[HIGH COURT OF AUSTRALIA.]

TERRY AND ANOTHER . . . . . APPELLANTS;

AND

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

H. C. OF A. 1920.

MELBOURNE, *May* 12, 13.

Knox C.J., Gavan Duffy, Rich and Starke JJ.

Land Tax—Assessment—Beneficiaries under will of testator who died before 1st July 1910—*Deduction of* £5,000—*Persons taxable as "joint owners"*—"*Owner*"—*Estate of freehold in possession—Contingent estate—Discretionary power to allow maintenance—Land Tax Assessment Act* 1910-1916 (*No.* 22 *of* 1910—*No.* 33 *of* 1916), *secs.* 3, 38 (7).

Certain land was devised by a testator to trustees in trust for seven children of the testator in certain specified unequal shares, with a proviso that the shares of the sons should not vest until they were forty years of age, and that the shares of the daughters should not vest until they attained the age of forty years or married under that age. The testator also provided that maintenance might be allowed to each beneficiary out of the income of his or her share during the period preceding the absolute vesting of the shares, and that so much of the income as was not so applied should be accumulated and treated as an accretion to the share from which that income was derived. The trustees having been assessed for Federal land tax in respect of the land in their representative character,

Held, that the trustees were not entitled to the benefit of sec. 38 (7) of the *Land Tax Assessment Act* 1910-1916; for the beneficiaries, 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, were neither "owners" nor "joint owners" of the land within the definition of those terms in sec. 3, and were therefore not "taxable as joint owners" within the meaning of sec. 38 (7).

Hoysted v. *Federal Commissioner of Taxation*, 27 C.L.R., 400, distinguished.
Glenn v. *Federal Commissioner of Land Tax*, 20 C.L.R., 490, applied.

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CASE STATED.

On an appeal to the High Court by Albert A. Terry and Robert Fulton from an assessment of them as trustees of the estate of Albert Terry deceased, for Federal land tax, a case, which was substantially as follows, was stated by *Starke* J. for the opinion of the Full Court :—

1. The appellants are the trustees of the will of Albert Terry, late of "Verulam," Mont Albert Road, Balwyn, in the State of Victoria, who died on 27th August 1907 leaving real estate in Victoria.

2. A copy of the said will is to be deemed to form part of this case.

3. The testator left him surviving his widow and the sons and daughters mentioned in his said will. Two of these sons, viz., Albert Augustus Terry and Edward Wright Terry, have attained the age of forty years, having been born on 23rd December 1866 and 28th August 1870 respectively; and two of these daughters, viz., Emily Mary Terry and Helen Amelia Terry, have been married with the previous consent in writing of the trustees, the said Emily Mary Terry having been married on 10th September 1912 and the said Helen Amelia Terry having been married on 3rd January 1912; and the respective shares of the said two daughters have been duly settled in accordance with the provisions of the said will.

4. Two sons of the testator, viz., Walter Terry and George Frederick Terry, are each under the age of forty years, and one daughter of the testator, viz., Evelyn Grace Terry, is also under the age of forty years and is unmarried.

5. The testator left real estate in Victoria the sale and conversion of which has been postponed by the trustees under the powers in that behalf contained in the said will.

6. The appellants claim to be entitled under the provisions of sec. 38 (7) of the *Land Tax Assessment Act* 1910-1916 to a deduction of £5,000 in respect of each of the shares of the said seven children of the testator, viz., Edward Wright Terry, Walter Terry, George Frederick Terry, Albert Augustus Terry, Emily Mary Terry, Helen Amelia Terry and Evelyn Grace Terry, such deduction of £5,000 being less than the sum which bears the same proportion to the unimproved value of the land (after deducting the value of the

annuities under sec. 34 of the said Act) as the share bears to the whole.

7. Alternatively, the appellants claim to be entitled under the aforesaid provisions of the said Act to a deduction of £5,000 in respect of each of the shares of four of the said children of the testator, viz., Edward Wright Terry and Albert Augustus Terry (who have attained the age of forty years), and Emily Mary Terry and Helen Amelia Terry, daughters of the testator who have married with the previous consent in writing of the trustees.

8. On 31st July 1918 the appellants, as trustees as aforesaid, duly furnished a return pursuant to the provisions of sec. 15 of the *Land Tax Assessment Act* 1910-1916 of the land owned by them on 30th June then last past.

9. On 12th April 1919 the respondent, pursuant to sec. 18 of the said Act, caused an assessment to be made for the purpose of ascertaining the amount upon which land tax should be levied; and thereafter, pursuant to sec. 24 of the said Act, the respondent duly caused notice of assessment for the year 1918-1919 to be given to the appellants, assessing the unimproved value of the land included in the said return at the sum of £37,373, less a deduction of £2,112 in respect of the annuity provision in the said will contained and less one deduction of £5,000 under sec. 11 of the said Act.

10. The appellants were satisfied with and accepted the said deduction of £2,112 as correct, but, being dissatisfied with the said assessment in other respects, they on 12th May 1919 duly lodged an objection to the assessment on the ground that it was excessive.

11. The respondent wholly disallowed the said objection, and the appellants required that the said objection should be treated as an appeal, and accordingly the respondent duly transmitted the said objection to the High Court at Melbourne for determination as a formal appeal.

12. The appeal coming on for hearing this day, the Court states this case for the opinion of the Full Court upon the following questions which arise in the appeal and in the opinion of the Court are questions of law :—

(1) Are the appellants entitled to seven deductions of £5,000 each—that is to say, a deduction of £5,000 in respect of

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each of the shares of the seven children of the said testator in the said land; or

(2) Are the appellants entitled to four only of such deductions —that is to say, a deduction of £5,000 in respect of each of the shares of the four children of the testator who, being sons, have attained the age of forty years or, being daughters, have married with the previous consent in writing of the trustees; or

(3) Are the appellants entitled to one deduction of £5,000 only?

The provisions of the will, so far as they are material, are shortly stated in the judgment of *Knox* C.J. hereunder.

Hayes, for the appellants. The shares of the beneficiaries were vested at the time of the testator's death, and were liable to be divested in the event of death before attaining the age of forty years in the case of the sons or before attaining that age or marrying under it in the case of the daughters. The word "vest," in the provision that the shares are not to vest until the beneficiaries attain the age of forty or marry, means vest in possession and not vest in interest. [Counsel referred to *Armytage* v. *Wilkinson* (1); *In re Turney*; *Turney* v. *Turney* (2).] The beneficiaries were therefore entitled to estates of freehold in possession, and were therefore holders of original shares within the meaning of sec. 38 (7) of the *Land Tax Assessment Act* 1910-1916.

[KNOX C.J. But in order to get the benefit of the sub-section they must also be taxable as joint owners. In *Hoysted* v. *Federal Commissioner of Taxation* (3) the trustees were taxed on the basis that the beneficiaries were taxable as joint owners.

[STARKE J. There must be in them a present right to enjoyment (*Glenn* v. *Federal Commissioner of Land Tax* (4)).]

The beneficiaries are the absolute owners of the property. They are the only beneficial owners. They are in possession as contrasted with ownership in remainder.

Pigott, for the respondent, referred to *Union Trustee Co. of*

(1) 3 App. Cas., 355, at p. 372.
(2) (1899) 2 Ch., 739.
(3) *Ante*, p. 400.
(4) 20 C.L.R., 490, at p. 501.

Australia v. *Federal Commissioner of Land Tax* (1) *and In re Hume*; *Public Trustee* v. *Mabey* (2).

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KNOX C.J.

KNOX C.J. This is a special case stated on an appeal from an assessment to land tax by the trustees of Albert Terry deceased. The questions raised by the special case are whether the appellants are entitled to seven deductions of £5,000 each or, alternatively, to four deductions of £5,000 each or to one deduction only of £5,000. The questions raised turn on the application of sec. 38 (7) of the *Land Tax Assessment Act* 1910-1916. There is no statement in the case now submitted to the Court, as there was in *Hoysted* v. *Federal Commissioner of Taxation* (3), which we decided recently, that the taxpayers had been assessed as joint owners. It appears that the assessment, as far as we can gather from the case, was made on the appellants in their representative character as trustees of the estate of Albert Terry deceased.

The relevant dispositions by the will are, briefly, that this land, which formed part of the residuary estate of the testator, was devised to the trustees in trust for seven children of the testator in certain specified unequal shares, with a proviso that the shares of the sons should not vest until they were forty years of age, and that the shares of the daughters should not vest until they attained the age of forty years or married under that age. The will further provided that maintenance might be allowed to each beneficiary out of the income of his or her share during the period preceding the absolute vesting of the shares, and that so much of the income as was not so applied should be accumulated and treated as an accretion to the share from which that income was derived. In these circumstances the first question is whether the beneficiaries can bring themselves within the first part of sub-sec. 7 of sec. 38. If they cannot, it is unnecessary for us to consider whether they are owners of original shares in the land within the later words of the sub-section. The first part of the sub-section runs thus: "Where, under a settlement made before

(1) 20 C.L.R., 526.
(2) (1912) 1 Ch., 693.
(3) *Ante*, p. 400.

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the first day of July one thousand nine hundred and ten, or under the will of a testator who died before that day, the beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons, all of whom are relatives of the settlor or testator by blood, marriage, or adoption, in such a way that they are taxable as joint owners under this Act"; then the consequences provided in the later part of the sub-section follow. Now, it is quite clear in the present case that the only persons who have any beneficial interest in the land or in the income therefrom are persons who are relatives of the testator by blood. But that is not enough to bring the sub-section into operation. The sub-section requires that those persons shall not only be relatives of the testator but that they shall hold the beneficial interest given by the will in such a way that they are taxable as joint owners under the Act. It therefore becomes necessary to inquire what is requisite to enable persons having interests in land to be taxed as joint owners under the Act. For that purpose we turn to the definition in sec. 3 of the term "joint owners," and so far as it is relevant it is in these words: "'Joint owners' means persons who own land jointly or in common, whether as partners or otherwise." To understand that definition, it is necessary to look at the definition in the same section of the word "owner," which is: "'Owner,' in relation to land, includes every person who jointly or severally, whether at law or in equity—(*a*) is entitled to the land for any estate of freehold in possession; or (*b*) is entitled to receive, or in receipt of, . . . the rents and profits thereof," &c. In *Hoysted* v. *Federal Commissioner of Taxation* (1) my brother *Starke* and I dealt with the suggestion made in that case that owners of a contingent estate in remainder might, on the arguments put forward in that case, be rendered liable to land tax although they had no present interest in the income from the land. We said this (2): "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 profits of the land; but in our opinion this is not so, for a person in that position would clearly not come within

(1) *Ante*, p. 400.

(2) *Ante*, at p. 411.

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," and we referred to *Glenn* v. *Federal Commissioner of Land Tax* (1). In my opinion, in order to render a person liable to taxation as an owner of land under the *Land Tax Assessment Act*, it is necessary that he shall either be entitled to the land for an estate of freehold in possession or be entitled to receive or in receipt of the rents and profits thereof, and, in order to render a number of persons liable to taxation as joint owners, it is necessary that they should jointly occupy the same position with regard to the land or the rents and profits thereof as an individual owner would occupy in his own person. Now, in the present case it is quite clear that until the absolute vesting of the estate, that is, until each son attains the age of forty years and each daughter attains that age or marries earlier, they have no present interest enforceable at law or in equity in the land or in the rents and profits of it. There is power in the trustees in their discretion to allow maintenance out of the rents and profits and advancement out of the corpus, but this power is discretionary only, and gives no enforceable right except a right to compel the trustees to exercise their discretion. Otherwise the beneficiaries have no present interest in the land or in the rents and profits thereof.

For these reasons I think it is clear that the beneficiaries do not come within the requirements of the first part of sub-sec. 7 of sec. 38, not being taxable as joint owners under this Act.

The further questions on the later part of the sub-section do not arise, and therefore it is not necessary to express an opinion upon the question whether the estates of the beneficiaries are vested or contingent. Whatever they are, the beneficiaries are clearly under the will not entitled to the land for an estate of freehold in possession, or entitled to receive or in receipt of the rents and profits of the land.

I am, therefore, of opinion that the questions should be answered : (1) No ; (2) No ; (3) Yes.

GAVAN DUFFY J. I concur.

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

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RICH J. I consider that the case under appeal is *à fortiori* to *Glenn* v. *Federal Commissioner of Land Tax* (1), the decision in which is binding upon me. I therefore concur.

STARKE J. I concur.

Questions answered: (1) *No*; (2) *No*; (3) *Yes*.

Solicitors for the appellants, *Snowden, Neave & Demaine*.

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

B. L.

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

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MEYER . . . . . PLAINTIFF;

AGAINST

POYNTON AND ANOTHER . . . . DEFENDANTS.

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MELBOURNE, *June* 4.

Starke J.

Alien—Deportation—Order for deportation—Communication to alien—Naturalization—Revocation—Reasons of Governor-General—Ultra vires—Treaty of Peace—Effect on naturalization—Naturalization Act 1903-1917 (*No.* 11 *of* 1903—*No.* 25 *of* 1917), *sec.* 11—*Aliens Restriction Order* 1915 (*Orders in Council of* 27*th May* 1915 *and* 1*st March* 1916), *par.* 2J—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 51 (XIX.).

Par. 2J of the *Aliens Restriction Order* 1915, which authorizes the Minister of Defence to "order the deportation of any alien," does not require communication to the alien of an order made under it for the purpose of giving the order efficacy and effect.

Sec. 11 of the *Naturalization Act* 1903-1917 provides that, where "(*b*) the Governor-General is satisfied that it is desirable for any reason that a certificate of naturalization should be revoked," he may revoke it.

Held, that a revocation of a certificate of naturalization need not state the reasons of the Governor-General.