

[HIGH COURT OF AUSTRALIA.]

MARY HANNAH LILLY APPELLANT;

AND

THE WEST AUSTRALIAN TRUSTEE }
 EXECUTOR AND AGENCY CO. LTD. } RESPONDENTS.
 AND OTHERS }

DAME CATHERINE ANNE LEE STEERE APPELLANT;

AND

THE WEST AUSTRALIAN TRUSTEE }
 EXECUTOR AND AGENCY CO. LTD. } RESPONDENTS.

H. C. OF A. 1911. *Probate duty—Apportionment of liability to duty as between beneficiaries—Life tenants—Remaindermen—Annuitants—Testamentary Expenses—Administration Act 1903 (W.A.) (No. 13), secs. 86, 87, 111, 112—Duties on Deceased Persons' Estates Act 1895 (W.A.) (59 Vict. No. 18), secs. 10, 13.*

PERTH,
 Oct. 27.

Griffith C.J.,
 Barton and
 O'Connor JJ.

Under the *Administration Act* 1903, where a testator devises property to trustees in trust for A. for life and for B. in remainder, the amount of the estate is reduced by the whole duty paid in respect of it, and A. is entitled to the income of the estate as so reduced.

The testator gave the residue of his estate, "after payment . . . of my debts funeral and testamentary expenses and legacies," upon certain trusts.

Held, that the duty payable under the Act was not a testamentary expense and that this was therefore not a "special provision" or a "specific direction" within the meaning of secs. 111 and 112.

In re Clemow; Yeo v. Clemow, (1900) 2 Ch., 182, distinguished.

An annuity is a legacy and for the purpose of ascertaining the duty payable in respect of it the value of the annuity must be calculated as at the date of the death of the testator. The duty so ascertained is to be deducted from the value, and the amount of the annuity itself must be reduced proportionately.

In re Ogilvie, 13 W.A.L.R., 97, discussed.

Decisions of *Rooth J.* varied.

APPEALS from orders of *Rooth J.* made on originating summonses in Chambers.

The facts in Mrs. Lilly's case were as follow :—

1. The testator James Lilly died at Claremont in the State of Western Australia on 18th April 1905.

2. Probate of his will with one codicil thereto was granted on 6th June 1905 to the West Australian Trustee Executor and Agency Company Limited the executors in the codicil to the said will.

3. By the said will and codicil the deceased

(a) Appointed the West Australian Trustee Executor and Agency Company Limited to be executors and trustees of his will.

(b) Bequeathed all the effects in and about his house to his trustees upon trust to his wife to permit his wife to enjoy the same during her life or widowhood and after her death or re-marriage either

(I.) To divide the said effects as his trustees should think proper amongst living children or

(II.) to sell same and divide the proceeds among the same persons.

(c) Gave the residue of his estate to his trustees upon trust to permit his wife to reside in his house at Fremantle during her widowhood and subject thereto upon trust to convert same into money and invest the proceeds (after payment thereof of his funeral and testamentary expenses and legacies) and to pay the income to his wife during widowhood and on her re-marriage to pay her an annuity of £200 during life.

(d) Directed that after his wife's death or re-marriage his trustees should subject to the said annuity stand pos-

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sessed of the residue upon trust for such child or children of his living at his death and such issue then living of any child or children of his dead before him as should being males attain the age of 21 years or being females attain that age or marry in equal shares.

4. The testator left him surviving his widow still alive and unmarried and five children all daughters and each one above the age of twenty-one years and married.

5. For the purpose of calculating probate duty the estate of the testator was assessed at £36,889 12s. subject to the adjustment of certain values in dispute upon which the duty was afterwards agreed and the Master of the Supreme Court claimed and was paid the sum of £1,660 0s. 8d. as duty at the rate of $4\frac{1}{2}$ per cent. on the said sum of £36,889 12s. and the sum of £100 by agreement on the values in dispute making the total amount of the duty paid on the estate £1,760 0s. 8d.

6. As all the beneficiaries under the will were of the same class and domiciled in Western Australia the same rate of duty $4\frac{1}{2}$ per cent. and the additional £100 were charged upon the estate as a whole in accordance with the usual practice of the Master of the Supreme Court in such cases and therefore no portion of the estate was separately assessed.

7. It was contended on behalf of the residuary legatees that under the provisions of the *Administration Act* 1903 each and every interest of the defendants should be charged with a portion of the duty paid and that the West Australian Trustee Executor and Agency Company Limited should deduct from each of such interests an amount equal to the duty upon the same respectively.

8. It was contended on behalf of the widow that under the said Act it was the duty of the said company to deduct a proportionate part of the duty from each devise bequest or legacy contained in the will whether the subject matter of such devise bequest or legacy was subject to any trust or not;

Or alternatively that the payment of duty was a testamentary expense and should be paid in accordance with the testator's directions as to testamentary expenses.

The questions submitted to the Court for decision were as follow :

1. Is either of the said contentions correct and if so which ?
2. How is the duty imposed by the said Act to be apportioned among the various interests created by the will.

Rooth J., following the decision of the Full Court of Western Australia in *In re Ogilvie* (1), held that under the provisions of the *Administration Act* 1903 each and every interest of the defendants should be charged with a portion of the duty paid and that the trustees should deduct from each of such interests an amount equal to the duty upon the same respectively.

The facts in *Lady Steere's* case were as follow :—

1. The deceased Sir James Lee Steere died at Perth in the State of Western Australia on 1st December 1903.

2. Probate of the deceased's will and the three codicils thereto was granted on 14th December 1903 to the West Australian Trustee Executor and Agency Company Limited the executors named in the third codicil to the said Will.

3. By the said will and codicils the deceased

- (a) Appointed the West Australian Trustee Executor and Agency Company Limited to be the Executors and Trustees of his Will.
- (b) Gave to his wife the sum of £500 to be paid within one calendar month after his decease.
- (c) Devised to his son Charles James Lee Steere a freehold block of land at Boyanup absolutely.
- (d) Gave his household effects carriages and horses to his trustees in trust to permit his wife to use the same during her life and declared that after her decease the same should fall into his residuary estate.
- (e) Devised and bequeathed all his real and personal estate not otherwise disposed of to his trustees upon trust that they should in their uncontrollable discretion either permit the same or any part thereof to remain in its then form of investment or at the like discretion should convert it into money and out of the proceeds and such part of his personal estate as should consist of money

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should pay his funeral and testamentary expenses and the legacies and should invest the residue and stand possessed of the investments upon the following trusts

- (i) In trust during the lifetime of his wife to pay to each of his sons (or to the widow or issue of a deceased son) the annual sum of £50.
 - (ii) In trust during the lifetime of his wife to pay to each of his daughters (or to the husband or issue of a deceased daughter) the annual sum of £50.
 - (iii) And upon further trust to pay the residue of the income to his wife during her life.
- (f) Declared that after his wife's decease his trustees should stand possessed of the residuary trust funds in trust for all his children living at his death as tenants in common subject to certain adjustments in respect of advances made to certain of the children and with a proviso substituting the children of any deceased child for their parent.
- (g) Devised his land and dwelling house at View Street Cottlesloe to his trustees upon trust for his wife for life and after her decease in trust for his four unmarried daughters during their joint lives and upon the death of any one of them upon trust for the survivors in succession until the death of the last survivor and upon the death of the last survivor upon trust for the issue if any of all or any of such daughters in equal shares as tenants in common and in the event of there being no such issue the property to fall into the residuary estate.
- (h) Devised to his trustees Lynburn Station upon trust for his daughter Marion Rose Turnbull during her life and should she predecease her present husband upon her death upon trust for him during his life and upon the death of both of them upon trust for the issue of Marion Rose Turnbull by her present husband in equal shares as tenants in common and in the event of there being no issue the property to fall into the residuary estate.

(i) Gave to each of his daughters who might be unmarried at the date of his death all household effects in her bedroom.

(j) Gave all his family photographs pictures paintings and prints to his trustees to be divided amongst his children.

4. The testator left him surviving his widow who is still alive and eleven children namely four sons and seven daughters who are still alive. The four unmarried daughters who are mentioned in the will and codicils are still unmarried.

For the purpose of calculating probate duty the estate of the testator was valued at £39,713 15s. 6d. and the Master of the Supreme Court claimed and was paid duty on the said sum amounting to £1,389 19s. 9d. being $3\frac{1}{2}$ per cent. on the said sum of £39,713 15s. 6d.

5. It was contended on behalf of the residuary legatees that under the provisions of the *Duties on Deceased Persons' Estates Act*, 59 Vict. No. 18, each and every interest of the defendants should be charged with a portion of the duty paid and that the West Australian Trustee Executor and Agency Company Limited should deduct from each of such interests an amount equal to the duty upon the same respectively.

6. It was contended on behalf of the widow that under the said Act it was the duty of the said Company to deduct a proportionate part of the duty from each devise bequest or legacy contained in the will whether the subject matter of such devise bequest or legacy was subject to any trust or not or alternatively that the payment of the duty was a testamentary expense and should be paid in accordance with the testator's directions as to testamentary expenses.

The questions submitted to the Court for decision were as follow :—

- (1) Is either of the said contentions correct and if so which ?
- (2) How is the duty imposed by the said Act to be apportioned amongst the various interests created by the will ?

Rooth J., following the decision of the Full Court of Western Australia in *In re Ogilvie* (1), held that under the *Duties on Deceased Persons' Estates Act* (59 Vict. No. 18), each and every

(1) 13 W.A.L.R., 97.

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 LILLY interests an amount equal to the duty upon the same respectively.

From these orders the present appeals were brought.

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Pilkington K.C., and *Boulton*, for the appellant, Mrs. Lilly.

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The duty is a duty imposed upon the corpus. The provisions of sec. 111 do not require a valuation of the different interests in any property as between beneficiaries. The trustee adjusts the duty according to the ordinary rules of equity as to adjusting a burden on the corpus. See sec. 112. He referred to *Murphy v. Ainslie* (1); *Administration and Probate Act* 1890 (Vict.) [54 Vict. No. 1060]; *In re Staughton* (2). Further, the words "testamentary expenses" used by the testator in directing "payment . . . of my debts funeral and testamentary expenses" include the payment of the duty imposed under the Act: *Williams on Executors*, 10th ed., p. 752; *In re Clemow*; *Yeo v. Clemow* (3); *In re Sharman*; *Wright v. Sharman* (4); *In re King*; *Travers v. Kelly* (5); *Carmichael v. Ryan* (6).

[GRIFFITH C.J. referred to *Affleck v. The King* (7); *Blackwood v. The Queen* (8); *In re Pimm*; *Sharpe v. Hodgson* (9); *In re Cayley*; *Awdry v. Cayley* (10); *In re Hadley*; *Johnson v. Hadley* (11)].

The testator gave his residue after payment of his debts. The duty should be regarded as a debt of the testator and consequently the testator gave the residue after payment of it.

Draper K.C., with him *Hensman*, for the respondent beneficiaries, referred to *In re Parker-Jervis*; *Salt v. Locker* (12). As to the expression "testamentary expenses" sec. 87 of the *Administration Act* clearly distinguishes between the duty and the testamentary expenses. Moreover the direction as to payment of debts in a will only refers to debts contracted in the testator's

(1) (1905) V.L.R., 350; 26 A.L.T., 202.

(2) (1910) V.L.R., 415; 32 A.L.T., 63.

(3) (1900) 2 Ch., 182, at p. 194.

(4) (1901) 2 Ch., 280.

(5) (1904) 1 Ch., 363.

(6) 20 N.S.W.L.R. (Eq.), 137.

(7) 3 C.L.R., 608.

(8) 8 App. Cas., 82, at p. 90.

(9) (1904) 2 Ch., 345.

(10) (1904) 2 Ch., 781.

(11) (1909) 1 Ch., 20.

(12) (1898) 2 Ch., 643.

lifetime. Hence estate duty cannot be regarded as a debt. He referred to *Hurst v. Hurst* (1).

George Parker for the respondent trustees.

Pilkington K.C. in reply.

Pilkington K.C., and *Stawell*, for the appellant, Lady Steere.

Draper K.C., and *Hensman*, for parties other than Lady Steere.

George Parker, for the respondent company.

Cur. adv. vult.

The judgment of the Court was delivered by

GRIFFITH C.J. The question for determination in these two appeals is how the duty payable under the *Duties on Deceased Persons' Estates Act* 1895 and the *Administration Act* 1903 is to be borne as between the takers of successive interests. Under the latter Act, which I will deal with first, it is provided that duty is to be paid upon the real and personal estate of every deceased person, according to the rates set forth in the Second Schedule to the Act. The rate of duty chargeable upon the estate varies according to its value, and there is a further differentiation according to the relationship of the beneficiary to the testator or intestate. The duty is to be paid by the executor or administrator before the grant of probate or administration is issued. The executor or administrator is to deduct from every devise, bequest, or legacy, and in the case of intestacy from each distributive share, an amount equal to the duty upon it; and in each case regard is to be had to the relationship of the beneficiary to the testator or intestate. The orders appealed from declare that "Each and every interest of the defendants should be charged with portion of the duty paid and that the above-named plaintiff" (the trustee) "should deduct from each of such interests an amount equal to the duty upon the same respectively."

(1) 12 V.L.R., 93.

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I understand that the orders were made formally by *Rooth J.* in supposed obedience to a decision of the Full Court in the case of *In re Ogilvie* (1), decided in April of this year. That, like the present, was a case between tenant for life and remainderman, and annuitants. The learned Chief Justice is reported to have said (2):—"I am of opinion, therefore, that this income for the life of Mrs. Birbeck is a property which is chargeable under the *Administration Act* with the payment of duty, and that Mrs. Birbeck should consequently pay or refund the duty which the executor paid. In the same way the annuity is a property chargeable with duty and the annuitant should refund the duty which has been paid by the executor." We are told that, in view of this decision, the orders under appeal are interpreted as meaning that the trustees are bound to require from the appellants the payment in cash of this amount of duty paid in respect of their life interests, that is, that the beneficiaries are to recoup to the estate the amount paid in duty. If that is what the orders mean, we think that they are wrong, for the beneficiaries took their interests already diminished by the duty, and cannot be called upon to refund what they have not received. The orders are, however, capable of another meaning.

Under these circumstances I will proceed to consider the proper construction of the Act on the question of how the burden of duty should be borne. I will read the material sections.

"86. Every executor and administrator shall pay to the Commissioner duty on the final balance of the real and personal estate of the deceased, according to the rates set forth in the Second Schedule: Provided that, in so far as beneficial interests pass to persons *bonâ fide* residents of and domiciled in Western Australia, and occupying towards the deceased the relationship set forth in the Third Schedule, duty shall be calculated so as to charge only one-half of the percentage upon the property so acquired by such persons."

"87. The duty payable under this Act shall be deemed a debt of the testator or intestate to His Majesty, and shall be a first charge upon the property derived from the deceased, and shall be paid by any executor or administrator out of the estate of the

(1) 13 W.A.L.R., 97.

(2) 13 W.A.L.R., 97, at p. 100.

deceased after payment of the funeral and testamentary expenses, in priority to all other debts."

"111. Subject to any special provision by a testator for the payment of the duty imposed by this Act, every executor or administrator with the will annexed shall deduct from each and every devise, bequest, or legacy, and in every case of intestacy an administrator shall deduct from each distributive share, an amount equal to the duty upon the same respectively; . . . In each case regard shall be had to the relationship of the beneficiary to the testator, intestate, settlor, or donor, as the case may be."

Now, the fact that the duty is differential according to the relationship of the beneficiary to the testator or intestate makes it necessary to value the interest of each beneficiary; for otherwise the amount payable to the Crown could not be ascertained. The sum of the duties payable in respect of the several interests is the duty payable under the Act. The amounts, then, to be deducted by the executor or administrator under sec. 111 are the same amounts which have been already ascertained and paid to the Crown. Where the gift is a straight out gift, *e.g.*, a legacy of £1,000, there is no difficulty; the executor simply hands over to the legatee the thousand pounds less the duty upon it. The only difficulty arises in the case of successive estates or interests and of annuities. Sec. 111, as framed, primarily applies only to cases where, as I have said, the executor or administrator retains the duty out of the legacy, or, in the case of a gift of real estate, provides for payment by a charge upon it. Sec. 111 says nothing in express terms about successive interests or annuities. But in every case where such successive interests or annuities are given there must be trustees, and, if none are expressly appointed, the executor himself becomes a trustee for the purpose of carrying out the trusts arising under these dispositions. The executor, therefore, hands over to the trustee, or as the case may be retains in the character of trustee, the estate diminished by the duty, and that diminution is constructively made from each interest in its proper proportion; and in the administration of the estate regard would have to be had to this fact. If no more were said the general doctrines of equity would apply, and would

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secure that no beneficiary should bear more than his own burden. Consequently sec. 111 itself would impose upon the trustee, subject to the supervision of the Court, the duty of seeing that no beneficiary should bear more than his own share of the burden of the duty payable upon the whole estate. Sec. 112 of the Act of 1903, however, gives express directions to that effect.

It is as follows:—"Subject to any specific direction appearing in any will, deed of gift, or settlement to the contrary, every executor, administrator, or trustee shall adjust any duties, and the incidence of any duties payable or paid by him, so as to throw the burden thereof upon the respective properties on which the same shall be ultimately chargeable."

In our opinion all that would be implied by sec. 111, even without the express words of sec. 112. Sec. 112 also authorizes the Court to control the trustee in the discharge of his duty in that respect. We think the Court might have done so even without the express enactment.

The principal question in both of the present cases is between tenant for life and remainderman. In the second case, Lady Steere's case, there are also annuitants. I will deal first with the case of successive estates for life and in remainder. It is immaterial whether the subject-matter is a residuary estate or not. The effect of the section which I have read is that the amount of the estate of which the income is given to the tenant for life is reduced by the whole duty paid in respect of it. If the rates payable by the tenant for life and the remainderman are equal, as they are in both these cases, there is no difficulty. The result will be the same as if the duty were raised by mortgage of the estate; in that case the tenant for life would have to keep down the interest, and the amount of her income would be reduced *pro tanto*. But if the rate payable by the remainderman is greater than that payable by the tenant for life, this rule would throw part of the remainderman's burden on the tenant for life, which would not be in accordance with the express directions of secs. 111 and 112. The tenant for life would lose an income equivalent to the interest upon the difference between the rate payable in respect of his interest and the greater rate payable in respect of the interest of the remainderman, and would

therefore be entitled to be recouped in some way, and to have a charge upon the corpus in respect of it. The benefit of the charge might be worked out in various ways, but as the question does not arise in either of these cases it is not necessary to say which would be the best way to work it out, or at what rate the interest should be calculated and charged on the difference.

I will deal now with the case of annuities. An annuity is a legacy in the view of a Court of Equity. For the purpose of ascertaining the duty payable in respect of it as a legacy, the value of the annuity must be calculated as at the date of the death of the testator, with the aid, of course, of any light thrown by subsequent events before the calculation is made. The duty so ascertained is to be deducted from the value, and the amount of the annuity itself will be reduced proportionately. For example, suppose there is an annuity of £100, the value of which at the death of the testator is £1,000, on which the duty is £50. The value of the gift is diminished by this amount, and the result is that the annuitant would be entitled only to an annuity of which the present value is £950 instead of £1,000, that is, £95 instead of £100, the other £5 falling into the corpus or income of the residue according to the terms of the will. In that way the person entitled to the residue would be exonerated from bearing a burden imposed upon the interest of the annuitant. In the case of a contingent deferred annuity, such as is given in one of these cases, the same principle can be applied; but it is not necessary to make any declaration on the point at present, as the event may never arise. The substantial result is that in Lilly's case the tenant for life is entitled to the income of the whole of the residuary estate, as reduced by the duty payable upon it under the Act.

Lady Steere's case depends upon the provisions of the *Duties on Deceased Persons' Estates Act* 1895, as to which it is only necessary to say that they are not distinguishable from the provisions of the Act of 1903, except that the former Act contains no express provisions in the terms of sec. 112 of the latter Act. But for the reasons which have been given the result is the same, these express provisions being implied by the doctrines of equity.

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A further contention was set up, which, if it were correct, would save the necessity of expressing any opinion on the matters which have already been dealt with. Sec. 111 of the *Administration Act* says that its provisions are to take effect "subject to any special provision by a testator for the payment of the duty imposed by this Act"; while sec. 112 says that the duty to adjust is "subject to any specific direction appearing in any will . . . to the contrary." In both these cases the testator gave the residue of his estate after payment of his debts, funeral and testamentary expenses. It is contended that the duty payable under the Acts is a testamentary expense, and that that is "a special provision" and "a specific direction" which excludes the operation of sec. 111. If that is so, no question arises as to the duty chargeable upon the several beneficial interests. On this point the judgment of *Kekewich J.* in *In re Clemow*; *Yeo v. Clemow* (1), was referred to. There are two answers to that contention, each of which appears to be conclusive. First of all, sec. 87 provides: (His Honor again read the section). The legislature, therefore, clearly distinguishes between the duty under the Act and testamentary expenses. The same words were used in the Act of 1895. Now when the legislature in an Act dealing with wills and duties which may be called succession duties uses the term "testamentary expenses" in one sense, it can hardly be contended with any hope of success that a testator is to be taken, on the authority of an English decision upon a different Statute, to have meant to use the words in a different sense from that in which the legislature has used them. The legislature did not use the term "testamentary expenses" as including the duty. Then an ingenious argument was put forward by Mr. *Boulton*, that the testator gave his residue after payment of his debts, that the duty is deemed to be a debt of the testator, and that the testator consequently gave the residue after payment of it. But it is plain that when the legislature said that the duty should be paid in priority to all other debts, it referred to the debts of the testator incurred during his lifetime. Another answer is supplied by the words of secs. 111 and 112, "Subject to any special provision," and "subject to any specific direction." We think that these

terms imply a distinct reference to the duty imposed by the Act; which is certainly not to be found in the words used.

Under the circumstances, whether the Orders appealed from are or are not capable of a construction consistent with the view which we take of the true meaning of the Act, it is desirable to vary them so as to lay down a clear rule which trustees can follow in the administration of estates. We think that the following declarations should be substituted :—

In Lilly's case—

(1) That under the provisions of the *Administration Act* 1903 the interests of the beneficiaries under the will of the testator are severally charged with the duty paid in respect of them ; and

(2) That for the purpose of giving effect to such charge the residuary estate is to be deemed to be reduced by the total amount of the duty paid in respect thereof, and the tenant for life is entitled to the income of the residuary estate as so reduced.

In Lady Steere's case—

(1) That under the provisions of the *Duties on Deceased Persons' Estates Act* the interest of the beneficiaries under the will of the testator are severally charged with the duty paid in respect of them ; and that for the purpose of giving effect to such charge

(2) The capital value of every legacy is to be deemed to be reduced by the amount of duty paid in respect thereof ;

(3) The residuary estate is to be deemed to be reduced by the total amount of the duty paid in respect thereof, and the tenant for life is entitled to the income of the residuary estate as so reduced.

Orders varied.

Solicitors, for the appellants, *G. F. Boulton*; *James & Darbyshire*.

Solicitors, for the respondents, *George Parker*; *Parker & Parker*.

J. H.

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