

For these reasons we think the provision under which the respondent was prosecuted is void.

The appeal will be dismissed with costs.

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PERRETT.

Appeal dismissed with costs.

Solicitors for the appellant, *Nicol Robinson & Fox*, for *S. E. Gatfield*, Goomeri.

Solicitors for the respondent, *Leonard Power & Power*, for *Bond & Wagner*, Kingaroy.

B. J. J.

Foll
Stamps,
Commissioner
of (Qld.) v
Counsell
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CLR 248

[HIGH COURT OF AUSTRALIA.]

FAIRBAIRN APPELLANT ;

AND

COMPTROLLER OF STAMPS (VICTORIA) . RESPONDENT.

Stamp Duties—Deed of settlement—Australian consolidated inscribed stock—Transfer not in prescribed form—Transfer of equitable interest—Statutory exemption from duty—“ Document relating to . . . the transfer . . . of any stock ”—Equitable transfer not within exemption—Commonwealth Inscribed Stock Act 1911-1933 (No. 20 of 1911—No. 5 of 1933), sec. 52A—Stamps Act 1928 (Vict.) (No. 3775), sec. 17, Third Schedule.

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MELBOURNE,
May 15 ;
Aug. 12.

Rich, Starke,
Dixon, Evatt
and McTiernan
JJ.

A deed of settlement otherwise dutiable under the *Stamps Act* 1928 (Vict.) purported to transfer Australian consolidated inscribed stock to a trustee upon the terms of the settlement. The transfer was not in the form prescribed by the *Commonwealth Inscribed Stock Act*, and consequently did not operate to vest in the trustee the legal property in the inscribed stock.

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Held that, as the deed of settlement transferred only the equitable interest in the stock, it was not a "document relating to the . . . transfer . . . of any stock" within the meaning of sec. 52A of the *Commonwealth Inscribed Stock Act* 1911-1933, as that provision applied only to transfers of legal interests, and that the deed of settlement was consequently not exempted from stamp duty under the *Victorian Stamps Act* 1928 by sec. 52A of the *Commonwealth Inscribed Stock Act*.

CASE STATED.

A case stated pursuant to the *Stamps Act* 1928 (Vict.) at the request of George Patrick Fairbairn, the settlor of the settlements in question, and referred to the High Court pursuant to sec. 40 of the *Judiciary Act* 1903-1927 for the determination of the question raised by the special case, was substantially as follows:—

1. On 12th September 1934 an indenture was made between George Patrick Fairbairn, the settlor, of the one part, and the Union Trustee Co. of Australia Ltd., the trustee, of the other part. The indenture recited that the settlor was possessed of and entitled absolutely to the investments and securities specified in the schedule and that in consideration of natural love and affection for his wife the settlor was desirous of settling such investments and securities and had agreed to transfer and assign the same to the trustee to be held upon the trusts thereafter declared. The indenture witnessed that in pursuance of the said agreement the settlor did thereby transfer and assign unto the trustee the investments and securities and all his right, title and beneficial interest therein and covenanted to execute and deliver all such other deeds, documents and writing as might be requisite for the purpose of effectually vesting the investments and securities in the trustee. The indenture then proceeded to declare the trusts which in substance were for the wife for life with a conditional limitation against alienation, and after her death, for the children of the marriage who attained twenty-one in equal shares, and, if there were no such children, upon the trusts appointed by the settlor under a general power, and, in default of its exercise, to his next of kin. The schedule to the indenture included Australian consolidated inscribed stock at 4 per cent having a face value of £15,000.

2. The Australian consolidated inscribed stock specified in the schedule to the deed was not by the prospectus relating to the loan

in respect of which it was issued declared to be liable to stamp duty or other tax under any law of the Commonwealth or a State. H. C. OF A. 1935.

3. Regulations under the *Commonwealth Inscribed Stock Act* 1911-1933, a copy of which formed part of the case, prescribed forms for the transfer of, and other transactions in connection with, stock inscribed under the Act. FAIRBAIRN v. COMPTROLLER OF STAMPS (VICT.).

4. On 17th September 1934 Messrs. Blake & Riggall, solicitors for George Patrick Fairbairn, produced the said deed of settlement to the Comptroller of Stamps and required him to express his opinion with reference to such deed of settlement upon the questions:—

(a) Whether it was chargeable with any duty.

(b) With what amount of duty it was chargeable.

5. On 24th September 1934 Messrs. Blake & Riggall produced a letter from Messrs. Clarke & Co., stockbrokers of Collins Street, Melbourne, stating the value per £100 face value of the Australian consolidated inscribed stock specified in the schedule to the said deed of settlement as at the date of the said deed of settlement, and at such valuation the total value of the said Australian consolidated inscribed stock was £16,195 10s.

6. On 26th October 1934 the Comptroller of Stamps gave his opinion that the deed of settlement was chargeable with duty, and assessed the amount of stamp duty with which it was chargeable at £485 17s. being duty at the rate of £3 per cent on £16,195 10s., the value of the Australian consolidated inscribed stock settled pursuant to the terms of the deed of settlement.

7. On 16th November 1934 George Patrick Fairbairn being dissatisfied with the assessment of the Comptroller of Stamps, Messrs. Blake & Riggall on his behalf paid the amount of stamp duty so assessed to the Comptroller of Stamps and on the same day for the purpose of appealing against such assessment to the Supreme Court required the Comptroller of Stamps to state and sign a case setting forth the questions upon which his opinion was required and the assessment made by him.

8. In compliance with the requisition in this behalf and pursuant to sec. 33 of the *Stamps Act* 1928 the Comptroller of Stamps under the said Act stated this case.

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The question for the opinion of the Court was :

Was the Comptroller of Stamps right in making the said assessment ?

A case was also stated with regard to a settlement made in similar terms by the settlor upon his daughter of an amount of Australian consolidated inscribed stock valued at £10,905.

Latham K.C. (with him *Tait*), for the appellant. The duties imposed by sec. 17 of the *Stamps Act* 1928 are stamp duties on instruments, and the indentures of settlement are documents relating to transfers of stock (*Collector of Imposts (Vict.) v. Peers* (1)). By the amendment to sec. 52A, effected by the *Commonwealth Incribed Stock Act* 1927, it was intended to extend the exemption to documents other than those actually effecting transfer. The Act was further amended in 1932, and the history of sec. 52A shows that it is directed to a more extensive class of document than those provided in the forms to the Act. The exemption extends beyond commercial transactions, and the effect of sec. 52A is to remove from the sphere of taxation by the States all documents relating to the transfer of Commonwealth stock, unless the securities themselves are declared to be liable by the prospectus under which they are issued. The particular stock dealt with was not declared liable to duty by the prospectus under which it was issued. This is a deed relating to a transfer of stock. An agreement which transfers stock or an agreement which transfers an equitable interest in stock falls within the exemption and is not liable to stamp duty. This is a stamp duty which is sought to be imposed. *Perpetual Trustee Co. v. Federal Commissioner of Taxation* (2) was decided before the latest amendment to the Act was passed. Settlement duty is plainly a stamp duty within the meaning of this Act (*Counsell v. Commissioner of Stamps* (3)). This case also decided that transfer includes equitable transfer. The section is within the constitutional powers of the Commonwealth (*Amalgamated Society of Engineers v. Adelaide Steamship Co.* (4) ; *D'Emden v. Pedder* (5)).

(1) (1921) 29 C.L.R. 115.

(2) (1932) 47 C.L.R. 402.

(3) (1929) Q.S.R. 99, at p. 111.

(4) (1920) 28 C.L.R. 129.

(5) (1904) 1 C.L.R. 91.

Fullagar K.C. (with him *Herring*), for respondent. This case is not touched by sec. 52A, but if it is within that section, the section is beyond the powers of the Commonwealth Parliament. The case really falls outside sec. 52A. It is only documents actually transferring or documents incidental to an actual legal transfer which come within sec. 52A. It refers to portions of a chain of title. Equitable interests are recognized by the Act which leaves their enforcement to State law. The whole question of the devolution of Commonwealth stock is left to State law by the provisions of secs. 23-32. Sec. 52A is thus in no way inconsistent with State law, but it marks out the limits beyond which the States may not go. By necessary implication the States may do all else not prohibited. On the other hand, if sec. 52A does exempt these documents, it is unconstitutional and void (*Caron v. The King* (1)). The Commonwealth had no power to prevent the State from passing legislation imposing a stamp tax on transfers of stock in Commonwealth loans. The Commonwealth power cannot go beyond defining exclusively the relation between it and its lenders. The State can only be prohibited to the extent of forbidding it from interfering in the actual relation established between the Commonwealth and its obligees, such as the making of entries in the register. A settlement of property does not affect the Commonwealth in any way. The State cannot be prevented from taxing such transactions so long as it leaves alone the relation between the Commonwealth and the lender.

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Coppel, for the Commonwealth, intervening. Sec. 51 (iv.) of the Constitution gives power to make laws with respect to borrowing money on the public credit of the Commonwealth, and sec. 52A is a valid exercise of the Commonwealth legislative power and is *intra vires*. The Commonwealth could create or recognize the distinction between the legal and beneficial title, and could regulate the transmission of both the legal and beneficial interest in the obligation. Those powers would be incidental to the power to borrow money on the credit of the Commonwealth, and if the Commonwealth said it would grant to every holder of this right, a right to transfer free of

H. C. OF A. any impediment that would be within the power of sec. 51 (iv.) of
 1935. Constitution, and in so far as the State Act impeded any free
 SATRN transfer it would infringe sec. 109 of the Constitution (*The Common-*
 v. *wealth v. Queensland* (1)). If, in the *Commonwealth Inscribed*
 COMPTROLLER OF STAMPS *Stock Act*, the Commonwealth Parliament has prescribed that
 (VICT.) transfers of Commonwealth stock should be free of any impediment,
 then a stamp duty imposed by a State on transactions generally is
 inconsistent with the Commonwealth Act to the extent to which it
 interferes with the latter Act. Sec. 52A is wide enough to include
 transfers of the beneficial interest, and is not limited to registrable
 documents.

Latham K.C., in reply. No transfer can be separated from the
 interest which it creates. Anything which is a transfer must create
 an interest in the transferee. Equitable interests would be covered
 by 13 Eliz. c. 5, though they are not mentioned in the statute. The
 Court must always consider the purpose of the legislation. [Counsel
 also referred to *The Commonwealth v. Queensland* (2) and to
Willoughby on the Constitution of the United States, 2nd ed. (1929),
 vol. 1, pp. 155-157.]

Cur. adv. vult.

Aug. 12.

The following written judgments were delivered :—

RICH, DIXON, EVATT AND McTIERNAN JJ. The question raised
 for decision by this case stated is whether an indenture is liable to
 stamp duty under the Victorian *Stamps Act* 1928. The instrument
 is voluntary and settles property and so, prima facie, falls within
 the operation of that part of the Third Schedule of the *Stamps Act*
 which imposes a duty on settlements and deeds of gift. But the
 property settled comprises nothing but Australian consolidated
 inscribed stock.

It is contended for the appellant that sec. 52A of the *Commonwealth*
Inscribed Stock Act 1911-1933 relieves the instrument from liability
 to stamp duty. That section provides that stock certificates, stock
 certificates to bearer, scrip certificates to bearer, Treasury bonds

(1) (1920) 29 C.L.R. 1.

(2) (1920) 29 C.L.R., at pp. 5, 6.

and coupons, debentures and other prescribed securities, and documents relating to the purchase, sale, transfer or transmission of any stock, Treasury bonds, debentures or other prescribed securities, shall not be liable to stamp duty or other tax under any law of the Commonwealth or a State unless they are declared to be so liable by the prospectus relating to the loan in respect of which they are issued or used. No such declaration was made in reference to the Australian consolidated inscribed stock, the subject of the settlement. The appellant's contention is that the settlement is a document relating to the transfer of stock within the meaning of this provision. The indenture is made between the settlor of the one part, and the trustee of the other part. It recites that the settlor, in consideration of natural love and affection for his wife, is desirous of making the settlement and has agreed to transfer and assign the securities to the trustee upon the trusts thereafter declared. It witnesses that, in pursuance of the said agreement, the settlor thereby doth transfer and assign unto the trustee the securities, and covenants to execute and deliver such other deeds and documents as may be requisite for the purpose of effectually vesting the securities in the trustee. It then proceeds to declare the trusts, which briefly stated, are for the wife for life with a conditional limitation against alienation, and after her death for the children of the marriage, who attain twenty-one, in equal shares, and, if there be no such children, upon the trusts appointed by the settlor under a general power, and, in default of its exercise, to his next of kin.

The purported transfer and assignment of the stock could not operate to vest in the trustee the legal property in the inscribed stock. For under secs. 24 to 26 of the *Commonwealth Inscribed Stock Act* 1911-1933 a transfer is to be made by an instrument in the prescribed form. Sec. 18 provides that the person, whose name is inscribed in the stock ledger as the owner, shall be deemed to be the owner of the stock and shall have power to dispose of and transfer the stock in the manner provided in the Act. Sec. 19 provides that no notice of any trust shall be received by the Registrar or entered in any stock ledger. Clause 25 of the *Commonwealth Inscribed Stock Regulations* provides that transfers of stock may be

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made from one person to another, and prescribes a form consisting in a simple assignment and transfer signed by the transferor and an acceptance signed by the transferee.

The settlement, is, therefore, not a transfer within the meaning of sec. 52A. The question is whether it falls within the vague words "documents relating to the . . . transfer . . . of any stock." These words occur in the phrase "documents relating to the purchase, sale, transfer or transmission of any stock, Treasury bonds, debentures or other prescribed securities." Secs. 7 and 51B of the Act refer to the issue and sale by the Treasury of stock, Treasury bonds and other prescribed securities. Secs. 23 to 27 refer to the transfer of stock by registration and sec. 36 to its transfer by delivery of bearer certificates. Sec. 51B incorporates the *Treasury Bills Act* 1914-1915, sec. 5 of which applies to make Treasury bonds transferable by delivery. Secs. 28 to 31 of the *Commonwealth Inscribed Stock Act* refer to transmissions. Transmissions are effected by registration on application to the Registrar supported by affidavit. They may result from death or from bankruptcy. The regulations provide, not only for transfers, but also for applications to purchase stock (clause 10), for transmissions (clauses 27 to 33A), and for applications to purchase Treasury bonds (clause 66). Forms are prescribed for applications, registrations, receipts, notifications, and other documents "relating to" these transactions.

There can be no doubt that the primary object of sec. 52A was to protect all these documents from liability to stamp duty. Every description of document enumerated in the section is satisfied by some form prescribed in the regulations. In particular a number of documents prescribed answers the description "documents relating to the purchase, sale, transfer or transmission of any stock" &c. Moreover, the Act alludes to the very matters for which these forms are prescribed. It does not, of course, follow that the words have no larger denotation. But, in reference to vague and elastic words like "relating to," the existence of specific things to which they evidently refer may legitimately be considered for the purpose of deciding in what sense they are used. It does not appear to be intended to protect from duty all documents connected with any transaction which leads to a transfer or transmission. For instance,

the words would not include an order of sequestration. Nor would they, it would seem, include letters of administration.

The settlement in the present case declares the trusts on which the transferee takes the settled property, and expresses an intention to transfer the securities to the trustee. But it forms no part of the documentary machinery which produces an actual transfer or records its consequences. Its operation does not "relate to" the divesting of the legal title of the transferee and the vesting of it in the trustee. Its operation "relates to" the equitable interests intended to be created. Its text may have reference to a transfer of the property in the stock. But this is not enough to give the instrument immunity from duty. The connection between the operative effect of the instrument considered as a settlement and the transfer of the stock is not close enough to come within the description of the words of sec. 52A. It is more accurate to say that the transfer of the stock "relates to" and is an incident of the settlement than that the settlement "relates to" or is an incident of the transfer of the stock. For these reasons sec. 52A does not save the indenture from stamp duty.

The claim for immunity was not based upon any other ground. But, to avoid misunderstanding, it may be desirable to add the following observations. Sec. 20 states that it is the intention of the Act that equitable interests may be enforced against the owners of stock in the same manner as in respect of any other personal property. No doubt this statement may be relied on as importing an intention that such equitable interests may be created. But, although the provision may contemplate the possibility of trusts and equities coming into existence, it does not of its own force confer a right or power to create them. Sec. 20 does no more than place the securities in the same category as other personal property with reference to trusts and equitable interests. The creation of such interests is governed by State law, and it is upon this law the settlement of the securities depends. At any rate, it was not contended that the creation of the trust depended upon the exercise of any right or power conferred by Federal law. Nothing in this judgment involves the consequence that, when Federal law confers a power

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or right to create a proprietary interest, State law may nevertheless tax the assurance by which it is done.

The question in the case stated should be answered : Yes.

STARKE J. Cases stated pursuant to the *Stamps Act* 1928 (Vict.), and removed into this Court pursuant to sec. 40 of the *Judiciary Act* 1903-1927.

In September of 1934, George Patrick Fairbairn executed two indentures of settlement, one in favour of his wife, the other in favour of his daughter, each expressed to be in consideration of the natural love and affection for his wife and daughter respectively. By the former, the settlor transferred and assigned unto a trustee £15,000 Australian consolidated inscribed stock, and his right, title and beneficial interest therein, upon trust to pay the net annual income to his wife during her life, and ultimately as to capital as well as income, for the children of the settlor and his wife attaining the age of twenty-one years in equal shares as tenants in common ; the settlor also covenanted to execute and deliver all such other deeds, documents and writings as might be requisite for the purpose of effectually vesting the said investments and securities in the trustee. By the latter, the settlor made a like transfer and assignment to the trustee of £10,000 Australian consolidated inscribed stock upon trust for the maintenance of his daughter until she attained the age of twenty-one years, and upon her attaining that age to pay the whole of the income to his daughter for life and ultimately as to capital as well as income to her children, with gifts over if no children ; this settlement also contained a like covenant to that contained in the other settlement. In each settlement, too, power was reserved to revoke or alter any of the trusts or authorities comprised therein, but so that neither the settlor nor his estate benefited thereby.

Admittedly these settlements were subject to stamp duty imposed by the *Stamps Act* 1928 (Vict.), unless the provision of the *Commonwealth Inscribed Stock Act* 1911-1932 protected them. Sec. 52A of the latter Act provides : “ Stock certificates, stock certificates to bearer, scrip certificates to bearer, Treasury bonds and coupons, debentures and other prescribed securities, and documents relating

to the purchase, sale, transfer, or transmission of any stock, Treasury bonds, debentures or other prescribed securities, shall not be liable to stamp duty or other tax under any law of the Commonwealth or a State unless they are declared to be so liable by the prospectus relating to the loan in respect of which they are issued or used." No such declaration was made in respect of the stocks the subject of the settlements now in question.

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The protection was originally limited to "transfers of stock or treasury bonds" (Act 1915 No. 26, sec. 5), but was enlarged, and the provision enacted in its present form by the Acts 1927 No. 2 and 1932 No. 25. But it is not reasonable to suppose that the protection, as it now exists, extends to every document referring to or remotely connected with the transfer of stock or other prescribed securities. The generality of the exception must be confined by the purpose of the Act, and read in connection with its other provisions. The Act makes elaborate provisions for the issue and sale of stock and other securities, for their redemption by purchase, &c., for their transfer and transmission, for powers of attorney in relation thereto, and so forth. Various forms are also prescribed by the regulations under the Act, all for use in connection with transactions in, or required to be registered in, the office of the Registrar of stock. These provisions give a clue to the meaning of the words "documents relating to the . . . sale transfer or transmission of any stock or . . . other . . . securities," and suggest the limitation that should be put upon those words. Shortly stated, the protection is limited to documents relating to transactions and registrations recognized by the Act, and documents connected therewith, such, for instance, as the forms prescribed by the rules. The purpose of the section is to protect Commonwealth securities from stamp duties, or impositions other than those sanctioned by the Commonwealth. But it is not necessary for that purpose to protect documents effecting mercantile or other contracts in relation to such stock or other securities, or settlements by parties holding the same. The settlements here in question do not by their own force vest any legal right to the stock in the trustee, nor are they recognized by the Act; they are incapable of registration under the Act, for they are not in the prescribed form, and disclose trusts which cannot

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be entered in the stock ledger or be otherwise noticed by the Registrar of stock. It is true that the settlements confer upon the trustee the right to call for a transfer of the stock, and govern the beneficial interests in the stock upon transfer and the inscription of the name of the trustee in the stock ledger. But, for the reasons assigned, they are not documents relating to the transfer of the stock according to the true construction and proper meaning of sec. 52A of the Act. The validity of the Act, upon the construction which I have adopted, is clear.

The questions stated in each case should be answered in the affirmative.

Question in each case answered : Yes. Appellant to pay the costs in the High Court and in the Supreme Court in both cases. Order to be dated back to 16th May 1935 (the last day of argument) the appellant having died after the conclusion of the argument and before the delivery of judgment.

Solicitors for the appellant, *Blake & Riggall*.

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria.

H. D. W.