[HIGH COURT OF AUSTRALIA.]

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

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1932.

MELBOURNE, *March* 15.

SYDNEY, *Aug.* 4.

Gavan Duffy C.J., Rich, Starke, Dixon, Evatt and McTiernan JJ.

Income tax (Cth.)—Assessment—Trustee—Will—Life tenant and remainderman—Prohibition against accepting premium for lease—Acceptance of premium authorized by Supreme Court—Direction that premium be treated as rent under lease paid in advance and to be apportioned between life tenants and remaindermen—Some remaindermen presently entitled—Whether trustee liable for tax for any part of the premium as income for year in which received—Averaging provisions—Whether applicable—Income Tax Assessment Act 1922-1929 (*No.* 37 *of* 1922—*No.* 11 *of* 1929) *secs.* 13, 31.

The appellant was the trustee for the testatrix, who by her will directed her trustee to stand possessed of her residuary trust moneys and her real estate upon trust to pay the income of one equal sixth part to each of her six daughters for life, and from and after the death of her said daughters or any of them to hold the share of the daughter so dying upon trust for the child or children of the daughter so dying, who being a son should attain the age of twenty-one years or being a daughter should attain that age or marry, in equal shares. The testatrix gave power to lease any hereditaments for a term not exceeding ten years at such rent as the trustee should think fit, without taking anything in the nature of a fine or premium therefor. The six daughters survived their mother. Three were still alive, but three died before 1st July 1927. Each daughter married in the lifetime of the mother and had children who were living at the death of the testatrix. The children of the daughters who had died were alive on 1st July 1927, and had attained the age of twenty-one years or had married. In March 1928 the Supreme Court of South Australia authorized the trustee to accept a tender of a lease for a certain hotel property, being part of the trust estate, for a term of seven years at a weekly rental of £6, and a premium of £3,300, and the Court directed that the premium of £3,300 be treated by the trustee as rent under the lease paid in advance and be

apportioned, with interest thereon, over the term of the lease. A lease of the property was accordingly granted as from 19th April 1928, and the premium of £3,300 was paid to the trustee on and between 28th March 1928 and 14th May 1928. The Commissioner of Taxation assessed the trustee to income tax for the financial year 1928-1929, based on income derived in the year commencing on 1st July 1927, and included in such assessment the sum of £3,300 subject to a deduction of £93, which the Commissioner treated as the amount to which the beneficiaries were presently entitled up to 30th June 1928. For the financial years ending June 1924 to June 1927 the trustee derived income of the estate, the whole of which was income from property and was distributable among the beneficiaries. In respect of this income the beneficiaries were assessed, and no tax was levied on the trustee.

Held, (1) by *Gavan Duffy* C.J., *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that under sec. 31 (2) (*b*) of the *Income Tax Assessment Act* 1922-1929 the trustee was liable to taxation as to half only of the premium, being that part in which the three daughters who were still alive were interested, and that the trustee was not liable in respect of the other half of the premium to which the children of deceased daughters were presently entitled; (2) by the whole Court, that the averaging provisions of sec. 13 of the *Income Tax Assessment Act* 1922-1929 did not apply to that part of the premium on which the trustee was liable to pay tax.

CASE STATED.

On an appeal by the Executor Trustee and Agency Co. of South Australia Ltd. as trustee under the will of Margaret Pearson deceased, to the High Court from the Board of Review, which had confirmed the Commissioner's assessment of it for Federal income tax for the year 1928-1929 *Starke* J. stated a special case, which was substantially as follows, for the opinion of the Full Court:—

1. This is an appeal from the decision given and made on 15th June 1931 by the Board of Review constituted under the *Income Tax Assessment Act* 1922-1929, affirming the assessment of income tax for the financial year which commenced on 1st July 1928. The assessment is based upon income derived by the appellant in the year which ended on 30th June 1928.

2. The appellant, the Executor Trustee and Agency Co. of South Australia Ltd. (hereinafter called "the Company"), whose registered office is situate at 22 Grenfell Street, Adelaide, in the State of South Australia, was at all material times a trustee of the estate of Margaret Pearson, late of South Road, near Edwardstown, in the said State, widow, deceased.

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3. By her last will and a codicil thereto dated respectively 6th and 31st May 1886 Margaret Pearson did (*inter alia*) devise and bequeath all her real and personal estate to her trustees upon trust to sell, call in and convert her personal estate and after payment of her funeral and testamentary expenses and debts to stand possessed of her residuary trust moneys and of the real estate upon trust to pay the income of one equal sixth part to each of her named six daughters for life, and from and after the death of her said daughters or any or either of them to hold the share of the daughter so dying upon trust for the child or children of the daughter so dying who being sons should attain the age of twenty-one years or being daughters should attain that age or be married and in equal shares, and declared that the share of such of the said daughters as died without leaving issue should be held by her trustees upon trust for the survivors of her said daughters upon and subject to the trusts thereinbefore declared concerning their one-sixth shares as aforesaid, and did further declare that as soon as conveniently may be after the decease of her said daughters the trustees should sell the said real estate, and did further declare that during the time her said hereditaments should remain unsold the said trustees should have the management thereof and should have ample powers to direct repairs, alterations and improvements, to reduce rents, accept surrenders of leases and tenancies and to do or cause to be done all such acts and things relating to the management of her said estate as her trustees should in their discretion think fit, and that her trustees might let any hereditaments for the time being remaining unsold either from year to year or for any term not exceeding ten years at such rent as they should think fit without taking anything in the nature of a fine or premium therefor. In the said will and codicil there is no power given to the trustees to carry on business, and as a fact the trustees did not at any relevant time carry on business.

4. Margaret Pearson died on 15th July 1898, and was at the time of her death a widow, and left surviving her six daughters named in the will, all of whom were married and had issue living at the date of the death of the testatrix.

5. Prior to 1st July 1927 and to the receipt by the Company of the premium hereinafter referred to, three of the daughters of the testatrix, life tenants under the will and codicil, had died, each of whom left issue who had survived the testatrix and attained the age of twenty-one years or being daughters had married. The remaining three life tenants still survive. None of the beneficiaries is under any disability.

6. Portion of the estate subject to the trusts of the will and codicil comprised certain licensed freehold premises situate at Edwardstown, known as the Avoca Hotel, which by registered memorandum of lease dated 17th April 1928 was leased to one Harry Douglas Clendinnen for a term of seven years from 19th April 1928, in consideration of the immediate payment of £3,300 by way of premium and a weekly rental of £6.

7. Upon the *ex parte* application of the Company by originating summons in the Supreme Court of South Australia on 26th March 1928, an order was made by a Judge of the said Court authorizing the Company to accept the tender of Harry Douglas Clendinnen for the lease notwithstanding the provisions of the will and directing that the premium be treated by the Company as such trustee as rent under the lease paid in advance and be apportioned with the interest thereon over the term of the lease.

8. The premium of £3,300 demanded and given in connection with the lease was paid to and received by the Company as to £100 on 28th March 1928, £1,450 on 19th April 1928 and £1,750 on 14th May 1928, the whole amount being received by the Company during the financial year ended 30th June 1928. During the same year the net income of the estate from other sources amounted to the sum of £394. The amount of £3,300 so received by the Company was invested, and a half-yearly account and statement rendered to the beneficiaries in August 1928, when £117 17s. 1d. portion of the total sum of £3,300 with interest was appropriated, transferred to estate income account and disbursed.

9. The Company made a return of the income derived by the trustees of the estate during the year ended 30th June 1928 and of the distribution thereof. For the purpose of arriving at such income no portion of the premium of £3,300 was taken into account, as the

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first appropriation as above indicated was not made until August 1928. No portion of the sum of £3,300 was in fact paid to the beneficiaries or any of them during the year ending 30th June 1928.

10. On 26th July 1929 the Deputy Commissioner caused an assessment to be made of the taxable income of the Company as such trustee during the said year of £3,207 by treating the sum of £3,300 as income (in addition to the sum of £394 net income from property which was the only other income shown by the return) and by allowing as deductions therefrom £487 as "the amount attributable to beneficiaries." The sum of £487 so allowed was composed of the sum of £394 previously referred to and the further sum of £93 (being the proportionate part of the sum of £3,300 treated by the Deputy Commissioner as being the amount to which the beneficiaries were presently entitled up to 30th June 1928 although not actually distributed). On 7th August 1929 the Deputy Commissioner caused a notice of the assessment to be issued to the trustee.

11. According to the returns filed, the trustee derived net income of the estate for the financial years ending June 1924 to 1927 respectively, £446, £465, £399 and £337, all being the net income from property. The returns also showed that the whole of those sums were distributable amongst the beneficiaries. Accordingly in those years the Deputy Commissioner caused assessments to be made against the several beneficiaries, including in the assessable income of each of such beneficiaries the respective amounts so distributable, and no tax was levied or imposed upon or paid by the trustee as such.

12. On 17th September 1929 the Company duly lodged with the Deputy Commissioner an objection in writing against the assessment. The grounds of objection were :—(1) The amount of £3,300 was received by the Company during the year ended 30th June 1928 as a premium on the granting of a lease in terms of an order of the Supreme Court of South Australia sanctioning its acceptance under a direction in the will, but subject to a direction in such order that it was to be accepted only as rent paid in advance and apportioned over the term of the lease and should be assessed accordingly. (2) As to three-sixths of the said premium the beneficiaries named in

the will, being the remaindermen, the issue of the three deceased life tenants, had under the will an absolutely vested and indefeasible interest in the income of the estate, notwithstanding the said order, and, being under no legal disability, were presently entitled to their respective portions of the said income and to the actual receipt thereof and should be assessed accordingly. (3) If the Company as such trustee was assessable in its representative capacity in respect of any portion of the said premium (which was not admitted) it was in respect of £1,356 and no more. (4) If the Company as such trustee was assessable on any portion of the said premium, the rate of tax should be that applicable to the average taxable income over the five years ending 30th June 1928. The Deputy Commissioner wholly disallowed the objection.

13. By notice dated 22nd December 1930 the Company requested the respondent to refer the decision to the Board of Review, which, by a decision given on 15th June 1931, disallowed the claims of the Company and confirmed the assessment.

14. From the decision of the Board of Review the Company by notice dated 13th July 1931 appealed to the High Court.

The questions stated for the determination of the Full Court were as follows :—

(1) Whether the appellant in its representative capacity as such trustee is, in the events that have happened, lawfully assessable and chargeable with tax in respect of the said sum of £3,207 or any and if so what part thereof ?

(2) Whether, if the appellant is assessable and liable to tax in respect of the whole or any portion of the said income, the rate of such tax should be the rate applicable to the average taxable income over the preceding five years.

Mayo K.C. (with him *Edmunds*), for the appellant. The whole question turns on the construction of sec. 31 of the *Income Tax Assessment Act* 1922-1928. The trustee is not taxable. There are three matters for consideration: first, the alternative construction of sec. 31 ; secondly, the effect of the order made by the Supreme Court authorizing the acceptance of the premium ; and thirdly, whether the averaging provisions under sec. 13 apply at all. The

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effect of sec. 31 is that the scheme of taxation of trustees is put into a code. The question involved under sec. 31 is whether or not double taxation will possibly fall on the beneficiaries. Sec. 31, read as a whole, deals with the taxation of trust estates, and exhausts the taxation of such estates. The income of a beneficiary who is not under any legal disability and is presently entitled to a share of the income of the trust estate is dealt with by sec. 31 (1). Where the trustee holds for a beneficiary who has a vested interest but is under a disability, the income is taxable under sec. 31 (2) (*a*). Where the income is held by the trustee in trust for persons having only a contingent interest, the trustee is taxable under sec. 31 (2) (*b*). In this sub-section stress is laid on the words " other persons," and the key word in this phrase is " other " and means a person who is not a beneficiary as that word is used in secs. 31 (1) and 31 (2) (*a*). Sec. 31 (2) (*b*) has no reference to anyone mentioned in sec. 31 (1). Sec. 31 (1) imposes a tax on persons presently entitled who are not under a disability. I adopt Mr. *Ham's* argument in *Federal Commissioner of Taxation* v. *Higgins* (1). Sec. 31 (2) (*b*) should be construed as though the word " and " were read as " or." Beneficiaries are taxed under sec. 31 (1) and not under sec. 31 (2) (*b*) and, therefore, the trustees are not liable to be taxed. As to the order of the Supreme Court authorizing the acceptance of the premium :—Under the *Rules of the Supreme Court* there is no power to make an order against persons not present and who have not been served. So that the order is merely a protection to the trustees and does not bind the beneficiaries. There is an alternative argument as to the rate of tax applicable. If the taxpayer is liable the rate is wrong. The taxpayer should have been assessed at the average rate ascertained under sec. 13 (2). In the five previous years the trustees paid no tax at all, but the beneficiaries did, and the trustees were taxpayers by virtue of the payments made by the beneficiaries, and are entitled to have the average income of the trust estate for the past five years assessed (sec. 4, definition of " taxpayer " ; sec. 89 (*a*) ; *Howey* v. *Federal Commissioner of Taxation* (2)).

Alderman, for the respondent. The trustees are not entitled to the benefit of the averaging provisions. There is no year but the

(1) (1930) 44 C.L.R. 297, at pp. 307-309. (2) (1930) 44 C.L.R. 289.

year in question that can be a first average year under sec. 13 (7). That provision disposes of the contention as to an average income. It does not appear from the case that any beneficiary had to pay any tax. His income may have been assessable, but it does not appear that it was taxable. The trustee must be assessed unless there is some person who answers all the descriptions in sec. 31. Here there is no one who answers any one description. The trustee is liable unless there is a person who is presently entitled, in actual receipt and liable as a taxpayer. Unless those requirements are fulfilled the trustee is liable under sec. 31 (2) (*b*). There is no person other than the trustee in actual receipt of this money (*In re Mallen*; *Executor Trustee and Agency Co. of South Australia* v. *Wooldridge* (1)). If the trustee keeps the money then he is the one who can be assessed. The Legislature imposes a liability on the person who has actually received the money during the year. The word "and" in sec. 31 (2) (*b*) should not be read as "or." The order of the Supreme Court authorizing the acceptance of this premium does not affect the liability of the trustee to taxation.

Mayo K.C., in reply. The policy of taxing trustees has changed since 1927. If the trustee is taxed on the whole of the income, it will mean that the tax will be based on a high rate. The order of the Supreme Court was made under sec. 69 of the *Administration and Probate Act* 1919. Under sub-sec. 5 of that section the order merely operates as a protection to the trustee and does not affect the beneficiaries. So far as the present case is concerned it does not matter whether the premium was income or capital. Under sec. 16 (*d*) of the *Income Tax Assessment Act* the premium is treated as assessable income.

Cur. adv. vult.

The following written judgments were delivered:— Aug. 4.

GAVAN DUFFY C.J. AND STARKE J. Margaret Pearson died on 15th July 1898, leaving a will whereby she directed her trustee to stand possessed of her residuary trust moneys and her real estate upon trust to pay the income of one equal sixth part to each of her

(1) (1929) S.A.S.R. 154.

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six daughters for life and, from and after the death of her said daughters or any or either of them, to hold the share of the daughter so dying upon trust for the child or children of the daughter so dying as aforesaid, who being a son or sons should attain the age of twenty-one years or being a daughter or daughters should attain that age or marry under that age, in equal shares. The testatrix further directed that her trustee might let any hereditaments for the time being remaining unsold either from year to year or for any term not exceeding ten years at such rent and subject to such conditions as it should think fit, without taking anything in the nature of a fine or premium therefor.

The appellant, the Executor Trustee and Agency Co. of Australia Ltd. is the trustee under this will. The six daughters survived their mother. Three are still alive, but three died before 1st July 1927. Each daughter married in the lifetime of the mother, and had children who were living on the day of the death of the testatrix. The children of the daughters who had died were alive on 1st July 1927, and had attained the age of twenty-one years or had married. In March of 1928 the Supreme Court of South Australia, notwithstanding the provisions of the will of the testatrix, authorized the trustee to accept a tender for the lease of a certain hotel property, part of the said trust estate, for a term of seven years, at a weekly rental of £6, and a premium of £3,300. And it directed that the premium of £3,300 be treated by the trustee as rent, under the lease, paid in advance, and be apportioned, with interest thereon, over the term of the said lease. A lease of the property was accordingly granted, and the premium of £3,300 was paid to the trustee on and between 28th March 1928 and 14th May 1928. The Commissioner of Taxes assessed the trustee to income tax for the financial year 1928-1929, based on income derived in the year commencing on 1st July 1927, and he included in such assessment the sum of £3,300 so received by the trustee.

It is quite immaterial, as it seems to us, to consider whether the Supreme Court had or had not jurisdiction to authorize the lease or whether the lease was within the powers conferred upon the trustee by the will. The sum was in fact received, and was income derived directly from a source within Australia during the twelve months

preceding the financial year for which the assessment was made (*Income Tax Assessment Act* 1922-1928, sec. 13). Again, it does not seem material to consider the question whether a fine paid as consideration for the grant of a lease should go to the life tenant or tenants as a casual profit, or should be apportioned between life tenants and remaindermen (see *Earl Cowley* v. *Wellesley* (1); *Brigstocke* v. *Brigstocke* (2); *Jarman on Wills*, 6th ed. (1910), pp. 1220-1222; *Theobald on Wills*, 8th ed. (1927), p. 618; *Strachan, Law of Trust Accounts* (1911), p. 27; *Sanger on Wills* 1st ed. (1914), p. 119); for the order of the Supreme Court which authorized the lease directs that the sum of £3,300 be treated by the trustee as rent under the lease paid in advance and apportioned with interest thereon over the term of the lease. It is the duty of the trustee to act upon this direction. The tenant or tenants for life will thus take during the time of his or their tenancy for life the amount so apportioned.

The question is whether the trustee can be assessed to and made liable for income tax in respect of the sum of £3,300 or any part of it for the financial year 1928-1929, having regard to the provisions of sec. 31 of the *Income Tax Assessment Act* 1922-1928. That section makes provision for the assessment of beneficiaries and trustees of trust estates. The scheme of the section is that in all cases in which any of the beneficiaries of the trust estate are assessable, then the trustees of that estate shall not be assessable or liable to tax, whilst in cases in which the beneficiaries or any of them are not assessable, then the trustees shall be assessed and liable to the tax. Each beneficiary who is under no legal disability and is presently entitled to a share in the income of the trust estate is assessable. A trustee is liable to be assessed and to pay tax in respect of the income of the trust estate of any beneficiary under legal disability or "to which no other person is presently entitled and in actual receipt thereof and liable as a taxpayer in respect thereof." A suggestion has been made that the word "and" in the phrase "presently entitled and in actual receipt thereof" should be read as "or" (*Federal Commissioner of Taxation* v. *Higgins* (3)), but even then the sentence is

(1) (1866) L.R. 1 Eq. 656. (2) (1878) 8 Ch. D. 357.
(3) (1930) 44 C.L.R., at p. 305.

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elliptical and some words must be supplied to complete the sense. "Income to which a person is in actual receipt thereof" is somewhat unintelligible English, though it is plain enough that what the section intends is "and income of which no other person is in actual receipt and liable as a taxpayer in respect thereof." So construed, the section—whether the conjunction "and" be read as "or" or not—presents no real difficulties. In such a context, the word "and" introduces a new case or category in which the trustee may be assessed or made liable to income tax. Every reason of convenience, and the mutual relations of the various provisions of the section, support this conclusion; whilst the opposite view might lead to double taxation, or at least to some difficulties in the adjustment of tax between the beneficiaries and the trustee.

The facts already set forth establish that the children of the three daughters who had died were, at the time relevant to this assessment, under no disability, and were presently entitled—that is, entitled in estate or interest—to their mother's shares in the income in question here, namely, three-sixths or one-half of the sum of £3,300. Consequently, the trustee has been wrongly assessed in respect of that sum. The three surviving daughters of the testatrix are entitled, for life, each to one-sixth share in this premium or advanced rent of £3,300. The lease was for a term of seven years from 19th April 1928, and these three daughters were entitled to their share of the rent that accrued due between 1st July 1927 and 30th June 1928. The trustee cannot therefore be assessed in respect of any rent or income arising from this lease accruing on and between 19th April 1928 and 30th June 1928. The right of each daughter to any further income or rent depends upon the duration of her life. Therefore, for the financial year 1928-1929, the daughters were not presently entitled to any further part of the premium or rent of £3,300, and to this extent the trustee can be lawfully assessed to income tax.

The first question stated should be answered in the negative, as to £1,650 and as to the shares of the three daughters in the premium or rent accruing on and between 19th April and 30th June 1928. The second question stated in the case should be answered

in the negative. It asks whether the rate of tax should be applicable to the average taxable income over the preceding five years. All that is necessary on this question is to refer to sec. 13, sub-secs. 6 and 13.

RICH J. This is a case stated by *Starke* J. on an appeal from the Board of Review under the *Income Tax Assessment Act* 1922-1929. The Board of Review confirmed the Commissioner's assessment and overruled an objection made by the taxpayer to the inclusion in the assessable income of a premium taken upon the grant of a lease. The appellants are trustees under a will and the assessment was made upon them in purported pursuance of sec. 31 (2) of the *Income Tax Assessment Act* 1922-1929. Under the trusts upon which they held the leased land the beneficial interest is as to one moiety vested in possession absolutely and as to the other moiety it stands limited in succession to the life tenant and remaindermen. The power of leasing did not permit the trustees to " take anything in the nature of a fine or premium " for a lease. But the trustees applied *ex parte* under sec. 69 of the *Administration and Probate Act* 1919-1922 (S.A.) for an order authorizing them to accept a tender for a lease at a rent of £6 per week and a premium of £3,300. This statutory provision has the same effect as *Lord St. Leonard's Act* and the Amendment Act of 1860 in providing protection for the trustees, but an order made under it, at any rate when made *ex parte*, cannot bind the rights of the beneficiaries *inter se*. It does not appear what were the circumstances relied upon in support of the application for an order authorizing a lease outside the power, but apparently the facts were considered strong enough to warrant an application of the doctrine of *In re New* (1) (compare *In re Weate* ; *Weate* v. *Weate* (2) ; *In re Higgins* ; *Higgins* v. *Higgins* (3)), for no statutory power has been drawn to our attention. In New South Wales, however, provision has been made in sec. 36 (5) of the *Trustee Act* 1925 empowering a trustee to take a bonus or fine in respect of the lease of licensed premises and authorizing the apportionment of the bonus or fine over the period of the lease as if it were rent. The order made

(1) (1901) 2 Ch. 534.
(2) (1906) 23 N.S.W.W.N. 101.
(3) (1911) 11 S.R. (N.S.W.) 276.

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in this case empowered the trustee to accept the premium, and directed that it should be treated as rent under the lease paid in advance and apportioned with interest over the term. The result clearly enough was to enable the trustees to accept a premium and, the premium being accepted, the rest of the order properly expressed the apportionment or distribution of the premium which on ordinary principles must be made between life tenant and remaindermen. The life tenant is entitled to all the casual and current profits which arise before the determination of his estate except in so far as the trust instrument otherwise provides, but in the absence of particular provision he is not entitled to immediate payment of moneys representing consideration given for the future use of the land possibly extending beyond the duration of his estate, for a premium involves a reward to the lessor for the grant of the particular interest or benefit obtained by the lessee (*Australian Mercantile Land and Finance Co.* v. *Federal Commissioner of Taxation* (1)). In this particular case, for a seven years' lease, £3,300 was paid in cash, although the rent reserved was only £312 per annum. If the premium had been spread over the term as rent the annual revenue for the land would have been more than doubled. It is obvious that a life tenant, who might die to-morrow, could not be permitted to receive the premium representing, as it largely would, the future value of the land which would otherwise enure to the remainderman. The application of these principles may be difficult in cases where a settlement includes estates or hereditaments which, apart from the powers of the trustees, have incident to them the irregular but recurrent payment of fines: Such a case was *Brigstocke* v. *Brigstocke* (2), which appears to have occasioned some difficulty among text-writers (see the note on p. 28 of *Strachan, Trust Accounts* (1911)), but which has been sufficiently explained by the observation made in the course of argument by *Jessel* M.R. himself, namely, that the lease was perpetually renewable (3). But the present case is a plain case in which a large sum of money representing the consideration in advance for the future use of the land over a long term has been taken by the trustees themselves under an authority based upon the supposed necessity of

(1) (1929) 42 C.L.R. 145, at p. 153. (2) (1878) 8 Ch. D. 357.
(3) (1878) 8 Ch. D., at p. 362.

conserving the interests of all concerned. It follows, therefore, that as to one moiety of the premium it was uncertain at the time it was taken how much would fall to remaindermen and how much to life tenant. It was paid to the trustees during the year of income upon which the assessment was based, and the Commissioner included the amount of the premium except so much as was referable to the few months which elapsed between its receipt and the end of the year of income. He did this, acting under par. (*b*) of sub-sec. 2 of sec. 31 of the *Income Tax Assessment Act* 1922-1928, presumably upon the ground that in view of the order the premium, subject to the exception mentioned, was 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. As to one moiety of the estate he was clearly right, because at the end of the year of income it was not ascertained whether life tenant or remaindermen would receive any or how much of the premium. But as to the other moiety the beneficiaries in whom an absolute interest had vested in possession were presently entitled. Being presently entitled, they were by virtue of sub-sec. 1 liable as taxpayers in respect thereof; for sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1928 gives the premium the character of income for the purposes of the tax. But the Commissioner contends that the trustees are also liable in respect of this moiety because par. (*b*) of sub-sec. 2 of sec. 31 requires the inclusion in their assessment of income of the trust estate unless it can be said of it not only that some other person is presently entitled thereto and liable as a taxpayer in respect thereof but also that that other person is in actual receipt thereof. In justification of this construction the Commissioner fastens upon the copulative "and," which he says must mean that some other persons should be both presently entitled, in actual receipt and liable as a taxpayer in respect of the income, before it can be excluded from the trustees' assessment. On two previous occasions I have had an opportunity of considering the difficulty occasioned by this conjunction: see *Federal Commissioner of Taxation* v. *Higgins* (1) and *Howey* v. *Federal Commissioner of Taxation* (2). In the former case I expressed the opinion, at p. 305, that a confusion had occurred and that the

(1) (1930) 44 C.L.R. 297. (2) (1930) 44 C.L.R. 289.

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disjunctive " or " was probably intended. The argument in the present case has confirmed this opinion. Nothing is more common than a confusion between " and " and " or " in cumulative conditions, particularly when a negative form of statement is adopted. The reasons for this construction are sufficiently stated in the argument of counsel in *Higgins' Case* (1) (which is well reported). Accordingly I am of opinion that as to one moiety of the premium the Commissioner's assessment was wrong. Another question which was argued was whether the averaging provisions contained in sec. 13 should be applied to the assessment. The trustees neither carried on a business nor were assessable to income tax in previous years. I do not think they can rely upon the inclusion in their beneficiaries' assessments of the income which passed through the hands of the trustees. In my opinion it follows from sub-secs. 6 and 13 of sec. 13 that the provisions of sec. 13 cannot apply.

I answer the first question in the case stated: Not in respect of the whole sum of £3,207 but in respect of a moiety thereof only. I answer the second question: No.

DIXON J. During the year ended 30th June 1928 the beneficial interest in the trust property, as to three undivided one-sixth parts, stood limited to tenants for life and remaindermen, and, as to the other three undivided one-sixth parts, stood vested in possession in remaindermen indefeasibly. The trustee was empowered by the trust instrument to lease realty for terms not exceeding ten years at such rent as the trustee should think fit without taking anything in the nature of a fine or premium therefor. The trust estate included some licensed premises for which the trustee received a tender for a lease of seven years at a weekly rent of £6 and at a premium of £3,300. Such a lease was outside the power (see *Booth* v. *dBeckett* (2); *Clark* v. *Smith* (3); *Bowes* v. *East London Waterworks* (4); *In re Mallen* (5).) However, upon an *ex parte* application, made apparently under sec. 69 of the *Administration and Probate Act* 1919-1922 (S.A.), the trustee obtained an order that in the

(1) (1930) 44 C.L.R. (see pp. 308-310).
(2) (1863) 1 Moo.P.C.C. (N.S.) 201, at p. 222; 15 E.R. 676, at p. 684.
(3) (1842) 9 Cl. & F. 126, at p. 142; 8 E.R. 363, at p. 369.
(4) (1821) Jac. 324, at p. 330; 37 E.R. 873, at p. 875.
(5) (1929) S.A.S.R., at p. 163.

circumstances shown it be authorized to accept the tender notwithstanding the provision in the trust instrument that the trustee might let the hereditaments without taking anything in the nature of a fine or premium therefor, and that the premium be treated by the trustee as rent under the lease paid in advance and be apportioned with interest thereon over the term of the lease. The order operates as a full protection to the trustee, but, in my opinion, it does not bind the rights of the beneficiaries *inter se*. This circumstance, however, is unimportant, because the direction that the premium should be treated as rent and be apportioned over the period of the lease is a correct application of the principle upon which the actual rights of life tenant and remaindermen are adjusted. The apportionment concerns only the three one-sixth interests that remain limited in succession to tenant for life and remainderman. The three shares the remainders in which have become vested in possession are unaffected. The beneficiaries are indefeasibly entitled to these interests, and no facts appear upon the case stated which would disable them from demanding at once their shares of the actual net revenue of the estate.

On the other hand, a tenant for life is not entitled as of course to a premium paid by a lessee. "The fine is merely the purchase-money of the land for a term of years (*Shepheard* v. *Beetham* (1)), paid in advance instead of being spread over a number of years as rent" (*Farwell* on *Powers*, ch. XVII., sec. 16, 3rd ed. (1916), at p. 660). The premium was paid as consideration for the grant of the lease. In effect, it was rent paid in advance which the remainderman might otherwise have received. Accordingly, so much of it as is attributable to the shares settled in succession should be apportioned between the life tenants and the remaindermen (*Strachan, Law of Trust Accounts* (1911), p. 27; see per *Younger* J. in *In re Wix*; *Hardy* v. *Lemon* (2), and compare *In re Baring*; *Jeune* v. *Baring* (3); per *Buckley* L.J. in *In re Lacon's Settlement*; *Lacon* v. *Lacon* (4), and per *Parker* J., *In re Rodes*; *Sanders* v. *Hobson* (5). The premium is not a casual recurrent profit of the estate which cannot be regarded as the consideration for the future use of the

(1) (1877) 6 Ch. D. 597.
(2) (1916) 1 Ch. 279, at pp. 287, 288.
(3) (1893) 1 Ch. 61, at p. 69.
(4) (1911) 2 Ch. 17, at p. 23.
(5) (1909) 1 Ch. 815, at p. 818.

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land, as the fines and heriots in *Brigstocke* v. *Brigstocke* (1). These fines and heriots were payable under a covenant requiring successive tenants for life each to grant a perpetually renewable lease for ninety-nine years if the tenant for life granting it so long lived, the fines and heriots being payable on the dropping of each life. Again the premium does not form part of the income of a business conducted by trustees like the brewer's business in *In re Mallen* (2). It follows that the tenants for life were not in 1928 presently entitled each to one of the three one-sixth shares in the premium. The extent to which each would become entitled to moneys arising from the premium would depend upon the duration of her life. On the other hand, the remaindermen in whom three one-sixth shares of the trust property had become indefeasibly vested in possesson were in 1928 presently entitled to the other three one-sixth shares in the premium.

Sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1928 provides that the assessable income of any person shall include money derived by way of consideration in the nature of premiums demanded and given in connection with leaseholds. There can be no doubt that the premium of £3,300 answered this description. For the financial year succeeding the twelve months in which the trustee received the premium, the Commissioner made an assessment upon the trustee in which the whole of the premium was included as assessable income. In doing so he purported to apply sec. 31 (2). This sub-section enacts that a trustee shall be separately assessed and liable to pay tax in respect of 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 (in effect) the taxable income of the trust estate " and (*a*) which is proportionate to the interest in the trust estate of any beneficiary who is under a legal disability ; or (*b*) to which no other person is presently entitled and in actual receipt thereof and liable as a taxpayer in respect thereof." Except for a very small proportion of the premium, which was attributable to the unexpired period of the year ended 30th June 1928, no person other than the trustee was either presently entitled to three-sixths of the premium or actually in receipt thereof.

(1) (1878) 8 Ch. D. 357. (2) (1929) S.A.S.R 154.

So much of the premium was therefore rightly included in the assessment upon the trustee. But the inclusion of the remaining three one-sixth parts of the premium raises a question of construction upon par. (*b*) of sec. 31 (2). The beneficiaries interested in these shares were presently entitled thereto, and therefore, notwithstanding that they had not received actual payment, they were liable under sec. 31 (2) to be assessed in their individual capacities in respect thereof. It does not appear from the case stated whether upon this footing the assessments of each of the beneficiaries sharing in these three one-sixth parts of the estate would, or would not, result in a taxable income. But no point was made of this, and I think we are entitled to assume that if, in ascertaining the assessable income of each beneficiary, his interest in the premium was included he would be liable to assessment in respect of a taxable income. If so, the beneficiaries unquestionably answer the description of the words of par. (*b*) of sec. 31 (2) " other person . . . liable as a taxpayer in respect thereof." Accordingly the question arises whether, upon the true construction of sec. 31 (2) (*b*), a trustee is liable to be separately assessed and to pay tax in respect of that part of the income of the trust estate of which no other person is in actual receipt although beneficiaries are presently entitled thereto and so liable as taxpayers in respect thereof. Sec. 31 (1) provides that a trustee shall not be liable to pay tax as a trustee, except as provided by the Act, but each beneficiary who is not under a legal disability and who is presently entitled to a share of the income of the trust estate shall be assessed in his individual capacity in respect of his individual interest in what may be described as the taxable income of the trust estate, that interest being aggregated with his other income. Sub-sec. 2 of sec. 31 proceeds to impose upon the trustee a liability to assessment and payment of tax. It might be expected to deal with the remaining income only of the trust estate. Income will be taxed twice if par. (*b*) means to include in the trustee's assessment income of which it cannot be said that there is another person presently entitled who is in actual receipt thereof and liable as a taxpayer in respect thereof. For, if this is its meaning, a beneficiary who is presently entitled but not in actual receipt of the income would be liable to assessment and payment of tax in respect

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of the income under sub-sec. 1 of sec. 31, while at the same time the trustee would be liable under par. (*b*) of sub-sec. 2 to assessment and payment of tax in respect of the same income because there is no person in actual receipt thereof. No interpretation of a taxing Act should be adopted which results in the imposition of double taxation unless the intention to do so is clear beyond any doubt. The arrangement and the substance of the provisions contained in sub-sec. 1 and in sub-sec. 2 of sec. 31 suggest very strongly that they were intended to be complementary and mutually exclusive. The object of sub-sec. 1 is plainly to define the liability of the beneficiary in order to ensure that, whether it reaches his hands or not, all income to which a person is presently entitled shall be included in his assessment so that it may not escape aggregation.

Under sub-sec. 3 special provision is made to prevent even persons under a legal disability escaping aggregation notwithstanding their exclusion from sub-sec. 1, but sub-sec. 3 contains a special proviso to avoid double taxation. Persons who actually receive income are liable to be taxed under sec. 13 whether they are, or are not, presently entitled thereto in point of law. It is not unreasonable to suppose that in par. (*b*) the actual receipt of income is mentioned in order to exclude from the trustee's assessment income which would be taxed upon this ground in the hands of the person who received it. It is true that sub-sec. 4 provides specially that recipients of income under discretionary trusts shall be deemed to be presently entitled, but it may have been considered desirable to make it clear that such persons came within the sub-section. The difficulty in par. (*b*) of sub-sec. 2 lies in the fact that literally it appears to require the inclusion in the trustee's assessment of all income of which it cannot be said that there is some other person who is not only presently entitled thereto but also in actual receipt thereof and liable as a taxpayer in respect thereof. To avoid this, it is suggested that it should be read: "to which no other person is presently entitled and (no other person is) in actual receipt thereof." It should then be understood to mean to include in the trustee's assessment that income only which another person is neither presently entitled to nor in actual receipt of. Another explanation of the provision is that the word "and" was used instead of the word

" or ", after the words " presently entitled ". This explanation was given during the argument in *Federal Commissioner of Taxation* v. *Higgins* (1), and it certainly seems to resolve all difficulties. The word " and " has been construed as " or " in order to avoid a harsh and unreasonable interpretation where it appeared probable, as it does here, that a confusion had occurred between the two conjunctions. See *Golden Horseshoe Estates Co.* v. *The Crown* (2). But, whichever explanation be adopted, I am clearly of opinion that the provision does not mean to make the trustee liable in respect of income to which a beneficiary is presently entitled as a taxpayer in respect thereof. It follows from this opinion that the assessment erroneously included so much of the income of the trust estate consisting of the premium as represents the three one-sixth interests of the remaindermen which have become vested in possession.

I think the first question in the case should be answered: " Not in respect of the whole sum, but in respect of one-half part thereof." The second question should, in my opinion, be answered: " No "; because, assuming that sub-secs. 2 to 13 of sec. 13 otherwise apply, yet sub-secs. 6 and 13 make it impossible for the trustee to rely upon any previous years.

EVATT J. This appeal concerns income derived by the appellant trustee in the year ending June 30th, 1928. The trust estate consisted of six equal parts which had been settled in trust upon the six daughters of Margaret Pearson for life and then over to their respective children. In the relevant income year three life tenants still survived, and the three remaining parts of the estate were being held in trust for the remaindermen—the issue of the three deceased daughters.

Part of the trust estate consisted of licensed freehold premises. During the income year the trustee leased the premises for a term of seven years from April 19th, 1928, in consideration of the immediate payment of £3,300 by way of premium and a weekly rental of £6. The £3,300 was paid to the trustees between March 28th, 1928, and May 14th, 1928. None of it was paid to any of the beneficiaries during the income year.

(1) (1930) 44 C.L.R., at pp. 305, 308, 309.
(2) (1911) A.C. 480, at pp. 487, 488.

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The Board of Review dismissed the trustee's appeal and confirmed the assessment. In my opinion they were right.

The first question is whether the premium of £3,300 was "income" of the trust estate. Sec. 16 (*d*) of the *Income Tax Assessment Act* 1922-1928 treats as included in the "assessable income of *any* person," premiums demanded and given "in connection with" leasehold estates. It was not always clear whether a premium received by the owner of a freehold for granting a leasehold interest therein should be regarded as being in the nature of income or of capital or as a receipt partaking of the nature of both and apportionable between income and capital. But in the case of the statute under consideration, the knot was cut and not unravelled. All of the £3,300 must be regarded as income of the trust estate, for there can be adduced no satisfactory reason for excluding from the operation of sec. 31 the general rule laid down in sec. 16 (*d*).

The next question is whether the separate assessment against the trustee of the £3,300 is justified by sec. 31 (2) (*b*) of the Act.

How much of the £3,300 was "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."

All of the £3,300 was part of the income of the trust estate. The three remaindermen, all being *sui juris* became "entitled" to receive one-half of it—£1,650 in all—so soon as it was paid, and, no doubt, the three surviving life tenants became "entitled" to receive some payment in respect of it before the expiry of the income year. But there was no actual receipt of any part of the premium by any one of the beneficiaries during the income year. Why, then, is the assessment of the whole sum of £3,300 against the trustee erroneous?

The answer suggested is that, as to one-half of the premium at least, the beneficiaries became "presently entitled" and were liable as taxpayers in respect thereof, and that the Commissioner cannot affirm of such half at least that no other person was (*a*) presently entitled and (*b*) liable as a taxpayer in respect of it. All that the Commissioner does say about it is that "no other person" was "in actual receipt thereof." Unless the legislation is redrafted by the Court, that statement is, I think, sufficient.

In my view the plain meaning of sec. 31 (2) (*b*) is that the adjectival phrases "presently entitled," "in actual receipt," "liable as a taxpayer," all qualify the word "person." It is not enough to show that a person became presently entitled to the disputed part of

the income of the trust estate, unless that person actually received it and became liable as a taxpayer in respect thereof. The subsection, as framed, deliberately rejects the notion that the mere proof that some person or another is entitled to receive, and is also liable to pay taxation in respect of, part of the income of the trust estate, enables the trustee to escape liability for such part of the income. The trustee's liability comes into being for all parts of the trust income if it is shown that there is no other person who answers to the threefold description already mentioned. It is said that this view gives rise to double taxation, but the question whether it does so, does not fall for present determination, and, in any event, the words used cannot yield to the policy suggested by the criticism.

It is interesting to observe that the *Income Tax Assessment Act* 1922 was amended in 1923, 1924, 1925, 1927 and 1928, and it is with the Act 1922-1928 that the present controversy is concerned. But sec. 31 (2) (*b*) ran the gauntlet unscathed throughout these years. It is not very convincing therefore to construe the relevant sentence as though the word " and " were read to mean " or ". The repeated use of the conjunctive form of expression can hardly be regarded as accidental.

A reference to sec. 13 makes it clear that the second question should be answered No.

In my opinion the questions should be answered : (1) Yes, all of the said sum ; (2) No.

McTIERNAN J. I agree with the judgment of my brother *Rich*. The first question should be answered thus : Not in respect of the whole sum of £3,207, but in respect of a moiety thereof only. The second question should be answered : No.

Questions answered as follows :—(1) *Not in respect of the whole sum, but in respect of one-half part thereof.* (2) *No. Costs in the appeal.*

Solicitors for the appellant, *Edmunds, Jessop & Ward*.

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

H. D. W.