In my opinion, the proper answer to question 1 (a) as newly framed is that *both* these dividends should be taken into the calculation; to question 1 (b) is Yes. The proper answer to question 2 (a) is, in my opinion, No; and to question 2 (b) is No proportion.

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Questions answered:—(1) (a) *Both*. (1) (b) *Yes*. (1) (c) *Not answered*. (2) (a) *No*. (2) (b) *No*.

Solicitors for the appellant, *Braund & Watt*.

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE NATIONAL TRUSTEES, EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED . . . . . } APPELLANT;

AND

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

Land Tax —Assessment—Owner—Joint owners—Deduction of £5000*—Trustees—Will of testator who died before 1st July* 1910*—Trust to pay income to children—Discretion to trustee to withhold part of income — Land Tax Assessment Act* 1910-1916 (*No.* 22 *of* 1910—*No.* 33 *of* 1916), *secs.* 3, 11, 38 (7).

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MELBOURNE, *Oct.* 12, 15.

SYDNEY, *Dec.* 13.

Knox C.J., Isaacs, Higgins, Rich and Starke JJ.

By his will a testator, who died before 1st July 1910, after certain specific gifts gave the residue of his estate real and personal to his trustee upon trust to sell and convert with full power to postpone, and to manage and let the real estate during postponement; and any rents were to be treated as income under the trust for investment. He directed that the net residue should be invested and, subject to an annuity to his widow and to the proviso next hereinafter mentioned, that the income should be paid to such of five of his children as

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should for the time being be living, during his or her life or until insolvency, assignment, &c. The proviso was that if any of the five children should die leaving any children, or have any children at insolvency, assignment, &c., the trustee should, until the death of the parent or the distribution of the residue, apply to or for the maintenance, education, benefit or advancement in life of the children of that child of the testator (or of such of them to the exclusion of the others and in such shares, equal or unequal, as the parent should by deed appoint, and in default of appointment in equal shares as tenants in common) or pay to the guardian of such children a share of the income of the residue proportioned to their expectant share in the corpus. But the trustee was empowered, if the trustee should deem it desirable, instead of paying or applying the whole of the share of the income, to pay or apply such part only as the trustee might think proper from time to time for the maintenance, education or benefit of the children, in which event the trustee should accumulate the balance of the share of the income by investing the same, and the balance and the resulting income thereof should follow the destination of the share of the trust estate from which such income had arisen. As to the corpus of the residue, the testator directed that the trustee should hold it in trust for such of his five children as should be living at the time when the youngest child should attain, or would if living have attained, the age of twenty-five years, provided that if any child of the testator should die before the date of distribution leaving any children who should live to attain the age of twenty-one years, then those children should take the share of the corpus which his or her parent would have taken if living at the period of distribution. A, one of the five children of the testator, died in 1914 leaving two children surviving him who were infants at the material time, and he had not executed the power of appointment by deed conferred upon him by the will. The youngest child of the testator attained the age of twenty-five years in February 1921. The trustee credited one-fifth part of the net income of the estate to the account of each of the four surviving children of the testator and of the infant children of A, and had never deemed it desirable to exercise and had never exercised the discretionary power to apply or pay part only of such one-fifth share. On an assessment of the trustee for Federal land tax in respect of the freehold hand which formed part of the testator's estate as at 30th June 1920,

Held, that neither the four surviving children of the testator and the children of A, nor those four surviving children, were "joint owners" of the land within the definition of that term in sec. 3 of the *Land Tax Assessment Act* 1910-1916; that, consequently, the beneficial interest in the land or in the income therefrom was not shared among them in such a way that they were taxable as joint owners within the meaning of sec. 38 (7) of the Act; and therefore that the trustee was entitled to only one deduction of £5000.

Hoysted v. *Federal Commissioner of Taxation* [No. 1], (1920) 27 C.L.R., 400, distinguished.

CASE STATED.

On an appeal to the High Court by the National Trustees, Executors and Agency Co. of Australasia Ltd., the trustees of the estate

of Michael Dawson deceased, from an assessment for Federal land tax, *Starke* J. stated a case, which was substantially as follows, for the opinion of the Full Court :—

1. Michael Dawson (hereinafter called the testator) late of "Sherwood," Warrnambool, in the State of Victoria, gentleman, who died on 8th March 1902, by his last will appointed the above-named appellant, the National Trustees, Executors and Agency Co. of Australasia Ltd., to be the executor and trustee thereof; and probate of such will was duly granted to the said Company on 5th May of that year.

2. The testator at the time of his death was the owner of real and personal property in the State of Victoria.

3. By the said will, after making various devises and bequests, the testator devised and bequeathed all the residue of his property real and personal unto his trustee upon trust to sell and convert into money, with power to postpone such sale altogether or for such period as his trustee should think expedient, and with power to his trustee as long as any part remained unsold to manage the same and to lease from time to time his real estate from year to year or for any term not exceeding twenty-one years in possession ; and the testator declared that his trustee should stand possessed of the moneys to arise from the conversion of his real and personal estate upon trust, after payment of the expenses incidental to the execution of the trust and his debts, funeral and testamentary expenses, to invest the residue ; and he declared :—"My trustee shall stand possessed of the annual income arising from the investment of my trust estate upon trust in the first place to pay thereout to my said wife during her life . . . an annuity or yearly sum of £500 to be payable quarterly the first payment thereof to be made at the expiration of three calendar months from my death with a proportionate part of any such quarterly payment up to the date of her decease And subject to the payment of the foregoing annuity and to the proviso next hereinafter contained I declare that my trustee shall stand possessed of the said annual income until the period of distribution hereinafter mentioned upon trust to divide the said annual income into as many shares as there shall be children of mine for the time being living (other than my said son Michael Francis Dawson and my said

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daughter Emma May McGee Dawson) and shall pay one of such shares to or stand possessed thereof upon trust for each of my said children other than my last named son and daughter (as and by way of annuity payable quarterly) during his or her life or until he or she shall be made or become insolvent or assign charge or encumber any share or interest which he or she may for the time being have or be entitled to whether in expectancy or otherwise under any of the trusts or declarations of this my will but such annuity or share of income hereby given to each of my said children shall be liable from time to time to be decreased as may be necessitated for the purpose of giving effect to the proviso next hereinafter contained Provided always and I declare it to be my will that notwithstanding anything to the contrary in this my will contained if any son or daughter of mine shall die whether before or after me leaving any child or children him or her surviving or if any son or daughter of mine shall at the time of his or her being made or becoming insolvent or assigning charging or encumbering any share or interest he or she may for the time being have or be entitled to whether in expectancy or otherwise under any of the trusts or declarations of this my will have any child or children then living my trustee shall out of the annual income of my trust estate or the investments for the time being representing the same and until the death of such child or children or the distribution of my trust estate amongst the parties respectively entitled thereto (whichever event shall first happen) apply to or for the maintenance education benefit or advancement in life of the child or children of such son or daughter of mine so dying or of the son or daughter of mine so being made or becoming insolvent or assigning charging or encumbering his or her share or interest as aforesaid (or of such one or more of such child or children to the exclusion of the other or others of them and in such equal or unequal shares as his or their parent being a son or daughter of mine shall by deed with or without power of revocation and new appointment or by will appoint and in default of or until such appointment or in so far as any such appointment shall not extend in equal shares as tenants in common) or pay to the guardian of such child or children to be so applied without requiring any account for the same or being responsible for the misapplication or non-application thereof a share of such annual income

proportionate to the share or expectant share for the time being of such child or children in the corpus of my estate but if my trustee shall deem it desirable it may instead of applying or paying the whole of such child's or children's share in the annual income pay or apply only such part thereof as it shall from time to time deem proper to or for the maintenance education or benefit of such child or children in which event my trustee shall accumulate the balance of such share of income by investing the same by way of compound interest and such balance and the resulting income thereof shall follow the destination of the share of my trust estate from which the said income shall have arisen And subject to the several trusts matters and things aforesaid I declare that as regards the whole of my trust estate (being the corpus of my estate) and the investments for the time being representing the same my trustee shall stand possessed thereof in trust for my child or such of my children (other than my said son Michael Francis Dawson and my daughter Emma May McGee Dawson) as shall be living at the time when the youngest of my children living at my decease shall attain or would if living have attained the age of twenty-five years (in this my will referred to as the period of distribution) in equal shares as tenants in common."

4. The testator's widow died in the year 1907. The testator's youngest child living at the date of testator's decease attained the age of twenty-five years in February 1921.

5. The testator's children who were living at the date of his death were the following: Albert George Dawson, Clive John Neville Dawson, Reginald Stanley Dawson, Dorothy Mary Dawson (now Dorothy Mary Sheahan) and Sylvester Richard Dawson—all of whom are living except the said Clive John Neville Dawson.

6. The said Clive John Neville Dawson died intestate on 20th March 1914 leaving him surviving his two children, Dorothy Eileen Magdalene Dawson and Roma Frances Mary Dawson, who are now infants. The said John Clive Neville Dawson did not by deed exercise the power of appointment conferred upon him by the part of the will quoted in par. 3 hereof.

7. Part of the testator's estate consists of freehold lands, and the whole of the rents and profits of any lands material to the purposes

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of this case were at all times included in the income of the testator's residuary estate.

8. The appellant, as trustee, by its land tax return for the year 1920-1921 claimed five deductions of £5,000 each—one in respect of the two children of Clive John Neville Dawson and one in respect of each of the surviving four children of the testator entitled to share in the residue.

9. The appellant Company distributed the whole net income of the estate by crediting one equal fifth part thereof to the private account of each of the four surviving children of the testator and of the infant children of Clive John Neville Dawson. By arrangement with the beneficiaries the appellant Company paid each beneficiary a fixed amount per month, which was debited against the said account, and paid over the surplus, if any, from time to time standing to the credit of such account. The fixed amount paid in the case of each of the surviving children is £33 6s. 8d. a month and in the case of the infant children of Clive John Neville Dawson £50 per month. This sum is paid to their guardian. For the year ending 30th June 1920 the appellant, as trustee, on 16th October, 29th December, 1st March and 8th June respectively credited, in the books of the Company, each of the beneficiaries with his share of the income of the estate so that the whole net income of the estate for the period referred to was accounted for and so that a one-fifth share of such income was credited to each of the four living children of the testator and the whole of the remaining one-fifth share was credited to the infant children of Clive John Neville Dawson deceased. The next credits were made on 8th September 1920. The appellant, as trustee, never deemed it desirable to exercise and had never exercised any discretionary power to apply or pay only part of the one-fifth share last mentioned.

10. On 16th April 1921 the Acting Deputy Commissioner of Land Tax issued upon the trustee an assessment as to land owned at 30th June 1920 claiming land tax upon the unimproved value £64,147 less £25,000 deducted under sec. 38 of the *Land Tax Assessment Act* 1910-1916, being the deduction claimed by the appellant. The amount of the tax claimed was £604 8s., which was paid by the appellant.

11. By notice dated 17th September 1921 the Deputy Commissioner altered the said assessment by disallowing £20,000 of the above-mentioned deduction of £25,000. On account of this alteration £624 4s. 8d. additional tax was claimed, and was paid by the appellant.

12. The appellant, being dissatisfied with the assessment as altered, duly lodged objections in writing against the same, dated 9th February 1922.

13. The Deputy Commissioner by written notice disallowed the objections and the appellant, being dissatisfied with the decision of the Deputy Commissioner, required the objections to be treated as an appeal and transmitted to the Court; and the Deputy Commissioner transmitted the same accordingly.

14. The appeal came on for hearing before me, and, the parties having agreed to the foregoing facts, I state this case in writing for the opinion of the High Court upon the following questions arising in the appeal, which in my opinion are questions of law :—

(1) Whether the facts stated in par. 9 are relevant to the determination of the appeal;

(2) How many deductions of £5,000 each is the appellant entitled to claim ?

The will (which formed part of the case) contained, immediately following the portion quoted above in par. 3, the following proviso : "Provided that if any son or daughter of mine (other than my said son Michael Francis Dawson and daughter Emma May McGee Dawson) shall die before the period of distribution leaving any child or children him or her surviving who shall live to attain the age of twenty-one years then such child or children shall take (and if more than one in equal shares as tenants in common) the share in my trust estate which his, her or their parent would have taken under the trusts of this my will had such parent been living at the period of distribution."

The grounds of objection stated in the notice of objection (which was made a part of the case) were as follows :—

1. That the said assessment is erroneous as a matter of law.

2. That it is contended that, under the will of the testator, who

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died before 1st July 1910, the beneficial interest in the land in question or in the income therefrom was on 30th June 1920 for the time being shared among a number of persons, all of whom were relatives of the testator by blood, in such a way that they were taxable as joint owners under the Act, such joint owners being the four then living children of the testator and the two children of the testator's then deceased son Clive Dawson. It is further contended that each of the said four children of the testator held and holds an original share under the said will within the meaning of sec. 38 of the *Land Tax Assessment Act* and that the said two children of Clive Dawson deceased together held and hold another such original share. It is accordingly contended that, in respect of each of the said four children and in respect also of the said two children of Clive Dawson deceased, there should have been allowed a deduction of £5,000, or £25,000 in the whole, as claimed in the trustee's return, or alternatively, and at least, in respect of each of the said four children, a deduction of £5,000 or £20,000 in the whole, and that the said amended assessment wrongly disallowed such deductions and should have been made in respect of a taxable balance of £39,147 as claimed by the trustee's return or, alternatively, in respect of a taxable balance of not more than £44,147.

Owen Dixon K.C. (with him *Hassett*), for the appellant.

Gregory, for the respondent.

Cur. adv. vult.

Dec. 13.

The following written judgments were delivered :—

KNOX C.J. The substantial question raised is whether more than one deduction of £5,000 should be allowed in the assessment of the appellant to land tax.

The appellant is trustee of the will of Michael Dawson deceased, and the land which is the subject of assessment forms part of testator's residuary estate. The trusts declared by the will in respect of the residuary real estate may be stated briefly as follows, namely :— Upon trust to divide the annual income until testator's youngest

child should attain the age of twenty-five years into as many shares as there should be children of testator for the time being living (other than two named children) and to pay one of such shares to each child (other than the two named children) during his or her life or until alienation or encumbrance of the share of such child under the will, with a proviso that, in the event of any child of testator dying leaving a child or children surviving, the trustee should out of the annual income apply to or for the maintenance, education, benefit or advancement of such child or children, or pay to the guardian of such child or children to be so applied, a share of such annual income proportionate to the share or expectant share for the time being of such child or children in the corpus of his estate; with power to the trustee in its discretion to apply or pay a part only of such child's or children's share in the income instead of the whole thereof, and in that event the trustee was directed to accumulate the balance of such income to follow the destination of the share of the trust estate from which it should have arisen. The trust of the corpus of the residuary estate was for such of testator's children (other than the named children) as should be living when the youngest of his children living at his decease should attain, or would if living have attained, the age of twenty-five years, with a proviso that, if any child (other than the named children) should die before the period of distribution leaving him or her surviving a child or children who should live to attain twenty-one, such child or children should take the share which his or their parent would have taken had such parent been living at the period of distribution.

Clive Dawson, one of the testator's children entitled under the residuary gift, died in 1914 leaving two children surviving who are now infants. Testator's youngest child attained twenty-five years of age in February 1921. The appellant claims that it is entitled to five deductions of £5,000 each from the value of the land—one in respect of the children of Clive and one in respect of each of the four surviving children of testator. The assessment in question is for the year 1919-1920, and the relevant date at which the ownership of the land is to be considered is therefore 30th June 1920.

The contention of the appellant is based on sec. 38 (7) of the *Land Tax Assessment Act* 1910-1916, and cannot be sustained unless it can

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be shown that under the will the beneficial interest in the residuary real estate or in the income therefrom was at the relevant time shared among the four children of the testator and the children of Clive in such a way that they were taxable as joint owners under the Act. Counsel for the appellant relied on the decision in *Hoysted* v. *Federal Commissioner of Taxation* [*No.* 1] (1) as supporting the argument that they were so taxable; but in my opinion that decision does not assist him, for the liability to be taxed as joint owners was assumed in that case, the only matter decided being that on that assumption each of the surviving children at the relevant date held an original share in the land within the meaning of sec. 38 (7). This was pointed out in the later case relating to the same estate—*Hoysted* v. *Federal Commissioner of Taxation* [*No.* 2] (2). I therefore proceed to consider whether the four children of testator and the children of Clive were "taxable as joint owners" in respect of the residuary real estate.

By sec. 3 of the Act the expression "'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." It is clear that the children and grandchildren of the testator are not persons who have a life or greater interest in shares of the income from the land. None of the children have an interest under the will in the income after the testator's youngest child attains twenty-five. But it is said that the children and grandchildren own the land jointly or in common within the meaning given to the words "owner" and "owned" by sec. 3 of the Act. The decision in *Glenn* v. *Federal Commissioner of Land Tax* (3) shows that neither the children nor the grandchildren are entitled to the land for any estate of freehold in possession; and the appellant is therefore driven to contend that they are entitled to receive or in receipt of the rents and profits thereof.

In my opinion this contention cannot be sustained. The children of Clive are not entitled to receive any part of the income except so much as the trustee chooses in the exercise of its discretion to apply for their benefit or to pay to their guardian. It was argued that the

(1) (1920) 27 C.L.R., 400. (2) (1921) 29 C.L.R., 537.
(3) (1915) 20 C.L.R., 490.

facts stated in par. 9 of the case showed that the children and grandchildren were in receipt of the rents and profits; but in my opinion the act of the trustee in crediting the account of Clive's children with the income did not, in view of the discretionary power vested in the trustee under the will, amount to a payment to or receipt by Clive's children of the share of the rents and profits so credited.

For these reasons I think the answer to question 2 should be "One." In view of the answer to question 2 it becomes unnecessary to answer question 1.

Isaacs J.

ISAACS J. Two questions of law are asked in the case stated. The statute (sec. 46) requires this Court to answer both. The first is a subsidiary question, and may be at once disposed of. Par. 9 of the case is relevant but as to one act only. I refer to the concluding sentence, namely:—"The appellant, as trustee, never deemed it desirable to exercise and had never exercised any discretionary power to apply or pay only part of the one-fifth share last mentioned." The fact is relevant, because it must be taken into consideration in relation to 30th June 1920 in deciding the legal position. Its ultimate effect in law is another question. The other facts are not relevant, because they are not connected with the crucial date. The main question is: "How many deductions of £5,000 each is the appellant entitled to claim?" *Sendall* v. *Federal Commissioner of Land Tax* (1) is not under review, the Court not being constituted for that purpose. That decision, therefore, might apply when the position of the beneficiaries is regarded.

The question put, though not expressly referring to the liability of the beneficiaries as "joint owners" within the meaning of the Act, involves it (sec. 38 (7)); and, so, that is the primary problem to consider. Sec. 3 is the definition clause of the Act. The definition of "joint owners" is in two parts: (*a*) it "*means* persons who own land jointly or in common, whether as partners or otherwise," and (*b*) it "*includes* persons who have a life or greater interest in shares of the income from the land." These two branches of the definition are quite distinct, and much confusion is possible by not keeping that in mind. On the primary subject of whether the beneficiaries are

(1) (1911) 12 C.L.R., 653.

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liable to be taxed as "joint owners," the first branch is all that is necessary to be considered. That branch of the definition by reason of the word "own" attracts the separate definition of "owner," and that, when introduced, creates a variety of cases constituting persons "joint owners" of land within the ambit of the statute. The governing words of the definition of "owner" make it plain that ownership may exist either "at law" or "in equity." We may pass by par. (*a*) of that definition and confine ourselves to portion only of par. (*b*), namely, that portion consisting of the words "is entitled to receive . . . the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, *or otherwise*." The last two words are all embracing so long as we properly understand the word "receive." The initial word "is," in the definition (*b*), denotes the relevant point of time, namely, noon on 30th June —in this case 1920 (sec. 12).

For the purpose of this case, therefore, the proposition of law may be thus stated: The beneficiaries are liable to taxation as joint owners for the period in question if they were at noon on 30th June 1920 entitled in equity to receive the rents and profits of the land jointly or in common. The expression "rents and profits" of the land, read with the context of the Act and having regard to its purpose as a yearly taxing Act, means, not the rents and profits in the unlimited sense for all time equivalent to a fee simple, but the full rents and profits for the time being. There are many expressions in the Act which support that, but it is unnecessary to specify them. It need hardly be said that the contrary view would seriously neutralize the Act. Then, it is obvious that the words "in equity" make applicable the principle of *Haig* v. *Swiney* (1) that where a gift of income is made "it makes no difference whether the income be given to the legatee directly, or through the intervention of trustees." (See also *Hardoon* v. *Belilios* (2).)

There can be no doubt, then, that if Clive Dawson were still living the five designated children of the testator would fall within the terms of the proposition as I have stated it. The will directs that pending conversion (and the postponement here is conformable to the testator's intention) the annual rents and profits shall be divided as

(1) (1823) 1 Sim. & St., 487, at p. 490.

(2) (1901) A.C., 118, at p. 123.

would the income of the investments after conversion. If Clive were alive, each of the five children would now be entitled to a fifth. The trustee would have had no answer to a demand by them for the "net rents and profits." On Clive's death each of the survivors would take a fourth subject to the proviso. The proviso, however, took effect because Clive left two children, and there are trusts declared as to them which cause the difficulty. Shortly, they are, to begin with, quite mandatory. The trustee *shall* "apply" as directed, or "pay" as directed, "a share of such annual income proportionate to the share or expectant share for the time being of such child or children in the corpus of any estate." Now, if it stopped there, I would be of opinion that the circle of statutory joint ownership was still complete. But the proviso goes on to empower the trustee, if it deem it desirable, instead of applying or paying the whole of the child or children's share in the annual income, to "pay or apply only such part thereof as it shall from time to time think proper" &c., and "shall accumulate the balance of such share of income" to follow the destination of the share of the trust estate from which the income has arisen. The final proviso shows that the destination of the share of the corpus is entirely contingent, the corpus being limited to those who survive at the time of distribution, including the grandchildren.

The appellant contends in substance, as I understand the argument, that the proviso created an absolute right at noon on 30th June in the grandchildren to their share of the current rents and profits, defeasible at any time if the trustee happened to exercise its descretion so as to diminish that share. Up to that moment, it is said, there had been no adverse exercise of discretion, and so it must be taken that the right of the grandchildren at the critical instant of time was established. On the other hand, it was argued for the Commissioner, in effect, that the discretion still existed, could not be abdicated, and that this precluded any absolute right to pay on application or any right to the money before it was actually paid over or applied.

I am of opinion that the Commissioner's view must prevail. Notwithstanding the form in which it is cast, the proviso unquestionably confers upon the trustee a power, a discretion and a duty, the duty being to consider, before paying or applying the money, whether it

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is " desirable " to so pay or apply the whole or part and what part of it as directed for the grandchildren, with the result, if part only be thought desirable, of conserving the balance to meet contingent interests. I think the judgments in *Chambers* v. *Smith* (1) support strongly the respondent's contention. The relevant trust there was sufficiently similar to the present trust to make the observations very apposite. If I have to select a passage from those judgments for present purposes, it is found in the judgment of Lord *Blackburn* (2), and is as follows :—" Where a truster gives discretionary powers to be exercised by his trustees, in order to protect the interests of others, the trustees are bound to exercise their discretion, and cannot in general deprive themselves by anticipation of the power to do so : *Weller* v. *Ker* (3). In the present case, however, the terms of the trust are such that the trustees might properly pay the whole or part of the share at the end of six months or any subsequent period ; and they in fact did pay a part, and as to that part their discretionary power was gone. It was argued at your Lordships' Bar that the trustees must either retain and settle the whole fund, or none. No doubt there may be and often is a trust where from the nature of the subject matter and the objects of the trust, or otherwise, it appears to be the intention of the truster that the whole shall be kept together as one entire thing. But here the fund is in its nature divisible, and the objects of the trust are such as to show that it is divisible. I think, therefore, that as against James Chambers, the trustees had power to exercise their discretion as to the postponement of the payment of any part of the fund which remained in their hands at any time up to actual payment." The result of that is that at no moment prior to payment or application could it be asserted that the grandchildren had an absolute, enforceable right—that is, in equity—against the trustees for the whole of the share for the financial year under consideration. At noon on 30th June 1920, if we envisage the actual situation, it could not have been said that the infants had an enforceable right to the whole income for the year. What they had was a right to an honest exercise of the trustee's discretion. As the exercise of that discretion was to affect the rights

(1) (1878) 3 App. Cas., 795. (2) (1878) 3 App. Cas., at pp. 815-816.
(3) (1866) L.R. 1 H.L. (Sc.), 11.

of others as well as those of the grandchildren, there was additional ground for leaving it unfettered until actual application or payment. Par. 9 does not say that the discretion had ever been affirmatively exercised, even if that would have sufficed: all it says as to the subject is to negative a particular exercise of it. It follows that the circuit of rights to the income necessary to constitute a joint ownership of the land was left incomplete. There was no such conjunction of rights as to absorb the whole of the current rents and profits, even accepting (as we must) the hour of noon on 30th June 1920 as representative of the period of the year of taxation.

Unless some other ground for establishing joint ownership is found, there was none, and the substratum for the deductions claimed under sec. 38 is wanting and the claim necessarily fails.

The beneficiaries have, however, contingent interests that might have been thought to be within the decision in *Hoysted* v. *Federal Commissioner of Taxation* [*No.* 1] (1) but for the later decision between the same parties in *Hoysted* v. *Federal Commissioner of Taxation* [*No.* 2] (2). The later decision excludes their interests "for the purposes of imposing initial liability as joint owners."

My answers to the questions then are: (1) Yes—but as to the concluding sentence of par. 9 only; (2) Not more than one deduction.

My answer to the second question is so framed because, if *Sendall's Case* (3) be accepted, I am not sure whether there is any liability of the trustee to taxation. I refer particularly to the following sentence in the judgment of *Griffith* C.J. (4):—"He" (the trustee) "is liable in the same way as if he were the person beneficially entitled: no more and, generally speaking, no less." The sense in which that is applied in the case leaves me in such doubt that I am not to be taken as assuming any liability. I feel compelled, in view of the argument addressed to us with reference to those two *Hoysted Cases*, to say a few words with reference to the earlier of them. I was a member of the Court—though a dissenting member—when the earlier case was heard. I was not a member of the Court in the later case. The earlier case would, on a different view of the proviso in this case, have

(1) (1920) 27 C.L.R., 400.
(2) (1921) 29 C.L.R., 537.
(3) (1911) 12 C.L.R., 653.
(4) (1911) 12 C.L.R., at p. 659.

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become a very important feature as to the right to the deductions, and it was so recognized during the argument. I desire, in case it ever comes to be read again, to make one matter plain, if it is not already plain, in *Hoysted's Case* [*No.* 1] (1). Some observations were made in the later case as to the basis upon which the earlier decision was founded. It need scarcely be said that what I am about to say relates to nothing but my own judgment and myself.

In *Hoysted's Case* [*No.* 2] (2) it is said, with reference to the earlier case :—" But the case drawn up by the parties and stated by our brother *Gavan Duffy* went upon the basis that the beneficiaries were taxable as joint owners. The point did not escape the attention of the Court, and was pointedly referred to by all its members." I wish to say that that is perfectly accurate, but from the view presented in argument, I fear it is not sufficiently full to make clear what my attitude was in that case. I undoubtedly went on the basis that a joint ownership sufficient to create liability as such to taxation had been established and determined in fact and in law by the learned Justice who stated the case. But I did not go on the basis that that joint ownership was constituted by " a life or greater interest in the income." I took special pains to indicate the opposite. And I did so because of the argument of learned counsel for the appellant, which seemed to me to reduce the question of law submitted in the case stated to a mere formality. By that I mean a formality for me, because I was unable to perceive any distinction between the words " life or greater interest " in the definition of " joint owners " in sec. 3 for the purpose of establishing liability to taxation, and the same words in sec. 38 (8) for the purpose of allowing a deduction. Whatever circumstances came within those words in the one place seemed to me necessarily to come within them in the other. I was anxious, therefore, to ascertain the import of the words " joint owners " in the case stated. When the report of the decision in *Hoysted's Case* [*No.* 1] is looked at, it will be seen that the case as stated (3) referred to the beneficiaries as " joint owners " without stating the circumstances that caused them to be so regarded. For all that appeared —and it was extremely probable, to say the least

(1) (1920) 27 C.L.R., 400. (2) (1921) 29 C.L.R., at pp. 547-548.
(3) (1920) 27 C.L.R., at p. 403.

of it—they were in fact *in actual receipt* of the rents and profits of the land, and this would of itself have brought them within the statutory definition of "joint owners" under its first branch, as already explained. At p. 405 the contending arguments of counsel may be seen. For the appellants it was argued that "as the trustees were taxed on the basis that the beneficiaries are 'joint owners' it follows from the definition of that term in sec. 3 that it is because they have a 'life or greater interest in shares of the income from the land.'" That was mere argument of course. On the other hand counsel for the Commissioner replied :—"The fact that the assessment is based on the assumption that the children are joint owners does *not require that the children are to be assumed to be specified in the will as entitled to a life or greater interest.* At the present moment none of the children have a life or greater interest. They are not *receiving the income* from the land by virtue of the fact that they are entitled to the first life or greater interest in the land."

It is quite clear to me that, while it was common ground that the beneficiaries were liable to taxation as "joint owners" within the statutory definition of that term, it was no part of the Commissioner's assumption or argument, and nothing was stated in the case that that liability arose under the second branch of the definition of "joint owners." Had the second branch been admitted and made the assumed starting-point by the Court, I should have thought there was nothing substantial to decide, for then even technically there would only be the word "first" to interpret. And so, in order to show that I considered the statement of joint ownership in the case had nothing to do with the determination of the actual point before us (except, of course, to make a determination on the point of deductions necessary), I said first (1): "The case is stated on the basis that the beneficiaries (as I shall for convenience designate the persons concerned) are rightly assessed as joint owners within the meaning of sec. 38, sub-secs. 1 to 6 inclusive, the written claim for deduction expressly asserts that they are taxable as joint owners, and the argument proceeded on that basis." That is, that on the basis that there was a joint ownership it became necessary to consider the claim to deductions. But I immediately continued :—

(1) (1920) 27 C.L.R., at p. 412.

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"Apparently the common ground of both sides was that the income received in fact by the appellants brought them, by the joint operation of par. (*b*) of the definition of 'owner' in sec. 3 and of the earlier part of the definition of 'joint owner' in the same section, within the scope of sub-sec. 1 of sec. 38. I desire, therefore, to be understood as not expressing or implying any opinion whatever on that subject. I accept the agreed assumption of the parties for the purposes of this case, and address myself solely to the one independent question raised, as already stated. The problem is: Does each of the joint owners hold an original share in the land under the will of Charles Campbell within the meaning of sub-secs. 7 and 8 of sec. 38? The answer depends, of course, on two things, namely, (a) the meaning of the sub-sections mentioned, and (b) the effect of the will with respect to the beneficiaries."

It will be seen, therefore, that I regarded the joint ownership established in the case stated as quite "independent" of any question of "life" or "greater interest." If that was not sufficiently clear before, I trust it is now.

HIGGINS J. There are two questions asked of us in the case stated: but the main question is, in substance, are the two infant children of Clive Dawson, a deceased son of the testator Michael, to be treated as "joint owners" of the land remaining unsold with the other four children of the testator under the trusts as to the residue.

The testator died in 1902; and, under sec. 38 (7) of the *Land Tax Assessment Act* 1910-1916, where the testator has died before 1st July 1910, a special deduction, or exemption, is allowed from the unimproved value of the land in the assessment of "joint owners." Instead of the usual exemption of £5,000 from the value of the land, this subsection allows an exemption of £5,000 in respect of each of the joint owners holding an original share in the land. An "original share in the land" means, according to sec. 38 (8), the share of one of the persons specified in the will as entitled to the first life or greater interest thereunder in the land or the income therefrom. The objection as taken to the assessment is that, "in respect of each of the four children (of the testator) and in respect also of the said two children of Clive Dawson deceased, there should have been

allowed a deduction of £5,000, or £25,000 in the whole, as claimed in the trustee's return, or alternatively, and at least, in respect of each of the said four children, a deduction of £5,000 or £20,000 in the whole." The Commissioner has allowed a deduction of £5,000 from the total value of the land, treating the beneficiaries as not coming within the special exemption provided by sec. 38 (7).

The question, therefore, is : Are the four children and the two infant grandchildren joint owners ; and, if not, are the four children joint owners—so as to entitle the trustee to a larger exemption than one sum of £5,000 ?

Before examining the provisions of the will, I refer to the definition of "joint owners" contained in sec. 3. It is declared to mean (unless the contrary intention appears) "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." Leaving aside for the present any complication arising from definitions of the words "owner" and "owned," it is clear that the infant children of Clive do not come under the first limb of the definition of "joint owners" ; for they do not hold land jointly or in common, as partners or otherwise. Nor—unless we are constrained by a decision of this Court in *Hoysted* v. *Federal Commissioner of Taxation* [*No.* 1] (1) to hold the contrary—can it be said that these infant children come under the second limb of the definition; for they have not a *life or greater interest* in shares of the *income* from the land. Their interest in the income ceased, at the furthest, on the day that the youngest child of the testator attained twenty-five years —that is to say, in February 1921. These infant children of Clive have not a life interest, or a greater than life interest, in shares of the income from the land.

Now, to examine the will :—After specific gifts to his widow and to his son Michael Francis and issue, and to his daughter Emma and issue, the testator deals with the residue of his estate, real and personal. That residue is given to the trustee to sell, convert and collect, with full power to postpone ; during postponement the trustee is empowered to manage and let the real estate ; and any rents are to be treated as income under the trust for investment. The net

(1) (1920) 27 C.L.R., 400.

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residue is to be invested; and, subject to an annuity to the widow, and to a proviso presently mentioned, the income is to be paid to such of his five other children as should be, for the time being, living, during his or her life, or until insolvency, assignment, &c. The proviso is that if any of the five children should die leaving any children, or have any children at insolvency, assignment, &c., the trustee shall, until the death of the parent or the distribution of the residue, (a) apply to or for the maintenance, education, benefit or advancement in life of the children of that child of the testator (or of such of them to the exclusion of the others and in such shares, equal or unequal, as the parent shall by deed appoint) and in default of appointment "in equal shares as tenants in common"; or (b) pay to the guardian of the said children *a share of the income of the residue proportioned to their expectant share in the corpus.* But the trustee is empowered if he deem it advisable, instead of paying (to the guardian) or applying (by the trustee directly) the whole of the share of the income, to pay or apply such part only as the trustee may think proper from time to time "for the maintenance education or benefit" of the children, "in which event my trustee shall accumulate the balance of such share of income by investing the same," and the balance and the resulting income "shall follow the destination of the share of my trust estate from which the said income shall have arisen." As to the corpus of the residue, the trustee is to hold it in trust for such of his five children as shall be living at the time when the youngest child shall attain or would if living have attained the age of twenty-five years. But there is an important proviso which the case as stated omits—that if any child of the testator shall die before the date for distribution (February 1921) leaving any children who should live to attain twenty-one years, then these children should take the share in the corpus which his or her parent would have taken if living at the date of distribution.

The assessment in question here is for the year ending 30th June 1920; and we must therefore direct our minds to the relations of the children and grandchildren to the land at that date. Clive Dawson did not exercise his power of appointment by deed; and it became the duty of the trustee either to pay the whole one-fifth share of net income to the guardian or itself to apply the share. What the trustee

has done is, it has paid £50 per month to the guardian and it has credited in its books the balance of the one-fifth share to the infant children. The book entry is not an *application* of the money for maintenance, education, benefit or advancement in life. It is a very difficult question, depending on the construction of the long-winded phraseology of the will, whether the infants have the beneficial interest in the one-fifth share of the income—whether, if either died before the date of distribution, her share would pass to her executors (see *Simpson on Infants*, 3rd ed., pp. 260-261). The trustee, as appellant, contends that the whole beneficial interest in one-fifth share of the income passed to the infants; and though the point is very doubtful, I shall assume that the contention is right. But in order that the infants should come within the definition of "joint owners" in sec. 3, it would have to be shown that they had, on 30th June 1920, a "life or greater interest" in the share of the income from the land; and all that has been shown is that they have an interest *for a term* in that income, until February 1921. Therefore, if I am free to express my opinion, unconstrained by any decisions, I have no hesitation in saying that the infants are not to be treated as joint owners of the land.

It has been held, however, by a majority of this Court in *Hoysted's Case* [*No.* 1] (1)—*Knox* C.J. and *Starke* J. (*Isaacs* J. dissenting)—that the children of a deceased child, under circumstances similar to, not identical with, the present, had a greater interest than a life interest "in the *land or the income therefrom*" within the meaning of sec. 38 (8), because they had a contingent interest in the proceeds of the land, the corpus. But there the Court was dealing with the construction of sec. 38 (8), not the definition "joint owners" in sec. 3. This is made perfectly clear by the words of the Judges who constitute the majority in that case, words used in the more recent *Hoysted's Case* (2):—"This decision" (the decision previously reported (1)) "was founded upon the true construction of sec. 38, and upon that section alone; it has, therefore, no bearing upon the true construction of the words 'owner' and 'joint owners' in sec. 3." It was *assumed* in the earlier case by both Commissioner and appellant, that the children in question were "joint owners" within the

(1) (1920) 27 C.L.R., 400.

(2) (1921) 29 C.L.R., at p. 549.

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meaning of sec. 3. Perhaps what has occurred points to the inexpediency of pronouncing what is the law on a given hypothesis of law; but there is nothing in the decision to prevent me from giving my own construction of sec. 3.

But the appellant relies also on the definition of "owner" and "owned" in sec. 3. It has been assumed on both sides that these definitions can be used to eke out, or supplement, the definition of "joint owners." I venture to doubt the assumption. It may be that each definition was meant to be complete in itself, and independent. The definition of "joint owners" is that it "means *persons* who own land jointly or in common," not that it "means *owners* who own land jointly or in common." Secs. 10 and 11 deal with ordinary ownership—land tax is to be levied upon the unimproved value of all lands which are "owned" by taxpayers; and land tax shall be payable by the "*owner*" of land upon the taxable value of land "owned" by him; whereas, under sec. 38, "joint owners of land shall be assessed and liable for land tax in accordance with the provisions of this section"; and then follows a complete scheme for taxation of joint owners. But, ignoring this doubt, and however wide the meaning given to the word "owner" in its definition, the condition remains that the owner must hold land jointly or in common (technical words), or must have a life or greater interest in shares of the income; and the appellant cannot bring these infant children within either limb of the definition of "joint owners."

Moreover, the definition of "owner" is: "'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; and includes every person who by virtue of this Act is deemed to be the owner." "Owned" has a meaning corresponding with that of "owner."

These children clearly cannot come under (*a*); or, in my opinion, under (*b*). For they are not in actual receipt of or entitled to receive any rents of the land. It is for the trustees to receive the rents and profits. The definition is of the word "owner," and it obviously

refers to those who receive from outsiders, not to those who receive shares of income from the "owner."

As for the alternative case put by the objections, that there should be a deduction of £5,000 in respect of each of the four children of the testator still living on 30th June 1920, this also, in my opinion, must fail; and for the same reason—that none of these four children had "a life or greater interest" in a share of the income from the land, and that the beneficial interest in the land or in the income therefrom is not "for the time being shared among a number of persons . . . in such a way that they are taxable as joint owners under this Act." I should also be inclined to think that sec. 38 (7) does not apply unless all those sharing the beneficial interest are taxable as joint owners; but it is not necessary to decide this point. If it is right, it is a defect in the Act, attributable to bad drafting.

I do not think that it is for this Court to answer the first question asked—"Whether the facts stated in par. 9 are relevant to the determination of the appeal." Under sec. 46 (3) the question to be answered must be a question "arising *in the appeal*" which in the opinion of the Court (the Judge who hears the appeal) is a question of law; but this question does not seem to arise *in the appeal*, but in the statement of the special case.

My answer to the second question is: One—the £5,000 deduction prescribed by sec. 11.

RICH J. The trustee has been assessed for the land. On the strength of *Sendall's Case* (1) several deductions have been claimed on behalf of beneficiaries holding, as they contend, original shares (sec. 38 of the *Land Tax Assessment Act* 1910-1916). *Sendall's Case* was not unreservedly accepted in argument, but for the present it may be taken as binding. The terms of the will must be ascertained and applied to the circumstances as they existed at noon on 30th June 1920.

The four surviving children of the testator have, in my opinion, satisfactorily established that each of them held at the requisite date what would have been an original share if they were taxable as joint owners within the meaning of sec. 38. But, looking back to the

(1) (1911) 12 C.L.R., 653.

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earlier part of the Act, I am of opinion that they were not so taxable. That is because the two children of Clive John Neville Dawson were not, on the date fixed by the Act, entitled to share in the rents and profits of the land in such a way as to bring them, along with the other beneficiaries, within the definition of "joint owners" in sec. 3. The proviso in the will under which their rights arise leaves it to the discretion of the trustee at any time before the trustee finally pays or applies rents and profits to the benefit of the grandchildren to exercise the discretion stated in the proviso. That discretion is for the trustee itself (*Gisborne* v. *Gisborne* (1)). The exercise of the discretion cannot be fettered or anticipated (*Weller* v. *Ker* (2)), there being no express power to do so. The consequence is that under no circumstances have the beneficiaries the right of deduction under sec. 38—unless, as was suggested as a last resort in argument, their contingent interest would so entitle them under the decision in *Hoysted* v. *Federal Commissioner of Taxation* [*No.* 1] (3); but that is met in the present case by *Hoysted* v. *Federal Commissioner of Taxation* [*No.* 2] (4), which decides that contingent interests do not create taxable joint ownership.

We are not called on to offer any opinion as to whether the trustee is rightly taxed at all, and this question I reserve until the occasion arises.

I answer the questions submitted:—(1) Yes, as to the statement as to discretion. No, otherwise. (2) One deduction at most under sec. 38.

STARKE J. The appellant, the trustee of Michael Dawson's will, has been assessed to land tax in respect of certain lands, and claims, in accordance with the principle established in *Sendall's Case* (5), the same deductions as its beneficiaries would have been entitled to had they been assessed. Under sec. 38 of the *Land Tax Assessment Act* 1910-1916 special provisions are made for the taxation of joint owners, and by sub-sec. 7 certain deductions are allowed where the beneficial interest in the land or in the income therefrom is for the time being shared among relatives of the testator in such a way that

(1) (1877) 2 App. Cas., 300, particularly at p. 307.
(2) (1866) L.R. 1 H.L. (Sc.), at p. 16.
(3) (1920) 27 C.L.R., 400.
(4) (1921) 29 C.L.R., 537.
(5) (1911) 12 C.L.R., 653.

they are taxable as joint owners under the Act. But we must go back to sec. 3 for the definition of the phrase "joint owners." It 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, and the question in this case is whether the children and grandchildren of Michael Dawson are joint owners of the lands within the meaning of the Act. Neither the children nor the grandchildren have a life or greater interest in shares of the income from the land.

I do not feel called upon to state minutely the trusts of the will in relation to the income from the land the subject of the present assessment: they are sufficiently set forth in the case. But there is no gift of income to the children or grandchildren beyond the period of distribution fixed by the will, namely, the day when the youngest child of the testator attained, or would, if living, have attained, the age of twenty-five years, which was, in point of fact, a day in the month of February 1921. *Hoysted's Case* [*No.* 1] (1) is said to be inconsistent with this view. But I do not think so, especially in view of the later *Hoysted's Case* (2). Further, it is to be observed that the earlier *Hoysted's Case* was based upon an interest in the land, and not upon an interest in a share of the income from the land. Subsequent events have, however, demonstrated, as my brother *Higgins* has observed, how inexpedient it was to pronounce a judgment in *Hoysted's Case* [*No.* 1] upon the hypothesis that the beneficiaries in that case were joint owners within the provisions of the *Land Tax Assessment Act*.

The appellant next called in aid the definition of "owner" and "owned" in sec. 3 of the *Land Tax Assessment Act*. Joint owners, as we have seen, is a phrase meaning persons who own land jointly or in common. But an 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 is in receipt of, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise. Clause (*a*) does not help the appellant, for neither the children nor the grandchildren of the testator are entitled to the

(1) (1920) 27 C.L.R., 400. (2) (1921) 29 C.L.R., 537.

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land for any estate of freehold in possession. The will makes that clear (*Glenn* v. *Federal Commissioner of Land Tax* (1)). But clause (*b*) in this definition requires consideration. Land tax is charged on land as owned at noon on 30th June immediately preceding the financial year for which the land tax is levied. Now, were the children and grandchildren of the testator entitled on that day to receive the rents and profits of the land? The interest in such rents and profits must be a joint interest, for "joint owners" means persons who own land jointly or in common; all those sharing the beneficial interest in the land must be taxable as joint owners. Under the limitations of the will, it is said, the children and grandchildren are jointly entitled to the receipt of the rents and profits of the land. But the grandchildren were not entitled to the receipt of any share of such rents and profits. Their right was always subject to the discretionary and controlling power of the trustee: "If my trustee shall deem it desirable it may instead of applying or paying the whole of such child's or children's share in the annual income pay or apply only such part thereof as it shall from time to time deem proper to or for the maintenance" &c. "of such child or children in which event my trustee shall accumulate the balance of such share of income by investing the same by way of compound interest and such balance and the resulting income shall follow the destination of the share of my trust estate from which the said income shall have arisen." Such a provision precludes the grandchildren from any absolute rights to the income or the rents and profits of the land, for it subjects their rights, at all times, to the control and discretion of the trustee.

Finally, it was contended that the beneficiaries were actually in receipt of the rents and profits of the land, and so within the definition of owners in sec. 3. Now, this argument depends upon the facts stated in par. 9 of the case, which I need not repeat. But, while crediting income or rents and profits to beneficiaries in the account books of the trustee was doubtless convenient as a matter of administration, it did not deprive the trustee of any discretionary power or control which the will gave it over the moneys so dealt with. It cannot therefore be said that the grandchildren were in receipt of

(1) (1915) 20 C.L.R., 490.

the rents and profits of the land; and the questions stated in the case should be answered as follows: (1) Yes, as evidence; (2) One deduction of £5,000.

Question 1 *not answered. Question* 2 *answered "One deduction."*

Solicitors for the appellant, *Gillott, Moir & Ahern.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.

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Appl *R v Coldham; Ex parte Australian Social Welfare Union* 153 CLR 297

Not Foll *Coldham, Re; Ex parte Aust Social Welfare Union* 57 ALJR 574

Not Foll *Coldham, Re; Ex parte Aust Social Welfare Union* 57 ALJR 574

Dist *McMahon, Re; Ex parte Darvall* 56 ALJR 861

Cons *R v Marshall; Ex parte Federated Clerks Union of Aust* (1975) 132 CLR 595

Cons *Pitfield v Franki* (1970) 123 CLR 448

[HIGH COURT OF AUSTRALIA.]

THE AUSTRALIAN INSURANCE STAFFS' FEDERATION . . . . . } CLAIMANT;

AND

THE ACCIDENT UNDERWRITERS' ASSOCIATION AND OTHERS . . . . . } RESPONDENTS.

THE BANK OFFICIALS' ASSOCIATION . . CLAIMANT;

AND

THE BANK OF AUSTRALASIA AND OTHERS RESPONDENTS.

H. C. OF A. 1923.

MELBOURNE, *Oct.* 23, 24.

SYDNEY, *Dec.* 13.

KNOX C.J., Isaacs, Higgins, Gavan Duffy, Powers, Rich and Starke JJ.

Industrial Arbitration—Meaning of "industrial dispute"—Dispute between employer carrying on business of banking or insurance and employees—Powers of Commonwealth Parliament—The Constitution (63 & 64 *Vict. c.* 12), *sec.* 51 (xxxv.)—*Commonwealth Conciliation and Arbitration Act* 1904-1921 (*No.* 13 *of* 1904—*No.* 29 *of* 1921), *sec.* 4.

Held, by *Isaacs, Higgins, Powers, Rich* and *Starke* JJ. (*Knox* C.J. and *Gavan Duffy* J. dissenting), that a dispute between employers who carry on the business of banking or the business of insurance and their employees engaged in the business as to the wages to be paid and the conditions of employment