

1976, 10

IN THE PRIVY COUNCIL

No. 41. of 1975

ON APPEAL  
FROM THE SUPREME COURT OF NEW SOUTH WALES  
ADMINISTRATIVE LAW DIVISION

B E T W E E N :-

PERPETUAL TRUSTEE COMPANY LIMITED

Appellant

- and -

THE COMMISSIONER OF STAMP DUTIES

Respondent

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CASE FOR THE RESPONDENT

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Respondent

## ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

ADMINISTRATIVE LAW DIVISION

IN THE MATTER of the Estate of EVERESTREGINALD YORK SEYMOUR deceasedAND IN THE MATTER of the Stamp Duties Act 1920  
as amendedBETWEEN:

10

PERPETUAL TRUSTEE COMPANY LIMITED

Appellant

-AND-

THE COMMISSIONER OF STAMP DUTIES

Respondent

## CASE FOR THE RESPONDENT

1. This is an appeal brought as of right from a judgment of the Supreme Court of New South Wales (Waddell J.) given on 7 March 1975.

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pp.52-64

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2. The proceedings in the Supreme Court and this appeal involve the question whether the residuary estate of the late Everest Reginald York Seymour (the deceased) was wrongly included by the respondent in the dutiable estate of the deceased for the purposes of the Stamp Duties Act, 1920 as amended (the Act).

3. The deceased died on 9 January 1966 and probate of his will and two codicils thereto was granted by the Supreme Court to the appellant on 29 August 1966.

pp.7-14

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4. Clause 5 of the deceased's will (which was not effected by the codicils) provided:

p.12 lines  
9-24

"5. As to the entire residue of my Estate of whatsoever kind and wheresoever situated IT IS MY WISH that my Trustees shall use the same for the purpose of the purchase or construction of a building (or to go towards a Fund for the purchase or construction of a building) in the City

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of Sydney to serve as a Centre for the cultivation, education and performance of musical and dramatic Arts befitting the City of Sydney AND I DIRECT my Trustees to transfer or to vest such residue of my Estate for the purposes mentioned in the Council of the Municipality of the City of Sydney or the University of Sydney or the New South Wales Government or in such other Public Authority as my Trustees shall consider fit." 10

pp.44-45

5. On 16 October 1967 the respondent issued an assessment of the death duty payable by the appellant in respect of the estate of the deceased. Such assessment treated the dutiable estate of the deceased as including inter alia the assets comprised in his residuary estate which passed under Clause 5 of his will.

p.22

6. The appellant did not appeal against such assessment. 20

pp.27-31

7. On 29 October 1970 the Appellant selected the University of Sydney as the body to administer the trust created by Clause 5 of the will. On 4 March 1971 the University of Sydney executed a Declaration of Trust acknowledging that upon transfer to it of the residuary estate of the deceased it would hold the same upon the trusts therein specified being trusts intended to give effect to Clause 5 of the will. 30

p.46

8. The appellant claimed that the residuary estate of the deceased was not properly included in his dutiable estate because of the operation of the Educational Institutions (Stamp Duties Exemption) Act 1961 (N.S.W.). Section 2(1)(b) of that Act provides that it should apply inter alia to the University of Sydney and Section 2(3) provides so far as material as follows:

"Nothing contained in the Stamp Duties Act 1920 ... applies to any real or personal property ... comprised in any gift bequest or devise made to - 40  
(a) any educational institution to which this Act applies or to the

trustees of any such institution  
or to the person or authority  
governing and managing any such  
institution, or

(b) ..."

10 9. The respondent denied such claim, and  
the appellant commenced proceedings pursuant  
to Section 140 of the Act to recover the death  
duty paid by it in respect of the residuary  
estate of the deceased on the ground that the  
property comprised therein had "been wrongly  
included in the dutiable estate of" the  
deceased within the meaning of the Section.

pp.47-48

pp.1-2

10. The Supreme Court (Waddell J.) rejected  
this claim.

p.63 lines  
30-31

FIRST SUBMISSION OF RESPONDENT: CLAIM TO  
EXEMPTION MUST BE TESTED AS AT DATE OF DEATH

p.64 lines  
1-9

20 11. The respondent submits that the decision  
under appeal is correct and that the appellant's  
claim to a refund of the death duty paid by it  
in respect of the residuary estate of the  
deceased should be rejected for the following  
reasons -

(a) Death Duty imposed by the Act must  
be assessed as at the date of the  
death of the deceased, and by  
reference to the facts and the law  
as they exist at that date,

30 (b) At the date of the death of the  
deceased his residuary estate was  
held upon the trusts declared in  
Clause 5 of his will,

(c) Under those trusts at that time it  
could not be said that the property  
in question was comprised in "any  
gift bequest or devise made to"  
the University of Sydney so as to  
attract the exemption,

40 (d) Although the University of Sydney  
was later selected as the body to  
administer the trusts on which the  
residuary estate was held and such  
estate became vested in it pursuant  
to such selection and following the  
execution of the Declaration of

p.22

pp.27-31

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Trust dated 4 March 1971 these acts do not have any retrospective effect,

(e) In particular those acts do not "relate back" in time to the date of death so as to alter the state of affairs which then existed,

(f) Property can only be exempt from death duty pursuant to the Exemption Act if at the date of death the property must pass to an institution which is entitled to the exemption. If there is a power of selection in the executors so that, depending on how that power is exercised, the property may or may not pass to an institution which is entitled to the benefit of the exemption, the exemption is not attracted. 10  
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12. The proposition contended for in paragraph 11(a) above is supported by the decision of the Full Court of the Supreme Court in Re Smith (1965) 82 W.N. (Pt. 1) 507 at pp. 510, 511. It is submitted that an independent examination of the provisions of the Act relating to the assessment and payment of death duty lead to the same conclusion.

13. The propositions contended for in paragraph 11(d) and (e) are, in our submission, established by the decision of Lord Hardwicke in Duke of Marlborough v. Lord Godolphin 2 Vesey Senior 61 at 76-79 (28 E.R. 41 at 50-52) that the exercise of a special power of appointment does not relate back in time to the date of the instrument creating the power. This decision has never been questioned on this point and was approved in Muir v. Muir (1943) A.C. 468 at 485 and in Pedley-Smith v. Pedley-Smith (1953) 88 C.L.R. 177 at 190. Appointees taking interests under an instrument exercising a special power of appointment therefore take those interests from the date the instrument exercising the power takes effect, and not from any earlier date. 30  
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10 14. The appellant will rely upon the well established principle that for certain purposes an instrument exercising a special power is to be "read back" into the instrument creating the power. In our submission this "reading back" is undertaken for the purposes of determining the source and validity of the appointee's title. In particular the reading back of the appointment involves no fiction, and the Courts have not held, contrary to the obvious facts, that the appointees derived their title when the instrument creating the power took effect.

20 15. The proposition contended for in paragraph 11(f) above, viz. that property is only exempt if at the date of death it must pass to an institution within the Exemption Act, in our submission is established by a long series of decisions on Section 8(5) of the Commonwealth Estate Duty Assessment Act 1914 (as amended). This Section so far as material provides:

"Duty shall not be assessed or payable upon so much of the estate as is devised or bequeathed or passes by gift inter vivos or settlement ..." for the benefit of designated purposes or institutions.

30 16. In relation to this Section the High Court has consistently held that a claim for exemption is not made out if at the date of death the relevant property could be applied, without breach of trust, for a purpose that is not within the exemption.

17. The relevant authorities are

(a) Public Trustee v. Federal Commissioner of Taxation (1934) 51 C.L.R. 75

per Starke J. at P. 100  
per Dixon J. at P. 103-105  
per McTiernan J. at P. 106

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(b) Teele v. F.C.T. (1940) 63 C.L.R. 201

per Starke J. at P. 206  
per Dixon J. at P. 206  
per McTiernan J. at P. 208

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- (c) Lemm v. F.C.T. (1942) 66  
C.L.R. 399  
per Williams J. at P. 410
- (d) Union Trustee Co. v. F.C.T.  
(1962) 108 C.L.R. 45  
per Taylor J. at PP. 455-  
456
- (e) Public Trustee v. F.C.T.  
(1964) 112 C.L.R. 326  
per Windeyer J. at PP. 329, 10  
331-2
- (f) Downing v. F.C.T. (1971) 125  
C.L.R. 185  
per Walsh J. at PP. 191-192,  
194, 201-202
- (g) Ryland v. F.C.T. (1971) 19  
F.L.R. 214  
per Nelson J. at PP. 224-225
- (h) Ryland v. F.C.T. (1973) 128  
C.L.R. 404 20  
per Barwick C.J. at PP. 409-  
410

18. In Ryland's case at P. 410 Barwick C.J.  
said:

"The question ... is whether ... the  
gift to the Association can be said, as  
at the date of the death of the  
testatrix to fall within the provisions  
of Section 8(5). The duty of course must  
be assessed as at that date. The gift 30  
therefore must then fall within the terms  
of the exemption. It is nothing to the  
point that, though it may not do so as at  
that date, it may do so later, or that  
though it then falls within the terms  
of the section for reasons other than the  
terms of the gift it may not do so at the  
date when the gift becomes effective in  
possession."

19. It is submitted that the two statutes 40  
are in pari materia, that these decisions are  
correct in principle, and they should be  
followed by the Board in the present case.

10 20. In the alternative the respondent submits that a power to determine the manner in which a fund devoted to charity shall be spent is quite different in principle from a special power of appointment and the "reading back" principle is not applicable at all. The respondent here relies upon the reasoning of Windeyer J. in Public Trustee v. F.C.T. (1964) 112 C.L.R. 326 at PP. 331-332.

SECOND SUBMISSION OF RESPONDENT: PROPERTY NOT EXEMPTED AS COMPRISED IN "GIFT"

20 21. The appellant contended at the trial that although the residuary estate of the deceased had not passed to the University by a "bequest or devise" within the meaning of Section 2(3) of the Exemption Act, nevertheless it was exempt because it was property "comprised in (a) gift ... made to" the University. It had further contended that the combined effect of Clause 5 of the will of the deceased and the exercise of the power of selection in favour of the University had been to pass the property to the University by way of gift i.e. without consideration.

p.57 lines 27-33  
p.58 lines 1-10  
p.58 lines 10-28  
p.59 lines 1-10

30 22. In answer to this argument the respondent submits firstly that in Section 2(3) of the Exemption Act the word "gift" refers to non testamentary dispositions of property since the words "bequest or devise" include all possible forms of testamentary gift. The Act can apply to non testamentary gifts because it imposes stamp duty at gift rates on conveyances of property made without full consideration in money or money's worth, and it imposes death duty on gifts inter vivos made within 3 years prior to the death of the donor.

40 23. The respondent further submits that if the residuary estate of the deceased passed to the University by gift that gift could only have been effected when the power of appointment or selection was exercised in its favour. Even if the disposition of the residuary estate effected by Clause 5 of the will, was a gift within the meaning of Section 2(3) of the Exemption Act, it was not a gift to

p.22 & pp. 27-31



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the University. The exemption from death duty therefore was not attracted. The instruments by which the power of appointment or selection was exercised and the property transferred to the University may have been gifts to the University but no claim by the respondent to stamp duty on such instruments is involved in this appeal.

THIRD SUBMISSION: PROPERTY DUTIABLE PURSUANT TO SECTION 102(2)(a) OF ACT

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p.61 lines  
20-28 &  
p.62 lines  
1-20

24. The appellant further contended at the trial that the property comprised in the residuary estate of the deceased was not liable to death duty under Section 102(1) of the Act because it was not property "to which any person (became) entitled under the will or upon the intestacy of the deceased". It was then submitted that a testamentary disposition in favour of charity was a gift to purposes and not to persons.

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25. The short answer to this submission is that Section 102(2)(a) of the Act includes in the dutiable estate of a deceased person "all property which the deceased has disposed of ... by will ..." and the property comprised in Clause 5 of the will of the deceased answers this description. The view that Section 102(2)(a) does catch all property which the deceased disposed of by will was adopted by the Board in Thompson v. Commissioner of Stamp Duties (1969) 1 A.C. 320 at 333-4. In our submission this view of Section 102(2)(a) was correct and should be followed in the present case.

30

26. In any event if the subject property was wrongly included in the dutiable estate of the deceased because of an erroneous view of Section 102(1) and Section 102(2)(a) of the Act a refund of the death duty wrongly paid could not be obtained under Section 140 of the Act. That Section precludes the recovery of duty paid in respect of property wrongly included in the dutiable estate of a deceased person "by reason of any mistake in the construction of this Act".

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FOURTH SUBMISSION: APPELLANT'S CLAIM NOT  
WITHIN SECTION 140 OF ACT

27. The deceased died on 9 January 1966 and the death duty payable in respect of his dutiable estate was assessed on 16 October 1967. The power of appointment or selection created by Clause 5 of the will was not exercised until 29 October 1970 or possibly 4 March 1971.

p.44 & 45

p.22 & pp.  
27-31

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28. The appellant did not appeal against the assessment of death duty nor could it have successfully done so. At the date of assessment it could not have been contended that the residuary estate of the deceased passed to the University so as to attract the exemption.

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29. Section 140 of the Act enables a refund of death duty to be obtained where "any property has been wrongly included in the dutiable estate of a deceased person".

30. In our submission whether this matter is tested as at the date of death or as at the date of assessment the residuary estate of the deceased was not wrongly included in his dutiable estate so as to enable a refund of death duty to be obtained under the Section.

FIFTH SUBMISSION: GIFTS TO UNIVERSITIES ON  
TRUST FOR OTHER CHARITABLE PURPOSES NOT EXEMPT

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31. The charitable bequest and devise contained in Clause 5 of the will was not made to the University as such. Moreover the inherent nature of the charity was not such as to require that it be administered by and within a University. The language of Clause 5 of the will itself envisaged that the trust could equally well be administered outside the University by a body which had no connection with it.

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32. When the Mortmain legislation was in force in England assurances of land for the benefit of universities were exempted but it was held that such assurances were only exempt if they were for the benefit of the university or university college as a body or for the benefit of some of their members, and the

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purposes had to be academical or collegiate. In particular the exemption did not apply to an assurance to a college as trustee for other charitable purposes.

33. The relevant authorities include:

Attorney General v. Tancred (1757)  
1 Eden 10 (28 E.R. 587)

Attorney General v. Munby (1816)  
1 Mer. 327 (35 E.R. 695)

34. It is submitted that these authorities are relevant to the construction of the Exemption Act, and therefore the gift to the University in this case (if such it be) is not exempt from death duty. 10

35. The respondent therefore submits that this appeal should be dismissed for the following (amongst other)

REASONS

1. Because the appellant's claim to exemption must be tested as at the date of the death of the deceased. 20
2. Because at that date the subject property was not comprised in a bequest or devise to the University.
3. Because at that date the subject property could have been transferred without breach of trust to an institution that was not within the exemption.
4. Because the property was not wrongly included in the dutiable estate of the deceased. 30
5. Because the decision of the Supreme Court was correct.

K.R. HANDLEY Q.C.

M.J. NEIL

COUNSEL FOR THE RESPONDENT

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