[HIGH COURT OF AUSTRALIA.]

UNION TRUSTEE CO. OF AUSTRALIA LTD. APPELLANT;

AND

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

Land Tax (Cth.)—Assessment—Deductions—"Joint owners"—Relatives of testator—"Original share . . . under . . . will"—Settlement by beneficiary of her interest under will on trust for herself for life and after her death for her issue—Land Tax Assessment Act 1910-1940 (*No.* 22 *of* 1910—*No.* 15 *of* 1940), *ss.* 11 (2) (*b*), 38 (7), 38A.

In order to obtain the benefit of s. 38 (7) of the *Land Tax Assessment Act* 1910-1940 all the "joint owners" in respect of whom sums are claimed by way of deduction must hold their respective interests directly under the will or settlement without the aid or intervention of any subsequent transaction.

Accordingly, where one of several beneficiaries in remainder under the trusts of a will assigned her interest to a trustee upon trust for herself for life and after her death for her issue, reserving to herself a power of revocation, *held* that she no longer had a share "under the will" within the meaning of s. 38 (7) of the Act, and the deductions provided by that section could not be claimed.

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MELBOURNE, *June* 4, 23.

Latham C.J., Rich and Starke JJ.

CASE STATED.

On an appeal against an assessment of land tax *Latham* C.J. stated for the Full Court of the High Court a case which was substantially as follows:—

1. Nathan Thornley died on 1st March 1903 and by his last will dated 15th May 1902 appointed William Boyd of Tarrone Warrong in the State of Victoria and the Union Trustee Company of Australia Ltd. (hereinafter called "the company") his executors and trustees. Probate of the will was duly granted to the executors and trustees by the Supreme Court of Victoria in its probate jurisdiction. William Boyd died on 23rd June 1926, and the company is now trustee of

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the estate. By his will (so far as is material to this report) the testator devised his estate to trustees on trust to accumulate the income during his widow's life and after her death to appropriate the estate, including the accumulations, to his children in stipulated shares as tenants in common and to pay the income of the shares to the children for life and after their respective deaths on trust as to their respective shares for their children who should attain the age of twenty-one years or marry under that age.

2. The testator left suriving him his widow, Mary Josephine Thornley, and six children.

3. One of the daughters, namely, Vera Beatrice MacPherson, died on 13th November 1907 leaving her surviving one child, namely, Mary Violet MacPherson.

4. The widow died on 24th November 1914.

5. Part of the estate comprised and still comprises certain real estate situate in the State of Victoria (hereinafter called " the said lands "). The unimproved value of the said lands as at 30th June 1941 was for Federal land tax purposes the sum of £65,717. The funeral and testamentary expenses and debts of the testator had all been paid before the year 1906.

6. On 26th June 1927 Mary Violet MacPherson attained the age of twenty-one years.

7. As from 26th June 1927 (save as hereinafter appears) the following persons were absolute owners of shares or interests in the said lands under the provisions of the said will as follows :—

Edmund Ashworth Thornley, son of Nathan Thornley	2/8ths share
Geoffrey Prestwich Thornley, son of Nathan Thornley	2/8ths share
Edith Teresa Boyd, daughter of Nathan Thornley	1/8th share
Florence Louise Nicholson, daughter of Nathan Thornley	1/8th share
Violet May Lillies, daughter of Nathan Thornley	1/8th share
Mary Violet MacPherson, grand-daughter of Nathan Thornley	1/8th share

These persons are still alive, and the first five of them have made no disposition of the respective interests in the said lands and are still such absolute owners. Save as hereinafter mentioned, Mary Violet MacPherson has made no disposition of her interest in the said lands.

8. For many years prior to the year 1941 the company claimed in its returns for Federal land tax purposes and the respondent

allowed in his assessments upon the company a deduction of six sums of £5,000 each pursuant to s. 38 (7) of the *Land Tax Assessment Act*.

9. On 29th August 1927, Mary Violet MacPherson executed an indenture of settlement bearing that date in respect of her interest in the said lands under the will. By this indenture she assigned and conveyed her share in the testator's estate upon trust for herself for life and after her death upon other trusts. On 10th December 1928 Mary Violet MacPherson (by that time named Mary Violet Urquhart, she having married one Angus Ronald Urquhart) executed an indenture bearing that date varying the trusts of the indenture of settlement, but in a manner not here material. Save as aforesaid Mary Violet MacPherson (or Urquhart) has made no disposition of her interest in the said lands.

10. On 25th September 1939 the company on behalf of the estate lodged with the respondent a return for Federal land tax purposes in respect of the said land. The return covered the triennial period 1939-1942 for Federal land tax purposes.

11. By notice of assessment dated 21st April 1942 the respondent assessed the appellant as trustee of the estate to Federal land tax upon lands owned by the estate as at 30th June 1941. In the assessment, the respondent in arriving at the taxable value of the said lands allowed only one statutory deduction of £5,000.

12. By notice dated 19th May 1942 the appellant objected to the assessment on the following grounds :—

1. That the allowance of only one statutory deduction of £5,000 in arriving at the taxable value of the land held by the company as such trustee in lieu of six statutory deductions of £5,000 each was wrong in law and not in accordance with the provisions of the *Land Tax Assessment Act* 1910-1940.

2. That the beneficial interest in the lands or in the income therefrom was at 30th June 1941 shared amongst the six beneficiaries of the estate and they were taxable as joint owners under the *Land Tax Assessment Act*.

3. That at the said date the beneficiaries each held their respective shares in the beneficial interest in the land under the will of the testator Nathan Thornley who died before the first day of July 1910, and are relatives by blood, marriage or adoption of the said testator, and each of them holds an original share in such lands, within the meaning of the Act, being entitled to a first life or greater interest in such lands or the income therefrom.

4. That the trustees are entitled to six deductions of £5,000 each pursuant to the provisions of s. 38 of the said Act.

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The objection was disallowed and was treated as an appeal to the High Court.

The following question was stated for the opinion and consideration of the Full Court:—

Was the Federal Commissioner of Taxation correct in allowing only one statutory deduction of £5,000 in arriving at the taxable value of the said lands in lieu of six statutory deductions of £5,000 each ?

Ham K.C. (with him *Dean*), for the appellant. Notwithstanding the settlement, the interest of Mrs. Urquhart is still "an original share . . . under the . . . will" within the meaning of ss. 38 (7) and 38A of the *Land Tax Assessment Act*. After the settlement she continued to have a life interest which, but for the will, she would not have. The right to that interest still flows from the will, and the case is different from one in which an original beneficiary has disposed of his interest to another person. [He referred to *Wilson* v. *Federal Commissioner of Land Tax* (1).] The statement of the law in *Thomson* v. *Deputy Federal Commissioner of Land Tax (Tas.)* (2) is too wide and is *obiter*.

Fullagar K.C. (with him *Adams*), for the respondent. The question raised here is already determined against the appellant by *Emmerton* v. *Federal Commissioner of Land Tax* (3); *Thomson's Case* (4) and *Wilson's Case* (5). Since the settlement Mrs. Urquhart has not an original share under the will. The settlement is her title to the life interest, which is not even the same kind of interest as she had under the will; her interest under the will was in remainder. [He referred to *Executor Trustee and Agency Co. of South Australia Ltd.* v. *Deputy Federal Commissioner of Taxation (S.A.)* (6).]

Ham K.C., in reply.

Cur. adv. vult.

June 23.

The following written judgments were delivered:—

LATHAM C.J. The question which arises upon this case is whether one statutory deduction of £5,000 or six statutory deductions each of £5,000 should be allowed under the *Land Tax Assessment Act* 1910-1940, s. 38 (7), in assessing to land tax the trustees of the will of the late Nathan Thornley.

(1) (1916) 21 C.L.R. 225, at pp. 234, 235, 246, 247.
(2) (1915) 19 C.L.R. 351, at p. 354.
(3) (1916) 22 C.L.R. 40, at pp. 48, 50, 53.
(4) (1915) 19 C.L.R. 351.
(5) (1916) 21 C.L.R. 225.
(6) (1940) 64 C.L.R. 413.

Nathan Thornley died on 1st March 1903, leaving a will under which his trustees were, at the relevant date (30th June 1939) owners of certain land subject to the trusts of the will. Under the will the trustees hold the land upon trust, subject to certain annuities, to accumulate the income during the life of the testator's widow and after her death to appropriate the estate to his children in specified shares as tenants in common, and thereafter to pay the income of the shares to the children for life, and after their respective deaths upon trust as to their respective shares for their children who should attain the age of twenty-one years or marry under that age. The testator left two sons and four daughters. One daughter died on 13th November 1907, leaving her surviving one child, Mary Violet MacPherson, now Mrs. Urquhart. The widow of the testator died on 24th November 1914. The surviving children still hold their shares under the will, not having dealt with them in any way. On 29th August 1927 Mrs. Urquhart executed an indenture of settlement, by which she assigned all her interest under the will to a trustee in trust to hold for the settlor during her life unless and until she should commit, permit or suffer any act, default or process of law whereby the income would become payable to or charged in favour of any other person. If any of these events happened the trustees had a discretion to apply the income for the benefit of the settlor, her husband, or her issue. The settlement provided that after the death of the settlor the property should be held in trust for issue of the settlor as the settlor by deed or will should appoint and in default of appointment in trust for children of the settlor subject to the conditions set out in the settlement. Provision was made for the event of no child being born to the settlor or no child being a male attaining the age of twenty-one years or being female attaining that age or previously marrying. By a subsequent indenture made on 10th November 1928 the settlement was varied in favour of the husband. This was done in pursuance of a power reserved to the settlor in the settlement.

The provisions of the will were considered by the Court in *Union Trustee Co. of Australia Ltd.* v. *Federal Commissioner of Land Tax* (1). It was there held that the testator's five surviving children and his granddaughter, Mrs. Urquhart, were not, during the life of testator's widow, joint owners of the land within the meaning of the *Land Tax Assessment Act* 1910-1914. Upon the death of the widow they became joint owners, and the question now arises as to the number of deductions which may properly be made in the assessment of the trustees of the will.

(1) (1915) 20 C.L.R. 526.

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Latham C.J.

Section 38 of the *Land Tax Assessment Act* 1910-1940 provides that joint owners of land shall be assessed and liable for land tax in accordance with the provisions of the section. Sub-section 7 contains a special provision which applies in the case of the will of a testator who died before 1st July 1910. The material provisions of the section are as follows :—" 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, all of whom are relatives of . . . 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 . . . —(*a*) the sum of Five thousand pounds," or a smaller sum to be ascertained in the manner prescribed by the section. The expression " original share in the land " is defined for the purpose of the section, but in the view which I take it is unnecessary to consider the terms of this definition.

In the present case the testator died before 1st July 1910. By his will the beneficial interest in the income of the land was, after the death of his widow, shared among a number of persons, namely, his children, all of whom were relatives of the testator by blood. It was so shared that those persons were taxable as joint owners under the Act. In order to obtain the benefit of the section, the beneficial interest must at the relevant time (in this case 30th June 1939) *under the will* of the testator be shared among such persons. The question is whether Mrs. Urquhart still holds her interest in the income " under the will of the testator."

Mrs. Urquhart assigned all her interest under the will to a trustee upon trusts which give her a right to the income, subject to certain protective provisions. The interest which she now holds is an interest created by the settlement, and limited by the terms of the settlement, though that interest could not have been created by her if she had not had an interest under the will. The decisions of the Court show that such an interest cannot be regarded as an interest " under the will " within the meaning of the section. In *Thomson* v. *Deputy Federal Commissioner of Land Tax* (*Tas.*) (1) it was held that in order that persons should be able to claim the benefit of s. 38 (7) they must be able to show that they held their interests in

(1) (1915) 19 C.L.R. 351.

the land " directly under the will or settlement without the aid or intervention of any subsequent or intermediate transaction." In *Wilson* v. *Federal Commissioner of Land Tax* (1) the view expressed in *Thomson's Case* (2) was approved, and it was held that where a share in land under a will was disposed of by the will of the beneficiary, the person taking under such a will could not be regarded as holding an interest " under the will of the original testator " : See also *Emmerton* v. *Federal Commissioner of Land Tax* (3), where it is said that in *Wilson's Case* (1) it was decided that, in order to obtain the benefit of s. 38 (7), it was essential that all the persons for the time being sharing the land or income, being relatives of the testator, should " all hold directly *under* the settlement or will, so that if any part of the interest is held under a mesne assignment the privilege is lost." In my opinion these authorities are decisive against the taxpayer in the present case. It is therefore unnecessary to consider whether Mrs. Urquhart holds an original share in the land within the meaning of the section.

The question asked in the case is : Was the Federal Commissioner of Taxation correct in allowing only one statutory deduction of £5,000 in arriving at the taxable value of the said lands in lieu of six statutory deductions of £5,000 each ? This question should be answered : Yes.

RICH J. The question submitted for our determination in this case is whether the respondent Commissioner was correct in allowing only one statutory deduction in arriving at the taxable value of the lands devised by the will of the testator in lieu of six statutory deductions of £5,000 each. The relevant facts are that the testator, who died on 1st March 1903, made a will appointing the appellant company and another trustees. The material provisions of the will are that the testator devised his estate to his trustees upon trust, subject to certain annuities, to accumulate the income during the life of the testator's widow and after her death to appropriate the estate, including the accumulations, to his children in certain shares as tenants in common, and to pay the income of the shares to the children respectively for life, and after their respective deaths upon trust as to their respective shares for their children who should attain the age of twenty-one years or marry under that age. The testator left him surviving his wife and six children. One of his children—a daughter—died on 13th November 1907, leaving her surviving one child. In these circumstances when a similar question

(1) (1916) 21 C.L.R. 225. (2) (1915) 19 C.L.R. 351.
(3) (1916) 22 C.L.R. 40, at p. 49.

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Rich J.

to that in the present case was submitted for the opinion of this Court it was held that the testator's surviving children and his grand-daughter were not during the life of his widow entitled to the land comprised in the estate for an estate of freehold in possession, and therefore were not "joint owners" of the land within the meaning of the then *Land Tax Assessment Act* 1910-1914. Subsequently the testator's widow died on 24th November 1914: the grand-daughter attained the age of twenty-one years on 26th June 1927, and on 29th August 1927 she executed an indenture of settlement whereby she assigned and conveyed her share in the testator's estate upon trust (in effect) for herself for life and subject thereto upon trust for such of her issue as she should by deed or will appoint. At a later date after her marriage she executed under the power reserved in the original settlement another indenture varying this settlement in matters which are not material to be stated. It thus appears that by this settlement the grand-daughter introduced a stranger in the capacity of the trustee of her share into the circle of the original "joint owners." So that at the date as of which the assessment in question is made the persons claiming the privilege provided by s. 38 (7) of the *Land Tax Assessment Act* 1910-1940 are the surviving sons and daughters of the testator and the trustee of the settlement mentioned. Now this Court in a number of cases has laid down the principle according to which the sub-section should be applied. It is that all the persons being relatives of the testator or settlor who claim the benefit of the deduction must at the time of assessment hold their respective interests in the land directly under the will or settlement as the case may be without the aid or intervention of any subsequent or intermediate transaction. In the events which have happened the grand-daughter now derives the title to her share, not directly from the will, but apart from it, and by virtue of the settlement which operates on the will.

It follows, therefore, from the previous decisions of this Court that, as all the beneficiaries do not hold directly under the will, only one deduction can be claimed, and I answer the question submitted in the affirmative.

STARKE J. The appellant as an executor and trustee of the will of Nathan Thornley deceased was assessed to land tax in respect of lands owned by it as such executor and trustee as at 30th June 1941. The will is set out in the case stated, and a summary of its contents is also stated in the report of the case *Union Trustee Co. of Australia Ltd.* v. *Federal Commissioner of Land Tax* (1).

(1) (1915) 20 C.L.R. 526.

The appellant claimed six deductions, each of £5,000, pursuant to the provisions of ss. 38 and 38A of the *Land Tax Assessment Act* 1910-1940 (See *Sendall & Crace* v. *Federal Commissioner of Land Tax* (1)), but the Commissioner only allowed one deduction of £5,000.

In my opinion, the Commissioner was right. The provisions of ss. 38 and 38A of the Act are, as *Higgins* J. observed in *Wilson* v. *Federal Commissioner of Land Tax* (2), "artificial and arbitrary." But the construction given to the sections by the Court is that the privilege conferred by the sections is "limited to persons upon whom a right to share in the land is conferred directly and immediately by the settlement or will itself, without calling in aid any subsequent transaction or event by which such a right has become vested in them" (*Wilson* v. *Federal Commissioner of Land Tax* (3); *Thomson* v. *Deputy Federal Commissioner of Land Tax* (*Tas.*) (4)).

In the present case one of the beneficiaries under the will of the testator, who died before 1st July 1910, settled her share by assigning it to a trustee upon trust, and that settlement is now the charter of her rights, derived though they are from the will. And the result of that assignment is, according to the cases, to exclude not only herself but all the other beneficiaries under the will from the privilege or right to several deductions under the sections mentioned.

In this view it becomes unnecessary to discuss a further contention on the part of the Commissioner, that the beneficiary who assigned her share to a trustee never took an "original share" under the will of the testator in respect of which any deduction could be claimed.

The question stated should be answered in the affirmative.

Question in case answered: Yes. Case remitted to Chief Justice. Costs of case to be costs in the appeal.

Solicitors for the appellant, *Blake & Riggall.*

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

E. F. H.

(1) (1911) 12 C.L.R. 653.
(2) (1916) 21 C.L.R. 225, at p. 248.
(3) (1916) 21 C.L.R., at p. 234.
(4) (1915) 19 C.L.R. 351.