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COLES v. ADENEY.

Griffith C.J.

Court or other tribunal must be satisfied, first, what were the words used in the conversations which are said to constitute the contract, and, secondly, what is the inference to be drawn from the words used. That is quite a different thing from the credibility of the witnesses. Evidence as to conversations is always uncertain. The Court may think that a witness, with the utmost desire to tell the truth, has made a mistake. It is always a question of fact what was the real bargain made between the parties.

I do not think it desirable, and certainly it is not necessary, to review the evidence at length. It is sufficient to say that upon the plaintiffs' evidence in this case it was certainly open to the learned Judge, or to any other tribunal that might have heard the evidence, to find as a fact that the real bargain was that the payment of commission at 15 per cent. was dependent upon the land realizing £8 an acre. It did not realize £8 an acre. If it was open to the learned Judge to come to that conclusion, the fact that it was open to him to come to another conclusion is quite irrelevant.

I would add for myself that I do not see how the learned Judge could have come to any other conclusion than that to which he did come.

ISAACS J. I agree that the appeal should not be allowed, and I will in just a few words state why I think so. This case, as has been pointed out by the learned Chief Justice, depends entirely upon oral evidence. The onus of establishing the contract, which is a very special one, namely, to pay commission on a sale of land at the rate of 15 per cent. whatever price happened to be obtained, was one which certainly required distinct proof. Upon the direct evidence of the plaintiffs that would have been very difficult indeed to maintain, and upon that evidence, without more, I should think that the learned Judge would have had no difficulty in saying that the case was not proved. As has been pointed out both by Mr. *McArthur* and Mr. *Bryant*, there is evidence given on the cross-examination of one of the plaintiffs which might, if it stood alone, have led a tribunal to find in their favour. But so much depends, not only upon the way in which

those answers, the most favourable to themselves, were given to counsel, but also upon the amount of questioning that was necessary in order to extract those answers, that the Judge who heard the witnesses examined and saw and watched them giving their evidence might easily come to the conclusion that the original statement was the more reliable. In those circumstances, although it is our duty as a Court of appeal so far as we can to form our own judgment, yet in a case like the present where, notwithstanding that there was no jury, still the witnesses' demeanour and manner of giving evidence are not before us, it would be impossible, in my view, to reverse the learned Judge's finding. In addition to that, if it is any consolation to the plaintiffs, I may say that if it fell to my lot to decide the question in the first instance, I should come to the same conclusion as the learned Judge.

GAVAN DUFFY J. I do not desire to express any opinion as to what result I should have arrived at if it had been to decide the case in the first instance; but otherwise I agree with what has been said by the learned Chief Justice, for the reasons which he has given.

POWERS J. I agree that the appeal should be dismissed for the reasons stated in the judgments which have just been delivered.

Appeal dismissed with costs.

Solicitors, for the appellants, *Connelly & Crocker.*
Solicitor, for the respondent, *A. Phillips.*

B. L.

[HIGH COURT OF AUSTRALIA.]

LEWIS AND OTHERS . . . . . APPELLANTS;

AND

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

H. C. OF A. 1914.

MELBOURNE, *March* 17.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Land Tax—Assessment — Trustee—Deduction — Interest of beneficiaries—Joint owners—"Original share"—Land Tax Assessment Act 1910-1911 (*No.* 22 *of* 1910—*No.* 12 *of* 1911), *sec.* 38 (7), (8).

By his will a testator who died before 1st July 1910 gave certain land to trustees for the benefit of his daughter for life with remainder to the children of that daughter in equal shares. On 30th June 1911, the testator's daughter being then dead, the trustees held the land for the daughter's children.

Held, that those children were not holders of original shares in the land within the meaning of sec. 38 (8) of the *Land Tax Assessment Act* 1910-1911, and, therefore, that in assessing the land as on the last-mentioned date the trustees were not entitled in respect of the interests of those children to the benefit of sec. 38 (7) of the Act.

CASE stated for the opinion of the Court.

On an appeal by Alexander Thomas Lewis, John Herbert Butler and Francis Wellington Were against an assessment of them as trustees of the will of Robert Downing, deceased, in respect of certain land and premises in Swanston Street, Melbourne, for the year ending 30th June 1912, *Rich* J. stated a case which set out the following facts (*inter alia*) :—The testator who died on 9th November 1869 by his will directed his trustees to stand and be possessed of the said land and premises, subject to the payment of certain annuities charged thereon, upon trust for his daughter Sophia Ann Adams for life, and after her death he directed that his trustees should stand and be possessed of the

said land and premises and the clear annual income, rents and profits thereof (subject as aforesaid) upon trust for the children of Sophia Ann Adams who should have attained or should live to attain the age of 21 years or, being a daughter, should have married or should marry under that age, equally to be divided between them. The testator left him surviving his daughter Sophia Ann Adams, who then had nine children, and had since had no other child. Sophia Ann Adams and also the annuitants all died before the coming into operation of the *Land Tax Assessment Act* 1910. All the said nine children of Sophia Ann Adams are still surviving and attained the age of 21 years before the coming into operation of that Act; and the said nine children were during the period for which the assessment appealed against was made entitled to the beneficial interest in the said land and premises and the clear annual income and rents and profits thereof as by the said will provided. The questions for the determination of the Court were:

1. Whether the appellants are entitled to several deductions, each of the prescribed amount, in respect of each of the shares of the nine children of the said Sophia Ann Adams in the said land and premises and the income thereof, or to one deduction only.
2. Whether any land tax is payable by the appellants in respect of the said land and premises for the year ended 30th June 1912; and, if yes, what amount, or how and upon what basis is the same to be ascertained?

Bryant, for the appellants, referred to *Neill* v. *Federal Commissioner of Land Tax* (1).

Pigott, for the respondent, was not called upon.

GRIFFITH C.J. The provision in force on the day as of which this assessment was made, 30th June 1911, was sec. 38 of the *Land Tax Assessment Act* 1910 as amended by the *Land Tax Assessment Act* 1911. Sec. 38 (7) provides that "where, under a settlement made before 1st July 1910, or under the will of a

(1) 14 C.L.R., 207.