[PRIVY COUNCIL.]

SYME . . . . . APPELLANT;

AND

THE COMMISSIONER OF TAXES FOR VICTORIA . . . . . } RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.*

PRIVY COUNCIL.** 1914. July 28.

Income Tax—Income derived from trust estate—Trade carried on by trustees—Income from personal exertion—Income the produce of property—Income Tax Act 1895 (*Vict.*) (*No.* 1374), *secs.* 2, 5, 9, 15, 34, 41—*Income Tax Act* 1896 (*Vict.*) (*No.* 1467), *secs.* 4, 12.

Under the terms of his will a trade or business formerly carried on by the testator was carried on by the trustees for the benefit of certain beneficiaries who under the will were entitled to share equally in the residue of the income of the estate,

Held, that the income of each of those beneficiaries, so far as it was attributable to the trade or business so carried on, was "income from personal exertion" within the meaning of that expression in sec. 2 of the *Income Tax Act* 1895 (Vict.) as amended by sec. 4 of the *Income Tax Act* 1896 (Vict.), and was taxable accordingly.

Decision of the Supreme Court of Victoria reversed.

Webb v. *Syme*, 10 C.L.R., 482, overruled.

APPEAL from the Supreme Court of Victoria.

This was an appeal by John Herbert Syme from the decision of the Full Court of the Supreme Court of Victoria to the Privy Council.

*This was in effect an appeal from the decision of the High Court in *Webb* v. *Syme*, 10 C.L.R., 482, and is therefore reported here.

**Present—Lord Dunedin, Lord Atkinson, Lord Sumner and Sir Joshua Williams.

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The judgment of their Lordships was delivered by

LORD SUMNER. The question on this appeal is shortly whether a portion of the appellant's income is assessable to income tax as income derived by him from personal exertion or as income derived by him from the produce of property within Victoria, within the *Income Tax Acts* 1895 and 1896 of the State of Victoria. The appellant returned this sum under the former head; the Commissioner of Taxes assessed him under the latter, and thereby doubled the rate of tax chargeable. Mr. Syme objected, and paid under protest, and his objection was duly transmitted for hearing and determination to a Judge of County Courts, who stated a case for the opinion of the Supreme Court which raised the above question. The Supreme Court decided against him on the authority of *Webb* v. *Syme* (1), in which the same question, on practically the same state of facts, had been answered by the Supreme Court of the State of Victoria in Mr. Syme's favour and against him by the High Court of Australia. So far as questions of principle and of construction of the Acts are concerned, this case is therefore in effect an appeal from *Webb* v. *Syme* (1).

Briefly, the facts are these. Mr. David Syme was a newspaper proprietor, and printed and published the *Age*, the *Leader* and *Every Saturday*. The business was large and lucrative. He had also separate businesses, relatively inconsiderable, in connection with the businesses known as Killara and Melbourne Mansions, and a farm at Mordialloc. He called the publishing concern the "*Age* business," after the principal and well-known newspaper. In 1908 he died, leaving a widow, five sons, of whom the appellant is the eldest, and two daughters. The debts and funeral expenses of the testator had been paid prior to 1910. On this one point the facts in this case differ from those in *Webb* v. *Syme* (1), and for what it is worth it is in the appellant's favour. In *Webb* v. *Syme* some reliance was placed on the possibility that in the year of assessment then in question there might be debts of the testator still to be discharged. There were none in the year in question now.

David Syme left certain specific legacies, and then gave the

(1) 10 C.L.R., 482.

residue of his estate, consisting principally of the above businesses, to trustees. The "*Age* business" they were to carry on, the other businesses and the rest of the residuary estate they were to convert, with power to postpone the conversion and to manage in the meantime. Out of the income of the residuary estate and out of the profits of the "*Age* business" and the other businesses while carried on, the trustees were to pay to the widow an annuity, which is the first charge thereon, to set aside certain capital sums for the benefit of the testator's daughters, and also of a charity to be called by his name, and then, as to the residue, to divide the income equally among the five sons. This is being done at present, and the ulterior trusts are not now material.

It so happens that the will names the appellant as one of the trustees, but it is rightly agreed that this is for present purposes of no consequence, as he might be removed and replaced by someone else. It also happens that as one of the managers of the "*Age* business" he is paid an appropriate salary, but nothing turns on this. His salary is clearly income derived by him from personal exertion, and is so assessed, and is outside the area of matters in dispute.

Having cleared the testator's estate of debts the trustees are now carrying on the businesses. In the main they do so at a large profit. For 1910 the newspaper business yielded a profit of £81,759 15s. 1d., and the Melbourne Mansions business a profit of £3,715 16s. Losses were incurred at Killara and Mordialloc, but they only amounted together to £376 4s. 8d. On the whole there was £85,397 13s. 10d. to divide, of which the appellant's one-fifth share is £17,079 10s. 9d. This he returns as £17,025 17s. 3d. derived from personal exertions, and only £53 13s. 6d. from the produce of property. The Commissioner claims and the Supreme Court has held, as the High Court held in *Webb* v. *Syme* (1), that the £17,025 17s. 3d. is also derived from the produce of property.

There is no doubt that this money is made in business, and sec. 2 of the *Income Tax Act* 1895, as amended by sec. 4 of the *Income Tax Act* 1896, which Acts are to be read as one Act,

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defined "income derived by any person from personal exertion" as, among other things, "all income arising or accruing from any trade carried on in Victoria although the" income "has not arisen or accrued or been . . . derived . . . from" the taxpayer's "own personal exertion or trade," and "trade" is defined to include every business. Under the same sections "income derived by any person from the produce of property" is defined as meaning "all income derived in or from Victoria and not derived from personal exertion," which again "shall include income of the taxpayer although the same has not been derived from his own property." The charging section, which is sec. 5 of 1895, classifies the tax according as the income taxed falls within one or other of the above categories.

Their Lordships are unable to hold that the portion of the appellant's income in question is not "income arising or accruing from any trade carried on in Victoria," and therefore is "income derived from the produce of property," and this for several reasons.

In saying "any trade carried on in Victoria" the definition does not say by whom such trade is carried on. The amending section enlarges "personal exertion" and extends it to trade carried on by vicarious exertion without stating the legal relationship between the real and the vicarious trader, or defining the capacity in which the business must be carried on by the latter. Their Lordships were informed that the provision in the Act of 1896 was inserted to settle a doubt whether a person could claim the lower, or personal exertion, rate, when all the work in his business was done for him by his agents. Be this as it may in fact, the enactment is general in form: it does not make the definition of 1895 affirmatively include business carried on by agents, but it provides negatively that a business may be carried on by personal exertion for the purposes of this Act, even when there is no personal exertion on the part of the person who benefits by the business, but everything is done for him. Again, the Act does not say for whom the trade is carried on. When a trade is carried on by trustees there is no doubt that they carry it on for the beneficiaries and not for themselves, save in so far as their remuneration is provided for by law or by

the trust deed. Unless the definition clause, as amended, is interpreted as though it ran: "any trade carried on by the taxpayer or his agents," for which the language of this taxing Act affords no sufficient warrant as against the subject, the definition of "income derived from personal exertion" is wide enough to cover the present case. What the appellant gets is "income arising . . . . from a trade carried on in Victoria" by trustees, for the benefit of himself and others, entitled equally with him, "although the same has not accrued . . . . from his own personal exertion" in his capacity as such a beneficiary.

Again, it is not disputed that in certain events the trustees are assessable in respect of the appellant's one-fifth share of the earnings of the "*Age* business," and the appellant contends that they are assessable in respect of the entire five-fifths in any event at the option of the Commissioner. Now, there is no doubt that these Income Tax Acts do not contemplate taxing the same fund twice over. If the trustees are assessed, they must be assessed upon "income derived from personal exertion," for by the personal exertion of themselves or their agents they make the money in trade. How, then, can the appellant be assessed otherwise when the assessment is made directly upon him? If the same money is to be regarded as two incomes, as it must be if it is to be assessable on two different bases, there would be double taxation of the same money, which no one suggests; and if there is no double taxation of the same money, then since the same money is, at any rate in some events, assessable in the alternative either on the trustees, who make it, or on the beneficiaries, who enjoy it, the assessment must in either case be made on the personal exertion basis, for that and that alone fits the case of an assessment on the trustees. For this purpose it matters not whether the cases in which either the trustee or the *cestuis que trustent* can be assessed in the Commissioner's option, be few, as the Commissioner argues, or many, as the appellant submits. In either event the logical result is the same. Since both the trustees and the *cestuis que trustent* can be assessed on this money, either both must be assessed at the same rate, and that rate must be the personal exertion rate, for to tax the trustees at the produce of property rate on what they earn

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themselves would be impossible; or they must be taxed at different rates in the option of the Commissioner, although the subject matter of taxation is one and the same fund.

There is no escape from this dilemma except the one adopted by the majority of the High Court of Australia in *Webb* v. *Syme* (1), and supported by the respondent on this appeal, and the crux of the case has been: is this a way out?

The argument is that the Act must be deemed to contemplate the assessment of the persons who are the final recipients of an income and can spend it as they please, since it provides (sec. 9 (2) of Act No. 1374) that, in estimating the balance of income liable to be taxed, on the one hand rent of dwelling-houses, maintenance of families and other personal disbursements shall not be deducted, and on the other that premiums of insurance on the taxpayer's life (sec. 9 (5) of Act No. 1374), calls or contributions on shares held by him in companies in liquidation or reconstruction (secs. 9 (6) and 9 (7)), and losses incurred in other trades which he may carry on (sec. 9 (9)), may be deducted. These are all matters neither known to nor any concern of trustees. This is so; but there is nothing to limit persons who can be assessed to such persons as may wish to deduct the expenses of their families, or may be in a position to deduct premiums, because they have families for whose benefit they insure their lives. Such persons are included and taxed, no doubt, and may be a large proportion of the taxpayers, but others, trustees among them, are included; and when trustees are assessed sec. 34 (2) provides sufficient machinery to enable the *cestui que trust* to obtain the benefit of such deductions in the shape of a refund, direct or indirect, of tax overpaid by a trustee who was ignorant of or for any other reason did not or could not claim the deductions which his *cestui que trust* might have made. Next it is said that secs. 15 (2) and 41 (1) of Act No. 1374 and 12 (1) (c) of Act No. 1467 show that the legislature intended to impose assessment upon a trustee only as a secondary liability, failing payment of the tax by the *cestui que trust*, or failing the opportunity of assessing him in the first instance. Their Lordships are unable to accept the contention. The Acts say nothing

(1) 10 C.L.R., 482.

about the primary liability of the *cestui que trust* and the secondary liability of the trustee; they do not make the trustee a surety for his *cestui que trust's* income tax; at most they give him a right of recourse in case he is compelled to pay it. The Acts, in so far as they make trustees assessable, do so upon the same footing as the *cestui que trust*, and this is for the more convenient collection of the revenue, and cannot therefore by any implication increase the burthen on the taxpayer.

Lastly, it is said that the income is not the same income, and the fund which produces it is not the same fund, when the trustees are assessed as when the *cestui que trust* is assessed. They carry on several businesses, one great and the rest relatively small, some at a profit and some at a loss. They set off losses against profits, and bring down a balance on profit and loss account; they discharge sundry prior charges, and then divide an ultimate balance. All this is true; but all this is mere book-keeping. It does not follow when the appellant receives the cheque for his share that he is getting a part of a new mixed fund or that the connection between his income and the newspaper business is lost. There is no difficulty, either in fact or in theory, in keeping the "*Age* business" apart from the other businesses, and all the businesses apart from those concerns the income of which is the produce of property. The Commissioner's argument conceived the fund out of which the appellant is paid, as a reservoir fed by various streams descending from sundry sources and blending their waters in one basin, out of which they flow indistinguishably and indissolubly. With all respect to the learned Judges, the majority in the High Court of Australia in *Webb* v. *Syme* (1), who adopted this figurative way of putting a very plain set of facts, their Lordships are only able to regard this argument as fallacious. There is no question here of showing whence the sovereigns came in the first instance which were ultimately paid to the appellant. In the ordinary course of business the trustees may mix all the sums that come to their hands from all sources, and with them discharge indiscriminately all or any of the obligations which fall upon them whether at law or in equity, but they keep accounts all the time, and there

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is no doubt whatever that the appellant's £17,025 17s. 3d. comes from the "*Age* business" and that of the Melbourne Mansions Co., was made in them, and is his solely because under his father's will they are carried on for him and the other members of the family. What was the produce of personal exertion in the trustees' hands till they part with it does not, in the instant of transfer, suffer a change, and become the produce of property and not of personal exertion, as it passes to the hands of the *cestui que trust.*

Their Lordships are accordingly of opinion that the appellant's contention is right that the question stated in the special case should have been answered in his favour, and that the judgment of the Supreme Court of Victoria should be set aside, and judgment should be entered for the now appellant for the amount paid by him under protest and in excess of his contention; and they will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that judgment as above stated should be entered for Mr. Syme.

[HIGH COURT OF AUSTRALIA.]

PRENTICE . . . . . APPELLANT;
PLAINTIFF,

AND

THE VICTORIAN RAILWAYS COMMISSIONERS . . . . . } RESPONDENTS.
DEFENDANTS,

H. C. OF A. 1914.

MELBOURNE, *Sept.* 21, 22, 28.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Griffith C.J., Gavan Duffy, Powers and Rich JJ.

Practice—New trial—Action tried by jury—Verdict supported by evidence—Misdirection—Substantial wrong or miscarriage—County Court Rules 1891 (*Vict.*), *r.* 192.