[HIGH COURT OF AUSTRALIA.]

COOPER . . . . . APPELLANT;

AND

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

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MELBOURNE, *Oct.* 10.

SYDNEY, *Nov.* 21.

Rich, Starke and Williams JJ.

Land Tax (Cth.)—Assessment—Land held in trust—Trustee entitled to beneficial interest in half share—Income of other half share held on discretionary trust and, subject thereto, for trustee—Aggregation with other lands owned beneficially by trustee—Land Tax Assessment Act 1910-1940 (*No.* 22 *of* 1910—*No.* 15 *of* 1940), *secs.* 3, 10, 11, 12, 33, 38.

The appellant held land upon trusts which, so far as related to the year of taxation, were (*a*) as to one undivided half share, for himself absolutely, and (*b*) as to the income of the other undivided half share, to apply such part thereof as he should think fit for the maintenance, education and benefit of his son and, subject as aforesaid, for himself absolutely.

Held that an assessment of the appellant to land tax which aggregated the land so held with other lands of which the appellant was beneficial owner was erroneous.

Quaere as to the correct method of assessment to land tax where a person is trustee of land for the benefit of himself and another.

APPEAL from *McTiernan* J.

Under the terms of a settlement of certain land on which was erected the Hotel Australia, Perth, the land was held by Reginald Frederick Cooper (thereinafter called "Mr. Cooper") upon the following trusts:—"(1) Upon trust as to a one undivided half share or interest therein for Mr. Cooper absolutely; (2) As to the other undivided half share or interest therein, Mr. Cooper or other the trustee or trustees for the time being hereof (who together with Mr. Cooper are hereinafter referred to as 'the trustees') shall hold the same and other the trust fund as from time to time constituted (which half share or interest and other the trust fund as from time to time

constituted are hereinafter referred to as 'the trust fund') and the income thereof upon the following trusts namely: (*a*) Until Reginald John Cooper, the son of Mr. Cooper, shall attain the age of twenty-one years the trustees shall apply such part as they in their discretion think fit of the income of the trust fund for or towards the maintenance and education or otherwise for the benefit of the said Reginald John Cooper and may either themselves so apply the same or may pay the same to the guardian or guardians for the time being of the said Reginald John Cooper or to any schoolmaster tutor or other person selected by them for that purpose without seeing to the application thereof. (*b*) After the said Reginald John Cooper shall have attained the age of twenty-one years and until he shall attain the age of twenty-five years the trustees shall pay to him out of the income from the trust fund the sum of five hundred pounds per annum by equal monthly instalments. (*c*) Subject as aforesaid and as hereinafter provided the trustees shall hold the income accruing from the trust fund until the said Reginald John Cooper attains the age of twenty-five years upon trust for Mr. Cooper absolutely. (*d*) If and when the said Reginald John Cooper attains the age of twenty-five years then the trustees shall hold the trust fund and the income thereafter accruing therefrom upon trust for the said Reginald John Cooper absolutely."

Reginald Frederick Cooper, the trustee under the settlement, was the registered proprietor and beneficial owner of eighteen other pieces of land. He received two assessments from the Federal Commissioner of Land Tax in respect of land held by him as at 30th June 1939. The first assessment was an assessment as trustee of the land on which the Hotel Australia was erected; Cooper made no objection to this assessment. The second assessment was in respect of the eighteen pieces of land beneficially owned by Cooper, and also the land on which the Hotel Australia was erected, but a deduction was allowed "to a secondary taxpayer under sec. 43—£250 5s.," which was the amount of tax payable under the first assessment. As the rate of land tax increases with the value of the taxpayer's holding, the amount of tax payable was greatly increased by adding the value of the land on which the Australia Hotel was erected to the other land.

Reginald John Cooper was under the age of twenty-one years on 30th June 1939.

Cooper objected to the second assessment on the ground that he was a trustee of the land on which the Hotel Australia was erected, and was not liable either under or independently of sec. 33 of the *Land Tax Assessment Act* 1910-1940 to be jointly assessed in respect

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of the lands which he owned beneficially and the land of which he was trustee, but the commissioner disallowed the objection.

The appeal was heard by *McTiernan* J., who held that Cooper was entitled, subject to a discretionary trust for the maintenance of John Reginald Cooper, to receive and was in receipt during the year of taxation of the whole of the rents and profits of the land on which the Hotel Australia was erected. In his Honour's opinion that land was correctly included in the assessment in respect of properties beneficially owned by Cooper. The appeal was therefore dismissed.

From the decision of *McTiernan* J., Cooper appealed to the Full Court.

The relevant statutory provisions appear in the judgments hereunder.

Ham K.C. (with him *Fraser*), for the appellant. Sec. 3 of the *Land Tax Assessment Act* 1910-1940 defines " owner " as the person who " jointly or severally, whether at law or in equity . . . is entitled to receive the rents and profits." If the commissioner's view is correct, then there should be only one assessment (*Land Tax Assessment Act* 1910-1940, secs. 11, 35). The legal owner must be in receipt of all the rents and profits, not part of them (*Cochrane* v. *Federal Commissioner of Land Tax* (1)). Land means part of the earth's surface (*Clifford* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (2) ; *Emmerton* v. *Federal Commissioner of Land Tax* (3) ; *Glenn* v. *Federal Commissioner of Land Tax* (4)). The terms of the trust deed are the crux of the whole matter. Under it, the appellant is not in receipt of the rents and profits, other than as trustee for himself and his son. He was not in receipt of the whole of the rents and profits. [He was stopped.]

Fullagar K.C. (with him *Smith*), for the respondent. Under the deed, there are three periods of distribution—(*a*) until the son attains twenty-one, during which period maintenance and education are dependent on the appellant's discretion ; (*b*) until the son attains twenty-five, during which period there is an annuity ; (*c*) after the son attains twenty-five. Subject to the payments referred to in *a* and *b*, the appellant is entitled to the income. For the first period the appellant took the income from the land and was not bound to account for it. He was not prevented from mixing it with his own funds. The son's interest at the most was a charge on the income.

(1) (1916) 21 C.L.R. 422, at p. 429.
(2) (1915) 19 C.L.R. 593, at pp. 618, 619.
(3) (1916) 22 C.L.R. 40, at pp. 48-50.
(4) (1915) 20 C.L.R. 490.

It was not a right which could be assigned or devised. The only proprietary interest was that of the appellant (*Executor Trustee and Agency Co. of South Australia Ltd.* v. *Deputy Federal Commissioner of Taxes (S.A.)* (1); *National Trustees Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (2)). The policy of the Act is to ignore charges, mortgages and the like (*Terry* v. *Federal Commissioner of Taxation* (3)). The trustee can be assessed under sec. 33 or sec. 11 of the *Land Tax Assessment Act* 1910-1940. During the second period, clearly the appellant was an "owner" within the meaning of the Act. There was a charge of the annuity (*Adams* v. *Federal Commissioner of Land Tax* (4); *Countess of Bective* v. *Federal Commissioner of Taxation* (5); *Manning* v. *Federal Commissioner of Taxation* (6)). The parent is under no obligation to account (*Hourigan* v. *Trustees Executors and Agency Co. Ltd.* (7)). For the first period the son had no proprietary interest in the land. He had, at the most, a mere personal right against the appellant to exercise his discretion.

[STARKE J. referred to *Hoysted* v. *Federal Commissioner of Taxation* (8).]

The whole basis of the Act is that it ignores charges and mortgages. In this case the son has a charge only on the appellant's right (*Molloy* v. *Federal Commissioner of Land Tax* (9); *Adams' Case* (4); *Cochrane's Case* (10)). Even if the appellant was not entitled to the receipts and profits, in fact he was in receipt thereof, and therefore is an "owner" within the Act. [He referred to sec. 33 of the *Land Tax Assessment Act* 1910-1940.]

Ham K.C., in reply. This is a trust for the maintenance of children (*Wetherell* v. *Wilson* (11); *Scott* v. *Commissioner of Taxes* (12); *Barling* v. *Commissioner of Taxes* (13)).

Cur. adv. vult.

NOV. 21.

The following written judgments were delivered:—

RICH J. For the financial year 1939-1940 the appellant made two land tax returns, one in respect of the Hotel Australia, Perth, which he held on the trusts of an indenture of trust, and the other in respect of some eighteen properties of which he was the

(1) (1939) 62 C.L.R. 545.
(2) (1923) 33 C.L.R. 491, at pp. 500, 504, 516.
(3) (1920) 27 C.L.R. 429, at p. 435.
(4) (1919) 26 C.L.R. 341.
(5) (1932) 47 C.L.R., at pp. 419, 420.
(6) (1928) 40 C.L.R. 506.
(7) (1934) 51 C.L.R. 619, at pp. 646-648.
(8) (1920) 27 C.L.R. 400, at p. 409.
(9) (1937) 58 C.L.R. 352, at p. 360.
(10) (1916) 21 C.L.R. 422.
(11) (1836) 1 Keen 80 [48 E.R. 237].
(12) (1939) N.Z.L.R. 246.
(13) (1940) N.Z.L.R. 831.

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absolute owner at law and in equity. In respect of these returns the commissioner made two separate assessments. The appellant did not object to the assessment on the Hotel Australia land, but with regard to the assessment on the lands of which he was the absolute owner he objected that the assessment was wrong, on the ground that the unimproved value of the land on which the hotel was erected was added to the unimproved value of the other properties. The question raised by this appeal is whether this aggregation was, as a matter of law, justified.

The proper interpretation of the trust deed to which I have referred appears to me to be the principal question for our determination, inasmuch as if on such an interpretation the appellant is entitled to the complete beneficial interest in the whole property he cannot complain about the course taken by the commissioner. The provisions of the trust deed are set out fully in the transcript and need not be repeated. It is sufficient to say that, having regard to the effective clauses of the deed, two trusts are created. First, a trust as to one undivided half share or interest in the trust property in favour of the appellant, who, together with T. G. A. Molloy, was a party to the trust deed. There can be no question that the appellant takes an absolute beneficial interest in this half share or interest. The second trust is with respect to the remaining undivided half share or interest, which is referred to in the deed as "the trust fund." The question which affects the determination of this case is, What is the proper interpretation of the language creating this trust? On the one hand it is said that the appellant takes the beneficial interest in the whole of this share subject to a charge thereon in favour of his son. On the other hand it is contended that he is not so entitled. In my opinion this trust is an original trust providing direct beneficial interests both for the appellant and his son. The language of the relevant clauses do not permit of a construction which gives to the appellant the complete beneficial interest in this half share subject to a charge in favour of his son. The fact that the appellant is a trustee as well as a beneficial owner obviously cannot affect the construction of the deed. The income arising from "the trust fund" is divisible between the appellant and his son, and it is clear that the son is entitled to some part thereof, although it is left to the discretion of the trustees during his minority. This is a direct gift from the income of the "trust fund", and is one of the original trusts created in respect of such income. In these circumstances it follows that the appellant is not entitled to the full beneficial interest in "the trust fund," or to receive or to be in receipt of the rents and

profits of the trust property whether as beneficial owner or otherwise (*Land Tax Assessment Act* 1910-1940, sec. 3 (*b*)). The interpretation which I have placed on the trust deed leads to the conclusion that the appellant is not beneficially entitled to the full interest in the land the subject of the deed. I see no reason for construing the word " trustee " in the second proviso to sec. 33 as a person holding the bare legal estate. Accordingly, he is entitled to claim the benefit of this proviso, and is not liable to have included in the assessment upon him in his own right the whole beneficial interest in the hotel property.

The appeal should be allowed and the assessment remitted to the commissioner for re-assessment.

STARKE J. This appeal concerns an assessment of the appellant to land tax as owner at 30th June 1939 of certain lands. It appears that the appellant, the taxpayer, was the owner of some eighteen parcels of land. He was also registered as the proprietor under the *Transfer of Land Act* 1893 (W.A.) of another parcel of land, upon which was erected the Australia Hotel at Perth, for an estate in fee simple in possession. This land had been transferred to him by or at the direction of one Molloy, his grandfather. The appellant had, with the consent of Molloy, executed a mortgage of this land, and also a lease. In May of 1937 Molloy and the appellant executed a deed whereby Molloy confirmed the mortgage and lease and both he and the appellant agreed and declared that, subject to the mortgage and lease, the said hotel should be held and as from 17th July 1936 be deemed to have been held by the appellant upon " the following trusts namely " :—(1) Upon trust as to a one undivided half share or interest therein for the appellant absolutely; (2) as to the other undivided half share or interest therein the appellant " or other the trustee or trustees for the time being hereof " shall hold the same and the income thereof " upon the following trusts namely :—Until " (the son of the appellant) " shall attain the age of twenty-one years the trustees shall apply such part as they in their discretion think fit of the income of the trust fund for or towards the maintenance and education or otherwise for the benefit of the said Reginald John Cooper " and after he shall have attained the age of twenty-one years to pay him out of the income £500 per annum by equal monthly instalments and subject thereto to hold the income for the appellant absolutely, but if and when R. J. Cooper attained the age of twenty-five years then upon trust as to his undivided share and the income thereafter accruing therefrom for R. J. Cooper absolutely with gifts over in certain contingencies

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which are immaterial for the purposes of this appeal. R. J. Cooper is alive and had not attained the age of twenty-one years on 30th June 1939.

The commissioner first assessed R. F. Cooper, trustee for Reginald F. (himself) and Reginald J. Cooper (his son), as owner of the land upon which the Australia Hotel is erected. He next assessed R. F. Cooper as owner of the eighteen parcels of land already mentioned and also the parcel of land upon which the Australia Hotel was erected. He aggregated the value of all these parcels of land for the purposes of this assessment, but allowed as a deduction "to secondary taxpayer under sec. 43—£250 5s.," which was the amount of tax payable under the separate assessment of R. F. Cooper, trustee above mentioned. The rate of tax increases with taxable value. Consequently, the aggregation of the values of all the parcels of land greatly increases the amount of tax payable by the appellant. And it is against the inclusion of the value of the land upon which the Australia Hotel is erected in the assessment last mentioned that this appeal is brought, and not against the trustee assessment first mentioned.

Land tax is payable by the owner of land upon the taxable value of all land owned by him at midnight on 30th June immediately preceding the financial year for which the tax is levied (*Land Tax Assessment Act* 1903-1940, sec. 12). "Owned" has a meaning corresponding with owner. And, unless a contrary intention appears, "'owner,' in relation to land includes every person who jointly or severally, whether at law or in equity,—(*a*) is entitled to the land for any estate of freehold in possession; or (*b*) is entitled to receive, or in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise."

But sec. 33 provides that 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: Provided that when a trustee is also the beneficial owner of other land, he shall be separately assessed for that land, and for the land of which he is a trustee, unless for any reason he is liable to be jointly assessed, independently of the section.

And, by sec. 38, joint owners of land shall be assessed and liable for land tax in accordance with the provisions of the section. Each joint owner of land is in addition liable to 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, and

(*c*) his individual interests in any other land. "Joint owners" means persons who own land jointly or in common, whether as partners or otherwise, and includes persons who have a life or greater interest in shares of the income from the land. "Owned" has a meaning corresponding with that of "owner": See *Quinlan* v. *Federal Commissioner of Taxation* (1). Subject to the provision of sec. 38 (3), the land upon which tax is levied is some parcel of land and not an undivided interest or interests in it (*Isles* v. *Federal Commissioner of Land Tax* (2); *Clifford's Case* (3)).

The commissioner has not assessed the taxpayer and his son, Reginald J. Cooper, as joint owners of the land upon which the Australia Hotel is erected, though the taxpayer and his son are beneficially entitled between them to the land and the rents and profits thereof. But he has assessed the taxpayer as a trustee pursuant to sec. 33, and the taxpayer did not appeal this assessment. But is a person a trustee for himself because he undertakes equitable duties in respect of the land for the benefit of himself and another? In the present case, the taxpayer holds an undivided interest in the land for himself, and the other undivided interest contingently for his son: Cf. *Conolly* v. *Conolly* (4); *In re Landi*; *Giorgi* v. *Navani* (5).

Again, should the taxpayer be assessed as a trustee if he be assessable as a joint owner under sec. 38?

Upon these questions I express no concluded opinion, for they do not arise on the present appeal. The question is whether the assessment appealed against can be justified under secs. 10, 11 and 12, coupled with the definition of "owner" in sec. 3. The taxpayer is entitled to the land for an estate of freehold in possession, and prima facie he falls within the terms of the section. But if he be a trustee, I apprehend that he should be assessed under sec. 33. And if the taxpayer and his son be joint owners, then they should be so assessed under sec. 38 and the taxpayer separately assessed in respect of his individual interest pursuant to sec. 38 (3). I do not dissent from the judgment of the court that the assessment of the taxpayer upon the aggregated value of the eighteen parcels of land already mentioned and the land upon which the Australia Hotel is erected was wrong, because the commissioner has already assessed him as trustee. But whether the taxpayer was assessable as a trustee or as a joint owner is a matter upon which I give no opinion.

(1) (1940) 64 C.L.R. 65.
(2) (1912) 14 C.L.R. 372, at p. 376.
(3) (1915) 19 C.L.R., at pp. 616, 619.
(4) (1867) L.R. 1 Eq. 376, at p. 383.
(5) (1939) Ch. 828, at p. 835.

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Perhaps I should refer to an argument that the provisions of sec. 33 (1) provide for the assessment of a trustee "as if he were beneficially entitled to the land," and therefore it was said that the person upon whom the section operated is not in fact beneficially entitled to the land, but has merely a bare legal title thereto as trustee. All I can say about this argument is that the section is apparently framed upon the assumption that a person cannot be a trustee for himself. But if he can, then I see no reason why the section should not operate. He would be a trustee entitled in his own right to some estate or interest in the land, though not the whole beneficial estate or interest therein. The section provides that a trustee may be assessed as if he were beneficially entitled to the land. To the extent that a trustee was beneficially entitled, the statutory provision would be inoperative or ineffective, for to that extent he would be beneficially entitled to the land, but further or otherwise the section provides that the trustee shall be assessed as if he were beneficially entitled to the parcel of land and not merely the trustee's beneficial estate or interest therein.

The commissioner's assessment was upheld in the court below on the ground that the appellant was entitled to receive and was in receipt of the whole of the rents and profits of the land as equitable owner thereof during the year of taxation. I cannot follow this reasoning and think it wrong.

The position of this court, owing to the limited nature of this appeal, is, I think, a little embarrassing. But as I have said, I do not in the circumstances of the case dissent from the judgment of the court allowing the appeal.

WILLIAMS J. The material facts are as follows:—By an indenture dated 17th May 1937 made between T. G. A. Molloy and his grandson, the appellant R. F. Cooper, therein called "Mr. Cooper", the former settled certain land on which is erected the licensed premises known as the Hotel Australia for the benefit of the appellant and the latter's son R. J. Cooper. On that date the appellant was the legal owner of the land for an estate in fee simple, subject to a certain mortgage, but he held it as trustee for Molloy, who had purchased the property. By the indenture the appellant, at Molloy's request, declared that from 17th July 1936 he held the land: "(1) Upon trust as to a one undivided half share or interest therein for Mr. Cooper absolutely; (2) As to the other undivided half share or interest therein Mr. Cooper or other the trustee or trustees for the time being hereof (who together with Mr. Cooper are hereinafter referred to as 'the trustees') shall hold the same and other the trust fund

as from time to time constituted (which half share or interest and other the trust fund as from time to time constituted are hereinafter referred to as 'the trust fund') and the income thereof upon the following trusts namely: (*a*) Until the said Reginald John Cooper shall attain the age of twenty-one years the trustees shall apply such part as they in their discretion think fit of the income of the trust fund for or towards the maintenance and education or otherwise for the benefit of the said Reginald John Cooper and may either themselves so apply the same or may pay the same to the guardian or guardians for the time being of the said Reginald John Cooper or to any schoolmaster tutor or other person selected by them for that purpose without seeing to the application thereof. (*b*) After the said Reginald John Cooper shall have attained the age of twenty-one years and until he shall attain the age of twenty-five years the trustees shall pay to him out of the income from the trust fund the sum of £500 per annum by equal monthly instalments. (*c*) Subject as aforesaid and as hereinafter provided the trustees shall hold the income accruing from the trust fund until the said Reginald John Cooper attains the age of twenty-five years upon trust for Mr. Cooper absolutely. (*d*) If and when the said Reginald John Cooper attains the age of twenty-five years then the trustees shall hold the trust fund and the income thereafter accruing therefrom upon trust for the said Reginald John Cooper absolutely."

The indenture gave the trustees power to sell or lease and other wide administrative powers affecting the whole land.

The *Land Tax Assessment Act* 1910-1940, sec. 12, provides that land tax shall be charged on land owned at midnight on the thirtieth day of June immediately preceding the financial year for which the tax is levied.

On 30th June 1939 the appellant, whose son R. J. Cooper was then under the age of twenty-one years, in addition to being the legal owner of the above land, the value of which was £44,000, was also the legal and equitable owner in fee simple of eighteen other properties of a total value of £28,859. For the year 1st July 1939 to 30th June 1940 he made separate returns of the Australia Hotel and these eighteen properties. The commissioner assessed the appellant by two assessments, but on the basis that he was liable to pay tax on the aggregate value of all these lands. The appellant objected, and contended that he should have been separately assessed in respect of the Australia Hotel and the other eighteen properties.

In my opinion this contention is correct. The Act, sec. 3, provides that, unless the contrary intention appears, "owner," in relation

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to land, includes every person who jointly or severally, whether at law or in equity—(*a*) is entitled to the land for any estate of freehold in possession; or (*b*) is entitled to receive, or in receipt of, or if the the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise; and includes every person who by virtue of this Act is deemed to be the owner. Sec. 33, so far as material, provides that 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: Provided that when a trustee is also the beneficial owner of other land, he shall be separately assessed for that land, and for the land of which he is a trustee, unless for any reason he is liable to be jointly assessed independently of this section.

On 30th June 1939 the appellant was entitled at law to the Australia Hotel for an estate of freehold in possession, but in equity he held the land upon the trusts of the indenture. If he had derived no interest under these trusts the proviso to sec. 33 would have operated, but he did in fact take the substantial beneficial interests already mentioned. And so the commissioner claims that on that date he was entitled to receive the whole of the rents and profits of the land not only as a trustee but also beneficially, and that he was therefore also the beneficial owner thereof within the meaning of sec. 3 (*b*). If this claim is correct I think it is clear that he could have been taxed in the one assessment as the sole beneficial owner of all the lands comprised in the two returns and that the aggregation would have been justified. But, in my opinion, on the true construction of the indenture, he was only beneficially entitled to a half share thereof under clause 1, and to the balance of the income of the other half share remaining after he as trustee, in the bona-fide exercise of his discretion, had first appropriated a sufficient sum to provide for the maintenance and education of his son. If the indenture had directed that the whole income of this half share was to be paid to the appellant by the trustees as a beneficiary but subject to a trust on his part to maintain and educate his son thereout, he would have been entitled to the receipt of the whole income beneficially, but the duty of exercising the discretion as to the amount to be provided for the benefit of the son is not imposed on him in respect of the income he receives as a beneficiary under clause 2 (*c*), but on the trustees for the time being of the settlement, so that, if separate trustees were appointed, they would have to exercise the discretion, and only pay to him the balance that remained after the necessary sum had first been provided for this purpose. The

coincidence that the appellant was the trustee as well as the beneficiary cannot affect the construction of the instrument. As, therefore, the appellant was not entitled to receive the whole of the rents and profits for his own use, he was not the beneficial owner of the land within the meaning of sec. 3 (*b*) (*Cochrane* v. *Federal Commissioner of Land Tax* (1)), but he was a trustee thereof and entitled to be separately assessed in accordance with the proviso to sec. 33.

Mr. *Fullagar* for the respondent commissioner also contended that it was the policy of the Act to treat a beneficiary as entitled to receive the whole of the income within the meaning of sec. 3 (*b*) where the trust was such that he was the principal recipient, although the trustees were directed to make certain payments, such as annuities or for maintenance thereout, before paying anything to him. I cannot find any such intention in the Act, and the contention appears to be a disguised attempt to ask the court to construe the gift according to its substance, a method of approach which was finally frowned upon by the House of Lords in *Commissioners of Inland Revenue* v. *Westminster* (*Duke*) (2). He referred us to the decision of this court in *Adams* v. *Federal Commissioner of Land Tax* (3) and said it was obvious that, when the appellant's son attained the age of twenty-one years and until he became twenty-five, the appellant would be beneficially entitled to the whole of the income of both shares within the meaning of the section; and that it would be strange if a different result followed where the prior trust was a discretionary trust for maintenance from where it was one for the payment of the definite sum of £500.

The appellant's liability after his son attains twenty-one can be determined when the necessity arises.

It is sufficient to say at present that the decision in *Adams' Case* (3) depends upon the construction of an instrument quite different from the indenture; and, in my opinion, cannot be justified on the view that the taxpayer there assessed was an owner within sec. 3 (*b*), but only upon the ground that he was an equitable tenant for life and entitled to an estate of freehold in possession within the meaning of sec. 3 (*a*). It is no warrant for the contention that the question whether a person is an owner within the meaning of the section or not can be determined except upon the true construction of the relevant instrument. If that instrument has been construed by the court the determination of this question will be governed by this construction (*Executor Trustee & Agency Co. of S.A. Ltd.* v. *Deputy*

(1) (1916) 21 C.L.R., at p. 429. (2) (1936) A.C. 1, at p. 19.
(3) (1919) 26 C.L.R. 341.

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Federal Commissioner of Taxes (*S.A.*) (1)). Otherwise the court will have to construe the instrument in the course of the appeal.

The submission forwarded to the court by the respondent's counsel after judgment had been reserved remains for consideration. It reads as follows :—" Sec. 33 (1) of the Act provides for the assessment of a trustee ' as if he were beneficially entitled to the land.' This assumes that the persons upon whom the section operates are not in fact beneficially entitled to the land, but have merely a bare legal title thereto as trustees. Accordingly, the section has no application to a case like the present, in which the taxpayer has a beneficial interest in addition to the bare legal title. Further, the direction for separate assessment of trust land which is contained in the second proviso to the section is similarly limited in its operation, and applies only in cases where the taxpayer has a bare legal title to the land. For these reasons neither the proviso nor any other part of the section is applicable in the present case and it follows that the case is concluded by the decision in *Adams' Case* (2) ".

In my opinion there is no substance in the suggestion that sec. 33 only applies where the trustee takes no beneficial interest in the land. The first limb of the section converts the legal ownership of the trustee into a notional beneficial ownership for the purpose of assessment and liability to tax. But the two provisos which follow safeguard the real beneficiaries by providing (apart from liability to joint assessment, as to which no question arises on this appeal) that this notional ownership is not to cause the value of lands, in which the same beneficial ownership does not in fact exist, to be aggregated. The section applies to all land of which a trustee is the legal owner within the meaning of sec. 3, not only where he is nothing except a trustee, but also where is he a beneficiary. And the second proviso operates so long as his beneficial interest is not such that he is also an actual beneficial owner. If there is a beneficial owner the commissioner cannot, by assessing the trustees, levy a greater tax than he would obtain if he assessed the beneficial owner (*Sendall* v. *Federal Commissioner of Land Tax* (3)). But in the case of many trusts there is no beneficial owner, and the trustee must then be taxed on the unimproved value of his legal ownership less the sum of £5,000. To quote the words of *Rich* A.C.J. and myself in *Quinlan* v. *Federal Commissioner of Taxation* (4) : " 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

(1) (1939) 62 C.L.R. 545.
(2) (1919) 26 C.L.R. 341.
(3) (1911) 12 C.L.R. 653.
(4) (1940) 64 C.L.R. 65, at p. 71.

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 appeal should be allowed.

Appeal allowed. Order appealed from discharged and in lieu thereof order that the assessment appealed from be remitted to the commissioner for re-assessment and that the commissioner pay the costs of this appeal.

Solicitors for the appellants, *Dwyer & Thomas*.

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

O. J. G.