[HIGH COURT OF AUSTRALIA.]

TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

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MELBOURNE, *Oct.* 27.

SYDNEY, *Nov.* 21.

Rich, Starke, McTiernan and Williams JJ.

Estate Duty (Cth.)—Gifts within twelve months of donor's death—Gift of cash transmuted into shares—Value for duty purposes—Deductions—State probate duty—Estate Duty Assessment Act 1914-1928 (*No.* 22 *of* 1914—*No.* 47 *of* 1928), *secs.* 3*, 8 (4), 17*—*Administration and Probate Act* 1928 (*Vict.*) (*No.* 3632), *secs.* 173, 178.

Sec. 8 (4) of the *Federal Estate Duty Assessment Act* 1914-1928 provides as follows:—"Property (*a*) which passed from the deceased person by any gift *inter vivos* or by a settlement made before or after the commencement of this Act within one year before his decease: . . . shall for the purposes of this Act be deemed to be part of the estate of the person so deceased."

Within twelve months of his death T. sold his business to a company formed to take it over. T. and each of his sons applied for shares in the company, and portion of the amount received by T. on the sale of the business was used to pay for these shares. T. settled a sum equal to the balance of the purchase money on trust for his wife and daughters, and by the trust instrument the trustee was empowered to invest the money settled in the shares of any company with T.'s approval. The settled money was invested in shares in the company which took over T.'s business. At the date of T.'s death the shares, for which one pound each had been paid, were worth only eighteen shillings each.

* The *Estate Duty Assessment Act* 1914-1928 provides as follows:—Sec. 3: "In this Act, unless the contrary intention appears— . . . 'Debts' includes probate and succession duties payable under any State Act, but does not include voluntary debts." Sec. 17: "For the purpose of assessing the value for duty of the estate of any person dying after the commencement of this Act, all debts due and owing by the deceased at the time of his death and Federal and State land and income taxes which become due and payable after his death and within one year after the payment of duty on any assessment under this Act, shall be deducted from the gross value of the assessable estate if the deceased was at the time of his death domiciled in Australia."

Held that in assessing the estate to duty the value at which the subject matter of the gifts and settlements should be included was the value of the shares as at the date of T.'s death.

The amount actually paid for Victorian probate duty on the estate of T. was the total amount assessed under the *Administration and Probate Act* 1928 (Vict.) less a deduction, allowed under that Act, of the amount of *ad-valorem* duty which had already been paid on settlements of property notionally included in T.'s dutiable estate.

Held that in assessing the estate to Federal estate duty there should be deducted from the gross value of the assessable estate, pursuant to sec. 17 of the *Estate Duty Assessment Act* 1914-1928, only the amount of Victorian probate duty actually paid.

APPEAL from the Federal Commissioner of Taxation.

John Corlett Teare was a hardware merchant carrying on business in Melbourne and elsewhere. In March 1937 Bennie Teare Pty. Ltd. (hereinafter called the company) was incorporated for the purpose of taking over the business. By agreement in writing dated 10th March 1937 Teare agreed to sell his business to the company for £120,000. The company handed a cheque to Teare for £78,000 on account of the purchase money. Teare applied for 42,000 shares of one pound each, and his sons, Athol and Philip, each applied for 18,000 shares of one pound each in the company. The 78,000 shares thus applied for were allotted by the company to the applicants on 2nd April 1937. The cheque for £78,000 given by the company to Teare was given back to the company and accepted by it in payment for the whole of the shares, and was paid into its account.

On 25th June 1937 Teare executed three deeds, whereby he appointed the Trustees Executors and Agency Co. Ltd. trustees of three separate sums of £18,000, £12,000 and £12,000, to be held in trust for the benefit of his wife and two daughters for life respectively, with remainders in each case to the above-mentioned sons. Each deed contained a direction to the trustee company to apply the sums paid to it in purchasing shares in any company selected by the trustee company and approved by Teare. On 25th June 1937 Teare approved of the trustee company investing all the trust moneys in the purchase of shares in the company. On 5th July 1937 the trustee company received three bank cheques, which replaced three cheques for the same amount made out in favour of the bank by the company, at the direction of Teare, in satisfaction of the balance of £120,000. Thereupon, the trustee company applied to the company for 42,000 shares of one pound each, paying therefor with its

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own cheque for £42,000. On 6th July 1937 three parcels of 18,000, 12,000 and 12,000 shares respectively were allotted by the company to the trustee company, and the trustee company was thereafter entered in the company's register as proprietor of these three parcels of shares.

John Corlett Teare died in Melbourne on 22nd October 1937. At the date of his death the one pound shares in the company were worth only eighteen shillings each.

The Commissioner of Taxation assessed the estate of the deceased to estate duty in respect of the sums of £36,000 and £42,000 credited on the shares applied for by the sons and the trustee company respectively. To this assessment the executor, the Trustees Executors and Agency Co. Ltd., objected on the ground that the gifts and settlements should have been assessed on the actual value at the time of the deceased's death of the property into which the property given and settled had been converted. This objection was disallowed by the commissioner.

In assessing the estate to duty the commissioner, pursuant to sec. 17 of the *Estate Duty Assessment Act* 1914-1928, allowed a deduction of £7,069 for Victorian probate duty. The actual amount of Victorian probate duty as assessed under sec. 173 of the *Administration and Probate Act* 1928 (Vict.) was £8,329 2s. 5d., but an allowance therefrom was made under sec. 178 of that Act for *ad-valorem* stamp duty amounting to £1,260, which had already been paid on the settlements. The company objected to the assessment on the ground that the appropriate deduction for Victorian probate duty should have been £8,329, and not £7,069, as included in the assessment. This objection was also disallowed by the commissioner.

The trustee company appealed to the High Court from the disallowance of the objections. Upon the appeal coming on to be heard before *McTiernan* J., his Honour, under sec. 18 of the *Judiciary Act* 1903-1940, directed that the case be argued before the Full Court.

Tait, for the appellant. It is clear on the evidence that there was no money given. The sons never got any money from the father. The father drew a cheque and paid it back for the shares allotted to the sons. What the sons were given was the shares in the proprietary company.

[WILLIAMS J. How could he give shares he never had ?]

He had means of giving shares ; perhaps what he did was to settle a debt they owed. It is doubtful whether such a debt could ever be within the section. It is sufficient for the present purposes to point

out the nature of the transaction, and it does not matter if it is a gift of shares or a settlement of a debt; simply, he caused the shares to be allotted and paid (*Osborne* v. *Federal Commissioner of Taxation* (1); *National Trustees Executors & Agency Co. of A/asia Ltd.* v. *Federal Commissioner of Taxation* (2); *Jackson* v. *Federal Commissioner of Taxation* (3)). Property can only be dutiable if it is identifiable at the death of the testator (*Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (4)). *Commissioner of Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (*Watt's Case*) (5) is a case where the property disappeared during the testator's lifetime. Cases where the property was transferred are *Re Grice* (6); *Dent* v. *Commissioner of Stamp Duties* (7); *Attorney-General for Ontario* v. *National Trust Co. Ltd.* (8); *Ballarat Trustees Executors & Agency Co. Ltd.* v. *The King* (9); *In re Payne*; *Poplett* v. *Attorney-General* (10). If the money, being the property given, is transmuted into shares, it is admitted you can, at the death, value the thing then in existence as the property given (*Estate Duty Assessment Act* 1914-1928, sec. 8 (4)). The money is not there to value. You must value the property at the death (*Estate Duty Assessment Act* 1914-1928, sec. 10). On the authorities and terms of the Act, in this case, whatever may be the actual property of the donor, the value must be taken at the death of the donor. The value must be the value of the shares at the date of death, as that is the only way the property can be found at that date. The full amount of the State probate duty should be deducted (*Estate Duty Assessment Act* 1914-1928, sec. 17; *Administration and Probate Act* 1928 (Vict.), secs. 173, 178).

Fullagar K.C. (with him *T. W. Smith*), for the respondent. It is not disputed that the proper date at which the valuation should be made is the date of death. The whole point of this case is, What has to be valued, the money given or the shares? The Act makes it plain that it is the property which has passed from the deceased person and no other property (*Estate Duty Assessment Act* 1914-1928, sec. 8 (4)). Money does not change in value; what is assessable is £36,000 by way of gift, and £42,000 by way of settlement. It is for the taxpayer to show that the original gift had disappeared (*National Trustees Executors & Agency Co. of A/asia Ltd.* v. *Federal*

(1) (1921) 29 C.L.R. 169.
(2) (1916) 22 C.L.R. 367.
(3) (1920) 27 C.L.R. 503.
(4) (1933) 49 C.L.R. 220.
(5) (1926) 38 C.L.R. 12.
(6) (1937) V.L.R. 356.
(7) (1909) 9 C.L.R. 406.
(8) (1931) A.C. 818.
(9) (1927) V.L.R. 415; 49 A.L.T. 67.
(10) (1940) Ch. 576.

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Commissioner of Taxation (1); *Attorney-General for Ontario* v. *National Trust Co. Ltd.* (2); *In the Will of Harper*; *Harper* v. *Harper* (3)). The statute requires the assumption that the disposition was not made by the donor, but that the thing which passed from him remained part of his property. Any disposition by the donee is really immaterial; any destruction or disposition can only be material in so far as it is consistent with that assumption (*Union Trustee Co. of Australia Ltd.* v. *Maslin* (4)). Sec. 120 (1) of the *Stamp Duties Act* 1920 (N.S.W.) in its old form and the Commonwealth Act in its present form exclude the necessity of finding the property in the Commonwealth for the purpose of valuation. The position in England is different, because of the statutory position there (*Attorney-General* v. *Oldham* (5)). The Act, unlike the Commonwealth Act, looks at the property in the hands of the donee (*Lord Strathcona* v. *Inland Revenue* (6); *In re Payne's Declaration* (7)). The only probate duty paid was the amount left after the deduction of the *ad-valorem* duty.

Tait, in reply.

Cur. adv. vult.

NOV. 21.

The following written judgments were delivered :—

RICH J. This matter was referred to the court under the provisions of sec. 18 of the *Judiciary Act* for the purpose of determining two questions which have arisen in the administration of the estate of the late J. C. Teare.

Within twelve months of his death the deceased made certain gifts and settlements which, under sec. 8, sub-sec. 4 (*a*), of the *Estate Duty Assessment Act* 1914-1928, are brought into and deemed to be part of the estate for the purpose of duty. The first question for our consideration is as to the value at which these gifts and settlements should be included—whether the value should be the value at the time of the death of the deceased or the value at the date when the property the subject of the gifts and settlements was given or settled.

The relevant facts in connection with this question are as follows :— The deceased, who died on 22nd October 1937, had been the proprietor of a hardware business in Melbourne which he managed and carried on solely in his own interests. In March 1937 he formed the

(1) (1916) 22 C.L.R. 367, at p. 372.
(2) (1931) A.C. 818, at pp. 822, 823.
(3) (1922) V.L.R. 512; 43 A.L.T. 197.
(4) (1940) 40 S.R. (N.S.W.) 542, at p. 549.
(5) (1940) 1 K.B. 599; (1940) 2 K.B. 485.
(6) (1929) S.C. 800.
(7) (1939) Ch. 865; (1940) Ch. 576.

business into a proprietary company and sold to it the whole of his business, assets and goodwill for the sum of £120,000 in cash. As the company had no cash to pay the vendor it sold shares, part of its capital of £200,000, to the value of £120,000. The transaction was carried out in this way. On 2nd April 1937 the company drew a cheque on its bank account for £78,000 and handed it to the deceased. The deceased signed an application form on his own behalf for 42,000 shares in the company, and obtained from each of his sons an application for 18,000 shares respectively. These applications were handed in to the company, together with the cheque for £78,000 which the deceased had received in part payment of the purchase money of his business. The company accepted the cheque in payment for these shares and paid it into its bank account. In the books of the company this sum of £78,000 was debited to the vendor's account, and when he returned the cheque for this amount the shares applied for were credited with the payment of the amounts due on them, so that the deceased and his two sons became the registered holders of fully paid-up shares in the company's capital. The balance of the purchase money, £42,000, formed the subject of the settlements in question.

On 25th June 1937 the deceased executed three settlements appointing the trustee company trustee of the settlements. They are all in the same form. The first settlement settled £18,000 in favour of the deceased's wife for life with remainder to his two sons. The two other documents settled the sums of £12,000 on each of his two daughters for life with remainder to the two sons. Each of these settlements expressly empowered the trustee company, with the approval of the deceased (the settlor), to invest in the shares of any company. He approved of the investment of the money in the shares of the proprietary company. On 5th July 1937 three cheques for the sums of £18,000, £12,000, and £12,000 respectively were drawn by the proprietary company on its banking account and debited to the deceased's account to complete the balance of the purchase money. The cheques were paid to the trustee company, which then applied for 18,000, 12,000 and 12,000 shares in the proprietary company. Each of these cheques was in this form: "Pay the Commercial Bank of Australia Ltd. for bank cheque payable to the Trustees Executors and Agency Co. Ltd." A bank cheque for £42,000 was obtained in favour of the trustee company, and the trustee company gave its own cheque for £42,000 to the proprietary company in payment for the 42,000 shares in the proprietary company for which it applied in respect of the three settlements. At the date of the deceased's death the shares were of the value of eighteen shillings per share.

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In these circumstances the question for solution both with regard to the gifts and the settlements is whether the property which was given or settled, and which under sec. 8, sub-sec. 4 (*a*), is deemed to be part of the deceased's estate, is to be valued at eighteen shillings per share or at twenty shillings per share, their nominal value.

The object of the section is to prevent the evasion of duty by substitutes for wills, and to tax property passing by semi-testamentary dispositions as if it had been disposed of by will or the deceased had died intestate in respect of it. This object is accomplished by extending the dutiable estate of the deceased so as to include property which, because of dispositions by the deceased or of the nature of his interest, is not actually part of his estate devolving upon his death. For the purposes of taxation the property remains part of the estate of the deceased. In the present case it is not disputed that the property falls within the Act, or that its value has to be determined at the death of the deceased, but the commissioner contends that what passed from the deceased was money, while the taxpayer says that, as at the death of the deceased the money is not in existence, the property to be valued is the shares into which the money was transformed. The word " pass " is commonly used in taxation statutes. It is not an expression of art: Cf. *Attorney-General* v. *Chapman* (1). The phrase " pass from " is to be construed not with reference to any technical rule of conveyancing, but according to its ordinary and popular meaning. The phrase describes the character of the interest to be valued. So far as the gifts are concerned, what passed into the possession and property of the sons was the shares which the deceased procured for them with portion of the purchase money paid to him by the proprietary company. The cheque given to the deceased by that company was retained by him until he returned it to the company in payment for the shares, and the sons had no control over the cheque or what it represented, and did not become masters of the situation until the shares were allotted to them. In that sense the shares passed to them and were the subject of the gifts. I feel more difficulty with regard to the settlements. That which passed from the deceased was money, using that word in its common and wide acceptation. The trustee company received the money from the deceased (the settlor), and was directed to invest it in shares selected by it and approved by the deceased. But " the property " must be valued at the date of the death of the deceased. And it is difficult to know how this is to be done when, as in the present case, under the very trusts affecting the money it is immediately transferred into shares. The

(1) (1891) 2 Q.B. 526.

Act is notorious for its deficiencies, and in the dilemma thus presented I am content to adopt the view that "the property" to be valued at the death of the deceased is represented by the shares into which the money had been transmogrified.

The first question should be answered in favour of the appellant company.

The second question in this appeal is concerned with the amount of probate duty payable upon the mass of the deceased's estate, including the constructive property the subject of the gifts and settlements. Upon this mass probate duty was exigible under sec. 173 of the *Administration and Probate Act* 1928 (Vict.), and was assessed at £8,329 2s. 5d. Upon the registration of the settlements in question the settlor had paid *ad-valorem* duty to the amount of £1,260. Sec. 178 of the same Act enables a person who pays the duty payable under the Act to deduct the amount of this *ad-valorem* duty. The *Estate Duty Assessment Act* 1914-1928, sec. 3, in the definition of "debts" includes probate and succession duties payable under any State Act. And the notice of assessment issued in this case shows that State probate duty to the amount of £7,069 was allowed as a deduction. This sum represents the balance of probate duty after deducting the *ad-valorem* duty, and is the duty paid in respect of the issue of probate under sec. 164 of the *Administration and Probate Act* 1928.

The claim for deduction in my opinion should be limited to £7,069.

STARKE J. Appeal from an assessment to estate duty made pursuant to the *Estate Duty Assessment Act* 1914-1928 directed to be argued before this court. For the purposes of that Act, the estate of a deceased person comprises property which passed from the deceased person by any gift *inter vivos* or by a settlement made before or after the commencement of the Act and within one year before his decease (Act, sec. 8 (4)).

John Corlett Teare was a hardware merchant carrying on business in Melbourne and elsewhere. In March of 1937 Bennie Teare Pty. Ltd. was incorporated for the purpose of taking over Teare's business. An agreement was accordingly executed whereby the business was sold to a company as a going concern for, *inter alia*, a sum of £120,000. The company handed a cheque to Teare for £78,000 on account of the purchase money. Teare applied for 42,000 shares of one pound each in the company, and his sons Athol and Philip each applied for 18,000 shares of one pound each in the company. The cheque for £78,000 was handed back to the company and Teare and his sons were credited with payment of one pound in respect of each share applied for by and allotted to them, or in all £78,000.

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Starke J.

In June of 1937 J. C. Teare made three settlements. A recital in these settlements sets forth that Teare had paid to the Trustees Executors and Agency Co. Ltd., the appellant here, three several sums of £18,000, £12,000 and £12,000 respectively, to be held by the company upon the trusts and with and subject to the powers and provisions thereinafter contained. And Teare directed and declared that the trustee company should apply the said several sums in the purchase of shares in any company or companies incorporated in the State of Victoria and selected by the company and approved by Teare. And the company was directed to hold the shares so purchased upon trusts for the benefit of his wife, daughters and sons in manner set forth in each settlement. Three cheques for the three several sums mentioned in the settlements were drawn by Bennie Teare Pty. Ltd. in payment of the balance of purchase money upon and made payable to the Commercial Bank of Australia Ltd. in exchange for bank cheques payable to the trustee company. The bank cheques were handed to the trustee company, which in turn applied for three several parcels of fully paid shares of one pound each in Bennie Teare Pty. Ltd. pursuant to the provisions of each settlement, and paid to the credit of Bennie Teare Pty. Ltd. its own cheque for £42,000 in respect of the shares, the subject of its application. The company issued to the trustee company the three several parcels of shares credited with the sum of one pound fully paid upon each share, or in all £42,000.

Teare died on 22nd October 1937, whereupon his estate was assessed to estate duty. The commissioner assessed the estate of the deceased to estate duty in respect of the sums of £36,000 and £42,000 credited on the shares applied for by the sons and by the trustee company respectively, whereas the appellant claims that the estate should be assessed upon the value of the shares at the time of the death of the deceased.

No money passed from the deceased to his sons or the trustee company. There is no doubt, however, that the exchange of cheques operated in payment of the moneys due on the shares (*Spargo's Case* (1)). The set-off of demands involved in these transactions has changed or altered the character of the property or choses in action passing from the deceased and transmuted that property or choses in action into shares which at the time of the death of the deceased were admittedly of a value of only eighteen shillings per share instead of twenty shillings per share, the amount credited as paid up upon them.

(1) (1873) 8 Ch. App. 407, at pp. 411, 412.

It is the value of the property given or settled that must be valued, but not the value at the date of the gift or settlement, but at the date of the death of the deceased : Cf. *Strathcona Case* (1) ; *Attorney-General for Ontario* v. *National Trust Co. Ltd.* (2). But the Act "merely enumerates classes of property which are or are deemed to be included in the estate of the deceased. You must find the property . . . and find it" in Australia (*Watt's Case* (3)). Now the property which passed from the deceased in the present case does not exist in the form in which it was given or settled : it has been transmuted into shares. It can, however, be traced, followed, and identified in those shares, or in other words, the subject matter of the gifts and settlements is found in its transmuted and actually existing form, namely, shares : Cf. *In re Payne's Declaration* (4). The value of the property which passed from the deceased as it actually existed at the date of his death is, therefore, the value of the shares at the date of the death of the deceased, namely, eighteen shillings per share.

Another matter raised by this appeal concerns a deduction of Victorian probate duty claimed by the appellant. For the purpose of assessing the value for duty of the estate of any person, all debts due at the time of his death shall be deducted from the gross value of the assessable estate. Debts include probate and succession duties payable under any State Act (Act, secs. 17 and 3 ; *Equity Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (5)). The *Administration and Probate Act* 1928 of Victoria provides in sec. 178 : "Any person paying the duty payable under this Act (that is, the duty payable by every person to whom has been granted probate or letters of administration) upon property comprised in a settlement or deed of gift may deduct the amount of *ad valorem* duty paid in respect of such property" (Act, secs. 178, 158). The duty assessed under the *Administration and Probate Act* 1928 was, in round figures, £8,329, less £1,260 *ad-valorem* duty paid on the settlements, or, in round figures, £7,069. The appellant contends that the duty payable under the Act was the amount calculated in the manner prescribed by sec. 158 without the deduction allowed by sec. 178. But this view cannot, I think, be sustained. The duty payable under the *Administration and Probate Act* is the sum which is payable and exigible as probate duty after all deductions allowed by the Act have been made.

(1) (1939) S.C. 800.
(2) (1931) A.C. 818.
(3) (1925) 25 S.R. (N.S.W.) 467 ; 42 W.N. 191 ; (1926) 38 C.L.R. 12.
(4) (1939) Ch., at pp. 874-876 ; (1940) Ch. 576.
(5) (1936) 55 C.L.R. 459.

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The appellant therefore succeeds in respect of the valuation of the property passing under the gifts and settlements already mentioned, and fails in respect of the deduction for probate duty which it claimed.

McTIERNAN J. I have had the advantage of reading the judgment of the Acting Chief Justice and I agree with his Honour's reasons and conclusions.

WILLIAMS J. The material facts are shortly as follows :—By an agreement in writing dated 10th March 1937 the deceased, John Corlett Teare, sold his business to the company, Bennie Teare Pty. Ltd. By virtue of the agreement the company became indebted to him in the sum of £120,000. On 1st April 1937 his sons, Athol Muir Teare and Philip Teare, each applied for 18,000 shares of one pound each fully paid in the capital of the company. On 2nd April 1937 the deceased applied for 42,000 shares of one pound each fully paid. Each of the share applications purported to enclose a cheque for the full amount of the purchase money, but none were in fact sent. The 78,000 shares so applied for were allotted to the respective applicants on 2nd April ; and, on the same day, they were all paid for by the deceased repaying into the company's bank account a cheque for £78,000 previously made out in his favour by the company as part payment of the £120,000. The deceased and his sons were entered in the register of members as the proprietors of their respective parcels of shares. On 25th June 1937 the deceased executed three indentures appointing the Trustees Executors and Agency Co. Ltd. trustees of three separate sums of £18,000, £12,000 and £12,000, totalling £42,000, to be invested and held by it upon trusts for the benefit of his wife and children. Each indenture contained a clause by which the deceased declared that the trustee company should apply the sum paid to it by him in the purchase of shares in any company or companies incorporated in the State of Victoria selected by the trustee company and approved by him. On 25th June the deceased addressed to the trustee company in respect of each settlement a document approving of the investment of the whole of the settled sum in the purchase of fully paid shares in the company. On 5th July the trustee company received from the company's bankers three bank cheques for the three amounts. The bank cheques had been issued as payment for three cheques for the same amounts made out in favour of the bank by the company at the request of the deceased in satisfaction of the balance of the £120,000.

On 5th July 1937 the trustee company forwarded three applications dated 29th June to the company, applying for 18,000, 12,000 and 12,000 shares of one pound each fully paid. A cheque drawn by the trustee company in favour of the company for £42,000 accompanied the applications. The shares were allotted to the trustee company on 6th July, and its name was entered in the register of members in three separate entries as proprietors of the three parcels of shares.

The two sons and the trustee company thus became the legal owners of the shares allotted to them respectively. The deceased never owned any of these shares either at law or in equity. He provided the purchase money, so that if the applicants had been strangers equity would have implied a trust in his favour, but as the applicants for the first two parcels were his sons equity would presume they had been purchased as an advancement. This presumption could be rebutted by evidence to the contrary; but the evidence proves the deceased intended the sons should take the shares beneficially. In the case of the indentures he had already made a complete disposition of the beneficial interests before the shares were applied for. In *In re Payne*; *Poplett* v. *Attorney-General* (1) the Court of Appeal was able to hold that property and not money was settled because there was a settlement of certain patent rights, so that, although these rights had previously been sold to a company, and all the settlor was entitled to was the purchase money together with an option to acquire certain shares in the company, the trustees became the assignees of the letters patent, and if the vendor made default would have remained the owners of the monopoly. But in the present case the gift to the sons comprised the moneys required to pay for the shares, and the settled gifts were also presents of sums of money. The gift was therefore in every case a gift of the moneys, the motive, and it might even be said the condition, being that they should be used to apply for the shares (*Perpetual Trustee Co. Ltd.* v. *Commissioner of Stamp Duties* (*Sargood's Case*) (2)). The deceased died at Melbourne on 22nd October 1937. It is common ground that the shares were worth eighteen shillings at this date. The *Estate Duty Assessment Act* 1914-1928 provides:—Sec. 8 (1): Estate duty shall be levied and paid upon the value, as assessed under this Act, of the estates of persons dying after the commencement of this Act. Sec. 8 (4): Property which passed from the deceased person by any gift *inter vivos* or by a settlement made within one year before his decease shall for the

(1) (1940) 1 Ch. 576.
(2) (1935) 36 S.R. (N.S.W.) 160; 53 W.N. 28.

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purpose of this Act be deemed to be part of the estate of the person so deceased. Sec. 10 (1): For the purpose of assessment and levy of estate duty every administrator shall prepare and furnish a statement setting forth a complete return of all the estate in Australia of the deceased person; (2) The statement shall set forth the description and values of the items comprising the estate. Sec. 34 (1): The duty assessed under this Act shall be a first charge upon the estate and there shall not be any disposition of the estate or any part of it until the duty thereon has been paid or the commissioner certifies that he holds security for payment of the duty sufficient to permit any specified part of the estate to be disposed of. Sec. 35A provides for the apportionment of the duty where an estate includes property which has passed from the deceased person by gift *inter vivos* or settlement between the property which has so passed and the residue of the estate in proportion to the respective values of that property and the residue, and for payment by the donees *inter vivos* of their proportions of the duty. Sec. 36 authorizes separate assessments of the duty and a distribution of the charge between the various assets comprising the estate.

It is the property which passed from the deceased by the gift or settlement which is deemed to be part of his estate, but it is to be valued at the date of death, so that any increase or diminution in the value of tangible real or personal property between the two dates must be taken into account (*Lord Strathcona* v. *Inland Revenue* (1); *Attorney-General for Ontario* v. *National Trust Co. Ltd.* (2); *In re Payne* (3); *Attorney-General* v. *Oldham* (4); *Watt's Case* (5)). There are dicta, perhaps somewhat optimistic under modern conditions, to the effect that the value of money is constant, so that the value of a cash donation must be the same at the date of death as at the date of the gift: See the *Strathcona Case* (1) and *In re Payne* (3). But in *Watt's Case* (5), a decision upon the New-South-Wales *Stamp Duties Act* 1920, sec. 102 (2) (*b*), which provides that, for the purpose of assessment and payment of death duty, the estate of the deceased shall include and consist of any properties comprised in any gift made by the deceased within three years before his death, it appeared that the deceased, within three years of his death, had paid to a Mr. Jamieson the sum of £200 and requested him to apply the same by way of gift in the purchase of a steamship ticket to America for a friend of the deceased and in payment of the balance to such friend, and this sum was applied

(1) (1929) S.C. 800.
(2) (1931) A.C. 818.
(3) (1940) 1 Ch. 576.
(4) (1940) 2 K.B. 485.
(5) (1925) 25 S.R. (N.S.W.) 467; 42 W.N. 191; (1926) 38 C.L.R. 12.

by Mr. Jamieson as to £109 in the purchase of such ticket and as to the balance in payment to such friend. The ticket was bought, and the balance of moneys was taken to America and the whole expended by the friend prior to the date of the death of the deceased. *Ferguson* J. said :—" The section merely enumerates classes of property which are or are deemed to be included in the estate of the deceased. You must find the property, and find it in New South Wales. In this case there was at the time of the testator's death no property in existence, either in New South Wales or elsewhere, representing this £200. The steamer passage had been used, the money had been spent, and spent abroad. I express no opinion on the question whether property which could be earmarked as having been bought with the money would be part of the testator's dutiable estate if it were in New South Wales at the time of his death " (1). *Campbell* J. said : " I have come to the conclusion that it is an indispensable condition of the operation of (2) (*b*) upon any gift that the subject of the gift should exist at the date of the death in some concrete identifiable form " (2). The decision of the Full Court on this point was affirmed by this court on appeal (*Higgins* J. dissenting) (3). *Knox* C.J. and *Gavan Duffy* J. agreed in the conclusion at which the Supreme Court had arrived (4). *Isaacs* J. said : " The property, the subject of sub-sec. 2 of sec. 102 (except merely appointed property), is in every case property which was originally property of the deceased and ceased to belong to him by reason of his disposition referred to ; and therefore, also, property not in existence in New South Wales at the time of the death—and which for that reason, if still retained by the deceased, would not form part of his estate—is not intended by the Act to be made part of his ' dutiable estate ' merely because he had parted with it . . . The actual intention of the legislature appears to accord with what I have said as to the ' property ' contemplated being situate in New South Wales at the date of the death. Sub-sec. 1 (*a*) of sec. 102 is express ; sub-sec. 1 (*b*), referring to sec. 103, assumes it, as is evident from the concluding words of sub-sec. 1 (*a*) and from the elaborate provisions of the rest of the sub-section and sub-secs. 2 and 3. Sec. 108 (2) is really legislative interpretation to that effect. I agree, therefore, with the view expressed by the learned judges of the Supreme Court that you must find the ' property ' in New South Wales at the essential time " (5). *Rich* J. said : " I agree with the conclusion arrived at by the Supreme Court " (6). *Starke* J. said :

(1) (1925) 25 S.R. (N.S.W.), at p. 492.
(2) (1925) 25 S.R. (N.S.W.), at p. 502.
(3) (1926) 38 C.L.R. 12.
(4) (1926) 38 C.L.R., at p. 29.
(5) (1926) 38 C.L.R., at pp. 32, 33.
(6) (1926) 38 C.L.R., at p. 45.

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"On the other matters raised by the case" (which included this point) "I assent to the opinion pronounced by *Ferguson* J. in the Supreme Court" (1). Despite the slightly different language no real distinction can be drawn between the legal effect of the relevant portions of sec. 8 (4) of the Federal Act and sec. 102 (2) (*b*) of the New-South-Wales Act. Indeed, the joint judgment of *Rich*, *Dixon* and *McTiernan* JJ. in *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (2) appears to recognize this. They said: "The charge of duty upon, and its apportionment to, gifts must often be ineffectual independently of locality; for instance, donees will consume or dispose of the subject matter given" (3). Since the administrator is bound to make a full and complete return of all the estate in Australia of the deceased person setting forth the description and values of the items comprising the estate, and the commissioner is given a charge over the whole estate both actual and notional and can distribute this charge between the separate assets, the Act would appear to contemplate that the assets which are to be returned as comprised in the estate must be identifiable at the date of death so that they can be described and valued and be subjected to the charge or an apportioned part thereof. Money can in many instances be traced into a particular bank account or asset. In the present case the moneys were used to buy shares, which were still in the hands of the sons or the trustee of the settlements at the date of death. They never received anything tangible capable of still existing at the date of death. I have referred to the gifts somewhat loosely as gifts of money, but they were, strictly speaking, equitable assignments of part of a chose in action, namely, the debt of £120,000 owing by the company to the deceased (*Williams* v. *Atlantic Assurance Co. Ltd.* (4)). The debt was completely discharged and ceased to exist in his lifetime. *Watt's Case* (5) shows that it is not correct to value at the death "the actual subject matter of the gift regarded as in a hypothetical state of preservation in the condition in which it was given." It is the actual state of preservation which is material. The value of the moneys, therefore, which passed from the deceased at the respective dates of the gifts could not exceed the value of the shares at the date of his death. This was the only identifiable form in which the gifts then existed. As the shares were then worth eighteen shillings, one-tenth of the value of the money had vanished.

(1) (1926) 38 C.L.R., at p. 47.
(2) (1933) 49 C.L.R. 220.
(3) (1933) 49 C.L.R., at p. 227.
(4) (1933) 1 K.B. 81.
(5) (1925) 25 S.R. (N.S.W.) 467; 42 W.N. 191; (1926) 38 C.L.R. 12.

To comply with the requirements of the *Stamps Act* 1928 (Vict.) the deceased paid £1,260 *ad-valorem* duty upon the indentures of settlement. As he died within twelve months the property comprised in the gifts became liable to Victorian probate duty as though it formed part of his estate (*Administration and Probate Act* 1928, sec. 173). The total probate duty assessed upon the actual and notional estate was £8,329 2s. 5d. Sec. 178 provides that any person paying the duty payable under this Act upon property comprised in a settlement or deed of gift may deduct the amount of *ad-valorem* duty paid in respect of such property by virtue of the *Stamps Act* 1928, notwithstanding anything to the contrary in sec. 78 of the said Act. So, in order to determine the net amount of probate duty payable, £1,260 was deducted from £8,329 2s. 5d., leaving a balance of £7,069 2s. 5d. The Federal Act, sec. 3, defines debts to include probate and succession duties payable under any State Act. Such duties are therefore deductible as though they were debts of the deceased (*Equity Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1); *Bakewell* v. *Deputy Federal Commissioner of Taxation* (S.A.) (2)). As the *ad-valorem* duty had been paid by the deceased in his lifetime as a separate liability, the amount of duty which became payable by his personal representative to obtain the issue of probate was the net amount. In my opinion only the net amount can be claimed as a deduction.

The first objection therefore should succeed and the second fail.

Appeal allowed. Assessment varied by assessing the value of shares given to sons at £32,400 *and the value of shares settled at* £37,800. *Matter remitted to the commissioner to vary assessment in accordance with this order. Half the costs of the appeal to be paid by the commissioner.*

Solicitors for the appellant, *Blake & Riggall.*

Solicitor for the respondent, *H. F. E. Whitlam,* Commonwealth Crown Solicitor.

O. J. G.

(1) (1936) 55 C.L.R. 459.

(2) (1937) 58 C.L.R. 743.