[HIGH COURT OF AUSTRALIA.]

THE UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED . . . } APPELLANTS;

AND

WEBB (COMMISSIONER OF TAXES FOR VICTORIA) . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1915.

MELBOURNE, *June* 14, 15.

Griffith C.J., Isaacs and Rich JJ.

Administration and Probate—Probate duty—Gifts inter vivos—Gift by husband to wife—House used as family home—Purchase money provided by husband—Administration and Probate Act 1903 (*Vict.*) (*No.* 1815), *sec.* 11.

Sec. 11 of the *Administration and Probate Act* 1903 (Vict.) provides that "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 . . . (*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."

A testator, who died in 1914, had, shortly after his marriage in 1901, promised to give his wife a house. In 1911 she entered into a contract to buy a house and land, the testator provided the purchase money, the land was duly transferred to his wife, and she was registered as proprietor in fee simple. The house was from the time of its purchase occupied by the testator and his wife during his lifetime as the family home. He paid municipal rates and taxes and the expenses of housekeeping. He also, first consulting his wife, defrayed the cost of repairs to the house. There was no agreement of any sort qualifying these facts.

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Held, that, whether the gift was of the house or of the purchase money, it did not fall within the above section, and therefore that neither the house nor the money was chargeable with duty as though part of the testator's estate.

Semble: By *Griffith* C.J.—The gift was of the house.

By *Isaacs* J.—The gift was of the money.

Decision of the Supreme Court: *In re Gibb*, (1915) V.L.R., 126; 36 A.L.T., 155, reversed.

APPEAL from the Supreme Court of Victoria.

Certain questions having arisen with regard to the statement filed in the Office of the Commissioner of Taxes by the Union Trustee Co. of Australia Ltd. as executors of the will of William Gibb, deceased, the Commissioner stated a case for the opinion of the Supreme Court, which was substantially as follows:—

1. The above-named William Gibb (hereinafter called "the testator") died at "Arran," Toorak Road, Toorak, on 11th March 1914, leaving him surviving his widow, Minnie Gibb, and Theodosia Helen Gibb and William Valentine Gibb, his children.

2. On 10th April 1902 the testator made a will and probate thereof was on 14th May 1914 granted by this Court to the Union Trustee Co. of Australia Ltd.

3. The testator was married to the said Minnie Gibb (hereinafter called "the wife") on 24th December 1901.

4. At the time of his marriage the testator had no house of his own, but shortly after his marriage the testator told his wife he would give her a house as a present, and it was arranged that she was to choose a house and the testator would purchase it for her. From the date of this conversation up to February 1911 she was continually looking for a suitable house, and ultimately in February 1911 she chose a house called "Arran," in Toorak Road, Toorak, and it was arranged between her and the testator that she should purchase the said house "Arran" at the price of £3,600, and that the testator should supply her with the purchase money.

5. Accordingly the wife entered into a contract in writing dated 20th February 1911 for the purchase of the said house called "Arran."

6. The testator supplied the money for the deposit, £1,000,

which was paid to the vendor's agent on 20th February 1911, and a receipt was given therefor.

7. The testator also supplied the money for the balance of the purchase money, £2,600, which was paid on 28th March 1911. The transfer of the said house was signed by the vendor and the wife on the said 28th March 1911 and was lodged in the Office of Titles on that day, and the certificate of title was issued to the wife in her name in due course.

8. Almost immediately after completion of the purchase the testator and the wife and their family went to reside in the said house, and they continued to reside there until the death of the testator, and the wife and family were maintained and all household expenses were paid by the testator. All rates and taxes payable in respect of the said house were paid by the testator. Before any repairs were effected to the said house they were generally discussed between the testator and the wife, but the testator directed and paid for all repairs.

(*a*) The transactions and matters above referred to were not at any time qualified by any reservation or trust or secret understanding of any sort or kind between the testator and the wife.

(*b*) At the time the transactions and matters above referred to took place the testator was in good health and had no reason whatever to anticipate an early death. He was in fact only fifty-eight years of age at the time of his death.

9. No agreement or arrangement whatever was at any time made between the testator and the wife as to the testator or the wife or their family living in the said house, but the testator and the wife were at all times material living on affectionate terms with each other, and it was at all times material taken for granted by both the testator and the wife that when the house was bought the testator and the wife and their family would live in it.

10. On the assessment of duty the Commissioner included the said purchase money or the said house "Arran," as the case might be, as part of the estate of the testator and as chargeable

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with the payment of duty under the provisions of the Administration and Probate Acts, and he accordingly claimed payment of £3,394 0s. 8d. duty on the whole estate. By treating the said money or house as part of the estate the duty payable in respect of the estate was increased by the sum of £270 6s. The duty claimed was paid under protest as to the said sum of £270 6s.

The questions for the opinion of the Court are :—

(1) Was the said purchase money or the house "Arran" referred to in this case chargeable with the payment of duty by reason of the provisions of the Administration and Probate Acts ?

(2) Is the executor of the deceased entitled to be refunded the said amount of £270 6s. paid under protest as aforesaid, and, if so, with any and what interest added ?

The Supreme Court answered the first question by saying that the house "Arran" was chargeable with the payment of duty therein referred to, and the second by saying that the executors were not entitled to be refunded the amount therein referred to: *In re Gibb* (1).

From that decision the executors now appealed to the High Court.

McArthur K.C. (with him *Martin*), for the appellants. The gift here was of the money and not of the house. The testator never had any estate legal or equitable in the house which he could give to his wife. The words "entire exclusion of the donor" in sec. 11 (*b*) of the *Administration and Probate Act* 1903 mean legal exclusion. That section only deals with proprietary rights and does not contemplate such a right as the personal right of a husband to live with his wife. [He referred to *Attorney-General* v. *Seccombe* (2); *Lang* v. *Webb* (3); *Commissioner of Stamp Duties* v. *Byrnes* (4); *Attorney-General* v. *Worrall* (5).]

Gregory, for the respondent. In equity the gift was of the house: *Dyer* v. *Dyer* (6); *White and Tudor's Leading Cases*, 8th

(1) (1915) V.L.R., 126; 36 A.L.T., 155.
(2) (1911) 2 K.B., 688.
(3) 13 C.L.R., 503, at p. 510.
(4) (1911) A.C., 386.
(5) (1895) 1 Q.B., 99.
(6) 2 Cox, 92.

ed., vol. II., p. 835. There is no difference between a case where a husband buys property and directs it to be transferred to his wife, and a case where the wife buys property and the husband supplies the purchase money. If money is given to buy property the property is to be treated as the thing given: *Rider* v. *Kidder* (1); *In re Whitehouse*; *Whitehouse* v. *Edwards* (2).

[ISAACS J. referred to *Mercier* v. *Mercier* (3).]

If the gift was of the money, it was given upon a trust to purchase the house. Treating the gift as of the house, *bonâ fide* possession was not assumed and retained by the wife. The testator had the legal possession of it, for he in fact exercised the control over it: *Paquin Ltd.* v. *Beauclerk* (4). By virtue of the matrimonial relationship the testator had a right to use and to have free access to the house: *Symonds* v. *Hallett* (5); *Halsbury's Laws of England*, vol. XVI., pp. 459, 460. The Court can draw the inference that there was a contract that the husband should have a right to enjoy the house. See *Administration and Probate Act* 1890, sec. 98; *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (6).

GRIFFITH C.J. read the following judgment:—By sec. 11 of the *Administration and Probate Act* of 1903 (No. 1815) it is provided that all transfers of property purporting to operate as an immediate gift shall, if made relating to any property of which *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 part of the estate of the donor for the purpose of the duty payable under the Administration and Probate Acts.

The testator in the present case, who died in 1914, had promised to give his wife a house. In the year 1911 she agreed to buy a house and land for the sum of £3,600. He provided the purchase money, the land was duly transferred to her, and she was registered as proprietor in fee simple. The house was thenceforward

(1) 10 Ves., 360, at p. 367.
(2) 37 Ch. D., 683.
(3) (1903) 2 Ch., 98.
(4) (1906) A.C., 148.
(5) 24 Ch. D., 346.
(6) 16 C.L.R., 591.

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occupied by them during his lifetime as the family home. He paid municipal rates and taxes and the expenses of housekeeping. He also, first consulting his wife, defrayed the cost of repairs to the house. It was, in short, an ordinary case of a husband living with his wife and family in his wife's house. There was no agreement of any sort qualifying these facts.

The questions as submitted by the special case are:—"(1) Was the said purchase money or the house 'Arran' referred to in this case chargeable with the payment of duty by reason of the provisions of the Administration and Probate Acts? (2) Is the executor of the deceased entitled to be refunded the said amount of £270 6s., paid under protest as aforesaid, and, if so, with any and what interest added?"

From one point of view the subject matter of the gift made by the husband to his wife may be regarded as the sum of £3,600; from another, it may be regarded as the land. *Hood* J. took the first view; *à Beckett* and *Hodges* JJ., the latter.

If the gift is regarded as one of a sum of money, it seems to me impossible to bring it within the words of sec. 11. The husband did not in that view retain any benefit by contract or otherwise in the £3,600, unless it was impressed with a trust in his favour which conferred upon him the rights which the Commissioner contends that he had in respect of the land purchased with that sum. In my opinion there is no foundation for the suggestion that the money was impressed with any such trust.

Having regard, however, to the rule often laid down, that in the construction of taxing Acts regard is had to the substance rather than the form of the transaction, I am disposed to regard the land as the real subject matter of the gift. On this basis it was contended for the Commissioner that the possession and enjoyment of the land was not assumed by the wife immediately upon the gift and thenceforward retained to the exclusion of the donor, because he as her husband was entitled to reside in her house, in which she also resided, and, so residing, had himself the possession and enjoyment of it. In my opinion the words "possession and enjoyment," as used in the Statute, have no reference to such a case. If they were so construed, every gift by a husband to his wife of a house used, or intended to be used,

as the family home would fall within the Act. Those words, in my opinion, mean independent possession and enjoyment in the nature of 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. Then it is said that the wife did not retain the land "exclusive of any benefit by contract or otherwise" to her husband. The only contract that is or can be suggested is the marriage contract, which is not, in my judgment, a contract within the meaning of the Act. Nor do I think that the words "or otherwise" include such a case. The meaning of those words was considered by *Hamilton* J. (now Lord *Sumner*) in the case of *Attorney-General* v. *Seccombe* (1). He thought, and I respectfully agree, that those words relate to something *ejusdem generis* with a contract, properly so called, and do not include such amenities as are enjoyed by the grace of the owner of property. In my opinion they do not include advantages arising from the relation existing between husband and wife living together on good terms in a house belonging to the wife. In this connection the words of Lord *Nottingham*, quoted with approval by Lord *Macnaghten*, delivering the judgment of the Judicial Committee in the case of *Commissioner of Stamp Duties* v. *Byrnes* (2) are very relevant and instructive.

In my judgment, therefore, the contention fails, and the questions propounded should be answered: (1) "Neither," and (2) "Yes." But I remark that, if the Act applied, the amount to be assessed for taxation would be the value of the subject matter of the gift at the death of the testator (whose property it is deemed to be), and not its value at the date of the gift.

The appeal should, therefore, be allowed.

ISAACS J. read the following judgment:—The question is whether the purchase money or the house, "Arran," is chargeable with probate duty. It may be that the result is the same whether the answer assumes that the gift consisted of the money or the house. At the same time, considering the way in which the question is framed, the terms of the judgments in the Supreme

(1) (1911) 2 K.B., 688. (2) (1911) A.C., 386.

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Court, the arguments here, and the difficulty I feel in placing the case otherwise on its true foundations, I think it proper to state the reasons why I have arrived at my conclusions.

In my opinion the gift consisted of the money, and not the house. In this I agree with what *Hood* J. said. The house never was the property of the husband, and no one can give away as his own property what he never had. The Act imposes duties in respect of what a man leaves, or (sec. 11 of No. 1815) what he has only colourably given. But it does not strike at property which he never had at law or in equity. The mere fact that the husband told his wife he would give her a house as a present is immaterial unless he did give her a house. Equally immaterial is it that he said he would purchase one for her if he did not purchase it at all. The facts are that the wife herself purchased in her own name and on her own behalf, and signed the contract creating a contractual obligation on her own part to pay the purchase money. What her husband did was to provide her with the means of payment. In a sense, and a substantial sense, colloquially speaking, he gave her a house just as he might be said to give her a dress. But in law—and we have here to do with law—he did not give her a house, but the money to pay for it. She paid for it with the money he gave her, and got the certificate of title in her own name. That house never was his at law or in equity; in other words, he never at any moment of time had the smallest interest in it, and never would it have been part of his estate. Had the parties been strangers, the purchaser would, in the circumstances, have been the legal owner, but, in the absence of proof of a contrary intention on his part, her conscience would have been affected with a resulting trust in favour of the person who provided the money. The Privy Council, in *Barton* v. *Muir* (1), thus states the doctrine as to "the law of resulting trusts":—"Where a man purchases land with the money of another, although there is no written evidence of the trust, a trust results to the owner of the money by operation of law. He is in equity, but only in equity, the owner of the land, and has a right to compel a conveyance to himself or to such person as he may direct. He is not the purchaser, but a *cestui*

(1) L.R. 6 P.C., 134, at p. 145.

que trust, and the whole legal right and legal rightful ownership is in the purchaser." If in such case the testator, being equitable owner, had by a fresh transaction *inter vivos* passed his equity to her, that would have been giving her his interest in the house. But, having regard to their relation, equity raised no trust in his favour, but regarded the provision of purchase money as an advancement—in other words, a gift as from the beginning. That is to say, the relationship prevented the equitable presumption from ever arising. This is the doctrine of all the cases from *Dyer* v. *Dyer* (1) to *Mercier* v. *Mercier* (2), where see, particularly, *per Romer* L.J., at pp. 99-100, and *per Vaughan Williams* L.J., at p. 100. It is clearly stated by *Wood* V.C., in *Tucker* v. *Burrow* (3), in these words :—" In every case in which any one asserts that another, in whom it is admitted that the legal estate in any lands is vested, was a trustee for him, the onus lies on him to make good his position: that onus is, however, sufficiently satisfied by the claimant showing that he paid the purchase money, and thereupon the onus is shifted to the other party, who has to show some ground for calling upon the Court to hold that the purchase enured for his benefit, and not merely for the benefit of the person who paid the purchase money." Having regard to that rule the final onus was satisfied by showing the relationship, and so the testator never had, at any instant, the least interest, legal or equitable, in the purchase itself, and consequently he never could give any. Nor does the fact that the money was given to her to apply as purchase money alter the character of the transaction. It evidences the motive and purpose of the gift, but leaves it when made as absolute and free from any trust as if the purpose were unnamed. Compare the observations of *Wood* V.C. in *In re Sanderson's Trust* (4). The donor made sure that the purpose of the gift would be effective, but, once that was complete, the purchased property was hers absolutely. No doubt he had the belief and expectation that they would continue to live there together. But she was not bound to live there, or even to retain the property.

If there were attached to the gift of the money a condition,

(1) 2 Cox, 92.
(2) (1903) 2 Ch., 98.
(3) 2 H. & M., 515, at p. 524.
(4) 3 Kay & J., 497, at p. 503.

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enforceable in some way, that the house which was thereby to be purchased was to be jointly enjoyed by both husband and wife, then the doubt I expressed in *Lang* v. *Webb* (1) as to the meaning of "benefit," which accords with the view of Lord *Sumner* (then *Hamilton* J.) in *Attorney-General* v. *Seccombe* (2), would be seriously called into play. The gift of a lump sum of money, or of debentures of a company, accompanied by a contract to pay an annuity generally, would probably fall within sub-sec. (*b*), although the benefit could not be said to be "part of the property before the cession." The substituted benefit would probably deprive the transaction of the character of a true gift.

It is suggested that the "house" should be taken to be the property given, on the doctrine of notional conversion. But such a doctrine has no application to such a case as the present. The Act is a taxing Act, and, as *Hamilton* J. points out in *Seccombe's Case* (3), "in construing a taxing Act the presumption is that the legislature has granted precisely that tax to the Crown which it has described, and no more; and there is no presumption in favour of extending the scope of the Act." Certainly it is not to be extended so as to cover fictions introduced for quite other purposes. It is evident that if money advanced for the purpose of purchasing land is to be treated as the land of the donor, then land given for the purpose, by means of its proceeds, of purchasing mining shares or a racehorse, would have to be regarded as the shares or the racehorse of the donor. It is simply necessary to adhere to the words of the Act and apply them to the actual facts.

But whether the gift be of the house or the money, the Commissioner fails, because it does not appear that the facts as stated come within par. (*b*) of sec. 11. At this point it is necessary to observe that the Court is not at liberty to add to the facts stated, even by way of drawing inferences. The facts in the special case are the ultimate facts which the Court has to consider, and to which it has to apply the law. They are not evidentiary facts, and inferences cannot be drawn, however clear they may be, because no power has been given to the Court to draw infer-

(1) 13 C.L.R., 503.

(2) (1911) 2 K.B., 688, at p. 701.

(3) (1911) 2 K.B., 688, at p. 703.

ences. This subject was dealt with very fully in the case of the *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [*No.* 1] (1). It is not competent to the Court, therefore, to draw any conclusion for itself as to what the parties had in contemplation, but the Court must accept the facts just as they are stated. If their legal effect is to bring the case within par. (*b*), then there is liability; if not, the claim fails.

As to exclusion from possession and enjoyment, it has been clearly laid down by Lord *Dunedin* in a Scottish case, and by Lord *Sumner*, following that, in *Seccombe's Case* (2), that "possession" and "enjoyment" mean by reason of some enforceable right. It cannot mean that for ever afterwards a child shall never let his parent enter the door, or set foot upon the land; or that a wife shall turn her husband out as long as she lives. If the mere presence of the husband is sufficient to bring the case within par. (*b*), then no husband who bestows the dwelling-house upon his wife can ever escape the section, unless the matrimonial home is broken up—an intention not lightly to be attributed to the legislature. The requirement of *bonâ fide* possession and enjoyment on the part of the donee is a very strong safeguard.

The suggestion that the husband's matrimonial rights satisfy the condition of "enforceable right" cannot be sustained. Matrimonial rights are not in any way connected with or incidental to the property: they exist irrespective of locality, and are in no sense a diminution or qualification of the fullest rights of ownership on the part of the donee. I assume, but by no means decide, that matrimonial rights are so coercive as the respondent contends for. It is unnecessary to determine this thorny question.

The next query is whether the testator had "any benefit to him by contract or otherwise." It is plain that, if Lord *Sumner's* opinion in *Seccombe's Case* (3) be correct that these words indicate some act of the parties creating a legal obligation enforceable at law or equity, the contention is hopeless. So much was conceded. This Court, in *Lang's Case* (4), has already held in accordance with that view; I see no reason to alter my opinion there expressed.

(1) 16 C.L.R., 591, at p. 622.
(2) (1911) 2 K.B., 688, at p. 700.
(3) (1911) 2 K.B., 688, at p. 703.
(4) 13 C.L.R., 503.

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I agree that the appeal should be allowed, and the first question answered in the negative, and the second answered in favour of the appellants.

RICH J. I concur in the conclusion at which the Court has arrived.

Appeal allowed. Judgment appealed from discharged. First question answered in the negative. Second question answered: "Yes, but without interest." Respondent to pay costs of appeal.

Solicitor, for the appellants, *H. T. W. Stillman.*

Solicitor, for the respondent, *E. J. D. Guinness*, Crown Solicitor for Victoria.

B. L.