[HIGH COURT OF AUSTRALIA.]

COMMISSIONER OF STAMPS (QUEENSLAND) APPELLANT;

AND

COUNSELL . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1937.

BRISBANE, *June* 23, 24.

SYDNEY, *Aug.* 13.

Latham C.J., Rich and McTiernan JJ.

Commonwealth Inscribed Stock—Exemption of transfer from taxation—Declaration of trust by holder—Whether transfer of stock—Commonwealth Inscribed Stock Act 1911-1918 (*No.* 20 *of* 1911—*No.* 7 *of* 1918), *sec.* 52A.

Personal Property—Taxation—Gift duty (*Q.*)—*Personal property situated outside Queensland—Duty imposed by legislation founded on domicil—Validity—Gift Duty Act of* 1926 (*Q.*) (17 *Geo. V. No.* 23), *secs.* 3*, 23.

An indenture whereby the holder of Commonwealth inscribed stock declares himself a trustee thereof is not a transfer of stock within the meaning of sec. 52A of the *Commonwealth Inscribed Stock Act* 1911-1918 and, accordingly, is not exempted by that section from gift duty under the *Gift Duty Act of* 1926 (Q.).

Fairbairn v. *Comptroller of Stamps* (*Vict.*), (1935) 53 C.L.R. 463, followed.

Domicil in a territory constitutes a sufficient connection with that territory to enable its legislature to impose a tax on personal property situated outside the territory of persons so domiciled. Consequently sec. 3 of the *Gift Duty Act of* 1926 (Q.) is a valid exercise of the powers of the Queensland Parliament.

Decision of the Supreme Court of Queensland: *Counsell* v. *Commissioner of Stamps*, (1929) Q.S.R. 99, varied.

* Sec. 3 of the *Gift Duty Act of* 1926 (Q.) provides:—"(1) Subject to this Act there shall be levied and paid to His Majesty a duty (in this Act referred to as "gift duty") in respect of every gift which is made after the commencement of this Act. (2) Gift duty shall be payable in respect of all property situated in Queensland at the time when the gift is made, although the donor may not have his domicil in Queensland. (3) For the purposes of gift duty the local situation of property shall be determined in manner following:—(*a*) If the donor is domiciled in Queensland at the time when the gift is made or is a body corporate incorporated in Queensland, all personal property comprised in the gift, whether situated inside or outside Queensland, shall be deemed to be situated in Queensland."

APPEAL from the Supreme Court of Queensland.

Charles Frederick Counsell, being domiciled in Queensland, on 13th July 1926 executed an indenture whereby in consideration of natural love and affection he declared himself a trustee (until transfers thereof should be duly made) for his children of, *inter alia*, Commonwealth inscribed stock issued under the *Commonwealth Inscribed Stock Act* 1911-1918 and not made subject to State taxation by the prospectus ; South Australian inscribed stock, shares in companies incorporated and registered outside Queensland, and debts secured by mortgages on lands in South Australia, the mortgagors being resident out of Queensland. The Commissioner of Stamps assessed duty under the *Gift Duty Act of* 1926 on the property mentioned in the indenture. Counsell appealed to the Full Court of Queensland which held that the gift of Commonwealth inscribed stock was a transfer within the meaning of sec. 52A of the *Commonwealth Inscribed Stock Act* and was not liable to duty, and that in so far as the other property was concerned gift duty was payable : *Counsell* v. *Commissioner of Stamps* (1).

The Commissioner of Stamps appealed to the High Court in so far as the gift duty on the Commonwealth inscribed stock was concerned. The respondent cross-appealed as to the validity of the gift duty claimed on the other property.

P. L. Hart (with him *E. T. Real*), for the appellant. Gift duty is payable on the Commonwealth inscribed stock under the *Gift Duty Act of* 1926. The indenture is not a transfer of the stock within the meaning of sec. 52A of the *Commonwealth Inscribed Stock Act* 1911-1918 (*Fairbairn* v. *Comptroller of Stamps* (*Vict.*) (2)). The word " transfer " in sec. 52A means legal transfer, that is, the prescribed document of transfer signed by the transferor and the transferee. *Fairbairn's Case* is indistinguishable from this case and the decision in that case was not the result of amendments to the Act since the year 1918.

McGill K.C. (with him *Fahey*), for the respondent. The case of *Fairbairn* v. *Comptroller of Stamps* (*Vict.*) (2) is distinguishable. That case was decided on sec. 52A as amended by later

(1) (1929) Q.S.R. 99.

(2) (1935) 53 C.L.R. 463.

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legislation. The grounds of the decision in that case were the words appearing in the later legislation. The transaction of transfer is exempted from duty by the statute. The instrument creating the gift is also exempt. The words "transfer of stock" in sec. 52A cannot be limited to the actual transfer prescribed by the Act but would also include an equitable transfer and the instrument creating the equitable transfer. The only question arising in *Fairbairn's Case* (1) was whether the document related to the transfer of stock. The section does not apply to the actual transfer of stock, as no document has been prescribed by the Act. *Fairbairn's Case* was a decision on words added to the section by later legislation. Gift duty is a stamp duty or other tax. The other property comprised in the gift was outside Queensland and so is not subject to taxation by the Parliament of Queensland (*Perpetual Trustee Co. (Ltd.)* v. *Federal Commissioner of Taxation* (2)). Sec. 3 (3) of the *Gift Duty Act* cannot make domicil the foundation of liability to tax. If the legislature can choose domicil for this tax it can make domicil the basis of any tax including income tax. It is not a law for the peace, order and welfare of the State and is contrary to the Constitution. A law imposing death duties based on domicil may be justified. Domicil is not sufficient nexus for other forms of taxation (*Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (3) ; *Burgin and Fletcher, Conflict of Laws*, 2nd ed. (1934), p. 117 ; *Commissioner of Stamps (Q.)* v. *Wienholt* (4)). The *Gift Duty Act* must be construed with a territorial limitation. The person or thing to be taxed must be within the territory. Sec. 3 (3) in selecting domicil selects a person who may have no connection with Queensland whatsoever. Domicil is expressly chosen and there can be no severability of any of the sections of the *Gift Duty Act* and the whole Act is invalid (*Blackwood* v. *The Queen* (5) ; *Udny* v. *Udny* (6) ; *Bell* v. *Kennedy* (7) ; *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (8) ; *Broken Hill South Ltd.* v. *Commissioner of Taxation (N.S.W.)* (9) ; *Commissioner of Stamp*

(1) (1935) 53 C.L.R. 463.
(2) (1932) 47 C.L.R. 402, at p. 411.
(3) (1933) 49 C.L.R. 220, at pp. 226, 241.
(4) (1915) 20 C.L.R. 531.
(5) (1882) 8 App. Cas. 82.
(6) (1869) L.R. 1 Sc. & Div. 441, at p. 457.
(7) (1868) L.R. 1 Sc. & Div. 307, at p. 320.
(8) (1933) A.C. 378.
(9) (1937) 56 C.L.R. 337.

Duties (N.S.W.) v. *Millar*; *Millar* v. *Commissioner of Stamp Duties (N.S.W.)* (1); *Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.* (2); *Owners of S.S. Kalibia* v. *Wilson* (3); *In re Initiative and Referendum Act* (4); *Attorney-General for Ontario* v. *Reciprocal Insurers* (5)).

Hart, in reply. The *Gift Duty Act* is within the power of the Parliament of Queensland (*Croft* v. *Dunphy* (6); *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (7); *Attorney-General* v. *Australian Agricultural Co.* (8); *In re J. A. Sellar* (9); *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (10)). Domicil is sufficient nexus for all classes of legislation. The *Gift Duty Act* is clearly within the competence of the Parliament of Queensland (*Royal Trust Co.* v. *Attorney-General for Alberta* (11); *English Scottish and Australian Bank Ltd.* v. *Inland Revenue Commissioners* (12); *Harding* v. *Commissioners of Stamps for Queensland* (13); *Re Silas Harding's Will* (14)).

Cur. adv. vult.

Aug. 13.

The following written judgments were delivered :—

LATHAM C.J. This matter comes before the court by way of appeal and cross-appeal from a judgment of the Full Court of the Supreme Court of Queensland of 8th May 1936. The appeal raises the question whether a certain gift of Commonwealth stock is taxable under the *Gift Duty Act of* 1926 of Queensland. The Supreme Court decided that sec. 52A of the *Commonwealth Inscribed Stock Act* 1911-1918 prevented the imposition of gift duty in respect of the stock.

The gift was made by an indenture dated 13th July 1926. By this indenture Charles Frederick Counsell declared, in consideration of his natural love and affection for the donees, that until transfers

(1) (1932) 48 C.L.R. 618, at p. 628.
(2) (1932) 48 C.L.R. 391, at p. 444.
(3) (1910) 11 C.L.R. 689.
(4) (1919) A.C. 935, at pp. 944, 945.
(5) (1924) A.C. 328, at p. 346.
(6) (1933) A.C. 156.
(7) (1933) A.C. 378, at pp. 386, 388.
(8) (1934) 34 S.R. (N.S.W.) 571; 51 W.N. (N.S.W.) 197.
(9) (1925) 25 S.R. (N.S.W.) 540; 42 W.N. (N.S.W.) 161.
(10) (1933) 49 C.L.R., at p. 237.
(11) (1930) A.C. 144, at pp. 150, 151.
(12) (1932) A.C. 238.
(13) (1898) A.C. 769.
(14) (1896) 7 Q.L.J. 126.

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should have been duly made of (*inter alia*) certain Commonwealth inscribed stock he should stand possessed of the said stock upon trust for the donees as tenants in common in equal shares.

Sec. 2 of the *Gift Duty Act* defines "disposition of property" to include the creation of a trust of property. "Gift" is defined to mean and include any disposition of property which is made otherwise than by will (with or without an instrument in writing) without fully adequate consideration in money or money's worth passing from the disponee to the disponor.

There is no doubt that a gift was made to the donees by the indenture in question. It is also clear that the indenture did not convey the legal interest in the stock to the donees. The legal interest was still vested in the donor who held it in trust for the donees.

At the time when the gift was made, sec. 52A of the *Commonwealth Inscribed Stock Act* was in the following form :—"Stock certificates, stock certificates to bearer, scrip certificates to bearer, Treasury bonds and coupons, and transfers of stock or Treasury bonds 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" (*Commonwealth Inscribed Stock Act* 1911, as amended by sec. 5 of the *Commonwealth Inscribed Stock Act* 1915 and sec. 5 of the *Commonwealth Inscribed Stock Act* 1918).

The validity of the section has not been challenged : see *The Commonwealth* v. *Queensland* (1) for a decision upholding the validity of a similar provision. The prospectus of the loan in respect of which the stock was issued did not declare that any of the documents mentioned in the section were liable to stamp duty. The *Gift Duty Act of* 1926 is plainly an Act imposing stamp duty (see sec. 25).

The Supreme Court applied the principle of the decision in *The Commonwealth* v. *Queensland* (1) and further held that the indenture constituted a transfer within the meaning of sec. 52A so that it was not liable to stamp duty under the State law. The reasons for the decision were given on 23rd November 1928, the delay in the drawing up of the judgment and the institution of

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

this appeal being due to causes to which it is unnecessary to refer. In 1935 this court decided the case of *Fairbairn* v. *Comptroller of Stamps* (*Vict.*) (1). The appellant commissioner relies upon the decision in that case for the purpose of showing that the judgment of the Supreme Court on this point is erroneous. When *Fairbairn's Case* was decided, sec. 52A had been amended by Act No. 2 of 1927, sec. 4. " Documents relating to the purchase or sale of stock or Treasury Bonds " were added to the category of documents which were not to be liable to stamp duty. Act No. 25 of 1932 made a further addition by including debentures and other prescribed securities and " documents relating to the . . . transfer or transmission " of any stock, &c. An attempt was made to distinguish *Fairbairn's Case* from the present case by reference to the words added in the two Acts mentioned. In my opinion, however, there is no room for any such distinction. *Fairbairn's Case* was based upon the view of the court that a document which transferred only an equitable interest in stock was not within the meaning of sec. 52A either a transfer of stock or a document relating to the transfer of stock. The only words upon which the respondent can rely for the purpose of procuring exemption under the section as it appeared in the 1911-1918 Act are the words " transfer of stock." *Fairbairn's Case* is decisive against the contention. In my opinion, therefore, the appeal should succeed.

It is now necessary to consider the cross-appeal. The deed of gift included not only Commonwealth inscribed stock but also : (*a*) South Australian Government bonds on the Adelaide register ; (*b*) shares in companies incorporated outside Queensland and on registers outside Queensland ; (*c*) debts secured on South Australian freeholds by mortgages under the *Real Property Acts* of that State and a debt agreed to be so secured by agreement made in that State, the debtors in all cases being resident out of Queensland ; (*d*) a policy of life assurance on the Queensland register of the Australian Mutual Provident Society.

It is not disputed that the policy of life insurance, being property situated in Queensland, is taxable under the Act. It is, however, contended that the other property covered by the indenture—

(1) (1935) 53 C.L.R. 463.

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(*a*), (*b*) and (*c*)—as well as the Commonwealth inscribed stock, is not situated in Queensland and that the Act is not valid in its application to such property.

In order to deal with this contention it is necessary to consider the provisions of sec. 3 of the Act which, so far as relevant, are as follows :—" (1) Subject to this Act there shall be levied and paid to His Majesty a duty (in this Act referred to as 'gift duty') in respect of every gift which is made after the commencement of this Act. (2) Gift duty shall be payable in respect of all property situated in Queensland at the time when the gift is made, although the donor may not have his domicil in Queensland. (3) For the purposes of gift duty the local situation of property shall be determined in manner following :—(*a*) If the donor is domiciled in Queensland at the time when the gift is made or is a body corporate incorporated in Queensland, all personal property comprised in the gift, whether situated inside or outside Queensland, shall be deemed to be situated in Queensland. . . ."

The donor in this case was domiciled in Queensland. The effect of sec. 3 (3) (*a*), therefore, is that all personal property, wherever situated, comprised in the gift is deemed to be situated in Queensland. It has not been contended that the stock and shares and the interests under the life policy are not personal property. The mortgage debts were secured upon land but they also are personal property for the purpose of succession (*Thornborough* v. *Baker* (1) ; *Tabor* v. *Grover* (2)) and a mortgagee's interest in the mortgaged land is treated as personalty for revenue purposes (*Attorney-General* v. *Worrall* (3)). See also cases mentioned in *McClelland* v. *Trustees Executors and Agency Co. Ltd.* (4), especially *In re Ralston* ; *Perpetual Executors and Trustees Association* v. *Ralston* (5). I therefore deal with the matter upon the basis that all the property included in the gift in this case was personal property. The effect of sec. 3 (2) therefore is that gift duty shall be payable in respect of all the property included in the gift. The question is whether the Parliament of Queensland has power to enact such legislation or whether it is beyond its territorial competence.

(1) (1675) 3 Swans., 628 ; 36 E.R. 1000.
(2) (1699) 2 Vern. 367 ; 23 E.R. 831.
(3) (1895) 1 Q.B. 99.
(4) (1936) 55 C.L.R., 483, at p. 493.
(5) (1906) V.L.R. 689, at p. 694 ; 28 A.L.T. 45, at p. 46.

Sec. 11 of the Act, which contains a proviso introduced by the words " provided that if the gift is made out of Queensland " shows that the legislature intended to deal with all gifts wherever made.

Sec. 23 provides that gift duty shall be a first charge on all property comprised in the gift and that it shall constitute a debt due to the Crown by the donee (as well as by the donor) on the making of the gift. No question arises in this case as to a gift made outside Queensland or as to the validity of sec. 23. The question is whether the Parliament of Queensland has power to impose taxation upon a domiciled Queenslander in relation to a gift made in Queensland of property which is situated outside Queensland.

In the case of property situated outside Queensland the Act selects as the criterion of taxability the domicil of the donor. In my opinion the case is covered by authority. It is not necessary to discuss the general question of the territorial competence of the legislature of a State. *Evatt* J. has examined the question in considerable detail in his judgment in *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1) and *Jordan* C.J. has collected and co-ordinated the principal relevant decisions in *Attorney-General* v. *Australian Agricultural Co.* (2). The fundamental rule is that the legislation of a State Parliament is valid if it is for the peace, welfare and good government of the State (*Croft* v. *Dunphy* (3)).

It is well settled that in the case of death duties the domicil of a deceased person may be adopted as affording a sufficient connection with a territory to justify taxation by the legislature of that territory with respect to the personal property of the deceased person wherever that property may be situated, including even property which has been disposed of by him by gift *inter vivos* before his death (*Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (4)—where it was held that it was " clearly not beyond the constitutional power " of the Commonwealth Parliament to impose such taxation). See also *Jackson* v. *Federal Commissioner of Taxation* (5) where *Isaacs* J. (on behalf of *Knox* C.J., *Starke* J. and

(1) (1933) 49 C.L.R., at pp. 232 et seq.
(2) (1934) 34 S.R. (N.S.W.), at pp. 576 et seq.; 51 W.N. (N.S.W.), at pp. 198, 199.
(3) (1933) A.C. 156.
(4) (1933) 49 C.L.R. 220.
(5) (1920) 27 C.L.R. 503, at p. 508.

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himself) said that "in right of *jus gentium* exercised by statute" the Commonwealth Parliament could tax all the personal property anywhere of a deceased person if that person was domiciled in Australia. Whether a statute operates to tax such property is purely a question of the construction of the statute. There is no rule that the revenue laws of a country cannot extend to the "foreign possessions" of its "subjects" (*Blackwood* v. *The Queen* (1); *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (2)) though there may be difficulties in the way of enforcing them (*Barcelo* v. *Electrolytic Zinc Co. of Australasia Ltd.* (3); *Sydney Municipal Council* v. *Bull* (4); *In re Visser*; *Queen of Holland* v. *Drukker* (5)).

The cases cited all relate to death duties of one kind or another. But the principle that domicil in a territory constitutes sufficient connection with that territory to enable its legislature to tax persons so domiciled is not limited to the case of death duties. The principle as stated in *Commissioner of Stamps, Straits Settlements* v. *Oei Tjong Swan* (6) applies to "revenue laws" generally. This case appears to me to answer the doubt as to the validity of taxation by a State parliament of income derived from outside the State indicated in *Commissioner of Taxes* v. *Union Trustee Co. of Australia* (7); and see *Australasian Scale Co. Ltd.* v. *Commissioner of Taxes* (Q.) (8).

The relevant principle is expressed by *Dixon* J. in *Broken Hill South Ltd.* v. *Commissioner of Taxation* (*N.S.W.*) (9) in the following terms:—"The power to make laws for the peace, order and good government of a State does not enable the State Parliament to impose by reference to some act, matter or thing occurring outside the State a liability upon a person unconnected with the State, whether by domicil, residence or otherwise. But it is within the competence of the State legislature to make any fact, circumstance, occurrence or thing in or connected with the territory the occasion of the imposition upon any person concerned therein

(1) (1882) 8 App. Cas. 82, at p. 96.
(2) (1933) A.C. 378, at p. 386.
(3) (1932) 48 C.L.R., at p. 409.
(4) (1909) 1 K.B. 7.
(5) (1928) Ch. 877.
(6) (1933) A.C. 378.
(7) (1931) A.C. 258, at p. 268.
(8) (1935) 53 C.L.R. 534, at p. 561.
(9) (1937) 56 C.L.R. 337, at p. 375.

of a liability to taxation or of any other liability. It is also within the competence of the legislature to base the imposition of liability on no more than the relation of the person to the territory. The relation may consist in presence within the territory, residence, domicil, carrying on business there, or even remoter connections. If a connection exists, it is for the legislature to decide how far it should go in the exercise of its powers." These principles are applicable to taxation of gifts made in Queensland by persons domiciled in Queensland. I do not think it is necessary to decide anything more in order to deal with the cross-appeal.

For the reasons which I have given the cross-appeal should be dismissed.

When, after long delay, the Supreme Court on 22nd April 1936 gave to the appellant liberty to proceed in the appeal to the Full Court (no judgment having then been entered) a condition was imposed that the commissioner should abide by any order as to costs which the Full Court of the Supreme Court might make, and it was ordered that the commissioner should pay the costs of the appeal to that court, although, except as to the one item of Commonwealth stock, he succeeded upon the appeal. In these circumstances I think that this court should make no order as to the costs of this appeal and that the order of the Supreme Court as to costs should not be varied. The respondent's appeal from the assessment should be wholly disallowed.

Rich J. I have had an opportunity of reading the judgment of the Chief Justice and desire to add only one or two observations with regard to the cross-appeal. We are concerned only with the case of a gift made in Queensland of movables situated outside Queensland by a donor domiciled in Queensland. The operation of sec. 11 (4) and sec. 23 of the *Gift Duty Act* 1926 (Q.), may be laid out of consideration. *Story* in his *Conflict of Laws*, 8th ed. (1883), c. IX., sec. 384, long ago laid down the proposition that " the general rule is, that a transfer of personal property, good by the law of the owner's domicil, is valid wherever else the property may be situate." In commenting upon this rule *Dicey, Conflict of Laws*, 3rd ed. (1922), at p. 569, says that the case law mainly refers to general assignments of

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movables and not to individual assignments as by gift or sale. He goes on to say: "But the validity of such assignments, when made in accordance with the owner's *lex domicilii*, is so uniformly taken for granted by judges and by writers of eminence, such as *Story*, that we may assume that a sale or gift by a person domiciled in England will, at any rate if made in England, be held (if it be in accordance with English law) to be valid as regards goods, wherever situate." Now if by the comity of nations the law of Queensland is recognized as a source of a donor's authority to impart to the donee property in the movables, the subject of the gift, it seems to me to be absurd to refuse to concede to the Queensland legislature the power to impose a tax upon the operation of giving.

I agree with the order proposed by the Chief Justice with regard to the appeal and cross-appeal.

McTIERNAN J. I agree with the judgment of the Chief Justice and the order therein proposed with regard to the appeal and the cross-appeal.

Appeal allowed. Cross-appeal dismissed. Judgment of Supreme Court set aside in so far as it orders that the appeal to the Supreme Court be allowed. Judgment of Supreme Court varied by ordering that the said appeal be dismissed and that the assessment of the commissioner be affirmed. No order as to costs of appeal or cross-appeal to this court.

Solicitor for the appellant, *H. J. H. Henchman*, Crown Solicitor for Queensland.

Solicitors for the respondent, *Cannan & Peterson*.

B. J. J.