H. C. OF A. 1915.

DOWLING v. COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD.

Powers J.

the equal distribution of the testator's assets." That is all the Society did in this case. The remarks of Lord *Watson* in delivering the judgment of the Privy Council satisfy me that the Judicial Committee did not in the case then under discussion, or in the other cases referred to in the judgment, regard indirect motives (such as those proved in this case) as sufficient to constitute either an "abuse of the process of the Court" or "fraud."

I hold the appeal should be dismissed.

*Appeal dismissed with costs.*

Solicitor, for the appellant, *A. A. Sinclair.*

Solicitors, for the respondent, *Moule, Hamilton & Kiddle.*

B. L.

Foll *Kinsman & Department of Veterans Affairs, Re* (1991) 23 ALD 151

Foll *NSW Aboriginal Land Council v State Revenue* (2004) 55 ATR 222

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[HIGH COURT OF AUSTRALIA.]

UNION TRUSTEE COMPANY OF AUSTRALIA LIMITED . . . . } APPELLANT;

AND

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

H. C. OF A. 1915.

MELBOURNE. *Sept.* 24, 27.

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

*Land Tax—Assessment—Deductions—Joint owners—Owner—Trust estate—Person entitled to land for "estate of freehold in possession"—Equitable estate of freehold in possession—Trust for accumulation—Land Tax Assessment Act* 1910-1914 (*No.* 22 *of* 1910—*No.* 29 *of* 1914), *secs.* 3, 38 (7).

The definition of the term "owner" in sec. 3 of the *Land Tax Assessment Act* 1910-1914 should be read as if after the words "'Owner,' in relation to land, includes" the words "besides absolute owners" were inserted, and so read the definition is exhaustive.

Under a will of real and personal property trustees held the estate upon trust, subject to certain annuities, to accumulate the income during the life of the testator's widow and after her death to appropriate the estate, including the accumulations, to his children in certain shares as tenants in common, and to pay the income of the shares to the children respectively for life, and after their respective deaths upon trust as to their respective shares for their children who should attain the age of twenty-one years or marry under that age. One of the testator's children died leaving a daughter surviving.

*Held*, that the testator's surviving children and his granddaughter were not during the life of his widow entitled to the land comprised in the estate for an estate of freehold in possession, and therefore were not "joint owners" of the land within the meaning of the *Land Tax Assessment Act* 1910-1914.

*Glenn* v. *Federal Commissioner of Land Tax*, 20 C.L.R., 490, followed.

CASE STATED.

On an appeal to the High Court by the Union Trustee Co. of Australia Ltd. from the assessment of them as trustees of the estate of Nathan Thornley, deceased, for land tax for the year ending 30th June 1914, *Griffith* C.J. stated a case for the opinion of the Full Court, which was substantially as follows :—

1. The appellant is one of the trustees of the will of Nathan Thornley, deceased, late of Melbourne, in the State of Victoria, who died on 1st March 1903. The other trustee of the said will is William Boyd, of Koroit, in the State of Victoria.

3. The said Nathan Thornley left him surviving his wife, who died on 24th November 1914, and six children, all of whom had then, or have since, attained the age of twenty-one years.

4. Of the testator's six children four were daughters and two were sons. The two sons and three of the daughters are still living. One of the said four daughters, namely, Vera Beatrice Macpherson, died on 13th November 1907, leaving her surviving one child, namely, Mary Violet Macpherson, who is now of the age of nine years.

5. In 1914 the appellant, as trustee as aforesaid, duly furnished a return for the purpose of the assessment of the amount upon which land tax for the financial year 1914-15 should be levied from the said trustees, and the appellant claimed six deductions of £5,000 from the unimproved value of the land, namely, a deduction in respect of the share of each of the two sons and the

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UNION TRUSTEE CO. OF AUSTRALIA LTD. v. FEDERAL COMMISSIONER OF LAND TAX.

three living daughters, and a deduction in respect of the share of Mary Violet Macpherson.

6. The Commissioner of Land Tax, in assessing such amount, allowed only one deduction of £5,000.

7. The appellant objected to the assessment and claimed to be entitled to six deductions of £5,000, but the objection was disallowed.

8. The appellant duly asked that the objection should be treated as an appeal, and the Commissioner duly transmitted the objection to the High Court at Melbourne for determination.

9. The question of law for the opinion of the Court is: Is the appellant entitled to one deduction of £5,000 or to six deductions of £5,000 each, or some other and what deduction from the unimproved value of the said land?

The case set out the will of Nathan Thornley, the provisions of which, so far as is material, were to the following effect:—The testator bequeathed legacies of £500 to his wife, £200 to each of his six children, and £50 and £40 respectively to two other persons. He bequeathed a life annuity of £1,000 to his wife, three other life annuities of £50, £50 and £30 respectively to three other persons, and an annuity of £200 during the joint lives of the annuitant and his wife to each of his six children. He directed that the whole of such legacies and annuities should be paid out of the income of his estate. He devised all his real and personal estate unto and to the use of his trustees upon trust to sell his real estate and to collect, call in and convert into money his personal estate, and to stand possessed of the proceeds thereof upon trust, after payment of his funeral and testamentary expenses and debts and the legacies, to invest upon certain securities. He directed his trustees during the life of his wife after providing for the annuities to accumulate all the residue of the interest and income by investing the same and the resulting income thereof in any of the securities before mentioned, and after the death of his wife to stand possessed of the whole of the proceeds then existing of his real and personal estate and the accumulations thereto, subject to the payment of the then existing annuities, upon trust that the same should be appropriated or considered as appropriated to his six children as

tenants in common but so that his sons should take in equal shares and his daughters should take in equal shares, but the share of each son should be double the share of each daughter. He directed the trustees to invest the share appropriated to each child in the securities before mentioned, and that they should, if such child should not at the date of the testator's wife's death be insolvent and should not have assigned or encumbered the income of such share or done anything whereby the income would if belonging to him absolutely have become vested in or payable to some other person, pay the income of such share to such son or daughter during his or her life or until he or she should become insolvent, &c., and in the case of such insolvency, &c., should apply the income or any part thereof of such share in their discretion for the maintenance of such son or daughter or his or her family during the remainder of the life of such son or daughter and accumulate the residue of the income not so applied and add it to the capital of the trust fund from which it proceeded. He directed that after the death of each respective son or daughter the trustees should hold the trust fund appropriated to him or her in trust for the children of such son or daughter who being sons attain the age of twenty-one years or being daughters attain that age or marry under it, with a gift over, in the event of any of his sons or daughters having no children or no such children, to his other sons and daughters. He directed that his trustees should not before the expiration of ten years from his death nor during the life of his wife sell any of his real estate or, without the consent of his wife, certain portions of his personal estate He gave his trustees full discretionary power after the expiration of ten years and the death of his wife to postpone the sale of his real estate and his personal estate for so long as they should think fit.

*Pigott*, for the appellant. Assuming that the five children of the testator and his granddaughter are not entitled to the land for estates in freehold in possession, as was decided in *Glenn* v. *Federal Commissioner of Land Tax* (1), the definition of "owner" in sec. 3 of the *Land Tax Assessment Act* 1910-1914 is

(1) 20 C.L.R., 490.

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not exhaustive, as is shown by the use of the word "includes" instead of "means": *R.* v. *Hermann* (1). The six persons are equitable owners of the estate, five of them being equitable owners of vested interests, and the sixth being equitable owner of a contingent interest. The fact that one of the interests is contingent does not deprive the persons of the benefit of sec. 38 (7): *Neill* v. *Federal Commissioner of Land Tax* (2).

*Starke*, for the respondent. This case is covered by *Glenn* v. *Federal Commissioner of Land Tax* (3). The use of the words "joint owners" in sec. 38 (7) excludes persons entitled to contingent interests. The section upon which *Neill's Case* (2) was decided did not contain these words. If the whole beneficial interest is not vested in joint owners, sec. 38 (7) does not apply: *Parker* v. *Deputy Federal Commissioner of Land Tax* (*Tas.*) (4).

*Pigott*, in reply.

*Cur. adv. vult.*

Sept. 27.

The judgment of the Court was read by

GRIFFITH C.J. The question submitted for determination in this case depends upon the answer to the prior question whether the beneficiaries on whose behalf the appeal is brought are personally, and independently of the trustees, taxable as owners of the land. At the date as of which the assessment was made they were not entitled to receive any part of the income, the whole of which, less some annuities, was subject to trusts for accumulation during the life of the testator's widow. On her death (which has since happened) the whole beneficial interest in the land and the accumulations would be shared between them.

*Glenn's Case* is a direct authority that under these circumstances they are not within either of the categories mentioned in the definition of the term "owner" in sec. 3 of the Act.

That term *primâ facie* connotes entire dominion. Sec. 3 extends the meaning so as to take in certain persons who possess some, but not all, of the rights of absolute owners. Although,

(1) 4 Q.B.D., 284.
(2) 14 C.L.R., 207.
(3) 20 C.L.R., 490.
(4) 17 C.L.R., 438.

therefore, the language of the definition is in form inclusive, and not exhaustive, it must be read as if the words "besides absolute owners" were inserted after "includes." So read, the definition is exhaustive, and this, we think, is the true construction.

Mr. *Starke* did not dispute that the beneficiaries are in one sense equitable owners of the land, but for the reasons we have given they are not taxable as owners under the Act.

*Question answered accordingly.*

Solicitors, for the appellant, *Blake & Riggall.*

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

B. L.



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[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONERS OF STAMPS (QUEENSLAND) . . . . } APPELLANTS;

AND

ARNOLD WIENHOLT AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.



*Stamp Duty—Acts of Legislature with limited powers—Stamp Duties Acts—Mortgage of Queensland property—Deed executed out of Queensland—Non-registration—Liability to duty—Effect of non-payment of duty—Attested copy—Queensland Constitution Act* 1867 (31 *Vict. c.* 38), *sec.* 2—*Stamp Duties Act* 1866 (*Qd.*) (30 *Vict. No.* 14), *secs.* 3, 18, 19, 27—*Stamp Duties Amendment Act* 1876 (40 *Vict. No.* 7), *secs.* 1, 2, 4—*Stamp Act* 1894 (58 *Vict. No.* 8), *secs.* 4, 81.

Where the Constitution of a State merely empowers the Legislature to make laws for the peace, welfare and good government of the State in all cases, one