[HIGH COURT OF AUSTRALIA.]

GLENN AND OTHERS . . . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . RESPONDENT.

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MELBOURNE, *June* 14, 15, 16; *Sept.* 16.

Griffith C.J., Isaacs and Rich JJ.

Land Tax—Assessment—Joint owners—"Owner"—Trust estate—Person entitled to land for "estate of freehold in possession"—Trust estate—Equitable estate of freehold in possession—Trust for accumulation—Gift of residue—Interest of residuary legatee—Land Tax Assessment Act 1910-1914 (*No.* 22 *of* 1910—*No.* 29 *of* 1914), *secs.* 3, 28.

Held, by *Griffith* C.J. and *Isaacs* J. (*Rich* J. dissenting), that, where under a will trustees held real and personal estate upon trust to accumulate a specified sum to be paid at the end of a certain period to certain persons and to divide the residuary estate among certain other persons, those other persons were not, while the trust for accumulation was still in operation, entitled to an "estate of freehold in possession," and consequently were not "owners," and, therefore, not "joint owners," of the land comprised in the trust estate within the meaning of the *Land Tax Assessment Act* 1910-1914.

Held, by *Griffith* C.J. and *Isaacs* J., that it is an essential element of an "estate of freehold in possession," as that term is used in the definition of "owner" in sec. 3 of the *Land Tax Assessment Act* 1910-1914, that the person entitled to the land for that estate has a present right of beneficial enjoyment of the land, whether accompanied by actual physical possession or not.

CASE STATED.

On an appeal to the High Court by Joseph Henry Glenn, Andrew Glenn and John Glenn from the assessment of them for land tax for the years ending 30th June 1911, 30th June 1912, and 30th June 1913, *Rich* J. stated a case for the opinion of the Full Court, which was substantially as follows:—

1. The appellants Joseph Henry Glenn, Andrew Glenn and John Glenn are and at all material times have been the members of the firm of Glenn Brothers, carrying on business in partnership in New South Wales and Victoria as graziers.

2. The said firm at all material times has owned the following lands:—Urawilkie Station, New South Wales; Myall Plains Station, New South Wales, and Theden Station, Victoria; and during the year ending 30th June 1912 the said firm became the owner of portion of Coree Station, New South Wales, and the said firm has thereafter remained the owner thereof. The lands owned by the said firm from time to time are hereinafter called the partnership lands.

3. John Glenn, senior (hereinafter called the testator), made his last will on 21st March 1908 and died on 22nd September 1908. Probate of the said will was granted in Victoria to the said Joseph Henry Glenn, leave being reserved to the other executors and executrices named therein to come in and prove at any time, but none of the said other executors and executrices have in fact come in and proved the said will. Probate of the said will was granted in New South Wales to the said Andrew Glenn, leave being reserved to the other executors and executrices named therein to come in and prove at any time, but none of the said other executors and executrices have in fact come in and proved the said will. The acting trustees of the said will at all times material have been the said appellants, Mary Glenn and Sarah Ann Glenn in the said will named.

4. The said testator left him surviving his widow (the said Mary Glenn), three sons (the said appellants), three daughters not yet married (the said Sarah Ann Glenn, Isabella Glenn, and Margaret Glenn), and two daughters married before the date of the death of the said testator (Mary Crockett and Rebecca Steele).

5. The said testator died possessed of the following lands (hereinafter called the trust lands):—North Yathong Station, New South Wales; Homebush Station, Victoria (part sold in 1911-1912).

6. In so far (if at all) as may be material to the questions of law raised by this case the position of the appellants as residuary

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devisees or legatees under the said will is substantially as follows:—The income of the trust estate of the said testator has never been sufficient to provide for the yearly payments which under the said will are chargeable thereon in priority to any rights of the appellants as residuary devisees or legatees. There have not yet been raised or paid the three sums of one thousand pounds for the testator's said unmarried daughters. The legacies or provisions in the said will for the benefit of the testator's Crockett and Steele grandchildren respectively have not been satisfied. It has never yet in the trustees' opinion been practicable and consistent with the provisions of the said will to accumulate and they have not yet accumulated any part of the sum or fund of ten thousand pounds in the said will mentioned. There are heavy liabilities of the trust estate still unsatisfied. No division of any residuary estate, either capital or income, has been or could properly have been made. No residuary devisee or legatee has claimed or received beneficial possession or enjoyment of any part of the trust estate or of any rents, profits or income thereof. The testator's widow Mary Glenn has since the testator's death occupied the dwelling-house and garden at Tylden known as "Homebush," together with about two acres of land adjoining the same.

7. For the years ending 30th June 1911, 30th June 1912, and 30th June 1913, the following returns in respect of the above-mentioned lands were made to the said Commissioner of Land Tax:—(*a*) Joint ownership return by the appellants as partners and in respect of the partnership lands only. (*b*) Trustee's return by the trustees of the said will of the said testator and in respect of the trust lands only. (*c*) (*d*) (*e*) Individual returns by each of the appellants respectively.

8. For each of the said years land tax was assessed and paid upon the basis of the said returns.

9. In April-May 1914 the Commissioner issued amended assessments, including in the same joint ownership assessments the partnership lands and the trust lands, and the Commissioner claims that the appellants are liable to be taxed as joint owners upon the said assessments as so amended.

10. As to each of the said amended assessments the following

objection was lodged by the appellants, and was duly received by the said Commissioner:—"That the basis of the assessment is incorrect. The ownership of the lands comprised in the partnership of Glenn Bros. is not the same as the ownership of the lands held by the trustees of John Glenn deceased."

11. The objections in par. 10 hereof mentioned were not allowed by the said Commissioner, and the said appellants did not accept the said amended assessments, and the said appellants duly asked that the said objections should be treated as an appeal, and the said Commissioner duly transmitted the said objections to the High Court at Melbourne for determination as a formal appeal.

12. The appeal came on for hearing before me on 7th September 1914, when the facts hereinbefore set forth were admitted, and at the request of the parties I consented to state a case for the opinion of the High Court upon the following questions arising in the appeal, which in my opinion are questions of law.

14. The question of law for the opinion of the Court is:—

(*a*) Are the appellants liable to be assessed in one assessment as joint owners in respect of the partnership lands and the trust lands for any and which of the following years: the year ending 30th June 1911, the year ending 30th June 1912, the year ending 30th June 1913?

The will was made part of the case. Its provisions are sufficiently stated in the judgment of *Griffith* C.J. hereunder.

Weigall K.C. (with him *Latham*), for the appellants. The appellants never at any time had an estate of freehold in possession in the land in question, and therefore were not "owners" within the meaning of sec. 3 of the *Land Tax Assessment Act* 1910-1912. The scheme of the will is inconsistent with their having any right to the immediate possession and enjoyment: *Taylor* v. *Taylor*; *Ex parte Taylor* (1). A person is not entitled to an estate of freehold in possession unless he could ask a Court of equity to put him in possession on his giving security to keep down the charges.

(1) L.R. 20 Eq., 297.

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[RICH J. referred to *Saunders* v. *Vautier* (1).]

Whatever estates the appellants have are at most contingent estates in remainder. [He also referred to *Carson's Real Property Statutes*, 2nd ed., p. 668; *Wolstenholme's Conveyancing and Settled Lands Acts*, 10th ed., p. 369; *Settled Land Act* 1882 (45 & 46 Vict. c. 38), sec. 2.]

Starke (with him *Owen Dixon*), for the Commissioner of Land Tax. The appellants are entitled to equitable estates of freehold in possession, notwithstanding that they may derive no benefit from the estate for ten years: *In re Jones* (2). They are the only persons who can have equitable estates in this land. Sec. 34 of the *Land Tax Assessment Act* shows that the fact that an annuitant has a charge upon land in which another person has a freehold estate in possession does not make the annuitant liable to land tax. The only gift of an interest in the land is that in the gift of the residue, and the other gifts are pecuniary only. The position is the same as if there were a gift of the land subject to charges.

[ISAACS J. referred to *Lord Sudeley* v. *Attorney-General* (3).]

Here the land could be handed over at once to the appellants if the charges were secured. [He also referred to *In re Clitheroe Estate* (4); *Harbin* v. *Masterman* (5).]

Weigall K.C., in reply. The will is practically a direction to the trustees to take the estate, do certain things with it, and distribute what is left after doing these things among the sons. The only gift to them is in the direction to divide at a future date. [He referred to *Bolling* v. *Hobday* (6).]

Cur. adv. vult.

The following judgments were read:—

Sept. 16.

GRIFFITH C.J. The testator by his will, after certain specific gifts, gave and devised "all the residue of the property both real and personal" of or to which he might at the time of his death

(1) Cr. & Ph., 240.
(2) 26 Ch. D., 736.
(3) (1897) A.C., 11.
(4) 28 Ch. D., 378.
(5) (1896) 1 Ch., 351.
(6) 31 W.R., 9, at p. 11.

be seised, possessed or entitled to trustees upon trust to pay his debts and certain funeral and testamentary expenses, and also £10 to each of them in lieu of commission. He then directed his trustees to pay "out of my estate" an annuity of £600 to his wife for her life. He next directed them to pay to each of his unmarried daughters an annuity of £150 until marriage. Then he directed them to pay to each of his daughters £500 within six months, and a further sum of £500 within twelve months, after his death. He next directed them "gradually and in such manner as not to depreciate the value of my estate or to impede or hamper the proper management thereof to the best advantage to accumulate the sum of £10,000," and at the expiration of two years from the death of his wife to pay out of the accumulations, so far as they should then extend, to each of his daughters the sum of £1,000, and at the expiration of ten years from her death a further sum of £2,000, with gifts over if any daughter should in the meantime have died having a child or children or childless. If any of his daughters should attain the age of sixty without having married he directed that she should receive the sum of £2,000 out of the capital of his estate, whereupon her annuity of £150 was to cease. He then authorized the payment of salaries to any one of his sons who might be employed on his property notwithstanding his being a trustee of the will. He then directed his trustees "out of the residue of my estate" to make provision for the education of two of his grandsons, and to pay to a granddaughter after his wife's death a sum of £500 on her attaining twenty-one. Next followed a direction to make provision "out of the residue of my estate" for the education of three other grandsons. Then followed the direction upon which the respondent bases his contention:—"I direct that my residuary estate be divided among my three sons" (the appellants) "in equal shares," with substitutionary gifts in case any of them should die "before the distribution of my estate." The testator gave his trustees "full power and authority at their discretion to sell let lease or otherwise deal with" any part of his estate, but not to mortgage it, as to the majority of them might seem fit in carrying out the trusts of the will, and full powers of investment.

It is manifest that, until the trust for accumulation (which has

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not yet even begun) has been carried out, the appellants have no right to any present perception of the fruits of any part of the testator's estate, real or personal.

The respondent contends that the appellants are entitled to an estate of freehold in possession in the testator's land, and are therefore taxable as joint owners of the land.

The term "owner," as defined in the *Land Tax Assessment Act*, includes (sec. 3) "every person who jointly or severally, whether at law or in equity—(*a*) is entitled to the land for any estate of freehold in possession; or (*b*) is entitled to receive, or in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise."

The term "estate in possession" is sometimes used in real property law merely to denote the first of two or more successive estates, the others being called "estates in remainder" or "estates in expectancy." It is also used to denote an estate of which some person has the present right of enjoyment.

Mr. *Fearne*, in the preface to his well-known work on *Contingent Remainders*, distinguished between estates vested in possession and estates vested in interest, and added that an estate is vested when there is an immediate fixed right of present or future enjoyment, is vested in possession when there exists a right of present enjoyment, and is vested in interest when there is a present fixed right of future enjoyment. On this Mr. *Butler*, in a note to the 10th edition, comments thus (p. 1, note (*a*)):—

"From the manner in which this distinction is expressed, it might be inferred, that Mr. *Fearne* considered that, under a conditional limitation or executory devise, depending on a certain event, the *cestui que use* or devisee takes a vested *estate*, while the event, on which it depends, is in suspense: but it seems evident, that, as in all these cases, the whole fee simple is either in the person from whom the land moves, or in his heirs, or is included in the actual limitations, the person taking under the conditional limitation or executory devise, cannot, while the suspense continues, in the proper sense of that word, have any *estate*, though the event, on which it depends, is certain of happening.

"A conveys land by lease and release to B and his heirs, to the use of C and his heirs, from the first day of the following January; or devises land to C and his heirs, from the first day of January next after the testator's decease:—In the first case, the fee remains in A; in the second, it descends to the heir at law of A, till the day arrives, upon which C is to be entitled to the land, for an estate in fee simple in possession. In the meantime, C has not an estate in possession, as he has not a right of present enjoyment; he has not an interest in remainder, as the limitation to him depends on the estate in fee simple, which, in the first case, remains in A; and, in the second, descends to A's heir; he has not a contingent interest, as he is a person in being and ascertained, and the event, on which the limitation to him depends, is certain; and he has not a vested estate, as the whole fee is vested in A or his heirs.

"He therefore has no estate; the limitation is executory, and confers on him and his heirs a certain fixed right to an estate in possession at a future period."

In my opinion the term "estate in possession" is used in the *Land Tax Assessment Act* in the sense explained by Mr. *Butler*. This is not only the natural, but the only just, interpretation that can be put on the words. For the tax is an annual tax, and the "owner" of the land is the person who is in the present enjoyment of the fruits which presumably afford the fund from which it is to be paid.

The respondent's argument is based on the assumption that whenever the legal estate in land is vested in a trustee there must be some person other than the trustee entitled to it in equity for an estate of freehold in possession, so that the only question to be answered is who is the owner of that equitable estate. In my opinion, there is a prior inquiry, namely, whether there is any such person. If there is not, the trustee is entitled to the whole estate in possession, both legal and equitable.

Just as a will devising land to trustees is to be construed in such a sense as will confer upon the trustees such an estate as is necessary for the execution of the powers and duties imposed upon them by the testator, so, in my opinion, it is to be construed as denying to a beneficiary any estate other than such as will

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confer on him the benefit which the testator intended him to enjoy. If, therefore, the testator says that an object of his bounty shall not for a determinate or indeterminate period have any beneficial enjoyment of specified property, the will cannot be construed as conferring upon him any equitable estate in possession before the expiration of that period. If, for instance, a testator gives land upon trusts for accumulation of the rents and profits during the life of A, and then upon trust for B in fee, the estate of freehold in possession both legal and equitable is in the trustees during the life of A, and B has no estate in possession. If the accumulation is to be for a term of ten years the result will be the same. So, in my opinion, if it is to continue until a certain sum has been accumulated. The fact that the term "in possession" is often used in contradistinction to "in remainder" or "in expectancy" does not, therefore, prove that there must always be in the case of trust property an equitable estate in possession held by some person other than the trustee. The essential element of an "estate in possession" is, in my opinion, that the owner of it has a present right of beneficial enjoyment, whether accompanied by physical possession of the land or not. The fact that the expression is commonly used in speaking of a terminable estate does not avoid the necessity for the inquiry whether there is any person of whose interest that essential condition can be predicated.

In my opinion, therefore, when the equitable rights created by a will, which may be as diverse as the testator thinks fit, are such that the beneficial enjoyment of property by a particular object of his bounty cannot begin until the expiration of a determinate or indeterminate period, there is no present estate in possession in that property in any person other than the trustees of the will. In one sense, perhaps, the persons who are for the time being entitled to share in the fruits of the land may collectively be called the equitable owners, but that point is not material to the present case.

It may be noted that the phrase "person entitled to land for any estate of freehold in possession" is used in sec. 3 of the Act in contradistinction to words denoting persons who, although not entitled in equity to any estate in the land, are entitled to receive

the rents and profits of it. The respondent asks us to say that a man who is not entitled to receive rents and profits may nevertheless be entitled to an equitable estate in possession within the meaning of the Act.

In *Sendall* v. *Federal Commissioner of Land Tax* (1) I said, with the concurrence of my brother *O'Connor*, "Sub-par. (*d*)," of sec. 62 of the Act "provides that when a trustee pays land tax he may recoup himself out of funds in his hands belonging to 'the person in whose behalf he paid it.' Sub-par. (*f*) provides that the trustee is 'personally liable for the land tax payable in respect of the land if while the tax remains unpaid he alienates charges or disposes of any real or personal property which is held by him in his representative capacity, but he shall not be otherwise personally liable for the tax.' . . . Sub-par. (*g*) authorizes the trustee to 'raise whatever moneys are necessary in order to pay the land tax by mortgage or charge with or without power of sale of any real or personal property held by him as such trustee, and may apply the money so raised or any other moneys in his possession as such trustee in paying the tax.' Of course, that means that the amount of the tax may be raised out of the real and personal property of the *cestui que trust*, and not that of someone else."

If the respondent's contention is accepted, it might happen, and in this case would happen, that while the trustees could raise out of the estate or take from the income the necessary money to pay the tax, yet, since the appellants (although they have no present right to the enjoyment of any part of the income) are the persons responsible for the tax, the trustees would be bound to call upon them to recoup out of their own pockets the money so raised or taken, so that they would in effect be supplementing the income for the benefit of the persons presently entitled to it. This consequence seems unjust, if not absurd.

Applying these principles to the present case I am of opinion that until the trusts for accumulation of income have been carried out the whole equitable as well as the legal estate in the land is vested in the trustees. It would, indeed, be a solemn

(1) 12 C.L.R., 653, at p. 661.

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mockery to pronounce in such circumstances that an estate of freehold in possession is vested in the appellants.

So far, I have dealt with the case upon principle. If authority is needed, I am unable to distinguish it from the case of *Lord Sudeley* v. *Attorney-General* (1). It was suggested that it might be distinguished on the ground that the will in question in that case directed conversion, while the will now under consideration does not direct, although it authorizes, conversion. But I do not think the distinction material. This Court has held in more than one case that when land is devised upon trusts for conversion and division amongst several persons, those persons being entitled to the rents and profits until conversion, they are joint owners of the land for the purposes of the Act.

The question must therefore be answered in the negative.

ISAACS J. The important words of the *Land Tax Assessment Act* are those contained in the first part of the definition of "owner" in sec. 3. Sub-par. (*b*) of that definition is not, and could not be, relied on; and so the whole matter turns on whether the appellants fall within sub-par. (*a*). "Owner," by that sub-paragraph, includes "every person who jointly or severally is entitled to the land for any estate of freehold in possession."

The appellants are not entitled to the land at law, because the trustees, having regard to the nature of the trusts, have, or are entitled to have, the legal estate. If the appellants are entitled to the land for an estate of freehold in possession, they are so entitled in equity only. And so much is common ground. The contest has been whether they are equitably entitled to a freehold estate "in possession." The appellants contended that the words "in possession" in the definition mean "in actual possession," and are not used in contradistinction to "in reversion or remainder."

I consider that contention erroneous. The expression "estate in possession" is a well-known technical expression of property law with a certain connotation, and there being no context to the contrary, it should receive its technical meaning. See per *Collins* M.R. in *Attorney-General* v. *Glossop* (2). Sec. 25 (1)

(1) (1897) A.C., 11.

(2) (1907) 1 K.B., 163, at p. 172.

distinctly supports the technical meaning. In that view the expression is contrasted with estates in expectancy, as in remainder or reversion. "An estate in possession," says *Preston* (p. 89), "gives a present right of present enjoyment." But, it is the right of present enjoyment, and not necessarily the right of actual possession of the land, for there may be a tenant for years, and still less the fact of actual possession, which is of the essence of the definition. The marked distinction between the two things was clearly stated, and pointedly acted upon, in *Leslie* v. *Earl of Rothes* (1). It is also recognized in cases decided under the *Settled Estates Act*, as *In re Jones* (2); *In re Clitheroe Estate* (3); and *In re Atkinson*; *Atkinson* v. *Bruce* (4). See also per *Stirling* J. in *In re Richardson*; *Richardson* v. *Richardson* (5).

The real question here, as I view it, is this: Have the appellants, in the eye of a Court of equity, a present right under the provisions of the will to the present enjoyment of the land? If they have, they are equitable "owners" within the meaning of the Act; if they have not, they are outside the definition. I emphasize the word "right," for nothing short of a right will satisfy the requirement. The whole of this case, when concentrated, resolves itself into that consideration,

Their rights are contained in the testator's direction following various gifts taking precedence, that "my residuary estate be divided among my three sons" (named) "in equal shares." I omit reference to the provisions for substitution as I think them immaterial.

Two points are to be noted. First, the appellants, taken conjointly, are really residuary legatees of the estate itself, and are not simply legatees of a particular fund consisting of an indeterminate surplus remaining after the preceding trusts are completed. This distinguishes the present case from such cases as *Weatherall* v. *Thornburgh* (6). The other point is that, between them all, they take, subject to the preceding trusts, the whole residuary estate, and not some fraction of it. This fact

(1) (1894) 2 Ch., 499.
(2) 26 Ch. D., 736.
(3) 31 Ch. D., 135.
(4) 31 Ch. D., 577.
(5) (1900) 2 Ch., 778, at p. 789.
(6) 8 Ch. D., 261.

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distinguishes the present case from *Lord Sudeley's Case* (1). That case hangs on the circumstance that Mrs. Tollemache was entitled only to a one-fourth share of the residue, and therefore, on well-established rules of equity, could not, in the absence of an agreement among all the residuary legatees or a proper appropriation by the executors, do more than claim a regular performance of the trusts. That was the only equity she had.

Treating the present appellants, therefore, as entitled eventually to the whole residuary estate between them, and as being capable by agreement among themselves of claiming it *in specie* at some time, the question is whether equity, having regard to the precedent interests still outstanding, recognizes in the appellants a right to present enjoyment. In *Harbin* v. *Masterman* (2) *Lindley* L.J. says :—" What is the meaning of a will which charges a residuary estate with a legacy or several legacies of this kind, and directs that upon the death of the survivor of the annuitants the residue is to be divided ? As between the annuitants on the one hand and the residuary legatees upon the other, it is a gift of the residue subject to the payment of the annuities. And if the annuities are released, or ample provision is made for the payment of them, it has been the invariable practice of the Court to let the residuary legatees have what is theirs, subject to the payment of the annuities."

The Commissioner relies upon the doctrine there enunciated, as establishing a right to present enjoyment, exercisable at the will of the appellants immediately—treating the precedent interests as mere incumbrances, which they may, if they choose, satisfy by security; while the appellants contend that until precedent legacies are cleared the necessary right of the appellants is not immediate, and they have not an equitable estate in possession. I have already said that so far as the appellants' argument rests upon the fact of, or the right to, actual possession of the land itself I do not agree with it. And if " possession " in the definition means " actual possession " at all, it necessarily means possession of the land itself.

Laying that contention aside, the matter, which must have very wide importance in the practical operation of the *Land Tax*

(1) (1897) A.C., 11. (2) (1896) 1 Ch., 351, at p. 361.

Act, can only be resolved on principle by recalling the true meaning of an equitable estate and by examining the ground upon which Courts of equity exercise the jurisdiction that was exercised in *Harbin* v. *Masterman* (1).

It is a fundamental rule (see, for instance, *Butler's* note III. to *Coke upon Littleton*, 290 (b), and *Ewing* v. *Orr Ewing* (2)) that equity acts *in personam*, and that the rights it recognizes, and enforces, are not rights *in rem*, but rights *in personam*. "Trusts," says *Lindley* L.J. in *In re Williams* (3), are "equitable obligations to deal with property in a particular way." Trustees have no equitable interest; that belongs to the person or persons for whom the benefit is intended. The right of any *cestui que trust* to have the property dealt with as the trust requires is regarded for the purposes of equity as equivalent to a right in the property itself, but only commensurate with his particular right *in personam*. In *Pearson* v. *Lane* (4) Sir *William Grant* makes this plain. He says:—"The equitable interest in that estate must have resided somewhere: the trustees themselves could not be the beneficial owners; and, if they were mere trustees, there must have been some *cestui que trust*. In order to ascertain who they are, in such a case a Court of equity inquires, for whose benefit the trust was created; and determines, that those, who are the objects of the trust, have the interest in the thing, which is the subject of it."

But it must not be overlooked that the complete interest in the thing is shared by all the objects of the trust. The Master of the Rolls was careful to say that where land is given on trust to sell, and pay the produce to A, he is, notwithstanding other purposes of sale, entitled to the surplus, and, therefore, in equity to the land, but "subject to those purposes; and, if he provides for them, he may keep the estates unsold." And in *Harbin* v. *Masterman* (5) the qualification is express, "subject to the payment of the annuities."

If no one else is interested, or if all interested combine, the position is that stated by Lord *Cairns* in *Brook* v. *Badley* (6),

(1) (1896) 1 Ch., 351.
(2) 9 App. Cas., 34, at p. 40.
(3) (1897) 2 Ch., 12, at p. 18.
(4) 17 Ves., 101, at p. 104.
(5) (1896) 1 Ch., 351.
(6) L.R. 3 Ch., 672, at p. 674.

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and the person or persons so interested may claim the property from the trustee as an unqualified right. In every case of special trust, therefore, the position is, as was said by Lord *Davey* in *Mountcashell* v. *More-Smyth* (1), that "the nature and extent of the equitable interest must be determined by the words by which it is created"; and the estate of the *cestuis que trustent*—apart from ancillary doctrines as to valuable consideration and notice, to affect other persons to the same extent as the trustee himself—is ascertained simply by their right *in personam* to compel their trustee to perform the trusts so far as that interest is concerned. Unless this elementary principle be overlooked, there is no real difficulty in the case.

On the literal terms of the will the appellants have no right to present enjoyment of the residuary estate. The trustees have prior duties to other legatees having definite interests, and the strict performance of those duties requires the trustees to retain possession of the property, to receive the profits, and to deal with them otherwise than by paying them to the appellants. The annuitants take precedence of the appellants, and they have what *Fry* J. calls "a most important interest in the residue" (*Wollaston* v. *Wollaston* (2)); and those and other trusts are interposed according to the strict intention of the testator between the appellants and their actual enjoyment of the property.

It is obvious, therefore, that the principle of *Saunders* v. *Vautier* (3) cannot apply, for the trusts are not exclusively for the appellants' benefit. Nor can it be said that the freehold shall not be left in abeyance, for that principle has no application to equitable estates (see, for instance, *Abbiss* v. *Burney* (4)). Such a doctrine has not been asserted; if it existed it might prove fatal to the appellants' rights altogether.

We are thus brought back to the sole question, what is the exact force of the doctrine stated in *Harbin* v. *Masterman* (5) consistently with the principles I have referred to? On what ground, and within what limits, does a Court of equity disregard the strict intentions of a testator in regard to the performance of

(1) (1896) A.C., 158, at p. 164.
(2) 7 Ch. D., 58.
(3) Cr. & Ph., 240.
(4) 17 Ch. D., 211, at p. 229.
(5) (1896) 1 Ch., 351.

the trusts he creates? The answer is that the passage in *Harbin* v. *Masterman* (1) already quoted is not intended to override any of the established rules of equity as to trusts, nor to alter the nature of the right of a *cestui que trust* from a right *in personam* to one *in rem*; nor to affect the right of any other object of the trust. The jurisdiction to regard and act upon the views there expressed by the learned Lord Justice, and even in opposition to one of the objects of the trust, is simply that of *administration of estates*: *In re Evans and Bettell's Contract* (2). That is the key to the problem, so far as any problem remains after applying the elementary rule of equity already referred to. The jurisdiction in administration is referable, not merely to trusts as its basis, but to what *Story* (sec. 534) calls "the mixed considerations" which operate in equity. In that jurisdiction the Court superintends the administration, so as to secure effectual and complete justice, and for that purpose follows what Lord *Lindley*, in the passage quoted, calls a "practice."

In *Evans and Bettell's Case* (2) Lord (then Mr. Justice) *Parker* said that he was not sure the jurisdiction to distribute the estate after provision for what appears to be a sufficient fund has ever been exercised, or could well be exercised with regard to real estate. This is important when considering whether the ultimate residuary legatee has the strict right asserted. Actual possession is, of course, different. The pith of the matter when the doctrine of *Harbin* v. *Masterman* (3) comes to be examined is this: that the Court, on application by a legatee claiming a life estate or the ultimate ownership, sets itself as a paramount and beneficent administrator to perform in substance the trusts created, and in the most beneficial manner, notwithstanding the course directed involves some departure from a subordinate particular intention of the creator of the trusts (*Tidd* v. *Lister* (4) and *In re Richardson* (5)). Non-essential directions as to the actual successive possession of the *res*, and intended only to secure desired actual enjoyment of the benefits conferred, may have to yield to the best effectuation of the main purpose, provided the Court sees

(1) (1896) 1 Ch., 351, at p. 361.
(2) (1910) 2 Ch., 438.
(3) (1896) 1 Ch., 351.
(4) 5 Madd., 429.
(5) (1900) 2 Ch., 778.

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that no single interest can reasonably be said to be thereby imperilled or impaired. But so long as others are interested it is not correct to say that an intermediate or the ultimate object of a trust can claim as a strict equitable right of property a departure from the course prescribed by the instrument: it rests in the sound discretion of the Court to say whether that departure shall be permitted; and the Court, in exercising its discretion, cannot and does not alter the substantial relative rights of beneficiaries, and does not take away or knowingly impair in the least degree the rights of one person for the benefit of another. Authorities which exemplify these principles include such cases as *Weatherall* v. *Thornburgh* (1); *In re Collins* (2); *In re Bagot's Settlement* (3); and *Re Smeed* (4).

Assuming, therefore, that the appellants are in a position to obtain from a Court of equity an order permitting them to enter into actual possession of the land or the receipt of profits, they could do so, as *Cotton* L.J. says in *Weatherall* v. *Thornburgh* (5), only as a matter of indulgence and discretion, and not as of right. Courts of equity have, it is true, always leant against restrictions on the enjoyment of an absolute vested interest (*Wharton* v. *Masterman* (6)); and have therefore assisted an ultimate legatee consistently with preserving prior rights. But there is an essential difference between an appeal to the discretion of the Court as regulating administration of estates, and a claim of right, which the Court enforces as a strict requirement of a trust; and in order to bring the appellants within the definition of the Land Tax Acts, nothing, as I have already said, short of such a right will suffice. This right they have not got. The right they have to invoke the Court's discretion—that is, speaking generally, the State Court's discretion—on terms yet wholly undefined, cannot be considered by this Court as equivalent to a right to have possession of the land itself. I do not, of course, rest my opinion on the difference as to the Courts, but the illustration helps to bring out the point distinctly. If possession were decreed under the administration jurisdiction of a Court of equity, I should

(1) 8 Ch. D., 261, at p. 270.
(2) 32 Ch. D., 229.
(3) (1894) 1 Ch., 177.
(4) 54 L.T., 929, at p. 930.
(5) 8 Ch., 261.
(6) (1895) A.C., 186, at pp. 198, 199.

require still further opportunity of consideration before determining that a freehold estate "in possession" would be thereby created. I say so much to prevent it being thought I come to any conclusion on that point one way or the other. Even where such possession is given, it is not final, and the Court may, if necessary, restore it to the trustees. See *Bagot's Case* (1). There would not, as I conceive, be any difficulty if possession were given, and, so long as it was retained, in bringing the appellants under sub-par. (*b*) of the definition of "owner," but as to sub-par. (*a*) in such case I say nothing until the position arises.

I agree with the Chief Justice that the question should be answered in favour of the appellants.

RICH J. The facts of the case have already been stated, and I proceed to deal with the question which emerges for consideration. "Owner," in sec. 3 of the *Land Tax Act* 1910-1911, in relation to land is, so far as this case is concerned, defined to include "every person who jointly or severally, whether at law or in equity, is entitled to the land for any estate of freehold in possession." The words "in possession" denote an immediate right as distinguished from one in remainder or reversion. The question then is whether the appellants have an immediate or present right to the land the subject of this appeal. The will begins with a bequest of chattels and a right to occupy a certain house and land. Testator then devises and bequeaths the residue of his real and personal property to the trustees of the will upon trust to pay his debts, &c., and certain annuities, and to accumulate a fund for the purpose of providing for his daughters. After directing payment of some minor sums there follows the gift of the estate now in question to the appellants: "I direct that my residuary estate be divided among my three sons in equal shares." Accidental circumstances may prevent the expectations of the testator being realized, but the nature of the estate taken by the appellants depends upon the words used by the testator, and not on the consideration that by reason of the prior charges contained in the will the appellants may derive no immediate benefit from

(1) (1894) 1 Ch., 177, at p. 182.

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their estate. My duty is to construe the Act of Parliament and the will, and not to criticize them. Hardship is a matter for the Parliament or the testator, and cannot affect interpretation.

In my opinion no precedent estate or interest is given by the will which makes that given to the appellants an estate *in futuro* or remainder, or postpones its being vested in possession. The prior interests given by the will are at most charges on the estate devised to the appellants. In my opinion the appellants have a present right which entitles them to pay off or provide for those charges and have possession of the estate. Apart from this, they are entitled to the surplus rents or income, if any. The whole of the beneficial interest is not disposed of for a particular period and the estate of the appellants postponed until the expiration of that period. I consider that the appellants are entitled in equity to an estate of freehold in possession, and that the question submitted should be answered in the affirmative.

Question answered in the negative.

Solicitors, for the appellants, *Croft & Rhoden.*

Solicitor, for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.