[HIGH COURT OF AUSTRALIA.]

THOMAS PURCELL . . . . . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

H. C. OF A. 1920.

BRISBANE, *June* 24.

SYDNEY, *Aug.* 14.

Knox C.J., Isaacs, Gavan Duffy and Rich JJ.

Bill of Sale—Declaration of Trust—Validity—Effect of non-registration—Bills of Sale Act 1891 (*Qd.*) (55 *Vict. No.* 23), *secs.* 3, 4.

The *Bills of Sale Act of* 1891 (Qd.) provides, by secs. 3 and 4, that until registered in the manner prescribed by that Act, bills of sale (including, *inter alia*, declarations of trust of chattels without transfer) under which the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any chattels comprised therein or made subject thereto, shall not have any effect.

An owner declared himself a trustee of certain property (including chattels) for himself, his wife and his daughter (the interest of the daughter being settled). In declaring the trust he reserved to himself exclusive powers of management and disposition. The declaration was not registered under the *Bills of Sale Act*.

Held, that the declaration of trust was valid and binding upon the settlor, on the ground that it was not a declaration of trust of chattels within the meaning of the *Bills of Sale Act*—by *Knox* C.J., *Duffy* and *Rich* JJ., because neither the wife nor the daughter had power under the deed to seize or take possession of the chattels comprised therein; by *Isaacs* J., because the deed operated, if at all, only as a gift of shares of the settlor's profits arising from the business.

SPECIAL CASE.

The appellant, Thomas Purcell, was a grazier in Queensland, and early in 1916 was the owner of a station known as Galway Downs,

H. C. OF A. 1920.

PURCELL v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

other pastoral holdings, and live stock depasturing thereon. On 20th May 1916 he executed a declaration of trust in favour of himself, his wife and his daughter, in terms which so far as material are set out in the judgments hereunder.

Purcell was assessed by the respondent, the Deputy Federal Commissioner of Taxation, to income tax in respect of £35,129 as income derived from the grazing business during the year 1st July 1916 to 30th June 1917. It was claimed on behalf of the appellant that this income was received by him as trustee for himself, his wife and his daughter in equal shares, and that each beneficiary should be assessed in respect of one third share of that amount.

On appeal to the High Court (*Knox* C.J.), the respondent put forward the contentions: (1) that the declaration of trust was within the terms of sec. 53 of the *Income Tax Assessment Act* 1915-1916, and must consequently be disregarded for the purpose of the assessment of income tax; (2) that the declaration of trust was a bill of sale within the meaning of the *Bills of Sale Act of* 1891 (Qd.) (55 Vict. No. 23), and, not having been registered in the manner prescribed by that Act, was void and of no effect.

Knox C.J. found in favour of the appellant on the first contention; and with respect to the second directed, under sec. 18 of the *Judiciary Act* 1903-1910, that the following question be argued before the Full Court: Whether the declaration of trust dated 20th May 1916 executed by the appellant, not having been registered in the manner prescribed by the *Bills of Sale Act of* 1891, is a valid declaration of trust binding on the appellant, or is of no effect with respect to the chattels comprised therein.

Woolcock and *Hart*, for the respondent. On the execution of the declaration of trust without ostensible change of possession, the right of possession which was formerly in the appellant in his own personal right became vested in him as trustee for himself, his wife and daughter. By sec. 3 of the *Bills of Sale Act of* 1891 the Act is intended to apply to cases where goods remain in the possession or apparent possession of the grantor, while the property or right to take possession is vested in some other person. The words " declarations of trust of chattels without transfer " import that the ostensible

possession remains in the grantor. No express power is required in the document to give the holder or grantee "power to seize or take possession" referred to in sec. 3 (2): if the right to seize is the legal result of the execution of the document, that is sufficient; it is sufficient if the right to take possession is vested in one of the grantees. There is a notional change of possession by virtue of the document, for the right to possession was transferred from the appellant as owner to the appellant as trustee. This is an equitable assurance of chattels (*Mercantile Acts* 1867 to 1896; *Ex parte Mackay and Brown*; *In re Jeavons* (1)). It is necessary that the document should contain a power to seize. [Counsel referred to *Ex parte Cooper*; *In re Baum* (2); *Woodgate* v. *Godfrey* (3); *Snell* v. *Heighton* (4); *In re Roberts*; *Evans* v. *Roberts* (5); *Anning* v. *Anning* (6); *Dublin City Distillery Ltd.* v. *Doherty* (7).] Possession of the trustee is the same as possession of the cestui que trust (*Halsbury*, vol. XXVIII., p. 94; *Lord Grenville* v. *Blyth* (8); *Stone* v. *Godfrey* (9); *Ashton* v. *Blackshaw* (10); *Adams* v. *Adams* (11); *In re Williams*; *Williams* v. *Williams* (12); *R.* v. *Townshend* (13); *Ex parte Hubbard*; *In re Hardwick* (14)). A trustee cannot assert any right to possession adverse to that of the cestui que trust. [*Rhodes* v. *Muswell Hill Land Co.* (15) was also referred to.]

Feez K.C., *Ryan* K.C. and *Douglas*, for the appellant. The declaration of trust does not fall within the terms of sec. 3 (2), for here there is no power in the grantee to seize or take possession. No one of the cestui que trusts had the right.

[ISAACS J. referred to *Fowler* v. *Foster* (16); *Letterstedt* v. *Broers* (17); *Spencer* v. *Midland Railway Co.* (18); *Halsbury*, vol. III., p. 11; *Great Eastern Railway Co.* v. *Lord's Trustee* (19).]

A declaration of trust of two thirds in favour of A and B is the same as a declaration of trust of two thirds in favour of A and B

(1) L.R. 8 Ch., 643, at p. 648.
(2) 10 Ch. D., 313.
(3) 4 Ex. D., 59.
(4) 1 Cab. & El., 95.
(5) 36 Ch. D., 196.
(6) 4 C.L.R., 1049.
(7) (1914) A.C., 823.
(8) 16 Ves., 224, at p. 231.
(9) 5 DeG. M. & G., 76, at p. 92.
(10) L.R. 9 Eq., 510, at pp. 518-519.
(11) (1892) 1 Ch., 369.
(12) (1912) 1 Ch., 399, at p. 404.
(13) 15 Cox C.C., 466.
(14) 17 Q.B.D., 690.
(15) 29 Beav., 560, at p. 563.
(16) 28 L.J. Q.B., 210.
(17) 9 App. Cas., 371.
(18) 11 T.L.R., 542.
(19) (1909) A.C., 109.

H. C. OF A. 1920.

PURCELL v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

and one third in favour of the settlor (*Charlesworth* v. *Mills* (1); *Halsbury*, vol. XXVIII., sec. 201). This is not a declaration of trust of chattels within the meaning of the Act (*Ramsay* v. *Margrett* (2)).

Woolcock, in reply.

Cur. adv. vult.

Aug. 14.

The following judgments were read :—

KNOX C.J. AND GAVAN DUFFY J. (read by KNOX C.J.). On 20th May 1916 Thomas Purcell signed a declaration of trust which, so far as is material, is as follows :—" I Thomas Purcell of Galway Downs Station in the State of Queensland grazier do hereby declare that I hold the whole of my business of a grazier now carried on by me at Galway Downs aforesaid or elsewhere in the State of Queensland and the whole of the capital stock-in-trade credits and assets of the said business which now and from time to time may represent the same (hereinafter called ' the trust premises ') particulars of part of such assets being set forth in the schedule hereto in trust as to one equal undivided third part thereof for my wife Subyna Purcell as to another equal undivided third part thereof to pay the income thereof to my daughter Mary Purcell until she attains the age of twenty-one years and when she attains the age of twenty-one years as to both the capital and income thereof for my said daughter absolutely but if my said daughter shall die before attaining the age of twenty-one years as to both the capital and income thereof for my said wife absolutely and as to the remaining equal undivided third part thereof for myself upon the trusts and subject to the powers provisoes and declarations hereinafter expressed that is to say :—1. Notwithstanding anything in these presents I shall be at liberty from time to time and at any time in my absolute and uncontrolled discretion either to continue carry on manage and control the said business or any part thereof as I shall think proper or to discontinue wind up or realize the same or any part thereof or to sell mortgage charge or give security for the purposes of the said business over the same or any part thereof or otherwise dispose of

(1) (1892) A.C., 231. (2) (1894) 2 Q.B., 18, at p. 25.

or deal therewith in the same manner as if I were the absolute owner thereof and these presents had not been executed and in particular I shall be at liberty to sell the said business or any part thereof to any company or to any trustees or trustee for or on behalf of any proposed company or to take any person or persons into partnership in the said business on such terms and conditions as I shall think proper and to accept payment in cash by instalments in shares stock or debentures of any company or proposed company or partly in one and partly in another or others of such modes of payment or otherwise howsoever without being in any way responsible or accountable for any loss or damage thereby incurred or suffered and no debtor purchaser mortgagee encumbrancers or other person shall be in any way concerned to see to the application of any moneys paid to me and my receipt alone shall be a sufficient and complete discharge to any such debtor purchaser mortgagee encumbrancer or other person and I declare that the intention of these presents is that no person taking any beneficial interest in the said business or in any part thereof by virtue of these presents shall be entitled in any manner whatsoever to intermeddle or interfere with or in any manner control my management of or my discretion to carry on wind up sell charge or otherwise dispose of or deal with same and that I shall be at all times entitled to use and employ the trust premises or any part thereof for the purposes of the said business and to subject the same to all incidents of trade risk and loss to be incurred or sustained in the carrying out and conduct thereof in such and the like manner and as fully to all intents and purposes in all respects as if the said business were my own absolute property and shall be entitled to deal with the same accordingly save and except that I shall not draw out or divert any part of the assets of the said business for my own purposes merely and shall not charge or encumber or in anywise diminish such assets or any part thereof for or in connection with any purpose or purposes other than those of the said business but nothing hereinbefore contained shall preclude me from drawing my share of profits of the said business from time to time in the ordinary course. . . . 6. I further declare that it shall be lawful for me from time to time and at any time by writing under my hand to nominate and appoint any other persons

H. C. OF A. 1920.

PURCELL v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

Knox C.J. Gavan Duffy J.

or person to act as trustees or trustee of the trust premises either in conjunction with or in substitution for myself and for the said purposes it shall be lawful for me to do all acts matters or things and to execute all writings which I may consider necessary or expedient for the purpose of investing such persons or person with all the rights powers capacities and duties of trustees or of a trustee of these presents and I further declare that if I shall die without having exercised this present power of appointing new trustees or a new trustee of the trust premises or if at the time of my death there shall happen to be no such trustees or trustee then the trust premises shall vest in the trustees for the time being of my will as trustees thereof Provided always and I further declare that if I shall at any time exercise this present power of appointing new trustees or a new trustee of the trust premises such new trustees or trustee for the time being shall not be bound or entitled to require any transfer to themselves or himself of the trust premises or any part thereof and shall not at any time be bound to ascertain the amount of the share of profits to which any beneficiary may at any time or times be entitled under trusts hereby declared or created or be responsible for any costs which any such beneficiary his or her executors administrators or assigns may incur in ascertaining or attempting to ascertain that amount and shall not be bound or concerned to learn what may be the application or misapplication by me of or my dealings with the trust premises or any part thereof or with the said business or the capital stock-in-trade credits or effects thereof or my conduct in relation to the said business and notwithstanding that they may have had notice express or implied of any misapplication by me of the trust premises or of any property of the said business or of any misperformance or breach of any of the provisions of these presents such trustees or trustee shall not be answerable or accountable for any loss which may arise or be occasioned thereby. 7. I further declare that if at the time of my death I shall not have converted my said business into a limited liability company or sold or disposed of the same to any such company or in either case shall have died without having allotted or caused to be allotted as investments representing the trust premises or any part thereof any debentures or shares of any class in any

such company then and in any such case the trustees of my will may notwithstanding anything in these presents exercise any power conferred upon them by my will of converting the said business or any part thereof into a limited liability company or of selling or disposing of the same or any part thereof to any such company in the same manner as if these presents had not been executed and may allot or cause to be allotted any debentures or shares of any class of or in any such company as investments representing the trust premises or any part thereof. 8. I further declare that if pursuant to any power conferred upon them by my will the trustees of my will continue to carry on the said business or any part thereof after my death then notwithstanding anything in these presents they shall at all times and in all respects have the like powers of management control and disposition and shall enjoy the like freedom from interference by the trustees or trustee for the time being of the trust premises or by any person beneficially interested in the said business by virtue of these presents and shall have the like right to use and employ the trust premises or any part thereof in the said business and the like discretion in relation to the said business or its continuance discontinuance sale or other disposition as is conferred upon or reserved to me during my lifetime by these presents." There were then set out, in a schedule, Galway Downs and certain other pastoral holdings, together with certain sheep, cattle and horses thereon; and the schedule continued: "And all my interest in the assets of the business of a grazier carried on by me in co-partnership with Matthew Horan D'Arcy at Ellenburnie in the district of Gregory South."

At the time of signing the declaration of trust Purcell was the owner of the chattels mentioned in the schedule.

On the hearing of the appeal it was decided that the declaration of trust was not affected by the provisions of sec. 53 of the *Income Tax Assessment Act*, and the following question was directed to be argued before the Full Court, namely, "Whether the declaration of trust dated 20th May 1916 executed by the appellant, not having been registered in the manner prescribed by the *Bills of Sale Act of* 1891, is a valid declaration of trust binding on the appellant, or is of no effect with respect to the chattels comprised therein."

H. C. OF A. 1920.

PURCELL v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

Knox C.J. Gavan Duffy J.

There was no ostensible change in the possession of the property in question on or after the date of the declaration of trust, Purcell remaining in possession of the whole of the property and continuing to manage the stations as before.

It is in our opinion quite clear that the declaration of trust in question is a declaration of trust without transfer within the meaning of sec. 3 (1) of the *Bills of Sale Act*, but it is necessary to consider the provisions of sec. 3 (2) which limit the application of the Act to bills of sale under which the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any chattels comprised therein. We do not think that this section requires that the bill of sale in order to come within the Act should contain express words giving power to the grantee to seize or take possession: in our opinion it is sufficient if the legal effect of the transaction evidenced by the bill of sale is to confer on the grantee a right enforceable at law or in equity to take possession of the chattels comprised therein. The question whether the declaration of trust now under consideration confers such a right is one which depends on the true construction of that document. In the case of a declaration of trust we apprehend that the persons beneficially interested take the place of the holder or grantee of an ordinary bill of sale, and the question therefore is whether by virtue of the declaration of trust the beneficiaries thereunder acquired the right to take possession of the chattels comprised therein. It appears to us that the real transaction evidenced by the declaration of trust was that Purcell (the settlor) parted with his beneficial interest in two thirds of the property comprised therein retaining his legal interest in the whole as well as his beneficial interest in one third of the property. Does, then, the declaration of trust give to Mrs. and Miss Purcell, or either of them, the right to seize or take possession of the chattels comprised therein? In our opinion it does not. The effect of the declaration of trust appears to us to be that Mrs. and Miss Purcell each became entitled immediately to one third of the income of the trust property, and Mrs. Purcell immediately, and Miss Purcell eventually, to one third of the corpus, but subject as to both interests to the right of the settlor to retain possession of the property and

to continue to manage and carry on the stations for as long as he should think proper, and subject also to his right to provide by his will for the management after his death. These provisions do not seem to us to offend against any rule of law or equity. We see no reason why a settlor should not retain full powers of management with the right to keep possession of property in which, notwithstanding the settlement, he retains a substantial beneficial interest; and we think this is what the settlor has in effect done in the present case, although he has in form declared that he holds one third of the settled property in trust for himself. If the transaction had taken the form of an assignment by the settlor to trustees for Mrs. and Miss Purcell of two thirds of his beneficial interest subject to the same provisions as those contained in the declaration of trust, especially in clauses 1 and 8, we do not think it could have been contended that the trustees of the settlement could have taken possession of any portion of the chattels comprised in the settlement, and in substance we see no difference between that case and the present.

For these reasons we are of opinion that the declaration of trust is not rendered invalid by reason of the omission to register it under the *Bills of Sale Act*.

The answer to the question submitted should be: "The declaration of trust is valid, and binding on the appellant."

ISAACS J. This matter comes before us by way of a direction of the learned Chief Justice, under sec. 18 of the *Judiciary Act* 1903-1910, on the original hearing before him of an income tax appeal. The direction was that there be argued before the Full Court the question "whether the declaration of trust dated 20th May 1916 executed by the appellant, not having been registered in the manner prescribed by the *Bills of Sale Act of* 1891, is a valid declaration of trust binding on the appellant, or is of no effect with respect to the chattels comprised therein." His Honor decided that the declaration of trust is not affected by the provisions of sec. 53 of the *Income Tax Assessment Act*. We have, therefore, on this proceeding, to read the deed—whatever other construction we may put upon it—as one not having

H. C. OF A. 1920.

PURCELL v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

Isaacs J.

the purpose or effect of in any way directly or indirectly defeating, evading or avoiding any duty or liability imposed on any person by the *Income Tax Assessment Act*, or preventing the operation of the Act in any respect. Consistently with that limitation, its construction and effect and its purpose, as gathered from the terms, are not only open to us, but are in the path of our duty.

It purports on the face of it to be, and it is put forward by the appellant as, a declaration of trust, and it was not denied by his learned counsel that it falls within the statutory definition of a " bill of sale " in sub-sec. 1 of sec. 3 of the Act as being a declaration of trust of chattels without transfer. It will be presently seen that, though it purports to be a declaration of trust, it falls within the statutory definition, yet, when read as a whole, my clear opinion is that it does not really answer even that description, because the trust deed, when properly and consistently construed, reduced the gift primarily appearing to, at most, rights in respect of income of the settlor arising out of *his* business and assets.

The contest nominally arises over sub-sec. 2 of sec. 3, which provides that the Act applies only to bills of sale " under which the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any chattels comprised therein." And, to begin with, I deal with the deed on that basis. We have to consider, therefore, in the first place, whether the " grantee " has the power of taking possession of the chattels. It is conceded that the power to take possession need not be given in express terms. It is sufficient if the rights conferred by the instrument are such as to include the right of possession. As equitable transfer, or an equitable declaration of trust of the proceeds of the property, without more, entitled the owner to possession (*Ex parte Montagu* ; *In re O'Brien* (1)), it is impossible to determine the question of the right of possession without a careful examination of the document itself, in order to ascertain its full nature and the rights of the parties according to its terms and legal operation.

It is made by Thomas Purcell, the appellant, who relies on its provisions to relieve him of taxation, in respect of two thirds of

(1) 1 Ch. D., 554.

the income arising from the trust property, because, as was contended in argument before us, he, by the deed, parted with two thirds of the property. By the deed, Purcell describes himself as of Galway Downs Station in the State of Queensland, grazier. He makes an express declaration of trust. The trust property is described as "the whole of my business of a grazier now carried on by me at Galway Downs aforesaid or elsewhere in the State of Queensland and the whole of the capital stock-in-trade credits and assets of the said business which now and from time to time may represent the same (hereinafter called 'the trust premises') particulars of part of such assets being set forth in the schedule hereto." The schedule sets out as pastoral holdings, Galway Downs and eleven others. It also mentions all the sheep, cattle and horses thereon branded as specified. It also includes all his interest in the assets of a separate business carried on by the settlor in co-partnership with one D'Arcy on another station. All that property is declared by the settlor to be held in trust as to one equal undivided third part for his wife, Subyna Purcell, who gets primarily an immediate absolute and indefeasible undivided third in the whole business and assets; then, as to another equal undivided third part, to pay the income thereof to his daughter, Mary Purcell, until she attains twenty-one and when she attains that age to her absolutely, but if she dies before twenty-one, then as to both capital and income for his wife absolutely; and finally as to the remaining equal undivided third part for himself. It is important to note that he expressly delimits the fullest beneficial interest given to be held by himself as "one third," which confirms the interest given to the daughter. She gets an immediate absolute vested (*In re Gossling*; *Gossling* v. *Elcock* (1)), though defeasible, undivided third of income and corpus (*In re L'Herminier*; *Mounsey v. Buston* (2)). That is the whole of the deed so far as it confers rights or property on the wife and daughter; and, supposing for the moment the deed stopped there, what would be the right of the parties? That supposition is made for two reasons. First, because one view put forward has been that we may and ought to regard the declaration of trust as a mere trust for the wife and the

(1) (1903) 1 Ch., 448.

(2) (1894) 1 Ch., 675, at p. 676.

H. C. OF A. 1920.

PURCELL v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

Isaacs J.

daughter, the settlor excluding from the operation of the trust instrument, excepting in point of law, the residue of the beneficial interest from the ambit of the deed, namely, the one third not given away. The second reason is that it was argued that, because the settlor is himself the trustee, transfer of possession to himself is unnecessary or impossible in law. Now, as to the first view mentioned, it is true he did not give the others more than two thirds. But that is quite different from saying he did not place the whole, including his beneficial one third interest, within the trust provisions. His words are : " *The whole of* my business " &c. and " *the whole* of the capital stock-in-trade " &c. *in trust*. Whether the practical effect in pounds, shillings and pence would have been the same, if he had said " two thirds " instead of " the whole," is beside the question. Such an argument was raised and overruled by the House of Lords in *Earl Grey* v. *Attorney-General* (1) and by this Court in *Lang* v. *Webb* (2). If for any reason someone else were to be appointed trustee in the settlor's place, would not the new trustee—disregarding for the moment the later provisions of the deed—be trustee for all three beneficiaries ? If not, then of course Purcell is not himself assessable as trustee in respect of his own interest. The matter seems transparently clear. The settlor was, and is, the legal owner of all the property. He so dealt with it as to retain an equitable interest, not so extensive as his legal interest, and therefore the two distinct interests, the legal and the equitable, stand together (*Phillips* v. *Brydges* (3) and *Fung Ping Shan* v. *Tong Shun* (4)). The result, so far, is that Purcell, by his affirmative declaration of trust, holds the whole of his business (that is, the intangible property of the enterprise of producing for sale and buying for sale and selling), and also the concrete elements of real and personal property and the choses in action comprising the assets of that business, in trust for the three equitable owners.

It is difficult to see, going no further for the moment than the primary declaration of trust, how, with their undivided thirds and joint ownership of a going concern called a " business " and of its assets, they are not partners if that business continues, with the

(1) (1900) A.C., 124, at p. 126.
(2) 13 C.L.R., 503.
(3) 3 Ves., 120, at pp. 125-127.
(4) (1918) A.C., 403, at p. 411.

primâ facie right of joint possession, at least as to the wife. If they are not, then the business and its profits are necessarily Purcell's, and he is the sole taxpayer in respect of them, though he might be bound either by personal obligation as distinct from a trust (*Bank of Scotland* v. *Macleod* (1)), or perhaps more probably by a trust as to his profits when received out of the business and assets as his property, as distinguished from a trust as to the business and assets as the joint property of the three, to hand over a third of the assets or even the income thereof as the revenue of *their* property to each of them, his wife and his daughter. But if they are partners in equity, the trust—always be it remembered going no further than the provisions already quoted—would be merely to permit the beneficial owners to enjoy their property according to the rights conferred. Trustees exist for the benefit of the beneficiaries, and for that alone (*Letterstedt* v. *Broers* (2) and *Ewing* v. *Orr Ewing* (3)). The settlor would hold no longer as individual owner but as trustee, because he says so. His enjoyment would be no longer in his individual capacity (see *per Grant* M.R. in *Attorney-General* v. *Munby* (4)), but as equitable owner under his new charter of rights, and the wife, an adult, would have precisely equal rights, and his daughter, having an immediate absolute one third, would be entitled to the same right, and, though a minor, would be a partner (*Lovell* v. *Beauchamp* (5)). The three would have equal right to possession of the business and all the property belonging to the firm. Their possession would be one of the " unities " of their joint ownership. The right to possession is " the essential part of ownership " (*Williams on Real Property*, 20th ed., p. 2), and, resting at the primary gift, there is no reason either in law or justice why the wife should not—whatever might be the case with the daughter—enter at will into possession. No injury could possibly arise thereby to any other cestui que trust. The principle is exactly the same as is laid down in *In re Marshall*; *Marshall* v. *Marshall* (6).

Before considering how that *primâ facie* position is affected by

(1) (1914) A.C., 311, at p. 323.
(2) 9 App. Cas., at p. 386.
(3) 10 App. Cas., 453, at p. 530.
(4) 1 Mer., 327.
(5) (1894) A.C., 607, at p. 611.
(6) (1914) 1 Ch., 192, see pp. 199-203.

H. C. OF A. 1920.

PURCELL v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

Isaacs J.

the succeeding provisions of the deed, it will be convenient to say a word as to the second reason above mentioned for denying the necessity of taking possession, even going no further than the primary provisions quoted. A person may be trustee for more than one estate, and unless he could, by an unequivocal and appropriate act, transfer effectually property from himself as trustee of one estate to himself as trustee of the other, his dual trusteeship would be in many instances a detriment to both estates and a bar to ordinary transactions. Further, the business of trustee companies would be seriously curtailed. The principle, however, appears clearly in *Vandenberg* v. *Palmer* (1), and, if the matter depended on transfer of property or possession to Purcell as trustee, that would appear to be satisfied, but a "declaration of trust without transfer" means without transfer of the legal ownership to the cestui que trust, who is the grantee, and the right of possession is the cestui que trust's right of personally having possession as *against* (and not by means of) the trustee. In *Milroy* v. *Lord* (2) *Turner* L.J. specifies three modes of effectual, though voluntary, transfer of property by a settlor, viz., (1) actual transfer to the beneficiary, (2) transfer to another person as trustee for the beneficiary and (3) declaration that he himself holds it in trust for the beneficiary. The last is the declaration without transfer, and the right of the equitable grantee to have possession cannot be satisfied by the settlor's retention of the property. That would give no *meaning* to the statutory requirement. We are now brought face to face with the remaining provisions in the deed. It was contended that as every cestui que trust must accept the gift as given, that is, subject to all the trusts contained in the deed of trust, the wife and daughter are bound to permit the possession to remain in the settlor, and therefore, by sub-sec. 2 of sec. 3 of the Act, registration was unnecessary. That the so-called equitable property of a cestui que trust is commensurate with the relief which a Court of equity would decree in his favour; that the power of a cestui que trust (or all the cestuis que trust, if of one mind) to determine the trust and take the property into their own hands, is dependent on their being *sui juris*, are propositions that are really fundamental. But for

(1) 4 Kay & J., 204.

(2) 4 DeG. F. & J., 264, at p. 274.

several reasons, they have no application in the present case, except as they apply to enforce the right of the three beneficiaries to joint possession under the provisions so far quoted. It is urged that one of the " trusts " is that Purcell shall solely possess and manage the affairs of the business and the assets appertaining to it, and that that is enough to determine the question. It is unnecessary to consider how far exclusive management connotes exclusive possession, because the provisions of the deed which are relied on as creating exclusive management and exclusive rights of possession in the settlor are, in my opinion, of such a character as not to require examination for such a purpose. There are eight clauses, and, reading them together and in connection with the primary gift, the deed *as a whole* constitutes the most extraordinary production of the kind that within my judicial and professional experience has ever been brought under the consideration of a Court of Justice. We are bound, as already stated, to consider it as not obnoxious to sec. 53 of the *Income Tax Assessment Act*, but, apart from that, its character as a mere device to do and yet not to do, to give and yet to retain, to part with and nevertheless to control in life and in death the property of the settlor, is, when its substance is weighed, patent on the face of the document. It is idle to stop and pick out isolated powers which, if they stood alone or as ordinary powers in an ordinary deed of the kind, would be recognized and respected. No doubt, the sole management and the sole possession of the business and all its belongings, all the settlor's property all over Queensland, are by the letter of the instrument conserved to him. But in what connection ?—As part of one entire indivisible scheme nominally to bestow immediate interests, and yet to proceed immediately to divest the beneficiaries of every vestige of ownership and rights of property in the things enumerated, and to reduce them as to those things, both during the settlor's life and after his death, to his personal will and bounty to be exercised *inter vivos* or by testamentary disposition at his discretion.

After declaring the trust already quoted, the deed proceeds, in clause 1, to say : " *Notwithstanding anything in these presents* I shall be at liberty from time to time and at any time in my absolute

H. C. OF A. 1920.

PURCELL v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

Isaacs J.

and uncontrolled discretion either to continue carry on manage and control the said business or any part thereof as I shall think proper or to *discontinue* wind up or realize the same or any part thereof or to sell mortgage charge or give security for the purposes of the said business over the same or any part thereof or otherwise dispose of or deal therewith in the same manner as if *I were the absolute owner thereof and these presents had not been executed* and in particular I shall be at liberty to sell the said business or any part thereof to any company or to any trustees or trustee for or on behalf of any proposed company *or to take any person or persons into partnership in the said business on such terms and conditions as I think proper.*" How this last provision is compatible with the wife and daughter retaining fixed interests, it is impossible to imagine; and as he retains the power of discontinuing the business—that is, destroying property he is supposed to have given—his ownership seems unimpaired; it goes beyond any reasonable powers of management. Further on in the same clause he declares that he is to have exclusive management and control and in effect to do what he pleases in conducting the business "*as if the said business were my own absolute property*," and that he "*shall be entitled to deal with the same accordingly.*" The only saving provision is this: "save and except that I shall not draw out or divert any part of the assets of the said business for my own purposes merely and shall not charge or encumber or in anywise diminish such assets or any part thereof for or in connection with any purpose or purposes other than those of the said business." But, having taken the power to discontinue or wind up the business, the saving clause might be ignored as not having any operation beyond the existence of the business. Clause 2 takes power to make and vary investments of any kind and anywhere "as if I were absolute owner of the trust premises" without responsibility. By clause 3 he takes power to decide what money represents income and what represents capital, and may allot or apportion property and investments to each beneficiary. Clause 4 takes power to apply income of a minor to maintenance. Clause 5 takes power to alter and rebuild "as if absolute owner." Clause 6 takes power to appoint new trustees, and he declares that if he dies without leaving a trustee of the deed, the trust premises shall vest in the trustees

of his will as trustees of the deed. Then comes this declaration: "Provided always and I further declare that if I shall at any time exercise this present power of appointing new trustees or a new trustee of the trust premises such new trustees or trustee for the time being *shall not be bound or entitled* to require any transfer to themselves or himself of the trust premises or any part thereof and shall not at any time be bound to ascertain the amount of the share of profits to which any beneficiary may at any time or times be entitled . . . *and shall not be bound or concerned to learn what may be the application or misapplication by me of or my dealings with the trust premises or any part thereof or with the said business*" &c. "notwithstanding that they may have had notice express or implied . . . of any misperformance or *breach of any of the provisions of these presents.*" Thus, even if new trustees be appointed in his stead, he and not they shall exercise dominion over the property; and, as he would not then be trustee, what would a Court of equity do? There is not such certainty as an enforceable trust requires. The Court would have to construe the trust. Clause 7 is in these terms: "I further declare that if at the time of my death *I* shall not have converted *my* said business" (observe the word "my") "into a limited liability company or sold or disposed of the same to any such company or in either case shall have died without having allotted or caused to be allotted as investments representing the trust premises or any part thereof any debentures or shares of any class in any such company then and in any such case the *trustees of my will* may notwithstanding anything in these presents exercise any power conferred upon them by my will of converting the said business or any part thereof into a limited liability company or of selling or disposing of the same or any part thereof to any such company in the same manner as if *these presents had not been executed.*" Clause 8 runs thus: "I further declare that if pursuant to any power conferred upon them by my will the trustees of my will continue to carry on the said business or any part thereof after my death then notwithstanding anything in these presents they shall at all times and in all respects have the like powers of management control and disposition and shall enjoy the like *freedom from interference*

H. C. OF A. 1920.

PURCELL v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

Isaacs J.

by the trustees or trustee for the time being of the trust premises or by any person beneficially interested in the said business by virtue of these presents and shall have the like right to use and employ the trust premises or any part thereof in the said business and the like discretion in relation to the said business or its continuance discontinuance sale or other disposition as is conferred upon or reserved to me during my lifetime by these presents."

It is impossible to convey a proper notion of the deed as a whole without quoting as much as above appears. And reading it as a whole, it certainly is one which, if it can be regarded, as argued for the appellant, as a serious and lawful declaration of trust, with a retention of substantially all the rights of proprietorship which the settlor had before executing the deed, then it seems a new and expansive chapter is added to the law of trusts, a chapter that will afford a comfortable refuge to many an enterprising debtor or taxpayer desiring shelter from the financial obligations of the law. To borrow the phrase of an American author, it "faces north by south." What it gives, it assumes to take away. It purports to create rights, and then immediately to deny any obligation to observe them. It gives immediate interests, and reserves the right of dealing with them in life and by will. It contemplates trustees who are to replace the settlor, and denies them the right to be seised of or to control the property. If it is not in substance a mere trust to pay out of the *settlor's* income, when received, a third of its amount to each of them, the wife and the daughter: then either it is a nullity, a mere simulacrum as to the gift of property in the business and assets themselves, creating no such obligations as a Court of equity could enforce (see and compare the language of the Privy Council in *Mussoorie Bank* v. *Raynor* (1)), and, if so, it does not require registration ; or it is an effective gift of that property by the primary provisions. The remaining provisions are so intermingled and united that they cannot justly be segregated. As a mass, they are repugnant to the gift regarded as a gift of shares in the business assets themselves. At most, they limit the primary gift so as to leave the dominion in the property, both legal and equitable, in

(1) 7 App. Cas., 321, at p. 331.

the settlor, and so as to confer a right to receive from him a share, variable according to the number of partners and their retrospective shares for the time being, of whatever income happens to be made by the settlor or by the firm which for the time being he creates under the power of introducing partners if the business continues, and, if not, then by the settlor as owner of the property. If the primary part is to stand as a gift of the property itself, then the repugnant provisions must, on the principle of *Gosling* v. *Gosling* (1) or *Harbin* v. *Masterman* (2), be disregarded, and, if so, the deed requires registration.

The only ground on which it is not required to be registered is that it is a nullity except, probably, as to the wife and the daughter receiving a third each out of the settlor's profits—his profits. As that is open on this proceeding, that is the proper conclusion. If it were not, then the proper conclusion would be that registration *is* necessary.

RICH J. The effect of the declaration of trust in this case may, for the purposes of my judgment, be summed up very briefly. An owner has declared himself a trustee of certain property (including chattels) for himself, his wife and daughter, the latter interest being settled. The settlor, in declaring the trust, has reserved to himself very wide powers of management and disposition.

Apart from the *Bills of Sale Act of* 1891 (Qd.), I see nothing in the terms of the settlement to prevent it being a valid declaration of trust. In my judgment it is competent to a settlor to give beneficial interests to others along with himself, and at the same time to provide that the interests are undivided interests, and that they are subject to the restrictions of the nature set forth in the instrument under consideration. It differs altogether from a gift in fee or of an absolute interest to a sole cestui que trust. If authority be needed for this statement, the principle of *In re Horsnaill*; *Womersley* v. *Horsnaill* (3), approved in *In re Kipping* (4), seems to apply.

The *Bills of Sale Act of* 1891 does not affect the validity of the

(1) John., 265, at p. 272.
(2) (1894) 2 Ch., 184, at p. 197.
(3) (1909) 1 Ch., 631.
(4) (1914) 1 Ch., 62.

H. C. OF A. 1920.

PURCELL v. DEPUTY FEDERAL COMMISSIONER OF TAXATION.

Rich J.

declaration of trust. The definition of the Act no doubt includes "declarations of trust of chattels without transfer," but that is subject to the important provision that "this Act applies only to bills of sale under which the holder or grantee has power, either with or without notice, and either immediately or at any future time, to seize or take possession of any chattels comprised therein or made subject thereto." Under the declaration of trust before us, there is no right, either at law or in equity, to seize or take possession of such chattels.

For these reasons I answer the question propounded by the Chief Justice, by saying that the declaration of trust dated 20th May 1916 is a valid declaration of trust binding on the appellant with respect to the chattels comprised therein.

Question answered accordingly.

Solicitors for the appellant, *Atthow & McGregor.*

Solicitors for the respondent, *Chambers, McNab & McNab*, for Commonwealth Crown Solicitor.