H. C. OF A. 1916. RYAN v. ROSS.

in holding that the findings of the jury and the judgment in the action should be set aside, and that a new trial should be had between the parties, and I agree that the appeal should be dismissed.

Appeal dismissed with costs, including costs of motion for special leave to appeal.

Solicitor for the appellant, *George Storer.*
Solicitors for the respondents, *Morris & Fletcher.*

R. T. G.

[HIGH COURT OF AUSTRALIA.]

EMMERTON AND ANOTHER . . . APPELLANTS;

AND

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

H. C. OF A. 1916. MELBOURNE, *Sept.* 11, 12, 19. Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Land Tax—Assessment—Joint owners—Beneficial interest under settlement made, or will of testator who died, before 1st July 1910—*Interest under several settlements or wills—"Beneficial interest in land"—Holders of "original shares"— Land Tax Assessment Act* 1910-1914 (*No.* 22 *of* 1910—*No.* 29 *of* 1914), *secs.* 38 (7), (8).

Held, by *Griffith* C.J. and *Barton*, *Gavan Duffy* and *Rich* JJ. (*Isaacs* J. dissenting), that the term "beneficial interest in land" in the proviso to sub-sec. 7 of sec. 38 of the *Land Tax Assessment Act* 1910-1914 refers to the beneficial interest in land mentioned in the earlier part of the sub-section, and means the whole beneficial interest in the land assessed; that the proviso does not apply to a case in which each of the settlements or wills relied upon comprises only an undivided interest in land; and that the only effect of the proviso is that, when the same group of persons take different parcels of land under more than one settlement or will, then, whether the settlors or testators are a single person or not, the privilege conferred by sub-sec. 7 must be claimed, once for all, in respect of the aggregate value of all the land.

Clifford v. *Deputy Federal Commissioner of Land Tax (N.S.W.)*, 19 C.L.R., 593, and *Wilson* v. *Federal Commissioner of Land Tax*, 21 C.L.R., 225, applied.

A testator, who died in 1863, by his will devised his real estate to trustees upon trust to sell and distribute the proceeds, one-half to his son A, one-quarter to his son B, and one-quarter to his daughter C for life with remainder to her children. A, who died in 1865, by his will gave one-half of his estate to his brother B, and one-half to his sister C for life with remainder to her children. B died in 1866, intestate, and his interest in his father's estate became divisible equally between his mother and C. By deed of settlement made in 1868 the mother and C settled the interests which they had acquired under B's intestacy upon the same trusts in favour of C and her children as those of her share under the original testator's will. C died in 1883 leaving five children. On the assessment of the trustees of the original will under the *Land Tax Assessment Act* 1910-1914 in respect of the land held by them in trust for the five children,

Held, that the five children were not within the terms of the proviso to sec. 38 (7), and, therefore, that the trustees were entitled to only one deduction of £5,000:

By *Griffith* C.J. and *Barton*, *Gavan Duffy* and *Rich* JJ., on the ground above stated;

By *Isaacs* J., on the ground that none of the five children was the holder of an original share within the meaning of sub-sec. 8 of sec. 38 of the Act.

CASE STATED.

On an appeal by Harry Emmerton and George Frederick Garrard, trustees of the estate of Arthur O'Mullane, deceased, from an assessment of them for land tax for the year ending 30th June 1915, under the *Land Tax Assessment Act* 1910-1914, *Griffith* C.J. stated a special case for the opinion of the Full Court which was substantially as follows :—

1. The above-named Arthur O'Mullane died on 9th October 1863 leaving a will dated 6th October 1863.

2. The trustees of the said will are, and were at all times material, the appellants Harry Emmerton and George Frederick Garrard.

3. By his said will the said Arthur O'Mullane devised his real estate to trustees upon trust to sell and invest the moneys to arise from such real estate in the names of his trustees upon trusts, so far as now material, to pay one moiety of the said moneys to his son Arthur Augustus O'Mullane and subject to payment of the said moiety in trust for his son George O'Mullane and his daughter

H. C. OF A. 1916.

EMMERTON v. FEDERAL COMMISSIONER OF LAND TAX.

Ann Elizabeth O'Mullane equally between them, their respective shares to be absolutely vested on the testator's death. And the testator declared that his trustees should retain the fund or share to which his daughter should become entitled upon trust to pay the income into the hands of his daughter subject to a restraint on anticipation for her life, and after the decease of his said daughter then as to the principal and future income in trust for the child if only one or for all the children if more than one of his said daughter who being a male or males should attain the age of 21 years or being a female or females should attain that age or marry.

4. The testator's son Arthur Augustus O'Mullane died on 25th May 1865 leaving a will dated 20th May 1865.

5. By his said will Arthur Augustus O'Mullane bequeathed all that moiety of the moneys and all other estate and interest to which he was entitled under the will of Arthur O'Mullane unto a trustee upon trust, so far as is now material, to pay one-half of the moneys unto his brother George O'Mullane absolutely, and as to the other moiety to invest the same and pay the income to his sister the said Ann Elizabeth O'Mullane for life and after her death then as to the principal and future income in trust for the child if only one or for all the children if more than one of his said sister who being a male or males should attain the age of 21 years or being a female or females should attain that age or marry.

6. The said George O'Mullane died on 21st December 1866 intestate.

7. The persons entitled to share in the distribution of the estate of the said George O'Mullane were his mother Maria Elizabeth O'Mullane and his sister the said Ann Elizabeth O'Mullane, and each of them was entitled to a moiety of the said estate.

8. By an indenture made 21st October 1868 between the said Maria Elizabeth O'Mullane of the first part, William Garrard of the second part, the said Ann Elizabeth O'Mullane of the third part, Samuel A. Richardson and John Ettershank of the fourth part, after reciting the death and will of the said Arthur O'Mullane and Arthur Augustus O'Mullane and the death of the said George O'Mullane, and that a marriage had been agreed upon between the said William Garrard and the said Ann Elizabeth O'Mullane, and

that upon the treaty for the said marriage it was agreed that the personal estate to which the said Maria Elizabeth O'Mullane and Ann Elizabeth O'Mullane respectively were entitled under the intestacy of the said George O'Mullane should be settled and assured upon the trusts thereinafter expressed, the said Maria Elizabeth O'Mullane and the said Ann Elizabeth O'Mullane (the latter with the approbation of the said William Garrard) did each grant and assign unto the said Samuel A. Richardson and John Ettershank, their executors and assigns, all that and those the sum and sums of money to which each of them was entitled as one of the next of kin of George O'Mullane and to which he was entitled at the time of his death under the will of Arthur O'Mullane or under the will of Arthur Augustus O'Mullane or otherwise, to hold the premises after the death of the survivor of them the said William Garrard and Ann Elizabeth O'Mullane upon trust, so far as is now material, for all and every the children of the said William Garrard by the said Ann Elizabeth O'Mullane his intended wife to be equally divided between them and among them if more than one share and share alike, and it was declared that all and every the aforesaid shares should be and be deemed vested interests in such of the said children as being sons should attain 21 years or die before that age leaving issue and being daughters should attain that age or marry in the lifetime of the survivor of them the said William Garrard and Ann Elizabeth O'Mullane. The said Harry Emmerton and George Frederick Garrard are the present trustees of this settlement.

9. The said William Garrard and Ann Elizabeth O'Mullane married on 22nd October 1868, and had issue as follows :—George Frederick Garrard, Maud Edith Garrard, Ida L. Garrard, William Garrard and Stanley Garrard. The said issue all attained the age of 21 years prior to the year 1903, and are all still living except Stanley Garrard, who was killed in action on 28th August 1915.

10. The said William Garrard senior and the said Ann Elizabeth Garrard, his wife, both died in the year 1883.

11. By an indenture made 1st March 1892 between William Garrard (the nephew of the first hereinbefore named William Garrard) of the first part, Maud Edith Garrard of the second part, Thomas Aubrey Bowen guardian of the said Maud Edith Garrard of

H. C. OF A. 1916.

EMMERTON v. FEDERAL COMMISSIONER OF LAND TAX.

the third part, and T. A. Bowen, Harry Emmerton and George Frederick Garrard of the fourth part (hereinafter called her trustees), after reciting an intended marriage (which was shortly afterwards solemnized) between the said William Garrard and Maud Edith Garrard, and that the said Maud Edith Garrard was a grandchild of the said Arthur O'Mullane and entitled to a share under his will and also under the will of her uncle Arthur Augustus O'Mullane and also under the said indenture of 21st October 1868 and also to certain other interests which are not material to the present case, and that the said Maud Edith Garrard would not attain the age of 21 years until 14th March 1893, the said Maud Edith Garrard with the consent and approval of her guardian aforesaid and with the approbation of the said William Garrard did grant and assign to her trustees and their executors and assigns all and every the parts or shares part or share to which she was then or should become seised, possessed or entitled in possession, reversion, originally or by survivorship or accruer or otherwise howsoever of and in the real and personal estate and property comprised or referred to in the thereinbefore recited wills and indentures respectively and every of them and in the securities upon which the same may be invested or consist to hold, receive and take the said shares or securities unto and to the use of her trustees upon trusts (so far as is now material) as follows :—

(*a*) To take steps as her trustees should in their absolute discretion think fit to enforce the rights derived from the said Maud Edith Garrard in respect of the trust premises or without actively enforcing such rights merely receive such moneys as the trustees of the said wills and indentures state to be properly payable.

(*b*) To sell and dispose of the trust premises.

(*c*) To pay at the absolute discretion of her trustees a sum not exceeding £5,000 out of the corpus of the trust premises for the benefit or advancement or in discharge of any obligation of the said Maud Edith Garrard.

(*d*) To pay a sum or sums not exceeding £5,000 out of the corpus of the trust premises to the said Maud Edith Garrard

for her separate use as the said Maud Edith Garrard by any deed or deeds appointed to be paid to her.

(*e*) Subject as aforesaid to invest the corpus of the trust premises and pay to Maud Edith Garrard for her separate use the income of or arising from the trust premises and after the death of the said Maud Edith Garrard to stand possessed of the trust premises and investments for the time being representing the same and the income thereof in trust for all such one or more exclusively of the other or others of her children as she should by deed or will appoint and in default of appointment in trust for all her children or any her child who being sons or a son attained the age of 21 years or being daughters or a daughter attained that age or married under that age and if more than one in equal shares.

No payments have been made under trust (*c*) as aforesaid but payments under trust (*d*) amounting in all to £5,000 were made to the said Maud Edith Garrard prior to 30th June 1914. The said T. A. Bowen died on 27th July 1893, and on 27th December 1913 Harvie Cavendish Hamilton was appointed a trustee in his place.

12. By an indenture made 5th April 1895 between Ida Louisa Garrard of the one part and Harry Emmerton and George Frederick Garrard of the other part, after reciting interests under wills and indentures vested in Ida Louisa Garrard similar to those contained in the indenture dated 1st March 1892 made by her sister Maud Edith Garrard, and that the said Ida Louisa Garrard attained the age of 21 years on 12th September 1894, the said Ida Louisa Garrard granted and assigned to her trustees Harry Emmerton and George Frederick Garrard all and every the part or share of the said Ida Louisa Garrard in the same words as are contained in the said indenture of 1st March 1892 and *mutatis mutandis* upon the same trusts so far as are now material. No payments either under trust (*c*) or (*d*) as aforesaid have been made to the said Ida Louisa Garrard, but by deed dated 14th September 1910 she has appointed to herself the sum of £5,000. The said Harry Emmerton and George Frederick Garrard are still the trustees of this settlement.

13. The said Ida Louisa is unmarried.

H. C. OF A. 1916.

EMMERTON v. FEDERAL COMMISSIONER OF LAND TAX.

14. Parts of the real estate of Arthur O'Mullane are still unsold by the trustees of his will, the unimproved value thereof on 30th June 1914 being £56,389.

15. On 31st August 1914 the appellants, as such trustees as aforesaid, furnished a return pursuant to the provisions of the said Acts of the said unsold lands held by them on 30th June 1914 as aforesaid, showing an unimproved value of £56,389 and claiming under sec. 38A to deduct £15,000, being deductions of £5,000 each in respect of each of the three original shares under the said will, to all of which shares the said five children had become collectively entitled as aforesaid.

16. The appellants, as such trustees as aforesaid, on or about 19th April 1915 received notice of assessment from the respondent for the years 1914-15 assessing the unimproved value of the land included in the said return at the sum of £56,389 less only one deduction of £5,000 and claiming payment of £800 19s. 6d., being land tax calculated on the taxable balance of £51,389 at the rate of $3\frac{13889}{18750}$d. in the pound.

17. On 13th May 1915 the appellants delivered to the respondent a notice of objection to the said assessment.

18. The objection specified in the said notice was not allowed by the respondent and the said assessment was not altered or amended accordingly, and the said appellants did not accept the said assessment, and the said appellants duly asked that the said objection should be treated as an appeal, and the said respondent duly transmitted the said objection to the High Court at Melbourne for determination as a formal appeal.

20. The question of law for the opinion of the Court is :—

Are the appellants entitled to claim three deductions of £5,000 each or only one deduction of £5,000 or some other and what deduction from the unimproved value of the said land ?

Argument as to one point in the case, which also arose in *Wilson* v. *Federal Commissioner of Land Tax* (1), was heard before a Full

(1) 21 C.L.R., 225.

Bench on 7th, 8th and 9th March, the two cases being heard together, and a decision on that point was given on 24th March.

The case now came on for further argument on other points.

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

Starke, for the respondent.

[During argument reference was made to *Wilson* v. *Federal Commissioner of Land Tax* (1); *Archer* v. *Deputy Federal Commissioner of Land Tax (Tas.)* (2); *Lewis* v. *Federal Commissioner of Land Tax* (3); *Clifford* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (4).]

Cur. adv. vult.

The following judgments were read :—

Sept. 19.

GRIFFITH C.J., and BARTON, GAVAN DUFFY and RICH JJ. Dr. O'Mullane, who died in 1863, by his will devised his real estate to trustees upon trust for sale and distribution of the proceeds. He disposed of the beneficial interest as follows :—One-half to his son Arthur ; one-fourth to his son George ; one-fourth to his daughter Ann Elizabeth for life with remainder to her children.

Arthur died in 1865, having by his will given half his estate to his brother George, and the other half to his sister Ann and her children for the same estates as they respectively took in the share given her by her father's will. The result was that half of the estate, which I will call Ann's share, was now held on trust for her for life with remainder to her children. George's share and Ann's share thus each comprised one-half of the estate.

George died in 1866, intestate, and so far as his share in Dr. O'Mullane's estate was concerned the operation of that gentleman's will was exhausted. His next of kin were his mother and his sister Ann, between whom his one-half share in Dr. O'Mullane's estate became divisible, each of them becoming entitled to one-fourth of the estate. The interest taken by Ann in this share was the whole

(1) 21 C.L.R., 225.
(2) 17 C.L.R., 444.
(3) 17 C.L.R., 566.
(4) 19 C.L.R., 593.

H. C. OF A. 1916.

EMMERTON v. FEDERAL COMMISSIONER OF LAND TAX.

Griffith C.J. Barton J. Gavan Duffy J. Rich J.

beneficial interest, and not, as in the case of the half share which she already had, a life interest only. This interest was derived directly from George, and was free from any trusts.

By a deed of settlement dated 21st October 1868 Mrs. O'Mullane (the widow of Dr. O'Mullane) and Ann settled the interests which they had acquired under George's intestacy upon the same trusts in favour of Ann and her children as those of her original share under the testator's will. This deed operated as two distinct settlements, namely, a settlement of the widow's fourth share and a settlement of Ann's new fourth share. Ann had five children, all of whom took vested interests, and were living at the time as of which the assessment now in question was made. She died in 1883.

The position thus was that the whole beneficial interest in the land was held by the trustees of the testator's will in trust for the same persons, namely, Ann's five children. But the rights of the beneficiaries were derived from four distinct sources. As to one undivided fourth of the estate they were derived directly from the testator's will, as to another undivided fourth from Arthur's will, as to a third undivided fourth from the widow's settlement, and as to the remaining fourth from Ann's settlement, the combined effect being that they took the whole beneficial interest.

Sec. 38, par. 7, of the *Land Tax Assessment Act* confers a privilege on joint owners of land in the case specified in it. The conditions upon which the privilege can be claimed are: (1) The joint holders must hold the beneficial interest in *the* land *under* a settlement or will which took effect before 1st July 1910; (2) they must *all* be relatives of *the* settlor or testator by blood, marriage or adoption; (3) they must all share the beneficial interest in such a way as to be joint owners. When these conditions co-exist, then, for the purposes of their joint assessment as joint owners, there may be deducted from the unimproved value of the land, instead of the sum of £5,000 as provided by sec. 11 of the Act, as many sums of £5,000 (or less) as there are joint owners who at the time of the assessment hold original shares as defined by par. 8.

It was held by this Court in *Clifford's Case* (1) that the term "beneficial interest in land," as used in par. 7, means the whole

(1) 19 C.L.R., 593.

beneficial interest in the land assessed, and that the privilege does not extend to the case of a settlement of an undivided share of land.

In *Wilson's Case* (2), with which the present case was argued, it was decided that, except in cases within sec. 38A, in order that the privilege may be claimed it is not sufficient that all the persons who for the time being share the land or income should be relatives of the settlor or testator, but that it is essential that they should all hold directly *under* the settlement or will, so that if any part of the interest is held under a mesne assignment the privilege is lost. It follows that the present beneficiaries could not claim the privilege under the testator's will.

The appellants, however, contend that, although they cannot claim the benefit of par. 7, they are entitled to the benefit of a proviso added to sec. 38 by the amending Act of 1912, which is as follows :—" Provided that, where the same persons have a beneficial interest in land or in the income therefrom under more than one settlement or will or under a settlement and will, they shall be jointly assessed in respect of the whole of their interests under the settlements or wills or settlement and will, and there may be deducted in the joint assessment from the unimproved value of the land comprised in the joint assessment, 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 being jointly assessed—(*a*) the total sum of £5,000, or (*b*) the sum which bears the same proportion to the unimproved value of the land after deducting the value of any annuity under sec. 34 of this Act as the share bears to the whole, whichever is the less."

The question is whether they are entitled to these several deductions or only one deduction of £5,000.

The words " provided that " are ordinarily used to introduce an exception from, or qualification of, a general rule to which it is added, and, when that rule is an enactment granting a privilege, suggest, *primâ facie*, that the privilege is to be limited or qualified, and not that a larger privilege is to be conferred, although the context may compel the latter construction.

(1) 21 C.L.R., 225.

H. C. OF A. 1916.

EMMERTON v. FEDERAL COMMISSIONER OF LAND TAX.

Griffith C.J. Barton J. Gavan Duffy J. Rich J.

In what way, then, was the existing law altered by the proviso? The only enacting words in the proviso are the words which prescribe that in the cases specified the persons claiming the privilege shall be jointly assessed in respect of the *whole* of their interests under all the instruments by which they are created, and that in the joint assessment so made of the unimproved value of the land comprised in the joint assessment there may be made a single set of deductions. This, *primâ facie*, means that the value of the several parcels of land subject to the settlements or wills shall be added together and treated as a single whole and not dealt with severally. It does not suggest that the value of several undivided interests each of which is itself incapable of being the subject of a settlement within par. 7 shall be added together so as to form a new entity which is capable of being so subject. In our opinion the term "beneficial interest in land" when used in the proviso refers to the beneficial interest in land mentioned in the earlier part of the sub-section, and has the meaning that was assigned to it in *Clifford's Case* (1), and the proviso does not apply to such a case as the present in which each of the settlements relied upon comprises only an undivided interest in land.

In our judgment the effect of the proviso is that, when the same group of persons take different parcels of land under more than one settlement or will, then, whether the settlors or testators are a single person or not, the privilege conferred by par. 7 must be claimed, once for all, in respect of the aggregate value of all the land. And we do not think it has any other effect.

If the Parliament had intended to enact that the privilege conferred by par. 7 should be extended to cases in which the whole beneficial interest in land which is to be jointly assessed is held under the conjoint operation of several settlements or wills made by independent settlors or testators, we think that such an intention would have been expressed in very different language from that of the proviso which we have considered.

It follows that the appellants are entitled to only one deduction of £5,000, and the question must be answered accordingly.

(1) 19 C.L.R., 593.

ISAACS J. For some time I thought that *Wilson's Case* (1) controlled this case in favour of the Commissioner. However, notwithstanding some difficulty occasioned by the reasons as stated, I have come to the conclusion that it should not be held to govern such a case as the present. This case calls, therefore, for an independent consideration of the meaning of the proviso to sub-sec. 7 of sec. 38 of the *Land Tax Assessment Act*, and in connection with that proviso the effect of sub-sec. 8. In that regard two points arise :—(1) The true scope of the proviso, and (2) the determination of whether any of the appellants holds an original share in the land within the meaning of sub-sec. 8.

On the first point, the meaning of the proviso, I am unable to take the same view as my learned brethren. This is the most important branch of the case, and as in my opinion the prevailing view excludes from the relief intended by the Legislature nearly all the possible cases to which that relief in the ordinary course of events could apply, I propose to state as clearly as I can the reasons leading me to my conclusion.

One firmly established canon of construction I carry into the interpretation of the Act. It finds expression in many cases, and I refer only to two of the most recent. "Judicial tribunals must in interpreting these taxing Acts stick to the letter of the Statute." Those are the words of Lord *Atkinson* in *Attorney-General* v. *Milne* (2). In the same case Lord *Parker* said (3) :—"The *Finance Act* is a taxing Statute, and if the Crown claims a duty thereunder it must show that such duty is imposed by clear and unambiguous words."

In a subsequent case in the same volume, *Lumsden* v. *Commissioners of Inland Revenue* (4), *Haldane* L.C. said :—"The duty of Judges in construing Statutes is to adhere to the literal construction unless the context renders it plain that such a construction *cannot* be put on the words. This rule is especially important in cases of Statutes which impose taxation." I italicize the word "cannot."

By that canon of construction I measure sec. 38. It is divided into sub-sections, but as it declares in the first of them that "joint

(1) 21 C.L.R., 225.
(2) (1914) A.C., 765, at p. 772.
(3) (1914) A.C., at p. 781.
(4) (1914) A.C., 877, at pp. 896, 897.

H. C. OF A. 1916.

EMMERTON v. FEDERAL COMMISSIONER OF LAND TAX.

Isaacs J.

owners of land shall be assessed and liable for land tax in accordance with the provisions of this section" the Crown must in any given case of joint tenancy show that the tax it claims is in conformity with the section. It is not a question of privilege of the subject; it is a question of the right of the Crown to demand the tax upon the ascertained facts.

By sub-sec. 2—as amended by the Act of 1912, and omitting immaterial exceptions—joint owners are to be jointly assessed in respect of "the land" and as if it were owned by a single person. "The land," means incontestably the whole mass of land brought into the joint assessment, and whether consisting of one or twenty separate tenements. Further, it matters not by how many or various titles "the land" if composed of separate tenements is held, so long as the persons taxed as "joint owners" own the land jointly or in common, or have "a life or greater interest in shares of the income from the land" (sec. 3).

Apart from sub-sec. 7, the joint owners being assessed as if they were "a single person," there would, in ascertaining the taxable value, be deducted one deduction of £5,000 only (sec. 11). But sub-sec. 7 provided a special deduction in a special case of joint assessment. Where the "joint owners" under *one* settlement or *one* will, called "the will" (and a man can leave but one will in howsoever many documents it is contained—see *Douglas-Menzies* v. *Umphelby* (1)), share among them—not the whole of the land or the whole of the beneficial interests in the land making up its complete ownership—but "the beneficial interest in the land or in the income therefrom *for the time being*"; then, if the settlement or the will were operative before 1st July 1910 and the joint owners are all relatives of the settlor or testator, a special deduction is made to ascertain the net "taxable value" of the land.

But this provision was rigidly confined to the case where beneficial interest "for the time being" was shared under one instrument only. Then in 1912 the Legislature enacted the proviso, which, with great deference, seems to me, when read so as to gather the *expressed intention* of the Legislature—because it is only the intention as expressed that we have any right to inquire after,—

(1) (1908) A.C., 224, at p. 233.

to be remarkably plain. Being a proviso to the sub-section, it of course assumes to deal with the same subject matter and to alter the main part of the sub-section to the extent indicated either by express words or necessary implication.

Now we have to assume the very same persons as joint owners holding the very same interests in the very same "land," whether consisting of one or many tenements, but being one jointly taxable unit. But we have to assume one difference and one only, namely, that the joint owners hold their "beneficial interests for the time being"—that is, possibly, partial fragments of ownership in the land —not under one instrument (settlement or will) but under more than one instrument (that is, more than one settlement or will, or a settlement and a will), and in that case, says the proviso in effect, the same method of deduction—not necessarily the same deduction —shall be followed as in the case of one settlement or will. The difference between the proviso and the main part of the sub-section is simply in the number of instruments of title.

My learned brethren think that in the proviso, "settlement" and "will" mean a settlement or a will disposing of the whole of the ownership in a given piece of land. But the proviso does not say so, and there is nothing in the inherent nature of a settlement or a will to require it. The notion, as I understand, is derived from the circumstance that in the main part of the sub-section, the settlement or will is supposed to dispose of the total ownership in given land, and "settlement" in the proviso must mean the same thing. I am by no means prepared to say that the major premise is correct; but suppose it to be true, then if we confine "settlement" in the proviso to the identical operation of "settlement" in the original part of the sub-section, we should have to hold that "settlement" in the proviso meant settlement disposing of the entire ownership of the whole land jointly assessed. That would, of course, nullify the proviso.

The truth is that if the "settlement" or the "will" in the early portion of the sub-section does deal with the whole beneficial interest in the land not merely "for the time being" but for all time, it does so, not because it is a settlement, or a will, but because the sub-section insists upon there being only *one* instrument. Directly

H. C. OF A. 1916.

EMMERTON v. FEDERAL COMMISSIONER OF LAND TAX.

Isaacs J.

that condition is altered and " more than one " substituted, the result disappears also. According to the view from which I have the misfortune to differ, a father and a mother each having an undivided moiety in land, and severally " settling " or devising their respective interests upon their children before the date mentioned, would have made their children joint owners within the meaning of the Act, but not under " more than one settlement or will " within the meaning of the proviso. I regret that I am bound to confess my inability to grasp this conclusion consistently with adherence to the ordinary meaning of the words used. Literally read, and with a meaning that is certainly rational, they apply, in my opinion, exactly to this case, and Mr. *Weigall's* main contention is, I think, correct.

I should add that when sec. 38A is looked at, as it was in *Wilson's Case* (1), to aid the construction of sec. 38, which requires all the interests for the time being to be held " under " the settlement or will, it confirms the conclusion I have stated. The phrase " a settlement made before that day by a beneficiary under the original settlement or will of his share thereunder or a will of a beneficiary under the original settlement or will who died before that day " necessarily includes a settlement or a will of a partial interest in the land.

When a suggested interpretation of a word is not only unsupported by express words or necessary implication but is opposed to the recognized and technical meaning of the word itself and to the distinct sense in which the Legislature has used it in the same document, I entertain no doubt—except that naturally occasioned by the fact of the opposite opinion—that the suggested interpretation is wrong.

I should add that I do not take the same view of the meaning of *Clifford's Case* (2) as my learned brethren. As one of the majority the point suggested was not my meaning.

The second branch of the case related to the question of " original share." The only result of a given case falling within sub-sec. 7 is that search must be made for " original shares." These are arbitrarily defined by sub-sec. 8, and the shares held by the appellants

(1) 21 C.L.R., 225.

(2) 19 C.L.R., 593.

do not, I think, come within the definition. Not one of the shares as held by the appellants is a first interest under the will or a first interest in remainder after the settlor or the settlor's husband. Strictly speaking, by the settlement of 1868 the mother of the appellants made the appellants rank after the survivor of herself and her husband, so that the literal meaning of the definition does not apply. If, as I think, "after" is used in the sense of immediately after, then, as the literal meaning must govern since there is no other guide, the interposition of the survivor's interest stands in the appellants' way. Such a case as the present was apparently not contemplated, and the form of the amendment of sub-sec. 8 by the Act of 1912 strengthens the view.

Question answered "One deduction only."

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

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

B. L.