[HIGH COURT OF AUSTRALIA.]

EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED } APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXES (SOUTH AUSTRALIA) . . . } RESPONDENT.

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MELBOURNE, *Oct.* 25-27.

SYDNEY, *Nov.* 28.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Land Tax (Cth.)—Assessment—Deductions—Persons taxable as "joint owners"—"Owner"—Income from land—Portion paid as annuities—Balance to annuitants in exercise of trustee's discretion—Will of testator who died before 1st July 1910—*Interpretation of will by court—Commissioner not a party to proceedings—Estoppel—Land Tax Assessment Act* 1910-1937 (*No.* 22 *of* 1910—*No.* 5 *of* 1937), *secs.* 3, 38 (7).

Under the will of a testator who died on 6th July 1898 certain persons were entitled to annuities of fixed amounts out of the income of the testator's residuary real and personal estate. The trustee named in the will was entitled by the terms of the will to accumulate any unapplied surplus income and in its discretion to distribute the same. In July 1921 the Full Court of the Supreme Court of South Australia, in proceedings to which the trustee, beneficiaries and representatives of the next of kin were parties, declared that the trustee was empowered in the exercise of its discretion to pay from time to time the surplus income which accrued after twenty-one years from the death of the testator equally among all the annuitants or such of them as might for the time being be living, with substitution of their children if they should be dead, and that, if and so far as the trustee did not exercise its discretion, there was an intestacy as to so much of the income as the trustee should not pay as aforesaid. Thereafter the trustee paid all surplus income equally among the annuitants or their survivors. By the year ending 30th June 1938 all life interests in the land in the estate had ceased and six only of the annuitants survived, those dying having left no issue. For the year ending 30th June 1938 the trustee paid the whole of the net income from the then real estate to the six surviving annuitants, first, in payment of their annuities, and, secondly, in exercise of its discretion to pay the surplus income to the survivors of the annuitants. The trustee, having been assessed in its representative

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capacity to land tax in respect of the land in the estate, claimed six deductions of £5,000, one in respect of each of the six annuitants.

Held that the trustee was not entitled to the benefit of sec. 38 (7) of the *Land Tax Assessment Act* 1910-1937 :—

By *Latham* C.J., *Starke* and *McTiernan* JJ., because (*a*) the beneficiaries, receiving the income by way of annuities and by the exercise of the trustee's discretion in their favour, were not entitled to receive or in receipt of the rents and profits of the land and, therefore, were not "owners" as defined by sec. 3 of the Act; (*b*) assuming the beneficiaries to be "owners," they did not own the land or income therefrom jointly or in common and therefore were not "joint owners" as defined by sec. 3.

By *Dixon* and *Evatt* JJ., because, assuming the beneficiaries to be "joint owners," they did not hold an "original share," not being "specified in the will as entitled to a first life or greater interest thereunder in the land or income therefrom," as required by sec. 38 (8).

Held, further, that the commissioner was entitled and bound to give effect to the order of the Supreme Court for the purpose of his assessment, not on the ground of estoppel by judicial decision, but because the existing rights of the beneficiaries formed the foundation of his assessment and these were governed by the will and other operative instruments which defined those rights, including the order of the Supreme Court.

CASE STATED.

On an appeal to the High Court by the Executor Trustee and Agency Co. of South Australia Ltd., the trustee of the estate of David Bower deceased, from an assessment for Federal land tax, *Dixon* J. stated a case which was substantially as follows for the opinion of the Full Court :—

1. David Bower, late of Woodville in the State of South Australia, gentleman, deceased (hereinafter called "the testator"), died on 6th July 1898.

2. The testator left a will dated 14th January 1898 and a codicil thereto dated 1st July 1898 by which he appointed the appellant to be his trustee and executor. Probate of the said will and codicil was granted to the appellant on 4th August 1898.

3. By his will the testator, after giving certain specific and pecuniary legacies and providing annuities for Lydia Rowley, Mary Grace Platt, Frances Charlotte Beaton, Fanny Kezia Quin and Ellen Maria White and giving life interests in certain of his lands,

directed that his trustee should apply the income from his real estate in providing for such legacies and annuities and then directed that his trustee should pay the income of his residuary real and personal estate to the following annuitants, being his nephews and nieces: (*a*) Sarah Edith Hill and Emma Bower, £250 each; (*b*) Joseph Bower, Richard Bower, David Bower, David Rowley, George Rowley, Amos Rowley and Albert Ernest Rowley, each £400, with a direction that the last-mentioned seven annuities should abate in the event of an insufficiency in the income of the estate, but with power to make up subsequently any reductions. The testator provided for substitution of children in the event of the death of Ellen Maria White or any of the nine annuitants above mentioned. The testator provided that after the death of Ellen Maria White and of all the said annuitants his trustee should sell and convert all his real and personal estate and divide the proceeds equally amongst the children then living of Ellen Maria White and of his said nine nephews and nieces. The testator directed that his trustee might in its discretion accumulate any unapplied surplus income and invest the same or in its discretion should be at liberty to apply the accumulations in like manner as income, namely, by distributing the same to the persons for the time being entitled to the income of his estate.

4. At the time when the land-tax return hereinafter mentioned was made all the legacies and specific gifts were satisfied, the annuitants Lydia Rowley, Mary Grace Platt, Frances Charlotte Beaton and Fanny Kezia Quin were dead, all life interests in the land had ceased and the lands included in the return comprised the testator's residuary real estate remaining unsold.

5. At the time of the said return the following annuitants mentioned in the will were also dead:—

Name of Annuitant	Date of Death.	Amount of Annuity.
David Bower	4th July 1902	£400 0 0
George Rowley	28th November 1928	£400 0 0
Ellen Maria White	17th April 1929	£450 0 0
Emma Bower	18th September 1931	£250 0 0

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6. At the time of the said return the following annuitants, all of whom were relatives by blood or marriage of the testator, were still living :—

Name of Annuitant.	Amount of Annuity.
Sarah Edith Hill	£250 0 0
Joseph Bower	£400 0 0
Richard Bower	£400 0 0
David Rowley	£400 0 0
Amos Rowley	£400 0 0
Albert Ernest Rowley	£400 0 0

7. After the appellant had entered upon the administration, it was ascertained that the income from the residuary real and personal estate was more than sufficient to provide for the annuities given by the will, and on 26th April 1902 the appellant issued an originating summons in the Supreme Court of South Australia for advice and direction as to whether the appellant as trustee had power in the exercise of its discretion to distribute the accumulations of the unapplied surplus income from the testator's residuary real and personal estate amongst the nephews and nieces of the testator named in the said will in addition to the annuities given to them and, if so, in what proportions, and on 25th March 1903 the Full Court of the Supreme Court made an order declaring that upon the true construction of the will the appellant was empowered in the exercise of its discretion from time to time to pay or distribute equally according to the stocks the unapplied surplus or accumulations of the income arising from the testator's real and personal estate to and among the testator's nephews and nieces, Joseph Bower, Richard Bower, David Bower, David Rowley, George Rowley, Amos Rowley, Albert Ernest Rowley, Emma Bower and Sarah Edith Hill, or such of them as for the time being be living, with substitution of their children (if any) according to the stocks in the event of their decease.

8. Acting upon this order the appellant distributed the surplus income arising from the residuary real and personal estate amongst the said nephews and nieces until 5th July 1919, when twenty-one years from the testator's death had expired.

9. On 6th April 1921 the appellant issued a further originating summons in the Supreme Court of South Australia for advice and directions, and on 4th July 1921 the Full Court of the Supreme Court made an order declaring that upon the true construction of the will the appellant had power in the exercise of its discretion from time to time to pay or to distribute equally the surplus income which had arisen and should thereafter arise from the testator's residuary real and personal estate and accruing after the expiration of twenty-one years from the death of the testator among the testator's nephews and nieces, Joseph Bower, Richard Bower, David Bower, David Rowley, George Rowley, Amos Rowley, Albert Ernest Rowley, Emma Bower and Sarah Edith Hill, or such of them as might for the time being be living, and the child or children of such of them as should have died, such child or children if more than one to take equally between them the share to which the parent would have been entitled if living, and that such payment or distribution should be in addition to and over and above the amount of the annuities and legacies which were expressly given to or in trust for such persons respectively and declared that if and so far as the appellant should not exercise its discretion as aforesaid there was an intestacy as to so much of such income as the appellant should not pay or distribute as aforesaid.

10. On the hearing of each of the applications all persons interested under the will and codicil and under any intestacy were represented before the Full Court.

11. Since 4th July 1921 the appellant has distributed the whole of the surplus income among the nephews and nieces or the survivors of them.

12. The next of kin of the testator at his death were Lydia Rowley, Mary Grace Platt and Joseph Bower, Richard Bower, David Bower, and Emma Bower, who were children of a deceased sister of the testator.

13. On 1st September 1938 the appellant furnished a return under *Land Tax Assessment Act* 1910-1937 showing the unimproved value of the land in the said estate as at 30th June 1938 as being £50,488 and upwards. From the said amount the appellant claimed to deduct the sum of £30,000, being six amounts of £5,000 each

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under sec. 38 (7) of the Act. In the return, the appellant claimed that Sarah Edith Hill, Joseph Bower, Richard Bower, David Bower, Amos Rowley, and Albert Ernest Rowley were each entitled to one-sixth share of the lands and therefore it was entitled to a deduction in respect of each beneficiary.

14. On 6th April 1939 the respondent issued a notice of assessment and allowed only one deduction of £5,000, giving the following reasons for the disallowance of the other five deductions of £5,000: "The interest in the estate held by A. A. L. Rowley, A. E. Rowley, D. J. B. Rowley, R. Bower, J. Bower and S. E. Hill not being first life or greater interests are therefore not original shares within the meaning of sec. 38 (8) and consequently deductions under sec. 38 (7) are not allowable."

15. On 4th May 1939 the appellant gave to the respondent notice of objection to the assessment, claiming that six deductions of £5,000 each should have been allowed.

16. On 26th June 1939 the respondent gave notice disallowing the objection, and on 13th October 1939 at the request of the appellant transmitted the objection as an appeal to the High Court.

17. The questions submitted for the opinion of the Full Court were as follows:—

(1) Whether the appellant is entitled to six deductions of £5,000 each from the unimproved value of the lands held in the said estate.

(2) Whether the appellant is entitled to more than one deduction of £5,000 from the unimproved value of the lands held in the said estate, and, if so, how many.

The provision in the will which gave the trustee the power to accumulate or distribute as aforesaid and which was interpreted by the Full Court of South Australia is set out in the judgment of *Latham* C.J. hereunder.

Ligertwood K.C. (with him *McEwin*), for the appellant. The six annuitants are "owners" within the definition in sec. 3 of the *Land Tax Assessment Act* 1912-1937. They are entitled to or in receipt of the rents and profits of the land in the estate. The object of the accumulation provision in the will is not to determine the destination

of the fund but to create machinery to make up the full amount of the annuities if there should be a deficiency. The trustee has a discretion to retain surplus income, not to distribute it. Under the will the beneficiaries had only a contingent right, but since the order of the Supreme Court on 25th March 1903 and the exercise by the trustee of its discretion they have a right to the surplus income (*In re Bower* (1)). On 4th July 1921 the Supreme Court interpreted the provision after the period of accumulation had expired; that order has been acted on by the trustee for eighteen years without detriment to anyone, and the trustee has made payments of surplus income to the annuitants. That order is not an order *in rem*. It was *inter partes* and is quite irrelevant as between the parties to this appeal, the commissioner not being a party to the Supreme-Court proceedings (*In re Sassoon*; *Inland Revenue Commissioners* v. *Raphael and Ezra* (2)). If this order is correct, then, once the trustee exercised its discretion, it was exercised once and for all time and there were no accumulations and no necessity for them. The discretion being exercised, then the beneficiaries were entitled to the income. On the other hand, it is submitted that the Full-Court order was wrong and the trust for accumulation was void after twenty-one years and the beneficiaries were absolutely entitled to the income. In either view the beneficiaries are "owners." They are "joint owners" because they are persons who have a life or greater interest in shares of the income from the land. They have a life interest in the income in shares. [He referred to sec. 38 (7), (8)]. All beneficiaries are relatives by blood and hold "an original share" as they are specified in the will as being entitled to a first life or greater interest in the income from the land. Even if the beneficiaries are not entitled absolutely, they are certainly entitled to the income contingently, the contingency being the exercise of the discretion of the trustee. It has been held that a contingent interest is sufficient to satisfy sec. 38 (7) (*Hoysted* v. *Federal Commissioner of Taxation* (3)). Here the trustee had two choices, either to accumulate or distribute, and in either case the beneficiaries were entitled to the rents and profits. During

(1) (1902) S.A.L.R. 51.
(2) (1933) Ch. 858.
(3) (1920) 27 C.L.R. 400.

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the whole period since the death of the testator, there has been only a short period (1919-1921) when the trustee was in doubt whether it should pay out the surplus income to the beneficiaries. It shows that the trustee exercised its discretion once and for all time. [He referred to *Terry* v. *Federal Commissioner of Taxation* (1); *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (2).]

[McTIERNAN J. referred to *Public Trustee (N.S.W.)* v. *Federal Commissioner of Taxation* (3).]

[Counsel referred to *Rofe* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (4); *Baker* v. *Archer-Shee* (5).]

Mayo K.C., and *Brebner*, for the respondent.

Mayo K.C. (1) The beneficial interests in the real estate and the income therefrom are not shared by the beneficiaries in such a way that they are taxable as "joint owners," because (*a*) they do not share the beneficial interest under the will; no right to the land or income accrues to them by virtue of the will, but what they receive is consequent upon the exercise of the trustee's discretion; (*b*) they do not share under the will but contrary to the terms of the will, which is partly rendered ineffective by the *Thellusson Act*; (*c*) they do not have a life or greater interest in shares of the income from the land; therefore they do not come within the definition of sec. 3 of the *Land Tax Assessment Act* 1910-1937. (2) None of the beneficiaries holds "an original share in the land or in the income therefrom," because they are not persons specified in the will as being entitled to the first life or greater interest in the land or the income therefrom. No deduction can be made, therefore, under sec. 38 (7). They are not specified in the will as the persons entitled, but the income goes to them on the exercise of the trustee's discretion or by virtue of the *Thellusson Act*. It must follow that they are not "persons who have the first life or greater interest." (3) The respondent is entitled to rely on the Supreme-Court judgments by which the persons named therein are not entitled to participate in the income from the land.

(1) (1920) 27 C.L.R. 429.
(2) (1923) 33 C.L.R. 491.
(3) (1934) 51 C.L.R. 75, at p. 101.
(4) (1920) 28 C.L.R. 347.
(5) (1927) A.C. 844.

(4) Alternatively, the judgments are "binding" on all parties to this appeal, including the commissioner. (5) On the other hand, if the Supreme-Court judgments are impeachable and not "binding" on the parties to this appeal, it is submitted that the six annuitants are not entitled to the surplus income under the will at all. Under sec. 23 of the *Land Tax Assessment Act* 1910-1937 the onus is on the appellant to show that the respondent was wrong in assessing the trustee under sec. 33 with one deduction of £5,000 under sec. 11 (2) (*b*). If the annuities provided for in the will came into the question at all, then they are introduced only for the purposes of adjustment under sec. 34 (*Adams* v. *Federal Commissioner of Land Tax* (1); *Cochrane* v. *Federal Commissioner of Land Tax* (2); *Queensland Trustees Ltd.* v. *Deputy Federal Commissioner of Land Tax* (*Q.*) (3)). The annuities are payable out of the income of any year unless charged on a particular year's income (*Hawkins* on *Wills*, 3rd ed. (1925), pp. 158, 159; *Phillips* v. *Gutteridge* (4); *Baker* v. *Archer-Shee* (5)). The right as "joint owner" cannot be based on the right as annuitant but must be based on the right if any under the will to the surplus income. At the most, this is an implied right and is not "specified" in the will as required by sec. 38 (8). [He referred to *Gillespie Brothers & Co.* v. *Cheney Eggar & Co.*, per Lord *Russell of Killowen* C.J. (6).]

[DIXON J. referred to *Hoysted* v. *Federal Commissioner of Taxation*, per *Isaacs* J. (7).]

Further, the annuitants are not "entitled" to the beneficial interests in the land or income. At the most their interests are contingent, and this is not sufficient for sec. 38 (8). *Hoysted's Case* (8) is explained in *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (9); *Hughes* v. *Young* (10); *Atcherley* v. *Du Moulin* (11); *In re Maunder*; *Maunder* v. *Maunder* (12)). Whether the annuitants receive a share of the surplus income depends on the exercise of the trustee's discretion.

(1) (1919) 26 C.L.R. 341.
(2) (1916) 21 C.L.R. 422.
(3) (1919) 26 C.L.R. 485.
(4) (1862) 3 De G.J. & Sm. 332 [46 E.R. 664].
(5) (1927) A.C. 844.
(6) (1896) 2 Q.B. 59.
(7) (1920) 27 C.L.R., at p. 416.
(8) (1920) 27 C.L.R. 400.
(9) (1923) 33 C.L.R., at p. 500, per *Knox* C.J., at p. 505, per *Isaacs* J., and p. 511, per *Higgins* J.
(10) (1862) 32 L.J. Ch. 137.
(11) (1855) 2 K. & J. 186 [69 E.R. 746].
(12) (1902) 2 Ch. 875.

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There is no duty on the trustee to do so (*Hart* v. *Federal Commissioner of Land Tax* (1)). The right of the annuitants is to the administration by the trustee of a mixed fund ; that is, they are not entitled to any particular portion of the income. They cannot be said to be " owners " of the income ; they can only call for an account. The respondent is entitled to rely on the Supreme-Court judgments, not on the ground of estoppel, but because he is inquiring as to the title of land objectively and therefore is entitled to act upon the basis of the interests of beneficiaries as are found by a court of competent jurisdiction. The only rights that the beneficiaries are entitled to enjoy are those which they are permitted to enjoy by the Supreme-Court judgments (*Doglioni* v. *Crispin* (2) ; *In re Trufort* ; *Trafford* v. *Blanc* (3)). The Supreme Court of South Australia is the only court in which jurisdiction is vested to deal with the assets of a deceased person by an administration action or advising trustees as to the rights of beneficiaries. Assuming that the judgments are *in personam*, as they regulate the rights of parties they also bind all parties represented at the hearing and those claiming under them (*Halsbury's Laws of England*, 2nd ed., vol. 13, pp. 426-429). Secs. 12, 56, 35, 11 and 51 of the *Land Tax Assessment Act* establish privity of debts between the Crown and the owner and create a charge on the land. Just as a mortgagee from the registered proprietor would be bound by a judgment affecting rights in the land, so is the Crown bound in this case.

Brebner. Assuming that the will is to be reinterpreted by this court, then it is submitted that (*a*) the annuitants were not entitled to the income under the will ; (*b*) alternatively, the trustee had no more than a mere discretion to pay. The direction in the will to the trustees to accumulate unapplied surplus in itself confers no right to anyone to take the income. It is difficult to see how the annuitants can say they are the persons entitled, when the whole will is looked at (*In re Bower* (4)). If the nephews and nieces are the persons entitled to the income, they have no enforceable right to be paid the income but the trustee has a discretion to

(1) (1912) 15 C.L.R. 545.
(2) (1866) L.R. 1 H.L. 301.
(3) (1887) 36 Ch. D. 600, at p. 611.
(4) (1902) S.A.L.R. 51.

pay it to them. The trustee can either distribute or accumulate. Even after twenty-one years it is not bound to distribute under *Thellusson's Act*.

Ligertwood K.C., in reply. If the appellant's construction of the will is correct, the court should postpone judgment and allow the parties an opportunity to review the Supreme-Court decision of 1921. The nephews and nieces are the persons entitled to the income and therefore must get the surplus income. [Counsel referred to *Sassoon's Case* (1).] The nephews and nieces are "joint owners" of the surplus income, that is, after deduction of the annuities. Their interest is a first life interest therein which begins at the end of twenty-one years (*National Trustees Case* (2); *Adams* v. *Federal Commissioner of Land Tax* (3)). Sec. 38 refers to a first life interest created prior to but not necessarily enjoyed before 1st July 1910.

Cur. adv. vult.

Nov. 28.

The following written judgments were delivered :—

LATHAM C.J. This is a special case stated for the opinion of the Full Court upon an appeal from an assessment to land tax.

The appellant is the executor and trustee of the will and codicil of David Bower, who died on 6th July 1898. The questions submitted for the opinion of the Full Court by the special case are—(1) Whether the appellant is entitled to six deductions of £5,000 each from the unimproved value of the lands held in the said estate ? (2) Whether the appellant is entitled to more than one deduction of £5,000 from the unimproved value of the lands held in the said estate, and, if so, how many ?

The appellant claims that six beneficiaries under the will are joint owners of the land in respect of which the assessment is made and are taxable as such, and that, as the testator died before 1st July 1910, the trustee, under the rule laid down in *Sendall and Crace* v. *Federal Commissioner of Land Tax* (4), is entitled to six deductions of £5,000 each from the unimproved value of the land (*Land Tax Assessment Act* 1910-1937, sec. 38 (7)).

(1) (1933) Ch. 858, at pp. 881, 882.
(2) (1923) 33 C.L.R. 491.
(3) (1919) 26 C.L.R. 341.
(4) (1911) 12 C.L.R. 653.

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The testator by his will, after giving certain annuities and legacies, directed his trustees to stand possessed of the whole of the residue of his estate ("my estate howsoever constituted") upon trust after providing for outgoings "to pay the income arising therefrom as under" to two nieces each two hundred and fifty pounds per annum and to seven nephews each four hundred pounds per annum. The next provision in the will declared that, if the income after payment in full of other beneficiaries should be insufficient to pay all of the last-mentioned annuities of £400 in full, the latter annuities should be reduced equally, but the trustees were empowered to make up any reductions from time to time when in their absolute discretion they should consider that the income would warrant it. The next provision substituted children for annuitants who predeceased the testator and provided that, if a certain named annuitant or any of the annuitants who were nephews and nieces should die without leaving a child or children surviving, the annuity should fall into the residuary personal estate. After the death of the named annuitant and of the said nephews and nieces there was a trust for sale and division of the proceeds with accrued income amongst the children then living of the said annuitant and the said nephews and nieces. A further provision of the will was as follows:—"And I direct that my said trustees may in their uncontrolled discretion accumulate the unapplied surplus (if any) of such income by laying out and investing the same on any one of the securities hereinbefore mentioned including rebuilding any erections pulled down as aforesaid with power to vary and transfer such investments into others of a similar nature at the discretion of my said trustees or in the exercise of such discretion shall be at liberty to apply the accumulations thereof in like manner as income namely by distributing the same to the persons for the time being entitled to the income of my said estate."

By an order of the Full Court of the Supreme Court of South Australia made on 24th March 1903 the Full Court interpreted this provision and declared that it empowered the trustee in the exercise of its discretion from time to time to pay according to the stocks the unapplied surplus or accumulations of the income of the residuary real and personal estate to the testator's said nieces and nephews

(or their children, if they should die). At the time when this order was made all the annuitant nephews and nieces were alive with the exception of David Bower, who had died on 6th July 1902.

The trustees acted upon this order till 5th July 1919, when twenty-one years from the testator's death expired. The question of the application of the *Thellusson Act* 1800 (39 & 40 Geo. III. c. 98) then arose. On 20th July 1921 upon further proceedings the Full Court of the Supreme Court declared that the trustee was empowered in the exercise of its discretion from time to time to pay the surplus income arising after 5th July 1921 equally to the testator's said nieces and nephews then living (or their children, if they should die) and that if and so far as the trustee should not exercise its discretion as aforesaid there was an intestacy as to so much of the income as the trustee should not pay as aforesaid. When this order was made all the said nieces and nephews, except David Bower, were still living.

The trustee and all persons interested under the will and codicil or under any intestacy were represented in both proceedings.

Under the latter order the trustee has exercised its discretion by distributing the whole of the surplus income of the personal estate and also of the real estate among the nephews and nieces or the survivors of them (now six in number)—those who died having left no children. Thus, in the taxation year in question the five surviving nephews and one surviving niece have in fact received the whole of the income of the land which is the subject matter of taxation under the assessment of the trustee against which this appeal is brought.

Upon these facts the trustee claims six deductions of £5,000 from the unimproved value of the land. The commissioner contends that only one deduction is allowable. Sec. 38 of the *Land Tax Assessment Act* 1910-1934 provides for the taxation of joint owners of land. Sub-sec. 7 is the special provision of which the appellant seeks to take advantage. So far as relevant it is in the following terms :—" Where, under a settlement made before the first day of July, one thousand nine hundred and ten, or under the will of a testator who died before that day, the beneficial interest in any land or in the income therefrom is for the time being shared among a

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number of persons, all of whom are relatives of the settlor or testator by blood, marriage, or adoption, in such a way that they are taxable as joint owners under this Act, then, for the purpose of their joint assessment as such joint owners, there may be deducted from the unimproved value of the land, instead of the sum of five thousand pounds as provided by paragraph (*b*) of sub-section (2) of section eleven of this Act, the aggregate of the following sums, namely :— In respect of each of the joint owners who hold an original share in the land under the settlement or will—(*a*) the sum of five thousand pounds, or (*b*) the sum which bears the same proportion to the unimproved value of the land, after deducting the value of any annuity under section thirty-four of this Act, as the share bears to the whole, whichever is the less : Provided " &c.

In the present case the deduction in respect of each joint owner would, if allowable, be £5,000.

Sub-sec. 8 of sec. 38 is as follows : " In this section, 'original share in the land' means the share of one of the persons specified in the settlement or will as entitled to the first life or greater interest thereunder in the land or the income therefrom, or to the first such interest in remainder after a life interest of the settlor or after a life interest of the wife or husband of the settlor or testator."

The beneficial interest in the income from the land was shared among the surviving niece and nephews in respect of the year ending 30th June 1938. These beneficiaries were all relatives of the testator by blood, marriage or adoption.

But the section further requires, before more than the usual single deduction of £5,000 can be allowed, that the persons must share the income in such a way that they are taxable as joint owners under the Act and provides that further deductions are allowable only in respect of each of the joint owners who hold an original share in the land under the will. In the present case the appellant contends that the annuitants are taxable as joint owners and that they each hold original shares because they are " persons specified in the . . . will as entitled to the first life or greater interest thereunder in the land or the income therefrom " (sec. 38 (8)). The annuitants are said to have life interests in the income.

The annuitants cannot be taxable as joint owners unless they are joint owners within the meaning of the Act. They cannot be joint owners unless they are owners: Cf. *Terry* v. *Federal Commissioner of Taxation* (1). "Owner" (sec. 3) "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." It is contended for the appellant that the annuitants were on 30th June 1938 entitled to receive the rents and profits of the land and that they did actually receive them during the year ending on that date.

Only the trustees were entitled at law to receive the rents and profits of the land. In equity the annuitants were not entitled as of right to more than £250 or £400 per annum out of the income of the real and personal estate of the testator. They obtained anything further only by virtue of the exercise of the discretion of the trustees, and not by virtue of an enforceable right. The second order of the Supreme Court so declares. Persons who so receive income are not owners within the meaning of the definition in sec. 3 (*National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (2); *Terry* v. *Federal Commissioner of Taxation* (1)).

This conclusion makes it unnecessary to consider in any detail the argument for the commissioner that the annuitants were not entitled, even in equity, to the rents and profits of the land, but that they were entitled only to compel the trustee to administer the trust estate so as to give them income arising therefrom in accordance with the provisions of the will. The reply made to such a contention is that which succeeded in the case of *Baker* v. *Archer-Shee* (3). But, even if this case should be regarded as an authority upon principles of equity and not as a decision to be treated with the more limited respect which may be appropriate to income-tax cases (See *Law Quarterly Review*, vol. 44, pp. 8, 468), it appears to me

(1) (1920) 27 C.L.R. 429.
(2) (1923) 33 C.L.R.: See p. 504.
(3) (1927) A.C. 844.

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to be distinguishable from the present case. Here the will gives a power to accumulate and accordingly to withhold income, and, when the power to accumulate ceased by reason of the *Thellusson Act*, the beneficiaries could not, under the will as interpreted by the second order of the Supreme Court, obtain any income beyond the fixed annuities unless the trustee exercised a discretion in their favour. This fact, which, as I have already said, prevents the beneficiaries from being "owners" within the meaning of the Act, provides also a reply to any argument based upon *Baker* v. *Archer-Shee* (1). In view of the fact that such a discretion exists, and that the exercise of it is interposed between the receipt of rents and profits of the land by the trustee and the payment of income to the beneficiaries, it seems to me to be impossible to hold that the latter are entitled specifically to the rents and profits.

It was contended for the appellant, however, that the second order of the Supreme Court was wrong and that, as *res inter alios acta*, the order was irrelevant in these proceedings. The commissioner, it was said, not having been a party to the previous proceedings, was not bound by the order made therein and was accordingly not entitled to rely upon that order just because it happened to suit him to do so. Reference was made to *In re Sassoon* (2), where, in a revenue case, *Farwell* J. held that the Commissioners of Inland Revenue could not escape from the effect of a decision upon the construction of a will and a settlement given in proceedings to which they were not parties. *Luxmoore* J. had decided that a share of residue under a will had become forfeited, so that the taxpayer's interest therein did not pass upon his death. The Court of Appeal held that the order of *Luxmoore* J. was right and dismissed the appeal upon this ground. Lord *Hanworth* M.R. did not refer in his reasons for judgment to the effect of the order in relation to the commissioners. *Lawrence* L.J. said that the commissioners were not bound by the order, which was made in proceedings to which they were not parties, but at a time when they were "directly and vitally interested in the question submitted . . . for decision" (3). *Romer* L.J. expressed no final opinion on the question of the con-

(1) (1927) A.C. 844.
(2) (1933) Ch. D. 858.
(3) (1933) Ch. D., at p. 881.

clusive effect of the order (1). Thus, *In re Sassoon* (2) cannot be regarded as authoritatively stating any principle which can serve as a guide to the court. In *Public Trustee (N.S.W.)* v. *Federal Commissioner of Taxation* (3) the court adverted to but did not decide the question of the effect in relation to the Commissioner of Taxation of an order interpreting a will which was made in proceedings to which he was not a party.

The order of the Supreme Court is certainly conclusive in relation to the rights *inter se* of the parties to the proceedings in which it was made. It could have been challenged upon appeal, but so long as it stands, the rights of the annuitants to receive income from the trustee are the rights declared in the order—no more and no less. There is no means whatever whereby either the trustee or the annuitants can, as a matter of right, vary those rights. There is no suggestion that the order was obtained collusively or fraudulently. If the commissioner could get the order set aside, the case would then be different. But there is no basis for setting the order aside. There is no doubt as to the jurisdiction of the Supreme Court to make the order, and an argument that the order is wrong, though it would be the very basis of an appeal, would be irrelevant in any other proceeding.

The question which arises in this appeal depends entirely upon the rights of the annuitants against the trustee. Those rights have been defined by a court of competent jurisdiction in a manner which excludes the definition of them now preferred by the annuitants—or any other definition inconsistent with the order of the court. The commissioner is entitled to take, and must take, interests in land as he finds them—apart from evasive arrangements which are in effect rendered void as against the commissioner (*Land Tax Assessment Act* 1910-1934, sec. 63). A particular decision of a court as to the interest of a person in land, or as to his right to receive moneys by way of income, may be wrong. But the commissioner cannot impose land tax upon interests in land which, if a contrary decision had been given, the taxpayer ought to have, but in fact does not have; nor can he impose income tax upon income which

(1) (1933) Ch. D., at p. 893. (2) (1933) Ch. D. 858.
(3) (1934) 51 C.L.R. 75.

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the taxpayer does not derive but which, upon the hypothesis of a contrary decision, he would have derived.

This view of the effect of the order does not treat it as an order *in rem*. The order really has the same kind of effect as the will it interprets. The will plus the order (that is, the will as interpreted by the order) is the foundation and only support of the rights in relation to which alone the commissioner can properly assess taxation. Perhaps the will "ought" to have been different. Perhaps the order "ought" to have been different. The first proposition is irrelevant and, for material purposes, is meaningless. I describe the second proposition in the same way.

The case would not be the same when the question was one of ownership of property which did not consist solely of rights enforceable against a person such as a trustee. A and B may litigate about the ownership of a horse. The court may order B to return the horse to A on the ground that A and not B is the owner of the horse. But C may, independently of any dealings with A, challenge A's ownership, and he would not be affected in any way by the decision in the case of A versus B. In such a case C would not be bound by the previous decision because he was neither a party to it nor privy to any party in interest. The Commissioner of Taxation who takes moneys from a taxpayer as a contribution to the revenue cannot be described as a privy in estate to the taxpayer where rights have been determined in a proceeding to which the commissioner was not a party. But when, in duly constituted proceedings before a competent court, the rights of a *cestui que trust* against a trustee and the corresponding duty of the trustee towards the *cestui que trust* have been defined, there is no means whereby those rights can be otherwise defined, because each party is conclusively bound by the order of the court. If the right in question is a right of the *cestui que trust* to receive money, such as income, from the trustee, the order necessarily and in the nature of the case finally determines, so far as it goes, the nature and extent of the right of the *cestui que trust*. When the revenue authorities come to impose a tax in relation to such rights, they must, in my opinion, take them as they in fact actually exist between the parties. Thus, although the commissioner cannot be said to be "bound" by the order of the

Supreme Court as *res judicata* or in any other way, he has no option but to assess the trustee or the *cestuis que trust* upon the basis of their duties and rights as declared by the order.

Accordingly I am of opinion that, by reason of the second order of the Supreme Court, the annuitants received and are entitled to receive income of the real estate beyond their fixed annuities only by reason of the exercise of the discretion of the trustee, and that they are therefore not owners of the land within the meaning of the Act.

There is another ground upon which, in my opinion, the appellants must fail in this appeal. Even if they are owners, they are not joint owners, and are therefore not taxable as joint owners, and so do not satisfy the requirements of sec. 38 (1). Sec. 3 of the Act provides that "'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." The appellant relies upon the second part of this provision, claiming that the annuitants have a life interest in shares of the income from the land. But the first part of the provision fixes the *meaning* of "joint owners" in all cases, *including* the cases included by the second part: See *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (1), per *Isaacs* J. No person can be a joint owner unless he "owns" land jointly or in common. In the present case there is no ownership of land or of income of land either jointly or in common. The annuitants are entitled severally to their respective annuities. They are not entitled to any income other than severally. Thus, they are not taxable as joint owners, and for this reason also the appellant should fail.

It is unnecessary for me to consider the further question whether the interests of the annuitants are "original shares in the land" within the meaning of sec. 38 (8). I will say only that in order to establish the existence of an "original share" as defined it would be necessary to show that a person owned a share of property owned jointly or in common with other persons.

(1) (1923) 33 C.L.R., at p. 501.

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The appellant asked that, if the court regarded the second order of the Supreme Court as in effect decisive, though not in a full technical sense binding upon the commissioner, the determination of the appeal should be delayed in order to give the appellant an opportunity of appealing against that order. I am of opinion that we should not accede to this request. The order was made in 1921, and has been acted upon ever since. The trustee or the annuitants could have appealed, and they did not do so. I may add that, in my opinion, if the question as to the effect of the *Thellusson Act* were reopened, it is much more likely that it would be held that there was an intestacy as to the whole of the income from 5th January 1921 than that it would be held that the annuitants were entitled as of right to receive the whole income of the estate.

For many years the commissioner has allowed several deductions of £5,000 to be made. As it is now held that these deductions are not properly allowable, the applicability of sec. 34 of the Act should be considered: See *Queensland Trustees Ltd.* v. *Deputy Federal Commissioner of Land Tax* (*Q.*) (1).

In my opinion the questions asked in the special case should be answered in the negative.

STARKE J. Case stated for the opinion of this court pursuant to the provisions of the *Land Tax Assessment Act* 1910-1937, sec. 44M.

The case states, at length, all the facts of the case; it is needless to recapitulate them.

The *Land Tax Assessment Act* 1910-1937, sec. 38 (7), provides, so far as material to this case, that where under the will of a testator who died before 1st July 1910 the beneficial interest in any land or in the income therefrom is for the time being shared among a number of persons who are relatives by blood, marriage or adoption of the testator in such a way that they are taxable as joint owners under the Act, then for the purpose of their joint assessment as such joint owners there may be deducted from the unimproved value of the land in respect of each of the joint owners who holds an original share in the land under the will the sum of £5,000. "Original share in the land" means the share

(1) (1919) 26 C.L.R. 485.

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. "Joint owners," by sec. 3, 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. "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, 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.

By his will, the testator directed that, when legacies bequeathed by him were paid and certain annuities provided for, his trustee should stand possessed of his estate howsoever constituted upon trust to pay the income arising therefrom to certain annuitants, being his nephews and nieces, in certain specified amounts. And further he directed that his trustees might in their uncontrolled discretion accumulate the unapplied surplus (if any) of such income by laying out and investing the same or in the exercise of such discretion should be at liberty to apply the accumulations thereof in like manner as income, namely, by distributing the same to the persons for the time being entitled to the income of the said estate.

The questions stated for the opinion of this court are:—(1) Whether the appellant is entitled to six deductions of £5,000 each from the unimproved value of the lands held in the estate of the testator. (2) Whether the appellant is entitled to more than one deduction of £5,000 from the unimproved value of the lands held in the estate and, if so, how many.

Since *Sendall's Case* (1) a trustee has been regarded as standing in the place of his beneficiaries for the purpose of assessment under the *Land Tax Acts*. *Griffith* C.J. said that he was "liable in the same way as if he were the person beneficially entitled: no more and, generally speaking, no less" (2). But nevertheless the questions above stated should be answered in the negative.

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

(2) (1911) 12 C.L.R., at p. 659.

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It was said for the commissioner that the annuitants had no beneficial interest in the lands the subject of the assessment or in the income therefrom (Cf. *Lord Sudeley* v. *Attorney-General* (1)) and consequently that sec. 38 (7) was wholly inapplicable to the case. But I reserve my opinion upon this contention. Appellant's claim for six deductions was thus supported: The annuitants are entitled to the annuities and also to the unapplied surplus income arising from the estate of the testator and so to a life or greater interest in the land or the income therefrom. The argument, if otherwise tenable, fails because the annuitants are not entitled to the unapplied income but only to so much as the trustee in the exercise of its uncontrolled discretion chose to apply for their benefit (*National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (2)). In 1921 the Supreme Court of South Australia declared that the trust as to the unapplied surplus was a discretionary trust, and that, in my judgment, is beyond all question on the terms of the will itself. It may be that the declarations put undue restrictions upon the uncontrolled discretion of the trustee, but that is immaterial for the purposes of this case.

The argument would also fail because the annuitants would not be assessable as joint owners. Joint owners, for the purposes of the Act, are, in my opinion, persons concurrently entitled to land or income from land or who are together in receipt of the income therefrom. It is ownership or receipt in community, in undivided shares, though the interest of one may be larger or smaller than that of another, and not ownership in severalty, that is, as sole owner, that is the subject of the provisions of the Act. The will creates no joint interest in the annuitants in any land or in the income therefrom; the legacies or interests given to them under the will are several and not joint.

It was further argued that the trust for accumulation of the unapplied surplus became void upon the expiration of the period prescribed by the *Thellusson Act*. In 1921 the Supreme Court of South Australia declared that after the expiration of twenty-one years from the death of the testator the will gave to the trustee a discretion to pay and distribute the surplus unapplied income

(1) (1897) A.C. 11, at p. 21.

(2) (1923) 33 C.L.R., at pp. 500, 504.

amongst the testator's nephews and nieces—the annuitants—and if and so far as the trustee should not exercise its discretion the court declared that the testator died intestate as to the undistributed income. It is plain, if this declaration is right, that the appellant cannot claim that any of the persons specified in the will are entitled to a life or greater interest in the lands or the income therefrom (*National Trustees Case* (1)). But it was argued that the decision of the Supreme Court of South Australia was wrong and that, as against the commissioner, the appellant was not bound by it (*In re Sassoon* (2)). It is unnecessary, I think, to consider the dicta in that case. If the order of the Supreme Court be wrong, " what would become of the unapplied surplus income not distributed within the period of twenty-one years, or received after the expiration of such period, and pending the time of distribution under the will ? " In the opinion of *Angas Parsons* J. given in the Supreme Court of South Australia in 1921 the testator would have died intestate as to the income and it would go to the next of kin. The appellant insists that it would go to the annuitants under the terms of the will, but I can find nothing in the will that warrants that construction or gives to them a life or greater interest in the land or the income therefrom.

Both the questions stated should, as already indicated, be answered in the negative.

DIXON J. The appellant company seeks six deductions of £5,000 each from the unimproved value of the land in respect of which it has been assessed for Federal land tax as at 30th June 1938. It claims the deduction under sec. 38 (7) of the *Land Tax Assessment Act* 1910-1937. That provision confers upon persons who, under a will or settlement coming into operation before 1st July 1910, share among them the beneficial interest in land in such a way that they are taxable as joint owners, a right, in certain conditions, to obtain a number of deductions " for the purpose of their joint assessment as such joint owners." The appellant company is not a joint owner and has not been assessed as a joint owner. It is a trustee of a will and has been assessed in that capacity. It invokes

(1) (1923) 33 C.L.R. 491. (2) (1933) Ch. 858.

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the provision because it claims that certain beneficiaries, six in number, are liable to be assessed as joint owners of the land and that the conditions are satisfied which would enable the six beneficiaries, if they were so assessed, to obtain for the purpose of their joint assessment six deductions of £5,000 each.

Apart from authority, I should have thought that sec. 38 (7) was clearly limited to the case of an actual joint assessment and that an assessment of a trustee was outside its scope. But the provision, it would seem, has been considered to fall within the doctrine of *Sendall's Case* (1), the doctrine that trustees are only vicariously responsible for the tax to which their beneficiaries would be assessable (*Hoysted* v. *Federal Commissioner of Taxation* (2))—But cf. per *Isaacs* and *Rich* JJ. in *Kuhnel & Co. Ltd.* v. *Deputy Federal Commissioner of Taxation (S.A.)* (3). However this may be, I am of opinion in the present case that, even assuming that the six beneficiaries are liable to be assessed as joint owners, the conditions are not fulfilled upon which their title to six deductions depends. Under sub-sec. 7 of sec. 38 a separate deduction may be made in respect only of each of the joint owners who hold an original share in the land under the settlement or will. Sub-sec. 8 then defines the expression "original share in the land" to mean the share of one of the persons specified in the settlement or will as entitled to the first life or greater interest thereunder in the land or the income therefrom, or to the first such interest in remainder after a life interest of the settlor, or after a life interest of the wife or husband of the settlor or testator. I think that, in the will which gives them their interests, the six beneficiaries are not specified as entitled to the first life or greater interest thereunder in the land. There is no interest in remainder answering the description contained in the rest of the definition.

The contention that the beneficiaries are so specified rests upon a construction which it is sought to place upon the will for the purpose of establishing that they are entitled to share among them the whole of the net income arising from the land. The will gives them

(1) (1911) 12 C.L.R. 653.
(2) (1920) 27 C.L.R. 400; (1921) 29 C.L.R. 537, at p. 547, per *Knox* C.J. and *Starke* J.
(3) (1923) 33 C.L.R. 349, at p. 360.

annuities of fixed amounts payable out of the income of the testator's estate however constituted, that is, of the residuary real and personal estate. After giving directions the meaning of some of which is not altogether clear, the testator makes a final disposition of the surplus income as follows: "And I direct that my said trustees may in their uncontrolled discretion accumulate the unapplied surplus (if any) of such income by laying out and investing the same on any one of the securities hereinbefore mentioned including rebuilding any erections pulled down as aforesaid with power to vary and transfer such investments into others of a similar nature at the discretion of my said trustees or in the exercise of such discretion shall be at liberty to apply the accumulations thereof in like manner as income namely by distributing the same to the persons for the time being entitled to the income of my said estate." A difficulty having arisen as to the persons fulfilling the description "persons for the time being entitled to the income of my said estate," an application was made to the Supreme Court for the interpretation of the clause. An order was made declaring, in effect, that, upon the true construction of the will, the trustee was empowered, in the exercise of its discretion, to pay or distribute equally the unapplied surplus or accumulations, pursuant to the will, of the income arising from the testator's residuary real and personal estate to and amongst named persons comprising the annuitants or such of them as may for the time being be living. The six beneficiaries form this class.

Twenty-one years having elapsed from the death of the testator, another application was made to the Supreme Court, which declared that upon the true construction of the said will the trustee is empowered in the exercise of its discretion given to it by the said will from time to time to pay or distribute equally the surplus income which has arisen and shall hereafter arise from the testator's residuary real and personal estate and accruing after the expiration of twenty-one years from the death of the testator amongst the persons named as annuitants and that if and so far as the trustee should not exercise its discretion as aforesaid there is an intestacy as to so much of such income as the trustee should not pay or distribute as aforesaid.

Even if these two orders had not been made and the construction of the will were altogether open, I should not place upon it the

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interpretation for which the appellant contends. The orders, however, fix the rights of the beneficiaries in relation to the income of the land upon which the tax is levied, and, in my opinion, they control the situation.

There is no question of *res judicata* or issue-estoppel. But the rights in question being measured by the nature and extent of the interests which are taken in the land as at 30th June 1938, we must look at all operative instruments which define those interests. The orders define the interests of the six beneficiaries. It is true that they do not purport to give new interests and that in law they operate only as declarations determining, as between trustee and beneficiary, the interests otherwise existing, that is, arising under the will. But it is none the less true that the beneficiaries can, after the making of the orders, have no interest in the land inconsistent with the orders.

The trustee has always exercised its discretion so that the beneficiaries take the whole income and the next of kin none of it. Nevertheless it is quite clear on the face of the last order that the beneficiaries take surplus income by an exercise of discretion and not otherwise ; they cannot be regarded as specified in the will as entitled to the first life or greater interest in the land. The appellant's claim to multiple deductions must, therefore, fail.

It may be that the appellant has some ground for claiming that under sec. 34 deductions should be made in respect of the annuities. We were informed that, if so, the Commissioner of Taxation would not treat the trustee as precluded from making the claim. The matter should be dealt with and cleared up before the appeal, as distinguished from this case stated, is finally disposed of.

Both questions in the case stated should, in my opinion, be answered : No.

EVATT J. I have had an opportunity of reading the judgment of my brother *Dixon*, and agree with it.

MCTIERNAN J. I agree that both questions should be answered : No.

The land for which the appellant has been assessed for Federal land tax is the unsold residue of the lands devised by the will

and codicil of the late David Bower, who died on 6th July 1898, and the appellant has been assessed as trustee. The assessment is not a joint assessment. The appellant, however, claims under sec. 38 (7) of the *Land Tax Assessment Act* 1910-1937 the benefit of six deductions of £5,000 each from the unimproved value of the land, as if it were a case of a joint assessment of the six persons who enjoyed the income of the land at 30th June 1938. The competence of the appellant to claim the deductions depends on the doctrine laid down in *Sendall's Case* (1)—See also *Hoysted's Case* (2) ; *Kuhnel's Case* (3) ; *Lloyd* v. *Federal Commissioner of Land Tax* ; *In re Browne* ; *Ex parte Lloyd* (4).

Each of the beneficiaries is a relative of the testator either by blood or marriage, and each is entitled under the will and codicil to an annuity which is payable out of the income of the lands the subject of the assessment. The annuities do not exhaust the income. The question what was the destination of the unapplied surplus during the period within and beyond twenty-one years from the testator's death has been the subject of two decisions of the Supreme Court of South Australia. The period of twenty-one years has long since passed. Under the interpretation placed on the will and codicil by the Supreme Court the trustee could at 30th June 1938 in its absolute discretion divide the surplus income equally between these beneficiaries or decline to do so, and, in the latter event, the surplus income would go to the next of kin.

In my opinion, one reason why the claim for the deductions should fail is that none of the beneficiaries has an interest which is that of a " joint owner " who holds " an original share in the land." First, as annuitants they are not owners of the land as defined by sec. 3 (*Adams* v. *Federal Commissioner of Land Tax* (5)). Secondly, the mere possibility of receiving shares in the whole of the unapplied surplus, which would happen if the trustee in its discretion divided it among them, does not change them from annuitants into " owners " within the meaning of the Act, even although they receive by such division, together with their annuities, the whole of the income of

(1) (1911) 12 C.L.R. 653.
(2) (1921) 29 C.L.R. 537.
(3) (1923) 33 C.L.R., at p. 360.
(4) (1933) 49 C.L.R. 160, at p. 170.
(5) (1919) 26 C.L.R., at p. 347.

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the land: See *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *Federal Commissioner of Taxation* (1), per *Knox* C.J.

But this court has been asked to say that the Supreme Court of South Australia did not correctly construe the will and codicil and that upon their true construction the annuitants were entitled to the unapplied surplus income, thus having rights to the whole income of the land, and the commissioner should have assessed them on this basis. It was said that, as the commissioner was not a party to the proceedings, the orders were not binding in this appeal. It is true that none of the questions decided in those proceedings is binding on the commissioner as if it were a *res judicata*. But the will and the orders made by the Supreme Court determine the interests which according to the law of South Australia the annuitants have in the income from the land. I agree that the interests were liable to taxation upon the basis that they were correctly declared by the orders.

Questions answered as follows:—(1) *No.* (2) *No. Costs of case to be costs in the appeal. Case remitted to Dixon J.*

Solicitors for the appellant, *Baker, McEwin, Ligertwood & Millhouse.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Fisher, Jeffries, Brebner & Taylor.*

O. J. G.

(1) (1923) 33 C.L.R., at pp. 500, 501.