[HIGH COURT OF AUSTRALIA.]

ISLES . . . . . APPELLANT;

AND

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

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BRISBANE, *May* 9;

SYDNEY, *May* 17.

Griffith C.J., Barton and Isaacs JJ.

*Land Tax—Joint owners—Trustee—Equitable tenant for life—Land Tax Assessment Act* 1910, (No. 22) *secs.* 25, 33, 38.

For the purpose of assessment of land tax, a joint owner, who holds as a trustee, is entitled to the benefit of the third proviso to sec. 33. If the trustee is also equitable tenant for life of the land he is also entitled to the benefit of sec. 25. Sec. 38 is not an over-riding provision.

SPECIAL CASE stated by *Griffith* C.J. for the opinion of the High Court pursuant to sec. 46 of the *Land Tax Assessment Act* 1910.

The special case was as follows:—

1. This is an appeal by the appellant from an assessment of land of which she and the Australian Bank of Commerce Ltd. are the owners as tenants in common.

2. The appellant is the trustee of the will of James Isles late of Brisbane, who died in the year 1888, leaving an undivided interest in the land which is the subject of the assessment under appeal and of which he and the predecessors in title of the said banks were tenants in common.

3. The unimproved capital value of the land has been assessed by the respondent at the sum of £36,050 and its taxable value after making one deduction of £5,000 at £31,050.

4. The said James Isles by his will and codicil thereto gave and devised all his real and personal estate to his wife (the now appellant) upon trust for conversion with unlimited discretionary

power of postponement and upon further trust to invest the net proceeds and to pay out of the income for five years certain sums by way of legacy and to pay one-half of the remainder of the income to the appellant for her life and to pay and divide the residue of the income between and among his five children whom he named until the youngest child should attain the age of 21 years and then to divide and distribute one half of the capital between and among them in equal shares and upon further trust on the death of his wife or upon the youngest child attaining 21 (whichever event should happen latest) to divide and distribute the remaining half of the capital between and among his said children.

5. One of the children of the said testator died under the age of 21 years. The other four children are still living and have attained that age.

6. The appellant claims that for the purpose of ascertaining the taxable value of the land in question so far as regards the interest held by her as such trustee a deduction should be made under the provisions of sec. 33 of the Act in respect of her own life estate and also in respect of each of the shares of the said four surviving children of the said testator.

7. The respondent claims that one deduction only of £5,000 ought to be made from the unimproved value of £36,050.

The question for the determination of the Court is whether the appellant is entitled to have any and if any what deduction made in respect of the interests of herself and the said four children of the testator from her liability under the joint assessment.

*Grove*, for appellant. The undivided interest is land for the purposes of taxation, and the appellant is entitled to claim deductions, as a trustee, on account of the share of each beneficiary, under the third proviso to sec. 33.

*Macgregor* (with him *Graham*), for respondent. Sec. 38 should be read exclusively, and the appellant is not entitled to claim any benefits under sec. 33. Secs. 13 and 14 are entirely exclusive

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sections. He referred to *Commissioners of Taxation* v. *Coveny* (1).

*Grove*, in reply.

*Cur. adv. vult.*

The following judgments were read :—

GRIFFITH C.J. The appellant and the Australian Bank of Commerce are the owners of the land in question as tenants in common.

Sec. 38 of the *Land Tax Assessment Act* provides that joint owners of land shall be jointly assessed and liable in respect of the land as if it were owned by a single person without regard to their respective interests therein. It also provides that each joint owner shall in addition be separately assessed and liable in respect of his individual interest in the land as if he were an owner of a part of the land in proportion to his interest, and that the joint owners in respect of their joint assessment shall be deemed to be the primary taxpayer and each joint owner in respect of his separate assessment to be a secondary taxpayer, with provisions to prevent double taxation.

The respondent, relying on the literal language of the section, has assessed the appellant and the bank as joint owners, allowing only one deduction of £5,000 from the unimproved value of the land.

The appellant, who takes her interest in the land as trustee of the will of James Isles who died in 1888, and who is herself equitable tenant for life of half of the testator's interest, claims the benefit of section 25, and also of the third proviso to sec. 33, which provides that, in the case of land vested in a trustee under a settlement made before 1st July 1910 or the will of a testator who died before that date, upon trust to stand possessed thereof for the benefit of a number of persons relatives of the settlor or testator, certain deductions are to be made from the unimproved value of the land. If effect is given to her contention, her interest in the land has no taxable value. It is clear that as secondary taxpayer she would not be liable for anything.

(1) 19 N.S.W. L.R. (L.), 231.

The question for determination is whether the provisions of sec. 38 are overriding provisions, or whether in the case of joint owners, of whom one is a trustee, the trustee joint owner can claim the benefit of secs. 25 and 33.

Sec. 35 provides that the owners of equitable estates or interests in land shall be assessed and liable in respect of land tax as if they were the legal owners, the owner of the legal estate being deemed to be the primary taxpayer and the owner of the equitable estate to be the secondary taxpayer, with provisions to prevent double taxation. This applies to equitable joint owners as well as others. The case dealt with by the third proviso to sec. 33 is, therefore, a particular case of joint owners, that is, equitable joint owners who would otherwise be subject to the provisions of sec. 38 in the same way as legal joint owners.

It is to be observed that the provisions of sec. 25 (dealing with life interests) and of the third proviso to sec. 33 are temporary provisions, applicable only to trusts created by settlements or wills taking effect before 1st July 1910. In all other cases the Act makes no distinction in favour of tenants for life or beneficiaries as distinguished from absolute legal owners. Again, they are applicable only to equitable joint owners who are relatives of the settlor or testator. But they are *primâ facie* applicable to all such cases.

Secs. 33 and 38 must, if possible, be read together so as to give effect to both, and neither section should be read as overriding the other if any other construction is fairly open.

The third proviso to sec. 33 contains, then, a temporary exception to the rule laid down by sec. 38, as applicable to some equitable joint owners. Why should its application be limited to cases in which the trustees are themselves the sole owners of the whole legal estate in the land? I can see no reason for so holding. In my judgment it must be read as an exception applicable to all cases falling within its terms.

Suppose, for instance, the case of two joint owners of land in severalty, each of whom died before 1st July 1910, having by will devised their respective interests in the land to trustees upon trusts for several persons, relatives of the respective testators, the value of the land being such that the whole value of each share

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would be deducted under the third proviso to sec. 33, would the land be taxable under sec. 38 ? I cannot think so.

The term 'land' is in general used in the Act to designate a portion of the earth's surface, and not in the wider sense given to it in the *Acts Interpretation Act*, sec. 22. But the Act makes provision for the assessment and taxation of undivided interests in land in some cases. Sec. 38, for instance, makes provision for the assessment and taxation of the individual interests of joint owners. By sec. 13 certain lands are exempt from taxation; amongst others, land owned by or in trust for a charitable institution; and sec. 14 provides that with respect to land which is exempt from taxation under sec. 13 the exemption shall be limited to the owner specified in that section and shall not extend to any other person who is the owner of any estate or interest in the land. Thus, if land were held by two persons as joint owners, one of whom was as to his undivided interest a trustee for a charitable institution, his interest would be exempt, but the interest of the other joint owner would not.

It is clear, I think, that in this case sec. 38 would not override sec. 13. The notion, therefore, that one of two joint owners may, notwithstanding sec. 38, be free from taxtion is expressly recognised by the Act.

Sec. 11 provides that land tax shall be payable by the owner of land upon the taxable value of all land owned by him which is not 'exempt from taxation' under the Act. The direct reference is apparently to sec. 13. Land coming within the third proviso to sec. 33 is, perhaps, not 'exempt' within that section, but it may, I think, be called in aid in determining the question before us.

I am, therefore, unable to draw any distinction, so far as regards the application of the third proviso to sec. 33, between a case where all the joint owners are trustees under different trusts and a case where one only of the joint owners is a trustee, and I think that in either case the proviso is applicable.

For these reasons I think that the appellant is entitled to claim the benefit of the proviso, and for similar reasons that she is entitled to claim the benefit of sec. 25.

BARTON J. concurred.

ISAACS J. The appellant is a tenant in common with the bank of certain land, that is to say, she has a unity of possession with the bank, but a several title as well as a several interest. Under the *Real Property Act*, sec. 40, persons entitled as tenants in common to undivided shares receive separate and distinct certificates of title to their shares. For the purposes of the *Land Tax Assessment Act* 1910, the expression "joint owners" means persons who own land jointly or in common, whether as partners or otherwise. Sec. 38 provides that joint owners are to be jointly assessed as if the land were owned by a single person without regard to their respective interests, and without taking into account any land owned by them in severalty, or as joint owner. But the section does not say that that shall be the sole or final consideration in determining their liability. Obviously, if that were so, it might clash with sec. 13, as qualified by sec. 14. The respondent, however, contends that it excludes the third proviso of sec. 33 unless all the joint owners are trustees. That qualification is admitted, because it is too self-evident to question. But if so much is admitted where is the qualification to end ? Sec. 38 does not say anything about trustees ; and if it be conceded that beneficial interests are to be protected when both owners are trustees, I fail to see how they are to be excluded when one is a trustee, and perhaps the legal owner of nine-tenths of the land. Sec. 38 is, in my opinion, nothing more than a machinery section to secure the due payment of tax as directed, and to guard at the same time against imposing more. A person entitled in association with others to land somewhat complicates the assessment and so a primary assessment is made disregarding separate interests, and disregarding outside interests. If the respondent were correct in his argument the section should stop there. But it does not, it goes on to provide for a secondary assessment by which the joint owners, or some of them, if liable under any other provisions of the Act, are made liable. And then double taxation is guarded against. But in the separate assessment of Mrs. Isles, which is to be on her individual interest in the land, and as if she were the owner of the land in proportion to her interest, undoubtedly

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sec. 33 must be taken into account. Why then must these beneficial interests be obliterated? The Commissioner says—because sub-clause 2 declares the land is to be assessed as if it were owned by a single person. But a single person might be trustee as to named shares for beneficiaries and hold in his own right as to the balance, and full effect can therefore be given to sub-sec. 1, without impliedly repealing the distinct and just provisions of the third sub-section of sec. 33. There is to be no regard to "respective interests" which means interests as between the "joint owners," and leaves untouched the trusts imposed on those interests. The undivided share left by the testator was a hereditament, it is a separate right, it is held by a separate title, and is "land" within the meaning of the *Acts Interpretation Act*, and also as I think within sec. 33.

I agree that the appeal should succeed.

*Question answered by declaring that the appellant is entitled to all the deductions claimed.*

Solicitors, for the appellant, *J. F. Fitzgerald & Walsh*, Brisbane.

Solicitors, for the respondent, *Chambers, McNab & McNab*, Brisbane.

N. McG.