[HIGH COURT OF AUSTRALIA.]

NEILL AND ANOTHER . . . . . APPELLANTS;

AND

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

Land Tax—Trustee—Contingent interests—Land Tax Assessment Act 1910 (*No.* 22 *of* 1910), *sec.* 33.

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BRISBANE, *April* 30; *May* 2.

Griffith C.J., Barton and Isaacs JJ.

The 3rd proviso to sec. 33 of the *Land Tax Assessment Act* of 1910 provides "that in the case of lands vested in a trustee under a settlement made before the first day of July, 1910, or under the will of a testator who died before that day, upon trust to stand possessed thereof for the benefit of a number of persons who are relatives of the settlor or testator, then, for the purposes of ascertaining the taxable value of the land owned by him as such trustee, there may be deducted. . . . in respect of each share into which the land is in the first instance distributed under the settlement or will amongst such beneficiaries, the sum of Five thousand pounds, or the unimproved value of the share, whichever is the less."

Held that the words "is in the first instance divided" extend to contingent interests.

A testator devised all his real and personal property including certain land to trustees upon trust after payment of certain annuities for such of the children of his daughter as being born in his lifetime should attain the age of 25 years, or, if a female, marry, or being born after his death, attained the age of 21 years or, being a female, married. The daughter married subsequently to the testator's death and, at the time when the land was assessed in the hands of the trustees, had four children, the eldest of whom was 9 years of age.

Held, that the trustees were entitled to claim the statutory deduction in respect of each of the four children.

SPECIAL CASE stated by *Griffith* C.J. for the opinion of the High Court under sec. 46 of the *Land Tax Assessment Act* 1910.

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The special case was as follows :—

1. The appellants are the trustees of the will of Hugh Neill, late of Galloway Plains in the District of Port Curtis in Queensland, who died on 27th May 1894 leaving real estate in Queensland.

2. The testator by his will devised all his real estate to the appellants and one Vincent Mackay Dowling, since deceased, as trustees upon trusts which, so far as material to be stated, were as follow :—Upon trust at their discretion to carry on the business of a grazier at Galloway Plains and subject thereto upon trusts for conversion with discretionary powers of postponement, and so that the net income of his estate real and personal and whether converted or not should be held by his trustees upon trust to pay thereout to his wife (the appellant Margaret Neill) during widowhood an annuity of £250 per annum to be reduced to £100 in the event of her marrying again ; And upon further trust to pay to his daugher Susan (then 17 years of age) during minority and spinsterhood an annuity of £100, and from and after her majority or marriage an increased annuity of £250, for her separate use without power of anticipation, with a proviso that, in case the net income of his estate should in any one year during her life exceed £750, a further sum should be paid to his said daughter to increase the annuity to one-third of such total net income.

The testator then declared as follows : —

"That subject to the payment of the aforesaid annuities my trustees shall stand possessed of my estate both real and personal . . . and the rents profits and income therefrom upon trust for all or any of the children of my said daughter attaining majority as hereinafter defined if more than one in equal shares." The testator declared that the expression "attaining majority" should mean, in the case of children born in his lifetime, attaining the age of 25 years, or if a female marrying, and in the case of children born after his death, attaining the age of 21 years, or, if a female, marrying. No child was to be entitled to share in the residuary estate unless and until he or she should assume the name of Neill as a prefix within twelve months of the time appointed for the vesting of his or her share. There was a gift over on default.

The testator also authorized his trustees to accumulate surplus

income and apply towards the benefit, education, maintenance and advancement of any child such part not exceeding one half of his or her presumptive or expectant share as they might think fit. He also authorized them, if the moneys in their hands should be sufficient for the purpose, to place at fixed deposit in a bank or banks such sums of money as should suffice to produce at current rates of interest the annuity payable to his wife, or with her consent in writing to purchase for her the said annuity; and he declared that, upon such purchase, the residue of his estate should be freed and discharged from the obligation of producing such annuity.

3. The testator's daughter Susan, now Susan Ballantine, was married in the year 1902 to one Duncan Stewart Ballantine. There are issue of the said marriage four children, aged respectively 9 years, 7 years, 5 years, and one year.

4. The amount of the annuity payable to the said Susan Ballantine for the year ending 30th June 1910 was £375.

5. The trustees of the will have not purchased an annuity for the appellant Margaret Neill under the power hereinbefore stated.

6. The unimproved capital value of the real estate of the testator in Queensland undisposed of has been assessed by the respondent at the sum of £16,543.

7. The appellants claim to be entitled under the provisions of sec. 33 of the *Land Tax Assessment Act* 1910 to a deduction in respect of each of the shares of the said four children of the said Susan Ballantine of a sum equal to the unimproved value of each such share (such value being less than £5,000) that is, to four deductions of sums each equal to one-fourth part of £16,543.

8. The appellants also claim to be entitled under the provisions of sec. 34 of the said Act to deductions in respect of the said annuities of the appellant Margaret Neill and the said Susan Ballantine of sums to be ascertained in the manner prescribed by that section.

9. The respondent refuses to allow more than one deduction of £5,000 in respect of the shares of the children of the said Susan Ballantine, or to allow any deductions in respect of the said annuities, and has assessed the taxable value of the said land at £11,543.

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The questions for the determination of the Court are:

1. Whether the appellants are entitled to deductions of the prescribed amount in respect of each of the shares of the said four children of the said Susan Ballantine or to a deduction of £5,000 only.
2. Whether the appellants are entitled to deductions in respect of the said annuities, and if so in what manner the amount of such deductions should be calculated.

Woolcock, for appellants. This case falls precisely within the third proviso to sec. 33. As to condition of taking name of Neill: *Chalmers*, 6th ed., Vol. 2, p. 1546; *Abbis* v. *Burnie*; *In re Finch* (1). The only point of difference between this case and that of *Archer and another* v. *Commissioner of Land Tax* (2), is that in the latter case the interests were vested and here they are contingent.

[He also referred to *Greville* v. *Browne* (3).]

McGregor, for respondent. That distinction is material and conclusive. [He referred to *In re Watkins' Settlement*; *Wills* v. *Spence* (4).]

Woolcock, in reply.

Cur. adv. vult.

May 2. GRIFFITH C.J. The first question stated in this case arises upon the construction of sec. 33 of the *Land Tax Assessment Act*, which provides, first, that trustees shall be assessed and liable in respect of land tax as if they were beneficially entitled to the land. Then there is a proviso "that in the case of land vested in a trustee under a settlement made before the first day of July 1910, or under the will of a testator who died before that day, upon trust to stand possessed thereof for the benefit of a number of persons who are relatives of the settlor or testator," then, instead of a single deduction of £5,000 allowed for the whole value of the land, there might be a deduction of £5,000 "in

(1) 17 Ch. D., 211.
(2) 13 C.L.R., 557.
(3) 7 H.L.C., 689.
(4) (1911) 1 Ch., 1.

respect of each share into which the land is in the first instance distributed under the settlement or will amongst such beneficiaries." The question is whether, under the circumstances of the case, one deduction or four deductions should be made from the unimproved value of the land? By the will of the testator, who died before 1st July 1910, he gave the land in question subject to certain annuities upon trust, "for all or any of the children of my said daughter attaining majority . . . if more than one in equal shares." At the time of his death his daughter was not married, so that at that time the number of shares into which the land might be divided was undetermined and incapable of being determined. Now she has four children, the eldest of whom is nine years old, and it is uncertain how many of them will attain 21, or whether any more children may be born who may attain 21 and who would share in the distribution. Upon this state of circumstances the question arises whether this property should be regarded for the purposes of this assessment as having been distributed in the first instance into four shares? Now, it is to be observed that the assessment is to be made every year. In each year it must be ascertained whether the taxpayer is a trustee, and, if he is a trustee, it must be ascertained whether he holds the land "upon trust to stand possessed thereof for the benefit of a number of persons who are relatives of the settlor or testator"? And I think that the fact to be ascertained for the purpose of making the assessment is whether at the time as of which the value is assessed—in this case 30th June 1910—he "stands possessed of the land for the benefit of a number of persons who are relatives of the settlor or testator?"

The testator died before the date mentioned in the Act. The appellants are trustees and they are possessed of the land not for their own benefit, but for the benefit of other persons. At the present time, if they hold it for any one, they hold it for the four children—no one else can be suggested as the beneficiaries. There is in the will a gift over on failure of any of the daughter's children to attain 21 years of age, in which event the estate is to go as on an intestacy. In that event also it would go to relatives of the testator. At the present time the matter to be ascertained is, for whom did the trustees hold this land on 30th

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June 1910? There is no doubt that these children have sufficient interest in the land to enable them to maintain a suit for the administration of the trusts. If, then, there were no more in the case, I should say that for the purposes of the Act the trustees clearly held the land for these four children. But a difficulty arises from the words "is in the first instance distributed." Now, those words do not mean distributed at the date of the will amongst persons named in it, nor do they mean distributable *instanter* at the death of the testator. So much was decided in *Archer's Case* (1). In that case we held that the intention is that the distribution intended is a distribution which is made directly by the will itself, in the sense that the shares are created by the will itself. That construction excludes any further subdivision of shares that may be made by the deed or will of the original beneficiaries. For instance, if the distribution made by the will is into four shares, or if, as here, there is an undetermined number of shares which turns out to be four at the relevant time of inquiry, and one subdivides her share into two, or dies, and by her will or by devolution on intestacy her share becomes divided into two, there are still only four deductions to be made, because the distribution made by the will is into four shares although there are now five beneficiaries. On the other hand, if in the events that happen before the assessment is made the property which was originally divisible into fourths has become divisible into thirds, only three deductions would be made. I think that is the true meaning of the words "is in the first instance distributed." The intention is to prevent any increase in the number by subsequent events not provided for by the will or settlement, while at the same time allowing as many deductions to be made, subject to that limitation, as there are beneficiaries within the class mentioned at the time of the assessment.

I think, therefore, that the first question—"Whether the appellants are entitled to deductions of the prescribed amount in respect of each of the shares of the said four children of the said Susan Ballantine?"—should be answered in the affirmative.

It is not necessary to answer the second question, raising a

(1) 13 C.L.R., 557.

question as to deductions for annuities and the manner in which they should be calculated, since the answer to the first question disposes of the whole matter, inasmuch as the result will be that the land has no taxable value.

BARTON J. read the following judgment:— The testator's daughter Susan, now Mrs. Ballantine, has four children aged respectively nine years, seven years, five years and one year.

The interest of each child depends on two contingencies,— attainment of the age of 21 years, or, in the case of females, marriage, and assumption of the name of Neill as a prefix to the child's other surname within 12 months after the time "named for the vesting of the share of such child."

The land in question is vested in trustees under the will of a testator who died before 1st July 1910, namely in 1894, and the trustees claim the benefit of the third proviso to sec. 33 of the *Land Tax Assessment Act* 1910. They say that the land is so vested "upon trust to stand possessed thereof for the benefit of a number of persons," namely the four children, "who are relatives of the . . . testator," and, therefore, that they are entitled to have deducted from £16,543 (which is the unimproved capital value), not the sum of £5,000 as provided by sec. 11 (2) (*b*), but the unimproved value of the share of each child (that being less than £5,000). They contend that the four children's shares are those into which the land is "in the first instance distributed." In the present case the deduction if allowed as claimed would amount to £20,000, and would wipe out in respect of taxation the entire unimproved value of each share.

In respect of the first question, the trustees have two propositions to maintain: first, that under the will they stand possessed of the unsold land "for the benefit" of these children, who are of course relatives of the testator: and secondly, that under the will the land is "in the first instance" distributed into four shares, one for each of them. The alternative to the success of the trustees in this task is that they will be liable in respect of land tax as if they were "beneficially entitled to the land," in which case the tax will be payable on a valuation of £16,543, less only one deduction of £5,000: that is to say, on £11,543.

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As to the first proposition, I think the trustees hold the land for the benefit of these children. Each child has an interest, not a mere possibility; there are no others in being entitled to any such interest; and it cannot be said that they are not beneficially interested: *Re Sheppard's Trusts* (1), where on this ground persons entitled to contingent interests were held to have a right to petition for the appointment of new trustees. But it is urged that the privilege of the proviso is not given in favour of interests which have not yet vested. I do not see why such beneficial interests are to be held excepted, if in other respects they are within the terms of the proviso. The Statute is intended to deal with the taxation of land year by year, and this proviso speaks of the persons interested as persons "who are relatives of the settlor or testator"—that is beneficial owners of interests, vested or contingent, who are existing as such relatives in the year and at the time of assessment, provided of course that their shares are those into which the land has "in the first instance" been distributed. Although the failure of a particular event to happen may prevent a contingent or an executory interest from becoming a vested one, it is nevertheless an *existing* interest, and the person entitled to such an interest can come to the Court to have it protected: *Cole* v. *Moore* (2); *Robinson* v. *Litton* (3); *Stansfield* v. *Habergham* (4); *Ross* v. *Ross* (5).

In respect of the second proposition I think the case is similar to *Archer* v. *Federal Commissioner of Land Tax* (6), decided by us in Tasmania last February. The interest of these children is the primary beneficial interest given by the will in the land devised to the trustees, in the sense that there is no other beneficial interest on the determination of which the shares are made expectant: in fact these contingent remainders would, but for the creation of the trust, fail for want of a particular estate to support them. The distribution is also immediate in that it is not made by any intermediate document not executed under the authority of the will. Thus it is a direct distribution. The proviso to sec. 33 clearly contemplates that where any distribution into shares is made by the settlement or will, one such distribution shall be

(1) 4 D.F. & J., 423.
(2) Mo., 806.
(3) 3 Atk., 209.
(4) 10 Ves., 272, at p. 277.
(5) 12 Beav., 89
(6) 13 C.L.R., 557.

considered to be made "in the first instance." Where there is only one, then it is difficult to say how it can be said to be anything else than the distribution made in the first instance, at any rate where it is the primary beneficial interest and the direct creation of the settlement or will.

I think, therefore, that the appellants, the trustees, are entitled to succeed and that the first question must be answered in the affirmative. That being so, the second question becomes purely academical, and must be left until the decision of some case involves an answer to it.

ISAACS J. read the following judgment:—As to the first point: In *Archer's Case* (1) the right of the parties equitably interested were vested, here they are contingent. But that, in my view, makes no difference. In applying the third proviso you first inquire who, at the moment of assessment, are the persons for whose benefit the trustee then stands possessed of the land. If none of them are relatives of the testator, or if there be one relative, the proviso has no operation. There must be a number of persons who are relatives of the testator. If that is so, then there is a positive provision for a plural or multiple deduction. The governing fact so far is that, although a trustee is by sub-sec. (1) to be liable as if he were himself beneficially entitled to the land, yet equitably the land does not belong to one owner, but to several owners who are supposed to have moral claims upon the bounty of the donor, and who therefore are taken by the legislature to have a moral claim to a separate deduction. Non-relatives are presumed to have no such moral claim to bounty, and, taking a windfall, are to get no special consideration. But if the distinctive principle I have mentioned is correct, it follows that, whether the relatives' interests be in possession or in contingency, the intention of Parliament is still to allow the several deductions at the time. Then the actual deductions are for each share into which the land is, in the first instance, distributed under the will amongst such beneficiaries. In *Archer's Case* (1) I expressed the opinion that a beneficiary's share was derived in the first instance under the will when his title arose under the

(1) 13 C.L.R., 557.

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will directly, and, by force of its provisions, without an intermediate transaction or event operating upon a share derived directly from the will. The words "such beneficiaries" refer, of course, to the beneficiaries at the time of assessment.

It is said that in the case at bar it is yet impossible to say how many shares exist, because the conditions precedent are not yet fulfilled. But that is not accurate as applied to this proviso. It cannot be denied the four grandchildren are beneficiaries—even though their rights are not completely vested. But not only so, they are the immediate objects of bounty, they are the primary beneficiaries, and they so far exclude all others. The donees over are more remotely interested and can only be said to be beneficiaries at all on condition that the primary gift fails. While that stands operative, the grandchildren are clearly the only real beneficiaries, and on this basis the shares they presumptively are entitled to are the shares intended to be reckoned by the proviso.

The first question should, therefore, be answered in the affirmative; and, in view of the value stated, it is unnecessary to answer the second.

Question answered accordingly.

Solicitor, for appellant, *Herbert C. Reeve.*

Solicitors, for respondent, *Chambers, McNab & McNab.*

N. McG