[HIGH COURT OF AUSTRALIA.]

BURNS, PHILP AND COMPANY LIMITED . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF LAND TAX RESPONDENT.

H. C. OF A. 1929.

SYDNEY, *Nov.* 12; *Dec.* 2.

Isaacs, Rich and Starke JJ.

Land Tax—Joint assessment—Lands separately owned by two companies—Shares of both companies—"Substantially . . . the same shareholders"—"By or on behalf of shareholders"—"Deemed to be held by shareholders"—Presumption as to single company—Land Tax Assessment Act 1910-1926 (*No.* 22 *of* 1910—*No.* 50 *of* 1926), *sec.* 40*.

At the material times shares representing not more than 33 per cent of the paid-up capital of the appellant company were held by or on behalf of 123 persons and corporations who were also shareholders in the Q. I. Co. At the same time shares representing 29·5 of the paid-up capital of the Q. I. Co. were held by or on behalf of persons and corporations, other than the appellant company who were also shareholders, or on whose behalf other persons held shares in the appellant company and the appellant company itself held shares on its own behalf in the Q. I. Co. representing 50·2 of the paid-up capital of the Q. I. Co. Apart from the last-mentioned shares no shares in the Q. I. Co. were held by any person or corporation on behalf of the appellant company.

Held, that the appellant company was not liable to be jointly assessed for land tax with the Q. I. Co. under sec. 40 of the *Land Tax Assessment Act* 1910-1926 in respect of the lands owned by those companies respectively at the material times.

* The *Land Tax Assessment Act* 1910-1926, sec. 40, provided that "(1) Any two or more companies which consist substantially of the same shareholders shall be deemed to be a single company, and shall be jointly assessed and liable accordingly, with such rights of contribution or indemnity between themselves as is just"; and that "(2) Two companies shall be deemed to consist substantially of the same shareholders if not less than three-fourths of the paid-up capital of each of them is held by or on behalf of shareholders of the other. Shares in one company held by or on behalf of another company shall for this purpose be deemed to be held by shareholders of the last-mentioned company."

CASE STATED.

On the hearing of an appeal to the High Court by Burns, Philp & Co. Ltd. from a joint assessment, by the Federal Commissioner of Land Tax, of that Company and the Queensland Insurance Co. Ltd., for land tax for the year ending 30th June 1927, in respect of certain land, a case, which was substantially as follows, was stated by *Rich* J. for the opinion of the High Court :—

1. Burns, Philp & Co. Ltd. (hereinafter called the appellant Company) is a company duly incorporated in the State of New South Wales and having its head office and principal place of business at Sydney in the said State.

2. The appellant Company carries on the business of shipowners and merchants, and for the purpose of its said business and as at noon on 30th June 1927 it was the owner of land within the Commonwealth of Australia of an unimproved value exceeding £5,000.

3. Queensland Insurance Co. Ltd. is a company duly incorporated in the State of New South Wales and having its head office and principal place of business at Sydney aforesaid. The said Company carries on the business of insurance in the said Commonwealth, and for the purpose of its said business and as at noon on 30th June 1927 was the owner of land in the said Commonwealth of an unimproved value exceeding £5,000.

4. As at noon on 30th June 1927 and at all material times the paid-up capital of the appellant Company was £1,435,115 10s. divided into 1,473,235 shares of £1 each, of which 1,396,996 shares were fully paid up and 76,239 shares were paid up to ten shillings each, and the said shares were held in the names of 1,611 different persons and corporations in varying numbers, no individual holder holding more than 199,200 shares and no individual holder holding less than 3 shares.

5. As at the said time and at all material times shares representing not more than 33 per cent of the said paid-up capital of the appellant Company were held by or on behalf of persons and corporations who were also shareholders in the said Queensland Insurance Co. Ltd. and such persons and corporations were 123 in number, but the appellant Company itself was a shareholder in the said Queensland

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Insurance Co. Ltd. as mentioned in par. 7 hereof. The said Queensland Insurance Co. Ltd. itself did not hold any shares in the appellant Company nor were any shares in the appellant Company held by any person or corporation on behalf of the said Queensland Insurance Co. Ltd.

6. As at noon on 30th June 1927 and at all material times the paid-up capital of the said Queensland Insurance Co. Ltd. was £500,000 divided into 500,000 shares of £1 each, all fully paid-up, and the said shares were held in the name of 386 different persons and corporations in varying numbers, no individual holder holding more than 251,000 shares and no individual holder holding less than 43 shares.

7. As at the said time and at all material times shares representing 29·5 per cent of the said paid-up capital of the said Queensland Insurance Co. Ltd. were held by or on behalf of persons or corporations (other than the appellant Company) who were also shareholders, or on whose behalf other persons held shares, in the appellant Company and the appellant Company itself held shares on its own behalf in the said Queensland Insurance Co. Ltd. representing 50·2 per cent of the said paid-up capital of the said Queensland Insurance Co. Ltd. Apart from the last-mentioned shares no shares in the said Queensland Insurance Co. Ltd. were held by any person or corporation on behalf of the appellant Company.

8. The shareholders of the appellant Company by whom or on whose behalf shares in the said Queensland Insurance Co. Ltd. were held at the said time and at all material times as aforesaid numbered only 123 in all, not including the shares held by the appellant Company in the said Queensland Insurance Co. Ltd. as hereinbefore mentioned.

9. In the financial year 1927-1928 each of them, the appellant Company and the said Queensland Insurance Co. Ltd., in the prescribed manner and within the prescribed time duly furnished to the Commissioner of Land Tax a return of the land owned by it at noon on the said 30th June 1927.

10. Under date 19th April 1928 the Deputy Commissioner of Land Tax, Melbourne, acting on behalf of the Commissioner of Land Tax caused to be served upon the appellant Company and the

said Queensland Insurance Co. Ltd. a notice of assessment of land tax on land owned as at 30th June 1927, such assessment being a joint assessment of the said two Companies and such notice of assessment being accompanied by a detail sheet which showed that the said Commissioner purported to have made such joint assessment under sec. 40 of the *Land Tax Assessment Act* 1910-1926.

11. The appellant Company being dissatisfied with the said assessment, the public officer of the appellant Company, for the purposes of the above-mentioned Act duly posted to the Commissioner of Land Tax under date 7th May 1928 an objection in writing against the said assessment, part of which objection was on the ground that the Deputy Commissioner is in error in jointly assessing Burns, Philp & Co. Ltd. and Queensland Insurance Co. Ltd. under sec. 40 of the Act for the reason that whereas shareholders in Burns, Philp & Co. Ltd. held shares representing three-fourths of the paid-up capital of Queensland Insurance Co. Ltd., shareholders in Queensland Insurance Co. Ltd. do not hold three-fourths of the paid-up capital of Burns, Philp & Co. Ltd."

12. The other part of the said objection related to the valuation of the land comprised in the said notice of assessment and is not material to this case, the objections on the ground of valuation having since been duly adjusted by the parties.

13. Notice of amended assessment dated 14th November 1928 allowing the objection mentioned in the last preceding paragraph hereof to the extent stated in the said notice of amended assessment, was duly forwarded by the Deputy Commissioner of Land Tax, Melbourne, to the appellant Company and the said Queensland Insurance Co. Ltd., together with a letter to the said Companies dated 14th November 1928.

14. Subsequently to the posting of the said objection and prior to the receipt by it of the said notice of amended assessment the appellant Company paid to the Commissioner of Land Tax the amount of tax assessed as set forth in the said notice of assessment mentioned in par. 10 hereof.

15. The Commissioner of Land Tax, having considered the objection mentioned in par. 11 hereof, disallowed the same and by post sent to the appellant Company written notice of his decision

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disallowing the same, such notice being incorporated in the said letter of 14th November 1928 mentioned in par. 13 hereof.

16. Within thirty days after the service by post of notice of the said decision, the appellant Company, being dissatisfied with the said decision, in writing requested the said Commissioner to treat the said objection as an appeal and to forward it to the High Court of Australia at Sydney, and within thirty days after the receipt by him of the said request the said Commissioner forwarded the said objection accordingly.

17. The appeal coming on for hearing before me, I consented, at the request of the parties, to state a case in writing for the opinion of the Full Court of the High Court of Australia upon the following question arising in the appeal, which, in my opinion, is a question of law :—

> Was the appellant Company liable to be jointly assessed for land tax with the said Queensland Insurance Co. Ltd. under sec. 40 of the above-mentioned Act in respect of the lands owned by the said Companies respectively at noon on 30th June 1927 ?

Browne K.C. (with him *Hooton*), for the appellant. The question arose before the amendment of sec. 40 by the 1927 Act took effect. Shares held by one company in another company must be taken as being held by the shareholders of the former company. The Commissioner's interpretation of sub-sec. 2 of sec. 40 involves reading in before the word " shareholders " where last appearing, the words " the whole of the," which he is not entitled to do. The facts of this case do not make the two Companies consist substantially of the same shareholders. There is no evidence to determine for which shareholders the shares of the appellant Company in the Queensland Insurance Co. are held. As to sec. 39, the purpose of that section is to enable shareholders to be taxed when the company cannot be taxed, and it does not help the Court on the question now before it. In the relevant section of the New Zealand Act the word " the " appears before the word " shareholders," therefore the decision in *Union Steamship Co. of New Zealand* v. *Commissioner of Taxes* (1) is distinguishable.

(1) (1926) N.Z.L.R. 801.

Maughan K.C. and *Bowie Wilson*, for the respondent. Under sub-sec. 2 of sec. 40 of the Act the appellant Company is deemed to hold the shares in the Queensland Insurance Co. on behalf of the shareholders in the appellant Company. The section is complied with as the persons who hold 79 per cent of the shares in the Queensland Insurance Co. also hold 100 per cent of the shares in the appellant Company. Sub-sec. 2 should be construed as if the word " the " appeared before the word " shareholders " where last appearing (*Union Steamship Co. of New Zealand* v. *Commissioner of Taxes* (1)). Looking at the objects of the section, the Legislature must have meant " the shareholders " ; otherwise there would be obvious loopholes for escape from taxation which would defeat the intention of the Legislature. The Legislature wished to avoid the creation by a company of subsidiary companies in which it held the shares. The intention of the Legislature was to replace the name of the company with the names of its shareholders. If the section is construed as meaning " some shareholders," who is to determine who of the shareholders constitute the " some " ? So construed, the section leaves open opportunities for evasion and would make for uncertainty, which would render the section inoperative to a great extent. The word " deemed," as appearing in sub-sec. 2 of sec. 40, is a statutory fiction, and was dealt with in *Hill* v. *East and West India Dock Co.* (2). The full extent of its operation must be ascertained by looking at the purposes of the Act. The words " for this purpose " mean for the purpose of making the analysis and comparison directed by the section to be made, and for this purpose a statutory fiction is introduced. The phrase " shares deemed to be held " must be held to apply in the converse.

Browne K.C., in reply. The word " shareholders " in sub-sec. 2 of sec. 40 means an undefined number of shareholders, many or few.

Cur. adv. vult.

Dec. 2.

The following written judgments were delivered :—

ISAACS J. Sec. 40 of the *Land Tax Assessment Act* 1910-1926 creates three presumptions of law, all designed to reduce legal

(1) (1926) N.Z.L.R. 801.

(2) (1884) 9 App. Cas. 448.

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artificialities to terms of business realities. But they cannot be carried further than the Legislature has stated them.

The first is a *substantive* presumption creating liability to aggregation where there is technically separate but really united ownership. It is contained in sub-sec. 1, and by it two or more companies are deemed to be one for the purposes of taxation. The condition is that the several companies consist substantially of the same shareholders. That condition in itself is merely as to personnel, and is a pure question of fact. It is irrespective of the interests held by the corresponding shareholders. Evasion, however, would be simple if the legislation stopped there. A comparatively few shareholders in each company might hold practically all the interests in both.

Sub-sec. 2 then adds a second presumption of an *evidentiary* character, making a certain quantum of interest conclusive of identity of personnel in two companies. It says: "If not less than three-fourths of the paid-up capital of each of them is held by or on behalf of shareholders of the other." The word "shareholders" is indefinite as to number. The necessary quantum of interest in company A may be held by one or more shareholders in company B, and in either case, so far as company B is concerned, the presumption is satisfied. If, conversely, the same fact can be proved as to the interest in company B being held by shareholders in company A, the presumption is completely satisfied, and then sub-sec. 1 operates, because the statutory evidence exists.

But it may be that the shareholders of company B who own the controlling interests in company A neither register their own names nor those of any nominees, but procure company B itself to be registered as the shareholder. In that event, evasion is further prevented by the third presumption. It is *interpretative* merely. It is as if it said "'shareholders' shall include the company of which they are shareholders." The shares in company A which are held by company B are deemed to be held by "shareholders" of the latter company. It does not go further. For the Commissioner it was contended that "shareholders" must be read as "the shareholders." It is impossible to interpolate the word. Not only would it be judicial legislation, but it would be a reversal of the evident

intention of the enactment. It would convert a term "shareholders," purposely left indefinite, into an expression definite, because ascertainable if necessary, and at all events completely inclusive.

The second presumption is satisfied as to one limb, namely, as to the paid-up capital in the Queensland Insurance Co. held by shareholders in the Burns, Philp Co. But as to the paid-up capital in the Burns, Philp Co., the Commissioner fails to show that the necessary quantum is held by shareholders in the Queensland Insurance Co. That Company holds no shares in the Burns, Philp Co., nor do its shareholders hold more than 33 per cent of the paid-up capital in that Company. Though its shareholders in fact do not hold the necessary quantum of the paid-up capital in the Burns, Philp Co., the Commissioner urges that they must be deemed to do so, because, since the Burns, Philp Co. shareholders are deemed to hold three-fourths of the paid-up capital in the Queensland Co., it is a necessary legal presumption that the same shareholders hold at least three-fourths in both Companies, thereby satisfying the first sub-section. The fallacy of that argument is twofold. First, as I have already stated, "shareholders" is a term indefinite, and so the suggested consequential presumption could not arise. But next, the presumption of the Burns, Philp Co. being individual shareholders—even if they were all its shareholders—has not any legal effect in satisfying the requirements of sub-sec. 1, unless it is accompanied by the correlative proof, either by facts or legislative presumption, that the Queensland Co. shareholders held the necessary quantum of interest in Burns, Philp & Co. The one limb of the second presumption is inert by itself; and to use it as is suggested is really to treat the section as saying if shareholders in one of the two companies hold at least three-fourths of the paid-up capital in the other, the two companies shall be deemed to be one. That brings the matter to earth, and shows that the position urged for the Commissioner is not sustained by the section.

The question should, in my opinion, be answered in the negative.

RICH J. The joint assessment of the Queensland Insurance Co. and of Burns, Philp & Co. Ltd. can only be maintained if the

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Commissioner's interpretation of the last sentence in sec. 40 of the *Land Tax Assessment Act* 1910-1926 is correct.

Shareholders in the Queensland Insurance Co. held only 33 per cent of the paid-up capital of Burns, Philp & Co. Ltd. Burns, Philp & Co. Ltd. held 50·2 per cent of the paid-up capital in the Queensland Insurance Co., and shareholders in Burns, Philp & Co. Ltd. held 29·5 per cent of the paid-up capital in the Queensland Insurance Co. Therefore, apart from the last sentence of sub-sec. 2 of sec. 40, it is clear that the provision would not apply, because it could not be said that shares representing not less than three-fourths of the paid-up capital of each of these Companies are held by or on the behalf of the shareholders of the other. But the Commissioner says that by virtue of the last sentence the fact that only 33 per cent of the capital of Burns, Philp & Co. Ltd. is held by shareholders of the Queensland Insurance Co. may be ignored. He starts with the obvious fact that the whole of the capital of Burns, Philp & Co. Ltd. is held by its shareholders. This he contends satisfies one of the conditions. He then adds to the 29·5 per cent of the capital in the Queensland Insurance Co. held by or on behalf of shareholders in Burns, Philp & Co. Ltd. the 50·2 per cent of that capital held by Burns, Philp & Co. Ltd. itself, thus making more than three-fourths. He contends that he is warranted in doing this because the last sentence of sub-sec. 2 provides "shares in one company held by or on behalf of another company shall for this purpose be deemed to be held by shareholders of the last-mentioned company." By treating Burns, Philp & Co. Ltd. as "the last-mentioned company" within this provision, he gives shareholders of Burns, Philp & Co. Ltd. a double character. They, or some of them, are constructively shareholders of three-fourths of the paid-up capital of the Queensland Insurance Co. and, as all of them are *ex hypothesi* shareholders in Burns, Philp & Co. Ltd., these constructive shareholders in the Queensland Insurance Co. hold paid-up capital in Burns, Philp & Co. Ltd. But why should they be deemed to hold three-fourths of the paid-up capital in Burns, Philp & Co. Ltd.? The provision does not say that the shares held by that Company in the Queensland Insurance Co. shall be deemed to be held by each and every of the shareholders in Burns, Philp & Co. Ltd., but only "by shareholders."

As actual shareholders in the Queensland Insurance Co. hold only 33 per cent of the capital in Burns, Philp & Co. Ltd., there remains 42 per cent of that capital which, in order to make the three-fourths, must be held by persons who constructively possess the character of shareholders of the Queensland Insurance Co. But there is nothing in the provision contained in the last sentence of sub-sec. 2 which can operate to bring about this result. All it requires even on the Commissioner's construction is that shareholders, few or many, in Burns, Philp & Co. Ltd. shall be considered as the holders of the shares in the Queensland Insurance Co. actually held by Burns, Philp & Co. Ltd. The result is that the Commissioner's view cannot be maintained. This is not due to any slip in the legislation but to the fact that the last sentence in sub-sec. 2 was enacted for a purpose entirely different from that to which the Commissioner has sought to apply it. The draftsman of sub-sec. 2 provided for the case of land being held in severalty by two companies which, although distinct legal entities, represented beneficial interests which were not distinct but approached identity. If three-fourths of the capital of each was held by shareholders of the other the several titles were to be considered joint. But a ready means of evasion would be apparent if the legislation stopped there, because it would be only necessary to register a holding company for either of the two land-owning companies and sub-sec. 2 could not apply because the shares of one company would be held by a holding company and not by members of the other company. The last sentence of the sub-section was therefore introduced so that for the purpose of ascertaining whether three-fourths of the shares of each were held by members of the other the interposition of "another company"—the holding company—would be ignored and the shares it held should be attributed to the shareholders of the holding company. Thus, if shareholders of the holding company own three-fourths of the capital of the other land company and the holding company holds three-fourths of the capital of its land-owning company, the provisions of sub-sec. 2 are satisfied. For such a purpose it was entirely appropriate to use the expression "held by shareholders of the last-mentioned company" because it is utterly

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immaterial whether it is held by few or many. All that is necessary for such a purpose is that the land company's shares shall be deemed to be vested in persons possessing the character of members of the holding company. It is for this reason that the words "another" company are used and not "the other company." Another company is the natural reference to the third entity. Indeed, the true scope and purpose of the provision would not have been lost sight of if due weight had been given to the words "for this purpose." "This purpose" is the purpose of ascertaining whether shares representing not less than three-fourths of the paid-up capital of each of the two companies are held by or on behalf of shareholders of the other of them. Upon the Commissioner's contention an affirmative conclusion would be reached on this question in the case when all the shares in one company were held by another. The truth is that sec. 40 is not addressed to anything but an attempt to sever the ownership of land by using two or more companies to own separate parcels. Sec. 39 deals with the case of a company as well as the case of natural persons holding shares in another company which owns land. When the legislation proceeded to sec. 40 it turned to another subject.

I answer the question in the case in the negative.

STARKE J. The question is whether Burns, Philp & Co. Ltd. is liable to be jointly assessed for land tax with the Queensland Insurance Co. Ltd., under sec. 40 of the *Land Tax Assessment Act* 1910-1926, in respect of lands owned by the Companies at noon on 30th June 1927. That section is as follows:—"(1) Any two or more companies which consist substantially of the same shareholders shall be deemed to be a single company, and shall be jointly assessed and liable accordingly, with such rights of contribution or indemnity between themselves as is just. (2) Two companies shall be deemed to consist substantially of the same shareholders if not less than three-fourths of the paid-up capital of each of them is held by or on behalf of shareholders of the other. Shares in one company held by or on behalf of another company shall for this purpose be deemed to be held by shareholders of the last-mentioned

company." Burns, Philp & Co. Ltd. held 50·2 per cent of the paid-up capital of the Queensland Insurance Co. Ltd., and its shareholders held 29·5 per cent of the paid-up capital of the Insurance Company. The Queensland Insurance Co. Ltd. held no shares in the capital of Burns, Philp & Co. Ltd., and its shareholders held no more than 33 per cent of the paid-up capital of Burns, Philp & Co. Ltd.

Applying the section to these facts, shareholders in Burns, Philp & Co. Ltd. held 79·7 per cent of the paid-up capital of the Queensland Insurance Co. Ltd.—actually, or by force of the provision that shares " held by or on behalf of another company shall for this purpose be deemed to be held by shareholders of the last-mentioned company." The Queensland Insurance Co. Ltd., however, held no shares in Burns, Philp & Co. Ltd., and its actual shareholders held no more than 33 per cent of the paid-up capital of Burns, Philp & Co. Ltd.

But it is said that all shareholders of Burns, Philp & Co. Ltd. are or are deemed to be shareholders in the Queensland Insurance Co. Ltd. in respect of the shares held by Burns, Philp & Co. Ltd. in that Company ; further, that the shareholders of Burns, Philp & Co. Ltd. hold all its paid-up capital ; therefore, that not less than three-fourths of the paid-up capital of Burns, Philp & Co. Ltd. is held by shareholders of the Queensland Insurance Co. Ltd. In my opinion, the argument is untenable. The critical words are : " shares in one company held by or on behalf of another company shall for this purpose be deemed to be held by shareholders of the last-mentioned company." The " purpose " relates to the preceding clause, namely, the purpose of determining whether not less than three-fourths of the paid-up capital of each company is held by shareholders of the other. But the presumption is not general, and applies only to the case of a company holding shares in another company. And here the Queensland Insurance Co. Ltd. held no shares in Burns, Philp & Co. Ltd.

Little importance attaches, I think, to the omission of the definite article before the word " shareholders " where it last occurs in sec. 40 (2).

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The question stated should be answered in the negative.

Case remitted to Rich J., with the opinion of this Court that the question submitted should be answered in the negative. Costs of the case to be costs in the appeal.

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

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

Foll
Berrill's Petition, In re (1976) 134 CLR 470

[HIGH COURT OF AUSTRALIA.]

PERKINS . . . . . PETITIONER;

AND

CUSACK . . . . . RESPONDENT.

IN THE COURT OF DISPUTED RETURNS.

H. C. OF A. 1930.

MELBOURNE, *Feb.* 11-13; *Mar.* 4.

Starke J.

Parliamentary Election—Election for House of Representatives—Ballot-papers alleged to have been tampered with by persons unknown—Allegation unproved—Provision that "Court shall not inquire into the correctness of any Roll"—Effect—Persons on Divisional Roll showing residence outside Division—Evidence to prove—Admissibility—Evidence rejected as challenging correctness of Roll—Commonwealth Electoral Act 1918-1928 (*No.* 27 *of* 1918—*No.* 17 *of* 1928), *secs.* 39 (3), 112 (2), (3), 113, 115 (1) (*a*), (2), (6), 116, 138, 189A, 190—*Electoral and Referendum Regulations* (*Statutory Rules* 1928, *No.* 80), *regs.* 46-67.

The petitioner sought a declaration that the respondent was not, and that the petitioner was, duly elected as a member of the House of Representatives at an election held in October 1929 for the Eden Monaro Electorate in New South Wales. One of the grounds of the petition was that a parcel containing fifty ballot-papers the first preferences on which had been given for the