Pike's argument is based has no existence. He cited in illustration sec. 135 of the Act of 1884, where a conditional purchase or a leasehold may be declared forfeited. Both are referred to later in the section as forfeited lands. Similarly in other sections which he mentioned the expression "forfeited land" is applied indifferently to land comprised in a forfeited conditional purchase or in forfeited leases other than conditional leases.

For these reasons I am of opinion that section 136 applies to the case of a forfeited improvement lease, that the decision of the Land Appeal Court was right, and should be upheld, and that the appeal from the Supreme Court allowed.

Appeal allowed.

Solicitor, for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitor, for the respondent, *S. R. Skuthorpe*, Coonamble, by *Collins & Mulholland.*

C. E. W.

Foll *Reading v Federal Commissioner of Land Tax* (1912) 14 CLR 217

[HIGH COURT OF AUSTRALIA.]

ARCHER AND ANOTHER . . . . APPELLANTS;

AND

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

Land Tax—Assessment—Land vested in trustees—Trusts created by will—Trust for sale—Life tenants and remaindermen—Interests of beneficiaries prior to sale—Trust "for the benefit of a number of persons"—Deductions—Shares into which the land is "in the first instance" distributed—Land Tax Assessment Act 1910 (*No.* 22 *of* 1910), *sec.* 33.

Under a codicil to the will of a testatrix who died before 1st June 1910 trustees were directed to hold land upon trust for sale, and to stand possessed of the proceeds of sale upon trust for her children living at her decease,

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except her daughter A., and the two named children of A. in substitution for A., and such of the issue then living of the children of the testatrix dying in her lifetime, who, being sons, should attain 21 years, or, being daughters, should attain that age or marry, as tenants in common in a course of distribution according to stocks, the children of A. taking one share between them. The share of each child was directed to be held by the trustees upon trust to invest and to pay the annual income to such child for life, and on the death of such child then, in default of appointment under a power which was ineffectually given, for the children of such child as, being sons, should attain 21, or, being daughters, should attain that age or marry, in equal shares, as tenants in common. The trustees were given a power of postponement of sale, and they were directed that until sale they should hold the land in trust for the persons entitled to the proceeds. The testatrix left seven children of whom three died unmarried. The land, which was still unconverted, was assessed for land tax in the hands of the trustees, and at that time one child of the testatrix was living; and there were also living, and of the age of 21 years, the two children of A., one child of the third daughter, and six children of the fourth daughter of the testatrix.

Held, that the trustees held the land upon trust "for the benefit of a number of persons" within the meaning of the third proviso to sec. 33 (1) of the *Land Tax Assessment Act* 1910.

Held, also, that the shares of the nine grandchildren of the testatrix were "shares into which the land is in the first instance distributed" under the codicil, within the meaning of the third proviso to sec. 33 (1).

Held, therefore, that the trustees were entitled, under sec. 33 (1), to ten deductions—one in respect of the share of A., and one in respect of each of the shares of the nine grandchildren of the testatrix—of £5,000, or the unimproved value of the share, whichever should be the less.

For fiscal purposes the Crown takes land as it finds it, and the equitable doctrine of notional conversion is not applicable.

In re de Lancey's Succession, L.R. 5 Ex., 102, followed.

CASE stated by *Griffith* C.J. under sec. 46 of the *Land Tax Assessment Act* 1910.

The case was as follows:—

1. The appellants (William Henry Davies Archer and Alexander Archer) are the trustees of the will of Harriett Brooke, deceased, who died on 31st May 1886.

2. By a marriage settlement, dated 16th February 1857, and made upon the marriage of the said Harriett Brooke, then Harriett Landale widow, with the Rev. Warren Amber Brooke the said Harriett Brooke conveyed to trustees, amongst other

property, certain lands in the colony of Tasmania upon trusts for the benefit of herself for her life and after her death upon trust for "all and every such one or more exclusively of the other or others of the children or more remote issue of the said Harriett Landale whether by her said former marriage or by her said intended marriage (such more remote issue being born in her lifetime) and for such estates and interests, and if more than one in such shares and proportions and charged and chargeable with such annual or other sums of money for the benefit of any other or others of the same children and issue and with such remainders and limitations over to or in favour of any other or others of the same children and issue as the said Harriett Landale notwithstanding her coverture should by any deed or deeds instrument or instruments in writing under her hand and seal with or without power of revocation and new appointment to be by her duly executed in the presence of and attested by one or more credible witness or witnesses or by her last will or any writing in the nature of her last will to be by her signed in the presence of and attested by two or more witnesses direct limit or appoint and in default of such direction limitation or appointment and so far as any such if made should not extend" then upon trusts for sale as soon as conveniently might be after her death with discretionary power of postponement until her youngest child should attain the age of 21 years. And by the said deed it was declared that the trustees for the time being should stand possessed of the proceeds of such sale and of the rent and profits of the lands in the meantime until sale upon certain trusts not material to be stated.

3. By her will dated 2nd August 1878 reciting the said settlement the said Harriett Brooke appointed the said lands upon trusts not material to be stated.

4. By a codicil dated 7th September 1882 the said Harriet Brooke revoked certain directions contained in her will as to the disposal of the moneys to arise from the sale of an estate called Boiton Hill except as to the life estate thereby given to her husband and in lieu thereof appointed that the trustees of her will should after his death stand possessed of the moneys to arise from the sale of Boiton Hill and the investments thereof

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upon trusts declared as follows :—" Upon trust for such of my children living at my decease (other than and except my daughter Maria Rebecca Adams) and for my grandchildren Jessie Harriet Adams and John Garibaldi Marriott Adams in place of and in substitution for their mother the said Maria Rebecca Adams and such of the issue then living of any child or children of mine dying in my lifetime as either before or after my decease being males attain the age of 21 years or being females attain that age or be married as tenants-in-common in a course of distribution according to the stocks the said Jessie Harriett Adams and John Garibaldi Adams taking one share only between them and the issue of deceased children of mine taking by substitution the shares only which their respective parents would if living at my decease have taken." The testatrix then directed that the net moneys to arise from the sale of the land comprised in the settlement hereinbefore stated and then remaining undisposed of (which include the lands now in question) should be held upon trusts declared as follows :—" Upon trust for such of my children grandchildren and issue living at my death in whose favour I have hereinbefore directed and appointed the moneys to arise from the sale of my estate of Boiton Hill and in the same parts shares and proportions but subject as to the share of each child of mine to the directions and declarations hereinafter contained concerning the same and I direct and declare that the share to which each child of mine shall become entitled in the moneys to arise as aforesaid shall be retained and held by the said . . . trustees or trustee upon trust to invest the same . . . and upon further trust to pay the annual income of the same share or the securities whereon the same shall be invested (which share and securities are hereinafter referred to under the denomination of 'the settled fund'). . . into the proper hands of my child entitled thereto during his or her life . . . as a strictly personal provision . . . and immediately after the decease of my same child as to as well the capital of the said settled fund as the annual income thenceforth to accrue due from the same " upon certain trusts for the benefit of the child or children of the same child as follows :—" In trust for all or any one or exclusively of

the children living at my decease of my same child in such proportions for such interests and generally in such manner as such child (and if a daughter whether covert or sole) shall from time to time by deed with or without power of revocation and new appointment or by will appoint But no grandchild of mine in whose favour an appointment shall be made shall participate under the trust next hereinafter contained in the unappointed portion of the said settled fund without bringing the benefit of such appointment into hotchpot And in default of appointment and subject to any partial appointment in trust for the child if only one or all the children if more than one living at my decease of my same child who shall being a son or sons attain the age of 21 years or being a daughter or daughters attain that age or be married such children if more than one to take in equal shares," with cross remainders. The testatrix then proceeded to declare her will as follows:—" but if there shall not be any child of my same child who being a son shall attain the age of 21 years or being a daughter shall attain that age or be married then in trust for the other of my children and their issue to whom or in whose favour I have hereinbefore appointed the moneys to arise as aforesaid and as to the shares of such of my children respectively upon the same or the like trusts as are hereinbefore declared concerning the original shares of such children . . . respectively. . . . And I further direct and appoint that until the said lands and hereditaments hereinbefore mentioned shall have been sold as aforesaid the same lands and hereditaments and the rents and profits thereof respectively shall so far as practicable be held upon and subject to the same or the like trusts and provisions as I have hereinbefore appointed concerning the moneys to arise from the sale of the same lands and hereditaments and the annual income of such moneys."

5. The testatrix had seven children, three sons and four daughters, by her former marriage, all of whom survived her. The three sons died without having been married. Each of the four daughters were married in the lifetime of the testatrix and had issue.

One of the said daughters, now Mrs. Jessie Maria Cumberland,

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is still living. The others are now deceased. Each of them left children born in the lifetime of the testatrix who are still living.

One of these, Maria Rebecca Adams, mentioned in the said codicil left two children, also therein mentioned, who are still living and have attained the age of 21 years.

Another daughter left six children who are still living and have attained the age of 21 years.

The fourth daughter left one child who is still living and has attained the age of 21 years.

6. The unimproved value of the said lands has been assessed at £30,377, from which the respondent has allowed one deduction of £5,000 under sec. 33 of the Act and a further deduction of £470 under sec. 34 in respect of an annuity, leaving a balance of £24,907, from which he has made a further deduction of £6,265, representing the difference between £7,594, one fourth of the total unimproved value of the land, and £1,329, the value of the life estate of the said Jessie Maria Cumberland assessed under sec. 25, leaving an assessed taxable value of £18,637.

7. The appellants claim that they are entitled to separate deductions under sec. 33 in respect of each of the shares into which the said lands are distributed under the said codicil and claim that such deductions should be made in respect of the share of the children of Maria Rebecca Adams, and six deductions in respect of the shares of the children of the third daughter.

The questions for the opinion of the Court are :—

1. Whether the appellants are entitled to a deduction under sec. 33 in respect of each of the shares in the said lands into which they are distributed under the said codicil and to how many such deductions they are entitled.

2. If not, on what basis the assessment should be made.

Waterhouse, for the appellants. Under sec. 33 of the *Land Tax Assessment Act* 1910, the appellants are entitled to deductions in respect of the interests of Mrs. Cumberland and of each child of the other three children of the testatrix. Each of them has an interest in the land and that interest is derived "in the first instance" from the codicil. A beneficiary entitled to share in the proceeds of the sale of land is interested in that land. The

beneficiaries could by agreement amongst themselves put an end to the trusts and take the land itself.

Sir Elliott Lewis, for the respondent, the Commissioner of Land Tax. The trustees holding the land on trust for sale and to distribute the proceeds, none of the beneficiaries, other than Mrs. Cumberland, have an interest in the land itself. The land is to be deemed to have been converted: *Biggs* v. *Peacock* (1). Sec. 33 only applies where under the instrument creating the trust the land passes directly from the trustees to the beneficiaries. The persons entitled "in the first instance" were the life tenants.

Waterhouse, in reply. For fiscal purposes the Crown must deal with land as they find it, and the equitable doctrine of notional conversion does not apply: *In re de Lancey's Succession* (2).

GRIFFITH C.J. The appellants in this case are trustees. Two points are raised on the appeal, both arising upon sec. 33 of the *Land Tax Assessment Act* 1910. One raises a question of general principles, and the other relates to the application of the Act to the terms of the particular trust. The land held by the trustees is held by them under the trusts of the will and codicil of Mrs. Brooke, who died before 1st June 1910. By the codicil, which was made in execution of a power conferred upon her by her marriage settlement, she appointed that the trustees should stand possessed of the moneys to arise from the sale of the land now in question under a trust for sale contained in the settlement upon trust for her children living at her decease, except her daughter Mrs. Adams, and for two named children of Mrs. Adams in substitution for their mother, and such of the issue then living of her (the testatrix's) children dying in her lifetime as being sons should attain the age of 21 years or being daughters should attain that age or marry, as tenants in common in a course of distribution according to the stocks, the children of Mrs. Adams taking one share between them. She then directed that the share of each child in the moneys to arise from such sale should be retained and held by the trustees upon trust to invest the same and to pay the annual income of such share into the hands of the child entitled thereto as a strictly personal provision, and,

(1) 22 Ch. D., 284. (2) L.R. 5 Ex., 102.

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on the death of such child, upon trust for the children of such child as such child should appoint, and in default of appointment for such children as being sons as should attain 21 years or being daughters attain that age or marry in equal shares. In the case of *Edyvean* v. *Archer* (1) it was decided by *McIntyre* J. that the attempted delegation by the testatrix to the children of the power of appointment was invalid, so that, as the trusts are to be read, they are for the children of the testatrix living at her decease, except Mrs. Adams, and those of Mrs. Adams (the latter taking one share between them), and after their deaths for their children who should attain 21 years as tenants in common.

When the testatrix died she left seven children, three of whom died unmarried, so that there remained four stocks. One of the children, Mrs. Cumberland, is still living, and has a life estate. Another, Mrs. Adams, left the two children mentioned in the codicil, who are still alive and have attained 21 years. Another daughter, Mrs. Mayne, left six children, all of whom are still living and have attained 21 years. The fourth daughter, Mrs. Grane, left one child, who is still living and has attained 21 years. The unimproved value of the land is assessed at £30,377. The question is what deductions, if any, should be allowed in respect of that value?

The first point made by the Commissioner is that the trustees are not entitled to any deduction except one of £5,000, which is to be allowed in respect of the whole estate.

Sec. 33 of the *Land Tax Assessment Act* 1910 provides that: "(1) Any person in whom land is vested as a trustee shall be assessed and liable in respect of land tax as if he were beneficially entitled to the land.

. . . . . .

"Provided . . . that, in the case of land vested in a trustee, under a settlement made before the first day of July, One thousand nine hundred and ten, 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 purpose of ascertaining the taxable value of the land owned by him as such trustee, there

(1) (1892) unreported.

may be deducted from the unimproved value of the land, instead of the sum of Five thousand pounds as provided by paragraph (*b*) of sub-section (2) of section eleven of this Act, the aggregate of the following sums, namely :—

"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 his share, whichever is the less."

The contention of the Commissioner is that as this land was given to the trustees upon trust to sell and distribute the proceeds, it is not a case in which trustees stand possessed of land for the benefit of a number of persons. As a matter of fact, the codicil contains a power of postponement of sale, and expressly declares that until the land is sold it is to be held in trust for the persons entitled to the proceeds. But even without such a declaration it is clear that, when land is given to trustees for sale, the persons entitled to the proceeds have until sale an equitable interest in the land itself. The definition of "owner" in sec. 3 of the Act includes in that term every person who is entitled to receive the rents and profits thereof as beneficial owner. Clearly the beneficial owners of this land of which the appellants are the legal owners are the persons designated in the will and codicil of the testatrix. This is therefore a case in which land is vested in trustees under an instrument taking effect before 1st July 1910 upon trust to stand possessed thereof for the benefit of a number of persons who are relatives of the testatrix. That is the main contention of the Commissioner and it fails.

The other question is how many deductions are to be made. With respect to Mrs. Cumberland, who is still living, sec. 25 provides that she is to be deemed to be the owner of the fee-simple to the exclusion of any person entitled in reversion or remainder. Her interest has been valued under the rule prescribed by that section at £1,329, and under sec. 33 that amount, being less than £5,000, goes out altogether.

As to the one-fourth share held for the only child of Mrs. Grane, the value of that share is one-fourth of the whole value, *i.e.*, £7,594, from which a deduction of £5,000 must be made.

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As to the Adams shares the question is whether they are shares into which the land was "in the first instance distributed under the will." The gift in the codicil is "upon trust for . . . and for my grandchildren Jessie Harriett Adams and John Garibaldi Marriott Adams in place of and in substitution for their mother," in a course of distribution according to the stocks. That is a direct gift by the codicil to them of what in the events that have happened has turned out to be one-eighth each, which is of less value than £5,000. Each of these children is therefore entitled to a deduction of the whole amount of the unimproved value of her share. Those shares consequently disappear from the assessment.

In the case of Mrs. Mayne, she left six children. They take under the codicil in default of appointment, the gift being to their mother for life with remainder to her children living at the death of the testatrix who being sons should attain 21 years or being daughters should attain that age or be married. Six children have attained 21 years and they were all alive during the lifetime of the testatrix, so that the question is whether those six shares which those children now have are shares into which the land was in the first instance distributed by the codicil. The division takes place purely by virtue of the codicil and of nothing subsequent to it. Each of the children therefore takes his share directly under the terms of the codicil. Those shares therefore fall within the terms of sec. 33, and a deduction, which turns out to be the full amount of each share, should be made in respect of each share. The result is that the only amount taxable is the difference between the value of the share of Grane and £5,000.

A suggestion was made that there is a difference between giving the income of proceeds and giving the income of property. I think it is impossible to maintain such a distinction. If, as I have already pointed out, a person is entitled to the proceeds of property directed to be sold, until it is sold he has an equitable estate in the land itself. I should add that it is clear that for fiscal purposes the State takes property as it finds it, and has nothing to do with the doctrine of notional conversion, which only applies between those who are interested in the land or the

proceeds of the sale of the land. That is clearly established by *In re de Lancey's Succession* (1).

The first question should therefore be answered by saying that the appellants are entitled to ten deductions in all, of the amounts which I have stated.

BARTON J. read the following judgment. I am of the same opinion. As to the number of deductions I will only add that at first I had some hesitation as to the meaning of the words "in the first instance" in the concluding paragraph of sec. 33 (1), but further consideration has convinced me that we cannot hold them, as against the taxpayer, to mean that the deduction can only be made in respect of the life estates. The words are not clear enough to have that effect, while it would have been easy for the legislature, had that been its intention, to express it clearly and briefly. I think we must hold "in the first instance" to refer to the instrument primarily constituting the trusts, and from which the beneficiary's title comes, apart from the intervention of any later instrument. The best position in which the matter can stand for the Commissioner is that there is an ambiguity, and one which he is not entitled to have resolved in favour of the Crown, there being no context to make the matter clear in his favour.

ISAACS J. The first question argued by *Sir Elliott Lewis* was that the proviso to sec. 33 is wholly inapplicable because the trustees are not trustees of the land for these beneficiaries. It has been pointed out that there are words in the instrument itself which declare that until sale the trustees shall be trustees of the land subject to the same or the like trusts and provisions as were appointed concerning the moneys to arise from sale. But it is clear, in my opinion, that independently of that clause, the argument cannot be supported. The proviso refers to the case of land vested in trustees. So far this case falls within it. Then the date of the instrument is applicable. The statutory proviso then goes on "for the benefit of a number of persons who are relatives of the . . . . testator." The question is whether the

(1) L.R. 5 Ex , 102.

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Isaacs J.

land was vested in the trustees for the benefit of a number of persons. I think there is no doubt it was. The whole proviso introduces the equitable interest of persons who are to derive benefit under the trusts. The words "trustees" and "beneficiaries" are well known terms in equity and the sole question then which comes to be determined is whether from an equitable standpoint these persons are entitled to be considered as owners of the land. I will just read from two or three cases which show, I think, that this matter is not reasonably open to any doubt whatever. In *Attorney-General* v. *Harley* (1), *Sir John Leach* V.-C. said:—"That money to arise from the sale of land is an interest in land admits of no doubt." *Sir William Grant* M.R., in *Pearson* v. *Lane* (2), was of the same opinion. Then Lord *Cairns*, in *Brook* v. *Badley* (3), said:—". . . if a testator devises his land to be sold, and the proceeds given, not to one person, but to four persons in shares, and if one of those four persons afterwards makes his will, and gives either his share of the proceeds or all his property to charity, the position of that second testator with regard to the estate which is to be sold is in substance that of a person who has a direct and distinct interest in land. The estate is in the hands of trustees, not for the benefit of those trustees, but for the benefit of the four persons between whom the proceeds of the estate are to be divided when the sale takes place. It may very well be that no one of those four persons could insist upon entering on the land, or taking the land, or enjoying the land *quâ* land, and it may very well be that the only method for each of them to make his enjoyment of the land productive, is by coming to the Court and applying to have the sale carried into execution, but nevertheless the interest of each one of them is, in my opinion, an interest in land; and it would be right to say in equity that the land does not belong to the trustees, but to the four persons between whom the proceeds are to be divided." The last case was referred to with approval in *Ashworth* v. *Munn* (4) and *In re Watts*; *Cornford* v. *Elliott* (5), and seems to put the matter beyond any possibility of doubt.

(1) 5 Mad., 321, at p. 327.
(2) 17 Ves. 101, at p. 104.
(3) L.R. 3 Ch., 672, at p. 674.
(4) 15 Ch. D., 363.
(5) 29 Ch. D., 947.

Then as to the meaning of the words "in the first instance" in sec. 33, I agree with what has been said about that. In my opinion they mean that the beneficiary for whose benefit the land is held at the time the question arises derives the title to his share directly from the instrument itself and independently of any intermediate transaction operating on a share derived directly from the instrument.

On the facts of this case the shares of the beneficiaries are derived immediately from the codicil, and from that alone. Therefore, I think the first question should be answered as the learned Chief Justice has indicated.

Questions answered accordingly.

Solicitors, for the appellants, *Walker, Wolfhagen & Walsh*, for *Ritchie & Parker*, Launceston.

Solicitor, for the respondent, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

HENRY BULL & CO., LTD. . . . APPELLANTS;
DEFENDANTS,

AND

HOLDEN . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

"Factory," meaning of—"Preparing articles for trade or sale"—Warehouse—Workmen's Compensation Act 1910 (*N.S.W.*) (*No.* 10 *of* 1910), *sec.* 3—*Factories and Shops Act* 1896 (*N.S.W.*) (60 *Vict. No.* 37), *sec.* 2.