LORD BRAYBROOKE - - Appellant.

The ATTORNEY-GENERAL - Respondent.

A tenant in tail in remainder cannot vary the amount of his liability to succession duty by barring the entail, and resettling the estate in his own favour. The person from whom he derives the estate is his “predecessor.

Devise in 1796 of certain freehold estates to A. for life, remainder to his eldest son B. for life, remainder to the first and other sons of B. in tail male. In 1841, A. being then tenant for life in possession, A. & B. executed a disentailing deed, to which two other persons were parties as trustees, and granted to the trustees, to hold, subject to the life estate of A., to such uses as A. and B. should appoint, and in default, if B. should survive, to such uses as he should appoint, and in default to B. for life, and to his first and other sons in tail male. In 1850, by another deed which recited the former, and by which A. brought new estates into settlement, and discharged all the estates from a charge of 10,000 l., and B. gave up advantages to which be was entitled, an annuity to B. during the life of A. was charged upon all the premises, and subject thereto, they were appointed to A. for life, remainder to B. for life, remainder to the use of his first and other sons in tail male:

HELD, affirming the judgment of the Court below, that these deeds must be taken as having been executed on the same day, that they constituted (diss. Lord Wensleydale) within the 12th section of the 16 & 17 Vict. c. 51, a disposition made by B. in favour of himself, and made out of the estate to which he was entitled under the will of 1796, that consequently his “succession” must be treated as happening under that will, and he was liable thereupon to the amount of duty chargeable in respect of his succession to the testator, on a disposition made under it by himself. And (diss. Lord Wensleydale) the nature of the consideration upon which the disposition was made did not affect the question.
The annuity, according to the terms of its creation, ceased on the death of A., at which time B. entered into possession of the estates:
HELD, varying the judgment of the Court below, that he was entitled under the 38th section of the Act to an allowance as on account of property of which he had been “deprived@ within the meaning of that section.

The Succession Duty Act is not to be construed according to the technicalities of the Law of England or Scotland, but according to the popular use of the language employed.

Per Lord Campbell (Lord Chancellor) : The protector of a settlement giving his consent to a disposition of property cannot be treated as a creator of such disposition.

Two deeds, though executed at an interval of nine years from each other, may be treated as constituting one disposition. And what is done under a power of appointment is to be referred to the deed creating the power.

THIS was an appeal against a decision of the Court of Exchequer as to the amount of succession duty payable by the Appellant, under the following circumstances:-

Lord Howard de Walden was, in 1788, created Baron Braybrooke, with remainder in the barony, in default of male issue., to his cousin, Richard Aldworth Neville, and the heirs male of his body.

In an information filed by the Attorney-General against the present Appellant, it was stated that, in 1796, Lord Howard de Walden devised certain estates known as the Audley End mansion estates, to the said R. Neville, for life, remainder to the use of his eldest son Richard Neville, for life, with remainder to the first and other sons of the body of the said Richard Neville successively, according to seniority, in tail male. The testator died 25 May 1797, and Richard Aldworth Neville, who afterwards took the surname of Griffin, succeeded him in the barony, and became the second Lord Braybrooke. He died in 1825, and his eldest son, Richard (the second tenant for life mentioned in the will), succeeded him, and became third Lord Braybrooke. His eldest son, Richard Cornwallis Griffin (the present Appellant) was born in March 1820. In 1841 Richard, the third Lord Braybrooke, and Richard Cornwallis, the Appellant, were respectively tenant for life in possession, and tenant in tail in remainder of the Audley End mansion estates, under the will of the testator, and they joined in executing a disentailing deed, dated 21 July 1841. The deed was expressed to be between Richard Griffin, the third Lord Braybrooke, of the first part; the Appellant of the second part, Lord Lyttelton and the Hon. R. N. Lawley, of the third part; and it was witnessed that, for the considerations therein mentioned, the Appellant, with the consent of Lord Braybrooke, as protector of the settlement., granted unto Lord Lyttelton and Mr. Lawley, their heirs, &c., all and singular the manors and other hereditaments therein mentioned (including the Audley End mansion estates), which then stood limited at law or in equity to the Appellant, to hold the same, subject to the estate for life of Lord Braybrooke, and to any term of years precedent to the estate tail of the Appellant, to such uses as Lord Braybrooke and the Appellant should, by any deed, &c., with or without powers of revocation or new appointment, from time to time, direct and appoint; and, in default of such appointment, to such uses as the Appellant, in case he should survive Lord Braybrooke, should, by deed or will appoint, and in default, &c. to the Appellant for life, with remainder to his first and other sons in tail male. This deed was duly enrolled. On the 1st January 1850 Lord Braybrooke and the Appellant executed a deed of appointment, the parties to which were Lord Braybrooke, of the first part; the Appellant, of the second part; Lord Lyttelton and Mr. Ralph Neville, of the third part; and Lord Lyttleton and the Hon. Robert Neville Lawley, of the fourth part. This deed, after reciting that Lord Braybrooke and the Appellant had agreed to settle, as well the hereditaments comprised in the first and third schedules thereto, comprising the Audley End mansion estates, and also the ancient estates of the family of Neville, as those of which he was seised in fee-simple or otherwise, and which were set forth in the second and fourth schedules thereto, witnessed (amongst other things) that, in pursuance, &c., they, Lord Braybrooke and the Appellant, in exercise and execution of the power or authority limited in the deed of July 1841, limited and appointed all and singular the manors and hereditaments comprised in the first schedule, and all the lands and hereditaments whatsoever in the counties of Essex, Cambridge, and Suffolk, comprised in or then subject to the uses and trusts of the deed of July 1841 (except as therein mentioned), freed and discharged from a charge of 10,134 l. 5s. 8d. (stated to be the absolute property of Lord Braybrooke), to such uses, upon such trusts, &c., as were thereinafter expressed concerning the same. And, in consideration of the premises, Lord Braybrooke and the Appellant granted and released (according to their several estates and interests) unto Lord Lyttelton and Mr. Neville, their heirs, &c. the said manors, &c. therein before appointed, to hold the same to the uses, &c. thereinafter limited and declared. And all leases and agreements for leases made by Lord Braybrooke, were confirmed; and the manors, &c. were subjected to such trusts as Lord Braybrooke and the Appellant should jointly appoint; and, in default of such appointment, that the Appellant, during the joint lives of Lord Braybrooke and himself, was to receive a rentcharge of 700 l. a year; and if the Appellant should marry, a rentcharge of 1,200 l. a year, charged upon all the premises thereinbefore appointed, and, subject as aforesaid, the premises, &c. were to be to the use of Lord Braybrooke for life; remainder to the use of the Appellant for life; remainder

to the use of his first and other sons in tail male.

Lord Braybrooke (the third Peer) died 13th March 1858, and the Appellant succeeded to the barony and the estates. The AttorneyGeneral alleged that the Appellant was in a degree of collateral consanguinity to the testator who was his Apredecessor, other than any one of those described in the tenth section of the 16 & 17 Vict. c. 51, and was consequently liable to a duty of ten per cent., under the 12th section.

The Appellant put in an answer, which admitted, or re-stated, many of the facts set forth in the information, but added the following:-

Between 1841 and 1850, Lord Braybrooke and the Appellant, under their joint power, sold parts of the estates. The Audley End mansion estates included the presentation to the mastership of Magdalen College, Cambridge. The third Lord Braybrooke (the Appellant's father) was seised of estates which be had himself purchased, and which were called the *Audley End* purchased estates, of the ancient estates of the Neville family, called *Billingbear* old estates, and likewise of others which he had purchased, called ABillingbear purchased estates.@ He was also possessed, absolutely, of a sum of 10,134 l. 5s. 8d. charged by way of mortgage on the Audley End mansion estates, and of the sums of 5,000 l., 5,000 1., and 6,000 l., charged on the Billingbear old estates. The Audley End mansion estates were of the value of about 180,000 l., the Billingbear old estates of the value of 300,0001., and the Audley End and Billingbear purchased estates of about 90,000 l. Just before the execution of the deed of 1850, the Appellant and his father had at their disposal shares to the amount of 7,400 1. in the London and North Western Railway Company, and 135 extension shares of the York and North Midland Railway Company. That ALord Braybrooke, with the view of inducing me,@ the, Appellant, Ato concur with him in exercising the joint power of appointment created by us over the Audley End mansion estates, proposed to me, that if I would give up the absolute power of disposition reserved to me by the indenture of July 1841, and, in favour of his younger sons, the next two presentations to Magdalen College, and would join with him in a settlement of the estates over which we bad a joint power, he would in such settlement settle the Audley End purchased estates, the Billingbear old estates, and Billingbear purchased estates, and would make an immediate provision for me during his lifetime.@ The Appellant agreed to these proposals, and in pursuance of them the deed of January 1850 was executed. By that deed the Audley End mansion estates were discharged of the 10,134 1. 5s. 8d. charged on them by way of mortgage; the Billingbear old estates were discharged of the sums of 5,000 l., 5,000 l, and 6,000 l., charged in like manner on them, and these three sets of estates, and the Billingbear old estates, and the Billingbear and Audley End purchased estates, were, together with the Audley End mansion estates, all settled on the same trusts as the Audley End mansion estates had been, and the stock in the railway companies was to go along with these settled estates. There was a power in the deed for the Appellant to raise a sum of 10,000 1. for his own use, and a farther sum of 10,000 1. for his own use if he should have no children who should succeed to the said estates, to jointure his wife and to raise portions for younger children, both of which powers he exercised on his subsequent marriage. There was also a power to the third Lord Braybrooke to give to ally of his younger sons the next two presentations to Magdalen College, and to the rectories of Haydon and Widdington, and to grant Haydon House and twenty acres of land to his son, the Hon. Charles Cornwallis Nevill, for life, all which had been done.

The Appellant, under these circumstances, insisted that his own father, and not the testator, must be treated as his Apredecessor,@ or that his father and himself were joint predecessors under the

13th section; and he besides claimed an allowance to be made to him in respect of the annuity of 1,2001. of which he was in the words of the 38th section of the Act Adeprived@ on coming into the succession.

The Court of Exchequer held that the Appellant took a succession under a disposition made by himself within the 12th section of Athe Succession Duty Act, 1853,@ the testator being his Apredecessor,@ and was therefore chargeable with duty at 10 per cent., and also that he was not entitled under the 38th section to an allowance in respect of the 1,2001. a year which ceased on the death of his father [5 Hurl. and Norm. 488. The sections relating to the subject matter of this appeal are the following:-

Section 2. Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally, or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred, or to confer, on the person entitled by reason of any such disposition or devolution, a Asuccession ;@ and the term Asuccessor@ shall denote the person so entitled; and the term "predecessor" shall denote settlor, disponer, testator, obligor, ancestor, or other person, from whom the interest of the successor is or shall be derived.

Section 12. "Where any person shall take a succession under a disposition made by himself, then, if at the date of. such disposition he shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of this Act, and such person shall have died, during the continuance of such disposition, he shall be chargeable with duty on his succession at the same rate as lie would have been chargeable with if no such disposition had been made; but a successor shall not in any other case be chargeable with duty upon a succession taken under a disposition made by himself."

Section 13. "Where the successor shall derive his succession from more predecessors than one, and the proportional interest derived from each of them shall not be distinguishable, it shall be lawful for the Commissioners to agree with the successor as to the duty payable."

Section 38. "Where any successor upon taking a succesion shall be bound to relinquish or to be deprived of any other property, the Commissioners shall, upon the computation of the assessable value of his succession, make such an allowance to him as may be just in respect to the value of such property."]

Mr. Rolt and Mr C. Hall for the Appellant:

The decision of the Court below cannot be supported in its terms. That Court decided that the resettlement amounted to nothing but a mere family arrangement, that a mere family arrangement could make no difference in such a case, and that the predecessor of the Appellant was the testator of 1796. The Attorney-General does not pretend to support the decision in that form ; he says that the Appellant now took an estate which was carved out of that which he before possessed, and so came within the 12th section. That argument can hardly be maintained unless the Respondent is prepared to contend that a person coming in under a resettlement of a nature

entirely different from that which before existed, is to pay the same rate of duty as if no alteration whatever had been made, but the original settlement had remained in force. The real question is not from what estate, but from what person, is the succession derived. In Lord Saltoun v. The Advocate-General [3 Macq. Se. App. Cas.659], it was held that Apredecessor@ means the person from whom the interest is derived.

In this case that person is the Appellant's father and the succession comes to the Appellant under the deed of 1850. Or if not the father alone, then it comes from the father and the Appellant jointly. The deed of 1850 was made by two persons having absolute control over the fee. It was made under the authority, of a general power of appointment, and the fourth section of the Act shows that the person exercising a general power of appointment is to be deemed the predecessor; under such a power he may make a disposition in favour of himself. This power was a general power, and so exercised by the Appellant and his father; and such considerations passed between him and his father who was in the situation of protector of the settlement, that the son took an estate entirely different from that which he would have taken under the testator's will. This is a Adisposition@ in the strongest sense of that word ; and it is a disposition made by the two persons jointly in virtue of a joint power previously existing; it is a bargain and sale. It might have been a disposition in favour, not of the Appellant, but of his youngest brother, or of any stranger. From whom in such a case would the succession have been derived? Certainly from those who, by the deed of 1850, under the power created by the deed of 1841, made the disposition. The case of The Attorney-General v. Sibthorp [3 Hurl. & Nor. 424] is not applicable here, for in that case there was not, as there is here, a disposition as by bargain and sale, and the execution of the two deeds took place on the same day, and formed but one transaction. Here the son was for nearly ten years entitled to the absolute ownership of the estates, and at the end of that period by a disposition, upon considerations passing between himself and his father, and under a joint power created ten years before, they jointly agreed to resettle the estate in a different manner, and the son cut down his absolute estate to a mere life estate. This was in all respects a different estate from that to which the son was entitled under the testator's will, and it was created by a power independent of that will. The case of The Attorney-General v. Baker [4 Hurl. & Nor. 19], is applicable here, and the father and son must be deemed the settlors; Re Jenkinson [24 Beav. 64] illustrates the same argument.

It cannot be said that the beneficial interest here is carved out of the previous estate of inheritance in fee tail, because, by the disentailing deed of 1841, the parliamentary power of conveyance given by the Fines and Recoveries Act had been executed., and a new estate in fee was created. Then the deed of 1850 limited the uses of that estate which had been created by the deed of 1841. The succession is not to the old estate, but to the new estate thus created. But even if the beneficial interest was created out of the original estate tail, it was not created by the Appellant alone, but by him and his father; and therefore falls within the thirteenth and not within the twelfth section of the statute, so that at all events the Appellant is only liable to one per cent. duty on the moiety which he must be taken to have derived from his father.

Then as to the other point. The Appellant was Adeprived@ of the annuity within the meaning of the thirty-eighth section of the statute, and is entitled to an allowance in respect of it. The argument on the other side is, that he was only entitled to the annuity during, the life of his father, and at his death it came to its natural termination, so that he lost it by the death of his father and by nothing else. But if a person has property for the life of A., it is impossible to say that be is not deprived of it by the death of A. In re Micklethwait [11 Exch. Rep. 452] decided that where an annuity was granted to a person for his life, but it was provided that if the grantee should by

the death of an elder brother come into possession of certain estates, the annuity should cease, he must on the death of such elder brother be deemed to have been deprived of the annuity within the words of the Act, and therefore to be entitled to an allowance.

[The Lord Chancellor: Is not that case overruled by The AttorneyGeneral v. Sibthorp? [3 Hurl. & Nor. 424].]

It was distinguished from the other by Mr. Baron Bramwell [3 Ilarl. & Nor. 451], on the ground that in Micklethwait=s case the annuity was determinable on a contingency, namely the coming into possession of certain property. So that on this point, Sibthorp's case does not apply to the present. Here the Appellant is "deprived" of the annuity, and is therefore entitled to the allowance.

The Attorney-General (Sir R. Bethell), and Mr. Hanson, for the Crown:

The question is, from whom has the interest now challenged been derived? For the Apredecessor@ is the person whom the Act treats as having conferred the interest; the Asuccessor@ as the owner coming into possession of that interest; and a "succession" as a beneficial interest falling into possession on the death of some person dying after the commencement of the Act. It is a clear enactment of the statute, that where the succession is nothing but a modification of the ownership possessed at the time of the disposition, by the person who so modifies it, that succession shall be subject to the same duty as the estate from which it is derived. That is clearly the effect of the 12th section. Where, as in this case, it appears on the face of the disposition itself that the succession is a thing created by the act of a person now claiming that succession, the Court must go back to the instrument creating the interest or power by which the succession itself is created. It is nothing that a few years have elapsed between the execution of the two deeds; they must be taken together, and they constitute one complete transaction. The Attorney-General v. Sibthorp [3 Hurl. & Nor. 424] is therefore strictly applicable. If what was done here in 1850 had been done in 1841, no one would have denied that the whole transaction rested on the will of Lord Howard de Walden.

The 13th section has no application to a case like the present. That was intended to apply where the successor was a person perfectly distinct from any of the predecessors, or where the amount of interest of each predecessor is unknown. As, for example, A. claims an interest in an estate; B. is in possession of it; C. sets up a title to part of it; they arrange among themselves, and whoever takes under that arrangement, cannot say from whom the interest is derived; it is not "distinguishable," for on the face of the instrument setting forth the claims and their arrangement, it would appear that it was impossible to be ascertained to whom the estate belonged.

The statute relates to cases where the interest is passed by disposition, not to the power exercised. Powers are divisible in the 4th section, into two classes: a limited, or trustee, power, which is to be exercised in favour of certain objects, who become successors when the power has been exercised in their favour., and a general power which is subject to no such restriction. Neither of them represents the power which is said to have been exercised in this case, but each was intended to apply to a state of circumstances entirely different from the present. It was because the Court of Exchequer in The Attorney General v. Baker [4 Hurl. & Nor. 19], considered Mrs. Smith to be the actual settlor of the property, which she had not obtained as a bounty, but on the compromise of a claim of right, that the duty was reduced to the lowest amount. That case is, therefore, not an authority for the present Appellant. But Lovelace's case [4 De G. & Jon. 340],

expressly laid down a rule which is applicable here, namely, that appointees under a general power of appointment are included in the section, for that it cannot be said that they are not entitled by reason of the disposition which created the power. Taking that as the rule, it follows that this Appellant is entitled under the disposition made by Lord Howard de Walden, to which the estate and the power to deal with it owed their existence.

Then as to the claim for allowance on the annuity ceasing. The statute only intended to make an allowance for what one man lost and another got. In such a case there would still be somebody liable to be taxed; but it did not intend that any allowance should be made when the thing by the natural course of events, and according to the very terms of its creation, ceased to exist. Here the Appellant is not "deprived" of any thing; by the very terms of its creation it is gone; it is not possessed by any one; the succession to the estate did not put an to the annuity; it has died a natural death.

If the reversionary interest had been sold by the Appellant, the purchaser would not have been entitled to the allowance. The case of Micklethwait [11 Exc. Rep. 452] is, therefore, inapplicable to the present. The 38th section was never intended to grant an allowance in a case of this kind.

Mr. Rolt, in reply:

Power, as well as property, may constitute predecessorship. Where the interest is derived from the exercise of a power, the power is equivalent to property, and the person who possesses the power is the predecessor within the meaning of the statute, for from him is the estate derived: The Attorney-General v. Baker [4 Hurl. & Nor. 19]. It may be admitted, that where a succession is merely the modification of an interest possessed by the predecessor, that succession shank be submitted to the same rules as the estate out of which it issued; but it is only so where the modification is made by that person alone who possesses the original estate, not where it is made by agreement between himself and another person, and on valuable consideration.

[The Lord Chancellor: If the mere consent of the other person is required, is not that a modification by himself alone ?]

No; consent is equivalent to power; a power to A., to be exercised with the consent of B., is a power in B. The Crown cannot inquire into the title on which the deed of 1850 was made, and the Appellant stands exclusively on that deed. That is a deed made under a joint power of the father and son, and they are the Apredecessors.@ Here the remainders over were destroyed, and a new estate was created. It was so even with regard to the father, who, though he took back the life estate, took it back subject to the rentcharge of 1,200l. a year. The 13th section is strictly applicable to this case; it was intended to meet cases where there were possible disputes between father and son, which were arranged by a new settlement of the estate, and not merely cases where the interests of the parties were incapable of being ascertained.

Then as to the other point. ARelinquish@ is the word in the 38th section applicable to the cases supposed on the other side. ADeprived@ is the word properly applicable to cases like the present. The Appellant was here deprived of the annuity. Here was an annuity for life, or rather two lives, to cease on the happening of a particular event. On the happening of that event, the parties previously entitled to it were deprived of it.

The Lord Chancellor (Lord Campbell):

My Lords, in this case it is admitted that the Appellant, who succeeded to the Audley End estates on the death of his father, since the 16 & 17 Vict. c. 51, Athe Succession Duty Act,@ came into operation, is liable in respect thereof to the succession duty; and the question is, at what rate the succession duty to which he is liable ought to be calculated? As the Appellant certainly took by Adisposition,@ not by Adevolution,@ we have only to consider by whose disposition he took.

Had the Appellant not thought fit to execute the disentailing deed of 1841 and the deed of appointment of 1850, he certainly would have taken under the provision made by the will of Lord Howard de Walden, under which the Appellant took by purchase an estate tail in the Audley End estates, expectant on the death of his father, the third Lord Braybrooke, who took a life interest in them; and he would unquestionably have been liable to succession duty at the rate of ten per cent.

Both those deeds were valid, operative deeds, and full effect is to be given to them. I regret, my Lords, that a good deal of confusion has arisen in this case from not giving full effect to these deeds. Giving full effect to them, under whose disposition did the Appellant take? I say, under his own.

I would beg leave to remind your Lordships of what all your Lordships who gave an opinion in the Saltoun case observed, that this statute., which, by the same enactments, imposes a tax on successions in every part of the United Kingdom, is to be construed, not according to the technicalities of the law of real property in England or in Scotland, but according to the popular use of the language employed; so that all such property may be subject to the succession duty, according to the general intention which the legislature has expressed.

I must farther remark, that although the Act only came into operation on the 19th of May, 1853, the liability to duty on subsequent successions depends upon the operation of wills and deeds made and executed previously, as if they had been made and executed subsequently; so that the decision of your Lordships in this case will be a binding authority as to the construction of the Act in all similar cases which may hereafter occur.

Now, my Lords, did not the Appellant take the Audley End estates, in popular language, and substantially, under a disposition made by himself? Has he not throughout been disposing of the interest he took as tenant in tail under the will of Lord Howard de Walden? Is it not a new disposition by him of the same property ?

Look first to the disentailing deed of 1841. Was not this a disposition by him of his interest as tenant in tail for his own benefit? His father, as tenant for life and protector of the settlement, joined in the deed, and his consent was necessary. But the father retained his life interest; and the son's interest as tenant in tail alone was really affected. It cannot be argued that a person, whose consent is necessary to a disposition of property, makes that disposition.

New legal interests were taken; but are we to construe this statute with the strictness of the old law, according to which, if a testator, after making his will, suffered a recovery to give effect to the will, the will was thereby revoked, the testator, by the recovery, being no longer seised of the estate he had devised? The subject matter dealt with by the disentailing deed was the estate tail in the Audley End estates devised to the Appellant by Lord Howard de Walden; and it still remained the same subject matter when, by the act of the Appellant, different legal interests were taken in it. These interests were all clearly taken by his provision.

Although there was a joint power of appointment in the father and the son, that power of appointment could not have been exercised without the son's concurrence. In default of appointment, an estate for life was limited to the son, remainder to his first and other sons in tail.

I cannot doubt that if the father had died without any deed of appointment being executed, the Appellant must have been considered as taking the succession under a disposition made by himself.

We have, therefore only farther to consider the effect of the deed of appointment of 1850. Although nine years intervened between the two deeds, I think they are to be construed as if they had both been executed on the same day, and that in truth they constitute one disposition. What is done under a power of appointment is to be referred to the deed by which the power was created.

There were (as there always are when an estate tail is barred by the son, tenant in tail, with the consent of the father, tenant for life) stipulations between father and son as to benefits which they are reciprocally to confer and to receive. But this was substantially a disposition of the interest in the Audley End estates which was vested in the Appellant as tenant in tail, for the father's estate for life remained untouched.

The joint power of appointment reserved to father and son is not intended as a matter of pecuniary value to the father, but only as a check upon the son, that he may not in his father's lifetime make any, imprudent disposition of the family property. The father had no interest in the Audley End estates beyond his own life interest, and to this the power of appointment had no application.

In the present case we have only to consider the duty payable in respect of the Audley End estates, which were included in the deed of appointment; and I do not think that any regard is to be had to the other estates which the father brought into the settlement, however valuable they might be, or to the annuity charged on the life estate, or to the arrangement about the mastership of Magdalen College, or the family livings. Detached from all these particulars, there was a disposition of the Appellant's interest in the Audley End estates, and, as far as the Audley End estates are concerned, this disposition was made by the Appellant himself.

The 12th section seems to me to have been framed precisely to meet such a case.

Some confusion has been introduced into the subject by supposing that this succession might be brought within the second section of the Act, entirely ignoring the disentailing deed and the deed of appointment, or considering them only as "modifications" of the original settlement; the inference being that the original settlor may still be treated as the direct predecessor of the Appellant, in the same manner as if the entail had remained in full force till his father's death, when the succession took place.

In The Attorney General v. Sibthorp, such suggestions appear to have been made both from the bar and from the bench; but, according to the report of the case [3 Hurl. & Nor. VA], the ratio decidendi was, Athat the Defendant took a succession under a disposition made by himself, within the meaning of the 12th section of the Succession Duty Act, 1853.@ Mr. Baron Bramwell there says, referring to other sections of the Act, AMy decision does not proceed on either of those sections, but on the 12th, the argument upon which seems to me unanswerable.@

In the present case we must consider under what disposition the succession did take place. A new disposition having been made, creating quite different interests in the estates from those created by the will, the testator can no longer be considered the predecessor.

The object of the 12th section was, to prevent any one with a vested estate tail in remainder, from diminishing, by his own act, the rate of succession duty to which he would be liable if he did not deal with the estate till it vested in possession.

The deeds of 1841 and 1850 make one disposition of the estate tail. At the date of such disposition, the Defendant was entitled to the property comprised in the succession expectant on the death of his father, who died during the continuance of the disposition, and after the time appointed for the commencement of the Act. Therefore the Defendant is chargeable with duty on his succession at the same rate as if no such disposition had been made, i.e., as if he had succeeded to the estate tail under the will of Lord Howard de Walden. To fix this rate of duty we have only to see who would have been the predecessor if the disentailing deed had not been executed.

As succession duty is certainly payable, and section 2 does not apply, it seemed to be admitted at the bar that the case would come within the 12th section, unless it can be brought within the 13th section; and on this section the counsel for the Appellant almost exclusively relied. But the 13th section seems to me to have been framed to meet a totally different state of things. For here the successor derives from his father no portion of the interest in the Audley End estates he took by the disentailing deed and the re-settlement; and the interest which he took from the father is not Adistinguishable@ (the word used in the 13th section), because there was no such interest in existence. This is not a case where the successor has derived his interest in the Audley End estates from more predecessors than one.

The question has been asked, what would have been the effect of the joint power of appointment being executed in favour of a stranger? That stranger, on taking the succession, would have been in a totally different position from the Appellant; and as he would clearly have taken under the disposition of others, the duty to be paid by him would depend upon totally different considerations.

A seeming hardship is urged, because the Defendant, who has succeeded his father and his grandfather in the occupation and enjoyment of the Audley End estates, is charged with duty at the rate of 10 per cent. But it must be recollected that he took the Audley End estates by purchase from Lord Howard de Walden, who was so distantly related to him, that the rate of duty is the same as if the had been strangers in blood to each other, and that he is only charged at the same rate as if he had succeeded under the will of Lord Howard de Walden, without his voluntary act of barring the entail.

I consider it my duty to remind your Lordships of the extreme inconvenience which may arise from departing from the broad rule laid down by the Court of Exchequer, that a tenant in tail in remainder cannot vary the succession duty to which he will be liable, by barring the entail and re-settling the estate. Much uncertainty, much temptation to attempt an evasion of the duty, and much litigation would arise, if regard is to be had to the terms on which, in each particular instance, the estate is resettled. The tenant in tail in remainder, when he bars the entail, may if he pleases alienate the estate, and no succession duty will be payable by him; but if he resettles the estate so that he himself shall succeed to it on the death of the tenant for life, he must then

pay the same succession duty as if he had taken under the original settlement.

This rule seems clear, easily to be applied, and not productive of any hardship beyond that felt from all fiscal impositions. In construing such statutes, we cannot consider what is fair and what is oppressive in taxation, except with a view to get at the probable intentions of the legislature where a doubt arises. But the legislature., having certainly enacted that in respect of property to which an individual is to succeed by the bountiful provision of another, succession duty is to be paid at a fixed rate, no oppressive character can be imputed to the legislature, if it be supposed that by a subsequent enactment it is provided that when this succession vests in possession, the individual who takes it shall be liable to pay that same rate of succession duty, although he may, by his own act, have taken what in point of law is a different interest in the property, and directed how the whole of the interest in the property shall hereafter be enjoyed.

For these reasons, I am of opinion that, as far as relates to the rate at which the succession duty is to be paid, the judgment of the court below ought to be affirmed.

I ought to mention, that since this opinion was written, by the courtesy of my noble and learned friend Lord Kingsdown, my attention has been particularly drawn to the fifteenth section of the Succession Duty Act; and although I adhere to the construction I had put upon the twelfth section, I think that the decision of the court below may be supported by the fifteenth section, which may have been introduced to guard more cautiously against the rate of duty on succession being diminished by any intervening disposition of the settled property.

As to the allowance for the annuity, after doubt, and with hesitation, I differ from the construction put by the court below on section 38, which enacts that "where any successor, upon taking a succession, shall be bound to relinquish or be deprived of any other property, the Commissioners shall, upon the computation of the assessable value of his succession, make such allowance to him as may be just in respect of the value of such property." The objection to the claim made by the Defendant for an allowance in respect of the annuity of 1,200 l., payable to him out of the Audley End estates, during the joint lives of his father and himself, is, that this annuity no longer existed when the Defendant took the succession on which the duty is to be assessed, the annuity having then come to an end by his father's death. If the section had only contained the words, Ashall be bound to relinquish any other property," I should have readily yielded to the argument that this could only apply to property which still exists; but the words "or be deprived of," are added; and I cannot certainly say that the Defendant has not been deprived of the annuity, by its coming to an end at the same moment when he succeeded to the Audley End estates, out of which the annuity was payable.

I ought to add, that I entirely approve of the decision of the Court of Exchequer in Re Micklethwait, which was questioned by Lord Chief Baron Pollock, in Attorney-General v. Sibthorp; and although the Micklethwait case may be distinguished from the present, the reasoning of the learned Judges who decided it tends to favour the construction which I am now induced to put upon the thirty-eighth section.

I must, therefore, advise your Lordships to affirm the judgment of the Court of Exchequer as to the rate of duty to be charged, and to reverse it as to the allowance for the annuity.

Lord Wensleydale:

My Lords, I entirely concur in that part of the opinion of my noble and learned friend on the woolsack, in which he expresses his approval of the decision of the Court of Exchequer in the case, Ain Re. Micklethwait." I think it quite clear that the Appellant was entitled to be allowed the value of the annuity of 1,200 l. per annum which he lost on his coming into possession of the estate for life on the death of the late Lord Braybrooke. The acquisition of the life estate was beneficial to him only to the extent of its value less the amount of the annuity. So far, therefore, at all events, the decree of the Court of Exchequer in this case must be varied.

But in my noble and learned friend's opinion upon the principal question in this case, I cannot, after all the consideration I have bestowed upon the subject, bring myself to agree.

There is no doubt, that if the entail bad not been cut off, and the estate had not been resettled Lord Howard de Walden must have been considered as the predecessor, and the Appellant the successor; and the duty to be paid on the death of the late Lord Braybrooke, who died since the 16 & 17 Vict. c. 51, came into operation, would have been ten per cent., according to his relationship to the settlor, Lord Howard de Walden.

The question is, what alteration was caused by the subsequent settlements made by the disentailing deed of the 21st July 1841, and the deed of appointment of the 1st January 1850?

It was laid down by the Court of Exchequer, in the present case under appeal, in conformity with the previous decision in that of The Attorney-General v. Sibthorp, that family settlements made no difference with respect to the rate of duty. I conceive that this is an erroneous ground of decision, and cannot be sustained. Indeed, it was not insisted upon by the Attorney-General on behalf of the Crown, but the case was rested upon the true effect of the settlements of 1841 and 1850, and that is now to be considered.

I have felt considerable difficulty in forming my opinion on that question, and I doubt much whether the very able framers of this well-drawn Act of Parliament have distinctly provided for this particular case; upon the best consideration I can give this subject, I feel at least so much doubt upon it, that I think that the duty of 10 per cent. cannot be imposed upon the Appellant.

There are three instruments under which the Appellant's interest arises.

The first is the will of Lord Howard de Walden, dated in 1796, under which the Appellant's father became tenant for life, with the remainder to the Appellant in tail.

The second, the disentailing deed executed by the Appellant and his father in 1841, by which the Audley End estates, subject to the life estate in the father, and to the estates prior to the estate tail limited to the Appellant, were., with the consent of the father, as protector of the settlement, granted to trustees, to such uses as the father and son should jointly appoint, remainder to such uses as the son., after the father's death, should appoint., and in default of appointment to the son for life, with remainder to his first and other sons in tail, with divers remainders over. Though the life estate of the Appellant's father was unaffected by this disentailing deed, the Appellant took a very different estate from what he had before. All the remainders over upon his estate tail were barred, that estate converted into a fee, and the father and son acquired by mutual agreement a new joint power of appointment by which the whole estate might be disposed of; each acquired from the other a moiety of that joint power which was newly created by that instrument, and never existed before. This gave them a power of disposing of the estate, the same as if they had

been the owners.

The third deed is the settlement of 1st January 1850, by the Appellant and his late father, pursuant to that power. New considerations were reciprocally given as the price of the execution by that deed of the joint power acquired by the disentailing deed. The late lord gave up a charge of 10,000 l. and upwards, on the estate which he was entitled to. He charged a present annuity of 700 l, and, in the event, which happened, of the Appellant's marriage, 1,200 1. a year, and he brought into settlement very large freehold estates, of his own. The son, on the other hand, gave up three nominations to the mastership of Magdalen College, Cambridge, two livings, and land, parcel of the Audley End estates; and agreed to confirm some leases, which he might possibly have set aside, and reduced his estate tail in the Audley End estates to a life estate.

This seems to me to make a very great difference in the position of the parties. By the disentailing deed they obtained a joint power of appointment; by the exercise of that power, for mutual valuable considerations, they have acquired separate interests., entirely different from those they took under the will of Lord Howard de Walden. Under that will the son would have taken an estate tail in remainder, after his father's life estate, in lands incumbered with a charge in favour of his father for 10,000 1. and upwards. By the new mutual agreement he has got a life estate in land unincumbered with that charge, and consequently of greater value; he has obtained an annuity, payable before his father's death, of 1,200 1. a year, charged on those lands, and a life interest on other extensive estates. But he has purchased those advantages not merely by giving up his estate tail in the lands left by Lord Howard, but also his patronage of Magdalen College for two lives, two advowsons, and lands. Who can say what part of this life estate is derived from the bounty of Lord Howard de Walden?

In my opinion he has entirely a new interest, derived partly from his father, partly from himself. I cannot think that the Appellant can be considered as taking his succession under the will of Lord Howard de Walden, which has been superseded by the new arrangement made by the father and the son, founded upon new and valuable considerations. A part of the interest of the Appellant was taken out of that which was Lord Howard de Walden's estate, but Lord Howard was not the donor of it. And the question is, I think, not whether the interest of the Appellant was derived out of his estate, but whether it was derived from him as the settlor.

Upon this view of the case, I think the second section of the Act applies to it. I should say that in making those dispositions the father and son were the settlors, and therefore predecessors, and the son the successor in respect of his ultimately acquired interest in the succession, and the duty to be paid would correspond with that relation.

Do the other sections of the Act control that section, and what duty do they impose on this species of succession? This is the part of the case upon which it is impossible not to feel some doubt.

The twelfth section, on which the Attorney-General in his argument at the bar, and my noble and learned friend the Lord Chancellor in the opinion which he has given, rely, does not, I think, apply to this case. The section is as follows. [His Lordship read it; see ante].

It seems to me impossible to consider the disposition made by the deed of 1st January 1850, as a disposition made by the Appellant, whatever might have been said if there had been no other deed than the disentailing deed executed by himself and his father in 1841; for that deed left his

father's life estate unaffected, and the son might be considered as so settling the remainder in tail, enlarged into a fee, by a disposition made by himself. But under the deed of the 1st January 1850, I think the disposition is not made by himself; it is made by himself and his father jointly, by virtue of the newly created power, quite independently of the will of Lord Howard de Walden, which power they acquired by mutual agreement, in part founded upon valuable considerations wholly collateral to, and independent of, that will.

I have satisfied myself that the disposition by which the Appellant acquired the estate, and for which he must pay the proper duty, is the new settlement by the deed of 1st January 1850, and not the will of Lord Howard de Walden. To test this, let us suppose that Lord Braybrooke and his son, the Appellant, had executed their joint power of appointment in favour of the widow or a son of Lord Howard (if he had such), would the former have paid no duty, the latter 1 1. per cent.? I should think no one would maintain that less than 10 1. per cent. would have been payable in either case. Neither of them would have been indebted to the bounty of Lord Howard for the estate so acquired, but to that of Lord Braybrooke and his son. In that case, they would have been the settlors or disponers. The section which seems to me to approach the nearest to this particular case is the 13th; but I am at a loss to distinguish the relative proportions of the interest derived from the father and the son respectively. The result is, that I do not see my way to any other conclusion than that the Appellant, as successor to his father, ought to pay 1 1. per cent. on the nominal value of the Audley End estates, deducting therefrom the annuity of 1,200 1. a year.

But I understand from my noble and learned friend, Lord Kingsdown, from his communications with me, that he thinks that the fifteenth section applies to this case, and that the Appellant must be considered as holding by alienation, or other derivative title, from the person originally entitled on the death of the late Lord Braybrooke; and that he is therefore, by that section, chargeable with duty in respect thereof as a succession at the came time and at the same rate as the person so originally entitled would be chargeable if no such alienation had been made or derivative title created.

This view of the case has not been presented to your Lordships in the argument at your Lordships' bar, nor does it appear to have occurred in that in the Court of Exchequer; but, nevertheless, if well founded, it ought to prevail. But I think, on the best consideration I can give to the subject, the 15th section does not apply. It is meant to meet the simple case of a person, having a right to a succession within the meaning of the Act, totally alienating that right to another person before the succession opens; or carving out a derivative interest from it; in which case the section provides that the assignee, or the person having the derivative title, shall stand on the same footing as the assignor. But if there is something different from a mere transfer of the interest or a part of it, if there is a title conferring a new succession on any other person, then the 15th section does not apply, as appears by the context; for, after having previously provided for the case of expectant property being vested in another at the time of the passing of the Act, it provides for other cases after the passing of the Act, and enacts that it shall not extend to alienations confering a new succession.

Now the great point which to my mind is fully established is., that the deed of 1st January 1850, constitutes an entirely new succession; it was a complete alteration of the old interests, and is really on the same footing for this purpose as if the father and son had bought and settled a new estate upon the same uses and trusts as are mentioned in that indenture. That arrangement is the root of the title of the Appellant, and not a mere transfer or alteration. I think, therefore, that he is not liable to the ten per cent. duty.

There seems, as I have observed, no section of the Act precisely applicable to this case. The one that approaches the nearest to it is the 13th. Will the successor of the Appellant, who takes a part of Lord Howard de Walden‘s estate., but not from him, be liable to pay ten per cent.?

From the argument at the bar, it appears that the Appellant is willing to pay 1 1. per cent. on a moiety as derived from his father. No proposition is better established than that a tax cannot be imposed on a subject unless by clear words, and I cannot certainly see my way to the conclusion that more than one per cent. on a life interest in a moiety can be recovered.

I have to add, that, at all events, so much of the value of the property as would be required to satisfy the charge of Lord Braybrooke,-10,000 1. given up,-ought not to be charged with duty at higher value than one per cent., for that part of the value was derived from his father.

Lord Kingsdown:

My Lords, it is not a very convenient course that what has passed in discussion between noble Lords in the consideration of a case, should be adverted to when judgment is delivered. The opinion which I have formed upon this case is entirely without regard to the 15th section, to which my noble and learned friend has referred. lf it had been necessary to enter into the consideration of that question, I should probably have been of opinion, with my noble and learned friend on the woolsack, as to the inference to be drawn from that section. But the opinion which I now desire to state is formed without reference to any considerations except those which I am about to lay before your Lordships.

By the Succession Duty Act of 1853, every person succeeding to any property on the death of another who dies after the Act comes into operation, is (with certain exceptions) subjected to the payment of duty upon the value of his succession. One of the exceptions is, where a person succeeds under a disposition made by himself; but this exception is subject to the qualification that “if, at the date of such disposition, the person making it shall have been entitled to the property comprised in the succession expectantly on the death of any person dying after the time appointed for the commencement of the Act, and such person shall have died during the continuance of such disposition,” he shall be chargeable with duty on his succession at the same rate as he would have been chargeable with, if no such disposition had been made.

Now at no time, as it seems to me, was Lord Braybrooke entitled to any interest in the Audley End estates, except in expectancy upon the death of his father, who died after the Act came into operation. Under the will of Lord Howard de Walden, he was entitled to an estate tail in remainder after his father’s life estate. Under the disentailing deed of 1841, his estate was also expectant on his father’s death, and it was equally so under the deed of 1850.

Under the will of Lord Howard de Walden, he was liable to the payment of 10 per cent. duty, and if the subsequent deeds are to be considered as dispositions made by himself, he remains liable to the payment of that rate of duty.

By the disentailing deed of 1841, the remainder in tail male to which Lord Braybrooke was entitled, was converted into a remainder in fee; and the estate was settled subject to the joint power of appointment in the father and son, to such uses as the son, if he should survive the father, should appoint; and in default of appointment to himself for life, with remainder to his first and other sons in tail male.

Though in law a new estate may have been created by, this deed, it seems to me impossible to hold that it is not a disposition of the previous estate vested in the son, and a disposition under which the son, if he survives his father, takes, if he thinks fit to exercise his power, an absolute estate, and if not, an estate for life.

It is, I think, a disposition made by the son, of an estate which he previously held, and liable to the payment of duty at 10 per cent.; and it does not seem to me sufficient to deprive it of that character, that his father, as protector of the settlement, consented to it.

If Lord Braybrooke had succeeded under this deed, I think he must have been subject to the same duty to which he would have been liable if no such deed had been executed, viz., 10 per cent. In fact, however, he succeeded not under the deed of 1841, but under the deed of 1850; and the estates thereby limited were created by the execution of a joint power of appointment by the father and son.

The question by which I have been embarrassed, and on which I confess that my opinion has much fluctuated, is this: Whether the deed of 1850 is not to be considered as the joint disposition of the father and son, and whether the father is not to be considered, under the 13th section, as one of the predecessors from whom the son derives his succession? If so, it would be necessary to consider whether the proportional interest derived from the father is distinguishable. If it be not, the father would be treated, as to one moiety, as the predecessor, and the son, as to that moiety, would be chargeable with only one per cent. duty. This was the point mainly urged by the Appellant=s counsel in their very able argument at your Lordships' bar. But after much consideration, I have arrived at the conclusion that the proposition so advanced cannot be maintained.

In the first place, as regards the form of the conveyance by the execution of a joint power, the general rule of law is, that limitations created by the execution of a power must be read as if they were introduced into the deed creating the power, and I have already expressed my opinion that the deed creating the power must be considered as the act and disposition of the son.

But to deal with the case, as it is always more satisfactory to do, on the substance and real effect of the transaction, does the son take any estate or interest whatever, in the property which is now the subject of dispute, from the disposition of the father? To a certain extent he does; his life interest is increased in value by his father's surrender of the charge on the reversion of 10,000 l., and to that extent, I think, he is liable to only one per cent. duty. As to the rest, with respect to the reversion of the Audley End estate, he takes no interest whatever from the father. He gives up a great deal, but he takes nothing. A portion of the estate he conveys away; he gives up the power which he had of disputing instruments affecting the estate executed by the father; he gives up the absolute power over the property which he had if he survived the father; he becomes tenant for life only of the estate. For all these sacrifices he, no doubt, receives abundant compensation from the father, who brines into settlement estates much larger than that of Audley End. And to the extent of an thing which he succeeds to through his father's disposition, he is charged only with one per cent. As to that portion of the reversion which he sold, of course he pays nothing, and as to that which he retained, he will be charged on the value of a life interest only. The amount of duty will, of course., be reduced, but the rate of duty must, I think, be the same as if the deeds of 1841 and 1850 had never been executed. This seems to me to be the result, whether we regard the language of the Act, the technical rules of law, or the substantial truth and justice of the case. But, on the other hand, I think that a person taking a succession

under the Act is to pay a duty only upon its value, and that the value is to be computed by taking into account, not only what he gains, but what he loses by the succession. Here Lord Braybrooke loses his annuity, in respect of which I agree with the Lord Chancellor, in thinking that he is entitled to an allowance. In this respect, and also with regard to the 10,000 1. charge, I think the decree below must be altered.

The Lord Chancellor. The judgment of the Court below will be varied. It is only upon what the Appellant takes under the will of Lord Howard de Walden that the ten per cent. is to be charged. It cannot be charged upon the 10,000 l., and he is to have an allowance for the annuity.

Ordered, that the decree below be varied, so far as relates to the annuity of 1,2001., and the sum of 10,1341. 5s. 8d., the House being of opinion that the Appellant is chargeable with duty on the Audley End Estates, at the rate of 101. per cent., but that he is entitled to an allowance in respect of each of the sums above mentioned.

Lords' Journals, 19 March 1861.