[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;

AND

CORNELL . . . . . RESPONDENT.

H. C. OF A. 1946.

ADELAIDE, *Sept.* 19.

MELBOURNE, *Oct.* 3.

Latham C.J.

Income Tax (Cth.)—Trust—Covenant by taxpayer to pay maintenance to former wife—Subsequent purported trust by husband—Vesting of trust property in trustees—Non-assent of former wife—Uncertainty—Whether valid trust—Income Tax Assessment Act 1936-1942 (*No.* 27 *of* 1936—*No.* 22 *of* 1942), *s.* 23 (*l*).

C., a taxpayer, and W., his wife, were divorced. Later they executed a deed which provided that C. should pay to W. during her life an annuity of £520 by equal monthly instalments. Until 13th June 1942, C.'s bank, at his direction, credited W.'s account with the appropriate monthly sum. On 22nd July 1940, after a conference between C., his brother and his taxation adviser, the brother wrote a letter to the adviser, which included provisions to the following effect:—The recommendation acceptable to C., if it is practicable, would be to allot 10,000 shares from his holding in C. Trust Ltd. to nominated trustees to hold in trust for the members of his family during the life of W. and at her death to distribute the shares as the trustees shall determine among surviving members of the family; the purpose of the trust is to receive the dividends from the shares and to apply them in payment or part payment of the annuity payable by C. to W.; C. shall make up any deficiency; and some arrangement will be necessary should C. be unable to pay, or should he predecease W., whereby the trustees may dispose of the shares to satisfy the monthly instalments of the annuity; that power be given to the trustees to effect a cash settlement with W. in lieu of the present contract. The letter named the members of C.'s family, but said that provision was necessary to embrace any additions or alterations thereto and also said that the sum was based on £520 per annum "the difference for taxes to be queried."

On 1st August 1940, C. transferred to the trustees named in this letter the 10,000 shares therein mentioned. Nevertheless, until 13th June 1942, the monthly payments to W. were made in the same manner as previously, and the trustees reimbursed C. After that date payments to W. were made by

debiting the trustees' account and crediting hers, but there was no evidence that she was aware of the alteration.

After the transfer of the shares, C.'s taxation adviser wrote to W.'s solicitors a letter which spoke of a trust of the 10,000 shares as something accomplished and mentioned that the creation of the trust affected the incidence of income tax. A draft deed of trust was enclosed. W.'s solicitors replied and objected to the creation of the trust for the purposes set out.

On an appeal to the Board of Review, it was decided that C. had created an irrevocable trust in W.'s favour and that, as a result, the dividends from the shares were not part of C.'s income for taxation purposes.

Held: (1) The evidence did not show that a trust had been created. The letter of 22nd July 1940 merely set forth a proposal for consideration, and its provisions as to beneficiaries were imprecise and uncertain; (2) even if a trust had been created, it could not be forced on W. and she, by her solicitor's letter, had refused it.

Townson v. *Tickell*, (1819) 3 B. & Ald. 31 [106 E.R. 575], applied.

APPEALS under *Income Tax Assessment Act*.

These were appeals by the Federal Commissioner of Taxation from a decision of a Board of Review under the *Income Tax Assessment Act* 1936-1942 on appeals against assessments to income tax of Clifford Edwy Percy Cornell in respect of the years ended 30th June 1941 and 30th June 1942. The facts and the relevant statutory provisions sufficiently appear in the judgment hereunder.

Alderman K.C. and *Kriewaldt*, for the appellant.

McEwin, for the respondent.

Cur. adv. vult.

Oct. 3.

LATHAM C.J. delivered the following written judgment:—

These are two appeals from decisions of a Board of Review constituted under the *Income Tax Assessment Act* 1936-1942. The taxpayer omitted from his returns for the purposes of income tax in respect of income received in the year ending 30th June 1941 a sum of £682, and in the year ending 30th June 1942 a sum of £691. These sums represent dividends paid upon 10,000 shares in a company entitled Cornell Trust Limited and interest upon moneys held by another company, Cornell Limited. The shares were held by the taxpayer Clifford Edwy Percy Cornell and his two brothers. It was claimed by the taxpayer that they were held upon trust to pay the income derived from them, up to a sum of £43 6s. 8d. per month, to the former wife of the taxpayer, Mrs. Rosalind Olive

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Corfield, who had remarried after a divorce from the taxpayer. The Commissioner treated these sums as income derived by the taxpayer and included them in his assessable income. Upon appeal to the Board of Review, the Board accepted the contention of the taxpayer that a trust of the shares had been effectively created and that the taxpayer had no interest in the moneys in question, and accordingly directed an amendment of the assessments. Appeals are now brought to this Court. The parties agreed to put in as evidence in the appeals the oral and documentary evidence which was taken before the Board of Review.

On 7th September 1936, after the divorce proceedings, a deed was executed by the taxpayer and his former wife which included a provision that the taxpayer should pay to her during her life an annuity of £520 by monthly instalments of £43 6s. 8d. each. The taxpayer gave a direction to the Bank of Adelaide, where he had an account, to pay this sum each month to Mrs. Cornell. This was done by crediting her account in the same bank with the sums mentioned. This practice continued until 13th June 1942.

As these moneys were paid by way of maintenance, the provisions of s. 23 (*l*) of the *Income Tax Assessment Act* 1936-1942 were applicable. Under s. 23 (*l*) there is an exemption from income tax of "the income received by way of periodical payments in the nature of alimony or maintenance, by a woman from her husband or former husband: Provided that for the purpose of making such payments the husband, or former husband, has not divested himself of any income producing assets, or diverted from himself income upon which he would otherwise have been liable to tax." Thus Mrs. Cornell, now Mrs. Corfield, was not liable to pay income tax upon the moneys paid to her by her former husband. He was liable to pay income tax upon the whole of his income without any deduction on account of the moneys paid to her.

In July 1940 the taxpayer called his brother, Mr. F. W. Cornell, into consultation, and it was determined to make an effort to alter the position by either making a cash settlement with Mrs. Corfield and thereby terminating the 1936 agreement, or creating a trust which would at one and the same time secure the payment of maintenance to her and relieve the taxpayer of some liability to income tax. The result of the conference between the taxpayer, his brother and Mr. Sidney Powell, the taxpayer's accountant and taxation adviser, was embodied in a letter dated 22nd July 1940 addressed to Mr. Powell by F. W. Cornell, which was in the following terms:—

"The recommendation acceptable to my brother, if it is practicable, would be to allot 10,000 Shares from his holding in Cornell

Trust Limited to Nominated Trustees, for the purpose of holding in trust for the members of his family during the life of Rosalind Corfield, and at her death to distribute the shares, and any accrued dividends as may have accumulated in such proportions as the Trustees may in their absolute discretion determine among surviving members of his family, the first trustees to be F. W., L. H. and C. E. Cornell with full powers to appoint successors should they so desire, or the occasion arise.

The purpose of the trust is to receive the dividends from the said shares and to apply them in payment, or part payment of an annuity, payable by Clifford Edwy Cornell to his former wife Rosalind Corfield, Five hundred and twenty pounds (£520) in equal monthly payments through the Bank of Adelaide, Adelaide, and surplus dividends, (if any) to accumulate for the purpose of satisfying future instalments.

In the event of the accumulated dividends being insufficient to pay forty three pounds six shillings and eight pence (£43/6/8) per calendar month, the said Clifford Edwy Cornell shall pay to the trustees the difference, and some arrangement will be necessary should the said Clifford Edwy Cornell be unable to pay, or should he predecease Rosalind Corfield, whereby the Trustees shall have power to dispose of any, or all of the said Cornell Trust Shares to satisfy the monthly instalments during the life of Rosalind Corfield.

That power be given to the trustees to effect a cash settlement with Rosalind Corfield in lieu of the present contract.

The family consists of his present wife Mollie Wyllie Cornell, a son William Robin Cornell and a daughter Helen Wyllie Cornell, but provision is necessary to embrace any further additions or alterations to the family.

The liability of the trustees to be limited wholly to the administrations of this trust.

N.B. The sum herein mentioned is based on Five hundred and twenty pounds (£520) p.a. the difference for taxes to be queried."

On 1st August 1940, 10,000 shares in Cornell Trust Limited were transferred by the taxpayer to F. W. Cornell, L. H. Cornell and the taxpayer, whose names were bracketed together opposite the word "trust" in the form of transfer, and who were described in that document as trustees. The scrip certificate was issued in the names of the three transferees and dividends upon the 10,000 shares were paid to them. The payments were actually made to Cornell Limited on behalf of the trustees, a ledger account being opened in the books of that company to which dividends were credited together with interest on moneys standing to the credit of the account. The

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sums of £682 and £691 which are the subject of controversy consist of dividends of £674 and £682 paid on the 10,000 shares in the years ending 30th June 1941 and 30th June 1942 respectively, together with amounts of interest of £8 and £9 allowed by Cornell Limited to the three trustees.

Although the shares had been placed in the names of the trustees and the trustees received the dividends, the taxpayer continued to pay his former wife the monthly amounts of £43 6s. 8d. in the manner already stated, that is to say, the Bank of Adelaide debited his account and credited her account with these monthly amounts. This practice continued up to 13th June 1942. From and after that date payments were made by debiting the trustees' account in the Bank of Adelaide and crediting Mrs. Corfield's account, but there is no evidence that she was aware that any alteration had been made in the source or method of payment. The trustees reimbursed to the taxpayer the amounts which he had paid to his wife. Thus the position is that during the income years in question the taxpayer (except as to one amount of £43 6s. 8d. paid by the trustees on 13th June 1942) paid the annuity out of his own moneys and obtained a recoupment from the trustees of the amount so paid. His contention is that he paid the moneys on account of the trustees, who had become bound to pay Mrs. Corfield as a beneficiary under an effectually created trust. The Commissioner's contention is that the trustees were merely handling moneys of the taxpayer, and that no trust in favour of Mrs. Corfield had been created.

After the shares had been transferred, Mr. Powell wrote to Mr. C. L. Abbott, solicitor for Mrs. Corfield, a letter in the following terms :—

" I mentioned to you some time ago that Mr. Cornell had created a trust by transferring to his brothers certain shares as a fund to provide the income for payment to Mrs. Corfield of the annuity secured to her under the deed dated September 7, 1936.

The object of creating the trust was to set aside a separate fund that would be primarily answerable for the annuity instead of the liability resting solely on Mr. Cornell, irrespective of what his position might be.

The creation of the trust alters the incidence of the income tax, but the original deed apparently contemplated that Mrs. Corfield might become liable to income tax and made provision accordingly.

A draft deed to cover the terms of the trust has been prepared, and is enclosed for your perusal and if you think desirable, for the approval of Mrs. Corfield."

The draft deed which was enclosed provided for the creation of a trust of the 10,000 shares under which income to the amount of £520 per annum was to be paid to Mrs. Corfield " together with such further annual sums not exceeding Fifty Pounds in respect of any one year of income as shall be equal to the income taxes " payable by her to the Commonwealth or any State. The draft deed also provided that after the death of Mrs. Corfield the trust property should be held by the trustees " for the benefit of the wife and children and remoter issue of the settlor " (the taxpayer) " as the settlor shall by deed or will appoint (such remoter issue to be born within the lifetime of the settlor or twenty-one years thereafter)," with provisions to operate in default of appointment. The draft contained a covenant by Mrs. Corfield that as long as the provisions of the deed were complied with she would not take any proceedings under the deed of 7th September 1936, and that all payments made to her under the later deed should be accepted by her *pro tanto* in satisfaction of the liability of the settlor under the earlier deed.

Mrs. Corfield was not prepared to accept the proposals made on behalf of the taxpayer. On 27th November 1941 her solicitors wrote to Mr. Powell a letter which, in addition to pointing out that the effect of creating a trust would be to impose an additional liability for income tax upon their client, contained the following statements : " Our client objects to your client creating a trust for the purpose set out in your letter. The incidence of taxation to which you refer is a very material matter from the point of view of our client. . . . We do not think that Mr. Cornell is entitled to alter the method of payment in such a way as to increase our client's liability for taxation."

It was held by the Board of Review that the oral evidence, which was in accord with the terms of the letter to Mr. Powell dated 22nd July 1940, established a trust in favour of Mrs. Corfield. The Board was of opinion that the letter and the evidence sufficiently identified, first, the trust property, namely 10,000 shares in Cornell Trust Limited, secondly, the beneficiaries, namely Mrs. Corfield and the members of the taxpayer's family, and, thirdly, the purposes of the trust, namely making payments out of income to Mrs. Corfield, and the disposition of the balance between members of the taxpayer's family. It was pointed out that the trust property had been effectively vested in the trustees by the appropriate method of transfer, and that the law did not require that a trust of such property as shares should be declared in writing. It was accordingly held that an irrevocable trust had been created under which Mrs. Corfield was a beneficiary. The result was that it was decided that the dividends

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from the shares and the interest paid on those dividends were not income of the taxpayer.

The terms of the letter of 22nd July 1940 are shown by the oral evidence to have represented the intention of the taxpayer when he made the transfer of shares to himself and his two brothers, so far as he had formed any intention. But in my opinion the evidence does not show that a trust was created. The letter does not itself create a trust, but it is relied upon as evidence of the intention of the taxpayer (which was communicated to his two brothers) when he took the further step of transferring the shares to himself and them expressly as trustees. This evidence of intention is used to rebut the presumption of a resulting trust which would otherwise arise when he placed property in the names of himself and other persons without consideration. But, in my opinion, an examination of the terms of the letter does not support the conclusion that it shows an intention to create a trust. The letter sets forth proposals for consideration—proposals which it was hoped would, in one form or another, be acceptable to Mrs. Corfield. It begins by referring to " The recommendation acceptable to my brother, if it is practicable." The letter records only a recommendation, which may or may not be practicable. Whether it would be practicable depended upon the assent of Mrs. Corfield. The letter states that some arrangement would be necessary, if the taxpayer should be unable to pay or should predecease his former wife, whereby the trustee should have power to dispose of the shares to satisfy monthly instalments payable to Mrs. Corfield. Thus the proposal in this particular is incomplete—it contemplates the inclusion of some further, still undefined, provision to deal with the contingencies mentioned. The letter also contemplates that some kind of power to effect a cash settlement with Mrs. Corfield should be given to the trustees. This provision treats the " trustees " as agents of the taxpayer to deal on his behalf with Mrs. Corfield. Further, the letter refers to the necessity of making some provision to embrace further " additions or alterations " to the family of the taxpayer. All these features of the letter show, in my opinion, that it was not regarded by the taxpayer as amounting to more than an outline of proposals for consideration, the proposals being, to some extent, only indications of matters which would have to be taken into account.

In particular, the terms of the letter in respect of the beneficiaries of the alleged trust are imprecise and uncertain. The letter begins by stating that the recommendation which is acceptable, if practicable, is that 10,000 shares in Cornell Trust Ltd. should be allotted to trustees " for the purpose of holding in trust for the members of

his family during the life of Rosalind Corfield, and at her death to distribute the shares, and any accrued dividends as may have accumulated in such proportions as the Trustees may in their absolute discretion determine among surviving members of his family." The next paragraph of the letter, however, describes the purpose of the trust as being to receive the dividends of the shares and to apply them towards payment of the annuity to Mrs. Corfield. Thus, in the first place, the object of the proposed transfer is stated to be to hold the shares in trust for the members of the taxpayer's family during the life of Mrs. Corfield and, in the second place, is stated to be to provide for the payment of moneys to Mrs. Corfield during her life.

Further, the proposal in the letter is that at Mrs. Corfield's death the shares and any accrued dividends are to be distributed among surviving members of the family as the trustees may in their absolute discretion determine. When the draft deed was submitted to Mrs. Corfield's solicitor the proposal then was that upon the death of Mrs. Corfield the shares should be held for the benefit of the wife and children and remoter issue of the taxpayer as the taxpayer should by deed or will appoint.

Thus, in my opinion, the evidence shows that the taxpayer was trying to work out the terms of a practicable arrangement, but does not show that any trust was actually created in July-August 1940.

If, however, it were held that a trust had been created by the transfer of the shares with the intention of conferring benefits upon Mrs. Corfield and some sufficiently identifiable members of the taxpayer's family, the case for the taxpayer would nevertheless fail because, as *Holroyd* J. in *Townson* v. *Tickell* (1) said (speaking of a devise) :—" I think that an estate cannot be forced on a man. A devise, however, being prima facie for the devisee's benefit, he is supposed to assent to it, until he does some act to show his dissent. The law presumes that he will assent until the contrary be proved ; when the contrary, however, is proved, it shows that he never did assent to the devise, and, consequently, that the estate never was in him." *Best* J. said (2) :—" It seems to be contrary to common sense to say, that an estate should vest in a man not assenting to it : there must be the assent of the party, before any interest in the property can pass to him." The same case shows that the dissent need not be evidenced by disclaimer in a court of record or by deed ; any evidence of actual dissent is sufficient. The law was

(1) (1819) 3 B. & Ald. 31, at p. 38 [106 E.R. 575, at p. 577].

(2) (1819) 3 B. & Ald., at p. 39 [106 E.R., at p. 578].

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stated with equal definiteness in *Standing* v. *Bowring* (1), where it was held that, when there is a transfer of property to a person, it vests in him even before he knows of the transfer, " subject to his right when informed of it to say, if he pleases, ' I will not take it.' When informed of it he may repudiate it, but it vests in him until he so repudiates it." See also *London & County Banking Co.* v. *London & River Plate Bank* (2) ; *Mallott* v. *Wilson* (3).

The letter written by Mrs. Corfield's solicitors on 27th November 1941 in my opinion clearly shows that Mrs. Corfield objected to the establishment of any trust fund whatever for the purpose of meeting the payments due to her under the deed of 1936. She and her advisers fully appreciated that the establishment of any such trust would be prejudicial to her from the point of view of liability for income tax, and, as they were evidently satisfied as to the solvency of the taxpayer, there was no reason why she should accept the proposals which were made on his behalf. The letter was a clear and decisive refusal to agree to the establishment of any fund for the purpose of paying the annuity to Mrs. Corfield. The result, therefore, is that, even if the evidence were sufficient to establish a trust in favour of Mrs. Corfield in the absence of evidence of dissent, the dissent which is proved makes it impossible to hold that a trust in her favour continued to exist. Accordingly, there was a resulting trust of the shares in favour of the taxpayer, and the dividends received from the shares, together with the small sums of interest paid by Cornell Ltd. on retained moneys, were the income of the taxpayer. The moneys in question were, except to the extent of one sum of £43 6s. 8d., which was paid by the trustees into Mrs. Corfield's account on 13th June 1942, actually paid to and received by the taxpayer. They were income derived by him. As to the said sum of £43 6s. 8d., it consisted of money belonging to him which was dealt with by the " trustees " on his behalf and as he directed, and therefore was his income within the meaning of the *Income Tax Assessment Act*, s. 19.

The view which I take of the case makes it unnecessary to consider an argument submitted on behalf of the taxpayer to the effect that, if there were a trust and the interest of Mrs. Corfield thereunder failed, the only effect would be to accelerate the future equitable interests of members of the taxpayer's family : *In re Willis* ; *Crossman* v. *Kirkaldy* (4) ; *In re Conyngham* ; *Conyngham* v. *Conyngham* (5) ; *In re Brooke* ; *Brooke* v. *Dickson* (6). The result of applying

(1) (1885) 31 Ch. D. 282, at p. 288.
(2) (1888) 21 Q.B.D. 535.
(3) (1903) 2 Ch. 494.
(4) (1917) 1 Ch. 365.
(5) (1921) 1 Ch. 491.
(6) (1923) 2 Ch. 265.

this principle would be (it is contended) that the members of the taxpayer's family would, upon Mrs. Corfield's dissent, at once become entitled to the 10,000 shares, so that the taxpayer would no longer have any interest in the shares or in dividends thereon. In the first place, however, no question of the application of this principle arises if, as in my opinion is the case, no trust was created at any time. In the second place, the rule mentioned is applied in order to give effect to an intention of the testator to dispose of the whole of the property which is the subject matter of the gift, later interests being given subject only to earlier interests, so that if the earlier interests fail for any reason those interested under the provisions relating to future interests at once become entitled. But in the present case it is impossible to identify any persons who could become so entitled. If the letter of 22nd July 1940 is regarded as setting forth the terms of a trust, then the relevant provision is that, at the death of Mrs. Corfield, the shares are to be distributed in such proportions as the trustees may in their absolute discretion determine amongst surviving members of the family of the taxpayer. The persons intended to benefit after Mrs. Corfield are persons who can be ascertained only at her death, because they are to be persons who survive her. As Mrs. Corfield is still alive, it is impossible to identify any such persons as beneficiaries under the trust, if it were held to be truly a trust.

I am, therefore, of opinion that the contentions of the taxpayer fail and that the appeal should be allowed with costs and the assessments confirmed.

Appeal allowed with costs. Assessments of Commissioner confirmed.

Solicitor for the appellant, *George A. Watson*, Acting Crown Solicitor for the Commonwealth.

Solicitors for the respondent, *Baker, McEwin, Millhouse & Wright.*

C. C. B.