has no application and the owner, although a trustee, is liable to assessment upon the full unimproved value of the estate in fee simple and not in respect of a lesser interest. The Official Receiver is so liable. For those reasons I agree that the questions in the special cases should be answered as *Rich* J. has announced.

Questions answered accordingly.

Solicitors for the appellant, *Perkins, Stevenson & Co.*

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

J. B.

[HIGH COURT OF AUSTRALIA.]

THE COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

Income Tax (Cth.)—Assessment—Deduction—Life insurance society—Expenditure—"Welfare service"—Consultant medical officers—Expenditure exclusively incurred in gaining premiums—Not deductible from assessable income—Income Tax Assessment Act 1922-1930 (*No.* 37 *of* 1922—*No.* 60 *of* 1930), *sec.* 20 (5).

The taxpayer, a life insurance society, derived income from premiums and from investments and other sources. It sought to deduct from its assessable income expenditure on a "welfare service," which consisted in the voluntary provision by the society of a nursing service for assured persons and in the issue of pamphlets upon matters relating to health, and also expenditure in connection with consultant medical officers who advised the society upon matters relating to its life insurance business and upon information given in the pamphlets issued by it.

H. C. OF A. 1933.

COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Held that the expenditure was exclusively incurred in gaining the premium income within the meaning of sec. 20 (5) (*a*) of the *Income Tax Assessment Act* 1922-1930, and therefore could not be deducted from the assessable income of the Society.

APPEALS from the Board of Review.

These were appeals by the Colonial Mutual Life Assurance Society Ltd. from a decision of the Board of Review confirming assessments to income tax for the financial years 1928-1929, 1929-1930 and 1930-1931, based on the Society's accounting periods ending on the 31st days of December of 1927, 1928 and 1929 respectively.

The facts and arguments sufficiently appear from the judgment hereunder.

Wilbur Ham K.C. and *A. D. Ellis*, for the appellant.

Fullagar, for the respondent.

Cur. adv. vult.

July 17.

STARKE J. delivered the following written judgment :—

These are appeals by the Colonial Mutual Life Assurance Society Ltd. from a Board of Review confirming assessments for the financial years 1928-1929, 1929-1930, 1930-1931, based on the Society's accounting periods ending on the 31st days of December of 1927, 1928 and 1929 respectively.

The principal business of the Society is life insurance. It has a large income derived from premiums in respect of life insurance, from considerations received in respect of annuities granted, from investments, and also from other sources. The liability of the Society to income tax is not in dispute, and the only question in issue on these appeals is whether the expenditure by the Society in respect of certain " welfare services " instituted by it in connection with its business, and in respect of " consulting officers " appointed by it, is, as the Commissioner contends, an expenditure exclusively incurred in gaining premium income, or is, as the Society contends, part of the expenditure incurred in the general management of the business of the company.

Income tax is levied for each financial year upon the taxable income derived directly or indirectly by every resident from all sources, whether in Australia, or, since 1930, elsewhere (Act No. 50 of 1930, sec. 4), but a taxpayer is entitled to deduct all losses and outgoings actually incurred in gaining or producing the assessable income, and in no case is a deduction allowed in respect of money not wholly and exclusively laid out or expended for the production of the assessable income (*Income Tax Assessment Act* 1922-1930, secs. 13, 23 and 25). But a special provision is made for ascertaining the taxable income of a company the principal business of which is life insurance. It is sec. 20 (5) of the *Income Tax Assessment Act* 1922-1930, and it is upon this section that the question before me arises. (See Act No. 46 of 1928, sec. 22 (2).) Sec. 20 (5) provides: "For the purpose of ascertaining the taxable income of a company the principal business of which is life insurance there shall be excluded from the assessment the following amounts—(*a*) all premiums received in respect of policies of life insurance and all considerations received in respect of annuities granted and all income derived from any source whether in or outside Australia which, apart from the provisions of this sub-section, would not be included in the assessment, and all expenditure exclusively incurred in gaining those premiums or considerations or that income; and (*b*) the part of the expenditure incurred in the general management of the business of the company (but not including any expenditure exclusively incurred in gaining or producing the income included in the assessment) which bears to that expenditure the proportion which the sum of the premiums, considerations and income mentioned in paragraph (*a*) of this sub-section bears to the total income of the company derived from any source whether in or outside Australia."

As part of its "welfare service" the Society voluntarily provides a nursing service, which enables skilled nurses to visit assured persons in their own homes and render them assistance both in treatment and in advice; in addition, it issues a series of pamphlets upon matters relating to health and measures to be taken for the prevention and treatment of various complaints. The benefit of this service to the Society is twofold: it attracts clients to the Society; it certainly maintains premium income for the Society,

H. C. OF A. 1933.

COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

and interest-earning power thereon, over longer periods than would otherwise be the case. The Society expended on this service, during 1927, £4,048, during 1928, £3,918, and during 1929, £6,852. The expenditure in connection with consultant medical officers arises in this way: the Society retains medical men, who advise it generally upon matters relating to life insurance and in particular upon reports and statements made with respect to life risks offered, and whether such risks should be accepted, rejected or loaded, upon claims made against the Society under life policies, and upon information given in the pamphlets issued by the Society. The Society expended on consultant medical officers, during 1927, £456, during 1928, £482, and in 1929, £922.

It will be observed that sec. 20 (5) refers to three classes of expenditure: the first, that exclusively incurred in gaining what I may shortly call premium income, the second, that exclusively incurred in gaining or producing the income included in the assessment, and the third, that part incurred in the general management of the business of the company but not including any expenditure incurred in gaining or producing the income included in the assessment. It recognizes that the expenditure of a company is not always exclusively incurred for the production of premium or assessable or non-assessable income, but may be undertaken for the general business purposes of the company, as, for instance, the class of expenditure often referred to as overhead expenses. But the classification of expenditure in sec. 20 (5) is, I think, exhaustive: that which is not exclusively incurred in gaining premium income or assessable income is incurred in the general management of the business of the company. Again, the phrase "any expenditure exclusively incurred in gaining or producing the income included in the assessment" refers us to the provisions of sec. 23 (1) (*a*) and sec. 25 (*e*), which were dealt with by this Court in *Herald and Weekly Times Ltd.* v. *Federal Commissioner of Taxation* (1). *Ward & Co.* v. *Commissioner of Taxes* (2), makes it clear, I think, that it is not enough that the disbursement is made in the course of, or arises out of, or is connected with, or is made out of the profits of, the business. It must

(1) (1932) 48 C.L.R. 113.

(2) (1923) A.C. 145.

be exclusively laid out or expended for the production of the assessable income. But the *Herald and Weekly Times Case* (1) establishes that expenditure repeatedly or recurrently involved in an enterprise or undertaken in order to gain assessable income cannot be excluded as a deduction simply because the obligation to make it is an unintended consequence which the taxpayer desired to avoid. A like construction must, I think, be given to the expression in sec. 20 (5) (*a*) " all expenditure exclusively incurred in gaining those premiums or considerations or that income."

Under the *Income Tax Assessment Act* 1922-1930, sec. 51 (6), the Commissioner or a taxpayer may appeal to the High Court from any decision of the Board which, in the opinion of the High Court, involves a question of law. If some question of law be involved in the decision of the Board, the whole decision of the Board, and not merely the question of law, is open to review (*Ruhamah Property Co.* v. *Federal Commissioner of Taxation* (2)). The question whether the expenditure has been exclusively incurred in gaining premium income or has been incurred in the general management of the business of the company is undoubtedly a question of fact (*Smith* v. *Incorporated Council of Law Reporting for England and Wales* (3)). But if in reaching that conclusion of fact the Board acted upon some principle of law, or acted without any evidence to support it, then a question of law is involved in the decision of the Board (*Smith* v. *Incorporated Council of Law Reporting for England and Wales* (4) ; *Currie* v. *Inland Revenue Commissioners* (5) ; *Rees Roturbo Development Syndicate Ltd.* v. *Inland Revenue Commissioners* (6) ; *Ducker* v. *Rees Roturbo Development Syndicate* (7) ; *American Thread Co.* v. *Joyce* (8) ; *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (9)). The Board has not discussed or disclosed its view of the construction of the Act, but decided the question before it as a mere matter of fact. In my opinion, it is quite impossible to say whether the Board acted upon a right or a wrong construction of the Act, and the question of its construction is involved in these appeals. Again, the taxpayer

(1) (1932) 48 C.L.R. 113.
(2) (1928) 41 C.L.R. 148, at p. 151.
(3) (1914) 3 K.B. 674, at p. 684.
(4) (1914) 3 K.B. 674.
(5) (1921) 2 K.B. 332, at pp. 339-343.
(6) (1928) 1 K.B. 506, at pp. 517, 518.
(7) (1928) A.C. 132.
(8) (1912) 6 Tax Cas. 1 ; (1913) 6 Tax Cas. 163.
(9) (1915) A.C. 433, at p. 465.

H. C. OF A. 1933.

COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

insists that there is no evidence supporting the conclusion of the Board, and that the expenditure in question on these appeals was in truth and on the admitted facts incurred in the general management of the business of the company. Therefore, in my opinion, questions of law are involved in these appeals, and it is competent for this Court to deal with them.

I have sufficiently dealt with the construction of the Act, and now proceed to consider the facts of the case in relation to that construction. It is conceded on both sides, and rightly, I think, that the expenditure was not exclusively incurred in gaining or producing the income included in the assessment. The question is whether it was incurred in the general management of the business of the company, or exclusively incurred in gaining the premium income. In my opinion, the welfare service expenditure was exclusively incurred in gaining the premium income. It is an expenditure connected wholly with the life insurance side of the company's business, its object is to attract life insurance business to the company and consequent premium income, and to retain that income over longer periods of time. It is an expenditure undertaken to gain premium income, and the mere fact that it enures to some extent for other purposes does not alter its real character (*Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1)). In my opinion, too, the expenditure in connection with the consulting medical officers was exclusively incurred in gaining the premium income. It is also an expenditure wholly connected with the life insurance side of the company's business. The advice these officers give is an aid to the company in fixing its premium rates, generally and in particular cases, and the expenditure is incurred for that among other purposes. It is also an aid to the company in ascertaining its liability upon risks in respect of which it has received premiums. The expenditure has little, if anything, to do with the investment side of the company's business; such influence as it has upon the earning power of the company in the way of investments is an indirect consequence of the expenditure; it is not an expenditure undertaken for the general business purposes of the company.

(1) (1915) A.C., at p. 469.

The appeals fail, in my opinion, and must be dismissed with costs.

Appeals dismissed.

Solicitors for the appellant, *Moule, Hamilton & Derham.*

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

H. D. W.

H. C. OF A. 1933.

COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LTD. *v.* FEDERAL COMMISSIONER OF TAXATION.

[HIGH COURT OF AUSTRALIA.]

AUSTIN . . . . . APPELLANT;
DEFENDANT,

AND

ABIGAIL AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS AND PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1933.

SYDNEY, *May* 2, 11.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Will—Construction—Gift to three life tenants in equal shares—Gift to one life tenant revoked by codicil—Gift over—Testacy as to income and corpus of share—"Realize the whole estate"—Infant remaindermen—Intermediate income from share—Maintenance, education or benefit—Accumulations—Acceleration of future interests—Conveyancing Act 1919-1930 (*N.S.W.*) (*No.* 6 *of* 1919—*No.* 44 *of* 1930), *sec.* 36B (1)*—*Trustee Act* 1925 (*N.S.W.*) (*No.* 14 *of* 1925), *sec.* 43*.

In 1928 a testator made his will in which he gave devised and bequeathed "all my estate real and personal" upon trusts to divide the rents and profits of "my estate" equally between his wife, her sister, and his son during their lifetime, and "if either one of these three charges mortgages or assigns their

The *Conveyancing Act* 1919-1930 (N.S.W.), by sec. 36B (1), provides:—"A contingent or future specific or residuary devise or bequest of property, and a specific or residuary devise or bequest of property to trustees upon trust for a person whose interest is contingent or executory shall, subject to the statutory provisions relating to accumulations, carry the intermediate income of that property from the death of the testator except so far as such income, or any part thereof, may be otherwise expressly disposed of."

The *Trustee Act* 1925 (N.S.W.), by sec. 43, provides, so far as material, as