[HIGH COURT OF AUSTRALIA.]

FADDEN AND ANOTHER . . . . APPELLANTS;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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BRISBANE, *July* 26.

SYDNEY, *Aug.* 13.

Williams J.

Estate Duty (Cth.)—Assessment—Bonds deposited in bank in joint account—Deposit subject to revocation—Gift—Beneficial interest—Joint tenancy—Survivorship—Duty on one-half value of bonds—Estate Duty Assessment Act 1914-1928 (*No.* 22 *of* 1914—*No.* 47 *of* 1928), *s.* 8 (4) (*d*).

In accordance with the deceased's instructions certain bonds were deposited in three joint accounts at banks in London on behalf of the deceased and his three daughters, there being an account in respect of himself and each daughter. No withdrawals were made by the deceased or his daughters and the interest was paid into his own account, out of which he made payments by way of allowances to his daughters. The deceased retained the right to withdraw the bonds. In assessing estate duty the Deputy Federal Commissioner of Taxation claimed that the bonds were the property of the deceased. On appeal against the assessment,

Held:—

1. That the deceased made gifts to his daughters of a joint interest in the bonds and that the gifts were perfected by the delivery of the bonds to the banks to be placed in joint accounts and were valid although subject to revocation.

2. That the deceased held a beneficial interest immediately before his death in a joint tenancy in the bonds, which formed part of his estate within the meaning of s. 8 (4) (*d*) of the *Estate Duty Assessment Act* 1914-1928.

3. That the value of the beneficial interest held by the deceased in the bonds was equal to half the value of the bonds at the date of his death.

APPEAL from the Deputy Federal Commissioner of Taxation.

This was an appeal under s. 24 (4) of the *Estate Duty Assessment Act* 1914-1928 by Arthur William Fadden and Patrick Collins, the executors of James Simpson Love deceased, against the decision of the Deputy Federal Commissioner of Taxation on the executors'

objection to an assessment to Federal estate duty on the estate of the deceased.

In his assessment the Commissioner included in the dutiable estate of the deceased three parcels of bonds deposited in banks in London in joint accounts in the names of the deceased and his daughters. The dutiable value of the estate was assessed at £240,632. The grounds of the appeal were :—

1. That the assessment should be made on a dutiable value of £186,919 arrived at by deducting from £240,632 the following amounts :—

(*a*) Value of securities held by the Bank of New South Wales, London, for safe custody on behalf of James Simpson Love and/or May Olive Gordon Corbett, being 3½% war loan bonds of face value £16,800, market value £16,847	£16,847
(*b*) Value of securities held by the Bank of New South Wales, London, for safe custody on behalf of James Simpson Love and/or Janet Steele, being 3½% war loan bonds of face value £16,050, market value £16,095 ..	£16,095
(*c*) Value of securities held by the Chartered Bank of India Australia and China, London, for safe custody on behalf of James Simpson Love and Hilda Gordon Lyon, being 3½% war loan bonds of face value £10,000, market value £10,028	£10,028
	£42,970
Exchange from England to Australia, 25% on £42,970	£10,743
	£53,713

2. In the alternative that the assessment should be made on a dutiable value of £207,508, arrived at by deducting from the sum of £240,632 the following—

(*a*) One-half the value of the two first-mentioned parcels of bonds	£16,471
(*b*) Value of the third-mentioned parcel of bonds set out in par. 1 (*c*)	£10,028
	£26,499
Exchange at 25%	6,625
	£33,124

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3. In the further alternative that the assessment should be made on a dutiable value of £213,775 arrived at by deducting from the sum of £240,632 the sum of £26,856 representing one-half of the market value of all the three parcels of bonds plus exchange thereon.

4. In the further alternative that the assessment should be made on a dutiable value of £228,097 arrived at by deducting from the sum of £240,632 the following :—

(*a*) Value of the third parcel of bonds set out in par. 1 (*c*)	£10,028
(*b*) Exchange at 25%	2,507
	£12,535

Fahey, for the appellants. The deceased created a trust in favour of his daughters. If no trust were created he made a gift which he perfected by depositing the bonds in banks in joint accounts. At the least the daughters acquired a joint interest with the deceased in the bonds, which on his death became an absolute interest by survivorship (*Russell* v. *Scott* (1)). The gift of the bonds was perfected even though the deceased retained the right to withdraw the bonds and revoke the gift (*Beecher* v. *Major* (2)). The bonds did not form any part of the deceased's estate (*Union Trustee Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (3)).

P. L. Hart, for the respondent. No trust was created. The deceased gave the bank a mandate to hand the bonds over to his daughters on his death. These instructions could have been countermanded at any time. If a trust were created the deceased could not have altered its terms. There was no gift. The deceased never divested himself of the property in the bonds. At his death he had the whole beneficial interest in the bonds. The contemporaneous acts of the deceased may be looked at to see whether he intended to create a trust or make a gift (*Vandenberg* v. *Palmer* (4)). These acts show that deceased retained the property in the bonds and had no intention of creating a trust (*Commissioner of Stamp Duties (Q.)* v. *Jolliffe* (5)). There was no trust to take effect after his death (*Commissioner of Succession Duties (S.A.)* v. *Isbister* (6)). The mandate or authority given to the bank by the deceased terminated on his death (*In re Williams* ; *Williams* v. *Ball* (7) ; *In re Engelbach's Estate* ; *Tibbetts* v. *Engelbach* (8) ; *In re Webb* ; *Barclays*

(1) (1936) 55 C.L.R. 440.
(2) (1865) 2 Dr. & Sm. 431 [62 E.R. 684].
(3) (1941) 65 C.L.R. 29.
(4) (1858) 4 K. & J. 204 [70 E.R. 85].
(5) (1920) 28 C.L.R. 178, at p. 190.
(6) (1941) 64 C.L.R. 375.
(7) (1917) 1 Ch. 1.
(8) (1924) 2 Ch. 348.

Bank Ltd. v. *Webb* (1)). A mere mandate gives no proprietary rights. The deceased's daughters acquired no proprietary rights in the bonds (*Comptroller of Stamps* (*Victoria*) v. *Howard-Smith* (2)). The whole fund was under the control of the deceased (*Manson* v. *Commissioner of Stamp Duties* (3)). The daughters never became full beneficial owners as in *Crichton* v. *Crichton* (4). The bonds were the property of the deceased (*Osborne* v. *Federal Commissioner of Taxation* (5)). If the interest of the deceased in the bonds was a joint tenancy then he had an interest in the whole. Therefore immediately before his death he had a beneficial interest in the whole of the bonds.

Fahey, in reply. It was the intention of the deceased to benefit his daughters (*Marshal* v. *Crutwell* (6)). By placing the bonds in the joint names the gift was completed and the daughters acquired an immediate interest which they could enforce (*Vandepitte* v. *Preferred Accident Insurance Corporation of New York* (7)). There were words of intended trust as well as intended gift (*Crichton* v. *Crichton* (8)). [He also referred to *Union Trustee Co. of Australia Ltd.* v. *Federal Commissioner of Taxation* (9) ; *Commissioner of Succession Duties* (*S.A.*) v. *Isbister* (10)].

Cur. adv. vult.

Aug. 13.

WILLIAMS J. delivered the following written judgment :—

The appellants are the executors of James Simpson Love who died domiciled in Queensland on 28th November 1933. They contend that in valuing the estate of the deceased for Federal estate duty the Commissioner was wrong in including three items in the dutiable estate. These items are :—(1) Bonds of the face value of £16,800 sterling held by the Bank of New South Wales in London for safe custody on behalf of the deceased and/or Mrs. Corbett, a daughter. (2) Bonds of the face value of £16,050 sterling held by the Bank of New South Wales in London on behalf of the deceased and/or Mrs. Steele, another daughter. (3) Bonds of the face value of £10,000 sterling held by the Chartered Bank of India Australia and China in London on behalf of the deceased and Mrs. Lyon, another daughter.

The deceased was a horse dealer who sold horses in India. Some of the proceeds of sale were paid to him in London and credited to

(1) (1941) 1 Ch. 225.
(2) (1936) 54 C.L.R. 614, at pp. 620, 622.
(3) (1930) Q.S.R. 295.
(4) (1930) 43 C.L.R. 536.
(5) (1921) 29 C.L.R. 169.
(6) (1875) L.R. 20 Eq. 328, at p. 330.
(7) (1933) A.C. 70.
(8) (1930) 43 C.L.R. 536, at p. 546.
(9) (1941) 65 C.L.R. 29.
(10) (1941) 64 C.L.R. 375.

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his accounts with the above-mentioned banks. From time to time the banks on his behalf invested some of these moneys in bonds. The first deposit of bonds which the deceased made on behalf of himself and one of his daughters in a joint account was a deposit in 1917 of bonds of the face value of £10,000 with the Chartered Bank in the joint names of himself and Mrs. Lyon, then Miss Hilda Love. This deposit was subsequently reduced to bonds worth £6,350 by withdrawals by this daughter, who had married in 1921. On 11th November 1923 the deceased, who objected to his daughter spending the capital, caused this account to be transferred into his sole name. On 24th October 1928 he instructed the bank to hold bonds of the face value of £10,000 (apparently provided by adding to the £6,350 worth of bonds) in a joint account deliverable to himself or Mrs. Lyon or the survivor. No portion of these bonds was withdrawn by either party during the lifetime of the deceased, so that at the date of his death the whole parcel remained deposited with the bank.

The history of the deposit of bonds with the Bank of New South Wales is as follows :—On 23rd October 1928 the deceased transferred bonds deposited in his name with the bank to the value of £24,100 into a joint account on behalf of himself and Mrs. Corbett (then Mrs. Robinson). On 29th January 1930 he instructed the bank to purchase and hold bonds to the value of £8,000 in a joint account to be opened on behalf of himself and Mrs. Steele. On 23rd February 1931 he instructed the bank to aggregate the two parcels and to hold one half on behalf of himself and Mrs. Corbett and the other half on behalf of himself and Mrs. Steele. In accordance with these instructions the bank divided the bonds into the two parcels which are part of the subject matter of this appeal. The accounts were opened by the bank in the names of the deceased and/or Mrs. Corbett and of the deceased and/or Mrs. Steele. No portion of either parcel of bonds was withdrawn by any of the parties during the lifetime of the deceased, so that at the date of his death the whole of both parcels was still deposited with the bank.

At the date the bonds in the three accounts were purchased they carried interest at the rate of five per cent per annum, but on 1st December 1932 the rate of interest was reduced from five per cent to three and a half per cent. In the case of the deposit in the Chartered Bank in the name of the deceased and Mrs. Lyon, the interest was credited to his account, but a sum equivalent to this amount was paid quarterly out of his account to Mrs. Lyon. In the case of the other two daughters the deceased at first allowed Mrs. Corbett £1,200 per annum, but in 1931 he reduced the allowance to £800 per annum. At that time the deceased commenced to allow Mrs.

Steele £600 per annum and his sister at first £200 and later £250 per annum. When the interest on the bonds was reduced from five per cent to three and a half per cent per annum, the deceased reduced the allowances of Mrs. Lyon, Mrs. Corbett and Mrs. Steele accordingly, but did not reduce the allowance of his sister. In order to make the allowances to Mrs. Corbett, Mrs. Steele and his sister the deceased had to pay out of his account with the Bank of New South Wales amounts which were slightly greater than the amounts credited to his account for interest on the two parcels of bonds.

In 1928 Mrs. Corbett, who had left her first husband in 1921 with the concurrence of the deceased, was living in England. He had objected to her earning her own living and was allowing her £1,200 per annum. In that year the deceased met her in Europe and they proceeded to England. On 23rd October 1928 he wrote to the Bank of New South Wales instructing that bank to transfer £24,100 worth of bonds which the bank was holding for safe custody on his behalf into a new account in the names of himself and this daughter, " the bonds to be at the disposal of either of us." On the following day he gave the Chartered Bank instructions which caused that bank to open the joint account in the names of himself and Mrs. Lyon. In 1931 Mrs. Steele, who had married a wealthy husband but had been divorced, also commenced to live in England. The deceased evidently considered that he must also make himself responsible for her maintenance, and it was for this purpose that he reduced Mrs. Corbett's allowance from £1,200 and divided the total number of bonds in the custody of the Bank of New South Wales between the two joint accounts.

No consideration passed from the daughters to the deceased for the opening of the joint accounts, so that the daughters can only claim an interest in the bonds if it is established (1) that the deceased opened the joint accounts in order to make gifts to them, and (2) that the gifts were perfected according to their tenor during his lifetime.

With respect to (1) there would be a presumption that the deceased intended to advance his daughters. Irrespective of the presumption the oral statements made by the deceased to Mrs. Corbett, Mrs. Scherer and Mr. Kennedy and the documentary evidence establish that the deceased intended to benefit his daughters. This evidence also establishes that the reduction in the amount of the bonds to the credit of the joint account in the name of the deceased and Mrs. Corbett to make provision for Mrs. Steele was made with Mrs. Corbett's consent. Even if the deceased made the reduction entirely on his own initiative it would be immaterial, because it was

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a condition of the deposit that the bonds should be at his disposal during his lifetime. He was therefore entitled to withdraw them for this purpose without her consent. But he made a fresh gift in her favour when he immediately redeposited bonds to the face value of £16,800 to the credit of the joint account.

The manner in which the deceased intended to make the gifts was by opening the joint accounts and placing the bonds in the custody of the two banks to be held by them in accordance with the rights of joint holders of accounts opened in accordance with such instructions.

In the case of the Bank of New South Wales the accounts were opened in the names of the deceased and/or a daughter, an elliptical and embarrassing expression which endangers accuracy for the sake of brevity. The remarks of *Farwell* J. in *In re Lewis*; *Goronwy* v. *Richards* (1) that "the expression 'and/or' is unfortunate. I do not think I have met it before in a will and I hope I shall never meet it again" are as apposite to other instruments intended to create legal rights as they are to wills. The expression "to be at the disposal of either during the joint lives and upon the death of either at the disposal of the survivor" would appear aptly to describe the terms of the bailment as understood by the bank. But, whatever the terms of such a bailment may be, they should be clearly stated and not slurred.

On 23rd February 1931 the deceased wrote to the Bank of New South Wales that the division of the bonds between Mrs. Corbett and Mrs. Steele was made so that they were each to receive an equal sum in the event of his death. On 6th March 1931 he wrote to the bank that they were not to touch the principal or overdraw. The bank, however, made it clear by its letter to the deceased dated 23rd April 1931 that in its view a holding of bonds in an account in his name and/or a daughter constituted a joint and several holding which would authorize either the deceased or a daughter to demand the delivery of the bonds during their joint lives. But, apart from its relevance, if any, on the question of estate duty, it is unnecessary to decide whether, after this reply, there was any conflict between the intentions of the deceased and the views of the bank on the question whether it was a term of the deposits that the daughters could not withdraw the bonds during the lifetime of the deceased, because neither the deceased nor his daughters attempted to do so.

The deceased intended to create rights in his daughters enforceable against the banks, so that the contracts with the banks relating

(1) (1942) 1 Ch. 424, at p. 425.

to the joint accounts, although entered into by the deceased alone, were made on behalf of the deceased and his daughters and in their joint names and were therefore capable of ratification by the daughters (*McEvoy* v. *Belfast Banking Company* (1))—see also *In re Shields*; *Corbould-Ellis* v. *Dales* (2); *Crichton* v. *Crichton* (3), and *Russell* v. *Scott* (4). The gifts were immediate gifts which were perfected by the delivery of the bonds into the custody of the banks to be placed to the credit of the respective joint accounts. As my brother *Starke* stated in *Russell* v. *Scott* (5), " a person who deposits money " (here it is bonds) " in a bank on a joint account vests the right to the debt or the chose in action in the persons in whose names it is deposited, and it carries with it the legal right to title by survivorship." The deceased retained the right to revoke the gifts by withdrawing the bonds during his lifetime, but a gift which is perfected is valid although it is subject to revocation (*Beecher* v. *Major* (6)).

There remains for consideration the question whether gifts of this nature made more than twelve months before the date of death form part of the estate of a deceased person for the purposes of estate duty. The *Estate Duty Assessment Act* 1914-1928, s. 8, provides that an estate of a deceased person shall comprise, *inter alia* : —Sub-section 4. Property. . . . (*c*) comprised in a settlement made by the deceased person under which he had any interest of any kind for his life whether or not that interest was surrendered by him at any time before his decease; or (*d*) being the beneficial interest held by the deceased person, immediately prior to his death in a joint tenancy or joint ownership with other persons; or (*e*) being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person.

Settlement, so far as material, is defined by s. 3 of the Act to mean " a conveyance, transfer, appointment under power, declaration of trust or other non-testamentary disposition of property made by any person either before or after the commencement of this Act containing trusts or dispositions to take effect after the death of the settlor."

The gifts do not fall within sub-s. *c* because there are no trusts or dispositions to take effect after the death of the deceased. Such dispositions must take effect after and by reference to his death

(1) (1935) A.C. 24, at pp. 43, 44.
(2) (1912) 1 Ch. 591.
(3) (1930) 43 C.L.R. 536.
(4) (1936) 55 C.L.R. 440.
(5) (1936) 55 C.L.R. 440, at p. 448.
(6) (1865) 2 Drew. & Sm. 431 [62 E.R. 684].

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(*Rabett* v. *Commissioner of Stamp Duties* (1); *Thomson* v. *Commissioner of Stamp Duties* (2)). The deceased never intended to create an estate for life in himself with the remainders to his daughters, whether the remainders were vested or contingent upon them surviving him. He intended to create an immediate joint and several tenancy *inter vivos*. The daughters became absolutely entitled to the bonds upon his death because "technically joint tenants are originally entitled to all which they ever have; and when one joint tenant dies, the other does not succeed to his interest by devolution of law, but remains the sole owner, the property being discharged from the control of the other. It is incident to the very nature of a joint tenancy that until it is severed, the right of survivorship is part of the original estate; it is not that the survivor succeeds to anything from the other": See the speech of Lord *Selborne* quoted in *Hanson's Death Duties*, 7th ed. (1925), p. 436, and referred to by Lord *Hatherley* in *Earl of Zetland* v. *Lord Advocate* (3). If a daughter had predeceased the deceased he would have become solely entitled to the bonds during his lifetime. The direction to pay the interest to his account was not given by the deceased in the capacity of a tenant for life of a fund, but in the capacity of one of the joint and several holders of a fund.

But the gifts do fall within sub-s. *d*, because the deceased was immediately prior to his death a joint beneficial owner of each parcel of bonds with his three daughters respectively. But it is not the whole value of the property of which a deceased person is a joint owner that is taxable. Moreover, liability under the subsection does not depend upon the extent to which a deceased person was entitled to the property, either absolutely or for some lesser interest, prior to his having caused the property to become subject to the joint ownership. It depends entirely upon the extent of the beneficial interest of a deceased person in the joint ownership immediately prior to his death. I presume that this moment of time was chosen because under the *jus accrescendi* the beneficial interest would at the moment of death survive to the other joint tenant. At this moment each joint tenant would have a beneficial interest in the joint property equal in value to that of the other joint tenant. Where there are two such tenants the value of their respective interests would each be one-half of the value of the property. In the present case the deceased had a several right to dispose of the bonds in his lifetime. If it is necessary to determine whether a daughter had a similar right, it appears to me that, in the

(1) (1929) A.C. 444, at p. 448. (2) (1929) A.C. 450, at pp. 454, 455.
(3) (1878) 3 App. Cas. 505, at p. 516.

absence of any further communication from the deceased to the bank after the letter of 23rd April 1931, it would be proper to draw the inference that the deceased was satisfied to accept the bank's views, and to rely on his threat that any daughter who touched the principal would be cut out of his will as a sufficient safeguard against a daughter attempting to dispose of any portion of the bonds during his lifetime. The direction by the deceased to pay the interest from the bonds into his own accounts was a right given to the deceased by the terms of the deposits. Mrs. Lyon received the same allowance as she would have received if the interest from the bonds in the custody of the Chartered Bank had been paid direct to her account. Apart from the allowance to the sister of the deceased, the other two daughters received, though in unequal shares, the same benefits from the interest from the bonds in the custody of the Bank of New South Wales as they would have received if it had been paid into their accounts. There can be little doubt that the dominant intention of the deceased was that his three daughters, all of whom were living in England, and not himself, should be, in every substantial sense, the beneficiaries of the interest from the bonds during his lifetime. The several right to dispose of the bonds was a right to adeem the gifts in whole or in part by withdrawing the bonds in whole or in part from the joint tenancy. But, until withdrawn, they remained subject to the joint ownership and it is the beneficial interest in the joint ownership that is caught by the sub-section. Each joint tenant holds the whole and holds nothing, that is, he holds the whole jointly and nothing separately: See *Halsbury's Laws of England*, 2nd ed., vol. 27, p. 659, note *c*, citing *Coke on Littleton*, 186 (a), where it is pointed out that for many purposes this is equivalent to a moiety at law. Such a holding cannot be in a beneficial sense of the same value as an absolute ownership. The greater the number of joint owners, the more apparent this becomes. For these reasons I am of opinion that the value of the beneficial interests held by the deceased in the bonds immediately prior to his death was equal to one-half of their value at the date of death. This conclusion accords with that reached by *Schutt* J. in *In re Boyle* (1).

It is admitted that the values of the bonds in sterling should be increased by twenty-five per cent to convert them into Australian currency (*Payne* v. *Federal Commissioner of Taxation* (2)).

It is unnecessary to discuss whether the transactions are caught by sub-s. *e*, because if they are the value for the purposes of duty would be the same as under sub-s. *d*.

(1) (1921) V.L.R. 394.

(2) (1936) 55 C.L.R. 158.

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The result is that the appeal has succeeded in part and failed in part, but the success is substantial. As the whole of the evidence is as relevant to the partial as it would have been to a complete success the respondent should pay the costs.

Appeal allowed. Present assessment set aside. Direct the respondent to re-assess the appellants on the basis that for the purpose of duty one-half of the value of the bonds in the three joint accounts at the date of death converted into Australian currency should be included in the dutiable estate. Order the respondent to pay the appellants' costs of the appeal.

Solicitors for the appellants, *Connolly, Suthers & Walker*, Townsville, by *Macnish, Macrossan & Dowling*.

Solicitors for the respondent, *Chambers, McNab & Co.*

B. J. J.