[HIGH COURT OF AUSTRALIA.]

JAMIESON AND ANOTHER . . . . APPELLANTS;

AND

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

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SYDNEY, *Sept.* 1, 2.

MELBOURNE, *Oct.* 17.

Rich, Starke, Dixon and McTiernan JJ.

Land Tax (Cth.)—Assessment—Lands used for partnership purposes—Owned by partners as tenants in common—Not assets of partnership—Partition of lands—Continued user of lands for partnership purposes—Land Tax Assessment Act 1910-1934 (*No.* 22 *of* 1910—*No.* 14 *of* 1934), *secs.* 27 (1), 38*, 42.*

Sec. 42 of the *Land Tax Assessment Act* 1910-1934 does not apply to a partition between joint proprietors whose joint occupation continues, so as to make them joint owners within sec. 38 of that Act. The operation of sec. 38 depends upon the existence in fact of joint ownership within the meaning of that section.

CASE STATED.

A case was stated pursuant to sec. 44M of the *Land Tax Assessment Act* 1910-1934, by *McTiernan* J., for the opinion of the Full Court upon an appeal to the High Court by Matthew Philip Arthur Jamieson and Evelyn Maud Christine Florence Hillas, executrix and trustee of the will of Albert Edward Stanley Hillas deceased, against assessments to land tax for each of the financial years 1928-1929, 1929-1930, 1930-1931, 1931-1932 and 1932-1933 with regard to certain grazing lands in New South Wales.

* The *Land Tax Assessment Act* 1910-1934 provides:—Sec. 38 (1): "Joint owners of land shall be assessed and liable for land tax in accordance with the provisions of this section." Sec. 42: "Notwithstanding any conveyance, transfer, declaration of trust, settlement, or other disposition of land . . . the person making the same shall, so long as he remains or is in possession or in receipt of the rents and profits of the land, whether on his own account or on account of any other person, be deemed (though not to the exclusion of any other person) to be the owner of the land."

For many years prior to 1928 Albert Stanley Edward Hillas and Matthew Philip Arthur Jamieson carried on business as graziers in partnership in equal shares on certain lands situate in New South Wales which they held as tenants in common in equal shares in fee simple. The lands were used solely for the purpose of carrying on and agisting the stock of the partnership and otherwise carrying on the business of the partnership thereon, and for no other purpose, the partnership paying no rent or other charge for the use of such lands, but paying the rates and taxes payable in respect thereof, the cost of upkeep of fences and improvements thereon and the other outgoings in respect thereof, and each of the partners was actively engaged in carrying on the business on the lands. There was no written agreement for partnership prior to 24th April 1928, upon which date a partnership agreement was executed by the partners. Material clauses in this partnership agreement were as follows :—

"4. The capital of the firm as from the first day of July one thousand nine hundred and twenty-two was . . . £14,455 9s. 2d. as per the schedule attached hereto. The said capital being represented by the money in the bank, live-stock and goods mentioned in the first schedule hereto in and upon the premises (which premises are the lands mentioned in the second and third schedules hereto and which lands shall be used occupied and agisted during the partnership in connection with the firm's business but shall not be deemed part of the capital) and all other property in connection with the firm's business and which stock and goods and cash and other property of the partnership hereinafter acquired belong to the partners in equal shares. . . . 11. During the continuance of the partnership each of the parties are to allow the stock of the firm to be run and agisted on their respective lands as set out in the second and third schedules hereto free of charge to the firm but all rates and costs of upkeep of fences and improvements on the said lands or on any lands hereinafter acquired by and on behalf of the partnership during the said partnership are to be borne by the said firm but it is expressly agreed understood and declared that the lands mentioned in the second and third schedules hereto are not to be considered or taken in any way to be part of the assets or property of the partnership.

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. . . 15. Neither partner shall without the consent in writing of the other sell or dispose of any land belonging to the firm or any interest of the firm therein or of any chattels or live stock or produce of the firm nor shall either party sell or dispose of or lease any of his lands used in connection with the partnership and during the term of such partnership without such consent in writing of the other. 16. Neither partner shall without the consent of the other bring or permit to be brought on to any land forming part of the station or stations used in connection with the firm's business any live stock other than the live stock of the firm."

The second and third schedules were headed: Albert Stanley Hillas and Matthew Philip Arthur Jamieson respectively, and contained brief particulars of numerous parcels of land aggregating in area 7,488a. 0r. 31p. and 7,563a. 1r. 32p. respectively.

On the same day, namely, 24th April 1928, the partners also executed an agreement for partition of the lands. The material parts of the agreement for partition were as follows:—

"1. The parties hereto being seised of or otherwise entitled to the hereditaments comprised in the schedule hereto as tenants in common in fee simple hereby agree to make partition of the same on terms that Albert Stanley Edward Hillas shall take in severalty the hereditaments comprised in the first schedule and Matthew Philip Arthur Jamieson shall take in severalty the hereditaments comprised in the second schedule. 2. The partition shall take effect as from 24th April instant and on that day or as soon as practicable thereafter mutual assurances shall be executed for completing the same."

The lands mentioned in the first schedule to the agreement for partition were the same lands as those mentioned in the second schedule to the partnership agreement and the lands mentioned in the second schedule to the agreement for partition were the same lands as those mentioned in the third schedule to the partnership agreement.

In pursuance of the agreement for partition all the parcels of land mentioned in the first and second schedules thereof were transferred in fee simple to Albert Stanley Edward Hillas and Matthew Philip Arthur Jamieson respectively. The transfers of so much of the land as was under the *Real Property Act* were expressed as transfers by

the joint proprietors to one or other of themselves and the conveyances of so much of the land as was under the general law were drawn as assurances from them as tenants in common of the one part to one or other of themselves of the other part.

Matthew Philip Arthur Jamieson and Albert Stanley Edward Hillas continued to carry on business as partners on the lands in terms of the partnership agreement until the dissolution of the partnership by the death of Albert Stanley Edward Hillas on 30th October 1934. Probate of the will of Albert Stanley Edward Hillas was granted by the Supreme Court of New South Wales in its probate jurisdiction to Evelyn Maud Christine Florence Hillas, the executrix and trustee therein named.

In pursuance of the *Land Tax Assessment Act* and the *Land Tax Act* in force for the time being the Commissioner of Land Tax assessed Albert Stanley Edward Hillas and Matthew Philip Arthur Jamieson as joint owners of the lands the subject of the agreement for partition for each of the financial years 1928-1929, 1929-1930, 1930-1931, 1931-1932 and 1932-1933. The appellants instituted appeals from these assessments, in each of which only one deduction of £5,000 was allowed from the total unimproved value of the whole of the lands, claiming that Albert Stanley Edward Hillas and Matthew Philip Arthur Jamieson should have been separately assessed in respect of the lands mentioned in the first and second schedules respectively to the agreement for partition, and that, as the several owners of the said lands, they were each entitled to a statutory deduction of £5,000.

The appeals having come on for hearing before *McTiernan* J., the parties agreed that the appeal in respect of the financial year 1929-1930 should be treated as governing all the remaining appeals, and at the request of the parties *McTiernan* J. stated a case for the opinion of the Full Court of the High Court upon the following questions :—

1. Whether the respondent was justified in assessing Albert Stanley Edward Hillas and Matthew Philip Arthur Jamieson as joint owners of the whole of the said lands, or of any, and if so which, part or parts thereof for the financial year 1929-1930 with only one statutory deduction of £5,000 in respect of such year's assessment.

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2. Whether Albert Stanley Edward Hillas and Matthew Philip Arthur Jamieson should have been separately assessed for the said financial year in respect of the lands mentioned in the first and second schedules respectively to the agreement for partition or of any, and if so which, part or parts of the lands, and should each have been allowed the statutory deduction of £5,000 in respect of such year's assessment.

Maughan K.C. (with him *Holmes*), for the appellants. The whole transaction between the parties was bona fide and was not colourable in any way. The applicability of sec. 42 of the *Land Tax Assessment Act* 1910-1934 to this matter is very doubtful. Whatever effect that section has, it cannot deprive each taxpayer affected by it of his right to a separate deduction—all to himself—of the sum of £5,000 (*Mant* v. *Deputy Federal Commissioner of Land Tax* (Q.) (1)). All that section provides is that he shall be "deemed to be the owner," but not that as such owner he shall lose his right to a deduction of £5,000.

E. M. Mitchell K.C. (with him *Hooton*), for the respondent. This matter is governed by the provisions of sec. 42 of the *Land Tax Assessment Act*. The general purport of that section is that if, notwithstanding the transfer of title, the use and enjoyment does not immediately pass to the transferee, then so long as the use and enjoyment remains with the transferor, the transferor, though not actually the owner, is deemed, during that interval of time, to be the owner. *Mant's Case* (1) turned on the point that the transfer in question had not been made by the persons assessed, but by a person who had died before that time. Here a different position arises. It is sufficient for the purposes of sec. 42 if the person referred to, having parted with the ownership, does in point of fact receive the rents and profits. *Mant's Case* (1) is further distinguishable from this case on the ground that in that case the only right under the partnership agreement was to agist the stock, in this case the partners had the right to use the whole of the station for all the

(1) (1915) 20 C.L.R. 564.

purposes of the station and it was in fact so used, and for no other purpose. The partnership agreement shows that the partition was only made subject to the condition that the joint owners should remain in the occupation of the transferred lands and especially subject to the conditions contained in the agreement. So far as mere title is concerned, there was a division of title with the object of avoiding, if possible, some land tax. In the circumstances, the transfer should not be deemed to divest the transferors of ownership. The effect of the partnership deed is to give the two transferors the exclusive possession of the land for the purposes of the partnership. That constitutes a lease (*Glenwood Lumber Co. Ltd.* v. *Phillips* (1); *Halsbury's Laws of England*, 2nd ed., vol. 20, p. 9).

Maughan K.C., in reply. The arrangement under the partnership does not contain the essentials of, and cannot be construed as a lease. The only rights under the document are contractual. Sec. 42 is quite inapt to apply to the case of severance of a tenancy in common or joint tenancy; it does not apply to partition at all. On a partition a person does not convey or dispose of his land to another person within the meaning of the section. The section does not make any taxpayer a joint owner with any person. It provides that he shall be "deemed to be the owner," not deemed to be a joint owner. It makes him a notional owner while some other person is the *ex facie* owner; but those two persons would not be joint owners. The notional tenant in common of a moiety would be thus associated or linked with the legal owner of the fee simple of the entirety, but these two would not be "joint owners." The land is owned in severalty. The partnership or firm has no interest in the land. Profits are received by the partners *qua* partners and not as owners. Sec. 42 is inapt for the application of the doctrine that words importing the singular may be read as importing the plural.

Cur. adv. vult.

The following written judgments were delivered:—

RICH J. This is a case stated by *McTiernan* J. under sec. 44M of the *Land Tax Assessment Act* 1910-1934.

The question raised in the case is, in substance, whether when joint owners partition the land of which they are co-owners sec. 42

(1) (1904) A.C. 405.

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Rich J.

of the *Land Tax Assessment Act* 1910-1934 can be applied to them, so that they remain joint proprietors and continue to obtain only one deduction of £5,000. In my opinion sec. 42 of the Act is not applicable to such a case. Each joint proprietor, whatever the form of conveyance or transfer, assures his undivided moiety to the other in the land the entirety of which is taken by that other under the arrangement for partition. I think that under sec. 38 of the Act the ownership must be actually joint and not artificially presumed to be joint in order to warrant taxation upon that footing. Mr. *Mitchell* attempted to support the assessment by means of the proviso to sec. 27 of the Act, but I think that there was no lease to the firm or its members.

In my opinion the questions in the case should be answered as follows: 1. No; 2. Yes.

STARKE J. Case stated pursuant to the *Land Tax Assessment Act* 1910-1934.

The facts are stated at great length in the case, but I shall summarize those I regard as essential. For some time before 24th April 1928 the appellant Jamieson and one Albert Stanley Edward Hillas (whose executrix is the other appellant) were, according to the case, entitled to certain lands as tenants in common in fee simple. They grazed and agisted stock in partnership upon the lands, which did not, however, form part of the capital assets of the partnership. They were assessed to land tax as joint owners of the land for each of the financial years 1928-1929, 1929-1930, 1930-1931, 1931-1932, 1932-1933. On 24th April 1928 the appellants, however, executed an agreement for partition of the lands, whereby it was agreed that Hillas should take in severalty certain parcels of the land, and the appellant Jamieson should take in severalty other parcels of the land. The agreement was carried out, as to lands under the *Real Property Act* 1900, by means of transfers duly registered, and as to lands contained in what is called "old-system grants" by deed of partition, according to the case, filed in the office of the Registrar-General. On the same date, 24th April 1928, Jamieson and Hillas executed a deed, whereby they agreed to become partners in the

business of graziers upon the lands already mentioned, which partnership should be deemed to have commenced on 1st July 1922 and should continue until determined by three months' notice. But it was expressly agreed that the lands should not be considered or taken in any way to be part of the assets or property of the partnership.

Hillas died on 30th October 1932.

Two questions are stated for the opinion of the court, one only of which is really necessary:—1. Whether the respondent—the Commissioner of Land Tax—was justified in assessing Hillas and Jamieson as joint owners of the whole of the said lands for the financial year 1929-1930 with only one statutory deduction of £5,000 in respect of such year's assessment. It was not argued that Jamieson and Hillas were not co-owners in common of the land or "joint owners" within the meaning of that expression in the *Land Tax Acts* until the partition on 24th April 1928. But the former co-owners or "joint owners" did not after the partition own the lands jointly or in common so as to constitute them joint owners within the meaning of secs. 3 and 38 of the *Land Tax Assessment Act*. It required, in these circumstances, further provision under the Act to constitute them joint owners. *Mant* v. *Deputy Federal Commissioner of Land Tax* (*Q.*) (1) was mentioned. But the learned counsel who argued the case made little of the case. They pointed out that the taxpayers there were never co-owners of the land jointly or in common, and the court denied that the user of the lands in partnership constituted "joint ownership" under the Acts. The argument was really directed to the question whether sec. 42 of the *Land Tax Assessment Act* 1910-1934 did not constitute Hillas and Jamieson "joint owners" for the purposes of the Act: "Notwithstanding any conveyance, transfer, declaration of trust, settlement, or other disposition of land, whether made before or after the commencement of the Act, the person making the same shall, so long as he remains or is in possession or in receipt of the rents and profits of the land, whether on his own account or on account of any other person, be deemed (though not to the exclusion of any other person) to be the owner of the land."

(1) (1915) 20 C.L.R. 564.

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In my judgment the language of the section is not appropriate to the case of a partition of lands by co-owners in common. The section contemplates the disposition in entirety of land, and not a division in severalty between co-owners. Notwithstanding the disposition of the land, the taxpayer making the same and retaining effective possession is deemed the owner, but it is as owner of an entirety in the lands and not as an owner of the lands divided in severalty. What Jamieson made over to Hillas was not the entirety but his moiety in the lands. And, similarly, in the case of Hillas, he made over to Jamieson not an entirety but only his moiety in the lands. But the partition of the land so divided in severalty amongst co-owners does not, in my opinion, attract the provisions of sec. 42. The dispositions coupled with the retention of possession did not, therefore, constitute Hillas and Jamieson joint owners of the land within the meaning of the *Land Tax Acts*. The provisions of sec. 27 of the *Land Tax Assessment Act* were referred to by the learned counsel who argued the case for the commissioner. But I am unable to agree that Jamieson and Hillas ever were the owners of any leasehold estate in the land.

The first question stated in the case should be answered in the negative and the second accordingly in the affirmative.

DIXON J. For the five financial years beginning on 1st July in years 1928 to 1932 the appellants have been assessed to land tax on the basis that A. S. E. Hillas, now deceased, and M. P. A. Jamieson were joint owners of the lands in question. During the period under assessment these two persons carried on in partnership the business of graziers. The business was conducted upon the lands in respect of which they have been assessed as joint owners. But the lands were not partnership property and were not vested in the partners as joint tenants or tenants in common. About half the area was vested in one of them as sole owner, and the remaining half in the other of them. The partnership articles expressed a covenant between them that they should " become and remain partners in the business of graziers upon or using lands lent and supplied for this purpose by both parties," and provided that the lands now in

question should be used, occupied and agisted during the partnership in connection with the firm's business but should not be deemed part of the capital, and, again, that each of the parties was to allow the stock of the firm to be run and agisted on their respective lands free of charge to the firm, rates and upkeep being borne by the firm, but that the land should not be considered or taken in any way to be part of the assets or property of the partnership.

If the matter stood there, *Mant* v. *Deputy Federal Commissioner of Land Tax* (*Q.*) (1) would be conclusive to show that the partners were not joint owners of the whole but remained each the beneficial owner in severalty of the entirety in the land vested in him (Cp. *Seymour Brothers* v. *Deputy Federal Commissioner of Land Tax* (*S.A.*) (2)). But up till 24th April 1928 the partners had not been owners of the entirety of separate parts of the land. For some years they had been tenants in common in equal shares of the whole area. The legal title of one undivided moiety stood in the name of one in his own right and of the other moiety in the name of the other partner as an executor ; but each was in fact entitled to his respective moiety beneficially. On 24th April 1928 they made an agreement of partition and executed transfers and conveyances one to another by which the entirety of each divided moiety of the partitioned area was respectively vested in the appropriate one of them. At the same time they entered into the partnership deed, making its provisions retrospective, however, over the period during which they had carried on the business.

The commissioner contends that this history brings the case within sec. 42 of the *Land Tax Assessment Act* 1910-1934. That section provides that, notwithstanding any conveyance, transfer, declaration of trust, settlement, or other disposition of land, the person making the same shall, so long as he remains or is in possession or in receipt of the rents and profits of the land, whether on his own account or on account of any other person, be deemed (though not to the exclusion of any other person) to be the owner of the land. It is said that the two co-owners were the person (or persons) making the conveyance or transfer.

(1) (1915) 20 C.L.R. 564.

(2) (1918) 25 C.L.R. 303.

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Dixon J.

Apparently the transfers of so much of the land as was under the *Real Property Act* were expressed as transfers by the joint proprietors to one or other of themselves and the conveyances of so much of the land as was under the general law were drawn as assurances from them as tenants in common of the one part to one or other of themselves of the other part. But I do not think that the words "conveyance, transfer, declaration of trust, settlement or other disposition of land" are concerned with the form of a document. They describe instruments according to their operation or legal effect. When a co-owner becomes by assurance the owner in severalty of the entirety in the whole or part of the lands, what is actually made over or assured to him is the undivided interest of the other co-owner or co-owners.

When A. S. E. Hillas became the owner in fee simple in severalty of the lands which he took on the partition, he obtained the entirety by an assurance of M. P. A. Jamieson's undivided moiety to him and M. P. A. Jamieson was, I think, "the person making the same" within the meaning of sec. 42. The land he conveyed or transferred was his undivided moiety, and sec. 42 cannot be applied to make him joint proprietor thereof with A. S. E. Hillas. These observations apply *e converso* to the lands of the entirety of which M. P. A. Jamieson became owner.

In my opinion, sec. 42 does not apply to a partition between joint proprietors, whose joint occupation continues, so as to make them joint owners within sec. 38. The operation of sec. 38 depends, as its language indicates, upon the existence in fact of joint ownership.

It was suggested that the proviso to sub-sec. 1 of sec. 27 might govern the case. This suggestion was based upon the view that under the articles the firm became owner of a leasehold estate in the lands which the partners had within the requisite period owned in fee simple. The firm is not a separate entity and the articles do not, in my opinion, contain a demise or operate as a lease to both or either of the members.

I think the first question in the case stated should be answered: No, and the second: Yes.

McTIERNAN J. I agree that the questions should be answered as follows: 1. No; 2. Yes.

In my opinion the conditions necessary for the application of sec. 42 were not fulfilled in the present case. As these conditions were not fulfilled, the appellants did not continue to be joint owners according to the intention of the Act. Prior to the partition of the lands they were tenants in common. The result of the partition was to make each of them the beneficial owner in severalty of a part of the land. It is true that the form of conveyancing employed to effect the partition was that the tenants in common conveyed to each one of them the part of the land intended to be released to such transferee. But the operative effect of the conveyance in each case was that each one released to the other such interest as he had in that part of the land of which the other became the sole owner. It follows that the person who made the conveyance in each was not identical with the person who remained in possession. For in respect of one part of the land A was the person who made the conveyance, and in respect of the other part B was the person who made the conveyance; while in respect of both parts of the land A and B were the persons who remained in possession.

Questions in the case stated answered: 1. *No*; 2. *Yes.*

Solicitors for the appellants, *E. F. Thomas & Brennock*, Goulburn, by *W. H. Hill & Co.*

Solicitor for the respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

J. B.