

[HIGH COURT OF AUSTRALIA.]

LLOYD APPELLANT;

AND

THE FEDERAL COMMISSIONER OF LAND TAX RESPONDENT.

IN RE BROWNE; EX PARTE LLOYD.

H. C. OF A. *Land tax—Bankruptcy—Land in sequestrated estate—Official Receiver and trustee in bankruptcy—“Trustee”—Obligation to furnish returns—Liability to tax—Incident of ownership—Payment—Cost of administration—Directions and advice—Jurisdiction of Court of Bankruptcy—Land Tax Assessment Act 1910-1930 (No. 22 of 1910—No. 8 of 1930), secs. 3, 15, 33, 44K, 44M (8), 62—Bankruptcy Act 1924-1932 (No. 37 of 1924—No. 31 of 1932), secs. 84 (1), 112—Bankruptcy Rules 1928, r. 127 (a), (k).*

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SYDNEY,

Aug. 17, 22.

Rich, Starke,
Dixon and
McTiernan JJ.

The Official Receiver and trustee in bankruptcy of an estate sequestrated on 4th June 1929 did not furnish returns under the *Land Tax Assessment Act* for the years ended 30th June 1929, 1930, 1931 and 1932, in respect of certain encumbered and unencumbered lands comprised in the estate, of which, except as regards one parcel, he did not apply under the *Real Property Act* 1900 (N.S.W.) to be registered as the proprietor. He appealed against assessments made upon him in respect of those periods, as Official Receiver and trustee of the bankrupt estate, by the Deputy Commissioner under sec. 19 of the *Land Tax Assessment Act*, on the ground that he was not liable to be assessed, and he also sought directions from the Court of Bankruptcy.

Held :—

(1) The Official Receiver (a) was bound to furnish returns as required by sec. 15 of the *Land Tax Assessment Act* in respect of lands comprised in a bankrupt estate whether he became the registered proprietor thereof or not; (b) was a trustee within the meaning of sec. 62 of the Act; (c) was liable to assessment as if he were beneficially entitled to the lands pursuant to sec. 33

and subject to sec. 62 (f) of the Act ; and (d) was personally liable to the extent provided by sec. 62 (f) for land tax assessed for any period subsequent to the sequestration of the estate of the bankrupt.

(2) In respect of land tax assessed for any period subsequent to the sequestration the Deputy Commissioner of Land Tax was not entitled to be paid as a proving creditor of the bankrupt or to receive a dividend out of the estate, but was entitled to be paid as the person to whom the Official Receiver was liable under an assessment as trustee governed by sec. 62 of the *Land Tax Assessment Act*.

(3) It was within the jurisdiction of the Court of Bankruptcy to give directions or advice upon the matters raised.

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CASES STATED.

The estate of James Warwick Browne was sequestrated on 4th June 1929, and Charles Fairfax Waterloo Lloyd was appointed Official Receiver thereof. From the time of his appointment Lloyd continued to act, and at the time of these proceedings was still acting, as Official Receiver and trustee in bankruptcy of Browne's estate. At the date of the sequestration of his estate Browne was the registered proprietor in fee simple, under the provisions of the *Real Property Act* 1900 (N.S.W.), of four parcels of land, namely, parcel (a), subject to two mortgages ; parcel (b), subject to a mortgage, and, as to part, subject to a lease which itself was subject to a mortgage ; parcel (c), subject to a mortgage ; and parcel (d), comprising a subdivision of several hundred allotments and subject to three mortgages. Lloyd did not, as Official Receiver, apply to the Registrar-General to be entered as registered proprietor of the estate or interest of Browne in the above-mentioned parcels of land, except that on 23rd October 1929 he became the registered proprietor of the land referred to above as parcel (d) and transferred to purchasers certain of the allotments which had been purchased from Browne and paid for prior to the date of sequestration, but no part of the purchase moneys was received by Lloyd who was still registered as the proprietor of the residue of the land within the parcel. Lloyd did not disclaim any part of the above-mentioned parcels of land, and was in receipt of certain rents and profits which accrued due in respect of part of such land after the date of the sequestration order. None of the creditors holding securities over the lands in question proved in Browne's estate. Lloyd did not

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furnish any returns under the *Land Tax Assessment Act* 1910-1930 in respect of any of the land comprised in the bankrupt estate on 30th June in the years 1929, 1930, 1931 or 1932, but, as Official Receiver and trustee in bankruptcy, he was assessed by the Deputy Commissioner of Land Tax, under sec. 19 of the Act, for Federal land tax as the owner of the lands comprised within the bankrupt estate on each of those dates. Lloyd disputed his liability to tax, and, after the Deputy Commissioner had threatened to take proceedings against him in respect of his failure to furnish returns under the Act, he filed a notice of motion in which he asked for the directions of the Court of Bankruptcy as to his position in the matter. Judge *Lukin*, at the request of Lloyd and the Deputy Commissioner, stated a case under sec. 20 (3) (a) of the *Bankruptcy Act* 1924-1932, setting out the facts, substantially as they appear above, for the opinion of the High Court.

The questions submitted for determination by the High Court were :—

- (1) Whether it is within the jurisdiction of the Court of Bankruptcy to determine the matters raised by questions (2), (3) and (5) hereunder.
- (2) Whether the Official Receiver in Bankruptcy is bound under sec. 15 of the *Land Tax Assessment Act* 1910-1930 to furnish returns in each financial year setting forth a full and complete statement of all lands comprised in the estate of the bankrupt at midnight on 30th June then last past and of the improved value and unimproved value of every parcel thereof with such other particulars as are prescribed, whether he has become registered proprietor thereof or not.
- (3) Whether the Official Receiver in bankruptcy is a trustee within the meaning of sec. 62 of the said Act.
- (4) Whether the Deputy Commissioner of Land Tax is entitled to receive out of the estate of the bankrupt any, and if so what, preferential treatment in respect of land tax assessed for any period subsequent to the sequestration of the estate of the bankrupt.

- (5) Whether the Deputy Commissioner of Land Tax is entitled to receive out of the estate of the bankrupt a dividend in respect of land tax assessed for any period subsequent to the sequestration of the estate of the bankrupt.
- (6) Whether the Official Receiver of the estate of the bankrupt is personally liable, to any, and, if so, to what, extent, for land tax assessed for any period subsequent to the sequestration of the estate of the bankrupt.

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In addition to taking out the notice of motion Lloyd lodged objections against the assessments made as above, on the ground that he was not liable, as Official Receiver and trustee of the bankrupt estate of Browne, to be assessed. The objections were disallowed by the Deputy Commissioner, by whom they were, at the request of Lloyd, treated as appeals and forwarded to the High Court. The appeals were consolidated. At the hearing before *Dixon J.* of the appeals so consolidated, the parties expressed the fear that the question submitted by Judge *Lukin*, as to the liability of Lloyd as Official Receiver and trustee of a bankrupt estate to assessment for land tax in respect of land of the bankrupt encumbered by a security, might remain undecided in the absence of an appeal under sec. 44M of the *Land Tax Assessment Act* 1910-1930. *Dixon J.* thereupon stated a case under sub-sec. 8 of that section, incorporating therein the facts as stated by Judge *Lukin*. It was admitted before *Dixon J.* that in the case of some of the parcels of land referred to above the amount of the mortgage debt secured thereon at the times of the assessments exceeded the improved value thereof, and, in the case of other parcels the mortgage debt secured thereon was less than the improved value thereof.

The questions submitted by *Dixon J.* for the determination of the Court were:—

Is the appellant liable to assessment in respect of the lands comprised in the estate (a) as if he were himself beneficially entitled to the land; or (b) as if he represented the interest (if any) in the said lands of (i.) the creditors secured and unsecured, and (ii.) the bankrupt, and in respect of such interests only; or (c) how otherwise?

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Both cases stated now came on to be heard together before the Full Court of the High Court.

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Teece K.C. (with him *Harrington*), for the appellant. The appellant is not liable, either as the person in whom the bankrupt estate vested or personally, in respect of land tax assessed subsequently to the date of the order of sequestration. The Commissioner's rights are limited to those contained in sec. 84 (h) of the *Bankruptcy Act*, under which he is entitled to prove for not more than one year's tax if assessed prior to the date of the order of sequestration, but in so doing he must conform to the rules with regard to secured creditors. Unless the Official Receiver applies under the *Real Property Act* 1900 (N.S.W.) to be registered as the proprietor of land comprised within a bankrupt estate, all that vests in him under sec. 103 of the *Bankruptcy Act* is the equitable interest of the bankrupt (*Re Williams* (1)). Sec. 81 of the *Bankruptcy Act* shows what debts can be made the foundation of a claim against the bankrupt's property. The *Bankruptcy Act* is later in point of time than the *Land Tax Assessment Act*; therefore, if there is inconsistency, the provisions of the *Bankruptcy Act* prevail. The *Bankruptcy Act*, by which the Crown is bound, provides exhaustively for the distribution of the bankrupt's property amongst all the persons, including the Crown, who were creditors of the bankrupt at the commencement of the bankruptcy in respect of the liabilities to which the bankrupt was then actually or contingently liable, and impliedly forbids the claim of any person, including the Crown, to be paid out of the property vested in the Official Receiver, or to charge any specific part thereof, for any pecuniary demand subsequently arising (*Food Controller v. Cork* (2)). By assenting to the provisions of the *Bankruptcy Act* the Crown surrendered its prerogative right to priority and became bound by the provisions of the Act (*Food Controller v. Cork* (3)). That Act, by sec. 112, provides that the whole of the bankrupt's property shall be distributed among his creditors in satisfaction of certain specified liabilities which do not include liabilities not in existence at the date of the bankruptcy. The *Land Tax Act* must be read as part of the

(1) (1931) 3 A.B.C. 157.

(2) (1923) A.C. 647.

(3) (1923) A.C., at p. 670.

Land Tax Assessment Act which contains provisions for making assessment, and making the land tax a charge upon the land, but it is not due and payable until notice is given to the owner. The charge does not attach until such notice has been given (*Church of England Property Trust, Diocese of Sydney v. Metropolitan Mutual Permanent Building and Investment Association Ltd.* (1)). If the Court holds that the Official Receiver is a taxpayer—is a representative of a taxpayer—then the matter is covered by *Sendall v. Federal Commissioner of Land Tax* (2). All Acts are continuously operative until repealed. The *Land Tax Assessment Act* was passed before the *Bankruptcy Act*. If the provisions of the *Land Tax Act* and the *Land Tax Assessment Act* are inconsistent with the provisions of the *Bankruptcy Act*, they must give way. There is no debt until after assessment (see sec. 51 of the *Land Tax Assessment Act*). The Official Receiver cannot, under the scheme of administration of the *Bankruptcy Act*, devote any portion of the assets of a bankrupt estate to payment of subsequently accruing debts. The effect of the legislation is to exempt from land tax the land forming the unrealized part of the bankrupt estate. The granting of a preference to the Crown in respect of land tax accruing due subsequently to the bankruptcy would be inconsistent with the whole scheme of the *Bankruptcy Act*. Land tax assessed after the date of sequestration is not a cost of administration within the meaning of secs. 84 and 112 of the *Bankruptcy Act*. Rule 127 of the *Bankruptcy Rules*, which deals with costs of administration, makes no provision for payment of such land tax. If the appellant is liable at all for the tax it will only be as a trustee; he has no beneficial interest beyond his remuneration. He is not personally liable unless he alienates the property which is liable. If he is not personally liable, and if the property is not liable, he is not a taxpayer within the meaning of the *Land Tax Assessment Act*. Consideration must be given to the effect of the *Bankruptcy Act* upon the *Land Tax Assessment Act*. If under the former Act the interests which the appellant represents are not liable, the persons entitled to them are not liable either, in which case the appellant cannot be liable as trustee. The liability of a trustee is co-extensive with that of the *cestui qui trust*.

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(1) (1932) 47 C.L.R. 369.

(2) (1911) 12 C.L.R. 623.

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[DIXON J. referred to *Hoysted v. Federal Commissioner of Taxation* (1).]

If the appellant is not personally liable, and if the estate is not liable, there is no liability whatever. As the appellant is not chargeable for tax in respect of the lands vested in him as Official Receiver he is not a taxpayer within the meaning of sec. 15 of the *Land Tax Assessment Act*; therefore he is not liable to make returns under the Act. Whatever powers to mortgage are given to trustees by sec. 62 (g) of the *Land Tax Assessment Act* are modified by the express restrictions of sec. 107 of the *Bankruptcy Act*. The bankrupt's assets are not liable to the tax; under sec. 112 of the *Bankruptcy Act* they must be applied as therein specified. It is clear from sec. 66 of the *Land Tax Assessment Act* that the Legislature intended that the assets of a bankrupt should be exempt from liability to tax. The Court will not assume that the Legislature intended to make a public officer personally liable to land tax. The scheme of the *Bankruptcy Act* is that land in the estate of a bankrupt should be sold for the benefit of his creditors, and the Crown has to come in subject to all existing charges. The *Bankruptcy Act*, by secs. 25 and 105 (i), empowers the Court of Bankruptcy to give advice and directions on the matters involved in the questions stated by Judge *Lukin*.

Kitto (Sir *Thomas Bavin* K.C. with him), for the respondent. The broad scheme which the *Land Tax Assessment Act* incorporates confers upon the Crown the right to revenue from all land throughout the Commonwealth, and gives to the Crown for the recovery of that tax two remedies, namely, the right out of the land and the right to have it paid by a person. It would be an unexpected result if it were found that upon the construction of the Act the mere accident that a former owner of the land has become bankrupt has deprived the Crown of a tax to which it would otherwise be entitled with respect to specific land. The tax is payable by the "owner" of land. "Owner" is defined by sec. 3 of the *Land Tax Assessment Act* as including every person who, jointly or severally, whether at law or in equity, is entitled to receive, or is in receipt of, the rents

(1) (1921) 29 C.L.R. 537; (1925) 37 C.L.R. 290; (1926) A.C. 155.

and profits arising from the land whether as beneficial owner, trustee, etc., which description, in the case of a bankrupt estate, exactly fits the Official Receiver. It cannot include the bankrupt, because all his assets, present and future, have been taken from him. The Official Receiver is entitled to receive the rents and profits, and also he is entitled to an estate, a freehold in possession of the land. If the Official Receiver does answer the description of "owner" then there is no section in the *Land Tax Assessment Act* which in any way qualifies or cuts down that liability. The Official Receiver is a "trustee" as defined by the Act; therefore the liability he attracts is limited to the extent shown in secs. 33 and 62 of the Act. By sec. 62 (f) he is made personally liable for the tax in the event of his trading with the bankrupt's assets which he should apply in payment of unpaid land tax. The provisions of the *Land Tax Assessment Act* and of the *Bankruptcy Act* are not inconsistent. Land tax accruing subsequently to the date of the sequestration order is an expense which the Official Receiver is put to in the course of his duties as Official Receiver, or which arises by virtue of his ownership of the bankrupt's property, and is a "cost of administration" within the meaning of secs. 84 and 112 of the *Bankruptcy Act* and rule 127 (a) and (k) of the *Bankruptcy Rules*. So read, sec. 84 of the *Bankruptcy Act* and rule 127 together provide a means whereby the Official Receiver is enabled to pay land tax which may become due, out of the assets to his own exoneration, and also create a priority in favour of land tax. The operation of sec. 84 of the *Bankruptcy Act* and of rule 127 affords a complete answer to any question of inconsistency between the *Land Tax Assessment Act* and the *Bankruptcy Act*. The provisions of sec. 112 of the *Bankruptcy Act* are not inconsistent with the liability of the Official Receiver as "owner" of the land. Similarly the power to mortgage for the purposes of tax given by sec. 62 of the *Land Tax Assessment Act* is not in conflict with the express power to mortgage given by sec. 107 of the *Bankruptcy Act*. The question of inconsistency between two statutes was not considered by the Court in *Food Controller v. Cork* (1); the only question involved was the operation of the prerogative rights of the Crown against the rights of ordinary creditors in respect

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of a debt incurred before sequestration. *Sendall v. Federal Commissioner of Land Tax* (1) does not apply, as here neither the creditors nor the bankrupt have any right in specific properties; the right of both of them is purely a statutory right arising out of the proceeds of realization and the receipt of any surplus. Where there are no persons who can be described as beneficiaries in the sense of having any proprietary rights in specific land, it would be an unwarranted extension of the principle in *Sendall v. Federal Commissioner of Land Tax* to exempt a trustee from liability because of the inability to find beneficiaries who can be assessed (see *Hoysted v. Federal Commissioner of Taxation* (2); *Kuhnel & Co. v. Deputy Federal Commissioner of Taxation (S.A.)* (3)). The trustee is liable to be assessed under the Act as though his interests were beneficial interests. To apply *Sendall's Case* to this case would have the effect of reversing the terms of sec. 33 of the *Land Tax Assessment Act*. There is nothing unreasonable in the Official Receiver being personally liable for tax and other outgoings. The provisions of sec. 103 (4) of the *Bankruptcy Act* do not affect the Official Receiver's liability to land tax. That sub-section does not prevent the full vesting of the land in the Official Receiver by virtue of sec. 60 of the Act; its only effect is that the property in the hands of the Official Receiver shall not be capable of being dealt with unless and until the requirements of the *Real Property Act* as to registration have been complied with. Whatever the effect of sec. 103 (4), the Official Receiver would still answer the description of "owner" as defined in the *Land Tax Assessment Act*.

[DIXON J. referred to *Holt v. Deputy Federal Commissioner of Land Tax (N.S.W.)* (4).]

There the Court was concerned with the question whether the devisee was the legal owner notwithstanding that he had not become registered under the Act as the proprietor of the land; it was stated that registration of transmission was not required by the *Real Property Act*. The Official Receiver is bound to furnish returns as required by sec. 15 of the *Land Tax Assessment Act*, it being a duty imposed upon him as owner, and as trustee under sec. 62 of the Act.

(1) (1911) 12 C.L.R. 653.
(2) (1921) 29 C.L.R. 537.

(3) (1923) 33 C.L.R. 349.
(4) (1914) 17 C.L.R. 720.

By virtue of sec. 105 (i) of the *Bankruptcy Act* it is within the jurisdiction of the Court of Bankruptcy to give directions to trustees in bankruptcy, including the Official Receiver.

Teece K.C., in reply. Sec. 25 of the *Bankruptcy Act* confers wide jurisdiction upon the Court of Bankruptcy to give directions in matters coming within the cognizance of the Court.

[DIXON J. Although the *Bankruptcy Act* is a subsequent Act, the *Land Tax Assessment Act* with its machinery for objections and appeals to this Court excludes all general jurisdiction. I should think that Part V. of the Act was the exclusive method of attacking any assessment.]

Unless the objection is that the Official Receiver is not covered by the Act (*Commissioners of Taxation (N.S.W.) v. Mooney* (1)). The Official Receiver is not a taxpayer within the meaning of the *Land Tax Assessment Act*; therefore any Court with jurisdiction in bankruptcy has power to determine the questions raised. The principles enunciated in *Sendall's Case* (2) should be applied. Land tax assessed subsequently to the date of the order of sequestration is not a cost of administration within the meaning of the *Bankruptcy Act*.

RICH J. delivered the judgment of the Court, as follows:—

As to the case stated by *Dixon J.*, the Court answers the question as follows: The appellant is so liable to assessment, as if he were beneficially entitled to the lands, pursuant to sec. 33 and subject to sec. 62 (f) of the *Land Tax Assessment Act*.

With regard to the case stated by Judge *Lukin* the Court answers the questions as follows:—(1) It is within the jurisdiction of the Court of Bankruptcy to give directions or advice upon the matter. Except as aforesaid this Court is of opinion that it is unnecessary to answer this question having regard to the case stated under the land tax appeals consolidated with this case. (2) Yes. (3) Yes. (4) He is not entitled to be paid as a proving creditor of the bankrupt but as the person to whom the Official Receiver is liable under an assessment as trustee governed by sec. 62 of the *Land Tax Assessment Act*.

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(1) (1905) 5 S.R. (N.S.W.) 244; 3 C.L.R. 221; (1907) 4 C.L.R. 1439.

(2) (1911) 12 C.L.R. 653.

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(5) No—not a dividend. (6) Yes—to the extent provided by sec. 62 (f) of the *Land Tax Assessment Act*.

DIXON J. I wish to add some observations. I am unable to agree with the argument that the *Bankruptcy Act* is inconsistent with the operation sought to be given to the *Land Tax Assessment Act*. It appears to me that the scheme of the *Land Tax Assessment Act* works in harmony with the *Bankruptcy Act*. The Official Receiver takes the land, and land tax is an incident to the ownership of the land. The question relates entirely to land tax which accrues due in respect of the period of time subsequent to his acquisition of ownership. The Official Receiver answers the description of a trustee as defined in the definition clause, sec. 3 of the *Land Tax Assessment Act*. Accordingly sec. 33 operates upon him. Sec. 62 seems equally to apply to him. The result of sec. 62 is perhaps to limit what might otherwise be an unqualified liability imposed by sec. 33. It qualifies it to the extent at least of rendering him personally liable, only if there are assets in his hands which he parts with. As the liability to land tax is an incident of the ownership of the land which vested in the Official Receiver as a result of the bankruptcy, he has a right of recourse to the assets for its discharge. The payment of the tax forms one of the costs of administration within sec. 84 (1) and sec. 112 of the *Bankruptcy Act*. It is a payment which certainly falls within par. (k), if not under par. (a), of rule 127 of the *Bankruptcy Rules*.

The real difficulty of the case might have been considered to lie in the application of *Sendall's Case* (1), in what may be described as its extreme form, but, in my opinion, the observations made by the late Chief Justice, Sir *Adrian Knox*, and *Starke J.*, in *Hoysted's Case* (2), dispose of that difficulty, and, though their Honors did form only two of a larger bench, it appears from the decision in *Kuhnel's Case* (3), that two other Judges of this Court were in full agreement with them and even went further. For those reasons it appears to me that where there are no beneficiaries entitled to an interest in the land, as in strictness there is none in this case, the doctrine laid down, whether right or wrong, in *Sendall's Case*,

(1) (1911) 12 C.L.R. 653. (2) (1921) 29 C.L.R. 537.
(3) (1923) 33 C.L.R., at p. 360.

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.

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Questions answered accordingly.

Solicitors for the appellant, *Perkins, Stevenson & Co.*
Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth.

J. B.

Dist Taxation, Federal Comr of v Manchester Unity IOOF (1994) 121 ALR 39	Dist FCT v Manchester Unity IOOF (1994) 28 ATR 251	Dist FCT v Manchester Unity IOOF (1994) 50 FCR 85
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[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).*

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Starke J.

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.