PRIVY COUNCIL. 1929. THE COMMONWEALTH v. NEW SOUTH WALES.

referred to of the Act of 1913, not correct. They are of opinion that it should run as follows:—"This Court doth declare that Garden Island, in the Harbour of Port Jackson, in the State of New South Wales, having an area of 18 acres 3 roods 17 perches or thereabouts is now, by virtue of the revocation dated 12th October 1923, vested in His Majesty, His Heirs and Successors, and has become Crown lands within the meaning of the New South Wales *Crown Lands Consolidation Act* 1913, and liable to be dealt with in accordance with the provisions of that Act."

They will humbly advise His Majesty accordingly.

Cons *Scook* v *Premier Building Solutions* (2003) 28 WAR 124

[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;

AND

ROBERT TAYLOR AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE HIGH COURT (GAVAN DUFFY J.).

H. C. OF A. 1929. MELBOURNE, *May* 10, 30. Isaacs, Rich, Starke and Dixon JJ.

Estate Duty (Cth.)—Testatrix entitled to residue of unadministered estate of intestate—Disposition of interest to children shortly before death—Deed—Delivery—Absolute or conditional—Escrow—Covenants by children to pay annuity as consideration—Deed not executed by some children until after death of testatrix—Whether property effectually disposed of by deceased—Whether "gift inter vivos or settlement made within one year before her decease"—"Bona fide purchaser for valuable consideration"—Estate Duty Assessment Act 1914-1922 (*No.* 22 *of* 1914—*No.* 34 *of* 1922), *secs.* 3, 8 (3) (*b*), (4) (*a*).*

A testatrix, who was domiciled in Australia, became entitled shortly before her death to the residue of the unadministered estate of an intestate. By deed which she signed and sealed four days before her death, she purported

* Sec. 8 of the Commonwealth *Estate Duty Assessment Act* 1914-1922 provides:—"(4) Property . . . (*a*) which passed from the deceased person by any gift *inter vivos* or settlement made before or after the commencement of this Act within one year before his decease . . . shall for the purposes of this Act be deemed to be part of the estate of the person so deceased."

to dispose of the greater part of this interest in favour of her eight children in consideration of covenants by each of them to pay her certain annual sums during her life. This deed was expressed to be made between the testatrix, the administrator of the intestate's estate and her eight children. Three of her children and the administrator did not execute the deed until after her death. The Federal Commissioner of Taxation, in assessing the estate of the testatrix for Federal estate duty, included the amount she had derived from the intestate's estate.

Held, (1) that unless the testatrix intended when she sealed the deed to deliver it as an escrow conditionally upon the other parties executing it, the deed operated at once to pass her interest, and that the circumstances were such as to justify a finding of fact that she did not so intend, and therefore the Commissioner had failed to establish upon appeal that because of its incomplete execution the deed did not pass the interest of the testatrix before her death; (2) that upon the footing that the interest of the testatrix had passed from her before her death, the transaction did not constitute a "gift *inter vivos* . . . made . . . within one year before her decease" within the meaning of sec. 8 (4) (*a*) of the *Estate Duty Assessment Act* 1914-1922.

Meaning of expression "bona fide" in the definition of "Gift *inter vivos*" in sec. 3 of the *Estate Duty Assessment Act* 1914-1922 considered.

Decision of *Gavan Duffy* J. affirmed.

APPEAL from the High Court (*Gavan Duffy* J.).

Jean Taylor of Launceston, Tasmania, widow, who was entitled as sole next-of-kin of George Taylor deceased to the whole of his property, amounting in value to £48,000 capital and £432 accrued interest, and who had authorized Robert Leslie Gatenby to apply for administration of his estate on her behalf, agreed with her eight children to distribute this sum of £48,000 amongst them, giving each of her children £6,000 in consideration of each of them agreeing to provide her with an annuity of £1,000 a year. To carry out this agreement an indenture dated 4th March 1927 was entered into between Jean Taylor, Robert Leslie Gatenby and her eight children. This indenture, which was executed by Jean Taylor and five of her children before her death but which was not executed by Gatenby and the remaining three of her children until after her death, when they executed it, directed Gatenby, in consideration of the premises and of the covenant thereinafter stated, to set apart the sum of £6,000 for each of Jean Taylor's children for their absolute use and benefit and to pay such sums to them as soon as he realized the

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investments in the estate of George Taylor deceased or to transfer to each of the children existing investments to the amount of £6,000, such sums to be held on behalf of the eight children as from 1st January 1927, the date when they had agreed to pay the said annuities. The indenture also contained a covenant by each child that, in consideration of the sum of £6,000 or investments representing that sum being paid or transferred to each of the children, each child would pay to Jean Taylor an annuity of £1,000 a year during her life.

Jean Taylor died on 8th March 1927 and the Federal Commissioner of Taxation claimed to include the sum of £48,432 in the estate of Jean Taylor deceased as being liable to duty under the Federal *Estate Duty Assessment Act* 1914-1922. The executors of the estate of Jean Taylor deceased, namely, Robert Taylor, Henry Russell Taylor, Robert Leslie Gatenby and Alfred Jamieson Douglas, objected to the inclusion of the sums (*inter alia*) of £48,000 and £432 in the assessment for estate duty. The objection was disallowed and the executors thereupon appealed to the High Court. The appeal was heard by *Gavan Duffy* J., who allowed the appeal. In delivering judgment his Honor said :—" In this case I accept the evidence called for the appellants, and I believe that all parties considered themselves bound by and intended to act in conformity with the terms agreed on prior to the 4th of March and ultimately embodied in the deed of that date. I direct that respondent's assessment be reduced by the sum of £48,432. In my opinion the nature of the appellant's claim was such as to justify the respondent in insisting on the fullest disclosure and utmost publicity. I make no order as to costs."

From that decision the Federal Commissioner of Taxation now appealed to the Full Court.

Gregory, for the appellant. The property in question came within the estate of Jean Taylor at the time of her death (see *Estate Duty Assessment Act*, sec. 8 (3) (*b*)). It was not effectually disposed of by her before her decease, or, if so disposed of, the disposition came within sub-sec. 4 (*a*) of sec. 8 as a gift *inter vivos*, as defined in sec. 3, and made by her within one year before her decease. In that case, in accordance with sub-sec. 4 of sec. 8

it was deemed to be part of the estate of the deceased. The transactions between deceased and her children and Gatenby (the administrator of George Taylor's estate) prior to her execution of the deed, did not constitute any binding contract. They merely amounted to an intimation of her readiness to effect a distribution amongst her children, and until the deed was signed by her it was open to her to change her mind. The obvious purpose of the deed was to effect an equal distribution amongst all the children of deceased. The deed was not completed during the lifetime of deceased. Several of the children and also Gatenby did not execute it until after the death of Mrs. Taylor. The deed failed altogether as not achieving its purpose of an equal distribution amongst all the children, or else it failed as to the shares of the children who had not executed it during the lifetime of the deceased.

Keating, for the respondents. The evidence disclosed, and *Gavan Duffy* J. has found, that prior to the execution of the deed by deceased there was a concluded agreement which the deed in terms expressed or recorded. Those terms were that in consideration of the children severally agreeing to provide her with an annuity to be fixed by Gatenby, she directed Gatenby, as administrator of George Taylor's estate, to set apart from such estate, and pay over or transfer to or hold on behalf of such child, an equal share or portion, also to be ascertained and fixed by Gatenby, and she released Gatenby and the estate of George Taylor deceased from any claims by her in respect of moneys set apart, &c., in accordance with her direction. That agreement was made on the night of 13th September 1926. On 28th December 1926 Gatenby effected a book or card-ledger distribution of £48,000 amongst the eight children, one of whom in February 1927 had received or been given credit for his full share of £6,000. The evidence explaining why the deed was not executed until 4th March 1927 was accepted below and negatived any suggested testamentary disposition. Though designed to keep the property outside the taxation area, the transaction was bona fide and for valuable consideration, and so found by his Honor in the Court below. The Court on appeal should in the circumstances adopt and apply the principles it followed in *Deputy Federal Commissioner*

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of Taxation v. *Purcell* (1). The contention that the deed was inoperative, because not executed by all the parties during the lifetime of the deceased, had not been raised below, but was sufficiently answered, as to substance, by his Honor's finding as to the prior agreement and also as to form, by reference to authorities. [Counsel referred to *Doe d. Garnons* v. *Knight* (2), *Xenos* v. *Wickham* (3), *Rose* v. *Poulton* (4) and *Petrie* v. *Bury & Grimshaw* (5).]

Cur. adv. vult.

May 30.

The following written judgments were delivered :—

ISAACS J. The respondents are the legal representatives of Jean Taylor deceased. They were assessed in that capacity under the Federal *Estate Duty Assessment Act*, at an assessable value of £52,891. They lodged an objection against the assessment, claiming that a sum of £48,000, with £432 interest thereon, was improperly included. They relied on a deed executed by Jean Taylor on 4th March 1927, four days before her death, and also on prior transactions between her and the other parties to the deed in respect of its purposes. The objection was disallowed by the Commissioner, and an appeal under the Act came before my brother *Gavan Duffy*, who allowed it and accordingly reduced the assessment by the sum of £48,432. This is an appeal, in the appellate jurisdiction of the Court, by the Commissioner against that decision.

The appeal was rested on two grounds, namely, (1) that the sum of £48,000 was not in law disposed of by Jean Taylor ; and (2) if it was disposed of by her, it was a gift *inter vivos* within the meaning of the Act. If either alternative is correct, the property is, for the purposes of the statute, to be taken as part of her estate. The prior transactions leading to the making of the deed were fully proved at the trial. *Gavan Duffy* J. accepted the evidence as true and the arrangement proved as real and genuine; and these findings are not now challenged—indeed, bona fides throughout is admitted (*Attorney-General* v. *Duke of Richmond and Gordon* (6)). The execution of the deed by all parties purporting to do so—that is,

(1) (1921) 29 C.L.R. 464.
(2) (1826) 4 L.J. (O.S.) K.B. 161.
(3) (1866) L.R. 2 H.L. 296.
(4) (1831) 1 L.J. (N.S.) K.B. 5.
(5) (1824) 3 L.J. (O.S.) K.B. 29.
(6) (1909) A.C. 466.

by all the necessary parties—is admitted. What is in dispute is the legal effect of the circumstances as they appear.

The Crown relies on the fact that three of the children of the deceased, as well as the trustee, did not execute the deed until after the death of the deceased. It is said then that the evident intention of Mrs. Taylor was that her children should benefit equally, that the deed was to operate as to all or not at all, and that, as she died before it was completely effective, it is wholly inoperative. In any case, it was added, it is inoperative as to the shares of the children who did not execute the deed in Jean Taylor's lifetime. Then, alternatively, it is said, assuming a disposition, the grantees were not bona fide purchasers for valuable consideration. As to the last mentioned alternative, it cannot, I think, be doubted that, assuming as we must, the genuineness of the promises to pay the annuities, they would in an ordinary deed constitute the grantees purchasers for valuable consideration.

The first essential is to construe the deed itself. It purports, in effect, to be a direction by Jean Taylor to Gatenby, carried out by Gatenby, to pay to or hold for each child, as from the first of the preceding January, a sum of £6,000 out of Jean Taylor's property, and a release by her to him in respect of those sums. The consideration is a several covenant by each of the children to pay her an annuity of £1,000 during her life, the first payment to be made on the first day of the following January. It is, in substance, a present grant, consequently one to take effect in Jean Taylor's lifetime, and in consideration for each grantee entering into the annuity covenant. The case was well argued, but since the argument I have found some authorities which resolve all difficulties and place the matter beyond doubt. One is as to delivery, namely, *Macedo* v. *Stroud* (1), which by reason of the facts and the observations of Viscount *Haldane* (2) makes it clear that Jean Taylor delivered the deed. Whether it was delivered absolutely or conditionally as an escrow is immaterial. If as an escrow, the only condition was that each child should enter into the covenant. It is equally immaterial whether the condition was several or indivisible, since all have entered into the covenant. The authorities to which I

(1) (1922) 2 A.C. 330.

(2) (1922) 2 A.C., at p. 337.

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have referred in this branch of the case (disregarding chronology) are: (a) *London and County Banking Co.* v. *London and River Plate Bank Ltd.* (1); (b) *Foundling Hospital (Governors and Guardians)* v. *Crane* (2)—the authorities cited by the learned Lord Justice; (c) *Graham* v. *Graham* (3), and (d) *Edmunds* v. *Edmunds* (4). In the first mentioned case *Lindley* L.J., with the concurrence of *Bowen* L.J., collects the authorities establishing that the acceptance of the grant by the grantees is to be presumed until dissent is signified, even if the grantee were not aware of it, which is far from the fact in this case. The other authorities make it plain that notwithstanding the death of the grantor, and even supposing the delivery of the deed to have been in escrow, the instant the condition was satisfied the title of the grantee was thrown back to the date of the original delivery of the escrow, even as against the Crown.

Since the transaction was not intended to be of a testamentary character, but specifically designed to be in truth and reality a disposition *inter vivos*, it was not an evasion of the Act in the dyslogistic sense. It was admittedly an evasion in the admissible sense, that is, a genuine transaction not struck at by the enactment, and was, as it appeared to be, within the law.

The appeal, therefore, should fail, and the judgment of *Gavan Duffy* J. be affirmed.

RICH, STARKE AND DIXON JJ. This case depends on the provisions of sec. 8 of the *Estate Duty Assessment Act* 1914-1922, and is not affected by the amendments contained in Act No. 47 of 1928. Sub-sec. 3 (*b*) of sec. 8 provides that for the purpose of the Act the estate of a person who dies domiciled in Australia shall comprise his personal property wherever situate. In this case, the testatrix, who was domiciled in Australia, became entitled shortly before her death to the net residue of the unadministered estate of an intestate as his only next-of-kin. By a deed which she signed and sealed four days before her death, she purported to dispose of the greater part of this interest in favour of her eight children in consideration of covenants by each of them to pay her certain annual sums during

(1) (1888) 21 Q.B.D. 535, at p. 541.
(2) (1911) 2 K.B. 367, at pp. 377-378, per *Farwell* L.J.
(3) (1791) 1 Ves. Jun. 272, at p. 274.
(4) (1904) P. 362, at p. 374.

her life. This deed was expressed to be made between the testatrix, the administrator of the intestate's estate, and her children. Three of her children and the administrator did not execute the deed until after her death. The Commissioner contends that, because death intervened between the sealing of the deed by the testatrix and its execution by the trustee and by three cestuis que trust who were to covenant with her, it could have no efficacy as an assurance of her interest or at least could have none until after her death when all the parties had executed it.

When a deed between parties is executed by one of them it is a question of fact whether he delivered it absolutely in the first instance, or conditionally with the intent that it should not take effect as his deed until the other parties had also executed it. (See per *Creswell* J. in *Cumberlege* v. *Lawson* (1).) If it is delivered absolutely in the first instance, it is at once operative, as the deed of the person who so executed it, in spite of the fact that he delivered it upon the faith of the other parties executing it. Of course, if in such a case the other parties fail in the event to execute it, relief in equity is available to the party who executed it upon the faith of the others doing so. (See *Carew's Case* [*No.* 2] (2); *Luke* v. *South Kensington Hotel Co.* (3).) If on the other hand the person who first seals the deed delivers it as an escrow intending it to become his deed when and not before the other parties execute it, then, upon the condition being fulfilled, the deed becomes effectual to give title as from its first delivery. See *Perryman's Case* (4), where it is laid down that "if a man delivers a writing as an escrow to be his deed on certain conditions to be performed, and afterwards the obligor or obligee dies, and afterwards the condition is performed, the deed is good, for there was *traditio inchoata* in the life of the parties, *sed postea consummata existens* by the performance of the condition, takes its effect by force of the first delivery, without any new delivery" (5). Lord *Ellenborough* C.J. said in *Coare* v. *Giblett* (6): "The principle is, that an inchoate act, which is to be consummate on the performance of a conditional act required to be first done

(1) (1857) 1 C.B. (N.S.) 709, at pp. 724, 726.
(2) (1885) 7 DeG. M. & G. 43, at p. 52.
(3) (1879) L.R. 11 Ch. D. 121, at p. 125.
(4) (1599) 5 Co. 84a.
(5) (1599) 5 Co., at p. 84b.
(6) (1803) 4 East 84, at p. 94.

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by the party who is the object of such inchoate act, and where the performance rests wholly with such party, becomes, when consummate by the performance on his part of such conditional act, an effectual act for the benefit of the inchoate actor by relation from the time of such his inchoate act done." If therefore the testatrix should be considered as having delivered her deed conditionally so that, until it was executed by all the remaining parties, it was a mere escrow, the result may perhaps be that, when they so executed it, the deed should be treated for all legal purposes as the deceased's deed, as from the time she first conditionally delivered it, although her death intervened. It must be remembered that, so far as she was concerned, she had done an act she could not recall, and that the perfection of the assurance rested entirely upon the acts of others. The operation of the legal rule in relation to sec. 8 (3) (*b*) of the *Estate Duty Assessment Act*, therefore, would not be artificial or unjust. But it is unnecessary to express a decided opinion upon this question, unless the Commissioner has obtained or now obtains a finding of fact to the effect that delivery by the deceased was in truth conditional and not absolute in the first instance.

Counsel for the taxpayer informed us that the Commissioner did not at the trial contend that the deed was inefficacious by reason of the fact that the death of the deceased occurred before the deed had been executed by all the parties; and perhaps this might have been inferred from the manner in which the learned Judge's finding is expressed, and from the terms of the notice of appeal. It is, however, enough to say that if this issue of fact was raised before the learned Judge, he must be taken to have decided it against the Commissioner; and if it was not, the Commissioner cannot now upon this appeal obtain a finding in his favour upon it, unless the trial Judge was bound to draw from the evidence the inference that the deed was delivered conditionally and not absolutely. It becomes therefore necessary to consider whether the trial Judge was bound to draw such an inference. The issue depends upon the intention with which the deed was executed *de facto*. "In order to constitute the delivery of a writing as an escrow, it is not necessary it should be done by express words, but you are to look at all the facts attending the execution,—to all that took place at the time,

and to the result of the transaction; and therefore, though it is in form an absolute delivery, if it can reasonably be inferred that it was delivered not to take effect as a deed till a certain condition was performed, it will nevertheless operate as an escrow" (per *Parke* B. in *Bowker* v. *Burdekin* (1)).

No doubt if the contents of the instrument were alone considered it would be natural to conclude that its delivery was conditional upon the children executing it, and thus giving the covenants which apparently afford the consideration for the grant. But the circumstances which preceded and attended the execution of the document do not support such an inference. The net residue of the intestate estate which had devolved upon the testatrix amounted to a very large sum, and she had determined to distribute the greater part of it among her eight children. But her solicitor pointed out that to do this simply, would have the unfortunate result of exposing the fund to liability for various heavy duties, and he advised her not to make gifts, but rather dispositions in consideration of annuities. She adopted this advice, and the transaction afterwards embodied in the deed was arranged, and was partly acted upon. Some time necessarily elapsed while letters of administration were obtained of the intestate's estate. Then the testatrix became suddenly ill, and further delay in divesting her of her interest became dangerous. The assurance, when made, was to be retrospective, so that the transaction should be in form from the beginning. Very important here, as well as upon the issue of bona fides presently to be mentioned, is the explicit finding of the learned Judge to which, perhaps, too little attention was paid. He says: "In this case I accept the evidence called for the appellants and I believe that all parties considered themselves bound by and intended to act in conformity with the terms agreed on prior to the 4th of March and ultimately embodied in the deed of that date."

In all these circumstances it may well be that the testatrix and her solicitor both desired that the deed should at once operate as an immediate assurance of her interest in the intestate's estate, and relied upon the pre-existing arrangement as ensuring that the consideration promised would not fail. At any rate the inference

(1) (1843) 11 M. & W. 128, at p. 147.

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that an unconditional delivery of the deed was made by the testatrix is fairly open upon the evidence. In these circumstances, the Commissioner has failed to show upon this appeal that, because of its incomplete execution, the deed did not pass the deceased's interest before her death. But, upon the footing that the interest of the testatrix had passed from her before her death, the Commissioner next claimed that it came within sub-sec. 4 (*a*) of sec. 8, and was "property which passed from the deceased person by a gift *inter vivos* within one year before her decease." By the definition of "gift *inter vivos*" contained in sec. 3, dispositions made in favour of bona fide purchasers for valuable consideration are excluded. The deed expresses a valuable consideration, namely, the covenant to pay the annuities. An objection that because some of the children did not execute the deed until after the death, this consideration was not, in their cases, given in time or at all, may perhaps be open to the answer that it is enough that the grant was not voluntary but made for a consideration, and that it is not material that the consideration was not actually received before death. Be this as it may, the objection must fail here because the deed was executed in pursuance of an arrangement made and for a consideration already promised by the children.

Mr. *Gregory* conceded that "bona fide" meant no more than real or genuine, being perhaps deterred from contending that it referred to an intention to avoid the operation of the statute by such cases as *Simms* v. *Registrar of Probates* (1) and such observations as those of Lord *Macnaghten* in *Attorney-General* v. *Duke of Richmond and Gordon* (2). At the trial the Commissioner did not challenge the honesty of the testimony given for the taxpayer, and the learned Judge expressed his conclusion in the language already quoted. There is ample evidence contained in the testimony given at the trial to support such a finding, which is quite inconsistent with the conclusion that the transaction was unreal or colourable.

It follows that the appeal should be dismissed.

The executors of the testatrix appealed in an informal manner against the learned Judge's order in respect of costs, but were

(1) (1900) A.C. 323.

(2) (1909) A.C., at p. 472.

unable to adduce any sufficient reason for interfering with his exercise of the discretion reposed in him.

Rich J. desires to add for himself that, whilst concurring in this judgment, he does not wish to conceal his misgivings upon the correctness of the interpretation of the words "bona fide" in the definition of "gift *inter vivos*" in sec. 3, which the parties both adopted, and upon the reality of the covenants in the deed, performance of which might well have involved a greater expenditure in income tax than would be saved in death duties.

Appeal dismissed with costs.

Solicitor for the appellant, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

Solicitors for the respondents, *Simmons, Wolfhagen, Simmons & Walch*, Hobart.

H. D. W.

[HIGH COURT OF AUSTRALIA.]

COHEN . . . . . PLAINTIFF;

AND

COHEN . . . . . DEFENDANT.

Contract—Husband and wife—Arrangement as to dress allowance—No resulting contract—Limitation of actions—Defendant receiving money for plaintiff—Whether to be accounted for specifically or merely as a debt—Express trust—Debt—Effect of Statute of Limitations—Acknowledgment in writing—Right of action accruing—Time within which—Onus of proof—Statute of Limitations 1623 (21 *Jac. I. c.* 16)—*Supreme Court Act* (*Vict.*) 1915 (*No.* 2733), *secs.* 57 (2), 79, 85.

Practice—High Court—Original jurisdiction—Statutes of Limitations—Whether in force in action tried in High Court—Supreme Court Act 1915 (*Vict.*) (*No.* 2733), *sec.* 79—*Judiciary Act* 1903-1927 (*No.* 6 *of* 1903—*No.* 9 *of* 1927), *secs.* 79, 80.