[HIGH COURT OF AUSTRALIA.]

NATIONAL TRUSTEES, EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. AND OTHERS . . . . . APPELLANTS;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . RESPONDENT.

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MELBOURNE, *Oct.* 12, 13, 23.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Estate Duty—Power of taxation—Subject of taxation—Estate of deceased person—Inclusion of gifts made before decease—Estate Duty Assessment Act 1914 (*No.* 22 *of* 1914), *sec.* 8—*Estate Duty Act* 1914 (*No.* 25 *of* 1914), *sec.* 2—*The Constitution* (63 & 64 *Vict. c.* 12), *sec.* 55.

The provision in sec. 8 (4) of the *Estate Duty Assessment Act* 1914, that the property which passed from a deceased person by a gift *inter vivos* or settlement made after the commencement of the Act and within one year before his decease shall for the purposes of the Act be deemed to be part of the estate of the deceased person, is not invalid. Its incorporation in the *Estate Duty Act* 1914, with which the former Act is to be read as one, has not the effect of rendering the latter Act an Act dealing with more than one subject of taxation, nor does it tax one person in respect of property which belongs to another.

Waterhouse v. *Deputy Federal Commissioner of Land Tax* (*S.A.*), 17 C.L.R., 665, distinguished.

CASE STATED.

On an appeal by the National Trustees, Executors and Agency Co. of Australasia Ltd., Commissioner Mitchell, John Mitchell and John Box, executors of the will of William Mitchell, deceased, from an assessment of them under the *Estate Duty Assessment Act*

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1914, *Griffith* C.J. stated the following case for the determination of the Full Court of the High Court :—

1. William Mitchell died on 21st June 1915 leaving a will dated 26th February 1915.

2. Probate of the said will was granted on 22nd September 1915 by the Supreme Court of the State of Victoria to the appellants the executors of the said William Mitchell.

3. The said William Mitchell was at the time of his death seised or possessed of certain real and personal property which was assessable to estate duty pursuant to the provisions of the *Estate Duty Act* 1914 and the *Estate Duty Assessment Act* 1914.

4. By deed dated 26th February 1915 the said William Mitchell in consideration of the natural love and affection which he had for his seven living children granted and conveyed to the appellants certain real property in fee simple upon trusts for the benefit of his said children. The legal estate in the said real property was by the said deed vested in the appellants.

5. On the 25th October 1915 the appellants furnished to the respondent a return showing the property of which the said William Mitchell was seised or possessed at the time of his death and also the property subject to the deed of 26th February 1915.

6. Pursuant to the said Acts the Commissioner caused an assessment to be made for the purpose of ascertaining the estate duty payable out of the estate of the said William Mitchell and gave notice in writing of such assessment to the appellants. The Commissioner assessed the real and personal property of the said deceased and the real property subject to the said deed as the estate of the said William Mitchell for the purposes of estate duty, and computed the duty at one rate for the whole of the said properties.

7. The appellants duly gave notice of objection to the said assessment, and the Commissioner considered the objection but disallowed the same. The appellants were dissatisfied with the decision of the Commissioner, and duly appealed to the High Court of Australia pursuant to the said Acts.

The following questions arising in the said appeal which, in the opinion of the Court, are questions of law, are stated for the opinion of the High Court :—(*a*) Whether the provisions of the *Estate Duty*

Assessment Act 1914, sec. 8 (4), are valid; (*b*) whether estate duty was rightly computed by the Commissioner at one rate upon the whole of the properties belonging to the said William Mitchell and the properties subject to the said deed of 26th February 1915.

Starke, for the appellants. The principle of *Waterhouse* v. *Deputy Federal Commissioner of Land Tax* (*S.A.*) (1), governs the present case. The facts are practically the same, and the same reasoning applies. Either sec. 8 (4) of the *Estate Duty Assessment Act* 1914 is obnoxious to the provision in sec. 55 of the Constitution that laws imposing taxation shall deal with one subject of taxation only, or it is not incidental to the tax which is imposed. It is irrelevant for the purpose of determining whether a provision is incidental to a particular tax to consider whether such a provision was usual in Statutes enacted by Legislatures with plenary powers. The particular Act must be looked at to consider what it is that is taxed. Here the Act taxes the estates of persons dying after the commencement of the Act, and sec. 8 (4) is an attempt to tax also the property which a deceased person has disposed of within a year before his death and which was not under his control at the time of his death or under that of his executors afterwards. That attempt is either to impose a tax on a different subject matter of taxation or to tax persons in respect of property in which they have no interest.

Mann (with him *Gregory*), for the respondent. The Commonwealth Parliament has a free choice of subjects of taxation, and is not limited in its choice to existing classifications of those subjects. Here the Legislature has chosen as the subject of taxation all property which has been derived from the testator since a point of time which is fixed as one year before his death, either by gift *inter vivos* or under his will or upon intestacy. For the purpose of taxation the Act does not regard the question of the ownership of the property at the time when the tax operates. It is therefore not material that some of the persons whose property is taxed are beneficiaries under the will or intestacy and others donees. The

(1) 17 C.L.R., 665.

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common quality is that all of the property has been the property of the deceased within one year before his death.

[GRIFFITH C.J. referred to *Knowlton* v. *Moore* (1).]

Such a provision as that in sec. 8 (4) was common in similar Acts prior to the Constitution being enacted. See *Customs and Inland Revenue Act* 1881 (44 & 45 Vict. c. 12), sec. 38; *Finance Act* 1894 (57 & 58 Vict. c. 30), secs. 1, 2; *Stamp Duties Act* 1898 (N.S.W.), sec. 49; *Succession and Probate Duties Act* 1892 (Qd.), sec. 10; *Duties on the Estates of Deceased Persons Statute* 1870 (Vict.), sec. 20. The fact that by sec. 34 of the *Estate Duty Assessment Act* the tax is made a charge on the property of a donee does not show that there are two subjects of taxation. The charge is in favour of the Crown, but the provisions for enabling the executor or administrator, who is made liable for payment of the whole tax on the artificial estate, to reimburse himself are limited to the estate over which he has control. So that, in practice, in order to reimburse himself he must have recourse through the Crown to that charge. That cannot affect the argument that there is one subject of tax and not two. *Waterhouse's Case* (2) is distinguishable. In that case the Court came to the conclusion that there was one subject of taxation and not two. The same reasoning leads to the same conclusion here, and that is sufficient. Having found that there was one subject of taxation, the Court went on to hold that the section in question there was invalid because with regard to one subject of taxation it imposed a liability upon a person who had no interest in that subject. In this case, having arrived at the conclusion that there is one subject of taxation, no further difficulty arises.

Starke, in reply. *Waterhouse's Case* (2) takes as an established proposition that the Commonwealth Parliament has no power to tax a person in respect of land or property in which he has no beneficial interest. The substance of the Act now under consideration is a direct attempt to impose such a tax.

Cur. adv. vult.

(1) 178 U.S., 41, at p. 49.

(2) 17 C.L.R., 665.

The following judgments were read :—

GRIFFITH C.J. The question raised for determination in this case is whether the provisions of sub-sec. 4 of sec. 8 of the *Estate Duty Assessment Act* 1914 (No. 22) are valid. That Act, which was assented to on 21st December 1914, is entitled " An Act relating to the Imposition, Assessment, and Collection of Duties upon the Estates of Deceased Persons." Sec. 8 provides (sub-sec. 3) that for the purposes of the Act the estate of a deceased person comprises all his real and personal property properly so called. Sub-sec. 4 provides that property which passed from a deceased person by a gift *inter vivos* or voluntary settlement made after the commencement of the Act and within one year before his decease shall, for the purposes of the Act, be deemed to be part of the estate of the deceased person. The *Estate Duty Act* 1914 (No. 25), which was assented to on the same day, and is entitled " An Act to impose Duties upon the Estates of Deceased Persons," provides (sec. 2) that the *Estate Duty Assessment Act* shall be incorporated and read as one with it. The two Acts read together are, as was pointed out in *Osborne* v. *The Commonwealth* (1), a law imposing taxation.

The appellants contend that the Act is invalid as offending against the provisions of the second paragraph of sec. 55 of the Constitution, which enacts that laws imposing taxation except laws imposing duties of customs and excise shall deal with one subject of taxation only. Their contention is, in brief, that property which was the property of a deceased person but ceased to be his before his death is a different subject of taxation from property which was his at his death.

The scope and purposes of sec. 55 are well known. It is one of a group of sections introduced to prevent the Senate, whose powers with respect to taxation are limited, from being coerced by the process known as " tacking." Bearing this fact in mind, I inquire what was the accepted meaning of the phrase " one subject of taxation " in 1900 when the Constitution was adopted. I find that a law which grouped for the purposes of taxation the property of which deceased persons were owners at the time of their death with property which they had disposed of otherwise than for valuable

(1) 12 C.L.R., 321.

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consideration within a short fixed period before their death was a common form of legislation, not only in the United Kingdom but in the Australian Colonies and the United States of America. Such duties were commonly described as "estate duties." It was pointed out by the Supreme Court of the United States in the case of *Knowlton* v. *Moore* (1), which contains an interesting and instructive account of the origin of this form of taxation, that the occasion of it is not the acquisition of ownership by the object of the bounty of the deceased person but the passing of it away from the deceased person. From this point of view the subject of taxation is substantially one subject only, since the property which he has recently disposed of by way of gift or voluntary settlement would otherwise have been represented by other assets that would have passed from him at his death.

In my opinion, therefore, the Act deals with one subject of taxation only, as that term was understood in 1900.

There is another answer to the appellants' contention which seems to me equally complete and cogent. The subject matter of the *Estate Duties Assessment Act* is a single mass comprising all the property which a deceased person possessed twelve months before his death and which he has not in the meantime disposed of for valuable consideration. This is obviously a single subject of taxation and not two subjects.

The objection therefore fails.

Reference was made to *Waterhouse's Case* (2), which, it was contended, governed the present case. In my judgment it has no bearing upon it. In that case the validity of a provision of the *Land Tax Assessment Act* was impeached. Four members of the Court (*Barton*, *Gavan Duffy*, *Rich* JJ. and myself) held that the provision in question did not fall within any power conferred on the Commonwealth Parliament. They also expressed the opinion that even if it did, it was not obnoxious to the second paragraph of sec. 55 of the Constitution as dealing with more than one subject of taxation. Two of them (*Barton* J. and myself) further held that, if it fell within any power of the Parliament, it dealt with a matter

(1) 178 U.S., 41, at p. 49.

(2) 17 C.L.R., 665.

other than the imposition of taxation, and was therefore invalid under the first paragraph of sec. 55.

The questions raised in the present case are quite different. They must be answered in the affirmative.

BARTON J. William Mitchell, whose estate is the subject of this appeal, made on 26th February 1915 a voluntary settlement of certain of his lands upon trusts for seven children, and vested the legal estate in the appellants. The trusts and dispositions were to take effect in the settlor's lifetime. Upon the same date he made a will, and at his death, which occurred on 21st June in the same year, he had certain real and personal property which it is not disputed was assessable to estate duty under the Acts to be mentioned. The Commissioner assessed for estate duty both the real and personal property which Mr. Mitchell had at his death and the real property the subject of the settlement, and the duty was computed at one rate for the whole. The trustees thereupon gave notice of objection, and the Commissioner disallowed the objection. The trustees, being dissatisfied, appealed, and at the hearing of the appeal the learned Chief Justice referred to the Full Court two questions of law—(*a*) whether the provisions of the *Estate Duty Assessment Act* 1914, sec. 8, sub-sec 4, are valid; (*b*) whether estate duty was rightly computed by the Commissioner at one rate upon the whole, that is, the properties belonging to Mitchell at his death and also the properties subject to the voluntary deed.

The *Estate Duty Assessment Act* is No. 22 of 1914, and the *Estate Duty Act* is No. 25 of the same year. Sec. 2 of the last-named Act prescribes that the *Estate Duty Assessment Act* shall be incorporated and read with the later Act. It imposes estate duty at the rates declared in the Schedule "Upon the estates of deceased persons dying after the commencement of this Act." The Schedule fixes the rates of estate duty "payable on the estates of deceased persons."

Both Acts were assented to on the same day, 21st December 1914.

The appeal is based on the arguments that estate duty is by these Acts levied on two subjects of taxation, and therefore that the Constitution (see sec. 55, par. 2) is invaded, and also that it is an attempt to impose a land tax irrespective of ownership.

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In addition to real and personal property, including property over which the deceased had exercised by will a general power of appointment (sec. 8 (3)), the estate of a deceased person was to comprise, for the purposes of the Act, property which passed from the deceased person by any gift *inter vivos* or settlement made within one year before his decease (sub-sec. 4 (*a*)). By the interpretation section, 3, " Gift *inter vivos* " includes " every gift absolute and every non-testamentary disposition of property . . . made by any person . . . containing trusts or dispositions to take effect during his lifetime, not being made before and in consideration of marriage, or in pursuance of a binding contract entered into before and in consideration of marriage, or in favour of a *bonâ fide* purchaser or incumbrancer for valuable consideration," &c.; and " ' Settlement ' means a . . . non-testamentary disposition of property made by any person . . . containing trusts or dispositions to take effect after the death of the settlor or any other person dying after the commencement of this Act."

The attack was concentrated on sec. 8, sub-sec. 4, the addition of which to sub-sec. 3 of the same section was said to constitute a second subject of taxation so as to cause the combined Act to offend against the second paragraph of sec. 55 of the Constitution. Also it was urged that the same sub-section was invalid as an attempt to levy a land tax in respect of persons who were not owners of the land.

Mr. *Starke*, for the appellants, relied on *Waterhouse's Case* (1) as justifying his contention. That case decides that sec. 36 (2) of the *Land Tax Assessment Act* 1910-1911 is invalid as being beyond the enacting power of the Parliament of the Commonwealth. That sub-section provides as follows: " Where (*a*) a husband has directly or indirectly transferred land to or in trust for his wife, or (*b*) a wife has directly or indirectly transferred land to or in trust for her husband, (they not being judicially separated), the husband and wife shall, unless the Commissioner is satisfied that the transfer was not for the purpose of evading land tax, be deemed to be joint owners of all the land owned by either of them " &c.

Though the decision was unanimous, the reasons given severally

(1) 17 C.L.R., 665.

by the learned Justices varied. As Mr. *Starke* seemed to rely principally on those given by me, I will state shortly what they were. I held that as sec. 36 (2) purported to impose a land tax the Assessment Act could still be regarded as dealing only with the imposition of taxation (sec. 55, par. 1), for the sub-section in question was a machinery provision and would not give the Act another character (*Osborne* v. *The Commonwealth* (1)). True, the *Land Tax Act* incorporated the Assessment Act. Even so, the position would not be different, for the subject matter of taxation in sec. 36 was "still land, and only land"; hence the second paragraph of sec. 55 of the Constitution did not stand in the way. If an effective tax at all, it would be a land tax. But to be effective as a land tax it would have to be imposed in respect of actual ownership (see interpretation of "owner" in the *Land Tax Assessment Act*, and secs. 10 and 11; also *Morgan* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (2)). To say that the husband and wife should be deemed to be joint owners did not make them such; one or the other would, if the sub-section were valid, be subjected to a tax in respect of land which he or she did not own. Hence the attempted tax failed as a tax, because it lacked the condition of ownership. It remained to say that the sub-section was invalid. Though not a land tax or in reality a tax at all, it at any rate intended to restrict the transfer of land in certain cases, and it was beyond the Constitutional power of the Parliament to do this.

At the outset of that judgment I had pointed out the principle on which the Royal Commissions Acts had been held invalid by the Privy Council in the case of *Attorney-General for the Commonwealth* v. *Colonial Sugar Refining Co.* (3), as a trespass on a power reserved to the States.

Here, then, is the ultimate reason of my judgment in *Waterhouse's Case* (4). The conclusion that sec. 36 (2) failed as a land tax under a particular Act because it failed to fulfil a condition expressly required by that Act, does not affect this case. There is no condition of the kind imposed by the present Statute, the substance, and not the name of which, is the question. The judgment

(1) 12 C.L.R., 321.
(2) 15 C.L.R., 661.
(3) (1914) A.C., 237; 17 C.L.R., 644.
(4) 17 C.L.R., 665.

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relied on does not, therefore, in any sense relieve Mr. *Starke* of the burden upon him. He cannot turn it to his purposes without first showing that sec. 8 (4) of the *Estate Duty Assessment Act* is an attempt to usurp a power reserved to the States, and this, I think, he has failed to do; and the real question remains.

The expedient of including in the operation of estate duties gifts *inter vivos* and voluntary settlements, as commonly known, as a precaution against the evasion of taxation by such methods of denuding estates, was commonly adopted in Statutes before the passage of the Constitution, and such gifts and settlements had become recognized as proper parts of the subject matter of such taxation. For this many Acts might be cited. It is sufficient to refer to 44 & 45 Vict. c. 12 (*Customs and Inland Revenue Act* 1881), Part III., sec. 38; 57 & 58 Vict. c. 30 (*Finance Act* 1894), Part I., secs. 1, 2; the Act of 1898, No. 27 (*Stamp Duties Act* (N.S.W.)), Part III., secs. 49 *et seqq.*; the Act 56 Vict. No. 13 (*Succession and Probate Duties Act* 1892 (Qd.)), sec. 10; and the Act of 1870, No. 388 (*Duties on the Estates of Deceased Persons Statute* (Vict.)). These were all passed before the enactment of the Constitution, and are sufficient to show what, to its framers and to the legislators of 1914, was connoted by an "Estate Duty Act." It was regarded as a single subject of taxation; though it included matters such as that objected to. The sub-section attacked evidently appeared to the framers to be an advisable, perhaps a necessary, precaution without which the revenue was likely to be extensively, however lawfully, evaded. I think such an obvious precaution could not be outside the contemplation of the framers of the Constitution when the power of taxation was granted in sec. 51 and when tacking was dealt with in sec. 55, and that the power to include this precaution was therefore rightly considered by the Parliament which passed the Estate Duty Acts as included in the conception of such Acts. In other words, reading the two Acts as one in accordance with sec. 2 of the later Act, Parliament could include in the meaning of the estate of a deceased person for the purpose of such legislation not only the property which he had when he died, but also any of his property with which he had dealt by gift *inter vivos* or voluntary settlement within twelve

months before his death. Otherwise the exercise of the power to tax the estates of deceased persons could easily be turned into Dead Sea fruit. But, in fact, taking the two Acts as one, I think they may fairly be read, as my learned brother *Gavan Duffy* suggested during the argument, as a tax on all the property which the deceased had from a period twelve months before his death down to his death.

Before concluding I mention the case of *G. G. Crespin & Son* v. *Colac Co-operative Farmers* (1) as a decision that the power to make laws with respect to taxation granted by the Constitution would, as a matter of interpretation, have been understood to include a provision which had for a long time been regarded by British Legislatures as fit to be included in laws imposing Customs duties.

I agree that both of the questions referred to us should be answered in the affirmative.

ISAACS J. The appellants contend that the provision made by sub-sec. 4 (*a*) of sec. 8 of the *Estate Duty Assessment Act* (No. 22 of 1914) is ineffectual. They put this contention on either of two grounds: (1) that by the incorporation of the provision into the Act No. 25 of 1914, the *Estate Duty Act* imposing the tax, the latter Act deals with two subjects of taxation, namely, property which the deceased had at the time of his death, and property which he had not then, and which, if it existed at all, belonged to someone else; or (2) that there is no power in the Constitution to tax a person in respect of property which belongs to another person. Both grounds are claimed to be supported by some of the reasoning in *Waterhouse's Case* (2), and the first ground is also said to be demonstrable from the mere statement of the terms.

In view of much of the reasoning in *Waterhouse's Case* (2) I should, but for one consideration, be greatly pressed. The only alternative would, as it seems to me, be this, that looking at both Acts as a whole, the tax was not placed on a *person* at all—for the former owner is dead, and it is *his* estate that is taxed and not the estate of his successors, or of any of his successors, or the estate of his administrator as such; but the tax was placed on the conglomerate

(1) 21 C.L.R., 205. (2) 17 C.L.R., 665.

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mass the deceased left—called his "estate"—and irrespective of what becomes of it afterwards; that that only was taxed, but that in view of known devices by owners expecting death to divest themselves of outward evidences of property while really controlling it, the Legislature, by sec. 8, has declared how the *value of that estate* is to be ascertained. It may be that that is the true effect of the legislation, but it is not necessary to determine it now. I approach the matter from a different standpoint, which in my opinion should govern it. It is the one I assumed in *Waterhouse's Case*, and which I think I am now at liberty to retain.

"One subject of taxation" (in sec. 55 of the Constitution) is a phrase that must depend for its application on the circumstances. A tax on land, a tax on ships and a tax on furniture are in one aspect taxes on three separate subjects; but if a man dies leaving an estate which as a single mass includes the three classes of property, then, by general understanding and long-existing usage, a tax on the whole estate which he has left, indiscriminately considered as a unity, is a tax on one subject. In *Waterhouse's Case* (1) I referred to some observations of the Privy Council in *Bank of Toronto* v. *Lambe* (2), where their Lordships, in determining that an income tax is a direct tax, said that the opposite view "would run counter to the common understanding of men on this subject, which is one main clue to the meaning of the Legislature." Their Lordships further added that the *indicia* of direct taxation was a common understanding, and was "likely to have been present to the minds of those who passed the Federation Act." That was the ground of my judgment in *Waterhouse's Case*, and I apply it to the present case.

Now, the singleness of a subject cannot be conclusively determined by the mere fact that Parliament has chosen to group together several distinct subjects. But it may depend as a fact on the application of certain *indicia* or on the circumstances of life, which are ever-changing. If the two Houses of Parliament, each alert as to its duties and rights and regarding the matter from the broad standpoint of the community, both consider that a proposed tax is laid upon a single subject, then it would, in my opinion, require a

(1) 17 C.L.R., 665, at p. 676.

(2) 12 App. Cas., 575, at p. 582.

very clear demonstration of error to lead the Court to say that was wrong, because the ingredients, so to speak, of the taxable subject were necessarily separate and distinct. The Court, in the performance of its constitutional duty, might of course have to say so, otherwise sec. 55 would be a vain inscription in the Constitution. But, on a matter open to doubt in view of the actual circumstances, I would be slow to reverse the opinion of Parliament.

In the present case, I find that, when the Constitution was adopted, both in England and Australia the Legislature as representing the general understanding of the community has regarded an estate duty as one including, if so desired so as to make it really effective, a provision reaching back, possibly for valuation purposes only, to property which within some not unreasonable time had been parted with by the deceased by way of gift so as to have some possible relation to the estate that still remained nominally his.

On this ground I reject the appellants' contentions, without expressing any opinion whatever as to the scope of many of the sections referred to, including the chargeability of the property actually parted with or the liability of its owners.

GAVAN DUFFY AND RICH JJ. In *Waterhouse's Case* (1) we felt coerced by previous decisions of this Court to hold that sec. 36 (2) of the *Land Tax Assessment Act* 1910 was an attempt to levy a land tax in respect of persons having no interest in the land, and was therefore invalid.

It is said that we are bound by the reasoning of the judgments which we then accepted and followed to hold that section 8 (4) of the *Estate Duty Assessment Act* 1914 (which is to be read as one with Act No. 25 of 1914) is bad, as an attempt to levy a property tax in respect of persons having no interest in the property, or in the alternative to hold the Act bad under the second paragraph of sec. 55 of the Constitution, as dealing with more than one subject of taxation. In our opinion neither of these contentions can prevail. We think that Parliament has dealt with only one subject of taxation, namely, all such property as a man has owned at any time

(1) 17 C.L.R., 665.

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within a period of one year before his death and has not disposed of for valuable consideration. The fact that Parliament for the purposes of the Act has called all such property "the estate of a deceased person" is immaterial. Some of it is not the estate of a deceased person in the ordinary acceptation of that term, but the validity of an Act of Parliament must be ascertained by inquiring whether the substance of the legislation is within its powers, not by inquiring whether the labels it has chosen to affix are accurate or even appropriate. The tax is payable by the personal representative of the dead man; we express no opinion as to the validity of any attempt to make it payable otherwise, if there be such an attempt in the Act of Parliament.

Questions answered in the affirmative.

Solicitors for the appellants, *Gillott, Moir & Ahern.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.