[HIGH COURT OF AUSTRALIA.]

ROBERTSON AND OTHERS . . . . APPELLANTS;

AND

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

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SYDNEY, *Nov.* 20; *Dec.* 8.

Rich, Starke, McTiernan and Williams JJ.

Land Tax (Cth.)—Land exempted from tax—Land "owned by or in trust for" educational institution—Devise upon trust to pay debts—Creation of fund of income after estate free from debts—Fund to be paid to educational institution—Estate debts unpaid—Land Tax Assessment Act 1910-1937 (*No.* 22 *of* 1910—*No.* 5 *of* 1937), *secs.* 3, 13 (*e*).

Land devised to trustees upon trust to convert, and out of the proceeds of conversion and the income pending conversion to pay the debts of the testator, and when the estate should be free of debts to constitute from the income thereof a fund and to pay the same in perpetuity to a named educational institution, is not, while debts of the testator remain unpaid, "owned by or in trust for" the educational institution, within the meaning of sec. 13 (*e*) of the *Land Tax Assessment Act* 1910-1937.

CASE STATED.

On the hearing of an appeal to the High Court by Arnold William Robertson, Charles Ferdinand Marks, and James Henry Lalor, as trustees of the will of James O'Neil Mayne, deceased, from an assessment to land tax made upon them in that capacity by the Deputy Federal Commissioner of Land Tax, under the *Land Tax Assessment Act* 1910-1937, in respect of lands belonging to or forming part of the estate of the deceased, at the request of the parties, on facts admitted by them, *Williams* J., pursuant to sec. 44M of the Act, stated for the opinion of the Full Court a case which was substantially as follows:—

1. James O'Neil Mayne of Brisbane in the State of Queensland, medical practitioner, died at Brisbane on 31st January 1939.

2. By his last will dated 23rd December 1937 the deceased appointed the appellants, Arnold William Robertson, Charles

Ferdinand Marks and James Henry Lalor, all of Brisbane, to be the executors and trustees thereof.

3. Probate of the will was granted to the appellants by the Supreme Court of Queensland on 10th May 1939.

4. By his will the testator devised the following lands situated in the County of Stanley, Parish of North Brisbane, City of Brisbane, namely the lands (*a*) known as the Arcade property and described as subdivisions 1 and 2 of allotment 17 of section 10 containing 36 perches, and (*b*) known as the Regent property and described as (i) subdivision 2 of allotment 3 of section 2 containing 21.8 perches, and (ii) allotment 17 of section 2 and subdivision 2 of allotment 16 of section 2 containing 1 rood 17.8 perches (but subject to any encumbrances and leases which might be subsisting on or affecting any such land at the time of his death), his two-thirds interest in the freehold property known as "Moorlands" (subject to a life interest in favour of his sister Miss Mary Emelia Mayne), and all other his real and personal estate property and effects of whatsoever nature and wheresoever situate not thereinbefore specifically mentioned (all of which are therein referred to as "my residuary estate") to his trustees in trust to convert with full power to postpone conversion.

5. By his will the testator then provided as follows:—"3. Out of the moneys arising from the sale calling in or conversion of or forming part of my residuary estate and the net rents profits and annual income arising therefrom pending such sale calling in or conversion to pay my funeral and testamentary expenses and debts including amounts if any due or owing on mortgage on any part of my estate. 4. As soon after my death as my estate shall be free of all debts (including debts due or owing under mortgages executed by me) to constitute from the net rents, profits and annual income arising from my residuary estate and from the net rents profits and annual income of the net proceeds of the sale and realization thereof should all or any part of it be sold a fund and to pay the same to the University of Queensland for ever to be applied for the maintenance and upkeep of the medical school within the said university and in particular for the following purposes:—(*a*) for the purchase of equipment for the use of such medical school, (*b*) for the establishment and maintenance of chairs of medicine and surgery, (*c*) for the endowment of medical research work and the granting of scholarships within the said school: And I declare that such endowments and scholarships shall be available to any graduate or undergraduate of the said university or to such other person as the senate of the said university and my trustees shall think fit. 5. I declare that the receipt of the registrar of the said university for all

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moneys so paid by my trustees to the said university shall be a good and sufficient discharge therefor and it shall not be necessary for my trustees to see to the application thereof. 6. I declare that any moneys owing which shall be owing by me at the time of my death upon mortgages and also any moneys raised by my trustees in exercise of the power to mortgage hereinafter contained shall not be a debt or debts within the meaning of the provisions of clause 4 of this my will but in the computation of the net rents profits and annual income mentioned in such clause there shall be first deducted from the gross income such a sum or sums as shall be sufficient to pay and satisfy the interest accruing during the period in which such rents profits and annual income arose and also such further sum as shall be sufficient to pay and satisfy such mortgage or mortgages in equal annual instalments over the period or unexpired period of such mortgage or mortgages."

6. The University of Queensland is a body corporate with perpetual succession and a common seal incorporated under *The University of Queensland Act* of 1909 and is a charitable or educational institution carried on solely for charitable or educational purposes and not for pecuniary profit.

7. The testator was at the date of his death the registered proprietor for an estate in fee simple of the lands specifically described in par. 4 hereof and also of other lands particulars whereof are as follows :—Subdivision 116 of allotment 19 situate in the County of Stanley Parish of Enoggera City of Brisbane containing 16 perches (one undivided moiety), subdivision 2 of allotment 20 situate in the County of Stanley Parish of Enoggera containing 14 acres 1 rood 35 perches (two undivided thirds), subdivisions 93 to 112 of allotment 19 situate in the County of Stanley Parish of Enoggera City of Brisbane containing 2 acres 3.95 perches (one undivided moiety), all of which said lands are collectively known as "Moorlands"; and also portion 196 situate in the County of Stanley Parish of Yeerongpilly City of Brisbane containing 20 acres 3 roods (one undivided moiety), portion 197 situate in the County of Stanley Parish of Yeerongpilly City of Brisbane containing 15 acres 2 roods 8 perches (one undivided moiety), portion 228 situate in the County of Stanley Parish of Yeerongpilly containing 55 acres, all of which said lands are situate at Moorooka, Brisbane.

8. The value of the said lands (including improvements) at the date of death was sworn for succession and estate duty purposes at over £95,000, and application was made to the Registrar of Titles to transfer the titles to the said lands into the names of the appellants as trustees on 4th August 1939 and 6th February 1940.

9. The lands referred to in par. 4 hereof, namely the lands known as the Arcade property and the Regent property respectively, at the date of death were subject to bills of mortgage registered numbers 863373, 899242 and A52792 in favour of the Australian Mutual Provident Society, the total amount owing thereunder at the date of death being £48,000, which amount is repayable on 1st April 1943.

10. The appellants since the date of death have received the rents and profits of the said lands, all of which rents and profits have been placed to the credit of the bank account of the " Trustees estate late James O'Neil Mayne ".

11. The above-mentioned Miss Mary Emelia Mayne was still alive and in enjoyment of the life interest in the freehold property known as " Moorlands " on 30th June 1939.

12. Save as hereinafter mentioned all the debts of the testator other than the said mortgage debt over the lands had been paid by the appellants prior to 30th June 1939. At that date there were outstanding debts of the testator for (*a*) Queensland State income tax in respect of the period from 1st July 1938 to the death of the testator, which had not been assessed but was subsequently assessed and paid, (*b*) medical expenses amounting to £177 7s., the claim for which was then disputed but was subsequently admitted and paid. Solicitors' costs and fees in connection with the application for probate and executors' corpus commission allowed by the court were also then unpaid.

13. At 30th June 1939 the duties payable in consequence of the death of the deceased, namely the Federal estate duty, the Queensland succession duty, and the Queensland probate duty, had not been assessed. The appellants at that date had made no payment in respect of the Federal estate duty, but had made an interim payment of £1,000 on account of the Queensland duties. The appellants were assessed for Queensland succession duty by notice dated 8th August 1939 in the sum of £565 13s. 5d. The appellants were assessed for Federal estate duty by notice dated 25th September 1939 in the sum of £19 13s.

14. The appellants since the date of death have reduced the mortgage debt by payments to the mortgagee from the fund created by the payment of the rents and profits into the bank account and at 30th June 1939 had so reduced the mortgage debt to the sum of £45,500.

15. The appellants made a return under the *Land Tax Assessment Act* 1910-1937 in respect of the lands held by them as trustees in the estate of the said James O'Neil Mayne on 30th June 1939.

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16. On 8th February 1940 the Deputy Federal Commissioner of Land Tax issued his assessment against the appellants whereby he assessed the appellants to land tax in the sum of £415 18s. 7d. in respect of the lands belonging to or forming part of the estate of the deceased and including the lands referred to in par. 4 hereof as on land owned on 30th June 1939.

17. By notice of objection dated 22nd February 1940 the trustees gave notice that they objected to the assessment dated 8th February 1940 upon, *inter alia*, the following grounds:—1. That the lands (*a*) known as the Arcade property and described as subdivisions 1 and 2 of allotment 17 of section 10 County of Stanley Parish of North Brisbane City of Brisbane containing 36 perches, and (*b*) known as the Regent property and described as (i) subdivision 2 of allotment 3 of section 2 County of Stanley Parish of North Brisbane City of Brisbane containing 21.8 perches and (ii) allotment 17 of section 2 and subdivision 2 of allotment 16 of section 2 County of Stanley aforesaid containing 1 rood 17.8 perches, are lands owned by or in trust for the University of Queensland a charitable or educational institution carried on solely for charitable or educational purposes and not for pecuniary profit. 2. That the said lands are exempt from taxation.

18. The Acting Deputy Commissioner of Taxation disallowed the objection and the appellants requested the commissioner to treat the objection as an appeal and to forward it to the High Court.

The following questions were reserved for the opinion of the Full Court:—

1. Were the lands belonging to or forming part of the estate of the said James O'Neil Mayne deceased, other than the freehold lands known as "Moorlands," lands owned by or in trust for the University of Queensland on 30th June 1939 within the meaning of the *Land Tax Assessment Act* 1910-1937?
2. Were the said lands exempt from taxation on 30th June 1939 for the financial year ended 30th June 1940 within the meaning of the said Act?
3. Were the appellants liable to be assessed to land tax in respect to the said lands for the year ended 30th June 1940 under the said Act?

Lukin, for the appellants. The definition of the word "owned" in sec. 3 of the *Land Tax Assessment Act* is wide enough to cover any equitable interest. The subject lands are "owned" within the meaning of that definition, or are "owned by or in trust for"

the University of Queensland, a charitable or an educational institution carried on solely for charitable or educational purposes and not for pecuniary profit within the meaning of sec. 13 (*e*) of the Act, and, therefore, are exempt from taxation under the Act. The lands are held for the University of Queensland as a *cestui que trust*. Under the law prevailing in Queensland the lands did not pass to the executors, but passed to the trustees as devisees in trust thereof for the University of Queensland; the trust being to apply the proceeds or income of the lands to the university for ever. The mere fact that there was a direction for the payment of debts did not prevent the vesting in the trustees of the subject lands in trust for the charity, the university (*Bacon* v. *Proctor* (1); *Jarman* on *Wills*, 7th ed. (1930), vol. 2, p. 1357)—See also *In the Will of Wright*; *Westley* v. *Melbourne Hospital* (2). There was not any intervening life estate; the only intervention, if it be such, was the direction to pay debts. The effect is the same as if the lands had been devised directly to the university (*Attorney-General* v. *Skinners' Co.* (3)). *Barnardo's Homes* v. *Special Income Tax Commissioners* (4) is distinguishable. The subject lands constitute real estate charged with the payment of debts and devised subject to that charge; this is in the fourth class in the application of assets under the old order. The words "in trust" can be used in respect of trustees holding property: See *Trustees and Executors Act of* 1897 (Q.), sec. 49.

Kitto, for the respondent. The matter must be determined upon the true construction of the will and the intention manifested by the testator. That intention, as manifested in the will, is an intention to create two successive trusts, namely, (*a*) a trust to pay out of both capital and income the debts, funeral and testamentary expenses, and, only on the conclusion of that trust, (*b*) a trust to pay the income to the university. Nothing turns upon the fact that the subject lands do not pass to the executors. The second trust does not begin to operate unless and until the first trust has been fully discharged; until then the university is not entitled to any benefit under the will. The trust for the payment of debts is in all senses a trust. The creditors are not inaptly termed *cestuis que trust*. They could come into the equity court and enforce that trust in their favour (*Ashburner, Principles of Equity*, 2nd ed. (1933), p. 437). There being debts unpaid at 30th June 1939, it follows that at that date the trust to pay debts was still current. *Jarman* on *Wills*, 7th ed. (1930),

(1) (1822) Turn. & R. 31, at p. 40 [37 E.R. 1005, at p. 1008].
(2) (1917) V.L.R. 127.
(3) (1827) 2 Russ. 407, at p. 435 [38 E.R. 389, at p. 399].
(4) (1921) 2 A.C. 1.

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vol. 2, p. 1357, and *Bacon* v. *Proctor* (1) deal with the question whether a devise is vested in interest or is still contingent and afford no assistance when the question is whether the interest given is vested in possession. It is shown in *Corbett* v. *Inland Revenue Commissioners* (2) that even where, as here, a trust of income is being dealt with, the doctrine of *Barnardo's Homes* v. *Special Income Tax Commissioners* (3)—i.e., that while the trust is still operative the income is the income of the trustee and not of the beneficiary—still applies. Under the terms of the will the university has no right to the income during the period necessary for the clearing of debts, so that, so far as land tax is concerned, this case is analogous to *Glenn* v. *Federal Commissioner of Land Tax* (4). The distinguishing feature in *Glenn's Case* (4) was pointed out by *Dixon* J. in *Molloy* v. *Federal Commissioner of Land Tax* (5). Here, also, the trustees have prior duties before any moneys may be paid to the university. The matter neither comes within the definition of "owner" nor within the words "in trust" in sec. 13 (*e*) of the Act.

Lukin, in reply. It is not necessary in this case, as in *Glenn's Case* (4), to show that the university is an owner. There was not any trust for the payment of debts; therefore the university did in fact receive the whole benefit of the rents and profits.

Cur. adv. vult.

Dec. 8.

The following written judgments were delivered:—

RICH J. This case was stated pursuant to sec. 44 (*m*) of the *Land Tax Assessment Act* 1910-1940 in an appeal by the appellants—the "executor-trustees" of the will of the late J. O. Mayne—against an assessment under the *Land Tax Assessment Act* 1910-1937 on land belonging to the testator. The appellants in their return for the financial year 1940 claimed exemption for certain parcels of the land on the ground that they were "owned by or in trust for" the University of Queensland on 30th June 1939 (*Land Tax Assessment Act* 1910-1937, sec. 13 (*e*)). The university is incorporated under the provisions of the *University of Queensland Act* 1909, and "is a charitable or educational institution carried on solely for charitable or educational purposes and not for pecuniary gain." The commissioner disallowed the claim for exemption, whereupon the appellants appealed, and this case was stated on the hearing of the appeal.

(1) (1822) Turn. & R. 31 [37 E.R. 1005].
(2) (1938) 1 K.B. 567.
(3) (1921) 2 A.C. 1.
(4) (1915) 20 C.L.R. 490.
(5) (1937) 58 C.L.R. 352, at pp. 360, 361.

The answers to the questions submitted in the case depend mainly upon the proper interpretation of the will, the material clauses of which are in effect these :—After a devise and bequest of all his real and personal estate " unto and to the use of my trustees hereinafter named " (in the last clause they are named and appointed executors) the testator made a bequest of personalty to his sister, and then proceeds to deal with his real estate and residuary personalty. In clauses 2 and 3 provision is made for conversion (with power to postpone) and out of the moneys from any such sale or conversion of his residuary estate and the net rents, profits and annual income arising therefrom pending sale to pay his funeral and testamentary expenses and debts, including amounts, if any, due or owing on mortgage on any part of his estate. Clause 6 creates a fund of income—as soon as his estate should be free of all debts, including debts under mortgages executed by him, upon trust to constitute from the net rents, profits and annual income arising from his residuary estate and from the net proceeds of any sale or realization thereof, if all or any part of it be sold, a fund, and to pay the same to the University of Queensland for ever for the maintenance and upkeep of the medical school within that university. By clause 6 the testator declared that moneys owing by him at his death on mortgages and moneys raised by his trustees under the power to mortgage in his will should not be a debt or debts within the meaning of clause 4, but in the computation of the net rents, profits and annual income in such clause there should be first deducted from the gross income such a sum or sums as should be sufficient to pay and satisfy the interest accruing during the period in which such rents profits and annual income arose, and also such further sum as should be sufficient to pay and satisfy such mortgage or mortgages in equal annual instalments over the period or unexpired period of such mortgage or mortgages.

At the crucial date—30th June 1939—the amount owing on the mortgages existing at the date of the testator's death over portion of the testator's residuary real estate had been reduced by payments out of the " income fund " constituted by clause 4 of the will. Apart, however, from the mortgage debts, there were other outstanding debts—those mentioned in par. 12 of the case, and unascertained liabilities of the estate to the Federal and State duties referred to in par. 13. In these circumstances, having regard to the express provisions of clause 4, the university was not entitled to any payment out of the " income fund," as its right only arises when these outstanding debts and liabilities (other than the mortgages) are paid and discharged. Moreover, the general principle is applicable that

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until the administration of an estate is complete and the ultimate residue ascertained the only right of a beneficiary is to have the estate administered. During administration a beneficiary is not specifically entitled to any asset in the estate, and the income is not the beneficiary's income, but the executors' income : Cf. *Lord Sudeley* v. *Attorney-General* (1) ; *Barnardo's Homes* v. *Special Income Tax Commissioners* (2) ; *Corbett* v. *Inland Revenue Commissioners* (3).

In my opinion, the appellants are not entitled to the exemption claimed.

Questions 1 and 2 should be answered : No, and question 3 : Yes. Costs—costs in the appeal.

STARKE J. Case stated under the provisions of the *Land Tax Assessment Act* 1910-1940.

The question is whether certain lands, in respect of which the appellants have been assessed to land tax pursuant to the provisions of the *Land Tax Assessment Act* 1910-1937, are exempt from such tax.

By the Act, sec. 13 (*e*), all land owned by or in trust for a charitable or educational institution, however formed or constituted, carried on solely for charitable or educational purposes and not for pecuniary profit, is exempt from taxation under the Act. One James O'Neil Mayne, of Queensland, by his will gave, devised, and bequeathed all his real and personal estate and effects unto and to the use of his trustees upon certain trusts. The trusts are set forth in the case, but those material to this appeal are as follows :—As to his residuary estate (which included some lands specifically mentioned) in trust to sell and convert and out of the moneys so arising and the annual income arising therefrom pending sale and conversion to pay his funeral and testamentary expenses and debts and as soon after his death as his estate should be free of debts to constitute from the net rents, profits and annual income arising from his residuary estate and from the net rents, profits and annual income of the net proceeds of the sale and realization thereof, should all or any part of it be sold, a fund, and to pay the same to the University of Queensland for ever to be applied for the maintenance and upkeep of the medical school. The will contained power to postpone the sale and conversion of the residuary estate, but expressed a desire that none of his Brisbane properties (part of his residuary estate) should be sold unless absolutely necessary or more beneficial to the objects of the trust than the retention of the property.

(1) (1897) A.C. 11. (2) (1921) 2 A.C. 1.
(3) (1938) 1 K.B. 567.

The appellants are the trustees and executors under the will of James O'Neil Mayne, and made a return of all lands held by them under the will at midnight on 30th June 1939. The lands included in the residuary estate of the testator were included in this return.

In Queensland, it appears that the legal estate in real property does not, as in other States, vest in the executor or administrator of a deceased person by virtue of his office. An owner of real estate in Queensland may, however, dispose of it by his will, and the devisee derives title and estate from the will itself. In the present case it was contended that the legal estate in the residuary real property of the testator was vested in the University of Queensland by force of the terms of the will, which thus became the owner both at law and in equity of the lands forming part of the residuary estate of the testator. This contention cannot be sustained. The provisions of the *Succession Act* 1867 of Queensland, sec. 60, the terms of the devise " unto and to the use of my trustees . . . upon the trusts," and the active duties imposed upon the trustees by the will, make it clear, I think, that the devise to the trustees vests in them the legal estate in fee simple in the residuary real estate devised by the testator (*Jarman* on *Wills*, 6th ed. (1910), pp. 1806-1808, 1811-1815; *Theobald* on *Wills*, 6th ed. (1905), pp. 415-419)—Cf. *Van Grutten* v. *Foxwell* (1). Consequently the trustees, and not the University of Queensland, are the owners at law of the lands forming part of the residuary estate of the testator within the meaning of the *Land Tax Assessment Act* 1910-1937, sec. 13 (*e*), coupled with the definition of " owner " in sec. 3.

Next it was contended that the university was the beneficial owner of the lands, or at least entitled to receive the rents and profits of the land, and so within the exemption contained in sec. 13 (*e*), coupled with the definitions in sec. 3. This contention is disposed of by the reasoning of such cases as *Lord Sudeley* v. *Attorney-General* (2); *Barnardo's Homes* v. *Special Income Tax Commissioners* (3); *Glenn* v. *Federal Commissioner of Land Tax* (4)—Cf. *Executor Trustee and Agency Co. of South Australia Ltd.* v. *Deputy Federal Commissioner of Taxes* (*S.A.*) (5). The gift to the university is contained in the direction to constitute a fund so soon as the testator's estate is free of debts, and until the estate is cleared the university has no right to the enjoyment of the residuary real estate or the rents and profits therefrom.

The questions stated should be answered:—1: No. 2: No. 3: Yes.

(1) (1897) A.C. 658, at p. 683.
(2) (1897) A.C. 11.
(3) (1921) 2 A.C. 1.
(4) (1915) 20 C.L.R. 490.
(5) (1939) 62 C.L.R. 545, at p. 566.

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McTIERNAN J. I agree with the judgment of *Rich* J., and have nothing to add.

WILLIAMS J. James O'Neil Mayne died at Brisbane on 31st January 1939. By his will he devised and bequeathed his real and residuary personal estate unto and to the use of his trustees, the appellants, upon trust for conversion with power to postpone conversion, and (clause 4) out of the moneys arising therefrom and the net rents, profits and annual income arising therefrom pending conversion to pay his funeral and testamentary expenses and debts including amounts if any due or owing on mortgage on any part of his estate, and as soon after his death as his estate should be free of all debts (including debts due or owing under mortgages executed by him) to constitute from the net rents, profits and annual income arising from his estate (other than Moorlands, in which he gave his sister a life estate) and from the net rents, profits and annual income of the net proceeds of sale and realization thereof should all or any part of it be sold a fund, and to pay the same to the University of Queensland for ever to be applied as therein mentioned. By clause 6 he declared that any moneys owing which should be owing by him at the time of his death on mortgage and also any moneys raised by his trustees in exercise of the power to mortgage contained in the will should not be a debt or debts within the meaning of the provisions of clause 4; but, in the computation of the net rents, profits and annual income mentioned in such clause, there should be deducted from the gross income such a sum or sums as should be sufficient to pay and satisfy the interest accruing during the period in which such rents, profits and annual income arose, and also such further sum as should be sufficient to pay and satisfy such mortgage or mortgages in equal annual instalments over the period or unexpired period of such mortgage or mortgages.

The University of Queensland is a body corporate with perpetual succession and a common seal incorporated under the *University of Queensland Act of* 1909 and is an educational institution carried on solely for educational purposes and not for pecuniary profit.

At the date of the death of the testator some of the residuary real estate was subject to mortgages totalling £48,000, repayable on 1st April 1943. Since the death, the appellants have used the rents and profits to reduce this debt, which on 30th June 1939 stood at £45,500. On the last-mentioned date, there were also outstanding debts of the testator for Queensland State income tax, which had not been assessed but was subsequently assessed and paid, medical expenses amounting to £177 7s., the claim for which was then

disputed but was subsequently admitted and paid, solicitors' costs and corpus commission, while the Federal estate duty and the Queensland succession and probate duties had not been assessed, although an interim payment of £1,000 on account of the Queensland duties had been made.

The appellants made a return under the *Land Tax Assessment Act* 1910-1937 for the year ended 30th June 1940 in respect of the lands held by them as trustees of the estate of the testator on 30th June 1939, in which they claimed exemption for the real estate other than Moorlands under sec. 13 (*e*) of the Act; but the commissioner assessed them on the basis that these lands were subject to tax, and the question for determination on this appeal is whether the commissioner was right or wrong.

Under the law of Queensland real estate does not vest in the executors by statute, but by the will of the testator the legal estate is devised to the appellants upon trust to pay debts. Moreover, the will directs that the debts must be discharged before the fund of income is constituted which is payable to the university in perpetuity. Clause 6, however, provides in effect that the fund will commence to be payable as soon as the debts other than any mortgage debts created by the testator or by the trustees have been discharged, and that the fund will consist of the balance of the income after deducting an amount necessary to pay the interest on these mortgage debts and to provide a sinking fund sufficient, by annual instalments, to discharge them at maturity. What effect this provision for payment of mortgage debts will have upon the rights of the university to claim exemption under sec. 13 (*e*) in subsequent years does not arise on this appeal; because, on 30th June 1939, there were other debts still unpaid, so that the right of the university to receive the fund was not then a right in possession. In order to obtain exemption in any year it is necessary that the university should be able to claim that on the preceding 30th June it had a present right to the beneficial enjoyment of the land or of the rents and profits thereof, whether accompanied by actual physical possession or not (*Glenn* v. *Federal Commissioner of Land Tax* (1); *Adams* v. *Federal Commissioner of Land Tax* (2); *Cooper* v. *Federal Commissioner of Land Tax* (3)). As the income of the fund only became payable to the university when the estate had been cleared of debts other than mortgage debts, the will itself created similar conditions to those which existed in cases like *Barnardo's Homes* v. *Special Income Tax Commissioners* (4) and *Corbett* v. *Inland Revenue Commissioners* (5)—See also *Skinner* v.

(1) (1915) 20 C.L.R. 490.
(2) (1919) 26 C.L.R. 341, at p. 347.
(3) *Ante*, p. 320.
(4) (1921) 2 A.C. 1.
(5) (1938) 1 K.B. 567.

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Attorney-General (1), where the right of the residuary beneficiary or beneficiaries to the income of the residuary estate or the estate itself only became immediate after the residue had been ascertained in due course of administration, although the right would not necessarily be postponed by the existence of mortgage debts (*Inland Revenue Commissioners* v. *Smith* (2)).

The first two questions asked should be answered in the negative and the third in the affirmative.

Questions 1 *and* 2 *answered*: *No, and question* 3: *Yes. Costs, costs in the appeal.*

Solicitors for the appellants, *Thynne & Macartney*, Brisbane, by *Norton, Smith & Co.*

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

J. B.

(1) (1940) A.C. 350, at p. 358.

(2) (1930) 1 K.B. 713.