[HIGH COURT OF AUSTRALIA.

MORGAN . . . . . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX, NEW SOUTH WALES } RESPONDENT.

H. C. OF A. 1912.

SYDNEY, *Dec.* 11, 19.

Griffith C.J., Barton and Isaacs JJ.

*Land Tax—Power of taxation—Subject of taxation—Company—Taxation of shareholders in respect of land of company—The Constitution* (63 & 64 *Vict. c.* 12), *secs.* 51 (ii.), 55—*Land Tax Assessment Act* 1910-1911 (*No.* 22 *of* 1910—*No.* 12 *of* 1911), *sec.* 39.

In the exercise of the power of taxation conferred by sec. 51 (ii.) of the Constitution, the Parliament of the Commonwealth in selecting subjects of taxation is entitled to take things as it finds them *in rerum naturâ*, irrespective of any positive laws of the States prescribing rules to be observed with regard to the acquisition or devolution of formal title to property, or the institution of judicial proceedings with regard to it.

*Held*, therefore, that the tax imposed by the Commonwealth Parliament by sec. 39 of the *Land Tax Assessment Act* 1910-1911 upon the shareholders of a company in respect of land owned by the company, is land taxation, and is not invalid by reason of sec. 55 of the Constitution.

SPECIAL CASE stated by *Isaacs* J. for the opinion of the Full Court of the High Court under sec. 46 of the *Land Tax Assessment Act* 1910-1911.

The special case was as follows:—

1. This is an appeal from assessment of land tax.

2. The appellant is a resident of New South Wales, and is the owner of real estate in fee simple situate within the State of New South Wales.

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3. The unimproved value of such land has been assessed at the sum of £1,797.

4. The appellant is the holder of 240 one pound fully paid up shares in the capital of the State Investment Company of New South Wales Limited, of which the total amount of paid up capital is £1,750.

5. The unimproved value of the land owned by the said State Investment Company of New South Wales Limited within the State of New South Wales has been fixed at the sum of £246, and the respondent has fixed the sum of £34 as the alleged interest of the appellant in the unimproved value of such land.

6. The appellant is also the holder of 500 one pound fully paid up shares in the capital of the Franz Joseph Land Company Limited, of which the total amount of paid up capital is £506.

7. The unimproved value of the land owned by the said Franz Joseph Land Company Limited within the State of New South Wales has been fixed at the sum of £6,561, and the unimproved value of the company's land has been assessed, after making the statutory deduction of £5,000, at the sum of £1,561. The respondent has fixed the sum of £6,483 as the alleged interest of the appellant in the unimproved value of such land.

8. The appellant is also the holder of 1,249 one pound shares paid up to seventeen shillings each in the capital of the North Coast Dairy Farms Company Limited, of which the total amount of paid up capital is £4,250.

9. The unimproved value of the land owned by the said North Coast Dairy Farms Company Limited within the State of New South Wales has been fixed at the sum of £89, and the respondent has fixed the sum of £22 as the alleged interest of the appellant in the unimproved value of such land.

10. The appellant is also the holder of 100 one pound shares paid up to ten shillings each in the capital of the New South Wales Fruit Exchange Co-operative Company Limited, of which the total amount of paid up capital is £5,000.

11. The unimproved value of the land owned by the said New South Wales Fruit Exchange Co-operative Company Limited within the State of New South Wales has been fixed at the sum of £20,000, and the unimproved value of the company's land has

been assessed, after making the statutory deduction of £5,000, at the sum of £15,000. The respondent has fixed the sum of £200 as the alleged interest of the appellant in the unimproved value of such land.

12. All the said companies are registered in New South Wales under the New South Wales *Companies Act* 1899, and the business and trading operations carried on by the said companies have been since the incorporation of such companies and at the present time are confined to the State of New South Wales, and the said companies have never carried on business or trading operations, nor do they at the present time carry on business or trading operations outside the State of New South Wales, nor do the said companies or any of them own any land outside the State of New South Wales.

13. The appellant has been assessed for land tax in the sum of £120 1s. 3d., which sum is arrived at by charging the appellant with tax upon a taxable balance of £18,836 made up as follows: The sum of £17,097 in respect of lands held by him in severalty as aforesaid; the sum of £6,739 as appellant's alleged interest in respect of the said shares in the said companies. From the total of these two sums, being £23,836, there has been deducted the statutory deduction of £5,000, leaving a taxable balance of £18,836. The tax upon this balance is assessed at £127 15s. 2d., and the respondent has deducted therefrom under sec. 43 of the said Act the sum of £7 13s. 11d., leaving the aforesaid amount of £120 1s. 3d. due and payable by the appellant. The said sum of £7 13s. 11d. is made up by crediting the appellant with the sum of 18s. 9d. in respect of tax payable by the New South Wales Fruit Exchange Co-operative Company Limited and £6 15s. 2d. in respect of tax payable by the Franz Joseph Land Company Limited in respect of the said lands held by such companies as aforesaid.

14. The appellant by notice of objection duly objected to the assessment in respect of the above-mentioned tax, and by arrangement with the respondent such notice of objection was agreed to be treated as a notice of appeal in pursuance of the Regulations in that behalf made under the said Act.

15. The appellant claims that the only tax for the payment of

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which he is liable is that payable by him in respect of the lands owned by him in severalty and in respect of which he has been assessed as owner at the said sum of £17,097 less the statutory deduction of £5,000 leaving a taxable balance of £12,097. Or in the alternative that payable by him in respect of the said lands owned by him in severalty as aforesaid plus a sum in respect of his interest (if any) in the lands held by the said Franz Joseph Land Company Limited And the appellant further claims that land tax is not payable by him on the said sum of £6,739 alleged to be his interests in respect of the shares held by him in the four companies above-mentioned or any part thereof.

The questions for the opinion of the Court are :—

1. Whether the appellant is liable for the payment of land tax in respect of the said sum of £6,739 or any part thereof?

2. Whether the assessment appealed from ought to be reduced, and if so to what extent?

*Knox* K.C. (with him *Harper*), for the appellant. The Commonwealth Parliament has no power under the guise of a land tax to impose a tax upon a man in respect of land in which he has no interest. A thing named as a tax is not a tax if it is imposed on a man in respect of a subject matter in which he has no interest and over which he has no control. *Osborne* v. *The Commonwealth* (1) did not decide anything to the contrary. An interest in land must be either legal or equitable. A shareholder of a company has no interest legal or equitable in land owned by the company : *Salomon* v. *Salomon & Co. Ltd* (2). The determination of the persons chargeable with land tax must depend on the law as to title of the State in which the land is situated. The Commonwealth Parliament has no power to enact that someone who in their opinion is the owner of land, but who under the law of a State has no interest in the land, is the owner of the land, or that an interest relating to land, which is not recognized by the law of a State as an interest in land, is an interest in land.

*Flannery*, for the respondent. Sec. 39 of the *Land Tax*

(1) 12 C.L.R., 321. (2) (1897) A.C., 22.

*Assessment Act* 1910-1911 deals directly with the imposition of land tax upon persons who have an interest in land. The Parliament has chosen, as the *discrimen* between persons who are to be taxed and those who are not, an interest in land—not using the word "interest" in its technical sense. The Parliament is not bound to restrict itself to legal or equitable interests in land, but they are bound not to include in the persons taxed those whose relation to land is fantastic or so unreal as to render the so-called tax an exaction of money from them under the guise of a land tax. [He referred to *Osborne* v. *The Commonwealth* (1).] The object of sec. 39 is for the purpose of equality of taxation.

*Knox* K.C., in reply. The Act is not one to tax interests in land, but it is an Act to impose taxation upon the unimproved capital value of land. Nothing which is not a tax upon the unimproved value of land can be put in the Act. That being so, the Parliament can only provide for payment of the tax by a person who is directly connected with the subject matter of the tax. The proper forum for determining the title to land is the Court administering the law of the locality in which the land is situated.

*Cur. adv. vult.*

Dec. 19.

GRIFFITH C. J. read the following judgment:—This case raises for direct decision the question of the validity of sec. 39 of the *Land Tax Assessment Act*, a question which was incidentally raised in the case of *Osborne* v. *The Commonwealth* (2), but not decided. In that case I said that I did not encourage anyone to act on the assumption of invalidity.

Sec. 39 provides that all land owned by a company shall be deemed to be owned by the shareholders of the company as joint owners in the proportions of their interests in the paid up capital of the company, with the same consequences as to liability to taxation in respect of their respective interests as in other cases of joint ownership.

In *Osborne's Case* (2) it was held that the subject of taxation

(1) 12 C.L.R., 321, at p. 365. (2) 12 C.L.R., 321.

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under sec. 39 is land. The objection now taken is that, assuming it to be land, the members of the company are not the owners of it, and that a law requiring persons not the owners of land to pay tax in respect of it is not, as to them, a law imposing land tax, and that sec. 39 is therefore obnoxious to the provisions of sec. 55 of the Constitution.

It was pointed out in the same case that Parliament had proceeded upon the assumption that the members of a company owning land are in substance the beneficial owners of the land in proportion to their interests in the paid up capital of the company, and the cases of *Smith* v. *Anderson* (1); *Birch* v. *Cropper*; *In re Bridgewater Navigation Co., Ltd.* (2); and *Randt Gold Mining Co.* v. *New Balkis Eersteling, Ltd.* (3), were referred to by the Court.

In my opinion, the Federal Parliament in selecting subjects of taxation is entitled to take things as it finds them *in rerum naturâ*, irrespective of any positive laws of the States prescribing rules to be observed with regard to the acquisition or devolution of formal title to property, or the institution of judicial proceedings with respect to it.

I think, therefore, that when Parliament has determined upon a subject matter of taxation it is entitled to enact that any person who has a beneficial interest in that subject matter—using the term "beneficial" in its widest sense—shall be liable to pay the tax.

Regarded in its essence, and apart from positive legislation, a joint stock company is an association of persons formed for the joint acquisition and enjoyment of certain rights. The differences between it and an ordinary partnership are only such as are prescribed by positive law. Usually one of the main objects of the formation of companies, as distinguished from partnerships, is to provide for the alienability of the shares of individual members without destroying the identity of the association. Another is to obtain the status of a juristic personality. But these and similar matters are matters of detail, and have nothing to do with the essential notion of an association of persons formed for the joint acquisition and enjoyment of property.

(1) 15 Ch. D., 247. (2) 14 App. Cas., 525. (3) (1903) 1 K.B., 461.

There can be no doubt that in the nature of things, apart from technical questions of nomenclature and conventional legislative rules, the members of a company owning land are the beneficial owners of it.

In my judgment this consideration is sufficient to dispose of the case. The Federal Parliament was entitled to treat the members of a company as the persons beneficially interested in the land owned by it, and to impose on them the liability to pay the tax made payable in respect of it.

The circumstance that in some cases the company itself escapes from liability by reason of the value of its land not exceeding £5,000 is, I think, irrelevant to the question whether its members may be made liable to tax in respect of their interests in the land.

The first question must therefore be answered in the affirmative as to the whole amount, and the second in the negative.

BARTON J. I am of the same opinion, and think it unnecessary to add much. The validity of sec. 39 of the *Land Tax Assessment Act* is attacked on the ground that it is a violation of sec. 55 of the Constitution, which provides that "laws imposing taxation shall deal only with the imposition of taxation, and any provision therein dealing with any other matter shall be of no effect," and that "laws imposing taxation . . . shall deal with one subject of taxation only." Sec. 39 of the *Land Tax Assessment Act* provides that: [His Honor read the section.] By sec. 3 "owner," in relation to land, "includes every person who by virtue of this Act is deemed to be the owner," and "owned" has a meaning corresponding with that of "owner." Sec. 38 provides in its first three paragraphs as follows: [His Honor read pars. (1), (2) and (3).] Those are the main provisions of sec. 38. It is said that, unless a person who is sought to be assessed under this Act can be said to own land in the sense of having a title in one of the recognized "channels" of title—if I may use that word—the taxation as regards him is either not land tax or is not a tax at all —that it is either an impost having no relation to land, or is an exaction not deserving to be called an impost. In the one view, it is argued, the Act deals with more than one subject of taxation; in the other, it deals with something more than the imposition of

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taxation. In the one case, the Act is said to be void; in the other, the provisions that do not deal with taxation in the true sense are of no effect. The argument is ingenious, but I do not think the matter can be dealt with in that way.

It is true, as Mr. *Knox* urged, that the legislature cannot impose a land tax upon any person who has not an interest in land, but it seems to me that any interest that is in any real sense beneficial is a sufficient interest for the purpose. I agree with Mr. *Flannery* that in applying sec. 55 of the Constitution to an Act purporting to tax land, this is the true limitation upon the Federal Parliament. The interest must be in truth beneficial. If the person made chargeable participates in a profitable use of the land, or would reap a benefit by its use or sale, that appears to me to be sufficient to support the tax. For an objector to succeed, he must show that in his case the impost is not relevant to land taxation, or that it is not taxation upon land but some other kind of tax. I do not think that either of these things has been shown. I am of opinion that the objector here is taxed in respect of a benefit accruing to him from land in a special sense, arising from the fact that the company, which is an artificial entity, consists of a number of persons who in truth and in substance own the land and are entitled, in the event of the liquidation of the company, to have the benefit of the value of the land individually. I am of opinion, therefore, that the objection fails, and that the questions must be answered as proposed by the Chief Justice.

ISAACS J. read the following judgment:—The point relied on by the appellant is that he is not the owner of the land taxed, and that the Commonwealth Parliament cannot, for the purposes of taxation, treat him as owner. As a corollary, it is added, the attempt to make him liable as if he were owner is, in reality, a tax upon him in respect of something quite different from land, namely, in respect of shares in a company, and therefore obnoxious to sec. 55 of the Constitution. If the argument is sound that two subjects of tax are dealt with in one Act, a most serious question presents itself as to whether the whole Act is not void. But I take it to have been decided by the whole Court in *Osborne's Case*

(1) that the Act does not deal with any other subject of taxation than land; and, if that were not then definitely decided, I have no hesitation in expressing that opinion finally now. Either the first point is valid, or the appeal must fail.

Now, it is said for the appellant that the Commonwealth Parliament must take things as it finds them, according to State law, and tax or not tax them accordingly. But at least the Commonwealth Parliament, deriving its powers direct from the Imperial Parliament, cannot be limited by any artificial creations or restrictions which the varying policies of State legislatures may devise. Natural facts, and actual business facts, are certainly as much real existing circumstances in the life of the people of the Commonwealth as any theoretical legal conception brought into existence by a State Statute. And there is no warrant for compelling the Commonwealth Parliament to ignore the substance of things as they exist and operate, and follow the metaphysical attributes which are attached to them for local purposes.

Applying those observations to the present case, it has been already pointed out in *Osborne's Case* (1) that the fundamental conception of a trading corporation is the personal interest of the members in the property and affairs of the corporate body. I may repeat a few words of what I there stated. I said (2):— "The incorporation of a company is not a fiction of course; it is a statutory fact, but while it remains a fact for all the purposes for which it was designed, it does not annihilate, but on the contrary is in aid of, the ultimate truth which underlies the matter, namely, the beneficial ownership of those who for the moment compose the company. Incorporation gives a special character and status to the partnership, and surrounds it with certain legal attributes and conditions, but it does not destroy it." I went on to quote the words of *James* L.J. in *Smith* v. *Anderson* (3) and Lord *Halsbury* L.C. in *Randt Gold Mining Co.* v. *New Balkis Eersteling, Ltd.* (4), as well as those of Lord *Macnaghten* in *Birch* v. *Cropper* (5) previously cited. I might have added the observations of Lord *Herschell* in the latter case (6) as to "the

(1) 12 C.L.R., 321.
(2) 12 C.L.R., 321, at p. 365.
(3) 15 Ch. D., 247, at p. 273.
(4) (1903) 1 K.B., 461, at p. 465.
(5) 14 App. Cas., 525, at p. 543.
(6) 14 App. Cas., 525, at p. 532.

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articles of association which form the contract of partnership." In *Osborne's Case* (1) I said:—"The essence of the matter is the partnership, or in other words the co-partnership of property and enterprise by the persons forming the partnership. The shareholders then—subject to liabilities and to securities for creditors provided by Statute—are the real and only masters of the property under the general law of the land, and the Commonwealth legislature may properly lay hold of this essential concept, and disregarding circumstances that though not fictitious are certainly factitious, make it the foundation or the guarantee of the tax imposed by it upon the property itself."

I adhere to what I then said, and will add one further consideration. Even the State law itself does not overlook this fundamental truth, but acts upon it by a provision which I believe is general in all the Companies Acts. It is this: a company may wind up voluntarily under certain circumstances including the wish of its own members expressed by way of special resolution. One of the consequences of the voluntary winding up is thus stated in section 134 (*a*) of the New South Wales *Companies Act* 1899 (No. 40):—"The property of the company shall be applied in satisfaction of its liabilities *pari passu*, and subject thereto shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company." In other words, once the artificial purpose of the statutory abstraction is served the real proprietors divide their net property according to their actual interests in it. If that radical conception be preserved even in State law, it is additionally difficult to see why the Commonwealth Parliament is debarred from recognizing it.

I agree that the questions should be answered as proposed by the learned Chief Justice.

*Questions answered accordingly.*

Solicitors, for the appellant, *Minter, Simpson & Co.*

Solicitor, for the respondent, *C. Powers*, Crown Solicitor for the Commonwealth.

B. L.

(1) 12 C.L.R., 321, at p. 366.