[HIGH COURT OF AUSTRALIA.]

THOMSON AND OTHERS . . . . . APPELLANTS;

AND

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX FOR TASMANIA . . RESPONDENT.

H. C. OF A. 1915.

HOBART, *February* 16.

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

Land Tax—Joint owners—Beneficial interest under will of testator who died before 1st July 1910—Conveyance of legal estate by trustees to beneficiaries—Land Tax Assessment Act 1910-1911 (*No.* 22 *of* 1910—*No.* 12 *of* 1911), *sec.* 38 (7).

Under the will of a testator who died before 1st July 1910 land was devised to trustees on trust for such of his sons as should attain twenty-five years or their issue, with power in the trustees to apportion it among those who attained that age in such manner as the trustees in their uncontrolled discretion should think fair and reasonable. All the sons having attained that age, the trustees conveyed the land to them as tenants in common in fee.

Held, that the beneficial interest in the land was no longer shared among the sons under the will, and, therefore, that they were not entitled to the benefit of sec. 38 (7) of the *Land Tax Assessment Act* 1910-1911.

CASE STATED.

On an appeal by Archibald Thomson, John Denham Thomson, James Robertson Thomson, Norman William Thomson, Henry Mangles Denham Thomson, Kenneth Russell Thomson and Bertram Lothian Thomson from an assessment under the *Land Tax Assessment Act* 1910-1911 by the Deputy Federal Commissioner of Land Tax for Tasmania, *Griffith* C.J. stated the following case:—

"1. John Thomson, who died on 30th August 1899, by his will bearing date 4th September 1865 devised all his real estate comprising an estate called 'Cormiston' in the State of Tasmania to

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trustees upon trust, after providing for certain legacies and annuities, all of which have since been paid or released, to stand seised of his residuary real estate upon trust for his son or sons who should be living at his decease and should attain the age of twenty-five years or die under the age of twenty years leaving issue. The testator directed his trustees as and when each of his sons should attain the age of twenty-five years to offer the said real estate to him at a valuation, and in case none of them should accept such offer he empowered his said trustees to apportion his said real estate amongst the persons entitled thereto in such manner as they should in their uncontrolled discretion think fair and reasonable.

"2. The testator left seven sons him surviving, who are the present appellants, and all of whom attained the age of twenty-five years. The youngest attained that age on 22nd June 1903.

"3. None of the appellants exercised the right of purchase of the said land on attaining the age of twenty-five years.

"4. By an indenture dated 24th April 1906 and duly registered, made between the then trustees of the said will of the first part, six daughters of the testator of the second, third, fourth, fifth, sixth and seventh parts, the appellants of the eighth part, and one Robert Lewis Parker of the ninth part, the said parties of the first part granted and conveyed to the said Robert Lewis Parker the land therein described, being portion of the said estate of Cormiston, to the use of the appellants, their heirs and assigns in fee simple as tenants in common in equal shares, and the parties of the second, third, fourth, fifth, sixth and seventh parts released the legacies bequeathed to them severally by the said will.

"5. Another part of the said Cormiston estate consisted of land under the *Real Property Act*, and the appellants are by virtue of an appointment in writing under the hand of the trustees of the said will now registered as proprietors thereof as tenants in common in fee.

"6. The unimproved value of the land so held by the appellants as tenants in common has been assessed by the respondent at the sum of £12,038.

"7. The appellants claim to be entitled to seven deductions

from the said sum under the provisions of sec. 38 of the *Land Tax Assessment Act*. The respondent refuses to allow more than a single deduction of £5,000.

"The question for the consideration of the Court is whether the appellants are entitled to one deduction of £5,000 only or to seven deductions as claimed by them."

Waterhouse, for the appellants. Prior to the deed of 24th April 1906 the beneficial interest in the land was vested in the appellants by virtue of the will of their father, and the case would have been within the literal meaning of the words of sec. 38 (7) of the *Land Tax Assessment Act* 1910-1911. The deed made no difference in the beneficial interest and gave the appellants no title to it, but was merely a conveyance to them of the legal estate. The addition of the legal estate to the beneficial interest makes no difference to the rights of the appellants under sec. 38 (7).

[Counsel referred to *Hart* v. *Federal Commissioner of Land Tax* (1); *Parker* v. *Deputy Federal Commissioner of Land Tax (Tas.)* (2); *Lewin on Trusts*, 11th ed., p. 847.]

[ISAACS J. referred to *Neill* v. *Federal Commissioner of Land Tax* (3); *Archer* v. *Federal Commissioner of Land Tax* (4).]

L. L. Dobson, for the respondent, was not called upon.

GRIFFITH C.J. The appellants are the seven sons of John Thomson, who died on 30th August 1899, having by his will devised the land in question to trustees for such of his sons as should attain the age of twenty-five, or their issue. The testator directed his trustees as each of his sons should attain twenty-five to offer the land to him at a valuation, and in case none of them should accept the offer he empowered the trustees to apportion the land amongst the persons entitled thereto as they should in their uncontrolled discretion think fair and reasonable. All the sons attained twenty-five, but none of them accepted the offer to purchase at a valuation, and the trustees did not make any

(1) 15 C.L.R., 545.
(2) 17 C.L.R., 438, at p. 442.
(3) 14 C.L.R., 207.
(4) 13 C.L.R., 557.

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apportionment. Subsequently the trustees, by a deed dated 24th April 1906, reciting amongst other things that the appellants had requested them to do so, conveyed the land to the appellants as tenants in common in fee. It will be seen that all this took place before the passing of the *Land Tax Act* of 1910. The appellants now claim that they are entitled to the benefit of sec. 38 (7) of the *Land Tax Assessment Act* 1910-1911, which provides, by way of exception to the general rule that joint owners are liable to be assessed as a single person and are therefore only entitled to one deduction of £5,000 from the total unimproved value, that when under the will of a testator who died before 1st July 1910 the beneficial interest in land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives of the testator, in such a way that they are taxable as joint owners, then a deduction of £5,000, or a lesser amount proportional to the total value, may be made in respect of each original share so taken. The only question in the present case is whether in the circumstances it can be said of these appellants, after the execution of the deed of 24th April 1906, that the beneficial interest in the land is shared among them under the will, or whether, as I apprehend the respondent contends, it is shared among them under the deed.

In *Archer* v. *Federal Commissioner of Land Tax* (1) and *Neill* v. *Federal Commissioner of Land Tax* (2) this Court expressed the opinion—though that opinion is not quite so clearly stated in the judgments as reported as I thought it was—that in the original Act the provision corresponding to sec. 38 (7) is only applicable when at the date as of which the assessment is made the persons claiming the benefit of it hold their interests in the land directly under the will or settlement, without the aid or intervention of any subsequent or intermediate transaction. That was certainly in the mind of all the members of this Court, and it was expressed by my brother *Isaacs* with sufficient clearness in *Neill's Case* (3). There is one exception only to that rule, which was made by the Act of 1912, passed subsequently to these decisions. By that Act a new clause, sec. 38A, was inserted

(1) 13 C.L.R., 557.
(2) 14 C.L.R., 207.
(3) 14 C.L.R., 207, at p. 215.

which allowed a subsidiary settlement or will to be taken into consideration in some cases. With that exception the only instrument of title to be considered is, in general, the original settlement or will. I express no opinion on the question whether a mere appointment under a power contained in a settlement or will to designate some of a larger class as the beneficiaries would fall within the rule.

In the present case it is clear that the appellants no longer hold directly under the will. Under it each son on attaining twenty-five acquired a vested interest in the estate, subject, however, to an overriding power of the trustees by the exercise of which he might have been deprived of the whole or part of his share by an apportionment. The appellants, not being satisfied with that state of things, procured the trustees to execute the deed of 24th April 1906, under which each of them became absolutely entitled to a one-seventh share. In my opinion there is a difference not only in form, but in substance, between their interests under the will and those under the deed. The rights which they now enjoy are not those created by the will, but different rights which they were enabled to acquire under it. I do not think, therefore, that it can be affirmed of the appellants that the beneficial interest in the land is shared by them "under the will." They are therefore not entitled to more than one deduction.

ISAACS J. I agree.

GAVAN DUFFY J. I agree.

Question answered accordingly.

Solicitors, for the appellants, *Ritchie & Parker.*

Solicitor, for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth, by *Dobson, Mitchell & Allport.*

B. L.