the " gift " of the trust property effected by the trust deed is caught by Sec. 102 (2) (d) the Respondent Commissioner passes by the payments amounting to £1,000 a year to the deceased during the minority of Mrs. Jackaman and afterwards until February 1939, when he began to operate on the account opened in the bank on 29th December 1938 by the deposit of £5,025. The Commissioner does not contest the view that these payments were made to the deceased for the maintenance of his daughter and were not more than adequate for the purpose. True it is that as a person entrusted with funds to be expended in the maintenance and support of a member of his family he was not liable to account as a trustee. He was under no duty in equity to vouch the items of his expenditure. It was enough that he fulfilled the obligation of maintenance in a manner commensurate with the income

available to him for the purpose and that being so he was not accountable : see *Countess of Bective* v. *Federal Commissioner of Taxation,* 1932 47 C.L.R. 417 at p. 420. Doubtless it is because he did maintain his daughter in a manner commensurate with the funds he is treated as having obtained no benefit from the payments. It is therefore considered true so far that the gift had been retained by the donee through the trustee to the entire exclusion of the deceased or of any benefit to him. But according to the Respondent Commissioner it ceased to be true once the bank account was placed entirely under the deceased's control and was fed with the income from the trust property. For, by means of the account, into which no other moneys went, the deceased was designedly placed in a position to use the income paid in for his own purposes, even if it was upon condition that he should in the end repay the amount drawn or that his executors should do so. This meant, according to the contention, that the deceased obtained a benefit at the expense of the donee's enjoyment of the gift.

In applying Sec. 102 (2) (d) many difficulties usually arise. The very terms of the section make it anything but easy to determine whether a given case comes within its application. But the difficulties appear to me to have been increased by too ready an assumption that the final words with which the provision in the New South Wales Act ends have but little effect on the meaning and operation of the whole. It seems to me that the words " 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 " give to the whole provision an operation differing appreciably from that of the English provision whence it was adapted, whether as it is found in 52 Vic. c. 7 s. 11 (1) or in 63 Vic. c. 7 s. 11 (1) or in 3 & 4 Geo. VI c. 29 s. 43 (2) (a). The words in the English legislation are " to the entire " exclusion of the person who had the interest and of any benefit to him " by contract or otherwise." But the word " otherwise " has been interpreted as *ejusdem generis* with " contract." Hamilton J. said of these words in *Attorney-General* v. *Seccombe,* 1911 2 K.B. 688 at p. 703 :

> " There is no reason why the rule of *ejusdem generis* " construction should not apply to these words. The enactment " might have stopped at the words ' or of any benefit to him,' or " it might have said ' of any benefit to him of whatsoever kind.' " It has not done so. The words ' by contract or otherwise ' " indicate a genus of which contract is one species, and all other " species are intended to be swept in. I do not see the difficulty " of saying that there is a genus of which contract is a species. " There are two points to notice about the word ' contract ' as " used in this connection. In the first place it points to a legal " obligation ; and in the next place it points to a contract between " the same persons as were parties to the gift. Hence I think " that the words ' by contract or otherwise ' are aimed at any " contract between the parties to the deed of gift or any contract " with third parties having the effect of conferring a benefit on the

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" donor, and also any transaction enforceable at law or in equity " which, though not in the form of a contract, may confer a " benefit, such as a lien. It is therefore not necessary to give " any unusual or exceptional construction to the words."

To place this construction upon the final words of the provision inevitably means that it was not enough that a benefit should be enjoyed by the donor at the expense of the donee's possession or enjoyment of the subject of the gift. That would not be enough unless the benefit was the product of a legal or equitable right. Such a conception must reflect back and affect the interpretation of the earlier words of the provision. However, the distinction does not appear to have been emphasised or maintained and now Sec. 102 (2) (d) is encrusted with a coating of authoritative exposition which makes it almost impossible to have recourse to the literal sense of the words in which it is expressed.

In the present case, however, the difficulties are more of fact than of law. It seems clear enough that the deceased received a benefit when he was placed in a position to withdraw moneys from his daughter's bank account and to treat the withdrawals as a loan to himself repayable at his death without interest in the meantime. The finding of the Chief Judge in Equity that the sums were loans says nothing of the terms of repayment. But it can hardly be doubted that the correct interpretation of the deceased's dealings with his daughter's bank account is that the loans were repayable at his death and not earlier. For his letter or memorandum of about the end of July 1939 already set out said that the withdrawals would stand as a credit to her which in the event of his dying his estate would have to pay back before the net worth of his estate could be ascertained for probate purposes. The plan was to create a debt to her repayable on his death so as to give her a benefit on that event forming no part of his dutiable estate, while in the meantime he had the advantage of the use of the moneys. It seems undeniable that a loan without interest repayable at death (or for that matter on demand) is a benefit and a benefit of a pecuniary or a proprietary kind. Again if this benefit was obtained out of the income of the property given it would seem clear enough, notwithstanding all the limitations judicially placed upon the operation of the provision, that the benefit obtained by the father would have been a benefit of a kind which, if the condition expressed in Sec. 102 (2) (d) is to be satisfied, must be excluded by the possession and enjoyment assumed by the donee and retained by her.

The critical question in the case appears therefore to be whether, for the purposes of Sec. 102 (2) (d) the moneys from which he obtained the loans without interest are to be considered part of the income of the trust fund, that is of the property given by the trust deed. At this point, however, the very clumsy procedural provisions of the Act obtrude themselves. The Supreme Court sits not as a tribunal of fact and law to elucidate every constituent element upon which depends a question of dutiability under the Stamp Duties Act. Its jurisdiction arises under Sec. 124. The procedure

is primarily by case stated and the Commissioner states and signs the case. He is to set forth the facts before him on making his assessment and the question to be decided : subsec. (2). The Court on the hearing of the case is to determine the question submitted and to assess the duty chargeable : subsec. (4). So far it would be supposed that the Court had no jurisdiction over the facts, but by subsec. (7) on the hearing of the case the Court is to be at liberty to draw from the facts and documents stated in the case any inference whether of fact or law which might have been drawn therefrom as proved at the trial. It will be noticed from what has been already said in the earlier part of this judgment that the Commissioner has included in the case stated not a little material that strictly speaking is only evidentiary. It may be supposed that under Sec. 124 (2) it was his duty to state the ultimate and not the evidentiary facts : see per Isaacs J. in *Mack* v. *Commissioner of Stamp Duties* (N.S.W.), 1920 28 C.L.R. 373 at p. 381, where his Honour said : " It cannot be too clearly understood that on a ' case " ' stated ' the facts stated are to be taken as the ultimate facts for whatever " purpose the case is stated." The power given by Sec. 124 (7) to draw inferences of facts is a familiar extension of the restricted authority of a Court upon a case stated, but it does not go very far. Then by subsec. (6) it is provided that if it appears to the Court that the facts necessary to enable the questions submitted to be determined are not sufficiently set forth in the case or that such facts are in dispute, the Court may direct all such enquiries to be made or issues to be tried as it deems necessary in order to ascertain such necessary facts, and, if it deems fit, may amend the case. The subsection goes on to say that the enquiry may be made before (inter alios) a judge of the Supreme Court with or without a jury. It was under this authority that in the present case the Chief Judge in Equity tried the issues. It seems that the findings of fact made under subsec. (6) take their place with the rest of the facts in the case stated, either as ultimate facts or ascertained facts from which ultimate facts may be inferred under subsec. (7). If this be right it follows that in the present case the Supreme Court could not re-examine the facts stated or the facts found and we in our turn cannot do so. We must accept the facts as they appear in the case stated and in the findings of fact made by the Chief Judge in Equity as they are expressed in the determination of the issues. The one qualification is that we may draw inferences therefrom but these inferences must be consistent therewith. We are therefore bound to take it to be the fact that there was a contract of loan between Mrs. Jackaman and her father and that he acted under her authority in withdrawing the moneys from her bank account and in doing so drew the moneys as loans. To a court of fact and law, unencumbered by procedural limitations, the case would probably present little difficulty. Such a court would clearly be entitled to find that Mrs. Jackaman had in fact placed the income of the trust under the disposal of her father for the purpose of his beneficial enjoyment, whatever terms may have been imposed as to repayment of the total amount by his personal representative after his death. But upon the facts stated and upon the facts found on the issues, the inference seems open that the deceased

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was placed in a situation in which he was master of the income as it was paid over by the trustee. For the facts stated show that at his instance his daughter had directed the trustee to pay her income into a bank account which, notwithstanding that it stood in her name, she effectually placed under his legal control in such a way as to make the account in substance his. The consequence is that the moneys paid in came into his effective control. Did he receive them in the guise or character of income of the trust estate ? Of course it was in that guise or character that they came into the bank account. For the payments into that account were distributions of income of the trust by the trustee. But does not that mean that the amounts distributed and in that very character were placed under the deceased's effective control for his own use beneficially ? As has been seen, Mrs. Jackaman's authority to the bank gave the deceased unrestricted power over the bank account and over the amounts from time to time placed to the credit of the bank account. Moreover, the deceased was placed in a position to ensure that the trustee should continue to distribute the income of the trust fund in this manner. Mrs. Jackaman's directions to the trustee required the trustee to give effect to the deceased's instructions in all matters regarding the trust or the banking account. It is no doubt true that she might have revoked her instructions, both to the bank and to the trustee. But she did not do so. It is no doubt equally true that she might have intercepted the deceased's right to draw the moneys from the bank account by anticipating him and drawing them herself by her own cheque. But she did not do so. He was therefore left in complete control. When he drew moneys for his own benefit he acted in his own interest, not in hers. *Prima facie* these considerations would warrant a conclusion that he obtained a beneficial enjoyment of the income of the trust as and when it was distributed. Unless some countervailing considerations appeared, that would mean a benefit or benefits in derogation of that kind of enjoyment and possession of the subject matter of the gift which the nature of the gift permitted. The same kind of conclusion was drawn in *O'Connor* v. *The Commissioner of Succession Duties* (*S.A.*), 1932 47 C.L.R. 601, where, however, there was no condition that amounts used should ever be repaid. The one countervailing consideration lies in the finding that the sums drawn were loans by Mrs. Jackaman to the deceased. Does that circumstance make that conclusion incorrect ? The justification for the finding consists in the general arrangement made by the deceased with his daughter. The finding cannot be taken to mean that each drawing was nothing but a specific loan then and there by the daughter herself and paid over out of her general funds. The general arrangement involved a promise on the deceased's part that his personal representatives would repay on his death the money he withdrew for his use but left him otherwise entitled to deal as he chose with the income distributed by the trustee. In other words the finding means simply that the promise gave to each sum of money drawn by the deceased for his use the legal complexion of money lent. It was a loan, however, payable on death and, being of this nature, the fact that there was a contract of loan did not deprive the deceased's dealings with the

moneys of all beneficial character. Regarded from the point of view of substantial effect as distinguished from legal character, it meant no more than that the deceased had on withdrawing the moneys incurred an obligation the fulfilment of which would produce the same result as if he himself had remained in immediate possession of that income but had made a testamentary gift to his daughter equivalent to the aggregate amount of the total income of the trust. No doubt it is true that when the deceased withdrew money under the general arrangement and so incurred a debt in the amount withdrawn, his daughter became the owner of a chose in action consisting in the debt. As the chose in action represented the income it may be said that the income, though in a new form, continued to belong as much to Mrs. Jackaman as it did when it lay in the bank. But the chose in action was not an investment of her money capable of any immediate enjoyment by her. Not until her father's death would it mean anything. It was he who enjoyed the use of the moneys and he enjoyed them over an indefinite period of time without giving any compensatory consideration for their use. Subject to his obligation to repay the capital sum upon his death, the deceased was placed by the arrangement with his daughter in possession and enjoyment of the income of the trust estate as such. There is nothing in this conclusion which is incompatible with the findings of the Chief Judge in Equity. The findings ought not to be read or applied apart from the evidence, and when they are read with the evidence it cannot be supposed that they were arrived at on any other footing. Once it is seen that the findings are based upon the general arrangement made between the father and the daughter no reason remains why they should be taken to mean more than that the enjoyment by the deceased of the moneys in the bank was subject to a contract to repay them on death and that the result was to give them the character of money lent.

The result of the foregoing is that the deceased obtained a benefit from the subject of the gift consisting of the receipt over the relevant time of the income thereof subject only to a liability in his personal representatives to repay after his death the amount applied to his own use and without interest and that the donee Mrs. Jackaman to this extent failed to retain enjoyment of the property comprised in the gift to the entire exclusion of any benefit to the deceased.

Accordingly I think that the appeal should be dismissed.

(*b*) WEBB, J. (*b*) Webb, J.

I would answer the questions in the case stated as proposed by Kitto and Taylor JJ. and for the reasons given by their Honours.

In coming to this conclusion I do not overlook the necessity to take into consideration the substance of the transaction. In *St. Aubyn* v. *Attorney-General* (1952 A.C. 15 at 47) Lord Radcliffe after stating that we are not to stop at the mere form of the transaction proceeded to say that he thought that *Attorney-General* v. *Worrall* (1895 1 Q.B. 99) was rightly decided, although the reservation from the donor's rights as mortgagee

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(b) Webb, J. —*continued.*

which he had assigned to the donee was not expressed to be the interest payable on the loan but an annuity. But in effect the donee was returning to the donor the income of the property given to the donee i.e. the interest on the loan. Here it is impossible to regard as a payment of the income to the donor by the donee what is unquestionably a loan to the donor by the donee, after the donee by the payment of the income to her account with the bank, had obtained complete possession and enjoyment of the income of the trust property. *Worrall's* case dealt with what were apparently two absolute payments, the interest and the annuity, and it was not difficult to identify them as the same payment in substance. But it is impossible to identify this loan with a payment of income outright as there can be no question as to the genuineness of the loan.

I would allow the appeal.

(c) Fullagar, J.

(c) FULLAGAR, J.

This is an appeal from a judgment of the Supreme Court of New South Wales (Full Court) given on a case stated by the Commissioner under Sec. 124 of the Stamp Duties Act 1920–1952. The Appellant Company is the executor of the will of Arthur Henry Davies, who died on 28th January 1946 and whom I will call the testator. The Supreme Court held that certain property the subject of a settlement made by the testator on 13th August 1924 formed part of his dutiable estate by virtue of Sec. 102 (2) (d) of the Act which, at the date of the testator's death, provided that the estate of a deceased person shall be deemed to include " any property comprised in " any gift made by the deceased at any time 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." The value of the property in question at the date of the testator's death was £38,162. The Appellant executor is also the trustee of the settlement.

The beneficiary under the settlement was the daughter and only child of the testator, Muriel Norah Davies, commonly known as Cherry Davies. The daughter was born on 22nd February 1910 and was therefore a little under fourteen years of age at the date of the settlement. The terms of the instrument need be noted only in the barest outline. The fund was to be held on trust to apply the whole or any part of the income to the maintenance, education and general support of the beneficiary until she attained the age of thirty years or married with the written consent of her parents or of the survivor of them. The balance of income was to be accumulated. There were provisions for the event of marriage without the parents' consent in writing. In the events which happened the beneficiary became absolutely entitled to the corpus of the fund on attaining the age of thirty years. In fact she married on 1st July 1938 and attained the age of thirty years on 22nd February 1940.

From the date of the settlement up to 21st June 1937 the trustee company paid out of the income of the settled fund an annual sum of £1,000 to the testator, presumably in the exercise of its discretion to apply income to the maintenance, education and general support of the beneficiary. She was during the whole of this period living with her parents. The Commissioner does not rely on the making of these payments as sufficient to bring the case within Sec. 102 (2) (d). Dixon C.J. in *Oakes* v. *Commissioner of Stamp Duties* (*N.S.W.*), 1952 85 C.L.R. 386, at p. 405, said : " It must be borne in mind that the fact that a gift results in relieving " the donor of parental responsibility is not in itself such a benefit as the " provision contemplates." This does not, of course, mean that the creation of a trust for the maintenance of a child can never fall within that provision. But, as Owen J. observed in the present case : " During this " period the daughter was living with her father and being fed, clothed, " educated and maintained by him. It was not suggested that the amounts " paid to him during this period by the trustee exceeded the amounts expended " by him for these purposes." Much more would have to be proved before it could be held that the settled property was brought into the dutiable estate under Sec. 102 (2) (d) by virtue of the annual payments by the trustee to the testator. It is on what happened after 21st June 1937 that the Commissioner relies.

In February 1938 the testator's daughter left Australia on a voyage overseas. For the purposes of the voyage and while she was abroad certain payments out of the income of the trust fund were made to her by the trustee of the settlement. These have no relevance to the present case. On 1st July 1938 she married a Mr. Jackaman at Alexandria and apparently went to live with her husband in Kenya. In April 1940 she accompanied her husband to London, where he joined the Armed Forces. She was in England until she returned to Australia in November 1943. On 2nd November 1938 the testator wrote to his daughter a letter in which he explained that a sum of £5,000 had come to him under his father's will which would in his opinion, if the will had been drawn properly, have gone to her. He said that he was about to open a new account in the Bank of New South Wales in the name of Cherry Jackaman that he intended to pay the sum of £5,025 into that account but to draw out again immediately a sum of £5,000 and he enclosed a cheque for £5,000 for her to sign. The letter said : " The reason why I want you to sign the cheque is that your " account will then loan to me the amount and this in turn will reduce " my overdraft with the bank by a like amount and by doing so will reduce " the amount of interest I have to pay to the bank." He also enclosed for his daughter's signature an authority to the bank to honour cheques drawn by him on the new account. Three documents were subsequently signed by Mrs. Jackaman and forwarded to her father. One, which was dated 1st December, 1938, was directed to the Appellant Company and was as follows :—" I hereby authorise you to take instructions from my father, " Mr. Arthur H. Davies, in all matters regarding my trust and in the new " account he is opening in my name in the Bank of New South Wales.

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" This authority is to be a continuing one until withdrawn by me in writing." A second authority was signed on 9th January 1939 and was in the following terms : " From now, until further instructions from me, will you kindly " pay into my account at the Bank of New South Wales, Head Office, " Sydney, Australia, any money coming in from my trust. My account " at the bank is under the name of Cherry Jackaman." The third, which was the authority to the bank and is dated 29th December 1938, was in the following terms : " I hereby authorise and empower my father, " Arthur H. Davies, whose signature is at the foot hereof, to draw cheques, " make, accept, and endorse in my name and on my behalf, promissory " notes, bills of exchange, bills of lading, drafts and other instruments, " either for the purpose of security or otherwise, and to operate upon my " account in your bank as fully and effectually to all intents and purposes " as I could if personally present. This authority to be a continuing one " until withdrawn by me in writing."

The new bank account in the name of Cherry Jackaman was opened on 29th December 1938. On that date the sum of £5,025 was paid into it and the sum of £5,000 drawn out of it by the testator. After his death the Commissioner, in assessing death duty, treated this sum of £5,000 as part of his dutiable estate. This must have been on the view that the gift fell within Sec. 102 (2) (d). If the payment into her account were treated as a straight out gift it would not be dutiable because such gifts are subject to duty only if made within three years of the donor's death (Sec. 102 (2) (b)). The Appellant Company has not objected to the inclusion of this sum of £5,000 in the estate.

In 1939 and subsequent years the trustee company paid the income of the trust fund from time to time into the Cherry Jackaman account in the Bank of New South Wales. No other moneys were at any material time paid into that account. During the next four years or thereabouts the testator drew out of that account (apart from the £5,000 already mentioned) sums totalling £6,425. The sums varied in amount from £50 to £750. All were drawn in pursuance of the authority to the bank given by the daughter and dated 29th December 1938. The first was drawn on 3rd February 1939 and the last on 4th April 1943. All but four (making a total of £485) of the amounts drawn by the testator were paid into his own account at the Bank of New South Wales. The four sums amounting to £485 were paid to the daughter or applied for her use or benefit. After 4th April 1943 no further sums were withdrawn from the account by the testator.

Mrs. Jackaman said in evidence that during her absence from Australia she received statements of income from the trustee company but received no bank statements. She presumed that these were sent to Mr. Wright, her father's secretary. After her return in November 1943 she said that she drew cheques on the account for private expenses and so on, during the two years or thereabouts which elapsed before her father's death, but that she never knew what the state of the account was and that she did not discover that her father had been " using " the moneys paid into the account

until about two months after his death. There is nothing to suggest that the first part of this statement is not true, and the second part of it may, I think, be true also, although there is a memorandum written by the testator and produced by her, from which the contrary could be inferred. The memorandum is itself undated, but it was sent to her with other documents which showed that it must have been written on or about 25th June 1939. It should, I think, be quoted in full. The testator, after stating that since the opening of the account the trustee company had paid into it a total of £1,552 12s. 10d., says: "This is because I told "them that whenever any funds from your investments reach £100 they "should be paid into this account, so the total amount at present which "has been paid into your account is £6,577 12s. 10d., but withdrawn from "it has been £6,400 5s. 0d. This amount is made up of £5,000 which "I withdrew (on the day I deposited the £5,025) together with refunds "(sic.) of £750, £150, £200, £300 to myself and an amount of 5s. for a cheque "book. The reason why I opened the account when I did was that this "£5,025, a gift from me, would be free of probate if I live beyond three "years of the date. All these withdrawals in my books naturally stand "as a credit to you, which in the event of my dying my estate would have "to pay them back before my nett worth for probate purposes was assessed. "It is necessary for these monies to be 'loaned' to me so that I can make "the advances to you through my London account per the medium of "Letters of Credit and such like. By doing it this way it removes any "necessity for you to advise anyone you have an income, because by law "a father can legally provide his children with living expenses, etc. Of "course when I see you I can go further into details, but I guess you can "understand there is no need at present for you to know. In fact the less "you know the better in case you are asked any questions. The whole "thing in fact is a gift from me and not an Income." This letter is far from disclosing any clear conception of what the testator was doing. It certainly shows that he had it in mind that it was necessary or desirable to avoid payment of English income tax on the income of the settled fund. It also makes it clear that he intended his estate to be liable on his death to repay to his daughter what he was taking out of the bank account. This liability he regarded as having the merit of reducing the value of his estate for duty. The word "refund" may mean anything or nothing. If the last sentence of the memorandum may be taken as literally true it might be decisive in favour of the Commissioner in this case, but the whole tenor of the context suggests that it represents a false statement which his daughter is to make, if it becomes necessary, to the revenue authorities in England. The main importance of the memorandum seems to me to be that, if the daughter is to be taken as having acquiesced in what the testator says he has been doing, and presumably proposes to continue to do, there is some ground for saying that she has authorised him to use her moneys for his own purposes subject to an obligation on the part of his estate to repay after his death all sums so taken and used.

The Commissioner, in assessing duty on the estate, allowed as a deduction the sums (including the £5,000) withdrawn by the testator

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from the bank account, but less certain sums which had been paid to the daughter or applied for her use or benefit during his lifetime. The Appellant claimed to deduct interest on the " loans," but the Commissioner refused to concede this. After the case had been stated under Sec. 124 of the Stamp Duties Act, certain issues were directed to be tried. These came before Roper C.J. in Eq., who held that the moneys withdrawn from the bank account by the testator were moneys lent by the daughter to her father but that there was no agreement to pay interest and no interest was therefore payable. There was no express finding as to when the loans were repayable but it must be taken, I think, that they were repayable on the testator's death.

This case illustrates once again the defects and difficulties of the procedure by way of case stated. Here we have selected issues which are really questions of mixed fact and law sent before one tribunal, after which the case itself goes before another tribunal which is faced with formal and probably inadequate answers to questions the real significance of which cannot be grasped until consideration of the case as a whole is undertaken. Here the case came before the Full Court of New South Wales with findings by Roper C.J. in Eq. that moneys had been lent by his daughter to the testator but that no interest was payable thereon. While it was necessary for the Full Court to apply and act on these findings, the Court was not, in my opinion, called upon to shut its eyes to the circumstances of the case which are set out in the case stated and the annexures thereto or to refrain from drawing inferences consistent with those findings from the material thus put before it : see Sec. 124 (7). On the one hand it was at liberty to draw the inference (which I would draw) that the " loans " were repayable at death and not before. On the other hand it was not bound to look at the case as if the whole of the relevant facts could be expressed in the sentence " Mrs. Jackaman lent to her father without interest some of the moneys " paid to her out of the income of the trust estate." If, indeed, that were the whole of the case it would present little difficulty. I would regard the findings as amounting to no more than that the moneys were withdrawn and applied by the testator in circumstances which created, as between himself and his daughter, the legal relation of borrower and lender. It seems to me to be essentially a decision of a point of law, though it necessarily involves a finding of fact that the sums were withdrawn and used with the concurrence of the daughter.

In order that a gift should escape Sec. 102 (2) (d) it is necessary not only that bona fide possession and enjoyment should be assumed by the donee immediately upon the gift, but also that bona fide possession and enjoyment should be thenceforth retained by the donee to the exclusion of the deceased or of any benefit to him. Most of the cases which have arisen under this and similar statutory provisions turn upon the circumstances or conditions attending the making of the gift. In the present case it has been assumed throughout (rightly or wrongly) that bona fide possession and enjoyment were assumed by the daughter immediately on the making of the settlement and were thenceforth retained by her to the exclusion of the testator up to the date of the daughter's going abroad, and thereafter up to

the time when she directed the trustee of the settlement to pay the income of the trust into the Cherry Jackaman account at the Bank of New South Wales and authorised her father to withdraw moneys from that account and to use the moneys withdrawn as he wished subject to an obligation to repay after his death moneys so withdrawn and used. When these authorities were acted upon, says the Commissioner, there was no longer " entire " exclusion of any benefit to the deceased " within the meaning of Sec. 102 (2) (d).

I think that difficulty attaches to the case arising largely from the unsatisfactory nature of the procedure to which I have referred. But I have not been able to see any substantial answer to the Commissioner's arguments. It seems to me that the effect of what was done was that the whole of the income of the settled fund was made directly available to the testator and that he had the use without interest during his lifetime of so much of that income as he chose to take. In fact he used it to reduce interest on his own bank overdraft, which is the same thing as setting it to earn interest for itself. It seems to me that that was a benefit within the meaning of Sec. 102 (2) (d). It was a very real advantage to him, even if it was only of a temporary nature. The arrangements made gave him what amounted to direct access to the income of the trust fund which he was at liberty to use and did use, and it seems to me that while those arrangements stood the daughter had not possession and enjoyment of the trust fund to the entire exclusion of any benefit therefrom to the testator. I would myself agree with Owen J. that the case is not really distinguishable from *O'Connor* v. *Commissioner of Succession Duties (S.A.)* 1932 47 C.L.R. 601. The language of the relevant South Australian enactment was not identical with that of the New South Wales Act, but no distinction can be based on that fact. *O'Connor's* case may be admitted to be a stronger case than the present case because after the making of what purported to be an absolute gift by father to son, the father under a power of attorney simply collected the whole income of the property for his own benefit and without liability to account. Here, of course, the benefit derived was much less in content. But the enjoyment of an interest-free loan not repayable until after the father's death was to my mind a real benefit of exactly the same kind.

There are two arguments against the view which I have expressed, and I would readily concede that each of them has force. But it has seemed to me that the one gives too much weight to the finding of Roper C.J. in Eq. that " loans " were made by the daughter to her father, and that the other gives too little weight to it, if it does not altogether ignore it.

It may be said, in the first place, that when the income was paid into the Cherry Jackaman account at the bank it came actually into the hands of Cherry Jackaman, who was the legal owner of the chose in action evidenced by the bank account. Then out of the money standing to her credit and in effect in her possession she made loans from time to time to her father. What her father received was not the income, or any part of the income, of the trust fund, but simply a sum of money which, when once paid into the bank, was the daughter's property and in the daughter's

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possession, to do what she liked with. That she chose to lend it to her father does not mean that she was in any way foregoing exclusive possession and enjoyment of the trust fund. The position is the same as if she had lent it to a stranger on the same terms. There is, I think, as I have said, much force in this argument. But it does not seem to me to represent the actual position which must be taken to have been created if one accepts the findings of Roper J. in the light of all the circumstances. Even if the income of the trust fund were paid into an account on which the daughter alone could operate, and she drew cheques on that account payable to her father, the regularity of the payments, the period over which they continued, and the fact that she thus disposed of the whole, or almost the whole, of the income, might well be held to warrant the inference that she was really surrendering to her father for the time being possession or enjoyment of that income. Here the account is opened by the father himself while the daughter is abroad and, being maintained by her husband, has no need of the income of the trust fund. During the whole period of her absence the father has authority to operate on the account, is the only person who is practically in a position to operate on it and is the only person who does in fact operate on it. The whole purpose and object of the opening of the account is that the father may have access to and practical control of the moneys paid into it. The intention is that the income of the trust fund shall be paid into it. The whole of that income is in fact paid into it on the father's instructions, and no other moneys (except the initial £5,000) are ever at any material time paid into it. Over a period of more than four years practically the whole of the moneys paid in are drawn out by the father and used for his own purposes. The net annual income is over £1,400 and during the whole of the period the account is never in credit to a greater extent than £418 and at one stage it is over-drawn to a trifling extent. Payment into the account by the trustee company was, of course, as between the company and the daughter, payment to the daughter, and each such payment discharged the company in respect of the sum paid. But in truth and in fact each such payment was intended to have, and did have, the effect of placing a sum of money which was derived from the trust fund at the disposal of the father, and he exercised the power of disposal which his daughter had given him. The circumstances as I see them cannot really be reconciled with the view that the daughter was " retaining " possession and enjoyment to the exclusion of any " benefit " to her father.

The other argument against the view which I have expressed above depends on taking a radically different view of the facts of the case from that which I have hitherto accepted. It may be said that the true inference to be drawn is that the daughter gave to her father authority to give directions to the trustee company and authority to operate on the bank account, not with the intention that he should draw money and use it for his own purposes, but with the intention that he should, and in the belief that he would, invest it or otherwise apply it for her benefit. On this view of the facts it might well be said that the daughter did retain possession and

enjoyment to the exclusion of the testator or of any benefit to him, because he was a trustee for her of any moneys which he withdrew. If he committed a breach of trust by using moneys for his own benefit he could not be said to be receiving a benefit from the trust fund, any more than if he stole money from a safe in which she had placed sums paid to her by the trustee company. I would not regard this as by any means an impossible or even improbable view of the facts. The testator's memorandum of 25th June 1939 may well have been completely misunderstood by his daughter. It is true that he tells her that he has taken four sums out of the account and that these are repayable to her out of his estate, but he does not say anything unequivocal about any future withdrawals. He speaks of having in mind a desirable method of remitting moneys to her and he uses the unexplained (and to me inexplicable) word " refund." The whole thing may have left a woman who had no business training or experience with the idea that he was moving in a mysterious way to perform peculiar paternal wonders for her benefit, and without any actual realization that he was using or intending to use her money for his own purposes. Such a view would indeed go far towards reconciling her evidence with the documents which were used against her in cross-examination. On this view interest would, of course, be payable to her by the testator's estate and probably at a higher rate than the 3½ per cent. with which he was prepared to credit her. But such a view seems never to have been put, and it is clearly inconsistent with the finding that there was a loan without interest—a finding which seems to me, having regard to the circumstances, necessarily to involve an agreement by the daughter that he should have the use to such extent as he wished of the income of the trust fund for an indefinite period. The whole thing is unsatisfactory, but it cannot be said, I think, that there was no evidence to support the finding actually made. On the finding and the other material evidence I am not able to avoid the conclusion that the case is brought within Sec. 102 (2) (d).

(c) Fullagar, J.— *continued.*

For these reasons I agree with the Judgment of Owen J. and I am of opinion that this appeal should be dismissed.

(d) KITTO and TAYLOR, JJ.

(*d*) Kitto and Taylor, JJ.

This case comes before us on appeal from a judgment of the Supreme Court of New South Wales (Full Court) given upon the hearing of a case stated by the Commissioner of Stamp Duties pursuant to S. 124 of the Stamp Duties Act, 1920–1940 (N.S.W.). The case stated submitted for decision certain questions which had arisen in respect of the assessment of the death duty payable on the estate of one Arthur Henry Davies, who died on 28th January 1946. When the case first came before the Supreme Court, an order was made under subs. (6) of Sec. 124 directing that a number of issues of fact which had been agreed upon between the parties should be tried by a Judge. These issues were thereafter tried and determined; and upon the facts appearing from the case stated as supplemented by the findings made the Court answered the questions in the case favourably to the Commissioner.

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The main question litigated in the Supreme Court, and the only question which the appeal brings before us, is whether the assets subject to a certain trust, as they existed at the death of the deceased, formed part of his dutiable estate by virtue of para. (d) of Sec. 102 (2) of the Stamp Duties Act. The trust was created by the deceased in 1924, by means of a deed of trust the parties to which were the deceased, a daughter of his, and a trustee company. Of the terms of the trust it is sufficient to say that in the events which happened the daughter became absolutely entitled to the corpus of the trust fund, together with any accumulations of income, when she attained the age of thirty in February 1940, and that in the interval the trustee company had power to apply the whole or such part as it thought fit of the income for or towards her maintenance education and general support. The parties have treated the case in argument, and it may now be considered, on the basis that the whole beneficial interest in the trust property was comprised in a gift made by the deceased in 1924, and that the daughter was the donee thereof. Moreover, it is common ground between the parties that such bona fide possession and enjoyment of the property given as the nature of that property allowed was assumed by the daughter immediately upon the gift and thenceforth retained to the entire exclusion of the deceased and of any benefit to him, until 3rd February 1939. This was so because the whole of the income of the trust property was, until that date, either paid to the daughter, applied for her benefit, or accumulated so as to form part of the fund to which she ultimately became absolutely entitled on attaining the age of thirty.

On 3rd February 1939, however, the deceased received by way of loan from the daughter a sum of £750, and he received from her twenty-four other loans at later dates. Together with an earlier loan of £5,000 which will be mentioned hereafter, these loans totalled £10,940, the bulk of which, said by the daughter to amount to £8,926 18s. 7d., was still owing to her by the deceased at his death. At first the daughter claimed that interest at 3½ per centum was payable to her upon the balance of these loans outstanding from time to time, and a question which was asked in the case stated was whether any interest on the £8,926 18s. 7d. should have been allowed as a debt due and owing by the deceased to his daughter and deducted from the dutiable estate. It was found, however, when the issues of fact came to be tried, that no agreement had been made for the payment of interest on the amounts lent, and it is now accepted by the Appellant executor that all the loans were free of interest. Now, all the loans made on or after 3rd February 1939 were made by means of cheques drawn upon a bank account of the daughter into which payments of income from the trust assets were made from time to time by the trustee company ; and because of this the Commissioner contends that to the extent of these loans the deceased received the income of the property comprised in his gift of 1924, and that therefore bona fide possession and enjoyment of that property was not retained by the daughter to the entire exclusion of benefits to the deceased.

In order to examine this contention it is necessary to state the

established facts in a little more detail. The bank account which has been mentioned was opened by the deceased himself in his daughter's name on 19th December 1938, and on that day he paid to the credit of the account a sum of £5,025 which had come to him as a beneficiary in the estate of his late father. His intention in doing this has been found to be : (a) to make a gift of the £5,025 to his daughter, (b) to withdraw £5,000 with her concurrence as a loan by her to him, (c) to arrange that the trustee company should pay into the account with her concurrence the income from the trust assets, and (d) to withdraw with her concurrence so much of that income as he from time to time wished, to be used as he wished, but subject to an obligation to repay to her the amounts not applied for her benefit or at her request. In pursuance of this intention the deceased withdrew the £5,000 on the same day, by means of a cheque which she had previously given him at his request. She had also signed at his request two other documents. One was a letter addressed to the bank manager, authorising the deceased to draw cheques and to operate on the account as fully and effectually as she could if personally present. This authority was expressed to be a continuing one until withdrawn in writing. The second document was a letter addressed to the manager of the trustee company, authorising him to take instructions from the deceased in all matters regarding her trust and the new bank account which he was opening in her name. This also was expressed to be a continuing authority until withdrawn in writing, and it was later supplemented by a letter of 9th January 1939, by which the daughter requested the trustee company until further instructions to pay into her bank account any money coming to her from her trust. Thereafter from time to time the trustee company paid income of the trust into the account. It is stated in the reasons for judgment delivered by Owen J. in the Supreme Court, and it was accepted as the fact in the argument in this Court, that apart from the opening deposit of £5,025 the only moneys which were paid into the daughter's bank account throughout the relevant period came from the trust funds. Between 3rd February 1939 and 4th April 1943, the deceased operated on that account by drawing cheques, thirty in all, and thereby withdrawing moneys which, with the £5,000 already withdrawn, amounted in the aggregate to £11,425. Of the amounts thus withdrawn, four, totalling £485, were (it has been found) in effect repaid to the daughter or paid to some other person at her request or on her behalf. The remaining sums withdrawn are those which have been referred to as the loans totalling £10,940. Of this amount, £2,000 was invested by the deceased in shares in the daughter's name. Thus there was £8,940 outstanding at the death, rather than £8,926 18s. 7d. as claimed by the daughter.

The view taken by the learned Judges of the Supreme Court on the only question which has been debated here was that the case was indistinguishable in principle from *O'Connor's* case (1932) 47 C.L.R. 601. Their Honours observed a difference between the facts of that case and the facts of the present in that here the moneys to which the daughter became entitled under the trust were paid by the trustee into a bank account in

her name ; but they considered that the effect of the instructions given by the daughter to the trustee company and the authority conferred by her on the deceased to operate on the bank account was to place the deceased in a position in which he controlled, used and enjoyed, for his own benefit, moneys derived from the trust assets. Their Honours thought that what occurred might be aptly described by adapting the words in which Lord Radcliffe, in *St. Aubyn* v. *Attorney-General* (1952) A.C. 15, 47, summed up the transaction which was the subject of the decision in *Worrall's* case (1895) 1 Q.B. 99 : " In effect the son was returning to the father the income " of the property given."

It would be difficult to resist this conclusion if the deceased, when he took moneys out of his daughter's bank account, had taken them free from any obligation of repayment ; but the fact that all the moneys he withdrew were retained by him as loans from his daughter introduces considerations which were absent in *O'Connor's* case, and in our opinion it requires a clear distinction to be drawn between that case and the present. That the loans were genuine and not colourable is conclusively established by the findings which were made on the trial of the issues of fact. Not only was it found, as has already been mentioned, that the intention of the deceased was to make withdrawals from his daughter's bank account subject to an obligation on his part to repay the amounts not applied for her benefit or at her request, but in answer to a specific question whether the sums withdrawn (other than the four amounts totalling £485) were loans by the daughter to the deceased the answer returned was Yes. It seems to us to be necessarily involved in this finding that the daughter's instruction to the trustee company to pay her income into her bank account and the authority she gave to the deceased to withdraw moneys from that account did not lead to his being found in receipt of the trust income. To say that the payments made out of the daughter's account to the deceased were loans by the daughter to the deceased is to say, first, that the payments of trust income into the account were in reality payments made to the daughter and not to the deceased, and, secondly, that the withdrawals from the account were transactions by which the daughter converted a debt owed to her by the bank into a debt owed to her by the deceased. The latter statement means that the withdrawals did not transfer the income to the deceased ; they merely changed the form in which the daughter continued to keep it as her own. Undeterred by the well-known warnings in the speeches delivered in the *Duke of Westminster's* case (1936) A.C.1, Counsel for the Commissioner sought to find in the distinction between form and substance a warrant for glossing over the fact that there never came a point of time when the daughter did not have in her own exclusive possession and enjoyment the assets, namely the debts, which at the various stages represented the whole of the moneys she received from the trust estate. But it seems to us to be logically impossible, having said in one breath that what the deceased received he received by way of loan from his daughter, to say in the next breath that what the deceased received was the income of the trust estate. It was money which he received

from his daughter upon a promise of repayment. It therefore did not constitute any addition to his total net wealth ; and by lending it to him the daughter did not reduce that addition to her own wealth which had come to her as income from the trust estate. That addition she always kept in one form or another ; and at all times she completely excluded the deceased from possession and enjoyment of the debts which represented that addition in her hands.

It is true that the deceased derived a benefit when he took moneys out of his daughter's bank account under the authority she had given him and applied those moneys, still by her authority, in making loans to himself. It is undoubtedly a benefit to obtain a loan which one desires, and especially to obtain a loan free of interest. The benefit which the deceased derived, in fact, could be stated exactly in terms of money, because the use he made of his borrowings was to keep down his own bank overdraft and thus to save interest. But it has been pointed out over and over again that provisions such as that which is made by Sec. 102 (2) (d) are not attracted wherever it is found that after the making of a gift by a person since deceased he derived a benefit from or with respect to the property given. Such provisions require that the history of the property from the time of the gift be considered from the point of view of the donee. Did he so assume immediately upon the gift and thenceforth retain such possession and enjoyment of the property as by its nature could be had that the deceased and every benefit to him were entirely excluded from that possession and enjoyment ? That is the question to be answered in every case, and it is beside the point to say that after making the gift the deceased had a benefit connected in some way with the property given but not involving his admission to any of the possession and enjoyment which the nature of the property given allowed the donee to have. Unless the benefit is such as to diminish the possession and enjoyment which the donee might otherwise have had, the conditions for the application of Sec. 102 (2) (d) are not satisfied : *Oakes* v. *Commissioner of Stamp Duties* (1954) A.C. at pp. 73, 74 and 75.

How, then, does the present case stand ? If the daughter had put the deceased in her place so that he received the income of the trust property as his own, clearly enough the resultant benefit to him would have been in derogation of the possession and enjoyment which the nature of the property allowed her to have, and the case would have been *O'Connor's* case over again. But she did not do so. She first reduced into possession each amount of income as it became payable, by having it paid into her bank account, thus acquiring full control over its disposition. The authority she had given the deceased to operate on the account was a revocable authority, and in any case it placed him in a fiduciary position so that he could not use it to withdraw moneys for his own use except by way of loan. Her next step might no doubt have been to invest the money so as to produce income in its turn ; but it cannot be maintained that unless she did this she was failing to have the exclusive possession and enjoyment of the trust fund

In the High Court of Australia.

No. 8. Reasons for Judgment, 19th August, 1954. (d) Kitto and Taylor, JJ.— *continued.*

which was the property comprised in the gift. She would clearly have had that exclusive possession and enjoyment if, having received the income, she had spent it on pleasure, or had used it in making donations to charity, or had left it in a non-interest-bearing bank account. There is no room that we can see for a different conclusion where it is found that the use which she chose to make of it was to lend it free of interest. It would not be true to say that by reason of the loan the borrower was admitted to some part of the possession and enjoyment of the property given, or that the benefit which he got from the loan was a benefit cutting into the possession and enjoyment which the daughter might otherwise have had of that property.

For these reasons we are of opinion that the case is not one to which Sec. 102 (2) (d) applies, and the first question in the case stated, which was whether the sum of £38,162 13s. 7d. (the value as at the death of the property given in 1924) should have been included in the dutiable estate of the deceased, ought to have been answered No.

It will be seen that this conclusion depends upon the unqualified finding of fact that the sums withdrawn by the deceased from his daughter's bank account were loans by his daughter to him. The procedure provisions of the Act are such that not only must we give full effect to this finding without placing any gloss upon it, but we are not, we think, authorised to take into our consideration the evidence which was given on the trial of the issues of fact. Indeed, we should have thought that the transcript of that evidence ought not to have been included in the appeal book ; there was no appeal from the findings, and the evidence upon which they were based formed no part of the material before the Full Court of the Supreme Court. The Act placed that Court, and it therefore places us, under the necessity of giving a decision upon material consisting only of the facts and the documents in the special case, such inferences as arise from those facts and documents, and the findings made on the trial of the issues. This position is somewhat artificial. The awkward, expensive, dilatory and generally unsatisfactory method of appeal which the Stamp Duties Act provides has often been the subject of protest. Not the least important objection to it is that it does not enable the court which has to decide an appeal to make its own findings of fact, as it can, for instance, in an appeal under the Income Tax Assessment Act 1936 (Commonwealth). It is a comforting reflection that if the deficiencies of the appeal procedure have led to the present case being decided upon a view which might have been displaced had the facts been more fully before us, the loss, for once, does not fall upon the taxpayer.

In our opinion the appeal should be allowed, the order of the Supreme Court should be discharged insofar as it answered Questions 1, 4 and 5 in the case stated, and those questions should be answered as follows :—

1. No.
4. An amount calculated in accordance with the answers to Questions 1 and 2.
5. By the Respondent.

No. 9.

Order.

In the High Court of Australia.

No. 9. Order, 19th August, 1954.

IN THE HIGH COURT OF AUSTRALIA NEW SOUTH WALES REGISTRY.

No. 32 of 1953.

On Appeal from the Supreme Court of New South Wales.

Between

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED ... ... *Appellant*

and

THE COMMISSIONER OF STAMP DUTIES ... ... *Respondent.*

Before Their Honours, The Chief Justice Sir OWEN DIXON, Mr. Justice WEBB, Mr. Justice FULLAGAR, Mr. Justice KITTO and Mr. Justice TAYLOR.

Thursday the 19th day of August, 1954.

THIS APPEAL from the Order of the Full Court of the Supreme Court of New South Wales made on the 1st day of June 1953 upon the hearing of a case stated by the Commissioner of Stamp Duties pursuant to Section 124 of the Stamp Duties Act 1924–1940 in Suit No. 315 of 1951 coming on for hearing before this Court at Sydney on the 7th and 8th days of April 1954 WHEREUPON AND UPON READING the transcript record of the proceedings herein AND UPON HEARING Sir Garfield Barwick of Queen's Counsel with whom was Mr. Forbes Officer of Counsel for the Appellant and Mr. Gordon Wallace of Queen's Counsel with whom was Mr. Robert C. Smith of Counsel for the Respondent THIS COURT DID ORDER on the said 8th day of April 1954 that this appeal should stand for judgment and the same standing for judgment this day accordingly at Sydney THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that so much of the said Order of the Full Court of the Supreme Court of New South Wales as answers questions 1, 4 and 5 submitted for the determination of the Supreme Court by the said case stated be discharged AND in lieu of the answers to questions 1, 4 and 5 THIS COURT DOTH ORDER that such questions be answered as follows :—

1. No.
4. An amount calculated in accordance with the answers to questions 1 and 2.
5. By the Respondent the Commissioner of Stamp Duties.

AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the Appellant of

In the High Court of Australia.

No. 9. Order, 19th August, 1954— *continued.*

this Appeal and that such costs when so taxed and certified be paid by the Respondent to the said Appellant or to George Ashwin Yuill its Solicitor after service upon the Respondent or his Solicitor of a copy of the certificate of such taxation AND THIS COURT DOTH FURTHER ORDER that the sum of Fifty pounds (£50) paid into Court by the Appellant as security for the costs of this appeal be paid out of Court to the Appellant or its Solicitor.

By the Court

(L.S.) M. DOHERTY,
Deputy Registrar.

In the Privy Council.

No. 10. Order in Council granting Special Leave to Appeal to Her Majesty in Council, 6th May, 1955.

No. 10.

Order in Council granting Special Leave to Appeal to Her Majesty in Council.

(L.S.) AT THE COURT AT BUCKINGHAM PALACE.

The 6th day of May, 1955.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY

LORD PRIVY SEAL (ACTING FOR LORD PRESIDENT)
EARL OF MUNSTER.
MR. SECRETARY HEAD
MR. BIRCH.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 19th day of April 1955 in the words following, viz. :—

" WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of The Commissioner of Stamp Duties for New South Wales in the matter of an Appeal from the High Court of Australia between the Petitioner and the Permanent Trustee Company of New South Wales Limited Respondent setting forth (amongst other matters): that the Petitioner desires special leave to appeal from a Judgment of the High Court of Australia allowing by a majority of three Judges to two (Webb, Kitto and Taylor JJ., Dixon C.J. and Fullagar J. dissenting) an Appeal from a unanimous Judgment of the Full Court of the Supreme Court of New South Wales answering in favour of the Petitioner certain questions submitted for determination by a case stated by the Petitioner under Section 124 of the Stamp Duties Act 1920–1940 of New South Wales

and confirming an assessment of death duty to be paid by the Respondent consequent on the decease of Arthur Henry Davies: that on the 13th August 1924 the aforesaid Arthur Henry Davies (thereinafter called the settlor) executed a settlement of certain property upon trusts to be administered by the Respondent his only child Muriel Norah Davies (thereinafter called the beneficiary) who was born on the 22nd February 1910 and so came of age on the 22nd February 1931 being the primary beneficiary: that during the minority of the beneficiary the Respondent made annual payments to the settlor for maintaining and educating her: that by a letter dated the 1st December 1938 the beneficiary at the settlor's request placed all matters concerning the trust under the settlor's sole control and by a letter dated the 29th December 1938 also empowered him to operate on her bank account in her name and on her behalf as fully and effectually to all intents and purposes as she could if personally present: that on the 22nd February 1940 the beneficiary became absolutely entitled to the trust fund: that between the 3rd February 1939 and the 4th April 1943 the settlor by way of interest free loans by the beneficiary to himself withdrew various sums: that on the 29th January 1946 the settlor died: that upon the assessment of the estate for death duties by the Petitioner the Respondent as executor objected *inter alia* to the inclusion of the sum of £38,162 13s. 7d. representing the value of the assets subject to the trust at the date of the settlor's death: that accordingly on the 20th November 1951 the Petitioner stated a case as aforesaid for determination by the Full Court of the Supreme Court of New South Wales the material questions being (i) Should the said sum of £38,162 13s. 7d. have been included in the dutiable estate of the testator; (iv) What is the amount of death duty payable in respect of the said estate; and (v) How should the costs of this case be borne and paid: that on the 1st June 1953 the Court delivered Judgment holding that the sum of £38,162 13s. 7d. was rightly included in the dutiable estate and that the costs should be borne by the Respondent: that the Respondent appealed to the High Court which on the 19th August 1954 allowed the Appeal with costs: And humbly praying Your Majesty in Council to grant to the Petitioner special leave to appeal from the Judgment of the High Court of Australia dated the 19th August 1954 or for 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 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 19th day of August 1954 upon the terms that the Petitioner if successful in the Appeal shall not ask for his costs thereof:

In the Privy Council

No. 10. Order in Council granting Special Leave to Appeal to Her Majesty in Council, 6th May, 1955— *continued.*

"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 on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

WHEREOF the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

In the Privy Council.

No. 36 of 1955.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN

THE COMMISSIONER OF STAMP DUTIES OF THE STATE OF NEW SOUTH WALES ... *Appellant*

AND

PERMANENT TRUSTEE COMPANY OF NEW SOUTH WALES LIMITED the Executor of the Will of ARTHUR HENRY DAVIES late of Sydney in the State of New South Wales deceased *Respondent.*

RECORD OF PROCEEDINGS

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(A66622)