[HIGH COURT OF AUSTRALIA.]

QUINLAN . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

Land Tax (Cth.)—Assessment—Joint owners—Trustee—Assessment as joint owner in respect of each of several pieces of land—Further assessment in respect of all interests in land in same trust—Land Tax Assessment Act 1910-1937 (*No.* 22 *of* 1910—*No.* 5 *of* 1937), *secs.* 33, 38.

Where a trustee is the legal joint owner of several pieces of land, with different co-owners for each piece, and for the purposes of Federal land tax has been assessed jointly with his co-owners in respect of each piece of land, sec. 38 (3) of the *Land Tax Assessment Act* 1910-1937 requires that he also be assessed separately in respect of all his legal interests in such pieces of land and any other land held by him in severalty in the same trust, all proper deductions arising from the former assessments being made in the latter assessment.

H. C. OF A. 1940.

MELBOURNE, *Oct.* 28.

SYDNEY, *Nov.* 26.

Rich A.C.J., Starke and Williams JJ.

CASE STATED.

A case was stated by *Rich* J. for the opinion of the Full Court of the High Court. It was substantially as follows :—

1. On 30th June 1938 Daniel Alphonsus O'Connor Quinlan was the registered proprietor of :—(*a*) All that piece of land at Fremantle comprised in certificate of title volume 256 folio 185. (*b*) An undivided half share in all that piece of land at Perth being the subject of certificate of title volume 695 folio 102. (*c*) An undivided half share in all the piece of land at Perth being the subject of certificate of title volume 695 folio 103. (*d*) An undivided half share in all that piece of land at Perth being the subject of certificate of title volume 695 folio 104.

H. C. OF A. 1940.

QUINLAN v. FEDERAL COMMISSIONER OF TAXATION.

2. On 30th June 1938 the co-owners with Daniel Alphonsus O'Connor Quinlan of the other undivided half share of the land described in par. 1 (*b*), (*c*) and (*d*) hereof were :—

As to *b* :—

M. Hayes	1/9th
L. F. O'Connor	1/36th
Estate Teresa Quinlan	1/12th
Estate B. M. Connor	1/12th
G. D. J. O'Connor	1/36th
M. O'Connor	1/12th
A. Murphy	1/12th

As to *c* :—

Estate B. M. Connor	1/12th
A. P. K. O'Connor	1/36th
M. Hayes	4/36ths
Estate Teresa Quinlan	1/12th
A. Murphy	1/12th
L. F. O'Connor	1/9th

As to *d* :—

Estate B. M. Connor	1/12th
M. O'Connor	1/12th
L. F. O'Connor	1/36th
M. A. Murphy	1/12th
M. Hayes	1/9th
E. D. O'Connor	1/36th
Estate Teresa Quinlan	1/12th

3. (*a*) The land described in par. 1 (*b*) was the subject of an assessment of Federal land tax, No. 3070, to Messrs. Leo F. and G. D. J. O'Connor and co-owners, including Daniel Alphonsus O'Connor Quinlan, as joint owners on 30th June 1938. (*b*) The land described in par. 1 (*c*) was the subject of an assessment, No. 3071, to Messrs. A. P. K. O'Connor and co-owners, including Daniel Alphonsus O'Connor Quinlan, as joint owners, on 30th June 1938. (*c*) The land described in par. 1 (*d*) was the subject of an assessment, No. 3085, to Messrs. Bernard Gerald Quinlan and co-owners, including Daniel Alphonsus O'Connor Quinlan, as joint owners, on 30th June 1938. These assessments were not objected to.

4. Daniel Alphonsus O'Connor Quinlan held the land described in par. 1 (*a*) as the duly appointed and sole surviving trustee of a deed of settlement bearing date 14th October 1914 and made between Timothy Francis Quinlan of the one part and Bernard Gerald Quinlan and Teresa Gertrude Kirwan of the other part. All the other land mentioned in the deed of settlement has since been sold.

5. Daniel Alphonsus O'Connor Quinlan held the one undivided half share in the land described in par. 1 (*b*), (*c*) and (*d*) as the duly appointed and sole surviving trustee of a deed of settlement bearing date 29th June 1915 and made between Timothy Francis Quinlan of the one part and Bernard Gerald Quinlan and Teresa Gertrude Kirwan of the other part. The two settlements are known as the Quinlan Kirwan and Quinlan trust.

6. The trustee of the Quinlan Kirwan and Quinlan trust was separately assessed in respect of his interest as such trustee at 30th June 1938 in the land described in par. 1 (*a*), (*b*), (*c*) and (*d*). The figure "£49,750" appearing in the assessment is made up of the values of his undivided half share in the three parcels of land referred to in pars. 1 (*b*), (*c*) and (*d*), and the sum of £3,240 which was the value as assessed of the land referred to in par. 1 (*a*). The assessment showed on its face a deduction to a secondary taxpayer under sec. 43 of the *Land Tax Assessment Act* 1910-1937 in respect of the tax paid by him as joint owner in respect of the parcels of land referred in par. 1 (*b*), (*c*) and (*d*). This is the assessment objected to.

7. In the events which have happened since the settlements were made the following persons were on 30th June 1938 the equitable owners of the land referred to in par. 1 (*a*) and were also the equitable owners of the respective undivided half shares in the lands mentioned in par. 1 (*b*), (*c*) and (*d*), the subject of the settlement dated 29th June 1915, and in the following shares :—

Daniel Alphonsus O'Connor Quinlan as to eight-fortieths.
The estate of P. F. Quinlan as to eight-fortieths.
Lady Teresa Gertrude Kirwan as to eight-fortieths.
Eileen Mary McIntyre as to eight-fortieths.
Mary Kathleen Bourke as to eight-fortieths (but three-fortieths thereof is held in trust for the said Mary Kathleen Bourke for life with remainder to her children under the trusts of the will of Timothy Francis Quinlan).

8. Each of the persons named in par. 7 was separately assessed in respect of all the land owned by them at 30th June 1938, and included in such respective assessments were their individual interests as equitable owners of the lands described in par. 1 (*a*), (*b*), (*c*) and (*d*).

9. Daniel Alphonsus O'Connor Quinlan as trustee of the Quinlan Kirwan and Quinlan trust objected by notice dated 21st March 1939 to the assessment referred to in par. 6. The notice of objection stated :—"We desire to object against the assessment . . . on the grounds that the assessment has not been issued in accordance with the provisions of section 38 (2) of the Federal Land Act. According to the judgment given in *Isles* v. *Commissioner of Land Tax* (1) the

(1) (1912) 14 C.L.R. 372.

H. C. OF A. 1940.

QUINLAN v. FEDERAL COMMISSIONER OF TAXATION.

term ' land ' in section 38 (2) means ' a portion of the earth's surface ' or in other words a parcel of land and not an undivided interest. The assessment issued comprises undivided interests in three different parcels of land and joint owners cannot be assessed on undivided interests."

10. The Deputy Commissioner of Taxation disallowed the objection, and the taxpayer requested the commissioner to treat the objection as an appeal and forward it to the High Court.

The opinion of the Full Court was sought on the question:

Was the commissioner correct in disallowing the objection?

Leake K.C. and *Tait*, for the appellant.

Leake K.C. It is contrary to the meaning of the word "land" as used in sec. 38 of the *Land Tax Assessment Act* 1910-1937 to amalgamate undivided interests for the purpose of taxing them as "land" (*Baird* v. *Federal Commissioner of Land Tax* (1); *Bailey* v. *Federal Commissioner of Land Tax* (2)). The existence of the trust does not mean that the commissioner can assess both the trustee and the beneficiaries. The beneficiaries are the "joint owners" under the section.

Tait. The commissioner has applied sec. 33 of the *Land Tax Assessment Act* 1910-1937 when it cannot be called into aid. When the commissioner is making assessments under sec. 38 (2) of the Act, the authorities suggest that the "joint owners" are the beneficiaries, not the trustees. The joint owners are the equitable owners, not the legal owners at all. That is where the commissioner has gone wrong in this case; he has assessed the legal owners. Under sec. 38 there are to be primary and secondary taxpayers. The primary taxpayers have been assessed; there is no objection to that. The question is: Who are the secondary taxpayers? If the trustees are assessed under sec. 38 (3), they must be assessed on all land held in severalty. But the commissioner has used sec. 33 to make his assessment because here there are trustees. He cannot do this, as sec. 33 says that under that section a person is to be assessed as a primary taxpayer. Further, sec. 38 (3) provides that they must be taxed jointly, whereas under sec. 33 they are taxed individually. Sec. 38 (3) is inapplicable to a trustee, because it deals with a primary taxpayer under sec. 33.

[STARKE J. referred to secs. 10 and 11 of the *Land Tax Assessment Act* 1910-1937.]

(1) (1915) 19 C.L.R. 490, at pp. 495, 497.
(2) (1911) 13 C.L.R. 302, at p. 306.

The scheme of the Act is to tax beneficial interests. Whenever there is a difference between the legal and beneficial interests, then the beneficial interest is to be charged (sec. 35). The Act recognizes that the beneficial owner is going to pay the tax. The charge falls on the estate, not on the trustee. In sec. 35 it is laid down that wherever there is a legal and beneficial ownership the legal owner will be the primary taxpayer and the beneficial owner the secondary. But under sec. 38 (3) the question is: Who is the secondary taxpayer? To be consistent the commissioner must tax the beneficiaries straight out: Compare sec. 38 (3) with the provisoes in secs. 33 and 35. If the trustees were not joint owners with others, the assessment would be under sec. 33 and the trustee would be the primary and the beneficiary would be the secondary taxpayer. [He referred to sec. 62.] In *Sendall and Crace* v. *Federal Commissioner of Land Tax* (1), the court was not dealing with joint owners, and that is the distinction from this case. The only reason for bringing in the trustee is to make the land primarily liable, but that has already been done under sec. 38 (2). That section is inept where the trustees are joint owners with others. The only right under the Act to tax trustees is under sec. 33.

Fullagar K.C. (with him *Dean*), for the respondent. The argument for the appellant is that the wrong persons are assessed, and that is not covered by the notice of objection. The assessment is made, not under sec. 38 (2), but under sec. 38 (3). By reason of sec. 44M (3) objection to the notice cannot be waived by the commissioner (*Molloy* v. *Federal Commissioner of Land Tax* (2)). The trustee is to be assessed as if he were the beneficiary (secs. 33, 35, 38 (1), (2) and (3)). *Sendall's Case* (1) cannot be left out of consideration. If there are separate trusts, a trustee must be assessed on each separate trust. By sec. 35 legal and equitable owners are equally assessable, provided that the legal owner is the primary taxpayer and the equitable owner is the secondary taxpayer. The relationship is not like principal and surety, but a new obligation is created in the secondary taxpayer. The commissioner must assess the trustees under sec. 38 (2) with their legal co-owners as "joint owners." Then sec. 38 (3) must be applied to the individual half interests and the interest in the entirety which are the subject matters of the trust. Having assessed under sec. 38 (2), the commissioner is bound to proceed to assess under sec. 38 (3). In sec. 38 joint owner means joint owner of land, that is, a piece of the earth's surface. The beneficiaries are not joint beneficial owners of the moiety.

(1) (1911) 12 C.L.R. 653. (2) (1938) 59 C.L.R. 608.

H. C. OF A. 1940.

QUINLAN v. FEDERAL COMMISSIONER OF TAXATION.

For the purposes of sec. 38 (2) we are concerned with the owners of land in law and equity. The position of primary and secondary taxpayers (and the reason therefor) is set out by *Griffith* C.J. in *Clifford* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (1). The real effect of sec. 38 is that a trustee who is a joint owner with another person is liable to be assessed under sub-sec. 2 or 3, but his liability as trustee is limited by the provisions of sec. 33. If the trustee owns separate pieces of land with different co-owners, then he must be assessed separately for each. The liability of a trustee under sec. 38 as affected by sec. 33 is established by *Isles* v. *Federal Commissioner of Land Tax* (2). Here the only joint owners are the trustees and their co-owners, and they must be assessed under sec. 38 (2).

Leake K.C., in reply. The amalgamation of the assessments means that the rate of tax is higher and the number of deductions is not so great. It is " land " which bears the tax, and by these assessments the beneficiaries carry a greater tax than they were bound to pay.

Cur. adv. vult.

NOV. 26.

The following written judgments were delivered :—

RICH A.C.J. AND WILLIAMS J. On 30th June 1938 the appellant, Daniel Alphonsus O'Connor Quinlan, was the registered proprietor in severalty of a block of land at Fremantle and of undivided half shares in three blocks of land at Perth. He was a trustee of all these interests for the same beneficiaries. Three separate assessments of land tax were made under the provisions of the Federal *Land Tax Assessment Act* 1910-1937, sec. 38 (2), against the appellant and the other co-owners of the three blocks of land at Perth. The appellant does not complain of these assessments, which he admits were duly made under the provisions of that sub-section. A further assessment was then made against the appellant in which his legal interests in all four blocks of land were aggregated and tax assessed on that basis, allowance being made for the taxes payable by him under the earlier assessments. It is against this further assessment that the appellant has appealed. The beneficiaries were also assessed in respect of their beneficial interests in all four blocks of land together with their notional or imputed interests in certain lands owned by a company in which they were shareholders. In these last-mentioned assessments allowances were made pursuant to sec.

(1) (1915) 19 C.L.R. 593, at pp. 596-600.
(2) (1912) 14 C.L.R. 372.

43 for the taxes payable by the appellant under the two earlier assessments.

Sec. 44M (3) of the Act provides that a taxpayer shall be limited on the hearing of the appeal to the grounds stated in his objection. The appellant's ground of objection is that the assessment comprises undivided interests in three different parcels of land. We understand this to mean that he complains of the aggregation of these interests in the one assessment.

He has not objected that even if his legal interests can be aggregated in this way he would only be liable to pay as much tax as the beneficiaries would have to pay if they were separately assessed under sec. 35: See *Sendall and Crace* v. *Federal Commissioner of Land Tax* (1); *Hoysted* v. *Federal Commissioner of Taxation* (2); *Lloyd* v. *Federal Commissioner of Land Tax*; *In re Browne*; *Ex parte Lloyd* (3); *Executor Trustee and Agency Co. of South Australia Ltd.* v. *Deputy Federal Commissioner of Taxes* (*S.A.*) (4). We do not propose, therefore, to deal with this question, as it is not covered by the grounds of objection.

Sec. 33 of the Act requires the commissioner to treat a person in whom land is vested as a trustee as if he were beneficially entitled to the land. If this is applied to sec. 38 (2), it means that the trustee of the settlement of the undivided share and the owner or owners of the other undivided share, who together make up the owners of the entirety of the land, should be assessed as primary taxpayers in respect of the entirety of the legal estate. But under sec. 38 (3) the owner of each undivided share is liable to be assessed in respect of that undivided interest together with any estates or interests of his in other lands. Sec. 38 (4) shows that such an owner is to be so assessed as a secondary taxpayer, which means that he obtains the deduction prescribed by sec. 43. But, again, under sec. 43 the trusts should be disregarded in the first instance and the trustee in that capacity should be assessed in respect of the undivided share as if he were the beneficial owner. Although the trustee is to be assessed as if he were the beneficial owner, and, in that sense, the trusts disregarded, his capacity of trustee is recognized to the extent of requiring a separate assessment upon him in respect of the trust estate; that is to say, land held in his own right is not to be mixed up with land held in *autre droit*.

The assessment under appeal is made on the trustee in his capacity of trustee, but it disregards the fact that he holds upon trust for beneficiaries who hold separate beneficial interests liable, or possibly

(1) (1911) 12 C.L.R. 653.
(2) (1921) 29 C.L.R. 537.
(3) (1933) 49 C.L.R. 160.
(4) (1939) 62 C.L.R. 545.

H. C. OF A. 1940.

QUINLAN v. FEDERAL COMMISSIONER OF TAXATION.

Rich A.C.J. Williams J.

liable, to taxation under sec. 35. The assessment is made in virtue of the liability imposed by sec. 38 (3) (*a*), (*b*) and (*c*) although this does not expressly appear on the face of the assessment. It does appear, however, clearly enough from an examination of the deductions made and from the explanatory sheet accompanying the assessment and stating how the deduction is calculated.

In *Isles* v. *Federal Commissioner of Land Tax* (1) this court decided that sec. 38 is not an overriding provision. In the present case it must be read together with sec. 33 and so as to give effect to both. The assessment complained of could only be made because the appellant was the trustee of all four blocks of land, but, if this fact brings the case within the scope of sec. 38 (3), its provisions must be given effect to even if the result is unexpected. The joint owners of the three blocks of land are the appellant as to a one-half undivided share and the other co-owners as to the other half shares (*Clifford* v. *Deputy Federal Commissioner of Land Tax* (*N.S.W.*) (2)). The beneficiaries, who have only equitable interests in the undivided share, are not joint owners with the other co-owners within the meaning of the Act. The commissioner was therefore bound to make the assessment. He could not assess the beneficiaries as joint owners under sub-sec. 3. Having made the assessment under sub-sec. 2, he was bound to make the further assessment under sub-sec. 3, the provisions of which are mandatory. Counsel for the appellant argued that secs. 38 and 33 cannot be read together, and that the commissioner could not make the assessment complained of because sub-sec. 3 is concerned with beneficial and not legal interests, this being shown by the fact that each joint owner in respect of his separate assessment is a secondary taxpayer. We cannot agree with this contention. The joint owner referred to in sub-sec. 3 is simply one of the joint owners, legal or equitable, identified by sub-sec. 2. The secondary taxpayer referred to in sub-sec. 4 may be a joint owner of either a legal or an equitable interest in the land.

The question in the case stated should be answered : Yes.

STARKE J. Case stated under sec. 44M of the *Land Tax Assessment Act* 1910-1937.

The appellant, Daniel Alphonsus O'Connor Quinlan, is the surviving trustee under a deed of settlement dated 29th June 1915. As such trustee he, on 30th June 1938, owned or was entitled at law to three parcels of land jointly or in common with certain other persons, but the joint owners of each parcel were not identical. The appellant was entitled to an undivided half share for the same

(1) (1912) 14 C.L.R. 372. (2) (1915) 19 C.L.R. 593.

beneficial owners in respect of each parcel of land. The commissioner assessed the appellant and those owning jointly or in common with him to land tax in respect of each parcel of land as joint owners on 30th June 1938. There were three assessments; one in respect of each parcel of land. No objection has been taken to these three assessments. The commissioner also assessed the appellant separately to land tax pursuant to the provisions of sec. 38 (3), coupled with sec. 33 of the Act:—"Each joint owner of land shall in addition be separately assessed and liable in respect of—(*a*) his individual interest in the land (as if he were the owner of a part of the land in proportion to his interest) together with (*b*) any other land owned by him in severalty, (*c*) his individual interests in any other land": See Act, sec. 38 (3). Any person in whom land is vested as a trustee shall be assessed and liable in respect of land tax as if he were beneficially entitled to the land: See Act, sec. 33. The appellant, as such trustee, owned or was entitled at law to certain land in severalty in addition to the parcels of land as already mentioned, which he owned jointly with others. The commissioner ascertained by his assessment half the unimproved value of the three parcels of land in which the appellant had an undivided half share and the unimproved value of the land which he had in severalty. He aggregated these sums and calculated the gross tax on that aggregate. Next he calculated the deduction to which he considered the appellant was entitled. According to the statement attached to the assessment he took half the tax charged to the joint owners in respect of each parcel of land. The deduction was based upon the provisions of secs. 43 and 38 (4) of the Act. By this means the commissioner made the separate assessment of the trustee under sec. 38 (3) of the Act. And it is this assessment that is the subject of objection.

It was argued that sec. 33 could not be operated in connection with the provision in sec. 38 (3), from which it followed that the equitable owners—the beneficiaries—were the joint owners for the purposes of the sub-section. The argument, if it were correct, would altogether exclude trustees from assessment under sec. 38 of the Act. But it is conceded that the appellant trustee in the present case was rightly assessed as one of the joint owners of the three parcels of land. And, if he be one of the joint owners, then sec. 38 (3) explicitly provides that each joint owner of land shall in addition be separately assessed. Further, the argument is opposed to the observations of this court in *Isles* v. *Federal Commissioner of Land Tax* (1) and to the definitions of "owner," "owned," "joint owners" and "taxpayer" in sec. 2 and also to sec. 33 of the Act.

(1) (1912) 14 C.L.R. 372.

H. C. OF A. 1940.

QUINLAN v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

A further argument attacked the assessment because it included three parcels of land the subject of three separate assessments to joint owners who were not the same persons in each case. But the "joint owner" the commissioner was assessing under sec. 38 (3) was the appellant, who as to his undivided half share in each parcel of land was a trustee for the same beneficiaries. And the sub-section explicitly provides that each joint owner shall be liable in respect of (*a*) his individual interest in the land (as if he were the owner of a part of the land in proportion to his interest), which includes any parcel of land in any one of the three assessments of joint owners, together with (*b*) any other land owned by him in severalty, which includes the parcels of land which the appellant as trustee owned in severalty, and (*c*) his individual interests in any other land, which includes the other parcels of land in respect of which the appellant was assessed as joint owner.

Consequently in my judgment the assessment, the subject of objection, is warranted by the Act and should be affirmed. The commissioner also separately assessed the beneficiaries in respect of all lands owned by them, including their individual interests in the land included in the separate assessment of their trustee already mentioned. These assessments are not the subject of objection, and it is unnecessary and therefore undesirable to express any opinion upon the authority of the commissioner to make them.

The question stated should be answered in the affirmative.

Question in case stated answered: Yes. Case remitted to Rich A.C.J. Costs—Costs in the appeal.

Solicitors for the appellants, *Northmore, Hale, Davy & Leake*, Perth, by *Hedderwick, Fookes & Alston*.

Solicitor for respondent, *H. F. E. Whitlam*, Commonwealth Crown Solicitor.

O. J. G.