

# HIGH COURT OF AUSTRALIA

O'Connor

Vs.

Commissioner of Succession Duties (South Australia)

(Rich, Starke and Dixon JJ .)

4 August 1932

Rich and Dixon JJ.

The question upon this appeal is whether a gift of shares and securities in 1923 made by a father to his son is liable to succession duty. Duty has been levied upon the gift under sec. 18 of the *South Australian Succession Duties Act Further Amendment 1919*, as amended by an Act of 1923 bearing the same title. These statutory provisions operate, when the conditions which they describe are satisfied, to impose duty upon the net present value of any property disposed of by certain forms of disposition, including gift, immediately upon such disposition and irrespective of the time of the death of the person making the same. The conditions of liability occur if the person taking under such disposition does not immediately upon the disposition bona fide assume the beneficial interest and possession of such property and thenceforward retain such interest and possession to the entire exclusion of the person making such disposition, and without reservation to such person of any benefit from or interest in such property by contract or otherwise. By the judgment under appeal, *Murray C.J.* decided that the gift was dutiable, not upon the ground that the son who is the appellant had not immediately upon the disposition assumed the beneficial interest and possession of the shares and securities given, without reservation to his father of any benefit from or interest in such property by contract or otherwise, but upon the ground that he had not thenceforward retained such interest and possession to the entire exclusion of the father.

The essential facts upon which the correctness of this conclusion depends are few. In December 1923 his father executed transfers to the appellant both of shares and mortgages and communicated to the appellant his intention of giving these securities to him. The transfers, which appear to have been executed also by the appellant as transferee, and the securities remained for some time in the custody of a firm of solicitors who acted for the parties, but later the transfers were registered. The income from the securities was received by the same solicitors, but they acknowledged the appellant as the client to whom they were accountable. In June 1924 one mortgage was paid off and the money was invested in other securities. In April 1925 the appellant gave a full power of attorney in favour of his father. In July 1926 the securities were taken out of the hands of the solicitors and deposited with a bank at the place where the father resided. From that time forward until his death on 23rd September 1928 the father, with the consent of the appellant, received the income from all the securities under his power of attorney and applied it to his own use. As *Murray C.J.* said, the appellant authorized his father to administer the property as his attorney, and allowed him to appropriate to his own use, without requiring him to account and without protest and objection, from July 1926 down to the time of his death, so much of the income of the property as he thought fit. Thus for two years and upwards before his death the donor was put by the donee into the *de facto* control of the property which he had given, into the direct receipt of the income which it

produced, and into the beneficial enjoyment of that income. Upon what ground, then, consistently with these facts can it be said that the donee retained the beneficial interest and possession of such property to the entire exclusion of the person who made the disposition by way of gift? Two grounds depending upon the construction of sec. 18 are relied upon on behalf of the appellant.

The first ground assigns to the relevant portion of the enactment a meaning based upon authority. It is contended that, upon the true construction of the section, as determined by decisions presently to be mentioned, a beneficial enjoyment of the property by the donor is not made a ground of liability to duty unless that enjoyment be derived from some enforceable right. The provision is founded upon sec. 11 (1) of 52 & 53 Vict. c. 7, in which the material words are "property taken under any gift, whenever made, of which property bona 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." With unimportant variations this language was adopted in Victoria in 1903 and is now contained in sec. 173 (b) of the *Administration and Probate Act 1928*. The cases of *Lord Advocate v. Stewart*<sup>[1]</sup>, *Attorney-General v. Seccombe*<sup>[2]</sup> and *Union Trustee Co. v. Webb*<sup>[3]</sup>, which were decided upon this language, are said to attach to the words "to the entire exclusion of" the disponent a meaning which they should receive in the South Australian provision. In each of these cases the question arose whether a gift of land with a dwelling upon it was liable to duty, because, notwithstanding that the donee had assumed complete possession, the donor dwelt with him in the house, and in each the gift was held not to be so liable. In *Lord Advocate v. Stewart* the disponent, one Mrs. Ommanney M'Taggert, remained as a licensee or guest. Lord *Dunedin*, who was then Lord President, said<sup>[4]</sup>:—"I hold it clear that the benefit from which the cedent must be excluded must be a benefit which was part of his property before the cession. Any other reading would I think drive the clause mad; because it would mean that if the cedent was after the cession even allowed again to set foot on the ceded property, the whole transaction for the purpose of the duty is held as non-existent. It therefore in the end comes to be a question of fact, whether the occupation of the bedroom and other rooms of the house which Mrs. Ommanney M'Taggert had after the cession is in truth the same as that she had before. It seems to me that the admissions in the joint minute show conclusively that it was not. Before the session her occupation was one of the incidents of her proprietorship; after, it was only the privilege of a guest. To say in general terms, as was said in the argument for the Crown, that she got the good of the estate as much after the cession as before, seems to me to beg the question. Very likely her actual enjoyment of life was not made less because she no longer pocketed the rents, or sat at the head of the table. I do not think one can analyse existence in such a fashion. Two of the prime necessities—air and sunshine—never depended upon her proprietary rights. The question seems to me always to revert to a simple question of fact, namely, after the cession was she the old proprietrix retaining a benefit of her old estate; or was she a guest getting as a guest what the new proprietrix chose to give her? As a jurymen reading the minute of the admissions, I pronounce unhesitatingly for the latter view." In *Attorney-General v. Seccombe*<sup>[5]</sup>, which was decided by Lord *Sumner* (then *Hamilton J.*), the donor was again a licensee or guest. Lord *Sumner* expressed his agreement with the principle of *Lord Advocate v. Stewart*<sup>[6]</sup>, and said<sup>[7]</sup>: "The principle there laid down, as I understand it, is that the possession and enjoyment or benefit from which the Act contemplates that the cedent or donor must be entirely excluded must be derived from some enforceable right, a benefit, as the Lord President said, which was part of his property before the cession and therefore not merely a benefit which is derived from his being present for a greater or less time in the old house by the leave and licence of the donee." His Lordship next proceeded (at p. 701) to deal with the words "or of any benefit to him by contract or otherwise" and limited the expression "or otherwise" by a construction *ejusdem generis* (p. 703). The expression "derived from some enforceable right" was not used by

Lord *Dunedin*, and it may be doubted whether he intended to place so great a restriction upon the words "to the entire exclusion of the donor" as the expression has been taken to imply. But, in *Union Trustee Co. v. Webb*[8], Lord *Sumner's* language was expressly adopted by *Isaacs J.* and impliedly by *Griffith C.J.* in this Court in construing the Victorian enactment. In that case the gift was by a husband to his wife. It was held that the matrimonial rights of the husband who dwelt with his wife in a house purchased with money which he had given her for the purpose did not amount to enforceable legal rights so as to satisfy the requirement described by Lord *Sumner*, because they were not rights connected with the property.

The wording of the South Australian enactment differs substantially from the English section, but, assuming that the words "to the entire exclusion of the person making the disposition" should receive the same construction as in the English provision, it does not appear that by the use of the expression "derived from some enforceable right" Lord *Sumner* meant to exclude such a case as the present. He was dealing with an argument that the physical presence of the donor upon land in a way advantageous to him was enough to make the gift dutiable. He used the expression to make it clear that physical acts in relation to the thing given were not enough. If in *Seccombe's Case*[9] the donor had been allowed to resume the exclusive occupation and enjoyment of the land given, although only during the will of the donee, it is not likely that Lord *Sumner* would have considered that the gift was not liable to duty. The distinction upon which Lord *Dunedin* relied may perhaps be described as that between the benefit derived from physical presence upon land as a place of habitation and enjoyment arising from the exercise of a full control characteristic of possessory or proprietary rights; what *Griffith C.J.* in *Union Trustee Co. v. Webb*[10] called "independent possession and enjoyment of a right, and not such enjoyment as a man has of a friend's garden to which he is admitted as a guest, or of a public garden or park, or of his wife's or son's house or garden." The phrase "derived from some enforceable right" has its own difficulties, but it evidently was not intended to exclude cases in which the donor resumed full possession and enjoyment of the property given although holding at the will only of the donee. It could not be said in such a case that the donee had retained possession and enjoyment to the entire exclusion of the donor. The expression "possession and enjoyment" must be understood as referring to that possession and enjoyment of which the property according to its nature admits (see per *Isaacs J.*, *Lang v. Webb*[11]; per *Higgins J.*, *Commissioner of Stamp Duties v. Thomson*[12]). The expression in the South Australian enactment "beneficial interest and possession" must also be thus understood.

In the present case choses in action are the subject of the gift. Apart from actual ownership, the chief form of beneficial interest and possession of which their nature admits is control of the instruments by which they are evidenced, direct receipt and enjoyment of the income they produce and ability to reduce them into possession according to their character and tenor. All these were vested in the father so long as the power of attorney remained in force and the appellant's consent continued to his beneficial enjoyment of the income.

For these reasons the first contention relied upon in support of the appeal fails.

The second ground relied upon was that upon a full consideration of sec. 18 it should be held to apply only to colourable dispositions and not to impose tax upon gifts made bona fide. In support of this contention, *Commissioner of Stamp Duties v. Byrnes*[13] was cited. But the explanation of that decision lies in the fact that when it was given the analogous provision of the New South Wales legislation, namely, sec. 49 (2) (b) of the *Stamp Duties Act*, applied only to personalty whereas the appeal related to a disposition of realty. This contention is not well founded. The provisions of [sec. 18](#) must be applied to dispositions which fall within the description it contains, whether colourable

or not.

On behalf of the appellant two further suggestions were made which depend ultimately on matters of fact. The transaction was treated as amounting to no more than the expenditure by the appellant of all or some of the income produced by the property for the benefit of his father. As the corpus was the thing given, it was said the enjoyment in this way of the income produced was not inconsistent with an exclusive retention by the donee of the beneficial interest and possession of what was actually given. Whatever may be the position where the donee himself expends upon the donor income derived from the property given, the facts of the present case show that the donor was put into immediate enjoyment of income directly reduced into his own possession by means of his administration of the property.

The second suggestion arose from the fact that one mortgage was paid off before the father obtained control. The moneys were invested in another form of security. As the thing given had ceased to exist as an identical piece of legal property, the question was raised whether a benefit derived only from its proceeds could be considered within the terms of the enactment. But in this case there was one transaction, one gift, although relating to various items of property and therefore carried out by more than one instrument. The disposition must be considered as one and so as an entirety. So considered the enjoyment by the disponent of the large amount of property remaining in existence in specie brings the entire gift under liability to duty: see *Attorney-General v. Seccombe*[\[14\]](#) and *Lang v. Webb*[\[15\]](#).

For these reasons the appeal should be dismissed.

Starke J .

By an Act of South Australia relating to succession duties (1923, No. 1576) a duty is imposed upon the net value of any property disposed of by conveyance, assignment, gift, transfer or other non-testamentary disposition of property immediately upon such disposition and irrespective of the time of the death of the person making the same, if the person taking under such disposition does not, immediately upon the disposition, bona fide assume the beneficial interest and possession of such property and thenceforward retain such interest and possession to the entire exclusion of the person making such disposition and without reservation to such person of any benefit from or interest in such property by contract or otherwise (sec. 10). The provision finds its counterpart in English legislation (which may be found in *Hanson on Death Duties*, 6th ed., p. 96), but in slightly different form.

Thomas O'Connor was possessed of shares in companies, and had moneys owing to him and secured by mortgages, amounting in all to a sum of between eight and nine thousand pounds. These shares and mortgages were deposited with his solicitor. In December 1923 he executed transfers of the shares and of the mortgages to his son, Thomas Aloysius O'Connor, a Marist brother, and thereafter the solicitor held the shares on account of the son and collected and accounted to him for the income arising therefrom. The transfers were not registered until June 1924 in the case of the mortgages, and July 1926 in the case of the shares. In February 1924 the father sailed for Ireland, but returned in November of that year. In April of 1925 the son appointed the father his attorney to manage his affairs. Thereafter the father, until his death in 1928, collected the income from the shares and mortgages, and dealt with and invested it just as if it were his own. The son was content, and neither asked nor required any account or payment.

The learned Chief Justice of South Australia was satisfied that the father had made a disposition or gift of the shares and mortgages in favour of his son, without any reservation to him of any benefit from or interest in such property by contract or otherwise, and that the son had immediately upon the disposition bona fide assumed the beneficial interest and possession of such property, but he held that the son had not "thenceforward" retained "such interest and possession to the entire exclusion" of the father.

In my opinion, this last conclusion is right and cannot be disturbed. *De facto*, the father had, and to the entire exclusion of his son, the use, enjoyment and possession of the whole of the property the subject of the disposition, from April 1925 until his death. The case falls, apparently, within the precise words of the statute. A conveyance, assignment or gift has been made to the son, and yet the father—the donor—is found in receipt of the whole of the income of the property the subject of the conveyance or gift, and dealing with it just as if he were the owner. He is not entirely excluded from possession or enjoyment of the property: on the contrary, he entirely excludes the son, with the latter's consent, from such possession and enjoyment. The case, it is said, however, falls outside the section because the father's use and enjoyment of the property in and after April 1925 was not a benefit which was part of his property before the disposition, or an enjoyment derived from any enforceable right (*Lord Advocate v. Stewart*[[16](#)]; *Attorney-General v. Seccombe*[[17](#)]; *Union Trustee Co. v. Webb*[[18](#)]). But in these cases, the inquiry was whether certain acts on or in connection with the property the subject of the disposition were or were not consistent with bona fide possession and enjoyment thereof always remaining in the donee. In *Stewart's Case* the donor was allowed certain privileges as a guest, and that, it was held, did not deprive the donee of the entire and exclusive possession of the property the subject of the disposition. *Seccombe's Case* was similar. In the *Union Trustee Case* the presence of a husband in a house purchased by his wife with moneys provided by him was held not to deprive the wife of the entire and exclusive possession of the home. But if the cedent or donor is allowed the full control, dominion, use and enjoyment of the property ceded or given, then, despite some general language in the cases cited and with reference to the facts of those cases, the question must be decided as the learned Chief Justice decided it in the present case.

The appeal ought to be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, J. J. Daly .

Solicitor for the respondent, A. J. Hannan , Crown Solicitor for South Australia.

[1] (1906) 8 F. (Ct. of Sess.) 579.

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

[3] [\[1915\] HCA 40](#); [\(1915\) 19 C.L.R. 669.](#)

[4] (1906) 8 F. (Ct. of Sess.), at pp. 595, 596.

[5] [\(1911\) 2 K.B. 688.](#)

[6] (1906) 8 F. (Ct. of Sess.) 579.

[7] (1911) 2 K.B., at p. 700.

[8] [\[1915\] HCA 40; \(1915\) 19 C.L.R. 669.](#)

[9] [\(1911\) 2 K.B. 688.](#)

[10] (1915) 19 C.L.R., at p. 675.

[11] (1912) 13 C.L.R., at p. 516.

[12] (1927) 40 C.L.R., at p. 416.

[13] [\(1911\) A.C. 386.](#)

[14] (1911) 2 K.B., at p. 699.

[15] (1912) 13 C.L.R., at pp. 514-515.

[16] (1906) 8 F. (Ct. of Sess.) 579.

[17] [\(1911\) 2 K.B. 688.](#)

[18] [\[1915\] HCA 40; \(1915\) 19 C.L.R. 669.](#)

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