Privy Council Appeal No. 47 of 1942

The Commissioner for Stamp Duties of the State of New South Wales - - - - - - - - *Appellant*

v.

Perpetual Trustee Company, Limited - - - - *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH APRIL, 1943

Present at the Hearing:

VISCOUNT MAUGHAM
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD ROMER
LORD PORTER

[*Delivered by* LORD RUSSELL OF KILLOWEN]

The question for decision on this appeal is whether certain shares in a company called R. Hall & Son Ltd. formed part of the dutiable estate of one John Richard Hall deceased. The proceedings were initiated in the Supreme Court of New South Wales upon a case stated by the Commissioner for Stamp Duties for that State under section 124 of the New South Wales Stamp Duties Act, 1920. The relevant facts as stated in the case are as follows:—

The company was one which carried on a business (originally owned by John Richard Hall) of commission and general merchants, and which was managed and controlled by him. By an indenture dated the 7th day of December, 1917, he made a settlement of 850 of the shares which he owned in the company, and of which he was the registered holder. These shares (which were fully paid and of the nominal value of £1 each) were transferred into and registered in the names of five trustees of whom he himself was one. The name of John Richard Hall (who will hereinafter be referred to as the settlor) stood first in the register of members.

By the said indenture, which was expressed to be made between the settlor of the one part and the five trustees of the other part, the settlor, in consideration of the natural love and affection which he bore for his infant son John Stuart Hall, declared that the trustees should hold the said shares upon trusts of which the material provisions ran thus:—

> " 1. To pay and apply the whole or such part or parts as the said Trustees shall think fit of the income and dividends received from the said shares and the investments hereinafter referred to from time to time towards the maintenance advancement benefit and education of the said John Stuart Hall during his minority.
>
> 2. To invest any surplus income from time to time in any one or more of the investments hereinafter authorised with full power to vary the same from time to time for another or others of a like nature but so that such accumulation shall always be liable to be applied for the purposes aforesaid as if the same were income arising in the then current year.
>
> 3. During the minority of the said John Stuart Hall to apply the said income and/or any accumulations thereof as aforesaid and/or any proceeds of sale of the said shares or any part or parts thereof as the said trustees shall think fit and/or any sum or sums which the trustees may think fit to raise by way of mortgage on the said shares or any part or parts

thereof for the maintenance education advancement or benefit of the said John Stuart Hall and for such purposes the trustees shall have power from time to time to mortgage all or such part or parts of the said shares as they may think fit and/or to sell from time to time all or any part or parts of the said shares at such prices on such conditions and either by private contract or public auction or on the Stock Exchange as the said trustees shall in their absolute discretion think fit.

5. Any moneys paid by the Trustees for the maintenance education advancement or benefit of the said John Stuart Hall may be paid to the natural or other guardian or guardians for the time being of the said John Stuart Hall by the Trustees without the necessity of the Trustees seeing to the application thereof or compelling the said guardian or guardians to account for the same or any part thereof provided the Trustees are satisfied that the said John Stuart Hall is being properly maintained and educated and that his advancement is not being neglected.

7. Any Trustee of this Settlement may from time to time with the consent of any other Trustee or Trustees of this settlement delegate to such other Trustee or Trustees all or any duty or duties and/or power or powers and/or discretions by writing under his hand only and without the necessity of it being under seal with full power to revoke the same from time to time. No Trustee who has so delegated any such duty power or discretion shall be personally liable for any loss incurred by the trust property and occasioned by any act default or omission of the said other Trustee or Trustees (to whom such delegation has been made) in the exercise of such delegated duty power or discretion.

10. Upon the said John Stuart Hall attaining the age of twenty-one years to transfer to him as his absolute property all the property and assets whatsoever including the accumulations of income and all investments held by the said Trustees under the trusts of this Indenture."

The settlor died on the 27th June, 1921, and the respondent is his surviving executor. The said John Stuart Hall attained his age of 21 years on the 27th November, 1931, when the assets comprised in the settlement were transferred to him. From the time of the settlement the settlor never exercised any voting power in respect of the said shares. Shortly after the date of the settlement, the trustees took out a policy of insurance on the life of the said John Stuart Hall in the sum of £10,000, and paid the premiums in respect thereof out of the dividends and income received by them as such trustees. With the exception of those premiums, no part of the said dividends and income was paid or applied towards the infant's maintenance, advancement or benefit. Any balance which might have been so applied was accumulated and invested.

The existence of the settlement was not disclosed when the settlor died, and accordingly the said shares were not in any way taken into account when the final balance of his estate was valued for purposes of death duty. Upon a recent disclosure of the settlement, the Commissioner claimed that the said shares formed part of the settlor's dutiable estate and assessed additional death duty in respect thereof at the sum of £165 17s. 0d. The respondent paid under protest, and called upon the Commissioner to state a case. The questions submitted for the decision of the Court were three, but only one is in dispute, viz.: Did the said shares form part of the settlor's dutiable estate?

One further fact should be added to those stated in the case. Eleven other settlements, in the same form as the one under consideration on this appeal, had been made by the settlor in favour of his infant son. The Commissioner made the same claim in respect of each, and notices of appeal in respect of each were served under the said Act. It was, however, agreed between the parties that only the appeal which has brought the matter before their Lordships' Board, should be proceeded with, and that the ultimate decision thereon should decide the others.

The Supreme Court of New South Wales answered the question in the affirmative. On appeal from that decision the High Court of Australia set aside the judgment and order of the Supreme Court and answered the question in the negative.

The question is one the answer to which depends partly upon the construction of the settlement, and partly upon the construction of the Act. The Act must be considered in the form in which it stood at the date of the settlor's death, viz. the Stamp Duties Act, 1920, which was Act No. 47, 1920, and was assented to on the 31st December, 1920.

The relevant provisions of this Act are the following, which occur in Part IV, which deals with " Death Duty ":—

" 100. In this part . . . unless the context or subject-matter otherwise indicates or requires,—

. . . . . .

" Disposition of property " means—

(*a*) any conveyance, transfer, assignment, mortgage, delivery, payment, or other alienation of property whether at law or in equity;

(*b*) the creation of any trust;

. . . . . .

" Gift " means any disposition of property made otherwise than by will whether with or without an instrument in writing without full consideration in money or money's worth; . . . . . .

101. In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere and wherever the deceased was domiciled, duty, hereinafter called death duty, at the rate mentioned in the Third Schedule to this Act shall be assessed and paid—

(*a*) upon the final balance of the estate of the deceased, as determined in accordance with this Act; and

(*b*) . . . . . .

102. For the purpose of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property:—

(1) (*a*) All property of the deceased which is situate in New South Wales at his death; and

(*b*) all property of the deceased mentioned in the next succeeding section

to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased.

(2) (*a*) . . . . . .

(*b*) . . . . . .

(*c*) . . . . . .

(*d*) Any property comprised in any gift made by the deceased at any time, whether before or after the passing of this Act, of which bona fide possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever.

(*e*) . . . . . .

(*f*) . . . . . .

(*g*) . . . . . .

(*h*) . . . . . .

(*i*) . . . . . .

(*j*) . . . . . .

(*k*) . . . . . .

(*l*) . . . . . .

[The lettered paragraphs other than (*d*) deal with classes of property which, like (*d*), could not fall within the class of property described in the first subsection of section 102, not being property " to which any person becomes entitled under the will or upon the intestacy of the deceased."]

103. [The estate of a deceased person whether domiciled at the time of his death in or out of New South Wales is also to be deemed to include certain debts and shares notwithstanding that the same were not at the time of the death of the deceased bona notabilia within New South Wales.]

104. The estate of a deceased person constituted as provided in the last two preceding sections together with all . . . income due or accruing due or payable in respect thereof, and all accretions to the capital thereof including the progeny of livestock after the death of the deceased and before grant of administration is in this Act referred to as his dutiable estate.

105. (1) The final balance of the estate of a deceased person shall be computed as being the total value of his dutiable estate (except such part thereof as is the subject of a separate assessment under the next succeeding section) after making such allowances as are hereinafter authorised in respect of the debts of the deceased.

(2) Subject to the preceding section the principal value of the property included in his dutiable estate shall be estimated as at the date of the death of the deceased."

Since authorities under the Finance Act, 1894, were cited and relied upon in the Courts of Australia, and also before their Lordships' Board, it will be convenient to set out the provisions in that Act which may be said to correspond with the relevant provisions of the Stamp Duties Act, 1920. It must, however, be borne in mind that the two Acts differ in this respect—that while the Stamp Duties Act taxes the final balance of the estate of the deceased which is deemed to consist of defined classes of property, the Finance Act taxes property which passes on the death of a deceased, and property which is to be deemed to be included in the property passing on his death Bearing this distinction in mind, the corresponding provisions of the Finance Act, 1894, would seem to be the following:—

> " 2.—(1) Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—
>
> (*a*) . . . . . .
>
> (*b*) . . . . . .
>
> (*c*) Property which would be required on the death of the deceased to be included in an account under section 38 of the Customs and Inland Revenue Act, 1881, as amended by section 11 of the Customs and Inland Revenue Act, 1889, if those sections were herein enacted and extended to real property as well as personal property and the words ' voluntary ' and ' voluntarily ' and a reference to a ' volunteer ' were omitted therefrom; and
>
> (*d*) . . . . . .
>
> (2) . . . . . .
>
> (3) Property passing on the death of the deceased shall not be deemed to include property held by the deceased as trustee for another person under a disposition not made by the deceased, or under a disposition made by the deceased more than twelve months before his death where possession and enjoyment of the property was *bona fide* assumed by the beneficiary immediately upon the creation of the trust and thenceforward retained to the entire exclusion of the deceased or of any benefit to him by contract or otherwise."

As is evident, it is necessary also to set out the two sections referred to in section 2 (1) (*c*) of the Finance Act, 1894. Section 38 of the Customs and Inland Revenue Act, 1881 (hereafter referred to as the Act of 1881), so far as relevant, runs as follows:—

> 38.—(1) Stamp Duties at the like rates as are by this Act charged on affidavits and inventories shall be charged and paid on accounts delivered of the personal or moveable property to be included therein according to the value thereof.
>
> (2) The personal or moveable property to be included in an account shall be property of the following descriptions, viz.:—
>
> (*a*) Any property taken as a *donatio mortis causa* made by any person dying on or after the first day of June, 1881, or taken under a voluntary disposition, made by any person so dying, purporting to operate as an immediate gift *inter vivos* whether by way of transfer, delivery, declaration of trust or otherwise which shall not have been *bona fide* made three months before the death of the deceased.
>
> (*b*) . . . . . .
>
> (*c*) Any property passing under any past or future voluntary settlement made by a person dying on or after such day by deed or any other instrument not taking effect as a will whereby an interest in such property for life or any other period determinable by reference to death is reserved either expressly or by implication to the settlor. . . ."

Section 11 of the Customs and Inland Revenue Act, 1889 (hereinafter referred to as the Act of 1889), so far as relevant, provides:—

> " 11.—(1) Subsection 2 of section 38 of the Customs and Inland Revenue Act, 1881, is hereby amended as follows:—
>
> The description of property marked (*a*) shall be read as if the word ' twelve ' were substituted for the word ' three ' therein, and the said description of property shall include property taken under any gift, whenever made, of which property *bona fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained, to the entire exclusion of the donor, or of any benefit to him by contract or otherwise. . . ."

As a result of this referential legislation, property passing on the death of a deceased is (under the Finance Act, 1894) deemed to include

property falling within the words just cited. Under the Stamp Duties Act the estate of a deceased is deemed to include property falling within the very similar words of section 102 (2) (*d*) of that Act.

There is no dispute, nor could there be any, that the settlement of the 7th December, 1917, was a gift within the meaning of the Stamp Duties Act, being, as it was, a disposition of property effected by the creation of a trust without full consideration in money or money's worth. The questions to be determined are (1) what was the property comprised in the gift, was it the shares themselves or only a particular kind of interest in the shares? (2) had *bona fide* possession and enjoyment been assumed by the donee immediately upon the gift? and (3) had *bona fide* possession and enjoyment been thenceforth retained by the donee to the entire exclusion of the settlor, and to the entire exclusion of any benefit to him of whatsoever kind or in any way whatsoever?

In the Supreme Court, Jordan C.J. (with whose judgment Rogers and Roper JJ. concurred) was of opinion (1) that " the property comprised in the gift was the 850 shares "; (2) that, the donee being the trustees, *bona fide* possession and enjoyment of the property given was assumed immediately upon the gift; but (3) the settlor was not after the gift excluded from possession of the property given, because he joined with his co-trustees in the receipt and application of dividends on the shares; nor was he entirely excluded from the enjoyment of the property given and from any benefit, because owing to the existence of a resulting trust he obtained, through the settlement, an equitable right to have the property revested in him, to the extent to which the rights of the son did not exhaust it, and to have it protected in the meanwhile.

It will be noticed that the decision of the Supreme Court is based upon the view that the gift was a gift of the shares, and that the donee of the gift was the body of trustees.

In the High Court of Australia other views prevailed, the four learned judges being substantially unanimous in their opinions.

Rich J. was of opinion that what was given was the beneficial interest in the shares created by the settlement and that the donee was the son. " The gift in this case," he said, " was a gift to the son by the creation of a trust for the beneficial interest in the shares." He held that the phrase " possession and enjoyment " was a composite one, meaning beneficial possession and enjoyment, which the son immediately obtained under the trusts. He disagreed with the view of the Supreme Court that the settlor (by reason of his trusteeship) had not been excluded from possession, and (by reason of the resulting trust) had not been excluded from enjoyment or benefit. He considered that " possession of the legal interest of the property comprised in the gift by the donor, as one of the trustees and not in his capacity as beneficial owner, was not the possession aimed at by the sub-section; and that the settlor having made a gift complete in itself without any reservation or power of disposition over what was the subject of the gift, he was entirely excluded from the enjoyment of the property given and from any benefit of whatsoever kind."

Starke J. was of opinion that the property comprised in the gift was not the 850 shares, but " the subject given or the interests in the property created or limited by the act of disposition of the property." Nor was the settlor in possession in the sense contemplated by the Act, viz., " possession beneficial to himself ". He was " entirely excluded by the terms of the deed, and, in fact, from possession of the property in the sense indicated, and from the enjoyment thereof and of any benefit whatsoever to him." The resulting trust was not a benefit within the sub-section; the sub-section " is not attracted merely because the donor has some interest in the property mentioned in the gifts; he must retain some benefit out of the property he affected to give or obtain some collateral benefit thereby."

Dixon J. confined his judgment to the consideration of two questions, the trusteeship of the settlor, and the resulting trust. As to the first he thought that the words " possession and enjoyment " mean beneficial possession and enjoyment as distinguished from possession and enjoyment

in a representative or fiduciary capacity; therefore by naming himself as a trustee a settlor or donor does not necessarily bring the gift within section 102 (2) (*d*) of the Act. That provision, he said, " appears to contemplate the assurance by way of gift of any recognised estate or interest, whether legal or equitable and whether present, future or contingent, and to require that, according to its nature, the estate or interest should pass into the donee's enjoyment unimpaired by any reservation in fact or law in favour of the donor. It may go even further, but the provision does not, I think, insist that the donor shall occupy no representative or fiduciary position in relation to the subject of a trust amounting to or involving a gift." As to the resulting trust, he held that its existence did not mean that there was not an exclusion of every benefit to the settlor. There was no reservation out of the interest given, nor was there any recompense or benefit in reference to the interest given.

McTiernan J. was of opinion that the property comprised in the gift was the equitable interest in the shares which passed to the son under the settlement, and that it was that interest of which the enquiry, whether *bona fide* possession and enjoyment had been assumed and retained at the time and in the manner required by section 102 (2) (*d*), was to be made. He held that the son had assumed and retained the full and complete possession and enjoyment of which the limited interest he took in the shares was capable, to the entire exclusion of the settlor except as a trustee. He further held that the fact that the settlor was a trustee did not make the section operate to sweep the shares into the settlor's estate; nor did the existence of a resulting trust prevent the settlor from being excluded from all benefit, because he had divested himself of the whole of the limited beneficial interest which he gave to his son.

In Australia the case was apparently argued upon the footing that the interest of the son under the settlement in the shares and accumulations of income was not an absolute vested interest, but was contingent on his attaining the age of 21 years. Before their Lordships' Board, however, it was contended by the respondent that the interest given was an absolute one, and this upon the authority of certain decisions upon the construction of wills, of which *re Ussher* ([1922], 2 Ch. 321) is perhaps the latest reported sample. Whether these authorities should be applied to the construction of a settlement, it is not necessary to consider in the present case, for it was conceded that the authorities referred to only apply for the purpose of resolving an ambiguity in the gift. In their Lordships' opinion there is no ambiguity in this settlement. There is no gift of *corpus* to the son except in the direction to the trustees to transfer to him upon his attaining 21. What have then (and only then) to be transferred are described as " all the property and assets whatsoever including the accumulations of income and all investments held by the Trustees " and they are then to be transferred to him " as his absolute property." Until that event had happened they were not, in their Lordships' opinion, his absolute property; until that event had happened he had only a contingent interest. He was only to be absolutely entitled to *corpus* if and when he attained his age of 21 years.

For the reasons hereinafter appearing their Lordships are in agreement with the decision of the High Court in this case. In their opinion the property comprised in the gift was the equitable interest in the 850 shares, which was given by the settlor to his son. The disposition of that interest was effected by the creation of a trust, i.e., by transferring the legal ownership of the shares to trustees, and declaring such trusts in favour of the son as were co-extensive with the gift which the settlor desired to give. The donee was the recipient of the gift; whether the son alone was the donee (as their Lordships think) or whether the son and the body of trustees together constituted the donee seems immaterial. The trustees alone were not the donee. They were in no sense the object of the settlor's bounty.

Did the donee assume *bona fide* possession and enjoyment immediately upon the gift? The linking of possession with enjoyment as a composite object which has to be assumed by the donee indicates that the possession and enjoyment contemplated is beneficial possession and enjoyment by the object of the donor's bounty. This question therefore must be answered

in the affirmative, because the son was (through the medium of the trustees) immediately put in such *bona fide* beneficial possession and enjoyment of the property comprised in the gift as the nature of the gift and the circumstances permitted.

Did he assume it, and thenceforth retain it to the entire exclusion of the donor? The answer, their Lordships think, must be in the affirmative, and for two reasons: viz. (1) the settlor had no enjoyment and possession such as is contemplated by the section; and (2) such possession and enjoyment as he had from the fact that the legal ownership of the shares vested in him and his co-trustees as joint tenants, was had by him solely on behalf of the donee. In his capacity as donor he was entirely excluded from possession and enjoyment of what he had given to his son.

Did the donee retain possession and enjoyment to the entire exclusion of any benefit to the settlor of whatsoever kind or in any way whatsoever? Clearly yes. In the interval between the gift and his death, the settlor received no benefit of any kind or in any way from the shares, nor did he receive any benefit whatsoever which was in any way attributable to the gift. Indeed this was ultimately conceded by the appellant.

Certain authorities were cited or referred to in the Courts in Australia, and these now require consideration.

Reliance was placed in the High Court upon a decision of the Courts in Ireland in the case of *In re Cochrane* ([1905] 2 I.R. 626 and [1906] 2 I.R. 200), the facts in which were these:—Sir Henry Cochrane was the mortgagee of two estates in County Mayo, the mortgage being one to secure a principal sum of £15,000 with interest at 4½ per cent. The mortgage debt and securities having been vested in trustees, Sir Henry (by an indenture dated the 4th September, 1902, and made between himself and the trustees) declared trusts of the £15,000. The trustees were to stand possessed thereof and all interest and the benefit of all securities for the same in trust out of the income to pay each year £575 to Sir Henry's daughter, Mrs. Day, for her life, and after her decease in trust as to the said sum of £15,000 for her issue as she should by deed or will appoint, and in default of appointment for her children who, being sons, should attain 21, or, being daughters, should attain 21 or marry. Power was given to Mrs. Day to appoint by will to her husband for his life a yearly sum not exceeding £300 out of the income of the £15,000. If no child of Mrs. Day should attain a vested interest in the trust funds, they were to be held in trust for Sir Henry absolutely. There was also a trust of the balance of the yearly income for Sir Henry absolutely. The trustees regularly received the interest, which amounted to £675 per annum. They paid £575 to Mrs. Day and the balance to Sir Henry; but in March, 1904, Sir Henry directed them to pay in future the whole income to Mrs. Day. He died in September of the same year. The Crown thereupon claimed that estate duty was payable in respect of the entire sum of £15,000 as property deemed to be included in property passing on the death of Sir Henry within section 2 (1) (*c*) of the Finance Act, 1894. The question at issue was whether the case fell within section 38 (2) (*a*) of the Act of 1881, as amended by section 11 of the Act of 1889, in other words was the £15,000 property taken under a gift, of which property *bona fide* possession and enjoyment had not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. The Court of Appeal held (affirming the King's Bench Division) that estate duty was not payable in respect of the £15,000, but only in respect of the values of Sir Henry's interest in the balance of income and his contingent interest in the £15,000.

Palles C.B. thought that the Crown's contention would be right if the subject matter of the gift was the entire equitable interest in the £15,000. The question was whether that was correct in law, a question which turned upon the word "gift." Gift in the context meant beneficial gift. A person who declares trusts of property only gives the beneficial interests covered by the trusts. Everything else he retains and does not give; and there is an entire exclusion of the donor from the property taken under the disposition of the gift. Sir Henry Cochrane obtained no benefit either by way of reservation out of the gift, or collaterally in reference to the gift.

He held, therefore, that estate duty was not payable in respect of the £15,000. Kenny and Johnson JJ. took the same view. In the Court of Appeal, Walker L.C. and FitzGibbon and Holmes L.JJ. unanimously affirmed this decision. FitzGibbon L.J., after stating that he agreed with and adopted the argument of the Lord Chief Baron, pointed out that Sir Henry gave the annuity absolutely to his daughter and the fund to her children absolutely in certain events, " but nothing over that, whether you call it a reversion, a reservation or a surplus, was included in the gift."

If *re Cochrane* was rightly decided, as their Lordships think it was, it covers the present case. It was, however, contended by the appellant that the decision was wrong and was inconsistent with (1) the decision of the House of Lords in the case of *Grey* v. *A.G.* ([1900] A.C. 124), which affirmed the decision of the Court of Appeal in the case of *A.G.* v. *Grey* ([1898] 2 Q.B. 534) and (2) the decision of the Court of Appeal in the case of *A.G.* v. *Worrall* ([1895] 1 Q.B. 99). To these decisions reference must now be made.

The case of Earl Grey was a case of a gift not made by the creation of a trust, but by direct conveyance and assignment to the donee of the donor's real and personal estate. It arose in the following circumstances:—The donor was the 3rd Earl, the donee was the heir presumptive who in fact succeeded to the earldom on the death of the 3rd Earl. The donor was absolute owner of some freehold and leasehold estates, subject to certain annuities charged thereon and certain mortgages affecting the same. The gift was effected by an indenture dated the 19th October, 1885, and made between the donor of the one part and the donee of the other part. This deed is stated (inaccurately) in the Law Reports to have excepted the mansion house from the real property conveyed to the donee, but a reference to the copy supplied to the House of Lords shows that it was included. The relevant contents of the deed were the following:— By clause 4 the donor conveyed to the donee all the donor's real estate and leaseholds to hold the same to the donee in fee simple (subject to the said annuities and mortgages) to the use that the donor should receive during his life an annual rentcharge of £4,000 to be issuing out of the said hereditaments (other than such part as the donor was to occupy under the trusts thereinafter declared) and subject thereto and charged therewith to the use of the donee in fee but as to the mansion house at Howick and the premises to be enjoyed therewith subject to the trusts thereinafter contained and as to leaseholds for the whole term and interest of the donor therein. By clause 5 the donor assigned to the donee the furniture and effects in or about the mansion house and (with immaterial exceptions) all other his personal estate. By clause 6 trusts were declared of the mansion house with the gardens, stables, outbuildings and appurtenances as then occupied and enjoyed by the donor and of the furniture and effects in the words following:—" upon trust to permit him [the donor] to occupy and enjoy the same as freely as heretofore during his life, and all the furniture . . . and other things whatever in or about the said mansion house and premises shall be held upon trust to permit the said Earl to use and enjoy the same in like manner during his life." It will thus be seen that the whole of the donor's real and leasehold estates were conveyed to the donee, but in his hands they had imposed upon them by the donor an annual rentcharge for the benefit of the donor issuing out of them (but not out of the mansion house and its appurtenances) during the life of the donor, and (as to the mansion house and its appurtenances) a trust for the benefit of the donor during his life. The deed also contained covenants by the donee with the donor (1) to pay the rentcharge; (2) to keep the mansion house insured and repaired, and to stock and manage the gardens; (3) to supply the donor free of cost with farm produce; and (4) to pay the donor's funeral and testamentary expenses and debts to the full exhaustion of the property. The deed further contained a proviso that if the donee died in the lifetime of the donor, or committed a breach of covenant, the donor should have power to revoke the deed wholly or in part. The annual income of the property comprised in the deed largely exceeded £4,000. By an indenture dated the 26th September, 1894, and made between the same parties, in consideration of

a sum of £5,000 paid by the donee to the donor, the donor released the properties conveyed by the former indenture from the annual rentcharge, and from the power of revocation. He also released the donee from his covenant to pay the rentcharge. He died about a fortnight afterwards, viz., on the 9th October, 1894.

The Crown claimed duty under section 2 (1) (*c*) of the Finance Act, 1894, alleging that the case fell within section 38 (2) (*a*) of the Act of 1881 as amended by section 11 (1) of the Act of 1889, or within section 38 (2) (*c*) of the Act of 1881. In the Court of Appeal A. L. Smith, L.J., relying upon the covenants by the donee to pay the donor £4,000 a year and to bear other liabilities of the donor, held that the donee had not assumed bona fide possession and enjoyment of the estate immediately upon the gift and thenceforward retained possession and enjoyment of the property contained in the deed either to the entire exclusion of the donor or of any benefit by contract or otherwise to the donor. Rigby, L.J., referred to the rentcharge in favour of the donor, to the donor's beneficial interest in the property which was not subject to the rentcharge, to the covenants by the donee and to the power of revocation, and said that it was impossible to say that the property subject to the deed was held by the donee to the exclusion of any benefit to the donee. Vaughan Williams, L.J., thought that the case fell within the later words of section 11 (1) of the Act of 1889. The covenant by the donee to pay the donor's debts prevented the gift from being one of which the donee assumed possession and enjoyment to the total exclusion of benefit to the donor. The decision of the Court of Appeal is based entirely on section 38 (2) (*a*) of the Act of 1881 as amended, and not on section 38 (2) (*c*) of that Act. The last-mentioned provision, they said, they need not consider.

In the House of Lords, the donee's appeal met with short shrift. The case was disposed of at one sitting, the Crown not being called upon to argue. Lord Halsbury, L.C., in stating his opinion (which was unreserved in more senses than one) thought the case a very plain one. His actual words are these:—

> " My Lords, there are some cases so extremely plain that it is difficult to give any better exposition of the question than that which the statute itself provides. In the present case I did not at first quite understand the argument presented to your Lordships, and I am not absolutely certain that I have got much further now; but at all events, forming my own judgment upon the statute, nothing appears to me much more plain than this, that what the Act of Parliament intended to prevent was that what has been described as a gift inter vivos should nevertheless reserve to the settlor some benefit, or some part of that which purported to be given inter vivos. In this case can anybody doubt that something has been reserved to the settlor? The settlement itself has reserved £4,000 a year, and has reserved a right also on the part of the settlor that all his debts up to the period of his death should be paid, and the payment secured by the estate. It seems to me that it is burning daylight to say that is not within the express language of the statute, and I am really wholly unable to understand why these words are not as plain in the statute itself as any explanatory exposition could make them. That, my Lords, is really all I have to say upon the subject. It seems to me it is a particularly plain case, and I move your Lordships that this appeal be dismissed with costs."

It will be observed that by the use of the word " reserved " the Lord Chancellor might perhaps appear to be basing his opinion upon the view that the case fell within section 38 (2) (*c*) as a case of property passing under a settlement whereby an interest in such property for life was reserved to the settlor. If this were so, then (the argument runs) *re Cochrane* is inconsistent with this decision, because there can be no difference in substance between (*a*) the case of a gift of property (and its income) to A coupled with a charge on the property of an annual sum in favour of the donor, and (*b*) the case of a gift (through the medium of trustees) to A for life of part only of the annual income of a trust fund, leaving the balance to be paid to the donor either under a resulting trust or an express trust in that behalf. In each case it can be said that the £4,000 a year, or the balance of income, is excluded from the gift. *re Cochrane* decided that in case (*b*) nothing was reserved out of the gift; but in case (*a*)

Grey v. *A.G.* decided that the rentcharge was reserved out of the property passing under the gift. Therefore *re Cochrane* is wrong. That is the argument

Their Lordships do not accept this contention. In the first place they do not think that *Grey* v. *A.G.* was decided on any ground other than that upon which the decision of the Court of Appeal was based, viz., that the case fell within section 38 (2) (*a*), as amended, because *bona fide* possession and enjoyment of the property taken under the gift had not been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise. The whole transaction reeked of benefits to the donor, some arising out of the property actually conveyed and assigned by way of gift to the donee, others arising out of covenants entered into by the donee collaterally and in reference to the gift. The Lord Chancellor refers, their Lordships think, to all these benefits as showing that the case fell plainly within the provisions of section 38 (2) (*a*) of the Act of 1881, as amended.

The learned judges who decided *re Cochrane* all thought that *Grey* v. *A.G.* was clearly distinguishable and their Lordships agree that it was. There is nothing laid down as law in that case which conflicts with the view that the entire exclusion of the donor from possession and enjoyment which is contemplated by section 11 (1) of the Act of 1889 is entire exclusion from possession and enjoyment of the beneficial interest in property which has been given by the gift, and that possession and enjoyment by the donor of some beneficial interest therein which he has not included in the gift is not inconsistent with the entire exclusion from possession and enjoyment which the sub-section requires.

With the suggestion that *re Cochrane* is inconsistent with the decision in *re Worrall* their Lordships cannot agree. That was simply a case in which the Court of Appeal held upon the facts and documents there disclosed, that the donor had obtained a collateral benefit in reference to the gift which he had made. Possession and enjoyment of the property taken under the gift had not been assumed and retained to the exclusion of any benefit to the donor by contract or otherwise.

Only one other case, which was referred to in the Australian Courts, need be referred to, viz., *A.G. Alberta* v. *Cowan* ([1926] 1 D.L.R. 29). In that case the owner of some negotiable securities declared trusts thereof for certain persons, and retained possession as sole trustee. It was held that although his possession was in law the possession of the *cestuis que trust* there had not been an assumption of possession by the beneficiaries sufficient to take the property out of section 6 (*b*) of the Succession Duties Act, R.S.A. 1922, c. 28, and that therefore the property was liable to Succession Duty. Duff J. (who delivered the judgment of the Supreme Court of Canada) was of opinion that the section in question contemplated possession by beneficiaries as contradistinguished from possession by the donor, and not a possession which was in fact that of the donor, and was attributable to the beneficiaries in point of law solely by force of the instrument under which the title of the beneficiaries was created. The basis of that decision has no relevance to a case such as the one under consideration, in which the possession of the donor is changed to the possession of a body of trustees. In such a case there is a possession by the beneficiaries as contradistinguished from the possession of the donor, and not less so if the donor is himself one of the body of trustees.

One argument addressed to their Lordships by Counsel for the appellant must be noticed. It was contended (first) that section 102 (1) (*a*) of the Stamp Duties Act, 1920, when closely studied revealed the fact that property vested in a deceased person as trustee for another person under a disposition made by the deceased, was to be deemed included in the estate of the deceased for the purposes of assessment and payment of death duty; (secondly) that the only niche into which such property could be fitted was subsection 2 (*d*); therefore (thirdly) the Act could not have contemplated that the requirements of subsection 2 (*d*) as to excluding the deceased donor from possession and enjoyment would be complied with when the donor was himself a trustee. Their Lordships find it difficult to follow this over-subtle argument, but

they think it breaks down in its initial stage. The first proposition is founded on the exception contained in subsection (1). The exception purports to be an exception from " all property of the deceased . . . to which any person becomes entitled under the will or upon the intestacy of the deceased," words which can only mean property of which the deceased was the owner; the exception however is of property of which the deceased was a trustee. The argument is that in order that the exception may not be meaningless, you must attribute to section 1 (*a*) the effect of including in the words cited above, property of which the deceased was a trustee if he was a trustee under a disposition made by himself. Their Lordships, however, feel unequal to the task of holding that the words cited above can refer to trust property at all: they prefer to treat the exception as having no operative effect. Indeed the words seem to have found their way into section 102 (1) (*a*) from section 2 (3) of the Finance Act, 1894, quoted earlier in this judgment. In that setting the words of exception were necessary and proper, because under that Act estate duty was payable, not on " all property of the deceased to which any person becomes entitled under the will or upon the intestacy of the deceased," but on " property passing on the death of the deceased "; and property vested in a deceased person as a trustee would undoubtedly pass on his death. In any event even if the argument under consideration were sound, the only case which could possibly fit the words would be the case (which is not the present case) when the deceased was sole trustee, for by no stretch of imagination can it be said of property vested in several trustees, that on the death of one, the surviving trustees became entitled to it under the will or upon the intestacy of the one who died.

For the reasons indicated their Lordships are of opinion that bona fide possession and enjoyment of the property comprised in the gift which the deceased made by the settlement of the shares was assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased or of any benefit to him of whatsoever kind or in any way whatsoever, and that the question in dispute should be answered in the negative.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. In accordance with the agreement entered into when special leave to appeal was obtained, the appellant will pay the respondent's costs of the appeal.

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In the Privy Council

THE COMMISSIONER FOR STAMP DUTIES OF THE STATE OF NEW SOUTH WALES

v.

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