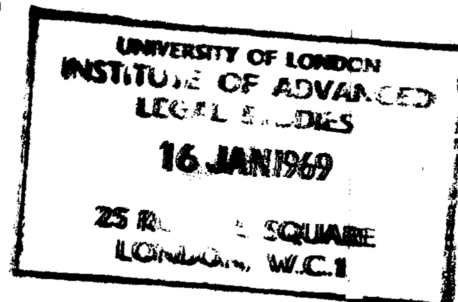
15, 1968

IN THE PRIVY COUNCIL No. 32 of 1967

ON APPEAL

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



B E T W E E N:

CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE — Appellants

\- and -

10 THE COMMISSIONER OF STAMP DUTIES — Respondent

CASE FOR THE APPELLANTS

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CECIL WOLSEY CURTIS THOMPSON AND ROSCOE WILLIAM GYLES HOYLE

INTRODUCTORY

1. The Appellants are the Executors of the Will and Codicil of Rita Buckland Thompson deceased (hereinafter called "the Testatrix").

2. This Appeal is brought pursuant to an Order made by the Court of Appeal of the Supreme Court of New South Wales on 23rd October, 1967 granting final leave to appeal to Her Majesty in Council from an Order made by the said Court of Appeal (comprising Wallace P., Walsh and Jacobs JJ.A.) on 30th June, 1967 whereby the said Court of Appeal determined certain questions submitted in a case stated by the Respondent the Commissioner of Stamp Duties pursuant to Section 124 of the Stamp Duties Act, 1920-1965.

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30 3. The case stated by the Respondent as aforesaid concerned a sum of $288,167.43 representing the value as at the date of death of the Testatrix

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of certain assets (hereinafter called "the subject assets") which at that date formed part of the estate of the Testatrix's father John Arthur Buckland (who predeceased her) and which (with other assets) had been appropriated by the Trustees of that estate pursuant to Section 46 of the Trustee Act, 1925-1942 in satisfaction of the share or interest of the Testatrix in that estate arising under the following provisions of the Will of the said John Arthur Buckland namely: 10

> "I give all my real and personal property not otherwise disposed of to my Trustees UPON TRUST to sell convert and get in the same ... and to hold the residue thereof IN TRUST for all or any my children or child ... living at my death and if more than one in equal shares ... PROVIDED ALWAYS AND I DECLARE that my Trustees shall retain the share in the said trust premises hereinbefore given to each 20 daughter of mine and shall invest the same and shall during the life of such daughter pay the income of her said share to her without power of anticipation while covert and after the death of such daughter shall hold such share upon trust for all or such one or more exclusively of the others or other of the children or remoter issue of such daughter if more than one in such shares and in such manner in all respects 30 as such daughter shall by Will or Codicil appoint and in default of and subject to any such appointment IN TRUST for all or any the children or child of such daughter of mine who shall be living at my decease or born afterwards and who being a son or sons attain the age of twenty one years or being a daughter or daughters attain that age or marry and if more than one in equal shares as tenants in common 40 PROVIDED ALWAYS AND I DECLARE that subject and without prejudice to the trusts and powers hereinbefore declared and contained concerning the share of any such daughter of mine as aforesaid my Trustees shall hold such share and the income thereof in trust for such person or persons for such purposes

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and in such manner in all respects as such daughter shall by Will or Codicil appoint and subject to any such appointment or so far as any such appointment shall not extend such share and any additional share or shares which may accrue or be added thereto by virtue of this present proviso and the income thereof respectively shall go and accrue by way of addition to the share
10 or shares of my other children or child in the said Trust premises if more than one in equal shares and proportions and so that the share which shall so accrue and be added to the share of any daughter of mine shall be held upon the trusts and with and subject to the powers and provisions herein declared and contained concerning her original share or as near thereto as circumstances will admit."

20 4. The Testatrix died without issue. At the time of her death the Testatrix was domiciled within the State of New South Wales but all of the subject assets were situate outside New South Wales.

5. By her Will the Testatrix made (inter alia) the following provision:

"If my husband the said Cecil Wolsey Curtis Thompson shall be living one month after my death <u>I DEVISE AND BEQUEATH</u> to him the
30 whole of my real and personal estate including all property over which I have a power of appointment under the Will of my late father the late John Arthur Buckland".

6. The husband of the Testatrix Cecil Wolsey Curtis Thompson was living one month after her death.

7. The questions submitted by the case stated by the Respondent as aforesaid were as follows:

(1) Whether the said sum of $288,167.43 was for
40 purposes of the assessment and payment of death duty properly included in the final balance of the dutiable estate of Rita Buckland Thompson?

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(2) If the answer to Question (1) is in the negative whether any, and if so, what part of the said sum of $288,167.43 was properly so included?

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

8. The Court of Appeal by its Order answered the said questions as follows:

(1) Yes.

(2) Not answered. 10

(3) By the Appellants.

STATUTORY PROVISIONS

9. Death duties in New South Wales are imposed by the Stamp Duties Act, 1920 (as amended). The provisions of that Act which are most material to the questions arising in this appeal are as follows:

" PART IV

...

100. In this Part ..., unless the context or subject matter otherwise indicates or requires, - 'Disposition of property' means - 20

(a) Any conveyance, transfer, assignment, mortgage, delivery, payment, or other alienation of property whether at law or in equity;

(b) The creation of any trust;

(c) The release, discharge, surrender, forfeiture, or abandonment at law or in equity of any debt, contract, or chose in action, or of any right, power, estate, or interest in or over any property; 30

(d) The exercise of a general power of appointment in favour of any person other than the donee of the power;

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(e) Any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own estate and to increase the value of the estate of any other person, whether in any of the cases referred to in the foregoing paragraphs the disposition is effected with or without an instrument in writing.

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'General power of appointment' includes any power or authority which enables the donee or other holder theof, or would enable him if he were of full capacity, to appoint or dispose of any property, or to charge any sum of money upon any property, as he thinks fit for his own benefit, whether exerciseable by instrument inter vivos or by will or otherwise but does not include any power exerciseable by any person in a fiduciary capacity for the benefit of others only arising under a disposition not made by himself, or exerciseable as tenant for life under Part IV of the Conveyancing and Law of Property Act, 1898, or as mortgagee.

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'Settlement' includes any disposition of property (whether without consideration or upon any consideration other than full consideration in money or money's worth) whereby any property is settled or agreed to be settled or containing any trust or disposition in respect of any property to take effect after the death of any person but does not include a will.

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...

...

102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:-

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(1) (a) All property of the deceased which is situate in New South

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Wales at his death and in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death;

(b) ...

to which any person becomes entitled under the Will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased. 10

(2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death including a Will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person: provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust. 20

... 30

(j) Any property over or in respect of which the deceased had atthe time of his death a general power of appointment.

...

(2A) All personal property situate outside New South Wales at the date of the decease when -

(a) The deceased dies after the commencement of the Stamp Duties (Amendment Act, 1939; and 40

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

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

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...

114. (1) Death duty (other than death duty separately assessed in respect of non-aggregated property) shall constitute a debt payable to His Majesty out of the estate of the deceased in the same manner as the debts of the deceased, and such duty shall be paid by the administrator accordingly out of all real or personal property vested in him and forming part of the dutiable estate of the deceased whether that property is available for the payment of the other debts of the deceased or not and whether the property in respect of which the duty or any part thereof has been assessed is vested in the administrator or not.

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(2) For the purpose of paying the duty the administrator shall have the same power of selling, leasing or mortgaging any real or personal property vested in him as in the case of other debts of the deceased.

(3) The administrator shall not be liable for any duty in excess of the assets which he has received as administrator or might but for his own neglect or default have received.

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(4) Death duty so far as not paid by the administrator shall be collected upon an account delivered in accordance with section one hundred and twenty.

115. (1) Death duty (other than death duty separately assessed in respect of non-aggregated property) shall become due and payable on the assessment thereof by the Commissioner, or if not duly so assessed within six months from the death of the deceased then on the expiration of that period of six months. 10

(2) Such duty shall constitute as from his death a charge upon so much of his dutiable estate as is situate in New South Wales and upon all property situate in New South Wales the value of which is or which is included in that estate, whether vested in the administrator or not, but no such charge shall affect the title of a bona fide purchaser for value (whether before or after the death of the deceased) without notice. 20

(3) In case the duty is not paid within the prescribed time the Commissioner may apply to the Supreme Court, which may order that a sufficient part of the property included in the dutiable estate be sold, and the proceeds of such sale applied in payment of the duty and of the costs consequent thereon. 30

(4) Where any property has been sold under any such order the Supreme Court may make an order vesting the property in the purchaser. 40

(5) Every such vesting order shall have the same effect as if all persons

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entitled to the property had been free from all disability, and had duly executed all proper conveyances, transfers, and assignments of the property for such estate or interest as is specified in the order.

120. (1) Where any property which is or the value of which is included in the dutiable estate of a deceased person is vested in any person other than the administrator, the duty payable in respect thereof (other than death duty separately assessed in respect of non-aggregated property) shall be paid by the persons entitled thereto, according to the value of their respective interests therein, to the administrator.

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

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(3) Any person directed by this section to deliver an account of any property shall upon the assessment of the duty payable in respect thereof be liable to pay such duty (including death duty separately assessed in respect of non-aggregated property) and interest thereon at the rate of eight

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pounds per centum per annum from the date of the expiration of the period of six months after the death of the deceased or if administration has been first granted out of New South Wales, from the date of the expiration of the period of twelve months after the death of the deceased, and if a trustee may raise the same by mortgage or sale of the property. 10

(4) A person who wilfully fails to comply with any of the foregoing provisions of subsections two and three of this section shall be liable to a fine not exceeding fifty pounds.

(5) In case the account and valuation is not lodged within the time above-mentioned, or if the duty is not paid within one month after assessment, the Commissioner or any person interested may apply to the Supreme Court, which may order that a sufficient part of such property be sold, and the proceeds of such sale applied in payment of the duty and of the costs consequent thereon. 20

(6) Where any property has been sold under any such order the Supreme Court may make an order vesting the property in the purchaser. 30

(7) Every such vesting order shall have the same effect as if all persons entitled to the property had been free from all disability and had duly executed all proper conveyances, transfers, and assignments of the property for such estate or interest as is specified in the order." 40

SUBMISSIONS TO AND DECISION OF THE COURT OF APPEAL

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10. Before the Court of Appeal the Appellants submitted:

(a) That the subject property was not brought to charge in the estate of the Testatrix by section 102(2)(a) nor by section 102(2)(j) of the Stamp Duties Act, 1920 (as amended) for the reason that each of the paragraphs of section 102(2) of the Act describe, upon their true construction, only property situate in New South Wales at the death of the relevant deceased.

(b) That the subject property was not brought to charge in the estate of the Testatrix by section 102(2A) of the Stamp Duties Act, 1920 (as amended) for the reason that that section insofar as it purports to impose death duty where a deceased person dies domiciled in New South Wales in respect of property situate outside New South Wales in the circumstances described in paragraphs (a) and (j) of section 102(2) of the Act is invalid.

(c) That section 102(2A) of the Act is not severable so as to enable it validly to operate to impose death duty on the subject assets in the circumstances of the present case.

11. The President, Mr. Justice Wallace, and Mr. Justice Jacobs expressed their agreement with the reasons and conclusions stated in the judgment of Mr. Justice Walsh although Mr. Justice Jacobs also published his reasons.

12. The decision of the Court of Appeal was, in substance, that upon the assumption that section 102(2A) of the Stamp Duties Act, 1920 (as amended) in respect of property situate outside New South Wales in the circumstances described in paragraph (a) of section 102(2) of the Act purported to operate to an extent beyond the legislative power of the State of New South Wales the invalid parts of that section were severable from the valid

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and that so construed it operated validly to impose death duty in respect of the subject assets.

13. Walsh J.A. in his judgment reached his conclusion by the following steps:-

(i) That as a matter of construction the property described by section 102(2A) in conjunction with paragraph (a) of section 102(2) of the Act embraces not only property subject to a general power of appointment (in the ordinary sense) or which a deceased was donee but also property subject to some special powers of appointment of which the relevant deceased was donee. 10

(ii) That personal property situate outside New South Wales over which a deceased who dies domiciled in New South Wales had during his life a general power of appointment (in the ordinary sense) may validly be taxed by the Parliament of New South Wales in the same way as personal property situate outside New South Wales which he in fact owned. 20

(iii) That if the donee of a special power of appointment of personal property situate outside New South Wales is enabled to appoint that property to himself the domicile of that person in New South Wales at his death is (whether the power be exercised or not) a sufficiently relevant nexus with New South Wales to enable duty to be imposed in respect of the value of that property. 30

(iv) That section 102(2A) of the Act insofar as it purports to impose duty in respect of the value of property situate outside New South Wales upon which property a deceased person who dies domiciled in New South Wales had a power "to charge any sum of money" appears to be beyond the legislative competence of the Parliament of New South Wales and thus to be invalid. 40

(v) That section 102(2A) insofar as it purports to impose duty to the invalid extent indicated in (iv) above is severable.

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(vi) That it was unnecessary, in the circumstances, to consider the operation and validity of section 102(2A) of the Act read in conjunction with section 102(2)(j) of the Act.

14. Jacobs J.A. in his judgment reached his conclusion by the following steps:-

(i) Domicile in New South Wales only provides a "link" for material purposes with the State when there is a relevant relationship between the property in question and the domicile of the deceased in New South Wales.

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(ii) Section 102(2A) of the Act has indicated that the domicile of the relevant person in New South Wales should be the link with New South Wales which gives power to the State to bring the property to duty.

(iii) It is unnecessary to decide whether there is a relevant relationship between the domicile of the deceased in New South Wales and the property in question where by the terms of the power the deceased as donee of the power is enabled to appoint or dispose of the property as he thinks fit for his own benefit.

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(iv) Whether or not there is a relevant relationship between the property and the domicile depends in most if not all cases upon whether under the rules of private international law the exercise of the power is governed by the law of the domicile of the donee of the power.

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(v) The law governing the exercise of a general power of appointment (in the ordinary sense) is the law of the domicile of the donee of the power. In the case of special powers the proper law governing the exercise of the power is the law governing the creation of the power.

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(vi) The definition of general power of appointment in section 100 of the Act is wide enough to include special powers of

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appointment where the donee of the power is one of the class of objects of the power.

(vii) It is unnecessary to decide whether in the case of such a special power the domicile of the donee of the power is sufficient to bring the property the subject of the power within the legislative competence of the New South Wales legislature.

(viii) It is within the competence of the New South Wales legislature to bring to duty property the subject of a general power of appointment in the ordinary sense of those words.

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(ix) If there is partial invalidity the operation of section 102(2A) in respect of the facts of the present case is severable from the invalid field of operation.

GENERAL LEGISLATIVE SCHEME

15. The broad scheme of the Stamp Duties Act, 1920 (as amended), in relation to the imposition of death duties, has been described by Lord Keith of Avonholm in Johnson v. Commissioner of Stamp Duties (1956) A.C. 331 at 349-350 as follows:-

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"Their Lordships would observe that, while section 102(1) deals with property of the deceased to which any person becomes entitled by will or on intestacy of the deceased and so is property of which he died possessed, section 102(2) includes a large number of categories of dutiable estate ... consisting mainly of property of which the deceased had disposed, or rights which he had created in third parties, during his lifetime, or within three years of his death, without full consideration. Most, if not all, of these cases are familiar in corresponding British legislation and have been compendiously referred to in various cases in the Australian courts as notional property of the deceased."

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and at 351-2 as follows:-

"The Act has regard first of all to persons

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dying domiciled in New South Wales and to persons dying domiciled outside New South Wales (sections 101D and 101E). By subsection (1) of section 102 the estate of a deceased person is deemed to include and consist of (a) his property situate in New South Wales at his death, and in addition (b) his personal property situate outside New South Wales at his death where he died domiciled in New South Wales. The person who is domiciled in New South Wales and the person who is not so domiciled are alike caught under (a) but the person who is not so domiciled escapes under (b). It would be a remarkable thing if the statute when it comes to deal with the various very special categories of property brought in for purposes of death duty by subsection (2) of section 102 cast the net wider than was done under subsection (1), by including under subsection (2) property inside and outside New South Wales, irrespective of whether the deceased died domiciled there or not. In their Lordships' view this would be an unreasonable construction to place upon the statute. That it was not so intended would, indeed, seem to follow from the addition of subsection (2A), which would be otiose if property under subsection (2) already included property inside and outside New South Wales. ... This view is in harmony with decisions of the High Court of Australia, when dealing with other paragraphs of subsection (2) of section 102, in Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co. Ltd. (Watt's case) 38 C.L.R. 12 and Vicars v. Commissioner of Stamp Duties (N.S.W.) 71 C.L.R. 309."

LIMITED NATURE OF POWERS OF NEW SOUTH WALES LEGISLATURE

16. The legislature of New South Wales is a subordinate legislature, its powers being found in the Constitution Act, 1902. Section 2 of that Act provides (so far as material):-

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

Legislation of the Parliament of New South Wales (upon any subject matter) which has no relevant territorial connection whatever with New South Wales is, accordingly, beyond the power of the legislature of that State. Johnson v. Commissioner of Stamp Duties (supra) at 350; Attorney-General v. Australian Agricultural Company (1934) 34 S.R. (N.S.W.) 571; Commissioner of Stamp Duties (N.S.W.) v. Millar (1932) 48 C.L.R. 618. 10

GENERAL CONSIDERATIONS

17. The principal enquiry in the present case is, therefore, whether, in the circumstances described in paragraphs (a) or (j) of section 102(2) as read in obedience to the command contained in section 102(2A) of the Act, there is a relevant nexus between the property dealt with in paragraphs (a) or (j) and the State of New South Wales. It must be borne in mind that for the purposes of section 102(2A) the relevant property described by paragraphs (a) and (j) is necessarily situate outside New South Wales. So far as each of those paragraphs is concerned for the purposes of section 102(2A) the relevant property is to be identified by reference to the existence of a "general power of appointment" as defined by section 100 in the deceased. Thus, whenever one finds that such a power of appointment as defined exists in respect of property outside New South Wales (which the deceased does not own and has never owned), the property in respect of which it exists is made the occasion of the imposition of liability to death duty and the value of that property is made the measure of that liability. It matters not that the relevant property is neither vested in the administrator nor available for the payment of the debts of the deceased. (Section 114 of the Act.) "Administrator" in this section means the 20 30 40

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"administrator" in New South Wales. Death duty constitutes a charge upon so much of the dutiable estate as is situate in New South Wales (section 115). In the case of property which is not vested in the administrator but is included in the dutiable estate of a deceased person, section 120 of the Act purports to impose upon the person entitled to such property the liability to pay the relevant duty to the New South Wales
10 administrator. Such provision would appear, however, to be beyond the power of the New South Wales legislature where the relevant property is situate outside New South Wales and the persons entitled to it have no connection by residence or domicile with New South Wales. London and South American Investment Trust v. British Tobacco Co. (Australia) Limited (1927) 1 Ch. 107; Comissioner of Stamp Duties (N.S.W.) v. Millar (1932) 48 C.L.R. 618.

20 BASIC SUBMISSIONS OF THE APPELLANTS

18. The basic submissions of the Appellants are as follows:-

(a) That section 102(2A) read in conjunction with section 102(2)(j) is in excess of the powers of the New South Wales legislature and is invalid.

(b) That section 102(2A) read in conjunction with section 102(2)(a) is in excess of the powers of the New South Wales legislature
30 and is invalid.

(c) That section 102(2A) read in conjunction with section 102(2)(a) has no application to the facts of the present case.

THE ARGUMENT AS TO SECTION 102(2A) READ IN CONJUNCTION WITH SECTION 102(2)(j)

19. (i) The criteria which are here selected for the imposition of the relevant tax in respect of the property over which the relevant power exists are
40 merely the facts that if such a power existed over property in New South Wales

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(whether exercised or not) duty would be chargeable and that the domicile at his death of the donee of that power was New South Wales.

(ii) The power may be a special power of appointment created under the law of a foreign country and the exercise of which is governed by the law of a foreign country. The relevant property is necessarily situate in a foreign country; the power need not be exercised by the donee; the donee may not have capacity to exercise it by reason of age or otherwise; the persons who take the property either by reason of the exercise of the power or in default of exercise of it may have no connection with New South Wales. If exercised, the power may be exercised outside New South Wales, for example, by a will made outside New South Wales for that purpose only. 10 20

(iii) Some one or more of the circumstances referred to in (ii) above if occurring in New South Wales might validly have been selected by a subordinate legislature as providing the relevant nexus between the foreign property in respect of which the tax is sought to be imposed and the State of New South Wales; in the present case, however, the only criteria which the legislature has indicated are the domicile of the deceased donee of the power and the existence of a power of appointment of the type described by the definition in respect of property which it situate in New South Wales would be made liable to the relevant duty. Those facts or circumstances in the Appellants' respectful submission do not provide a "relevant nexus"; cf. Johnson v. Commissioner of Stamp Duties (supra) at 350-351, and at 352-3. Even if it may be said that some connection between the property and New South Wales may be discovered in the domicile there of 30 40

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the donee of a power over the property, the statute "goes beyond legislating in respect of that connection". Commissioner of Stamp Duties v. Millar 48 C.L.R. 618 at 632, cited with approval in Johnson v. Commissioner of Stamp Duties (supra) at 353.

(iv) The Appellants rely on the matters submitted in subparagraphs (iii) to (v) inclusive of paragraph 20 hereunder, mutatis mutandis.

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(v) No valid process of limited construction whether pursuant to section 144 of the Act or otherwise can save from invalidity (i) the operation of section 102(2A) read in conjunction with section 102(2)(j), or alternatively (ii) the operation of section 102(2A) read in conjunction with section 102(2)(j) construed by reference to part only of the definition of "general power of appointment" in section 100; or alternatively (iii) the operation of section 102(2A) read in conjunction with section 102(2)(j) construed by reference to any part of the definition of "general power of appointment" in section 100 which may apply to any particular set of facts or to the facts of the present case.

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(vi) To attempt to introduce as the "relevant nexus" any of the circumstances referred to above if concurring in New South Wales or sufficiently and relevantly connected therewith in order to preserve some valid area of operation for section 102(2A) read with section 102(2)(j) is to depart from the principles enunciated in Johnson v. Commissioner of Stamp Duties (supra) at 356-7 in relation to the severability of section 102(2A).

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THE ARGUMENT AS TO SECTION 102(2A) READ IN CONJUNCTION WITH SECTION 102(2)(a)

20. (i) Many of the arguments stated in

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paragraph 19 are, it is respectfully submitted, similarly applicable to the question arising in relation to section 102(2A) read with section 102(2)(a). For the same reasons it is submitted that the same result should follow as in the case of paragraph (j).

(ii) It may, however, be argued that since paragraph (a) contains the words "property disposed of" the "relevant nexus" for the purposes of legislative competence is to be found in the fact of the exercise by the will of a domiciled New South Welshman of a power of appointment. The argument requires the initial assumption that to exercise a special power of appointment is "to dispose of property by will ...". Assuming for the purposes of the present argument that that is so, it is submitted that the exercise by will of a special power of appointment by a donee of the power who happens to be domiciled in New South Wales is not a "relevant nexus". To take that connection with New South Wales - when the special power may be exercised outside New South Wales and its validity depend upon the law of some other country - and to impose a tax in respect of the relevant property which is situate outside New South Wales is, it is submitted, to go beyond legislating in respect of the connection which can be seen to exist. If the circumstances selected as the criterion by reference to which the tax were imposed were the exercise of the power by a will proved in New South Wales, it might be possible to say that the proof of such a will under the laws of New South Wales provided a sufficiently "relevant nexus", since it might then be said that the will which exercises the power derives its status and operation from its proof under the law of New South Wales; cf. <u>The Myer Emporium Limited v.</u>

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Commissioner of Stamp Duties (1967) 85 W.N. (N.S.W.) Part 2, 115.

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(iii) It is not to the point, it is submitted, to say that the validity has long been generally accepted of similar legislation imposing a liability to duty in consequence of the domicile of the donee of a general power of appointment within the ordinary meaning of that phrase. The passage from Commissioner of Stamp Duties v. Stephen (1904) A.C. 137 at 140 cited by Walsh J.A. is expressed only in relation to a general power of appointment which has been exercised by the donee. So too, in the passage cited by Walsh J.A. from the judgment of Dixon J. (as he then was) in Grey v. Federal Commissioner of Taxation 62 C.L.R. at 63, His Honour referred only to the case where a general power had been exercised by the donee. The Estate Duty Assessment Act, 1914 (as amended) then being considered by the High Court of Australia expressly only taxes property in respect of which a general power of appointment had been exercised by the deceased. Thus, it is submitted, there is no warrant to be found in these cases for treating such observations as justifying the broad principle stated by Walsh J.A. that the domicile of the donee of a power which (whether general or special) enables the donee, if he chooses to do so, "to make the property his own or to transmit it by his will as if it were his own" provides a sufficiently relevant connection to enable the New South Wales legislature to impose death duty in respect of the property subject to such power as if the property were that of the donee.

(iv) Apart from the more general consideration adverted to above, it is submitted that the legislature has disclosed an intention that the burden of the duty

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should fall upon the property itself, and does not intend that the New South Wales or other estate of the deceased, which does not in fact include the relevant property, should bear the duty without the right to recoup the duty conferred by section 120. The construction given to the paragraphs of section 102(2) (apart from section 102(2A)) which require that the property described should be in existence and situate in New South Wales at the date of death stemmed, historically, in part from this view of the intention of section 102(2) and the predecessors of section 115 and section 120 coupled with considerations of legislative competence related thereto; cf. per Holmes J.A. in Drew v. Commissioner of Stamp Duties (1967) 86 W.N. (part 2) 335 at 341. So too, section 102(2A) operates in respect of property situate outside New South Wales only if that property is in existence at the date of death. Thus, the overriding intention of the relevant provision is seen to be not to impose a tax upon the New South Wales assets of the deceased quantified by reference to the value of foreign property, but to impose a tax the burden of which is cast upon the relevant foreign property and the owners of it. The achievement of this result, of course, depends upon the legislative competence to cast the ultimate burden of the tax in respect of the particular property upon the owners of it pursuant to section 120. It was, it is submitted, for this fundamental reason that Johnson v. Commissioner of Stamp Duties (supra) was decided as it was. It could be ssen clearly that the legislative intention was to cast the burden of the tax upon the relevant property and the owners of it - not upon the New South Wales estate of the deceased person who was domiciled in New South Wales. No doubt it is legislatively competent

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for the New South Wales Parliament to impose as a condition of a grant of probate in New South Wales any tax or duty ascertained in any manner upon an executor who takes probate in New South Wales, or to impose duty upon the New South Wales estate of a person domiciled there by reference to any criteria whatsoever. Johnson's Case (supra) establishes (as its predecessor had) that one must see what is the property or who are the persons which are intended by the legislature to bear the tax and then to enquire whether there is a relevant connection with New South Wales between that property and the tax intended to be levied upon it or between those persons and the tax sought to be imposed upon them. This, it is submitted, is the meaning of the passage in Commissioner of Stamp Duties v. Millar 48 C.L.R. 618 at 632 cited in Johnson's Case (supra) at 353, (cited in paragraph 19 of this Case). The connection which may be seen to exist may be sufficient to enable the legislature to impose tax upon a person present or domiciled in New Sough Wales or upon actual property of such a person (and, of course, upon property situate in New South Wales) but it may, nevertheless, be "too remote" a connection or an "irrelevant" connection if the tax is sought to be imposed upon property owned by persons havingno connection by residence or domicile themselves with New South Wales or upon property situate outside New South Wales. The present case is, in the Appellants' submission, of the latter character, as was Johnson's Case (supra).

(v) Section 102(2A) read in conjunction with section 102(2)(a) in the Appellants' submission clearly purports to embrace property situate outside New South Wales which is subject to some classes of special powers of appointment -

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whether or not the exercise of such a power is governed by or depends for its validity upon the law of New South Wales and whether or not the owners of that property have any personal connection with New South Wales. In the light of sections 114, 115 and 120 of the Act the legislative intention is to impose that tax upon that foreign property. In these circumstances, it is submitted that the "connection" of the donee of the power (even of one donee of a joint power) by domicile with New South Wales is "too remote" a connection with New South Wales and the property to authorise the imposition of a tax upon that property or the owners of it or, in other words, that the connection of New South Wales with the property is irrelevant to the tax sought to be imposed. 10 20

(vi) Accordingly, section 102(2A) read in conjunction with section 102(2)(a) is wholly invalid since to give validity to any part of it (insofar as property subject to a power of appointment is concerned) by severance would be to introduce criteria of validity which are not expressed as those criteria which the legislature has selected for the imposition of the duty. 30

(vii) The Appellants respectfully submit that it is an erroneous application of the doctrine of severability simply "to excise" part of the definition of "general power of appointment". What section 102(2A) relevantly for present purposes says is that, if property described by paragraph (a) of section 102(2) is situate outside New South Wales and the donee of the relevant power is domiciled in New South Wales and by the description contained in paragraph (a) the property would have been included in the estate of the deceased if it had been situated in New South Wales (when 40

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the tax would have fallen upon the property itself or the owners of it by reason of section 102 of the Act) that property or the owners of it shall bear the same duty as, in the other circumstances, it would have borne or its owners would have borne. Thus, section 102(2A) simply says that it takes two criteria for determining the
10 liability to duty in respect of property situate outside New South Wales - the one that, if situate in New South Wales, the relevant property would be liable to duty and, the other, that the deceased was domiciled in New South Wales, As is said in Johnson v. Commissioner of Stamp Duties (supra) at 357:-

> "The enactment (that is section
> 20 102(2A)) prescribes for only one thing, the imposition of duty on property outside New South Wales where the deceased dies domiciled in that State and the property would be liable if it were inside New Sough Wales. There is no way of splitting that up into good and bad in its application to paragraph 2(g). It is wholly bad."

30 (viii) Moreover, the approach of Jacobs J.A. to this question is, it is respectfully submitted, quite erroneous. His Honour did not determine the extent of the invalidity which he seems clearly to have recognised to exist. He would, it would seem, have concluded, had it appeared necessary to him to do so, that the greatest area of valid operation which could be given to
40 section 102(2A) was in respect of property in respect of which a general power of appointment in the ordinary sense had been exercised by the donee. If this be so, his conclusion upon the question of severability is necessarily that one simply ignores the definition of "general power of appointment" and,

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as it were, for the purpose of section 102(2A) reads the words "general power of appointment" where they appear in section 102(2)(a) in their ordinary sense. To do so, it is submitted, is not only to introduce something that is not in the enactment but requires, before that can be done, that one omit the definition. It is to bring in something from outside the enactment to make good its deficiencies. 10

THE ARGUMENT THAT SECTION 102(2A) READ IN CONJUNCTION WITH SECTION 102(2)(a) HAS NO APPLICATION TO THE FACTS OF THIS CASE.

21. (i) The relevant words of section 102(2)(a) are:-

> "All property which the deceased has disposed of ... by will or by a settlement containing any trust in respect of that property to take effect after his death including a will or settlement made in the exercise of any general power of appointment whether exercisable by the deceased alone or jointly with another person. 20
>
> Provided that the property deemed to be included in the estate of the deceased shall be the property which at the time of his death is subject to such trust." 30

(ii) There are serious difficulties involved in giving a sensible meaning to this provision. Some of these are as follows: The ordinary and natural meaning of the words "property which the deceased has disposed of" is "property which was owned by the deceased and has been divested from him by his voluntary act". However, when one comes to the words "by will" it is difficult to find any such property which would not already be 40

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caught under section 102(1). The proviso to section 102(2)(a) appears to indicate that property, to be caught under that provision, must be subject to a trust to take effect after the death of the deceased, and consequently that the words "containing any trust in respect of that property to take effect after his death" qualify not only the words "by a settlement", but also the words "by will". In that event, it is submitted, it is difficult to give to the words "property which the deceased has disposed of" any meaning other than their ordinary and natural meaning, particularly in a taxing statute, notwithstanding the subsequent phrase "including a will ... made in the exercise of a general power of appointment". Considerations such as these no doubt prompted Dixon C.J. (with whose judgment Fullagar and Kitto JJ. agreed) in Commissioner of Stamp Duties v. Sprague 101 C.L.R. 184 at 192 to observe in relation to section 102(2)(a):

> "I have failed to understand what in the context is meant by the words 'by will'. The words 'including a will made in the exercise of any general power of appointment' seem to suggest that there are other forms of property which might pass by will which are not caught by section 102(1) - the provision dealing with the testator's own property."

(iii) The Appellants respectfully submit that the subject assets are not "property which the deceased has disposed of" within the ordinary and natural meaning of those words, that the will of the Testatrix contains no trust in respect of the subject assets "to take effect after her death", and that therefore section 102(2)(a) has no

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application to the present case.

(iv) If a sensible meaning is to be sought for that part of section 102(2)(a) which refers to a disposition by will, it may be found by limiting the application thereof to circumstances where a deceased exercises a general power of appointment by his will in favour of his own executors and by his same will creates a trust affecting the property the subject of the power. The present is not, of course, such a case. 10

(v) It is conceded that this argument was not put by the Appellants to the Court of Appeal. Nevertheless, the statutory task conferred upon the Court, in these cases, is to "determine the question submitted" and to "assess the duty chargeable". (Section 124(4)). 20 The relevant question submitted was, as appears from paragraph 7 of this Case, framed in the broadest terms. In any event, the point is, if correct, fatal to the claim for duty and is a pure question of statutory construction; in the Appellants' respectful submission, the Appellants should, accordingly, now be permitted to rely upon it; cf. Turner v. York Motors Pty. Limited (1951) 85 C.L.R. 55 at 92; 30 Adams v. Chas. S. Watson Pty. Limited (1938) 60 C.L.R. 545 at 548.

CONCLUSIONS

22. The Appellants therefore submit that the decision of the Court of Appeal is erroneous and ought to be reversed, that this appeal should be allowed and the Order of the Court of Appeal set aside and that in lieu thereof the questions submitted in the case stated by the Respondent 40 as aforesaid should be answered as follows:-

Question 1. No.

Question 2. No. Record

Question 3. By the Respondent;

for the reasons hereinbefore appearing.

D.A. STAFF Q.C.

F. McALARY.

NO. 32 of 1967

IN THE PRIVY COUNCIL

ON APPEAL

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

BETWEEN:

CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE — Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES — Respondent

CASE FOR THE APPELLANTS

CECIL WOLSEY CURTIS THOMPSON
and
ROSCOE WILLIAM GYLES HOYLE

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