26, 1970

IN THE PRIVY COUNCIL No. 18 of 1970

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

BETWEEN :

DOLORES HAY McCLELLAND Appellant

- and -

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA
Respondent

RECORD OF PROCEEDINGS

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Following documents forwarded to the High Court by Respondent pursuant to Order 65 Rule 8.	
(i) Return by Appellant of her income during the year ended 30th June 1963	17th Dec. 1963
(ii) Statements which accompanied that return and set out further details of the income and deductions shown thereon	
(v) Letter addressed by Appellant's Solicitors to the Deputy Commissioner of Taxation requesting further particulars of an amount of $113.902 included in the taxable income the subject of the assessment	15th Aug. 1966
(viii) Request that the objection be treated as an appeal and forwarded to the High Court of Australia	1st Feb. 1967

IN THE PRIVY COUNCIL No. 18 of 1970

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :

DOLORES HAY McCLELLAND Appellant

- and -

THE COMMISSIONER OF TAXATION
OF THE COMMONEEALTH OF AUSTRALIA
Respondent

RECORD OF PROCEEDINGS

No. 1

TRANSMISSION OF OBJECTION

In the High Court of Australia

No. 1

Transmission of Objection

11th Aug. 1967

WHEREAS DOLORES HAY McCLELLAND is dissatisfied with the decision of the Deputy Commissioner of Taxation of 96 Barrack Street, Perth in the State of Western Australia upon her objection dated the 25th day of August 1966 against assessment of income tax and social services contribution notice of which issued on the 16th day of December 1966 relating to income derived during the year ended the 30th day of June 1963 AND WHEREAS the said DOLORES HAY McCLELLAND on the 1st day of February 1967 in writing requested the Deputy Commissioner of Taxation to treat her objection as an appeal and forward it to the High Court of Australia NOW THEREFORE the Deputy Commissioner of Taxation as requested HEREBY FORWARDS the objection to the High Court of Australia at Perth AND ALSO FORWARDS to the Court copies of the following documents necessary for the hearing of the appeal :-

In the High Court of Australia

No. 1

Transmission of Objection

11th Aug.1967

(continued)

Folio	Description of Documents
1.	Return, dated 17th December, 1963 of income derived by Mrs. Dolores Hay McClelland during the year ended 30th June, 1963.
2/3.	Statements which accompanied that return and set out further details of the income and deductions shown thereon.
4.	Notice of assessment dated 5th August, 1966 on a taxable income of $115,406 derived by Mrs. Dolores Hay McClelland during the year ended 30th June, 1963.
5.	Adjustment Sheet which accompanied the notice of assessment.
6.	Letter dated 15th August, 1966 addressed by Messrs. Dwyer and Thomas, solicitors for Mrs. D.H.McClelland, to the Deputy Commissioner of Taxation, requesting further particulars of an amount of $113,902 included in the taxable income.
7/8.	Notice dated 25th August, 1966 of objection against the assessment on income derived during the year ended 30th June, 1963.
9.	Notice, dated 16th December, 1966, of disallowance of the objection.
10/11.	Request, dated 1st February, 1967, that the objection be treated as an appeal and forwarded to the High Court of Australia.
12/17.	Will and codicils to the will of Henry John Spaven.
18.	Option dated 26th July, 1962 given by R.R. Spaven to Mrs. D.H.McClelland to purchase his share in Rockingham land.
19.	Notice, dated 10th September, 1962, of exercise by Mrs. D.H.McClelland of option dated 26th July, 1962.
20.	Extract from registered transfer No.18640 of 1962, dated 5th October,1962, effecting transfer of certain land to Dolores Hay McClelland.

Folio	Description of Documents
21.	Notice, dated 5th October, 1962, from Dolores Hay McClelland to M.H.H.Kennedy and P.W. Markham, authorising them to pay a deposit of £50,000 to Messrs. Robinson Cox & Co. the solicitors for the executors of H.J. Spaven.
22/23.	Letter dated 5th October, 1962 addressed by Morris Crawcour & Solomon, Barristers and Solicitors, to Messrs. Robinson Cox & Co. concerning the payment the subject of the document at folio 21.
24.	Sketch plan of portion of Cockburn Sound Location 16.

DATED the 11th day of August 1967.

G.R. McCarter,

Deputy Commissioner of Taxation

TO:

The Registrar,
High Court of Australia,
PERTH. WESTERN AUSTRALIA.

No. 2

APPELLANT'S EVIDENCE

Examination: DOLORES HAY McCLELLAND, sworn :

MR. REILLY: You live at 36 Leake Street, Peppermint Grove, you are a married woman and the appellant in these proceedings?--- Yes.

It is common ground that Henry John Spaven was your uncle and he died on the 27th September 1958? - Yes.

We are concerned in this case with some land which has been referred to as Rockingham land and we are told that it formed part of the estate of your uncle? -- That is correct.

In the High Court of Australia

No. 2

Appellants Evidence.

Dolores Hay McClelland

28th Sep.1967

Examination (continued)

Do you produce a certified copy of the land to which you referred as the Rockingham land? --- That is it but it was not divided in this manner at the time of his death.

I will tender that.

Copy in Pocket of Record.

EXHIBIT: EXHIBIT B... Plan of the land in question.

MR. REILLY: Were there other assets in the estate?-- Yes, there were two stations at Shark Bay and there were a couple of other assets which covered the probate and various bequests.

What attitude did you adopt as to realisation of the real estate, that is the Rockingham land and the stations?--- Dealing with the stations I was very anxious to retain the stations and I did my utmost to retain them even on my own accord but my brother would not have a partnership so I could not do very much about that.

What happened to them? --- They were sold. He had the same attitude about the Rockingham land, he would not have a partnership, and I wanted to retain it.

Why did you want to retain it? --- Well, because I thought that in time it could become very valuable.

How would it be realised? --- Later on I thought it could be sub-divided; it was near the beach and beach house cottages could be built on it.

I want to carry you forward to May 1962. Can

you remember this matter arising during that month? --- Yes, I can. It was a meeting with Mr. Medcalf and Mr. Simpson who were the joint executors in this estate and at this meeting ---

MR. REILLY: Could you say who was present? --- Yes. My husband and Mr. Medcalf and myself and my brother.

Will you tell the court what heppened then?--- At the end of the meeting my brother dropped a bombshell really when he said he was going to sell his share of the Rockingham land. He said he had someone who would buy his share but he would not disclose who it was. This was rather frightening to me. I did not want a partnership with a stranger so I suggested a partition but he refused this.

Did he give any ground for refusing.

MR. DOWNING: Your Honour ---

HIS HONOUR: I do not think you can get that. How would that be admissible, Mr. Reilly?

MR. REILLY: I suppose you could put it on the basis of res gestae; what we are concerned with is what was in the mind of the taxpayer in entering into this transaction and all the circumstances which surround the actual taking of this option in this exercise are surely admissible, Sir. The conversation is not sought to be admitted for the purpose of what was said but the fact that it was said.

HIS HONOUR: You have proved that the brother would not agree to a partition of the land; Does it matter why he would not agree to a partition of the land? That is the only thing that is objected to. It seems to be getting a little far afield but if you think it is important - we do not want to go further and further afield - you may ask it.

MR. REILLY: I am only concerned with what he said.

HIS HONOUR: Mr. Downing, I think perhaps he could get the whole of this conversation.

In the High Court of Australia

No. 2

Appellants Evidence.

Dolores Hay McClelland.

28th Sep.1967.

Examination.

(continued)

MR. DOWNING: I was just wondering how far we were going.

HIS HONOUR: You may get the whole of this conversation so far as it is relevant to the land but not to what I might call family disagreements or reasons for them. It is apparent that they had different views as to what should happen.

MR. REILLY: Did your brother give a reason as to why he would not agree to a partition?-- No, he did not. I cannot recall it.

Did you make any request at this stage?--- Excuse me, I think he meant that it was a trouble and expense; I am not sure.

HIS HONOUR: The upshot of it was he would not agree to a partition.

MR. REILLY: When he refused to agree, what did you do? --- He said he could get £40,000 for his share and he wanted the money and he said he could sell my share too for the same amount. I said, "Well, I do not want to sell my share." I wanted to retain it. Then I asked him if I could have a first refusal of his share and he agreed to this.

Did you have the £40,000 to pay him, if necessary? -- No, I did not have the money.

Where would you get it from? --- I thought I could get it from the estate.

Where would the estate get it from? --- It would, of course, involve selling some of this land we are talking of.

Armed with your brother's promise of first refusal, what did you do? --- I had a chat to Mr. Medcalf and then I got in touch with a builder by the name of Mr. Plunkett and I also saw Miss Feilman, a town planner.

HIS HONOUR: Mrs. McClelland, at this stage had the station properties been sold? --- Yes.

They had. I was only wondering when you said

you could not get any money from the estate: Had you received no money from the estate from the sale of its estates at that time? --- I do not think so. It was a long time before we got anything.

MR. REILLY: You told us you consulted these various people. What was the purpose of consulting them? --- Just to see how I could sell some of this land and retain what I thought was valuable and be able to pay my brother his money.

Why did that present any problem? --- The land, it was not of uniform value and the part I wanted to keep was along the Safety Bay Road. That was more valuable than the land back of the Safety Bay Road.

Then as a result of that consultation, what happened? --- Well Miss Feilman prepared a plan for me whereby I could retain about 500 acres of this land facing Safety Bay Road, which was in two blocks, and I could sell the other.

That, in effect, is the plan before the court, is that right? --- Yes.

MR. REILLY: Then armed with that information, what did you do then? --- Then I took an option from my brother.

That is for the whole of the land? --- Yes.

If you would just look at this plan: Would you just tell the court the area that you contemplated selling? --- I was keeping 4 and 6 and selling the area marked 5.

HIS HONOUR: Mr. Reilly, this plan shows a lot of sub-divided allotments apparently.

MR. REILLY: Subsequent, Sir.

HIS HONOUR: All subsequent. So at this time it was not subdivided? --- No, Sir.

But the witness's proposal was that she should sell the area marked 5 and keep the area marked 4. What about the area marked 6?

In the High Court of Australia

No. 2

Appellants Evidence.

Dolores Hay McClelland.

28th Sep.1967

Examination.

(continued)

MR. REILLY: Retain 4 and 6. The motel site had already gone at this stage.

HIS HONOUR: I follow that. The motel site is this bit just above the figure 950, is it?

MR. REILLY: Yes, Sir, that is correct, just below the figures with the 8043 immediately below it.

HIS HONOUR: Below it or to the west?

MR. REILLY: South-west. The road is a confusing factor, Sir.

HIS HONOUR: I follow now, what you say is that you proposed to keep the whole of the areas marked 4 and 6 here other than the motel site, is that right? --- Yes, the motel site was already gone.

And to sell the area marked 5? --- Yes.

MR. REILLY: I think there is possibly some confusion there. This Titles Office plan is not the best lot 4 on the north-west does not extend beyond that row of dots or circles and similarly lot 6 does not extend on the east beyond that similar row of circles which is a continuation of the outside of the western boundary of the northern portion of the land so that lot 5 does have a frontage on Safety Bay to the east of the motel site. Lot 5 extends across that diagonal road.

HIS HONOUR: Still whatever 4 and 6 actually indicates, what she proposed to do was to sell the whole of this area marked 5 and retain all the rest? --- That is right, Sir.

MR. REILLY: You have told us you took an option on the 6th July 1962? --- Yes.

Why did you take the option? --- The executors wanted that time before they would make a transfer and a survey had to be made.

Having taken the option, what did you do? --- Then I set about trying to follow up some enquiries. I knew there had been a few enquiries and my husband and I ---

What sort of enquiries? --- About the land, what was going to happen to it so eventually my husband and I made enquiries as to what we could do with it and finally we were involved in a discussion with Mr. Medcalf and a land agent named Mr. Seward and another prospective purchaser. And then I consulted my solicitor and after that consultation I asked the executors if I could take a transfer by their direction and I myself would enter into a contract with whoever bought the land.

What was the system proposed to be adopted previous to that as to sale? --- First of all, prior to that, we were going to advertise for tenders.

Who was going to do that? --- The executors.

Was the form of advertisement prepared? --- Yes.

That was cancelled. Why? --- My brother refused to give the executors authority for this sale by tender.

Once you decided to deal with the matter yourself did you find a buyer? --- Yes, I did.

And did you enter into a contract? --- Yes, I entered into a contract with Messrs. Markham and Kennedy.

Is that the contract of sale you then executed (showing document to the witness)? --- Yes, that is it.

I tender that, your Honour.

HIS HONOUR: You have seen it, Mr. Downing?

MR. DOWNING: Yes Sir.

HIS HONOUR: No objection?

MR. DOWNING: No Sir.

EXHIBIT: EXHIBIT C. Contract of sale dated 5th October 1962 between appellant, Mrs. McClelland and Messrs. Kennedy and Markham.

In the High Court of Australia

No. 2

Appellants Evidence.

Dolores Hay McClelland.

28th Sep.1967.

Examination (continued)

Mr. REILLY: It was consequent upon that contract that the transfer was executed that is referred to in the proceedings in Court? --- Yes.

The question before this Court, of course, is what was your purpose in paying £40,000 to your brother. What do you say it was? --- My purpose was to get control of the land. I did not want to be a partner with a stranger. I wanted to have control. I did not want to be bullied around, and I bought that land for that purpose. I did not buy it to make a profit out of it. My brother fixed the value of the land and I took it that that was the value. He fixed the value of his share and I took it that was the value of the land.

What about these two lots, 4 and 6, that you did not sell at that stage? Have you sold them since? --- No, I still have them.

Finally, it may be suggested that you are in the habit of dealing in land. Have you ever sold any land? --- I have never sold any of that land.

HIS HONOUR: The area shown in pink, which is the land sold, I take it, in this contract - that accords except for area with what the witness described as Lot 5, the area marked 5?

MR. REILLY: That is correct, Sir.

Cross-examination.

CROSS-EXAMINED BY MR. DOWNING.

MR. DOWNING: I think you had made some inquiries regarding the possibility of sub-dividing this land before you had these discussions with your brother in May 1962. Would that be right? Did you not see Miss Fieldman some time during 1961 as to the possible sub-division of the land? --- It is rather hard to recall.

I am instructed that Miss Fieldman says she had discussions with you during the latter part of 1961 regarding the development or sub-division of this land? --- We were interested to see. My husband and I went up. I do not know that my brother did not go. We were interested to see

what would happen to land in that area.

And in the course of this discussion I suppose you discussed with Miss Fieldman its probable value, did you? --- Miss Fieldman - yes, I did ask her and she did tell us that an area of land adjacent to this, about 100 acres, was sold for £18 an acre.

Did she tell you when that had been sold? --- About a year before.

MR. DOWNING: So that would be some time in 1960? --- Or 1961.

And you also, I think, inquired of the Shire Clerk what he thought the value of the land was - Mr. Cuthbertson, the Rockingham Shire Clerk? --- Yes.

That was about the same time as you saw Miss Fieldman? --- I cannot recall when I saw him.

It would have been prior to the discussions with your brother in May 1962, would it? --- Yes.

And I think Mr. Cuthbertson expressed the opinion that the land might be worth up to £100 an acre, did he not? --- No. I do not remember him saying exactly what it would be. He just said it was developing well, but I do not recall.

Mr. Cuthbertson says he then expressed the view you might get £10 an acre for it to you in that conversation. Would you deny that if Mr. Cuthbertson says that that is what occurred? --- I do not remember him saying that. I remember him saying the land was developing and that building blocks around Rockingham were bringing very good prices.

And there was, of course, at that time in late 1961 or the beginning of 1962 quite a lot of development in the area of your land. Settlement was moving down that way, was it not - along Safety Bay Road? --- No, there was not much development there at all.

In the High Court of Australia

No. 2

Appellants Evidence.

Dolores Hay McClelland.

28th Sep.1967.

Cross-examination.

(continued)

MR. DOWNING: When was the motel built the Waikiki Motel? --- I am not too sure - about 1961, I think.

HIS HONOUR: Is that the motel on the area?

MR. DOWNING: It is known as the Waikiki Motel.

THE WITNESS: I could not be sure. I know it was up when we sold the land.

MR. DOWNING: I think you also had discussions, did you, before this discussion with your brother with a Mr. Peet regarding the development of the land? --- Yes.

You then told us you had this discussion with your brother in May, I think you said. At or about that time did not a Mr. Markham get in touch with you about buying this land? --- He called down to my home one day.

Did he not make an offer to you then of £40,000 for your share of the land? --- No. He did not make an offer to me of £40,000 for my share. He never talked about my share. He made an offer for the 3,600 - that was the lot.

The whole of the land, yes? --- For about £70,000.

So he was interested in buying not your share, but the whole of the area? --- Yes.

At £70,000? --- I t might have been £75,000, but I was not interested because at that time I thought the executors were going to sell the land. I had no idea all this was going to happen and I said to him - he pressed it and I said, "I cannot discuss it with you because I know nothing about this. It has nothing to do with me". It was not in my hands at all.

But you also thought, I think, and I think you said to Mr. Markham the land was a lot more valuable than the £70,000 he was offering. Is that right? --- I might have.

You thought it was worth more than that, did you not, at that time? --- I did not know it

was worth more than that at that time.

I did not ask if you knew. I said you thought it was worth more than £70,000. Your opinion was that it was of a higher value than the amount being offered? --- Yes, I suppose--

Did your brother tell you, when these discussions were held with you and he indicated his desire to sell, that he had an offer for the land of £40,000? --- Yes.

Did he not tell you the offer was from Mr. Markham? --- No, he would not tell me who the offer was from.

But he told you, did he, the offer was £40,000 for his share? --- Yes.

And I think you told us before he also told you that he could get his buyer to pay you £40,000 for your share? --- That is correct.

But again you were not interested in selling at that price? --- No, it was not at the price. I was not interested in selling at all. I wanted to hold the land. I have a family. I have a young son; he was younger then. I had wanted the stations particularly for him because he was booked in ---

Leave that for the moment. You were not interested in selling, you told us, but you have already told me you thought the land was worth more than that in any case.

HIS HONOUR: She said she thought it would go up in value, which I suppose is the same as saying it was worth more. What she said, and actually it was cut short, was that she supposed it was worth more then because she supposed it would be worth more in the future. Well, that is rational.

MR. DOWNING: That is fair enough. Now, Mrs. McClelland, you did not take the option from your brother until 26th July. That is the date of it? --- Yes.

In June I think you were in touch with Mr. Plunkett regarding the land and the possible

In the High Court of Australia

No. 2

Appellants Evidence.

Dolores Hay McClelland.

28th Sep.1967

Cross-examination.

(continued)

sale of portion of it? --- I am not sure when I was in touch with Mr. Plunkett, but I was in touch with him.

I am told by him it was in June? --- I was in touch with him, yes.

I think you then indicated to Mr. Plunkett that you proposed to sell about 3,000 acres of the land. Would that be right? --- I do not know that I knew exactly how much I was going to sell. I just knew I wanted to hold land and I did not know how much I could afford to sell because I had to meet this price.

But you did mention to Mr. Plunkett, so I am told, that you thought of selling about 3,000 acres of the land and probably by that stage you had discussed the matter with Miss Fieldman and she tentatively indicated a proposed split up of the land. Would that be right? --- I cannot tell you when I spoke, the dates of speaking to Miss Fieldman and Mr. Plunkett. It is five years ago at least and I do not really remember the dates.

Let me put it to you this way: you did speak to Miss Fieldman regarding the sub-division of the land? --- Yes, I did.

And the manner of sub-division which ultimately was adopted was then suggested by Miss Fieldman? --- Yes. She might have altered it from the first time. I do not remember. I think I wanted to retain more, but she was afraid I might not realize my price, so I lost some of it.

The valuable land was along the Safety Bay Road? --- Yes.

You wanted to retain the valuable part of the land? --- As much as I could.

But Miss Fieldman told you that in order to enable the purchaser to pay a good price it would be necessary to give to a purchaser part of the good land as well as the back part? --- That is right.

MR. DOWNING: And her sub-division of the land was made up on that basis? --- Yes.

The original proposition by Miss Fieldman, the survey did not quite fulfil what you discussed but the original intention was to sell about 3,000 acres in Lot 5? --- I cannot remember what the original amount was. I do not remember. My husband might know.

But you do not remember? --- I do not remember the original amount.

Mr. Plunkett will tell us you discussed with him the possible sale of 3,000 acres of the land and he will also tell us that you put a price on it to him of £50 an acre. Would that be right? --- I might have suggested that - yes, it could have been. My husband did most of this business with Mr. Plunkett.

I do not want to know about your husband. If you don't know, say so; but I am putting it to you that you discussed with Mr. Plunkett the amount of £50 an acre. If you do not know, say so? --- I don't exactly remember.

And Mr. Plunkett was interested in the purchase of the land but he was unable to finance it? --- Yes, the whole scheme was too big a proposition for him - too much land.

But you had several discussions with him, did you not? --- Yes.

Following the taking of the option - which was at the end of July - did your husband (I suppose in consultation with you) make some enquiries of the Town Planning Department regarding the sub-division of the land? --- No, I went to Town Planning, but they could not tell me anything about it really, and the gentleman I spoke to about it said ---

I do not want to know what happened. You did go to the Town Planning? --- Yes.

And that would be in August, shortly after you took the option? --- I do not remember.

In the High Court of Australia

No. 2

Appellants Evidence

Dolores Hay McClelland.

28th Sep.1967

Cross-examination (continued)

MR. DOWNING: We are told that an application for approval of the sub-division was put in on 15th September, and it would be some weeks after that that you discussed the matter with Town Planning, would it? --- I think there is something wrong here. This might be the approval Miss Fieldman might have to get.

What do you mean by "something wrong"? --- I was speaking to someone in Town Planning, and they said "If I had any land I would not be selling it at this stage". 10

All right. You did go there, and ultimately an application was put in, we know, because the sub-division was approved? --- Yes.

During August you were in touch with a Mr. Seward, were you not, regarding the sale of the land? --- Yes.

And I think Mr. Seward called at your home, did he not? --- Yes.

And you discussed the possible sale then of the 3,000 acres? --- Yes. 20

And I think you told him your price was £50 an acre? --- Well, that is what we wanted.

And Mr. Seward subsequently got an offer from a client of £35 an acre? --- No, his first offer was less than that.

He got an offer which you regarded as inadequate? --- Yes.

And then he discussed with you and your husband what price you would accept, and I think you said £40 an acre - is that right? --- My husband is in Court, and I would like to ask him. I am not sure whether it was £30 or £40. 30

HIS HONOUR: Your husband was present at the time? --- Yes, and he helped me with the discussions.

And you do not remember, but you think he might? --- Yes.

MR. DOWNING: And in the ultimate, you did I think accept an offer from Mr. Seward's client of £40 an acre for the land? --- I am not sure whether it was £40 an acre.

Anyway, you did receive an offer? --- Yes, my husband did. I think the offer was made over the telephone.

And following that, there was some conference at Mr. Medcalf's office on the matter? --- Yes.

And that happened in August? --- Yes, at the end of August.

And on 30th August, or 29th August, you got an offer from someone else of, I think £45 an acre for the land - from Landall Development, from a Mr. Clarke - is that right? --- Yes, but I am not sure if that was the name.

And you then realised that Mr. Seward's offer was too low, so you withdrew from that transaction? --- No, I had no experience in dealing with land, and we had gone too far. When my husband went to see Mr. Medcalf about this, he had been out of the picture - we had done this arranging ourselves, and we had already taken a step too far; and Mr. Medcalf said he could not do anything about it because things were not in order.

I am only suggesting that you did not go on with the sale? --- That is so.

And on 5th September you had an offer from Markham & Kennedy of £50 an acre for the land? --- Yes.

And you accepted it? --- Yes.

And on 10th September you exercised the option of purchase from your brother? --- No, I think you have the date wrong.

I think we have the date of the option on the file? --- The exercise of the option was 10th September, and in October I made this contract.

I am talking of the date you got the offer from Markham & Kennedy, and I am putting it to you

In the High Court of Australia

No. 2

Appellants Evidence

Dolores Hay McClelland.

28th Sep.1967

Cross-examination.

(continued)

that was the 5th September? --- I exercised the option before I had - I am not sure of these dates because it is so long ago and I do not want to say the wrong thing.

I put it to you that when you exercised the option on 5th September, you knew that you could get £50 an acre for the land? --- I am not sure. When I exercised the option I did not know what was going to happen, and it was after exercising the option that the executors were asked to make plans for a sale by tender; so I could not have known what I was going to get - and I think I may have seen the printed forms this morning for the advertisement. I think it was after that that I made the sale with Markham & Kennedy - after I had got these plans going.

You did in August agree, or your husband agreed verbally, to accept an offer from Mr. Seward of £40 an acre? --- Yes.

And that transaction went off? --- Yes.

But before it went off you had received an offer from Mr. Clarke of Landall's of £45 an acre? --- I know it was a little more.

So at the time you exercised the option - irrespective of whether you had an offer of £50 an acre from Markham & Kennedy - you already had an offer of £40 and of £45 an acre for the land, did you not? --- Yes.

So when you exercised the option to buy your brother's interest in the land at a price equal to about £20 an acre you knew you could sell for very much more than that figure? --- Yes.

Thank you.

Re-examination.

RE-EXAMINED BY MR. REILLY:

In answer to my friend you said that Mr.Plunkett was willing to pay £50 an acre for the land which you were proposing to sell? --- No, he was not willing to pay £50 an acre.

MR. REILLY: Perhaps I heard you wrong. Did you ask £50 an acre? --- We asked it, but I do not think we got anything like that.

You also spoke about calling for tenders for the sale of this land. Who was to call for tenders? --- The executors.

And was a document prepared to give effect to that, do you know? --- Yes.

Will you look at that (document handed to witness). Where did that come from? --- I suppose it came from Robinson Cox.

I thought you knew? ---

HIS HONOUR: She does not know where it came from, other than the fact that you just gave it to her.

MR. REILLY: Thank you, Mrs. McClelland.

HIS HONOUR: Thank you. You may take a seat.

MR. REILLY: I will now call Ian George Medcalf.

No. 3

APPELLANT'S EVIDENCE.

IAN GEORGE MEDCALF, sworn:

EXAMINED BY MR. REILLY.

MR. REILLY: I think you are a solicitor practising in Perth? --- Yes.

We are told that you are one of the executors of the will of Henry John Spaven? --- Yes.

What, in general, was the nature of the assets left by the deceased? --- He left two stations at Shark Bay, 3,615 acres of land at Rockingham and a quantity of shares and unsecured notes.

What happened to the stations? --- The stations were sold in about June or July 1959, six months after the deceased died - or nine months

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Appellants Evidence.

Ian George Medcalf.

28th September 1967.

Examination (continued)

after.

MR. REILLY: We are told that Mrs. McClelland and her brother Reginald were beneficiaries of the estate. What was Mrs. McClelland's attitude to the sale of the stations? --- She did not want to sell the stations.

What was Mr. Spaven's attitude? --- He desired to have them sold as soon as possible.

What was the attitude of Mrs. McClelland to the Rockingham land? --- She wanted to retain the Rockingham land as long as possible.

What did Mr. Spaven want? --- He wanted to sell it as soon as possible.

Was the Rockingham land at the time of the testator's death used for any purpose? Was the testator using it? --- At the time of his death he had 250 acres of oats in crop on it, and he had a machinery shed and water facilities; and I think he was farming it in some way or the other.

HIS HONOUR: It was at that time - I asked because I am not very well acquainted with the area - at that time the neighborhood was farming land, was it? We are told suburban development of a sort was coming? --- It was a mixture, it was partly zoned for residential, and partly, I understand, for rural or industrial or something else. It was right on the fringe of the metropolitan area.

MR. REILLY: Just to complete this aspect, was the land let for agistment or any other purpose? --- Yes, it was let at the time of death, I think. It had been let for agistment by the deceased, but at the time of death he had a crop on it. That is the position at the time of death.

And subsequently? --- Subsequently the executors let it out to Mr. Sloane. He agisted cattle on it.

So the answer is, at the material time we are referring to it was let on agistment? --- Yes.

MR. REILLY: You have just told us the attitude of the two beneficiaries to the sale of the Rockingham land. So far as you are concerned as executor was it necessary for the purposes of administration to sell that land? --- No. I would have to enlarge on this. It was not necessary. We made a plan early in the administration. It was apparent we would have to sell something to pay the duties. It was purely a question of trying to fit in with the wishes of the beneficiaries and when it was decided that the stations would be sold it was not necessary to sell the Rockingham land.

I want to carry you forward to May 1962. You heard Mrs. McClelland give evidence of the conference in your office. Do you agree you were present there? --- Yes.

What was Mr. Spaven's attitude at this conference? --- Mr. Spaven continued, or persisted with his attitude that the Rockingham land be sold as soon as possible, and he had already made several suggestions to me that this be done over the years. Do you want to know what I said?

Very well? --- I said it could not be sold immediately because we had not yet paid the final estate duty and there were other administrative problems, and it would have to be deferred for at least another three or four months.

Was there any discussion at that conference of the way in which Mrs. McClelland would be paying for this land if she bought her brother out. There was a discussion about buying the brother out.

Would you tell his Honour what that was? --- There were several discussions around about this time. I cannot remember exactly when but it was round about May 1962 and Mrs. McClelland and her brother discussed the purchase by one of the other's share, and Mr. Spaven said he had a buyer at £40,000 for his half share. He said his buyer would buy her share for another £40,000. This is in this general

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Examination (continued)

period. Mrs. McClelland did not wish to sell her half share to any undisclosed buyer. He did not disclose the name of the buyer.

MR. REILLY: Was any request made by Mrs. McClelland? --- Mrs. McClelland wanted the right to buy his half share and she did make a request. She asked if she could get an option to purchase his half share at the same price that somebody else was prepared to pay, £40,000, and he agreed.

Was there any discussion as to the way in which Mrs. McClelland would get the money to pay for this? --- Yes. Mrs. McClelland, I understand, was going to try and sell part of the land in order to pay her brother out.

We are told that an option was made out in your office, it is before the court. Did you prepare that option? --- Yes I did.

That is on the 26th July? --- Yes.

Why was the option for a period up to September? Why was it necessary to have an option? --- Because Mrs. McClelland had to raise the money.

Was there any other reason? --- There was certain problems about her getting the land sub-divided. She wanted to keep part of it and sell part of it and it would all take a little time. I think that was the reason.

There was nothing concerned with the estate? --- At this stage we had paid the duty. We had one or two problems. We wanted to be secure. There were annuities in the will and we wanted to make sure this was attended to before we allowed the land out of our control.

Had the executors prepared any realisation scheme for the Rockingham land? --- I do not quite follow that.

Had you a plan of sub-division of how you would realise? --- No.

We are told that the motel area was excised from that left by the deceased. How did that come

about? --- The deceased himself had granted an option to a man named Greig to purchase about 15 acres of land for a motel, and after the deceased died they exercised their option in a slightly amended form, but generally speaking they exercised it.

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Examination (continued)

MR. REILLY: During the course of what you have given evidence of were you in any way involved with the potential buyers of any part of this land? --- Yes, we were involved with one or two interested buyers who were brought into the office round about the 8th September, I think it was, pressing my mind, I think it was the 8th.

Can you tell the court the figures that were discussed by the potential buyers? --- Yes, the figure which was discussed was, I think, from memory £120,000 for the 3,000 acres.

Had there been any previous offers to you, or discussions, as to price? --- No, I do not think so.

CROSS-EXAMINED BY MR. DOWNING:

Cross-examination

MR. DOWNING: You mentioned that you had discussions with potential buyers of this property in September. Was one of those discussions with a Mr. Seward, a land agent? --- Yes, that was the one I was referring to.

And his offer you think was about £120,000 for 3,000 acres - that would be £40 an acre? --- Yes.

In fact I think when Mr. Seward called to see you it was on the basis that that offer had been accepted verbally by Mr. McClelland? --- That is correct.

But subsequently a higher offer was received by McClelland? --- Yes.

That was before any formal agreement had been made with the Seward buyer? --- No formal agreement was made at all.

It was a verbal acceptance of an offer? --- I did not verbally accept an offer.

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Cross-examination.

(continued)

MR. DOWNING: Was it a verbal acceptance by Mr. McClelland of an offer made by Mr. Seward? --- Mr. Seward told me it had been verbally accepted.

But when this higher offer was received the McClelland's decided not to go on with Mr. Seward's proposition? --- No, I prevented the sale to Mr. Seward's client.

You did? --- I did.

Subsequent to that, but about the same time, did you not have discussions with a Mr. Clark regarding the purchase of this land? --- Yes, Mr. Clark also was interested in buying the land.

He I think was then a director of a development company, Development Company Pty. Ltd.? --- I do not know. He was acting for some company.

You do not know what the company was? Was it Landall Construction? --- I remember the name, I do not know what company he was working for at this stage but it was some proprietary company.

About the same time as you have told us you saw Mr. Seward did he call to see you at your office - Mr. Clarke? --- Yes.

And I think present at that meeting also were Mr. & Mrs. McClelland? --- I am not sure about that.

Did Mr. Clarke discuss with you the purchase of about 3,000 acres for £130,000? --- I think that would be right. It certainly was an advance on Mr. Seward's price.

At that meeting did not Mr. & Mrs. McClelland indicate that Mrs. McClelland would accept £150,000? --- I cannot recollect that.

Did they not indicate they would be prepared to accept from Mr. Clarke's principals a sum somewhat higher than he was offering? Do you remember that? --- No.

The £130,000 was not accepted? --- Nothing was

accepted so far as I am concerned.

MR. DOWNING: Nothing was acceptable to McClelland's at that time? --- Nothing was acceptable to me because the title was in my name as executor.

Leave that for the moment. Was anything acceptable to the McClelland's, leaving aside your objection to the sale? --- I could not say. I do not know what was acceptable to them. I said they could not accept any price at all.

Did they say they wanted to accept this offer of £130,000? --- They could have said that. They could well have said that.

Do you remember whether they said it or not? --- Yes, I think they probably did.

But you said there were difficulties and therefore they could not accept it? --- Certainly. I would not allow them to accept it.

But if you had been prepared to allow them to accept it they would have accepted it? --- I think they probably would have.

Did they indicate that? --- I cannot recollect whether they did indicate it or not. I do not know whether it reached that stage.

HIS HONOUR: Do I understand you would not allow it to be sold at all or you would not allow it to be sold at that price? --- I would not allow it to be sold at all. If I might explain my reason?

Do you mind my asking him his reason?

MR. DOWNING: No.

THE WITNESS: I feel an explanation is called for. They were proposing to sell on the basis of sub-division and no sub-division had been approved by the Town Planning Board and I said in my opinion it was illegal to sell without the consent of the Town Planning Board.

HIS HONOUR: Do you mean a sub-division into

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28th September 1967.

Cross-examination.

(continued)

allotments? --- So that they could retain 500 acres.

HIS HONOUR: A sub-division into large areas? --- Yes.

MR. DOWNING: Your Honour, there is one question I omitted to ask Mr. Medcalf. I wonder if I could ask it now.

HIS HONOUR: Yes.

MR. DOWNING: Mr. Medcalf, under the Will of the late Mr. Spaven it was necessary for the executors to set aside a sum of money to meet some annuities for the beneficiaries. At the time of these discussions had that money in fact been provided by the estate? --- No.

Was it not part of the arrangement with Mrs. McClelland and her brother that some deposit of moneys or investments should be made with you? --- Yes.

What in fact was the arrangement? --- We had made a tentative appropriation to satisfy these two annuity funds but we had used some assets in another company which we did not regard as satisfactory to answer the annuity so we required both beneficiaries before we let out any final moneys on the winding up to deposit with us £10,000 deposit with money or securities.

Was that a condition of yours for transferring this land? --- Yes, we required from her an authority to take out something for some security, for the sum of £10,000 before we paid over. We insisted on handling the moneys on the transfer and we required a deduction from those moneys from each beneficiary.

So Mrs. McClelland had to find not only the £40,000 to pay to the brother but also an additional £10,000 to lodge with the executor before she could take a transfer of this land, is that correct? --- Not quite. We were prepared to transfer the land to her provided the title came back to us and that is exactly what we did.

It would not have been possible for her to

transfer the land to a buyer unless she put up £10,000? --- That is correct.

HIS HONOUR: What was the position regarding the sale of the station at this stage, had money been received? --- That was received almost immediately, Sir.

Almost immediately after death? --- Within nine or 12 months. That went to pay the debts.

That all went to pay the debts. There was no surplus there for the beneficiaries? --- The duties ---

More than absorbed the price of both stations? --- Yes.

Thank you Mr. Medcalf.

THE WITNESS WITHDREW

MR. DOWNING: May it please your Honour, I think the attitude of the Commissioner in regard to this transaction is fairly adequately indicated. I wondered whether perhaps I might call two short witnesses now and then address on the facts?

HIS HONOUR: Certainly.

In the High Court of Australia

No. 3

Appellants Evidence.

Ian George Medcalf.

28th September 1967.

Cross-examination.

(continued)

No. 4

No. 4

Respondents Evidence.

Thomas Scott Plunkett.

28th Sept. 1967.

Examination.

RESPONDENT'S EVIDENCE

THOMAS SCOTT PLUNKETT, sworn.

MR. DOWNING: Mr. Plunkett, I think you are a company director and a builder? --- Yes, Sir.

And you are interested, I think, in land development for building? --- Yes.

Do you reside at 148 Forrest Street, Peppermint Grove? --- Yes, I do.

Some time in 1962 were you in touch with Mrs. McClelland and her husband regarding some land

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No. 4

Respondents Evidence.

Thomas Scott Plunkett.

28th Sept. 1967.

Examination (continued)

at Rockingham? --- Yes.

MR. DOWNING: Do you remember when that was? --- I have notes that remind me that it was in June, July and August.

HIS HONOUR: June, July and August 1962, is that right? --- Yes.

Do you know approximately what date in June you first started these discussions? --- I have recorded one date of the 7th June and the next day I have recorded on notes is 21st.

Where did you have discussions with the McClelland's? --- At their home.

In peppermint Grove? --- Yes, Sir.

What did Mrs. McClelland or Mr. McClelland at these meetings discuss with you? --- My prime interest was in endeavouring to acquire the land.

You say the land - the whole of the land or any part of it? --- My first interest was in the whole of the land. I had no idea what might come out of it. It was indicated to me if they did give consideration to selling it it would be a part of it only but they wanted to keep some of it.

Did they say how much of the land they would be prepared to sell? --- The first indication that I had of it was that they wanted to keep 500 acres leaving, therefore, 3,000 or thereabouts available for sale.

Did Mrs. McClelland tell you what price she hoped to get for these 3,000 acres? --- I have in my notes a price of £40 an acre at one stage and in the latter stages a price of £50 an acre.

How long after the first approach were the later stages reached? --- May I refer to my notes?

MR. DOWNING: Yes. These notes were made at the time, were they? --- Yes. I have here 1st of August, price £50 per acre.

This is the first time £50 is mentioned in your notes, is it? --- Yes.

I think you gave some consideration to finalising the purchase of the blocks? --- Yes, I made one or two suggestions to the McClellands as to terms and date for payment, etc., none of which were acceptable.

CROSS-EXAMINED BY MR. REILLY:

MR. REILLY: Mr. Plunkett, were the conditions that you paid cash at the date of the sale? --- No, I wanted to buy whatever land was available at the lowest possible deposit and the longest terms.

What were the terms?--- On the purchase of this site, five years or 10 years. There was nothing definite in my mind. One had to see what would come out of conversation.

Would it be fair to state that you would sell individual blocks and pay off the vendor as each block was sold? --- There was one suggestion I made.

Is it not correct to say that that was a final proposition that was discussed by you with the McClellands?--- Yes.

MR. DOWNING: I have no re-examination.

HIS HONOUR: You may stay or go as you please Mr. Plunkett.

(THE WITNEES WITHDREW)

In the High Court of Australia

No. 5

Respondents Evidence.

Donald William Clarke

28th Sept. 1967.

Examination.

No. 5

RESPONDENTS EVIDENCE

DONALD WILLIAM CLARKE, sworn.

MR. DOWNING: You live at 8 Davis Crescent, Kalamunda and I think you are a company director? --- Yes.

What company? --- Landall Construction and Development Company Pty. Ltd.

Some time in 1962, Mr. Clarke, did you see Mrs. McClelland and, if so, where? --- I think it may have been in August. Mrs. McClelland came into our office in Murray Street in the old Prince of Wales Buildings.

Did she there see you? --- Yes.

For what purpose did she come? --- She wanted to know whether my company would be interested in buying land at Rockingham.

Did she say what area of land it was? --- Yes, she stated it was approximately 3,000 acres.

Did she indicate in any manner where it was or what it was like? --- She had a little map, if I remember rightly, a rough plan of the land. She indicated the particular area which was apparently available.

And did she say what price she would like to get for this 3,000 acres? --- Yes, I think she said that the --- I cannot be exact on this. I made no notes. As far as I recall she said £50 an acre and she would require a fairly substantial deposit. She did give a date and a time, I cannot remember.

She gave you a time by which she would require the deposit? --- It was a particular date.

HIS HONOUR: Were there any details discussed as to whether the balance was to be paid by instalments or in one sum? --- No. Mrs. McClelland indicated that terms would be available, a deposit with something later.

HIS HONOUR: A deposit and the balance to be paid over a period? --- Yes.

What was your reaction to the proposition? --- I was interested in the land. I subsequently in conjunction with another company, made an offer to them.

Your company deals in land? --- Yes.

What business does your company carry on? --- Primarily house building. We do some dealing.

MR. DOWNING: I think you are described in modern parlance as developers, is that correct? --- Yes.

And in conjunction with another company you were interested. Did you inspect the land? --- Yes, Sir.

Did you again see Mrs. McClelland? --- Yes, I can recall seeing her at her home in Peppermint Grove on one or possibly two occasions.

Did you subsequently at any time make any offer for the purchase of this land? --- Yes, in conjunction with another company we made a joint offer to purchase the land.

At what price? --- £130,000 based on the 3,000 acre proposition.

HIS HONOUR: £130,000 how much is that an acre?

MR. DOWNING: Round about £45 an acre; £43 and a bit.

But it was to be adjusted on the acreage that was ultimately sold? --- Yes.

Do you remember on what date that offer was made? --- No, I do not remember the exact date. The only record I have is in the minutes of my own company where I have reported that on 5th September at a particular meeting that the offer had been made, so it would be prior to that date.

Prior to 5th September? --- Yes Sir.

Was that offer accepted? --- No. I cannot recall

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No. 5

Respondents Evidence

Donald William Clarke

28th Sept. 1967.

Examination (continued)

the dates again, but subsequent to this arrangements were made with Mrs. McClelland to discuss this in her solicitor's office.

MR. DOWNING: Mr. Medcalf's office? --- Yes.

Do you remember how long after the offer was made that would have been? --- No. It was not a long period. I am afraid I cannot recollect the exact time.

Would it have been a matter of weeks or days? --- I think it would be weeks rather than days.

HIS HONOUR: You have said arrangements were made to discuss this in the solicitor's office. There was a discussion in the solicitor's office? --- Yes.

And you mean within a matter of weeks of 5th September the discussion occurred in the solicitor's office? --- Within a matter of weeks of making the offer.

MR. DOWNING: Did you attend at the office of Mr. Medcalf? --- Yes.

Who was present? --- Mr. and Mrs. McClelland were there, Mr. Simpson from Reid Murray Development, who was representing the company.

That was the joint company? --- The joint offer, yes - and Mr. Medcalf.

Was there discussion at that meeting? --- Yes. I am a little hazy on the details. We moved from one room to another.

Was the offer accepted at that meeting? --- My recollection is that not the original offer but a revised offer was acceptable to Mr. and Mrs. McClelland.

What was the amount of the revised offer? --- I cannot really recollect. I think it was £160,000.

It was something in excess of £130,000? --- In excess of the original offer.

HIS HONOUR: That was an offer made by your company and Reid Murray Developments in conjunction?--- Yes.

MR. DOWNING: Mr. Simpson being there representing Reid Murray Developments? --- Yes.

I think your company and Reid Murray subsequently did purchase this land? --- Yes. Here again I cannot really recollect the timing. This is quite a few years ago. We acquired the interest of Markham and Kennedy.

So you did not actually buy it from Mrs. McClelland? --- I am not sure of the legal position. We in effect took over their interest in the contract before settlement was made by Markham and Kennedy.

CROSS-EXAMINED BY MR. REILLY:

cross-examination.

MR. REILLY: You mean your Bungaree Ltd., or whatever this company is; but the transfer suggests Markham and Kennedy acted as your agents for the purposes of stamp duty? --- There was a deposit. Markham and Kennedy had paid a deposit on the land at that stage.

So it would not be true that Markham and Kennedy acted as your agent in negotiating the purchase from Mrs. McClelland? --- They did act as our agents in completing the purchase. At the time they were making it I do not think ---

Let us go back to these offers you made.

HIS HONOUR: I have not quite understood. I understood the witness to say the revised offer was accepted.

MR. REILLY: There were two offers you referred to - one you thought of £130,000 and one of £160,000? --- I know the offer of £130,000 was made. I am not sure of the amount of the second.

Was the first one made in Mr. Medcalf's office? --- No, it had been made previously to that meeting.

In the High Court of Australia

No. 5

Respondents Evidence

Donald William Clarke

28th Sept. 1967.

Cross-examination. (continued)

MR. REILLY: The meeting was called to discuss the £130,000 offer? --- As I recollect it, yes.

What happened to that offer? --- That offer and the revised offer ---

Stick to the £130,000? --- It was rejected.

Why was it rejected? --- I cannot really be sure. I think it was on the matter of price.

But you were in Court this morning, were you not? --- Yes Sir.

You heard Mr. Medcalf say he refused to allow the sale to go through? --- Yes Sir.

Do you agree with that? --- Yes, I do.

It was subsequent to that, was it, that you then made a revised offer of £160,000? --- No, it was prior to Mr. Medcalf refusing to allow any dealing to go through, but the revised offer was accepted.

HIS HONOUR: I have not understood the sequence of events.

MR. REILLY: Neither have I. Do we understand there were two interviews with Mr. Medcalf where two offers were discussed? --- When the original offer of £130,000 was discussed I am not sure whether Mr. Medcalf was present.

HIS HONOUR: Was it at Mr. Medcalf's office?--- Yes, but I am not sure that he was in the office at that time.

And in any event, whoever was present, it was rejected?--- Yes Sir.

Then we move on to the next offer.

MR. REILLY: The revised offer was made, and was this discussed in Mr. Medcalf's office?--- Yes.

HIS HONOUR: At another interview?--- No, at the same time, but we shifted from one office to another.

HIS HONOUR: The same day, same occasion? --- Same occasion, yes.

And to your recollection was Mr. Medcalf present when this second and revised proposal was put forward? --- Whether he was there when it was put forward or not I could not be sure. He was certainly acquainted with the details of that offer at that time.

MR. REILLY: And he then and there refused to allow the deal to go through? --- More or less. I was under the impression at the time that the McClellands were agreeable to accept this revised offer. If I remember rightly, Mr. Medcalf took a telephone call, which he took out of the office and on his return he said that the offer could not be accepted, that the McClellands could not go ahead.

HIS HONOUR: Was this what you meant when you said earlier in answer to Mr. Downing that the revised offer was accepted? You mean you understood it was acceptable? --- Acceptable.

Acceptable to the McClellands, but in fact no contract resulted. It was rejected? --- That is right.

RE-EXAMINED BY MR. DOWNING:

MR. DOWNING: The original offer of £130,000 was made direct to the McClellands at their home, I think you told us? --- Yes Sir.

Thank you, that is all.

HIS HONOUR: You may leave, Mr. Clarke, if you wish, or remain - as you wish.

(THE WITNESS WITHDREW)

HIS HONOUR: That is the case, is it?

MR. DOWNING: Yes Sir.

I would first of all like to clarify what we are discussing, and I assume from the manner in which the case has been presented that my friend ---

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No. 5

Respondents Evidence

Donald William Clarke

28th Sept. 1967.

Re-examination.

(continued)

HIS HONOUR: I should have asked, Mr. Reilly: you have no evidence in reply?

MR. REILLY: No Sir.

HIS HONOUR: Do you wish to call any evidence?

MR. REILLY: No Sir.

No. 6

Judgment of Windeyer J.

8th November 1967.

No. 6

JUDGMENT OF WINDEYER J.

Mrs. D.M. McClelland is a married woman living with her husband and children in Perth. She appeals against an assessment of income tax in respect of the year ended 30th June 1963. Mrs. McClelland (whom I shall call "the taxpayer) had a rich uncle. He died. He left the residue of his estate to her and her brother. As a result they became beneficially entitled in equal undivided shares to an area of some 3,600 acres of land at Rockingham, south of Fremantle. It was apparent that this land would increase in value in the future. Urban population and industry were spreading. The Taxpayer wanted to keep the land with a view to the future. Her brother wanted it sold at once. The taxpayer thereupon bought her brother's interest for £40,000. Having thus become entitled to the entirety of the land, not merely a share in it, she sold off a large part, 3,073 acres, for £153,632. The remainder, about 525 acres, she kept. The part she kept is, per acre, the more valuable land as it fronts Safety Bay Road beyond which lies the water of Warnbro Sound. The Commissioner claims that the transaction by which the taxpayer bought her brother's interest and thereafter sold part of the land

produced for the taxpayer a "profit" brought to tax by s. 26(a) of the Act. The Commissioner assessed this profit as £56,951 ($113,902). I shall say something later about the way in which this figure was arrived at. The primary question is whether the taxpayer is assessable at all in respect of any part of the proceeds of the sale of the 3,073 acres. For the decision of that question it is necessary to describe in more detail the transaction into which the taxpayer entered; and to state what I, having heard the evidence, find she had in mind in doing so.

The taxpayer's uncle, Henry John Spaven, died on 27th September 1958. He left a large estate. The main items were certain shares and other investments, two stations near Shark Bay, and the land at Rockingham. This land had before his death been used by him, or let by him, for agistment of stock and in part for farming. At the date of his death part of it was under crop. By his will and codicils thereto he gave certain pecuniary legacies. Subject to those, he gave the whole of his estate to trustees upon trust to convert it (with power to postpone conversion), and to hold the proceeds upon trust to set aside two sums of £15,000 and £10,000 respectively and pay the income therefrom to two named beneficiaries for their lives. Subject to these provisions, he directed his trustees to hold the capital and income of his estate upon trust for his nephew, Reginald Spaven, and his niece (the taxpayer) "as shall survive me and if both survive me then as tenants in common in equal shares." The trustees of the will are Messrs. Ian George Medcalf and Brian Simpson, solicitors, of Perth. Probate was granted to them. Mr. Medcalf gave evidence before me explaining the course of events in the administration of the estate.

The taxpayer would have been glad if some arrangement could have been made for the two station properties to be kept and worked by her and her brother as partners. But that was impossible for two reasons. Her brother would not agree; and it was necessary to realise the stations to pay the testator's debts and the duties on his estate. These absorbed the

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proceeds of the sale of the stations. By 1962 the estate had been so far administered that debts, funeral and testamentary expenses had been paid, and the trustees had set aside investments which it was thought would probably be enough to provide two sums of £15,000 and £10,000 to meet the two life interests.

The residue had been substantially ascertained. It seemed certain that the Rockingham land or most of it would form part of the residue. Therefore, although the legal title was still in the trustees it was recognised that the taxpayer and her brother would be entitled in equal shares to the proceeds of the sale of this land, if the trustees were to sell it pursuant to the direction for conversion in the will - or alternatively to have it as tenants in common in equal shares - unless it proved necessary to sell it to make up the two funds for life tenants. Therefore the taxpayer and her brother were both interested in the disposition of this land. They dealt with one another on the basis that they had equal interests in it as tenants in common in equity.

The taxpayer had from soon after the testator's death been well aware of the value of this land and of the prospect that it would increase in value. She was keenly interested in turning to account to the best advantage of herself and her family what her uncle had left her. To this end she wished that the land should not be sold, but that it should be retained against a rise in its market value. Her brother had different views. He wanted his share of the estate in money, and he did not want to wait for it. He made that clear at a meeting which, in May 1962, he and the taxpayer had with the trustees to discuss what should be done about the land. At this meeting, or at some meeting at about that time, he informed the taxpayer that he had a buyer who was prepared to pay him £40,000 for his interest in the land. He told the taxpayer that this buyer would be willing to buy her share also for the same sum. He did not say who the prospective buyer was. The taxpayer was not willing to sell her share. Her main purpose throughout was to keep the land for subdivision later.

She had suggested a partition, but to this her brother would not agree.

Her brother's statement that he intended to sell his share for £40,000 was, she said "a bombshell". She was concerned that she might find herself a tenant in common with someone unknown to her whose ideas about how to deal with the land would not be acceptable to her. But she certainly was not willing to sell out her interest for £40,000. As a result of inquiries which she and her husband made she had high hopes that in time she would get much more from her share than that. She saw a way out. Her brother had said he proposed to sell his share for £40,000. If she could somehow raise that amount and buy his share herself, she would be in command of the future and could deal with the land as and when she liked. But her brother wanted cash. How was she to raise £40,000? She was not without some means. Her income tax return shows receipts of some £1,500 from dividends. But she had, she says, no ready money. She conceived the idea that she might obtain all the money she needed by selling in advance part of what would become hers when she bought out her brother. She therefore asked him to give her an option to buy his share. He agreed, and on 26th July 1962 Mr. Medcalf prepared and the brother signed a document addressed to the taxpayer in the following terms:

> "I hereby agree to give you an option to purchase my ½ share in Rockingham land of the Estate of the late H.J. Spaven for £40,000 cash, option to be exercised in writing by 15.9.62 at 5 p.m.
>
> Deposit 10% to be paid on exercise of option, balance on transfer of title."

Thereafter the taxpayer, acting throughout in consultation with her husband, had a plan made for the subdivision of the land into three portions which were later described, in a plan approved by the Town Planning Board, as portions 4, 5 and 6. Portions 4 and 6, having a total area of 525 acres, were the parts which the taxpayer wished to keep, being nearest to the beach where land was most likely to increase in

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value. Portion 5, 3,073 acres, was the part which she proposed to sell. Only a comparatively small part of it fronts the Bay Road. Most of it is well away from the water, That a buyer could be found for it was not in doubt. The Taxpayer had during this period been approached by several land developers interested in this land. Some of their proposals were unacceptable, as they were to purchase on terms, whereas she would need cash to pay to her brother. But the prices which they suggested shewed that her plan was feasible. Early in September she had an offer of £40 an acre for the part she proposed to sell. This would have been acceptable to her. But the title to the land was still in the trustees and Mr. Medcalf would not agree. The proposed sub-division had not then been approved by the authorities.

Mr. Medcalf considered the trustees ought not to assent to any sale until approval was obtained. Moreover he still had to be assured that the two life interests were secured. That proposal therefore fell through. However, later on the sub-division was approved and the trustees were agreeable to the land being sold provided that the taxpayer and her brother each deposited £10,000 with them. They required this as without it they were uncertain whether investments they had set aside to provide the two sums for life interests would prove sufficient. They were not willing to let the Rockingham land go until these amounts were provided.

On 10th September the taxpayer wrote to her brother as follows :

> "I hereby exercise the option the subject of your memorandum of 26/7/1962 to purchase for £40,000 your half share in Rockingham land of the Estate of the late H.J. Spaven. Herewith £4,000 being 10% deposit as required."

It seems probable that at this date the taxpayer knew, or had at least good grounds for thinking, that she could get perhaps £50 per acre for portion 5. She had had the offer of £40

per acre, and later a suggestion of £45 per acre. When she exercised the option she was in no doubt that it was to her benefit to do so. She in fact sold portion 5 for £50 per acre. The contract of sale is dated 5th October. The purchasers paid a deposit of £50,000, the balance to be paid on the registration of the transfer. The taxpayer paid her brother £40,000 out of the £50,000 she thus received; and she deposited £10,000 with the trustees as they required. The transaction was then completed by the trustees transferring to her, with the assent and at the direction of her brother, all their right, title and interest in the Rockingham land. She thus became empowered to convey the land to the purchaser pursuant to her contract.

The taxpayer had thus carried into effect the plan she had formed. She was the owner of a considerable part of the land which she could hold with a view to selling it in the future, and she had done very well by her sale of portion 5.

As I have said, the Commissioner's case is that the plan which she had carried into effect yielded her a "profit " which by virtue of paragraph (a) of s. 26 of the Income Tax Assessment Act was part of her assessable income.

The concept of profit is one of the more debateable aspects of economic theory. But from a practical point of view when a thing is bought for sale and afterwards sold the difference between on the one hand the costs of acquisition and of selling and on the other the price realised is profit. This is reflected in s. 26 which as far as relevant reads as follows :

> "26. The assessable income of a taxpayer shall include -
>
> (a) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale, or from the carrying on or carrying out of any profit-making undertaking or scheme."

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This provision of the Act brings to tax profits which because of the singular or isolated transactions out of which they arose might not otherwise be income of the taxpayer. The words of the paragraph are derived from expressions used in this Court by way of explanation of the nature of profits of an income character, which are taxable, as distinct from capital appreciation, which is not. But, as Dixon J. pointed out, the words having been adopted by the Legislature and inserted in the statute, are now to be applied more literally: see Premier Automatic Ticket Issuers Ltd. v. Federal Commissioner of Taxation (1933) 50 C.L.R. 268 at p. 298. Unless the words of the enactment strictly and literally read describe the present case the taxpayer's appeal must in my opinion be upheld. The Commissioner points to no other provision by which he can bring to tax any part of the price the taxpayer received for the land she sold.

Turning then to the paragraph of the statute: It covers two different things, expressed as alternatives - one, profits made by the sale of property bought for sale; the other, profits made by carrying into effect some profit-making undertaking or scheme. The first is expressed as "a profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit-making by sale." Was there such a profit here? I think there was not. The taxpayer had, by the bounty of the testator, acquired an undivided share in the land. This was given to her. It was not acquired by her for the purpose of profit-making. She acquired the other half share by purchase. She did this so that she might as owner of the entirety sell it to her own advantage. She bought an undivided share. She sold an entirety, portion 5. The first part of s. 26(a), that is the part quoted above, applies to a transaction whereby a taxpayer sells any property he acquired for the purpose of sale. It applies whether he sells that property as a whole or in parts, and whether when he sells he sells to one buyer or to several buyers as joint tenants or tenants in common. But, as I read it, it does not apply when what is sold is essentially different in kind from the thing acquired. It would apply in

the case of a taxpayer A who, by purchasing from two tenants in common, B and C the share of each, acquired Blackacre for the purpose of thereafter selling it at a profit. There the thing acquired for the profit-making purpose was Blackacre. That is not this case. I cannot accept the proposition, put for the Commissioner, that when Mrs. McClelland sold portion 5 she sold two separate shares in it, hers and her brother's. She did not. She was not selling separate shares. The shares had disappeared into a unity. She sold an entirety.

I turn then to the alternative in the enactment. Was there "a profit arising from the carrying on or carrying out of any profit-making undertaking or scheme" The taxpayer undoubtedly had a programme or plan of action. She can certainly be said to have engaged in an undertaking or scheme designed by her to enable her to turn to the best advantage for herself what she had got from her uncle. But was it a profit-making undertaking which produced a profit within the meaning of the Act? As I understood the argument for the Commissioner portion 5 was sold by the taxpayer pursuant to an undertaking or scheme; and the price realised included an ascertainable element of profit attributable to her having purchased her brother's share. I doubt whether this proposition is really different from that advanced under the first alternative in s. 26(a).

It seems to me that, whatever part of s. 26(a) the Commissioner relies on, his case must really be that whenever the taxpayer sold, or in the future sells, any part of the land a profit arose, or will or may arise, forming part of her assessable income. The sale of portion 5 should not stand in any special position. That it was sold when it was so that the taxpayer might thereby obtain moneys to pay her brother seems to me immaterial. Would it have been different if she had paid her brother otherwise and have held it for sale later? Certainly she did well out of this sale. She may do well out of selling the land which remains. To turn a gift into money is not to make a profit, but to realise a capital asset. To hold a gift for a time until it becomes enhanced in value, and then to sell it, is still only to realise a capital asset; a better price got by

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waiting is not a profit of an income character. The owner of a capital asset which he proposes to sell may expend money to increase its market value. I do not think that simply because he does so he can be said to be engaged in a profit-making scheme from which a taxable profit arises. For example, the owner of premises let to a tenant may pay money to the tenant in consideration of his surrendering his term. By doing so he may get a better price for the freehold. Or a landowner proposing to sell land not readily accessible from a road may acquire a right of way or an adjoining property and thus make his land more valuable. A multitude of similar instances can be readily imagined. Probably such cases may sometimes depend upon matters of fact and degree. A man might perhaps buy something and then sell it along with something he already had, and thus derive a taxable profit from the sale of what he bought. But that it seems to me is not this case. The taxpayer bought her brother's interest in the Rockingham land so that she might realise her plan of retaining her interest under her uncle's will as far as possible in the form of land. The sale immediately of portion 5 was part of her plan. It was necessary to achieve her object. Looking at her plan as a whole I do not think that it was in the relevant sense "a profit-making scheme." I am satisfied that her dominant purpose throughout was to ensure as far as she could that the land would not be sold until some time in the future and that she would be in control of it.

For these reasons I think that no part of the proceeds of the sale of portion 5 should have been included in the taxpayer's assessable income.

I should add that even if I thought there was a profit brought to tax by s. 26(a), I could not accept the Commissioner's computation of it as £ 56,951 ($113,902). I shall explain why I say so.

On this aspect the case has some peculiar features. The taxpayer in her return of income said nothing at all about the Rockingham land except that she claimed as a deduction £305 for

rates which she had paid to the Rockingham Road Board. The Commissioner made his own enquiries. When forwarding his notice of assessment he sent an adjustment sheet shewing two items as additions to the taxable income as returned. The first was described as "profit arising from the sale of Rockingham land £56,951". (The second was a sum of £31, a deduction of certain education expenses claimed but not allowable. It is not in dispute). On 15th August 1966, that is within a few days of the issue of the assessment, the taxpayer's solicitors wrote to the Deputy Commissioner as follows :

"Dear Sir,

Dolores H.McClelland - Income Tax
File No. 230845.

We have instructions to lodge an objection on behalf of the abovenamed against Assessment 57398 for the purposes of which the taxable income was increased in respect of "assessable income from the sale of portion of Cockburn Sound Location 16 - lot 5" by $113,902. We find ourselves in some difficulty as we do not understand how this figure was arrived at. Would you please let us know?

Yours faithfully,"

(The land referred to is the Rockingham land). The Commissioner did not then, nor I am told did he at any time thereafter, reply to this letter. This seems to me an unusual way for the Crown to treat a subject. At least I hope it is unusual; for it seems to me to have been unfair. The Commissioner was not obliged to tell the taxpayer the basis on which he calculated the figure which he added to her taxable income. But he was not obliged to refrain from doing so. Certainly he was not required to refrain from replying at all to what seems a reasonable request in a courteous letter. There are cases in which the Commissioner must make a more or less arbitrary assessment, leaving it to the taxpayer to dispute it if he can. But I can see no reason why in the present case the Commissioner should not have told the taxpayer's solicitors the method by which he assessed what

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he said was a "profit". Cases such as Trautwein's Case (1936), 56 C.L.R. 63 seem to me far removed from this case.

The taxpayer's solicitors having after ten days not had a reply to their letter sent a notice of objection which, after a reference to the assessment, reads as follows:

> "The taxpayer claims that the said assessment was excessive erroneous and contrary to law and should be reduced in that for the purposes of the assessment there was wrongly included in the taxable income the sum of $113,902 described as assessable income from the sale of portion of Cockburn Sound Location 16 - Lot 5.
>
> The grounds upon which the taxpaper relies are that the whole of the sale price of the said land was a capital receipt and no part thereof constituted assessable income of the taxpayer."

It was impossible to make an alternative objection to the actual sum of $113,902 for it was impossible for the taxpayer to know how the Commissioner had arrived at it.

The objection made was not allowed. The taxpayer thereupon requested that the objection be treated as an appeal and forwarded to this Court. It is therefore this objection which I have to consider.

Counsel for the Commissioner did inform counsel for the taxpayer before the case came on for hearing before me of how the figure in question was calculated. Nevertheless he felt obliged on his instructions to support a proposition that the figure was not challengeable. The assessment, he said, was a "default assessment" made pursuant to s. 167(c). He relied upon the requirement of s. 185 that the objection must state the grounds relied upon "fully and in detail". He pointed to s. 190 which provides that the taxpayer is limited to the grounds stated in his objection, and that the burden of proving the assessment is excessive

is on the taxpayer. While supporting the Commissioner's view that these provisions prevented my examining the manner in which the figure was arrived at, counsel for the Commissioner did, at my request, explain this to me, as he had, in my view quite properly, explained it to counsel for the taxpayer. The process of calculation was as follows : The Commissioner obtained valuations of the freehold of portions 4, 5 and 6, the values being assessed as at 10th September 1962, the date the taxpayer exercised the option. Portion 4 was valued at $180,000: portion 5 at $276,630: portion 6 at $108,000. This makes a total of $564,630, as the value of the whole of the Rockingham land. The fractional value of portion 5 was thus $\frac{276,630}{564,630}$. Applying this fraction to $80,000, the amount the taxpayer paid her brother for his half interest, yields $39,730. This sum was then assumed to be the part of the price attributable to the purchase of a half interest in that part of the land which was later to be separated from the rest as portion 5. The price which the taxpayer got when she sold portion 5 was, after deducting the costs of selling, found to be $307,264. Half of this, namely $153,632, was then assumed to represent the interest which the taxpayer had bought from her brother. Subtracting $39,730, the price it was assumed she had paid for this interest, the result is $113,902. Therefore this is said to be profit made by the taxpayer by buying and selling a half interest in portion 5.

This seems to me a highly artificial and most questionable proposition. Of course, if the trustees of the will had sold the Rockingham land, or any part of it, the taxpayer and her brother would have been entitled to the proceeds in equal shares (subject to any prior claims in the administration of the testator's estate). But when, having bought her brother's interest, the taxpayer as beneficial owner of the land sold a part of it, why should half of the price she got be regarded as the proceeds of the sale of something she had bought from her brother? To repeat what I have already said, what she bought was the undivided share of a tenant in common in the whole of the land: what she sold was the entirety of a part of what had become hers as a tenant in

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severalty. The market value of the share of a tenant in common in vacant land is, generally speaking, considerably less than an amount calculated by reference to his fractional interest in the freehold value of the entirety. That is well recognised as a general proposition. It applies emphatically in the case of a speculator buying vacant land with a view to realisation. The only evidence of the market value of an equal undivided share in the Rockingham land on a cash sale basis is that the taxpayer's brother said he had been offered £40,000 ($80,000). Of course to the taxpayer her brother's share was worth much more than it would have been to a stranger; and no doubt she was fortunate that he was willing to sell it to her for the price which he said he had been offered by a stranger. It was worth more to her than to a stranger simply because its acquisition made her the sole owner of the land. But it is, in my view, still a fallacy to assume that the difference between the price paid for an undivided half share in land and half the price realised upon a sale of the land is profit arising from the buying of the half share.

I should add that I doubt the validity of another aspect of the Commissioner's calculation. The figures on which he relies as his starting point are freehold valuations of portions 4, 5 and 6. Obviously they are not comparable on the basis of a uniform value per acre, because 4 and 6 are per acre more valuable than 5 by reason of their situation; and I do not think that the criticism which counsel for the taxpayer made by comparing the valuations on the basis of area is valid. But it is right to assume the values of the interest of a tenant in common in the separate portions to be proportionate to the freehold market value of each portion? It may be so. I do not say that it is not, although it seems to me a doubtful assumption.

As in my opinion the taxpayer's appeal succeeds on the major issue, I do not have to say what course I would take if the only question were whether the figure of $113,902 should stand. I should say that Mr. Reilly, for

the taxpayer, questioned it only in one respect. Assuming that he was not confined by the terms of the notice of objection, he said that the valuations which the Commissioner used could be seen to be mistaken because of the variations in the value per acre of each portion, and because the value put upon portion 5 was $276,630, whereas it actually fetched $ 307,366. But Mr. Downing, for the Commissioner, rightly said that the purpose of the valuations was only to determine relative values of portions 4, 5 and 6, not to determine their absolute values. The taxpayer thus did not successfully challenge the Commissioner's calculation. The Act puts upon an appellant taxpayer the burden of shewing that the assessment is excessive. Section 199 provides that the Court hearing the appeal may make such order as it thinks fit and may confirm, reduce, increase or vary the assessment. I do not accept the proposition that if the Commissioner had given no information to the taxpayer or the Court of how he arrived at the amount in question, the Court would have been bound to dismiss the appeal and confirm the assessment. That question does not arise, however, because I was told how the amount was calculated. Knowing that, is the Court to dismiss an appeal and confirm an assessment although it appears to have been made on a wrong basis, simply because the taxpayer has not challenged it or has had no opportunity to do so? I think not. If I had not come to the conclusion that the taxpayer should succeed on the main issue, I would have been disposed to direct the Commissioner to reconsider the manner in which he had determined the profit said to arise from the taxpayer's transaction in respect of the Rockingham land. Section 199 would, I think, enable such an order to be made.

I set the assessment aside and direct the Commissioner to re-assess the tax payable by the taxpayer without including in the assessable income any part of the proceeds of the sale by her of any part of the land at Rockingham which formed part of the estate of Henry John Spaven, deceased.

The Commissioner must pay the taxpayer's costs.

In the High Court of Australia

No. 7

Order allowing Appeal.

8th November 1967.

No. 7

ORDER ALLOWING APPEAL

THIS APPEAL coming on for hearing on the 28th day of September 1967 at Perth UPON READING the documents submitted as evidence AND UPON HEARING the evidence of the witnesses called for the Appellant and the witnesses called for the Respondent AND UPON HEARING Mr. H.V.Reilly of Counsel for the Appellant and Mr. E.F. Downing Q.C. with whom was Mr. C.Zempilas of Counsel for the Respondent and the Court having reserved judgment thereon and the same standing for judgment this day at Sydney IT IS ORDERED that the appeal be and the same is hereby allowed and the assessment appealed from be set aside and it is directed that the Commissioner of Taxation do assess the income tax and social services contribution payable by the Appellant in respect of the income derived by her during the year ended the 30th day of June 1963 without including in the assessable income any part of the proceeds of sale by the Appellant of any part of the land at Rockingham which formerly formed part of the estate of Henry John Spaven deceased and THIS COURT DOTH FURTHER ORDER that the Appellant's costs of the appeal be taxed and paid by the Respondent to the Appellant AND THIS COURT DOTH FURTHER ORDER that when fourteen days have elapsed from the last day fixed by Order 70 Rule 6 of the High Court Rules for lodging an Appeal from this order, the exhibits in the appeal be handed out to the person who produced it or them or to a solicitor authorised by such person to receive it or them or to the solicitor for the party who then having the possession or custody of the same, tendered the exhibit or exhibits upon filing a proper acknowledgment of such receipt.

BY THE COURT

G. Staples

DISTRICT REGISTRAR

THIS ORDER was taken out by Dwyer & Thomas of 49 William Street Perth Solicitors for the abovenamed Appellant.

No. 8

In the Full Court of the High Court of Australia

No. 8

Notice of Appeal

29th November 1967

NOTICE OF APPEAL

TAKE NOTICE that the High Court of Australia will be moved by way of appeal at the First sittings of the Court in its Appellate jurisdiction appointed to be held at Perth after the expiration of six weeks from the institution of this Appeal by Counsel on behalf of the abovenamed Appellant or so soon thereafter as Counsel can be heard for an order that the whole of the Judgment and Order made by the Right Honourable Sir William John Victor Windeyer K.B.E., C.B., D.S.O., on the 8th day of November 1967 allowing with costs the Appeal of the abovenamed Respondent against the assessment of Income Tax and Social Services Contribution dated the 6th day of August 1966 in respect of the income of the abovenamed Respondent during the year ended 30th June 1963 and setting the assessment aside and directing that Appellant re-assess the Respondent in respect of that year be reversed and set aside and that in lieu thereof it be ordered that the said appeal be dismissed with costs and that the said assessment be confirmed and for an Order that the abovenamed Respondent do pay to the abovenamed Appellant his costs of and incidental to the proceedings before this Appeal. The grounds of this Appeal are as follows:-

1. The said Judgment and Order of the learned Judge was wrong in law.

2. The said Judgment and Order of the learned Judge was against the evidence and the weight of the evidence.

3. As to Lot 5 of the land at Rockingham the learned Judge was wrong both in law and in fact in holding that none of the proceeds received by the Respondent from the sale of the said land formed part of her "assessable income" under thesaid Act.

4. That the learned Judge was wrong both in fact and in law in holding that the Respondent did not acquire the interest of her brother REGINALD JOHN SPAVEN in the land at Rockingham for the purpose of profit making by sale within the meaning of

In the Full Court of the High Court of Australia

No. 8

Notice of Appeal

29th November 1967 (continued)

Section 26(a) of the said Act, or that in acquiring from the said REGINALD JOHN SPAVEN his interest in the said land and in subsequently selling portion thereof the Respondent was not carrying on or carrying out a profit making undertaking or scheme within the meaning of that Section.

5. The learned Judge should have held that the purpose of the Respondent acquiring the interest of her brother REGINALD JOHN SPAVEN in the Rockingham land was to dispose of her own and her brother's former interest therein at profit.

6. The learned Judge should have held that the acquisition by the Respondent of her said brother's interest in the said land and her subsequent disposal of part of such land was carrying on or carrying out of a profit making undertaking or scheme by the Respondent within the meaning of Section 26(a) of the said Act.

7. The learned Judge should have held that such part of the profit derived from the sale of the said Lot 5 as was included by the Appellant in his assessment under appeal was assessable income of the Respondent and properly included by the Appellant in such assessment.

8. The learned Judge should have held that on the evidence the Respondent had not discharged the burden of proving that the assessment was excessive.

9. In any event the learned Judge erred in ordering that the assessment be set aside. He should have ordered that it be remitted to the Appellant for amendment in accordance with his decision.

10. The said assessment issued to the abovenamed Respondent on the 6th day of August 1966 was a correct assessment and made in conformity with the said Act and the learned Judge should have so held.

DATED the twentyninth day of November 1967

H.E. Renfree

Commonwealth Crown Solicitor
and Solicitor for the Respondent.

To the Respondent

And to her Solicitors,
Messrs. Dwyer & Thomas,
Solicitors,
49 William Street,
Perth, W.A.

In the Full Court of the High Court of Australia

No. 8

Notice of Appeal

29th November 1967 (continued)

This NOTICE is filed on behalf of the Appellant by HAROLD EDWARD RENFREE of Cecil Building, 6 Sherwood Court, Perth, Commonwealth Crown Solicitor and Solicitor for the Appellant.

No. 9

No. 9

REASONS FOR JUDGMENT OF BARWICK, C.J.

Reasons for Judgment of Barwick, C.J.

28th February 1969

The detailed facts of this matter are fully set forth in the reasons for judgment of my brother Windeyer, from whose order allowing the respondent taxpayer's appeal the appellant Commissioner now appeals. The basic structure of the somewhat unique state of facts disclosed by the evidence was that the respondent inherited an interest in common with her brother under the will of their uncle in some 3,600 acres of land at Rockingham near the City of Fremantle in Western Australia. But the trustees of the deceased estate were quite properly unwilling to convey the land to the respondent and her brother until some £20,000 was provided to secure the interests of other persons under the will. The respondent's brother wanted to realise upon his interest immediately and claimed to have a potential buyer for it for the sum of £40,000. The respondent was anxious not to sell her inheritance or the land but, on the contrary, desired to maintain them against the future when she thought the land would become much more valuable, particularly if then sold in subdivision. She did not want a stranger as her co-tenant, and therefore desired, if her brother did not remain her co-tenant, to be in sole control of the land. She was prepared for the land to be partitioned, thus giving her sole control of what would then be hers but to this her brother would not agree.

In the Full Court of the High Court of Australia

No. 9

Reasons for Judgment of Barwick, C.J.

28th February 1969 (continued)

Thus, to achieve her purpose, she must buy out her brother: but she lacked the ready money to do so. To effect her overall purpose of retaining at least the more valuable portion of the land in her sole control, she conceived a plan which involved the purchaser of her brother's interest at his price by means of money obtained by the sale of some of the less valuable land. His Honour's finding as to her purpose in conceiving and carrying on this plan was:

> "I am satisfied that her dominant purpose throughout was to ensure as far as she could that the land would not be sold until some time in the future and that she would be in control of it."

The formal steps to carry out the plan consisted of, first, the obtaining of an option to buy the respondent's brother's interest in the land. Second, to obtain local government approval to subdivide the land so as to enable a sale to be made of what I have called a less valuable part of it. Third, the exercise of the option to purchase the brother's interest. Fourth, the sale of a subdivided portion of the land on terms that the usual percentage of the price be paid as a deposit. And, finally, the completion of both transactions. The deposit on the sale of the land was the sum of £50,000 which covered the purchase price of the brother's interest in the land and the respondent's share, £10,000, of the sum required by the trustees before conveyance of the land. Thus the respondent retained the entirety in the more valuable portion of the land in which she inherited an equal interest in common with her brother, and received £153,632, the price of the land she had sold out of which she had paid her brother £40,000 and the trustees £10,000.

My brother Windeyer decided that no part of the money received by the appellant as the consideration for the sale of portion of the land was taxable as a profit arising from the sale of property acquired for the purpose of profit-making by sale within the meaning of sec. 26(a) of The Income Tax & Social Services Contribution Assessment Act, 1936-1963 (the Act). In my opinion, his Honour was plainly right in this conclusion. The respondent did not purchase her brother's

interest with a view to its resale, and, in my opinion, she did not in any significant sense resell it. Upon her acquisition of it, no doubt her own interest in the land was enlarged so that she became solely entitled to the land. Further, though I do not think it matters, there is nothing in the evidence to establish that the interest in common of her brother was worth any more in the market than the sum for which she acquired it, though doubtless the appellant thought her interest worth more than that sum. But it cannot be doubted that upon her acquisition of it her own interest in the land not merely became larger in extent but became very much more valuable. She undoubtedly made a profit by getting in her brother's interest but that was not a taxable profit. The profit consisted of the increase in value of her inheritance, the entire interest in the land being much more valuable than the sum of values of the separate interests in common, though, of course, no longer capable of being regarded as consisting of two parts.

My brother Windeyer also decided that no part of the money received by the respondent from the sale of the portion of the land she did sell was profit arising from the carrying on or carrying out of a profit-making undertaking or scheme. And, in my opinion, with due respect to those of a contrary opinion, in this his Honour was also right. Indeed, for my part, I am unable to see how consistently with the earlier finding and the disclosed facts there could be in this case a profit-making scheme. Were it not that other views are entertained, I would be prepared fully to endorse his Honour's reasons for decision on the footing that the finding as to the respondent's purpose, which I have quoted, was not read, as I do not read it to be, as a paramount consideration in reaching the conclusions at which his Honour arrived. For those reasons, I would be content to dismiss this appeal. However, in the circumstances, I shall shortly explain why, in my opinion, there was no profit arising from the carrying on or carrying out of a profit-making scheme.

Before doing so, I should observe that it was not suggested in argument that the proceeds of the sale of the land were income according to ordinary notions. But I shall advert to that aspect of the

In the Full Court of the High Court of Australia

No. 9

Reasons for Judgment of Barwick, C.J.

28th February 1969 (continued)

matter. In White v. The Federal Commissioner of Taxation (1968) 43 A.L.J.R. 26, the Court dealt with a case in which land not purchased for resale was subsequently adventured as the capital of a business of timber extraction and sale. What I then said is applicable, in my opinion, to the present situation. The realisation of an inheritance even though carried out systematically and in a businesslike way to obtain the greatest sum of money it will produce does not, in my opinion, make the proceeds either profit or income for the purposes of the Act. But, if the inheritor adventures the inheritance as the capital of a business, for example, of land jobbing or developing, the income of that business will be taxable, not, in my opinion, under sec. 26(a) but according to ordinary concepts of income. No part of the value of the inheritance will be deductible in determining that income. The inheritance is then but the capital of the business. The point at which what was inherited or acquired not for resale so becomes the capital of a business may be at times difficult of identification. But, in my opinion, there is no difficulty in this case in deciding that the respondent did not at any time make the land or her interest in it the capital of a business of land jobbing or developing. She no doubt resolved that she would realise the land to the best advantage by selling it in parcels. But neither her delay in selling the land nor her sale of it in subdivision, though each would increase the amount of money she would receive for the land, could be said in a relevant sense to result in a profit to her, nor make her realisation of the land a business so that the gross returns of the realisation became income in the ordinary sense of that word.

What I have so far said in reality disposes of the submission that the respondent was engaged in carrying out a profit-making scheme. I am unable to conceive of a profit in the relevant sense in circumstances such as those with which we are here dealing which does not represent a surplus over cost. The respondent had not acquired her inheritance nor could it be said to have cost her any sum of money. I am quite unable to accept the Commissioner's submission that a cost of the land sold can be worked out by valuation of the interests in the land or of the land itself. His attempt to

do so which is reflected in his Honour's reasons was, in my opinion, not only unconvincing but lacked commercial reality. Clearly the sum paid to her brother was not the cost of the land sold. It was of course the only disbursement by the respondent in respect of her ownership of the entirety in the 3,600 acres: and, as I have said, its disbursement brought the respondent a profit, namely, the enlargement of her interest in the land. But that profit was clearly not taxable. If it had been, the amount of the profit could have been determined by valuation because it was the increase in value of the respondent's interest in the land which was the profit. Thereafter, having the ownership of the entirety in the land, her sale of the portion was, in my opinion, but a realisation of part of her asset. It would not matter in this connection, in my opinion, whether that realisation was in anticipation of obtaining title to the whole of the land, or occurred subsequently at any interval of time. Whenever it happened it would be no more than a partial realisation of a capital asset. Nor, in my opinion, can it matter that there was an overall plan which included the acquisition of the brother's interest in the land and the sale of part of, or for that matter the whole of, the land after subdivision in compliance with the requirements of the appropriate authority. Given that the profit represented by the enlargement and the increase in value of the appellant's interest in the land is not taxable, I can find no basis for saying that the sale of the asset thus acquired yields a profit, or that the plan of action I have described was a profit-making scheme. At best it was, in my opinion, no more than a scheme or plan to realise the enlarged interest in the land to the best advantage. It was a money-making scheme or plan but not, in my opinion, a profit-making scheme or undertaking.

Before parting with the matter, I should observe that the purpose of the respondent in formulating and carrying through her plan does not, in my opinion, control the result of this case. No doubt being found to be as his Honour expressed it, that purpose does not support the view that the respondent had decided to carry on a business and to employ therein the land or some part of it as capital. But, on the other hand, if in truth the facts of the case had established that she had

In the Full Court of the High Court of Australia

No. 9

Reasons for Judgment of Barwick, C.J.

28th February 1969 (continued)

engaged in a business or the existence of a profit-making scheme within sec. 26(a), the tenure of the stated purpose would not have prevented the taxation of the income of the business or the profits arising from carrying out the scheme as the case may be.

For these reasons, I would dismiss this appeal.

No.10

Reasons for Judgment of Kitto, J.

28th February 1969

No. 10

REASONS FOR JUDGMENT OF KITTO, J.

In assessing the income tax and social services contribution payable by the present respondent in respect of income derived in the year ended 30th June 1963, the Commissioner included as part of the respondent's assessable income an amount of $113,902 which had found no place in the respondent's return of income for that year. The only explanation which the Commissioner offered for the inclusion was in a description of the amount, in an adjustment sheet which accompanied the notice of assessment, as "profit arising from the sale of Rockingham land £56,951."

A request by the respondent's solicitors to be allowed to know how the figure had been arrived at, reasonable though it was and courteously expressed, met with no response. When ten days had elapsed, a notice of objection was lodged claiming that the assessment was excessive and contrary to law and should be reduced, in that for the purposes of the assessment the whole of the sale price of the land sold at Rockingham was a capital receipt and wrongly included as assessable income. The grounds as stated were that the whole of the sale price of the land sold was a capital receipt and that no part of it constituted assessable income of the respondent. The objection was disallowed, and the respondent appealed to this Court. She

obtained an order upholding the appeal, setting aside the assessment, and directing the Commissioner to assess the tax without including in her assessable income any part of the proceeds of sale of any part of the Rockingham land. From that order the Commissioner appeals.

The notice of objection described the land that had been sold as Lot 5 of Cockburn Sound Location 16, and the order referred to it as being part of the land at Rockingham which formerly formed part of the estate of Henry John Spaven deceased. Henry John Spaven was the respondent's uncle. At his death, which occurred on 27th September 1958, he owned land within Cockburn Sound Location 16, and the Lot 5 that is referred to is a part of what he owned there. By his will as modified by codicils he bequeathed certain pecuniary legacies, forgave a certain debt, and subject to those dispositions he devised and bequeathed the whole of his real and personal property to his trustees upon trust to convert it into money, out of the moneys so arising and his ready moneys to pay his funeral and testamentary expenses, debts and probate and estate duties, and to invest the residue of such moneys. The investments and such portions of his residuary estate as should for the time being remain unconverted (all of which he referred to as his trust estate) he directed should be held upon trusts to set aside £15,000 and pay the income therefrom to a Miss Hoult, to set aside a sum of £10,000 and pay the income therefrom to a Mrs. Burns, and subject as so provided to hold the capital and income of his trust estate (in the events which happened) upon trust for his nephew Reginald Spaven and his niece the respondent as tenants in common in equal shares. Reginald Spaven was the respondent's brother.

By May, 1962, all the debts, funeral and testamentary expenses and duties had been paid or were about to be paid, and the trustees had set aside certain investments as a tentative appropriation to provide the sums of £15,000 and £10,000 in accordance with the will; but they considered that these investments were not altogether satisfactory for the purpose and accordingly they had yet to complete the setting aside of the two funds. At a conference with the respondent and her brother in

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No. 10

Reasons for Judgment of Kitto, J.

28th February 1969 (continued)

that month, they said that because of "administration problems" - an expression which seems to have referred to the completion of the setting aside of the two funds and the obtaining of necessary official approvals to a mode of subdivision - any sale of the Rockingham land would need to be deferred for another three or four months. The brother, who had wanted an immediate sale of the land and a distribution of the proceeds, then disclosed that he was considering a sale of his interest in the land to a stranger for £40,000. He suggested that the respondent might sell her interest at a similar price, but this she was unwilling to do. She foresaw that at least a part of the land, facing a road called Safety Bay Road and near to a beach, would become in time very valuable as an area for sale in subdivision, and she desired that it should be retained for realisation at a future date. She was averse, however, to finding herself tenant in common with a stranger, and accordingly she set about considering whether she could buy her brother out. He promised her the first refusal of his interest at £40,000, and later gave her a formal option of purchase at that price exercisable by 15th September 1962. She did not have £40,000 available for the purpose and her first thought was that the executors might sell the less valuable part of the land, which lay back from the Safety Bay Road, and so put her in a position to exercise the option. Difficulties arose however as to the mode of effecting such a sale, and the respondent fell back upon another idea. If she could get the executors to transfer to her the legal estate in the whole of the Rockingham land she might sell off the portion that was least likely to grow in value, and pay her brother off out of the proceeds. The executors were not prepared to give her a transfer unless she lodged £10,000 with them to ensure that they could set aside the two funds, so the sale that she contemplated would need to bring her £50,000 in cash immediately.

She consulted a town-planner, who told her that in order to get a good price it would be necessary to sell a small part of the better land together with the land back from the road, and prepared a plan of subdivision showing as Lot 5 an area of about 3,000 acres consisting mainly of the land least worth retaining, and showing as Lots 4

and 6 the parts the respondent was most anxious to keep. The respondent then found a purchaser for Lot 5 at the price of £153,632 on terms which provided for the immediate payment of a deposit of £50,000. The subdivision was approved by the Town Planning Board, and the respondent exercised her option to buy her brother's interest in the whole of the land. Receiving £50,000 as a deposit under the contract of sale, she paid £40,000 to her brother as the price of his interest, lodged £10,000 with the executors, and received from them a transfer of the fee simple in the whole of the Rockingham land. Then she completed the sale of Lot 5. Her plan was thus, by the end of the relevant year of income, carried to the point where in place of her interest under the will in respect of the Rockingham land she had £103,632 in cash, her interest in the £10,000 she had lodged with the executors, and the fee simple of Lots 4 and 6.

"Her main purpose throughout", the learned Judge found, "was to keep the land for subdivision later"; and her evidence, which his Honour accepted, was to the effect that the taking of a transfer from the executors and the selling of part of the land to a stranger were steps she took in order to be able to retain most of the part that she expected would increase greatly in value. "I was not interested in selling at all," she said in her evidence; "I wanted to hold the land. I have a family....." And again: "I just knew I wanted to hold (the) land and I did not know how much I could afford to sell because I had to meet this price" (the £40,000). She wanted £50 per acre for Lot 5, and that, approximately, was the price at which she succeeded in selling it.

These facts having been established to the satisfaction of the learned Judge, the respondent contends that his Honour was right in holding that the grounds of her objection to the assessment were made out. It is necessary first to recognise that the finding that her main purpose was "to keep the land for subdivision later" brings out an important distinction between this case and cases of the kind of which Plimmer v. Commissioner of Inland Revenue (1957) 7 A.I.T.R. 286 is an example. There, a group of taxpayers anxious to acquire the ordinary shares of a certain company found that the holder would not sell them except together with the

In the Full Court of the High Court of Australia

No. 10

Reasons for Judgment of Kitto, J.

28th February 1969 (continued)

preference shares of the same company. They did not want the preference shares, but they bought the shares of both classes with the aid of bank finance, and then resold the preference shares at a price higher than they had paid for them. The profit thus made was held not to be taxable as income, because although the taxpayers had acquired the preference shares intending to resell them, they had not acquired them for the purpose of profit-making by the resale: their purpose had been to overcome an obstacle to the acquisition of the ordinary shares.

In the present case, what the respondent bought was her brother's half interest in the Rockingham lands, and her purpose was to enable herself to sell the fee simple in those lands, that is to say to sell part of them immediately and the rest at a future time. She had no other purpose than that of selling the entirety, and of doing so in such a way as would bring in the best price. This means that the plan she finally worked out and adopted was a plan for the making of profit by selling part of the lands immediately and the rest at a future time, at prices which would show her a profit over what she had laid out. The learned Judge rightly held that her purpose was not one of profit-making by sale of the brother's half interest either in Lot 5 or in the whole of the Rockingham land; but the point to which I respectfully think that his Honour did not give due weight is that the purpose was one of profit-making by a process which involved bringing both that half interest and her own to an end by uniting them in her own hands and then selling the resulting entirety in subdivision, over a period, for more than the entirety had cost her. What it had cost her consisted of the half interest she had become entitled to under the will plus £40,000. The excess arising from the carrying out of the scheme would plainly be profit which would answer the description in the second limb of s. 26(a) and would also, I think, be income according to ordinary concepts since it would be the net proceeds of an adventure in the nature of trade: cf. Iswera v. Commissioner of Inland Revenue (1965) 1 W.L.R. 663.

It is a question for consideration, however, whether any of the profit which the scheme was devised to produce arose in the relevant year of

income. At the trial, counsel for the Commissioner had the fairness to disclose how the figure which had been treated in the assessment as profit had been arrived at. The respondent was regarded as having purchased her brother's interest in Lot 5 for £19,865 (by applying to £40,000 the proportion which the estimated value of Lot 5 at the date of exercise of the option bore to the estimated aggregate value of Lots 4, 5 and 6 at that date) and as having sold it for £76,816 (half the sale price of Lot 5). The difference is £56,951. Until long after the time allowed for objecting to the assessment the respondent, despite her solicitor's request to the Commissioner for information, was left in the dark both as to the method that had been followed in order to arrive at this figure and as to the amounts that were taken as the values of Lots 4, 5 and 6. Thus she had been effectually prevented from formulating any more specific challenge to the figure than her notice of objection contained. Yet the submission was made in this court, and even pressed, that the notice of objection should be construed as conceding that a profit of £56,951 arose from the sale of Lot 5, with the result that the respondent is here restricted to contending that that amount is a capital profit not included by s. 26(1) in her assessable income. The submission is erroneous, as well as being unfair. The assertion in the notice of objection that "the whole of the sale price of the said land was a capital receipt" did not stand alone: it was followed by the specific statement that "no part thereof constituted assessable income of the taxpayer". To the officers who had charge of the matter in the Department this must necessarily have brought home that they were being required to reconsider in regard to each of the limbs of s. 26(a) whether the essential elements were present, and in particular whether the £56,951 or any part of it was a profit which arose in the 1963 year.

I turn, therefore, to that question. As the Court observed in Official Receiver v. Federal Commissioner of Taxation (Fox's case) (1956) 96 C.L.R. 370 at p. 386, taxable income has, under the Act, to be ascertained annually, and therefore if a transaction or scheme for the acquisition and sale of property extends over more than one year, the profit for a particular year which ends before the transaction or scheme has been carried to completion

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No. 10

Reasons for Judgment of Kitto, J.

28th February 1969 (continued)

may properly be estimated, provided that property realised in the year is taken into the account as at the opening of the year at a known or ascertainable value. The argument presented for the Commissioner in support of the assessment in the present case was that not only did the respondent have a general scheme for turning the £40,000 and her half interest in the Rockingham land into the total proceeds of realisation of that land, but she had within that scheme a separately identifiable scheme in relation to Lot 5, namely a scheme for turning the estimated cost to her of Lot 5 - the value as at the initiation of the scheme of her half interest in Lot 5 plus so much of the £40,000 as was referable to Lot 5 - into the proceeds of sale of Lot 5. Thus, it was said, the surplus of the proceeds of Lot 5 over its estimated cost was profit which arose in the relevant year of income from the profit-making scheme for Lot 5. As against this contention it was argued for the respondent that there was really only one scheme, namely the scheme for the acquisition and resale in subdivision of the entirety in the Rockingham land as a whole, and that it will not be possible to identify as profit any part of the receipts from the carrying out of that scheme, until sales shall have brought into the respondent more than the cost to her of the whole of the Rockingham land, that is to say more than £40,000 plus the estimated value, as at the initiation of the scheme, of her half interest in that land. It seems to me unsound to regard the respondent's acquisition and sale of Lot 5 as steps in a self-contained scheme concerning that Lot as a separate parcel of land. There was in truth but one scheme, a coherent scheme for the acquisition of the Rockingham land, an immediate sale of Lot 5, and later sales of Lots 4 and 6. But it does not follow from this that an assessment is necessarily wrong which treats as profit from that entire scheme an estimated amount of profit from the sale of Lot 5 by itself. It is true that any estimated profit from the sale may be partly or wholly counterbalanced by losses from the later carrying out of the rest of the scheme, for the respondent's confident expectations for the land she has retained may be sadly disappointed. In that event the scheme as a whole will have given rise to less profit or to no profit at all. But unless and until such an untoward event occurs, the surplus cannot be denied the character of an

estimated profit arising in the 1963 year from the sale of Lot 5. As s. 170(9) recognises, an estimated profit may properly be included in an assessment as assessable income on the basis that the assessment will be appropriately amended if events falsify the estimate. The estimate stands at the present time unfalsified, and the respondent must therefore fail in her contention that no amount should have been included in the assessment as profit arising from the sale of Lot 5.

What remains to be considered is whether the respondent has shown that the figure of £56,951 is excessive. To show that she would need to establish that the estimate which the Commissioner adopted of the cost to her of acquiring the entirety of Lot 5 was too low. It is necessary to explain in more detail how the estimate was made. The Commissioner treated the date of the respondent's exercise of the option to buy her brother's half interest as the initiation of the scheme, and that seems plainly to be right. The assessment was based upon valuations (as at that date) which the Commissioner obtained. According to his Honour's judgment - and that is our only source of information on the point - they were: Lot 4, £90,000; Lot 5, £138,315; and Lot 6, £54,000, making a total of £282,315. It is the fraction 138,315 over 282,315 applied to £40,000 that is said to give the figure £19,865 as being the part of the £40,000 which the Commissioner treated as referable to Lot 5. The net proceeds of sale of Lot 5 proved to be £153,632. Half of this was taken to relate to the interest (in Lot 5) that the respondent had acquired under her uncle's will, and half to relate to the interest (in that land) which she had bought from her brother. Subtracting £19,865 from £76,816 (half of £153,632) one gets the Commissioner's figure of £56,951 as the excess of the net proceeds of the realisation of the brother's half interest over the cost thereof to the respondent. (There seems to be a small error in the figures but it is in favour of the respondent.)

To prove the assessment excessive the respondent would have had to show by evidence that the valuations failed to provide a true basis for the apportionment that was made of the £40,000. She addressed no evidence to this matter, and the only

In the Full Court of the High Court of Australia

No. 10

Reasons for Judgment of Kitto, J.

28th February 1969 (continued)

comment that could be made on her behalf, that the value assigned to Lot 5 was less than the amount which that Lot actually produced upon sale, gets nowhere. I am unable to see any ground for regarding the estimate of profit as excessive. The learned Judge offered criticisms of it, mainly because of the fallacy of assuming "that the difference between the price paid for an undivided half share in land and half the price realised upon a sale of the land is a profit arising from the buying of the half share." But the assessment is not based upon such an assumption. It proceeds on the view that in this case a profit arose from the sale of the entire interest in Lot 5 because that Lot was sold for more than the money equivalent of what it cost the respondent to get that entire interest. The only questionable assumption that seems to lie behind the assessment is that the respondent's own original half interest in Lot 5 was worth half the amount which Lot 5 brought on sale. Only on this assumption could half the proceeds of sale be taken as relating to her former half interest. Almost certainly it was worth less than half. But any error in this respect necessarily operated in favour of the respondent.

In my opinion the assessment was not proved to be excessive. I would allow the appeal, set aside the order appealed from, and order instead that the appeal against the assessment be dismissed.

No. 11

No. 11

Reasons for Judgment of Menzies, J.

28th February 1969

REASONS FOR JUDGMENT OF MENZIES, J.

I have had the advantage of reading the judgment of Kitto J. and I wish to do no more than express my agreement with it.

No. 12

REASONS FOR JUDGMENT OF OWEN, J.

In the Full Court of the High Court of Australia

No. 12

Reasons for Judgment of Owen, J.

28th February 1969

I have had the advantage of reading the judgment prepared by my brother Kitto. I agree with it and have nothing to add.

No. 13

ORDER ALLOWING APPEAL

No. 13

Order Allowing Appeal

28th February 1969

IN THE HIGH COURT OF AUSTRALIA

Appeal No.25 of 1967

WESTERN AUSTRALIA REGISTRY

ON APPEAL

From the High Court of Australia
(Mr. Justice Windeyer)

IN THE MATTER of the Income Tax and Social Services Contribution Assessment Act, 1936-1963

- and -

IN THE MATTER of an Appeal thereunder against assessment of income tax and social services contribution on income derived during the year ended 30th June 1963

B E T W E E N :

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA — Appellant (Respondent)

- and -

DOLORES HAY McCLELLAND — Respondent (Appellant)

In the Full Court of the High Court of Australia

No. 13

Order Allowing Appeal

28th February 1969 (continued)

BEFORE THE FULL COURT

Their Honours The Chief Justice,
Mr. Justice Kitto,
Mr. Justice Menzies and
Mr. Justice Owen

THE 28th DAY OF FEBRUARY 1969

THIS APPEAL from the order of His Honour Mr.Justice Windeyer dated the 8th day of November 1967 coming on for hearing on the 24th day of September 1968 at Perth in the State of Western Australia AND UPON READING the Appeal book herein AND UPON HEARING Mr. E.F. Downing one of Her Majesty's Counsel with him Mr. C. Zempilas of Counsel for the Appellant and Mr. H.V. Reilly of Counsel for the Respondent and the Court having ordered that the Appeal stand for judgment and the same standing for judgment this day at Melbourne in the State of Victoria THIS COURT DOTH ORDER that the Appeal be and the same is hereby allowed and that the said order of His Honour Mr. Justice Windeyer be set aside and in lieu thereof it be ordered that the appeal of the Respondent be dismissed with costs AND THIS COURT DOTH FURTHER ORDER that the Appellant's costs of this Appeal be taxed and paid by the Respondent to the Appellant

BY THE COURT

G.T. STAPLES

DISTRICT REGISTRAR

THIS ORDER was taken out by H.E. Renfree of Cecil Building, 6 Sherwood Court, Perth, Commonwealth Crown Solicitor and Solicitor for the appellant

No. 14

In the Privy Council

No. 14

Order Granting Special Leave to Appeal to Her Majesty in Council

28th November 1969

ORDER GRANTING SPECIAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

(L.S.)

AT THE COURT AT BUCKINGHAM PALACE

The 28th day of November 1969

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY

Lord President	Mr. Greenwood
Lord Delacourt-Smith	Mr. Chancellor of the Exchequer
Mr. Secretary Callaghan	Mr. Stonehouse
Mr. Secretary Healey	Mr. Hoy

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 24th day of November 1969 in the words following, viz.:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Dolores Hay McClelland in the matter of an Appeal from the High Court of Australia between the Petitioner and the Commissioner of Taxation of the Commonwealth of Australia Respondent setting forth that by assessment dated the 5th August 1966 the Deputy Commissioner of Taxation for the State of Western Australia on behalf of the Respondent assessed the Petitioner for income tax under Income Tax Assessment Act 1936-65: that the Petitioner objected to the assessment and the Respondent on the 11th August 1967 treated the Petitioner's objection as an Appeal and forwarded it to the High Court: that on the 8th November 1967 the High Court allowed the Petitioner's Appeal with costs and set aside the Respondent's assessment and directed the Respondent to reassess the tax payable by the Petitioner: that the Respondent appealed from that Order to the Full Court of the High Court of Australia which on the 28th February 1969 allowed the Appeal with costs

In the Privy Council

No. 14

Order Granting Special Leave to Appeal to Her Majesty in Council

28th November 1969 (continued)

and set aside the Order made by the High Court on the 8th November 1967: And humbly praying Your Majesty in Council to order that the Petitioner should have special leave to appeal from the Judgment of the Full Court of the High Court of Australia dated the 28th February 1969 or for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute her Appeal against the Judgment of the Full Court of the High Court of Australia dated the 28th February 1969 upon depositing in the Registry of the Privy Council the sum of £400 as security for costs:

"AND Their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W.G. AGNEW

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(iii) Notice of Assessment of Income Tax based on income of Appellant during year ended 30th June 1963.

5th August 1966

E X H I B I T S

EXHIBIT "A"

DOCUMENTS FORWARDED TO THE COURT BY RESPONDENT PURSUANT TO ORDER 65 RULE 8 AS FOLLOWS:-

(iii) NOTICE OF ASSESSMENT OF INCOME TAX BASED ON INCOME OF APPELLANT DURING YEAR ENDED 30th JUNE 1963

COPY

Receipt by Cash Register will be printed here

File No. 230845

Mrs. Dolores H. McClelland,
36 Leake Street,
PEPPERMINT GROVE.

Asst. No. B57398

5/8/66
Issue Date

7/9/66
Date Due and Payable * (SEE NOTE BELOW)

Received the above amount

Receiver

Taxable Income (1) $	Tax & Contribution on income derived during year of income (2) $	Additional Tax Late Return or Omitted Income (3) $	LESS CREDIT FOR: Provisional Tax and Contribution (4) $	LESS CREDIT FOR: Group Certificates and Tax Stamps (5) $	Balance of Tax and Contribution (6) $	ADD Provisional Tax and Contribution in respect of provisional income (7) $	AMOUNT PAYABLE (8) $
115,406	68,817.80		12.00		68,805.80	NIL	68,805.80

COMMONWEALTH OF AUSTRALIA

NOTICE OF ASSESSMENT

Income Tax and Social Services Contribution

Based on Income Derived During Year Ended 30th June, 1963

OTHER AMOUNTS PAYABLE (9)

TOTAL AMOUNT PAYABLE (10) 68,805.80

In accordance with the provisions of the *Income Tax and Social Services Contribution Assessment Act* 1936-1965, the Income Tax and Social Services Contribution payable by you on income derived during the above year has been assessed as above. The provisional tax and contribution payable by you in accordance with that Act in respect of your provisional income is the amount notified in Column 7. That amount is based on a provisional income equal to the taxable income shown in Column 1.

OBJECTION.—Objection may be lodged against this assessment within sixty days after service of this notice, but notwithstanding any objection, the full amount payable must be paid by the due date.

GOVERNMENT LOAN INTEREST.— Where interest on Commonwealth Government Loans and on certain other loans issued by Public Authorities guaranteed free of State Income Tax, is included in the taxable income a rebate of 10c in the $ has been allowed in respect of any such interest when arriving at the amount of Tax and Contribution.

OPTION TO VARY PROVISIONAL TAX

Until the due date of this assessment, you have the option of varying the amount of provisional tax shown in Column 7 above if your income has increased or decreased.

If you decide to have your provisional tax recalculated, you should obtain the necessary form from the Taxation Office and complete it. In such case payment should not be made until a notice of adjustment is received.

720/2/66—6m.

* Tax on the assessment notified above is due on the date shown. Other amounts payable are due as otherwise notified.

LATE PAYMENT PENALTY.—An additional amount for late payment becomes due and payable at the rate of 10% per annum on the amount unpaid by the due date.

HOURS FOR PAYMENT—Monday to Friday, 9.00 a.m. until 4.30 p.m.

G. R. McCARTER
Deputy Commissioner of Taxation
96-102 BARRACK STREET, PERTH

EXHIBIT "A"

DOCUMENTS FORWARDED TO THE COURT BY RESPONDENT PURSUANT TO ORDER 65 RULE 8 AS FOLLOWS:-

(iv) ADJUSTMENT SHEET WHICH ACCOMPANIED THE NOTICE OF ASSESSMENT

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:

(iv) Adjustment Sheet which accompanied the Notice of Assessment.

COMMONWEALTH OF AUSTRALIA W.A.

COPY:

INCOME TAX – ADJUSTMENT SHEET

Mrs. [illegible] McClelland File No. 230845.

The following adjustments have been made to the taxable income in your return for the year ended 30th JUNE, 19 63.

TAXABLE INCOME AS RETURNED		£. 721
" " " "		442
3d Profit arising from the sale of Rockingham land £56,951		113,902
Education expenses not allowable "Ballet", "Tennis Coach" and "Ju Jitsu Training" - £31		62
TAXABLE INCOME AS SHOWN IN ATTACHED NOTICE		$115,406

PLEASE RECORD, OR NOTIFY YOUR TAX AGENT OF, ANY ALTERATIONS AFFECTING YOUR NEXT RETURN.

53: 77

(vi) NOTICE OF OBJECTION AGAINST THE ASSESSMENT dated 25th August 1966

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(vi) Notice of Objection against the Assessment

25th August 1966

COMMONWEALTH OF AUSTRALIA

INCOME TAX AND SOCIAL SERVICES CONTRIBUTION ASSESSMENT ACT 1936-1965

File No. 230845

Assessment No. B.57398

DOLORES HAY McCLELLAND of 36 Leake Street Peppermint Grove in the State of Western Australia (hereinafter called "the taxpayer") HEREBY OBJECTS AGAINST the assessment of Commonwealth Income Tax and Social Services Contribution based on the income of the taxpayer during the year ended the 30th June 1963 the subject of Notice of Assessment numbered as above and dated the 5th day of August 1966.

The taxpayer claims that the said assessment was excessive erroneous and contrary to law and should be reduced in that for the purposes of the assessment there was wrongly included in the taxable income the sum of $113,902 described as assessable income from the sale of portion of Cockburn Sound Location 16 - Lot 5.

The grounds upon which the taxpayer relies are that the whole of the sale price of the said land was a capital receipt and no part thereof constituted assessable income of the taxpayer.

DATED this 25th day of August 1966.

(Sgd.) Dwyer & Thomas

Solicitors for the taxpayer.

THIS OBJECTION was lodged by Howard Vincent Reilly of the firm of Dwyer & Thomas, 49 William Street, Perth, Solicitors for the taxpayer.

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(vii) Notice of Disallowance of the Objection

16th December 1966

(vii) NOTICE OF DISALLOWANCE OF THE OBJECTION dated 16th December 1966

COPY

COMMONWEALTH OF AUSTRALIA

Telephone 23 0191

Telegraph "Depcomtax"

TAXATION OFFICE
96-102 Barrack Street
Perth

G.P.O. Box A15

Mrs. Dolores H. McClelland,
c/- Messrs. Dwyer & Thomas,
Third Floor, National House,
49 William Street,
PERTH. W.A.

In Reply Please Quote:
IT.230845/63

16th December, 1966.

Dear ~~Sir~~/Madam,

INCOME TAX ASSESSMENT ACT, 1936-1966

Your objection, dated 25th August, 1966 to the assessment, notice of which was issued on 5th August, 1966 in respect of income derived during the year ended 30/6/63 has been considered and has been disallowed.

It is now competent for you to request that the decision be referred to a Board of Review for review, or that your objection to be treated as an Appeal and forwarded either to the High Court or to the Supreme Court of a State. It is necessary, however, that you make your request in writing within sixty days after the service by post of this notification, in accordance with Section 187 of the Act, quoted on back hereof.

Unless the fee of $2 referred to in Section 188 (see back hereof) accompanies your request to refer the decision on the objection to any of the tribunals referred to in Section 187, such request cannot be complied with.

Yours faithfully,

(Sgd.) G.R. McCarter.

G.R. McCARTER,
Deputy Commissioner of Taxation.

(IX) WILL AND TWO CODICILS TO THE WILL OF HENRY JOHN SPAVEN

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(ix) Will and two Codicils to the Will of Henry John Spaven

14th July 1955, 8th August 1956, and 27th June 1968

COPY

I, HENRY JOHN SPAVEN of Shark Bay in the State of Western Australia Pastoralist HEREBY REVOKE all former Wills and Testamentary dispositions made by me AND DECLARE this to be my last Will.

1. I APPOINT ARTHUR WILLIAM FERGUSON Public Accountant of Merredin and IAN GEORGE MEDCALF Solicitor of Perth (hereinafter called "my Trustees" which expression shall include the Trustee or Trustees for the time being of this my Will whether original additional or substituted) to be the Executors and Trustees hereof. I DECLARE that my said Executors shall if they prove my Will be entitled to the same remuneration fees or commission as the Public Trustee would have been entitled to receive under the Public Trustee Act 1941 and amendments if he had been appointed my Executor and had acted in the administration of my estate and the trusts of my Will.

2. I BEQUEATH the following pecunoary legacies free of all duties

(a) To BRUCE WILKINSON of Grange Street Cottesloe the sum of Five hundred pounds (£500)

(b) To RICHARD REDFERN of Arbordale Flats St. George's Terrace Perth the sum of Five hundred pounds (£500)

(c) To ROY GERALD HOULT and his wife ELSIE HOULT both of Shark Bay the sum of Five hundred pounds (£500) equally between them

(d) To NORMAN CAMPBELL of Nanga Station Shark Bay the sum of One thousand pounds (£1000)

3. I FORGIVE AND RELEASE (free of all duties) to the said Arthur William Ferguson the sum of Five hundred pounds (£500) now owing to me or whatever lesser sum may be owing to me by the said Arthur William Ferguson at the date of my death.

4. Subject as aforesaid I GIVE DEVISE AND BEQUEATH the whole of my real and personal property whatsoever

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(ix) Will and two Codicils to the Will of Henry John Spaven

14th July 1955, 8th August 1956, and 27th June 1968

and wheresoever situate unto and to the use of my Trustees upon trust to sell call in and convert into money the same with power in their discretion to postpone such sale calling in and conversion for any period and with and out of the moneys arising from such sale calling in and conversion and out of my ready moneys to pay my funeral and testamentary expenses and just debts and all probate and estate duties on the whole of my estate and to invest the residue of such moneys with power to vary or transpose such investments from time to time and to stand possessed of such moneys and investments for the time being representing the same and all such parts of my residuary estate as shall at my death consist of such investments as aforesaid and also all such portions of my residuary estate as shall for the time being remain unconverted (all of which moneys investments and property are hereinafter referred to as "my trust estate") upon the following trusts that is to say:-

(i) To set aside the sum of Fifteen thousand pounds (£15000) in moneys or in such investments as aforesaid and to pay the net income arising therefrom (H.J. Spaven Witnesses G.A. Kennedy Frank Garside) free of all duties payable on or by reason of my death to MISS DELSIE AVIS HOULT of Shark Bay during her lifetime.

(ii) To set aside the further sum of Ten thousand pounds (£10000) in moneys or in such investments as aforesaid and to pay the net income arising therefrom free of all duties payable on or by reason of my death to MRS. JESSIE BURNS of 91 Blincowe Street West Leederville during her lifetime.

(iii) To pay to JIM TORLIN an aboriginal station hand of Nanga Station Shark Bay an annuity during his lifetime of Seventy eight pounds (£78) by such weekly or monthly instalments as my Trustees may deem fit AND I DIRECT my Trustees to appropriate to meet such annuity investments of the nature aforesaid as may be sufficient at the date of appropriation to answer out of the income thereof the same And I declare that such income shall be the primary fund for answering such annuity and the capital of the said investments shall form the secondary fund for answering the same in

the event of the income proving insufficient and further that after any such appropriation shall have been made the residue of my trust estate or the income thereof shall no longer be liable to provide for such annuity in respect of which such appropriation shall have been made.

(iv) Subject as provided in sub-clauses (i) (ii) and (iii) above to hold the capital and income of my trust estate upon trust for such one or both of them my nephew REGINALD SPAVEN of care of Dalgety & Company Limited Perth and my niece DOLORES the sister of my said nephew as shall survive me and if both survive me then as tenants in common in equal shares.

5. I DIRECT AND DECLARE

(i) that in the event of either my said nephew or niece predeceasing me leaving a child or children him or her surviving who shall not predecease me and who has attained or shall attain the age of twenty one years then such child or children shall take and if more than one equally between them the share of and in my trust estate which his her or their parent would have taken if he or she had survived me and

(ii) that during the minority of any infant beneficiary for the time being entitled in expectancy to a share in my trust estate my Trustees may in their discretion from time to time apply the income of such share (with recourse if considered necessary to the corpus of such share) for or towards the proper maintenance education advancement and support of such infant beneficiary with liberty to make payments for such purposes to the guardian or guardians of such infant beneficiary or to any (H.J. Spaven Witnesses G.A. Kennedy Frank Garside) other person or persons without being liable or responsible to see to the proper application of the payments so made.

6. I FURTHER DIRECT AND DECLARE that notwithstanding

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(ix) Will and two Codicils to the Will of Henry John Spaven

14th July 1955, 8th August 1956, and 27th June 1968 (continued)

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(ix) Will and two Codicils to the Will of Henry John Spaven

14th July 1955, 8th August 1956 and 27th June 1968 (continued)

any power or trust for sale or conversion hereinbefore contained my Trustees shall have power to hold develop work and carry on any pastoral or farming property or properties business or businesses together with the stock plant chattels and effects thereon and appertaining thereto which I may own or be interested in either in partnership or otherwise at the time of my death for so long as they shall in their discretion think fit And may make and effect improvements renewals and repairs thereto and may make sales and purchases of livestock plant and chattel with liberty for my Trustees to use and employ such part of my residuary estate or the proceeds thereof as they may think fit in so doing And may let or sharefarm or concur in letting or sharefarming any lands property and leaseholds for the time being remaining unsold either from year to year or for any term of years at such rents subject to such covenants and conditions and with or without an option to the lessee or lessees to purchase And may build or rebuild or otherwise improve and divide or sub-divide my property or properties as my Trustee shall think fit And for all or any of such purposes my Trustee shall be at liberty to borrow and raise on mortgage or otherwise any sum or sums of money from time to time at such interest and on such terms and conditions as my Trustees shall deem advisable And generally to conduct and carry on my said property or properties and business or businesses in such manner as my Trustees in their discretion shall think fit as if they were the absolute owners thereof without being liable or responsible for any loss or losses arising or occasioned thereby.

7. I DECLARE that in effecting sales of any property whether real or personal my Trustees may sell by public auction tender or private treaty and either for cash or on terms and in the case of a sale on terms with or without security for the unpaid purchase money and generally upon such terms and conditions as my Trustees shall in their sole discretion think fit.

8. In addition to the powers and authorities hereinbefore granted to my Trustees I ALSO DECLARE that my Trustees shall have the following further powers:-

(i) To let or lease any hereditaments or premises

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(ix) Will and two Codicils to the Will of Henry John Spaven

14th July 1955, 8th August 1956 and 27th June 1968 (continued)

for the time being remaining unsold either from year to year or for any term of years at such rent and subject to such covenants and conditions as my Trustees may think fit with power also to my Trustees to accept surrenders of leases and generally to manage my property in such manner as they shall think fit.

(ii) To determine whether any moneys coming into the hands of my Trustees are capital or income and to apportion blended funds and every such determination or apportionment (H.J. Spaven Witnesses G.A. Kennedy Frank Garside) shall be final and binding on all persons beneficially interested under this my Will.

(iii) To appropriate any part of my trust estate in its actual condition or state of investment in or towards satisfaction of any share or expectant share therein with power for that purpose conclusively to determine the value of any part or parts of my trust estate in such manner as my Trustees shall think fit

(iv) To retain unsold for any period any investments of an unauthorised nature forming part of my trust estate at my death without being liable or responsible for any loss arising therefrom

(v) To take and act upon the opinion of any Queen's Counsel practising in Perth or elsewhere in relation to the interpretation of this my Will or any other documents or statute or as to the administration of the trusts hereof without being liable to any of the persons beneficially interested in respect of any act done by them in accordance with such opinion but nothing in this clause shall prohibit my Trustees from applying to the Court if my Trustees shall think fit

(vi) I declare that in addition to any investments from time to time sanctioned by law for the investment of trust funds my Trustees may at their discretion invest any moneys liable to be invested under this my Will in or upon one or more of the following investments or securities that is to say:-

(a) The shares or stocks of any Bank carrying

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(ix) Will and two Codicils to the Will of Henry John Spaven

14th July 1955, 8th August 1956 and 27th June 1968 (continued)

on business in four or more States of the Commonwealth of Australia or on fixed deposit in any such Bank

(b) The shares or stocks of any limited liability company not being a pastoral or a stock or station or a mining company carrying on business in the Commonwealth of Australia which has paid dividends for not less than six years prior to the date of such investment being made of which fact a letter signed by the Secretary or Auditor of the Company shall be sufficient evidence.

(c) Income producing real estate situated in the State of Western Australia.

(vii) My Trustees being persons engaged in any profession or business may be so employed or act and shall be entitled to charge and be paid all professional or other charges for any business or act done by either of them or their respective firms in connection with the administration of my estate or the trusts of this my Will or any Codicil hereto including acts which a (H.J. Spaven Witnesses G.A.Kennedy Frank Garside) trustee could have done personally

IN WITNESS whereof I the said HENRY JOHN SPAVEN have to this my last Will and Testament set my hand this Fourteenth day of July One thousand nine hundred and fifty five.

H.J. Spaven

SIGNED by the said Testator as and for his last Will and Testament in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses:

G.A. Kennedy
Articled Law Clerk
Perth.

Frank Garside
Law Clerk
Perth.

WE LYNETTE HELEN SMITH and CAROLE LARAINE PIKE Clerks to Messrs. Robinson, Cox & Co., Solicitors, Perth do hereby certify that we have checked the within copy document with the original of which it purports to be a copy and declare that the same is a true copy of the said original

(Signed: L. Smith) (Signed: C.L. Pike)

COPY

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(ix) Will and two Codicils to the Will of Henry John Spaven

14th July 1955, 8th August 1956 and 27th June 1968 (continued)

I, HENRY JOHN SPAVEN of Shark Bay in the State of Western Australia Pastoralist declare this to be a First Codicil to my Will bearing date the Fourteenth day of July One thousand nine hundred and fifty five

WHEREAS in Clause 4 (iii) of my said Will I Directed my Trustees to pay to JIM TORLIN an aboriginal station hand of Nanga Station Shark Bay an annuity during his lifetime of Seventy eight pounds (£78) by such weekly or monthly instalments as my Trustees should deem fit and further directed my Trustees to make such appropriations as might be sufficient to answer the same

AND WHEREAS the said Jim Torlin having left my employment I am now desirous of revoking such bequest

I NOW REVOKE the bequest of the said annuity to the said Jim Torlin to the intent that it shall no longer be necessary for my Trustees to make any such payments or appropriations as aforesaid.

In all other respects I confirm my said Will

IN WITNESS whereof I the said HENRY JOHN SPAVEN have hereunto set my hand this 8th day of August One thousand nine hundred and fifty six

H.J. Spaven

H.J. Spaven

SIGNED by the said Testator as a first Codicil to his Will bearing date the fourteenth day of July 1955 in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses.

Ian G. Medcalf
Solicitor
Perth.

Ian Stephenson
Solicitor
Perth.

WE LYNETTE HELEN SMITH and CAROLE LARAINE PIKE Clerks to Messrs. Robinson Cox & Co. Solicitors, Perth do hereby certify that we have checked the within copy documents with the original of which it purports to be a copy and declare that the same is a true copy of the said original.

(Sgd.) C.L. Pike

(Sgd.) L. Smith

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(ix) Will and two Codicils to the Will of Henry John Spaven

14th July 1955, 8th August 1956 and 27th June 1968 (continued)

COPY

I, HENRY JOHN SPAVEN of Shark Bay in the State of Western Australia Pastoralist declare this to be a Second Codicil to my Will bearing date the fourteenth day of July One thousand nine hundred and fifty-five.

WHEREAS by my said Will I have appointed ARTHUR WILLIAM FERGUSON Public Accountant Merredin to be one of the Executors and Trustees thereof together with IAN GEORGE MEDCALF Solicitor of Perth

NOW I HEREBY REVOKE the appointment of the said Arthur William Ferguson as Executor and Trustee of my said WILL AND APPOINT BRIAN SIMPSON Solicitor of Perth to be Executor and Trustee thereof in place of the said Arthur William Ferguson and I DECLARE that my said Will shall be construed as if the name of the said Brian Simpson were substituted therein as an Executor and Trustee thereof for the name of the said Arthur William Ferguson.

In all other respects I confirm my said Will.

IN WITNESS whereof I the said HENRY JOHN SPAVEN have hereunto set my hand this 27th day of June One thousand nine hundred and fifty eight

H.J. Spaven

SIGNED by the said Testator as a Second Codicil to his Will bearing date the fourteenth day of July 1955 in the presence of us both present at the same time who at his request in his presence and in the presence of each other have hereunto subscribed our names as witnesses:

E.M. Collins
Solicitor
Perth.

Dorothy Hopkins
10 Armagh St.
Victoria Park
Clerk.

WE LYNETTE HELEN SMITH and CAROLE LARAINE PIKE Clerks to Messrs. Robinson, Cox & Co., Solicitors, Perth do hereby certify that we have checked the within copy document with the original of which it purports to be a copy and declare that the same is a true copy of the said original.

(Sgd.) L. Smith

(Sgd.) C.L. Pike

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(x) Option given by R.R. Spaven to Appellant

26th July 1962

(x) OPTION GIVEN BY R.R. SPAVEN TO APPELLANT dated 26th July 1962

26th July 1962.

Mrs. D.H. McClelland,
26 Leake St.,
PEPPERMINT GROVE.

I hereby agree to give you an option to purchase my ½ share in Rockingham land of the Estate of the late H.J. Spaven for £40,000 cash, option to be exercised in writing by 15.9.62 at 5 p.m.

Deposit 10% to be paid on exercise of option, balance on transfer of title.

Reg Spaven.

(xi) Notice of Exercise of Option

10th September 1962

(xi) NOTICE OF EXERCISE OF OPTION dated 10th September 1962

Reg. Spaven,
4 Margaret Street,
COTTESLOE.

I hereby exercise the option the subject of your memorandum of 26/7/1962 to purchase for £40,000 your half share in Rockingham land of the Estate of the late H.J. Spaven. Herewith £4,000 being 10% deposit as required.

10th September, 1962.

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(xii) Extract from registered Transfer No. 18640 of 1962

5th October 1962

(xii) EXTRACT FROM REGISTERED TRANSFER NO. 18640 of 1962 dated 5th October 1962

EXTRACT OF TRANSFER

Transfer 18640/1962.

We, Ian George Medcalf of 42 Gallop Road Dalkeith in the State of Western Australia and Brian Simpson of 10 Jutland Parade Dalkeith aforesaid solicitors the executors of the will and two codicils of Henry John Spaven deceased being Registered as the proprietors of an Estate

in fee simple in the Land Hereinafter described subject to the Encumbrances (if any) notified hereunder. In consideration of the Terms of the will of the said deceased, * (whereby Reginald Robert Spaven and Dolores Hay McClelland are the Residuary Beneficiaries) and in further consideration of the sum of Forty Thousand (£40000) paid to *(the said) Reginald Robert Spaven of 4 Margaret Street Cottesloe in the said State Pastoral Inspector by *(the said) Dolores Hay McClelland of 36 Leake Street Peppermint Grove in the said State Married Woman do Hereby Transfer at the request and by the direction of the said Reginal Robert Spaven (as Testified by his execution hereof) to the said Dolores Hay McClelland all our Estate and Interest in all that piece of land being:-

Ptn. of Cockburn Sound Locn. 16 being the Balance of the land comprised in C/T.1169/514 Less Ptn. dedicated.

Dated the 5th day of October 1962.

Stamped £400 & 10/-.

---

* Parts of above Transfer as marked (and in brackets) are only written on Transfer in lead pencil not typed.

(xiii) NOTICE FROM APPELLANT TO M.H.H. KENNEDY AND P.W. MARKHAM, AUTHORISING THEM TO PAY A DEPOSIT OF £50,000 TO MESSRS. ROBINSON COX & CO. THE SOLICITORS FOR THE EXECUTORS OF H.J. SPAVEN dated 5th October 1962

To: Murray Hamilton Hume Kennedy and
Percival Wynyard Markham

This will authorise you to pay the deposit of £50,000 referred to in our Contract of this date to Messrs. Robinson Cox & Co., as solicitors for the executors of Harry John Spaven (Deceased) and to be held by them pending registration of a transfer from such executors to me of an estate in fee simple in possession free of encumbrances in all that piece of land being portion of Cockburn Sound Location 16 and being the balance of the land in Certificate of Title Volume 1169 Folio 514.

DATED this fifth day of October 1962.

Dolores H. McClelland.

Exhibits

"A"

Documents forwarded to the Court by Respondent pursuant to Order 65 Rule 8 as follows:-

(xiii) Notice from Appellant to M.H.H. Kennedy and P.W. Markham authorising them to pay a deposit of £50,000 to Messrs. Robinson Cox & Co., Solicitors for the Executors of H.J.Spaven

5th October 1962

Exhibits

"A"

Documents forwarded to the Court by the Respondent pursuant to Order 65 Rule 8 as follows:-

(xiv) Letter Morris Crawcour & Solomon to Robinson Cox & Co. concerning the payment of the deposit

5th October 1962

(xiv) LETTER ADDRESSED BY MORRIS CRAWCOUR & SOLOMON TO MESSRS. ROBINSON COX & CO. CONCERNING THE PAYMENT OF THE DEPOSIT dated 5th October 1962

MORRIS CRAWCOUR & SOLOMON
Barristers & Solicitors
Commissioners for Affidavits

Howard A. Solomon
Robert E. Jones HS:BB

Telephone 21 6196 (2 lines)

Atlas Building,
Esplanade,
Perth, W.A.

5th October 1962.

Messrs. Robinson, Cox & Co.,
Solicitors,
PERTH.

Attention: Mr. Medcalf

Dear Sirs,

RE: Markham and Kennedy, Mrs. D.H.McClelland and Estate H.J. Spaven

Referring to the writer's telephonic conversation with Mr. Medcalf, we confirm that Mr. Kennedy has signed Contract of Sale with Mrs. McClelland and Mr. Markham will be signing same at Messrs. Dwyer & Thomas' office today, at which time Mrs. McClelland will also be signing.

In view of the fact that Transfer from the Trustees to Mrs. McClelland has not yet been registered, our clients were not prepared to pay over the sum of £50,000 part payment provided in the Contract of Sale, until the land was transferred to Mrs. McClelland. Accordingly, by arrangement with Mr. Reilly, and with Mrs.McClelland's agreement, it was decided that the £50,000 should be paid to you as solicitors for the Trustees to be held by you until such time as Transfer to Mrs. McClelland is registered when you would be at liberty to pay out the moneys to Mrs. McClelland or as she should direct, which we presume would possibly embody a payment to Mr. Reginald Spaven of the balance payable by Mrs. McClelland to him.

Mr. Reilly has prepared an authority from Mrs. McClelland directed to our clients authorising them to pay to you on this basis. Mr. Reilly is at present holding a Bank Cheque in favour of your Firm for £15,000 and Mr. Markham will hand to him, when he signs the Contract, a further Bank Cheque in favour of your Firm for £35,000.

We would be pleased if you would advise us immediately Transfer to Mrs. McClelland has been accepted for registration at the Titles Office as our clients wish us to lodge Caveat against the Title pending Mrs. McClelland being in a position to Transfer pursuant to the Contract, which will not be able to be done until subdivision has been completed and the diagram of subdivision is approved for dealings by the Titles Office.

We return herewith original Probate of the Will and two Codicils of the late H.J. Spaven which you left with us for perusal.

Yours faithfully,

MORRIS CRAWCOUR & SOLOMON.

Per Howard A. Solomon.

Exhibits

"A"

Documents forwarded to the Court by the Respondent pursuant to Order 65 Rule 8 as follows:-

(xiv) Letter Morris Crawcour & Solomon to Robinson Cox & Co. concerning the payment of the deposit

5th October 1962 (continued)

Exhibits

"A"

Documents forwarded the Court by Respond pursuant to Order 65 Rule 8 as follows:-

(xv) Sketch Plan of portion of Cockburn Sound Location 16

MANGLES BAY

21018 COMMON

ROCKINGHAM

Existing Centre

Part of 255

20226 Recreation GOLF LINKS

9458 LAKE RICHMOND

SAFETY BAY

SHOALWATER BAY

Possible future Roads

A 65 acres approx.

B 500 acres approx.

WARNBRO SOUND

EXISTING FARM

MANDURAH ROAD

To KWINANA & FREMANTLE

Access Point

Recreation

LAKE COOLOONGUP OR WHITE LAKE

TAMWORTH HILL

Access Point

ROAD

To MANDURAH

LAKE WALYUNGUP

N

1 mile = 1 inch

4th Dec. 1956.

S.D. 5th Aug 1962.

DIAGRAM of PART

COCKBURN SOUND 16

FILE 3074 II 16

- 5

FROM

Exhibits

"C"

Contract of Sale between Appellant and Kennedy and Markham

5th October 1962

EXHIBIT "C"

CONTRACT OF SALE BETWEEN APPELLANT AND MESSRS. KENNEDY AND MARKHAM dated 5th October 1962

AGREEMENT made the fifth day of October One thousand nine hundred and sixty-two B E T W E E N DOLORES HAY McCLELLAND of 36 Leake Street Peppermint Grove in the State of Western Australia Married Woman (hereinafter with her personal representatives and assigns called "the vendor") of the one part AND MURRAY HAMILTON HUME KENNEDY of 38 Jutland Parade Dalkeith in the said State Agent AND PERCIVAL WYNYARD MARKHAM of 40 Clanmel Road Floreat Park in the said State Agent (hereinafter with their and each of their personal representatives and assigns called "the purchasers") of the other part

WHEREBY IT IS AGREED as follows:-

1. The vendor agrees to sell and the purchasers to purchase ALL THAT piece of land being Portion of Cockburn Sound Location 16 being part of the land comprised in Certificate of Title Volume 1169 Folio 514 being the land more particularly delineated in the sketch in the Schedule hereto therein shown and coloured red (excluding road No. 40) (hereinafter called "the said land") free of encumbrances at the price subject to Clause 4 hereof of ONE HUNDRED AND FIFTY THOUSAND POUNDS (£150,000) payable as hereinafter provided

2. The said purchase price shall be paid by the purchasers to the vendor as follows namely:

As to the sum of FIFTY THOUSAND POUNDS (£50,000) as and by way of deposit by bank marked cheque upon the execution hereof and as to the balance of purchase price upon the acceptance for registration of a Transfer of the said land at the Land Titles Office Perth not later than a date three months from the date of execution hereof (unless the vendor shall extend such time for the reason that the diagram may not then have been approved by the Titles Office) provided that 28 days notice shall have been given by the vendor to the purchasers of the date on which it is proposed to Tender the Transfer for registration.

A.R.
P.M.
M.H.H.K.
D.McC.
H.S.

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Contract of Sale between Appellant and Kennedy and Markham

5th October 1962 (continued)

3. Possession of the said land shall be given and taken as at the date of registration of the said Transfer and to that date all rents rates taxes and outgoings in respect of the said land shall be adjusted between the vendor and the purchasers.

4. The said land is sold subject to a survey to be made by Messrs. Steffanoni Ewing & Cruickshank, Licensed Surveyors, at the expense of the vendor in order to determine the area thereof. The sum of One hundred and fifty thousand pounds (£150,000) hereinbefore referred to is based upon the said land being of an area of 3,000 acres and no more and no less and upon completion of the survey of the said land by the said surveyors the parties hereto shall accept the Certificate of the said surveyors as to the true acreage thereof. In the event of the acreage according to such Certificate being more than 3,000 acres the purchase price payable hereunder shall be increased in excess of One hundred and fifty thousand pounds by an amount equal to the surplus of such acreage over 3,000 multiplied by Fifty Pounds (£50). In the event of the acreage according to such Certificate being less than 3,000 acres the purchase price payable hereunder shall be reduced below One hundred and fifty thousand pounds by an amount equal to the difference between 3,000 acres and the acreage according to such Certificate multiplied by Fifty Pounds (£50).

5. If for any cause whatsoever the purchasers shall not pay the amount payable hereunder on the day appointed for the payment of the same they shall pay to the vendors interest on the unpaid amount at the rate of Nine pounds (£9) per centum per annum computed from the date appointed for payment until actual payment thereof but this stipulation is without prejudice to the vendor's rights under Clause 10 hereof.

6. The said land is believed to be and shall be taken to be correctly described and any error misstatement omission or misdescription which may be discovered shall not annul the sale or entitle the purchasers to be discharged from their purchase nor shall any claim for compensation be made in respect thereof.

7. The property is sold subject to the existing

Exhibits

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Contract of Sale between Appellant and Kennedy and Markham

5th October 1962 (continued)

tenancy of Mr. A.T. Sloan of "Rosalie" Stud East Rockingham in the said State and to the rights of the tenant by contract custom statute or otherwise and subject to all easements and rights of adjoining owners liability to maintain fences and other liabilities without any obligation on the vendor to show the creation thereof or to define or apportion any burden.

8. The purchasers hereby declare that they have inspected the state of repair of all or any improvements on the said land and purchase solely in reliance on that inspection. The vendor makes no representation and gives no warranty whatsoever as to the location of any improvements which may be on the said land. The purchasers must make their own enquiry as to whether or not any such improvements are located within the boundaries of the said land.

9. The said land includes an area surveyed as a road under an arrangement made with Waikiki Motel Ltd. The purchasers must make their own enquiries as to whether the same has been dedicated or alienated from the title of the vendor but irrespective of any such survey or any dedication or alienation which may have occurred the area of such road shall be deemed to be included in the said land for the purpose of calculation of acreage. The purchasers must accept all or any liabilities which may exist or arise in connection with liability to dedicate the fee simple of or contribute to the cost of making any roads upon or adjoining the said land.

10. In case the purchasers shall fail to pay any deposit or amount or instalment of the purchase price payable hereunder or any other moneys payable under these conditions or any part thereof at the time appointed for the payment of the same or if the purchasers shall fail or neglect to comply with these conditions or any of them in any other respect all moneys actually paid by them in respect of the purchase shall be absolutely forfeited to the vendor who shall be at liberty (without being obliged to make any tender to the purchasers and without notice to the purchasers) to rescind the contract and to resume and take possession of the said land and to hold the same as of her former estate and interest or to resell the same either by

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"C"

Contract of Sale between Appellant and Kennedy and Markham

5th October 1962 (continued)

public tender or auction or by private contract in such manner and subject to such conditions as the vendor shall think fit and in case of any deficiency arising on any such resale such deficiency together with all expenses attending the resale shall be paid and borne by the defaulting purchaser and in case the whole shall not be paid the whole shall be recoverable by the vendor as and for liquidated damages and any increase in price on such resale shall belong to the purchaser ~~vendor in addition to the forfeited money.~~

11. ~~The vendor's legal costs of and incidental to the sale of the said land to the purchasers including~~ All stamp duties payable hereon and on the Transfer pursuant hereto and all registration fees shall be paid by the purchasers.

A.R.
P.M.
M.H.H.K.
D.McC.
H.S.

12. Any notices or demands which may be required to be served on the purchasers shall be deemed to have been received by them in due course of post if posted addressed to them at their addresses appearing herein.

A.R.
P.M.
M.H.H.K.
D.McC.
H.S.

13. Time shall be of the essence of the contract in all things.

14. This contract is entered into subject to the approval of the Town Planning Board under the Town Planning and Development Act 1928 and amendments being obtain hereto.

AS WITNESS the hands and seals of the parties hereto the day and year first before written.

THE SCHEDULE

See sketch Plan "A" attached.

SIGNED SEALED AND DELIVERED by the said DOLORES HAY McCLELLAND in the presence of: Dolores H.McClelland

A. Reilly
Solicitor
Perth

SIGNED SEALED AND DELIVERED) by the said MURRAY HAMILTON) HUME KENNEDY in the) presence of:)

M.H.H. Kennedy

Howard A. Solomon
Solicitor
Perth

SIGNED SEALED AND DELIVERED) by the said PERCIVAL) WYNYARD MARKHAM in the) presence of:)

P. Markham

A. Reilly
Solicitor
Perth

Exhibits

"C"

Contract of Sale between Appellant and Kennedy and Markham

5th October 1962 (continued)

IN THE PRIVY COUNCIL No. 18 of 1970

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :

DOLORES HAY McCLELLAND Appellant

- and -

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF AUSTRALIA
Respondent

RECORD OF PROCEEDINGS

M.L. MOSS & SON,
Western Australia House,
115-116 Strand,
London, W.C.2.

Solicitors for the Appellant.

COWARD, CHANCE & CO.,
St.Swithins' House,
Walbrook,
London, E.C.4.

Solicitors for the Respondent