[HIGH COURT OF AUSTRALIA.]

THE COUNTESS OF BECTIVE . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1932.

MELBOURNE, *June* 21, 22, 30.

Dixon J.

*Income Tax (Cth.)—Assessment—Sum paid to taxpayer by trustees of a trust in favour of taxpayer's daughter—Whether sum rightly included in assessment of taxpayer.*

The Commissioner of Taxation included in the assessable income of the appellant a sum of money which had been paid to her by the trustees of a trust established during his lifetime by her late husband in favour, primarily, of their infant daughter. The money was paid under a provision requiring the trustees, until the child attained fifteen years of age, to pay to the taxpayer the net annual income of the trust for the child's maintenance, education and support.

*Held*, that, upon the proper construction of the trust instrument, the assessment was wrong in including the entire sum received by the taxpayer under the settlement as her assessable income, and that it should include none of the taxpayer's actual expenditure upon the purpose for which she received the income.

Effect of different forms of gifts for maintenance considered.

It is a general rule that guardians of infants, committees of the person of lunatics, and others who are entrusted with funds to be expended in the maintenance and support of persons under their care are not liable to account as trustees; but a guardian is not permitted to receive moneys for maintenance without liability to account except upon the condition that he discharges his duty adequately to maintain.

APPEAL from the Federal Commissioner of Taxation.

This was an appeal from an assessment to income tax in respect of income derived by the appellant during the year ended 30th June 1930.

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The facts are stated in the judgment hereunder.

*Tait*, for the appellant.

*C. Gavan Duffy*, for the Commissioner of Taxation.

*Cur. adv. vult.*

June 30.

DIXON J. delivered the following written judgment:—

In ascertaining the taxable income derived by the taxpayer during the year ended 30th June 1930, the Commissioner of Taxation included in her assessable income the sum of £663 which had been paid to her in that year by the trustees of a trust established during his lifetime by her late husband in favour, primarily, of their infant daughter. The money was paid under a provision requiring the trustees, until the child attains fifteen years of age, to pay to the taxpayer the net annual income of the trust for the child's maintenance, education and support. The question is whether the assessment of the taxpayer in her individual capacity should include these payments.

When a provision is made by way of gift, testamentary or *inter vivos*, directing a payment to one person and expressing a purpose beneficial to another or others, it may receive one or other of at least four different interpretations.

(1) The expression of the purpose may be taken as but a statement of the donor's motive or of his expectation. If so, the first person takes the gift absolutely and incurs no legal or equitable obligation to fulfil the purpose. Examples of such a construction will be found in *Benson* v. *Whittam* (1); *Thorp* v. *Owen* (2); *Webb* v. *Wools* (3); *Byne* v. *Blackburn* (4); *Scott* v. *Key* (5); *Lambe* v. *Eames* (6); *Mackett* v. *Mackett* (7).

(2) The purpose may be so stated as to amount to a condition upon and subject to which the first person takes the gift beneficially. By accepting it the donee incurs an equitable duty to perform the

(1) (1831) 5 Sim. 22; 58 E.R. 246.
(2) (1843) 2 Ha. 607; 67 E.R. 250.
(3) (1852) 2 Sim. (N.S.) 267; 61 E.R. 343.
(4) (1858) 26 Beav. 41, at p. 44; 53 E.R. 811, at p. 812 (per *Romilly* M.R.).
(5) (1865) 35 Beav. 291; 55 E.R. 907 (as to the one-third of the estate).
(6) (1871) L.R. 6 Ch. 597.
(7) (1872) L.R. 14 Eq. 49.

condition which is annexed to the gift. If the condition requires a money payment, it must be made whether the property given is or is not adequate for the purpose. (See per Lord *Cairns* in *Attorney-General* v. *Wax Chandlers Co.* (1); *Messenger* v. *Andrews* (2).)

(3) The first person may take the gift beneficially, but the statement of the purpose, particularly if it involves the payment of money, may operate as an equitable charge thereon in favour of the other or others. Bequests and devises to parents for the maintenance and benefit of their children are from their very nature peculiarly susceptible of this interpretation. "Where a fund is bequeathed to a parent, subject to a trust to maintain and educate his children, the surplus will belong to the parent; it is a gift subject to a charge" (*Spence's Equitable Jurisdiction* (1849), vol. II., p. 466). It is a construction which, as no exact account of expenditure upon maintenance is required in equity, may be considered to effectuate the intention of a husband who devises or bequeaths property to his wife for the purpose of maintaining their children. His widow is enabled to apply the income towards their joint upkeep as a family and to continue a common establishment. If a testamentary gift is made to a parent for the benefit both of himself and of his children, it appears from the decided cases that such a construction is usually adopted. Whenever a gift is made to one person beneficially, subject to his paying money to another, the provision takes effect as a charge, notwithstanding that words of condition are used, unless an intention clearly appears that it should operate by way of condition. The second object of the disposition thus obtains proprietary and not merely personal rights and is not left in danger of losing the intended benefit through the donee's electing to reject the gift with its attendant condition, rather than to accept it *cum onere*. Of the decided cases upon dispositions stating a purpose that includes the maintenance or benefit of children, the greater number gives to the provision an operation, which, under one description or another, amounts to a gift subject to a charge. It is, I think, the substantial effect of the view adopted in *Hamley* v. *Gilbert* (per *Plumer* M.R.) (3); *Berkeley* v. *Swinburne* (4); *Woods*

(1) (1873) L.R. 6 H.L. 1, at p. 19.
(2) (1828) 4 Russ. 478; 38 E.R. 885.
(3) (1821) Jac. 354, at pp. 360-361; 37 E.R. 885, at p. 887.
(4) (1834) 6 Sim. 613; 58 E.R. 723.

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v. *Woods* (per *Cottenham* L.C.) (1); *Hadow* v. *Hadow* (per *Shadwell* V.C.) (2); *Gilbert* v. *Bennett* (3); *Raikes* v. *Ward* (per *Wigram* V.C.) (4); *Thorp* v. *Owen* (per *Wigram* V.C.) (5); *Longmore* v. *Elcum* (reservation by *Knight Bruce* V.C. of the question whether the children took under the equivalent of a charge or as joint tenants) (6); *Crockett* v. *Crockett* (per *Cottenham* L.C.) (7); *Browne* v. *Paull* (per *Cranworth* V.C.) (8); *Carr* v. *Living* (9); *Berry* v. *Briant* (as to two-thirds of the estate) (10); *Scott* v. *Key* (11); *In re Booth*; *Booth* v. *Booth* (12); *In re G.* (*Infants*) (13). See also per Lord *Selborne*, *Cunningham* v. *Foot* (14), and per *Chitty* J., *Re Oliver*; *Newbald* v. *Beckitt* (15).

(4) The direction to pay the first person may be regarded as conferring no beneficial interest upon him, and, whether he receives it strictly in the character of a trustee or in some other character such as guardian, the expression of the purpose may amount to a statement of objects to which he is bound to apply the fund. Gifts providing for the maintenance of children appear to have received this interpretation in *Wetherell* v. *Wilson* (16); *In re Yates*; *Yates* v. *Wyatt* (17), and perhaps in *Leach* v. *Leach* (18), and *In re Morgan* (19).

But an obligation to apply moneys in the maintenance of children or others does not involve the liability which arises from an ordinary trust. It is a general rule that guardians of infants, committees of the person of lunatics, and others who are entrusted with funds to be expended in the maintenance and support of persons under their care are not liable to account as trustees. They need not vouch the items of their expenditure, and, if they fulfil the obligation of maintenance in a manner commensurate with the

(1) (1836) 1 My. & Cr. 401, at pp. 408-409; 40 E.R. 429, at p. 432.
(2) (1838) 9 Sim. 438, at p. 441; 59 E.R. 426, at p. 428.
(3) (1839) 10 Sim. 371; 59 E.R. 658.
(4) (1842) 1 Ha. 445, at p. 450; 66 E.R. 1106, at p. 1108.
(5) (1843) 2 Ha., at p. 610; 67 E.R., at p. 252.
(6) (1843) 2 Y. & C. C. C. 363, at pp. 369, 370-371; 63 E.R. 160, at pp. 163, 164.
(7) (1848) 2 Ph. 553, at p. 561; 41 E.R. 1057, at p. 1060.
(8) (1850) 1 Sim. (N.S.) 92, at pp. 103-104; 61 E.R. 36, at pp. 40-41.
(9) (1860) 28 Beav. 644; 54 E.R. 514.
(10) (1862) 2 Dr. & Sm. 1, at p. 6; 62 E.R. 521, at p. 523.
(11) (1865) 35 Beav. 291; 55 E.R. 907.
(12) (1894) 2 Ch. 282.
(13) (1899) 1 Ch. 719, at pp. 724-725.
(14) (1878) 3 App. Cas. 974, at p. 1002.
(15) (1890) 62 L.T. 533, at p. 535.
(16) (1836) 1 Keen 80; 48 E.R. 237.
(17) (1901) 2 Ch. 438.
(18) (1843) 13 Sim. 304; 60 E.R. 118.
(19) (1883) 24 Ch. D. 114.

income available to them for the purpose, an account will not be taken. Often the person to be maintained is a member of a family enjoying the advantages of a common establishment; always the end in view is to supply the daily wants of an individual, to provide for his comfort, edification and amusement, and to promote his happiness. It would defeat the very purpose for which the fund is provided, if its administration were hampered by the necessity of identifying, distinguishing, apportioning and recording every item of expenditure and vindicating its propriety. Although these considerations furnish an independent foundation for the general rule, yet, after all, it is a doctrine regulating the application of moneys payable under an instrument, whether a will, a settlement or an order of a Court of equity, and the operation of the doctrine must depend upon the provisions contained in the instrument, both express and implied. But the effect of the instrument will often be governed by the circumstances to which it was intended to apply, and, in particular, by a consideration of the nature of the actual abode, the condition of the household and the state of the family of the infant or other person to be maintained. Courts of equity have not disguised the fact that the general rule gives to a parent or guardian dispensing the fund an opportunity of gaining incidental benefits, but the nature and extent of the advantages permitted must depend peculiarly upon the intention ascribed to the instrument. In *Brown* v. *Smith* (1) *Jessel* M.R. describes conditions which may be contemplated by an order of the Court, and they are material also to the meaning and operation of other instruments providing for maintenance. Statements to be found in some authorities that any surplus remaining after adequate maintenance has been provided belongs to the person having the care of the infant or of the lunatic cannot be safely used unless careful attention is given to the scope and purpose of the instrument under which the moneys arise and the conditions to which its operation is directed. A confusion appears to have arisen out of the decision in *Grosvenor* v. *Drax* (2), a lunacy appeal to the Privy Council in which no reasons were given. Lord *Cairns*, in *In re French* (3), differed as to its effect with Lord *St. Leonards* who, in *In re Ponsonby* (4), had said that since that decision the savings had always been

(1) (1878) 10 Ch. D. 377, at pp. 380-382.
(2) (1833) 2 Knapp 82; 12 E.R. 410.
(3) (1868) L.R. 3 Ch. 317, at p. 319.
(4) (1842) 3 Dr. & War. 27, at p. 31.

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considered as belonging to the person who had the care of the lunatic and not to the lunatic's personal estate; cf. per *Romer* J. in *Strangwayes* v. *Read* (1); and the observations of Lord *St. Leonards*, no doubt, influenced *Romilly* M.R. in what he said in *Jodrell* v. *Jodrell* (2). But the difficulty relates to the application rather than to the nature of the rule, and in any case it is evident that to reach the conclusion that savings belong to the guardian is much easier if the allowance is meant to include some inducement to the recipient to undertake the care of the person to be maintained, or if the intention is that the guardian should be associated with a child in a mode of life, or standard of living or in the enjoyment of pursuits which, otherwise, he would not adopt. The conclusion is less easy when the fund is meant simply to provide the proper charges of the infant.

A guardian is not permitted to receive moneys for maintenance without liability to account except upon the condition that he discharges his duty adequately to maintain and not otherwise. Upon his default the Court will administer the fund or intercept the payments and has jurisdiction to order an account or an inquiry (*In re Oldfield* (3); *Leach* v. *Leach* (per *Shadwell* V.C.) (4); *Browne* v. *Paull* (per Lord *Cranworth* V.C.) (5); *Re Dalton* (per *Truro* L.C.) (6); *Castle* v. *Castle* (per Lord *Cranworth* L.C.) (7); *Carr* v. *Living* (per *Romilly* M.R.) (8); *Hora* v. *Hora* (per *Romilly* M.R.) (9); *In re Weld* (per *Jessel* M.R.) (10); *In re Morgan* (per *North* J.) (11); *In re Evans*; *Welch* v. *Channell* (per *Cotton* L.J.) (12); *Macrae* v. *Harness* (per *Swinfen Eady* J.) (13)). Where, however, the condition is performed the Court does not inquire whether the money has been completely expended or whether the recipient has spent small sums for his personal benefit, but, nevertheless, it

(1) (1898) 2 Ch. 419, at pp. 426, 427.
(2) (1851) 14 Beav. 396, at pp. 411-413 (see p. 404); 51 E.R. 339, at pp. 344-345 (see p. 342).
(3) (1828) 2 Molloy 294.
(4) (1843) 13 Sim., at p. 308; 60 E.R., at p. 120.
(5) (1850) 1 Sim. (N.S.), at p. 103; 61 E.R., at p. 40.
(6) (1852) 1 DeG. M. & G. 265, at pp. 273-274; 42 E.R. 554, at p. 557.
(7) (1857) 1 DeG. & J. 352, at p. 359; 44 E.R. 759, at p. 762.
(8) (1860) 28 Beav. 644, at p. 647; 54 E.R. 514, at p. 515.
(9) (1863) 33 Beav. 88; 55 E.R. 300.
(10) (1882) 20 Ch. D. 451, at p. 457.
(11) (1883) 24 Ch. D. 114, at pp. 116-117.
(12) (1884) 26 Ch. D. 58, at p. 64.
(13) (1910) 103 L.T. 629, at p. 631.

remains an allowance to a person in a fiduciary capacity and for a definite purpose. Compare per *Jessel* M.R. in *In re Weld* (1) and see per *Brett* L.J. in *Brown* v. *Smith* (2). Lord *Cranworth* V.C. probably considered that the instrument before him fell within the application of these principles, when, in *Browne* v. *Paull* (3), relying on two earlier decisions, he formulated the statement that where the interest of the children's legacies is given to a parent, to be applied for or towards their maintenance and education, there, in the absence of anything indicating a contrary intention, the parent takes the interest subject to no account, provided only that he discharges the duty imposed on him of maintaining and educating the children; although perhaps, he meant that such a provision, being readily susceptible of a construction conferring a beneficial interest upon the parent, should be given that operation. In *Manning* v. *Federal Commissioner of Taxation* (4) *Knox* C.J., perhaps giving it the wider meaning, applied Lord *Cranworth's* statement to a direction contained in a will that the income of the estate should be received by the testator's widow for the support and maintenance of herself and his children; he held that the widow was under no liability to account provided that she discharged the duty of supporting and maintaining her children, that for this reason she was not under a fiduciary obligation, and so, that she did not fall within the definition of " trustee " contained in sec. 4 of the *Income Tax Assessment Act*. In that case the widow took the income beneficially, although, probably, subject to a charge for maintenance. In the present case the question is not whether the taxpayer is a trustee for the purpose of assessment. The trustees of the instrument certainly come, if she does not, within the meaning of the definition of " trustee." The question is whether the payments to her form part of her assessable income. The income of the trust fund appears to have been included in the taxpayer's assessment upon the view that she took it beneficially, the statement of the purpose contained in the provision for maintenance amounting to no more than an expression of the donor's motive, or of his expectation. Its inclusion

(1) (1882) 20 Ch. D., at p. 460 and at p. 458.
(2) (1878) L.R. 10 Ch. D., at p. 386.
(3) (1850) 1 Sim. (N.S.), at pp. 103-104; 61 E.R., at p. 41.
(4) (1928) 40 C.L.R. 506.

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in her assessable income could be supported, if the statement of the purpose were understood as annexing to a gift to her a condition which she was bound to perform. Possibly, it might be supported also if the provision were construed as a gift of income to the taxpayer subject to a charge for maintenance. But if either of these two constructions were adopted, a corresponding deduction should be allowed for expenditure upon maintenance, a deduction which would not, of course, necessarily amount to the same sum. On the other hand, if she is not an object intended to be benefited at all by the provision for maintenance, the payments ought not, in my opinion, to be included as assessable income of the taxpayer, although, if it appeared that she had appropriated to her own use an unexpended surplus after discharging her duty of maintaining her daughter, that surplus would be taxable as part of her income.

The instrument providing for maintenance is an indenture. None of the circumstances in which it was made appears, and its meaning and operation must be ascertained, so to speak, in the abstract. It is expressed to be made between the father, who is referred to as " the settlor," of the one part and the trustees of the other part. The property settled consists of shares in two trading companies. The instrument begins with a recital of the settlor's desire to make provision in manner thereinafter appearing for his daughter, who is referred to as " the beneficiary." The first of the trusts declared operates until the beneficiary reaches fifteen years of age and contains the provision for maintenance out of which this appeal arises. Before stating its terms, it is convenient to describe the trusts to operate thereafter. When the beneficiary attains the age of fifteen the income of the trust is to be paid or applied by the trustees at their discretion to the beneficiary for her maintenance, education and benefit until she attains the age of twenty-one. Thereafter the trustees stand possessed of corpus and income for the beneficiary absolutely. If she die before attaining full age leaving a child or children who attain full age, or, being daughters, marry, the trust is for such child or children absolutely. But if the beneficiary die before attaining full age without leaving any child who obtains a vested interest, then the trust is for the taxpayer

for life and after her death for the children then living of the settlor as tenants in common.

By the terms of the first trust of the instrument, the trustees are required until the beneficiary attains the age of fifteen years to pay to the taxpayer the net annual income of the trust at such time and in such manner as the trustees shall determine for the maintenance, education and support of the beneficiary, and, in the event of the death of the taxpayer before the beneficiary attains that age, to pay the net annual income to the guardian or guardians of the beneficiary in manner aforesaid for the maintenance, support and education of the beneficiary, and the trustees are to be under no obligation to see to the application of the net annual income by the taxpayer, or by the guardian or guardians. It is to be noticed that, excluding this clause from consideration, the only provision contained in the settlement in favour of the taxpayer is a limitation over upon the entire failure of the trusts declared in favour of the daughter of the settlor and her possible children. The recital and the description of the daughter as " the beneficiary " establish that she was the object of the settlement. The provision, which, upon her daughter's reaching the age of fifteen, terminates the taxpayer's dispensation and requires the trustee to undertake the payment or application of the income to the beneficiary for her maintenance, education and benefit, suggests that no other reason than the tenderness of the girl's age actuated the settlor in directing payment to her mother or her guardian until that time. In the clause containing this direction there is no difference in the forms of expression used in requiring the trustees to pay the income to the taxpayer and in requiring them to pay it to the guardian if the taxpayer should die. Upon these grounds, I conclude that the taxpayer is not a beneficial object of the provision for maintenance, but is chosen, as is the guardian after her death, as an appropriate person to dispense the income belonging to the child for her benefit. In establishing this conclusion I think the taxpayer has discharged the burden of showing that the assessment was wrong in including the entire sum received by the taxpayer under the settlement as her assessable income. But, in the absence of any information as

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to the taxpayer's actual expenditure upon the purpose for which she receives the income, I shall do no more than remit the assessment to the Commissioner.

*Appeal allowed with costs. Assessment set aside and remitted to the Commissioner of Taxation.*

Solicitors for the appellant, *Blake & Riggall.*

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

H. D. W.

Foll *Swiss Aluminium Aust Ltd* v FCT 73 ALR 584

Cons *Wellcome Australia Ltd* v *Aust Eagle Insurance Co Ltd* (1993) 34 NSWLR 269

Appl *CIC Workers' Compensation (NSW) Ltd* v *Alcan Aust Ltd* (1994) 35 NSWLR 169

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[HIGH COURT OF AUSTRALIA.]

SMITH . . . . . APPELLANT; APPLICANT,

AND

MANN AND OTHERS . . . . . RESPONDENTS. RESPONDENTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1932.

SYDNEY, *April* 6, 7; *Aug.* 4.

Gavan Duffy C.J., Rich, Starke, Dixon and McTiernan JJ.

*Workers' Compensation—Injury—Disease—Contracted by gradual process—Whether brought about or contributed to by employment during twelve months preceding disablement—Necessity of proof—Disease incidental to employment in question—Cause—Condition of worker—Certificate of Medical Board—Conclusiveness—Case stated to Supreme Court subsequent to award—Appeal therefrom to High Court—Workers' Compensation Act* 1926 (*N.S.W.*) (*No.* 15 *of* 1926), *secs.* 6*, 7 (1)*, (4)*, 37*, 51 (3)*—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 73

Where a worker has contracted a disease which is of such a nature as to be contracted by a gradual process, it is not necessary for him, on an application for compensation in accordance with sec. 7 (4) of the *Workers' Compensation Act* 1926 (N.S.W.), to establish that the disease was actually brought about or

* The *Workers' Compensation Act* 1926 (N.S.W.), provided:—By sec. 6: "'Injury' means personal injury, and includes a disease which is contracted by the worker in the course of his employment, whether at or away from his place of employment, and to which the employment was a contributing factor, but does not include a disease caused by silica dust." By sec. 7:—"(1) A worker who receives personal injury . . . in the course of his