[HIGH COURT OF AUSTRALIA.]

HOYSTED AND OTHERS . . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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MELBOURNE, *March* 15; *May* 10.

Knox C.J., Isaacs and Starke JJ.

Land Tax—Assessment—Beneficiaries under will of testator who died before 1st July 1910—*Joint owners—Deductions of* £5,000—"*Original share in the land*"—"*First life or greater interest*"—"*Entitled*"—*Contingent interest—Interest in proceeds of sale of land—Land Tax Assessment Act* 1910-1916 (*No.* 22 *of* 1910—*No.* 33 *of* 1916), *secs.* 3, 38 (7) *and* (8).

Held, by *Knox* C.J. and *Starke* J., that, within the meaning of sec. 38 (8) of the *Land Tax Assessment Act* 1910-1916, a contingent interest is an "interest," an interest in the proceeds of the sale of land devised on trust for sale and payment of the proceeds to beneficiaries is an interest in the land, and such an interest contingent upon surviving a certain period is an interest greater than a life interest.

Per Isaacs J.: Although a contingent interest is an "interest" in land, it is not, within the meaning of sec. 38 (8), a "first life or greater interest" in the land or in the income therefrom.

By his will a testator who died before 1st July 1910 devised certain land to trustees upon trust to carry on, manage and work it until the expiration of twenty-one years after his death, and to stand possessed of the net annual income to arise from such carrying on upon trust for such of seven of his children as should be living at the expiration of each "annual period" 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 such seven children who should have died during an "annual period." He further directed that upon the expiration of the period of twenty-one years his trustees should (subject to a power of postponement and to certain conditions) sell the land and stand possessed of the net proceeds (after making certain payments) upon trust to pay or divide the same equally amongst such of the

said children as should be living at the expiration of the period of twenty-one years, with a proviso for the substitution in lieu of their parent of the children of such of the seven children as should be dead at the expiration of the period of twenty-one years. The term "annual period" was defined in the will as a completed period computed from the date of the testator's death to 31st January following and thenceforth from 31st January of each year to 31st January in the year following. One of the seven children died leaving two children her surviving. During the period of twenty-one years the trustees were assessed for Federal land tax on the assumption that the six surviving children and the two grandchildren of the testator were taxable as joint owners of the land,

Held, by *Knox* C.J. and *Starke* J. (*Isaacs* J. dissenting), that each of the six surviving children of the testator was at the date of assessment a person entitled to a first life or greater interest in the land within the meaning of sec. 38 (8) of the *Land Tax Assessment Act* 1910-1916, that each of them, assuming them to be joint owners, was accordingly a joint owner who held an original share in the land under the will within the meaning of sec. 38 (7) of the Act, and therefore that the trustees were entitled under sec. 38 (7) to a deduction of £5,000 in respect of each of the six children but not to a deduction of £5,000 in respect of the two grandchildren of the testator.

CASE STATED.

On the hearing of an appeal by Lionel Norton Hoysted, John H. McFarland and the Trustees, Executors and Agency Co. Ltd., trustees of the estate of Charles Campbell deceased, from an assessment of them by the Federal Commissioner of Land Tax for land tax, a case, which was substantially as follows, was stated by *Gavan Duffy* J. for the opinion of the Full Court :—

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

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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, 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," all of whom are now living except one of such children, Mrs. Mary Elizabeth Johnson, who died on 13th January 1912 leaving two children her surviving and now living.

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 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.

8. A copy of the will, which is to be treated as part of this case, is annexed to it.

9. The trustees by their return, 1918-1919, claimed seven deductions of £5,000 in respect of the station properties, one in respect of each of the seven children.

10. The Commissioner caused an assessment to be made for the purpose of ascertaining the amount upon which the land tax for the financial year 1918-1919 should be levied. The station properties and the land in the residue of the testator's estate were included in the one assessment because the joint owners in each case were the same.

11. In the assessment the Commissioner (*inter alia*) allowed as deductions under sec. 38 (7), in respect of each of the joint owners who held an original share in the residuary estate at 30th June 1918, the sum which bore the same proportion to the unimproved value of the land in the residuary estate as the share bore to the whole. The sums so allowed amounted to £5,126.

12. No deduction was allowed by the Commissioner in respect of the shares of the joint owners in the station properties, on the ground that the joint owners did not any of them hold original shares in these properties as defined by sec. 38 (8).

13. The trustees, being dissatisfied with such assessment, duly lodged objections in writing against the same. A copy of such objections is annexed as part of this case.

14. The Commissioner, by written notice to the trustees, disallowed such objections; and the trustees, being dissatisfied with the decision of the Commissioner, required the objections to be treated as an appeal and transmitted to this Court, and the Commissioner transmitted them accordingly.

15. The appeal coming on for hearing before me together with another appeal relating to an amended assessment for a previous

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financial year involving the same question, I consented at the request of the parties 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, and the questions for the opinion of the Court are :—

(1) Are the shares of the joint owners, or of any and which of them, in the station properties original shares in the land within the meaning of sec. 38 ?

(2) What number of deductions of £5,000 should the Commissioner make in the assessment of the joint owners of the said station properties ?

The objections referred to in par. 13 of the case were : (1) that the beneficiaries named in the will of the testator, who died before 1st July 1910, all of whom are relatives of the testator by blood, marriage or adoption, are entitled to the beneficial interest in the lands known as " the station properties " or in the income therefrom in such a way that they are taxable as joint owners under the *Land Tax Assessment Act* 1910-1916, and that they are the holders of original shares in such lands, being entitled to the first life or greater interest in such lands or the income thereof ; (2) that the taxpayers are entitled to seven deductions of £5,000 each pursuant to the provisions of secs. 38 and 38A of the *Land Tax Assessment Act* 1910-1916.

Material provisions of the will not stated in the case are stated in the judgments hereunder.

Weigall K.C. and *Owen Dixon*, for the appellants. The trustees hold the property for the six surviving children of the testator and the children of the seventh child who are taxed as joint owners, and they are entitled to seven, or at least six, deductions of £5,000 under sec. 38 (7) of the *Land Tax Assessment Act* 1910-1916. The beneficiaries are, under the will, entitled to " the first life or greater interest " in the land. Those words are not words of art. The will creates in each of the children an interest which is at least as great as a life interest and is in substance greater than a life interest,

for it can be asserted of each of them that as long as he lives he has a share in the income and if he survives the period of twenty-one years he has the fee. The intention of sec. 38 (7) and (8) is that if there are persons each of whom has substantially an interest which is not less than a life interest, and if they are the first holders of that interest, then they are each entitled to a deduction of £5,000. As the trustees were taxed on the basis that the beneficiaries are "joint owners" it follows from the definition of that term in sec. 3 that it is because they have "a life or greater interest in shares of the income from the land." The share of the children of the deceased child of the testator is an "original share." (See *Archer* v. *Deputy Federal Commissioner of Land Tax (Tas.)* (1).)

[KNOX C.J. referred to *Lewis* v. *Federal Commissioner of Land Tax* (2).]

In *Neill* v. *Federal Commissioner of Land Tax* (3) it was held that in the third proviso to sec. 33 of the Act of 1910, which provided for a deduction "in respect of each share into which the land is in the first instance distributed" amongst the beneficiaries, the words "is in the first instance distributed" extended to a contingent interest, and the reasons for that conclusion apply here.

Gregory, for the respondent. The fact that the assessment is based on the assumption that the children are joint owners does not require that the children are to be assumed to be specified in the will as entitled to a life or greater interest. At the present moment none of the children have a life or greater interest. They are not receiving the income from the land by virtue of the fact that they are entitled to the first life or greater interest in the land. Until the twenty-one years have passed, it cannot be said who are the members of the class specified in the will as entitled to any interest in the property. The position is the same as if the land had been given to a stranger for twenty-one years. Until the contingency arises none of the beneficiaries has an estate in the land (*Glenn* v. *Federal Commissioner of Land Tax* (4)). *Neill* v. *Federal Commissioner of Land Tax* (3) has no application to the present case, owing

(1) 17 C.L.R., 444, at p. 449.
(2) 17 C.L.R., 566.
(3) 14 C.L.R., 207.
(4) 20 C.L.R., 490.

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to the alteration of the law. No deduction should be allowed in respect of the children of the deceased child, for it cannot be said that they are among the persons specified as entitled to the *first* life or greater interest.

Weigall K.C., in reply. The will specifies a number of persons who are " entitled " to a life or greater interest in the land.

[ISAACS J. referred to *Umbers* v. *Jaggard* (1) and *Hughes* v. *Young* (2).]

It is an ordinary thing to speak of a man as being " entitled to " a contingent interest. " Interest " has no technical meaning such as " estate " has. [Counsel referred also to *In re Dowling*; *Dowling* v. *Dowling* (3).]

Cur. adv. vult.

May 10.

The following judgments were read :—

KNOX C.J. AND STARKE J. (read by KNOX C.J.). The question raised for decision by the special case is whether the appellants, trustees of the will of Charles Campbell deceased, having been assessed for land tax in respect of (*inter alia*) certain station properties passing under his will, are entitled by virtue of sec. 38 (7) of the *Land Tax Assessment Act* 1910-1916 to either six or seven deductions of £5,000 each on such assessment. The relevant provisions of the will of the testator and the facts necessary to raise the question are sufficiently stated in the special case. The answers to be given to the questions submitted depend on the determination of the question whether any, and if so how many, of the persons who were at the date of the assessment beneficially interested in the station properties held under the will original shares in the land within the meaning of that section of the Act. The beneficial interest under the devise of the station properties was divided into seven shares, and at the time of the assessment the beneficiaries under that devise were six of the children of the testator and the children of one child of the testator who died in the year 1912.

By his will the testator devised the station properties to his

(1) L.R. 9 Eq., 200.
(2) 32 L.J. Ch., 137.
(3) (1917) V.L.R., 208; 38 A.L.T., 183.

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.

We proceed to consider whether the provisions of sec. 38 (7) are applicable to the assessment in question. It is clear that the testator died before 1st July 1910, and that under his will the beneficial interest in the income of the station properties was, at the date of the assessment, shared among a number of persons all of whom were relatives of the testator. It must be assumed for the purpose of this decision that these persons were taxable as joint owners under the Act, for they have been so assessed and the propriety of the assessment is not challenged in this respect. This being so, the section provides that there may be deducted from the unimproved value of the land, instead of the sum of £5,000, the aggregate of the following sums, namely, in respect of each of the joint owners who holds an original share in the land under the will the sum of £5,000. The question then is whether any, and if so how many, of the beneficiaries hold original shares in the land under the will. Sub-sec. 8 contains a definition of the meaning of the words " original share in the land," and is, so far as is material, in the following words, namely, " In this section ' original share in the land ' means the share of one of the persons specified in the settlement or

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will as entitled to the first life or greater interest thereunder in the land or the income therefrom." The first question therefore is whether each of the six children of the testator who were living at the date of the assessment is "one of the persons specified in the will as entitled to the first life or greater interest thereunder in the land or the income therefrom," or, stated otherwise, were the seven children of the testator who are named in the will as beneficiaries in respect of the station properties entitled thereunder to the first life or greater interest in the land or the income therefrom? It is clear that under the provisions of the will each of these seven children must inevitably during his or her whole life be entitled to receive one-seventh of the income of the land, or one-seventh of the land itself or the proceeds of sale thereof, under the combined effects of the trust to distribute income during twenty-one years and of the trust if he or she should survive that period to divide the proceeds of sale of the land. It is equally clear that the class of seven children must, so long as they all survive, take between them the whole of the income from the land or, if they all survive the period of twenty-one years, the whole of the land or the proceeds of sale thereof, and that on the death of any one of them his or her one-seventh share became payable to his or her children, the right of each of the survivors to receive his or her one-seventh share remaining unimpaired. It may be that the fact that each of the seven children of the testator is entitled under the will to receive during the whole of his or her life his or her proportionate share of the income from the land and all the children are entitled under the will to receive during their joint lives between them the whole of such income is sufficient to establish the conclusion that the class composed of these children is entitled to a life interest in the income from the land and, there being no preceding life interest, to the first life interest therein, and so to establish the right of the trustees to at least six deductions of £5,000 each. But we do not think it is necessary to base our decision on this ground.

It cannot be disputed that each of the six surviving children was, at the date of the assessment, entitled contingently on surviving the period of twenty-one years to an equal one-seventh interest in the proceeds of sale of the land which was devised on

trust for sale. In our opinion such an interest is an interest in the land and is greater than a life interest. In arriving at this conclusion four questions have to be determined, viz.: (1) Is a contingent interest an interest within the meaning of the section? (2) Is an interest in the proceeds of sale of the land an interest in the land within the meaning of the section? (3) Is such interest greater than a life interest? and (4) Can each child properly be said to be "entitled" to his or her "interest"?

As to the first of these questions we have no doubt but that a contingent interest is an interest within the meaning of the section. "Interest" is not a technical word in the sense in which "fee simple" or "estate tail" may be said to be technical words, but includes all those various limitations of real estate allowed by law, vested, contingent or executory. Further, the words "holds," "share," "entitled," which occur in sec. 38, sub-secs. 7 and 8, are words as appropriate to connote the possibility of the vesting of an estate at a future time as to connote the vesting of that estate in possession or in interest. We therefore think that, taking the word "interest" in its ordinary meaning, it is impossible to deny that it is an apt word to describe that right to which the person named as contingent remainderman or executory devisee in a devise of land is entitled. It is, in fact, the word which would generally be used in that connection either by a lawyer or by a layman. "Contingent interest" is a phrase in every day use, and, if authority be needed for the apt nature of the word, it may be found in *Watkins on Conveyancing*, 8th ed., p. 219, where the following passage occurs:—"There are two classes of possibilities, namely, possibilities coupled with an interest such as contingent remainders, executory devises, springing or shifting uses; the other bare or naked possibilities, such as the hope of inheritance entertained by the heir. . . . The former class may, perhaps with more propriety, be denominated contingent interests, and the latter mere expectancies; for a possibility coupled with an interest is more than a possibility—it is a present interest, and may be devised (*Perry* v. *Phelips* (1))." See also *In re Parsons*; *Stockley* v. *Parsons* (2), in which case a mere possibility or expectancy is distinguished from

(1) 17 Ves., 173, at p. 182.

(2) 45 Ch. D., 51.

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an " interest," and *In re Mackenzie's Settlement* (per *Turner* L.J.) (1). See also *Neill* v. *Federal Commissioner of Land Tax* (2) decided on the provision of the Act which is now replaced by sec. 38 (7) and (8); and English *Conveyancing Act* of 1881, sec. 43 (1).

The second question must also, in our opinion, both on principle and authority be answered in the affirmative. We need say no more than that we think the observations of Lord *Cairns* L.C. in *Brook* v. *Badley* (3) are directly in point. The Lord Chancellor says :—" It is admitted that if a testator devises his real estate to be sold, and the proceeds paid to AB, and AB subsequently makes his will, and either devises those proceeds by name, or devises all his property to charity, the proceeds of the sale of that real estate will not go to the charity, and the bequest of the second testator to that extent is invalid. That is not matter in controversy at the present day. It has, indeed, been suggested as the reason for this, that the second testator, or those who claim under him, might, instead of having the land sold, insist upon taking it in its unconverted form, and thus the charity might become the actual possessor of specific real estate. But this cannot be the true reason, for if a testator devises his land to be sold, and the proceeds given, not to one person, but to four persons in shares, and if one of those four persons afterwards makes his will, and gives either his share of the proceeds or all his property to charity, the position of that second testator with regard to the estate which is to be sold is in substance that of a person who has *a direct and distinct interest in land.* The estate is in the hands of trustees, not for the benefit of those trustees, but for the benefit of the four persons between whom the proceeds of the estate are to be divided when the sale takes place. It may very well be that no one of those four persons could insist upon entering on the land, or taking the land, or enjoying the land *quâ* land, and it may very well be that the only method for each one of them to make his enjoyment of the land productive, is by coming to the Court and applying to have the sale carried into execution, but nevertheless the interest of each one of them is, in my opinion, an interest in land ; and it would be right to say in

(1) L.R. 2 Ch., 345, at p. 348. (2) 14 C.L.R., 207.
(3) L.R. 3 Ch., 672, at pp. 673-674.

equity that the land does not belong to the trustees, but to the four persons between whom the proceeds are to be divided." See also *Archer* v. *Federal Commissioner of Taxation* (per *Isaacs* J.) (1).

The third question also is, we think, not open to doubt. The contingent interest in this case is commensurate with a fee simple, and it cannot be disputed that an interest in fee simple is greater than a life interest.

As to the fourth question it is clear that the right of each of the children to a share of the corpus is a right capable of being passed by assignment, and is more than a mere possibility or expectancy. We think that, even if the word " entitled " be regarded as having been used in this section in a technical sense, each child was " entitled " to his interest, inasmuch as his title or right thereto accrued on the death of the testator, and he or she had from that time an interest capable of assignment. It is true that the interest in question was a contingent interest, but such an interest is not uncommonly the subject of sale and purchase, and we cannot regard the use of the word " entitled " in the section as importing " entitled in possession " or " entitled for a vested interest."

For these reasons we are of opinion that each of the six surviving children of the testator was at the date of the assessment entitled to a life or greater interest in the land in question.

It was suggested in argument that the result of our opinion would be to render liable to taxation persons having contingent interests but having no present interest in or right to receive the rents and profits of the land ; but in our opinion this is not so, for a person in that position would clearly not come within the definition of " owner " contained in sec. 3, not being either entitled to the land for an estate of freehold *in possession*, or entitled to receive, or in receipt of, the rents and profits thereof. See *Glenn* v. *Federal Commissioner of Land Tax* (2). Moreover, the words of sec. 38 (7) and (8) being unambiguous, it is neither necessary nor permissible to consider the effect which the construction put on those words may have on other provisions of the Act.

With regard to the remaining share, we are of opinion that the grandchildren of the testator who were at the date of the assessment

(1) 13 C.L.R., 557, at p. 568. (2) 20 C.L.R., 490.

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beneficially entitled to this share were not holders of an original share, inasmuch as there was a life or greater interest in the land to which their parent was beneficially entitled under the will in priority to them, and it was only on the failure of that interest that they came in as beneficiaries. Consequently, they were not entitled to the *first* life or greater interest in the land (see *Lewis* v. *Federal Commissioner of Land Tax* (1)).

The result is that, in our opinion, the trustees are entitled to be allowed six deductions of £5,000 each, and the questions submitted by the special case should be answered as follows, viz. :—Question 1. "The shares of the six children surviving at the date of the assessment." Question 2. "Six."

ISAACS J. The importance of this case, at first sight quite simple, justifies an extended examination of the principles which, in view of the arguments addressed to us, are necessary for its determination. The appellants complain, not of being taxed as joint owners, but only of not being allowed aggregate deductions of £5,000 each under sub-secs. 7 and 8 of sec. 38 of the *Land Tax Assessment Act* 1910-1916. As their learned counsel, Mr. *Weigall*, tersely stated the problem, it is only "How many deductions?" The appellants contended for seven, or at least six, deductions of £5,000 each; while the Commissioner contended that only one deduction should be allowed. The case is stated on the basis that the beneficiaries (as I shall for convenience designate the persons concerned) are rightly assessed as joint owners within the meaning of sec. 38, sub-secs. 1 to 6 inclusive, the written claim for deduction expressly asserts that they are taxable as joint owners, and the argument proceeded on that basis. Apparently the common ground of both sides was that the income received in fact by the appellants brought them, by the joint operation of par. (*b*) of the definition of "owner" in sec. 3 and of the earlier part of the definition of "joint owner" in the same section, within the scope of sub-sec. 1 of sec. 38. I desire, therefore, to be understood as not expressing or implying any opinion whatever on that subject. I accept the agreed assumption of the parties for the purposes of this case, and address myself

(1) 17 C.L.R., 566.

solely to the one independent question raised, as already stated. The problem is: Does each of the joint owners hold an original share in the land under the will of Charles Campbell within the meaning of sub-secs. 7 and 8 of sec. 38? The answer depends, of course, on two things, namely, (*a*) the meaning of the sub-sections mentioned, and (*b*) the effect of the will with respect to the beneficiaries.

(*a*) *Sub-secs.* 7 *and* 8 *of Sec.* 38.—The provisions in question have been introduced by way of substitution for earlier provisions, contained in sec. 33 of the Act, which taxed a trustee as if he were the beneficial owner and allowed him to have separate deductions in respect of "each share into which the land is in the first instance distributed" among the beneficiaries. Obviously a trustee may hold land divided into shares for beneficiaries yet unborn or unascertained. He would, nevertheless, as the taxpayer, be entitled to say the land was divided into shares, leaving it to be determined hereafter who the beneficiaries might at the essential moment turn out to be. So far as I am concerned, that is at the root of my judgment in *Neill's Case* (1). The Legislature, however, abolished the law then existing, and substituted the present provisions, which require the beneficiaries themselves and not the trustee to claim the deduction as joint owners. This in itself seems to me a legislative declaration of intention that the law of *Neill's Case* shall not apply. A joint owner, under the present law, cannot rightfully claim a separate deduction of £5,000 unless he "holds" an "original share in the land." The word "holds" is in the present tense, and signifies a present ownership. Land tax is charged on land as "owned" on 30th June immediately preceding the tax year (sec. 12). Then, as "owned" is defined by sec. 3 in a way that indicates either actual present enjoyment of the land as a freehold, or actual present receipt or the right to have receipt of the rents and profits of the land, it seems clear to me that the rights of ownership rendering a person liable to taxation on the given date are vested rights, and not contingent rights. A mere contingent estate could not, in my opinion, answer the description of "owner" in sec. 3. And if the matter were less clear than I hold it to be, I should still be of

(1) 14 C.L.R., 207.

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opinion that the Legislature had not been so unjust as to make persons only contingently entitled to land responsible for present taxation of the land. The word "hold" is no different in effect, in this enactment, from the word "have" in the latter part of the definition of "joint owners" in sec. 3. The two provisions came in together by Act No. 12 of 1911 as amended by No. 37 of 1912. The importance of the observation that "have" and "hold" are practically convertible is that, while the privilege conceded by sub-secs. 7 and 8 of sec. 38—though no doubt very extensive in operation for a long time to come—is a gradually disappearing feature, the liability created by the concluding words of the definition of "joint owners" in sec. 3 is a continual and an increasing one. If the appellants' arguments are sound to exonerate them, they are also sound to embrace in liability others who, as I think, are not within the scope of the definition, and are not intended to be made liable. Passing to sub-sec. 8, in order to define "original share in the land" the first thing to determine is whether the terms employed by the Legislature are to be read in their legal sense or in some popular sense. The subject matter is "settlements and wills," and "the first life or greater interest" thereunder, or the first such interest in remainder after a life interest of the settlor or after a life interest of the spouse of the settlor or testator. The word "entitled" is employed. It seems to me—even if we go no further than the particular sub-section—that the true meaning of the terms in the Act is their primary meaning in such a connection, namely, their technical meaning. The "first life interest," where property is brought into settlement on marriage, is an expression too common to require explanation. It is sufficient to refer, for instance, to such a work as *Vaizey* on *Settlements* (1887), vol. II., chap. xi., pp. 857 *et seqq.* (and particularly at pp. 861 and 863), to see how familiar in such a connection are the phrases "the first life interest" and "a greater estate or interest." The rule of construction in the case of terms *primâ facie* technical has been so often and so recently stated in this Court as to make restatement superfluous. A few words of Lord *Selborne* L.C. in *Giles* v. *Melsom* (1) may, however, be of use. He says, apropos of an argument similar in principle to one of the

(1) L.R. 6 H.L., 24, at p. 33.

arguments of the present appellants: "The whole argument . . . seems to me to lose sight of the cardinal rules of construction, which are, that where you have got words which are sensible and intelligible in their proper and natural meaning, especially if they are words of law and words of art, they are not by any uncertain conjecture to be wrested or diverted from that meaning."

The rest of the *Land Tax Assessment Act*, so far from weakening the technical meaning of these terms, strengthens it. For instance, secs. 14, 25, 33, 35, 38 (*passim*), 43, 43A, 48 (*e*), 58 (which, by using the word "estate" alone, indicates that the "greater interest" mentioned in the definition of "joint owners" and in sub-sec. 8 of sec. 38 must be an estate). Looking a little further to see how the expression "life or greater interest" is used, we find in sec. 43 (1) of the English Conveyancing Act of 1881 the phrase "for life or for any greater interest." The effect of the word "contingently" there is shown by *In re Judkin's Trusts* (1). In the New South Wales Conveyancing Act of 1898, as another instance, in sec. 54 we find the phrase "estate for life or any greater estate," the word "estate" by sec. 37 including "interest." *The question is, therefore, not what is an "interest" in land*—because for different purposes that expression in itself means different things, and is extremely comprehensive—but *what is a "life interest" and "a greater interest"*? I conceive that question admits of no doubt: a "life interest" is analogous to a life estate, and a greater interest is a freehold interest in tail (where that estate is permitted) or in fee. The word "greater" has reference to the "quantity of interest" which the taxpayer has in the lands. (See *Cruise's Digest*, vol. I., p. 47 (8).) To be either a life interest or greater than a life interest, it must have a legal indeterminate duration. And, as the *Land Tax Assessment Act* includes both legal and equitable "interests," it may be at once observed that in this respect there is no distinction between them. Consequently, in applying the Act to the will in order to ascertain whether the beneficiaries are *entitled* (see *In re Averill*; *Salsbury* v. *Buckle* (2)), we have to bear in mind the ordinary rules of property law and equity jurisprudence.

There is yet another point of construction of sub-sec. 8 which

(1) 25 Ch. D., 743, at p. 749.

(2) (1898) 1 Ch., 523.

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goes to the very root of the matter; for, as it appears to me, the groundwork of the appellants' contention is a violation of the definition of "original share in the land." What, in the view of sub-sec. 7 and sub-sec. 8, is each individual joint owner's property is his "share." But his share is what? Clearly his "share" in the joint property of all the statutory joint owners. And that individual share is described as "the share of *one* of the *persons*" (that is, of *all the persons*) who are "specified in the settlement or will as entitled" (that is, they are as a body entitled) "to the first life or greater interest thereunder in the land or the income therefrom." "Specified," of course, includes designation as well as reference by name. "The first life" or "greater interest" must be an interest which can be recognized according to established legal standards as *either* a "life interest" or a "greater interest." It cannot be both. And whichever it is, it must *as such* belong to *all* the persons specified. It is a "joint interest" (including in that, of course, an interest held in common), and it cannot be something which as to one of the persons is a life estate and as to another is an estate in fee. At the time of assessment one must be able to predicate which it is as to all the persons concerned. Then, to apply the Act to the circumstances of this case, we have to look at the will.

(*b*) *The Effect of the Will.*—The argument was this:—First, it was said that each of the children of the testator was sure, in any event, to get a share of the income for life, because for twenty-one years he shared it as income so long as he lived, and if he survived the twenty-one years he got a share of the corpus. Next, it was said that that was at least a life interest, and possibly a greater interest, and so within the stated definition of "original share." But learned counsel was careful not to say whether the interest of the beneficiaries is a "life interest," or is a "greater interest." It cannot possibly be both. For reasons which will presently appear, the practical result stated in argument as mentioned, even if accurate, would not, in my opinion, answer the legal requirements of the Assessment Act. But, apart from that Act, it is not correct to say that the beneficiaries are sure to receive the net income for life. After certain bequests, here immaterial, certain stations with the

stock and effects thereon were devised and bequeathed to trustees upon certain trusts. The first trust is to carry them on for twenty-one years. And then the will proceeds to declare: That the trustees shall stand possessed of the *net annual income* to arise from the carrying on of the said two station properties *upon trust* for "*such of my children*" (naming seven) "as shall be living at the expiration of the annual period (as hereinafter defined) during or in respect of which such income shall have arisen *and also such of the children* of any of my said children who shall be then dead, as shall be living *at the expiration of the annual period* (as hereinafter defined) during or in respect of which such income shall have arisen in the same shares and proportion as they shall then" (that is to say, at the expiration of that particular annual period) "respectively be *presumptively entitled* under the trusts and declarations hereinafter contained to participate in the distribution or division of the proceeds to arise or be received from the sale of the said station properties." "Net annual income" is defined. "Annual period" is also defined to be "a completed period computed from the date of my death to 31st January following and thenceforth from 31st January of each year to 31st January in the next succeeding year." Then follow directions appropriate to the twenty-one years period, and, as the testator died in 1905, that period ends in 1926. Now, the class is what Lord *Parker* (then *Parker* J.) in *White* v. *Summers* (1) calls "a contingent class," since the beneficiaries to share the income of each "annual period" can only be ascertained, in the words of the will, "at the expiration of the annual period." Consequently, a child dying on 29th January in any one of the twenty-one years would not participate in the income for that "annual period," though he had lived practically the whole year. The testator died on 13th September 1905, and the first testamentary annual period was from that date to 31st January 1906. But if a child had died on 29th January 1906, that child would get nothing of the income. Could it be said, then, that that child had a "life or greater interest" in the land? And so on throughout the twenty-one years. Therefore the so-called "practical view" fails at the threshold. But even if there were a right in the children to receive income accruing

(1) (1908) 2 Ch., 256, at p. 264.

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during the twenty-one years up to the hour of their death within that period, it would not, in my opinion, help their case. Supposing them to survive the twenty-one years, the first trust would not be a life interest within any hitherto known acceptation of the expression. And if not, how can death within that period turn it into a life interest? Assuming, even, an absolute interest for twenty-one years had been given, the terms of the first trust could not, as I think, be regarded as doing more than making the trust for twenty-one years in favour of each person terminate at death. The certainty of termination at the end of twenty-one years is fatal to a life estate or life interest as understood in law—in which expression, of course, I include equity. I may here observe that, if it were correct that a child dying within the twenty-one years had in the event which happened "a life interest," it must be the "first life interest." Now, one child, Mrs. Johnson, died, as the special case states (par. 4), in 1912, leaving two children surviving. If, then, Mrs. Johnson had a "life interest," it must have been "the first life interest," and the claim of the rest must fail under the terms of sub-sec. 8. Overlooking this consequence, and disregarding the necessary fatal effect upon the case of the present beneficiaries of the argument as to Mrs. Johnson, it is said that besides her "life interest" her children also have a "first life or greater interest." That is alleged as to them and the other beneficiaries because, it is said, we have to look at the next trust, and when that is read in conjunction with the first the argument is that the combined effect is to give to the present beneficiaries at least a life interest and perhaps a greater interest. That also is a "practical" argument and not based on the principle of giving technical expressions in the Act their legal effect. I deal with that contention, however, on its own basis and apart from what I have already said. The second trust is a declaration that upon the expiration of the said period of twenty-one years from the time of the testator's death, the trustees shall sell and *convert into money* the said two station properties and all sheep and other stock thereon, and shall stand possessed of the *net proceeds* of such sale, after payment thereout of all moneys (if any) which shall then remain unpaid in respect of any mortgage or mortgages, and all other moneys (if any) which

shall have been borrowed by the trustees in connection with the said stations, " upon *trust* to pay or divide the same equally between and amongst *such of my said children* as shall be living at the expiration of such period of twenty-one years and *such of the children* of any of my said children who shall then be dead as shall be living at the expiration of such period of twenty-one years," but stirpitally, so that the children of each dead child of the testator shall take as tenants in common only, in the aggregate, a share equal to the share which his, her or their parent would have taken, had such parent been alive. The trustees are to have power to postpone the sale and conversion. The testator adds as a wish and desire only (and not as controlling the trustees) that the trustees will not sell and convert until they are requested to do so by a " majority in numbers and interest of the persons *entitled* to the proceeds of such sale and conversion." And for the purpose of any such request the child or children of any of the testator's children who shall then be dead shall be represented by the executors or administrators of the parent through whom the children claim. And he adds that, notwithstanding any postponement of the sale and conversion, the conversion shall, for the purpose of transmission, be considered as at the expiration of the twenty-one years. Then he deals with the residue, but that is immaterial to the present case. The appellants contend that those provisions bring them within the words of sub-secs. 7 and 8, and establish that each of the appellants *holds* " an original share " in the land under the will, because the share which each appellant holds is a share of one of " the persons specified in the . . . will as entitled *to the first life or greater interest thereunder in the land or the income therefrom.*"

Considering the rights of the beneficiaries apart from the Assessment Act, the first position is that their interest under the second trust is contingent. It is not a legal interest, but an equitable interest. If it were a contingent legal remainder, they, not being the ascertained or ascertainable beneficiaries, would have no present estate or interest in the land. *Cruise* says (*Digest*, vol. I., p. 47): —" An estate in land means such an interest as the tenant hath therein. It is called in Latin *status*, because it signifies the condition or circumstance in which the owner stands with regard

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to his property." Mr. *Butler*, in his note to *Fearne on Contingent Remainders*, 8th ed., at p. 2, says: "While the contingency exists, B, properly speaking, has not an *estate* in the land,—he rather has a right to have an estate in the land, *if the contingency takes place*." In *Preston on Estates*, vol. I., p. 20, it is said:—"The *interest* which any one has in lands, or any other subject of property, is called his *estate*; and to this term some adjunct or expression must be added, when the time for which the estate is to continue; as for years, for life, in tail, or in fee; . . . is to be described." See also *Petersdorff*, 2nd ed., vol. IV., p. 270, note 1, and *Blackstone's Commentaries*, vol. II., p. 103. In *Duffield* v. *Duffield* (1), decided in 1829, *Best* C.J., in stating his reasons for the answers given by the Judges, said (*inter alia*): "Whilst estates remain contingent, those in whom they are at a future time to be vested, have *no interest in the estates, or the rents and profits of such estates.*" The Chief Justice said (2) that which is appropriate here, viz.:—"The estates are not given to any *particular children* by name, but *to such children as shall attain the age of twenty-one years.* Until they have attained that age, no one completely answers the description which the testator has given of those who are to be devisees under his will, and therefore there is no person in whom the estates can vest. *It is an established principle of law* recognized by all the cases that are in the books, and founded on the nature of things, that estates must remain contingent until there be a person having all the qualifications that the testator requires, and completely answering the description given of the object of his bounty in his will." *Best* C.J. also says (3): "A presumptive title is only a possibility, . . . when the testator speaks of his grandchildren as presumptively entitled, he must be understood to say that they have no absolute or vested interest." That accords with Lord *Eldon's* words (4): "I take it a person is said to be presumptively entitled to that to which he is not actually entitled, but may become entitled." *Leake on Property in Land*, 2nd ed., at p. 243, says: "The limitation of a contingent remainder for life or in tail . . . *conveys no estate*, but only *a possibility* of an estate in a future event." There is no dispute that

(1) 3 Bli. (N.S.), 260, at p. 330.
(2) 3 Bli. (N.S.), at pp. 333-334.
(3) 3 Bli. (N.S.), at p. 335.
(4) 3 Bli. (N.S.), at p. 293.

a contingent remainder, or an executory devise, or a springing or shifting use, can be devised as a possibility coupled with an interest, some of these by force of the conjoint operation of the *Statute of Uses* and the doctrines of equity retained by the common law Courts. But the point to observe is that the essential condition of this doctrine is, as stated by Lord *Mansfield* in *Roe d. Noden* v. *Griffiths* (1), and noted in the report of *Selwyn* v. *Selwyn* (2), that they are devisable "*where the person who is to take is certain.*" That is the reason of the distinction in such cases as *In re Parsons*; *Stockley* v. *Parsons* (3). But even granting the devisability of the "interest," the question remains what is that interest? In *Bective* v. *Hodgson* (4) Lord *Westbury* L.C. said: "My Lords, it is an indisputable rule of law, that if a freehold estate be given by way of executory devise, there is no disposition of the property until that estate arises and becomes vested." At law, therefore, apart from other difficulties, and notwithstanding the comprehensive nature of the word "interest" (see *Attorney-General* v. *Harley* (5)), the contingency in this will regarding the description of the class, would of itself prevent any of the present beneficiaries from asserting any present freehold estate or interest *in the land*. Nevertheless, the argument of the appellants would, if sound, have the effect both of making all contingent remaindermen liable to taxation, and of entitling them to the statutory deduction, even though their contingent remainder were legal and not equitable. If not liable, or entitled to separate deductions, supposing the right were legal simply, it would be strange if the contrary result obtained when the right was equitable. But the position in equity is quite clear. As to a trust *Festing* v. *Allen* (6), still a leading authority as to principles, was a celebrated case, where a testator had left lands to trustees upon certain trusts including a life tenancy to Mrs. Festing and after her decease to the use of all and every child and children "who shall attain the age of twenty-one years," &c. *Rolfe* B. for the whole Court, which included *Parke* B., said (7):—"Here there is no gift to any one who does not answer the whole of the requisite description. The gift is not

(1) 1 W. Bl., 605.
(2) 1 W. Bl., 254, note (*m*).
(3) 45 Ch. D., 51.
(4) 10 H.L.C., 656, at p. 665.
(5) 5 Madd., 321, at p. 327.
(6) 12 M. & W., 279.
(7) 12 M. & W., at pp. 300-301.

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to the children of Mrs. Festing, but the children who shall attain twenty-one, and no one who has not attained his age of twenty-one years is an object of the testator's bounty, any more than a person who is not a child of Mrs. Festing." His Lordship then refers to cases, including *Duffield* v. *Duffield* (1). Similarly Lord *Hatherley* L.C. in *Williams* v. *Haythorne* (2), enunciating the same principles as, when Vice-Chancellor, he had stated in *Price* v. *Hall* (3). So, also, per *Hall* V.C. in *In re Orlebar's Settlement Trusts* (4).

The result, so far, has been to show not merely that the beneficiaries in one year's income are unascertained as to the next year's income, but also that they are not necessarily the same persons who will be beneficiaries as to the corpus. Children yet unborn, may come in, and may be the only beneficiaries as to the corpus. Not only is the class not ascertained, but not even are the maximum members of the class at present ascertained or ascertainable. On what principle, then, can it be said that the present beneficiaries for the relevant annual period of "net income," can be said to be "entitled" to the corpus under the second trust? With the greatest respect to the opposite opinion, I find standing in my way and preventing its acceptance some of the most vital and fundamental principles of equity. The only doctrine of *Finch's Case* (5), that an equitable right was merely a chose in action, is, of course, not the law now. Equity regards the cestui que trust of property as the true owner of the property itself. But it is, nevertheless, true that equity acts only *in personam*, and the rights it recognizes and enforces are rights *in personam* and not rights *in rem*. See *Butler's* note III. to *Coke upon Littleton*, 290b. In *Ewing* v. *Orr Ewing* (6) Lord *Selborne* L.C. said: "The Courts of equity in England are, and always have been, Courts of conscience, operating *in personam and not in rem*; and in the exercise of this personal jurisdiction they have always been accustomed to compel the performance of *contracts and trusts* as to subjects which were not either locally or *ratione domicilii* within their jurisdiction." That statement in 1883 is, in effect, what was said

(1) 3 Bli. (N.S.), 260.
(2) L.R. 6 Ch., 782, at p. 786.
(3) L.R. 5 Eq., 399, at p. 402.
(4) L.R. 20 Eq., 711, at pp. 719-720.
(5) 4 Co. Inst., 85.
(6) 9 App. Cas., 34, at p. 40.

in *Burgess* v. *Wheate* (1) in 1759. Lord *Mansfield* then said (2): "A trust in *Chancery* is the estate at law." Lord Keeper *Henley* said (3): "Where there is a trust, it should be considered in this Court as the real estate, between the cestuy que trust and the trustee, and all claiming by or under them." See also the speech of Lord *Selborne* in *Hansard* (N.S.), vol. CCXIV., p. 333, quoted in *Underhill on Trusts*, 7th ed., at p. 6. Further, "the nature and extent of the equitable interest must be determined by the words by which it is created" (per Lord *Davey* in *Earl of Mountcashell* v. *More-Smyth* (4)). It is an inevitable consequence of what is there said that, before you can assert that any person has an equitable interest, you must ascertain the trust by which he gets it. His equitable interest is commensurate only with the relief which equity will give him. In *Central Trust and Safe Deposit Co.* v. *Snider* (5) Lord *Parker*, for the Judicial Committee, illustrated this principle in a case relating to specific performance. At page 272, a page deserving of careful reading, the learned Lord said: "Though the purchaser of real estate might before conveyance have an equitable interest capable of registration, such interest was in every case *commensurate only with what would be decreed to him* by a Court of equity in specifically performing the contract, and *could only be defined by reference to the relief which the Court would give* by way of specific performance." The same view was held and applied by the Privy Council in *Plimmer* v. *Wellington Corporation* (6), where a passage from the judgment of Lord *Kingsdown* in *Ramsden* v. *Dyson* (7) was cited, a passage based on the principle that equitable property is commensurate with equitable relief. Precisely the same measure is applicable to trusts. In *Hawkins* v. *Chappel* (8) Lord *Hardwicke* said: "Whoever has the trust is in this Court considered as having the beneficial interest, and therefore the ownership of the estate." It was there argued that by the words of the will the interest of the testator's daughters was contingent, but the Lord Chancellor answered that by saying: "It is objected too, that this interest of the daughters is a *contingency*, and to arise *in futuro*;

(1) 1 Eden, 177.
(2) 1 Eden, at p. 224.
(3) 1 Eden, at p. 251.
(4) (1896) A.C., 158, at p. 164.
(5) (1916) 1 A.C., 266.
(6) 9 App. Cas., 699.
(7) L.R. 1 H.L., 129.
(8) 1 Atk., 621, at pp. 622 *et seq.*

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but I am clear of opinion, it is a vested interest." It is manifest that if the Lord Chancellor had considered the daughters' interest contingent, he would not have held them to be the beneficial owners of the property, because they would not have had "the trust," but others would have shared it with them. In other words, he looked to see what was "the trust." The late Professor *Maitland* in his *Equity*, at p. 121, quotes with approval *Pollock on Contracts*, 7th ed., at p. 209, as stating the true way to understand the nature and incidents of equitable ownership. It exactly squares with what has been already stated, and is borne out consistently by the way in which Courts of equity deal with trusts. It is, as I understand, a fundamental principle of equity in relation to trusts that, whatever the trust may be, that and that only can be enforced by the Court, subject only to a special rule of equity, sometimes called "the rule in *Saunders* v. *Vautier*" (1). The main principle is that the Court's "business" is to *execute* trusts, not to alter them (see per *Farwell* L.J. in *In re Hazeldine's Trusts* (2)). In *Letterstedt* v. *Broers* (3) the Privy Council, speaking by Lord *Blackburn*, said, with regard to a trust, that the principal duty of a Court of equity is "to see that the trusts are properly executed." In *Leake on Property in Land*, 2nd ed., at p. 98, the maxim is quoted as "The equity is the land." In *Lewin on Trusts*, 12th ed., at pp. 884 *et seqq.*, the cestui que trust's estate in a special trust is said to be "the right to enforce in equity the specific execution of the settlor's intention, to the extent of that cestui que trust's particular interest." Even a contingent legatee, as being what the learned author calls "a quasi cestui que trust," has certain rights. If he can show at the time he brings his suit that he is a person who either by name or designation is an ascertained person having an *interest in the execution of the trusts*, he is a competent party to ask the Court's assistance. Therein lies the distinction between law and equity. At law, the contingent devisee has no interest in the land. In equity, an identifiable contingent cestui que trust has an interest beyond a mere possibility in the *execution of the trusts*, and in that sense he has, in the eye of a Court of equity, an interest in the trust estate, because, as shown,

(1) Cr. & Ph., 240.
(2) (1908) 1 Ch., 34, at pp. 40-41.
(3) 9 App. Cas., 371, at p. 386.

in equity the trust is everything. But his interest in the trust estate at any given moment is measured by the relief which equity is then prepared to give him, that is, by the rights which the due execution of the trusts as framed by the creator of the trusts will at that moment give him. There is, however, the special rule above mentioned, which, if not properly understood, may lead to difficulty. In *Harbin* v. *Masterman* (1) *Lindley* L.J. says :— "Notwithstanding the general principle that a donee or legatee can only take what is given him on the terms on which it is given, yet by our law there is a remarkable exception to this general principle. *Conditions which are repugnant to the estate to which they are annexed are absolutely void, and may consequently be disregarded.* This doctrine, I apprehend, underlies the rule laid down in *Saunders* v. *Vautier* (2), and enunciated with great clearness by Vice-Chancellor *Wood* in *Gosling* v. *Gosling* (3)." I believe it has been reserved for that eminent jurist Lord *Lindley* to state so clearly the true principle involved in the exception. That statement of the fundamental doctrine, however, not only makes all the relevant decisions harmonious, but brings equity into line with legal doctrines on the same subject. The House of Lords, on the appeal (*Wharton* v. *Masterman* (4)), appears to have tacitly adopted that point of view. Two lines of the judgment of Lord *Davey* (5) may be referred to as here important, viz. : "There is no condition precedent to happen or to be performed in order to perfect the title of the legatees." In the present case, as I have said, there is an essential condition precedent even to the ascertainment of the legatees. In *Lewin on Trusts*, 12th ed., at p. 884, this subject is dealt with as the conversion of a special trust into a simple trust. It is there stated : "If there be only one cestui que trust, or there be several cestuis que trust, and all *of one mind* (in each case *sui juris*), the specific execution may be stayed, and the *special trust* will then acquire the character of a *simple* trust." In that case, and only in that case, the cestuis que trust are "the absolute beneficial proprietors." Two things, however, are essential. The first

(1) (1894) 2 Ch., 184, at pp. 196-197.
(2) 4 Beav., 115; Cr. & Ph., 240.
(3) John., 265, at p. 272.
(4) (1895) A.C., 186.
(5) (1895) A.C., at p. 198.

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is that the election to put an end to the specific trusts must be by persons who are *absolutely* interested in the property in question, and, if they have only limited or defeasible interests, their direction is ineffective, and consequently they are not in equity regarded as the full owners of the property. The authority for this is abundant, and includes the following cases: *Sisson* v. *Giles* (1); *Harcourt* v. *Seymour* (2); *Cookson* v. *Cookson* (3) and *In re Douglas and Powell's Contract* (4). Applying the principle stated by Lord *Lindley*, there is, in the case of beneficiaries not absolutely entitled, no repugnancy between giving them to the full all the full interest they are then entitled to, and not putting them into uncontrolled enjoyment of the trust estate. If they are presently absolutely entitled, however, as were the daughters in *Pearson* v. *Lane* (5) or the taxpayers in *Archer's Case* (6), they can elect to keep unsold the property, instead of having it sold according to the specific terms of the trust. That was the point of learned counsel's argument in *Archer's Case* given effect to by the Court. Selling the property against the will of the beneficiaries in such a case is, in the view of equity, a fetter on the uncontrolled enjoyment of the property, which the beneficiaries in question alone are to share in. In that case *Grant* M.R. was very distinct in *Pearson* v. *Lane* (7) in stating the rule that equity must first ascertain "the objects of the trust." He was also careful to point out (8) that their right depended on "the event, that has happened, viz., their father's death without issue male." Had the question arisen before that contingency had happened, it is manifest from the whole tenor of the judgment that the Court would have held that no title could have been made. So in the example given by Lord *Cairns* in *Brook* v. *Badley* (9), the four persons are persons *absolutely* and not contingently entitled. The last-mentioned case rests on the circumstance that, on the construction of the *Mortmain Act*, a devise is within the Act as an interest in land even though it is only necessary to deal with an interest in land to give effect to it. See per *Brett* M.R. (then *Brett*

(1) 3 DeG. J. & S., 614.
(2) 2 Sim. (N.S.), 12, at p. 46.
(3) 12 Cl. & Fin., 121, at p. 147.
(4) (1902) 2 Ch., 296, at p. 312.
(5) 17 Ves., 101.
(6) 13 C.L.R., 557.
(7) 17 Ves., at p. 104.
(8) 17 Ves., at p. 105.
(9) L.R. 3 Ch., at p. 674.

L.J.) in *Ashworth* v. *Munn* (1), per *Cotton* L.J. in *In re Watts*; *Cornford* v. *Elliott* (2), and per *Swinfen-Eady* L.J. in *Gresham Life Assurance Society* v. *Crowther* (3). Personally I cannot think Lord *Cairns* would ever have sanctioned the notion that equity regards persons as the beneficial owners where, as here, (1) they are only contingently entitled; (2) they are not yet ascertained as the objects of the trust; and (3) other persons yet unborn may become entitled at the date of distribution. No doubt a man only contingently entitled may, in addition to statutory powers, elect beforehand, so as to bind himself—should he ever become absolutely entitled—or he may assign so as to similarly bind himself in that event; but the point is that until he does become absolutely entitled he is not either in law or in equity the owner of the property. The election or assignment is sustained in equity as election or a contract binding on his conscience when, as Lord *Macnaghten* in *Tailby* v. *Official Receiver* (4) phrased it, "the subject matter . . . comes into existence." (See *In re Dallas* (5).) But how can the present beneficiaries, on these principles, escape from the specific trust for conversion? The trust is imperative, and the objects of the trust, whoever they may turn out to be, if any, are to take the proceeds as personalty and not as realty (*Fletcher* v. *Ashburner* (6) and *Halsbury's Laws of England*, vol. XIII., pp. 106-107). The objects of the trust may—if *sui juris*—then, at the time when they are ascertainable, elect to reconvert, and in that case they will be entitled to the property in its actual state. The rule in such case is thus stated by *Pearson* J. in *In re Lewis*; *Foxwell* v. *Lewis* (7): "Whenever real estate has been converted into personalty, or, according to the doctrine of a Court of equity, is to be treated as having been converted into personalty, it must then descend as personalty, unless some person who is *absolutely* entitled to it has shown in some way that he has elected to take it as real estate."

The second essential is that *all* the beneficiaries entitled must concur (*Holloway* v. *Radcliffe* (8). In the present case who are the

(1) 15 Ch. D., 363, at p. 371.
(2) 29 Ch. D., 947, at pp. 952-953.
(3) (1915) 1 Ch., 214, at p. 226.
(4) 13 App. Cas., 523, at p. 543.
(5) (1904) 2 Ch., 385, at pp. 393-394.
(6) 1 Wh. & T. L. C., 8th ed., 347.
(7) 30 Ch. D., 654, at p. 656.
(8) 23 Beav., 163, at p. 170.

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persons who could request the trustees to sell and convert? Who would compose, in the words of the will itself, "the majority in numbers and interest of the persons entitled to the proceeds of the sale?" With regard to the *Land Tax Assessment Act*, if all are in a position—supposing them *sui juris*—that would entitle them to concur if they chose, they are regarded collectively as "joint owners," and are taxable accordingly, and are entitled to be consulted as such for the purposes of sub-secs. 7 and 8 of sec. 38. But the position they occupy with regard to the trust is an essential feature in ascertaining whether they are to be considered beneficial owners of the land or income.

For these several reasons, therefore, the appellants, in my opinion, fail, and the questions should be answered in favour of the respondent.

Questions answered: (1) *The shares of the six children surviving at the date of the assessment*; (2) *Six. Costs 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.