[HIGH COURT OF AUSTRALIA.]

ASHBY AND ANOTHER . . . . . APPELLANTS;
APPELLANTS,

AND

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

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

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ADELAIDE, *Sept.* 15, 16.

MELBOURNE, *Oct.* 15.

Latham C.J., Starke and Williams JJ.

Succession Duty (S.A.)—Definition of deed of gift—Non-testamentary "disposition of property"—Covenant to pay money—Succession Duties Act 1929-1940 (*S.A.*) (*No.* 1898 *of* 1929—*No.* 62 *of* 1940), *secs.* 4, 32 (1) (*f*), 35 (3).

A covenant to pay money is not a disposition of property within the meaning of the *Succession Duties Act* 1929-1940 (S.A.), secs. 4 (definition of "deed of gift"), 32 (1) (*f*) and 35 (3).

Simms v. *Registrar of Probates*, (1900) A.C. 323, distinguished.

Decision of the Supreme Court of South Australia (*Napier* C.J.): *Ashby* v. *Commissioner of Succession Duties*, (1942) S.A.S.R. 102, reversed.

APPEAL from the Supreme Court of South Australia.

On an appeal to the Supreme Court of South Australia by Eric Johnston Ashby and Mary Elizabeth Drew against assessments to succession duty under the *Succession Duties Act* 1929-1940 (S.A.) the following facts were agreed :—

1. On or about 1st February 1938 an indenture between Eric Johnston Ashby of the first part, Mary Elizabeth Drew of the second part, William Brownlow Ashby the elder of the third part, W. B. Ashby & Sons Ltd. of the fourth part, and Mary Jane Ashby, Thomas Edward Ashby and William Brownlow Ashby the younger of the fifth part was duly executed by the said parties.

2. On 8th May 1940 William Brownlow Ashby the elder died.

3. On 25th January 1941 the Commissioner of Succession Duties (S.A.) made an assessment wherein he assessed duty on the death of William Brownlow Ashby the elder deceased as follows :—

(*a*) The sum of £116 9s. 7d. to be payable by Eric Johnston Ashby, being four per cent on the sum of £2,912 alleged to be contracted to be paid by William Brownlow Ashby the elder deceased

under the above-mentioned indenture and in respect of which it is alleged the said Eric Johnston Ashby is beneficially entitled.

(*b*) The sum of £525 to be payable by Mary Elizabeth Drew, being seven and a half per cent on the sum of £7,000 alleged to be contracted to be paid by William Brownlow Ashby the elder deceased under the above-mentioned indenture and in respect of which it is alleged the said Mary Elizabeth Drew is beneficially entitled.

4. Up to the date of the death of the said deceased W. B. Ashby & Sons Ltd. had not demanded payment from William Brownlow Ashby the elder deceased under par. 2 of the indenture nor had he paid anything on account of or in part payment of any moneys owing by him under the indenture. From the date of the indenture to the date of the death of the deceased W. B. Ashby & Sons Ltd. paid to the Australian Mutual Provident Society a total sum of £2,000 on account of principal owing under the mortgage referred to in the indenture to the Australian Mutual Provident Society and at the date of the death of the deceased there was a principal sum of £10,000 owing on the mortgage. From time to time the said W. B. Ashby & Sons Ltd. have paid to the Australian Mutual Provident Society all interest becoming due on the mortgage.

5. The sums of £2,912 and £7,000 hereinbefore referred to were claimed in the statements filed by the executors for the purposes of the *Succession Duties Act* 1929-1939 (S.A.) as a deduction from the estate and were allowed by the Commissioner of Succession Duties as such deduction.

The material terms of the indenture referred to in the statement of agreed facts are stated in the judgment of *Williams* J. (*post*, pp. 292, 293).

In the Supreme Court *Napier* C.J. stated that it was conceded that William Brownlow Ashby the elder's covenant to pay £9,912 in the second paragraph of the indenture was a disposition of property within the meaning of sec. 35 (3) of the *Succession Duties Act* 1929-1940 (S.A.) and held that he had agreed to make a gift to Eric Johnston Ashby and Mary Elizabeth Drew and possession and enjoyment of the money agreed to be given had not been bona fide assumed by them to the entire exclusion of William Brownlow Ashby the elder, and accordingly that there was a liability to succession duty under the said section: *Ashby* v. *Commissioner of Succession Duties* (1).

From that decision Eric Johnston Ashby and Mary Elizabeth Drew appealed to the High Court.

The relevant legislation is set out in the judgments hereunder.

(1) (1942) S.A.S.R. 102.

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Ligertwood K.C. (with him *Stevens*), for the appellants. There was no disposition of property within sec. 35 (3), merely a creation of a chose in action (*Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1)). Alternatively, if there were a disposition, there was full consideration. Consideration does not necessarily have to pass to the deceased (*Attorney-General* v. *Sandwich* (*Earl*) (2)). The only transaction entered into was the incurring of an obligation by the deceased. There was not, and was not intended to be, a gift of money. The nature of the transaction must be ascertained from the document (*Yorkshire Railway Wagon Co.* v. *Maclure* (3) ; *Helby* v. *Matthews* (4) ; *In re George Inglefield Ltd.* (5) ; *Transport and General Credit Corporation* v. *Morgan* (6) ; *Australian Guarantee Corporation Ltd.* v. *Balding* (7) ; *Olds Discount Co. Ltd.* v. *John Playfair Ltd.* (8)). The appellants are not liable, because there was no disposition of property, or because real consideration was given and therefore the indenture is not a " deed of gift " within sec. 4. If there were a gift it was completed at the date of the deed. Construing the document as it stands the only disposition (if any) is entering into an obligation, and the appellants assumed and retained the beneficial interest and possession immediately and thenceforth retained it to the entire exclusion of the deceased (*O'Connor* v. *Commissioner of Succession Duties* (*S.A.*) (9)).

Hannan K.C. (with him *K. Healy*), for the respondent. The indenture is a deed of gift within sec. 4, because it is a non-testamentary disposition of property containing a disposition which may take effect during the lifetime of the donor (*Simms* v. *Registrar of Probates* (10) ; *Lord Advocate* v. *Roberts' Trustees* (11) ; *Attorney-General* v. *Montefiore* (12)). The property given under the deed of gift is the sum of £9,912, which the donor covenanted to pay on demand, and this sum is dutiable under sec. 32 (1) (*f*) because beneficial enjoyment was not parted with by the donor at least twelve months prior to his death, and is dutiable under sec. 35 (3), because the son and the daughter did not immediately bona fide assume the beneficial interest in possession and thenceforth retain such interest and possession to the entire exclusion of the donor. The real nature of the transaction must be ascertained (*Attorney-General* v. *Worrall* (13) ; *Union Trustee Co. of Australia Ltd.* v. *Webb* (14) ; *Commissioner of*

(1) (1920) 28 C.L.R. 373.
(2) (1922) 2 K.B. 500, at p. 517.
(3) (1882) 21 Ch. D. 309.
(4) (1895) A.C. 471.
(5) (1933) Ch. 1, at pp. 5, 17.
(6) (1939) Ch. 531, at p. 551.
(7) (1930) 43 C.L.R. 140, at p. 151.
(8) (1938) 3 All E.R. 275, at p. 282.
(9) (1932) 47 C.L.R. 601, at p. 614.
(10) (1900) A.C. 323, at pp. 331, 332.
(11) (1858) 20 Sess. Cas., 2nd ser., 449.
(12) (1888) 21 Q.B.D. 461.
(13) (1895) 1 Q.B. 99, at p. 104.
(14) (1915) 19 C.L.R. 669.

Stamp Duties (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (1)). The real nature of this transaction is that the donor gave to his son and his daughter by the indenture a chose in action, namely the legal right to have £9,912 paid, but he retained the £9,912, of which his children were the legal owners until his death, thus retaining the beneficial interest and enjoyment of the money instead of his children having such interest and enjoyment in the manner contemplated by the terms of the gift (*O'Connor* v. *Commissioner of Succession Duties* (*S.A.*) (2)).

Ligertwood K.C., in reply. Secs. 10 (1) (*b*) and sec. 31 show that when the Act intends to deal with obligations, it expressly says so. *Simms* v. *Registrar of Probates* (3) is not a binding authority that entering into an obligation is in all cases a disposition of property because the dictum (4) is *obiter* and is opposed to *Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (5). If that dictum is to be accepted, it must be confined to a simple case of a person entering into a voluntary covenant to pay (*Fryer* v. *Morland* (6)). *Attorney-General* v. *Montefiore* (7) and *Lord Advocate* v. *Roberts' Trustees* (8) are under a statute which expressly provides that moneys paid under an engagement shall be property.

Cur. adv. vult.

Oct. 15.

The following written judgments were delivered :—

LATHAM C.J. I agree with the reasons for judgment of *Starke* J.

STARKE J. Appeal from the decision of the Supreme Court of South Australia upholding the assessment of the appellant Eric Johnston Ashby to duty under the *Succession Duties Act* 1929-1940 (S.A.) in respect of £2,912 contracted to be paid by William Brownlow Ashby deceased under an indenture dated 1st February 1938 and also the assessment of the appellant Mary Elizabeth Drew to duty under the same Act in respect of a sum of £7,000 contracted to be paid by the deceased under the same indenture.

In October of 1936 the appellant E. J. Ashby purchased a parcel of land in South Australia for £13,618 4s. 6d., and on the same date the appellant M. E. Drew purchased another parcel of land in the same State for £9,070 3s. 6d. Their father William Brownlow Ashby the elder, who died in May 1940, requested the appellants to

(1) (1915) 21 C.L.R. 69, at p. 75.
(2) (1932) 47 C.L.R. 601, at pp. 614, 616, 617.
(3) (1900) A.C. 323.
(4) (1900) A.C., at p. 332.
(5) (1920) 28 C.L.R. 373.
(6) (1876) 3 Ch. D. 675, at pp. 686, 687.
(7) (1888) 21 Q.B.D. 461.
(8) (1858) 20 Sess. Cas., 2nd ser., 449.

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purchase the land and agreed to contribute the sum of £2,912 of the purchase money payable by his son E. J. Ashby and £7,000 of the purchase money payable by his daughter M. E. Drew. I should think that these agreed contributions were for the advancement and benefit of his son and daughter. But in fact the father made no contribution in money towards the purchase money. A family company called W. B. Ashby & Sons Ltd. found £7,688 8s. of the purchase money and the balance, £15,000, was borrowed from the Australian Mutual Provident Society on the security of a mortgage given by E. J. Ashby and M. E. Drew over the lands which was supported by their covenants, by that of their father, and by covenants of other members of the family. Subsequently the company repaid the A.M.P. Society £5,000, and the sum of £10,000 still remains due upon the mortgage. No demand has yet been made upon W. B. Ashby the elder or his executors to pay the sums of money the subject of the covenant hereafter mentioned.

In February of 1938 a deed of indenture was entered into between the appellants, their father, the deceased, the company, and other members of the family of the deceased. It recites the facts I have mentioned and contains the following amongst other covenants :—

1. That the company should find the total purchase price payable and should pay all moneys becoming due on the mortgage both principal and interest.

2. That the said W. B. Ashby (the father, deceased) would on demand pay to the company the sum of £9,912 being portion of the principal moneys paid by the company on account of the purchase moneys and mortgage moneys ; provided that the said W. B. Ashby might at any time repay the company the whole or any portion of the said sum of £9,912 whether demand had been made therefor or not. This covenant was expressed as with the company and as a separate covenant with the said E. J. Ashby and M. E. Drew and each of them their executors, administrators and assigns.

3. That the said W. B. Ashby would indemnify the company in respect of moneys paid or to be paid by the company under the indenture to the extent of £9,912 and no more.

Other provisions of the indenture provided for payment of interest by the appellants, the letting of the land to the company, and the indemnification of certain members of the family who had joined in the mortgage.

In the statement filed for the purpose of the *Succession Duties Act* 1929-1939 the executors of the deceased claimed the sums of £2,912 and £7,000 as deductions from his estate, and this was allowed by the Commissioner. Accordingly the provisions of secs. 8 and

10 (1) (*b*) of the Act do not fall for consideration in this case. Nor do the provisions of sec. 31 of the Act, which corresponds with the section under which *Simms* v. *Registrar of Probates* (1) was decided, for the Commissioner concedes in this case that there was no intent to evade the payment of any duty under the Act. Nor do the provisions of sec. 35 (1), which are only applicable in the event of the death of the person within twelve months of the transaction in question here which the Commissioner contends is a disposition of property.

But the Commissioner relies upon the provisions of sec. 35 (3) which provides:—If any property is after 27th November 1919 disposed of by deed of gift, gift, or otherwise than for full consideration in money or money's worth, and the person taking under the disposition does not immediately after the disposition bona fide assume the beneficial interest and possession of the said property and thenceforward retain the said interest and possession to the entire exclusion of the person making the disposition and without reservation to that person of any benefit of whatsoever kind or in any way whatsoever, then duty shall be chargeable . . . upon the net present value of the property so disposed of irrespective of whether the death of the person making the disposition occurs within twelve months of the making of the disposition or not.

And sec. 32 (1) (*f*) provides:—Succession duty shall be chargeable . . . on the net present value of . . . the property given or accruing to any person under any deed of gift to the extent to which the said property, or property required to satisfy the same, or the beneficial enjoyment thereof, has not been parted with by the donor at least twelve months prior to the date of his death.

Deed of gift by sec. 4 (1) means:—Every deed of gift absolute, and every deed of conveyance . . . or other non-testamentary disposition of property made by any person, and containing trusts or dispositions to take effect or which shall or may take effect during his lifetime, and not being made . . . in favour of a bona fide purchaser . . . for valuable consideration, . . .

Property also by sec. 4 (1) includes any interest in property.

In the judgment under appeal it is said that it was conceded that the engagement of the deceased to pay £9,912 mentioned in the indenture had diminished his estate by that amount and was a disposition of property within the meaning of sec. 35 (3). In this Court it was suggested that the learned Chief Justice was under some misapprehension and that the appellants, though pressed by some observations of the Judicial Committee in the case of *Simms*

(1) (1900) A.C. 323.

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v. *Registrar of Probates* (1), did not abandon the contention and still contended that the engagement was not a disposition of property, and still further that no property accrued to the appellants by force of the covenant.

The contention is fundamental to the right decision of this case and depends entirely upon the construction of the Act, and the Commissioner raises no objection to it being considered on this appeal. It is open to this Court to consider the question, and the circumstances are such that it should do so, though no argument was addressed to the Chief Justice upon the matter. The covenant created a liability to pay a sum of money; no property of any description whatsoever passed by force of the covenant; no property accrued to any person or persons by its force, and no charge was created over any property. The covenant did not diminish the property of the covenantor; he was possessed of the same property after the making of the covenant as he was before. A balance-sheet doubtless discloses the assets of a person on one side of the account and his liabilities on the other and therefore his financial position at a particular moment of time. If the assets exceed the liabilities the balance-sheet shows a surplus, and if the liabilities exceed the assets then the balance-sheet shows a deficiency. But it does not show any disposition of property; in bankruptcy the assets, speaking generally, would pass to the trustee in bankruptcy and the liabilities would be provable in the bankruptcy. And so also in case of death the assets would pass to the personal representative, who would discharge the liabilities in due order of administration. Thus an obligation to pay money, or, to use the words of the Master of the Rolls, Sir *George Jessel*, "a contract for the payment of money is not a disposition of property" (*Fryer* v. *Morland* (2); *Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (3)). But it is said that the cases establish that a contract for payment of money amounts in popular language to a disposition of that money, and therefore of property. That may be so in cases in which legislation provides that property shall include "money payable under any engagement," as in the *Succession Duties Act* 1853 (16 & 17 Vict. c. 51), sec. 1, or that any disposition of property or of any money or the incurring of any debt "shall be deemed to be a deed of gift," as in the *Succession Duties Act* 1929-1940 (S.A.), sec. 31. But that is not the ordinary, usual and natural signification of the phrase "disposition of property." The purpose of the statutory provision is to make the phrase apply to some things to which it would not ordinarily be applicable. The

(1) (1900) A.C. 323, at p. 332.
(2) (1876) 3 Ch. D. 675, at pp. 685, 686.
(3) (1920) 28 C.L.R. 373, at p. 380.

case of *Lord Advocate* v. *Roberts' Trustees* (1) and the other cases referred to in *Hanson's Death Duties*, 6th ed. (1911), pp. 619, 620, were decided under a statutory provision such as I have mentioned. So was the case of *Simms* v. *Registrar of Probates* (2) already mentioned. It was decided under sec. 27 of the *Succession Duties Act* 1893 (S.A.), which is re-enacted in sec. 31 of the *Succession Duties Act* 1929-1940 (S.A.). Their Lordships held that a covenant to pay conferring complete ownership of the debt and diminishing the net assets by that amount is rightly deemed to be a disposition of property within the meaning of the Act. It is not said that a covenant to pay is a disposition of property but a "disposition of property within the meaning of the Act." Again, their Lordships add that it is very difficult to understand why the words in sec. 27 of the Act then under consideration, "the incurring of a debt shall, so far as circumstances will admit, be a deed of gift under sec. 16," were introduced (3). Apparently they served no purpose and effected no charge that was not provided by other words in the section. *Boucaut* J. in South Australia had suggested that the words were put in *ex abundanti cautela*, and did not clear but confused the meaning of the section: See *In re Simms* (4). The observations, however, of their Lordships have no bearing whatever upon the meaning of the words, a disposition of property, or of the words, the property accruing to a person under any deed of gift. In *Simms* v. *Registrar of Probates* (2) their Lordships agreed with the meaning assigned by *Way* C.J. to the words "with intent to evade the payment of duty hereunder" in sec. 27 of the *Succession Duties Act* 1893, but I do not find any express approval of a passage in his judgment in the same case: "The covenant created property—that is to say, six debts—and made as many dispositions of it" (5). In my opinion that passage is not an accurate statement of the law for reasons already appearing, and perhaps I may add that neither *Boucaut* nor *Bundey* JJ., who were the other members of the Court, agreed with the statement of the Chief Justice.

Other contentions were also advanced in support of the appeal, such as, that full consideration was given for the covenant and that no gift of any money was made, but in the view I take it is unnecessary to deal with these contentions.

The appeal should be allowed and the assessments of the appellants to duty under the *Succession Duties Act* 1929-1940 (S.A.) quashed.

(1) (1858) 20 Sess. Cas., 2nd ser., 449.
(2) (1900) A.C. 323.
(3) (1900) A.C., at p. 333.
(4) (1899) S.A.L.R. 1, at p. 21.
(5) (1899) S.A.L.R., at p. 46.

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WILLIAMS J. This is an appeal by E. J. Ashby and M. E. Drew against a judgment of the Supreme Court of South Australia dismissing appeals by them against assessments made under secs. 32 and 35 of the *Succession Duties Act* 1929-1940 (S.A.) consequent upon the death of their father, W. B. Ashby the elder, who died on 8th May 1940. The assessment in the case of the appellant E. J. Ashby was in respect of the sum of £2,912 contracted to be paid by the father under the indenture dated 1st February 1938, and, in the case of M. E. Drew, in respect of the sum of £7,000 contracted to be paid by the father under the same indenture. The indenture was made between the appellant E. J. Ashby of the first part, the appellant M. E. Drew of the second part, W. B. Ashby the elder of the third part, W. B. Ashby & Sons Ltd. of the fourth part, and M. J. Ashby wife of W. B. Ashby the elder and T. E. Ashby and W. B. Ashby the younger of the fifth part. It contains a number of recitals referring to certain transactions which had occurred prior to the date of its execution, and the appeal in the Court below and in this Court proceeded upon the basis that these recitals can be accepted as evidence of the facts which they narrate. From these recitals it appears that on 21st October 1936 the appellant E. J. Ashby contracted to purchase certain land for £13,618 4s. 6d. and that, on the same date, the appellant M. E. Drew contracted to purchase certain other land for £9,070 3s. 6d.; that such purchases were made by them respectively at the request of the company and their father and in consideration of the company entering into the indenture and of the father agreeing to contribute £2,912 of the purchase money payable by the appellant E. J. Ashby and £7,000 of the purchase money payable by the appellant M. E. Drew; that completion of the contracts took place by the vendors being paid the total purchase moneys, £7,688 8s. of these moneys being advanced by the company and the balance £15,000 being raised by one mortgage given by the appellants to the Australian Mutual Provident Society over the two parcels of land, which were transferred to them respectively on the completion of the purchases; that the mortgage contained a covenant by all the parties to the indenture other than the company to repay to the Australian Mutual Provident Society the moneys thereby secured; that the company, at the request and on behalf of the appellants and the father, had paid the following moneys, viz., on account of the purchase money paid to the vendors £7,688 8s., and, on account of the moneys secured by the mortgage to the Australian Mutual Provident Society £3,000, or the sum of £10,688 8s. in all, leaving £12,000 as the principal sum still owing on the mortgage; and that the company had been renting

the two parcels of land, and had, at the request and on behalf of the appellants and the father, paid the interest becoming due from time to time on the mortgage.

The operative parts of the indenture include the following covenants:—(1) that the company will pay all moneys becoming due on the mortgage both for principal and interest; (2) that the father covenants with the company and as a separate covenant with each of the appellants that he will on demand pay to the company the sum of £9,912, being portion of the principal moneys paid by the company on account of the purchases and mortgage moneys, with a proviso that he may at any time repay to the company the whole or any portion of this sum whether demand has been made or not; (3) that the balance of the mortgage moneys paid or to be paid by the company and interest on such moneys and of the purchase moneys paid by the company with interest thereon at the rate of five per cent per annum shall on demand be paid by the appellants in the following proportions: (*a*) so long as the father owes the company any portion of the sum of £9,912, interest at the rate of five per cent on this sum as to $\frac{2912}{9912}$ thereof by the appellant E. J. Ashby, and as to $\frac{7000}{9912}$ thereof by the appellant M. E. Drew; (*b*) the balance of the moneys payable by the appellants to the company to be borne and paid in the proportions E. J. Ashby $\frac{10706}{12776}$ and M. E. Drew $\frac{2070}{12776}$; that the father will indemnify the company in respect of the moneys paid or to be paid by the company to the extent of £9,912 and that the appellants will indemnify the company for the balance of all moneys whether principal or interest paid or to be paid by the company with interest in the above proportions; (4) that until all moneys payable to the company shall have been paid, the company is to have a charge over the two parcels of land as security for any moneys payable or becoming payable to the company; (5) that the appellants will let to the company the lands owned by them respectively for the period from 20th November 1936 to 29th June 1940, with an option to renew for a further term of 10 years, at the rentals therein mentioned: these rentals, which were approximately equivalent to the interest payable by the appellants to the company at the date of the indenture, to be set off against moneys payable by the appellants to the company.

By the indenture, therefore, (i) the appellants were relieved from all personal liability to pay to the company the sum of £9,912, (ii) the father became liable to pay this sum to the company, (iii) until this sum was paid to the company, the appellants became

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liable to pay interest upon this sum or the balance thereof outstanding from time to time at the rate of five per cent per annum, (iv) this sum or the balance outstanding from time to time and interest thereon became charged upon the two parcels of land.

During the hearing there was a debate whether the father became liable to pay the sum of £9,912 to the company only on demand by the company or upon demand by either the company or the appellants. In my opinion the demand had to be made by the company. The concluding words in par. 2, "whether the demand has been made therefor or not," indicate a demand by the company. The relationship between the father and the company was that of debtor and creditor, while the relationship between him and the appellants was that he had agreed to indemnify them against proceedings being taken to raise this sum out of their lands. They could not enforce the payment of this indemnity until the debt had crystallized into a presently enforceable liability by the company demanding payment (*In re a Debtor* (1); *In re Conley* (2); *McIntosh* v. *Dalwood* [*No.* 3] (3)). At the date of his death the company had not demanded payment of, and the father had not paid, any part of the debt.

It is to be noted that the covenant by the father is to pay one sum of £9,912 to the company, but the assessments are based upon a division of this covenant into two parts in accordance with the amounts which the father had agreed to contribute towards the respective purchases. Reading the indenture as a whole, it is apparent that the father, who was the managing director of and a shareholder in the company, was desirous that the appellants should purchase the two parcels of land, partly for their own benefit and partly so that the company should benefit by being able to lease the lands from them. The contract was dictated, therefore, partly by affection for the children and partly by business considerations (*Brown* v. *Attorney-General* (4); *Attorney-General* v. *Boden* (5))—Cf. *Finch* v. *Commissioner of Stamp Duties* (6). When the company advanced the sum of £9,912 at his request, the father received full consideration in money or money's worth wholly for his benefit for his covenant to repay this sum to the company (*Attorney-General* v. *Richmond and Gordon* (*Duke*) (7)), but, while the appellants, by undertaking their respective obligations in connection with the purchase of the lands, gave the father valuable consideration (*Hay* v. *Commissioner of Stamps* (8)), it could not be said that the covenant between the father and the children was entered into for such full consideration.

(1) (1937) Ch. 156, at p. 161.
(2) (1938) 2 All E.R. 127.
(3) (1930) 30 S.R. (N.S.W.) 332, 415; 47 W.N. 85.
(4) (1898) 79 L.T. 572.
(5) (1912) 1 K.B. 539, at p. 562.
(6) (1929) A.C. 427.
(7) (1909) A.C. 466, at p. 473.
(8) (1911) 11 S.R. (N.S.W.) 304.

If the indenture had contained a covenant by the father to pay the sum of £9,912 to the company on demand, and the appellants and their lands had been released from all liability in respect of this sum, the promise by the father to contribute this sum towards the purchase moneys would have been completely fulfilled on 1st February 1938. But since the appellants had to pay interest on the debt and it remained charged on their lands until payment, it cannot be said that the appellants assumed the beneficial interest and possession of the gift at the date of the indenture or that the father after that date was excluded from the beneficial interest and possession of the money which he had promised to contribute (*Lord Advocate* v. *Heywood-Lonsdale's Trustees* (1); *Lord Advocate* v. *Gunning's Trustees* (2)).

In the Supreme Court, the learned Chief Justice relying upon the decision of the Privy Council in *Simms* v. *Registrar of Probates* (3) held, as it was then conceded, that the covenant was a non-testamentary disposition of property within the meaning of sec. 35 of the Act; and that, although the indenture was executed more than twelve months before the date of the death of the father, the disposition was liable to duty because the father, in breach of sec. 35 (3), had retained possession of the money the subject matter of the disposition. As his Honour, in my opinion, came to a correct conclusion on the second point, if he was right on the first, the fate of the appeal depends upon whether the covenant was such a disposition.

Mr. *Hannan* did not contend that the first point, although conceded before his Honour, was not open to attack before this court. The headnote in *Simms* v. *Registrar of Probates* (3) reads as follows:— "The deceased covenanted to pay £200,000 to his children with interest at 1½ per cent per annum, the debt being payable at call. He regularly paid the interest, but no portion of the principal:— *Held*, that this covenant, in the absence of evidence to the contrary, conferred on the children complete ownership of the debt, and was a non-testamentary disposition of property within the meaning of the South Australian *Succession Duties Act* 1893, sec. 16, not subject to duty under sec. 17, as the testator died more than three months thereafter. *Held*, further, that it was not chargeable with double duty under sec. 27, as made 'with intent to evade the payment of duty hereunder' in the absence of evidence of some device or contrivance for that purpose."

(1) (1906) 8 Sess. Cas., 5th ser., 724. (2) (1902) 9 S.L.T. 403.
(3) (1900) A.C. 323.

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The *Succession Duties Act* 1893 contained, *inter alia*, the following provisions:—Sec. 16: "Deed of gift" shall include every non-testamentary disposition of property made by any person containing dispositions to take effect during his lifetime and not being made in favour of a bona fide purchaser for valuable consideration. Sec. 17: The property given or accruing to any person under any deed of gift shall, in the event of the death of the donor within three months from the date of the deed of gift, be chargeable immediately after such death with succession duty. Sec. 18: Property comprised in a deed of gift shall be subject to duty in so far as it is payable out of the real property of the deceased in South Australia, or his personal property wherever the same shall be if he was at the time of the deed of gift domiciled there, or his personal property in South Australia if he had at the time of the deed of gift a foreign domicile. Sec. 27 (1): If any person has made, or shall make, any gift or other non-testamentary disposition of any property real or personal or of any money or securities for money or has incurred or shall incur any debt or has given or shall give any mortgage or incumbrance, with intent to evade the payment of duty hereunder such disposition mortgage encumbrance or the incurring of such debt, shall be deemed, so far as the circumstances will admit, to be a deed of gift under sec. 16, and any property accruing to any person thereunder shall be liable to duty as if the donor had died within three months from the date thereof, but double duty shall be payable in respect of such property. In the present Act the definition of deed of gift in sec. 4 corresponds to sec. 16 of the Act of 1893, except that it is expanded to include non-testamentary dispositions of property containing dispositions to take effect or which shall or may take effect during the lifetime of the disponer; sec. 20 (2) corresponds to sec. 17; sec. 22 (1) to sec. 18; and sec. 31 (1) to sec. 27 (1); but the period of probation is enlarged in each case to twelve months. Sec. 32 (1) (*f*) of the present Act provides that succession duty shall be chargeable on the net present value of the property given or accruing to any person under any deed of gift to the extent to which the said property, or property required to satisfy the same, or the beneficial enjoyment thereof, has not been parted with by the donor at least twelve months prior to the date of his death; sec. 35 (1), that duty shall be chargeable upon the net present value of any property given or accruing after 27th November 1919 to any person under any gift or non-testamentary disposition of property, not being a deed of gift within the meaning of the Act and not being for full consideration in money or money's worth wholly for the benefit of the person making the disposition in the

event of the death of such last-mentioned person within twelve months of the making of the disposition; sec. 35 (3): If any property is after 27th November 1919 disposed of by deed of gift or otherwise than for full consideration in money or money's worth, and the person taking under the disposition does not immediately after the disposition bona fide assume the beneficial interest and possession of the property, and thenceforward retain this interest and possession to the entire exclusion of the person making the disposition and without reservation to that person of any benefit of whatsoever kind or in any way whatsoever, duty shall be chargeable upon the net present value of the property so disposed of irrespective of whether the death of the person occurs within twelve months of the making of the disposition or not.

The father's covenant in the present case was to pay a sum of money on demand by the company, so that, as performance of the disposition in favour of the appellants was contingent upon a demand being made by the company, it could not be deemed to be a disposition of property to take effect in their favour in his lifetime. But as it was a covenant which might take effect during this period, it could be deemed to be a disposition of property within the expanded meaning of disposition in the present Act to the same extent as the covenant by Mr. Simms was deemed to be a disposition of property within the meaning of the former Act. Although the expanded words in sec. 4 are not repeated in sec. 35 (1), it would seem that the latter sub-section is intended to apply to non-testamentary dispositions of property which are not deeds of gift because they have been entered into for valuable consideration but are dispositions which have not been entered into for full consideration. If, therefore, the headnote to *Simms' Case* (1) is correct, there would be great weight in the contention that the covenant in favour of the appellants contained in par. 2 of the indenture was, as the learned Chief Justice held, a non-testamentary disposition of property within the meaning of sec. 35 (1).

The only issue in *Simms* v. *Registrar of Probates* (1) was whether the covenant was made with intent to evade the payment of duty within the meaning of sec. 27. If the debt was incurred with this intent, the section required that, so far as circumstances permitted, it should be deemed to be a disposition of property to take effect during the lifetime of the covenantor, and that double duty should be payable on this basis. It was *obiter dictum* for the Privy Council to discuss whether in a case where a debt was not incurred with this intent, but the covenantor died within the next three months, the covenant

(1) (1900) A.C. 323.

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was a deed of gift within the meaning of secs. 16 and 17. The Privy Council, after discussing the contents of the covenant said: "An Act involving such consequences the learned Chief Justice holds to be a non-testamentary disposition of property within the meaning of sec. 16 of the Statute which is not subject to duty under sec. 17 unless the donor dies within three months. With regard to the expression 'disposition of property,' one of the other learned judges below doubted, and one denied, that a covenant to pay is such a disposition. It was not, however, so contended by the respondent's counsel at this Bar. Their Lordships hold that a covenant to pay conferring complete ownership of the debt, and diminishing the covenantor's net assets by that amount, is rightly deemed to be a disposition of property within the meaning of the Act" (1). This passage must be elucidated in the light of the question their Lordships had to determine. They concurred with *Boucaut* J. that the words "the incurring of a debt shall, so far as circumstances will admit, be a deed of gift under sec. 16" caused a difficulty in the construction of the section (2). Apparently this was because the section required that the circumstances must be such that the transaction could be notionally converted into what could be deemed to be a non-testamentary disposition of property to take effect in the lifetime of the covenantor. They considered that the covenant which Simms had entered into was such that it conferred on his children the equivalent of complete and immediate ownership of the debt, and so could be deemed, for the purposes of sec. 27, to be such a disposition. In order to determine the person liable to pay the duty, the amount of duty to be paid, and the property out of which it would be payable, the provisions of the Act relating to deeds of gift where the disponer died within three months of the disposition would then have to be considered, and I think that it was in this sense that their Lordships referred to a covenant to pay being rightly deemed (a word which occurred only in sec. 27) to be a disposition of property within the meaning of the Act.

The English *Succession Duty Act* 1853 provides: sec. 1, that personal property shall include money payable under any engagement; and sec. 2, that every disposition of property whereby any person shall become beneficially entitled to any property upon the death of any person shall be deemed to confer upon the person entitled by reason of any such disposition a "succession" and the term "successor" shall denote a person so entitled and the term "predecessor" shall denote, *inter alia*, an obligor from whom the interest of the successor is derived. As, therefore, personal property includes a covenant to

(1) (1900) A.C., at p. 332.

(2) (1900) A.C., at p. 333.

pay a debt, this Act expressly provides that a covenant by a person to pay a sum of money upon his death shall create a succession. The *Finance Act* 1940, sec. 45 (1), provides that the creation by a person of a debt enforceable against him personally shall be deemed, for the purposes of the enactments relating to estate duty, to have been a disposition made by that person, and, in relation to such a disposition, that the expression "property" in the said enactments shall include the debt created. If the Act of 1893 had included a definition similar to those in the English Acts, then, no doubt, the covenant in *Simms* v. *Registrar of Probates* (1) would have been a deed of gift within the meaning of secs. 16 and 17 and the headnote in the report would have been correct (*Lord Advocate* v. *Roberts' Trustees* (2); *Attorney-General* v. *Montefiore* (3); *Hanson's Death Duties*, 8th ed. (1931), pp. 423 and 424). But, in the absence of any such provision, it is so clear that, at law and in equity, a covenant creates contractual obligations only and the ownership of the covenantor's assets is not affected (*Fryer* v. *Morland* (4); *Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (5)), that I am driven to conclude that the covenant in *Simms* v. *Registrar of Probates* (1) was not a non-testamentary disposition of property within the meaning of secs. 16 and 17 of the Act of 1893 so that the headnote is in this respect erroneous.

Moreover, the present Act differs in many respects from the Act of 1893, and contains additional provisions to show that the non-testamentary dispositions of property which constitute deeds of gift under sec. 4 or are included in sec. 35 (1) refer to alienations of identifiable real or personal property. Secs. 10 (1) and (2) and 35 (1) were added by the amending Act No. 1396 of 1919. Sec. 10 (1) (*b*), which deals with duty on property payable by the administrator, provides that property shall be deemed to be derived from a deceased person if the title thereto consists, wholly or in part, of any non-testamentary disposition of property, including therein any debt, covenant, bond, obligation, mortgage, incumbrance, or engagement made, incurred, given, created, or entered into by the deceased person to the extent of any property which the administrator of the said deceased person is bound to transfer, convey, deliver, or pay in satisfaction of the said disposition, unless the same property so deemed to be derived from the deceased person is otherwise liable to duty under this Act; so that while, in the case of sec. 10, a covenant to pay a debt was included in dispositions of property, no similar provision was inserted in sec. 35 (1). After the Act of 1919 had come into force a covenant to pay a debt, where there

(1) (1900) A.C. 323.
(2) (1858) 20 Sess. Cas., 2nd ser., 449.
(3) (1888) 21 Q.B.D. 461.
(4) (1876) 3 Ch. D. 675, at p. 685.
(5) (1920) 28 C.L.R. 373.

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was no evasion, was placed in the following position. If the covenant was entered into otherwise than before and in consideration of marriage or for full consideration in money or money's worth wholly for the benefit of the covenantor, and was not paid in the lifetime of the covenantor, the amount required to satisfy the covenant was liable to duty under sec. 10 (1) (*b*). If the debt was paid during the lifetime of the covenantor but within twelve months of his death, the amount was liable to duty as a non-testamentary disposition of property taking effect during the lifetime of the covenantor, under sec. 20 (2) if it was of a voluntary covenant, or under sec. 35 (1) if it was paid in satisfaction of a covenant not entered into before and in consideration of marriage or for full consideration of money or money's worth wholly for the benefit of the person making the disposition (*Attorney-General* v. *Cobham* (1); *Lord Advocate* v. *Heywood-Lonsdale's Trustees* (2)). The present covenant is an unusual one, because it was entered into with the company for full consideration as well as with the appellants for valuable consideration; so that, as the company is the payee, the amount payable under the covenant may not be liable for duty under sec. 10 (1) (*b*); but, if this is so, it is because the Act does not contain any provision to meet such a case similar to sec. 11 of the English Act, 52 & 53 Vict. c. 7 (*Attorney-General* v. *Gosling* (3)). Sub-sec. 35 (3) contemplates that property, the subject matter of the disposition, will be such that the donee can take some kind of beneficial possession of it to the exclusion of the donor. It is therefore inapt to apply to contractual obligations which do not relate to any identifiable property.

For these reasons I am of opinion that the covenant in par. 2 of the indenture is not a non-testamentary disposition of property within the meaning of secs. 4, 32 and 35 of the Act and that the appeal should be allowed.

Appeal allowed. Order of Supreme Court set aside. Assessments set aside. Respondent to pay costs of appeal to Supreme Court and to this Court.

Solicitors for the appellants, *Browne, Rymill & Stevens.*

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

C. C. B.

(1) (1904) 90 L.T. 816.

(2) (1906) 8 Sess. Cas., 5th ser., 724.

(3) (1892) 1 Q.B. 545.