

SARAH FLORENCE BARRACK

A

v.

THE COMMISSIONER OF ESTATE AND GIFT DUTIES

[SUPREME COURT—Kermode J.—24 November 1983.]

B

Civil Jurisdiction

Gift Duty—Disclosure of gifts in Gift Duty Statement—later in formal memoranda—the Statement and Memoranda did not create, merely evidenced intention to make gifts—Counsel's agreement that gifts does not alter the legal situation that the gifts are still incomplete.

C

D. Whippy for the Appellant
M. J. Scott for the Respondent

D

Appeal by way of case stated against assessment of Gift duty on purported gifts by appellant to a son.

The Commissioner of Estate and Gift Duties had pointed out the gifts were not perfected at the time the appellant alleged the gifts were made. It was accepted by the parties that gifts had been made.

E

Questions for opinion of the Court were:

1. Whether the respondent has correctly assessed the appellant the sum shown in Exhibit 7 (the notice of Gift Duty Statement)?
2. Whether the respondent was correct in aggregating the gifts?"

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On 21 June 1979 appellant completed a gift duty statement disclosing a gift of \$4000 to a son by way of 'reduction of loan'. On 10 May 1981 she disclosed similarly a gift of \$9,306.31 to the son 'in reduction of interest free loans granted in 1975–1979'. No documents accompanied the statements. On 28 July 1979 the Commissioner wrote acknowledging the statements thus:

"Your forgiveness of debts should be made by deeds or documents in writing and your signature should be witnessed by at least one person who is not an interested party."

G

The appellant provided for each gift what appeared to be an answer to this. Both documents were dated 5 October 1981. One such document read:

"MEMORANDUM OF A GIFT

H

I the undersigned *Sarah Florence Barrack* of Sigasiga Estate, Savusavu did on the 1st day of May, 1980 make a gift of \$9306.31 to my son *Lennard Anthony Barrack* in reduction of the interest free loans made by me to him on 1st May 1981. The gift was and is intended to be an irrecovable gift.

A *And on the 10th day of May, 1981 I completed a Gift Duty Statement relating to my said gift which statement has already been delivered to the Commissioner of Estate and Gift Duties.*

Dated the 5th day of October, 1981.

B Signed by the said Sarah Florence Barrack in my presence } (sgd) S. F. BARRACK
 (sgd) T. J. Cornish J.P.”

The Commissionner aggregated the two gifts, being of the view that both gifts were dated 5 October 1981, the date the appellant signed the two memoranda, and assessed her for gift duty accordingly.

C The learned judge referred to the definition of 'Gift' in the Estate and Gift Duties Act (The Act). It was noted the definition did require the gift had to be made or evidenced in writing. Counsel argued that if there was no consideration a release of a debt must be in the form of a Deed (*Gray v. Commissioner of Stamp Duties* (1939) N.Z.L.R. 23). 'Deed' was not defined in the Act but is referred to in the Property Law Act S.4(1).

D Authority was cited to support the Commissioner's contention that the date of the 2 gifts was the date the appellant acknowledged in writing making the gifts; though the filing of the statement created no estoppel.

E Held: The memoranda could not be treated as partial releases of the debt owing by appellant to her son. They do not create or perfect or complete the gifts expressed to have been made at an earlier date. A debt may only be released either for consideration or by deed.

The Court said:

F "The memoranda do not operate as partial releases but merely record verbal gifts of sums which at the time they were said to have been made were reductions of loans. In my view the alleged releases have still not been legally completed."

The memoranda were merely evidence of intention to complete the gifts, of no more evidentiary value than the Gift Duty Statements.

G If the documents dated 5 October 1981 are considered to be deeds because signed and witnessed when the Gift Duty Statements must also be considered to be deeds.

Of the two sets of documents the earlier ones must be accepted.

The questions were answered:

1. No
2. No

A

Cases Referred to:

Gray v. Commissioner of Stamp Duties (1939) N.Z.L.R. 23

Commissioner of Stamp v. Erskine (1916) N.Z.L.R. 93

Strong v. Bird (1874) 18 Eq. 315

Buckland v. Commissioner of Stamp Duties (1954) N.Z.L.R. 1194

B

KERMODE, Mr Justice.

Judgment

This appeal by way of Case Stated was heard at the same time as Civil Appeal No. 13 of 1983 (*Reported p.19 ante*) because one issue was common to both cases.

C

Both cases involved alleged gifts which the Commissioner contends were not perfected at the time the respective appellants allege the gifts were made.

Mr Scott was asked by the Court what the position would be if it was held that the documents before the Court did not disclose any of the alleged gifts had been perfected.

D

Mr Scott stated, without comment from other counsel involved, that the parties accepted that gifts had in fact been made and what was in issue was when they were made and whether the Commissioner had correctly assessed the appellant in each case for the sum shown in his notice of assessment of gift duty. I will refer to this aspect of the appeal later.

E

The relevant facts in the instant case are as follows.

On the 21st June, 1979, the appellant completed a gift duty statement disclosing that she had made a gift of \$4,000 to her son Lennard Anthony Barrack by way of "reduction of loan".

On the 10th May, 1981, she completed another gift duty statement indicating she had made a further gift of \$9,306.31 to the same beneficiary in "reduction of interest free loans granted in 1975—1979."

F

No documents evidencing the alleged gifts accompanied the gift duty statements although in paragraph 5 of the declarations there is mention of an attached document marked C purporting to be a true copy of the instrument creating or evidencing the gift.

G

On the 28th July, the Commissioner wrote to the appellant acknowledging receipt of the two gift duty statements but pointing out that:

"Your forgiveness of debts should be made by deeds or documents in writing and your signature should be witnessed by at least one person who is not an interested party".

On the 5th October, 1981, the appellant signed two memoranda in similar form relating to the two alleged gifts.

H

It is only necessary to set out one of the documents as under:

A "MEMORANDUM OF A GIFT"

I the undersigned Sarah Florence Barrack of Sigasiga Estate, Savusavu did on the 1st day of May, 1980 make a gift of \$9,306.31 to my son Lennard Anthony Barrack in reduction of the interest fee loans made by me to him on 1st May 1981. The gift was and is intended to be an irrevocable gift.

B And on the 10th day of May, 1981 I completed a Gift Duty Statement relating to my said gift which statement had already been delivered to the Commissioner of Estate and Gift Duties.

Dated the 5th day of October, 1981.

Signed by the said Sarah Florence } (sgd) S. F. BARRACK
Barrack in my presence

C (sgd) T. J. Cornish J.P."

The second gift if it was in fact made, being over \$4,000, is liable to gift duty in any event but the Commissioner aggregated the two gifts being of the view that the date of the two gifts was the 5th October, 1981, the date the appellant signed the two memoranda and assessed her for gift duty accordingly.

D The questions for the opinion of the Court are:

1. Whether the respondent has correctly assessed the appellant the sum shown in Exhibit 7 (the notice of Gift Duty Statement)?
2. Whether the respondent was correct in aggregating the gifts?

"Gift" is defined in section 2 of the Estate and Gift Duties Act as follows:

E "Gift" means any disposition of property 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:

Provided that if any such disposition of property is made for a consideration in money or money's worth which is inadequate, the disposition shall be deemed to be a gift to the extent of such inadequacy."

F Mr Whippy points out that under the Act, by virtue of the definition a gift can be made without any writing to evidence the gift.

"Disposition of property is also defined in the Act. A release at law or in equity of any debt comes within the definition of "disposition of property".

G Mr Scott has presented a formidable list of authorities to support his argument that the date of the two gifts was in each case the 5th October 1981 the date the appellant acknowledged in writing making gifts on 1st June, 1979 and on 1st May, 1980.

Mr Scott quoting from Adams "Law of Estate and Gift Duties in New Zealand 3rd Edition (1956)" and Graham Hill "Stamp and Death Duties in New South Wales" points out that if there is no consideration a release of a debt must be in the form of a deed (*Re Gray, Gray v. Commissioner of Stamp Duties* (1939) N.Z.L.R. 23).

H Deed is not defined in the Estate of Gift Duties Act nor in the Interpretation Act but Mr Scott relies on subsection (1) of section 4 of the Property Law Act which provides:

"4.(1) Every deed, whether or not affecting property, shall be signed by the party to be bound thereby, and shall also be attested by at least one witness not being a party to the deed, but no particular form of words shall be requisite for the attestation."

A

Mr Scott also drew attention to the case of *Commissioner of Stamp v. Erskine* (1916) N.Z.L.R. 937 where it was held that the filing of a gift duty statement does not in any way create an estoppel. It is still open to the intended donor or to the Crown to aver that the intended gift has not been completed. Even the voluntary payment of gift duty will not create estoppel. If the two memoranda purporting to evidence the two gifts can be considered to be deeds creating the gifts, then there can be no doubt on the authorities quoted by Mr Scott that the gifts were both perfected on the 5th October, 1981.

B

The Commissioner in his letter to the appellant's solicitors dated 8th March, 1982, quoted an extract from the judgment of Sir George Jessel M. R. in *Strong v. Bird* (1874) 18 Eq. 315 as follows:

C

"First of all, it is said, and said quite accurately, that the mere saying by a creditor to a debtor, 'I forgive you the debt', will not operate as a release at law. It is what the law calls "nudum pactum", a promise made without an actual consideration passing, and which consequently cannot be supported as a contract. It is not a release, because it is not under seal. Therefore the mere circumstance of saying, 'I will forgive you', will not do....' The gift is not perfect until what has been generally called a change of the property at law has taken place."

D

Applying that statement to the facts in the instant case, I am left in no doubt that the memoranda cannot be treated as partial releases of the debt owing by the appellant's son to her. They do not in my view perfect or complete the gifts expressed to have been made at an earlier date.

E

A debt may only be released either for consideration or by a deed (*Buckland v. Commissioner of Stamp Duties* (1954) N.Z.L.R. 1194.)

A release whether of the whole or a part of a debt must be complete and legally effective to be considered, a disposition of property as defined in the Act.

To quote from Sir George Jessel's judgment referred to above "the gift is not perfect until what has been generally called a change of the property at law has taken place".

F

The memoranda do not in my view operate as partial releases but merely record verbal gifts of sums which at the time they were said to have been made were reductions of loans made by appellant to her son.

G

In my view the alleged releases have still not been legally completed.

The fact that counsel appear to agree that two gifts have been legally made does not alter the legal situation that the gifts are still incomplete.

The memoranda in my view do not create the gifts (or perfect them) and are merely evidence of intention to complete the gifts and as evidence are of no more evidentiary value than the Gift Duty Statements.

H

If, however, I am not correct in my view that neither of the two gifts have been perfected or that effect should be given to counsel's apparent agreement that the gifts have been perfected my answers to the two questions would still be the same.

- A If the documents dated the 5th October, 1981, must be considered to be deeds because they are signed by the donor and witnessed then the Gift Duty Statements must also be considered to be deeds.

The Gift Duty Statements purport to record gifts, are signed by the donor and witnessed. Furthermore, they embody a statutory declaration. Of the documents purporting to record the alleged gifts, the gift duty statements are of equal weight as

- B the later documents.

For the purpose of this exercise, *Erskine's* case can have no application because counsel agree gifts have been perfected and they perfected either by the Gift Duty Statements or the later documents. Of the two sets of documents the earlier documents must be accepted.

- C My answers to the two questions posed are:
1. No.
2. No.

Appeal allowed.