[HIGH COURT OF AUSTRALIA.]

JOHN LANG AND OTHERS . . . APPELLANTS;

AND

THOMAS PROUT WEBB (COMMISSIONER OF TAXES FOR VICTORIA) . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 29, *March* 1, 11.

Griffith C.J., Barton and Isaacs JJ.

Probate duty—Gift of property before death—Lease by donee to donor—Possession and enjoyment to exclusion of donor—Benefit to donor—Administration and Probate Act 1903 (*Vict.*) (*No.* 1815), *sec.* 11*.

In order that property which is in its nature susceptible of actual delivery, that is, of visible change of possession, and which is the subject of a gift shall not be liable to payment of duty under sec. 11 of the *Administration and Probate Act* 1903, possession must be taken by such delivery.

A testatrix was the owner in fee of land in her actual possession and enjoyment, which she worked as a single property. More than twelve months before her death she gave to her three sons blocks of this land each of which was surrounded by other of the land of the testatrix. The gift was made by conveyances of so much of the land as was under the general law, and by transfers of so much of it as was under the Transfer of Land Acts. On the same day upon which the conveyances and transfers were executed, each of the

*Sec. 11 is as follows :—"Every conveyance or assignment gift delivery or transfer of any estate real or personal and whether made before or after the commencement of this Act, purporting to operate as an immediate gift *inter vivos* whether by way of transfer delivery declaration of trust or otherwise shall—

"(*a*) if made within twelve months immediately preceding the death of the person so dying; or

(*b*) if made at any time relating to any property of which property *bonâ 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

be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under the Administration and Probate Acts as though part of the estate of the donor."

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sons executed a lease for five years of the land given to him to the testatrix at a fair and reasonable rent. After the gifts the lands given continued to be in the actual physical occupation of the testatrix, and to be worked by her with her other land in the same way as before the gifts. The testatrix died before the expiration of the leases.

Held, that the land so given was chargeable with the payment of the duty payable under the Administration and Probate Acts as though part of the estate of the testatrix.

Decision of the Supreme Court of Victoria : *Commissioner of Taxes* v. *Lang* (1911) V.L.R., 459 ; 33 A.L.T., 87, affirmed.

APPEAL from the Supreme Court of Victoria.

Certain questions having arisen with regard to a statement filed in the office of the Commissioner of Taxes for Victoria by John Lang, Patrick Henry Lang and Stewart Sellar Lang, the executors of Henrietta Lang, deceased, the Commissioner, Thomas Prout Webb, stated the following case for the opinion of the Supreme Court :—

"(1) At and for some time prior to the 25th day of September 1908 Henrietta Lang now deceased then the wife of Patrick Sellar Lang now also deceased was owner in fee simple of 'Titanga' Estate consisting of 12,932 acres of freehold land in the County of Hampden the title whereto was as to part under the *Transfer of Land Act* and as to part under the General Law.

"(2) At and for some time prior to and after the 25th day of September 1908 'Titanga' was worked by the said Henrietta Lang and her said husband but since August 1907 and until his death on the 13th day of April 1909 her said husband was through ill-health permanently incapable of doing any business.

"(3) The only children living in September 1908 of the said Henrietta Lang and of her said husband were three sons namely John Lang, Patrick Henry Lang and Stewart Sellar Lang who are all of full age and still living. At all times material to this case the said John Lang was a solicitor practising in Melbourne, the said Patrick Henry Lang was a medical practitioner residing at Camperdown and the said Stewart Sellar Lang was living at 'Titanga' where his parents at all times material to this case also resided.

"(4) On the 25th day of September 1908 there were executed

by Henrietta Lang transfers and conveyances of parts of 'Titanga' as follows .—

"(*a*) To John Lang 2724 acres.

"(*b*) To Patrick Henry Lang 2860 acres.

"(*c*) To Stewart Sellar Lang 3288 acres.

"The lands transferred and conveyed to each son were of approximately the same value, those of Stewart Sellar Lang being of somewhat poorer quality. The transfers and conveyances were all in the same form respectively. Specimen copies of each omitting the schedule of lands are attached to this case.

"(5) On the same date as but subsequently to the execution of the said transfers and conveyances there were executed by Henrietta Lang and the several lessors therein leases as follows :—

"(*a*) A lease from the said John Lang to Henrietta Lang of the above-mentioned part of 'Titanga' transferred and conveyed to him.

"(*b*) A lease from the said Patrick Henry Lang to Henrietta Lang of the above-mentioned part of 'Titanga' transferred and conveyed to him.

"(*c*) A lease from the said Stewart Sellar Lang to Henrietta Lang of the above-mentioned part of 'Titanga' transferred and conveyed to him.

"The leases were all in the same form and a specimen copy of one of such leases omitting the schedule of lands is attached to this case.

"(6) The said transfers and conveyances and leases were executed after discussion and arrangement between Henrietta Lang and her said three sons and after the said Henrietta Lang had explained to her said sons that she desired to make fixed and permanent provision for them and at the same time to take from them leases at whatever might be a reasonable rental for grazing purposes having regard to the conditions of the leases. The conditions of the said leases and the amounts of the rentals thereunder were accordingly discussed and agreed upon between the said Henrietta Lang and her said sons after they had respectively made inquiries as to what the fair rental value would be before the execution of any of the said documents.

"(7) The said transfers and conveyances were submitted to

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the Collector of Imposts who assessed duty upon them as a whole at one sum of £538 14s. 8d. under Subdivision VIII. of the Schedule to the *Stamps Act* 1892 such duty together with the sum of £4 5s. assessed duty upon the leases as a whole was thereupon duly paid.

"(8) The said lands so transferred or conveyed to the sons as aforesaid comprised altogether nine fenced paddocks of different areas. The paddocks were at and prior to the 25th day of September 1908 completely fenced off from each other except for one short line of fence which was afterwards put up in 1909. Of these nine paddocks two were included in the area transferred or conveyed to John Lang two in the area transferred or conveyed to Patrick Henry Lang and four in the area transferred or conveyed to Stewart Sellar Lang. The ninth or remaining paddock was included as to part thereof in the area transferred or conveyed to John Lang as to another part thereof in the area transferred or conveyed to Patrick Henry Lang and as to the remaining part thereof in the area transferred or conveyed to Stewart Sellar Lang. The ninth paddock was not in 1908 and has not since by any fence or otherwise been subdivided. There are no buildings or improvements on the said lands except fences plantations two or three windmills and some small water holes.

"(9) The rents reserved under the said leases were in each case fair and reasonable having regard to the terms and conditions in the said leases contained and were in no case less than might reasonably have been asked for and obtained from any other person or persons for grazing leases with similar terms and conditions.

"(10) After the execution of the said leases the lands thereby leased were occupied by the said Henrietta Lang and were used by her for grazing purposes and the whole of 'Titanga' including the area so leased was worked and used by the said Henrietta Lang in precisely the same manner as theretofore. The said rents were in each case duly paid to the said three sons respectively by the said Henrietta Lang up to and including the amount due on the latest day (the 30th day of November 1909)

for payment of rent prior to her death and no remission allowance or refund of any kind was made to her.

"(11) The said Henrietta Lang died at 'Titanga' on the 16th day of January 1910 being at the date of her death and at all times material to this case domiciled in Victoria.

"(12) On the 5th day of April 1910 probate of the will and codicils of the said Henrietta Lang was granted in Victoria to the said John Lang, Patrick Henry Lang and Stewart Sellar Lang the executors therein named.

"(13) The said executors filed a statement for probate duty giving the area of freehold lands owned by the deceased at her death. The areas comprised in the said transfers and conveyances were not included in such statement but the rents due from the 30th day of November 1909 to the date of her death were apportioned and set out as liabilities of her estate. The Commissioner thereupon required that the said executors should file a statement including all the lands comprised in the said transfers and conveyances and claimed that the said lands were all chargeable with the payment of duty under the provisions of sec. 11 of the *Administration and Probate Act* 1903 (No. 1815). The right to make such requirement and the alleged liability for duty in respect of the said lands was disputed by the said executors but after negotiations it was arranged between the Commissioner and the said executors that the latter should under protest file such statement and pay such duty and that a case should be stated for the opinion of the Supreme Court. In pursuance of such arrangement a statement such as aforesaid was filed and there was paid under protest by the said executors on the 5th day of January 1911 the sum of £4,449 7s. 1d. being at the rate of 10 per cent. on £49,890 17s. 6d. less £539 14s. 8d. *ad valorem* duty paid—being the sum which would be payable for duty in respect of the said lands so transferred or conveyed if section 11 of the said Act No. 1815 applied as contended for by the Commissioner.

"(14) It is agreed by the parties to this case that the Court and the parties are to be at liberty to refer to the probate copy of the said will and codicil and to the original or agreed copies of the said transfers conveyances and leases and all the said documents are deemed to form part of this case.

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"(15) It is also agreed by the parties to this case that the Court shall be at liberty to draw all inferences of fact from the facts matters and things set forth or referred to herein.

"The questions for the opinion of the Court are:—

"(1) Are or were the properties transferred and conveyed by the said deceased to her three sons and leased by them to her as herein above stated chargeable with the payment of duty by reason of the provisions of section 11 of the *Administration and Probate Act* 1903 (No. 1815)?

"(2) Are the executors of the deceased entitled to be recouped the said sum of £4,449 7s. 1d. paid under protest as aforesaid and if so with any and what interest added?"

The Full Court answered the first question "Yes" and the second question "No": *Commissioner of Taxes* v. *Lang* (1).

From this decision the executors now appealed to the High Court.

Irvine K.C. and *Schutt*, for the appellants. The transaction as a whole must be looked at and not the instruments by which it is carried into effect. The whole transaction here is a gift of a reversion into possession of which the donee forthwith entered to the exclusion of the donor. If it is not that, it is a gift of an estate in fee into possession of which the donee immediately entered to the exclusion of the donor, and exercised the rights of owner by granting a lease. In either case the donee had absolute dominion over the thing which was given. The "possession and enjoyment" referred to in sub-sec. (*b*) sec. 11 are of the thing given, *i.e.*, the estate in reversion or the estate in fee. The word "property" in that sub-sec. means the thing which is given: *Davidson* v. *Armytage* (2). The only thing to be looked at is the thing which is given: *In re Cochrane* (3). The occupation of the land by the donor is not a "possession" or "enjoyment" by, or a "benefit" to, the donor; *Attorney-General* v. *Seccombe* (4). If a lease is a "benefit" to the donor, it would not matter if the lease were given ten years afterwards. The transac-

(1) (1911) V.L.R., 459; 33 A.L.T., 87.
(2) 4 C.L.R., 205.
(3) (1906) 2 I.R., 200.
(4) (1911) 2 K.B., 688; 80 L.J.K.B., 913.

tion would still fall within the section. The section is intended to hit only colourable transactions.

They also referred to *Dobson's Death Duties*, pp. 69-72; *Attorney-General* v. *Worrall* (1); *Earl Grey* v. *Attorney-General* (2); *Attorney-General* v. *Johnson* (3).]

Weigall K.C. (with him *à Beckett*) for the respondent. Where a person gives away property but appears outwardly to be still the owner, the section applies. In the case of a gift of an estate in fee, the donor must go out of possession and the donee must go into possession. The "possession and enjoyment" which the donee must assume is something to the entire exclusion of the donor, and of any benefit to her. Here the benefit the donor gets is the right to remain on the land and use it. That was part of her property before and she is not excluded from it. [He referred to *Heward* v. *The King* (4); *Commissioner of Stamp Duties* v. *Byrnes* (5).]

Irvine K.C. in reply.

Cur. adv. vult.

March 11.

GRIFFITH C.J. The question raised in this case depends upon the construction of sec. 11 of the *Administration and Probate Act* 1903 which is as follows:—"Every conveyance or assignment gift delivery or transfer of any estate real or personal and whether made before or after the commencement of this Act, purporting to operate as an immediate gift *inter vivos* whether by way of transfer delivery declaration of trust or otherwise shall—

"(*a*) if made within twelve months immediately preceding the death of the person so dying; or

"(*b*) if made at any time relating to any property of which property *bonâ 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

(1) (1895) 1 Q.B., 99.
(2) (1900) A.C., 124.
(3) (1903) 1 K.B., 617.
(4) 3 C.L.R., 117.
(5) (1911) A.C., 386.

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be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under the Administration and Probate Acts as though part of the estate of the donor."

That section lays down an artificial rule, and the duty of the Court is to construe the section as they find it. It is applicable alike to real and personal property, to interests in possession and in remainder or reversion, and to corporeal and incorporeal property. In the second case mentioned, that is, where the gift is made more than twelve months before the death of the person dying, four conditions are necessary to take the case out of the section:—First, that *bonâ fide* possession of the property shall be assumed by the donee immediately upon the gift and thenceforward be retained by him; secondly, that *bonâ fide* enjoyment of the property shall be in like manner assumed and retained by the donee; thirdly, that the donor shall be and continue entirely excluded from the property; and, fourthly, that the donor shall be entirely excluded from any benefit to him by contract or otherwise. As to the last condition I agree with the opinion expressed by the Court of Session in Scotland and followed by *Hamilton* J. in *Attorney-General* v. *Seccombe* (1) that the benefit intended is a benefit which was part of the property before the gift. That is, I think, imported by the word "excluded," which implies a previous inclusion.

The facts of the present case are that the donor, the mother of the donees, was the owner in fee of land in her actual possession and enjoyment. The lands in question formed portion of a larger estate belonging to her, were surrounded by other lands of the donor and were worked with them as a single property. The gift was made by conveyances of the lands which were not subject to the Transfer of Land Acts and by transfers of the lands which were subject to those Acts. On the same day upon which the conveyances and transfers were executed the several donees executed leases to her of the lands the subject of the gifts at rents which are stated in the case to be fair and reasonable. No change took place in the actual or visible possession or occupation of the land, which remained where it was before, in the

(1) (1911) 2 K.B., 688, at p. 700.

donor. The only change that took place was in the legal dominion over the fee.

The case was presented to us by the appellants as being in substance a gift of a reversion after an estate for years. But that is not so. The whole estate in fee was intended to be given and was given, and the gift of what was given was intended to take effect *in præsenti*. If the gift had been intended to take effect *in futuro* upon the expiration of a prior estate for life or years, the case might, and probably would, have been different, as in *In re Cochrane* (1). In my opinion the term "possession," as used in this section, means such a change of ostensible dominion as can be made having regard to the nature of the particular property, and that must vary according as the property is corporeal or incorporeal, in possession or in remainder. In the case of corporeal property actual delivery is always possible. In the case of goods it is clearly necessary. So, I think, it is necessary in the case of land, if the gift is a gift of an estate in possession. But a mere change of possession is not sufficient without a change of enjoyment. Both are necessary. In the present case, I think that the donees acquired and assumed a right to the immediate enjoyment of the property to the entire exclusion of the donor, and I think that such enjoyment so given was immediately assumed and was retained by the donees within the meaning of the section. For, in my opinion, the enjoyment of an estate in fee subject to lease is in the landlord, and not in the tenant, within the meaning of the section. But that is not enough. There must be immediate assumption of possession, as well as of enjoyment, and, as I have pointed out, there was no actual change of possession, which was possible and, being possible, was essential.

As to the exclusion of the donor from benefit, there is much weight in the argument put forward by Mr. *Weigall* that the continued possession of the lands the subject of the gifts, which were surrounded by other lands of the donor, was a distinct benefit to the donor. But it is not necessary to decide that point. On the ground that, where the property given is in its nature susceptible of actual delivery, that is, of visible change of pos-

(1) (1906) 2 I.R., 200.

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session, possession must be taken by such delivery, I think this case falls within the section. The appeal must therefore be dismissed.

BARTON J. read the following judgment :—

The question is whether the properties, the subject of the conveyances or transfers and the leases, are chargeable with the payment of duty by reason of the terms of the *Administration and Probate Act* 1903, sec. 11. The Commissioner contends that "*bonâ fide* possession and enjoyment" were not "assumed by the donees immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to" her "by contract or otherwise."

There is no doubt that each instrument vesting a freehold in one of the appellants was a "conveyance," "gift," and "transfer" of real estate "purporting to operate as an immediate gift *inter vivos* . . by way of transfer." The leases were executed on the same day as the deeds of gift, and it is not asserted that during the interval between the two executions there was change in the actual possession of the land on the part of the donor, such as could be called an "exclusion of the donor" or an exclusion of "any benefit to" her. As a matter of fact she never relinquished possession at all. She retained that benefit. It is true that, if the "property" given was in reality a reversion, the retention of actual possession by the donor was not an exclusion from the property, since in that case the right of possession would not have been included in the gift. But, as the instruments purported to operate as immediate gifts *inter vivos* of the whole freehold in possession, it was necessary, in my opinion, that the possession and enjoyment involved in an entire gift of such an estate should ensue, and here, though she purported to give them up, the donor retained them. Had the leases been at a peppercorn rent it could scarcely have been contended that the transaction rendered the property immune from duty. The only difference in the present case being that the leases to the donor are at full rent, I cannot see that that fact, in the face of a retention of the actual possession and enjoyment, shows that the possession and enjoyment were either assumed or retained by the donees in

the sense necessary to protect the property from duty, having regard to the terms of sub-sec. (*b*).

It was contended that as "it is incumbent upon us to look at the real substance of the transaction and its object" (as said by *Hawkins* J. in *Crossman* v. *The Queen* (1)), we should consider this transaction as merely a gift of the reversion upon a five years' lease. But it was not in terms such a gift, nor could the donor give herself a lease so as to create the reversion. It matters not that the donees turned a freehold into a reversion by themselves granting a lease. I think the transaction is in substance a gift to each son, with a stipulation at the time of the gift that the donor is to have an immediate lease so as to retain the possession and enjoyment for a term. I do not think that this means an assumption of the possession and enjoyment by the donee immediately upon the gift, nor that it means the retention of the property to the entire exclusion of the donor. Lord *Halsbury* L.C. says in *Earl Grey* v. *Attorney-General* (2):—"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*." That is what I think has been done here.

I am of opinion, therefore, that the appeal fails.

ISAACS J. read the following judgment:—

The owner of property desiring to make a gift of it to another may do so in any manner known to the law. Apparent gifts may be genuine, or colourable, and experience has shown that frequently the process of ascertaining their genuineness is attended with delay, expense and uncertainty—all of which are extremely embarrassing from a public revenue standpoint.

With a view of avoiding this inconvenience, the legislature has fixed two standards, both of them consistent with actual genuineness, but *primâ facie* indicating a colourable attempt to escape probate duty. One is the standard of time. A gift however real and *bonâ fide*, if made within twelve months before the donor's death is for the purpose of duty regarded as not

(1) 18 Q.B.D., 256, at p. 262. (2) (1900) A.C., 124, at p. 126.

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made. The other is conduct which at first sight and in the absence of explanation is inconsistent with the gift. The *primâ facie* view is made by the legislature conclusive. If the parties to the transaction choose to act so as to be in apparent conflict with its purport, they are to be held to their conduct.

The validity of the transaction itself is left untouched, because it concerns themselves alone. But they are not to embarrass the public treasury by equivocal acts.

It is no answer that the same result, so far as distribution of property is concerned, might have been reached in another way. The method of attaining a result is sometimes very important in determining its inherent reality and genuineness, and, if the parties choose to adopt a method that on the face of it is self-contradictory, it is no answer that they might have achieved their object by a perfectly consistent mode, not inviting challenge. If this were not so, *Earl Grey* v. *Attorney-General* (1) must have been differently decided.

Now I thoroughly agree that in order to find out what is given, it is the real transaction which must be looked at and not merely the form which it takes. I will read with respectful agreement some words on this subject of *Palles* C.B. in *Attorney-General* v. *Power* (2). The learned Chief Baron said:—"As conveyancing forms must, to a certain extent, be disregarded in questions upon this Act, so that a person cannot be permitted to evade estate duty by clothing a transaction, which was in its reality and essence one which would subject the property to estate duty in a particular event, in such a conveyancing form that it would escape it, so I think that it can be well contended that a transaction cannot be made liable to duty merely by its conveyancing form, when the beneficial estate actually taken is substantially the same as would have been taken under a conveyance in the ordinary form, and when, if taken in the latter form, it would not be within the Act."

This is in accordance with the views of Lord *Esher* M.R. in *Attorney-General* v. *Worrall* (3), and *Walker* C. in *In re Cochrane* (4).

(1) (1900) A.C., 124.
(2) (1906) 2 I.R., 272, at p. 280.
(3) (1895) 1 Q.B., 99, at p. 104.
(4) (1906) 2 I.R., 200, at p. 201.

But there must be no misunderstanding as to what is meant by the transaction. It does not mean the preliminary agreement by which a series of documents is arranged for. Those documents might in themselves amount to a number of transactions, or in a sense they might be different parts of one transaction, one conveyance being the consideration for the other. But in the relevant sense it means that you regard the substantial effect of the "conveyance, assignment, gift, delivery or transfer," by which the gift was made. If by an instrument, as in this case, you look at the instrument by which the property passes from the donor to the donee, and, disregarding mere form, ascertain its real effect. What does it give, not how does it give it? In this case the gift is made by the indenture executed by Henrietta Lang, and by that the whole of her estate in the lands was given without any exception or reservation whatever. That was the transaction of gift—complete in itself and unqualified. No other construction is possible. It had to be complete before the donee could execute to her the lease of the property. A lease is a conveyance; and it is more than form, it is substance, when the donor's interest has to be vested in the donee before the donee can convey a smaller interest. That smaller interest was comprised in the gift itself, it was part of it, and is quite different from the case of *In re Cochrane* (1), where the trust of surplus income and the ultimate contingent trust of corpus were expressly retained by the donor for himself on the face of the instrument, and never in any shape or form included in what he gave.

Then it was said on behalf of the appellant that the execution of the lease and the retention of physical possession and enjoyment of the land by the donor as lessee was no breach of the statutory condition. It was said that, as the donees received rent, they had *bonâ fide* possession and enjoyment of the land, and that the possession and enjoyment of the land by the donor under the lease was in another character, and quite consistent with the statutory requirement. I am not prepared, and do not think it necessary, to say that the assumption of *bonâ fide* possession and enjoyment would necessarily involve the corporal

(1) (1906) 2 I.R. 200.

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eviction of the donor, if the subsequent words of the sub-section were not added.

The phraseology of the legislation is apparently founded upon that of the *Mortmain Act* (9 Geo. II. c. 36), sec. 1, and modified to meet the circumstances. There is an instructive decision upon that enactment. By the Statute, charitable gifts, conveyances, appointments and settlements of real or personal property were avoided unless made to take effect in possession for the charitable use intended, immediately from the making thereof and to be without any power of revocation, reservation, trust, condition, limitation clause or agreement whatsoever for the benefit of the donor or grantor or any person claiming under him.

Sir William Grant M.R. in *Attorney-General* v. *Munby* (1) held valid a charitable gift by a person who was the rector of Gilling, which was in trust for the rector of Gilling for the time being. The Master of the Rolls said that the enjoyment under the trust was no longer an enjoyment as owner but accidental as attached to the situation in which he happened to be placed, that is, the rectorship. The grantor, he held, had parted absolutely with the subject of his donation; that the grant itself contained no reservation in favour of the grantor in his individual capacity; that the benefit which he got as rector under the trust was a case for which the Statute made no provision, and was entirely out of its contemplation, and that the legislature had not thought of precluding this sort of incidental advantage.

The present legislation, however, fills the gap with added provisions. The possession and enjoyment must be assumed and retained "to the entire exclusion of the donor, or of any benefit to him by contract or otherwise."

The exclusion of the donor, and the words "by contract or otherwise" are intended to prevent what was possible under the *Statute of Mortmain*. First of all, the donee himself must go into *bonâ fide* possession and enjoyment of the subject of the gift according to its nature. In *Lord Advocate* v. *Young* (2), Lord *Fitz Gerald* said:—"By possession is meant possession of that character of which the thing is capable." And as to enjoyment as well as possession the same idea is conveyed by Lord *Watson*

(1) 1 Mer., 327.

(2) 12 App. Cas., 544, at p. 556.

(1). And see *per Palles* C.B. in *In re Cochrane* (2). But the possession and enjoyment must be actual, that is, the acquirement of the right is not sufficient, it must be exercised as an owner of that kind of property ordinarily exercises it. So far for the donee's assumption.

But then he must see that the donor goes out and stays out of all possession and enjoyment, and further that the donor does not obtain any "benefit," not merely under the instrument of gift, but "by contract or otherwise."

The lease, however, gave to the donor possession and enjoyment of the land itself, which is a simple negation of exclusion, and brings the case within the statutory liability.

It was argued that as the rent was full value, the lessee's possession and occupation were not a benefit. The argument is unimportant because the lease, at whatsoever rent, prevents the entire exclusion of the donor. If necessary I should be disposed to say that adequacy of consideration for any benefit arising or issuing out of the subject matter of the gift would be immaterial. The "benefit" would be there just the same, whatever the price paid for it, and the legislature does not mean to launch the parties upon so difficult an enquiry. The donor would be receiving, in the words of the Lord President quoted by *Hamilton* J. in *Attorney-General* v. *Seccombe* (3), a benefit "which was part of his property before the cession."

As for the board and lodging incident in *Attorney-General* v. *Seccombe* (4), it appears to me to stand thus. The learned Judge had already found there was no contractual or enforceable right in the donor to remain in the house, and of course there was no contractual right to be fed. The donor was in fact supplied with board and lodging which was paid for out of the annuity of £15 a year. Such a state of things could not reasonably be regarded even faintly as a "benefit by contract or otherwise" which evidenced inconsistency with the gift as made, or, as Lord *Esher* M.R. said in *Attorney-General* v. *Worrall* (5), preventing it from being a pure and simple gift. But, in my opinion, the decision as to that affords no basis for a general rule

(1) 12 App. Cas., 544, at p. 553.
(2) (1905) 2 I.R., 626, at p. 637.
(3) (1911) 2 K.B., 688, at p. 700.
(4) (1911) 2 K.B., 688.
(5) (1895) 1 Q.B., 99, at p. 105.

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that, so long as it can be proved that an adequate consideration is given for some right however extensive in connection with the subject matter of the gift, it is not a "benefit" within the meaning of the Statute. I am not prepared to hold that the benefit must be something which was part of the donor's property before. Such a rule would, I fear, seriously impair the efficiency of the enactment, and is inconsistent with *Attorney-General* v. *Worrall* (1). I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellants, *John Lang.*

Solicitor, for the respondent, *Guinness,* Crown Solicitor for Victoria.

B. L.

[HIGH COURT OF AUSTRALIA.]

DAVIES BROTHERS LIMITED . . . APPELLANTS; DEFENDANTS,

AND

BOND . . . . . RESPONDENT. PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

H. C. OF A. 1912.

HOBART, *Feb.* 21, 22.

Griffith C.J., Barton and Isaacs JJ.

Defamation—Libel—Fair comment—Basis of comment—Adequacy of damages—New trial—Defamation Act 1895 (*Tas.*) (59 *Vict. No.* 11), *sec.* 14.

An alleged libel contained two statements of fact and comments based on both of them combined. One of the statements of fact was found by the jury to be untrue, and they awarded one penny damages in respect thereof, and

(1) (1895) 1 Q.B., 99.