Privy Council Appeal No. 18 of 1970

Dolores Hay McClelland – – – – – – *Appellant*

v.

The Commissioner of Taxation of the Commonwealth of Australia – – – – – – – – *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND NOVEMBER 1970

Present at the Hearing:
LORD DONOVAN
LORD MACDERMOTT
VISCOUNT DILHORNE
LORD WILBERFORCE
LORD PEARSON

[*Majority Judgment delivered by* LORD DONOVAN]

The appellant, jointly with her brother, became entitled under the will of her uncle and pursuant to the assent of his Executors to land in Western Australia. She wished to retain the land unsold. Her brother did not. She managed to purchase his interest, but only by selling off part of the land. She still retains the rest. The respondent estimated that on the part she sold the appellant made a profit of £56,951, and assessed her to income tax in this sum. The appellant objected, on the ground that the whole of the sale price she received was capital and that no part of it constituted assessable income. At the hearing of this objection before a single Judge of the High Court of Australia (*Windeyer J.*) she won her case. The assessment was set aside and the respondent ordered to pay costs. Upon his appealing to the Full Court (*Barwick C.J., Kitto, Menzies* and *Owen JJ.*) the appellant lost (*Barwick C.J.* dissenting) and was herself ordered to pay the respondent's costs. Subsequently special leave was granted to the appellant to appeal to the Board.

The detailed narrative begins with the will and codicil thereto of Henry John Spaven who died on 27th September 1958. He gave his residuary estate to his trustees (who were also his executors) upon trust to sell, with power to postpone the sale; to set aside out of the proceeds of sale two sums of £15,000 and £10,000, in which he gave a life interest to Miss Hoult and a Mrs. Burns respectively: and subject thereto the capital and income of the residue was given to the appellant and her brother as "tenants in common in equal shares". The appellant and her brother—Reginald Spaven—were respectively the niece and nephew of the testator.

Pursuant to this last provision the appellant and her brother were each entitled to one-half of the proceeds of sale of certain land at Rockingham south of Fremantle. Or, if they wished to have the land instead and hold it as tenants in common they could do so if the Executors assented. It was not necessary for the purposes of the administration of the estate that the land should be sold.

Reginald, the brother, however wanted the land sold as soon as possible, and in 1962 told one of the Executors that he had been offered £40,000 for his half-share and that the same buyer would pay another £40,000 for the appellant's share. She, however, did not wish to sell, believing that over the years the land would appreciate in value. It comprised some 3,600 acres with development potential. Accordingly she asked her brother to grant her an option to buy his half-share for the £40,000 he said he had been offered. He agreed, and granted it. This was on 26th July 1962. The option was to expire on 15th September 1962.

The appellant did not have £40,000 at her disposal. Accordingly she decided to sell part of the land in order to raise it. Acting on advice she prepared a plan dividing the land into three portions, known as portions 4, 5 and 6. The plan was submitted to and approved by the local Town Planning Board. Portions 4 and 6 being nearest to the beach were the portions which the appellant particularly wished to keep as being more likely to appreciate in value. These two portions comprised 525 acres. Portion 5 comprised 3,073 acres but on the other hand most of it was back land away from the beach.

Eventually after declining a number of less attractive offers the appellant on 5th October 1962 with the assent of the Executors accepted an offer of £150,000 for portion 5, the purchasers agreeing to pay a deposit of £50,000 on the execution of the contract and the balance upon acceptance for registration of a transfer of the land at the Land Titles Office Perth.

The Executors' assent was made conditional upon the appellant and her brother each depositing £10,000 as further security for the above mentioned settled legacies of £15,000 and £10,000; the executors being uncertain whether the investments they had set aside for these would prove sufficient.

With some foreknowledge of the terms of the eventual contract of sale the appellant had on 10th September 1962 exercised her option to buy for £40,000 her brother's half-share in the whole of portions 4, 5 and 6.

The sale went through as planned. Out of the deposit of £50,000 the appellant paid her brother £40,000 lodged the balance of £10,000 with the Executors as required, and was left with the balance of the purchase price plus the sole ownership of portions 4 and 6 which were duly transferred to her by the Executors with her brother's assent.

The respondent estimated that the appellant had made a profit of £56,951 from the foregoing transaction; and in August 1966 made an adjusted assessment to income tax upon her in respect of this profit for the year ended 30th June 1963. He declined a request by her Solicitors to state how he arrived at his figure, but did so at the trial before *Windeyer J.* who was critical of the computation. The result of the trial and of the subsequent appeal have already been narrated.

The question obviously suggests itself—why did the appellant have to sell land worth £150,000 simply in order to get £40,000 to pay her brother? The answer is that the appellant was advised that in order to get a good price for portion No. 5 she would have to include in that part some of the more valuable land.

The respondent made the adjusted assessment upon the appellant pursuant to the terms of section 26 (*a*) of the Income Tax Assessment Act 1936–1965 of the Commonwealth of Australia. This reads

> "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."

In addition he contends that the profit made by the appellant was income and not capital according to the commonly accepted notions of what income is, since she had engaged in an adventure in the nature of trade.

Windeyer J. held that neither limb of section 26 (*a*) applied to the present case. The appellant had not acquired property for the purpose of profit-making by sale. She acquired an undivided half-share through the bounty of the testator. She acquired the other half-share by purchase from her brother but her dominant purpose in doing this was to ensure that as far as she could do so the land would not be sold until some time in the future. The appellant—so far as she had been obliged to sell—had done no more than realise a capital asset.

On appeal by the respondent to the Full Court *Barwick C.J.* agreed with the foregoing conclusions. He took the view that 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 . . . make the proceeds either profit or income for the purposes of the Act." It would be different if the inheritance had been adventured as the capital of a business, for example, land jobbing or development, but no such thing had been done here.

Kitto J. was of the opinion that liability to income tax had been established. He considered, for reasons which will presently be specified that the profit made by the appellant was caught by the second limb of section 26 (*a*) and was also income as being the result of an adventure in the nature of trade.

Menzies J. and *Owen J.* concurred with *Kitto J.* delivering no separate judgments.

This division of opinion reflects the difficulty in deciding when an isolated transaction involving the acquisition, whether by purchase or otherwise, of an asset, and its resale at a profit, yields to the seller a profit in the nature of income or, instead, an accretion to capital. Judicial decisions, whether in the Commonwealth, or in the United Kingdom, yield no touchstone by which all cases may be easily resolved. In the United Kingdom the test is whether the transaction is "an adventure in the nature of trade"—see the definition of trade in section 526 of the Income Tax Act 1952. Although there is no similar provision in the Australian Income Tax Act, the respondent invokes the same test in his argument that the profit accruing to the appellant was income according to ordinary concepts "because (she) was engaged in an adventure in the nature of trade" (see paragraph 5 of his Reasons). But his primary contention is that the appellant is liable under the express provisions of section 26 (*a*) and this contention their Lordships now examine.

The first question is whether the appellant acquired property for the purpose of profit-making by sale. *Windeyer J.* held that she had not. She had, he said, acquired an undivided share in the land by the bounty of the testator. "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 but "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 statement that an undivided share in the land came to the appellant by the bounty of the testator was challenged by the Solicitor-General on behalf of the respondent. What the appellant was entitled to under the will was, he said, not a half-share in land but a half-share in the proceeds of the sale of the land which the testator directed his trustees to effect. She acquired the land by agreement between herself and her brother and the Executors, and did so at a time when she had already formed her plan for sale and had received an offer which would yield a profit. So that within the words of section 26 she acquired land for the purpose of profit-making by sale.

If one looks no further than the terms of the residuary gift it is true that the appellant was entitled to a share of the proceeds of sale. There was no specific devise of the land. But she and her brother were the sole beneficiaries in respect of the land; and if the state of administration allowed it, they could have called for the transfer of the land to them. In fact specific power enabling the Trustees to do this is contained in Clause 8 (iii) of the will. Not only did the state of administration allow such a transfer (subject to the above mentioned deposits as additional security for the settled legacies) but the evidence strongly suggests that not only the appellant but her brother wanted the land transferred to them in specie. Thus Mr. Medcalf one of the Executors said that about May 1962 the appellant "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". And the option given by him to the appellant begins "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. . . ." It is clear therefore that rather than let the trust for sale be executed according to the will both beneficiaries wanted the land in specie as soon as the Executors could properly transfer it: and that being so it is not inaccurate to describe sister and brother as acquiring the land through the bounty of the testator. On that footing it would be quite inappropriate to say of the appellant that she acquired land through the bounty of the testator "for the purpose of profit-making by sale". This may well explain why there is no separate mention in the majority judgment in the High Court of any argument based on the first limb of section 26 though your Lordships were assured that one was advanced.

The second limb of the section poses the question whether the appellant derived profit from the "carrying on or carrying out of any profit-making undertaking or scheme". *Kitto J.* rested his affirmative answer on these grounds:

(i) The appellant purchased her brother's half-interest in the Rockingham land for the purpose of enabling her to sell the fee simple in those lands.

(ii) She had no other purpose than to sell the entirety of those lands, part of them immediately and the rest at a future time.

(iii) She wished to do this in a way which would bring in the best price.

(iv) These premises involve the conclusion that the plan the appellant adopted was a plan for the making of profit.

(v) This profit answered the description of profit in the second limb of section 26 (*a*).

(vi) It would also be income according to ordinary concepts since it would be the net proceeds of an adventure in the nature of trade.

(vii) *Windeyer J.* had not given due weight to the point that the appellant's purpose was one of profit-making by uniting both half-interests in the lands in her own hands and then selling the resulting entirety in sub-division over a period for more than the entirety had cost her.

It is not easy to reconcile with the evidence the learned Judge's assertion that the appellant had no other purpose than to sell the entirety of the land, part immediately and the rest at a later date. The relevant testimony is that of the appellant herself, and the nearest she gets to the purpose so ascribed to her is in one answer which she gave in examination in chief. After saying that she had wanted to retain the Rockingham land because in time it would become very valuable she was asked "How would it be realised?" To which she replied "Later on I thought it could be sub-divided: it was near the beach and beach cottages could be built on it."

Their Lordships would hesitate to draw from this single answer the conclusion that the appellant's sole purpose in 1962 was the sale of the whole land. She reiterated constantly in her evidence that she wanted to keep it unsold: and at one stage implied that this would be for the benefit of her family. Moreover if the implication be read into the evidence that it was the appellant herself who would build the cottages, or cause them to be built, she said nothing which proved her intention to sell them, rather than to let them and retain them as investments. It is fair to say that the learned Judge did not rest his conclusion in favour of the respondent solely on his assumption regarding the intentions of the appellant. Nor could he have done so consistently with a considerable body of judicial authority, to the effect that a landowner may develop and realise his land without making a profit which partakes of the character of income: even though he goes about the realisation in an enterprising way so as to secure the best price. Looking at Australian authorities alone one need only instance *Scottish Australian Mining Co. Ltd. v. Federal Commissioner of Taxation* (1950) 81 C.L.R. 188, and *White v. Commissioner of Taxation* 43 Australian Law Journal Reports at p. 28. What clearly helped to tip the scales in favour of the respondent was the further fact which *Kitto J.* describes as "a process which involved bringing both that" (i.e. the brother's) "half interest and her own to an end by uniting them in her own hands etc."

The process thus described, if spelt out in more detail, comes to this: the appellant found herself in a position where, desiring to retain the land, she had a prospective tenant in common with herself who desired to sell. To avoid becoming tenant in common with a stranger she decided to try and acquire her brother's interest. She accordingly obtained the option. When she exercised it she became in equity the owner of the fee simple, owing her brother £40,000. At this point as *Barwick C.J.* points out she made a profit in the sense that the fee simple was much more valuable than the sum of the former interests in common: but this profit, being unrealised appreciation, was not a taxable profit in her hands. She then had to pay her brother, and to enable her to do so she had to sell part of the land.

Do these facts disclose a "profit-making undertaking or scheme" within the meaning of section 26 (*a*)? It is clear in the first place that not all such undertakings or schemes are caught by the section. Otherwise every successful wager would be within it. So also would the purchase of investments bought by a private investor as a hedge against inflation and sold—perhaps long afterwards—at more than the purchase price. The participator in a lottery would also be liable if he drew the winning ticket. The undertaking or scheme, if it is to fall

within section 26 (*a*) must be a scheme producing assessable income, not a capital gain. What criterion is to be applied to determine whether a single transaction produces assessable income rather than a capital accretion.? It seems to their Lordships that an " undertaking or scheme " to produce this result must--at any rate where the transaction is one of acquisition and re-sale--exhibit features which give it the character of a business deal. It is true that the word " business " does not appear in the section; but given the premise that the profit produced has to be income in its character their Lordships think the notion of business is implicit in the words " undertaking or scheme ". They are reinforced in their view by the opinion expressed by the respondent in paragraph 19 of his case. Referring to the fact that he did not submit in the High Court that the appellant had engaged in an adventure in the nature of trade, he nevertheless asked to be allowed to raise this contention before the Board on the ground that " it is only an alternative way of presenting the respondent's case under s. 26 (*a*) ".

Did the appellant engage in such an undertaking or scheme? One must look at all the facts to decide. She obtained her share in the land through the bounty of her uncle. She desired to keep it and not to sell it. Her co-beneficiary had the opposite desire. She was thus faced with the prospect of a tenant in common who was a stranger with all the difficulties which that situation might produce. There were two possible solutions: to sell her share also as her brother suggested, or to buy him out. She chose the latter course as the one which would enable her to salvage as much as possible of her original purpose.

Like *Barwick C.J.* and *Windeyer J.* their Lordships cannot think that this is the kind of undertaking or scheme caught by section 26 (*a*). It is true that the appellant set about selling sufficient land in an enterprising way. But in argument the Solicitor-General on behalf of the respondent rightly admitted that this was inconclusive. What he strongly relied upon was the prior purchase of the brother's interest and its inclusion in the sale. Their Lordships take the view that the facts bring out clearly that this was simply a means to an end, i.e. the retention of the more valuable land.

The final contention of the respondent is that the profit which arose to the appellant is income according to ordinary concepts, since it arose from an adventure in the nature of trade. Whilst this claim is quite independent of section 26 (*a*) it seems to their Lordships to introduce no new element into the problem such as would lead to some different conclusion. The whole of the facts have still to be considered; the same criteria have to be applied; the question to be asked and answered is still whether the facts reveal a mere realisation of capital, albeit in an enterprising way, or whether they justify a finding that the appellant went beyond this and engaged in a trade of dealing in land albeit on one occasion only. To this question their Lordships think that, as in the case of the question arising under s. 26 (*a*) the answer should be in the negative.

As in most cases of this kind a wealth of authorities was cited, ranging from *Californian Copper Syndicate Ltd. v. Harris* (1904) 5 Tax Cases 159 down to *White v. Commissioner of Taxation* (1968) 43 A.L.J.R. 26. No useful purpose would be served by examining them all. The governing principle is clear: it is the application of it to cases exhibiting a wide variety of circumstance that constitutes the difficulty. In *Californian Copper Syndicate v. Harris* The Lord Justice Clerk formulated the question which must be asked in cases like the present. " Is the sum of gain that has been made a mere enhancement of value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making?"

So far as section 26 (*a*) is concerned, the Solicitor-General pointed out that the words " an operation of business " do not occur therein. Their Lordships' view, already stated, is that in a case where the profit is made by the acquisition and sale of some asset a similar notion must be implied if the profit is to partake of the character of assessable income.

So far as concerns the claim that the appellant's profit is income according to ordinary usages and concepts it is common ground that this can be established only if what the appellant did was an adventure in the nature of trade.

Applying these tests it must be a question of fact in each case whether liability to income tax has been incurred or not.

A word should be said however about two cases strongly relied upon by the respondent, one is *Official Receiver v. Federal Commissioner of Taxation* 96 C.L.R. 370. In that case the Official Receiver as administrator in bankruptcy of the estate of one Fox (also known as Rankin) carried on after an interval a business which Fox had conducted during his lifetime. This was to reclaim land in Queensland, top dress the reclaimed soil, construct drains and water channels, make roads and then sell the land in plots. In one year the Official Receiver sold 32 plots so reclaimed and developed by him. In the second year he sold 66 such plots: and still had on hand 235 more waiting to be sold after the necessary expenditure had been laid out upon them. It was held that although the Official Receiver's duty was to realise the estate for the benefit of creditors he had adopted a set plan to do so and the profit was assessable under section 26 (*a*). It was also held, however, that the basis of computation of the profit adopted by the Commissioner was wrong, and the report does not indicate whether his victory was a pyrrhic one or not. But although he succeeded in principle the facts are so different from the present case that the decision does not really help.

The other case is *Iswera v. Commissioner of Inland Revenue* [1965] 1 W.L.R. 663. This was an appeal heard by the Board from a decision of the Supreme Court of Ceylon. The appellant wishing to live near a school which her daughters were attending, bought a site of 2½ acres in the locality. It was more than she wanted but the vendor would sell only the whole. The appellant divided the land into 12 lots selling 9 to sub-purchasers, reconveying one to the vendor, and keeping one for herself. She made a profit and was assessed to Ceylon income tax upon it as being profit from an adventure in the nature of trade. The Board of Review in Ceylon on appeal to them by the appellant found that her dominant motive was to divide the land and to sell the surplus lots so as to make a profit, and obtain a lot for herself below market value. They therefore upheld the assessment. An appeal lies to the Supreme Court of Ceylon from the Board of Review only on a point of law. The Supreme Court held that no error of law had been made. On appeal to the Judicial Committee the same view was taken, Lord Reid however indicating that it was a borderline case, and that the Board of Review might properly have taken a different view of some of the evidence.

The case illustrates the difficulty of applying the accepted tests. It differs sharply from the present case since Mrs. Iswera intended from the first to divide and sell off the greater part of the land. Mrs McClelland wanted to keep it, but circumstances forced a sale upon her.

Having carefully considered the evidence and the arguments their Lordships have reached the conclusion that the decision of *Windeyer J. and Barwick C.J.* ought to prevail: and in the circumstances they do not need to consider the validity of the respondent's method of calculating

the figure of £56,951. They will humbly advise Her Majesty that this appeal should be allowed. The respondent must pay the costs here and below.

[*Dissenting Judgment of* LORD PEARSON *concurred in by* LORD MACDERMOTT]

I would hold that section 26 (*a*) of the Income Tax and Social Services Contribution Assessment Act 1936–1963 applies to this case. Being in a minority, I will state my reasons shortly.

Section 26 provides that " 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 ".

This provision was introduced in the Act in the year 1930 a few months after the decision of the House of Lords in *Jones v. Leeming* [1930] A.C. 415. and, as Windeyer J. said in *White v. Commissioner of Taxation of the Commonwealth* (1968) 42 A.L.J.R. 139 at p. 146, seems to have been introduced for the purpose of overcoming the decision in *Jones v. Leeming* as it might have applied to Australia. In *Jones v. Leeming* four persons had joined in obtaining options to purchase rubber estates in Malaysia, and they ultimately sold them at a profit. The Crown's claim that this profit was assessable to income tax was rejected. There was a supplementary finding by the Commissioners that the transaction was not a concern in the nature of trade. In the course of his judgment in the Court of Appeal Lawrence L.J. had said " It seems to me in the case of an isolated transaction of purchase and re-sale of property there is really no middle course open. It is either an adventure in the nature of trade, or else it is simply a case of sale and re-sale of property." This passage in the judgment of Lawrence L.J. was cited with approval by Lord Buckmaster at p. 421 Lord Dunedin at p. 422 and Lord Thankerton at pp. 427–8. Lord Warrington said at p. 425: " Here we have a case of the acquisition of an item of property and a profit made by the transfer thereof to another. In this I can find nothing but a profit arising from an accretion in value of the item of property in question and the realisation of such enhanced value. There is in this nothing in the nature of revenue or income. The fact that the parties intended from the first to make a profit if they could does not in my opinion affect the question we have to determine. The case seems to me a clear one against the Crown ".

Section 26 (*a*) enacted the opposite of the *ratio decidendi* in *Jones v. Leeming*. In section 26 (*a*) there is no requirement that the acquisition and subsequent sale or the carrying out of a profit-making scheme must not be an isolated transaction or must amount to, or be in the course of, a business or trade or adventure in the nature of trade. In *Official Receiver v. Federal Commissioner of Taxation* (1956) 96 C.L.R. 370 the judgment of the Court (Dixon C.J. and Williams, Webb, Fullagar and Kitto J.J.) contained at p. 387 this passage:

> " Although s. 26 (*a*) is founded on language which was used in judicial decisions (see *Premier Automatic Ticket Issuers Ltd. v. Federal Commissioner of Taxation* (1933) 50 C.L.R. 268 at pp. 297, 298) yet it provides a statutory criterion which must be applied directly and cannot be treated as going no further and producing no different result than would a criterion expressed as ' exercising trade ' or ' carrying on a business '. English cases applying those tests cannot govern the application of s. 26 (*a*), although no doubt they may give some assistance."

In the case referred to in that passage—*Premier Automatic Ticket Issuers Ltd. v. Federal Commissioner of Taxation*—at pp. 297–8 Dixon J. had said " In *Ruhamah Property Co. v. Federal Commissioners of Taxation* in the judgment of Knox C.J., Gavan Duffy, Parvis and Starke JJ. the rule was re-stated: " The principle of law is that profits derived directly or indirectly from sources within Australia in carrying on or carrying out any scheme of profit-making are assessable to income tax, whilst proceeds of a mere realisation or change of investment or from an enhancement of capital are not income nor assessable to income tax. (*Commissioners of Taxes v. Melbourne Trust Ltd.; Duckes v. Rees Roturbo Development Syndicate; Commissioner of Taxation (W.A.) v. Newman; Blockley v. Federal Commissioner of Taxation*) " . . . The alternative " carrying on or carrying out " appears to cover on the one hand the habitual pursuit of a course of conduct and, on the other, the carrying into execution of a plan or venture which does not involve repetition or system."

This last sentence was cited and adopted by Taylor J. in *Clowes and another v. Federal Commissioner of Taxation* (1954) 91 C.L.R. 209 at p. 231.

Dixon J. had also said in the same judgment, in relation to section 26 (*a*), " It is not easy to say whether the expression ' profit-making by sale ' refers to a sole purpose or a dominant or main purpose, or includes any one of a number of purposes ". But I think it can now be taken as settled by later cases that the " purpose " referred to in the phrase in section 26 (*a*) " for the purpose of profit-making by sale " is the dominant or main purpose. *Evans v. Deputy Federal Commissioner of Taxation* (S.A.) (1936) 55 C.L.R. 80 at p. 99 per Rich, Dixon and Evatt J.J. (" The purpose of which it speaks is the dominant purpose actuating the acquisition of the assets—the use to which they are to be put ") *Buckland v. Federal Commissioner of Taxation* (1960) 12 Australasian Tax Decisions 166 at p. 169 per Windeyer J. (" When a person buys property, as a commercial money-making transaction and not for his personal use or enjoyment, the purpose he has in view is the use to which he intends to put the property to achieve this end. He may intend either to sell it at a profit, or to keep it as a revenue-producing asset. In relation to s. 26 (*a*) it is the main or dominant purpose of the acquisition that is significant. If a property, say a house or farm, were bought for the purpose of resale at a profit it would be immaterial that the purchaser also had in mind to take the rents and profits in the meantime or pending selling to use it for some purpose of his own.") *Pascoe v. Federal Commissioner of Taxation* (1956) 11 Australasian Tax Decisions 108 at p. 112 per Fullagar J.

Does the first part of section 26 (*a*) apply to the present case? Was there in the year of assessment a profit arising from the sale by the appellant of any property acquired by her for the purpose of profit-making by sale?

In July 1962 the estate of the deceased had not been completely administered. The executors had to set aside two sums of £15,000 and £10,000 respectively and pay the income thereof to two named beneficiaries for their lives. The executors considered that they had not made sufficient provision and they wished the appellant and her brother to lodge £10,000 each for this purpose.

The appellant and her brother did not yet have any property in the land. *Commissioner of Stamp Duties (Queensland) v. Livingston* [1965] A.C. 694. They were entitled to have the estate duly administered with the result that either the land would be sold and the nett proceeds of sale, after making provision for setting aside the £15,000 and the £10,000, would be divided equally between them, or the lodgments would be made and the land would be transferred to them as tenants in common in equal

shares. Neither of them yet had any tenancy in common or other estate in the land. Each of them had a conditional and prospective right to acquire a tenancy in common. The appellant on the 10th September 1962 exercised her option to acquire her brother's right for £40,000 but the right would not pass to her until she paid the price for it.

That was the position at the beginning of the 5th October 1962. On that date several things happened. The appellant contracted to sell to certain purchasers Portion 5 of the land at a price of £150,000 (which was subject to adjustment on measurement) and the purchasers paid a deposit of £50,000. This enabled the appellant to pay £40,000 to her brother for his right and to lodge £10,000 with the executors. Then the executors transferred to her the ownership in fee simple of the entirety of the land. That is what she acquired.

Did she acquire it for the purpose of profit-making by sale? In my opinion the answer is in the affirmative. The evidence and the findings of the learned judges show that she acquired the ownership of the land for the purpose of selling it at a profit. She was going to sell Portion 5 of the land immediately to the purchasers in pursuance of the contract, which gave her a large profit, and her intention was to keep the rest of the land (Portions 4 and 6) while its market value would greatly increase and eventually she would sell it at a very large profit.

Subject to a question to be considered in a moment, it seems to me that this transaction does fall within the first part of section 26 (*a*) and also within the second part which refers to " profit arising . . . from the carrying out of any profit-making . . . scheme ".

The question remaining to be considered is whether the profits of this transaction, though *prima facie* within s. 26 (*a*), are to be excluded as being " proceeds of a mere realisation or change of investment or from an enhancement of capital ". (*Premier Automatic Ticket Issuers Ltd. v. Federal Commissioner of Taxation* supra.)

In *Commissioner of Taxation v. British Australian Wool Realisation Limited* [1931] A.C. 224 at p. 250 Lord Blanesburgh said " To their Lordships, therefore, there is disclosed, on their view of the facts here, a case entirely within the terms of the following words from the judgment in *California Copper Syndicate v. Harris* which have been since so often cited with approval: " It is quite a well-settled principle in dealing with questions of assessment of income tax that where the owner of an ordinary investment chooses to realize it, and obtains a greater price for it than he originally acquired it at, the enhanced price is not profit . . . assessable to income tax." Equally applicable in the view of their Lordships are the words of Lord Dunedin in *Commissioner of Taxes v. Melbourne Trust,* where he says " If the liquidator of one of the banks had made an estimate of the various assets held by him for realisation, and then on realisation had obtained more than that estimate, such surplus would not have been profit assessable to income tax."

There have been English and Australian cases in which advantageous disposal of an inheritance or of property no longer required for the use for which it was acquired has been held to be " mere realisation ", so that the profit was not assessable to income tax, but I have not found any statement of the principle wide enough to cover the present case. In the present case there was an elaborate scheme not merely to enlarge the inheritance but to acquire something different and much more valuable. The appellant put into the transaction (i) the £40,000 paid to her brother for his prospective right to receive one-half of the nett proceeds of sale of the land or a tenancy in common (ii) her own similar right (iii) the lodgment of £10,000. She took out of the transaction the fee simple of

the entirety of the land. She also sold immediately a portion of the land for a good profit and was able to retain the rest in the expectation of eventually selling it at a very high profit. In my opinion this transaction went beyond mere realisation and so is not excluded from the operation of section 26 (*a*). There may be doubts as to the proper method of assessing the taxable profit, but I agree with Kitto J. that the assessment made has not been shown to be excessive.

Lord MacDermott has asked me to add that he agrees with this judgment and would dismiss the appeal for the reasons I have given.

311142—1 Dd. 178171 11/70

In the Privy Council

DOLORES HAY McCLELLAND

v.

THE COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA

Printed by HER MAJESTY'S STATIONERY OFFICE
1970