Privy Council Appeal No. 12 of 1933.

George Gould and others - - - - - - *Appellants*

v.

The Commissioner of Stamp Duties - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW ZEALAND.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH OCTOBER 1933.

Present at the Hearing:

LORD ATKIN.
LORD TOMLIN.
LORD MACMILLAN.
LORD WRIGHT.
SIR GEORGE LOWNDES.

[*Delivered by* LORD TOMLIN.]

Ranald Macintosh Macdonald (who will hereafter be referred to as the settlor), died at Christchurch in New Zealand on the 21st October, 1928, leaving an estate exceeding £300,000 in value.

The question raised by this appeal from the Supreme Court of New Zealand is whether two sums of £21,600 and £4,450, being part of moneys alleged to have been settled by the settlor in his lifetime were properly included in the dutiable estate of the settlor in assessing the death duties payable on his death.

In the year 1918 the settlor was, and for many years prior thereto, had been a sleeping partner in the firm of Messrs. Gould, Beaumont & Co., of Christchurch.

This firm, in 1918, had for some years acted, and was acting as the agents of the settlor in the management of his private affairs or of some substantial part thereof, the settlor having in 1915 given a general joint power of attorney to his partners, the appellant, George Gould and Frederick Maurice Warren, and to the firm's accountant, James Morrison. This power of attorney remained in force until the settlor's death.

The firm, in fact, on behalf of the settlor, kept a set of books of account dealing with his affairs so far as they controlled them.

In 1918 the firm had in their custody all the title deeds, certificates and other documents relating to certain mortgages and debentures taken or registered in the settlor's name. At all material times in 1918 the capital amount secured by the mortgages was £52,200, and the capital amount secured by the debentures was £5,000, making an aggregate sum of £57,200.

Appropriate entries in relation to these investments were apparently made in the books kept on the settlor's behalf by the firm, though these entries were not produced either below or before their Lordships' Board.

In or about the year 1919 the business of the firm, together with similar businesses of other firms, were taken over by way of amalgamation by a company formed for that purpose called Pyne Gould Guinness, Ltd. After the change the limited company took the place of Messrs. Gould, Beaumont & Co. in the management of the settlor's affairs, and the expression the company where hereafter used is intended to refer to the partnership firm in regard to any transaction before the formation of the limited company, and to the limited company in regard to any transaction after such formation.

In 1918 the settlor had living a wife Gertrude, and five children, namely: (1) Helen; (2) Guyon; (3) George; (4) Ian, and (5) Mary. All the children were of age except Mary, who attained her majority in September, 1919. The settlor's solicitor in New Zealand was a Mr. Wilding, a member of the firm of Messrs. Wilding & Acland.

On the 28th February, 1918, the settlor being then with his wife and children in England, wrote to the appellant George Gould the following letter:—

"London, 28th February, 1918.

"My Dear George,

"Some time back I received a cable from you *re* Settlement on my children saying there was no immediate urgency (probably from the point of view of any change of laws of N.Z.) and that the matter was in Wilding's hands and about two weeks back a cable asking for general particulars of settlement, hence this letter.

"At present I propose to devote £25,000 to the trust on the following conditions; these are very bare but will be a guide to Wilding.

"Settlements made by R. M. Macdonald of £5,000 each (may be added to later) of his children viz. Helen Gertrude (Blakemore) Guyon Kenneth George Ranald Ian Macphersoh Mary Moata.

"Capital to be held in trust as follows:

"Sons may be paid their capital on attaining 25 years age.

"Daughters capital to remain in trust for their children on same lines. If no children may be willed. Trustees to pay at their discretion say one year after death. Intestate cases in family, capital to go equally to rest of family.

"Sons and daughters to receive all income from their capital. Incomes in deceased daughters estates at Trustees discretion.

"Trustees R.M.M., Gertrude Macdonald eldest son living and George Gould. In case of a vacancy remaining Trustees to appoint someone and failing this the Supreme Court to nominate trustees.

"I think that you spoke of a settlement and giving a mortgage on the Hermitage. I don't quite understand the new taxation scheme, but is there any gain in giving a mortgage? In my case it seems to me that it would be better to take enough of my good mortgages and transfer them to these trusts. As I understand it I would have to pay a tax of 5 per cent. on this and in the event of my death within three years of the settlement my estate would have made the amount to full death duty. I am wondering if I cabled you to set aside this £25,000 before 31st March whether I should save my income tax on it. I think that I will try.

"Yours sincerely, R. M. MACDONALD."

"P.S.—This idea I fancy is no use as it is not land and would not alter my income for the period.—R.M."

"P.S.—G. GOULD. 1/3/18

"On further consideration I have decided to add £2,000 to Helen Gertrude Blakemore's amount per 1st sheet making it £7,000 (seven thousand pounds) and to Guyon Kenneth's amount £3,000 making it £8,000 (eight thousand pounds). The increased totals will then give them about the incomes I am now allowing them. This will mean that you will take £30,000 from my capital for these five trusts.—R. M. Macdonald."

After the receipt of that letter by the appellant George Gould, the company acting as agents of the settlor and apparently upon the instruction of the settlor's attornies opened in the books of account kept by them on behalf of the settlor a special trust account to which they credited a sum of £30,000, at the same time debiting with a like sum the settlor's capital account in the same books relating to the mortgages and debentures for £57,200.

On the 29th April, 1918, the appellant George Gould wrote to the settlor as follows:—

"I think I have omitted in my letters to mention to you that your instructions with regard to a settlement, dated the 28th February, came to hand and that I immediately put the matter into Wilding's hands. The matter appears perfectly simple and within a week or two we should get the document completed. I understand that Wilding will have it engrossed in duplicate one copy of which we can sign here as your and Gertie's attorneys, and the second can be sent home to you for your own signature, and that of the Trustees and the beneficiaries themselves. Either copy, however, will I understand be sufficient to act upon. The stamping will, of course, cost £1,500, and this is another matter we had to keep in view when making your subscription to War Loan. I do not suppose we can get mortgages to fit exactly the individual amounts of each beneficiary, but we can set aside a sum approximating in total £30,000 and allocate it very closely according to your instructions. In any case I do not suppose a hundred or two one way or the other is of great importance as the amounts so put in trust will be taken account of in your will."

Messrs. Wilding & Acland early in May, 1918, prepared a deed of settlement in duplicate—one of the duplicates, which was dated the 1st May, was executed by the attornies of the settlor on his behalf and was stamped with gift duty to the amount of £1,500 as a settlement of £30,000. The other duplicate was sent to England for execution by the parties

there, together with a deed of delegation to be executed by the trustees who were in England, to provide for the performance of the trust in New Zealand on behalf of such trustees.

In a letter forwarding to the company these documents on the 8th May, 1918, with instructions as to sending them on to England, Messrs. Wilding & Acland said :—

> "When you receive the Deed of Settlement and the Deed of Delegation duly executed, securities to the amount of £30,000 can be transferred from Mr. Macdonald's name to the names of the Trustees. It would not be desirable to do this before you receive the Deed of Delegation as necessity may arise for dealing with one or more of the Trust mortgages. In the meantime the mortgages will stand in the name of Mr. Macdonald as trustee for the purposes of the Settlement, but beneficiaries under the Settlement will be entitled to their incomes as from the time that the settled fund was transferred in your books to the credit of the Settlement."

The deed of settlement was expressed to be made between the settlor of the first part, his five children of the next five parts respectively, and the appellant George Gould, the settlor, his wife and the settlor's son Guyon, therein called the trustees of the seventh part.

The deed recited that the settlor being desirous of making provision for his five children had paid to the trustees five several sums of £7,000, £8,000. £5,000, £5,000 and £5,000, to be held by them upon the five several trusts thereinafter declared.

The deed then witnessed that in consideration of the natural love and affection which the settlor had for his said children, and in consideration of the five said several sums of money paid by the settlor to the trustees, who were thereby expressed to acknowledge having received the said sums respectively, the trustees covenanted with the settlor and each of the other parties thereto that they would thenceforth hold the said several sums of money so paid to them upon the trusts and with the powers thereinafter declared.

There followed a declaration of trust of each of the five several sums in favour of the five children respectively and their respective issue with a power for the trustees in the case of any son who attained the age of 25 years to pay to him for his sole and absolute benefit any capital money then held in trust for him or his issue.

No money was in fact paid to the trustees nor were any of the mortgages or debentures transferred to them.

In July, 1919, the settlor returned to New Zealand, and on the 30th September, 1919, decided to increase the trust funds by a further sum of £1,000. This was not effected by any payment to the trustees. All that was done was that the special trust account to which reference has already been made was credited by the company with £1,000 and the settlor's capital account relating to the mortgages and debentures kept by the company was debited with a like amount. At the same time gift duty was paid on £1,000.

The settlor's son Guyon died on the 21st November, 1919, leaving a widow and two infant children.

On the 20th May, 1920, the settlor executed a further deed of settlement made between the same parties as the first deed of settlement except that Guyon's executors were joined in place of Guyon as party of the third part, and that Guyon's name was omitted as one of the parties of the seventh part. By this deed the settlor was expressed to settle further sums amounting to £15,000 upon trusts similar to those already existing under the earlier deed of settlement. By this deed it was witnessed that in consideration of the natural love and affection which the settlor had for his children and grandchildren, and in consideration of five several sums of £2.000, £2,000, £4,000, £4,000 and £3,000 paid by the settlor to the trustees the receipt whereof was expressed to be acknowledged the trustees covenanted with the parties, then to hold the several sums for the purposes therein set forth, being purposes similar to those of the original deed of settlement. Gift duty on £15.000 was duly paid, but no sum was in fact, paid to the trustees. The same course was pursued as on the previous occasions. The company credited the special trust account and debited the settlor's capital account with the sum of £15.000.

Between the years 1920 and 1923 the settlor was absent from New Zealand, but after his return on the 31st July, 1924, a further sum of £750 was added by him to the settled funds, and gift duty was duly paid on it. The same procedure was adopted ; no money was paid to the trustees, but an appropriate credit to the special trust account and debit to the settlor's capital account were made by the company.

Three other matters require to be mentioned. First the settlor's capital dealt with in the settlor's books of account kept by the company varied from time to time in amount and in the manner of investment. In 1920 it had fallen to £47,825 in value, the holding of mortgages having been reduced to £42,325. Subsequently the amount of such capital increased, and at the settlor's death stood at £112,849 17*s*. 8*d*., of which £59,325 were represented by mortgages and the balance by debentures and Government securities.

Secondly from the inception of the trusts the beneficiaries were paid a flat rate of interest, viz., up to the 30th September 1922, at the rate of 5½ per cent. per annum, and thereafter at the rate of 6 per cent. per annum.

The interest appears to have been paid in the following way : All the income derived from the investments representing the settlor's capital fund managed by the company was by the company collected and paid into a banking account in the settlor's name. The settlor's attornies, however, operated the banking account, and at the due times signed as attornies cheques on such account for the amount required to pay the interest which was distributed by the company between the beneficiaries.

Thirdly, it will be remembered that there was power under

the settlement for the trustees to pay out capital to the sons. This power was exercised in favour of Guyon to the extent of £10,200, in favour of George to the extent of £9,200 and in favour of Ian to the extent of £5,750. These sums were actually paid. It is not clear from the evidence how they were provided, but as the special trust account was debited with them, presumably they were provided out of the settlor's capital account managed by the company.

The total amount of the sums so paid out was £25,150, and this amount deducted from £46,750, the total amount settled, gives the figure £21,600 the first item to which this appeal relates.

All the sums paid out were paid out more than three years before the settlor's death with the exception of sums amounting to £4,450, part of the payments made to Ian. This sum of £4,450 constitutes the second item to which the appeal relates.

At this stage it will be convenient to call attention to the relevant provisions of the New Zealand statute which governs the matter, viz., the Death Duties Act, 1921 (Act No. 21 of 1921).

Under Section 2, unless a contrary intention appears " debt " includes any pecuniary liability, charge or encumbrance.

Section 3 provides that in the case of every person who dies after the commencement of the Act whether in New Zealand or elsewhere and wherever the deceased was domiciled, there shall be payable to the Crown on the final balance of the estate of the deceased as determined in accordance with the Act a duty (thereinafter called estate duty) at the rate and in accordance with the provisions of the Act, and Section 4 provides that estate duty shall be charged and assessed as a percentage of the amount of the final balance of the estate in accordance with a graduated scale of percentages set out in the first schedule to the Act.

Section 5 of the Act, so far as material, is as follows :—

" 5.—(1) In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property :—

(*a*) All property of the deceased which is situated in New Zealand at his death, and to which any person becomes entitled under the will or intestacy of the deceased, except property held by the deceased as trustee for another person :

(*b*) Any property comprised in any gift, within the meaning of Part IV of this Act, made by the deceased within three years before his death, and whether before or after the commencement of this Act, if the property was situated in New Zealand at the time of the gift :

(*c*) Any property comprised in any gift, within the meaning of Part IV of this Act, made by the deceased at any time, whether before or after the commencement of this Act, unless *bona fide* possession and enjoyment has been assumed by the beneficiary not less than three years before the death of the deceased, and has been thenceforth retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise, if the property was situated in New Zealand at the time of the gift :

The following further provisions of the Act are material :—

"9.—(1) In computing the final balance of the estate of the deceased, allowance shall, save so far as otherwise provided by this Act, be made for all debts owing by the deceased at his death.

"(2) No such allowance shall be made :—

(a) For debts incurred by the deceased otherwise than for full consideration in money or money's worth wholly for his own use and benefit.

"PART IV.—GIFT DUTY.

"38.—(1) In this Act the term 'gift' means any disposition of property (as hereinafter defined) which is made otherwise than by Will, whether with or without an instrument in writing, without fully adequate consideration in money or money's worth.

"39. In this Act the term 'disposition of property' means :—

(a) Any conveyance, transfer, assignment, settlement, delivery, payment, or other alienation of property, whether at law or in equity.

(b) The creation of a trust :

"40.—(1) In this Act the term 'Voluntary Contract' means a contract entered into, whether with or without an instrument in writing, without fully adequate consideration in money or money's worth. If any contract, is made for a consideration in money or money's worth which is inadequate the contract shall be deemed to be voluntary to the extent of that inadequacy.

"(2) A disposition of property made in performance or satisfaction of a voluntary contract shall be deemed to be a gift, whether the contract or disposition was made before or after the commencement of this Act.

"(3) A Voluntary Contract, whether made before or after the commencement of this Act, shall not in itself constitute a gift within the meaning of this Act, but shall become or be deemed to have become a gift so soon and so far as it has attached to and affected the legal or equitable title to any property to which it relates.

"60.—(1) When the same property is liable both to gift duty and also (upon the death of the donor) to death duty, the amount paid or payable by way of gift duty shall be deducted from the sum which would otherwise be payable in respect of that property by way of death duty, and only the residue (if any) of that sum shall be payable as death duty."

The estate of the settlor after his death was assessed to death duty upon the footing that such estate must be deemed to include the two sums of £21,600 and £4,450, but that allowance ought to be made for the gift duty paid thereon.

Upon objection being taken to this assessment by the settlor's executors, who are the appellants here, a special case was stated under Section 62 of the Act the question propounded for the Court being whether these sums were rightfully included in the dutiable estate of the deceased in assessing duty.

The Supreme Court of New Zealand were unanimously of opinion that the appeal against the assessment should be dismissed. The learned Chief Justice and other Judges of the Supreme Court reached the conclusion upon the facts that the settlor had declared himself a trustee in respect of sums of money equal in amount to those purported to be settled, but that as he paid a

fixed rate of interest and retained any surplus income earned by the money the case was brought within Section 5 (1) (*c*) of the Act.

Their Lordships, after having heard a full and able argument on either side, are of opinion that the decision of the Supreme Court should stand.

Their Lordships have, however, reached that conclusion for reasons which are not identical with those preferred by the Judges of the Supreme Court.

In their Lordships' opinion it is not admissible upon the material available to draw the inference that the testator declared himself a trustee of any money or fund.

The settlements themselves were obviously and admittedly *bona fide* transactions. The question is whether the gifts which the settlements were intended to effect were perfected gifts either by an effective transfer of the property to the trustees or by the settlor or other person in whom the property was vested effectively declaring himself a trustee of such property for the purposes of the settlements.

It cannot be contended that there was any effective transfer to the trustees. The credits entered in the special trust account kept by the company could not have that result, and it is not suggested that any money or investment was paid or transferred to the trustees.

It is however contended that the settlor made himself a trustee. He did not do so expressly. If he was a trustee he must have become such by necessary implication from his conduct.

Counsel for the appellants put the matter in two alternative ways, he said that either the settlor declared himself a trustee of thirty-fifty-sevenths of the capital fund existing under the company's management in 1918, being roughly the proportion which £30,000 bore to the nominal value of the fund, or else that he declared himself a trustee of the £57,200 upon trust to permit the settlement trustees to select securities of an amount equal to £30,000, and that until such selection to permit interest to be paid to the beneficiaries out of the income.

In their Lordships' judgment neither of the alternative views can be supported. Apart from the difficulty of reconciling either alternative with the way in which the fund was actually dealt with neither the property, the subject of the trust, nor the trust alleged to have been declared can, upon the material available, be ascertained with sufficient precision to justify the inference of the existence of a trust.

It follows, therefore, that the settlements cannot be treated as gifts perfected either by transfer of property or declaration of trust.

Their Lordships have little doubt, however, that by the conduct of the parties there was created a charge upon the funds managed by the company in favour of the trustees of the settle-

ments for the sums which the settlor had affected to settle, but such a charge is a debt within the meaning of the definition of debt contained in Section 2 of the Act, and being a debt made otherwise than for full consideration in money or moneys worth wholly for the settlor's own use or benefit no allowance can be made for it having regard to Section 9 (2) of the Act.

In their Lordships' judgment, therefore, this appeal must fail and be dismissed, and their Lordships will humbly advise His Majesty accordingly.

The appellants must pay the costs of the appeal.

Before parting with this case their Lordships desire to call attention to the fact that though this matter came before the Supreme Court upon a special case stated under Section 62 of the Act evidence was adduced before the Supreme Court. Their Lordships' attention has not been directed to any provision of the Act by which this course could be justified, and they point out that though at the desire of the parties they have thought fit to deal with the present case, a serious question of jurisdiction may arise if in any future case the same procedure is adopted.

In the Privy Council.

GEORGE GOULD AND OTHERS

v.

THE COMMISSIONER OF STAMP DUTIES.

DELIVERED BY LORD TOMLIN.

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