[HIGH COURT OF AUSTRALIA.]

MOLLOY . . . . . APPELLANT;

AND

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

H. C. OF A. 1937.

PERTH, *Oct.* 1, 4.

MELBOURNE, *Nov.* 19.

Dixon J.

Land Tax (Cth.)—Assessment—Amended assessment—Land included in amended assessment—Contract of sale—"Owner"—Possession—"Payment" of fifteen per centum of purchase money—Land Tax Assessment Act 1910-1934 (*No.* 22 *of* 1910—*No.* 14 *of* 1934), *secs.* 3, 21, 37, 63.

Sec. 21 of the *Land Tax Assessment Act* 1910-1934 provides: "Where any land or interest in land has not been included in the assessment of the owner, the commissioner may cause the assessment to be altered so as to include that land or interest as from the date when the assessment was made."

Held that the concluding words mean that an amendment or alteration shall operate as from the date of the original assessment as an imposition of liability and do not mean that the land can only be included as from the date upon which the original assessment was made or issued so that it could not be regarded for the purpose of assessing him as "owned" by the taxpayer at any prior date, e.g., as at the 30th June in respect of which the original assessment was made.

An intestate at her death owned land subject to a mortgage and other encumbrances, but she owed no unsecured debts and she owned no other property. Two persons were entitled to share in the distribution of her estate as next of kin. One obtained an assignment of the other's interest and took out letters of administration. He entered into beneficial enjoyment of the rents and profits and kept down interest and renewed the mortgage.

Held that, as the sole person entitled, he had taken the only asset of the estate in specie and had entered into its enjoyment and was an "owner" within par. *b* of the definition of that word in sec. 3 of the *Land Tax Assessment Act* 1910-1934.

Having seen an instrument expressing a sale by the taxpayer of certain land to a relative, the Deputy Federal Commissioner of Taxation assessed the taxpayer and the relative to land tax, excluding the land altogether from the former's assessment and including it in the latter's. Afterwards the commissioner caused the taxpayer's assessment to be amended by including the land and treating him as a secondary taxpayer under sec. 37 of the *Land Tax Assessment Act*. The commissioner's power of exemption under the proviso to sub-sec. 1 of that section had not been delegated to the deputy commissioner, and the latter had not purported to exercise a discretion thereunder. But, if an exemption had been granted, the assessment would under departmental practice have merely excluded the land without express reference to the exemption, that is, it would have been in the form which it in fact assumed.

Held that the commissioner was not precluded from making the amendment.

The taxpayer entered into contracts of sale to different relatives of various parcels of land subject to mortgages upon which in each case a sum greater than fifteen per cent of the purchase money was owing. Under the contracts the relatives undertook to bear and discharge the liability upon the mortgages and to pay the residue of the purchase money on a future date without interest in the meantime. In each case the land was let to tenants upon leases in the name of the relative as lessor, and in most cases the lease was in writing and was executed by the relative. The rents, however, were paid to the taxpayer. In his books he credited the relative with the rent received against the purchase money. The credits did not amount to fifteen per cent of the purchase money. He paid the interest on the mortgages.

Held:—

(1) For the purpose of sec. 37 of the *Land Tax Assessment Act* possession of the land had not been delivered to the purchasers and at least fifteen per cent of the purchase money had not been paid.

(2) On the facts, the main purpose of the contracts was to relieve the taxpayer of liability for land tax and to avoid such a liability within the meaning of sec. 63.

APPEALS from the Federal Commissioner of Land Tax.

These were appeals by Thomas G. A. Molloy from amended assessments to Federal land tax in respect of land owned by him as at 30th June 1917 to 1934, inclusive.

The facts are set out in the judgment hereunder.

Keenan K.C. and *Reilly*, for the appellant.

H. P. Downing K.C. and *E. F. Downing*, for the respondent.

Cur. adv. vult.

H. C. OF A. 1937.

MOLLOY v. FEDERAL COMMISSIONER OF LAND TAX.

Nov. 19.

DIXON J. delivered the following written judgment :—

These are appeals against amended assessments for land tax made as at 30th June 1917 to 1934 inclusive.

The questions raised concern the inclusion in the assessments of two parcels of land in the City of Perth. One is a piece of land at the corner of Hay Street and King Street on which are erected buildings called " King's Chambers." The other is a parcel of land called " Spencer's," running from Hay Street to St. George's Terrace, which since the close of the period in question has become " London Court."

The question whether Spencer's land should be included in the appellant's assessment arises only for the four years 30th June 1931 to 1934. There is a dispute as to King's Chambers in all the years from 1917 to 1934, but that period falls into two parts, in which the question whether the land should be included in the appellant's assessments depends on entirely separate considerations. For the first ten years, namely, as at 30th June 1917 to 1926, the appellant has been assessed in respect of King's Chambers on the footing that he is entitled to the beneficial ownership of the land. In respect of the period 30th June 1927 to 1934 he has been assessed as a vendor whose purchaser has not paid fifteen per cent of the purchase money or has not obtained possession. Since the land was included in the appellant's assessments for the first period of ten years, the commissioner has ascertained facts which, he contends, entitle him to assess the appellant for that period on a like footing, and he supports his assessment upon that ground as an alternative.

Sec. 37 (1) of the *Land Tax Assessment Act* 1910-1934 provides that, where an agreement has been made for the sale of land, whether the agreement has been completed by conveyance or not—(*a*) the buyer shall be deemed to be the owner of the land (though not to the exclusion of the liability of any other person) so soon as he has obtained possession of the land ; and (*b*) the seller shall be deemed to remain the owner of the land (though not to the exclusion of the liability of any other person) until possession of the land has been delivered to the purchaser and at least fifteen per centum of the purchase money has been paid. The sub-section contains a proviso that the commissioner may exempt the seller from the provisions

of the section, if he is satisfied that the agreement for sale has been made in good faith and not for the purpose of evading the payment of land tax, and that the agreement is still in force ; as to all of which matters the decision of the commissioner shall be final and conclusive. The assessments in question were made by the deputy commissioner acting under a delegation of powers pursuant to sec. 8. In his instrument of delegation, the commissioner has not included the power of exemption under the proviso to sec. 37 (1), but, on the contrary, he has expressly excluded that section.

The foundation of the appellant's claim that he is not liable in respect of the parcels of land consists in transactions with one or other member of his family. If these transactions are accepted as real and if to them is conceded a validity which is not destroyed by sec. 63 of the *Land Tax Assessment Act* 1910-1934, the questions which the appeals raise may be stated under the following heads :—

(1) When the appellant, in 1914, transferred King's Chambers to a daughter named Mrs. Neven, did he remain liable to land tax in respect of the land under sec. 37 (1) ?

(2) After Mrs. Neven's death, in March 1917, intestate, did he become liable on the further ground that he had acquired the sole beneficial interest in the assets of her estate, of which also he was administrator ?

(3) Did he so dispose of the same land in June 1927 to a grandson named R. F. Cooper as to cease under sec. 37 to be liable to have the land included in his assessment ?

(4) Did he so dispose of the land known as " Spencer's " in June 1931 to daughters named Mrs. Barrett and Mrs. Hammond as to cease under sec. 37 to be liable to have the land included in his assessment ?

(5) Was the power of the commissioner under the proviso to sec. 37 (1) to exempt the appellant exercised, particularly in respect of the sale to his grandson R. F. Cooper ?

(6) Does sec. 21 of the *Land Tax Assessment Acts* authorize the amendments made by the commissioner from which this appeal is brought ?

It is convenient to deal with this last question before the others. The deputy commissioner made the amendments or alterations

H. C. OF A. 1937.

MOLLOY v. FEDERAL COMMISSIONER OF LAND TAX.

Dixon J.

complained of on 9th December 1935. The result of the amendments in the assessments was to include the lands in question as at 30th June in each of the years, in the case of King's Chambers, from 1917 to 1934, and, in the case of Spencer's, from 1931 to 1934. Each of the assessments, so amended, was of course made for the financial year ensuing from the 30th June to which it related and at a date after that 30th June.

A contention was raised on behalf of the appellant to the effect that sec. 21 of the *Land Tax Assessment Act* 1910-1934 authorized no alteration of an assessment which would have the effect of bringing land into it as at any 30th June anterior to the date upon which the original assessment was notified or made. The contention is based upon the concluding words of sub-sec. 1 of sec. 21, which is as follows: "Where any land or interest in land has not been included in the assessment of the owner, the commissioner may cause the assessment to be altered so as to include that land or interest as from the date when the assessment was made." It is said that the land can only be included "as from" the date upon which the original assessment was made or issued and, therefore, cannot be regarded as "owned" by the taxpayer at any prior date for the purpose of assessing him. The language of sub-sec. 1 is clumsy, but, in my opinion, this cannot be its meaning. In spite of the system of triennial valuation or "assessment" introduced in 1927, when sec. 21 took its present form, separate assessments of liability to tax for each year remain necessary (See sec. 15 (1), particularly the proviso, and sec. 20 (3)). Every such assessment is based upon the ownership of land as at 30th June of the year preceding the financial year for which it is made (See secs. 12 and 15 (1)). Accordingly, if the contention were correct, sec. 21 (1) could have no useful effect. For an original assessment must bear a date after the time as at which the land is to be included for the purpose of liability. It would follow that, if the contention were correct, no alteration could be made bringing land into the assessment as at the only date that is material for the purpose of imposing liability. The words "as from the date when the assessment was made" mean, in my opinion, that the amendment or alteration shall operate as from the date of the original assessment as an imposition of liability. The inclusion of the land

shall have the same result upon the taxpayer's liability as if no omission of the land had occurred. The contention, therefore, fails. In my opinion sec. 21 does authorize the alterations or amendments made on 9th December 1935, assuming, of course, that the appellant is, on the true facts, liable to be taxed in respect of the land included.

It is now convenient to deal with the liability of the appellant to the inclusion of King's Chambers in his assessments in respect of the period 30th June 1917 to 1926. I proceed briefly to state the facts affecting that question.

The land upon which King's Chambers stands was transferred by the appellant to his daughter, Mrs. Neven, on 18th June 1914. The consideration was expressed in the transfer as £22,500, the transferee undertaking to the extent of £11,500 a mortgage securing that and other moneys. She died in 1916, leaving a husband and no issue. Her father, who thus became entitled to a half share of her estate subject to her husband's right to the first £500, obtained with her husband's consent letters of administration of her estate. The letters of administration were granted to the appellant on 8th October 1917. On 31st March 1917 an agreement under seal between himself and his deceased daughter's husband had been executed. Except for two blocks of land, valued at £200, the only assets of her estate were the land comprising King's Chambers, the value of which was set down in the statement at £20,340. The liabilities given consisted in three secured debts, viz., a mortgage over the land for £10,950, a second mortgage to the appellant for £8,815 and a sum of £3,500 owing to a bank and, according to the statement of assets, secured over the same land. The appellant was guarantor in respect of the last sum. It represented an overdraft of the deceased caused by her drawing in the appellant's favour a cheque which was paid into his account. The agreement recited that the estate was financially involved and that the appellant was the principal creditor and that the parties were fully satisfied that, if the assets were realized, it would be insufficient to discharge the liabilities to him. The instrument then expressed an assignment by the husband to the appellant of all the former's right, title and interest in his wife's estate for the sum of £40, the receipt whereof the former acknowledged.

H. C. OF A. 1937. MOLLOY v. FEDERAL COMMISSIONER OF LAND TAX. Dixon J.

Shortly after the grant of administration the appellant sold the blocks of land forming the only other assets, and from that time onwards, until, at all events, the year 1927, he remained in receipt of the rents and profits of King's Chambers. They were paid into the appellant's general banking account. But in the rent account kept in his office the receipts were shown separately under the head of "the late Mrs. Neven" or "Mrs. Neven a/c," and in the ledgers imperfect accounts were kept or entries made under the heading "Estate Mrs. Neven." Butts of cheques for expenditure referable to King's Chambers were produced marked in the same way. When the first mortgage fell due in February 1921 it was extended, and the appellant executed the extension as administrator.

On 16th August 1926 the appellant obtained from the Supreme Court an order giving him liberty to transfer to himself beneficially the land comprising King's Chambers, and, on the following day, he executed accordingly a transfer of the land from himself as administrator of Mrs. Neven's estate to himself beneficially, expressed to be in pursuance of the order. The incumbrances were discharged at the same time, and the appellant gave a fresh mortgage for £10,950. Notices of alienation and of acquisition were given to the deputy commissioner, bearing date 23rd July 1927. They stated the consideration as £23,265 and set out that the purchaser discharged a mortgage to himself for £8,815 and took over mortgages for £14,450, a sum which, no doubt, is made up of the first mortgage of £10,950 and the £3,500 owing to the bank.

Upon these facts the question arising first in logical or chronological order is whether upon the transfer in 1914 to Mrs. Neven of the land on which King's Chambers stands the appellant ceased to be liable to include the land in his assessment. This, in effect, means: Did the appellant deliver possession to his daughter and was at least fifteen per cent of the purchase money paid? The facts of the transaction do not distinctly appear, owing in part to lapse of time and in part to the fact that the taxpayer, who is old and is said to be unfit to give evidence, was not examined. But the circumstances of the case make it practically certain that the transaction did not result in Mrs. Neven's assuming any personal control of the rents and profits of the land, and, if the assessment

for the years 1917-1926 in respect of King's Chambers rested on sec. 37, I should be prepared to hold that the appellant had not satisfied me that possession had ever been given to Mrs. Neven as purchaser. I do not think that she paid any purchase money, and, unless the fact that she became prima facie liable to bear the mortgage debt involves a payment of part of the purchase money, I should say that fifteen per cent had not been paid.

The power of exemption under the proviso was not in fact exercised, and I do not think that the omission of the land from the original assessments precludes the commissioner from treating sec. 37 as applicable and as justifying his alterations. But, since this does not appear to be the ground upon which the assessments were in fact made for the period I am discussing and as I do not think that they need the support of this ground, I shall not enter further upon it.

The actual reason for making the alterations by which King's Chambers were included in the assessments for these years was that the appellant appeared to be beneficially entitled to the ownership of the land. Subject to the incumbrances, he appeared to the commissioner to be entitled to the full beneficial interest and to be in receipt of the rents and profits. The answer made on behalf of the appellant is that he was entitled only to the distributable share or shares of the next of kin in an intestate estate and that this does not amount to ownership at law or in equity of the land itself. Assessments have, it is said, been made upon him as administrator of Mrs. Neven's estate in respect of the land, and the question is whether he is liable as a secondary taxpayer under sec. 35. It must be conceded at once that a person entitled as next of kin to the surplus of the unadministered estate of a person dying intestate and leaving land cannot without more be treated as owner of the land either at law or in equity. In *Vanneck* v. *Benham* (1) *Younger* J., as he then was, after discussing *Lord Sudeley* v. *Attorney-General* (2), *Cooper* v. *Cooper* (3) and *Blake* v. *Bayne* (4), said :—" But I think it is not difficult to arrive at the true distinction between the two lines of authority which at first sight may seem to be in conflict. The

(1) (1917) 1 Ch. 60, at p. 76.
(2) (1897) A.C. 11 ; (1896) 1 Q.B. 354.
(3) (1874) L.R. 7 H.L. 53.
(4) (1908) A.C. 371.

H. C. OF A. 1937.

MOLLOY v. FEDERAL COMMISSIONER OF LAND TAX.

Dixon J.

distinction, it appears to me, is that an interest in an intestate's estate is sufficiently specific to raise a case of election, representing as that interest does all the money's worth of the property comprised therein, but that such interest is not sufficiently specific, apart from agreement with the next of kin where there are more than one, to enable any one of the next of kin to say to the administrator 'This or that thing is mine. Hand it over to me.'"

The present appellant obtained by assignment the interest of the deceased's husband in the estate and, apart from creditors, was the only person interested. There were no unsecured debts owing by the intestate, except possibly the overdraft to the bank. The statement or list of assets and liabilities says that the overdraft was secured, and there is not any sufficient reason for disregarding this contemporary evidence. But in any case the appellant was the person who as between the deceased and himself was primarily liable for this debt. The second mortgage was a debt to the appellant. He made no attempt to administer the estate by selling the land to pay off the debts. He retained it and collected the rents and profits. Indeed, he took an extension of the first mortgage. No doubt his books designated the receipts as coming from the estate, but the moneys appear to have gone into his general bank account. In the end he transferred the land into his own name. This, I think, amounted to no more than a change in the dry legal title. Under sec. 31, no deduction is to be made from the unimproved value of land in respect of any mortgage and the mortgagor is to be assessed as if he were the owner of an unencumbered estate. I think that under sec. 35 an equitable owner of an incumbered estate, although he is not a "mortgagor," is to be assessed as secondary taxpayer on the same footing. He is to be assessed as if he were the legal owner of the estate or interest.

In the present case I think that the appellant, exercising a right which as sole next of kin he has, chose to take the only asset of the estate in specie and entered into its enjoyment. He assumed a position not unlike that which I ascribed to infant children in *In re Rowe* (1). It is not a case like *Glenn* v. *Federal Commissioner of Land Tax* (2), the distinguishing feature of which is expressed

(1) (1926) V.L.R. 452; 48 A.L.T. 68.

(2) (1915) 20 C.L.R. 490.

by *Isaacs* J. when he says: "The trustees have prior duties to other legatees having definite interests, and the strict performance of those duties requires the trustees to retain possession of the property, to receive the profits, and to deal with them otherwise than by paying them to the appellants" (1). I should think it had become correct to say that the present appellant was entitled in equity to an estate of freehold in the land in possession, subject to the first mortgage. But I think it is true also that, within par. *b* of the definition of "owner" in sec. 3, he was in receipt of the rents and profits as beneficial owner or otherwise beneficially.

For these reasons I am of opinion that the appellant was rightly assessed in respect of the land comprising King's Chambers for the period 1917 to 1926.

I turn to the consideration of the period 1927 to 1934 in respect of the same land.

The appellant and R. F. Cooper executed an indenture, dated 16th June 1927, according to the tenor of which the latter agreed to buy and the former to sell the land comprising King's Chambers. The price named by the indenture was £38,000. It was provided that the purchaser should pay £10,950 to the mortgagee and that the balance, namely, £27,050, should be paid to the vendor on his giving the purchaser three months' notice. It was also provided that no interest should be payable on the balance of purchase money until thus demanded. The indenture was expressed to give the purchaser an immediate right to possession and to the receipt of the rents and profits and, upon demand, to a transfer of the property subject to a mortgage back to the vendor to secure the unpaid purchase money. Immediately upon the execution of the indenture notices of alienation and acquisition were given to the Commissioner of Taxation, and R. F. Cooper lodged a caveat in the Land Titles Office. On 15th March 1928, at the request of the Deputy Commissioner of Taxation, this indenture was submitted for his inspection. On 6th June 1928 the deputy commissioner assessed the appellant to land tax as on 30th June 1927 and did not include in the assessment the land comprising King's Chambers. To the assessment was annexed an alteration or explanation sheet, bearing date 31st March

(1) (1915) 20 C.L.R., at p. 504.

H. C. OF A. 1937.

MOLLOY v. FEDERAL COMMISSIONER OF LAND TAX.

Dixon J.

1928, a date a fortnight or so after the production of the indentures. R. F. Cooper was assessed to land tax on 21st May 1928 as at 30th June 1927, and his assessment did include the land comprising King's Chambers.

The appellant had an office with two or three female clerks who kept books of a sort. The books recorded the receipts of rent and other income and were kept so as to afford sufficient information for all purposes of taxation. R. F. Cooper said that he instructed one of the clerks to credit the rent of King's Chambers after the date of the indenture of sale to him, that is, to enter them in the appellant's books under or against Cooper's name; and a book was produced showing a pencil note made by the clerk opposite the records of rent received for that week. Cooper also said that it was arranged between the appellant and himself that the former should collect the rents through his office and, after the payment of outgoings, apply or credit the balance in reduction of the purchase money. The appellant's clerks kept a ledger account under Cooper's name, but I suspect that the purpose rather was to record the income to be included in his taxation return than to keep an account under the contract. Cooper superintended the leasing of the shops in King's Chambers, and the leases were drawn up in his name. In the eight years ended 30th June 1927 to 1934 the aggregate net income derived from King's Chambers was £2,981.

When the Deputy Commissioner of Taxation raised the question in 1935 whether the appellant was not liable to include the land comprising King's Chambers in his assessment, the appellant in a letter to the deputy commissioner gave the following account of the transaction :—" I sold this property to my grandson, Mr. Reg. F. Cooper, in 1927. I understand that the assessment is being queried because he did not pay 15% of the price, and that I am being assessed as a taxpayer in consequence of not having insisted upon a deposit. I was anxious to do something for my grandson, and let him have the property at a price which would give him the chance of an equity in it. I asked for a certain price because my grandson, being a young man, I was afraid that he might do something foolish with it. Although the price was payable on demand, I arranged with him that it should be paid out of the profit each year. My idea

was that the completion of the purchase be delayed until he was of an age when he would be in a position to appreciate that he had a good asset." Shortly afterwards the appellant and Cooper executed another indenture relating to the land. This was dated 27th June 1935, a date which is, of course, outside the period covered by the appeals. It recites the previous indenture. After stating that owing to the depression the premises have fallen in value and that the purchaser has been unable to pay more than £2,981, that is to say, the sum I have already mentioned as representing the net income up to the previous 30th June, the indenture goes on to recite that the vendor, the appellant, is liable to be assessed for Federal land tax as the owner of the premises by reason of the fact that fifteen per cent of the purchase money has not been paid. The indenture then proceeds to reduce the price from £38,000 to £30,000 and to provide for an immediate transfer. It provides for the satisfaction or payment of the purchase money by the purchaser's finding £3,050 by raising a further advance from the mortgagee, by his taking over the first mortgage of £10,950, receiving credit for £2,981 already mentioned, or in round figures £3,000, and by his giving a mortgage back for £13,000, representing the balance of the £30,000 purchase money. This transaction was carried through, and Cooper took a transfer of King's Chambers, dated 29th June 1935.

Although in the appellant's letter to the deputy commissioner he or the draftsman of the letter describes his grandson as, in 1927, a young man who he feared might do something foolish, this description is not altogether borne out by Mr. Cooper's appearance or demeanour in the witness box. I suspect that in some degree he is responsible for originating and carrying through both this transaction and that by which Mrs. Hammond and Mrs. Barrett were represented as taking Spencer's property. I think the desire to lessen land tax and income tax formed a powerful motive for each of these transactions. Mr. Cooper's was the only oral evidence adduced on the part of the appellant. He showed great familiarity with the matters in question in the appeal, but he was not a satisfactory witness and I am not prepared to act on his explanations of his grandfather's objects nor his accounts of what passed between the various parties to the transactions.

H. C. OF A. 1937.

MOLLOY v. FEDERAL COMMISSIONER OF LAND TAX.

Dixon J.

In discussing an objection to evidence, counsel for the commissioner said that he did not suggest that the contract between the appellant and Cooper was a sham. I agree that the parties intended the document to have a real effect. But, at the same time, I think the purpose of the contract was to relieve the appellant of liability to pay land tax in respect of the land. This purpose I do not think the transaction could accomplish. In the first place, the assumption by Cooper of the appearance of possession of the land, in my opinion, involved no real delivery of possession to him. It was intended by both parties that the appellant should remain in enjoyment of the rents and profits, and in fact through his office the appellant collected them. Because Cooper was his grandfather's solicitor and man of business, he concerned himself in tenancies and perhaps other matters arising in connection with the properties, and the leases were made in his name because under the contract he occupied the position of purchaser. But, as between himself and his grandfather, I think that it was thoroughly understood that he should have neither beneficial control of the properties nor receipt nor enjoyment of the rents and profits. In the second place, fifteen per cent of the purchase money was not paid. I am quite unable to accept the argument that, because by the contract the purchaser undertook to discharge the vendor's liability to the mortgagee as part payment of the purchase money, this involved a payment within the meaning of sec. 37. Such a contractual term does not amount to payment according to the ordinary legal meaning of the word, and the presence of par. *c* of sub-sec. 2 of sec. 37 is enough to show that it cannot be the kind of payment meant by sec. 37 (1).

I am, therefore, of opinion that the appellant remained liable to assessment under sec. 37 (1) unless exempted under the proviso. An attempt was made to show that such an exemption had been conferred upon him. It appears that, when the deputy commissioner called for the contract or indenture in March 1928, the chief clerk in his office approved of a proposal to assess the land to the purchaser and the appellant was not assessed. It is clear that the deputy commissioner did not deal with the matter personally, and, if he had done so, his authority under his delegation would not have extended to exempting the appellant from the operation of sec.

37 (1). The practice does not seem to be to notify a taxpayer of an exemption when it is granted under the proviso. The land is simply omitted from his assessment. In these circumstances there was nothing to show the appellant why on 6th June 1928 he was not assessed in respect of King's Chambers as at 30th June 1927, and it is conceivable, but hardly likely, that his advisers may have supposed it was because of an exercise of discretion under the proviso. There cannot, however, be an estoppel against the exercise of the statutory power of alteration, and, though it may appear hard on a taxpayer to go back so long and employ sec. 37 (1) to assess him as vendor, there is nothing to preclude the commissioner from doing so. In the present case I am not impressed with the harshness of the proceeding. For these reasons I think the appellant was properly assessed in respect of King's Chambers for the period 1927 to 1934.

It remains to consider the third case, which relates to the land extending from St. George's Terrace to Hay Street, formerly called Spencer's property but now called London Court. The matter in dispute is the liability of the appellant to be assessed in respect of this parcel of land for the years 1931 to 1934. He became registered proprietor of the land by a transfer dated 18th June 1931. The transfer was from himself as executor of his deceased son to himself in his own right. The assessments in question are those made as at 30th June 1931 to 1934. By two indentures of even date with the transfer, the appellant agreed to sell the land in moieties to two married daughters, named respectively Mrs. Hammond and Mrs. Barrett. The moiety fronting Hay Street was, according to the indenture, sold to Mrs. Hammond for the sum of £45,000. The price was to be met by the purchaser's paying £6,800 on the execution of the instrument, by her taking over to the extent of £19,300 a liability under mortgages securing £30,000 and by her agreeing to pay the balance, namely, £18,900, on demand in writing. The moiety fronting St. George's Terrace was similarly sold to Mrs. Barrett, but for a price of £25,000. This sum was to be discharged by the purchaser's paying £4,000 on the execution of the instrument, by her taking over to the extent of the remaining

H. C. OF A. 1937.

MOLLOY v. FEDERAL COMMISSIONER OF LAND TAX.

Dixon J.

£10,700 the liability under the same two mortgages and by her agreeing to pay the balance, namely, £10,300, on demand.

It will be noticed that in each case that the amount immediately payable exceeds fifteen per cent of the purchase money. The purchasers each gave her respective cheque for the amount so payable by her, and these cheques were duly paid into the appellant's bank account. The cheques were used by the appellant to reduce his overdraft and to assist in enabling him to draw in respect of another transaction. The accounts of Mrs. Hammond and of Mrs. Barrett upon which the cheques were drawn were largely in credit, but these ladies had given the bank authority to apply the amounts standing to their credit in reduction or discharge of their father's overdraft. The bank had intimated its intention of exercising this power. The source of the money so standing to their credit was the sale of leases of hotels owned by the appellant. He granted leases to his daughters without premiums and they forthwith assigned the leases for large premiums, which went into their bank accounts but subject to an arrangement that the bank should be entitled to resort to them for payment of the appellant's overdraft. It is obvious that the appellant had complete control of the moneys and that his daughters could not use them for their own benefit except in so far as he allowed it.

After the execution of the indentures by Mrs. Hammond and Mrs. Barrett, notices of alienation and of acquisition were at once sent to the Deputy Commissioner of Taxation.

These purchases were based upon an arrangement, according to Cooper's evidence, that the rents should be collected through the appellant's office and applied in payment of outgoings and that the balance should be credited against the purchase money. In fact the rents were so collected and paid to the appellant's credit in a bank account called "Spencer's property account." The books kept by the appellant's clerk included a record of rents received which, beginning with the week ending 22nd June 1931, entered those collected from the Hay Street moiety of Spencer's land under the name of Mrs. Hammond and those from the other moiety under the name of Mrs. Barrett. Receipts for rent paid by tenants were made out in the respective names of Mrs. Hammond and Mrs. Barrett. The business of negotiating and preparing leases was

done by Cooper. The leases were granted in the names of Mrs. Hammond or Mrs. Barrett, as the case might be. The latter did not live in Western Australia, but she had executed a power of attorney in favour of her father, and he signed the leases on her behalf.

On 5th February 1935 an auction was held of many properties standing in the name of the appellant and of members of his family. Spencer's property was sold for £75,000, the amount fixed by Cooper as the reserve. The appellant signed the particulars and conditions of sale as vendor in respect of this property, as of all other lots. The answers to the requisitions on title disclosed Mrs. Barrett's and Mrs. Hammond's names, and so-called assignments by these ladies as landlords under the tenancy agreements were executed. The purchase money paid under the contract of sale was paid into a joint account in the name of the appellant and Mrs. Hammond. Mrs. Barrett's authority to include her name in the joint account had not been obtained. Statements were prepared showing the amounts which, under the provisions of the two indentures of 18th June 1931, would remain for Mrs. Hammond and Mrs. Barrett out of the purchase money paid on the sale of Spencer's property. Further statements were prepared showing how these balances were applied. They were applied to discharge or wipe out liabilities of the two daughters to their father said to exist on other transactions the nature of which was not fully explained.

In Mrs. Hammond's case the liabilities she is said to have incurred appear to consist in the purchase money of properties sold or treated as sold to her by her father. The prices are not consistent with the values shortly afterwards placed on the properties, but greatly exceed them, and one of the properties formed her father's place of residence.

In the case of Mrs. Barrett, the greater part of the money is said to have been advanced to her father on second mortgage of one of his hotels. I think that the transactions in respect of Spencer's property resulted in no more than a credit upon paper in favour of the appellant's daughters.

These complicated dealings between the appellant and his two daughters are to be explained to a large extent by the desire to lessen land tax and perhaps income tax. I regard the payment of

H. C. OF A. 1937.

MOLLOY v. FEDERAL COMMISSIONER OF LAND TAX.

DIXON J.

the two cheques of £6,800 and £4,000 as nothing but a transfer of money belonging to the appellant from one fund to another. I do not accept the view that the money arising from the disposal of the hotel leases was intended to belong to the two daughters beneficially. The father retained control of the money by the expedient of hypothecating it to support his overdraft. It is apparent that neither lady exercised any independent will or judgment in the dealings in respect of the hotel leases or of Spencer's property. I am not satisfied that there was any payment of purchase money by either Mrs. Barrett or Mrs. Hammond to the appellant. But, in any event, I think that neither daughter ever went into possession of her moiety of the land or into receipt of the rents and profits. The fact that leases were made out in the names of one or other of them and that rent receipts were given on their account was relied upon. But these are mere formal matters. In fact the appellant retained complete control of the premises and of the rents and profits, which he applied to his own use. The appeal fails in respect of the inclusion of Spencer's property.

In the case both of the contract with Cooper and of the contracts with Mrs. Hammond and Mrs. Barrett I am prepared to find the existence of a main purpose of relieving the appellant of liability for land tax and of avoiding such a liability. But for the reasons I have given I think that, independently of sec. 63 of the *Land Tax Assessment Act* 1910-1930, the commissioner is entitled to succeed and that the appeals fail.

Appeals dismissed with costs.

Solicitor for the appellant, *R. F. Cooper.*

Solicitor for the respondent, *A. A. Wolff* K.C., Crown Solicitor for Western Australia.