[HIGH COURT OF AUSTRALIA.]

O'CONNOR . . . . . APPELLANT;
PLAINTIFF,

AND

THE COMMISSIONER OF SUCCESSION DUTIES (SOUTH AUSTRALIA) . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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MELBOURNE, *June* 28, 29.

SYDNEY, *Aug.* 4.

Rich, Starke and Dixon JJ.

*Succession Duties—Choses in action—Gift by father to son—Resumption of possession of income and instruments of title by father—Whether son held property to the entire exclusion of the donor—Succession Duties Act Further Amendment Act* 1919 (*S.A.*) (*No.* 1396), *sec.* 18 (3)*—*Succession Duties Act Further Amendment Act* 1923 (*S.A.*) (*No.* 1576), *sec.* 10*.

In December 1923 the appellant's father executed transfers to the appellant of both shares in companies and mortgages of real property and communicated to the appellant his intention of giving these securities to him. Between December 1923 and April 1925 the income from the securities was received by a firm of solicitors who held the securities and acknowledged the appellant as the client to whom they were accountable. In April 1925 the appellant gave a full power of attorney in favour of his father. In July 1926 the securities were taken out of the hands of the solicitors and deposited with a bank at the place where the father resided. From that time forward until his death,

* Sec. 18 (3) of the *Succession Duties Act Further Amendment Act* 1919 (S.A.) as amended by sec. 10 of the *Succession Duties Act Further Amendment Act* 1923 provides: "Duty shall be chargeable . . . upon the net present value of any property disposed of" by certain forms of disposition, including gift, "immediately upon such disposition, and irrespective of the time of the death of the person making the same, if the person taking under such disposition does not immediately upon the disposition bona fide assume the beneficial interest and possession of such property and thenceforward retain such interest and possession to the entire exclusion of the person making such disposition, and without reservation to such person of any benefit from or interest in such property by contract or otherwise."

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on 23rd September 1928, the father, with the consent of the appellant, received the income from all the securities under his power of attorney and applied it to his own use, without protest or objection by the appellant and without being required to account to the appellant.

*Held*, that the property the subject of the gift was chargeable with duty under sec. 18 (3) of the *Succession Duties Act Further Amendment Act* 1919 (S.A.), as amended by sec. 10 of the *Succession Duties Act Further Amendment Act* 1923, inasmuch as the appellant had not retained the beneficial interest and possession of the property to the entire exclusion of his father.

*Per Rich* and *Dixon* JJ. : The provisions of sec. 18 of the *Succession Duties Act Further Amendment Act* 1919, as amended by the Act of 1923, apply to dispositions which fall within the description in the section, whether colourable or not.

*Commissioner of Stamp Duties* v. *Byrnes*, (1911) A.C. 386, explained.

*Lord Advocate* v. *Stewart*, (1906) 8 F. (Ct. of Sess.) 579, and *Attorney-General* v. *Seccombe*, (1911) 2 K.B. 688, considered.

Decision of the Supreme Court of South Australia (*Murray* C.J.) : *In re O'Connor* ; *O'Connor* v. *Commissioner of Succession Duties*, (1932) S.A.S.R. 19, affirmed.

APPEAL from the Supreme Court of South Australia.

This was an appeal by Thomas Aloysius O'Connor from a decision of *Murray* C.J. The facts found by the learned Chief Justice were substantially as follows :—Thomas O'Connor (who was referred to as " the testator ") died on 23rd September 1928. He made a will leaving the whole of his property to his son, the appellant. Prior to December 1923 the testator was living apart from his wife, and was displeased with other members of his family. He desired to dispose of his property, of which he possessed a considerable amount, in such a way that his wife and family other than the appellant should receive no benefit from it, either under his will or on his intestacy, or by means of an order obtained under the *Testator's Family Maintenance Act* 1918 (S.A.). As early as 1914 he had told the appellant that, if he would stay with him, he would give him the whole of his property. This, however, the appellant was unable to do, as he had then become, or intended to become, a member of the Institute of Marist Brothers of the Roman Catholic Church. In 1923 the appellant was at Lismore in New South Wales. The testator asked him to come to

Adelaide. After his arrival there they went to the office of Messrs. Denny & Daly, solicitors, where, on a day in December 1923 not precisely fixed, the testator executed transfers in favour of the appellant of shares in companies to the value of £2,665 15s. and transfers of mortgages of land to the value of £6,121 5s. 8d. As a Marist Brother the appellant had entered into what is termed in the constitution of the Institute the "simple vow" of poverty. This vow did not prevent him from becoming the owner of property, but it debarred him from keeping the administration, the usufruct and the use of the property. He had to cede these advantages to other persons, and might do so to whomsoever he pleased, but subject, it appeared, to the permission of his lawful superiors. The testator was aware that the appellant had made this vow. The appellant, however, obtained the necessary permission to accept the gift, and, when his father executed the transfers, he also signed them as transferee. The testator did not make any reservation of an interest in the property; he received no consideration for the transfer, and there was no arrangement between him and the appellant that he was to have any benefit from the property. After the transaction, the mortgages and scrip certificates, the subject matter of the gift, which were in the custody of Messrs. Denny & Daly, were retained by them on behalf of the appellant, and they collected the dividends and interest, and generally administered the property according to his directions. He authorized them to pay to his father such reasonable amounts as he might require, and also to make payments towards the support of his mother, who was in poor circumstances, and he received some small amounts himself, which he applied principally for the benefit of the boys who were under the care and tuition of the Brotherhood. The remainder of the income was capitalized and invested by Messrs. Denny & Daly in the name of the appellant. On 1st February 1924 the testator, who had not divested himself of the whole of his property, sailed for Ireland with the intention of residing there. The appellant saw him off at the steamer, and asked him what he should do with the property. The testator replied "You can do what you like with it: it is your own,"—adding that he thought the family would squander it, and that, if the appellant had it, he would look after it

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and put it to a good purpose. The appellant afterwards returned to New South Wales. Contrary to expectation, the testator did not remain in Ireland, but came back in November 1924. The appellant went to Western Australia in 1925. He met his father in January of that year. The testator came on to Adelaide. In April 1925 the appellant sent his father from Western Australia a full power of attorney to manage all his affairs in South Australia, and thereafter Messrs. Denny & Daly took their instructions from him. The transfer of the mortgages was not completed by registration until 5th June 1924, and the share transfers were not registered until July 1926. In July 1926 the testator complained of the conduct of Messrs. Denny & Daly's accountant. In consequence the appellant came from Western Australia. He heard what his father had to say, and then took his business out of Messrs. Denny & Daly's hands. The securities were removed to the Bank of New South Wales, Jamestown, South Australia, near which place the testator was residing, and an account was opened at that bank in the testator's name. Thenceforth the testator received the income of the property until his death in 1928. He did not render any accounts of his expenditure to the appellant, nor was he asked to do so. He invested part of the income in houses and land in his own name, and after his death these investments were treated by the appellant as part of his father's estate for the purposes of succession duty.

The appellant was assessed to duty amounting to £717 17s. 5d. under the *Succession Duties Act Further Amendment Acts* of 1919 and 1923 (S.A.) on the property he received from his father and, by way of appeal from the assessment, he took out an originating summons against the respondent, the Commissioner of Succession Duties, for a declaration (*a*) that none of the said property was chargeable with duty under the said Acts; (*b*) that the assessment be rescinded; (*c*) that the respondent be directed to refund the sum of £717 17s. 5d. and £11 2s. 11d. interest thereon paid by the appellant, together with interest thereon until the date of payment.

In delivering judgment *Murray* C.J. said:—" From these facts it is clear that the disposition in favour of the appellant, though set in train in December 1923, was not complete until July 1926, when

all the transfers had been registered (*Milroy* v. *Lord* (1); *Anning* v. *Anning* (2)), and that although the appellant had assumed the beneficial interest and possession of the various items of the property comprised in the disposition, by Denny & Daly's acknowledgment that they held the documents of title for him (*Dublin City Distillery Ltd.* v. *Doherty* (3)), and by their subsequently administering the property on his behalf, he allowed the testator to appropriate for his own use and benefit, from July 1926 until his death, substantially the whole of the income from the property. This was not pursuant to any reservation made by the testator at the time of the disposition, but was a purely voluntary act on the part of the appellant. The question, therefore, is whether under these circumstances the disposition is caught by sec. 18, sub-sec. 3, of the *Succession Duties Act Further Amendment Act* 1919, and rendered chargeable with succession duty under that section. . . . The crucial question for my decision, therefore, is whether it is possible to say that from the time when the disposition of the property given to the appellant by his father became complete, the appellant had assumed the beneficial interest and possession of the property and retained such interest and possession to the entire exclusion of his father. In my judgment, it is impossible for me so to hold, in view of the facts that the appellant authorized his father to administer the property as his attorney, and allowed him to appropriate to his own use, without requiring him to account, and without protest or objection, from July 1926 down to the time of his death, so much of the income of the property as the testator thought fit. So far from this being an entire exclusion of the testator from the beneficial interest of the property, it appears to me to amount to actual enjoyment of the greater part of it. I think, therefore, the disposition was caught by the Act, and that the appeal must be dismissed, but I wish to say that I find nothing in the conduct of the appellant in relation to the transaction which was not entirely creditable to him" :—*In re O'Connor*; *O'Connor* v. *Commissioner of Succession Duties* (4).

From this decision the appellant now appealed to the High Court.

(1) (1862) 4 DeG. F. & J. 264; 45 E.R. 1185.
(2) (1907) 4 C.L.R. 1049.
(3) (1914) A.C. 823, at p. 852.
(4) (1932) S.A.S.R. 19.

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*Rollison* and *Christie*, for the appellant. Sec. 10 (3) of the *Succession Duties Act Further Amendment Act* 1923, which is the relevant provision, appeared for the first time in South Australia in 1923. The relevant documents were handed over in 1923 and the donor did all that was necessary to make a valid disposition of his property. The testator died on 23rd September 1928 and this assessment was made on 28th February 1929. The Chief Justice found that the disposition was bona fide; that it was made without reservation; that there was no benefit retained by the donor, but that the appellant was caught by the words "retain such interest and possession to the entire exclusion of the person making such disposition." In April 1925 the appellant sent his father a full power of attorney to manage all his affairs in South Australia, and in 1926 the father was permitted by the appellant to use for his own benefit the interest derived from this property. This was done voluntarily by the appellant. The owner had done all that he could to dispose of his interest within *Anning* v. *Anning* (1). The purpose of the section was to catch colourable transactions in which the donor retained some benefit. As no benefit was retained by the transaction of 1923, it was not attached by the transaction of 1926. What was given to the father was given as a matter of grace, and not as an enforceable interest. If the donor has done everything that is necessary for him to do to make a complete disposition, that is sufficient (*Milroy* v. *Lord* (2)). In order to escape from the section the donee must "thenceforward retain" the gift as of right, and what he did in 1926 did not constitute a parting with such right to possession. The words "and thenceforward . . . by contract or otherwise" mean "and thenceforward retained as of right free of any enforceable claim" (*Attorney-General* v. *Seccombe* (3)). The Chief Justice distinguishes *Seccombe's Case*, but any enjoyment retained by the donor would be caught by the section. The Chief Justice finds that the act of the appellant was a voluntary allowance on the part of the son, and was not made pursuant to any reservation on the part of the testator. "Benefit" means some enforceable claim (*Seccombe's Case* (4)). *Seccombe's Case* has been followed

(1) (1907) 4 C.L.R. 1049.
(2) (1862) 4 DeG. F. & J. 264; 45 E.R. 1185.
(3) (1911) 2 K.B. 688, at p. 703.
(4) (1911) 2 K.B., at p. 703.

by the High Court, and is in favour of the appellant. *Commissioner of Stamp Duties* v. *Byrnes* (1) also supports the appellant's contention, and so do *Attorney-General* v. *Sandwich* (*Earl*) (2), *Lang* v. *Webb* (3), *Union Trustee Co. of Australia* v. *Webb* (4) and *Commissioner of Stamp Duties* (*N.S.W.*) v. *Thomson* (5). The words " and without reservation," &c., do not add anything to the sub-section, which might have stopped at " such disposition."

*Hannan*, for the respondent. The first question is what is the meaning of the relevant words in sec. 18 (3) of the *Succession Duties Act Further Amendment Act* 1919, namely, " bona fide assume the beneficial interest " in such property. These words have reference, not to legal rights or fresh legal rights to be conferred, but to donees exercising legal rights. Whenever there is a gift the donee is entitled to all the rights of the owner of the property, both to the possession of the property and to the beneficial interest in it; so the section has reference to something more than the mere right of ownership. It looks to the condition of things in which the donee does nothing actively but merely has his rights of property which he does not put into operation. The section, in effect, requires the donee to exercise his rights of ownership which the donor intends to confer upon him, and the Legislature says that, unless the donor in fact relinquishes the possession and enjoyment he had before the gift, duty will be payable. It is fallacious to say that the test is the existence of enforceable legal rights: the test is, who has the actual possession and enjoyment of the property? If the Legislature did not intend to make the existence of enforceable rights the test in that provision, neither did it so intend later on (*Lang* v. *Webb* (6)). The Chief Justice finds that the appellant entered into the enjoyment of this property in 1923. This he could not have done because the appellant never took any steps to see that the companies should pay the dividends to him. The Chief Justice was wrong in finding that the appellant entered into bona fide possession and enjoyment of the whole of the property. As to the mortgages, the appellant never

(1) (1911) A.C. 386.
(2) (1922) 2 K.B. 500.
(3) (1912) 13 C.L.R. 503.
(4) (1915) 19 C.L.R. 669.
(5) (1927) 40 C.L.R. 394; (1929) A.C. 450; (1929) 42 C.L.R. 139.
(6) (1912) 13 C.L.R., at pp. 510, 513, 515.

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entered into beneficial enjoyment at all. Unless the appellant assumes the entire beneficial ownership the section applies. The High Court is in as good a position as the Chief Justice of the Supreme Court to draw the right inference from the evidence where nothing turns on the credibility of the witnesses, and should draw the inference that the appellant never entered into bona fide possession (*Dominion Trust Co.* v. *New York Life Insurance Co.* (1) ). *Union Trustee Co.* v. *Webb* (2) was a case where a husband provided money to buy a house for his wife and the then Chief Justice of the High Court held that the gift was property bought with the proceeds of the money. The husband could not be said to be in enjoyment of the house, because it was his wife's for she had the legal right to say how he should enjoy it. The husband in that case was merely there by reason of his wife's leave and licence. [Counsel also referred to *Lang* v. *Webb* (3).] After 1926 the appellant's father had independent possession and enjoyment of this property. When he had the power of attorney he enjoyed the income in as full and complete a manner as the appellant could have done, and he used it for his own purposes. "Reservation" means reservation by the donor, and has no application to events occurring after the disposition.

[STARKE J. referred to *Lord Advocate* v. *Stewart* (4).]

*Thomson's Case* (5) was a decision by *Knox* C.J. and *Gavan Duffy* J. on the facts and the gift was not caught by the section. *Higgins* J. (6) fell into a fallacy as to the meaning of the New South Wales Act. The question is whether the donee retained the legal interest and possession, not whether the donor retained any benefit. The settlor can give an estate in reversion and retain a life estate, but once the reversion is given the section says the donee is continually to hold such reversion to the entire exclusion of the donor. The respondent is not bound by *Seccombe's Case* (7), because the South Australian Act differs from the Act discussed in that case. *Commissioner of Stamp Duties* v. *Byrnes* (8) was argued and decided on sec. 52 of the New South Wales Act and the question was whether a disposition was made with intent to avoid payment of duty, and

(1) (1919) A.C. 254, at p. 257.
(2) (1915) 19 C.L.R. 669.
(3) (1912) 13 C.L.R., at pp. 510, 517.
(4) (1906) 8 F. (Ct. of Sess.) 579, at p. 594.
(5) (1927) 40 C.L.R. 394; (1929) A.C. 450; (1929) 42 C.L.R. 139.
(6) (1927) 40 C.L.R., at p. 418.
(7) (1911) 2 K.B. 688.
(8) (1911) A.C. 386.

sec. 49 of that Act, which is the corresponding section to the present, was not mentioned. If the Court holds that it is necessary that the exclusion of the donor from the property should be in pursuance of some legally enforceable right, then in this case the testator had the whole income from 1926 onwards under such circumstances that he had a legally enforceable right to continue to receive it, as he had a power of attorney and was legally entitled to receive the income from time to time; he had a legal right sufficient to satisfy such requirement; and, if the provision means that the donee should be excluded by some legally enforceable right, it need not be a beneficial right, because beneficial rights are dealt with in the next limb of the section. The mere holding by the testator of the power of attorney makes him dutiable under the section. The testator exercised a privilege he had in pursuance of a legal right. The appellant made a gift of the income to the testator for the testator's life and could not have recovered the income received by the testator between 1926 and the latter's death. Words have been added at the end of the section that make it quite clear that "by contract or otherwise" refers to a reservation of the benefit to the donor, and means reservation by the donor himself at the time when he made the disposition. In that case there is no reason to modify the words "to the entire exclusion" by any argument derived from the context. Those words mean in their context that the donor may not retain any actual independent beneficial enjoyment of the same nature as he enjoyed before the gift, and that the donee is required by the section not in any way to share the beneficial interest and possession of the gift with the donor.

*Rollison*, in reply.

*Cur. adv. vult.*

The following written judgments were delivered:— Aug. 4.

RICH AND DIXON JJ. The question upon this appeal is whether a gift of shares and securities in 1923 made by a father to his son is liable to succession duty. Duty has been levied upon the gift under sec. 18 of the South Australian *Succession Duties Act Further Amendment* 1919, as amended by an Act of 1923 bearing the same title. These

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statutory provisions operate, when the conditions which they describe are satisfied, to impose duty upon the net present value of any property disposed of by certain forms of disposition, including gift, immediately upon such disposition and irrespective of the time of the death of the person making the same. The conditions of liability occur if the person taking under such disposition does not immediately upon the disposition bona fide assume the beneficial interest and possession of such property and thenceforward retain such interest and possession to the entire exclusion of the person making such disposition, and without reservation to such person of any benefit from or interest in such property by contract or otherwise. By the judgment under appeal, *Murray* C.J. decided that the gift was dutiable, not upon the ground that the son who is the appellant had not immediately upon the disposition assumed the beneficial interest and possession of the shares and securities given, without reservation to his father of any benefit from or interest in such property by contract or otherwise, but upon the ground that he had not thenceforward retained such interest and possession to the entire exclusion of the father.

The essential facts upon which the correctness of this conclusion depends are few. In December 1923 his father executed transfers to the appellant both of shares and mortgages and communicated to the appellant his intention of giving these securities to him. The transfers, which appear to have been executed also by the appellant as transferee, and the securities remained for some time in the custody of a firm of solicitors who acted for the parties, but later the transfers were registered. The income from the securities was received by the same solicitors, but they acknowledged the appellant as the client to whom they were accountable. In June 1924 one mortgage was paid off and the money was invested in other securities. In April 1925 the appellant gave a full power of attorney in favour of his father. In July 1926 the securities were taken out of the hands of the solicitors and deposited with a bank at the place where the father resided. From that time forward until his death on 23rd September 1928 the father, with the consent of the appellant, received the income from all the securities under his power of attorney and applied it to his own use. As *Murray* C.J. said, the appellant authorized his father to administer the property as his attorney, and

allowed him to appropriate to his own use, without requiring him to account and without protest and objection, from July 1926 down to the time of his death, so much of the income of the property as he thought fit. Thus for two years and upwards before his death the donor was put by the donee into the *de facto* control of the property which he had given, into the direct receipt of the income which it produced, and into the beneficial enjoyment of that income. Upon what ground, then, consistently with these facts can it be said that the donee retained the beneficial interest and possession of such property to the entire exclusion of the person who made the disposition by way of gift? Two grounds depending upon the construction of sec. 18 are relied upon on behalf of the appellant.

The first ground assigns to the relevant portion of the enactment a meaning based upon authority. It is contended that, upon the true construction of the section, as determined by decisions presently to be mentioned, a beneficial enjoyment of the property by the donor is not made a ground of liability to duty unless that enjoyment be derived from some enforceable right. The provision is founded upon sec. 11 (1) of 52 & 53 Vict. c. 7, in which the material words are "property taken under any gift, whenever made, of which property bona fide possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise." With unimportant variations this language was adopted in Victoria in 1903 and is now contained in sec. 173 (*b*) of the *Administration and Probate Act* 1928. The cases of *Lord Advocate* v. *Stewart* (1), *Attorney-General* v. *Seccombe* (2) and *Union Trustee Co.* v. *Webb* (3), which were decided upon this language, are said to attach to the words "to the entire exclusion of" the disponor a meaning which they should receive in the South Australian provision. In each of these cases the question arose whether a gift of land with a dwelling upon it was liable to duty, because, notwithstanding that the donee had assumed complete possession, the donor dwelt with him in the house, and in each the gift was held not to be so liable. In *Lord Advocate* v. *Stewart*

(1) (1906) 8 F. (Ct. of Sess.) 579. (2) (1911) 2 K.B. 688.
(3) (1915) 19 C.L.R. 669.

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the disponor, one Mrs. Ommanney M'Taggert, remained as a licensee or guest. Lord *Dunedin*, who was then Lord President, said (1):—"I hold it clear that the benefit from which the cedent must be excluded must be a benefit which was part of his property before the cession. Any other reading would I think drive the clause mad; because it would mean that if the cedent was after the cession even allowed again to set foot on the ceded property, the whole transaction for the purpose of the duty is held as non-existent. It therefore in the end comes to be a question of fact, whether the occupation of the bedroom and other rooms of the house which Mrs. Ommanney M'Taggert had after the cession is in truth the same as that she had before. It seems to me that the admissions in the joint minute show conclusively that it was not. Before the session her occupation was one of the incidents of her proprietorship; after, it was only the privilege of a guest. To say in general terms, as was said in the argument for the Crown, that she 'got the good of the estate' as much after the cession as before, seems to me to beg the question. Very likely her actual enjoyment of life was not made less because she no longer pocketed the rents, or sat at the head of the table. I do not think one can analyse existence in such a fashion. Two of the prime necessities—air and sunshine—never depended upon her proprietary rights. The question seems to me always to revert to a simple question of fact, namely, after the cession was she the old proprietrix retaining a benefit of her old estate; or was she a guest getting as a guest what the new proprietrix chose to give her? As a juryman reading the minute of the admissions, I pronounce unhesitatingly for the latter view." In *Attorney-General* v. *Seccombe* (2), which was decided by Lord *Sumner* (then *Hamilton* J.), the donor was again a licensee or guest. Lord *Sumner* expressed his agreement with the principle of *Lord Advocate* v. *Stewart* (3), and said (4): "The principle there laid down, as I understand it, is that the possession and enjoyment or benefit from which the Act contemplates that the cedent or donor must be entirely excluded must be derived from some enforceable right, a benefit, as the Lord President said, 'which was part of his property

(1) (1906) 8 F. (Ct. of Sess.), at pp. 595, 596.
(2) (1911) 2 K.B. 688.
(3) (1906) 8 F. (Ct. of Sess.) 579.
(4) (1911) 2 K.B., at p. 700.

before the cession' and therefore not merely a benefit which is derived from his being present for a greater or less time in the old house by the leave and licence of the donee." His Lordship next proceeded (at p. 701) to deal with the words " or of any benefit to him by contract or otherwise " and limited the expression " or otherwise " by a construction *ejusdem generis* (p. 703). The expression " derived from some enforceable right " was not used by Lord *Dunedin*, and it may be doubted whether he intended to place so great a restriction upon the words " to the entire exclusion of the donor " as the expression has been taken to imply. But, in *Union Trustee Co.* v. *Webb* (1), Lord *Sumner's* language was expressly adopted by *Isaacs* J. and impliedly by *Griffith* C.J. in this Court in construing the Victorian enactment. In that case the gift was by a husband to his wife. It was held that the matrimonial rights of the husband who dwelt with his wife in a house purchased with money which he had given her for the purpose did not amount to enforceable legal rights so as to satisfy the requirement described by Lord *Sumner*, because they were not rights connected with the property.

The wording of the South Australian enactment differs substantially from the English section, but, assuming that the words " to the entire exclusion of the person making the disposition " should receive the same construction as in the English provision, it does not appear that by the use of the expression " derived from some enforceable right " Lord *Sumner* meant to exclude such a case as the present. He was dealing with an argument that the physical presence of the donor upon land in a way advantageous to him was enough to make the gift dutiable. He used the expression to make it clear that physical acts in relation to the thing given were not enough. If in *Seccombe's Case* (2) the donor had been allowed to resume the exclusive occupation and enjoyment of the land given, although only during the will of the donee, it is not likely that Lord *Sumner* would have considered that the gift was not liable to duty. The distinction upon which Lord *Dunedin* relied may perhaps be described as that between the benefit derived from physical presence upon land as a place of habitation and enjoyment arising from the

(1) (1915) 19 C.L.R. 669.

(2) (1911) 2 K.B. 688.

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exercise of a full control characteristic of possessory or proprietary rights; what *Griffith* C.J. in *Union Trustee Co.* v. *Webb* (1) called "independent possession and enjoyment of a right, and not such enjoyment as a man has of a friend's garden to which he is admitted as a guest, or of a public garden or park, or of his wife's or son's house or garden." The phrase "derived from some enforceable right" has its own difficulties, but it evidently was not intended to exclude cases in which the donor resumed full possession and enjoyment of the property given although holding at the will only of the donee. It could not be said in such a case that the donee had retained possession and enjoyment to the entire exclusion of the donor. The expression "possession and enjoyment" must be understood as referring to that possession and enjoyment of which the property according to its nature admits (see per *Isaacs* J., *Lang* v. *Webb* (2); per *Higgins* J., *Commissioner of Stamp Duties* v. *Thomson* (3)). The expression in the South Australian enactment "beneficial interest and possession" must also be thus understood.

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

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

The second ground relied upon was that upon a full consideration of sec. 18 it should be held to apply only to colourable dispositions and not to impose tax upon gifts made bona fide. In support of this contention, *Commissioner of Stamp Duties* v. *Byrnes* (4) was cited. But the explanation of that decision lies in the fact that when it was given the analogous provision of the New South Wales legislation, namely, sec. 49 (2) (*b*) of the *Stamp Duties Act*, applied

(1) (1915) 19 C.L.R., at p. 675.
(2) (1912) 13 C.L.R., at p. 516.
(3) (1927) 40 C.L.R., at p. 416.
(4) (1911) A.C. 386.

only to personalty whereas the appeal related to a disposition of realty. This contention is not well founded. The provisions of sec. 18 must be applied to dispositions which fall within the description it contains, whether colourable or not.

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

The second suggestion arose from the fact that one mortgage was paid off before the father obtained control. The moneys were invested in another form of security. As the thing given had ceased to exist as an identical piece of legal property, the question was raised whether a benefit derived only from its proceeds could be considered within the terms of the enactment. But in this case there was one transaction, one gift, although relating to various items of property and therefore carried out by more than one instrument. The disposition must be considered as one and so as an entirety. So considered the enjoyment by the disponor of the large amount of property remaining in existence in specie brings the entire gift under liability to duty: see *Attorney-General* v. *Seccombe* (1) and *Lang* v. *Webb* (2).

For these reasons the appeal should be dismissed.

STARKE J. By an Act of South Australia relating to succession duties (1923, No. 1576) a duty is imposed upon the net value of any property disposed of by conveyance, assignment, gift, transfer or other non-testamentary disposition of property immediately upon

(1) (1911) 2 K.B., at p. 699. (2) (1912) 13 C.L.R., at pp. 514-515.

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such disposition and irrespective of the time of the death of the person making the same, if the person taking under such disposition does not, immediately upon the disposition, bona fide assume the beneficial interest and possession of such property and thenceforward retain such interest and possession to the entire exclusion of the person making such disposition and without reservation to such person of any benefit from or interest in such property by contract or otherwise (sec. 10). The provision finds its counterpart in English legislation (which may be found in *Hanson* on *Death Duties*, 6th ed., p. 96), but in slightly different form.

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

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

In my opinion, this last conclusion is right and cannot be disturbed. *De facto*, the father had, and to the entire exclusion of his son, the use, enjoyment and possession of the whole of the property the

subject of the disposition, from April 1925 until his death. The case falls, apparently, within the precise words of the statute. A conveyance, assignment or gift has been made to the son, and yet the father—the donor—is found in receipt of the whole of the income of the property the subject of the conveyance or gift, and dealing with it just as if he were the owner. He is not entirely excluded from possession or enjoyment of the property: on the contrary, he entirely excludes the son, with the latter's consent, from such possession and enjoyment. The case, it is said, however, falls outside the section because the father's use and enjoyment of the property in and after April 1925 was not a benefit which was part of his property before the disposition, or an enjoyment derived from any enforceable right (*Lord Advocate* v. *Stewart* (1); *Attorney-General* v. *Seccombe* (2); *Union Trustee Co.* v. *Webb* (3)). But in these cases, the inquiry was whether certain acts on or in connection with the property the subject of the disposition were or were not consistent with bona fide possession and enjoyment thereof always remaining in the donee. In *Stewart's Case* the donor was allowed certain privileges as a guest, and that, it was held, did not deprive the donee of the entire and exclusive possession of the property the subject of the disposition. *Seccombe's Case* was similar. In the *Union Trustee Case* the presence of a husband in a house purchased by his wife with moneys provided by him was held not to deprive the wife of the entire and exclusive possession of the home. But if the cedent or donor is allowed the full control, dominion, use and enjoyment of the property ceded or given, then, despite some general language in the cases cited and with reference to the facts of those cases, the question must be decided as the learned Chief Justice decided it in the present case.

The appeal ought to be dismissed.

*Appeal dismissed with costs.*

Solicitor for the appellant, *J. J. Daly.*

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

H. D. W.

(1) (1906) 8 F. (Ct. of Sess.) 579.
(2) (1911) 2 K.B. 688.
(3) (1915) 19 C.L.R. 669.