[HIGH COURT OF AUSTRALIA.]

MATTHEWS AND OTHERS . . . . APPELLANTS;
PLAINTIFFS,

AND

MATTHEWS . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

H. C. OF A. 1913.

MELBOURNE, *Sept.* 11, 12, 15, 16, 17; *Oct.* 13.

Barton A.C.J., Isaacs, Gavan Duffy Powers and Rich JJ.

Gift—Imperfect gift—Completion of gift—Donee an executor of donor—Intention to make immediate gift—Gift of land in Victoria—Administration and Probate Act 1890 (*Vict.*) (*No.* 1060), *secs.* 6, 8, 9, 12.

Held, per Barton A.C.J., *Gavan Duffy* and *Rich* JJ., that the doctrine enunciated in *Strong* v. *Bird*, L.R. 18 Eq., 315, that an imperfect gift made by a testator during his lifetime may be perfected by the vesting of the subject matter of the gift in the donee as executor, is not applicable unless the testator at the time he made what is alleged to be an imperfect gift had the intention to make an immediate gift, and up to the time of his death intended that that gift should stand and have effect.

Per Isaacs and *Powers* JJ.—It is not necessary that the intention that the gift is to stand and have effect, should be continuous during the whole time between the imperfect gift and the final act perfecting it. It is necessary only that the final act shall be done with the continuing intention to perfect the gift originally intended and hitherto left imperfect.

Quære, whether the doctrine of *Strong* v. *Bird* applies to land in Victoria or, if so, to a case where the alleged donee is one of several executors in all of whom the land the subject matter of the gift has become vested.

In an action by some of the executors against another executor to recover certain land as being part of the estate of the testator the defendant alleged an imperfect gift of the land by the testator to him which had been perfected in accordance with the above doctrine.

Held, by *Barton* A.C.J., *Gavan Duffy* and *Rich* JJ. (*Isaacs* and *Powers* JJ. dissenting), that on the evidence the alleged donee had not shown that the testator, at the time he did the acts which were alleged to constitute an imperfect gift, intended to make an immediate gift and that such intention was a continuing one up to his death.

Decision of the Supreme Court of Victoria (*Hood J.*), (1913) V.L.R., 80; 34 A.L.T., 151, reversed.

APPEAL from the Supreme Court of Victoria.

An action was brought in the Supreme Court by Mary Ann Matthews, Frances Chambers, Mary Ann Matthews the younger and Sarah Ann Matthews, executrices of George Cole Matthews, against Frake Richard Matthews, claiming possession of certain land of which the plaintiffs alleged that they were registered proprietors.

The testator had been registered proprietor of the land, and the plaintiffs alleged that about June 1911 he had verbally let the land to the defendant, and that they had terminated the tenancy thereby created by a notice to quit. The defendant had been appointed an executor with the plaintiffs of the testator's will, and, when probate was granted to the plaintiffs, leave was reserved to him to come in and prove, and by his defence he alleged his willingness to do so. It was also alleged in the defence that between May 1910 and June 1911 the testator had told the defendant that he was giving the defendant the land and would transfer it to him, that the testator thereupon put the defendant in possession of the land and that thenceforward the testator's intention to give the land to the defendant remained unchanged. The defendant accordingly claimed that he was entitled to a transfer of the land.

The action was heard by *Hood* J., and the case was argued before him on the assumption that probate had been granted to the defendant in common with the plaintiffs. The learned Judge having given judgment for the defendant (1), the plaintiffs now appealed to the High Court.

The material facts are fully stated in the judgments hereunder.

Davis (with him *Latham*), for the appellants. The first ques-

(1) (1913) V.L.R., 80: 34 A.L.T., 151.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

tion is whether a verbal gift of land incomplete at the death of the testator is rendered complete and valid by the appointment of the donee as one of the executors. As to personal property, if the gift was an immediate one though incomplete, that is enough to rebut the presumption of a resulting trust for the beneficiaries: *In re Pink*; *Pink* v. *Pink* (1). But there is no equity in the donee, because he has no right which is enforceable in a Court of law: *Goodeve's Personal Property*, 5th ed., p. 83. The doctrine stated by *Jessel* M.R. in *Strong* v. *Bird* (2) was not recognized in any previous case, and was only applied to the release of a defendant. The only reasonable basis for it is that the testator made what he believed to be a complete gift, but had not made what was really a complete gift. The appointment of the donee as executor then gives effect to what the testator believed he had done: *Jarman on Wills*, 6th ed., vol. I., p. 497.

[ISAACS J. referred to *In re Innes*; *Innes* v. *Innes* (3).]

If that be the true basis of the doctrine, then the testator in this case made no transfer of the land, although he knew that he had not done so and that a transfer was necessary. That negatives the intention to make a present gift, and it is an essential part of the doctrine that the intention should be to make a present gift and not to make a gift at some future time. To constitute a gift, an acceptance by the donee must be proved: *Goodeve's Personal Property*, 5th ed., p. 85; *Hill* v. *Wilson* (4); *London and County Banking Co.* v. *London and River Plate Bank* (5). Here the evidence shows that there was not an acceptance. Even if this would have been a good gift of personal property, it is not a good gift in the case of land in Victoria. A residuary devise of land is specific: *Hensman* v. *Fryer* (6); *Lancefield* v. *Iggulden* (7); and that negatives any other intention than that the beneficiaries should get it. Under the *Administration and Probate Act* 1890 the executors must hold the real estate on the trusts of the will: *Administration and Probate Act* 1890, secs. 6, 8, 9, 12; *National Trustees Executors and Agency Co. of Australasia Ltd.* v. *Doyle* (8); *Union Bank of*

(1) (1912) 2 Ch., 528.
(2) L.R. 18 Eq., 315.
(3) (1910) 1 Ch., 188.
(4) L.R. 8 Ch., 888, at p. 896.
(5) 21 Q.B.D., 535, at p. 541.
(6) L.R. 3 Ch., 420.
(7) L.R. 10 Ch., 136, at p. 140.
(8) 24 V.L.R., 626; 20 A.L.T., 161.

Australia v. *Harrison, Jones & Devlin Ltd.* (1). The fact that the donee is one of several executors does not make the gift complete. See *Barton* v. *London and North Western Railway Co.* (2); *Barton* v. *North Staffordshire Railway Co.* (3). [He also referred to *In re Stewart*; *Stewart* v. *McLaughlin* (4); *Transfer of Land Act* 1890, sec. 193.]

Mitchell K.C. (with him *Lowe*), for the respondent. The Court should not interfere with the finding of fact that the testator when he put the respondent into possession of the land intended to give, and thought that he was giving, the land to the respondent. That is the proper inference to be drawn from the evidence, and not that the testator intended to make a gift in the future. There is no evidence of any promise to make a future gift. The doctrine as to an imperfect gift being perfected by the appointment of the donee as executor applies to a gift of land in Victoria. Under the *Administration and Probate Act* 1890 the effect of the grant of probate is to vest in each of the executors the entire estate of the testator in his lands: *Union Bank of Australia* v. *Harrison, Jones & Devlin Ltd.* (1); and that interest is sufficient to complete an imperfect gift. Sec. 12 of that Act is a provision relating to conveyancing, and does not affect the vesting of the estate in each executor. [He also referred to *Barton* v. *London and North Western Railway Co.* (5); *Anning* v. *Anning* (6); *Maddison* v. *Alderson* (7); *In re Griffin*; *Griffin* v. *Griffin* (8).]

[BARTON A.C.J. referred to *Maiden* v. *Maiden* (9).]

Davis, in reply, referred to *In re Garnett*; *Gandy* v. *Macaulay* (10); *Craine* v. *Australian Deposit and Mortgage Bank* (11); *Montgomerie & Co. Ltd.* v. *Wallace-James* (12); *Austin's Jurisprudence*, vol. I. p. 382; *Holland's Jurisprudence*, 9th ed., p. 194; *Williams on Real Property*, 21st ed., p. 2.

(1) 11 C.L.R., 492.
(2) 24 Q.B.D., 77.
(3) 38 Ch. D., 458.
(4) (1908) 2 Ch., 251.
(5) 24 Q.B.D., 77, at p. 86.
(6) 4 C.L.R., 1049.
(7) 8 App. Cas., 467, at p. 479.
(8) (1899) 1 Ch. 408, at p. 412.
(9) 7 C.L.R., 727.
(10) 31 Ch. D., 1.
(11) 15 C.L.R., 389.
(12) (1904) A.C., 73, at p. 75.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Oct. 13.

[RICH J. referred to *Jarman on Wills*, 6th ed., p. 498.]

Cur. adv. vult.

The following judgments were read:—

BARTON A.C.J. The plaintiffs, now appellants, are the executrices of the will of their father George Cole Matthews, late of Yeo, grazier, who died on 17th March 1912. The defendant is a son of the testator and an executor of his will. The plaintiffs applied for, and on 11th June 1912 received, probate, leave being reserved to the defendant to come in and prove.

By his will dated 9th March 1912 the testator directed the sale and conversion of his estate real and personal, but as to the real estate not until after the death of his wife. He gave the rents, profits and income of his whole estate to his wife for life, and on her death he directed three small legacies to be paid to as many churches, and to his son George, his daughter Mrs. Charlotte Wells, his son James, and his daughter Mrs. Elizabeth Cox £250 each, and to his son John £500. The residue of his estate he gave to be divided equally between his daughter Mrs. Avis Gamble, his son the defendant, and his unmarried daughters Mary and Sarah.

In the year 1910 the testator owned land at Yeo, the locality in which he lived, and this land was under mortgage to the Trustees Executors and Agency Company. He also owned an hotel at Mansfield, for which he received rent. The defendant, who had been living with his father all his life, was then thirty years of age, and had for some years farmed and managed for him the land at Yeo. The defendant received no wages up to the time of his marriage, which took place on 4th May 1910. In June 1911 the defendant was placed by the testator in occupation of part of the land at Yeo, which he has continued to occupy ever since, and the action was brought by the plaintiffs to obtain possession of this land. The plaintiffs set up that the defendant was no more than a tenant at will, and that they determined his tenancy by notice a few months after the death of the testator. The defendant relies on his occupation as exclusive possession given to him by his father in intended, or rather attempted, bestowal of the land upon him; and on his appointment as

executor, which he claims gave him title, since it operated in conjunction with the imperfect gift made by his father to vest the 155 acres in him. The will makes no specific mention of the 155 acres or of any other land as distinguished from the general bulk of the estate. The defendant's claim to the land therefore turns upon the doctrine first expounded by Sir *George Jessel* M.R. in the case of *Strong* v. *Bird* (1), and acted upon in subsequent cases, together with the effect of the *Administration and Probate Act* and other Statutes of this State, which as the defendant claims give him the benefit of the doctrine as applied to land.

It is first necessary to treat the case as one of personal property, for which purpose I will assume that under the Victorian Statute law the doctrine applies to land, and before discussing the evidence I will examine the cases.

Strong v. *Bird* (1) was a case in which, admittedly, the debt in controversy had not been released at law by the testatrix. The defendant owed the testatrix a sum of £1,100. She lived in his house, paying him a large sum every quarter for her maintenance, and it was agreed that the loan should be paid off by the defendant by allowing the testatrix to diminish her quarterly payments by £100 until the extinction of the debt. Accordingly, two of these quarterly deductions were made by the testatrix. Then she declined to pay less than the sums originally stipulated for her maintenance, and thereafter she paid these amounts quarterly without deduction up to her death, and accordingly a sum of £900 then remained unpaid by the defendant. She made the defendant the executor of her will, but made no disposition of her residuary personal estate. The Master of the Rolls pointed out that what the testatrix had done up to her death had not operated as a release at law. It was not a contract, because it was *nudum pactum*. It was not a release, because it was not under seal. The gift therefore was not perfect until the change of the property at law had taken place. The alleged donor had made her will, by which she had appointed the alleged donee executor; after her death he had proved the will, and the legal effect of that was to release the debt in law, and therefore the condition required, namely that the release should be perfect at

(1) L.R. 18 Eq., 315.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Barton A.C.J.

law, was complied with by the testatrix making him executor. His Lordship said (1):—"It appears to me that there being the continuing intention to give, and there being a legal act which transferred the ownership or released the obligation—for it is the same thing—the transaction is perfected, and he does not want the aid of a Court of Equity to carry it out, or to make it complete, because it is complete already, and there is no equity against him to take the property away from him."

In the case of *In re Hyslop*; *Hyslop* v. *Chamberlain* (2), a testator in a letter of instructions to one of his executors stated that a debt from that executor to the testator was cancelled, and did not form part of a specific bequest made to the executor in his will. The letter was not communicated to the executor during the testator's life, nor executed as a will. It was contended for the debtor that his appointment as executor destroyed the debt at law. *Strong* v. *Bird* (3) was cited. *North* J. held that the appointment of a debtor as executor is clearly not sufficient of itself to annul his debt in equity. If the letter of instructions had been communicated to the debtor by the testator in his lifetime the case might have been different. The letter was intended to operate as a testamentary document, and was not executed in the way it ought to have been for that purpose, and under the circumstances he did not think he could look at it.

In *In re Stewart*; *Stewart* v. *McLaughlin* (4), *Neville* J. held that the principle of *Strong* v. *Bird* (3) is not confined to the release of a debt, but extends to imperfect gifts of personal property, and that it does not matter whether the donee is the only executor or one of several. The testator, who died in 1906, had in the previous year given to his wife bonds payable to bearer worth over £16,000. Her title to those bonds was undisputed. At that time, or in the same year, he entered a list of the bonds in a book headed "Mrs. Stewart's capital account." In the same year he wrote at the foot of the list "coming in next year £1,000" and added this sum to the amount of the bonds already enumerated, making a total of £17,230; and he made a corresponding addition of £50 to the income. Early in 1906 the

(1) L.R. 18 Eq., 315, at p. 319.
(2) (1894) 3 Ch., 522.
(3) L.R. 18 Eq., 315.
(4) (1908) 2 Ch., 251.

testator drew the money for one of these bonds and paid it into his own banking account, and shortly afterwards he bought three other bonds of £500 each, and received from the brokers a letter announcing the purchase, with a bought note. He handed these to his wife in an envelope, the three bonds themselves not having yet been delivered to him, and said to her: "I have bought these bonds for you." He died, the bonds being still undelivered, without having done anything further to complete the transaction. The action was brought by the widow, who was one of the executors, to determine whether she was entitled to the three bonds and the proceeds of the bond sold, in addition to the bonds actually presented to her in 1905, her title to those being, as I have said, admitted. The plaintiff's co-executors, who were the defendants, sought to distinguish the case from *Strong* v. *Bird* (1). *Neville* J. said of that case (2):—"The decision is, as I understand it, to the following effect: that where a testator has expressed the intention of making a gift of personal estate belonging to him to one who upon his death becomes his executor, the intention continuing unchanged, the executor is entitled to hold the property for his own benefit. The reasoning by which the conclusion is reached is of a double character—first, that the vesting of the property in the executor at the testator's death completes the imperfect gift made in the lifetime, and, secondly, that the intention of the testator to give the beneficial interest to the executor is sufficient to countervail the equity of beneficiaries under the will, the testator having vested the legal estate in the executor." Of the case before him the learned Judge said (2):—"The whole of the property in the personal estate in the eye of the law vesting in each executor, it seems to me immaterial whether the donee is the only executor or one of several; nor do I think the rule is confined to cases of the release of a debt owing by the donee."

Accordingly the widow was held entitled to the three bonds, as also to the proceeds of the prior sale of one bond. It is as well to point out that although *Neville* J., in his statement of the doctrine, does not expressly say that the intention of making a gift must be coupled with some act in that direction, the facts of the case he

(1) L.R. 18 Eq., 315.

(2) (1908) 2 Ch., 251, at p. 254.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Barton A.C.J.

was deciding go far beyond any mere expression of intention. There was a manual delivery of the brokers' letter and the bought note, which was all the evidence the testator apparently had of his claim to the possession of the bonds then just purchased. Though, therefore, the words of the learned Judge may be open to misconstruction if taken alone, they are quite clear when applied to the facts he was weighing, and the facts are those of an attempted gift in execution of an intention which was not altered up to the testator's death.

In *In re Innes*; *Innes* v. *Innes* (1) the plaintiff was an executrix of the testator, who was her father, and who had in his will directed that his estate should be equally divided between his children. Some five years before his death, she then keeping house for him, he handed her a paper signed by him, by which he declared that she should receive from his business two pounds each week, and also that an additional weekly sum of two pounds should remain in the business for her, to be withdrawn by her if necessary after 5 years with 5 per cent. per annum increase. She did not receive anything regularly, but he gave her various sums amounting altogether to £78 10s. About two years before the testator's death the plaintiff handed him the document at his request, so that he might consult a solicitor, and see that there should be no doubt of her getting the money. She found it among his papers after his death. On these facts *Parker* J. declined to hold that the gift of the document, coupled with her appointment as executrix, was a complete gift of the amounts specified in the document. It was argued that if the *animus donandi* is present, the gift is completed by the appointment of the donee to be executor. To this the learned Judge answered (2): "There must be a present gift although it is imperfect." It was attempted to enforce the transaction against the estate not only on the doctrine of *Strong* v. *Bird* (3), but also as a contract or as a declaration of trust. The last two grounds being negatived, *Parker* J. referred (4) to the cases of *Strong* v. *Bird* (3) and *In re Stewart* (5), and interpreted the judgment of *Neville* J. in the

(1) (1910) 1 Ch., 188.
(2) (1910) 1 Ch., 188, at p. 191.
(3) L.R. 18 Eq., 315.
(4) (1910) 1 Ch., 188, at p. 192.
(5) (1908) 2 Ch., 251.

last mentioned case as a decision that, "there having been an actual attempted gift, imperfect though it might have been, the subsequent appointing of the lady as executrix perfected that gift by vesting in her the legal interest in the property which was the subject of the action" (1). He then pointed out that the case before him was an attempt to extend the doctrine of the previous cases, first to a gift of money not sufficiently identifiable to enable it to be separated from the rest of the estate; and next to a mere promise to give on a future occasion, not being an actual attempted gift which as a matter of fact was imperfect. In his opinion the principle ought not to be so extended. "What is wanted," he said (1), "in order to make that principle applicable is certain definite property which a donor has attempted to give to a donee, but has not succeeded. There must be in every case a present intention of giving, the gift being imperfect for some reason at law, and then a subsequent perfection of that gift by the appointment of the donee to be executor of the donor, so that he takes the legal estate by virtue of the executorship conferred upon him. It seems to me that it would be exceedingly dangerous to try to give effect by the appointment of an executor to what is at most an announcement of what a man intends to do in the future, and is not intended by him as a gift in the present which though failing on technical considerations may be subsequently perfected." There could be no more distinct enunciation of the necessity of something much more than a mere expression of intention, however reiterated, in order that the testator's conduct may account to a gift, however imperfect. There must be some attempt to give—something which only the law prevents from being an effective gift.

In re Pink; *Pink* v. *Pink* (2), was a case in which *Eve* J. had dealt with a claim by the legal personal representatives of the testator to have it determined whether certain debts were still due to him. As to one of these debts no question material to the present case arose. The other consisted of a sum of £9,800 advanced by the testator in his lifetime to one of the defendants, who was a co-executor with the plaintiffs. *Eve* J. had held as to the whole of the £9,800 that there was not suffi-

(1) (1910) 1 Ch., 188, at p. 193.

(2) (1912) 1 Ch., 498; (1912) 2 Ch., 528

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Barton A.C.J.

cient evidence of an intention by the testator to make the gift, but even if there were such an intention, or an imperfect gift, it was not in the particular circumstances perfected by the appointment of the debtor as executor, and the case did not come within *Strong* v. *Bird* (1). The Court of Appeal varied the order of *Eve* J., and held that although as to £5,000 the indebtedness continued, yet as to £4,800 it had been released by the testator, and the defect in the debtor's title had been cured by his appointment as executor. It is not necessary to make further reference to the facts of that case for present purposes, but as to the law I will quote some of the expressions used by the Judges. First, in the Court below *Eve* J. said (2), referring to the judgment of *Jessel* M.R. in *Strong* v. *Bird* (1) — "From that judgment I gather that what you have to find first is a clear gift or attempt to give: then you have to be satisfied that in the appointment of the donee as executor the testator had not any intention inconsistent with an intention to bring about the result flowing from the appointment, and thereby to perfect the gift." In the Court of Appeal (3), *Farwell* L.J. said:—"Since *Strong* v. *Bird* (1) we must regard the matter in the light given us by that decision. It is plain that a mere intention to give, not carried out during the lifetime, will not do, because that would in effect be to allow a man to dispose after his death of his property by a document not testamentary. It is plain also that a mere intention to give is not enough, because you want an immediate gift. If there is an immediate gift, then the resulting trust for the benefit of the beneficiaries is rebutted." *Kennedy* L.J. said (4):—" . . . as I understand it, it is quite clear that what is spoken of both in the head-note in *Strong* v. *Bird* (1), and also in *In re Stewart* (5), as a continuing intention on the part of the testator, . . . means a continuing intention that the gift should have been given at the time when it was given." From this I gather that in his Lordship's opinion an intention continuing after the gift means an intention that the thing done should operate and continue to operate as a gift. If that is so, conduct on the part of

(1) L.R. 18 Eq., 315.
(2) (1912) 1 Ch., 498, at p. 509.
(3) (1912) 2 Ch., 528, at p. 536.
(4) (1912) 2 Ch., 528, at p. 538.
(5) (1908) 2 Ch., 251.

the donor inconsistent with the continued operation of the attempt as a gift is evidence of the absence or abandonment of the necessary continuing intention, and it seems to follow that a donor, if he holds such an intention, will consider up to the time of his death that he has made the gift which he has attempted to make. Still speaking of continuing intention, *Kennedy* L.J. said a little later (1):—"What I understand it to mean, and to be intended by the decision in *Strong* v. *Bird* (2), is that, where a testator appoints a debtor as his executor, in equity as well as in law any indebtedness which might otherwise have been held to exist from the debtor to the testator will not be held to exist if there has, before that, been a gift which was intended to be a gift, although that gift was not complete according to law and could not merely as it stood have been held to forego or discharge any portion of the debt had the question arisen in the testator's lifetime." I might mention that the same learned Lord Justice points out (3) that the burden of proof rests in such a case upon the executor, who, he says, "is unquestionably a debtor in equity for all such debts as he cannot be proved to have got rid of by the gift of the testator." Assuming that the doctrine of *Strong* v. *Bird* (2) applies in Victoria to imperfect gifts of land, the burden of proof will in this case rest upon the defendant, for the executor meant by *Kennedy* L.J. is the executor who claims that his appointment has perfected a previously imperfect gift.

Upon consideration of the cases it cannot be doubted that there must be an attempt to make an immediate gift, and not a mere expression of intention, and that there must be a continuous intention of giving, which, after the act of making what the testator supposes to be a gift, can only mean, I think, that he believes it to have operated, and continues to mean that it should operate, as a gift, although in effect it does not satisfy the legal or equitable requirements of a perfect gift.

It is necessary therefore to consider how far the evidence enables us to say that the defendant has discharged the onus which lay upon him of proving facts which show the attempted gift and the continuing intention, in the sense I have endeavoured to describe.

(1) (1912) 2 Ch., 528, at p 538. (2) L.R. 18 Eq., 315.
(3) (1912) 2 Ch., 528, at p. 540.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Barton A.C.J.

A further question raised for the appellants must be considered, namely, whether the defendant assented to the alleged gift. Mr. *Davis* argued that, as a matter of law, such an assent was necessary, and that upon the facts it had not been established. There is no doubt that, as *Mellish* L.J. said in *Hill* v. *Wilson* (1):—"It requires the assent of both minds to make a gift as it does to make a contract," and, as he there says, the assent of a person to that which is obviously for his benefit may be inferred on slighter evidence than would be required to show that he assented to something, *e.g.*, a contract, which may be to his prejudice. In the case of a complete gift legally carried out by the mode of transfer applicable to the class of property to which the subject of the gift belongs, "the donor has put the thing given out of his own power, and has placed it in such a position that he can only get the thing back with the concurrence of the donee." See *per Lindley* L.J. in *Standing* v. *Bowring* (2). That learned Judge cited *Siggers* v. *Evans* (3), and added (2):—"The older authorities were carefully examined in this last case by Lord *Campbell*, and I take it now to be settled, that although a donee may dissent from and thereby render null a gift to him, yet that a gift to him of property, whether real or personal, by deed, vests the property in him subject to his dissent." Where a title is made complete by transfer, it seems that the donee can only devest the property from himself by actual repudiation when informed of the transfer. Lord *Halsbury* L.C. said in the same case (4):—"If the matter were to be discussed now for the first time, I think it might well be doubted whether the assent of the donee was not a preliminary to the actual passing of the property. You certainly cannot make a man accept as a gift that which he does not desire to possess. It vests only subject to repudiation." He cited *Butler and Baker's Case* (5), where it is said:—"The same law of a gift of goods and chattels, if the deed be delivered to the use of the donee, the goods and chattels are in the donee presently, before notice or agreement; but the donee may make refusal *in pais*, and by

(1) L.R. 8 Ch., 888, at p. 896.
(2) 31 Ch. D., 282, at p. 290.
(3) 5 E. & B., 367.
(4) 31 Ch. D., 282, at p. 286.
(5) 3 Rep., 25a, at p. 26b.

that the property and interest will be devested." See also the judgment of *Ventris* J. in *Thompson* v. *Leach* (1), adopted by the House of Lords (2). So far for a completed transfer. Where there is an incomplete gift, is the assent of the donee to be presumed? As to that I have not seen any authority, and I doubt whether such a presumption exists; but assuming, without deciding, that it does, I take it to be clear that an express refusal of the gift as proffered puts an end to the matter, unless, indeed, there is a subsequent proffer not followed by any repudiation.

Coming then to the facts, I proceed to deal with the questions in this order: (1) Was there an attempted gift? (2) Was there a continuing intention? (3) If these two co-existed, did the defendant refuse or repudiate the attempted gift?

On the first question the defendant in making out his case before us relied mainly upon the contention that the testator placed him in possession of the land, such possession being referable only to a gift, or, as Mr. *Mitchell* preferred to put it, to "some such transaction." I think this is clearly a case of gift or no gift.

The defendant, who, as above stated, had been living with the testator, then an old man, and farming his property for him, was married on 4th May 1910. Some two years before that, the testator had given him a block of 233 acres of farming land called Morrison's, in the neighbourhood of the testator's property. About the time of the marriage one of the defendant's sisters in his presence said to the testator that he ought to get the defendant "settled." The defendant asked for two paddocks, Ball's and Lemon's, the latter being the land in question. The testator offered Lemon's or whichever the defendant chose, and the defendant said: "I'll take Lemon's." The testator replied: "All right, Frake." Lemon's was, as it apparently still is, under mortgage. Nothing appears to have been done in consequence of this conversation, but the testator, in answer to what his daughter had urged, had said that he would give the defendant half his profits for that year to build a house on Lemon's; whether that promise was fulfilled or not does not appear. The father grazed his stock on Lemon's until June in the following year. In the

(1) 2 Vent., 198. (2) 2 Vent., 208.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Barton A.C.J.

interval the defendant continued to live with his father at Yeo, visiting his wife twice a week. She lived at Colac, four miles away. About six months after the marriage, that is, about November 1910, another conversation took place in which the defendant expressed a desire for a house of his own, and after discussion it was agreed that the defendant should make an arrangement with his father-in-law, Mr. Caldwell, whose property was to be let; and the testator visited that property with the defendant and promised to build him a house there, which he did. In March 1911 Mary Ann Matthews, the defendant's sister, and one of the plaintiffs, prepared a paper on instructions from the testator. It is headed "Particulars of land for sale," and the description embraces 958 acres of farm land known as "Tottenham Park," being the testator's whole property at Yeo, and admittedly it includes the 155 acres known as Lemon's. As will appear, the defendant consented to the inclusion. The paper contains this statement: "The owner of this property would not think of disposing of it, only he is too old to work it for himself, and his son is married and is starting on his own." It is signed by the testator. These particulars were handed to at least two land agents, and a sale of the whole property was evidently in contemplation both before and after the defendant began to occupy the 155 acres. In March 1911, and some time therefore before the defendant entered on the land (although he erroneously places it at a time later than his entry) there was a conversation in which the defendant asked the testator to transfer Lemon's paddock to him. The father replied, to quote the defendant, that "he would, but he would have to write to the mortgagees before he could transfer." On 30th March he did write to the mortgagees in these terms: "Kindly inform me *per* return of post whether you have the power to transfer any of the land I hold over to my son." Their reply, dated the next day, was that unless default were made and possession taken by them they had no power to transfer to the testator's son. But they added: "You can transfer the property subject to the mortgages, and our relations with the mortgagors remain unaltered." These letters were evidently written after the last mentioned conversation between father and son.

The defendant says that the testator informed him that he had "written to the trustees to have the land transferred to him" (the defendant), "but they were going to hold him" (the testator) "responsible." Apparently the testator thought that if the land became the defendant's he should no longer be held responsible for the mortgage. The defendant admits that he never offered to pay the interest or the rates. As will be seen, the testator held to the opinion that the defendant should pay the interest, which I take to mean that he should become responsible for the mortgage. The defendant refused to pay any interest until the land should be transferred to him. The testator paid it.

In May a Mr. Abbott, who had seen the "particulars of land for sale" drawn up in March, inspected the testator's property in contemplation of purchase, and there was a conversation, to which both the defendant and Mary Ann Matthews deposed. The testator asked Abbott what he thought of the property—that is, the whole farm. Abbott said that he was well satisfied with it, but that the defendant had told him that "Lemon's was his own." The defendant said he would not stand in the way of a sale of it—that Abbott could have Lemon's and he would have Ball's paddock. Miss Matthews states that thereupon the testator said to the defendant: "It is not yours yet." This, however, is denied by the defendant. Abbott did not buy, and, indeed, the particulars were handed in the following November—unaltered apparently—to an agent in Colac, with a view to a sale; but no sale was effected. These facts are important, as showing that a sale of the 155 acres as part of the testator's entire farm was in contemplation with the defendant's consent in March 1911, and again in November, that is to say, three months before as well as five months after the defendant began to occupy that portion. It is consistent with all this that the defendant was to have the proportion of the purchase money attributable to the 155 acres. But it is not actually evidenced.

In the beginning of the same month, May 1911, the defendant, with his father's consent, bought some sheep, and on the 8th June following he put them on Lemon's with the help of the testator, whose sheep were removed from that paddock. The defendant's

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Barton A.C.J.

occupation, thus instituted, still continues, and is the cause of this action.

In or about August of the same year, as the defendant states, he saw a pocket book of his father's, a leaf of which is in evidence. There are several entries of payments, and three or four of them, according to the defendant, have reference to building materials and fittings for the house built by the testator for him on Caldwell's land. One entry is "Frake cash wire netting £21 9s. 7d.," and refers, we are told by the defendant, to fencing on Morrison's paddock already mentioned. The remaining item runs thus: "Lemon's interest 15th September £9 18s. 11d." This, the defendant says, refers to payment of interest on Lemon's, which I take to mean on the mortgage on Lemon's.

Mary Ann Matthews says that in September 1911, shortly after the testator had paid the last half-yearly interest on the mortgage, she asked the defendant, at her father's request, whether he would pay the "transfer fees for Lemon's." This the defendant refused to do, and said that "when the testator gave the thing he should give it free." This remark does not appear in the direct narration in the notes of evidence, and it is not certain whether it refers to an anticipated gift or to a gift attempted in the past. But certainly all the circumstances show that the parties were aware that the gift would not be complete until transfer, and thus it seems probable that the reference is to the expected transfer deed itself, to which, indeed, the sister's question relates.

It appears that about 1912 the testator went into a hospital to undergo an operation which preceded his death by only a few days. At the time of taking this step, Miss Matthews says he told her to give the "interest note" on Lemon's (the next interest coming due that month) to Frake when it came, and to tell him to pay it "out of his own money"; that she accordingly gave the interest note to the defendant with that message; that the defendant gave it back to her and refused to pay. And here, again, his Honor's note contains the following words as the sister's statement of the answer:—"When father gave me a thing let him give it free." The defendant gives one account of this incident which is as follows:—"I spoke to my sister Mary Ann Matthews about interest while father was in hospital. She handed me the bill of

interest on Lemon's and said father told her next time it became due to hand it to me. I said that he ought to pay the interest when he transfers to me." This is not very clearly stated, but in another account of the same conversation the defendant says his answer was: "Surely father will pay the interest until he gives me the transfer." Also he states that he said: "When father is *going to give me a present* let him give it to me clear."

If the defendant's possession was referable to a gift already made, it seems strange that he should give this answer either as recounted by his sister or as he states it himself. The defendant does not appear to have contradicted his sister's statement as to the conversation in September 1911 on the same subject, when he was asked whether he would pay the transfer fees, and refused. The testator seems to have hesitated to transfer unless the defendant would undertake with the gift the burden of the mortgage and also would pay the transfer fees. The defendant, on the other hand, seems not only to have been unwilling, but to have refused to do either. Was there in truth an attempted gift, or only a willingness, or even a desire, to transfer subject to terms which the defendant declined? Again, did the testator vacillate as to whether he would give the defendant the land, or money? or did he intend to transfer to the defendant only if he failed to sell it?

Well, Mrs. Gamble, a daughter of the testator and a beneficiary, deposes to some conversations with the testator and the defendant. She says that at the defendant's instance she asked the testator to "give him a start," and that the reply was, "I have already given him Morrison's and I will give Mrs. Ball's back paddock." The defendant said "that is no good to me." Mrs. Gamble then made a suggestion: "Suppose you give him Lemon's and Ball's and he gives up the right to Morrison's, would you do that?" The testator is said to have replied "No. That is taking the best paddock, the heart of the place." Mrs. Gamble then at the defendant's request asked the testator if he would let the defendant the whole place, which seems to mean the whole 958 acres before referred to. On her making this request the testator, she says, refused; he said he would offer it for sale, and used these words: "I will give him money and let him go where he likes."

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Barton A.C.J.

Mrs. Gamble also relates a conversation with the testator about six weeks before his death, when he said that he would have to give up the place. Mrs. Gamble said: "Yes, it seems nonsense for you to try. The rents of the place would keep you comfortable." The testator said: "Yes, and the hotel and 800 acres here." Mrs. Gamble upon this said: "I thought you had 900 or more." The testator's reply was: "Yes, but I had thought if I could not sell, to transfer Lemon's to Frake. The mortgagees want to hold me responsible. Why should I be responsible for Frake if he left me? It seems too complicated." Then Mrs. Gamble said: "It can be easily arranged if you transfer your interest to Frake, Caldwell might back him." The testator replied: "I will try and sell and give him money, and he can buy land over where he lives."

One expression imputed to the defendant in the first of these conversations with Mrs. Gamble, namely that he wanted to be married, seems to be an error on the part of that witness, because she gives January or February 1911 as the time of that conversation, and she states in cross-examination that at the time of its occurrence Frake was already married.

There are some important circumstances telling in favour of the defendant. Some few days before the operation which shortly preceded his death, the testator gave his solicitor instructions for his will. The solicitor produced his note of the instructions, and in the items of property occurs the following: "Yeo land 800 acres, £10, £800 (450 given to son)." We know that he had given the defendant the block known as Morrison's, 233 acres, and unless the 155 acres known as Lemon's were also included in the 450 it is difficult to see how the testator has made up that area upon the evidence before us. Even, then, however, the defendant would have only 388 acres. The defendant has not made it clear whether these instructions were given before or after the occasion when the defendant made use of the expression to his sister, "when father is going to give me a present let him give it to me clear," this being the occasion when, as his sister relates, he gave her back the interest notice and said he would not pay. The instructions rather favour the defendant's contention, but they are not of the great weight claimed for them in argument. They show, perhaps, that the testator felt at liberty

to deal only with 800 acres at that moment. But they do not necessarily mean more. It is probable, having regard to the changes apparent from time to time in the testator's intentions, that he told himself that the difficulty about the mortgage and the 155 acres would be got over when he got about again after the operation. If at the time of giving the instructions he had thought he was likely to die under the operation, he would probably have included the 155 acres specifically in the instructions, so as to put matters beyond doubt, because the evidence shows clearly that he knew that he could not vest this land in his son *inter vivos* without a transfer. With that knowledge, if he had thought death imminent or very probable, he would surely not have failed to make a specific devise of Lemon's paddock. It is not easy to attribute to a farmer a knowledge of the doctrine of *Strong* v. *Bird* (1). A design to make his will without specific mention of the block in question would be perfectly intelligible if the evidence showed that he thought he had already vested it in his son. But the evidence does not show it, for he was continually talking about a transfer to the defendant.

The Colac rate collector's clerk says that in November 1911 the rates were paid on the testator's land at Yeo. The payment did not cover the proportion proper to the 155 acres. This is claimed as showing that the testator treated the land as a gift to the defendant. But the contention for the plaintiffs that the defendant in refusing to pay the rates repudiated the alleged gift is equally strong, for it tends to show that the thing which the defendant was willing to take was something that the testator was not willing to give, namely, the land without any of the burdens of ownership.

There is evidence from Mrs. Charlotte Wells, another daughter of the testator. She relates conversations with him in the presence of her husband and daughter, at her house, in December 1911. At the first conversation the testator is said to have stated that he had given the defendant Lemon's paddock. In this Mrs. Wells is corroborated by her husband and her daughter. In the second conversation it is said the testator alluded to Lemon's paddock as a handsome wedding present that he had

(1) L.R. 18 Eq., 315.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Barton A.C.J.

given to the defendant. In this Mrs. Wells is corroborated by her daughter. Further, there is the evidence of Mr. Caldwell, the defendant's father-in-law, who says that in September 1911 the testator told him that he was very short of grass because he had given Lemon's paddock to Frake, and that he had taken his own stock off and put Frake's on. But there can be no doubt that the testator on several occasions spoke of the paddock as a gift to his son, and it seems equally clear that on more occasions than one he expressed an intention to sell it with the rest of his property, in terms which he could not well have used regarding that which was no longer his own.

In the case of *Montgomerie & Co. Ltd.* v. *Wallace-James* (1), Lord *Halsbury* L.C. said in his judgment :—"Doubtless, where a question of fact has been decided by a tribunal which has seen and heard the witnesses, the greatest weight ought to be attached to the finding of such a tribunal. It has had the opportunity of observing the demeanour of the witnesses and judging of their veracity and accuracy in a way that no appellate tribunal can have. But where no question arises as to truthfulness, and where the question is as to the proper inferences to be drawn from truthful evidence, then the original tribunal is in no better position to decide than the Judges of an Appellate Court." I think that is the position here. There seems really to be only one contradiction in the case, and that is where the defendant denies his sister's statement that in the conversation with Mr. Abbott the testator said to the defendant, referring to Lemon's paddock, "it is not yours yet." The case may be treated independently of that one disagreement. The statement implies that the testator did not consider the paddock would be his son's until transferred to him, but may be disregarded, since there is other evidence on that head. There is certainly no necessity to discredit any witness who testified in this case. As under the will the whole of the testator's land apparently vests in his executors in trust for the purposes set out in the will, it was for the defendant to make out his case, and the question is whether upon the balance of the evidence he has done so to the satisfaction of the Court. It is for him to make out affirmatively the attempt to

(1) (1904) A.C., 73, at p. 75.

give and the continuing intention of the testator—a continuing intention up to his death that the imperfect gift should operate and continue to operate as an actual gift, with a continuing belief up to his death that he had made that gift. The Court must also be able to see that there was an acceptance of the gift by the defendant in the manner and form in which it was made to him. I will treat this part of the case as if it were incumbent on the plaintiffs to show that the gift if made was not so accepted. Further, as the defendant is a claimant against the estate of a deceased person, his case deserves strict scrutiny.

As to the first of these questions the main and almost the only fact relied on to show that the testator gave the land in act and not merely in intention was the placing of the defendant in possession. No doubt this is a fact of weight, but it must be remembered that while the testator several times spoke of the paddock as his son's, he also more than once contemplated a sale of this land as if it remained his own. I am not now speaking of the projected sale under the written particulars, but of Mrs. Gamble's evidence. In this light the occupation of the defendant for nine months before the death of the testator is consistent with an intention to give him a mere permissive occupancy, or at any rate some benefit short of the absolute and untrammelled property in the paddock. On the whole of the evidence the possession does not seem to me to be referable only to a gift to the exclusion of any other inference that might reasonably be drawn from the facts, and where the essential act is of doubtful import I find myself unable to conclude that it converts a casual and fluctuating intention into an imperfect gift. Again the gift, if any, intended by the testator was not such as the defendant contends that it is. There is no evidence at all of an endeavour on the part of the father to give the son this land free and unincumbered. When he learned from the mortgagees that they could not transfer the land to the defendant unless they acquired possession through default, yet that he, the testator, could transfer the property subject to the mortgage, he seems to have regarded this state of things as an almost unsurmountable obstacle to further progress with the gift. He may well have thought it futile to pursue the project as his son was unwilling

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Barton A.C.J.

to take the land with the burden. If the possession is not shown to have converted the mere intention into a gift before the correspondence with the mortgagees, there was nothing subsequent amounting to an endeavour to give the land.

Then, as to the fact of continuing intention. This question only arises if there has been an attempted gift. Assuming the attempt, but only for the purpose of discussing this question, I cannot find any steady intention on the part of the testator that what he had done should operate as a gift. Unless, for instance, the evidence of Mrs. Gamble be discredited, and I do not see why we should discredit it, the testator in January or February 1911, months after he is said to have promised this land to the defendant, desired to offer the whole of his land, including this area, for sale. As for the defendant, the father was ready to "give him money and let him go where he liked." The same desire to sell is apparent in the other conversation with Mrs. Gamble, six weeks before his death, and this conversation evidences only a contingent intention to make the land over to the defendant—an intention contingent on failure to sell it. And he gives his reason. He says: "Why should I be responsible for Frake if he left me?" And he winds up by saying that he will try to sell (meaning, I think, the whole place) and give him money, "and he can buy land over where he is." There seems in facts such as these unshaken evidence of much fluctuation of intention, if it is not even abandonment. If the intention fluctuated the defendant's case fails in an essential part. If the intention is once abandoned I doubt if it can be effectively renewed or revived without some fresh attempt at a gift *inter vivos*, and there is no evidence of any fresh attempt.

But even assuming that there were an attempted gift and a continuing intention, was the very gift accepted which the testator offered? I think it is clear that what the testator offered and meant to give, if the defendant would accept it, was the land burdened with the mortgage. Was the defendant willing to accept, and did he accept, the land with that burden? I think not. If it were true that the testator, so far as he could, made over this land as mortgaged, and that the defendant accepted it as mortgaged, then one would expect to find that the

defendant, if his possession was referable to a gift—if, that is to say, he was enjoying the benefits of proprietorship,—was ready, out of these benefits, to pay the interest which was the note of the burden. If he was willing to enjoy the land only on the condition that he bore no burden, then he was not willing to accept the gift as it was offered. And it seems to me that he evidenced no willingness to bear that burden, and that he always repudiated the notion of bearing it in his father's lifetime. But there is no trace of an intention on the part of the father to give the benefit and postpone the burden. He meant them to go together. Further, the refusal to pay the rates is hardly consistent with an acceptance of the land as a gift; since if the land had become his he must have known that he was under a moral, if not a legal, obligation to pay them.

Upon a full consideraton of all the evidence I find myself compelled to conclude that the defendant has not discharged the onus which lay upon him. If in respect of the matter of acceptance of the attempted gift the onus was not upon the defendant, but it was rather for the plaintiffs to show non-acceptance or repudiation—if that is the proper word,—I think the plaintiffs must be held to have succeeded in showing it. If one comes to the conclusion that the acceptance of the gift in the first instance must be presumed, yet the evidence is, as I think, that when the defendant realized that he could only have the land *in præsenti* with its burden, he refused to bear that burden. If then there was a technical or presumed acceptance, there was a repudiation afterwards.

I stated early in this opinion that the defendant's claim to the land rested not only on the doctrine of *Strong* v. *Bird* (1), but on the effect of the *Administration and Probate Act* and other Statutes of this State, which, as he contended, gave him the benefit of the doctrine as applied to land, and that for the purposes of my judgment I would assume that under the Victorian Statute law the doctrine does apply to land.

It will be seen that in the view I have taken of the evidence it is not now necessary to discuss the question of the effect of

(1) L.R. 18 Eq., 315.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Barton A.C.J.

the Statutes. That question could only arise if the defendant succeeded in discharging by evidence the onus laid upon him.

For the reasons given, I am of opinion that this appeal must be allowed.

The case, both below and here, has been argued on the footing that probate had been granted to the defendant in common with the plaintiffs, although the defendant had not acted on the leave reserved to him to come in and prove. But that arrangement was come to only to admit of the defendant raising the primary question in the case, namely the application of the doctrine of *Strong* v. *Bird* (1), and it extended only to that object, and cannot impede the making of any necessary order.

The judgment of ISAACS and POWERS JJ. was read by

ISAACS J. The respondent's case is rested on the doctrine of *Strong* v. *Bird* (1). In order to succeed he has to establish: (1) a gift, though originally imperfect; and (2) the perfecting of the gift by his appointment as executor.

The second branch involves not merely the construction and effect of the will on ordinary principles, but also the question raised in argument whether the doctrine relied on has application to realty, and particularly under the *Transfer of Land Act*. These interesting inquiries need not be pursued, in view of the opinion of the majority of the Court that the respondent has failed to maintain the first essential condition of his case—the original imperfect gift.

That portion of the case, though in the final result a proposition of fact, concerns itself with, and is largely dependent upon, several highly important principles of law and practice. As we are unable to arrive at the same conclusion as has just been expressed consistently with those principles as we understand them, we propose to state our reasons for thinking there was at the time of the father's death an imperfect gift to the respondent.

An imperfect gift of property connotes that its owner has, contemporaneously or antecedently, done some act which couples itself with his communicated intention at some given moment, of immediately transferring his legal right to the property to

(1) L.R. 18 Eq., 315.

another, who accepts it, the act done by the owner being, however, for some reason, insufficient in law to effect the intended transfer, which consequently remains incomplete.

If that is shown, then apart from the special features involved in the second branch, nothing more is wanted to satisfy the doctrine of *Strong* v. *Bird* (1) than the perfecting of the gift by appropriate vesting of the legal title by executorial appointment, with what Sir *George Jessel* calls "a continuing intention to give."

It is, in our opinion, necessary to observe that that expression in its application connects itself with the testamentary appointment, and not with the original imperfect gift. The latter, once it exists, remains; the donor by his subsequent conduct may complete it, or may leave it incomplete and ineffectual; but, as we understand the matter, the "continuing intention to give" is not to be considered at all, except in its relation to and as affecting the final act relied on as the completion of the gift. "With what intention was that final act done?" is answered by saying whether it was done with "a continuing intention to give" or not. If it was, then it perfects the previously incomplete donation; if not, the imperfection remains and counts for nothing.

The question of "continuing intention" of itself neither affects the original attempted gift, nor stands as an independent condition of its validity—it is not a third requirement. We emphasize this point as, in view of the argument, it has a material bearing on the admissibility and effect of some of the testimony relied on by the appellants to control the quality of the alleged imperfect gift.

It is true that the respondent had the burden of establishing the fact of the incomplete gift so as to succeed in the first branch.

As will be seen presently, the appellants' contention as to the extent of that burden was, according to well established authorities, pushed a great deal too far. The view we take of these very largely accounts for our inability to concur with the opposite view taken on this branch of the case, and so we shall endeavour to make our opinion clear.

In the first place it is necessary to define the proper attitude of

(1) L.R. 18 Eq., 315.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Isaacs J. Powers J.

the primary Court in such a case. The word "suspicion" in *In re Garnett*; *Gandy* v. *Macaulay* (1) was relied on as if it required the claimant in such a case to overcome initial curial distrust of his personal veracity, and of the veracity of every other witness whose testimony supported his case. We do not so read the words of the learned Master of the Rolls. In our opinion all he intended to convey was that, in addition to the ordinary onus of establishing an affirmative allegation, the Court must bear in mind the weaknesses and temptations of human nature, and, in the absence of the only person who could contradict or explain the claimant's version, should, as a matter of prudence, display very great care in testing and examining his evidence and should cautiously require such light, and look for such corroboration, as in the circumstances of the case one would reasonably expect to find. The learned Master of the Rolls did not, in our opinion, mean that a Judge should start with a presumption of perjury or fraud. This is shown by these words, which apply to all the witnesses alike (1):—"If in the end the truthfulness of the witnesses is made perfectly clear and apparent, and the tribunal which has to act on their evidence believes them, the suggested doctrine becomes absurd." The suggested doctrine is that corroboration is essential.

If the demeanour of the claimant carries conviction, and it does if the Judge who hears him believes him, then in the opinion of the Master of the Rolls, as expressed in the early part of page 9, it would be unreasonable to insist on corroboration.

Minister of Stamps v. *Townend* (2) may, with advantage, be referred to in this connection, because of its clearness and authority. That was a case of alleged perfect gift *inter vivos*, and where, therefore, the question was, as stated by Lord *Loreburn* L.C., whether the deceased "intended to give, and did effectively give," certain money.

Lord *Loreburn* L.C., speaking for the Judicial Committee, states the law thus (3):—"A Court must carefully scrutinize any claims by the living that they have received gifts at the hands of those who are no longer able to give an account of themselves."

(1) 31 Ch. D., 1, at p. 9.
(2) (1909) A.C., 633.
(3) (1909) A.C., 633, at p. 638.

But in applying this rule it is pointed out that, although there was in fact corroboration of the claimant, yet her evidence (1) "of itself seems to their Lordships to be abundantly sufficient in every respect to show that it is a probable and credible account of what happened."

The Privy Council there manifestly considered it "abundantly sufficient" if the claimant's account is "probable and credible."

And, further, that case lays down a valuable rule with respect to corroboration. It is this, that the claimant's evidence must be taken as a whole, and that substantial corroboration of his testimony on what may be called anticipatory or collateral incidents relating to the alleged gift "confirms the credit not only of the statements which are expressly supported, but of all statements made by the interested party" (1).

Then, adds the Lord Chancellor, "If this be so, the evidence given by Mrs. Townend is conclusive in regard to the case." Nothing could, to our mind, be clearer than this. Once establish that credit is to be given to the claimant's evidence—including that of his witnesses—and it follows his case is made out as far as that testimony establishes it.

In the present case *Hood* J. saw and heard the respondent, and the witnesses who supported him, and believed them, and found the facts in respondent's favour. It was greatly debated whether the learned Judge properly appreciated the position, that to constitute an imperfect gift the intention must be an intention of giving *in præsenti*, that is, of bringing his intended bounty into immediate effect. But a careful reading of the reasons for judgment leaves no doubt in our minds that this was thoroughly present to his Honor's mind: and this, more particularly from the authorities cited to him, and the case of *In re Innes*; *Innes* v. *Innes* (2) referred to by him, a case in which Lord (then Mr. Justice) *Parker* was particularly careful to emphasize the point.

(1) *The Offer.*—As to this particular question the learned Judge gave full credence to the witnesses for the respondent.

If therefore, the fact of the father's intention to presently give be a matter in controversy as between the witnesses on opposite sides, and consequently dependent upon their credibility for any

(1) (1909) A.C., 633, at p. 638. (2) (1910) 1 Ch., 188.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Isaacs J. Powers J.

personal reason, the well established rule guiding appellate tribunals in such a case, precludes us from overruling the view of the learned Judge upon the facts.

That, it will be seen, is the lowest position for the respondent on this particular question, because there is abundant affirmative evidence if believed, which, in the words of the Privy Council, is "conclusive" in his favour. And it is not to be overlooked that the witnesses opposed to him are themselves interested in defeating him.

The respondent was 31 years old when his father died. From about the age of 18 he managed his father's property, receiving no wages. He had lost the fingers of—apparently—one hand. His capacity for work was lessened, but not destroyed. He could use implements, but not plough with a single plough. He bought and sold sheep for his father since he was 21, and looked after the place generally.

In 1908 his father gave him Morrison's land, 233 acres, which does not appear to have been suitable—at all events, it was not utilized—to give the respondent what is called in the case "a start."

He married on 4th May 1910, and for some time before this event he was, even according to the opposing case, "always asking father for a start," and in this connection asking for Lemon's land. Respondent says: "My sister said to father that he ought to get me settled."

He asked for both Waugh's and Lemon's, but the father gave him his choice. He chose Lemon's, to which the father agreed.

The first important point is that the promise was then made of Lemon's to get Frake "settled." In fact, however, for reasons clearly appearing, the father himself grazed Lemon's to the exclusion of Frake till May or June 1911. After Frake's marriage he still continued for over a year to live with his father, and to manage his affairs, though wanting to start for himself. His wife had to live at Colac four miles away, and naturally he wanted a house of his own. It is common ground that the father about October 1910 promised to provide and did afterwards provide one on Caldwell's land.

But obviously that would have been worse than useless unless

Frake got the desired "start;" and that meant "land," as clearly appears even from the opposing testimony of Mary Ann Matthews.

There was some delay in carrying out the declared intention to actually give Lemon's land, but we can trace some of the intervening events.

In August 1910, as Mary Ann states, the mother asked the father to give Frake Lemon's land, to which the father said nothing. He appears to have been a thoughtful but not over-communicative man. He did not act impulsively, but slowly and deliberately, and, so far as one can judge, was faithful to his word. It was after this request that Frake who, as already pointed out, was always asking for Lemon's, said he was tired of the life he was leading and obtained the promise of the house on Caldwell's.

The mother manifestly urgently pressed the father to carry out his promise, because by her instructions, and with the father's knowledge and assent, a letter was written to the mortgagees on his behalf on 30th March 1911, asking for information "*per* return post" if they had the power to transfer any of the land he held to his son. No one can doubt that that letter was written with the object of directing a transfer at once if the mortgagee could do it.

The answer next day explained that the mortgagees had no such power before default. But it added: "You can transfer the property subject to the mortgages and our relations with the mortgagors remain unaltered."

Now it is important to survey the position at this, one of the crucial points. In the first place, it is to be observed that the father George Cole Matthews, though the registered proprietor, held the land subject to mortgages, of which, not he, but two other persons, Robert Lemon and Caroline Lemon were then the mortgagors. In effect, though not in law, he owned merely the equity of redemption, and all he could ever have transferred was that equity, or, in formal language, the legal estate subject to the registered mortgage. That is unless he could and did pay off the mortgage at once.

It therefore appears also that whatever liability he was under

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Isaacs J. Powers J.

as to the mortgage money it was by way of indemnity only. Hence the form of his question to the mortgagees and their reply. What was he to do after the mortgagees' letter? He had definitely promised the land to Frake. He was well enough off in land, but apparently somewhat pressed for ready money; he told Frake in May 1911, "he hadn't enough for himself." Evidently he did not desire to incur legal expenses of transfer unnecessarily—the transaction being between father and son, and known to the whole family.

About this time he made up his mind to sell off if he could. He gave some instructions to Mary Ann as to putting his land in the hands of agents for sale. Some particulars she got from him, some from papers for herself. It is unlikely he personally remembered the numbers of the various allotments, and the original partial instructions coming from himself are not produced. A document in final form is in evidence, but undated.

It is not clear whether Lemon's was originally included or not. The probabilities are it was not. Frake says it was not, and his statement is not denied. But if it was, it would not tell against Frake. While this intended sale was under family discussion, that is, about April 1911, a most significant fact is deposed to by Mary Ann. She says: "Mother asked father to hand Lemon's over to Frake."

"Handing over" is an expressive term, analogous to delivery of a chattel, and a potent circumstance in any case, unless attributable to some other and distinct agreement; more potent still among people who are little accustomed to legal forms, and when it takes place after a promise to give it, and by way of segregating the property from the general mass to be disposed of, it almost conclusively implies a recognition of ownership in the person to whom it was "handed over."

Once "handed over" pursuant to a solemn promise, no man of honour would think of again claiming the land, though, of course, he might insist on the agreed terms being observed, and George Cole Matthews has shown he was not a dishonourable man.

Early next month the mother's request is acceded to. Frake's affairs are discussed, Frake still living with his father. Unable to supply his son with ready money, it is arranged that Frake

shall have his start. He is to buy stock on terms from some agent, and "put them on Lemon's."

He does so, and the "handing over" takes place either on 8th May or 8th June 1911. The paddock was fenced. The father up to that time had 26 sheep on it. He helped Frake to take them off, and to draft and put on the land 110 sheep that Frake had bought, and a little later the father took two horses belonging to Frake off his own land and sent them on to Lemon's.

From that moment until the father's death the land was treated as if it were Frake's, and not the father's, with the exception of one circumstance which is clearly explained, and which, when so explained, adds to the credibility of the claim made.

Frake, then, had possession in fact, which is *primâ facie* possession in law. If his story is true, he had, undoubtedly, possession in law. In either case, no substantive reason is alleged for his continued possession without acknowledgment, and without rent, except as owner. Any other reason is mere conjecture, and denies the honesty of the evidence given. He says: "In May 1910 I understood that father had given me Lemon's." That was in cross-examination, and its admissibility cannot be objected to. It indicates the capacity in which Frake subsequently entered. Again in cross-examination he says: "He did not say that he would transfer unless I took over the mortgage"—obviously the witness was right, because to "take over the mortgage" would mean substituting himself for the Lemons, which the Trustees Company could not be compelled to agree to. He further adds: "I understood from him that I would have to pay the mortgage when I took the land"—that is, when he took the land in May or June 1911, he understood he was to pay the mortgagee just as the father was doing.

That is quite consistent either with distinguishing between principal and interest or with his afterwards trying to improve the terms when he found himself short of means. And so at this point the imperfect gift either was or was not made. It either existed then or never. Subsequent conduct on either side, whether refusal to pay interest or parental requests to pay, could not affect its existence, when possession was finally given, and

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Isaacs J. Powers J.

there was only one person in the world who actually *knew* whether the father intended that the transaction of handing over should amount to a gift *in præsenti*—the father himself. If he at any subsequent time said it was already given, that I apprehend would conclude it. And if the evidence for the claimant was to be believed—as it was—he said so not once but many times.

Some time after 8th June, when Abbott inspected, the father said to him, speaking of Lemon's: "That is his, I can't sell it." But rather than stand in the way of a sale as Abbott seemed to want it, Frake agreed to his selling Lemon's, if he could. He frequently promised to transfer. Mrs. Wells says on 14th December 1911 she asked her father: "What did you give Frake for a wedding present?" He hesitated and said: "Don't you think Lemon's is a very handsome present?" Two days after the father said he had some business to fix up for Frake in reference to transferring Lemon's. In cross-examination, evidently directed to ascertain more definitely the substance of what the father said, she stated: "I understood that the land *had been given* to Frake, but that it had not been transferred."

Robert Samuel Wells said he heard the deceased say on the day he left, which would be the 16th December, that he "*gave* Frake 20 cows and some farming implements and two horses and also Lemon's paddock." There can be no ambiguity about the word "gave" there, because it is applied in the same sense to all the property, and it would be absurd to confine it to an intention to give in the future. Young Miss Wells in direct examination uses the words "was giving" as to land, cattle and implements; but she makes it clear in cross-examination that "grandfather said he *had given* Lemon's as a wedding present."

Caldwell, claimant's father-in-law, says that about September 1911 the father said "he was very short of grass because he had given Lemon's paddock to Frake." He adds: "On different occasions before he had told me many times that he *had given* Lemon's to Frake."

It is sworn on one side, and denied on the other, that when Abbott came and informed the father that Frake claimed Lemon's as his own, the father said: "It is not yours yet." The denial

must be taken to have been believed. So far there is distinct affirmative evidence of what the father actually said, and as the witnesses who gave it have been accepted as trustworthy we are unable to see how the finding of fact of the primary Judge can be reversed, so long as the rule laid down on the subject in *Riekman* v. *Thierry* (1) and other cases cited in *Dearman* v. *Dearman* (2) remains unimpeached. But, even treating the matter as open to unrestricted original consideration, there are some dominant facts that we think lead to the same conclusion. It is undisputed that the father intended to bestow the land on the claimant, and we think it is a safe rule to act upon, that, where words and acts are capable of two significations, that should be adopted which is the more calculated to effectuate and not destroy the intention. If this be so, the respondent should succeed, because on this point all other conditions of success are assumed.

Next, there is the conduct of the father in discriminating between Lemon's land and the other land of which he held the legal title, in respect of rates (30th November 1911) and interest (September 1911 and March 1912). Again, when he so far appreciated the seriousness of his condition as to send for a solicitor to make his will, which is another crucial point of time in this case, he gave instructions which are, to our mind, not merely corroborative of what the witnesses quoted have said, but altogether inconsistent with the opposite intention. He told Mr. Sewell that his own Yeo land consisted only of 800 acres. If he had not considered Lemon's as already belonging to Frake, he would have said 958, or would have instructed Sewell to prepare a transfer to Frake. But he added: "450 given to son." In fact, Morrison's land, 233 acres, and Lemon's land, 155, together amount only to 388 acres, but that is unimportant, because Lemon's, whatever its acreage, must have been included, and because of the figures, 800. Now, the word "given" there, is incapable of ambiguity, even apart from its ordinary natural meaning. It must mean the same for Lemon's land as for Morrison's. Morrison's was admittedly fully and legally vested in Frake, and, so far as the father was concerned, he certainly

(1) 14 R.P.C., 105. (2) 7 C.L.R., 549.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Isaacs J. Powers J.

meant that the real right had passed from him in the one case as much as in the other.

Lastly, his statement after Sewell had left, "I have left Frake too much," clearly indicates what his substantial intention was, because he had by his will given Frake only an equal share, and the statement made to him, "Everything is in your name yet," was a reference to a mere technicality, which does not affect the point we are considering.

For these reasons, we think that so far as what may be called the offer is concerned, it has been and is amply established.

One point of legal importance must here be mentioned. In Mrs. Gamble's evidence, some of which is opposed to all the other testimony on both sides, some conversations were deposed to which she says she had with the father in Frake's absence, and one of them only about six weeks before the father's death. The alleged statements of the father were relied on—as, for instance, intention to sell, and, only on failure to sell, to transfer to Frake—as showing, first, a mere intention to give in the future, and, next, a discontinuance of intention in respect of a prior gift *in præsenti*, had any such intention originally existed.

In our opinion such evidence is quite inadmissible, and cannot be regarded by a Court for the purpose indicated. Statements before the alleged gift in the absence of claimant cannot, either in fact or law, affect what is clearly shown to have taken place afterwards between him and his father.

And as to the subsequent statements, it is stated in *Lewin on Trusts*, 12th ed., p. 197, and, in our opinion, is good law, that "it seems the subsequent acts and declarations of the father may be *used against* him by the son, though they cannot be used *in his favour*," on the question "what did the *father* mean by the purchase." Here we may substitute for "purchase" the words "handing over."

In *Stock* v. *McAvoy* (1) *Wickens* V.C. says:—"The admissible evidence consists of contemporaneous statements and acts, and of subsequent statements of either of them against the interest of the party making them."

Xenos v. *Wickham* (2) is another high authority.

(1) L.R. 15 Eq., 55, at p. 59. (2) 13 C.B.N.S., 381.

These observations we apply to all evidence of a like nature given in the course of the appellants' case, or in the cross-examination of respondent's witnesses.

The respondent, then, has in our opinion amply established the father's intention to make a present gift.

(2) *Acceptance.*—The next question is that of acceptance. As to this the burden is clearly on the appellants. *Standing* v. *Bowring* (1) settles the law as to this, even as to onerous gifts. That is followed in *London and County Banking Co. Ltd.* v. *London and River Plate Bank Ltd.* (2); and *In re Arbib and Class's Contract* (3). See also *Xenos* v. *Wickham* (4); and *Townson* v. *Tickell* (5).

There is a presumption of acceptance. In the *London and County Banking Co. Case* (6) *Lindley* L.J. says:—"The presumption of acceptance in such cases is artificial, but is founded on human nature; a man may be fairly presumed to assent to that to which he in all probability would assent if the opportunity of assenting were given him."

Now, it was stated at the bar, and admitted on both sides, that the property here in question was worth considerably more than the mortgage debts upon it.

Unless, therefore, we are to suppose human nature in Frake to have been up to his father's death so different from that of his fellow mortals, as to decline the gift, valuable though it was, because it was not still larger, how is it possible, especially in view of the finding of the primary Judge, to deny his acceptance? There is not a word to show he refused it explicitly; his retention of the land, his statement, again in cross-examination, that after May 1910 he regarded Lemon's as his own, his constant requests for a transfer, his father's belief down to his death that the land was Frake's, and Frake's assumption of dominion in the presence of his father and Abbott, the father's request to Frake to pay interest as late as March 1912, all tend to negative any dissent from the gift.

True, he declined to pay the interest, but that is quite con-

(1) 31 Ch. D., 282, at p. 288.
(2) 21 Q.B.D., 535.
(3) (1891) 1 Ch., 601, at p. 613.
(4) 13 C.B.N.S., 381.
(5) 3 B. & Ald., 31.
(6) 21 Q.B.D., 535, at p. 542.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Isaacs J. Powers J.

sistent with a desire to persuade his father to extend his bounty, or, if the respondent's own evidence is to be believed, as it was, with his anxiety to get the transfer first. And he swears he knew his obligation, as settled by the terms of the gift, was to pay the mortgage when he got the transfer. Then, he could no doubt have raised the money when necessary, and indemnified his father, or paid off the debt. There is one passage in his evidence in this connection which should be specially referred to, as it was misunderstood.

In a conversation with his mother and sister two days before his father's death, reference was made to interest and to transfer and the cost of a transfer, which he supposed was about £30. He said: "When father is going to give me a present let him give it to me clear." That we take to mean, clear of the transfer cost, because throughout his evidence he acknowledges his liability to pay the mortgage debt, principal and interest, as soon as he got the transfer; so that the word "clear" in that sentence, as it seems to us, must have reference solely to the transfer. That is entirely supported by the evidence of Mary Ann as to a similar statement in September 1911.

We consequently see nothing to overcome the strong presumption of law referred to, and, based as that is on fundamental attributes of human nature, it requires specially distinct testimony to cancel it.

We have said that only one person knew whether the father originally intended to make a gift *in præsenti*—the father himself. With equal force we may observe on this branch that, besides the legal presumption of continuance, only the same person knew whether he intended that gift should continue, and all his actions indicated he did. Moreover, he best knew how he regarded the son's conduct, whether that was a rejection of his terms or not. Clearly the father did not, up to the time of his death, so regard it—and if he, the best judge of the matter, did not, why should we, on the merest conjecture, think differently?

In the result, we consider the respondent should be held to have established the fact of an imperfect gift, and, further, we desire to add that, so far as it is necessary to decide it, and for what it is worth, the testator at the time he made his will had

the personal continued intention of regarding the land as Frake's against himself.

In our opinion the appeal should be dismissed.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. We agree that this appeal should be allowed. The question for determination is whether the respondent is entitled to certain land. The land belonged to his father, and he asserts that his father made an imperfect gift to him, and that the gift was completed in law and in equity when the legal title to the land vested in him as one of several executors of his father's will. It was strenuously argued before us that the doctrine evolved by Sir *George Jessel* in *Strong* v. *Bird* (1), and explained and adopted in a *catena* of cases cited by our brother *Barton*, does not apply to imperfect gifts of real property in Victoria, and that, in any event, it has no application in a case where the donee of the imperfect gift relies for completion of the gift on the fact that the legal title has become vested in him as one of several executors. In our opinion it is not necessary to determine these questions of law. The learned Judge from whom the appeal lies, in delivering judgment, said (2):—"The first question for determination is one of fact, and is—'Had the testator in his lifetime a continuing definite expressed intention of giving the land known as Lemon's to the defendant?' Although the burden of proving this rests on the defendant, and the case is one where, as a matter of prudence, evidence to corroborate the defendant's claim should be looked for, I have no difficulty in finding this issue in his favour." He adds later (3):—"I think that if the father could then" (namely, when Abbott was bargaining for the land in 1911), "or at any later time, have sold this land, he would have done so, but failing a sale he intended up to the last that the land should be the defendant's." We agree that there is no difficulty in answering the question propounded by the learned Judge as he has done; indeed, no part of the evidence is inconsistent with such an

Gavan Duffy J. Rich J.

(1) L.R. 18 Eq., 315.
(2) (1913) V.L.R., 80, at p. 83; 34 A.L.T., 151.
(3) (1913) V.L.R., 80, at p. 84; 34 A.L.T., 151.

H. C. OF A. 1913.

MATTHEWS v. MATTHEWS.

Gavan Duffy J. Rich J.

answer, and that, perhaps, is the reason why his Honor did not think it necessary to state which version he accepted where there is a conflict in the evidence. But in our opinion this finding does not determine the real question at issue between the parties. It is not enough that the respondent should prove that the testator had a continuing definite expressed intention of doing something in the future. It is not enough that there should be a present intention to make a gift whether such intention is absolute or conditional, there must be an intention to make a present gift, and the donor must intend at the time of death that the transaction shall stand and have effect as a gift. If the respondent does not establish this he cannot succeed; and after a careful consideration of the evidence we have come to the conclusion that he has not done so. No dishonesty or misbehaviour is attributed to him by the learned Judge who heard his evidence, and in our opinion the conduct of his father justified him, as far as an unsuccessful litigant can be justified, in resisting the plaintiffs' claim in the Supreme Court and before us. We think justice will be done by ordering that the plaintiffs shall pay the defendant's costs below and here; they will, of course, retain this amount out of the estate of the testator.

Appeal allowed. Order appealed from discharged. Declare that the plaintiffs are entitled to possession of the premises and land in the statement of claim mentioned. Appellants to pay the respondent's costs of the action and of this appeal.

Solicitor, for the appellants, *J. B. McConkey* for *Harwood & Pincott*, Geelong.

Solicitors, for the respondent, *Hodgson & Finlayson* for *A. S. Cunningham*, Colac.

B. L.