[HIGH COURT OF AUSTRALIA.]

HIS MAJESTY THE KING . . . . APPELLANT;
RESPONDENT,

AND

THE BALLARAT TRUSTEES, EXECUTORS AND AGENCY COMPANY LIMITED } RESPONDENT.
PETITIONER,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 2, 3.

SYDNEY, *Dec.* 11.

Isaacs, Gavan Duffy and Rich JJ.

Probate Duty—Gift—"Purporting to operate as an immediate gift inter vivos"—Transaction in form of sale—Consideration less valuable than property sold—No want of bona fides—Onus of proof—Administration and Probate Act 1915 (*Vict.*) (*No.* 2611), *sec.* 143.

Sec. 143 of the *Administration and Probate Act* 1915 (Vict.) provides that "Every conveyance or assignment gift delivery or transfer of any real or personal property, 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 *bonâ fide* possession and enjoyment has not 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 this Act as though part of the estate of the donor."

A father, eighty years of age, by agreement in writing agreed to sell to his sons certain land, the consideration being an annuity to be paid by the sons to the father, the payment by the sons of a sum of money due to a bank by a company the whole of the shares in which belonged to the father and the sons, the father having the controlling interest, and the payment of a certain sum of money to a debtor of the father. The value of the land was much greater than the sum of the actuarial value of the annuity and the other amounts forming the consideration.

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Held, that the facts did not establish a gift of the difference between the value of the land and the total amount of the consideration, and, therefore, that on the death of the father more than five years afterwards, the land was not chargeable with any duty under the section.

Decision of the Supreme Court of Victoria: *Ballarat Trustees, Executors and Agency Co. Ltd.* v. *The King*, (1918) V.L.R., 687; 40 A.L.T., 103, affirmed.

APPEAL from the Supreme Court of Victoria.

A petition having been brought by the Ballarat Trustees, Executors and Agency Co. Ltd. against His Majesty the King, a special case was stated by the parties, which was substantially as follows:—

1. On 7th November 1917 the petitioner, the Ballarat Trustees, Executors and Agency Co. Ltd., a company duly incorporated in the State of Victoria, filed a petition under the provisions of the *Crown Remedies and Liability Act* 1915 claiming a refund of the sum of £119 17s. 6d. paid to the Commissioner of Taxes as duty under sec. 143 of the *Administration and Probate Act* 1915 in the circumstances hereinafter mentioned.

2. The said petitioner is the executor and trustee of the will dated 4th April 1915 of James Long, late of "Burswood," Portland, in the State of Victoria, gentleman (hereinafter called "the testator"), who died on 3rd March 1916, probate of which will was upon 8th June 1916 granted by the Supreme Court of Victoria to the petitioner.

3. On 1st September 1910 the testator, who was then the registered proprietor of the lands hereinafter mentioned, by agreement in writing of that date made between the testator (thereinafter designated "the vendor") of the one part and his two sons William Edwin Long and Thomas Percy Long (thereinafter designated "the purchasers") of the other part agreed to sell and the purchasers agreed to purchase all and singular the lands comprised and described in the schedule thereunder written together with all buildings, erections and improvements thereon and all fixtures in the said buildings, and the benefit of all insurance policies on the said buildings, upon the terms and conditions therein set forth that is to say (in substance): (*a*) Portion of the consideration for the said sale was an annuity of £260 to be paid by the purchasers to the vendor during the term of his natural life by monthly payments as from 1st October 1910; (*b*) another portion of the consideration for the said sale

was the payment by the purchasers to the London Bank of Australia Ltd. of the sum of £3,644 14s. 3d., which was at the date of the said agreement due and owing to the said bank under and by virtue of an unregistered guarantee mortgage given by the vendor to the said bank on 28th January 1909 over the said lands to secure advances to a company known as "James Long & Co. Proprietary Ltd."; (*c*) the remaining portion of the consideration for the said sale was the payment by the purchasers on behalf of the vendor to one Alfred James Long of Melbourne, coachsmith, of a sum of £500 by payments as in the said agreement specified; (*d*) it was agreed that possession of the property sold should be given to and taken by the purchasers forthwith on the execution of the transfer of the property sold, which transfer was to be executed immediately after the execution of the said agreement; (*e*) the purchasers for themselves and their respective executors and administrators agreed with the vendor that they should and would pay or cause to be paid to the vendor during the term of his natural life the said annuity of £260 as in the said agreement specified; (*f*) the purchasers also for themselves and their respective executors and administrators agreed with the vendor, his executors and administrators, that they (the purchasers) should and would pay or cause to be paid to the said bank the sum of £3,644 14s. 3d. then due and owing to the said bank under the said mortgage given by the vendor to such bank, and also should and would pay or cause to be paid unto the said Alfred James Long the said sum of £500 in the manner and within the period specified and set out in the said agreement, and they (the purchasers) and each of them by the said agreement indemnified and held harmless the vendor, his executors and administrators and his and their estates and effects, from and against all actions, suits, damages, accounts, reckonings, claims and demands whatsoever by the said bank or any person claiming on its behalf, or through or under it, or by the said Alfred James Long or any person or persons claiming through or under him.

4. Immediately after the execution of the said agreement and in pursuance thereof the lands therein mentioned were transferred by the vendor to the purchasers, and the terms of the said agreement

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were carried out in all respects by the vendor and purchasers respectively.

5. In assessing the estate of the testator for duty under the *Administration and Probate Act* 1915 the Commissioner of Taxes included a sum of £2,305 5s. 9d. as chargeable with duty as though part of the estate of the testator. He fixed the value of the said lands transferred by the testator in accordance with the agreement mentioned in par. 3 hereof at £7,537 at the time of such transfer and also at the time of the testator's death, and deducting therefrom (*a*) the sum of £1,087 as the actuarially ascertained capital value of the said annuity and (*b*) the said sum of £3,644 14s. 3d. and (*c*) the said sum of £500, making together the sum of £5,231 14s. 3d., he treated the balance, namely, £2,305 5s. 9d., as dutiable under sec. 143 of the said Act. The petitioner for the purposes of this case admits the correctness of the said sums and values, but denies that the said sum of £2,305 5s. 9d. or any sum in respect of the said agreement or the said lands transferred to the testator's said two sons in accordance with the said agreement was liable to duty as aforesaid. The Commissioner refused to certify as to the payment of duty until the amount of £119 17s. 6d., being duty at the rate of $5\frac{1}{5}$ per centum upon the said sum of £2,305 5s. 9d., had been paid. In order to obtain the issue of probate of the testator's will the petitioner was compelled to pay and did pay the said amount of £119 17s. 6d. under protest on 17th March 1917.

6. The petitioner contends that the estate of the testator was not liable to be assessed for duty nor was duty payable under the said Act upon the said sum of £2,305 5s. 9d. nor any part thereof, and that the said sum of £119 17s. 6d. paid under protest as aforesaid should be refunded.

7. The Commissioner contends that in the said circumstances the said lands, or alternatively the said lands to the extent or value of the said sum of £2,305 5s. 9d., are property of which *bonâ fide* possession and enjoyment was not assumed by the donees immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

8. The parties hereto have agreed to state this special case for

the opinion of the Supreme Court pursuant to Order XXXIV. of the *Rules of the Supreme Court* 1916.

9. The parties have also agreed that the Court shall be at liberty to draw all inferences of fact from the facts, matters and things set forth or referred to in this case.

10. The question for the opinion of the Court is : Having regard to the facts hereinbefore set forth, was duty payable under sec. 143 of the *Administration and Probate Act* 1915 upon the said sum of £2,305 5s. 9d. ?

11. It is agreed between the parties hereto that, (*a*) if the Court is of the opinion that the above question should be answered in the negative, then judgment herein shall be entered for the petitioner for the sum of £119 17s. 6d. with costs to be taxed ; (*b*) if the Court is of the opinion that the said question should be answered in the affirmative, then judgment shall be entered for His Majesty with costs to be taxed.

In addition to the facts stated in the special case the following facts also were admitted :—(*a*) That at the date of the agreement referred to in the special case the testator was about eighty years of age : (*b*) that prior to such agreement a wholesale confectionery business was carried on at Ballarat by a company called the James Long Co. Proprietary Ltd. upon the lands referred to in the special case ; that at the date of the agreement such business was carried on by the testator and his two sons, William Edwin Long and Thomas Percy Long, who together held beneficially all the issued shares in such company, the testator having a controlling interest in such shares, which were paid up : (*c*) that about the year 1904 the testator purchased a property at Portland, and thereupon removed thereto and continued to reside there until his decease ; that after his removal to Portland and until the signing of the said agreement the testator continued to visit Ballarat and controlled the business and operated on the business account of the company ; that in the intervals between his visits he exercised control by means of written communications : (*d*) that prior to the said agreement the business of the company was going back, and the testator on one of his visits to Ballarat proposed to Thomas Percy Long that he should take over

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the testator's shares in the company and allow him to retire from it; that Thomas Percy Long declined to do this because the financial position of the company was such that the stock-in-trade and book debts were not worth the debts owing by the company, which was then being pressed by its creditors for payment of accounts owing; that at a later hour on the same day the testator met Thomas Percy Long and William Edwin Long, and offered to transfer the land set out in the said agreement on certain conditions set out in the said agreement, provided they took over the shares in the company standing in the testator's name: (*e*) that after signing the said contract the testator transferred all his said shares to Thomas Percy Long and William Edwin Long, and left Ballarat, and thenceforward resided permanently at Portland, and Thomas Percy Long and William Edwin Long, or the said company, were thenceforth and until the testator's death in actual possession and enjoyment of the lands referred to in the said agreement: (*f*) that after signing the said agreement the testator never took any part in the management of the said business, nor did he write to any person, nor did any person write to him, any letters relating to such business or its management; nor did he, after signing the said agreement, receive any payment from the said company, or in any way receive any benefit therefrom, nor did he attend any meeting of the shareholders, but he absolutely ceased to be a member of the said company or to be entitled in any shape or form to any benefit therefrom, whether as a shareholder or under any agreement, written or verbal: (*g*) that when Thomas Percy Long and William Edwin Long took over the shares of the testator they had not taken stock or made any calculation, as the testator was desirous of settling the affair on the same day of his visit, and at his request they attended his solicitor, who made the necessary legal arrangements; that Thomas Percy Long has since taken over his brother's shares in the company, and thereupon, when extending and altering the business premises, had destroyed all accumulated papers and books relating to the early operations when he and his brother took over the shares of the testator, and he was unable to find particulars of the stock-in-trade and trade debts.

The Full Court, by a majority (*Irvine* C.J. and *Hood* J., *Cussen* J. dissenting), were of opinion that the question should be answered in the negative, and gave judgment for the petitioner for £119 17s. 6d.: *Ballarat Trustees, Executors and Agency Co. Ltd.* v. *The King* (1).

From that decision the Crown now, by special leave, appealed to the High Court.

A. H. Davis, for the appellant. The substance of the transaction shows that a gift was intended, and it is the substance, and not the form, which is to be looked at. The word "purporting" in sec. 143 of the *Administration and Probate Act* 1915 does not relate to the form of the transaction but attaches to the word "immediate," and refers to the time at which the gift is to operate (*Horsfall* v. *Commissioner of Taxes* (*Vict.*) (2); *Attorney-General* v. *Viscount Cobham* (3)).

[RICH J. referred to *Attorney-General* v. *Smyth* (4).]

The object of sec. 143 was to impose taxation in respect of any transaction relating to property which had an element of benefaction in it, if possession or any benefit was retained by the grantor. That appears from sec. 38 (2) of the *Customs and Inland Revenue Act* 1881 (44 & 45 Vict. c. 12) and sec. 11 of the *Customs and Inland Revenue Act* 1889 (52 & 53 Vict. c. 7), from which sec. 143 was taken (see *Attorney-General* v. *Johnson* (5)). The latter Act did not enlarge the scope of the former, but merely extended the period during which the transaction would be liable to taxation. Sec. 2 of the *Finance Act* 1894 (57 & 58 Vict. c. 30) did not alter the law. The mere fact that some consideration is given does not prevent the transaction from being a gift. This view of sec. 143 is supported by *Heward* v. *The King* (6). It is not necessary that the benefit to the donor should be reserved out of the property given (*Crossman* v. *The Queen* (7); *Attorney-General* v. *Worrall* (8); *Attorney-General* v. *Seccombe* (9); *Lang* v. *Webb* (10); *Union Trustee Co. of Australia Ltd.* v. *Webb* (11)).

(1) (1918) V.L.R., 687; 40 A.L.T., 103.
(2) 24 C.L.R., 422, at p. 441.
(3) 90 L.T., 816.
(4) (1905) 2 I.R., 553.
(5) (1902) 1 K.B., 416, at p. 423.
(6) 3 C.L.R., 117, at p. 131
(7) 18 Q.B.D., 256, at p. 262.
(8) (1895) 1 Q.B., 99.
(9) (1911) 2 K.B., 688.
(10) 13 C.L.R., 503, at p. 510.
(11) 19 C.L.R., 669, at p. 678.

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[RICH J. referred to *Lord Advocate* v. *Wilsons* (1).]

Weigall K.C. (with him *Lewers*), for the respondent. The facts of this case do not bring it within sec. 143. No want of *bona fides* is suggested. Sec. 11 of the *Administration and Probate Act* 1903, which is the original enactment of sec. 143, was passed in consequence of the decision in *Payne* v. *The King* (2), and was only intended to hit colourable transactions. The section means that a transaction which purported to be of a certain nature but which contained certain indicia should be deemed to be colourable. Up to that time all that the Legislature had dealt with was sham transactions, and there is nothing in sec. 143 to show that by it the Legislature intended to deal with anything else (*Lang* v. *Webb* (3); *Union Trustee Co. of Australia Ltd.* v. *Webb* (4); *Commissioner of Stamp Duties* v. *Byrnes* (5); *Re Cochrane* (6)). The language of sec. 143 is clear, and the precise words of it should be adhered to (*Commissioner of Stamp Duties (N.S.W.)* v. *Simpson* (7)). The decisions in the English Acts do not apply, for the sections there dealt with have a totally different history (*Attorney-General* v. *Smyth* (8)). If this view is wrong, the Crown has to show that the transaction should be regarded as essentially in its nature a gift. There is nothing to support that view except that the value of the property was greater than the consideration. On a case stated the Court is not justified in drawing an inference that the transaction was not a sale unless no other conclusion is possible (*Burgess* v. *Morton* (9); *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co. Ltd.* [No. 1] (10)). Even if the transaction amounts to a gift the meaning of sec. 143 is that the benefit to the donor must be retained out of the property given. It cannot be said that there was anything that the donees did not enjoy to the exclusion of the donor.

A. H. Davis, in reply.

Cur. adv. vult.

(1) 31 Sc. L.R., 819; (1896) W.N., 118.
(2) (1902) A.C., 552.
(3) 13 C.L.R., at p. 513.
(4) 19 C.L.R., at p. 676.
(5) (1911) A.C., 386, at p. 391.
(6) (1906) 2 I.R., 200, at p. 203.
(7) 24 C.L.R., 209.
(8) (1905) 2 I.R., at p. 571.
(9) (1896) A.C., 136, at p. 138.
(10) 16 C.L.R., 591, at p. 624.

The judgment of the COURT, which was read by ISAACS J., was as follows :—

This appeal arises on a special case stated by the parties on a petition to recover back £119 17s. 6d. alleged to have been overpaid for probate duty. The duty was claimed under one specific section of the *Administration and Probate Act* 1915 of Victoria. The Supreme Court, by a majority, held that the petitioner was entitled to succeed.

In *Attorney-General* v. *Seccombe* (1) Lord *Sumner* (then *Hamilton* J.), on a corresponding section of the English Act, said : "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." Looking, then, at sec. 143 we find it is limited in terms to the case of "Every conveyance or assignment gift delivery or transfer of any real or personal property, 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." The words "purporting to operate as an immediate gift *inter vivos* " constitute the frontiers of the class of the transactions called conveyances, assignments, gifts, deliveries or transfers, which is made subject to the section. If any such transaction does not fall within that class, it does not fall within the section.

The burden of showing that the transactions are of such a character as to have made the property dutiable under the section is on the Crown. To do that in the present instance, the Crown has undertaken to show, first, that there purported to be a gift *inter vivos* of £2,305 5s. 9d., and then, that par. (*b*) applies to the facts of the case. The chief point relied on by the Crown as to the first branch is that the property dealt with was, as the petitioner admits, worth at the time of transfer £7,537, while, after capitalizing the annuity, the total consideration did not exceed £5,231 14s. 3d., the balance being the sum of £2,305 5s. 9d. above mentioned. The agreement in its terms purports to be a sale and not a gift of the land, and the Crown does not say the transaction was a sham. Nor does it attack it under sec. 146 as one entered into with "intent to evade the payment of

(1) (1911) 2 K.B., at p. 703.

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duty." But, assuming it to be real and not to be made with the forbidden intent, it is said that it purports to operate as a gift *inter vivos* of the difference between the real value of the land and the money consideration set out in the written agreement. There is no claim to treat as undone, or to disregard, anything that was done. The transaction is left unimpeached and to be really what it purports to be, but the argument is that when the whole transaction is examined its effect is, and the proper construction it bears is, that there was a gift of the difference in value. It is difficult to understand the case so made. If it is conceded that the land was sold and not given, then there seems no room for contending that portion of its value was the subject of donation. If it is contended that the land was never sold at all, or was sold with intent to evade the payment of duty, not only would a case have to be made showing the transaction to be either a sham or contrary to sec. 146, but the whole land and not merely its excess value would probably be the subject of taxation (see *Seccombe's Case* (1)). The case for the Crown, however, being simply that £2,305 5s. 9d., part of the value of the land, was given, it is sufficient to say that it is not enough that the Crown should create a doubt or a suspicion. It must sustain its burden by satisfying the Court that the construction it contends for is the true one.

It is palpable that the mere fact of property being proved to have been worth more than it was purchased for in any ordinary transaction of sale cannot suffice to constitute a gift of the difference. In the present instance it is true that the parties were father and sons, and that the father was eighty years of age, and that the property sold was more valuable in fact than the money consideration named in the agreement. But as the agreement is not attacked as a sham or a fraud, its legal effect only being contended for, it is most material to observe that it purports to be a sale (see *Denny* v. *Denny and Warr* (2)), and that the consideration is not merely an annuity, which if it stood alone might give rise to other consequences. There is, besides the annuity, one money consideration of £3,644 14s. 3d. due to the bank on the father's personal guarantee. Though this sum was for the benefit of the business, yet the father had the controlling interest,

(1) (1911) 2 K.B., at p. 699.

(2) (1919) 1 K.B., 583, at p. 592.

and we are not informed to what, if any, extent the father was ultimately to bear the burden of the guaranteed debt. It is admitted that the stock-in-trade and book debts were not worth the liabilities of the business. Further, there is the payment of £500 to Alfred James Long. Again, there are covenants to indemnify the father in respect of any claims by the bank or Alfred James Long, and there is no allegation either that these were useless or were exhausted. No reliable inference can be founded on the facts as stated in the special case, supplemented by the further facts agreed on, which would satisfy the burden undertaken by the Crown to prove the property taxable.

The judgment appealed from appears to us to be right, and the appeal should be dismissed with costs.

Appeal dismissed with costs.

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

Solicitor for the respondent, *R. H. Rodda* for *W. J. Williamson*, Portland.

B. L.