15/1968
(15)

IN THE PRIVY COUNCIL

No. 32 of 1967.

O N A P P E A L

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

(No. 445 of 1966).

IN THE MATTER of the estate of RITA BUCKLAND THOMPSON, late of Mosman, in the said State, Married Woman, deceased

- and -

IN THE MATTER of the Stamp Duties Act 1920-1965

- and -

IN THE MATTER of the appeal by CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE against the assessment of Death Duty upon the estate of the said deceased.

B E T W E E N :

CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE — Appellants

- and -

THE COMMISSIONERS OF STAMP DUTIES — Respondent

R E C O R D O F P R O C E E D I N G S

ALAN, GEORGE & SACKER,
415, Oxford Street,
London, W.1.

Solicitors for Appellants

LIGHT & FULTON,
24, John Street,
Bedford Row,
London, W.C.1.

Solicitors for Respondent

IN THE PRIVY COUNCIL No. 32 of 1967.

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

(No. 445 of 1966).

IN THE MATTER of the estate of RITA BUCKLAND THOMPSON, late of Mosman, in the said State, Married Woman, deceased

- and -

IN THE MATTER of the Stamp Duties Act 1920-1965

- and -

IN THE MATTER of the appeal by CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE against the assessment of Death Duty upon the estate of the said deceased.

B E T W E E N :

CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE — Appellants

- and -

THE COMMISSIONERS OF STAMP DUTIES — Respondent

R E C O R D O F P R O C E E D I N G S

I N D E X O F R E F E R E N C E

No.	Description of Document	Date	Page
1	Case Stated pursuant to Section 124 of the Stamp Duties Act 1920-1965	7th November 1966	1
2	Schedule "A" Will of John Arthur Buckland and Codicil thereto	4th June 1926 16th February 1928	6 13
3	Schedule "B" Will of Rita Buckland Thompson	6th January 1960	15
4	Judgment of the Supreme Court of New South Wales Court of Appeal	30th June 1967	23

INDEX OF REFERENCE (Contd.)

No.	Description of Document	Date	Page
5	Reasons for Judgment of Mr. Justice Walsh	30th June 1967	25
6	Reasons for Judgment of Mr. Justice Jacobs	30th June 1967	42
7	Order granting final leave to appeal to Her Majesty in Council	23rd October 1967	44

INDEX OF REFERENCE (Contd.)

Documents Not Included in the Record

	Description of Document	Date	
	Notice of Motion for Conditional leave to appeal to Her Majesty in Council	14th July 1967	
	Affidavit of Stanley Rowland Hill in support of Notice of Motion for Conditional leave to appeal to Her Majesty in Council	14th July 1967	
	Rule of the Supreme Court of New South Wales Court of Appeal granting Conditional leave to appeal to Her Majesty in Council	22nd August 1967	
	Certificate of Compliance of the Prothonotary of the Supreme Court of New South Wales	4th October 1967	
	Notice of Motion for final leave to appeal to Her Majesty in Council	18th October 1967	
	Affidavit of Stanley Rowland Hill in support of Notice of Motion for final leave to appeal to Her Majesty in Council	13th October 1967	

Document transmitted to the Privy Council but not reproduced

	Certificate verifying Transcript of Record	1st December 1967	

IN THE PRIVY COUNCIL No. 32 of 1967.

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

(No. 445 of 1966).

IN THE MATTER of the estate of RITA BUCKLAND THOMPSON, late of Mosman, in the said State, Married Woman, deceased

- and -

IN THE MATTER of the Stamp Duties Act 1920-1965

- and -

IN THE MATTER of the appeal by CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE against the assessment of Death Duty upon the estate of the said deceased.

B E T W E E N :

CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE — Appellants

- and -

THE COMMISSIONERS OF STAMP DUTIES — Respondent

R E C O R D O F P R O C E E D I N G S

No.1

STATED CASE

In the Supreme Court of New South Wales

No.1
Case Stated pursuant to Section 124 of the Stamp Duties Act 1920-1965
7th November 1966

1. John Arthur Buckland duly made his last will on the fourth day of June 1926 and a codicil thereto on the sixteenth day of February 1928. True copies of such will and codicil are set out in Schedule A to this Case.

2. By his said will the said John Arthur Buckland gave all his residuary estate to his trustees "in trust for all or any my children or child (including my step daughter, Nina Lenore Clark) 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 daughter of mine and shall invest the same and shall during the life of such daughter pay the income of her

In the Supreme Court of New South Wales

No. 1
Case Stated pursuant to Section 124 of the Stamp Duties Act 1920-1965
7th November 1966
(Contd.)

said will and codicil she appointed Cecil Wolsey Curtis Thompson and Roscoe William Gyles Hoyle (hereinafter called the appellants) to be the executors and trustees of her will.

10. By her said will and codicil, true copies whereof are set out in Schedule B to this case, the said Rita Buckland Thompson provided inter alia :-

> "(3) If my husband the said Cecil Wolsey Curtis Thompson shall be living one month after my death I DEVISE AND BEQUEATH to him the 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."

11. Cecil Wolsey Curtis Thompson, the husband of Rita Buckland Thompson, was one month after the death of Rita Buckland Thompson, and is still, living.

12. Rita Buckland Thompson had no issue.

13. On the 17th day of September, 1965, probate of the said will and codicil of Rita Buckland Thompson was granted by the Supreme Court of New South Wales to the appellants.

14. The appellants included in the return made by them to the Commissioner of Stamp Duties for the purpose of the assessment and payment of death duty in the estate of Rita Buckland Thompson the assets numbered 1, 8 and 9 in paragraph 8 hereof.

15. The Commissioner of Stamp Duties claimed that the estate of Rita Buckland Thompson for the purpose of the assessment and payment of death duties thereon included also the assets numbered 2, 3, 4, 5, 6 and 7 in the list in the said paragraph 8.

16. The Commissioner of Stamp Duties accordingly determined the final balance of the estate of Rita Buckland Thompson for the purposes of the assessment and payment of death duty to be $357,135-57 and assessed thereon duty in the amount of $103,282-32 which said duty has been paid by the appellants.

IN THE PRIVY COUNCIL — No. 32 of 1967.

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

(No. 445 of 1966).

IN THE MATTER of the estate of RITA BUCKLAND THOMPSON, late of Mosman, in the said State, Married Woman, deceased

- and -

IN THE MATTER of the Stamp Duties Act 1920-1965

- and -

IN THE MATTER of the appeal by CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE against the assessment of Death Duty upon the estate of the said deceased.

B E T W E E N :

CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE — Appellants

- and -

THE COMMISSIONERS OF STAMP DUTIES — Respondent

R E C O R D O F P R O C E E D I N G S

No.1

STATED CASE

In the Supreme Court of New South Wales

No.1
Case Stated pursuant to Section 124 of the Stamp Duties Act 1920-1965
7th November 1966

1. John Arthur Buckland duly made his last will on the fourth day of June 1926 and a codicil thereto on the sixteenth day of February 1928. True copies of such will and codicil are set out in Schedule A to this Case.

2. By his said will the said John Arthur Buckland gave all his residuary estate to his trustees "in trust for all or any my children or child (including my step daughter, Nina Lenore Clark) 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 daughter of mine and shall invest the same and shall during the life of such daughter pay the income of her

In the Supreme Court of New South Wales

No.1
Case Stated pursuant to Section 124 of the Stamp Duties Act 1920-1965
7th November 1966
(Contd.)

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 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 twentyone years or being a daughter or daughters attain that age or marry and if more than one in equal shares as tenants in common 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 and in such manner in all respects as such daughter shall by will or codicil appoint."

3. The said John Arthur Buckland died on the twelfth day of July 1931 domiciled and leaving real and personal property in New South Wales.

4. Probate of the said will and codicil of the said John Arthur Buckland was in due course granted by the Supreme Court of New South Wales to the executors named therein.

5. The abovenamed Rita Buckland Thompson was a daughter of the said John Arthur Buckland.

6. The trustees of the estate of John Arthur Buckland in exercise of the powers conferred upon them by Section 46 of the Trustee Act 1925 of the State of New South Wales set aside and appropriated certain assets of the said estate to answer the share or interest of Rita Buckland Thompson in the estate of John Arthur Buckland and thereafter held the said assets upon the trusts set out in paragraph 2 above.

7. Rita Buckland Thompson died on the second day of June 1965 domiciled and leaving real and personal property in New South Wales.

8. At the time of the death of the said Rita Buckland Thompson the assets and the location and value of the same in the hands of the trustees of the estate of John Arthur Buckland set aside to answer the estate or interest therein of Rita Buckland Thompson were as follows :-

	ASSET	WHERE SITUATE	VALUE AT DATE OF DEATH
1.	150 $2 shares in Australian Gaslight Company	New South Wales	$322.50
2.	5,440 $2 shares in Bank of New South Wales	Victoria	$31,008.00
3.	1,344 $2 shares in British Tobacco Co. (Aust.) Limited	Victoria	$4,513.60
4.	31,700 $2 shares in Colonial Sugar Refining Co. Limited	Victoria	$202,087.50
5.	4,864 $2 shares in Tooth & Co. Ltd.	Victoria	$47,667.20
6.	1,175 $2 shares in Winchcombe Carson Limited	Australian Capital Territory	$2,496.88
7.	$400 4½% Commonwealth Government Inscribed Stock	Victoria	$394.25
8.	$700 Special Bonds Series G	New South Wales	$712.25
9.	Capital uninvested	New South Wales	$160.68
			$289,362.86.

9. Rita Buckland Thompson made her last will on the sixth day of January 1960 and a codicil thereto on the third day of April 1964. By the

In the Supreme Court of New South Wales

No. 1
Case Stated pursuant to Section 124 of the Stamp Duties Act 1920-1965
7th November 1966
(Contd.)

said will and codicil she appointed Cecil Wolsey Curtis Thompson and Roscoe William Gyles Hoyle (hereinafter called the appellants) to be the executors and trustees of her will.

10. By her said will and codicil, true copies whereof are set out in Schedule B to this case, the said Rita Buckland Thompson provided inter alia :-

> "(3) If my husband the said Cecil Wolsey Curtis Thompson shall be living one month after my death I DEVISE AND BEQUEATH to him the 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."

11. Cecil Wolsey Curtis Thompson, the husband of Rita Buckland Thompson, was one month after the death of Rita Buckland Thompson, and is still, living.

12. Rita Buckland Thompson had no issue.

13. On the 17th day of September, 1965, probate of the said will and codicil of Rita Buckland Thompson was granted by the Supreme Court of New South Wales to the appellants.

14. The appellants included in the return made by them to the Commissioner of Stamp Duties for the purpose of the assessment and payment of death duty in the estate of Rita Buckland Thompson the assets numbered 1, 8 and 9 in paragraph 8 hereof.

15. The Commissioner of Stamp Duties claimed that the estate of Rita Buckland Thompson for the purpose of the assessment and payment of death duties thereon included also the assets numbered 2, 3, 4, 5, 6 and 7 in the list in the said paragraph 8.

16. The Commissioner of Stamp Duties accordingly determined the final balance of the estate of Rita Buckland Thompson for the purposes of the assessment and payment of death duty to be $357,135-57 and assessed thereon duty in the amount of $103,282-32 which said duty has been paid by the appellants.

17. The appellants claim that the final balance of the estate of Rita Buckland Thompson for the purposes of the assessment and payment of death duty should not include the assets numbered 2, 3, 4, 5, 6 and 7 in the list in the said paragraph 8 and that the final balance of the said estate should accordingly be reduced by the sum of $288,167.43 being the total of the value of the said assets.

18. The Commissioner of Stamp Duties claims that the said sum of $288,167.43 was properly included in the final balance of the estate of Rita Buckland Thompson for the purposes of the assessment and payment of death duty thereon.

19. The appellants being dissatisfied with the said assessment of the Commissioner have paid the duty assessed together with a sum of $40 as security for costs and have delivered to the Commissioner a notice in writing requiring him to state a case for the opinion of this Honourable Court pursuant to the provisions of Section 124 of the said Act.

20. The questions to be decided are :-

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

(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?

DATED this seventh day of November 1966.

(Signed)

COMMISSIONER OF STAMP DUTIES

In the Supreme Court of New South Wales

No.2

SCHEDULE "A"

No.2
Schedule "A"
Will of John Arthur Buckland
4th June 1926

Will of John Arthur Buckland and Codicil thereto

THIS IS THE LAST WILL AND TESTAMENT of me JOHN ARTHUR BUCKLAND of Clydesdale near Riverstone in the State of New South Wales Grazier I REVOKE all former Wills and testamentary dispositions made by me I APPOINT my wife ESTHER DUDLEY BUCKLAND my son ARTHUR ROY BUCKLAND and my friend JOHN MUSGRAVE HARVEY a Judge of the Supreme Court of New South Wales (hereinafter referred to as my Trustees) to be the EXECUTORS and TRUSTEES of this my Will I BEQUEATH to my said wife all articles of personal or domestic or household use or ornament and all my motor cars and spare parts and accessories thereto belonging to me at my death and an Annuity during her life of Two thousand five hundred pounds commencing from my death and to be payable quarterly and the first payment to be made three calendar months after my death I ALSO GIVE to my said wife for her life my residence at Riverstone known as Clydesdale including that part of the land purchased by me from George Kiss which is bounded on the south by the southern boundary of W. Lang's seven hundred acres Grant on the west and north by South Creek and on the north by the road from Parramatta to Richmond as shown on Certificate of Title Volume 1028 Folio 240 she keeping the buildings in repair and insured against loss by fire and at her death the said residence and land shall fall into my residuary estate the trusts whereof are hereinafter declared AND I DECLARE that if at my death or at any time afterwards my wife shall intimate to her co-executors or co-trustees for the time being of my will or any one of them that she does not wish to continue in occupation of Clydesdale aforesaid then from and after her vacating the same and surrendering her life interest in the same the same shall fall into my residuary estate as if my wife were then dead and in lieu of the life estate so surrendered the life annuity of Two thousand five hundred pounds abovementioned shall be increased to a life annuity of Four thousand pounds as from the date of her so surrendering the said residence and land and such annuity shall continue during the rest of her life I BEQUEATH to my step son TREVOR SUMNER

WILBERFORCE BIRD generally known as Trevor Sumner Wilberforce Buckland a legacy of ONE THOUSAND POUNDS I DECLARE that the foregoing gifts bequests and

WITNESSES
ERNEST A. MADDOCK
EVELYN M. FANNING

J.A. BUCKLAND

annuity shall be free of all stamp probate and estate duties whatsoever 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 (but with full discretionary power to postpone such sale and conversion and getting in indefinitely) and out of the proceeds to pay my funeral and testamentary expenses (including State and Federal Probate and Estate Duties) debts and legacies and to hold the residue thereof IN TRUST for all or any my children or child (including my stepdaughter Nina Lenore Clark) living at my death and if more than one in equal shares I DECLARE that throughout this my Will all gifts and references to "my children" or "child" "child of mine" "Daughters or daughter" or "daughters or daughter of mine" shall include and extend to my said stepdaughter Nina Lenore Clark in the same way as if she were my own daughter PROVIDED ALWAYS AND I DECLARE that if any child of mine shall have died in my lifetime leaving issue living at my death such issue being male and attaining the age of twenty one years or being female and attaining that age or marrying shall take by substitution if more than one in equal shares as tenants in common the share in the trust premises which such deceased child of mine would have taken under the trusts in that behalf hereinbefore contained had he or she survived me PROVIDED ALWAYS AND I DECLARE that my Trustees shall retain the share in the said trust premises hereinbefore given to each 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 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

In the Supreme Court of New South Wales

No.2
Schedule "A"
Will of John Arthur Buckland
4th June 1926
(Contd.)

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 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

WITNESSES
ERNEST A. MADDOCK
EVELYN M. FANNING

J.A. BUCKLAND

purposes 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 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 I DECLARE that my Trustees may apply the whole or any part at their discretion of any income to which any minor shall or if of full age being a male or of full age or married being a female would for the time being be entitled in possession under any of the trusts or dispositions herein contained for or towards his or her maintenance education or benefit and may either themselves so apply the same or may pay the same to the parent or guardian of such person for the purpose aforesaid without seeing to the application thereof and shall during such minority or minority and discoverture as the case may be accumulate the surplus if any of the same income in the way of compound interest by investing the same and the resulting income thereof in any of the investments hereby authorised in augmentation

and so as to follow the destination of the share or fund from which the same shall have proceeded but with power to apply any such accumulations in any subsequent year for or towards the maintenance education or benefit of the minor for the time being presumptively entitled thereto in the same manner as such accumulation might have been applied had they been income arising from the original trust fund in the then current year I AUTHORISE my Trustees after the determination or failure of the prior life interest (if any) or previously thereto with the consent in writing of the life tenant to raise any part or parts not exceeding in the whole a moiety of the then expectant presumptive or vested share of any minor in the said trust premises under the trusts aforesaid and to pay or apply the same for his or her advancement or benefit as my Trustees shall think fit I DECLARE that all moneys hereinbefore directed to be invested shall be invested in the names or under the legal control of my Trustees in or upon any investment for the

WITNESSES
ERNEST A. MADDOCK
EVELYN M. FANNING

J.A. BUCKLAND

time being authorised by law for the investment of trust funds or any of the public stocks funds or securities of the Commonwealth of Austrialia or the Government of any State within the Commonwealth of the Dominion of New Zealand or any British Possession in the Pacific or on rent producing security in any of the said States Dominion or Possessions or upon loan to or in the debentures or other securities of the Municipal Corporation of the Cities of Sydney Melbourne Adelaide or Brisbane or upon fixed deposit in the Bank of New South Wales the Commercial Banking Company of Sydney Limited the Union Bank of Australia and the Bank of Australasia or any one or more of such Banks or in the purchase of the shares of the said Commercial Banking Company of Sydney Limited or the Bank of New South Wales or either of them or in the purchase of shares or debentures of the Colonial Sugar Refining Company Limited the British Tobacco Company (Australia) the Australian Gaslight Company or Tooth and Company Limited or on deposit at interest with any of such Companies with power from time to time to vary or transpose such investments into or for any other or others hereby authorised I DIRECT that notwithstanding the

In the Supreme Court of New South Wales

No.2
Schedule "A"
Will of John Arthur Buckland
4th June 1926
(Contd.)

amalgamation with any other Company or Companies of any Company in which I have by this my Will authorised my Trustees to deposit money or purchase shares or debentures or of the reforming of any such Company after voluntary liquidation any moneys by this my Will directed to be invested may be invested by my Trustees in any such amalgamated or reformed Company whether amalgamated or reformed in my lifetime or afterwards and whether retaining its original name or known by any modification thereof or any new name and may accept shares in or the debentures or securities of any such amalgamated or reformed Company or partly shares debentures or securities and partly cash in exchange for or satisfaction of the shares or debentures or securities held by my Trustees in any Company affected by any such amalgamated or reformation and all shares debentures or securities coming to the hands of my Trustees as aforesaid shall be subject to the provisions of this my Will in the same way as if such amalgamated or reformed Companies had been named in the clause authorising certain investments hereinbefore contained and all such cash shall be placed upon investments thereby authorised I AUTHORISE my Trustees to appropriate a sufficient part of my residuary estate for answering by the annual income thereof the annuity of Two thousand five hundred pounds or Four thousand pounds as the case may be hereinbefore bequeathed to my wife with power in case of the annual income at any time proving

WITNESSES
ERNEST A. MADDOCK
EVELYN M. FANNING

J.A. BUCKLAND

insufficient to resort to the capital of the appropriated fund for the payment of such annuity AND I DECLARE that when the said annuity shall cease the said appropriated fund shall revert to and become subject to the trusts hereby declared concerning the trust premises out of which the same shall have been appropriated as aforesaid I AUTHORISE my Trustees to carry on the trade or business of Stud Farmer now carried on by me during such period as they shall think fit and for that purpose to retain and employ therein the capital which shall at my death be employed therein and such additional capital as they shall think fit to advance from time to time out of my

residuary estate with power to employ at such salary as they shall think fit any Manager of the said business and generally to act in all matters relating to the said business as if they were beneficially entitled thereto and also power to delegate all or any of the powers vested in them in relation to the said business to any persons or person whom they may think fit And my Trustees shall be free from all responsibility and be fully indemnified out of my Estate in respect of any loss arising in relation to the said business I DECLARE that the net annual produce arising from the unconverted part of my estate whether real or personal and whether of a permanent or leasehold or wasting character including the net profits derived from the carrying on of the said business shall be applied in the same manner as if the same were income arising from the proceeds of the conversion of my estate I EMPOWER my Trustees to manage my real estate hereinbefore devised in trust for sale until the same shall be sold and to repair and insure houses and buildings and to make allowances to and arrangements with tenants and others and to accept surrenders of leases and tenancies AND I DECLARE that it shall be lawful for my Trustees to demise all or any part of my real estate in possession which shall for the time being remain unsold for any term of years either in possession or reversion and for any purpose with or without taking a fine or premium and upon such terms and conditions in all respects as they shall think fit I AUTHORISE my trustees to deduct from the proceeds of the sale and conversion of my estate hereinbefore directed to be made and retain for their own respective benefit in equal shares a commission at the rate of Two pounds ten shillings per centum and from year to year

WITNESSES
ERNEST A. MADDOCK
EVELYN M. FANNING

J.A. BUCKLAND

commission at the same rate on the income of my estate collected by them during that year.

IN WITNESS whereof I have hereunto set my hand this fourth day of June one thousand nine hundred and twenty six.

J.A. BUCKLAND

In the Supreme Court of New South Wales

No.2
Schedule "A"
Will of John Arthur Buckland
4th June 1926
(Contd.)

SIGNED by the Testator as and for his last Will and Testament in the presence of us who being both present at the same time have at his request in his presence and in the presence of each other hereunto subscribed our names as witnesses.

ERNEST A. MADDOCK
SOLR.
SYDNEY.

EVELYN M. FANNING
HIS CLERK.

10

In the Supreme Court of New South Wales

No.2
Codicil of Will of John Arthur Buckland 16th February 1926

THIS IS A CODICIL TO THE WILL dated the fourth day of June one thousand nine hundred and twenty six of me JOHN ARTHUR BUCKLAND of Clydesdale Riverstone Grazier.

WHEREAS I have recently advanced to Bertie Slade Brown of Alexandria near Sydney Wood and Coal Merchant the sum of One thousand five hundred pounds repayable on demand the repayment of which with interest at five per centum per annum is secured to me by deposit of Certificate of Title registered Volume 4087 Folio 142 accompanied by a Memorandum of Deposit dated the fourteenth day of February one thousand nine hundred and twenty eight now it is my intention to allow the said Bertie Slade Brown to repay me by instalments convenient to himself and I do not intend to press him for payment of principal as I have a high opinion of his integrity NOW I HEREBY DIRECT my Executors to allow the said Bertie Slade Brown to repay the principal in the manner I have indicated and to grant him such time or times for repayment as he may reasonably ask for AND I exonerate my Executors from all responsibility for any loss arising from extending from time to time the time for repayment of the said sum of One thousand five hundred pounds or so much thereof as shall for the time being remain unpaid and even though the time for payment be extended for many years after my death.

IN ALL other respects I confirm my said WILL.

IN WITNESS whereof I have hereunto set my hand this sixteenth day of February one thousand nine hundred and twenty eight.

J.A. BUCKLAND

SIGNED AND ACKNOWLEDGED by the said Testator JOHN ARTHUR BUCKLAND as and for a Codicil to his last Will and Testament in the presence of us both present at the same time who in his presence at his request and in the presence of each other have hereunto subscribed our names as witnesses :-

Ernest A. Maddock
Solr. Sydney

H.A. Sagar
Solicitor
Sydney

In the Supreme Court of New South Wales

No.2
Codicil of Will of John Arthur Buckland 16th February 1926
(Contd.)

This and the preceding seven pages form the Schedule "A" referred to in the case stated by me on this seventh day of November 1966 in the Estate of Rita Buckland Thompson deceased.

(Signed)

Commissioner of Stamp Duties

No.3

In the Supreme Court of New South Wales

No.3
Schedule "B"
Will of Rita Buckland Thompson 6th January 1960

SCHEDULE "B"

Will of Rita Buckland Thompson

I RITA BUCKLAND THOMPSON the wife of Cecil Wolsey Curtis Thompson of Mosman Army Officer (Retired) HEREBY REVOKE all former wills and testamentary dispositions made by me AND DECLARE this to be my last will

(1) I APPOINT my husband the said CECIL WOLSEY CURTIS THOMPSON and my friend JOHN CLAYTON HUDSON (of Glenview Street Gordon) to be the executors and trustees of this my will

(2) I DECLARE that I am making no provision in this my will for my brother ARTHUR ROY BUCKLAND nor for my sister NINA LENORE CLARK as they already are well and adequately provided for

(3) If my husband the said Cecil Wolsey Curtis Thompson shall be living one month after my death I DEVISE AND BEQUEATH to him the 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

(4) If my said husband shall predecease me or die within one month after my death then and in either of such cases I DECLARE that the subsequent clauses of this my will shall have effect AND I DECLARE that in such subsequent clauses the expression "my trustee" shall mean the said John Clayton Hudson and/or other the executor and/or trustee of this my will for the time being

(5) I MAKE the following bequests free of all duties payable upon or by reason or in consequence of my death namely:

(a) TO the Salvation Army (New South Wales) Property Trust

R.W.G. HOYLE
J. DIXON

RITA BUCKLAND THOMPSON

In the Supreme Court of New South Wales

No.3
Schedule "B" Will of Rita Buckland Thompson 6th January 1960 (Contd.)

Two Hundred and fifty pounds (£250)

(b) TO the Rector for the time being of St. Luke's Church of England Mosman Two hundred and fifty pounds (£250)

(c) TO the Rector for the time being of St. James' Church of England King Street Sydney Two hundred and fifty pounds (£250)

(d) TO the Randwick Branch of the Australian Red Cross Society New South Wales Division Two hundred and fifty pounds (£250)

(e) TO MINA (SHELLEY) BAILY wife of C.V. Baily of care Samuel French (Aust.) Pty. Limited, 159 Forbes Street Sydney Five hundred pounds (£500)

(f) TO JUSTINE (RETTICK) HALL wife of Peter Hall of "Norge" 32 McLaughlin Avenue Sandringham Victoria Five hundred pounds (£500)

(g) TO EMILY FORDER wife of Basil Forder of 77 Foulds Avenue Sandringham S.W. 1 Auckland New Zealand Five hundred pounds (£500) if she shall be living at my death AND if she shall predecease me THEN I BEQUEATH such Five hundred pounds (£500) to her daughter BEVERLEY WRAY

(h) TO RONALD NEILL of 18 Collingwood Avenue Earlwood New South Wales Five hundred pounds (£500)

(i) TO MARGARET DALZIEL of Lynwood Charles Street Lawson New South Wales One thousand pounds (£1,000) if she is living at my death AND if she shall predecease me THEN I BEQUEATH such One thousand pounds (£1,000) to her sister SHEILA DALZIEL of the like address

R.W.G. HOYLE
J. DIXON

RITA BUCKLAND THOMPSON

(j) TO my friend the said JOHN CLAYTON HUDSON One thousand pounds (£1,000)

(k) TO MARIE AUSTIN COOGAN of 7 Telepea Street Wollstonecraft One thousand pounds (£1,000)

AND I DECLARE that the bequests in subclauses (a) (b) (c) and (d) of this clause of this my will shall be applied for or towards such general or special purposes of the Churches and organizations respectively named in such subclauses as the Rectors and Governing Bodies of such Churches and organizations respectively shall determine AND I FURTHER DECLARE that the receipt of the respective Rectors and of the respective Treasurers of the said organizations shall exonerate my trustee

(6) I DEVISE AND BEQUEATH all the rest and residue of my real and personal estate including all property over which I have power of appointment under the will of my late father the late John Arthur Buckland to my trustee UPON TRUST to sell call in and convert the same into money and out of the nett proceeds of such sale calling in and conversion to pay all my just debts funeral and testamentary expenses Probate Duty Federal Estate Duty and all other (if any) duties payable upon or by reason or in consequence of my death AND TO STAND POSSESSED of the balance then remaining (herein called "my residuary estate") AND to divide the same into twenty equal parts or shares and to deal with such parts or shares as follows:

R.W.G. HOYLE RITA BUCKLAND THOMPSON
J. DIXON

(a) TO STAND POSSESSED of four of such parts or shares to invest the same and to hold the income thereof on protective trusts as declared by Section 45 of the Trustee Act 1925-1942 for the benefit of my beloved niece ESTHER NINA MULLINS of care Messrs. Roscoe W.G. Hoyle & Co. Solicitors Wingello House Angel Place Sydney for the period of her life and from and after her death TO STAND POSSESSED of such four equal parts or shares both capital and income UPON TRUST for BEVERLEY (FORDER) WRAY wife of John Wray of New Zealand Regular Army Officer if she shall then be living and if

In the Supreme Court of New South Wales

No.3
Schedule "B"
Will of Rita Buckland Thompson 6th January 1960
(Contd.)

she shall predecease the said Esther Nina Mullins then UPON TRUST for such of her children as shall be living at her death and have then attained or thereafter shall attain the age of twenty-one years and if more than one as tenants-in common in equal shares between them

(b) TO pay or transfer to LORRAINE PAGE wife of Mervyn Page of 30 Park Crescent Bentleigh S.E. 14 Victoria four of such parts of shares if she shall be living at my death AND if she shall predecease me then I DIRECT my trustee to pay or transfer such four parts or shares to such of her children as are living at my death and have then attained or thereafter shall attain the age of twenty-one years and if more than one as tenants-in-common in equal shares between them

R.W.G. HOYLE RITA BUCKLAND THOMPSON
J. DIXON

(c) TO pay or transfer to my beloved god-children:

(i) BEVERLEY (FORDER) WRAY wife of John Wray of New Zealand Regular Army Officer two of such parts or shares

(ii) GRAHAM FORDER of care Box 14 Tokoroa via Putaruru North Island New Zealand two of such parts or shares

(iii) NOEL FORDER of 17 Patterson Street Sandringham Auckland New Zealand one of such parts or shares

(iv) BARRY FORDER of 20 Anglesea Ponsonby Auckland New Zealand one of such parts or shares

(v) RITA CAVE wife of Bruce Cave of care Beverley Wray abovementioned one of such parts or shares

(vi) KEITH LOWE of "Tinga" Mudgee New South Wales two of such parts or shares

(vii) JAMES PAGE son of the said Lorraine Page of 30 Park Crescent Bentleigh S.E. 14 Victoria Two of such parts or shares

(viii) DAVID RETTICK HALL of "Norge" 32 McLaughlin Avenue Sandringham Victoria one of such parts or shares

(7) WHEREAS in this clause of this my will the expression "My residuary beneficiaries" means the persons named in sub-clause (c) of clause (6) of this my will to and amongst whom I have directed my trustee to pay and divide certain parts or shares of my residuary estate NOW I DIRECT that if

R.W.G. HOYLE RITA BUCKLAND THOMPSON
J. DIXON

any such residuary beneficiary shall die in my lifetime (or as regards the said James Page if he shall be living at my death but die before attaining the age of twenty one years) the share or interest in my residiary estate which such person would have taken had he or she been living at my death (or in the case of the said James Page had been living at my death and had then or thereafter attained the age of twenty one years) shall be paid and divided by my trustee to and among all other my said residuary beneficiaries in the several fractional proportions whereof the denominator shall be the number of the sum of the parts or shares as set out in sub-clause (c) of clause (6) of this my will payable to such other residuary beneficiaries and whereof the numerators respectively shall be the number of such parts or shares payable to each such other residuary beneficiary as set out in such clause

(8) My trustee shall have full power of advancement in favour of the said James Page to the full extent provided in Section 44 of the Trustee Act 1925 as amended but without any limitation as appearing in sub-section 1A and sub-section 6 of such Section 44 to the same extent as though such sub-section 1A and sub-section 6 had never been enacted

In the Supreme Court of New South Wales

No.3
Schedule "B"
Will of Rita Buckland Thompson 6th January 1960 (Contd.)

(9) I DECLARE that authorised investments under this my will shall include:

(a) Any investment for the time being permitted by law in

R.W.G. HOYLE RITA BUCKLAND THOMPSON
J. DIXON

New South Wales for the investment of trust funds

(b) Improved real estate in New South Wales

(c) The shares of any company officially listed on the Sydney Stock Exchange

(d) Any investment of mine of a kind above-mentioned existing at my death

(10) I EMPOWER my trustee notwithstanding the trust for sale hereinbefore contained at any time or times in his discretion to partition or appropriate any real or personal property forming part of my residuary estate in its then actual condition or state of investment in or towards satisfaction of the share of any person or persons in my residuary estate with power for that purpose conclusively to determine the value of any real or personal property so partitioned or appropriated as aforesaid in such manner as my trustee shall think fit and every such partition or appropriation shall be binding on all persons interested under this my will

IN WITNESS whereof I have hereunto set my hand to this my will at Sydney on the sixth day of January One thousand nine hundred and ~~fifty~~ nine sixty ------

J.D.
R.W.G.H.
R.B.T.

SIGNED by the testatrix the said RITA BUCKLAND THOMPSON as and for her last will in the joint presence of her-self and us who at her request and in such joint presence have hereunto subscribed our names as witnesses:

R.W.G. HOYLE
Solicitor
Sydney

RITA BUCKLAND THOMPSON

J. DIXON
Typiste
Sydney

In the Supreme Court of New South Wales

No.3
Schedule "B"
Will of Rita Buckland Thompson 6th January 1960
(Contd.)

I RITA BUCKLAND THOMPSON the wife of Cecil Wolsey Curtis Thompson of Mosman Army Officer (Retired) DECLARE this to be a first codicil to my will which bears date the sixth day of January One thousand nine hundred and sixty

(1) I alter my said will by deleting from clause (1) the words "John Clayton Hudson (of Glenview Street Gordon)" and by deleting from clause (4) the words "the said John Clayton Hudson" and by inserting in both clause (1) and clause (4) in the place of the words so deleted the words "Roscoe William Gyles Hoyle"

(2) IN all other respects I confirm my said will

IN WITNESS whereof I have hereunto set my hand
B.H. C.L.S.
at Kirribilli this third day of ~~third~~ April One thousand nine hundred and sixty four

SIGNED by the testatrix the said RITA BUCKLAND THOMPSON with her mark as a first codicil (the same having previously been carefully read over by her when she seemed thoroughly to understand the same) to her will which bears date sixth January 1960 in the joint presence of herself and us who at her request and in such joint presence have hereunto subscribed our names as witnesses) Rita Buckland her X mark Thompson

C. LANDON SMITH F.R.C.S. (Medical Practitioner)

B. HEARNE. D.C. Trained Nurse
Kirribilli Private Hospital

In the Supreme Court of New South Wales

No.3
Schedule "B"
Will of Rita Buckland Thompson 6th January 1960
(Contd.)

This and the preceding six pages form the Schedule "B" referred to in the case stated by me on this seventh day of November 1966 in the Estate of Rita Buckland Thompson deceased.

(Signed)

Commissioner of Stamp Duties

No.4

JUDGMENT

In the Supreme Court of New South Wales

No.4
Judgment of Supreme Court of New South Wales 30th June 1967

IN THE SUPREME COURT OF NEW SOUTH WALES) Term No.445 of 1966

COURT OF APPEAL

CORAM: WALLACE, P.
WALSH, J.A.
JACOBS, J.A.

Friday, 30th June, 1967

THOMPSON v. THE COMMISSIONER OF STAMP DUTIES

J U D G M E N T

WALLACE, P.: I agree with the reasons about to be published by my brother Walsh and I think that the questions should be answered -

(1) Yes.

(3) By the appellants.

I publish my reasons.

WALSH, J.A.: In my opinion the questions in the stated case should be answered -

(1) Yes.

(3) By the Appellants.

I publish my reasons. Question (2) is not answered because it does not arise.

WALLACE, P.: I am authorised by my bother Jacobs to say that he also agrees with the reasons and conclusions arrived at by His Honour Mr. Justice Walsh and I publish Mr. Justice Jacobs' reasons.

The order of the Court therefore is that the questions are answered as follows:

Question 1: Yes.

Question 2: Not answered.

Question 3: By the appellants.

In the Supreme Court of New South Wales

No.4
Judgment of Supreme Court of New South Wales 30th June 1967 (Contd.)

IN THE SUPREME COURT OF NEW SOUTH WALES) Term No 445 of 1966

COURT OF APPEAL

CORAM: WALLACE, P
WALSH, J.A.
JACOBS, J.A.

Friday, 30th June, 1967.

THOMPSON v. THE COMMISSIONER OF STAMP DUTIES

J U D G M E N T

WALLACE, P.: I agree with Walsh, J.A. 10

The questions should be answered -

(1) - Yes.

(3) - By the Appellants.

...

I CERTIFY THAT THIS AND THE PRECEDING PAGES ARE A TRUE COPY OF THE REASONS FOR JUDGMENT HEREIN OF THE HONOURABLE MR. JUSTICE WALLACE, PRESIDENT OF THE COURT OF APPEAL; ..... DATED 30/6/67 J. CHARFIELD ASSOCIATE TO THE PRESIDENT.

No.5

In the Supreme Court of New South Wales

No.5
Reasons for Judgment of Mr. Justice Walsh 30th June 1967

Reasons for Judgment of Mr. Justice Walsh

IN THE SUPREME COURT OF NEW SOUTH WALES } Term No. 445 to 1966.

COURT OF APPEAL

CORAM: WALLACE P.
WALSH J.A.
JACOBS J.A.

Friday, 30th June, 1967.

THOMPSON v. COMMISSIONER OF STAMP DUTIES.

J U D G M E N T

WALSH J.A.: This is a case stated concerning the assessment of death duty in the estate of Rita Buckland Thompson, who died on 2nd June 1965, domiciled in New South Wales. Her father, John Arthur Buckland, who died in 1931, had by his will given a share in his estate to his trustees in trust for his daughter with a direction that it was to be retained by the trustees and invested. His trustees were to pay to the daughter during her life the income of that share and, after her death, were to hold it on trust for such of her children or remoter issue as she should by will appoint. In default of such appointment, the share was to be held in trust for children of the daughter. Then it was further provided:-

> "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 and in such manner in all respects as such daughter shall by will or codicil appoint."

Certain assets of the father's estate were appropriated by his trustees to the share of the daughter and thereafter held by them upon the foregoing trusts. When the daughter died, some of the assets so held by the trustees were personal

In the Supreme Court of New South Wales

No.5
Reasons for Judgment of Mr. Justice Walsh 30th June 1967 (Contd.)

property situated in this State. But some were personal property situated outside New South Wales, consisting of shares in companies and Commonwealth Government Inscribed Stock, which were situated in Victoria or in the Australian Capital Territory. The deceased daughter had married and her husband is one of the executors and trustees of her will, who are the appellants. But she had no children. Therefore, the power given by her father's will to appoint amongst her children and remoter issue and the gift over in default of such appointment were inoperative, so that the ultimate general power of appointment quoted above could operate. By her will, the deceased exercised that power by a provision that, in the event (which, of course, has happened) that her husband should be living one month after her death, she devised and bequeathed to him "the 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".

The appellants have acknowledged that the dutiable estate includes so much of the property held by the father's trustees on the above trusts as was at the date of the deceased's death in New South Wales, but they have objected to the inclusion in the estate of so much of that property as was not situated in New South Wales at the date of her death. The question which the Court has to decide is whether the last-mentioned property was properly included in the estate.

The claim of the Commissioner is that that property is brought to duty under section 102(2A) of the Stamp Duties Act because it is claimed that that personal property, if it had been in New South Wales, would have been included in the estate by virtue either of paragraph (a) or of paragraph (j) of section 102(2). Sub-section (2A) brings into the estate for the purposes of death duty all personal property outside New South Wales, if the deceased was domiciled in New South Wales at the time of death and if such personal property would, if in New South Wales, be deemed to be included in the estate by virtue of sub-section (2).

The provisions of sub-section (2) on which the

Commissioner relies are as follows:-

"(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."

.....

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

Both those provisions contain the expression "general power of appointment". By section 100 it is provided that, unless the context or subject-matter otherwise indicates or requires -

"'General power of appointment' includes any power or authority which enables the donee or other holder thereof, 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 exercisable by instrument inter vivos or by will or otherwise but does not include any power exercisable by any person in a fiduciary capacity for the benefit of others only arising under a disposition not made by himself, or exercisable as tenant for life under Part IV of the Conveyancing and Law of Property Act, 1898, or as mortgagee."

The arguments submitted to the Court on behalf of the appellants have been confined to a challenge to the validity of the provisions under which the Commissioner seeks to support his claim, insofar as those provisions extend to personal property outside

In the Supreme Court of New South Wales

No.5
Reasons for Judgment of Mr. Justice Walsh 30th June 1967 (Contd.)

the State. It has not been suggested in any way that the facts do not bring the property within the ambit of the provisions. The sole contention is that, whilst paragraphs (a) and (j) themselves should as a matter of construction be limited so that the word "property" relates only to property within New South Wales, and for that reason the enactment of those paragraphs is within the legislative competence of the State, the attempt by means of sub-section (2A) to bring to duty personal property outside New South Wales which would, if in New South Wales, be caught by paragraph (a) or by paragraph (j), is not competent. It is invalidated by the principle that legislation on a matter which has no relevant territorial connection with New South Wales falls outside the power to make laws for the peace, order and good government of New South Wales.

It is to be observed that the property which the appellants contend should not have been included in the dutiable estate consists of definite identified personal property which was in existence at the date of the death of the deceased. Therefore, assuming that it is an essential condition of the bringing of property to duty that it must be found to be in existence at the date of death (inside New South Wales if it is to be included under some paragraph of section 102(2) or outside New South Wales if it is to be included by virtue of sub-section (2A)), this condition was fulfilled. In any event, so far as paragraph (a) of sub-section (2) is concerned, there is an express provision that the property to be included is the property which, at the time of death, is subject to the trust. Thus we are not concerned in this case with the problem which was recently considered by this Court in Drew v. Commissioner of Stamp Duties. Nor are we required to consider any such problems of construction as were considered in Commissioner of Stamp Duties v. Perpetual Trustee Co. (Limited) (Watts' case) (38 C.L.R. 12) and in Johnson v. Commissioner of Stamp Duties (1956 A.C. 331) in order to determine whether, as a matter of construction, the property in question falls within the provisions upon which the Commissioner relies to make it dutiable. As has been stated, the only argument is as to the validity, in a territorial sense, of sub-section (2A) insofar

as it would operate, if valid, to make that property dutiable.

On this territorial question, reliance is placed by the appellants upon the decision in Johnson v. Commissioner of Stamp Duties (1956 A.C. 331), which denied validity to sub-section (2A) insofar as it purported to extend to property not in New South Wales the provisions of paragraph (g) of section 102(2). It is claimed that the reasons, for which it was held in that case that the domicile of the deceased was irrelevant and could not be regarded as providing a sufficient nexus, are applicable here. It is claimed that domicile in New South Wales of a deceased who had a "general power of appointment" (as defined in the Act) is irrelevant and cannot support the imposition of duty upon property outside New South Wales which has been disposed of by the deceased in exercise of the power or on property over or in respect of which the deceased had such a power.

It was suggested on behalf of the appellants that, if the references to a general power had been left to be read without any extention of the ordinary meaning of that expression, there would be a stronger case for the validity of the legislation, but it was argued that, because the expression has been given a meaning going far beyond its ordinary meaning, it becomes clear that the attempt to impose duty goes beyond the point where a relevant nexus can be seen to exist and that this makes wholly invalid the provision, so far as it seeks to make dutiable, by reference to paragraphs (a) or (j), property which is outside New South Wales.

But the Commissioner claims that, although the provisions extend to powers which would not ordinarily be described as general powers, yet the circumstance that they are limited to powers by virtue of which the donee of the power is entitled to make the property his own, or to dispose of it as if it were his own, has the effect that the local domicile of the person having that power provides a sufficient basis for legislation which imposes death duty in respect of that property.

It could not be disputed that it is within power of the Parliament to bring into the dutiable estate of a person dying domiciled here personal

In the Supreme Court of New South Wales

No.5
Reasons for Judgment of Mr. Justice Walsh 30th June 1967 (Contd.)

property actually owned by that person but situated elsewhere, as it has done in section 102(1). See Commissioner of Stamps (Queensland) v. Counsell (57 C.L.R. 248). Further, it is within power to bring to duty personal property outside New South Wales, which such a deceased does not own at the time of death but has formerly owned, and has transferred by way of gift. See Trustees Executors and Agency Co. Ltd. v. F.C.T. (49 C.L.R. 220), where at 227 it was stated by Rich, Dixon and McTiernan JJ. that this was clearly not beyond power. The decision was on the Estate Duty Assessment Act of the Commonwealth, but, in my opinion, it is equally applicable in relation to the territorial competence of a State Act imposing death duty. Thus it is shown that, at least to some extent, the connection for the purpose of death duty laws between a local domicile and personal property abroad can be regarded as a relevant and sufficient nexus in relation to "notional" property of the deceased, as well as in relation to property actually owned by the deceased at the time when the law operates.

On the other hand, it is clear that a local domicile is not always a sufficient basis for the validity of a law imposing a tax on property abroad, an interest in which passes on the death of the deceased. Having regard to the way in which the law operates and to its subject-matter, the domicile of the deceased whose death provides the occasion for the levying of the duty may in some situations be regarded as irrelevant. This was decided in Johnson's case in relation to the extension of paragraph (g) by sub-section (2A). In that case in the Supreme Court, the judgment of the Court (55 S.R. 398 at 409) included the following statements:-

> "It is well established particularly in taxation cases, that a subordinate legislature has wide powers with respect to persons domiciled or dying domiciled within its territory, and with respect to the taxation of the property of such persons even though that property be situate outside the jurisdiction.
>
> In this case, however, the duty is levied on or in respect of property which is not nor ever was property belonging to the deceased whose domicile in New South Wales is regarded

as the touchstone of liability. The case may be exemplified as being one in which a duty is levied on or in respect of the property of 'A' because of the domicile in the jurisdiction of 'B'. In our opinion the suggested nexus is completely irrelevant, and, consequently, in so far as s. 102(2A) purports to extend the operation of par. (g) it is, we think, invalid."

If the whole of the passage quoted is taken literally, it may be said that domicile can never be validly made "the touchstone of liability" in respect of property which is not and never was "property belonging to the deceased". But, in my opinion, such a statement would go too far unless the qualification is made that, for death duty purposes, it may sometimes be proper to treat property which a person does not actually own as being property "belonging to" that person. I feel little doubt that for such purposes personal property over which a domiciled person has a completely general power of appointment can validly be treated by the Parliament of the State in the same way as personal property which he actually owns and, therefore, can be brought to duty, although the deceased never was the actual owner of it. In Commissioner of Stamp Duties v. Stephen (1904 A.C. 137 at 140) Their Lordships, after stating that the distinction between a person's own property and property which is not his own but which he can dispose of in any way he pleases by virtue of a power conferred on him is well established, went on to say:-

"Notwithstanding, therefore, the difference between a person's own property and property which he can dispose of as he pleases and does dispose of, although it is not his own, the distinction is one which the Legislature can hardly be expected to recognise when imposing probate or other duties payable on the death of a person who has exercised his power of disposition. Accordingly, modern Acts imposing such duties are almost always, if not always, so framed as to include both classes of property; and this is reasonable and just."

The view which I have stated is not at variance

In the Supreme Court of New South Wales

No.5
Reasons for Judgment of Mr. Justice Walsh 30th June 1967 (Contd.)

with Johnson's case. In the Privy Council, Their Lordships, who decided that the Supreme Court had reached the right conclusion, cited part, but not all, of the passage from its judgment which I have set out above. In my opinion, we are not bound by Johnson's case to decide this appeal in favour of the appellants. The provisions of paragraph (g) are different in kind from the other paragraphs of that sub-section which create categories of notional estate. Paragraph (g) operates on the death of a person upon whose death there is a cesser of a limited interest in property and it operates to the extent to which a benefit accrues or arises by that cesser and it brings that property into the dutiable estate of that person. But the property so brought into the estate is segregated and a separate assessment is made in respect of it. The duty thus separately assessed is made payable out of the "non-aggregated" property and by the person in whom that property is vested. See sections 105A and 114A. The imposition of this duty seems to me to be different in character from the imposition of duty upon property on the footing that it was owned by the deceased or on the footing that the property itself or other assets expended for the benefit of others in its acquisition would have been owned by the deceased and would have augmented his estate, but for the manner in which he has chosen to arrange his affairs for the benefit of others and so as to diminish the amount of his estate at the date of his death. He may diminish his own actual estate by such methods as making gifts inter vivos, by paying insurance premiums or purchasing annuities. The policy of death duty statutes, both here and elsewhere, has been that such measures are to be prevented (to the extent enacted) from reducing the amount of duty to which his estate will be subject. Then the Act goes a step further and seeks to exact duty upon property which would have formed part of the actual estate, if the deceased had chosen to exercise for his own benefit a power to make property his own, where that property is not in his actual estate because he has chosen to exercise the power for the benefit of others or not to exercise it at all. The character of such property in regard to the relationship between it and the deceased person may, I think, be regarded for death duty purposes as being much more akin to that of property of the deceased and of

property which was his own but has been transferred to others, than is that of the property described in paragraph (g). I am of opinion that the reasons for which it has been denied that the domicile of the deceased is relevant to property described by paragraph (g) do not require that the domicile should also be regarded as irrelevant in relation to property over which the deceased has had a power of appointment which enabled him to make it his own or to direct by his will how it is to devolve.

But it is necessary to examine the contention that, whatever may be the position in relation to a power of appointment which is completely general, the enactment has gone beyond competence because of the nature of the powers of appointment to which it may extend.

A question has been debated concerning the construction of the words "as he thinks fit for his own benefit". A possible view is that, if the power is one to appoint amongst a specified class including the donee, or to appoint to anyone other than specified persons, then the power is not within the description contained in section 100, the reason being that such a power is not a power to appoint "as he thinks fit". Cf. In re Byron's Settlement ((1891) 3 Ch. 474 at 479) and In re Triffitt's Settlement (1958 Ch. 852 at 862). If this is correct, the description in section 100 is really no wider than a description of an ordinary general power of appointment (except insofar as it refers to a power to charge any sum of money upon property). However, I am of opinion that the description goes further than that and that it would be satisfied by a power to appoint within a class of which the donee was one, provided always that the terms of the power are such that it would be a valid exercise of it if the donee appointed or disposed of the property for his own benefit to the exclusion of the other members of the class. Such a power would be more properly called a special power than a general power and would not come within the expression "general power of appointment" if it had been left undefined.

But the division of powers into general and special powers is not an exhaustive or a precise one and the law recognises hybrid powers. See Halsbury, 3rd Ed., Vol. 30, pp. 208-209; In re

In the Supreme Court of New South Wales

No.5
Reasons for Judgment of Mr. Justice Walsh 30th June 1967 (Contd.)

Triffitt's Settlement (supra). I do not think that it really matters for present purposes by what name the powers described in section 100 are called. If the holder of the power is enabled by it either to make the property his own or to dispose of it as if it were his own, the question which has to be resolved is whether this circumstance is enough to make the holder's domicile in New South Wales a valid criterion for the imposition of death duty in his estate upon that property. So far as I am aware, this precise question is not governed by any of the authorities.

The general approach to be made by the Court to a challenge to validity on the basis of a lack of territorial connection has been discussed recently by this Court in The Myer Emporium Ltd. v. Commissioner of Stamp Duties (unreported). I have already indicated above some more particular considerations to be taken into account when the challenge relates to a death duty enactment and the criterion of dutiability selected, in relation to personal property situated elsewhere, is the domicile of the deceased in New South Wales. In the present case, so far as the Commissioner relies on paragraph (a), there are some particular points relating to its construction to which I must refer later. Subject to those matters, the conclusion which I have reached is that that paragraph, as extended by sub-section (2A), is within power. Paragraph (a) postulates that the deceased has disposed of the property in question either by his will or by a settlement containing a trust to take effect after his death and it may operate where that will or settlement has been made in the exercise of any "general power of appointment". Because of the definition in section 100, it extends to cases in which the power is not in the ordinary sense a general power but it is limited to cases where the power is such that it was open to the deceased, if he wished to do so, to make the property his own or to transmit it by his will as if it were his own. This is, I think, sufficient to enable the Legislature to impose death duty as if it were his own. Although the provision may extend in some cases to powers which are such that section 23(3) and section 46B of the Wills, Probate and Administration Act would not operate upon the property the important thing is that, although the

deceased could have appointed the property to himself or to his executors and administrators, in which event it would have formed part of his actual estate, he has disposed of it in some other way. I think that, in relation to such property, if it is personal property situated abroad, there is a sufficient relationship between it and the domicile in New South Wales of the person who has that power over it to make competent the levying of death duty on it in the estate of that person.

In Grey v. Federal Commissioner of Taxation (62 C.L.R. 49 at 59) Rich J. said:-

> "In order to prevent resort to gifts and dispositions inter vivos on the part of men of property who manifest more benevolence to their offspring or other claimants on their bounty than interest in the budgets of their country some provision is almost invariably included in such Acts whereby property, the subject of the gift, is treated as comprehended in the deceased's estate: Cf. Horsfall v. Commissioner of Taxes (Vict.) (24 C.L.R. 422 at 441). Further, as a general power of appointment enables the donee of the power to dispose of property as if it were his own, it is usual to levy duty upon property subject to such power as if it were part of the estate passing upon death."

At 63 Dixon J. said:-

> "It is quite clear why it was thought proper to include in the dutiable estate property over which a testator had exercised a general testamentary power of appointment. It is because the donee of a general power of appointment has a right of disposition which is in many respects the equivalent of property. The power enables him to appoint to himself or his executors. It enables him to devise or bequeath the property subject to the power as freely and effectually as if it were his own. That property becomes subject to his debts as if it were his own estate. He may release the power instead of exercising it. Further, all these things he may do for valuable consideration. A general power immediately arising, therefore, has many practical results which ordinarily flow from

In the Supreme Court of New South Wales

No.5
Reasons for Judgment of Mr. Justice Walsh 30th June 1967 (Contd.)

the ownership of property."

It may be acknowledged that those observations may not be wholly applicable to all of the powers to which section 100 refers. Nevertheless, I think that they support the assimilation of legislation imposing duty on personal property abroad, owned by a deceased domiciled here, to legislation imposing duty on property with which that person could have dealt, so as to make it belong to himself or to his estate, where he has actually exercised his power and has disposed of the property in favour of someone else.

It must now be noticed that section 100, in describing "general power of appointment", refers to a power or authority "whether exercisable by instrument inter vivos or by will or otherwise". Then section 102(2)(a) speaks of 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". In Commissioner of Stamp Duties v. Sprague (101 C.L.R. 184 at 192) Dixon C.J. said:- "I have failed to understand what in the context is meant by the words 'by will'". He passed by that difficulty, as being not directly material to the case before the Court. His Honour seems to have thought that, if the property could pass by the will of the deceased, it would be caught by section 102(1) which deals with the testator's own property. He may have had in mind such provisions as section 46A and 46B of the Wills, Probate and Administration Act and perhaps also such considerations in relation to property appointed by will under a general power of appointment, as were mentioned in Commissioner of Stamp Duties v. Stephen (1904 A.C. at 140), namely, that such property is subject to the payment of the appointor's debts and, if personal property, is equitable assets of the testator which his executor can claim for distribution in the proper order. The learned Chief Justice did not have to consider in that case any such problem as that with which we are now concerned. In my opinion, the difficulty to which he referred may also be passed by in this case. The Commissioner has not suggested that he can support the assessment by means of section 102(1).

On the other hand, the appellants have not argued that paragraph (a) of sub-section (2), insofar as it refers to the disposition of property by a will made in exercise of a power of appointment, is lacking in meaning or can have no practical operation. In particular, they have not argued that it does not operate upon the facts of this case. As stated earlier, the only question argued has been the question of territorial competence.

There are other aspects of the language of paragraph (a) which may suggest some difficulties, such as the apparent oddity of referring, in a provision which operates upon a disposition by will, to a trust to take effect after the death of the deceased and of referring in the proviso to property which, at the time of death, is subject to such trust. It may be that the provision, insofar as it relates to a disposition by will, should be taken to refer only to a disposition of property which does not actually belong to the deceased. Since the property, if it did actually belong to the deceased, would not need to be brought into the notional estate, perhaps that is the intention of the paragraph. However, I do not think that these problems have any bearing upon any arguments which the parties have put to the Court in the present case.

In section 100 appear the words "or would enable him if he were of full capacity". Thus a "general power of appointment" is made to include a power or authority which, for want of capacity, cannot be exercised, which is something like a contradiction in terms. However, I do not think that this can affect the question of validity, so far as paragraph (a) is concerned. That paragraph can come into operation only if there has been a disposition of property. In any case, where this has been done in the exercise of a power of appointment, the paragraph cannot operate unless the exercise of the power has been effective to make a disposition, so that it can never operate where, through lack of capacity, the person named as the donee of the power is unable to exercise it. The point now being discussed may have importance in relation to paragraph (j), but I think it has none in relation to paragraph (a).

Section 100 refers also to a power "to charge

In the Supreme Court of New South Wales

No.5
Reasons for Judgment of Mr. Justice Walsh 30th June 1967 (Contd.)

any sum of money upon any property". This creates a difficulty concerning the territorial operation of sub-section (2A), assuming it would otherwise be valid. Property in respect of which the deceased had nothing more than that power could hardly be said to be property which he was able to make his own and therefore to be property which, in accordance with the reasons I have given above, could validly be treated for death duty purposes in the same manner as if it were his own. Section 100 states that any "mortgage" or any "other alienation of property" is included in the meaning of the expression "disposition of property". But this is not so if the context or subject-matter otherwise indicates or requires. The definition in section 100 of "general power of appointment" refers disjunctively to a power to appoint or dispose of any property or to charge any sum of money upon any property. I think that there is an argument for saying that, as a matter of construction, paragraph (a), when it refers to property which the deceased has disposed of, does not apply at all to property in respect of which all that the deceased has done is to charge a sum of money on that property. If that be correct, the difficulty disappears. If it is not correct, I am of opinion that the difficulty can be resolved by reference to section 144 of the Act. The hypothesis now being made is that, if the property is in New South Wales, paragraph (a) brings into the estate (inter alia) (a) property which the deceased has disposed of by a will made in the exercise of a power to appoint or dispose of property; and (b) property which the deceased has "disposed of" by a will, made in the exercise of a power to charge a sum of money on it.

Then sub-section (2A) says (inter alia) that, if the property is outside New South Wales but the deceased died domiciled here, his dutiable estate includes any personal property in either of the above categories (a) and (b). If the bringing into the estate of property in category (b) is beyond power, because the existence of the limited power to deal with it by charging it does not cause it to have a sufficient connection with New South Wales by reason of the domicile of the donee of the power, but the bringing into the estate of property within category (a) would be within power (for reasons which I have stated

above), I think that the relevant provisions of the Act can properly be given an operation such that they remain effective in their application to the property in category (a), (as well as to property described in some of the other paragraphs of sub-section (2)). This view, I think, is in conformity with the principles stated in The King v. Poole; Ex P. Henry (61 C.L.R. 634 at 651 to 653) in relation to section 15A of the Acts Interpretation Act, 1901, which is similar to section 144.

In Allpike v. The Commonwealth (77 C.L.R. 62) the question arose whether section 7(1) of the War Service Estate Act, 1942, was valid. It made certain provisions in relation to "the war service estate" of a deceased member of the Armed Forces. The term "war service estate" was defined so as to include various different classes of property. The view was taken that, if section 7(1) would be beyond power (the defence power) in relation to some classes of the property described in the definition, then, although section 7(1) was not itself capable of the moulding that would be necessary to give it partial validity, yet the definition provisions could be severed and part of them could be notionally excised, leaving section 7(1) as an operative provision in relation to property covered by what remained of the definition. Section 15A of the Acts Interpretation Act would authorise that course. See 77 C.L.R. at 75.

The problem here is not identical. I acknowledge the difficulty of simply "excising" part of the definition, because sub-section (2) of section 102 (construed as operating only on property in New South Wales) probably does not raise a question of power and, for the purposes of that sub-section considered alone, there is no need to excise any part of the definition. Yet I think the decision is of assistance. In sub-section (2A), the convenient course has been adopted of incorporating by reference the provisions of sub-section (2), instead of setting out in full the classes of personal property outside New South Wales to which sub-section (2A) is to apply. But its meaning is the same as if it had set them all out. It is an independent provision. For its purposes, I think that it is permissible under section 144 to give sub-section (2A) validity in relation to some

In the Supreme Court of New South Wales

No.5
Reasons for Judgment of Mr. Justice Walsh 30th June 1967 (Contd.)

classes of such property, although it be invalid as to others, provided that this can be done without introducing some new element not indicated by the Act into the description of the class of property in respect of which it is held to be valid. This seems to be in conformity, not in conflict, with Johnson's case (1956 A.C. 331). Unless this is permissible, it would seem that the logical consequence of the decision in Johnson's case (1956 A.C. 331) that sub-section (2A) is invalid insofar as it purports to operate on property described in paragraph (g), would be that it is wholly invalid in relation to all the classes of property described in all the paragraphs of sub-section (2). But the decision does not suggest that and has never been regarded as having that result.

I think that the question of "reading down" is different in this case from that which arose in Johnson's case in relation to the operation of sub-section (2A) on paragraph (g). Their Lordships were of opinion that there was no way of "splitting up" the enactment of sub-section (2A) into good and bad in its application to paragraph (g). But, in relation to paragraph (a), regarded as extended by the section 100 definition in a way which is in terms disjunctive, I think that there is a way of splitting it up. In Johnson's case what the argument, which was rejected, sought to do was to invoke the presence in New South Wales of the person liable to duty in order to save the enactment in part. It was sought to say that a criterion for the valid imposition of the duty, which could have been but which was not selected by the Act, could nevertheless be used to make it valid, in cases where that criterion existed in fact in the particular case. In the present case, the application of the provisions of sub-section (2A) in the way which I have suggested does not do that. It does not "bring in something from outside the enactment". It rests upon the basis that, although the whole of paragraph (a) is set out in one paragraph, it contains within it words which apply to property affected by several different classes of dispositions, under different types of power, by means of a reference back to a disjunctive definition provision. For relevant purposes, its operation is the same as if property disposed of in exercise of a power to charge a sum of money

had been mentioned in a separate paragraph. It could not be held that sub-section (2A) is wholly invalid in relation to the whole of the paragraphs in sub-section (2), merely because it is invalid in relation to one of them. Likewise, within a particular paragraph, I think that it can be invalid as to part, but valid as to the rest of what is described in that paragraph, provided that (1) the language used in the paragraph makes it possible to divide what is there described into separate categories without importing any new element into the description of it; and (2) it appears that it was not intended that the relevant provision of the Act should operate either totally or not at all. I think that paragraph (a) is so expressed that both of those conditions are fulfilled, whereas paragraph (g) is so expressed that the first of them cannot be fulfilled.

For the reasons stated, I am of opinion that the Commissioner is entitled to succeed in respect of paragraph (a) as extended by sub-section (2A). Therefore, it is unnecessary to deal with the arguments relating to paragraph (j) and I refrain from doing so.

The questions in the Stated Case should be answered:-

(1) Yes.

(2) Does not arise.

(3) By the appellants.

In the Supreme Court of New South Wales

No.6

Reasons for Judgment of Mr. Justice Jacobs

No.6
Reasons for Judgment of Mr. Justice Jacobs 30th June 1967

IN THE SUPREME COURT OF NEW SOUTH WALES } Term No. 445 of 1966

COURT OF APPEAL

CORAM: WALLACE, P.
WALSH, J.A.
JACOBS, J.A.

Friday, 30th June, 1967.

THOMPSON v. COMMISSIONER OF STAMP DUTIES

J U D G M E N T

JACOBS, J.A.: In the case of personal property situate outside New South Wales at the date of the death of a person the Legislature has indicated in Section 102(2A) that the domicile of that person in New South Wales should be the link with New South Wales which gives power to this State to bring the property to duty. However, domicile in New South Wales is only a link with this State when there is a relevant relationship between the property in question and the domicile of the deceased in New South Wales. Thus in Johnson v. Commissioner of Stamp Duties (1956) A.C. 331 it was held that the domicile of a deceased life tenant in New South Wales had no relevant relationship to the settled property and therefore the settled property could not be brought to duty by the New South Wales Legislature if it was situated outside New South Wales at the time of the death of the life tenant.

The question in the present case therefore is whether there is a relevant relationship between the domicile of the deceased in New South Wales and the property in question over which the deceased had the power of appointment. I do not find it necessary to decide that there is such a relevant relationship in respect of property the subject of a power of appointment. In every case 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. Whether or not there is a relevant relationship between the property and the domicile of the deceased person seems to me to depend 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. Despite some conflict in the decisions (see Cheshire on Private International Law 7th Edition page 494) I think that we should follow the decision of the Court of Appeal in Re Pryce (1911) 2 Ch. 286 and hold that the law governing the exercise of a general power of appointment is the law of the domicile of the donee of the power. In the case of special powers of appointment the proper law governing the exercise of the power is the law governing the creation of the power. See Pouey v. Hordern (1900) 1 Ch. 492 at 494.

The definition of "general power of appointment" in Section 100 of the Stamp Duties Act is wide enough to cover not only general powers of appointment in the true sense but also special powers of appointment where the donee of the power is one of the class of objects of the power. I do not find it necessary to decide in this case whether in the case of such a special power of appointment the domicile of the donee of the power is sufficient to bring the property the subject of the power within the competence of the New South Wales Legislature. The facts of the present case disclose a general power of appointment even though it may only be exercised by will. It is within the competence of the New South Wales Legislature to bring to duty the property the subject of such a general power of appointment. The appellant in my view could only succeed upon this case if, despite the fact that the property might otherwise be brought to duty, the whole of the legislative provision failed because it was too widely expressed. For the reasons which have been given by Walsh, J.A. whose judgment in draft form I have had the advantage of reading I agree with his conclusion that, even if there is a partial invalidity, the whole operation of Section 102(2A) is not displaced. I would therefore agree with Walsh, J.A. in answering the questions in the manner which he has indicated.

In the Supreme Court of New South Wales

No.7

Order granting final leave to appeal to Her Majesty in Council 23rd October 1967

No.7

ORDER granting final leave to appeal to Her Majesty in Council

IN THE SUPREME COURT) No. 445 of 1966.
OF NEW SOUTH WALES)

COURT OF APPEAL

IN THE MATTER of the estate of RITA BUCKLAND THOMPSON late of Mosman in the said State, Married Woman, deceased.

- and -

IN THE MATTER of the Stamp Duties Act, 1920-1965.

- and -

IN THE MATTER of the Appeal by CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE against the assessment of Death Duty upon the estate of the said deceased.

The twenty third day of October, 1967.

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the 18th day of October, 1967, WHEREUPON AND UPON READING the said Notice of Motion the affidavit of Stanley Rowland Hill sworn on the 13th day of October, 1967, and the Prothonotary's Certificate of Compliance, AND UPON HEARING what is alleged by Mr. McAlary of Counsel for the Appellants and Mr. Needham of Counsel for the Respondent IT IS ORDERED that final leave to appeal to Her Majesty in Council from the judgment of the Court of Appeal given and made herein on the 30th day of June, 1967, be and the same is hereby granted to the Appellants AND IT IS FURTHER ORDERED that upon payment by the Appellants of the costs of preparation of the

Transcript Record and despatch thereof to England the sum of Fifty dollars ($50.00) deposited in Court by the Appellants as security for and towards the costs thereof be paid out of Court to the Appellants.

By the Court,
Registrar
For the ~~Prothonotary~~

(Signed)

Chief Clerk.

In the Supreme Court of New South Wales

No.7
Order granting final leave to appeal to Her Majesty in Council 23rd October 1967
(Contd.)

IN THE PRIVY COUNCIL No. 32 of 1967.

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

(No. 445 of 1966).

IN THE MATTER of the estate of RITA BUCKLAND THOMPSON, late of Mosman, in the said State, Married Woman, deceased

- and -

IN THE MATTER of the Stamp Duties Act 1920-1965

- and -

IN THE MATTER of the appeal by CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE against the assessment of Death Duty upon the estate of the said deceased.

B E T W E E N :

CECIL WOLSEY CURTIS THOMPSON and ROSCOE WILLIAM GYLES HOYLE — Appellants

- and -

THE COMMISSIONERS OF STAMP DUTIES — Respondent

R E C O R D O F P R O C E E D I N G S

ALAN, GEORGE & SACKER
415, Oxford Street,
London, W.1.

Solicitors for Appellants

LIGHT & FULTON,
24, John Street,
Bedford Row,
London, W.C.1.

Solicitors for Respondent