

HIGH COURT OF AUSTRALIA

John Lang

Vs.

Thomas Prout Webb

11 March 1912

(Griffith C.J., Barton and Isaacs JJ)

(Griffith C.J.)

The question raised in this case depends upon the construction of sec. 11 of the *Administration and Probate Act 1903* which is as follows:—

Every conveyance or assignment gift delivery or transfer of any estate real or personal and whether made before or after the commencement of this Act, purporting to operate as an immediate gift *inter vivos* whether by way of transfer delivery declaration of trust or otherwise shall—

(a)

if made within twelve months immediately preceding the death of the person so dying; or

(b)

if made at any time relating to any property of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise

be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under the Administration and Probate Acts as though part of the estate of the donor.

That section lays down an artificial rule, and the duty of the Court is to construe the section as they find it. It is applicable alike to real and personal property, to interests in possession and in remainder or reversion, and to corporeal and incorporeal property. In the second case mentioned, that is, where the gift is made more than twelve months before the death of the person dying, four conditions are necessary to take the case out of the section:—First, that *bonâ fide* possession of the property shall be assumed by the donee immediately upon the gift and thenceforward be retained by him; secondly, that *bonâ fide* enjoyment of the property shall be in like manner assumed and retained by the donee; thirdly, that the donor shall be and continue entirely excluded from the property; and, fourthly, that the donor shall be entirely excluded from any benefit to him by contract or otherwise. As to the last condition I agree with the opinion expressed by the Court of Session in Scotland and followed by *Hamilton J. in Attorney-General v. Seccombe*^[1] that the benefit intended is a benefit which was part of the property before the gift. That is, I think, imported by the word "excluded," which implies a previous inclusion.

The facts of the present case are that the donor, the mother of the donees, was the owner in fee of land in her actual possession and enjoyment. The lands in question formed portion of a larger estate belonging to her, were surrounded by other lands of the donor and were worked with them as a single property. The gift was made by conveyances of the lands which were not subject to the Transfer of Land Acts and by transfers of the lands which were subject to those Acts. On the same day upon which the conveyances and transfers were executed the several donees executed leases to her of the lands the subject of the gifts at rents which are stated in the case to be fair and reasonable. No change took place in the actual or visible possession or occupation of the land, which remained where it was before, in the donor. The only change that took place was in the legal dominion over the fee.

The case was presented to us by the appellants as being in substance a gift of a reversion after an estate for years. But that is not so. The whole estate in fee was intended to be given and was given, and the gift of what was given was intended to take effect *in præsenti*. If the gift had been intended to take effect *in futuro* upon the expiration of a prior estate for life or years, the case might, and probably would, have been different, as in *In re Cochrane*[2]. In my opinion the term "possession," as used in this section, means such a change of ostensible dominion as can be made having regard to the nature of the particular property, and that must vary according as the property is corporeal or incorporeal, in possession or in remainder. In the case of corporeal property actual delivery is always possible. In the case of goods it is clearly necessary. So, I think, it is necessary in the case of land, if the gift is a gift of an estate in possession. But a mere change of possession is not sufficient without a change of enjoyment. Both are necessary. In the present case, I think that the donees acquired and assumed a right to the immediate enjoyment of the property to the entire exclusion of the donor, and I think that such enjoyment so given was immediately assumed and was retained by the donees within the meaning of the section. For, in my opinion, the enjoyment of an estate in fee subject to lease is in the landlord, and not in the tenant, within the meaning of the section. But that is not enough. There must be immediate assumption of possession, as well as of enjoyment, and, as I have pointed out, there was no actual change of possession, which was possible and, being possible, was essential.

As to the exclusion of the donor from benefit, there is much weight in the argument put forward by Mr. *Weigall* that the continued possession of the lands the subject of the gifts, which were surrounded by other lands of the donor, was a distinct benefit to the donor. But it is not necessary to decide that point. On the ground that, where the property given is in its nature susceptible of actual delivery, that is, of visible change of possession, possession must be taken by such delivery, I think this case falls within the section. The appeal must therefore be dismissed.

Barton J. read the following judgment:—

The question is whether the properties, the subject of the conveyances or transfers and the leases, are chargeable with the payment of duty by reason of the terms of the *Administration and Probate Act 1903*, sec. 11. The Commissioner contends that "bonâ fide possession and enjoyment" were not "assumed by the donees immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to" her "by contract or otherwise."

There is no doubt that each instrument vesting a freehold in one of the appellants was a "conveyance," "gift," and "transfer" of real estate "purporting to operate as an immediate gift *inter vivos* ... by way of transfer." The leases were executed on the same day as the deeds of gift, and it is not asserted that during the interval between the two executions there was change in the actual

possession of the land on the part of the donor, such as could be called an "exclusion of the donor" or an exclusion of "any benefit to" her. As a matter of fact she never relinquished possession at all. She retained that benefit. It is true that, if the "property" given was in reality a reversion, the retention of actual possession by the donor was not an exclusion from the property, since in that case the right of possession would not have been included in the gift. But, as the instruments purported to operate as immediate gifts *inter vivos* of the whole freehold in possession, it was necessary, in my opinion, that the possession and enjoyment involved in an entire gift of such an estate should ensue, and here, though she purported to give them up, the donor retained them. Had the leases been at a peppercorn rent it could scarcely have been contended that the transaction rendered the property immune from duty. The only difference in the present case being that the leases to the donor are at full rent, I cannot see that that fact, in the face of a retention of the actual possession and enjoyment, shows that the possession and enjoyment were either assumed or retained by the donees in the sense necessary to protect the property from duty, having regard to the terms of sub-sec. (b).

It was contended that as "it is incumbent upon us to look at the real substance of the transaction and its object" (as said by *Hawkins J.* in *Crossman v. The Queen*^[3]), we should consider this transaction as merely a gift of the reversion upon a five years' lease. But it was not in terms such a gift, nor could the donor give herself a lease so as to create the reversion. It matters not that the donees turned a freehold into a reversion by themselves granting a lease. I think the transaction is in substance a gift to each son, with a stipulation at the time of the gift that the donor is to have an immediate lease so as to retain the possession and enjoyment for a term. I do not think that this means an assumption of the possession and enjoyment by the donee immediately upon the gift, nor that it means the retention of the property to the entire exclusion of the donor. Lord *Halsbury L.C.* says in *Earl Grey v. Attorney-General*^[4]:—"Nothing appears to me much more plain than this, that what the Act of Parliament intended to prevent was that what has been described as a gift *inter vivos* should nevertheless reserve to the settlor some benefit, or some part of that which purported to be given *inter vivos*." That is what I think has been done here.

I am of opinion, therefore, that the appeal fails.

Isaacs J. read the following judgment:—

The owner of property desiring to make a gift of it to another may do so in any manner known to the law. Apparent gifts may be genuine, or colourable, and experience has shown that frequently the process of ascertaining their genuineness is attended with delay, expense and uncertainty—all of which are extremely embarrassing from a public revenue standpoint.

With a view of avoiding this inconvenience, the legislature has fixed two standards, both of them consistent with actual genuineness, but *primâ facie* indicating a colourable attempt to escape probate duty. One is the standard of time. A gift however real and *bonâ fide*, if made within twelve months before the donor's death is for the purpose of duty regarded as not made. The other is conduct which at first sight and in the absence of explanation is inconsistent with the gift. The *primâ facie* view is made by the legislature conclusive. If the parties to the transaction choose to act so as to be in apparent conflict with its purport, they are to be held to their conduct.

The validity of the transaction itself is left untouched, because it concerns themselves alone. But they are not to embarrass the public treasury by equivocal acts.

It is no answer that the same result, so far as distribution of property is concerned, might have been

reached in another way. The method of attaining a result is sometimes very important in determining its inherent reality and genuineness, and, if the parties choose to adopt a method that on the face of it is self-contradictory, it is no answer that they might have achieved their object by a perfectly consistent mode, not inviting challenge. If this were not so, *Earl Grey v. Attorney-General*[5] must have been differently decided.

Now I thoroughly agree that in order to find out what is given, it is the real transaction which must be looked at and not merely the form which it takes. I will read with respectful agreement some words on this subject of *Palles C.B. in Attorney-General v. Power*[6]. The learned Chief Baron said:—"As conveyancing forms must, to a certain extent, be disregarded in questions upon this Act, so that a person cannot be permitted to evade estate duty by clothing a transaction, which was in its reality and essence one which would subject the property to estate duty in a particular event, in such a conveyancing form that it would escape it, so I think that it can be well contended that a transaction cannot be made liable to duty merely by its conveyancing form, when the beneficial estate actually taken is substantially the same as would have been taken under a conveyance in the ordinary form, and when, if taken in the latter form, it would not be within the Act."

This is in accordance with the views of Lord *Esher* M.R. in *Attorney-General v. Worrall*[7], and *Walker C. in In re Cochrane*[8].

But there must be no misunderstanding as to what is meant by the transaction. It does not mean the preliminary agreement by which a series of documents is arranged for. Those documents might in themselves amount to a number of transactions, or in a sense they might be different parts of one transaction, one conveyance being the consideration for the other. But in the relevant sense it means that you regard the substantial effect of the "conveyance, assignment, gift, delivery or transfer," by which the gift was made. If by an instrument, as in this case, you look at the instrument by which the property passes from the donor to the donee, and, disregarding mere form, ascertain its real effect. What does it give, not how does it give it? In this case the gift is made by the indenture executed by Henrietta Lang, and by that the whole of her estate in the lands was given without any exception or reservation whatever. That was the transaction of gift—complete in itself and unqualified. No other construction is possible. It had to be complete before the donee could execute to her the lease of the property. A lease is a conveyance; and it is more than form, it is substance, when the donor's interest has to be vested in the donee before the donee can convey a smaller interest. That smaller interest was comprised in the gift itself, it was part of it, and is quite different from the case of *In re Cochrane*[9], where the trust of surplus income and the ultimate contingent trust of corpus were expressly retained by the donor for himself on the face of the instrument, and never in any shape or form included in what he gave.

Then it was said on behalf of the appellant that the execution of the lease and the retention of physical possession and enjoyment of the land by the donor as lessee was no breach of the statutory condition. It was said that, as the donees received rent, they had *bonâ fide* possession and enjoyment of the land, and that the possession and enjoyment of the land by the donor under the lease was in another character, and quite consistent with the statutory requirement. I am not prepared, and do not think it necessary, to say that the assumption of *bonâ fide* possession and enjoyment would necessarily involve the corporal eviction of the donor, if the subsequent words of the sub-section were not added.

The phraseology of the legislation is apparently founded upon that of the *Mortmain Act* (9 Geo. II. c. 36), sec. 1, and modified to meet the circumstances. There is an instructive decision upon that

enactment. By the Statute, charitable gifts, conveyances, appointments and settlements of real or personal property were avoided unless made to take effect in possession for the charitable use intended, immediately from the making thereof and to be without any power of revocation, reservation, trust, condition, limitation clause or agreement whatsoever for the benefit of the donor or grantor or any person claiming under him.

Sir William Grant M.R. in *Attorney-General v. Munby*[\[10\]](#) held valid a charitable gift by a person who was the rector of Gilling, which was in trust for the rector of Gilling for the time being. The Master of the Rolls said that the enjoyment under the trust was no longer an enjoyment as owner but accidental as attached to the situation in which he happened to be placed, that is, the rectorship. The grantor, he held, had parted absolutely with the subject of his donation; that the grant itself contained no reservation in favour of the grantor in his individual capacity; that the benefit which he got as rector under the trust was a case for which the Statute made no provision, and was entirely out of its contemplation, and that the legislature had not thought of precluding this sort of incidental advantage.

The present legislation, however, fills the gap with added provisions. The possession and enjoyment must be assumed and retained "to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

The exclusion of the donor, and the words "by contract or otherwise" are intended to prevent what was possible under the *Statute of Mortmain*. First of all, the donee himself must go into *bonâ fide* possession and enjoyment of the subject of the gift according to its nature. In *Lord Advocate v. Young*[\[11\]](#), Lord *Fitz Gerald* said:—"By possession is meant possession of that character of which the thing is capable." And as to enjoyment as well as possession the same idea is conveyed by Lord *Watson*[\[12\]](#). And see *per Palles* C.B. in *In re Cochrane*[\[13\]](#). But the possession and enjoyment must be actual, that is, the acquirement of the right is not sufficient, it must be exercised as an owner of that kind of property ordinarily exercises it. So far for the donee's assumption.

But then he must see that the donor goes out and stays out of all possession and enjoyment, and further that the donor does not obtain any "benefit," not merely under the instrument of gift, but "by contract or otherwise."

The lease, however, gave to the donor possession and enjoyment of the land itself, which is a simple negation of exclusion, and brings the case within the statutory liability.

It was argued that as the rent was full value, the lessee's possession and occupation were not a benefit. The argument is unimportant because the lease, at whatsoever rent, prevents the entire exclusion of the donor. If necessary I should be disposed to say that adequacy of consideration for any benefit arising or issuing out of the subject matter of the gift would be immaterial. The "benefit" would be there just the same, whatever the price paid for it, and the legislature does not mean to launch the parties upon so difficult an enquiry. The donor would be receiving, in the words of the Lord President quoted by *Hamilton J.* in *Attorney-General v. Seccombe*[\[14\]](#), a benefit "which was part of his property before the cession."

As for the board and lodging incident in *Attorney-General v. Seccombe*[\[15\]](#), it appears to me to stand thus. The learned Judge had already found there was no contractual or enforceable right in the donor to remain in the house, and of course there was no contractual right to be fed. The donor was in fact supplied with board and lodging which was paid for out of the annuity of £15 a year. Such a

state of things could not reasonably be regarded even faintly as a "benefit by contract or otherwise" which evidenced inconsistency with the gift as made, or, as Lord *Esher* M.R. said in *Attorney-General v. Worrall*[16], preventing it from being a pure and simple gift. But, in my opinion, the decision as to that affords no basis for a general rule that, so long as it can be proved that an adequate consideration is given for some right however extensive in connection with the subject matter of the gift, it is not a "benefit" within the meaning of the Statute. I am not prepared to hold that the benefit must be something which was part of the donor's property before. Such a rule would, I fear, seriously impair the efficiency of the enactment, and is inconsistent with *Attorney-General v. Worrall*[17]. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellants, John Lang.

Solicitor, for the respondent, Guinness, Crown Solicitor for Victoria.

[1] [\(1911\) 2 K.B., 688](#), at p. 700.

[2] (1906) 2 I.R., 200.

[3] [18 Q.B.D., 256](#), at p. 262.

[4] (1900) A.C., 124, at p. 126.

[5] (1900) A.C., 124.

[6] [\(1906\) 2 I.R., 272](#), at p. 280.

[7] [\(1895\) 1 Q.B., 99](#), at p. 104.

[8] (1906) 2 I.R., 200, at p. 201.

[9] (1906) 2 I.R. 200.

[10] 1 Mer., 327.

[11] 12 App. Cas., 544, at p. 556.

[12] 12 App. Cas., 544, at p. 553.

[13] (1905) 2 I.R., 626, at p. 637.

[14] [\(1911\) 2 K.B., 688](#), at p. 700.

[15] [\(1911\) 2 K.B., 688](#).

[16] [\(1895\) 1 Q.B., 99](#), at p. 105.

[17] [\(1895\) 1 Q.B., 99](#).

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