[HIGH COURT OF AUSTRALIA.]

THE TRUSTEES, EXECUTORS AND AGENCY COMPANY LIMITED AND OTHERS . . . . . } APPELLANTS;

AND

THE COMMISSIONER OF LAND TAX . RESPONDENT.

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MELBOURNE, *May* 11, 12, 13, 21.

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

Land Tax—Assessment—Will of testator who died before 1st July 1910—Tenant for life—Equitable life interest in term of years—Land Tax Assessment Act 1910 (No. 22 of 1910), sec. 25.

Land Tax—Assessment—Alterations and additions to assessments—Power of Commissioner of Land Tax to make—Limitation of power—Mistake of law—Refund where too much duty paid—Amendment of assessment after refund—Recovery of amount refunded—Land Tax Assessment Act 1910-1912 (No. 22 of 1910—No. 37 of 1912), secs. 20, 21, 59, 60.

By the will of a testator who died before 1st July 1910 certain pastoral properties were devised to trustees upon trust to carry on the pastoral business until the expiration of twenty-one years from his death, and to stand possessed of the net annual income for such of seven of his children (who were named) as should be living at the expiration of the annual period (a term defined in the will) during or in respect of which it should have arisen, and such of the children of any of the seven who should then be dead as should be living at the expiration of the annual period, and after the expiration of the period of twenty-one years upon trust to convert and to divide the proceeds, after making certain payments, equally amongst such of the seven children as should then be living and such of the children of any deceased child as should then be living, such children taking their parent's share.

Held, that the children of the testator were not tenants for life within the meaning of the proviso to sec. 25 (1) of the *Land Tax Assessment Act* 1910, and, therefore, were not entitled to the benefit of that proviso.

The power conferred on the Commissioner by sec. 20 of the *Land Tax Assessment Act* 1910-1912 to make alterations in or additions to any assessment is not restricted by the provisions of secs. 59 and 60.

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Semble, per Higgins J., secs. 59 and 60 refer merely to mistakes made in carrying out a given assessment.

In 1911 the trustees were assessed as of 30th June 1910 on the basis that the beneficiaries were not entitled to the benefit of the proviso to sec. 25 (1), and the amount of tax demanded was paid. Within two years from the payment the Commissioner of Land Tax amended the assessment by assessing the trustees on the basis that the beneficiaries were entitled to the benefit of the proviso, and a refund was accordingly made to the trustees of the excess which they had paid on that basis. Shortly after the expiration of two years from the original payment the Commissioner further amended the assessment on the basis that the beneficiaries were not entitled to the benefit of the proviso, and a demand was made upon the trustees for payment of the difference between the amount of the tax as originally assessed and that shown by the amended assessment as last amended. The trustees paid under protest the amount demanded.

Held, that the Commissioner had power under sec. 20 to make the second amendment of the assessment, and that the trustees were bound to make the payment demanded on that assessment.

CASE STATED for the opinion of the Court.

On an appeal by the Trustees, Executors and Agency Co. Ltd., Lionel Norton Hoysted and John Henry McFarland, against an assessment of them as trustees of the will of Charles Campbell, deceased, in respect of certain land as of 30th June 1910, *Isaacs* J. stated a case for the opinion of the Court, which was substantially as follows:—

"1. Charles Campbell (hereinafter called the testator) late of Melbourne in the State of Victoria, merchant and station proprietor, who died on 13th September 1905, by his last will appointed Mary Helen Campbell and the above-named Lionel Norton Hoysted and the Trustees, Executors and Agency Co. Ltd., the executrix, executors and trustees thereof, and probate of such will was on 24th November 1905 duly granted to them by the Supreme Court of the said State, and on 6th July 1906 the said probate was duly resealed in their favour by the Supreme Court of the State of New South Wales.

"2. The said Mary Helen Campbell died on 8th September 1911, and by deed dated 6th April 1914 the said Lionel Norton Hoysted and the Trustees, Executors and Agency Co. Ltd., in exercise of the powers contained in the said will, appointed the

above-named John Henry McFarland as a trustee thereof in the place of the said Mary Helen Campbell, deceased; and the appellants are now the sole trustees of the said will.

"3. The testator at his death was possessed of a large amount of real and personal estate in the Commonwealth of Australia, including two station properties called respectively 'Murray Downs' and 'Langi Kal Kal,' situated in the States of New South Wales and Victoria respectively, with stock and other personal property thereon (hereinafter collectively referred to as the station properties).

"4. The testator left him surviving (*inter alios*) his seven children referred to in the will as 'my said children,' who alone are beneficially interested thereunder in manner material to this case.

"5. By his said will the testator made special provisions as to the station properties and other provisions as to the residue of his estate.

"6. As to the station properties the testator (in substance) devised the same to his trustees upon trust to carry on, manage and work them until the expiration of twenty-one years from his death, and to stand possessed of the net annual income to arise from such carrying on upon trust for such of his said seven children as should be living at the expiration of each 'annual period' (as therein defined) during or in respect of which such income should have arisen, and he provided for the substitution, in lieu of their parent, of the children of any of the said seven children who should have died during an 'annual period,' and he directed that upon the expiration of the said period of twenty-one years his trustees should (subject to a power of postponement and to certain conditions) sell the station properties and stand possessed of the net proceeds of sale (after making certain payments) upon trust to pay or divide the same equally amongst such of the said seven children as should be living at the expiration of the said period of twenty-one years, with a proviso for the substitution in lieu of their parent of the children of such of the said seven children as should be dead at the expiration of the said period of twenty-one years.

"7. As to the residue of his estate (subject to certain legacies

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and certain payments and outgoings), the testator (in substance) devised and bequeathed the same to his trustees upon trust for his said seven children, but directed that the shares of his daughters should be settled upon them for their lives respectively with remainder to their children.

"9. Before sending in their return next hereinafter mentioned, the trustees by letter dated 10th February 1911 asked the respondent his opinion whether in their return they could as to the station properties claim the benefit of the provisions of sec. 25 of the *Land Tax Assessment Act* 1910, and on being answered in the negative by letter from the respondent dated 14th February 1911, they furnished on 3rd June 1911 a return for purposes of land tax for the year commencing on 1st July 1910 of all land owned by them on 30th June 1910 under the trusts of the said will, and in such return did not claim as to the station properties the benefit of the provisions of the said sec. 25.

"10. On 17th June 1911 the respondent, by notice of assessment of that date, required the trustees to pay a tax of £4,742 6s. 10d. as upon a taxable balance of £220,944, and on 20th June 1911 the trustees duly paid the said sum of £4,742 6s. 10d.

"11. On 12th August 1911 the respondent, by notice of that date, notified the trustees that the assessment notified as aforesaid on 17th June 1911 had been amended, not by reason of any different view being taken as to the right to the benefit of the provisions of sec. 25, but by reason of the inclusion of the unimproved value of the properties constituting the testator's residuary estate, which were inadvertently omitted from the previous assessment, and also by the disallowance of annuity deductions, and so as to make the taxable balance £231,556 and the tax £5,007 12s. 10d., and he required the trustees to pay a balance of £265 6s., being the difference between the said sums of £4,742 6s. 10d. and £5,007 12s. 10d.; and on 16th November 1911 the trustees duly paid the said balance of £265 6s.

"12. The trustees duly furnished a return, for purposes of land tax for the year commencing on 1st July 1911, of all land owned by them on 30th June 1911 under the trusts of the said will. Such return, save that it accepted the inclusion of the unimproved value of the properties constituting the testator's residuary estate

mentioned in par. 11, was upon the same basis as that for the preceding year.

"13. The respondent duly notified the trustees of the amount of their assessment in respect of the year commencing on 1st July 1911, but, save as regards the crediting of a sum of £152 18s. 10d. hereinafter mentioned, the assessment in respect of that year is not material to this case.

"14. On 6th February 1913 the respondent sent to the trustees a letter, which (omitting formal parts) was as follows:—'I have to inform you that the assessments issued to you for the years 1910-11 and 1911-12 have been reviewed, and notices of amended assessment, together with calculation sheets and a statement showing how the amended assessment for 1910-11 is arrived at, are enclosed. As you will see from the statement referred to, the assessable unimproved value of the aggregate of the life interests in the station properties based on the net rent capitalized for life expectation is £176,657, as against £256,746, the freehold unimproved value, the difference being £80,089. This gives the taxable balance shown in the notice, viz., £158,525. The gross tax on this sum is £3,181 17s. 4d., but you are allowed deductions amounting to £44 11s. 6d. under sec. 43 of the Act as secondary taxpayer to the taxable companies in which you hold shares. This leaves £3,137 5s. 10d. as against £5,007 12s. 10d.—the amount already paid. You are thus entitled to a refund of £1,870 7s. for the year 1910-11. There is additional tax to the extent of £152 18s. 10d. due for 1911-12, but this has been credited by the transfer of a similar sum from the refund due for 1910-11, which is accordingly reduced to £1,717 8s. 2d. A form of claim for this amount is enclosed for the favour of your signature and early return.'

"15. With the letter mentioned in par. 14 the respondent sent to the trustees a notice, dated 3rd February 1913, stating (*inter alia*) that the said assessment of 17th June 1911 had been amended so as to tax the interests of the beneficiaries in the station properties (that is to say, the interests of the said seven children) as life interests in respect of the year commencing on 1st July 1910, and so as to make the taxable balance for that year £158,525 instead of the said £231,556, and so as to entitle

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the trustees to a refund in respect of that year of £1,870 7s., which sum was, however, reduced (by the transfer of £152 18s. 10d. to the credit of the assessment for the year 1911-12) to £1,717 8s. 2d.

"17. The trustees did not sign the 'form of claim' for £1,717 8s. 2d. referred to in the said letter of 6th February 1913, but returned the same to the respondent pursuant to the request contained in the letter in par. 18 mentioned.

"18. On 10th April 1913 the respondent sent to the trustees a letter, which (omitting formal parts) was as follows:—'I beg to inform you that, as a consequence of departmental valuation of your holdings raising the unimproved value of the Langi Kal Kal Station from £75,865 to £90,095, the life tenants' interests therein for the financial year 1910-11 have been recalculated, and the amount now arrived at is £186,442 as against £176,657 shown in the previous assessment for the year 1910-11. The beneficiaries' interests in the general estate have also been recalculated on the basis of the life interests of the daughters and the absolute shares of the sons, in lieu of the whole of the shares being calculated on the absolute basis, *i.e.*, on the freehold unimproved value of the land. The total unimproved value of the interests shows a decrease of £2,633 on the amount shown in the previous assessment, and with the increase in the life tenants' interests in the Langi Kal Kal Station raises the taxable balance by £7,152. The accompanying amended notice of assessment shows that you are paying tax on a taxable balance of £165,677 as against £158,525, and as the assessment now issued to you for the year 1910-11 is in lieu of that issued to you on 6th February last, together with a refund claim for £1,870 7s., this claim should be returned to me at once, and the accompanying form of claim showing the amount of refund due as £1,538 12s. 2d. signed and returned in its place. I am enclosing a statement showing the calculations of the beneficiaries' interests referred to above, also secondary deduction calculations in respect of your shareholding interests in various land-owning companies.'

"19. With the letter mentioned in par. 18 the respondent sent to the trustees a notice, dated 4th April 1913, stating (*inter alia*) that the said amended assessment of 3rd February 1913 had been

amended so as to increase the unimproved value of the life tenants' interests in the station properties, and so as to recalculate the beneficiaries' interests in the testator's general (residuary) estate on the basis of daughters for life and sons absolute, in lieu of the whole absolute, and so as to make the taxable balance for the year 1910-11 £165,677 in lieu of the said £158,525, and stating (*inter alia*) that (after allowing for the crediting of the said sum of £152 18s. 10d. as in par. 15 mentioned) the refund would be £1,538 12s. 2d. instead of the said £1,717 8s. 2d." (This notice is referred to in question (C) hereunder as "Exhibit G.")

"21. On or about 16th May 1913 the trustees signed the 'form of claim' referred to in the said letter of 10th April 1913, and returned the same to the respondent." (This form of claim is referred to in question (C) hereunder as "Exhibit I.")

"22. On 23rd May 1913 the respondent by one of his officers lodged in the Royal Bank of Australia Ltd., Melbourne, to the credit of the estate of the testator the said sum of £1,538 12s. 2d." (The lodgment slip for this sum is referred to in question (C) hereunder as "Exhibit J.")

"23. The trustees accepted the said refund of £1,538 12s. 2d. in good faith and in the belief that they were entitled thereto, and, shortly after receipt and except as to £219 16s. retained for infant beneficiaries, they paid the same to the beneficiaries, and the trustees in their accounts with the beneficiaries in effect also paid to them the said sum of £152 18s. 10d.

"24. On 11th July 1913 the respondent, by notice of that date, notified the trustees that the amended assessment referred to in par. 19 had been amended by re-assessing the trustees on the full unimproved value of the station properties in lieu of the unimproved value of the life interests therein, and expressed the view that the provisions of sec. 25 were not applicable, and stated the taxable balance for the year 1910-11 as £250,211, and required payment by the trustees of £2,113 7s., being the difference between the tax for that year of £5,429 8s. 10d. (as now fixed) and £3,316 1s. 10d., which was treated as the sum previously paid by the trustees although in fact £5,007 12s. 10d. had been previously paid by them, as mentioned in pars. 10 and 11." (This notice is hereinafter referred to as "Exhibit K.")

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"25. Subsequently and after communication and negotiation with the respondent, during which the respondent, pursuant to Land Tax Regulation 40 (2), allowed the trustees one month from 13th October 1913 to lodge objections against the assessment notified in Exhibit K., the trustees lodged with the respondent a notice of objections to the assessment notified in Exhibit K.

"26. Afterwards the respondent by written notice, dated 19th November 1913, informed the trustees that the amended assessment objected to was in accordance with law, and that he could not alter it unless by direction from the Court.

"27. The trustees did not accept the said amended assessment, but by letter dated 10th December 1913 to the respondent requested that the said notice of objection should be treated as a notice of appeal pursuant to regulation 39 of the Provisional Regulations under the *Land Tax Assessment Act*, and shou d be transmitted as a formal appeal to the High Court of Australia in its original jurisdiction.

"28. On 10th December 1913 the trustees paid to the respondent under protest the sum of £2,113 7s., mentioned in par. 24.

"29. By memorandum dated 21st January 1914, addressed to the Deputy Registrar of the said Court at Melbourne, the respondent duly transmitted the said notice of objection to the said Court for determination at Melbourne as a formal appeal.

"30. The average annual profit of the land for the last eight years was £11,705, but as the will requires mortgage repayment instalments, amounting in fact to £10,000 a year, to be paid off, and as there is now an accumulated deficiency of £11,779, there is not at the present time any income available for distribution among the beneficiaries. If the next three to five seasons were fair seasons, the mortgage debt and the deficiency could both be paid off.

"31. The appeal came on for hearing before me on 29th October 1914, when the facts hereinbefore set forth were admitted, and at the request of the parties I consented to state a case for the opinion of the High Court upon the following questions arising in the appeal, which in my opinion are questions of law:—

"(A) Under the circumstances stated, was there any right in the respondent to make any such further amended

assessment or re-assessment as was made by Exhibit K or at all?

"(B) Was the respondent entitled to re-assess the trustees as under Exhibit K on the footing that as to the station properties the proviso to sec. 25 of the *Land Tax Assessment Act* 1910 had no application?

"(C) Were the trustees, as against any liability imposed by the further amended assessment (Exhibit K), entitled to credit for all, or any and what part, of the sum of £1,691 11s. (the difference between the £5,007 12s. 10d. paid by them as aforesaid and the £3,316 1s. 10d.) credited to them by the further amended re-assessment (being Exhibit G) and refunded to the trustees in manner set forth in Exhibits I and J to this case?"

Weigall K.C. and *Davis*, for the appellants.

Starke (with him *Mann*), for the respondent.

During argument reference was made to *Sendall* v. *Federal Commissioner of Land Tax* (1); *Cox* v. *Deputy Federal Commissioner of Land Tax (Tas.)* (2); *Williams on Real Property*, 20th ed., pp. 63, 487, 521.

Cur. adv. vult.

The following judgments were read:—

May 21.

GRIFFITH C.J. This appeal, which is brought from an assessment of land tax made as of 30th June 1910, raises two questions: (1) as to the applicability of a provision which under the Principal Act stood as a proviso to sec. 25 but has since been repealed, and (2) as to the competency of the Commissioner to amend assessments of land tax and the effect of amendments so made.

The appellants are the trustees of the will of Charles Campbell, who died on 13th September 1905. By his will he devised certain pastoral properties comprising the lands in question to trustees, upon trust, so far as material to the present case, to

(1) 12 C.L.R., 653. (2) 17 C.L.R., 450.

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carry on the pastoral business until the expiration of twenty-one years from his death, and to stand possessed of the net annual income for such of seven of his children (named) as should be living at the expiration of such annual period (a term defined in the will) during which it should have arisen, and such of the children of any of the seven who should then be dead as should be living at the expiration of the annual period, and after the expiration of the period of twenty-one years upon trust to convert, and divide the proceeds, after making certain payments, equally amongst such of the seven children as should then be living and such of the children of any deceased child as should then be living, such children taking their parent's share.

By sec. 25 of the *Land Tax Assessment Act* owners of freehold estate less than the fee simple are to be deemed to be the owners of the fee simple, but by the proviso already mentioned tenants for life of the land without power of sale under the will of a testator who had died before 1st July 1910 were entitled to certain privileges in the assessment of the unimproved value of the land as against them. An extended meaning was given to the term "tenant for life," which, however, is not material to the present case.

On 3rd June 1911 the appellants furnished to the Commissioner their return of the land already mentioned, as land held by them on 30th June 1910. They had desired as representing their beneficiaries to claim the benefit of the proviso to sec. 25, but, on being informed by the Commissioner that in his opinion they could not do so, they made up the return on the basis of the full unimproved value of the land as held in fee simple. The total value as so returned was £256,746 subject to admitted deductions of £35,802, leaving a taxable balance of £220,944, upon which the land tax payable was £4,742 6s. 10d. The Commissioner accepted this valuation, and made his assessment accordingly.

The notice of assessment was dated 17th June 1911, and the amount of £4,742 6s. 10d. was paid by the appellants on the 20th of that month.

Shortly afterwards it was discovered that other land of the testator of the value of £10,612 had been inadvertently omitted

from the appellants' return of 3rd June, and on 12th August the Commissioner gave them notice of amended assessment, by which the taxable value was increased to £231,556, upon which the land tax payable was £5,007 12s. 10d. The additional land tax due on the amended assessment, amounting to £265 6s., was paid by the appellants on 16th November 1911.

On 6th February 1913 the Commissioner sent to the appellants a further notice, dated 3rd February, of amended assessment, by which the taxable value of the appellants' land was reduced from £231,556 to £158,525. The notice set out upon its face that the unimproved value of the land now in question had been reduced by £81,491 by valuing the interests of the seven beneficiaries as life interests instead of as freehold interests, while additions amounting to £8,460 were made in respect of the value of other lands of the testator. The result of the amendment was that the land tax payable upon the assessment as amended was £3,137 5s. 10d. only. The notice also set out that there was a balance of £1,870 7s. overpaid by the appellants. By a letter of 6th February 1913 the Commissioner called the attention of the appellants to the alterations, and invited a claim for refundment of the balance, less a sum of £152 18s. 10d. already credited to them by the Commission from another source.

On 10th April 1913 the Commissioner sent to the appellants a further notice, dated 4th April, of amended assessment (which he explained by a letter of the former date to have been founded upon departmental valuations of the land). The assessment as thus amended assessed the taxable value of the land at £165,677, upon which the land tax payable was £3,316 1s. 10d. After allowing for the alterations, the balance repayable to the appellants was £1,691 11s., less the amount already credited from another source. The appellants applied for a refund of this amount, and on 23rd May it was repaid to them.

By a notice dated 11th July 1913 the Commissioner notified to the appellants that the assessment had been further amended on the basis that they were not entitled to the benefit of the proviso to sec. 25, and that the taxable value of the land was now assessed at £250,211, upon which the land tax payable was £5,429 8s. 2d., leaving, after giving credit for the £3,316 1s. 10d., the amount

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payable upon the assessment as last previously amended, a balance of £2,113 7s., which the appellants were required to pay.

The present appeal is from the assessment as last amended. The appellants contend that the assessment so amended is invalid, and further that the basis on which it is made is erroneous on the ground that the seven children are tenants for life. It will be convenient to deal with the latter point first.

In my opinion the seven children of the testator are not tenants for life of any estate in the land. At most they are holders of equitable life interests in a term of twenty-one years, which is not a freehold. The circumstance that if they survive that period they may acquire an absolute interest does not enlarge their present interest into a tenancy for life in the land. I am therefore of opinion that the Commissioner was right in denying to the appellants the benefit of the proviso to sec. 25.

The ground on which the appellants contend that the last assessment is invalid is that the Commissioner was precluded by his amended assessments of 3rd February 1913 and 4th April 1913 (reducing the previous assessments on the grounds stated), followed by a repayment of the sum which, on the basis of those assessments, had been overpaid by the appellants, from again amending the assessment on 11th July.

Sec. 20 of the *Land Tax Assessment Act* provides that: "(1) The Commissioner may at any time make all such alterations in or additions to any assessment as he thinks necessary in order to ensure its completeness and accuracy, notwithstanding that land tax may have been paid in respect of the land included in the assessment: Provided that every alteration or addition which has the effect of imposing any fresh liability, or increasing any existing liability, shall be notified to the taxpayer affected, and, unless made with his consent, shall be subject to appeal. (2) For the purposes of this section the Commissioner may, *inter alia*, (*a*) place on or remove from an assessment the name of any person, or the particulars or valuation of any land, or (*b*) increase or reduce the assessed value of any land."

There is nothing in the language of this section to suggest that the power to alter or add to an assessment cannot be exercised more than once. If any doubt could arise on the point it

is, in my opinion, removed by sec. 33 of the *Acts Interpretation Act* 1901, which provides that—"(1) Where an Act confers a power or imposes a duty, then, unless the contrary intention appears, the power may be exercised and the duty shall be performed from time to time as occasion requires."

The suggested limitation of the power of the Commissioner must therefore be sought for elsewhere. The appellants contend that it is to be found in secs. 59 and 60 of the Act, either alone or in conjunction with the doctrine that money paid under a mistake of law cannot be recovered back, and that no amendment of an assessment which would have the effect of such a recovery can be made.

By sec. 15 of the Act taxpayers are required to furnish annual returns of lands owned by them with their value. Sec. 18 requires the Commissioner from these returns and valuations and other sources to cause assessments to be made for the purpose of ascertaining the amount upon which land tax shall be levied. I have already read sec. 20. Sec. 21 deals with two specific cases. The first is the case of an assessment made by the Commissioner upon the taxpayer's return without obtaining any independent valuation. In that case, if from valuations made or obtained by him or other information in his possession the Commissioner finds that the assessment ought to have been for a greater amount, he may alter the assessment as from its original date, but the power must be exercised within two years from the date of first assessment. The amendment of 4th April 1913 was such a case. The second case is the omission of land from the original assessment, which error may be corrected if discovered "at any time thereafter." The amendment of 12th August 1911 was such a case.

In the case now before us the first assessment was made upon the taxpayer's return without any independent valuation obtained by the Commissioner, but the amendment, so far as it is complained of, although it was made after the expiration of two years from the date of the first assessment, was not an alteration of the original assessment made upon the basis of valuations made or obtained by the Commissioner, but a mere reverting to

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the valuation made upon the appellants' return. It does not, therefore, fall within the limitation of two years.

By sec. 23 the production of the assessment (by which I understand the record of it in the Commissioner's books) is conclusive evidence that the amount and all the particulars of the assessment, which certainly include the taxable value, are correct, except in proceedings on appeal against it. The only questions which can be raised on appeal are that the appellant is not liable for the tax or any part of it or that the assessment is excessive, *i.e.*, in amount (sec. 44). This excess may arise from too great a value being given to the land, which is a matter of fact (although it may involve a matter of law as to the proper basis of valuation), or from omission to allow some deduction allowed by the Act from the gross value.

By sec. 24 the Commissioner is required to cause notice of the assessment to be given to the taxpayer. By sec. 49 land tax for each year is due and payable on a date appointed by the Governor-General by notice in the *Gazette*. By sec. 51 it is to be deemed when it becomes due and payable to be a debt due to the King on behalf of the Commonwealth, and by sec. 54 no Statute of Limitations at any time in force is to bar or affect any action or remedy for its recovery.

Secs. 59 and 60 are as follows:—

"59. If within three years after any land tax has been paid, it is discovered that too little in amount has been paid, the taxpayer liable for the tax shall forthwith pay the deficiency . . . ."

"60. If within three years after any land tax has been paid, it is discovered that too much in amount has been paid, whether by reason of duplicate taxation or otherwise, the Commissioner upon being satisfied thereof shall order the excess to be returned to the taxpayer entitled thereto."

It is contended that it is a necessary implication from these two sections that the amount of land tax must be finally adjusted and fixed within three years after any land tax has been paid, *i.e.*, within three years after the first payment made upon the original assessment. On the other hand, it is contended that these sections relate merely to matters of account on the footing of an existing assessment, as, for instance, if an amount has been

paid twice over in respect of the same land under assessments against different taxpayers or groups of taxpayers, which is spoken of as "duplicate," and elsewhere in the Act as "double," taxation, or if a mistake has been made in arithmetical calculations, and has nothing to do with the question of what is the amount due under the assessment in force for the time being, which, under sec. 23, is, except in proceedings on appeal against it, conclusive evidence that the amount of the assessment is correct..

It may be that these sections do suggest that the framers of them had in their mind the idea that there should be some definite period allowed for the final adjustment of the amount of tax payable by the taxpayer, and there may, no doubt, be great hardship when, as in the present case, a large sum has been returned to trustees and distributed among the beneficiaries. This, however, is a matter for the consideration of the Legislature. I do not think that these arguments are sufficient to justify the Court in holding that the power conferred on the Commissioner by sec. 20 to make at any time all such alterations to an assessment as he thinks necessary are cut down or qualified by secs. 59 and 60. In my opinion those sections relate only to matters of account and payment.

It follows, in my opinion, that the amendment of 3rd February 1913 was a valid alteration of the original assessment, and is conclusive as to the taxable value of the land of which the appellants were the owners on 30th June 1910. There is no question as to the amount of land tax payable in respect of land of that taxable value. The only question, therefore, that can arise is whether it has been paid, which is not a question that can be raised by appeal from the assessment.

To sum up the matter, it may be thus stated. The amount of land tax payable is determined by the existing assessment, which may, subject to the limitations of sec. 21, be altered from time to time, either by way of increase or diminution. Whatever amount appears by an existing assessment to be the land tax payable is, until paid, a debt due by the taxpayer to the Crown. If he has not paid so much, he is bound to pay the deficiency; if he has paid more, he is entitled to a refundment of the excess (subject to

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the limitation, if any, imposed by sec. 60), and so on *toties quoties*. When the refundment was made to the appellants it would have been unjust, as the facts then were, to have retained the amount. After the refundment the matter stood as if the larger assessment had not been made, and the excess had not been paid. But, when the new assessment was altered and the taxable value assessed at a larger amount, it was the duty of the Commissioner to demand the greater sum which became payable under it. There is, therefore, no question of a mistake of law at the time when the refundment was made. The Commissioner might or might not have made a mistake in law—I think, as I have said, that he did—in reducing the original assessment, and, if he did, the refundment would have been an indirect consequence of that mistake, but that is quite a different thing from saying that the refundment was made under a mistake of law. The Commissioner thought that, the assessment being as it was, he was bound to make the refundment. In forming that opinion he made no mistake, either of law or fact. The doctrine appealed to has therefore no application to the case.

For these reasons I am of opinion that the assessment complained of was validly made, and was made upon a correct basis.

The first and second questions should be answered accordingly.

The point sought to be raised by the third question is not one that can be raised upon appeal from the assessment, although it has incidentally become necessary to express an opinion upon it.

ISAACS J. Sec. 20 of the *Land Tax Assessment Act* is general in its terms and unambiguous. Unless cut down by some other portion of the Act, its language entitles the Commissioner to an answer to the first question in the affirmative, that is to say that he had the right to amend the assessment as in Exhibit K showing a liability of £5,429.

The circumstances of the case are outside sec. 21, so that that section may be disregarded.

The main contention for the appellants was rested on sec. 60, the argument being that as £1,691 was returned under the powers of that section in February 1913, as being in excess of what was owing for land tax, the Commissioner was precluded

from doing anything inconsistent with his determination that £3,316 was the maximum amount payable for land tax for that year.

The section says nothing on that subject, and it is difficult to suggest why, even if the repayment had been made under that section, estoppel should arise from an act that, so far from causing prejudice, conferred a decided benefit.

If the argument be correct, that sec. 60 once acted upon concludes the liability of the taxpayer for that year, then sec. 59 must have the same effect. And if the supposed discovery, say, within a week of the payment of land tax, that the taxpayer had paid a pound too little, followed by his payment of that pound closes that year's liability for ever, it would be impossible for the Commissioner on really discovering an overpayment of £100 to return it under sec. 60. Alternatively, said learned counsel, sec. 60 closes up the year's liability so far as existing material is concerned, that is, without a new valuation or the addition of other land. But the same difficulty might occur even upon existing material, and through an error in computation, and such an unjust position cannot be supposed without distinct words to support it.

The argument for the appellants cannot be adequately dealt with unless the true import of secs. 59 and 60 and their relation to sec. 20 and other sections be considered.

Shortly stated, the view I take is that secs. 59 and 60 are adjustment sections only. Clerical and accountancy errors, not perceived before payment, may be set right within three years after payment, the taxpayer, if he alleges overpayment from such a cause, being bound to satisfy the Commissioner that it is so. But the accuracy of the basic fact of the value of the land as it appears in the assessment, is assumed for the purposes of those sections; no contention challenging that basic fact is a ground for acting under them. The following considerations lead me to that conclusion.

The land tax itself is imposed by Act No. 21 of 1910, at rates therein set out and based on "the taxable value." That is the central point. The "taxable value" is not an arbitrary value but is a real business value, subject to certain exceptional cases and

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requires a process of ascertainment. This is provided for by the Assessment Act. Sec. 11 of that Act defines "taxable value" broadly speaking as the unimproved value of the land, less £5,000 in the case of non-absentees. Sec. 18 requires the Commissioner to make assessments "for the purpose of ascertaining the amount upon which land tax shall be levied"—that is to say, for the purpose of ascertaining the taxable value.

It is important to note that the words of that section are "upon which," not "for which"; in other words, the assessment is to determine the value of the land, and not the sum which the taxpayer is to pay to the Crown for land tax. The amount of tax payable is to be computed according to the formula given by the *Land Tax Act* 1910; and except for statutory provisions, such as those against double taxation, is merely mechanical.

To arrive at the taxable value involves considerations of a complex nature. Some are fixed, namely, the statutory regulations, such, for instance, as are contained in sec. 25; others are variable, and dependent on the actual circumstances. The latter are dependent at last on the opinion and sound judgment of the Commissioner, and his assessment is, as a whole, subject to revision by the Court. But, subject to that revision, his assessment fixes "the taxable value," and until that is done no one can tell what amount is payable for land tax to the Crown.

Sec. 51 says "Land tax shall be deemed when it becomes due or is payable to be a debt due to the King," and "any land tax unpaid" may be sued for and recovered by the Commissioner. That section is of the first importance in determining this case.

In one sense the land tax is a liability as from 1st July in each year (Land Tax Act, sec. 5). It is charged on land as owned at noon on the previous day (Assessment Act, sec. 12). It is due and payable on such date as the Governor-General appoints by notice in the *Gazette* (*ib.*, sec. 49); and additional tax is the penalty for not paying the tax within thirty days after it has become due, subject to certain powers of remission. Therefore it is true that "land tax" becomes a debt on the day so appointed, whenever that may be.

But what is meant by the expression "land tax" in sec. 49? It seems to me the term "land tax" in this system of taxation

has two somewhat different meanings, according to the Act it is found in. In the Land Tax Act itself it means simply the liability to pay at the rate mentioned on the taxable value of land. In the Assessment Act it means something further. Sec. 3 of the interpretation section defines "land tax" as "the land tax imposed as such by any Act, as *assessed under this Act.*" Assessment is a necessary condition to the liability becoming a "debt." It necessarily follows that the term "land tax" in sec. 49 means the tax as assessed, and that the amount of the debt depends entirely upon the state of the assessment at the given moment. It also follows that when sec. 51 speaks of "land tax unpaid" it means "unpaid" on the footing of the assessment as it then exists. Sec. 54, in negativing limitation for the "recovery of land tax," necessarily assumes an assessment justifying the claim, because without that no recovery is possible—no one can tell how much is to be recovered.

Sec. 20 is couched in the most general terms. In itself it contains no limit to the power therein given to the Commissioner to alter and amend an assessment as often and as radically as he thinks necessary to make it complete and accurate. And he may do it, "notwithstanding that land tax may have been paid."

Sec. 21 already mentioned enacts certain limitations for certain cases, which do not concern the present case; but secs. 59 and 60, whether acted on or not, do not, on a proper reading, place any limitation whatever on the comprehensive language of sec. 20. The effect of those two sections may, perhaps, be better appreciated by remembering that a taxpayer, on receiving an assessment, may either pay or not pay the tax. If he does not pay, it is clear that those sections do not affect the Commissioner's power of amending the assessment, and there is no other that does. And, further, sec. 54 clearly applies with undiminished force to his obligation to pay. If he does pay, he of course pays, and the Commissioner equally of course receives payment, on the footing that the amount paid is the true amount properly calculated upon the taxable value.

The amount so paid may be—(1) too much in amount if the

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calculation had been correct, (2) too little on the same assumption, or (3) perfectly accurate on that assumption.

It is clear that in the last case as already stated, there is nothing in either sec. 59 or sec. 60 to affect the power of the Commissioner to amend his assessment. So that if no tax at all is paid, or if the true amount based on the assessment is paid, there is undiminished authority to alter the assessment. What is there in the other two cases to lead to a different result? The phrase in secs. 59 and 60 "after any land tax has been paid" means, I think, after payment of land tax has been made as payment in full on the basis of an existing assessment. If on that basis the actual amount paid is too little, yet, being received as correct, was probably regarded by the Legislature as sufficient to be an intended compliance with the provisions of sec. 49 and to relieve from the penal consequences of sec. 50. But a new statutory obligation was imposed by sec. 59 to "forthwith pay the deficiency" when it is discovered that a deficiency exists. And conversely by sec. 60, if the amount actually paid prove to be too much on the same basis, there is a statutory obligation on the Commissioner to order the excess to be returned when he discovers, or is satisfied, that an excess exists. But that exhausts those sections. As in the other two cases mentioned, these two cases rest upon the foundation of the "taxable value" remaining unaltered; and in no way constitute or work any admission by the Commissioner on the one hand, or the taxpayer on the other, that the power of alteration of the taxable value is to cease, should the facts require it. I refer to the taxpayer as well as the Commissioner, because payment of a supposed deficiency under sec. 59 might be followed by the discovery of a gross error of valuation against the taxpayer, which could only be corrected by amending the assessment. Assuming, therefore, the repayment could be taken to have been lawfully made under the powers given by sec. 60, the Commissioner's powers of alteration would not be affected.

The repayment, however, in my opinion, cannot be lawfully referred to sec. 60, because it was not made as the result of any adjustment while retaining the same taxable value. We have nothing to say to the authority under which it was repaid,

except to exclude it from sec. 60, which does not relate to such a case.

The first question, therefore, should be answered in the affirmative.

The second question should be answered in the affirmative. At no moment of time could it be said that the beneficiaries were tenants for life of the land. During the twenty-one years they had a right to receive the income until their death, when a similar right passed to their children. After the twenty-one years the right is, not to the income as such, but to the corpus, and not as tenant for life.

The third question does not, strictly speaking, arise in such a case as the present, though it is and always has been the substantial contention between the parties, this procedure being thought by them open to determine it.

The Court, however, has jurisdiction to answer the question as between these parties in another form of proceeding, and both of them desire the Court's opinion. In addition, it is important to the administration of a great public department to know the views of the Court in the matter. In these circumstances it is desirable to express them, not as a technical adjudication, but as a guide to what the Court would be prepared to decide formally. There is at any given moment but one assessment by the Commissioner, and that is conclusive (sec. 23) as to amount, except on appeals. Being conclusive as to amount, the rest follows.

It is subject to correction by the Commissioner, and when altered or added to, the assessment may show a different amount, but it operates *ab initio* as to the amount of the debt payable, though the date of amendment may be essential when considering liability to penalty under sec. 50. The assessment when amended is conclusive that the amount it shows at a given moment was the true amount as at the taxable date, because that amount is taken for all purposes to be the true value of the land at that date. That is the aim of sec. 20.

The £1,691 was refunded when the assessment was reduced from a sum producing £5,007 to a sum producing £3,316. It was therefore refunded, on the basis that no debt greater than

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£3,316 ever existed, and by necessary consequence, that no payment of any debt over £3,316 could ever have been demanded or satisfied. In other words, when the Commissioner handed back the sum of £1,691, and the taxpayers received it, they mutually acted on the assumption that it was not to be considered that a debt to that amount had been paid by the sum in question, but that because no such debt had ever been payable or paid the money was always in conscience and in law that of the taxpayer.

When, however, the assessment was finally corrected so as to show a debt of £5,492 as at the original date, when assessed land tax became payable according to the *Gazette* notice under sec. 49, the whole of that sum was payable except so much as was truly paid in respect of land tax since that date. The only sum so paid and treated as so paid was £3,316; and the taxpayers could not and cannot be heard to say that they had received and retained from the Commissioner £1,691 of public moneys, to which they had no right, because it was money owing and paid by them to the Crown and retainable by the Crown for land tax.

That would be illegal and dishonest, for the Commissioner could have no right to make such a payment. And if they received it on the footing that it was not such money, they cannot now be allowed to aver the direct contrary. Once grant the power to make the alteration in the assessment, and then sec. 60 cannot in any aspect be relied on as justifying the repayment, because no repayment can be made under that section unless it is of money that ought never to have been paid to the Crown.

It must be borne in mind that the Commissioner could never make a valid claim for repayment of the £1,691 as money received to his use. The essence of his position is that *that money*, when returned to the trustees, was not then, and never at any time could be, held by them to his use. It was theirs when refunded, because, as the assessment at that moment stood, their right to it was conclusive. But since the assessment has been amended, he, ignoring that sum altogether, because its original payment was cancelled and undone, would claim not repayment of that £1,691, but payment of land tax on the

footing of a debt of £5,429, and would recognize only the payment of £3,316, which was included in the larger sum, and which had always stood as a liability, and, since payment of £3,316, was a discharged liability *pro tanto* of the debt of £5,429. The balance is still unpaid.

I am, therefore, of opinion that the trustees are not entitled to credit for the £1,691, or any part of it.

Higgins J.

HIGGINS J. I concur in the opinion that the first question should be answered in the affirmative. The question assumes that the Commissioner was wrong in February-May 1913 in treating the proviso in sec. 25 as applying to this case, so as to reduce the amount on which land tax should be levied; and that he was right in July 1913 when he treated the proviso as inapplicable. Sec. 20 gives the Commissioner power "at any time" to "make all such alterations in or additions to any assessment as he thinks necessary in order to insure its completeness and accuracy, notwithstanding that land tax may have been paid in respect of the land included in the assessment." There is no express limitation of this power, either as to time, or as to character, or as to grounds of amendment, except the limitation (if it is a limitation) in sec. 21, which does not apply to the circumstances of this case; and as for an implied limitation, I see nothing to support it but conjecture, based chiefly on our view of what the Legislature ought to have enacted. The power is not confined to mistakes of fact as distinguished from mistakes of law. There is, at first sight, a difficulty in reconciling the provisions of secs. 59 and 60 with this power of amendment of assessment. These sections provide, in substance, that if within three years after any land tax is paid it be discovered that too little or too much "in amount" has been paid, the deficiency or the excess shall be paid, but these sections do not relate to amendments of assessment. At present, I am inclined to the view that these latter sections refer to mistakes made in carrying out a given assessment. The assessment shows "the amount on which . . . land tax ought to be levied" (sec. 19); and mistakes may be made in the calculation of the land tax payable

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thereunder, or in the arithmetical process preceding or accompanying the payment in fact made. At all events, we have no right to import into secs. 59 and 60 a limitation of the power of amending the assessment conferred by sec. 20. I recognize the force of the argument that a power to amend the assessment, if unlimited in point of time, may cause grave injustice—for instance, in the case of trustees who, in the meantime, have distributed the trust property among the beneficiaries; and I recognize that the indefinite charge of the land tax on the land may put serious difficulties in the way of sale of the land, notwithstanding the provisoes contained in sec. 56. But if any improvement of the Act has to be made, it must be made by Parliament, not by this Court.

As for the second question—Does the proviso in sec. 25 apply? —I have felt more difficulty than my learned colleagues. This proviso is limited to settlements or wills made before 1st July 1910, and it is designed to mitigate the hardship of the tax in the case of life tenants who have neither the power to sell, nor (generally) the power to put the land to a more productive use. The benefit of this proviso is not confined to the case of one who is strictly tenant for life; it is granted to (amongst others) "a person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life."

Looking now at the will, we find that the lands (station properties) are to be used for the carrying on of the pastoral business of the testator until the expiration of twenty-one years from his death; and that the income of the business is to be divided amongst such of the seven children as are living at the end of each annual period. (We may ignore, for the present purpose, the contingent gift of the proceeds of the corpus, less certain payments, to such children as are living at the expiration of twenty-one years from the death. There can be no merger, in this case, of the life interest of the child in his contingent interest in the corpus, less certain payments.) If a child die before the expiration of the twenty-one years his interest in the income of the business ceases; his children are substituted. I suppose that the interest of the child would be accurately described as a beneficial interest in the income of the business

for a term of years, but defeasible by his death during the term. But, substantially, he has an interest so long as the term lasts and he lives—an interest for life in the term. When one considers the obvious object of the proviso, it is hard to see why Parliament should intend the relaxation of the tax to apply to such a beneficiary; but I have come to the conclusion that he does not come within even the words of the proviso. He is not a tenant for life of land but (at most) a tenant for life of a term; nor is he (under the expanded definition of "tenant for life") entitled to share in the "income of land" *for his life.* The specific provisions made in the adjoining sections (secs. 26-29) for the cases of leaseholders, &c., are inconsistent with the idea that "land" in sec. 25 can include a term of years in land, can mean anything but the concrete thing—the land itself. "Land" generally includes leasehold interests in land, under sec. 22 of the *Acts Interpretation Act* 1901; but in this case the contrary intention sufficiently appears, so as to displace the general rule. Moreover, the beneficiary is not entitled to share in the income for his life, or for any period beyond twenty-one years. I may add that it is very doubtful whether a share in the income of this business can be treated as a share in the "income of land" within the meaning of sec. 25. It certainly would not be rents or profits of the land: *In re Morewood* (1).

My answer to the second question also is in the affirmative.

As for the third question, if we are justified in answering it at all, my answer is No. It is sufficient to say that the sum of £1,619 11s. was not paid to the Commissioner under the assessment as last amended; it was paid, and rightly paid, to the Commissioner under the original assessment; and it was repaid, and rightly repaid, by the Commissioner under the amended assessment of February 1913. The Commissioner afterwards claimed land tax under the assessment as it now stands, re-amended; and there has been no previous payment under this assessment.

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

GAVAN DUFFY J. We have arrived at the same conclusion as the other members of the Court.

(1) (1885) W.N., 51.

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We think the beneficiaries were not tenants for life within the meaning of sec. 25 of the *Land Tax Assessment Act* 1910, and that nothing had happened to prevent the Commissioner from amending his assessment under the provisions of sec. 20 in the way notified by him to the taxpayers on 11th July 1913.

When the amended assessment was made, the day for payment having been appointed by the Governor, a debt of £5,429 8s. 10d. became due and payable by the taxpayers, and in our opinion the sum of £2,113 7s. then claimed on behalf of the Crown was the true and correct balance due and payable after giving credit for all payments in respect of the assessment already made by the taxpayers.

The result is that questions (A) and (B) must be answered in the affirmative and question (C) in the negative.

Questions (A) *and* (B) *answered in the affirmative. Costs of the special case to be costs in the appeal.*

Solicitors, for the appellants, *Gillott, Moir & Ahern.*

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

B. L.