Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Simms and Others v. The Registrar of Probates, from the Supreme Court of South Australia; delivered 6th April 1900.

Present at the Hearing:

THE LORD CHANCELLOR.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
LORD DAVEY.
LORD ROBERTSON.

[*Delivered by Lord Hobhouse.*]

In this Appeal the question is what amount of succession duty is payable to the Respondent representing the Crown from the estate of William Knox Simms. He died on the 25th December 1897 domiciled in South Australia. The Appellants are entitled under his will and they claim that duty is not payable in respect of a sum of 200,000*l.* which the testator had covenanted to pay in the year 1896. The Respondent contends that the testator's covenant was made with intent to evade the payment of duty and that under the provisions of the Succession Duties Act 1893 double duty is chargeable on this sum. The material facts on which the discussion has turned are as follows.

On the 26th September 1892 the testator, who had been a brewer in Adelaide but had retired from business, made his will. After giving some specific properties and a life annuity of 2,000*l.* to his wife, he gave his

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residuary estate in trust for his children in equal shares. As to the shares of the daughters he gave the income to the separate use of each for life. If she did not leave issue she had power to dispose of her share by will; and if she did leave issue, they took the share. Further trusts were declared in favour of husbands or wives of all his children on failure of the prior trusts.

The present Succession Duties Act received the Royal Assent on the 25th October 1893. It superseded the previous Act of 1876, and it imposed much heavier rates of duty; amounting for an estate so large as that of the testator to an increase of 8 per cent. When it passed and up to the time of the testator's death there were living six children of his; three sons, and three married daughters two of whom had living issue.

On the 10th January 1896 the testator executed a deed poll in the following terms:—

"Know all men by these presents that in consideration of "natural love and affection, I, William Knox Simms, of "Adelaide, in the province of South Australia, gentleman, "do hereby covenant, promise, and agree, jointly and severally "with my children Alfred Simms, Harry Simms, Edward "Simms, Louie Colley, Clara Jane Bonnin and Eleanor Varley, "that I will pay to them the sum of 200,000*l.*, such sum to be "divided between them in equal shares. And I further "covenant and agree, jointly and severally with my said "children, that until the said sum of money be paid and "divided between them as aforesaid, or suitably invested on "their behalf, I will pay to them interest thereon at the rate "paid by the Associated Banks in Adelaide on deposits at "three months, provided such interest shall not be less than "at the rate of 1*l.* 10*s.* per centum per annum, such payments "to be paid and payable quarterly in advance, the first of "such payments to become due and payable on the 1st day of "January, 1896. And I declare that as to the interest accruing "due to my said children until the said principal sums be "otherwise invested I will pay to my sons as they may direct, "but to my daughters personally or into their respective "banking accounts and to and for their sole and separate use, "free from the control of their respective husbands. And I "hereby declare that I will pay the principal sums due to such "of my daughters as have issue living into the hands of my "said sons, Alfred Simms and Edward Simms, and my son-in-

" law, Paul Frederick Bonnin, as trustees on their behalf, to " invest the same for such daughters for life, and pay the " annual income thereof to them, and thereafter to divide the " same between their respective children *per stirpes* and not " *per capita*. And I hereby acknowledge and declare that I " am indebted to my said children in the said sum of 200,000*l*., " such principal sum to be utterly irrespective of any sum I " may leave to them under my Will, and not to be brought " into hotchpot with my testamentary estate. In witness," &c.

When the testator died no part of the 200,000*l*. was paid, but interest thereon at $1\frac{1}{2}$ per cent. was regularly paid by him in advance to the six children. It is shown that he received about 3 per cent. on his investments. As under his covenant he paid interest one quarter in advance the debt was not payable strictly on demand, but it was payable at call varying in time from three months down to a day. The Chief Justice says that $1\frac{1}{2}$ per cent. is a very fair rate of interest for money at call of three months (Rec., p. 22).

On the testator's death his executors claimed to treat the whole sum as a debt and to deduct it from the estate for the purpose of ascertaining the amount of duty. On the part of the Crown it is not disputed that, independently of the express provisions of the Succession Duties Act with reference to gifts made prior to death, the estate is entitled to that deduction. Deducting the 200,000*l*. the residuary estate has been found to amount to upwards of 115,000*l*. on which duty has been paid. The further claim of the Crown is founded on those statutory provisions which impose duty on gifts made with intent to evade duty.

In the Act of 1876 there were two sections which have a bearing on this question. Section 14 enacts to the effect that if a deceased person had made a gift of property with intent to evade the payment of duty, and such property were in the hands of the donee or of volunteers claiming under him, it should for the purposes of the Act be deemed part of the property of the

deceased donor; and it adds that every voluntary gift made within one year prior to the death of the donor shall be presumed to be made with the intent to evade unless the contrary be proved. The same section declares that any voluntary gift of property to take effect upon the death of the donor shall be deemed to have been made with intent to evade payment of duty. It also contains a provision making donations *mortis causâ* part of the property of the donor.

Section 27 corresponds to the 8th section of the English Succession Duty Act of 1853. It enacts that where any disposition of property shall purport to take effect presently, but by some secret arrangement capable of being enforced in a Court of Law or Equity the beneficial ownership shall not *bonâ fide* pass according to such disposition but shall in fact devolve on death, the taker shall be deemed to acquire the property as a succession, and further that where any disposition is judicially declared to be fraudulent and made for the purpose of evading the duty, the Court may declare a succession to have been conferred on the taker at such time and to such an extent as it shall think just.

There are difficulties in construing these clauses, occasioned probably by the fact that the Act imposes two sets of duties. The first part, in which Section 14 occurs, relates to probate duties. The second part, in which Section 27 occurs, relates to succession duties which are imposed by Section 20 on successions as defined by Section 21. Section 14 makes the property given with intent to evade part of the donor's estate; clearly for the purpose of bringing it under the head of probate duty. The same provision would appear to bring the same property within the definitions of Section 21, and so make it liable to succession duty, if it were not for the last clause of Section

27 by which the Court is empowered to declare a succession to have been conferred after it has declared a disposition to have been fraudulent and made for the purpose of evasion. Mr. Justice Bundey lays it down in this case that to impose succession duty the Court must find fraud (Rec., p. 59); and Mr. Justice Boucaut says (p. 45) that Section 27 says substantially that an attempt to evade duty is a fraud. That question is obscure, but it is clear that neither Section 14 nor Section 27 is framed to interfere with gifts taking full effect *in præsenti* except in the one case of a gift made within a year of the donor's death; in which a positive rule is laid down that intention to evade shall be presumed but may be rebutted by evidence.

In the Act of 1893 matters are much simplified. Only one duty, viz. succession duty, is imposed. Section 14 of 1876 disappears as a whole. Its provision as to donations *mortis causâ* are the subject of a separate Section 10 of the present Act. Its provision as to voluntary conveyances to take effect on death has become useless; for such gifts confer a succession, and the object of imposing probate duty has ceased to exist. Its provision as to gifts made within a year prior to the donor's death is superseded by Sections 16 and 17 of the new Act.

Section 16 declares that a deed of gift shall mean and include among other things every non-testamentary disposition of property containing trusts or dispositions to take effect during the lifetime of the donor. It is then enacted by Section 17 "that the property given "or accruing to any person under any deed "of gift shall, in the event of the death of the "donor within three months from the date of the "deed of gift, be chargeable immediately after "such death with succession duty according to "the scale in the Third Schedule hereto except

" in cases of death by accident." The time which may be called that of probation is shortened from a year to three months, but the imposition of duty is made a positive and peremptory rule of law, and is not reached by the indirect road of an artificial presumption rebuttable by evidence.

The more general words of Section 14 and the whole of Section 27 of 1876 are replaced by Section 27 of the present Act which runs as follows :—

" If any person has made or shall hereafter make any " conveyance, assignment, gift, delivery, transfer decla- " ration of trust or other non-testamentary disposition " whether in writing or otherwise of any property, real or " personal, or of any money or securities for money or has " given or shall give any mortgage or incumbrance or has " incurred or shall incur any debt with intent to evade the " payment of duty hereunder, such disposition, mortgage or " incumbrance, or the incurring of such debt shall be deemed " so far as the circumstances will admit to be a deed of gift " under Section 16 hereof, and any property accruing to any " person thereunder shall be liable to duty as if the donor " had died within three months from the date thereof, but " double duty shall be payable in respect of such property."

The matter was brought by summons before the Chief Justice sitting in Chambers. The Respondent tendered no evidence of intent, relying entirely on the inferences to be drawn from the dates of events and the documents. The learned Chief Justice dismissed the summons with costs, holding that the act of the testator was sufficiently explicable by a desire to make a beneficial family arrangement, resembling though by no means identical with that of his will, and not alterable as his will was.

The Respondent appealed to the Full Court consisting of the Chief Justice and Justices Boucaut and Bundey. The Chief Justice adhered to his former conclusion ; but inasmuch as the two other learned Judges were of a different opinion the Court decreed that the order of the Chief Justice should be set aside and that the

originating summons should stand over to be dealt with on the merits, the Registrar having made out a *primâ facie* case to be answered. From that decree the present Appeal is brought.

In the reasons given by the learned Chief Justice for his opinion on the appeal, he again states his inability, from the mere perusal of the documents, and in the absence of evidence that the transaction was any other than it purported to be, to hold that the intent of the covenantor was to evade the duty. But before dealing with the matter peculiar to the case before him, he takes broader and more general ground on the construction of the statute. He examines the meaning of the expression "evade," and the conclusion he comes to is in the following terms :—

"I am thus driven to the conclusion that the "word 'evade' in Section 27 means to avoid by "some direct means, by some device or stratagem. "Without attempting, what is probably impracticable, to give an exhaustive definition of the "phrase 'with intent to evade the payment of "'duty hereunder,' I am of opinion that the "phrase would cover some arrangement, trust or "other device, whether concealed, or apparent on "the face of the non-testamentary disposition by "which what is really a part of the estate of the "deceased is made to appear to belong to somebody else in order to escape payment of duty."

Inasmuch as no evidence was offered to qualify the effect of the covenant and the actual dealings under it, it is a necessary conclusion that Mr. Simms completely deprived himself of the power of reclaiming the 200,000*l.*, and that he put that sum entirely in the power of the covenantees. Subject only to the delay resulting from the acceptance of interest in advance, the money might have been demanded from him at

any moment. Whatever he might have wished or have expected to be done by his children, he took all risks. His children might forbear to enforce their claim against the wish of their father from deference and respect, or even from the reflection that the receipt of interest by their father would increase his estate which they knew he intended for them. But changes of feeling might occur, quarrels or estrangements; or changes of circumstance, a death, an insolvency, or some great pressure for money; any of which things might lead to demands under the covenant such as the testator had made himself incapable of resisting. An act involving such consequences the learned Chief Justice holds to be a non-testamentary disposition of property within the meaning of Section 16 of the statute which is not subject to duty under Section 17 unless the donor dies within three months.

With regard to the expression "disposition "of property" one of the other learned Judges below doubted, and one denied, that a covenant to pay is such a disposition. It was not however so contended by the Respondent's Counsel at this Bar. Their Lordships hold that a covenant to pay conferring complete ownership of the debt, and diminishing the covenantor's net assets by that amount, is rightly deemed to be a disposition of property within the meaning of the Act.

Mr. Justice Boucaut holds that though the motives of the donor may be complex, yet if the intent to evade duty be in his mind Section 27 will operate on his gift (Rec., p. 44). He takes it to be clear that Mr. Simms intended to avoid the duty, and he proceeds to discuss whether an intention to avoid is an intention to evade. He decides that it is. He points out the distinction between the Acts of 1876 and 1893; that Section 27 of the former enumerates schemes for "attempting to keep without the

" Act " (Rec., p. 44) and defeats them; whereas " Our Act of 1893 attempts a wider grasp, and " says generally all transactions with intent to " evade shall be doubly dutiable " (Rec., p. 44). In his view Section 27 of 1876 substantially says that an attempt to evade duty shall be a fraud; whereas the Act of 1893 does not prohibit any transaction to evade duty, nor does it require any trick sham scheme or secret understanding, as the Act of 1876 did, to make the transferred property dutiable. And he insists on the importance of the consideration that the section clearly applies to valid gifts or debts because it recognises that the property dealt with accrues to the donee, and fastens the duty upon it (p. 46). The whole difficulty he thinks has been occasioned by the words in Section 27 which declare that the incurring of a debt shall so far as circumstances will admit be a deed of gift under Section 16.

With regard to this last declaration, which was discussed at some length during the argument, their Lordships concur with the learned Judge that it is very difficult to understand why the words in question were introduced. But they do not concur in thinking that the whole difficulty of the case lies in those words, or indeed any part of the difficulty; for they have no appreciable bearing on the question which lies at the bottom of the whole discussion, viz., in what sense is the word " evade " to be used.

Mr. Justice Bundey recognizes to the full both the legal and the moral right of every man to dispose of his property if he can in a way which does not expose it to be taxed under the existing system of taxation. He points out the severity of a law by which, " for doing an act " that is held not to be unlawful or immoral, a " penalty is inflicted far beyond those imposed " for offences against the criminal law that are

" punishable by fine; and it must be borne in " mind that this penalty falls upon those who " are innocent of the act that brought it about " (Rec., p. 52). He adds quite justly that a Judge must guard himself from being adversely affected towards such a law. He substantially agrees with Mr. Justice Boucaut so far as regards: 1st, Complexity of motive, only adding that in this case he considers the motive of avoiding the duty to be the dominant one (p. 57): 2ndly, The importance of the consideration that the Act strikes at real and valid transactions, only adding that he considers the present transaction to be a sham, because he thinks it left the control of the whole estate in the donor to as full an extent as if he had not executed the deed (p. 57): and 3rdly, the significance of the differences between the two Acts of 1876 and 1893 in the omission of the term " fraudulent " (p. 59).

With respect to the opinion of Mr. Justice Bundey that the covenant was a sham, their Lordships cannot find any evidence to support it. For all that appears it was a genuine deed creating valid obligations on the covenantor, which might have been enforced at once. It is quite true, as the learned Judges observe, that the Act strikes at valid transactions. But that is nothing new in the Act of 1893. The Act of 1876 did the same. No gift was thereby invalidated for being evasive, and except to the extent of letting in the duty, neither past nor future enjoyment by the donee of the property evasively given to him was interfered with. It does not follow at all that because duty is made to attach on property validly transferred, it is also made to attach on property transferred *in præsenti* and placed beyond the control of the transferor and within the immediate control of the transferee.

Mr. Justice Boucaut (Rec., p. 46) is pressed with the consideration that his reasoning would apply even if Mr. Simms had actually

paid over the money instead of covenanting to pay it. Even in that case he thinks that the difficulty would consist not in the nature of the act done, but in finding evidence of evasion, and he is not prepared to say that the duty would not attach. But whatever arguments might be drawn from transfers completely executed, he thinks they do not extend to the incurring of a debt. Section 27 however couples gifts deliveries and transfers with, and places them on the same footing as, the incurring of debts. It makes all alike subject to duty if done with an intent to evade.

It does not appear to their Lordships that an examination of the decisions in which the word "evade" has been the subject of comment leads to any tangible result. Everybody agrees that the word is capable of being used in two senses; one which suggests underhand dealing, and another which means nothing more than the intentional avoidance of something disagreeable. Beyond this nothing is to be found having much bearing on the construction of the word, which depends entirely upon its use in the Colonial Acts.

According to the majority of the learned Judges below the Legislature of South Australia has enacted that every voluntary disposition of property however honest and open, in favour of any person however innocent or even ignorant of the transaction, may, if the motive of escaping succession duty can be traced to the disposer, be made liable to what everybody speaks of as and feels to be a penal tax: and that, with no limit of time, and with no limit of person such as is provided in Section 14 of the Act of 1876. If a man for family or personal reasons conveys a property in trust for an absent son, and dies 10 years afterwards, and it is shown that when the conveyance was contemplated he said that an

additional reason for making it would be avoidance of succession duties, then, according to this view of the Act, the owner of the property whether the son or anybody claiming under him would, though he might have been in enjoyment for years, find himself saddled with the tax doubled by way of penalty.

It is quite true as Mr. Justice Bundey intimates when he is pointing out the severity of the law that Courts must nevertheless construe it according to its true meaning. But where there are two meanings each adequately satisfying the language, and great harshness is produced by one of them, that has legitimate influence in inclining the mind to the other. Now if the word evade be taken to signify some contrivance between donor and donee, that which is pointed out as the greatest harshness of the enactment would be removed or substantially reduced, seeing that the donee would be a party to the transaction which causes loss to him. It is more probable that the Legislature should have intended to use the word in that interpretation which least offends our sense of justice.

Again as regards the difficult question of mixed motive. If the thing which constitutes evasion is some contrivance between two or more persons, that is a substantial subject of inquiry with easily defined limits. The question whether an apparent transfer is also a real one is a question which occurs not very rarely, and on which the evidence of actual dealings by the parties can usually be brought to bear. But if we are to dive into the motives of a person acting by himself, and to find out whether a desire to avoid a tax, which probably everybody thinks desirable *per se*, was, when he gave away property, a dominant motive with him, or a substantial motive, or a minor motive, or any motive at all, that is an inquiry of a vague and indefinite kind. If

the Legislature has ordered it there is no help; the Courts must obey as best they can, but they will certainly be led into the region of conjecture, as indeed this case, whether the conjectures be right or wrong, shows: and the chances of error and injustice will be considerable. Other things being equal it is preferable to suppose that the Legislature contemplated the more ordinary and tangible kind of judicial inquiry, rather than the vague and more elusive one.

Turning again to a comparison of the two statutes, we find that the list of contrivances enumerated in Section 27 of 1876 is in Section 27 of 1893 comprised in the short expression "intent to evade"; for they are all attempts to evade, interpreting the word *in malam partem*. The same expression would clearly cover other contrivances, if other there be, of a like character. But their Lordships cannot find in this substitution of a comprehensive expression for an enumeration of instances any indication that the Legislature intended to extend the operation of the law to transactions of a wholly different kind; and to do so moreover by a retrospective enactment, without any attempt to provide the safeguards and qualifications necessary for the protection of existing arrangements, or for the prevention of great hardship in the new field of legislation. If there really was that intention it seems unaccountable that the draftsman of the Act should not have said so in unmistakeable terms, which are very easy to find, but instead of doing so should simply have reproduced the old word "evade" from the Act of 1876. That word, when used of actual evasion, as in Section 27 of 1876, and not merely of something which, not being an evasion was by an artificial mental process to be presumed or deemed an evasion, as in Section 14, was taken as meaning some kind of underhand contrivance.

Why should we think that its continued use meant anything else? What would there be on the face of the Bill to suggest to members of the Legislature that they were being asked to extend the law concerning evasion to a number of innocent transactions?

In the case of this statute it would be sufficient to say that clear enactments are required for the imposition of a tax, and that this enactment is not clear. But it is not necessary to have recourse to any such principle. Having regard to the language of the Act, to its connection with the Act of 1876, and to the consequences of the two admissible constructions, their Lordships hold that there is a strong preponderance of probability in favour of that which has been adopted by the learned Chief Justice. They think that the law of 1893 has, as the previous law had, left people at liberty to dispose of their property during life so that it should not form part of their estates at death for the purpose of taxation or any other purpose. Against deathbed gifts the public treasury is protected by Section 17. Against sham disposals it is protected by Section 27 on its narrower construction. Against real gifts on any large scale made while yet the ordinary expectation of life remains, it has probably been considered in South Australia as elsewhere that there is sufficient protection in the general reluctance of mankind to part with their property to others. The Supreme Court should have dismissed the Appeal to them with costs. That is the decree which their Lordships will humbly advise Her Majesty now to make in lieu of the decree appealed from. The Respondent must pay the costs of this Appeal.