[HIGH COURT OF AUSTRALIA.]

CLIFFORD AND OTHERS . . . . APPELLANTS;

AND

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX FOR NEW SOUTH WALES . . . . . } RESPONDENT.

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MELBOURNE, 1914, *Oct.* 14, 15; 1915, *March* 26.

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

Land Tax—Assessment—Deductions—Joint owners—Trustees of deceased partners—Wills of testators who died before 1st July 1910—Beneficiaries not relatives of testators by blood, &c.—Land Tax Assessment Act 1910-1912 (*No.* 22 *of* 1910—*No.* 37 *of* 1912), *sec.* 38 (7).

Certain lands were held as to one undivided moiety by trustees in fee under the will of A as joint tenants, and as to the other undivided moiety by other trustees in fee under the will of B as tenants in common, so that the trustees of A and those of B were joint owners within the meaning of the *Land Tax Assessment Act* 1910-1912. Both A and B had died before 1st July 1910. The trustees of A held on behalf of the children of A equally, and the trustees of B on behalf of the children of B equally; the children of A were not related to B, nor the children of B to A.

Held by *Isaacs*, *Gavan Duffy* and *Rich* JJ. (*Griffith* C.J. and *Barton* J. dissenting), that the trustees, as representing the beneficiaries under the above-mentioned wills, were not entitled to the benefit of sec. 38 (7) of the *Land Tax Assessment Act* 1910-1912.

Isles v. *Federal Commissioner of Land Tax*, 14 C.L.R., 372, distinguished.

Baird v. *Federal Commissioner of Land Tax*, 19 C.L.R., 490, discussed.

SPECIAL CASE.

On an appeal by Miller Hancorne Clifford and the Equity Trustees Executors and Agency Co. Ltd.—trustees of the estate of William Peterson, deceased,—and Frederick George Sargood and the Trustees Executors and Agency Co. Ltd.—trustees of the estate of Sir

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Frederick Thomas Sargood, deceased,—from an assessment of them by the Deputy Commissioner of Land Tax, New South Wales. *Powers* J. stated a special case for the Full Court of the High Court, which was, in substance, as follows :—

1. At the time of the death of William Peterson the said William Peterson and Sir Frederick Thomas Sargood were partners in the business of squatters and station owners and sheep farmers and carried on the said business pursuant to articles of partnership dated 1st December 1893.

2. The said William Peterson died on 24th February 1898, leaving a will dated 24th April 1895 and two codicils thereto dated respectively 20th November 1895 and 23rd February 1898.

3. Pursuant to the terms of the said will and codicils the appellants Miller Hancorne Clifford and the Equity Trustees Executors and Agency Co. Ltd. are the trustees of the said William Peterson so far as relates to his estate in Australia.

4. The said Sir Frederick Sargood died on 2nd January 1903, leaving a will dated 3rd August 1896 and a codicil thereto dated 23rd October 1899.

5. Pursuant to the terms of the will and codicil last mentioned the appellants Frederick George Sargood and the Trustees Executors and Agency Co. Ltd. are the trustees of the estate of the said Sir Frederick Thomas Sargood.

6. At the date of the death of the said William Peterson the assets of the said partnership included certain freehold and leasehold lands in New South Wales forming the Wunnamurra Station.

7. Part of the said lands is still unsold, and the appellants Miller Hancorne Clifford and the Equity Trustees Executors and Agency Co. Ltd. are registered under the *Real Property Act* of New South Wales as proprietors of an estate in fee simple as joint tenants in an undivided moiety therein, and the appellants Frederick George Sargood and the Trustees Executors and Agency Co. Ltd. are registered under the said Act as proprietors of an estate in fee simple as tenants in common of the other undivided moiety therein.

8. Under the said will and codicils of the said William Peterson the beneficial interest in the one undivided half-interest in the said lands still unsold is shared equally by his four children.

9. Under the said will and codicil of the said Sir Frederick Thomas Sargood the beneficial interest in the other undivided half interest in the said lands still unsold is shared equally by eleven persons, who are relatives, by blood or marriage, of the testator.

10. On 16th August 1912 the appellants as trustees as aforesaid furnished a return pursuant to the provisions of the *Land Tax Assessment Act* 1910-1912 of the lands held by them as in the preceding paragraph 7 hereof set forth.

11. The unimproved value of the land included in the said return was stated at £52,035.

12. The appellants, as trustees as aforesaid, on or about 24th April 1913 received notice of assessment from the respondent for the year 1912-1913, assessing the unimproved value of the land included in the said return at the sum of £52,035 less one deduction of £5,000, and claiming payment of £503 4s. 9d. being land tax calculated on the taxable balance of £47,035 at the rate of $1\frac{470}{3}\frac{35}{000}$d. in the pound.

13. On 17th May 1913 the appellants delivered to the respondent a notice of objection to the said assessment.

14. The respondent disallowed the objection and the notice of objection was at the request of the appellants treated by the respondent as a notice of appeal.

15. The question for the opinion of the Court is :—

> Are the appellants entitled to have any, and what, deduction or deductions made from their liability under their joint assessment in respect of the beneficial interests of the four children of the said William Peterson and of the eleven persons beneficially entitled under the will and codicil of the said Sir Frederick Thomas Sargood ?

The objection mentioned in the notice referred to in par. 13 was that, under sec. 38 (7) of the *Land Tax Assessment Act* 1910-1912, there should be deducted from the unimproved value of land held in joint ownership under a will of a testator who died before 1st July 1910, by each joint owner who is a relative of the testator by blood or marriage, the sum of £5,000.

The articles of partnership and the wills and codicils were

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included in the special case, and the material provisions of them are stated in the judgments hereunder.

Weigall K.C. (with him *Pigott*), for the appellants.

Mitchell K.C. and *Gregory*, for the respondent.

During argument reference was made to *Isles* v. *Federal Commissioner of Land Tax* (1); *Archer* v. *Deputy Federal Commissioner of Land Tax (Tas.)* (2).

Cur. adv. vult.

March 26.

GRIFFITH C.J. read the following judgment:—The question to be determined in this case depends upon the construction of sub-sec. 7 of sec. 38 of the *Land Tax Assessment Act* 1910-1912 which is in the following terms:—

"(7) Where, under a settlement made before the first day of July, 1910, or under the will of a testator who died before that day, the beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives of the settlor or testator by blood, marriage, or adoption, in such a way that they are taxable as joint owners under this Act, then, for the purpose of their joint assessment as such joint owners, there may be deducted from the unimproved value of the land, instead of the sum of £5,000 as provided by par. (*b*) of sub-sec. 2 of sec. 11 of this Act, the aggregate of the following sums namely:—

"In respect of each of the joint owners who holds an original share in the land under the settlement or will—

"(*a*) the sum of £5,000, or

"(*b*) the sum which bears the same proportion to the unimproved value of the land . . . as the share bears to the whole,

whichever is the less."

The term "original share" is defined by sub-sec. 8.

The term "owner" includes beneficial as well as legal owners of

(1) 14 C.L.R., 372. (2) 17 C.L.R., 444.

land (sec. 3). Both are liable to land tax, but the amount of tax payable by a trustee does not exceed that for which the beneficial owners are liable (*Sendall's Case* (1)).

The appellants are the trustees of the wills of two persons who were joint owners of the land now in question, and both of whom died before 1st July 1910, having devised their respective interests in the land to trustees wholly for the joint benefit of their respective children, in one case four, in the other eleven. The appellants claim that they, as representing the beneficiaries, are entitled to the benefit of sub-sec. 7. The Commissioner has decided that they are not, and this is an appeal from his decision.

The appellants maintain that they come within the terms of sub-sec. 7 properly construed. They contend further that the point is concluded in their favour by authority, which has, moreover, received parliamentary recognition.

The respondent's contention is, in effect, that the sub-section should be expanded to read as follows :—

" Where, under a *single* settlement made before the first day of July 1910, or under the will of a *single* testator who died before that day, the *whole* beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives," &c., " in such a way that they are taxable as *the* joint owners *of the land* under this Act, then, for the purpose of their joint assessment as such joint owners *of the land,* there may be deducted " &c. I have put in italic the words which the respondent contends should be read into the sub-section. In other words, he contends that the provision is only applicable to the case of a single settlement or will, and that the word " land " whenever used in sub-sec. 7 means a separate parcel of land regarded as a physical entity or portion of the earth's surface. I will deal first with the second contention, which raises a question of general importance.

The *Acts Interpretation Act* 1901 provides (sec. 22) that " unless the contrary intention appears " the word " land," when used in a Statute, includes an undivided interest in land. The contention of

(1) 12 C.L.R., 653.

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the respondent cannot therefore be sustained unless upon examination of the other relevant provisions of the Act such a contrary intention appears. The burden of establishing the contrary intention rests, of course, upon the party asserting it.

I proceed to make this examination, and premise that in order to exclude the statutory definition it is not enough to show that the provision in which the defined word is used would, if that word were read in its primary sense, be consistent with the other provisions of the Act. The true test is to read the provision in the sense which it bears with the prescribed signification given to the defined word, and then to inquire whether the provision so read is inconsistent with some other clear provision or provisions of the Act. If it is not inconsistent the contrary intention does not appear, and that signification must be adopted, even though the provision would be equally consistent with the rest of the Act if it were not adopted.

The first step in determining the amount of land tax payable in respect of any land is to ascertain the gross unimproved value of the land itself, regarded as a portion of the earth's surface, and irrespective of title or ownership. This matter is dealt with by sec. 10, and is a matter of valuation *simpliciter*.

The next step is to determine the taxable value so far as regards the individual taxpayer. This matter is dealt with by sec. 11.

In the case of owners in severalty the taxable value is the total sum of the unimproved values of every parcel of land owned by the taxpayer. But if the owner is not an absentee the sum of £5,000 is to be deducted from the total (sec. 11 (2) (*b*)). This is the deduction of £5,000 referred to in sub-sec. 7 of sec. 38.

That section deals with the case of joint owners. It provides as follows :—

"(1) Joint owners of land shall be assessed and liable for land tax in accordance with the provisions of this section."

Sub-sec. 2 as originally passed, and as it stood when the assessment now in question was made, was as follows :—

"(2) The joint owners shall be jointly assessed and liable in respect of the land as if it were owned by a single person, without regard to their respective interests therein, and without taking into account any land owned by any one of them in severalty, or as joint

owner with any other person." Here the word "land" no doubt means "parcel of land."

The result of this provision standing alone is to allow a single deduction of £5,000 from the total value, which is to be made in every case, without regard to the question whether any of the joint owners is an absentee (sub-sec. 5).

But, since the *Land Tax Assessment Act* is to be read as one with the *Land Tax Act*, under which the rate of land tax is progressive according to value, the result in the case of joint owners is that the amount of land tax for which they are jointly liable is much greater than the aggregate amount of the taxes which would be payable on separate holdings equal in value to their respective interests in the joint estate. For instance, the land tax payable in respect of land of an unimproved value of £10,000 at the rates prevailing until the year 1914 was just under £25, while the tax payable on land of an unimproved value of £20,000 was £93 15s., and the tax payable upon land of an unimproved value of £40,000 was within a few pence of £316. The joint owners are jointly and severally liable for the whole amount of the tax, but are, of course, entitled to contribution between themselves.

When the Principal Act was passed it seems to have been thought that these provisions would involve a hardship in the case of what may be called "family estates" held by trustees for the benefit of several persons jointly under settlements or wills which had taken effect before the law was proposed to Parliament. It was, therefore, proposed that in such cases certain deductions might be made from the gross value in relief of the individual beneficiaries. Such estates were usually, though not necessarily, held by trustees, and the relief was confined to land so held. The case of a direct gift by settlement or will to several persons as joint owners does not seem to have been contemplated.

I shall afterwards, in dealing with another aspect of the case, have occasion to refer in detail to the provision of the Principal Act dealing with this matter, which was, perhaps inartificially, made by way of a proviso to section 33, which dealt with the assessment of trustees.

By the amendment Act of 1911 this proviso was repealed, and

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a new paragraph was added to section 38 as sub-section 7, on which the question to be now determined arises.

With this introduction I proceed to the inquiry whether the statutory meaning of the word "land" as used in sub-sec. 7 is excluded by a contrary intention appearing on the face of the Act. On such an inquiry the apparent object of the provision is of the first importance.

I remark in the first place, that sub-sec. 7 is, on its face, a grant of a concession or privilege limited to certain cases, but being an extension of the general concession or privilege conferred by sec. 11 on all owners who are not absentees.

In my opinion the plain object of the provision in question was to confer upon certain owners a personal privilege. This privilege is in terms made dependent upon two conditions, namely, the date at which the settlement or will took effect, and the common relationship of the beneficiaries to the settlor or testator. The entirety or severalty of their collective interests in the parcel of land is not expressly mentioned. The Commissioner, however, maintains that a third condition, viz., that the beneficiaries shall be collectively the owners of the whole interest in the parcel of land, is imposed by necessary implication.

There is nothing in the words defining the class to be benefited to suggest that the privilege is to be limited to cases in which the whole interest in the land is the subject of the settlement or will. The word "all," relied upon by the respondent, is an adjective qualifying "persons," *i.e.*, denoting that the whole beneficial interest in the "land," whatever that land may be, is shared between them, and is quite irrelevant to the question of what it is. The words "in such a way that they are taxable as joint owners under this Act" are equally applicable whether they are collectively the joint owners of the whole interest in the particular parcel or only some of such joint owners. The word "assessment" in the phrase "their joint assessment as such joint owners" does not, as in sub-sec. 2, mean the mere valuation of the land regarded as a physical entity, in making which no question of deduction, whether of one sum, or of several sums, of £5,000, arises. The joint assessment here spoken of is, on the contrary, the ascertainment of the taxable

value as against them, in which the element of personal privilege comes in. That is to say, it refers to a later stage in the process of calculating the extent of the liability of the individual taxpayer to taxation.

The main argument for the Commissioner, as I understand it, is based upon this phrase. No doubt if the word "land" when first used in sub-sec. 7 means "parcel of land," the words "for the purpose of their joint assessment as such joint owners" imply an assessment of them as owners of the whole interest in the land. But in that view those words are mere surplusage, for there can be no other purpose. Yet some effect should, if possible, be given to them. To my mind they suggest a distinction between the purpose mentioned and some other possible purpose. (Compare *Brunton* v. *Commissioner of Stamp Duties for New South Wales* (1)). The use of the word "their" (not "the"), which is certainly apt to distinguish the assessment of the taxable value of the land as regards them from a possible different assessment as regards other persons jointly interested with them, emphasizes this suggestion. The question whether the language of this phrase implies the ownership by the persons claiming privilege of the whole interest in the land depends, therefore, upon whether the word "land" when first used means parcel of land, which is the question to be solved. To assume that the language of the phrase does make such an implication, and thence to infer that the word "land" has that meaning, is obviously begging the question. The argument may be put thus: "If A is B, C is D; I will assume that C is D; therefore A is B."

For these reasons I am unable to find in sub-sec. 7 itself any indication of an intention to use the word "land" in the sentence conferring the privilege in a sense inconsistent with its meaning according to its statutory definition. It is, however, contended that, since the word is used in the narrower sense in sub-sec. 2 and also in the phrase "unimproved value of the land" in sub-sec. 7 it must be read in the same sense throughout that sub-section. I have already pointed out the two different senses in which the word "assessment" is used. Sub-sec. 2 deals with the valuation of a

(1) (1913) A.C., 747.

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physical object irrespective of person or title. The subject matter of sub-sec. 7, on the other hand, is a privilege granted to a special class of persons. In dealing with such a subject matter there is no *primâ facie* probability that the privilege was intended to be made dependent upon the quantity of estate held by them. In the one case a contrary intention clearly appears, and in the other it does not.

In general, no doubt, it should be inferred, if no more appears, that Parliament has used the same words in the same Act in the same sense, but this *primâ facie* inference is not, in my judgment, sufficient to override the definition prescribed by the *Acts Interpretation Act*, which is a rule of law.

This view is strongly confirmed by an amendment of sub-sec. 2 of sec. 38 made in 1912. The sub-section now stands as follows :—

"(2) Joint owners (except those of them whose interests are exempt from taxation under sec. 13 or sec. 41 of this Act) shall be jointly assessed and liable in respect of the land (exclusive of the interest of any joint owner so exempt) as if it were owned by a single person, without regard to their respective interests therein or to any deductions to which any of them may be entitled under this Act, and without taking into account any land owned by any one of them in severalty or as joint owner with any other person."

The words "any deductions to which *any of them* may be entitled under this Act" can only refer to sub-sec. 7, for the deduction under sec. 11 is a single deduction made, once for all, for the joint benefit of all the joint owners, and all other deductions mentioned in the Act are either deductions made before determining the gross value, and necessarily enuring for the benefit of all the joint owners, or deductions from the tax payable by individual taxpayers. While, therefore, the deductions referred to in sub-sec. 2 are to be disregarded for the purpose of assessing the gross unimproved value of the land, with which alone sub-sec. 2 deals, it is assumed that the joint owners or *some of them* may, nevertheless, be entitled to deductions for some other purpose. The only other purpose that can be suggested is the ascertainment of the taxable value of the land so

far as regards them. The use of the words "any of them" seems to me a clear recognition of the position that some of the joint owners may be entitled to deductions although others are not. It also has another important bearing upon another aspect of the case. This position is equally inconsistent with the argument that the word "whole" should be read in before the words "beneficial interest," with the argument that the word "the" in the sense of "the sole" should be read in before the words "joint owners," with reading in the words "of the land" after those words in two places (and the word "such" before the same words, in the second instance), and with the conclusion sought to be drawn, namely, that either all the joint owners of the parcel of land must be entitled to the deductions or none of them can be entitled.

There can be no doubt that in a case falling within sub-sec. 2 as amended, if the interest of some of the joint owners is exempt from taxation and the other joint owners are within sub-sec. 7, the latter or any of them would be entitled to the privilege conferred by it. It would be strange indeed if, the privilege having been originally denied, as now contended, except in cases in which the persons claiming it are the sole owners of the whole estate in the land, it should be conferred on *some* of them in the case in which the other joint owners are exempt from taxation, and in all other cases denied to any unless claimable by all.

In *Baird's Case* (1), heard during the present sittings, which arose under the repealed proviso to sec. 33, this Court decided that in an assessment of taxable value against joint owners the value of all the parcels of land of which they are joint owners, under whatever title, must be added together, and the permitted deduction made, once for all, from the total value, and not by way of diminution of the value of one of the parcels. In other words, the true formula is (A+B)−C and not (A−C)+B. Although the arithmetical result is the same, the principle that the permitted deduction, whether of £5,000 or of several sums of £5,000, operates as a proportional diminution of the value of each parcel is important. The Court also decided that, in order that joint owners should be entitled to claim the privilege of the proviso to sec. 33, it was not necessary

(1) 19 C.L.R., 490.

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that the land in respect of which it was claimed should be the whole of the land of which they were joint owners. That case does not, of course, govern the present, but it suggests that, if it is not necessary that the land in respect of which the privilege is claimed should be the whole of the land comprised in the joint assessment, it may not be necessary for it to be the whole interest in that land.

If there were no more in the case, therefore, I should be of opinion that the respondents have failed to show the contrary intention necessary to exclude the statutory definition of the word "land" in the construction of sub-sec. 7.

There is, however, an apparent practical difficulty, which was rather suggested than developed in the argument for the respondent, but with which I ought to deal.

When the first step in the assessment has been taken, and the gross value of the land regarded as a physical entity has been determined, it remains to take the second step of ascertaining the taxable value so far as regards the taxpayer or taxpayers; and in ordinary circumstances, when sub-sec. 7 does not apply, all that is to be done is to deduct or not to deduct a single sum of £5,000 from the gross value. In the case of joint ownership this deduction, of course, enures ratably for the benefit of all the joint owners. If, however, sub-sec. 7 is applicable to the case, instead of a single deduction there are to be as many deductions for the purpose of the assessment of the beneficiaries as there are persons who can claim the privilege. These deductions are to be made "instead of" the single deduction, that is, in substitution for it. They should, therefore, *primâ facie*, enure for the benefit of the same persons as would have had the benefit of the single deduction. Yet if some only of the joint owners are entitled to it this result could not have been intended, for, as I have shown, the privilege is a personal one, and we should expect to find some words excluding such a result. I have already indicated that in my opinion the word "their" is apt to express that purpose, namely, to show that the deductions are not to enure for the benefit of any other parties concerned in the assessment of the gross value. If this is so, it follows that the taxable value assessed *quoad* the privileged joint owners is not identical with that assessed *quoad* the unprivileged ones. The

point can be conveniently illustrated by a concrete instance. I will take the simplest case (which is substantially *Isles's Case* (1), to which I shall afterwards have to refer), that of land worth, say, £30,000, held jointly by two joint owners in equal moieties, one of whom, A, is both legal and equitable owner, and the other, B, is a trustee for two persons who are entitled to the benefit of sub-sec. 7. So far as A is concerned, one deduction only (of £5,000) can be made, but so far as regards B two deductions are to be allowed. That is to say, as regards A the taxable value is £25,000, on which the tax is about £190, and as regards B it is £20,000, on which the tax is about £140. So far there is no difficulty. The first deduction of £5,000 enures for the benefit of both, but the second for the benefit of B only. The result is that the joint liability of A and B for land tax does not extend beyond the tax payable on £20,000, that is, the taxable value assessed as against B. In this sense they are not jointly liable for the whole tax payable in respect of the land. This is no doubt *primâ facie* inconsistent with sub-sec. 2. But sub-sec. 7 is in substance a proviso to or exception from sub-sec. 2. An inconsistency between the general enactment and the exception is natural, and is not sufficient to exclude the statutory definition of the word "land." The only result is that the liability of A for land tax upon a taxable value of £25,000 is not affected, but his liability in respect of the excess (about £50) over the tax payable upon a taxable value of £20,000 is not joint, but several. As between A and B the burden of the tax computed upon the value of £20,000 will be divided between them in equal shares.

It would, however, be manifestly unfair that in such a case A should be penalized for his misfortune in having B for a co-owner. Apart from sub-sec. 7 A would be entitled to contribution from B for half of the total liability of £190. But the limitation of B's joint liability to £140 is inconsistent with his liability to contribute more than £70. It seems to me to follow by necessary implication that, just as it must have followed, before the amendment of sub-sec. 2 already referred to, in the case of land in which one of two joint owners was exempt from taxation that the liability, nominally but not really joint, of the other joint owner who was not entitled

(1) 14 C.L.R., 372.

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to claim contribution at all was cut down to an aliquot part of the nominal joint liability, so in the supposed case of A and B the liability of A in respect of the £190 would be cut down by the amount in respect of which he would not be entitled to claim contribution from B, and his several liability would be limited to half of the difference, *i.e.*, £25.

For these reasons I am of opinion that as a mere matter of construction, and apart from authority, the appellants are entitled to the benefit of sub-sec. 7.

The appellants, as I have said, further contend that the point is determined in their favour by authority which has received parliamentary recognition. The case relied on is *Isles* v. *Federal Commissioner of Land Tax* (1), which arose under the repealed proviso to sec. 33 before the passing of the amending Act of 1911. The facts were that one of two joint owners of land had died before 1st July 1910, devising his land to trustees for the benefit of his wife and children, and the question raised was whether the benefit of the proviso was excluded by the fact that the trustees held only an undivided moiety of the land.

The repealed proviso was in these words :—

"Provided . . . 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, for the purpose of ascertaining the taxable value of the land owned by him as such trustee, there may be deducted from the unimproved value of the land, instead of the sum of £5,000 as provided by par. (*b*) of sub-sec. 2 of sec. 11 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 £5,000, or the unimproved value of the share, whichever is the less."

This Court held that the trustees were entitled to the benefit of the proviso, in other words, that it was not necessary that the persons in whose right the privilege was claimed should be the owners

(1) 14 C.L.R., 372.

of the whole beneficial interest in the soil. The ground of the decision was that the proviso was to be read with sec. 38 and as a qualification of it, and that it applied as well to trustees of an undivided moiety of land who were themselves joint owners of the land with strangers, as to trustees who held the whole interest in trust for beneficiaries who were equitable joint owners. It was pointed out that although the term "land" is in general used in the Act to designate a portion of the earth's surface, and not in the wider sense given to it in sec. 22 of the *Acts Interpretation Act*, which includes an undivided interest in land, yet the assessment and taxation of undivided interests was in some cases recognized by the Act. Reference was made in particular to the possible case of land held jointly by two sets of trustees, one set taking under a will and the other set holding as trustees for a charity, who are exempt from taxation (sec. 13), in which case the trustees of the will alone would be liable to be taxed, and would apparently be liable to taxation calculated upon the full value of the land, although they would not be liable to pay more than a share of the tax so calculated. Such a case as the present was referred to by way of illustration, and treated as too clear for argument. *Isaacs* J., said (1) :— "The undivided share left by the testator was a hereditament, it is a separate right, it is held by a separate title, and is 'land' within the meaning of the *Acts Interpretation Act*, and also I think within sec. 33."

The appellants contend that the present case is governed by *Isles's Case*; the respondent contends that that case, if it was rightly decided, is distinguishable on the ground of the change in the language of the Act of 1911. If it is not distinguishable, I think that it should be followed until overruled, for I conceive that continuity of decision is as desirable in this Court as in others. If the principle of construction laid down in that case is applicable, it cannot make any difference that in the present case the joint owners of the legal estate are two sets of trustees instead of one set of trustees and a beneficial owner. I have already pointed out that sub-sec. 7 is, like the repealed proviso, in the nature of a

(1) 14 C.L.R., 372, at p. 378.

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proviso to or exception from the other provisions of the Act relating to the taxation of joint owners.

I will endeavour to deal with the arguments by which it was sought to establish the distinction, so far as I have been able to apprehend them.

The words to be compared are :—

(*a*) " In the case of land vested in a trustee under a settlement or will " (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 settlor or testator, for the purpose of ascertaining the taxable value of the land owned by him as such trustee " &c.

and

(*b*) " Where under a settlement or will " (taking effect before 1st July 1910) " the beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives of the settlor or testator . . . , in such a way that they are taxable as joint owners under this Act, then, for the purpose of their joint assessment as such joint owners " &c.

It is obvious that in any case of which it can be predicated that land is vested in a trustee upon trust to stand possessed thereof for the benefit of a number of persons who are relatives of the settlor or testator, it can also be predicated that the beneficial interest in the land or in the income thereof is for the time being shared among a number of persons who are relatives of the testator . . . . in such a way that they are taxable as joint owners under the Act, and the two purposes are identical. The two phrases are merely different ways of expressing the same proposition, varying only according to the aspect from which the facts are regarded.

So far, therefore, as these words are concerned there is no distinction in principle between the old and the new enactment, unless it is to be found in the word " all." I have already pointed out that in the context in which that word is used it is immaterial whether the word " land " means the whole interest in a portion of the earth's surface or includes an undivided interest in such

portion. The only other alteration made by the amendment was the possible extension of the privilege to joint owners in whom the legal estate as well as the beneficial interest is vested without the intervention of a trustee, which is irrelevant to the present question. I am therefore unable to distinguish the present case from *Isles's Case* (1). I think also that that case was rightly decided.

I am further of opinion that *Isles's Case* has received parliamentary recognition, and that for that reason, if there were no other, it ought to be followed.

I have already mentioned that in that case reference was made to the possible case of land held jointly by two sets of trustees, one set taking under a will, and the other set holding as trustees for a charity, who are exempt from taxation under sec. 13.

By the amendment Act of 1912, which was passed just after the decision in *Isles's Case*, Parliament dealt with such cases by the words enclosed in brackets in sub-sec. 2 as amended, thus indicating that its attention had been called to the anomaly. The other amendment in the same sub-section, to which I have adverted at length, seems to me a plain recognition of the authority of that case, in which, as I have pointed out, the only point decided was that it is not necessary, in order to claim the benefit of the provisions for relief of beneficiaries under old settlements and wills, that the beneficiaries should be the holders of the whole beneficial interest in the land in question. No other reason can be suggested for the insertion of the words " any of them," nor, on any other construction of sub-sec. 7 than that which I adopt, can any effect be given to them. Further, in the same Act Parliament dealt with sub-sec. 7 itself, and amended it by adding a proviso limiting the amount of deduction which might possibly have been claimed in certain cases upon a literal construction of the sub-section as it then stood, but not in any way qualifying the effect of the decision in *Isles's Case*.

Whatever opinion, therefore, I might form as to *Isles's Case* if it were under review, I feel constrained to come to the conclusion that it has received parliamentary recognition and ought to be followed.

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I pass to the argument founded by the respondent upon the introductory words of sub-sec. 7, which, it was said, necessarily limit its application to cases in which the whole interest in land, regarded as a physical entity, is settled or given by a single settlement or will and possibly cases of two or more settlements or wills, or of a settlement and will, in which all the beneficiaries are relatives by blood, marriage or adoption of both the settlors or testators. Apart from any statutory provision this does not seem to me a natural construction.

Sec. 23 of the *Acts Interpretation Act* prescribes that unless the contrary intention appears words in the singular shall include the plural. Having regard to the object and purpose of the provision now under consideration, which, as I have pointed out, is to give a privilege to persons claiming under old family settlements and wills, so far from seeing any indication of a contrary intention, I think that, even giving the narrower meaning contended for to the word "land," the natural construction of sub-sec. 7 is that it should be read "when under a settlement or settlements, &c., or a will or wills, &c., the beneficial interest in any land, &c., is for the time being shared among a number of persons all of whom are relatives of the settlor or testator under whom they respectively claim." If the same settlor settled different interests in the same land by different settlements, the point would not seem to admit of doubt. If this construction is correct, it exactly covers the present case, and it would not be necessary to deal with the general question.

For these reasons I am of opinion that it should be declared that the appellants are respectively entitled to four and eleven deductions of £5,000.

BARTON J. I agree with the judgment of the learned Chief Justice.

ISAACS J. read the following judgment:—I have arrived at a different conclusion.

Mr. William Peterson and Sir Frederick Sargood were equal partners as station owners; certain freehold and leasehold lands in New South Wales, called Wunnamurra Station were included in

their partnership assets. Peterson died in 1898, leaving a will by which he appointed the appellants Clifford and the Equity Trustees Executors and Agency Co. trustees of his Australian estate. His four children who survived him share equally the beneficial interest.

In 1903 Sargood died leaving a will by which he appointed the appellants Frederick George Sargood and the Trustees Executors and Agency Co. the trustees of his estate. Eleven persons share equally the beneficial interest.

The lands, so far as unsold, are held by the two sets of appellants under one registration under the Transfer of Land Statute, the first named appellants being registered as proprietors of an estate in fee simple as joint tenants in an undivided moiety, and the secondly named appellants being registered as proprietors of an estate in fee simple as tenants in common of the other undivided moiety. As between the two sets of appellants they are "joint owners" within the definition of that term in the *Land Tax Assessment Act*.

The admitted unimproved value of the land is £52,035. The Commissioner assessed all the appellants jointly upon that sum, allowing one deduction of £5,000. This is objected to on the ground that each of the fifteen beneficiaries is entitled to a deduction under sub-sec. 7 of sec. 38 of the Act. This objection, if good, would in the case of the Sargood estate, leave it entirely exempt from taxation. In the case of the Peterson estate there would be an amount of £6,017 left for taxation to be borne entirely by that estate, the Sargood trustees and beneficiaries being wholly free from any liability even as to that. There is no suggestion that the Peterson children were in any way related to Sir Frederick Sargood, or that the Sargood children were in any way related to Mr. Peterson.

In my opinion the objection is not sustainable. The words of the legislature by which liability is primarily imposed are clear. Sec. 11 makes land tax payable by every "owner" of land upon "the taxable value" of all land owned by him, and not exempt from taxation. The lands exempt from taxation are enumerated in secs. 13 and 41, but by sec. 14 the exemptions in sec. 13 do not extend to any other person who is the owner of any estate or interest in the land.

"Owner" includes "every person who jointly or severally,

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whether at law or in equity, (*a*) is entitled to the land for any estate of freehold in possession; or (*b*) is entitled to receive, or in receipt of, . . . the rents and profits thereof, whether as beneficial owner . . . or otherwise."

The appellants then are clearly "owners" and liable to be taxed upon the "taxable value" of the whole land. That by sec. 11 is in this case—there being no absentees—"the balance of the total sum of the unimproved value . . . after deducting the sum of £5,000." That amounts to £47,035.

Now, how do the appellants escape from that?

Sec. 38 is one of a group dealing with "liability," and making special provisions in particular cases. One of the sections of the group is sec. 33 dealing with "trustees" as a class. The first sub-section of sec. 33 enacts that "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"; while sec. 35 makes the equitable owner liable as if *he* were the legal owner, and provides that the legal owner is the primary taxpayer and the equitable owner is the secondary taxpayer. As sec. 33 originally stood there were three provisoes—the third being the one under which a case of *Isles* v. *Federal Commissioner of Land Tax* (1) was decided. That case is relied on here by the appellants, but is in my opinion irrelevant for two reasons. First, the third proviso, though resembling to some extent in form sub-sec. 7 of sec. 38 as the law now stands, was directed to a different immediate subject matter, namely, the liability of a trustee as such whether a joint owner or not, and not to joint owners as such whether trustees or not. And the third sub-section of sec. 33, under which *Isles's Case* was decided, was to cut down, in the case mentioned, the unrestricted liability imposed by sub-sec. 1 on every trustee, whether joint owner or not. The transfer of the provision as to deduction in the case of settlements from "trustees" to "joint owners" indicates a change of intention to some extent on the part of the legislature, and makes it impossible to say that the decision in question is necessarily to govern the differently placed provision.

But, in the next place, the condition upon which the privileged

(1) 14 C.L.R., 372.

deduction is to take place is very differently expressed, and whatever might be said as to the ambiguity of the former verbiage, the latter words are clear.

In the former enactment, for instance, the deduction was "for the purpose of ascertaining the taxable value of the land owned by him as such trustee." The concluding words of my judgment in *Isles's Case* (1) have special reference to sec. 40 of the Queensland *Real Property Act of* 1861, which enacts that "in all cases where two or more persons are entitled as tenants in common to undivided shares of or in any land such persons shall be bound to receive separate and distinct certificates of title or other instruments evidencing title to such undivided shares." The passage has no reference to equitable interests.

But in sub-sec. 7 of sec. 38, which is concerned solely with equitable interests, we find these words: "for the purpose of their *joint assessment* as such *joint owners.*" Now, these are vital words, different from those previously adjudicated upon, and are therefore not governed by the decision. More decidedly does this appear when those words are read with the rest of the sub-section as presently to be indicated. That decision was given in 1912 after the new enactment was passed (1911) but on a state of facts existing before it began to operate.

And to my mind the test—or at least one sufficient test—of the appellants' argument is this. In seeking these separate exemptions from the amount of the Sargood half of the total unimproved value of the land, are the appellants satisfying the words of the Act that the deductions are to be for the purpose of "their joint assessment" as joint owners? For it can lawfully be for no other purpose. What does "joint assessment" mean? There are only two methods of assessment known to sec. 38, viz.: "joint" and "separate." That section begins by saying that "joint owners of land shall be *assessed* and *liable* for land tax in accordance with the provisions of this section." That means, as I read it, when we refer back to sec. 11, that *all* the joint owners are to be assessed and liable—subject to the subordinate or modifying provisions which follow—in respect of the unimproved value of the whole "parcel of land," less £5,000.

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Then sub-sec. 2 (as it stands since the passing of No. 37 of 1912) directs all joint owners (apart from exemptions) to be "jointly" assessed and liable; that is joint assessment and joint liability. And then in respect of what? The sub-section supplies the answer:—"In respect of the land (exclusive of the interest of any joint owner so exempt) as if it were owned by a single person, without regard to their respective interests therein." I stop there for a moment. It seems to me too plain for controversy, that so far, the legislature directs that each and every joint owner shall be included in the same united assessment of the whole land (apart from exempted interests which are entirely free), in other words, of the whole taxable interest in the parcel of land, and that each and every of the joint owners is personally responsible for the total tax so assessed; and, as the sub-section says, "without regard to their respective interests therein," that is, in *the parcel of land.*

Then this joint assessment and liability is to be also without regard "to any deductions to which any of them may be entitled under this Act." It is argued from these words that necessarily the appellants' construction is right, because otherwise no meaning would be given to sub-sec. 7. In answer, the first thing that strikes one is that the argument gives rise to self-contradiction. Sub-sec. 2 directs a joint assessment without regard to deductions to which *any* joint owner is entitled. Sub-sec. 7 says for the purpose of joint assessments certain deductions are to be made. The natural conclusion must be that, if contradiction is to be avoided, the deductions spoken of in sub-sec. 2 are not the same deductions as are mentioned in sub-sec. 7. And that is found on examination to be so. Sub-sec. 7 speaks of the deduction of an *aggregate* of certain sums, and that deduction is to be from the gross unimproved value of the land, undiminished by the one deduction of £5,000. In other words, it is a single deduction, not for the special benefit of any one of the beneficiaries, but a general deduction, enuring in the aggregate for the benefit of every joint tenant alike no matter what the value of his individual share may be, because the result is to fix *the taxable value of the land itself*, just as the annuity value

deduction (also introduced by the Act of 1911) enures for the joint benefit of all the joint owners by reducing that taxable value.

On the other hand, the deductions referred to by sub-sec. 2 as those which are *not* to be regarded, are deductions to which "any" of them may be entitled, that is, any of them separately on the same principle as any of the "respective interests." Remember that this sub-sec. 2 is speaking of "liability" as well as "assessment," and "deductions" have reference to liability, quite as much as to assessment. The group of sections headed "liability" include deductions from the "tax payable" as well as deductions from the "unimproved value."

Thus secs. 27, 32, 35, 37, 38 (4) and 43 give a right to "deduct" amounts from the "tax payable," so as to prevent double taxation. Secs. 28, 34, 38 (7) and 38A, provide for deductions from the unimproved value of the land.

The deductions, therefore, in the new sub-sec. 2 of sec. 38 have a relevant and clear meaning if referred to the deductions from the tax payable by "any" joint owner, that is, a personal right of deduction, which is appropriate in connection with a separate liability but wholly foreign to a joint liability with others who have no such personal right of deduction.

Continuing sec. 38, we see in sub-sec. 3 a provision for "separate" assessment, which segregates each joint owner from the rest and adds together his personal interests in that and all other land.

Sub-sec. 4 makes the "joint owners" in respect of "their joint assessment," where that phrase is used for the first time, an inseparable entity called "the primary taxpayer," and not "taxpayers." Then the sub-section goes on in marked contra-distinction to say "*each* joint owner in respect of his separate assessment" is to be a secondary taxpayer, and, from the tax payable as appearing upon this separate assessment, there is to be a deduction to prevent double taxation. But the joint assessment is to stand without differentiation between joint owners.

Sub-sec. 5 provides also for a separate assessment of those joint owners who are absentees. It, however, forbids joint owners being deemed to be absentees in respect of "their joint assessment," the phrase being used for the second time. "Joint assessment" is

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untouched by personal disability as much as by personal privilege. Sub-sec. 6 is immaterial.

Then comes sub-sec. 7 couched in terms markedly different from the provision under which *Isles's Case* (1) was decided. It is limited to cases where, under a settlement made before 1st July 1910, or under a will of a testator who died before that day "the beneficial interest," which I take to mean the whole beneficial interest "in any land," which means the physical substance, as is shown by the succeeding words "or in the income therefrom," is for the time being shared among a number of persons, "*all of whom*" are relatives of the settlor or testator, "in such a way that they are taxable as joint owners"—that is, if they answer the description of "joint owners" in sec. 3. If those conditions exist, then a certain legal result is enacted to follow, viz., for the purpose of "their joint assessment as such joint owners," a deduction—one deduction only—is to be made from the gross unimproved value of the land, that is, as owned by all the joint owners, the whole land. The single deduction ordinarily applying—namely, £5,000—is not in this case to be the deduction. There is substituted another single deduction, which, however, is to be the aggregate of certain subordinate factors, each of which, is ascertained by reference to every joint owner's respective original share, and to be either £5,000 or another sum mentioned proportionally, whichever is the less. Having ascertained each subordinate factor separately, the whole are collected, and, when aggregated, the sum total forms the "deduction" from the unimproved value. The difference is to be the taxable value for the purpose of the one joint assessment, and all the joint owners are looked to, as the one primary taxpayer for the tax payable on the basis of that net unimproved value. Then a proviso is added to sub-sec. 7 by the Act of 1912. It suggests, on the face of it, that in working out the Act some special case or cases have been presented to the taxing authorities and need provision. "Settlement" may be read in the plural (*Acts Interpretation Act* 1901, sec. 23). A settlor may have made two settlements, or a settlement and a will, which in combination include all the parcel of land taxed, and all beneficial interests in it, except such as are

(1) 14 C.L.R., 372.

exempted by the Act. The words in sub-sec. 7 "under the will of a testator" may equally well be read "under the wills of testators." So the words "all of whom are relatives of the settlor or testator" may be read "all of whom are relatives of the settlors or testators." Both parents may make settlements or wills, and they may have been tenants in common of the same land, and in that case—unlike the present case—"all" the beneficiaries are relatives of the settlors and testators. But the unity of the "joint assessment" must be, and is, preserved, and that of the "land" must be, and is, preserved, and the completeness of "the beneficial interest" which is held by "all" the beneficiaries must be, and is, maintained in the cases suggested.

And throughout the legislation remains consistent, the original clearness of sub-sec. 7 not being marred, the new proviso relating to what are really "original" though independent interests in the land.

On the other hand, where, in a given case, the present beneficiaries enjoy interests in the land, some of which are truly "original" and some of which are derivative, but which would, without any further legislation, come under sub-sec. 7 of sec. 38 if the appellants' view were correct, Parliament has stepped in and made special provision by sec. 38A.

The contention of the appellants is, therefore, not well founded. If it were, I would only add that, besides "joint assessments" of all the joint owners and separate assessments of each of them, there would be necessarily combined assessments of each set of joint owners, for which no provision is made, there would be varying amounts representing the unimproved value of the same land, which seems to me an absurdity, some joint owners would be liable for land tax, and others free, and the whole system of taxation of joint owners would be thrown out of gear, confused and discordant.

In my opinion the question should be answered accordingly—one deduction only.

I wish to add a word as to *Baird's Case* (1). The decision was simply that, under secs. 33 and 38 of the Act as those sections stood before they assumed their present form, beneficiaries, when

(1) 19 C.L.R., 490.

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assessed under sec. 38, were not thereby disentitled to the benefits conferred by sec. 33 upon them indirectly through their trustees. Here the question is how much benefit has the legislature conferred on the beneficiaries directly by language materially and in its crucial phraseology vitally differing from the terms formerly employed.

Baird's Case therefore has, in my opinion, no relation to the present case. As a party to the judgment in that case, I am free to say I regarded it as entirely disparate from the question we have here to consider.

The judgment of GAVAN DUFFY and RICH JJ. was read by

GAVAN DUFFY J. The appellants put two distinct views in support of their case. They say, in the first place, that the word "land" in the phrase "beneficial interest in any land or in the income therefrom" contained in sec. 38 (7) of the *Land Tax Assessment Act* 1910-1911 means not a piece or parcel of land but an estate or interest in or arising out of land and includes the fee simple in an undivided moiety of a piece of land such as each set of trustees has here, and they rely on the provisions of sec. 22 (*c*) of the *Acts Interpretation Act* 1901. In the alternative they invoke the assistance of sec. 23 of the *Acts Interpretation Act* 1901, which provides that words in the singular shall include the plural, and say that the sub-section should be read thus :—"Where, under a settlement or settlements made before the first day of July 1910, or under a will or wills of a testator or testators who died before that date, the beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives of one or other of such settlors or testators," &c.

In support of the first contention they rely upon the case of *Isles* v. *Federal Commissioner of Land Tax* (1). That case is an authority on the question with which it deals, but cannot relieve us from the necessity of determining for ourselves the true meaning of sec. 38 (7), with which it does not deal. In our opinion the word land in the sub-section means a piece or parcel of land. We think that this is shown not only by its collocation in the phrase "beneficial interest in any land or in the income therefrom" but by the

(1) 14 C.L.R., 372.

whole phraseology of the sub-section. The words "in such a way that they are taxable as joint owners" mean "as joint owners of such piece or parcel of land"; for, on reference to the definitions in sec. 3 to ascertain the meaning of the expression "joint owners," we find:—

"'Joint owners' means persons who own land jointly or in common, whether as partners or otherwise."

"'Owned' has a meaning corresponding with that of owner."

"'Owner,' in relation to land, includes every person who jointly or severally, whether at law or in equity—

"(*a*) is entitled to the land for any estate of freehold in possession; or

"(*b*) is entitled to receive, or in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise;

and includes every person who by virtue of this Act is deemed to be the owner."

Continuing the perusal of sec. 38 (7), we next come to the words "for the purpose of their joint assessment as such joint owners." What is this assessment? Why, clearly the assessment spoken of in the preceding sub-sections of sec. 38, that is the assessment of all those who among them own the piece of land, the subject matter of the taxation. Finally, in the phrase "there may be deducted from the unimproved value of the land" the word "land" means a piece of land, not an interest in land. The "land" mentioned in the sub-section is a piece of the earth's surface. "Joint owners" are those who among them own an estate or interest in the whole of such land; and "joint assessment" is an assessment of all such joint owners.

As to the second contention put forward by the appellants, it is unnecessary to determine whether the singular words "settlement," "will," "testator," in the sub-section, include their plural forms, or whether the contrary intention does appear in the Act itself, for if the appellants are given the full benefit of sec. 23 of the *Acts Interpretation Act* 1901 it does not do what they need. If we adopt the plural forms instead of the singular, the sub-section will

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read thus :—"Where under the wills of testators who died before the first day of July 1910 the beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives of the testators," &c. The beneficiaries here are not all relatives of the testators, but some are relatives of one testator, some of the other.

Question answered : "One deduction only." Costs of special case to be costs in the appeal.

Foll *Decor Corp Pty Ltd v Dart Industries Inc* 13 IPR 385

Solicitors, for the appellants, *J. M. Smith & Emmerton.*

Solicitors, for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

BALLANTYNE AND ANOTHER . . APPELLANTS; DEFENDANTS,

AND

AKTIEBOLAGET SEPARATOR . . . RESPONDENTS. PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 19, 22, 23, 24, 25, 26.

Griffith C.J., Isaacs and Rich JJ.

Patent—Validity—Common knowledge—Prior publication—Construction of specification.

In an action for infringement of a patent for a "feed device for centrifugal separators" the defence was that the patent was invalid on the ground that the invention was not novel at the date of the letters patent by reason of common public knowledge and prior publication.

Held, on the evidence, that the defence failed.

Decision of the Supreme Court of Victoria (*à Beckett* A.C.J.) affirmed.