[HIGH COURT OF AUSTRALIA.]

BUHLMANN AND ANOTHER . . . . APPELLANTS;
DEFENDANTS,

AND

NILSSON AND ANOTHER . . . . RESPONDENTS.
DEFENDANT AND PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1921.

ADELAIDE, *Sept.* 15, 16.

KNOX C.J., HIGGINS AND STARKE JJ.

Will—Interpretation—Gift of land—Land subject to mortgage—Right of devisee to have mortgage debt satisfied out of other assets—Administration and Probate Act 1919 (*S.A.*) (*No.* 1367), *sec.* 52.

Sec. 52 of the *Administration and Probate Act* 1919 (S.A.) provides that "(1) When any person has died . . . seised of or entitled to any estate or interest in any land or other hereditaments in this State which are, at the time of his death, charged with the payment of money, by way of mortgage or other legal or equitable charge, . . . and such person has not, by his will, or deed, or other document, signified any contrary or other intention, the person becoming beneficially entitled to such land or hereditaments through or under the deceased person shall not be entitled to have the money satisfied out of the personal estate, or any other real estate, of the deceased; but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all money with which the same is or are charged, every part thereof, according to its value, bearing a proportionate part of the money charged on the whole. (2) The contrary or other intention mentioned in sub-sec. 1 shall not be deemed to be signified by a direction for payment of debts out of, or a charge of debts upon, personal estate, or residuary real and personal estate, or residuary real estate, but such intention must be signified expressly and by distinct reference to the money charged."

A testator by his will gave to his trustees all his real and personal property on trust for his wife for life, and after her death gave to each of his two

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daughters a specified parcel of land subject to the payment by her to his trustees of the sum of £600. At the date of the testator's death the two parcels of land were subject to a mortgage for £1,200 and interest thereon.

Held, that sec. 52 of the *Administration and Probate Act* 1919 applied, and therefore that neither of the daughters was entitled to have any portion of the mortgage debt satisfied out of any other assets of the testator.

Decision of the Supreme Court of South Australia affirmed.

APPEAL from the Supreme Court of South Australia.

By his will dated 6th April 1916 Peter Nilsson, who died on 16th September 1919, appointed William Staniland Hobart and Johann Carl August Nitschke his executors and trustees, and gave to them the whole of his real and personal property upon trust for his wife for life. The will then proceeded :—"Upon the death of my said wife I dispose of my property in the following manner namely—To my daughter Katrina Magdalena Charlotta Johansson I give all my furniture and household effects . . . . I also give to my said daughter subject to the payment by her of the sum of six hundred pounds to my trustees Section 126 Hundred of Rivoli Bay I further give to my said daughter Sections 46, 258, 261, 262, 270, 271 and 109 Hundred of Rivoli Bay for her sole use and benefit during her lifetime and at her death to be equally divided between her children share and share alike but should she have no children living at the time of her decease I direct that the said Sections be equally divided between the children of my daughter Dora Sophia Buhlmann share and share alike To my daughter Dora Sophia Buhlmann I give subject to the payment by her of the sum of six hundred pounds to my trustees Section 124 Hundred of Rivoli Bay To my son Edward Ernest Carl I give Sections 39E and 42 Hundred of Smith free of all encumbrances thereon also Section 20 Hundred of Rivoli Bay subject to the payment by him of any mortgage that may be on the said Section . . . . To my three children aforesaid to be divided between them in three equal parts but subject to any mortgage thereon being paid off by them I leave Section 219 Hundred of Mount Muirhead Sections 11 and 24 Hundred of Kennion All the residue of my real and personal estate I give to my three children aforesaid share and share alike."

At the date of his death the testator was the registered proprietor

of Sections 124 and 126 Hundred of Rivoli Bay, which were subject to a mortgage given by the testator to the Australian Mutual Provident Society on 8th June 1912 to secure repayment of the sum of £1,200 and interest thereon; and the value of those sections was, at the date of the testator's death, £1,278 and £946 respectively.

An originating summons in the Supreme Court was taken out by Nitschke, to whom alone probate of the will had been granted, for the determination of the question whether Dora Sophia Buhlmann and Katrina Magdalena Charlotta Johansson were respectively entitled upon payment of the sum of £600 each to have transferred to them respectively Sections 124 and 126 Hundred of Rivoli Bay free from the mortgage upon those Sections, or whether they were entitled to have those Sections transferred to them respectively on payment of the said sum of £600 each and subject to the proportionate parts of the mortgage according to the respective values of the Sections.

The summons was heard by *Poole* J., who made an order that neither Dora Sophia Buhlmann nor Katrina Magdalena Charlotta Johansson was entitled to have any portion of moneys secured by the mortgage from the testator to the Australian Mutual Provident Society over Sections 124 and 126 Hundred of Rivoli Bay satisfied out of any other assets of the testator.

From that decision Dora Sophia Buhlmann and Katrina Magdalena Charlotta Johansson now appealed to the High Court.

Browne, for the appellants. Sec. 52 of the *Administration and Probate Act* 1919 does not apply, because neither of the appellants is a "person becoming beneficially entitled to such land or hereditaments through or under" the testator. In order to fall within those words, the beneficiary must become beneficially entitled to the whole estate in the land which the testator had, and he must become entitled to it "through or under" the testator. What each of the appellants became entitled to was not the land as the testator held it but the land subject to payment of £600, and each of them became entitled to the land not through or under the testator but partly through or under the testator and partly through payment of £600. All that the appellants got was an option of purchase of

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the land, and that is not within the section (*Given* v. *Massey* (1); *In re Wilson*; *Wilson* v. *Wilson* (2)).

Magarey, for the respondent Edward Ernest Carl Nilsson, referred to *In re Jones* (3). [He was stopped.]

McLachlan, for the respondent Nitschke, was not heard.

KNOX C.J. This is an appeal from the decision of *Poole* J. on the construction of the will of Peter Nilsson, deceased. By that will the testator gave two allotments of land to his two daughters, one to each of them, subject in each case to the payment by the daughter of the sum of £600 to his trustee. It turned out that at the time of the testator's death these two parcels of land were subject to a mortgage of £1,200 to the Australian Mutual Provident Society, and the question raised by the originating summons was whether the two daughters were entitled to have that mortgage discharged out of the testator's residuary estate, or whether, on the other hand, the parcels of land devised to them were to bear the mortgage debt of £1,200 as well as the two charges of £600 imposed by the will.

The question turns upon the construction of sec. 52 of the *Administration and Probate Act* 1919, which, with certain verbal differences, enacted provisions similar to those contained in *Locke King's Act*. That section provides that "(1) When any person has died . . . seised of or entitled to any estate or interest in any land or other hereditaments . . . which are, at the time of his death, charged with the payment of money, by way of mortgage or other legal or equitable charge, . . . and such person has not, by his will, . . . signified any contrary or other intention, the person becoming beneficially entitled to such land or hereditaments through or under the deceased person shall not be entitled to have the money satisfied out of the personal estate, or any other real estate, of the deceased; but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all money with which the same

(1) 31 L.R. Ir., 126.
(2) (1908) 1 Ch., 839.
(3) 26 Ch. D., 736, at p. 743.

is or are charged, every part thereof, according to its value, bearing a proportionate part of the money charged on the whole." Sub-sec. 2 provides, in slightly different terms from those of *Locke King's Act*, that the "contrary or other intention" must be "signified expressly and by distinct reference to the money charged."

Dr. *Browne* candidly admits that he cannot contend that on this will there is any expression of intention to exonerate this land within the meaning of sub-sec. 2, and his argument is based on the proposition that neither of the daughters, the donees of the two parcels of land, is a "person becoming beneficially entitled to such land . . . through or under the deceased person." Dr. *Browne* contends that in order to come within those words it is necessary that the person of whom it is predicated that he becomes so beneficially entitled should get the whole estate which the testator had at the date of his death in the land in question, and that, inasmuch as each of the daughters only got her parcel of land subject to payment of £600, she did not get the whole estate which the testator had at the time of his death, and therefore was not a "person becoming beneficially entitled to such land . . . through or under the deceased person." In my opinion that contention is untenable. In the first place, there is a distinction drawn in the section between "any estate or interest in any land or other hereditaments" and "such land or hereditaments." I am not sure that the provisions of the *Real Property Act* 1886 affect the matter, because apparently those provisions only apply to the meaning of "land" in that Act and in all instruments made or purporting to be made under it. However that may be, it appears to me that on the language of sec. 52 itself it is clear that a person taking land under the will of a testator, no matter whether he takes a less estate than, or the same estate as, or a less interest than, or the same interest as, the testator had in that land, is none the less a "person becoming beneficially entitled to such land . . . through or under the deceased person." I think the matter may be decided by considering the position under this will apart from the *Administration and Probate Act*, which provided for the vesting of the estate of a deceased person in his executors. Dr. *Browne* very properly admitted that under the

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law apart from that Act each of these gifts of the testator would vest the legal estate in the daughter on the death of the testator. If that is so, I cannot see any escape from the position that she had become "beneficially entitled to such land . . . through or under the deceased person."

Another contention was raised, that all these daughters obtained was an option of purchase and not the land. That matter depends entirely upon the construction of the words of the will. The cases cited in support of that contention were *Given* v. *Massey* (1) and *In re Wilson*; *Wilson* v. *Wilson* (2). In both those cases there was a gift of the whole estate to trustees on trust to sell the real estate, and an option was given to named persons to purchase specified land; and in both those cases it was held that the donee was not a devisee of the land, but that what was given was a right to purchase the land at a fixed price. In the present case there is no gift of this land to any person but Dr. *Browne's* clients, the appellants. There is no trust for sale of this land. Those circumstances, I think, distinguish this case from those I have referred to. The words in which these gifts are expressed only show a gift of land charged with the payment of a sum of money, and in my opinion the appellants are persons "becoming beneficially entitled to such land . . . through or under the deceased person"; and consequently the decision of the learned Judge was correct.

HIGGINS J. The *Administration and Probate Act*, by sec. 52, prescribes a rule of construction which is to operate unless the contrary intention appears, and by sub-sec. 2 the contrary intention does not appear unless expressly signified and by distinct reference to the money charged. *Primâ facie*, all debts used to be payable out of the personal estate, and even if a testator had raised money for the purpose of improving his real estate the burden of the debt would fall upon the personal estate. That was thought to be unfair, and *Locke King's Act* interfered, prescribing that if a charge existed upon land at the death of the testator the land should bear it and the personalty should not. The South Australian Act goes even further than *Locke King's Act*, in particular by the concluding

(1) 31 L.R. Ir., 126. (2) (1908) 1 Ch., 839.

words of sub-sec. 2 of sec. 52. Whether those words are wise or not, it is not for us to consider. Counsel for the appellants does not rely on the words of the will as bringing the case under those concluding words. There is no reference in the will, express or otherwise, to any relation between the two sums of £600 and the mortgage. If those concluding words were not in the sub-section, there would be, to my mind, a strong argument—an argument which has not been mentioned on either side or in the judgment—in favour of the exoneration of these lands. For if one looks at the gifts to other beneficiaries it is seen that the testator gives to his son certain land "free of all encumbrances" and certain other land "subject to the payment by him of any mortgage that may be" upon it. It might well be said that where the testator wanted to charge the real estate he said so, and where he did not want to charge it he said so, and that the will was drawn in ignorance of this section. Moreover, if we were allowed to conjecture as to the real intention of the testator, there would be a very strong argument in favour of the appellants' contention; but we are not allowed to conjecture as to the real intention of the testator: we are bound by this Act. In the will there is no statement at all which shows that the two sums of £600 which were to be charged one upon each parcel of land had any relation to the sum of £1,200 which was secured by mortgage upon both parcels jointly; and certainly there is no "distinct reference to the money charged." Counsel for the appellants has admitted that the will cannot satisfy the concluding words of sec. 52 (2). But he says that the words in sec. 52 (1), "the person becoming beneficially entitled to such land or hereditaments through or under the deceased person," do not apply to any case where the person beneficially interested does not get precisely the same estate as the testator had. I can find nothing to suggest such a limitation of the meaning of sec. 52 (1). The Chief Justice has dealt with that point, and I do not intend to elaborate it further. As to the cases of *Given* v. *Massey* (1) and *In re Wilson*; *Wilson* v. *Wilson* (2), the Chief Justice has said that they do not apply. He relies on the trust for sale which existed in those cases, and the fact that there is no trust for sale in this case at all but a direct devise subject

(1) 31 L.R. Ir., 126.

(2) (1908) 1 Ch., 839.

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Starke J.

to a charge. I concur in his view that those cases do not apply. Whether they are a correct application of the law or not does not concern us at present.

I agree in the judgment that the appeal should be dismissed.

STARKE J. I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellants, *Symon, Browne & Symon.*

Solicitors for the respondents, *Isbister, Hayward, Magarey & Finlayson*; *McLachlan & Reed*, for *Spehr & Mackenzie*, Mount Gambier.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE ALLIANCE ASSURANCE COMPANY LIMITED . . . . . APPELLANT;

AND

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

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SYDNEY, *Aug.* 12, 25.

KNOX C.J., Higgins, Gavan Duffy, Rich and Starke JJ.

Income Tax—Assessment—Deductions—Outgoings—Insurance company—Premiums for reinsurance—Payment made outside Australia—"Proceeds of any business," meaning of—Income Tax Assessment Acts 1915 (*Nos.* 34 *and* 47 *of* 1915), *secs.* 3, 10, 18.

By sec. 18 (1) of the *Income Tax Assessment Acts* 1915 it is provided that "in calculating the taxable income of a taxpayer the total income derived by the taxpayer from all sources in Australia shall be taken as a basis, and from it there shall be deducted (*a*) all losses and outgoings, not being in the nature of losses and outgoings of capital, including commission, discount, travelling expenses, interest, and expenses actually incurred in Australia in gaining or producing the gross income."