[HIGH COURT OF AUSTRALIA.]

STEWART DAWSON AND COMPANY (VICTORIA) PROPRIETARY LIMITED } APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

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MELBOURNE, *Feb.* 20, 21, 27.

Dixon J.

Land Tax—Assessment—Companies—Companies consisting substantially of the same shareholders—Several companies deemed a single company for purposes of assessment—Whether three-fourths of paid-up capital of each company held on behalf of shareholders of the other—Whether shares held beneficially or in trust—Land Tax Assessment Act 1910-1927 (*No.* 22 *of* 1910—*No.* 30 *of* 1927), *sec.* 40.

Sec. 40 of the *Land Tax Assessment Act* 1910-1927 provides:—"(1) Any two or more companies which consist substantially of the same shareholders shall be deemed to be a single company, and shall be jointly assessed and liable accordingly, with such rights of contribution or indemnity between themselves as is just. (2) Two companies shall be deemed to consist substantially of the same shareholders if shares representing not less than three-fourths of the paid-up capital of each of them are held by or on behalf of shareholders of the other. Shares in one company held by or on behalf of another company shall for this purpose be deemed to be held by shareholders of the last-mentioned company."

Four companies, including the appellant, were jointly assessed under this provision. The appellant objected to the inclusion in the aggregation of one of the four companies, referred to as the Queensland Company, because shares representing not less than three-fourths of the paid-up capital of the Queensland Company were not held by or on behalf of shareholders in the other three companies. D., a shareholder in all the Companies, had voluntarily transferred 3,000 shares in the Queensland Company to each of his two daughters and to his granddaughter, who held no shares in one of the other companies.

Held, that the shares so transferred to his daughters and granddaughter respectively were held by them beneficially and not in trust for D.; that D. consequently did not hold three-quarters of the shares in the Queensland Company, and consequently that the four Companies should not have been assessed jointly under sec. 40 of the *Land Tax Assessment Act* 1910-1927.

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APPEAL from the Commissioner of Taxation.

This was an appeal by one of four companies which had been jointly assessed to land tax as if they were a single company. The assessment under appeal was for the financial year 1927-1928 upon land as owned on 30th June 1927.

The facts fully appear in the judgment of *Dixon* J. hereunder.

Herring, for the appellant.

Robert Menzies, A.-G. for Vict., and *Moore*, for the respondent.

Cur. adv. vult.

Feb. 27.

DIXON J. delivered the following written judgment:—

The appellant is one of four Companies which have been jointly assessed to land tax as if they were a single company. The assessment under appeal is for the financial year 1927-1928 upon land as owned on 30th June 1927. Sec. 40 of the *Land Tax Assessment Act* 1910-1927 provides that any two or more companies which consist substantially of the same shareholders shall be deemed a single company, and shall be jointly assessed and liable accordingly, and that two companies shall be deemed to consist substantially of the same shareholders if shares representing not less than three-fourths of the paid-up capital of each of them are held by or on behalf of shareholders of the other. The four Companies which have been jointly assessed under this provision upon their combined ownership of land are these: (1) Stewart Dawson & Co. Pitt Street Property Limited, a company incorporated in New South Wales on 28th June 1920 owning land in Sydney upon which a jeweller's business appears to have been conducted by a company called Stewart Dawson & Company (N.S.W.) Limited; (2) Stewart Dawson & Company (Vict.) Proprietary Limited, a company incorporated on 24th March 1922 owning land in Melbourne and there conducting a jeweller's business; (3) Stewart Dawson & Company (W.A.) Limited, a company incorporated about 15th March 1922 owning a leasehold interest in land in Perth and there conducting a jeweller's business; (4) Stewart Dawson & Company (Queensland) Limited, a company

incorporated about 8th October 1921 owning land in Brisbane and there conducting a jeweller's business.

The appellant, which is the Victorian Company, complains that the inclusion of the land of the Queensland Company in the aggregation is wrong because shares representing not less than three-fourths of the paid-up capital of the Queensland Company are not held by or on behalf of shareholders in the other three Companies. In fact less than three-fourths of the paid-up capital of the Queensland Company was and is held by shareholders of the Pitt Street Property Company, and the assessment can be supported only on the ground that enough additional paid-up capital in the Queensland Company to make up the required three-fourths is held by persons, who, although not themselves members of the Pitt Street Property Company, yet hold their shares on behalf of a member or members of that Company.

The Companies were all founded by David Stewart Dawson, and he was the principal shareholder in the Pitt Street Property Company. Two of his daughters, Mrs. Arnold and Mrs. Jerrard, and a granddaughter, Miss Joyce Verrall, were and are each registered as holder of 3,000 shares of the paid-up capital of the Queensland Company, but none of them was a member of the Pitt Street Property Company. The Commissioner has adopted the view that the 9,000 shares in respect of which these names appear on the Company's share register were in fact held on behalf of David Stewart Dawson. It is clear that, unless 3,403 of them were held on his behalf, the assessment cannot be supported. As each allotment of 3,000 shares was made as one indistinguishable parcel, this means, in substance, that the assessment falls unless two of these three shareholders held their shares on behalf of David Stewart Dawson.

Before the formation of the several Companies that have been described, the jewellery businesses since parcelled out amongst them were carried on as one enterprise by a single company incorporated in New South Wales called Stewart Dawson & Co. (Australia) Ltd. Towards the end of 1921, probably because of the incidence of the income taxes, particularly that of the State of Queensland which discriminates between companies that have and those that have not their head office or principal place of business in the State, it

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was decided to form separate companies for each of the four States in which business was carried on. In the cases of Stewart Dawson & Co. (N.S.W.) Ltd., Stewart Dawson & Co. (Vict.) Ltd., and Stewart Dawson & Co. (W.A.) Ltd., it appears that the new company took over the assets belonging to the business in the State in which it was formed and paid for them in shares allotted at the direction of Stewart Dawson & Co. (Aust.) Ltd. to its shareholders in proportion to their interests. In the case, however, of Stewart Dawson & Co. (Queensland) Ltd., the assets were paid for in cash. David Stewart Dawson paid £30,000 to the Queensland Company for 30,000 paid-up shares of £1 each, which, together with seven shares subscribed for in its memorandum, brought the share issue to 30,007. Thereupon as consideration for the Queensland assets the Queensland Company paid this sum to Stewart Dawson & Co. (Aust.) Ltd., which has in fact advanced it to David Stewart Dawson for the purpose of paying up the shares. Stewart Dawson & Co. (Aust.) Ltd. then went into liquidation, and in the liquidation the debit of £30,000 to David Stewart Dawson's loan account with the Company was extinguished. It does not appear from the evidence that any part of this sum was debited against the interest in the surplus assets to which other allottees of shares in the Queensland Company were or may have been entitled. Before these transactions 5,000 shares in Stewart Dawson (Aust.) Ltd. stood in the name of Mrs. Arnold and 5,000 in the name of Mrs. Jerrard. None stood in the name of Miss Joyce Verrall, but some appear to have been standing in the name of her mother Mrs. Bertha Verrall. Upon the reconstruction Mrs. Arnold and Mrs. Jerrard were each allotted 3,334 fully paid up shares in the New South Wales Company; 3,666 in the Victorian Company, and 1,334 in the Western Australian Company. It does not appear whether Miss Joyce Verrall was allotted any shares in the New South Wales Company, but she was allotted 1,000 shares in the Victorian and 500 in the Western Australian Company and this was done at the instance of her grandfather, David Stewart Dawson, and presumably out of the shares to which he became entitled in those Companies in respect of his shareholding in Stewart Dawson & Co. (Aust.) Ltd. Under his direction, of the shares for which the sum of £30,000 was paid, 3,000 each were allotted to his daughters Mrs.

Arnold and Mrs. Jerrard and to his granddaughter Miss Joyce Verrall and 1,700 to the manager of the Queensland business. It is not contended that the manager took his shares otherwise than beneficially. But the Commissioner maintains that David Stewart Dawson's daughters and granddaughter did not take their shares by way of gift or beneficially, but held them on his behalf.

David Stewart Dawson died in his eighty-second year on 6th August 1932 while this appeal was pending. In the absence of the direct evidence which he might have given, his object and his intention in reference to the transaction must be inferred from circumstances. Unfortunately the parties have been able to lay before the Court but scanty material for the purpose. David Stewart Dawson had six children, two daughters by a first marriage who became Mrs. Arnold and Mrs. Jerrard, and, by a second marriage, a daughter who became Mrs. Verrall, and three sons. The age of the youngest of his children, a son, was in 1922 about twenty-five or twenty-six. He made an annual allowance to each of his children, and at all material times his daughters received £1,000 a year which was paid through the London or Sydney business offices. Mrs. Jerrard resided in England with her husband. Mrs. Arnold and her husband for the most part resided in England, but they were in Australia for about four and a half years in the years 1921-1925. Mrs. Verrall, whose husband died in 1917, with her daughter Joyce, who was seven years of age at the death of her father, lived sometimes in Australia and sometimes in England. David Stewart Dawson had a home in Sydney but he was much abroad. He paid for his granddaughter's education, and, from the time she was sixteen or seventeen, made her an allowance. He did not communicate to her the fact that he had put in her name 3,000 shares in the Queensland Company nor apparently any other shares. Mrs. Jerrard first learned that shares stood in her name from a letter received from her father, she thinks during the War, saying, in effect, that she would be glad to hear he was putting some shares in her name. She obtained no precise knowledge of the nature or extent of the shares allotted to her. Mrs. Arnold had a conversation with her father in Sydney in 1922 in which he said that he had some good news for her, that he had put shares in her name from which

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she would get dividends. At or about the same time some difficulties arose about Federal income tax upon undistributed income which the Commissioner might or did claim could reasonably have been distributed, and her father asked Mrs. Arnold to sign a paper stating that she had received all dividends. Her evidence, while plainly truthful, cannot be relied upon for the order of events or for the business significance of these occurrences, because, as she says, she was very careless about it and did not seem to trouble and left her affairs in her husband's hands. What is clear, however, is that she received directly from the Queensland Company about 30th December 1922 a dividend of 4 per cent on her shares, a sum of £120; about 20th October 1923 a dividend of 6 per cent, a sum of £180; and about 29th December 1924 another dividend of 6 per cent, £180. She also received a notice or notices of meeting from the Queensland Company and a notice or notices from Stewart Dawson & Co. (Aust.) Ltd., or some other source relating to the scheme of reconstruction. It appears that within a day or so of 29th December 1925, when Mrs. Arnold was actually paid a dividend of £180, her father telegraphed instructions to the manager of the Queensland Company that it should be paid to him. These instructions he confirmed by a letter in which he directed that dividends should always be sent to him as he paid his daughter monthly on account and "kept the dividends against same." The Arnolds left for England at about this time. Mrs. Arnold had, while in Australia, refused her father's request to sign an acknowledgment that she had received all dividends from her shares in the Companies. On 12th February 1925 her father cabled to the London office:—"The Arnolds gone to London. Do not pay them any money refer them to me." On 22nd April 1925 he cabled authorizing payment of a month's allowance to Mrs. Arnold on her signing a paper at the office of his London solicitors. The nature of the paper may be inferred from a letter which he wrote to his solicitors on 14th May 1925. This letter is not, I think, evidence of the facts it narrates, but the instructions it contains are relevant and admissible. It instructed them to make out acknowledgments that Mrs. Arnold and Mrs. Jerrard had received in the yearly £1,000 paid to them all

dividends and that future dividends would be covered by the allowance and to get them to call and sign the documents. The letter referred expressly to "5,000 shares of Stewart Dawson & Co. in their names," but added a postscript: "This applies to the original shares that stood in their names and also to the shares that at present stand in their names." Acknowledgments were drawn accordingly and signed, one by Mrs. Arnold and the other by Mrs. Jerrard, and sent to David Stewart Dawson in Australia. Mrs. Arnold's allowance had been stopped until she agreed to sign an acknowledgment. About a month before the next dividend was paid by the Queensland Company, the manager received from David Stewart Dawson a note directing that "all family dividends" should be sent to him. Except for the three Queensland dividends paid in 1922, 1923 and 1924 respectively to Mrs. Arnold, all dividends upon shares standing in the names of Mrs. Arnold, Mrs. Jerrard and Miss Joyce Verrall were in fact paid by the Companies to David Stewart Dawson. In no year did the aggregate amount of dividends payable in respect of all the shares standing in the name of any one of these ladies reach the amount of her annual allowance. Indeed, the largest total sum payable in respect of all the shares standing in the name of Mrs. Arnold or of Mrs. Jerrard was £506 13s. 7d.

The inference which should be drawn from these facts is in contest. The Commissioner relies upon the presumption established by the provisions contained in sec. 23 (1) of the *Land Tax Assessment Act* 1910-1926, which operates to place upon the taxpayer the onus of establishing to the reasonable satisfaction of the Court that the assessment is wrong. The appellant does not deny that in the present case the onus rests upon it of establishing that the shares in question, or a sufficient number of them, were not held on behalf of David Stewart Dawson, but it contends that upon its showing that the shares were placed in the name of a child by a parent or a person *in loco parentis*, this onus is satisfied unless and until it is made to appear affirmatively that the child was not intended to take beneficially but that a resulting trust arose. In *Scott* v. *Pauly* (1) it is suggested by *Isaacs* J., as he then was, that the so-called "presumption" of advancement is but "an inference which the

(1) (1917) 24 C.L.R. 274, at p. 282.

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Courts of equity in practice drew from the mere fact of the purchaser being the father, and the head of the family, under the primary moral obligation to provide for the children of the marriage." This suggestion, perhaps, is not altogether in conformity with Lord *Eldon's* statement in *Finch* v. *Finch* (1) of the principle, which in *Dyer* v. *Dyer* (2) the Court meant to establish, " viz. admitting the clear rule, that, where A purchases in the name of B, A paying the consideration, B is a trustee, notwithstanding the *Statute of Frauds*" (Stat. 29 Ch. II. c. 3), " that rule does not obtain, where the purchase is in the name of a son: that purchase is an advancement prima facie; and in this sense; that this principle of law and presumption is not to be frittered away by nice refinements." In *Sidmouth* v. *Sidmouth* (3) Lord *Langdale* describes the relation of parent and child as " only evidence of the intention of the parent to advance the child " which " may be rebutted by other evidence, manifesting an intention that the child shall take as a trustee," but he says " the purchase is prima facie to be deemed an advancement." In *Davies* v. *National Trustees Executors and Agency Co. of Australasia Ltd.* (4) *Cussen* J., whose judgment contains what is, perhaps, the best modern statement of the whole doctrine, says :—" Where a husband or father (as the case may be) purchases property in the name of his wife or child, and is proved to have paid the purchase-money in the character of a purchaser, a prima facie but rebuttable presumption arises that the wife or child takes by way of advancement—that is to say, takes beneficially. Evidence may be given to rebut this presumption and to show that the husband or father did not intend the wife or child to take by way of advancement, and on the other hand evidence may, where necessary, be given to support the presumption. If on the whole of the evidence the Court is satisfied that the husband or father did not intend at the time of the purchase that his wife or child should take by way of advancement, the rule of law is that there is a resulting trust for the husband or father." But whether the relation of parent and child be treated as a circumstance from which it is the practice of

(1) (1808) 15 Ves. 43, at p. 50; 33 E.R. 671, at p. 674.
(2) (1788) 2 Cox Eq. 92; 30 E.R. 42.
(3) (1840) 2 Beav. 447, at p. 454; 48 E.R. 1254, at p. 1257.
(4) (1912) V.L.R. 397, at p. 401.

the Court to draw an inference, or as the foundation of a definite presumption of law, it is clear that upon an issue of gift or trust "it is necessary to repel that presumption" or inference "by evidence which shows that, at the time, the father intended the purchase for his own benefit" (per Lord *Eldon*, *Murless* v. *Franklin* (1)). I see no reason why this rule should not apply in revenue matters. If liability for tax depends upon the existence or non-existence of a trust, the occasion seems to demand the application of the rules by which the determination of such questions is governed in Courts of equity.

In the present case the evidence, in my opinion, does not repel the inference or presumption that David Stewart Dawson, when he directed an allotment to his daughters Mrs. Arnold and Mrs. Jerrard of 3,000 shares each in the Queensland Company, intended that they should take the full beneficial interest in them. On the contrary, I feel satisfied positively that he did not intend to reserve any beneficial interest in the shares to himself, but meant that his daughters should have absolute property in the shares. Such an intention is, in my opinion, in no way inconsistent with his entertaining the design, as I think he did, of intercepting any dividends so long as he supplied each daughter with a regular allowance greater in amount than dividends on all her shares would provide. I am also satisfied that her grandfather intended Miss Joyce Verrall to be the beneficial owner of the 3,000 shares which he directed the Queensland Company to allot to her and that he did not mean to retain any proprietary interest in them for himself. I do not think that the evidence shows that, before these shares were placed in her name, her grandfather had placed himself in such a situation to the child, whose age was only twelve, as to incur a moral duty to provide for her, and I am not prepared to hold that he stood *in loco parentis* to her. See per Lord *Cottenham* in *Powys* v. *Mansfield* (2); per *Page Wood* V.C. in *Tucker* v. *Burrow* (3); per *Jessel* M.R. in *Bennett* v. *Bennett* (4). But taking into account the relationship, the allowance made to her mother, the payment of her schooling,

(1) (1818) 1 Swans. 13, at p. 17; 36 E.R. 278, at p. 280.
(2) (1837) 3 My. & Cr. 359, at p. 367; 40 E.R. 964, at p. 967.
(3) (1865) 2 Hem. & M. 515, at p. 526; 71 E.R. 563, at p. 567.
(4) (1879) 10 Ch. D. 474, at p. 477.

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the provisions he made for his family generally, his own age at that time, and his subsequent conduct, I think the inference is very strong that he meant to give the shares to her absolutely. No doubt he considered the allowance to her mother as a provision for the maintenance of mother and daughter, and, as a justification for impounding the dividends which were strictly his granddaughter's. His failure to tell her that he had put shares in her name appears to me to have little or no significance when her age is remembered. For these reasons I am of opinion that none of the 9,000 shares in the Queensland Company standing in the several names of Mrs. Arnold, Mrs. Jerrard, and Miss Joyce Verrall were held on behalf of David Stewart Dawson. It follows that the assessment cannot stand.

The order will be:—Appeal allowed. Assessment set aside. Commissioner to pay the costs of the appeal including the costs reserved by the order of 30th June 1932.

Appeal allowed accordingly.

Solicitors for the appellant, *Raynes Dickson & Kiddle.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.