found by the learned Judge, they did not communicate to her any intention of conferring upon her a right to the profits, nor of admitting her to participate in profits in consideration of the loan. There was no suggestion that the deposit should not remain payable on demand and, if for any reason it became desirable for her to call it up, it would have been immediately payable. In these circumstances, we think the learned Judge was entitled to infer, as he did, that she did not contract for a share in the profits.

The appeal must be dismissed with costs.

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Appeal dismissed with costs.

Solicitors for the appellant, *Villeneuve Smith, Kelly, Hague & Travers.*

Solicitors for the respondents, *Joyner, Phillips & Joyner*; *Varley, Evan & Thomson*; *Baker, McEwin, Ligertwood & Millhouse.*

C. C. B.

Appr *Fermanis* v *Cheshire Holdings Pty Ltd* (1990) 1 VAR 373

Appl *Fermanis* v *Cheshire Holdings Pty Ltd* 20 ATR 1862

Dist *Taxation, Federal Commissioner of* v *Everett* (1980) 143 CLR 440

[HIGH COURT OF AUSTRALIA.]

HOWEY . . . . . APPELLANT;

AND

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

H. C. OF A. 1930. MELBOURNE, *Oct.* 29, 30. SYDNEY, *Dec.* 8. Isaacs C.J., Rich, Starke and Dixon JJ

Income Tax (Cth.)—Trustee—Separate assessments—Direction to trustee to remit proportion of income to settlor to be expended on maintenance and education of children — Assessment on total amount so received by settlor — Claim for separate assessment on amount expended on each child and on amount remaining unexpended—Income Tax Assessment Act 1922-1928 (*No.* 37 *of* 1922—*No.* 46 *of* 1928), *secs.* 4, 31 (2), 89.

The appellant, being entitled to an equitable life estate in certain land and buildings in Melbourne, executed a settlement vesting his interest in a trustee in trust for the settlor's two children, and the settlor directed that

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four-fifths of the annual income produced should be transmitted by the trustee to the settlor in England, for him to apply such portion thereof as he should think fit for the maintenance and education of the children. The Commissioner of Taxation having assessed the trustee in respect of the one-fifth of the income retained by him and the appellant as trustee in respect of the total four-fifths transmitted to him in each year,

Held, that, assuming that the appellant was liable to assessment at all, the Commissioner had rightly assessed him as a trustee under secs. 4 and 31 (2) of the *Income Tax Assessment Act* 1922-1928, and that he was not entitled to be assessed separately in respect of the amount expended annually by him on each child and on the balance remaining in his hands unexpended.

CASE STATED.

John Edwards Presgrave Howey, being the owner of an equitable estate in certain land and premises known as Albany Chambers in Collins Street, Melbourne, executed a settlement dated 11th June 1926, by which he transferred his equitable life estate to Raynes Waite Stanley Dickson upon trust for the settler's two children. By the settlement the settlor directed that four-fifths of the net income should be remitted by the trustee to the settlor in England to be expended by the settlor in his discretion for the maintenance, education, benefit or advancement in life of his children in the proportions provided (namely, that each son should receive twice the proportion received by each daughter); and the settlor directed that the other one-fifth of the net income should be retained by the trustee and accumulated by him for the general purposes of the trust.

For each of the financial years 1926-1927 and 1927-1928 the Federal Commissioner of Taxation assessed Dickson as trustee in respect of the one-fifth of the income, and Howey as trustee in respect of the total sum of the four-fifths transmitted to him in each year, in one lump sum. Howey objected that he should not have been assessed as if he were a single beneficiary in respect of the four-fifths of the income transmitted to him, and contended that under sec. 31 (2) of the *Income Tax Assessment Act* 1922-1928 he should have been separately assessed in respect of the money actually expended upon each child. He did not object that he ought not to have been assessed at all in respect of the amounts received from the trustee.

The objection was treated as an appeal, and *Starke* J. stated a case for the opinion of the Full Court upon the question thus raised in the following terms :—

> Should the Commissioner have assessed the taxpayer separately in respect of the amounts actually expended by the taxpayer in each of the two taxation periods aforesaid and on the maintenance, education, benefit or advancement in life of each of the two children aforesaid pursuant to the deed of settlement aforesaid ?

A. D. Ellis, for the appellant. The money received by the appellant should be considered as divided into three parts for the purpose of assessing income tax, namely, the part expended on each of the two children and the surplus remaining in the hands of the settlor. The appellant is for this purpose a trustee under sec. 4 of the *Income Tax Assessment Act*, and as a trustee he is only liable to assessment under sec. 31 (2) of that Act. To the extent that there is an expenditure on any child, such child is a beneficiary with an interest in the trust estate within sec. 31 (2) (*a*). There is no person presently entitled to the unexpended balance and liable to pay income tax thereon (sec. 31 (2) (*b*)). Each child was liable to be assessed in respect of the amounts expended upon him or her because it was income derived by the child, and sec. 89 means that the appellant, as trustee, could be assessed separately for the liability of each of his beneficiaries. On the other hand, if the children are not to be separately regarded as beneficiaries under sec. 31 (2) (*a*), there should be separate assessments as the income received by the appellant is being administered by him in three distinct divisions. *In re Income Tax Acts* (*No.* 3) (1) relates to different circumstances.

Ham K.C. (with him *C. Gavan Duffy*), for the Commissioner. A single assessment is justified in this case by sec. 89 of the *Income Tax Assessment Act*. In this case the fund in question is itself the trust estate of which the appellant alone is trustee, and there is not a trust estate the income of which is being assessed. There is no measurable or vested interest in these beneficiaries, and

(1) (1907) V.L.R. 358; 28 A.L.T. 215.

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sec. 31 (2) (*a*) is, therefore, not applicable. The appellant is not a trustee in relation to this income within the Act (*Manning* v. *Federal Commissioner of Taxation* (1); see, also, *Stroud's Judicial Dictionary*, vol. II., p. 628).

Cur. adv. vult.

Dec. 8.

The following written judgments were delivered:—

ISAACS C.J. In my opinion, the answer to the question submitted in the case stated by my brother *Starke* should be in the negative. My reason is that the taxpayer is, by sec. 4, a trustee within the meaning of sub-sec. 2 of sec. 31 of the *Income Tax Assessment Act* 1922-1928. He is liable on the facts of this case, and in conformity with that sub-section, to be assessed in respect of the four-fifths of income of the trust estate remitted to him in England, or elsewhere where he may direct, because it is that part of the income of the trust estate which, if the trustee were liable to pay tax in respect of the income of the trust estate, would have been the income of the trust estate remaining after allowing all the deductions under the Act, except the deduction under sec. 24, and to which no other person is presently entitled and in actual receipt thereof, and liable as a taxpayer in respect thereof.

RICH AND DIXON JJ. Property in Australia stands settled upon trust for the children of the appellant and of his wife who shall attain the age of twenty-one years, or, being female, attain that age or marry under it, in such proportions that each son shall receive twice the proportion received by each daughter. There are two children and they are under age. Until the youngest child attains a vested interest, one-fifth of the income is to be accumulated by the trustee and four-fifths are to be remitted to the appellant, who resides in England, to be expended by him in his discretion for the maintenance, education, benefit or advancement in life of the children in the aforesaid proportions. The appellant may so expend the whole or part only of the income remitted to him, but he is to accumulate any surplus and invest it. For this purpose

(1) (1928) 40 C.L.R. 506.

the trust instrument requires that the appellant shall be deemed to be a trustee. The accumulations are to be held by the appellant until the youngest child attains a vested interest. Upon failure of these trusts the appellant may appoint the settled property among his blood relations.

Income has been remitted by the trustee to the appellant, who has expended substantial portions of the money so remitted pursuant to the trust instrument for the maintenance, education, benefit and advancement in life of each of the two children. But for each of the financial years beginning on 1st July 1926 and 1st July 1927 the appellant has been assessed as trustee upon a taxable income consisting of the whole sum remitted to him in the preceding year. To this he objects, not upon the ground that he ought not to be assessed at all as trustee, but upon the ground that a single assessment upon the total sum remitted to him in a year of income is wrong, and that he should be separately assessed upon the actual amounts expended by him in respect of each child. This contention is based upon sub-sec. 2 of sec. 31 of the *Income Tax Assessment Act* 1922-1928. It is by no means clear, however, that any assessment of the appellant can be supported under that provision. It appears to relate to income derived by a trustee from property under his control. The income derived by the appellant is not that of a trust estate of which he is a trustee. To meet this difficulty it is said that the wide definition of "trustee" in sec. 4 covers his case. But the word is to have its defined meaning only unless the contrary appears, and it is therefore difficult to apply the definition in order to overcome the effect of the references in sec. 31 to "income of the trust estate." These references suggest that the person who answers the description "trustee" must stand in some relation to the proprietary right in virtue of which the income arises, even although he need not be a trustee in the proper sense. In this case, however, the appellant is constituted as an intermediary between the trustee of the estate and the beneficiaries contingently entitled, and he is empowered to deal only with the income paid to him by the trustee of the trust estate. But in the circumstances of this case it appears to be unnecessary to decide whether sec. 31 applies to such a person. Even if the assumption be correct which

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Rich J. Dixon J.

both the Commissioner and the appellant make, that sec. 31 (2) governs the matter, it could not, in our opinion, result in separate assessments upon him in respect of each beneficiary. We think sec. 31 (2) means that "that part of the income of the trust estate" should be included in the one assessment which falls under par. (*a*) or par. (*b*) of the sub-section, or partly under one paragraph and partly under the other. This assessment should be made upon the trustee "separately." We do not think the word "separately," in sub-sec. 2, requires a discrimination between portions of that part of the income of the trust estate which answers the alternative description contained in pars. (*a*) and (*b*). The separation which it contemplates is a separation between the assessment of the taxpayer in respect of such income in his capacity of trustee, and assessments made upon him otherwise. If, therefore, sec. 31 (1) does apply to his case, it does not confer upon the appellant a right to be separately assessed in respect of income expended on each child. On the other hand, if sec. 31 (1) does not apply, we think the appellant cannot obtain a separate assessment in respect of income expended on each child. A question, it is true, does arise, whether, if sec. 31 (1) does not apply, there is any provision which warrants any assessment upon the appellant as trustee. Sec. 89 enables the Commissioner to assess a trustee, but it is not easy to say precisely in respect of what income. It is perhaps doubtful whether it operates to impose upon a trustee any liability for tax which is not provided for by sec. 31, and it is by no means clear what is the relation between sec. 89 and sec. 31. Possibly, so far as it affects trustees, sec. 89 should be regarded as a "collecting section and not a taxing section," to borrow the language used by Lord *Parker* in *Drummond* v. *Collins* (1). If so, it does no more in respect of trustees than provide machinery for carrying out the provisions of sec. 31. This view would mean that, unless the appellant could be assessed under sec. 31, he ought not to be assessed at all; and that is a position which is neither covered by his objection nor relied upon by the appellant, and is opposed to the view of the Commissioner. If the appellant's case falls outside sec. 31, he might desire to avail himself of sec. 89, if

(1) (1915) A.C. 1011, at p. 1019.

sec. 89 does authorize the assessment of the appellant independently of sec. 31, but, upon its true interpretation, requires that he should be separately assessed in respect of the income expended on each beneficiary. But this does not seem to be the effect of the language of sec. 89, which, if it applied to the appellant, would appear to require that the income received by him as trustee should all be included in one assessment. The most plausible suggestion to the contrary was to the effect that each child was liable to be assessed in respect of the amounts expended upon him or her because it was income derived by the child, and that sec. 89 meant that the appellant, as trustee, could be assessed separately for the liability of each of his beneficiaries. But, in our opinion, this suggestion is answered by the terms of sub-sec. 1 of sec. 31, which excludes beneficiaries under a legal disability from assessment in their individual capacity unless their case falls within sub-sec. 3. Whether the children in fact derived income or not, to treat the children as taxpayers liable to assessment is not consistent with this express exception.

For these reasons, the question in the case stated should be answered—No.

STARKE J. The Commissioner assessed the taxpayer to income tax for the financial years 1927-1928, 1928-1929, in respect of certain moneys which he received in those years under the deed of settlement mentioned in the case, and expended on the maintenance, education, benefit or advancement in life of his children—beneficiaries under the settlement. The Commissioner has assessed the aggregate of the sum received by the taxpayer in each year. The taxpayer claims that he should have been assessed in respect of the amounts received and expended on each beneficiary separately. We have not to consider whether the taxpayer should have been assessed at all, for that is not the question raised in the case or by the taxpayer's objection on appeal, to which he is limited (see *Income Tax Assessment Act* 1922-1928, sec. 51A (3)). The case turns upon the construction of sec. 31 of the Acts, and mainly sub-sec. 2 of that section. Assuming that the taxpayer is a trustee, liable to be separately assessed under that sub-section, then he is to be assessed

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Starke J.

"in respect of that part of the income of the trust estate . . . to which no other person is presently entitled and in actual receipt thereof and liable as a taxpayer in respect thereof." No present interest in the moneys received by the taxpayer subsisted in the children under the deed of settlement. Therefore, it is said, the trustee should be separately assessed, and in respect of the share of the income which he may apply to the maintenance, education and advancement of each beneficiary—for that is the "trust estate" within the meaning of sec. 31 (2). But I think those words refer to the income from the trust estate mentioned in sub-sec. 1, in respect of which beneficiaries cannot be assessed. In my opinion, therefore, sec. 31 does not support the contention of the taxpayer, and the question stated by the case should be answered in the negative.

Case remitted to Starke J. with the opinion that the question should be answered in the negative. Costs of and occasioned by case stated to be costs in appeal.

Solicitors for the taxpayer, *Raynes Dickson & Kiddle.*

Solicitor for the Commissioner of Taxation, *W. H. Sharwood,* Crown Solicitor for the Commonwealth.

H. D. W.