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Foll Nicholas Paspaley Properties v Commissioner of Taxes (1991) 103 FLR 305
Disap Gorton v Federal Commissioner of Taxation (1965) 113 CLR 604

[HIGH COURT OF AUSTRALIA.]

GRIMWADE AND OTHERS . . . . APPELLANTS;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1949.

MELBOURNE, *March* 7, 8. SYDNEY, *April* 4.

Williams J.

MELBOURNE, *May* 17, 18. SYDNEY, *July* 28.

Latham C.J., Rich and Webb JJ.

Gift Duty (Cth.)—Assessment—"Disposition of property"—"Release . . . of any interest in property"—"Transaction entered into . . . with intent . . . to diminish . . . the value of . . . own property and to increase the value of the property of . . . other person"—Shares in company purchased by governing director and allotted to sons—Retention by governing director during his life of voting and dividend rights and right to assets in a winding up—Reduction of capital of company—Resultant gain by sons on return of capital—Whether transaction dutiable as gift by governing director to sons—Gift Duty Act 1941 (*No.* 53 *of* 1941), *s.* 4—*Gift Duty Assessment Act* 1941-1942 (*No.* 52 *of* 1941—*No.* 17 *of* 1942), *ss.* 4, 11.*

In 1936 G. formed an investment company the assets of which consisted of shares in companies which G. transferred to the company in consideration

* The *Gift Duty Assessment Act* 1941-1942 provided:—By s. 4: "'disposition of property' means any conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing, includes—(*a*) the allotment of shares in a company; (*b*) the creation of a trust in property; (*c*) the grant or creation of any lease, mortgage, charge, servitude, licence, power, partnership or interest in property; (*d*) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property; (*e*) the exercise of a general power of appointment of property in favour of any person other than the donee of the power; and (*f*) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his own property and to increase the value of the property of any other person"; "'gift' means any disposition of property which is made otherwise than by will (whether with or without an instrument in writing), without consideration in money or money's worth passing from the disponee to the disponor, or with such consideration so passing if the consideration is not, or, in the opinion of the Commissioner, is not, fully adequate"; "'property' includes real property and personal property and every interest in real property or personal property." By s. 11: "Subject to this Act, gift duty at rates declared by the Parliament, shall be levied and paid in respect of every gift made on or after the date of the commencement of this Act—(*a*) by a person (not being a body corporate) who is domiciled in Australia, or by a body corporate which is incorporated under the law of any State or Territory which is part of the Commonwealth—of any property wherever situated; or (*b*) by any other person—of any property which is situated in Australia at the time when the gift is made."

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of shares issued as fully paid to him and by his direction to his sons. There were two classes of £1 shares, A shares and B shares. G. held nearly all the A shares, and during his life the A shares alone had voting and dividend rights. G. had full powers of appointing directors and managing the company. On a winding up during his life the holders of the B shares were entitled only to two and one-half per cent of the capital paid or deemed to be paid up on their shares and the holders of A shares were entitled to the balance of the assets. In 1942 and 1943 resolutions were passed providing for a return of capital of 17s. 6d. per share to all the shareholders. The resolutions were carried unanimously, G. being present. At this time G. owned 9,997 A shares and five other persons each owned one A share. Capital was returned in accordance with the resolutions, and the other shareholders thereby received a benefit amounting to 17s. 6d. per share on 180,760 B shares. Under the *Gift Duty Assessment Act* 1941-1942 the commissioner assessed G. to duty on what was computed as the amount of net benefit received by the shareholders other than G. On an appeal from the assessment the commissioner contended that the benefit was received as the result of a " disposition of property " as defined in s. 4 of the *Gift Duty Assessment Act* (under either par. (*d*) or par. (*f*) of that definition) and, therefore, a " gift " (as defined in s. 4) by G. which was subject to duty under s. 11 of that Act and s. 4 of the *Gift Duty Act* 1941.

Held (affirming the decision of *Williams* J. on this point): There had been no " disposition of property " within the meaning of par. (*d*) of the definition.

Held (reversing the decision of *Williams* J. on this point), that the benefit was not the result of any " transaction " within the meaning of par. (*f*) of the definition of " disposition of property " which would give rise to a liability to gift duty.

APPEALS from *Williams* J.

These were appeals (heard together) from two assessments to duty under the *Gift Duty Assessment Act* 1941-1942. The facts appear hereunder in the judgment of *Williams* J., before whom the appeals came for hearing.

T. W. Smith, K.C., and *Winneke*, for the appellants.

Tait, K.C., and *Eggleston*, for the respondent.

Cur. adv. vult.

April 4.

WILLIAMS J. delivered the following written judgment:—

The appellants, Frederick Norton Grimwade, Geoffrey Holt Grimwade and Reginald Gordon Grimwade, in their capacity of executors of the will of Edward Norton Grimwade, who died on 28th April 1945, aged seventy-eight years and eleven months, have appealed to this Court from two assessments of gift duty made on

22nd August 1947 under the provisions of the *Gift Duty Assessment Act* 1941-1942. The two appeals have been heard together because they depend upon substantially the same evidence and raise the same questions of law.

In order to understand the basis of the assessments, it is necessary to refer shortly to the facts. On 16th April 1936 the deceased caused to be incorporated under the provisions of the Victorian *Companies Acts* a proprietary company under the name of Batman Exploration Co. Pty. Ltd. The two subscribers to the memorandum and articles of association were R. W. Bland and R. W. Shepheard. Clause 4 of the memorandum of association provides that the share capital of the company is £250,000 divided into 250,000 shares of £1 each with power to divide the shares in the capital for the time being into several classes and to attach thereto respectively any preferential preferred qualified or special rights, privileges or conditions. Clause 4 of the articles of association provides that the company's capital of £250,000 is divided into 20,000 A shares of £1 each and 230,000 B shares of £1 each. During the lifetime of the first governing director the A shares alone shall confer voting and dividend rights on the holders thereof and in the event of the company going into liquidation during the lifetime of the first governing director the assets of the company remaining after the payment of liabilities shall be distributed amongst the shareholders in the following manner: the holders of the B shares shall receive in proportion to the B shares held by them two and one-half per centum of the capital paid up or deemed to be paid up on the B shares and the holders of the A shares shall receive the balance of the assets. During the lifetime of the first governing director the B shares shall not confer any voting or dividend rights on the holders thereof and in the event of the company going into liquidation during the lifetime of the first governing director shall not except as aforesaid confer any rights in a liquidation to share in the distribution of the company's assets. In all other respects the A and B shares shall rank equally.

Clause 27 of the articles of association provides that the company may from time to time by special resolution reduce its capital by paying off capital or by cancelling unallotted, forfeited or surrendered shares or by cancelling capital which has been lost or is unrepresented by available assets or by extinguishing or reducing the liability of any of its shares or otherwise as may seem expedient and capital may be paid off on the footing that it may be called up again or otherwise. Clause 67 of the articles of association provides that on a show of hands every member shall have one vote and upon a

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poll every member shall have one vote for every share held by him provided that during the lifetime of the first governing director the holders of the B shares shall have no right to receive notice of or to be present or to vote at any general meeting by virtue or in respect of their holding of B shares. Clause 77 of the articles of association provides that a majority of the subscribers to the memorandum of association may by writing under their hand appoint a person to be the first governing director. The governing director shall retain office until he resigns the office or dies or until he becomes bankrupt or insolvent or a lunatic and whilst he retains office and notwithstanding anything to the contrary shall have authority to exercise all the powers, authorities and discretions vested in the directors generally and all the other directors, if any, shall be under his control and shall be bound to conform to his directions in regard to the company's business.

At the first meeting of directors of the company held on 17th April 1936, E. N. Grimwade was appointed the first governing director of the company by the subscribers to the memorandum of association and he then appointed his four sons, that is to say the three appellants and L. C. Grimwade who died soon afterwards, directors. One A share was allotted to each of the two subscribers of the memorandum and articles of association, 10,000 A shares were allotted to E. N. Grimwade and 130,000 B shares were allotted by his direction equally amongst his four sons. The whole of the purchase money for the A and B shares so allotted, that is to say £140,002, was paid to the company by E. N. Grimwade. At the same meeting the company purchased from E. N. Grimwade for £141,873 15s. 0d. 34,785 shares in Commonwealth Industrial Gases Ltd. and 54,000 shares in Drug Houses of Australia Ltd. At a meeting of directors held on 17th August 1936, the A share in the name of R. W. Bland was transferred to T. C. Alston, the solicitor of the company, and the A share in the name of R. W. Shepheard was transferred to H. M. Mogensen, the secretary of the company. At a meeting of directors held on 12th January 1937, 4,920 B shares were allotted equally amongst F. N. Grimwade, G. H. Grimwade and R. G. Grimwade by direction of E. N. Grimwade. The whole of the purchase money for these shares, that is to say £4,920, was paid to the company by E. N. Grimwade. At the same meeting the company purchased from E. N. Grimwade, for £4,919, 14,757 shares in Carba Dry Ice (Aust.) Ltd. At a meeting of directors held on 8th July 1937, 45,840 B shares were allotted equally amongst F. N. Grimwade, G. H. Grimwade and R. G. Grimwade by direction of E. N. Grimwade. The whole of the purchase money for these

shares, that is to say £45,840, was paid to the company by E. N. Grimwade. At the same meeting the company agreed to purchase from E. N. Grimwade for £45,840 an A.M.P. policy, 21,200 shares in Cuming Smith & Co. Pty. Ltd. and 5,000 shares in Australian Glass Manufacturing Ltd. At a meeting of directors held on 6th April 1938, E. N. Grimwade transferred one A share to F. N. Grimwade, one to G. H. Grimwade and one to R. G. Grimwade.

As a result of these allotments and transfers of shares the shareholding of the company became and thereafter remained E. N. Grimwade 9,997 A shares, F. N. Grimwade, G. H. Grimwade, R. G. Grimwade, T. C. Alston and H. M. Mogensen one A share each; F. N. Grimwade, G. H. Grimwade and R. G. Grimwade 49,420 B shares each, and the executors of the estate of L. C. Grimwade 32,500 B shares, the total allotment of shares being 10,002 A shares and 180,760 B shares.

At an extraordinary general meeting of the company held on 20th November 1942 at which E. N. Grimwade was present the following resolution was passed as a special resolution :—" That the Capital of the Company (which now is £250,000 divided into 20,000 A shares of £1 each and 230,000 B shares of £1 each of which 10,002 of the said A shares and 180,760 of the said B shares are issued and are fully paid up) be reduced to £47,690 10s. divided into 10,002 A shares of 5s. each and 180,760 B shares of 5s. each and that such reduction be effected by cancelling 9,998 of the existing A shares and 49,240 of the existing B shares which have not been taken or agreed to be taken by any person and by returning to the holders of the 10,002 A shares and to the holders of the 180,760 B shares that have been issued paid up capital to the extent of 15s. per share (the capital represented thereby being in excess of the wants of the Company) and by reducing the nominal amount of each of the said issued A and B shares from £1 to 5s."

At a further extraordinary general meeting of the company held on 31st March 1943 at which E. N. Grimwade was present the following resolution was passed as a special resolution :—" That the Capital of the Company (which now is £47,690 10s. divided into 10,002 A shares of 5s. each and 180,760 B shares of 5s. each all of which are issued and are fully paid up) be reduced to £23,845 5s. divided into 10,002 A shares of 2s. 6d. each and 180,760 B shares of 2s. 6d. each and that such reduction be effected by returning to the holders of the said 10,002 A shares and to the holders of the said 180,760 B shares paid up capital to the extent of 2s. 6d. per share (the capital represented thereby being in excess of the

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wants of the Company) and by reducing the nominal amount of each of the said A and B shares from 5s. to 2s. 6d."

Both reductions of capital were subsequently confirmed by orders of the Supreme Court of Victoria and the orders and minutes approved by the court registered with the Registrar-General, those relating to the first reduction on 11th December 1942 and those relating to the second reduction on 6th July 1943. The *Companies Act* 1938 (Vict.), s. 58 (2) contains the usual provision that upon registration of the order and minute and not before the resolution for reducing share capital as confirmed by the order so registered shall take effect.

The only business in which the company was engaged was the investment of its funds, principally in the shares which it had purchased from E. N. Grimwade. In order to find the cash necessary to make the repayments of capital to the shareholders authorized by the special resolutions the company sold large parcels of these shares either on the stock exchange or to the shareholders themelves. The moneys authorized to be paid by the first special resolution were paid to the shareholders in two equal instalments on 17th December 1942 and 28th January 1943. The moneys authorized to be paid by the second special resolution were paid to the shareholders on 27th July 1943. The total amount paid to the holders of the B shares pursuant to the first special resolution was £135,570. The total amount paid to the holders of the B shares pursuant to the second special resolution was £22,590.

The commissioner contends that these amounts less in the first case two and one-half per cent of three-fourths of the paid-up capital on the B shares, that is £3,389, and in the second case two and one-half per cent or one-eighth of such paid-up capital, that is £568, to represent the proportionate amounts which the holders of the B shares would have received upon the liquidation of the company in the lifetime of E. N. Grimwade were gifts by E. N. Grimwade to his sons within the meaning of the Act. He therefore assessed the appellants for gift duty on the sum of £132,181 in respect of the first special resolution and £22,030 in respect of the second resolution. The amount claimed in the former assessment is £34,591 and in the latter £5,765.

The Act provides for the taxation of gifts that are dispositions of property made otherwise than by will whether with or without an instrument in writing without consideration in money or money's worth passing from the disponee to the disponor, or with such consideration so passing if the consideration is not, or, in the opinion of the commissioner, is not, fully adequate. It defines disposition

of property to mean any conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing includes . . . (*d*) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property; . . . (*f*) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his own property and to increase the value of the property of any other person. It lay within the power of E. N. Grimwade during his life as the holder of all but five of the issued A shares to convene at any time a general meeting of the company and pass a special resolution that the company be wound up voluntarily. He would then have become entitled to practically the whole of the net assets of the company less the sixpence per share payable to the B shareholders. The company had practically no debts and its assets consisted of shares which could be easily realized or divided among the contributories in specie so that the cost charges and expenses of a winding up would have been small. The value of these assets exceeded the amount of the issued capital. It was contended for the respondent that by voting for or failing to vote against the special resolutions E. N. Grimwade had allowed himself to be deprived of this power and had thereby disposed of property to his sons in that he had forfeited or abandoned an interest in property to them within the meaning of par. (*d*). Alternatively it was contended that by so voting or failing to vote E. N. Grimwade had in each case entered into a transaction with the intent to diminish, directly or indirectly, the value of his own property, that is the value of the A shares, and to increase the value of the property of his sons, that is the value of the B shares, within the meaning of par. (*f*). It was contended that on either view the dispositions of property took place, that is the gifts were made, at the point of time when the special resolutions were passed.

Section 4 of the Act defines property to include real property and personal property and every interest in real property or personal property, and interest in property to mean any estate, interest, right or power whatsoever, whether at law or in equity, in or over any property. The definition of interest in property is very wide. It would seem to include a contractual right or power over property but the interest must be a legal or equitable right or power in or over particular property. It does not include a right or power which is only a right or power over property in a commercial sense. The power of E. N. Grimwade to put an end to the company by summoning an extraordinary general meeting of the company and

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voting in favour of a special resolution that the company be wound up voluntarily and thereby acquire the net assets was at most a power over property in a commercial sense. For it is clear that a company is the complete legal and equitable owner of its property and that a shareholder has no legal or equitable interest in any of its assets. The nature of the property in a share is described by Lord *Russell of Killowen* in *Commissioners of Inland Revenue* v. *Crossman* ; *Commissioners of Inland Revenue* v. *Sir Edward Mann, Bt.* (1), as " the interest of a person in the Company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company." In *Short* v. *Treasury Commissioners* (2), Lord *Porter* said that " a shareholder has no direct share in the assets of a company, he has such rights as the memorandum and articles give him and nothing more." The only right which E. N. Grimwade exercised or failed to exercise at the general meetings of the company at which the special resolutions to reduce its capital were passed was the right to vote. The right to vote has been said to be a right of property, and it is a right that in general a shareholder can exercise in general meeting as he thinks best in his own interests. He can also enter into a contract for valuable consideration which the court will enforce by an injunction to exercise or not to exercise his right to vote in general meeting as the other contracting party may direct: *Pender* v. *Lushington* (3) ; *Greenwell* v. *Porter* (4) ; *Puddephatt* v. *Leith* (5). If E. N. Grimwade had entered into a contract with his sons to vote in favour of the special resolutions or not to vote against them so that the sons should thereby derive a pecuniary benefit, and the consideration had been inadequate, it would have been open to argument that there had been a disposition of property made for an inadequate consideration. But there is no evidence of any such contract. The only evidence is that E. N. Grimwade attended both meetings and exercised his right to vote as he thought fit. He appears to have voted for both resolutions but nothing turns upon whether he so voted or allowed the resolutions to be passed by not voting against them. The *Companies Act* 1938 (Vict.), s. 55, empowers a company limited by shares subject to confirmation by the court if so authorized by its articles by special resolution to reduce its share capital in any way and in particular (without prejudice to the generality of the foregoing power) a company may . . . (*c*) . . . pay off any paid-up

(1) (1937) A.C. 26, at p. 66.
(2) (1948) A.C. 534, at p. 545.
(3) (1877) 6 Ch. D. 70.
(4) (1902) 1 Ch. 530.
(5) (1916) 1 Ch. 200.

share capital which is in excess of the wants of the company. The present company was authorized by its articles to pay off such capital. It is impossible for a company to go into liquidation in order to make a partial return of capital to the shareholders. Such a return can only be made by reducing the capital of the company. Upon the special resolution taking effect the company becomes indebted to those shareholders who are entitled to participate in the return of capital. Upon a reduction of capital the A and B shares were entitled to rank equally. A reduction of capital requires to be confirmed by the court principally to ensure that the creditors are not prejudiced but also to ensure that the reduction will not operate unfairly between the shareholders. It is the money of the company which becomes repayable to the shareholders. By voting for or failing to vote against the special resolutions E. N. Grimwade could not be said to have forfeited or abandoned any interest in property. He had no legal or equitable interest in the property of the company which he could forfeit or abandon. He became entitled to receive certain sums of money from the company when the special resolutions became effective. But he did not dispose of any interest in that money to his sons and the moneys to which his sons became entitled were the property of the company and not property in or over which he had at any time a legal or equitable interest or power. For these reasons I am of opinion that there was no disposition of property within the meaning of par. (*d*).

The more difficult question is whether there was a disposition of property within the meaning of par. (*f*). It was contended for the respondent that read in its context " transaction " means a transaction which is a disposition or alienation of the property of the disponor to the disponee, disposition being used in its widest sense to include the creation of a new right of property or the transfer of an existing right or the release or surrender of an existing right, and that the paragraph does not apply to transactions which are not in any sense dispositions or alienations by a disponor to a disponee of his own property or property over which he has a power of appointment. Section 25 (2) of the Act provides that gift duty shall constitute a duty jointly and severally due by the disponor and disponee to the King on behalf of the Commonwealth. It was submitted that Parliament could not have intended to impose liability for duty on a donee for a gift made *in invitum*, so that the transaction entered into must mean a transaction voluntarily entered into between a donor and a donee. Paragraph (*f*) appears to have been taken from s. 39 (*f*), which is contained in Part IV.

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of the *Death Duties Act* 1921 (N.Z.). Section 39 is the section which defines the meaning of disposition of property for the purposes of gift duty payable in respect of property situated in New Zealand. Section 50 of the New Zealand Act provides that gift duty shall constitute a debt due and payable by the donor to the Crown on the making of the gift. Accordingly in New Zealand the donee is not made liable for gift duty jointly with the donor as he is in Australia. Section 5 of the New Zealand Act provides that the estate of a deceased person shall be deemed to include any property comprised in any gift within the meaning of Part IV. of the Act made by the deceased within three years before his death. In *Finch* v. *Commissioner of Stamp Duties* (1), the meaning of par. (*f*) of s. 39 of the New Zealand Act, as incorporated in s. 5, was considered by the Privy Council. Lord *Hailsham* L.C. (2), delivering the judgment of the Privy Council, said that: "In their Lordships' view when the statute brings in as a gift a transaction entered into with intent to diminish the value of one estate and to increase the value of another, what is hit at by the statute is a transaction which the person entering into it intends to have the effect stated in the sub-section. It is not enough merely to prove that the result which is stated in that sub-section accrued."

The whole emphasis of par. (*f*) is upon a transaction entered into by one person, which seems to me to mean that where there is an act done by one person with the requisite intent, and as a result there is a transfer of value from any property of that person to the property of another person, the conditions of liability are satisfied. I do not think that the circumstance that the Australian Act makes the donee liable jointly with the donor for the duty is sufficient to limit the meaning of a transaction entered into to a transaction which is a disposition or other alienation of property of a donor to a donee entered into with intent to diminish the value of the property of the donor and increase the value of the property of the donee. Such a disposition or alienation would operate under some other words of the definition of disposition of property and would not be dependent on the intent with which it was entered into. It appears to me that pars. (*a*) to (*f*) were included in the definition of disposition of property for the purpose of including in the definition transactions which might otherwise not be held to fall within the ordinary meaning of a disposition or other alienation of property and that each paragraph is complete in itself.

The Act does not make the assessment prima-facie evidence of any facts. The onus is therefore on the respondent to satisfy the

(1) (1929) A.C. 427. (2) (1929) A.C., at p. 429.

court that E. N. Grimwade voted for the special resolutions or failed to vote against them with the intention of diminishing the value of the A shares and increasing the value of the B shares. If this is proved then it appears to me that E. N. Grimwade on each occasion entered into a transaction which was a disposition of property within the meaning of the Act. He had paid the company a pound for each of the B shares. But it is evident that they were not worth anything like this sum in his lifetime. The holders of these shares in this period had no right to vote or to dividends whilst the company was a going concern and were only entitled to sixpence per share upon a winding up. The company would seem to have been formed by E. N. Grimwade so that by using the machinery of company law he could create the equivalent of a life estate in the funds invested in the B shares with a general power to appoint the capital less sixpence per share during his life by deed with trusts in default of appointment to his sons without causing the funds so invested to be notionally included in his dutiable estate for the purposes of death duties. By virtue of his control of the company E. N. Grimwade could at any time during his lifetime place the company in voluntary liquidation and recover practically the whole of the moneys he had invested in the B shares. He was under no obligation to take this course but it is difficult to see how the B shares could have been worth more than sixpence per share so long as it lay in his power to do so. On the other hand the A shares were entitled to the whole of the dividends whilst the company was a going concern and to the whole of the net assets of the company less sixpence per B share upon a liquidation. Accordingly there can be no doubt that the result of the special resolutions was to diminish on the one hand the value of the A shares which were the property of E. N. Grimwade and to increase the value of the B shares which were the property of the sons. The only evidence of intent on the part of E. N. Grimwade to bring about this result is that he was present at the meetings of the company and voted for or failed to vote against the special resolutions. But he must be presumed to have intended the consequences of his acts. These consequences were that the capital returned to the B shareholders no longer formed part of the assets of the company available for distribution upon a winding up and became capable of earning income in their hands and for their benefit in lieu of its previous capacity to earn profits out of which dividends could be declared on the A shares. No evidence was tendered of any intent on the part of E. N. Grimwade to effect some other purpose and in the circumstances I think that I am bound to find that E. N. Grimwade

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voted for or failed to vote against the special resolutions with the intent that they should have the effect stated in par. (*f*). The respondent contended that dispositions of property within the meaning of the paragraph were made by E. N. Grimwade when he voted for or failed to vote against the special resolutions at the meetings of the company. I am inclined to think that the gifts were made when the special resolutions became effective but the point is of no importance.

Section 18 (*b*) of the Act provides that, subject to this Act, the value of a gift shall be taken to be the value thereof at the time of the making of the gift. The values of the gifts in the present case would be the extent to which the values of the A shares were diminished and those of the B shares increased by the reductions of capital. After the nominal amounts of the A and B shares had been reduced by the first special resolution to 5s. each the B shares were only entitled to 1½d. upon a winding up in the lifetime of E. N. Grimwade, and after the nominal amounts had been further reduced to 2s. 6d. the B shares were only entitled to ¾d. upon such a winding up. The B shares would not therefore have been worth more than 1½d. between the dates of the two special resolutions and ¾d. between the dates of the second special resolution and the death of E. N. Grimwade. On the other hand the holders of the B shares received 15s. per share on the first reduction and 2s. 6d. upon the second reduction, so that if the diminutions in value of the B shares in the first instance 4½d. and in the second instance ¾d. are deducted from these receipts the balance represents the extent to which the value of the A shares was diminished and the value of the B shares was increased by the reductions of capital. This was the basis on which the respondent calculated the values of the gifts for the purposes of the assessments under appeal. No evidence was tendered by the appellants to prove that these values were incorrect, and I can see no reason for not accepting them.

For these reasons I must dismiss the appeals with costs. One order may be taken out in both appeals. Liberty to apply.

From this decision the appellants appealed to the Full Court.

T. W. Smith K.C. (with him *Winneke*), for the appellants. The judgment appealed from is wrong in that it treats the question of liability to duty as depending simply on the question whether the case is within par. (*f*) of the definition of "disposition of property" in s. 4 of the *Gift Duty Assessment Act*. It is necessary to go further and to find whether the case is within the provision imposing liability

to duty, which is narrower in that it applies only to a dispositive transaction by the alleged donor. The liability to duty is declared by s. 11 of the *Assessment Act*, and s. 4 of the *Gift Duty Act* 1941, which is in substantially the same terms, imposes the duty. Under these sections what is taxed is a gift *of property* having the prescribed situation (as to which, see s. 13 of the *Assessment Act*). The scheme of the legislation is, first, to define " disposition of property " ; then, to define " gift " so as to exclude from duty some dispositions of property ; and, lastly, to impose liability, not on every " gift " (as defined), but only on such as come within the description of a " gift " (as defined) of " property " (as defined) which has an ascertainable location. The result is that, despite the wide language of par. (*f*) of the definition of "disposition of property," a "transaction" falling within the literal meaning of that paragraph is not dutiable unless it is a " gift " of " property " with the required location. Accordingly, duty is levied on a transaction within par. (*f*) only if it is a disposition (in the widest sense) by a donor of " property " with the required location. The word " property " has this restrictive effect in relation to par. (*d*) of the definition of " disposition of property," as was recognized by *Williams* J. ; but he did not advert to the fact that the very same situation arises in relation to par. (*f*) because of the terms of s. 11 of the *Assessment Act* and s. 4 of the *Gift Duty Act*. The view that, to be dutiable, a transaction must be dispositive on the part of a donor is supported by other sections of the *Assessment Act*. In s. 12 " disposition of property " would seem to be used in the ordinary (not the defined) sense ; here it cannot mean a transaction " with intent " &c. as in par. (*f*). In cases within ss. 11 (*b*) and 13 a local situation of the subject matter of the gift must be ascertained. It would be impossible to locate a mere increase or diminution in value ; it can only be done where some " property " is disposed of. In ss. 16 and 17 it is assumed that property the subject of the " disposition " can be identified. [He referred to *Broome* v. *Chenoweth* (1) ; *Vicars* v. *Commissioner of Stamp Duties* (*N.S.W.*) (2) ; *Finch* v. *Commissioner of Stamp Duties* (3) ; *Commissioner of Stamp Duties* v. *Card* (4).] Under the New Zealand Act the cases cited show that the disposition must be, not only by a donor, but by him to a donee. It is not necessary for the appellants here to go as far as that ; it is sufficient to say that there must be a dispositive transaction by a donor to a donee or another person with the required intent.

(1) (1946) 73 C.L.R. 583, at pp. 591, 592, 603.
(2) (1945) 71 C.L.R. 309, at pp. 333, 334, 336, 337.
(3) (1927) N.Z.L.R. 807, at p. 811 ; (1929) A.C. 427.
(4) (1940) N.Z.L.R. 637, at pp. 648, 649, 651.

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Some support, however, is to be found in our legislation for the view that the position is the same as in New Zealand; even if not sufficient to support a contention to that effect, it at least confirms the view that the transaction must be dispositive of property by a donor. Provisions which support this view, when read with the *Gift Duty Act* and with the definition of "donee" in s. 3 of the *Assessment Act* are ss. 16, 18, 19 and 25 of the latter Act; they all seem to make it essential that there shall be a donee who acquires an interest in property under the gift. If the appellants' view of the law is correct, it follows that there was no dutiable transaction here. By voting for, or refraining from voting against, the reduction of capital, E. N. Grimwade did not enter into any transaction which was dispositive in any sense of any "property" of his. The appellants' view does not—as *Williams* J. seems to have thought—deny to par. (*f*) any effect beyond that of pars. (*a*) to (*e*); for instance, par. (*f*) would bring in a case in which A pays B £1,000 in consideration of B's undertaking to transfer the same amount to C. Moreover, even if the view already submitted is not correct, nevertheless there must be a "transaction entered into"; these words are quite inapt to cover the casting of a vote, and more so the refraining from voting against a resolution.

Tait K.C. (with him *Eggleston*), for the respondent. The word "property" in s. 11 is not itself a limitation. The definition of "property" in s. 4 does not apply where "the contrary intention appears." Moreover, it is not exhaustive; it uses the word "includes," not "means." The word "property" is used in s. 11 only to define the thing as to which a local situation is required. By s. 11 duty is levied on every "gift," i.e., "any disposition of property" without consideration &c. For the purposes of s. 11, therefore, every transaction covered by par. (*f*) of the definition is a "disposition of property", whether it is dispositive or not. In relation to par. (*f*) the word "property" must be regarded as including whatever is the appropriate equivalent of property in the transactions to which the paragraph refers. This is the natural interpretation; it gives full effect to all the words used, whereas the appellants' construction gives par. (*f*) something less than its literal meaning. The appellants have advanced no valid reason for restricting the meaning of the words of the paragraph, as is admittedly the result of their construction. It is significant that, whereas pars. (*a*) to (*e*) deal in terms with dispositions of property (in the general sense), par. (*f*) departs from that form of expression; it is clearly intended to bring in cases which are not of that character.

In none of the cases cited for the appellants was there any question whether a " transaction " was " dispositive." *Broome* v. *Chenoweth* (1) is not an apt analogy. In *Vicars Case* (2) *Rich* J. was not concerned with any such question. In *Finch's Case* (3) the question was one of intent. In *Card's Case* (4) there was no question of non-dispositive acts. As to sections of the *Assessment Act* which were relied on as supporting the appellants' construction of par. (*f*): In s. 25, the references to a donee mean no more than " donee, if any " ; ss. 12, 16 and 18 are concerned only with bilateral transactions, and they shed no light on par. (*f*). In that paragraph " transaction " is a word of very wide meaning ; it is not necessarily confined to cases having the bilateral element ; it would include, but is not limited to, such cases. In the present case the act of voting would constitute a transaction as between the donor and the company. On the question of intent, there is a finding in the respondent's favour. As to the diminution of " the value of his own property," what is meant is " the whole or any part of his property." Here E. N. Grimwade clearly diminished the value of his whole estate, and that is sufficient for present purposes. Value means market value (*Commissioners of Inland Revenue* v. *Crossman* ; *Commissioners of Inland Revenue* v. *Sir Edward Mann, Bt.* (5) ; *Myer* v. *Commissioner of Taxes* (6) ; *Abrahams* v. *Federal Commissioner of Taxation* (7)).

T. W. Smith K.C., in reply.

Cur. adv. vult.

July 28.

The following written judgments were delivered :—

LATHAM C.J. AND WEBB J. This is an appeal from an order of *Williams* J. confirming two assessments of the executors of the late Edward Norton Grimwade to duty under the *Gift Duty Act* 1941. In 1936 (five years before the *Gift Duty Act* was passed) E. N. Grimwade formed the Batman Exploration Co. Pty. Ltd. The assets of the company consisted of shares in several companies which were transferred to the company by E. N. Grimwade in consideration of shares issued as fully paid to him and by his direction to his four sons. There were two classes of £1 shares—A shares and B shares. E. N. Grimwade held nearly all the A shares. During his life the A shares alone had voting rights and

(1) (1946) 73 C.L.R. 583.
(2) (1945) 71 C.L.R., at p. 333.
(3) (1927) N.Z.L.R. 807 : see pp. 811, 815 ; (1929) A.C. 427 : see pp. 429, 430.
(4) (1940) N.Z.L.R. 637 : see pp. 648, 649.
(5) (1937) A.C. 26.
(6) (1937) V.L.R. 106.
(7) (1944) 70 C.L.R. 23.

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dividend rights. E. N. Grimwade had full powers of appointing directors and managing the company. Upon a winding up during his life the holders of the B shares were entitled only to two and one-half per cent of the capital paid or deemed to be paid up on their shares and the A shareholders were entitled to the balance of the assets. In 1942 and 1943 resolutions were passed providing for a return of capital of 17s. 6d. per share to all the shareholders. The resolutions were carried unanimously, E. N. Grimwade being present. At this time he owned 9,997 A shares and five other persons each owned one A share. Capital was returned in accordance with the resolutions and the other shareholders thereby received a large benefit—17s. 6d. per share on 180,760 B shares. The commissioner applied the provisions of the *Gift Duty Assessment Act* 1941-1942 and assessed the executors to gift duty upon what was calculated as being the amount of net benefit received by the shareholders other than E. N. Grimwade himself.

The *Gift Duty Act* 1941 provides in s. 4 that gift duty at the rates set forth in the schedule shall be levied and paid in respect of every gift made on or after the commencement of the Act "(*a*) by a person . . . domiciled in Australia . . . of any property wherever situated." E. N. Grimwade was domiciled in Australia. The commissioner estimated the value of the two gifts alleged to have been made at £154,211. The schedule provides, *inter alia*, that where the value of all gifts exceeds £120,000 but is less than £500,000 the rate of duty shall be twenty-six per centum of the value of the gift, increasing according to a specified scale. The term " value of all gifts " is defined in the schedule as meaning " the sum of the value of the gift in question and the value of all other gifts made, whether at the same time or within eighteen months previously . . . or eighteen months subsequently, by the same donor to the same or any other donee." The *Gift Duty Assessment Act* 1941-1942 contains in s. 11 the same provision as that already quoted from the *Gift Duty Act*, except that the rates of duty are to be such as are declared by Parliament. As already stated, rates were so declared in the *Gift Duty Act* 1941. Accordingly, gift duty is levied in accordance with the schedule mentioned upon the value of the gift.

Section 4 of the *Gift Duty Assessment Act* 1941-1942 defines " gift " as meaning " any disposition of property which is made otherwise than by will (whether with or without an instrument in writing), without consideration in money or money's worth passing from the disponee to the disponor, or with such consideration so

passing if the consideration is not, or, in the opinion of the Commissioner, is not, fully adequate." Section 4 provides that " ' property ' includes real property and personal property and every interest in real property or personal property." Section 4 contains the following provision with respect to the term " disposition of property " :—" ' Disposition of property ' means any conveyance, transfer, assignment, settlement, delivery, payment or other alienation of property and, without limiting the generality of the foregoing, includes— . . . (*d*) the release, discharge, surrender, forfeiture or abandonment, at law or in equity, of any debt, contract or chose in action, or of any interest in property; (*e*) . . . (*f*) any transaction entered into by any person with intent thereby to diminish, directly or indirectly, the value of his own property and to increase the value of the property of any other person." Before *Williams* J. the commissioner relied upon both par. (*d*) and par. (*f*) to support the assessment. The learned judge, for reasons with which we entirely agree, rejected the argument based upon par. (*d*) and the respondent did not again present that argument upon the appeal. The question therefore which arises upon this appeal is whether par. (*f*) applies to the facts of the case.

The learned judge held that the action of E. N. Grimwade in voting for the resolutions for the reduction of capital—or his failing to vote against them when he had a controlling vote—constituted entering into a transaction of the description set forth in par. (*f*) of the definition of " disposition of property."

Paragraph (*f*) applies to any transaction entered into with the specified intent. It is evidently intended to include within the scope of the Act transactions which do not consist in an actual transfer of property from a donor to a donee. Such latter transactions are dispositions of property within the meaning of other parts of the definition. Paragraph (*f*) is intended to cover cases of transactions entered into with the intent to diminish the value, not of some property which is transferred to another person, but of the donor's own property *in globo* and to increase the value of the property *in globo* of another person. A transfer of property by A, not directly to another person C, but through an intermediary B, where it was the intention of A that C should obtain the property without giving consideration, would be a transaction falling within par. (*f*). A similar result would be attained by contractual arrangements whereby C obtained a benefit without becoming the owner of any property that had belonged to A. Thus if B for some valuable consideration moving from A made a contract with A that he (B) would pay £1,000 to C without receiving

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any consideration from C, the intent of A would be to diminish the value of his own property by giving consideration to B and by that means to increase the value of C's property by £1,000, which sum would be paid to C by B. It was suggested in comment upon this illustration that in such a case B would be the person who made a gift to C, because, as between B and C, there would be no consideration for the payment of the £1,000. The reason why B was content to make such a gift to C would be immaterial in determining whether or not there was a gift to C. But this circumstance would leave unchanged the fact that A had entered into a transaction with B the result of which was to diminish the value of A's property and increase the value of C's property without any consideration being given by C. Such a transaction would therefore (it would seem) fall within par. (*f*).

Paragraph (*f*) refers only to the *intent* of the person who diminishes the value of his own property, and does not in its own terms require that the transaction should actually produce the *effect* of diminishing the value of the donor's property and increasing the value of another person's property. But s. 11 of the *Assessment Act* and s. 4 of the *Gift Duty Act* show that, in order that a disposition of property falling within the description of par. (*f*) should be a gift resulting in a liability to duty, the transaction must have the effect of diminishing the value of the donor's property and increasing the value of the donee's property, because otherwise it would be impossible to ascertain the value of the property taken under the gift and therefore no duty would be payable in respect of the transaction. Thus par. (*f*) is aimed at transactions which are entered into with a particular intent and which produce the effect referred to in the description of that intent. If they are entered into without consideration they are gifts the value of which is assessed by the benefit (in the form of increase of value of his property) received by the person who, for the purposes of the Act, is in the position of a donee. It is not necessary, in order that par. (*f*) should apply, that property should pass from the donor himself directly or indirectly to the donee as long as there are to be found in the transaction the intent and the effect specified.

Before considering the application of the Act, it is necessary to state in greater detail the facts of the case. In the year 1936 E. N. Grimwade formed the Batman Exploration Co. Pty. Ltd. with a capital of £250,000 divided into 20,000 A shares of £1 each and 230,000 B shares of £1 each. 10,002 of the A shares and 180,760 of the B shares had been issued as fully paid up at the time of the reductions of capital hereinafter mentioned. The A

shares in 1942 were held as follows :—E. N. Grimwade 9,997 shares, F. N. Grimwade, G. H. Grimwade, R. G. Grimwade (sons of E. N. Grimwade), T. C. Alston and H. M. Mogensen, one share each. F. M. Grimwade, G. H. Grimwade and R. G. Grimwade each held 49,420 B shares, and the executors of the will of L. C. Grimwade held 32,500 B shares. The company was an investment company. It held shares in other companies but, according to the evidence, did no other business. The articles of association provide that during the lifetime of the first governing director the A shares alone should confer voting and dividend rights on the holders, and in the event of the company going into liquidation during the lifetime of the first governing director the assets of the company remaining after the payment of liabilities should be distributed among the shareholders in the following manner : the holders of the B shares to receive two and one-half per cent of the capital paid up or deemed to be paid up on those shares, and the holders of the A shares to receive the balance of the assets (article 4).

The articles also provide that the company may from time to time, by special resolution, reduce its capital by (*inter alia*) paying off capital or cancelling unallotted shares or by extinguishing or reducing the liability of any of its shares (article 27). Article 67, which deals with votes of members, provides that during the lifetime of the first governing director the holders of the B shares shall have no right to be present or to vote at any general meetings by virtue of their holding of B shares. Article 77 provides that a majority of the subscribers to the memorandum of association may by writing under their hand appoint a person to be the first governing director. E. N. Grimwade was so appointed. Article 77 also provides that the governing director shall have authority to exercise all the powers, authorities and discretions expressed to be vested in the directors generally and that all the other directors, if any, of the company shall be under his control and bound to conform to his directions in regard to the company's business. Article 79 provides that the governing director may appoint other persons to be directors of the company and may remove them. E. N. Grimwade appointed his four sons as directors of the company, and after the death of L. C. Grimwade the other three sons with E. N. Grimwade were the directors of the company. Article 101 provides that the management of the business of the company shall be vested in the directors who can exercise all powers of the company. The effect of these articles was that E. N. Grimwade had complete control of the business of the company.

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The assets of the company consisted of shares transferred to the company by E. N. Grimwade in consideration of the allotment of shares to him and by his direction to his sons. The balance sheet of the company dated 15th November 1942 showed assets of £203,806, and there were no external liabilities. In 1942 from August to November the company sold a large number of shares for over £102,000. On 20th November 1942 an extraordinary general meeting of the company was held. E. N. Grimwade was present and the following special resolution was passed unanimously :—" That the capital of the Company (which now is £250,000 divided into 20,000 A shares of £1 each and 230,000 B shares of £1 each of which 10,002 of the said A shares and 180,760 of the said B shares are issued and are fully paid up) be reduced to £47,690 10s. divided into 10,002 A shares of 5s. each and 180,760 B shares of 5s. each and that such reduction be effected by cancelling 9,998 of the existing A shares and 49,240 of the existing B shares which have not been taken or agreed to be taken by any person and by returning to the holders of the 10,002 A shares and to the holders of the 180,760 B shares that have been issued paid up capital to the extent of 15s. per share (the capital represented thereby being in excess of the wants of the Company) and by reducing the nominal amount of each of the said issued A and B shares from £1 to 5s." On 25th November 1942 a petition was presented to the Supreme Court praying that the reduction of capital to be effected by the special resolution should be confirmed. At that time the company held about £82,000 in cash and it was considered that other investments of the value of £61,000 would not be required for re-investment by the company. The reduction of capital was confirmed by the Supreme Court. The result was that the A shares and B shares each became 5s. shares, and that the unissued shares were cancelled. The A shareholders and the B shareholders each received 15s. per share as a return of capital.

On 31st March 1943 another special resolution was unanimously passed at a meeting, at which E. N. Grimwade was present, further reducing the capital of the company, and this resolution was approved by the Supreme Court. The resolution provided for the reduction of the A and B shares of 5s. each (which at this time were all issued shares) to shares of 2s. 6d. each, and for returning 2s. 6d. per share to the A and B shareholders. The company had, when the second resolution was passed, enough money in hand to pay the full amount of 17s. 6d. per share. The money was paid in accordance with the resolutions. The result was that the shares in the company became fully paid-up shares of 2s. 6d. each, the

governing director still had control of the company, the B shareholders as such had no voting rights and if the governing director had wound up the company in his lifetime they would have been entitled only to two and one-half per cent of the remaining assets of the company—which were worth about £73,000.

The first question which arises may be answered without much difficulty: "Was there a diminution in the value of E. N. Grimwade's property and an increase in the value of the property of his sons by reason of the return of capital?" It is plain that the value of E. N. Grimwade's A shares, which gave him full control of the company with a right to wind up at any time, and therefore to obtain for himself ninety-seven and one-half per cent of the assets of the company, was greatly diminished by the reduction of capital. It is equally obvious that the value of the property of the sons was increased by the 17s. 6d. per share which they received. After the return of capital they were much better off—with 17s. 6d. received in respect of all their shares and still owning the single A shares and all the B shares (reduced to 2s. 6d.)—than they had been as owners of the same shares as £1 shares subject to the overriding rights of their father. The amount of the increase in value may be matter for argument, but there can be no doubt that there was a very substantial increase.

Paragraph (*f*) of the definition of "disposition of property" requires that a transaction should be entered into by a person with intent to diminish the value of his own property and to increase the value of the property of some other person. This intent must be a real intent: *Finch* v. *Commissioner of Stamp Duties* (1). It was found by the learned trial judge that there was such an intent. This finding was based on an inference from all the facts of the case. We agree that this inference should be drawn. There was no evidence of any other intent. The diminution of the value of E. N. Grimwade's property and the increase in the value of the property of his sons was the obvious and necessary result of what was done. It is true that the intent was to reduce the value of both A and B shares, but it is still the case that the value of the property of the sons was increased because they each received 17s. 6d. per share and that E. N. Grimwade intended this result.

But did E. N. Grimwade "enter into a transaction" when he voted for the resolutions reducing capital?

There may be a "transaction" with respect to the casting of a vote. It may be an illegal transaction as when an elector takes

(1) (1929) A.C. 427.

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a bribe in return for his vote at a parliamentary election. It may be a legal transaction, as when a shareholder (who as such has no fiduciary obligation in respect of the manner in which he exercises his right to vote on the affairs of a company) agrees to vote in a particular way for a consideration, e.g. if other shareholders will exercise their votes in a particular way. Such an agreement is an ordinary business matter when a re-adjustment of rights between ordinary and preference shareholders takes place. The commissioner did not allege that there was any agreement between E. N. Grimwade and his sons as to voting for the resolutions. But when a shareholder makes up his mind to vote in a particular way and casts his vote accordingly he cannot be said to be " entering into a transaction." A transaction by a person must be a transaction *with* some other person. In the circumstances mentioned there is no transaction with any person.

If a preference shareholder in a company voted in favour of reducing the rate of dividend upon preference shares in order to allow the company to pay some dividends to ordinary shareholders it would be an unreal description of what took place to say that that fact showed that the preference shareholder had " entered into a transaction." The result of a contrary view would be that each of the preference shareholders or at least all who voted for the resolution, would (if the intent of improving the value of ordinary shares were found to exist) be regarded as making a gift within the meaning of the *Gift Duty Act* to each of the ordinary shareholders. Presumably a dissenting minority would not be held to be engaged in a transaction of making a gift. If so, the majority of voting shareholders would be regarded as making the whole of the gift—which would be a remarkable result. It was suggested that even to abstain from voting against a resolution beneficial to a class of shareholders amounted to entering into a transaction within par. (*f*). All these contentions interpret the words " enter into a transaction " as if they had the same meaning as " do an act or abstain from doing an act." Such an interpretation gives no real effect to the words " enter " and " transaction."

We are therefore of opinion that E. N. Grimwade did not enter into a transaction constituting a disposition of property within the meaning of par. (*f*) in s. 4 and that therefore there was no gift upon which duty became chargeable. This conclusion renders it unnecessary for us to consider various questions which were raised with respect to the value of the alleged gift. In our opinion the appeal should be allowed and the assessment should be set aside.

RICH J. The facts which have given rise to this appeal are stated in the judgment of the primary judge, and it is unnecessary to recapitulate them. The question for our decision is whether these facts disclose within the *Gift Duty Assessment Act* 1941-1942 a " disposition of property " by Edward Norton Grimwade whom I will hereafter refer to as the propositus.

The Act in question is cited as " *The Gift Duty Assessment Act* 1941-1942 " and from this description one would presume that it was intended to provide for a duty on gifts.

The definition section—s. 4—has a material bearing on the question at issue. In it a " donor " means any person who makes a gift and a " donee " is any person who acquires any interest in property under a gift, and where a gift is made to a trustee for the benefit of another person, includes both the trustee and beneficiary. And a gift means " any disposition of property which is made otherwise than by will . . . without consideration in money or money's worth passing from the disponee to the disponor, or with such consideration so passing if the consideration is not, or, in the opinion of the Commissioner, is not, fully adequate." Then " disposition of property " is also defined. Thus it would appear from the material provisions of s. 4 that what is struck at by the Act is a gift constituted by a disposition of property made by a donor to a donee who thereby acquires an interest in the property In *Carter* v. *Carter* (1) it was held that a declaration of trust of copyholds by a married woman, tenant on the rolls of the manor, by a deed acknowledged under the *Fines and Recoveries Act* (1833) was a disposition within the meaning of s. 77 of the Act. *Stirling* J. (2), as he then was, said :—" The words ' dispose ' and ' disposition ' in the Fines and Recoveries Act are not technical words, but ordinary English words of wide meaning ; and where not limited by the context those words are sufficient to extend to all acts by which a new interest (legal or equitable) in the property is effectually created." I take this statement to apply to a new interest created as between a donor and donee.

The facts of this case do not, in my opinion, justify the conclusion that there was a gift made by the propositus. It is, I think, clear that what was done by him did not come within s. 4 (*d*) of the Act. The more difficult question to my mind is whether what was done came within s. 4 (*f*). This clause provides that a disposition of property includes any transaction entered into by any person with intent to diminish, directly or indirectly, the value of his own property and to increase the value of the property of any other

(1) (1896) 1 Ch. 62. (2) (1896) 1 Ch., at p. 67.

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person. "Transaction" in its dictionary meaning is an act, doing, negotiation or dealing.

In *Brewin, Nicholson and Mercer, Assignees of Katton* v. *Short, Cutts, North and Gallimore* (1), during the argument Lord *Campbell* C.J. said: "Johnson defines 'transaction' as 'negotiation; dealing between man and man'." In the second edition of Dr. Johnson's Dictionary "transaction" is defined as follows:—"Negotiation: dealing between man and man: management; affairs; things managed." Whatever may be the precise meaning of the word in s. 4 (*f*), it should in my opinion be construed as meaning some act, doing, negotiation or dealing by a donor in favour of a donee, whether by a direct or indirect method.

What was done by the propositus in the present case was to form a holding company whose assets were provided by him, no doubt with the intention of reducing some of his liability to the Commissioner of Taxation. But the structure of this company as evidenced by the provisions set out in the judgment under appeal, does not show any intention on the part of the propositus to dispose of his property by gifts.

The formation of the company might be considered as a transaction on the part of the propositus, but it has no connection between him and any donee or donees. Whatever the company did when it was incorporated was something for which the company was responsible, and there is no evidence that what it did, it did as the agent or trustee of the propositus. One cannot disregard the legal proposition that a company is an independent legal entity distinct from its members. In *Aron Salomon* (*Pauper*) v. *A. Salomon and Company, Limited* (2), Lord *Halsbury* L.C. said:—"I am simply here dealing with the provisions of the statute, and it seems to me to be essential to the artificial creation that the law should recognise only that artificial existence—quite apart from the motives or conduct of individual corporators. In saying this, I do not at all mean to suggest that if it could be established that this provision of the statute to which I am adverting had not been complied with, you could not go behind the certificate of incorporation to shew that a fraud had been committed upon the officer entrusted with the duty of giving the certificate, and that by some proceeding in the nature of *scire facias* you could not prove the fact that the company had no real legal existence. But short of such proof it seems to me impossible to dispute that once the company is legally incorporated it must be treated like any

(1) (1855) 5 E. & B. 227, at p. 233 [119 E.R. 466, at p. 468.]

(2) (1897) A.C. 22, at p. 30.

other independent person with its rights and liabilities appropriate to itself, and that the motives of those who took part in the promotion of the company are absolutely irrelevant in discussing what those rights and liabilities are."

In *Macaura* v. *Northern Assurance Company Limited* (1), Lord *Wrenbury* said: "My Lords, this appeal may be disposed of by saying that the corporator even if he holds all the shares is not the corporation, and that neither he nor any creditor of the company has any property legal or equitable in the assets of the corporation."

In the instant case the propositus was responsible for the formation in April 1936 of the company known as Batman Exploration Co. Pty. Ltd., but this company when formed could only be regarded as Lord *Halsbury* said "like any other independent person with its rights and liabilities appropriate to itself and that the motives of those who took part in the formation of the company are absolutely irrelevant in discussing what those rights and liabilities are." In order to determine whether there is a disposition under s. 4 (*f*) one must examine the constitution of the Batman Company and the substance and form of the transactions entered into by it in the light of the principles I have mentioned.

Thus examined it leads, I consider, to the conclusion that while on a surface appearance it might be said that the company was acting in accordance with the wishes of the propositus, yet it cannot be said that what was done by the propositus in the formation of the company and thereafter by the company constituted a gift by him under the *Gift Duty Assessment Act*.

The appeal should be allowed.

Appeal allowed. Order discharged. In lieu thereof order that assessment be set aside. Respondent to pay costs of appeal to High Court and of appeal to Full Court.

Solicitors for the appellants: *Hedderwick, Fookes & Alston.*

Solicitor for the respondent: *K. C. Waugh*, Acting Crown Solicitor for the Commonwealth.

E. F. H.

(1) (1925) A.C. 619, at p. 633.