[HIGH COURT OF AUSTRALIA.]

WYNDHAM AND OTHERS . . . . APPELLANTS;

AND

MACKENZIE AND OTHERS . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1918.

SYDNEY, *Aug.* 8, 9, 23.

Isaacs, Gavan Duffy and Rich JJ.

Administration and Probate—Testamentary expenses—Stamp duty—Corpus commission—Direction in will to pay out of residue—Exoneration of real estate—Stamp Duties Act 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *secs.* 4, 49, 56, *Third Schedule—Perpetual Trustee Company* (*Limited*) *Act* 1888 (*N.S.W.*), *sec.* 13—*Wills, Probate and Administration Act* 1898 (*N.S.W.*) (*No.* 13 *of* 1898), *secs.* 44, 46, 61.

By secs. 4 and 49 of the *Stamp Duties Act* 1898 (N.S.W.) and the Third Schedule thereto, stamp duty is imposed upon probate or letters of administration to be granted in respect of any estate real and personal of deceased persons. By sec. 56 it is provided that "(1) Any duty payable under this Act by any executor or administrator shall be deemed to be a debt of the testator or intestate to Her Majesty, and shall be payable out of his personal estate. (2) If the personal estate is insufficient to pay such duty the executor or administrator . . . may apply to the Supreme Court, which may order that a sufficient part of the real estate be sold to pay the said duty. (3) Every executor or administrator may deduct from any property devised or bequeathed to any person an amount equal to the duty thereon, calculated at the same rate as is payable upon the estate under this Act, unless the testator has made a different disposition as to the payment of the said duty in his will."

By sec. 13 of the *Perpetual Trustee Company* (*Limited*) *Act* (N.S.W.), it is provided that the Company shall be entitled to receive a commission not exceeding a certain percentage upon the corpus, and a certain other percentage upon the income, of any estate of which the administration shall have been committed to it, which commission shall be accepted by the Company in full satisfaction of any claim to remuneration for acting as executor, administrator, trustee, &c.

By his will a testator, having disposed of certain of his real and personal estate, directed his trustees, the Perpetual Trustee Co. Ltd., to sell, call in and convert into money the residue of his real and personal estate and to pay thereout in the first place his debts, funeral and testamentary expenses.

Held, that the stamp duty payable under the *Stamp Duties Act* 1898 and the corpus commission payable under the *Perpetual Trustee Company (Limited) Act* were testamentary expenses; that the direction in the will was a "different disposition" within the meaning of sec. 56 (3) of the *Stamp Duties Act* 1898 in respect of the proportion of the stamp duty referable to the real estate as well as of that referable to the personal estate; and that under the direction in the will the whole of the stamp duty and the whole of the corpus commission must be paid out of the residue.

Perpetual Trustee Co. Ltd. v. *Tasker*, 13 S.R. (N.S.W.), 322, overruled.

Carmichael v. *Ryan*, 20 N.S.W.L.R. (Eq.), 137, approved.

In re Betts; *Doughty* v. *Walker*, (1907) 2 Ch., 149, distinguished.

Decision of the Supreme Court of New South Wales (*Harvey* J.): *Perpetual Trustee Co.* v. *Mackenzie*, 17 S.R. (N.S.W.), 660, reversed.

APPEAL from the Supreme Court of New South Wales.

An originating summons was taken out in the Supreme Court by the Perpetual Trustee Co. Ltd., executors and trustees of the will of George William Harris, deceased, for the determination of the question (*inter alia*) in what order of priority ought the Commonwealth estate duty and the New South Wales stamp duty on the estate other than the estate specifically devised or bequeathed and those on the specifically devised and bequeathed real and personal estate, and the corpus commission payable to the plaintiff Company on the personal estate, that payable on the residuary real estate and that payable on the specifically devised real estate, to be paid out of the real and personal estate not specifically devised and bequeathed.

By the will, which was dated 6th September 1916, the testator, after giving certain pecuniary legacies gave, devised and bequeathed all the rest, residue and remainder of his real and personal estate to his trustees upon certain trusts as to a cottage, a hotel and certain inscribed stock in the Commonwealth War Loan, in respect of each of which life estates with remainders over were given. The will then proceeded: "And as to all the rest residue and remainder of my real and personal estate including any lapsed legacies I direct my said trustees to sell call in and convert the same into money and after

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payment thereout of my just debts funeral and testamentary expenses and after payment of the legacies hereinbefore bequeathed in case there shall then be then any surplus to pay and divide the same" among certain named beneficiaries including certain charitable institutions. The defendants to the summons were Jane Mackenzie, Lucy Blanche Stewart and William James Stewart, an infant, each of whom represented a class of beneficiaries..

The summons was heard by *Harvey* J., who made an order declaring (*inter alia*) that the Commonwealth estate duty and the New South Wales stamp duty on the estate other than the portion of the estate available for payment as thereinafter provided of the general pecuniary legacies and other than the estate specifically devised or bequeathed, and that the corpus commission payable to the plaintiffs on the whole of the personal estate and on the real estate not specifically devised, ought to be paid out of the real and personal estate not specifically devised or bequeathed in priority to all other payments thereout; that the general pecuniary legacies and the New South Wales stamp duty on the personal estate specifically bequeathed and on the general pecuniary legacies ought to be paid *pari passu* in due course of administration out of any of the real and personal estate not specifically devised or bequeathed available for those purposes; and that the New South Wales stamp duty payable in respect of any specifically devised real estate, and that the corpus commission payable to the plaintiffs in respect of the specifically devised real estate, were to be paid out of and borne by such real estate respectively and that no portion thereof should be paid out of the personal estate or out of the residuary real estate: *Perpetual Trustee Co.* v. *Mackenzie* (1).

From that decision Linda Lucy Wyndham (one of the beneficiaries) and the plaintiff Company now appealed to the High Court.

Knox K.C. (with him *R. K. Manning* and *Maughan*), for the appellants. Both the stamp duty and the corpus commission are testamentary expenses, that is to say, they are necessarily to be incurred to enable the personal representative to obtain the right to administer

(1) 17 S.R. (N.S.W.), 660.

the estate and to exercise that right (*New South Wales Institution for the Deaf, Dumb and the Blind* v. *Shelley* (1)). That case recognized that a direction to pay testamentary expenses out of a particular fund was a "different disposition" within the meaning of sec. 56 of the *Stamp Duties Act* 1898. As to the stamp duty, until the decision now appealed from, it has always been held that it is a testamentary expense within a direction in a will to pay testamentary expenses out of a particular fund, and it has been so held where the stamp duty or some of it was payable in respect of real estate. See *In re Macleay's Will* (2); *Carmichael* v. *Ryan* (3); *In re McIntosh*; *Perpetual Trustee Co.* v. *McIntosh* (4); *In re McIntosh* [*No.* 2]; *Perpetual Trustee Co.* v. *McIntosh* (5); *In re Douglas*; *Umphelby* v. *Douglas* (6). As to the corpus commission, which is payable under sec. 13 of the *Perpetual Trustee Company* (*Limited*) *Act*, it is a testamentary expense, because it is a lump sum payable to the executors as executors immediately on undertaking their duties and it comes under the direction in the will whether attributable to real estate or to personal estate. The decision of *Harvey* J. in *Perpetual Trustee Co.* v. *Tasker* (7) that a direction in a will to pay testamentary expenses out of a particular fund does not apply to corpus commission which is attributable to real estate, was based on *In re Betts*; *Doughty* v. *Walker* (8) and *Patching* v. *Barnett* (9), on the assumption that the *Wills, Probate and Administration Act* had the same effect as the English *Land Transfer Act* 1897 (60 & 61 Vict. c. 65). But the former Act does not contain any provision similar to the proviso to sec. 2 of the latter Act. [Counsel referred to secs. 46 and 61 of the *Wills, Probate and Administration Act* 1898.] The corpus commission chargeable under sec. 13 of the *Perpetual Trustee Company* (*Limited*) *Act* is payable immediately on probate being obtained, and is the price payable by the estate for the benefit of the estate being administered by the Company, and is therefore, in the strictest sense, a testamentary expense. See *In re Muir* (10). It comes within the direction of the will whether it is attributable to real estate or to personal estate.

(1) 23 C.L.R., 351.
(2) 14 N.S.W.L.R. (Eq.), 217 (n.).
(3) 20 N.S.W.L.R. (Eq.), 137.
(4) 2 S.R. (N.S.W.) (Eq.), 185.
(5) 2 S.R. (N.S.W.) (Eq.), 247.
(6) 9 S.R. (N.S.W.), 269.
(7) 13 S.R. (N.S.W.), 322.
(8) (1907) 2 Ch., 149.
(9) (1907) 2 Ch., 154 (n.).
(10) 6 S.R. (N.S.W.), 124.

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Bethune, for the respondents. The old rule before the *Wills, Probate and Administration Act* 1898 was that so far as the general costs of administration had been increased by the cost of administering the real estate they should be borne by the real estate. In England the same rule existed, and it has been held as to several duties payable by executors that, although they are payments necessarily made in the course of administration, they are not testamentary expenses within the meaning of the common direction in a will that testamentary expenses shall be paid out of a particular fund. See *In re King*; *Travers* v. *Kelly* (1); *O'Grady* v. *Wilmot* (2). That direction had acquired a certain meaning which excluded from its operation payments attributable to real estate, and just as the *Land Transfer Act* was held in England not to alter that meaning, so the *Wills, Probate and Administration Act* did not alter it here. In *In re Betts*; *Doughty* v. *Walker* (3), *Kekewich* J. laid it down as a general rule of administration that the costs of administering real estate are outside what are known as administration expenses. So that as to the stamp duty the direction in the will is not a "different disposition" within the meaning of sec. 56 of the *Stamp Duties Act*. The same arguments apply to the corpus commission as to the stamp duty. So far as it is attributable to real estate, it is not a testamentary expense within the direction in the will.

[ISAACS J. referred to *In re Twigg's Estate*; *Twigg* v. *Black* (4).]

Knox K.C., in reply.

Cur. adv. vult.

Aug. 23.

The judgment of the COURT, which was read by ISAACS J., was as follows:—

George William Harris died on 5th January 1917, leaving a will made in the previous September. After various pecuniary legacies, he devised and bequeathed the residue of his real and personal estate to trustees upon trusts, comprising, first, certain specific gifts both of real and personal property, and then

(1) (1904) 1 Ch., 363.
(2) (1916) 2 A.C., 231.
(3) (1907) 2 Ch., 149.
(4) (1892) 1 Ch., 579.

said the testator : " as to all the rest residue and remainder of my real and personal estate including any lapsed legacies I direct my said trustees to sell call in and convert the same into money and after payment thereout of my just debts funeral and testamentary expenses and after payment of the legacies hereinbefore bequeathed in case there shall then be any surplus to pay and divide the same as follows " ; and then followed directions. An originating summons was taken out to determine the order of priority in which certain moneys should be paid out of the real and personal estate not specifically devised and bequeathed. Those moneys included : (1) New South Wales stamp duty on the estate ; (2) Perpetual Trustee Co.'s commission. As to both of these *Harvey* J. held that the direction as to " testamentary expenses " in the will should be construed as referring only to such proportion of the stamp duty and the commission as is referable to the personal estate.

The appellants contend that the words " testamentary expenses " there used include the whole duty and commission. Probate duty is, of course, a testamentary expense. The commission is chargeable by the Perpetual Trustee Co under its special Act of 1888 (sec. 13) " as executor," and the rate is a maximum of $2\frac{1}{2}$ per cent. on corpus and 5 per cent. of annual income received by the Company, and is " in full satisfaction of any claim to remuneration for acting as such executor." It is also a " testamentary expense." See *Sharp* v. *Lush* (1) and *In re Twigg's Estate* (2). *Primâ facie*, both these charges fall in their entirety within the terms of the special direction in the will. The foundation of the decision of the learned Judge, that they do not wholly come within it, is found in *Perpetual Trustee Co.* v. *Tasker* (3). In that case, decided in 1913, his Honor held that the commission on corpus is distributable, and so far as it is a commission on personal estate it is paid out of the assets in the ordinary order, but so far as it represents commission on realty it is thrown on the realty alone *pro ratâ*. No question as to stamp duties arose in *Tasker's Case*, and therefore the case of *Carmichael* v. *Ryan* (4) was not cited. In that case, decided in 1899 by

(1) 10 Ch. D., 468, at p. 470.
(2) (1892) 1 Ch., at p. 582.
(3) 13 S.R. (N.S.W.), 322.
(4) 20 N.S.W.L.R. (Eq.), 137.

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A. H. Simpson C.J. in Eq., it was expressly held, under a direction to pay testamentary expenses out of residue, that the whole probate duty was included, notwithstanding specific gifts in the will. However, having determined in *Tasker's Case* that commission was distributable, the learned Judge in the present case thought that no difference in principle really existed between commission and probate duty, and that both are similarly distributable. In effect, that means that the words " testamentary expenses " as they stand unqualified otherwise, either by words or by context, are qualified by the context to this extent, that, there being both realty and personalty dealt with by the will, they are applicable only to personalty.

The basis of that conclusion is found in two English cases: *In re Jones*; *Elgood* v. *Kinderley* (1) and *In re Betts*; *Doughty* v. *Walker* (2). Before examining those cases, reference should be made to sec. 56 of the *Stamp Duties Act* 1898, which deals with the incidence of the probate duty. That section, in the first paragraph, declares that the duty shall be deemed to be a debt of the testator to the Crown, and " shall be payable out of his personal estate." The second paragraph makes the real estate liable if the personal estate is insufficient for the purpose. The third paragraph is in these words: " Every executor or administrator may deduct from any property devised or bequeathed to any person an amount equal to the duty thereon, calculated at the same rate as is payable upon the estate under this Act, unless the testator has made a different disposition as to the payment of the said duty in his will."

Now, the effect of sec. 56 is that, as regards the Crown, the whole or any part of the estate is liable for the payment of the duty, though the order is first personalty, and, if that is insufficient, then realty in manner prescribed. No disposition by the testator can relieve any part of his property from that responsibility. But, the Crown being so secured, the section provides a ratable contribution to that payment as between beneficiaries, according to the relative value of the properties they receive, unless the testator makes " a different disposition " as to the payment of the duty. The words

(1) (1902) 1 Ch., 92. (2) (1907) 2 Ch., 149.

"any property" in par. 3 naturally include both real and personal property, and in this paragraph must mean it, because they are followed by the words "devised or bequeathed," and in the two previous paragraphs both "real" and "personal" estate are expressly mentioned. That is consonant with the general policy and rule of law established in New South Wales, and found embodied in secs. 44 to 61 of the *Wills, Probate and Administration Act* 1898. By sec. 61, when a testator dies and until probate, all his real and personal estate vests in the Chief Justice "in the same manner and to the same extent as aforetime the personal estate and effects vested in the Ordinary in England." On grant of probate (sec. 44) all real and personal estate vests in his executor, and (sec. 46) real as well as personal estate becomes assets for the payment of all duties and fees and debts in the ordinary course of administration.

Upon that state of affairs sec. 56 of the *Stamp Duties Act* operates; and the question is how in the case of a will dealing with the whole estate real and personal, and containing the express disposition as to testamentary expenses found in this will, there can arise the distinction and separation of realty and personalty laid down in *Tasker's Case* as to commission, and applied in this both to commission and to probate duty. The two English cases are thought to establish the principle. Those two cases were decided on the *Land Transfer Act* 1897. In his judgment in *Tasker's Case* *Harvey* J. says (1): "No doubt sec. 2, sub-sec. 3, of the *Land Transfer Act* preserves the old liability for testamentary expenses, but I think the *Probate Act* 1890 and the present *Wills, Probate and Administration Act* must be interpreted in the same manner." The crux of the matter is contained in that sentence.

The learned Judge decided that the cases on which he relied applied not merely to the costs of administration suits, but that the principle approved of was of general application and extended to all the costs of administration to the estate. Let us assume, without deciding, that his Honor was correct in so holding. The learned Judge says that *Jessel* M.R. considered that the expenses incurred in selling the real estate were not testamentary expenses in the ordinary sense, so as to be payable out of the personal estate, that

(1) 13 S.R. (N.S.W.), at p. 330.

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is, of course, under the special direction in the will. The cases referred to, however, when carefully examined, make the position clear. Before 1897 the executor in England had no concern with realty, and a practice was established by the Court of Chancery that when the aid of the Court was invoked in an administration suit, the costs of the suit in its discretion should be so apportioned as to throw upon the real estate—as a rule—such part of those costs as were exclusively caused by the real estate, that is, to the extent that the real estate increased the ordinary costs of administering the personal estate. That, as *Jessel* M.R. said, was done "as a rule." In other words, the Court of Appeal considered that at that date, in giving a general direction as to "testamentary expenses," the testator, in the absence of more specific direction, did not mean to override the general practice of the Court with regard to realty when the realty had to be administered under the direction of the Court.

In *Betts' Case* (1) *Kekewich* J. takes that view of the decision, and adds: "What I take the meaning of the decision to be is that the direction must be so plain as to show that the testator intended to depart from the general rule, otherwise when he says that the testamentary expenses are to be borne by the personal estate he only means such part of the testamentary expenses as in the ordinary course would be borne by the personal estate, and does not mean to defeat the rule of Court that in an administration action there is to be a fair distribution between the real and personal estate." The learned Judge goes on to hold that the *Land Transfer Act* 1897 had clearly the effect of making the costs of the Court proceedings before him in 1907 "testamentary expenses." The observation of *Jessel* M.R. (2), that "Testamentary expenses, I suppose, do not include the costs of the real estate," might or might not have been strictly correct in 1881, but in 1907, according to *Kekewich* J. (1), whose judgment is relied on, they had become testamentary expenses in the true sense. Then proceeded the learned Judge: "But, though they may be so, I think the Act does not otherwise assist the heir, because it is plainly decided by *Buckley* J. in the

(1) (1907) 2 Ch., at p. 153. (2) (1907) 2 Ch., at p. 155.

case of *In re Jones* (1) that no variation of the rules has been produced by the provisions of the Act." That throws us back on the reasons of *Buckley* J. in the case of *In re Jones*. In that case (2) that learned Judge makes it most manifest that, notwithstanding the earlier part of sub-sec. 3 of sec. 2 of the *Land Transfer Act* 1897 provides that the real estate shall be administered in the same manner and subject to the same liabilities for costs and expenses as if it were personal estate, the proviso at the end made a specific enactment, which had to be followed. It said: "Nothing herein" (that is, in the Act) "contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of . . . testamentary expenses"; and the learned Judge goes on to add: "which include the costs of an administration action." On that proviso, and on that alone, it was held that the rule formerly established by *Patching* v. *Barnett* (3) and *In re Middleton*; *Thompson* v. *Harris* (4) must be followed.

In the absence of any corresponding provision in New South Wales legislation, the analogy fails, and the same full force must be given to the assimilation of administration enacted with regard to real and personal property as *Buckley* J. was prepared to give to the *Land Transfer Act* but for the proviso quoted. The change effected by the Legislature in enacting that assimilation was so deliberate, radical and sweeping, that nothing short of express or necessarily implied qualification by Parliament itself can cut down the natural effect of its language. This is what the Imperial Parliament thought in 1897, and took care to express.

The basis of reasoning in *Tasker's Case* (5) not being sustained, there remains nothing to cut down the natural effect of the testator's direction. He has thrown his testamentary expenses on the residue in exoneration of the rest of his estate. That is a "different disposition" within the meaning of sec. 56 of the *Stamps Act*. Mr. *Bethune* placed considerable reliance on that part of *O'Grady* v. *Wilmot* (6) which deals with the construction of the direction in the will to pay testamentary expenses. It was there held that the

(1) (1902) 1 Ch., 92.
(2) (1902) 1 Ch., at p. 96.
(3) (1907) 2 Ch., 154 (n.).
(4) 19 Ch. D., 552.
(5) 13 S.R. (N.S.W.), 322.
(6) (1916) 2 A.C., 231.

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words "testamentary expenses" as used in that direction did not include estate duty on appointed property, because the common form used in the will was construed *secundum subjectam materiam*, and, so construed, it was taken to apply to what it ordinarily applies to, namely, testamentary expenses relating to the testator's own property. That decision does not assist the respondents here.

We were asked to give weight to the fact that *Carmichael* v. *Ryan* (1) was accepted as correct in New South Wales from 1899 to 1913, that is, fourteen years, and that it was probably acted on extensively during that period. *Tasker's Case* (2) has also been standing for about five years, and may have been acted on also. We do not find it necessary to rest our judgment at all on considerations of that nature. Regarding the question as *res integra*, we agree with the view taken in *Carmichael* v. *Ryan*, and are of opinion that *Tasker's Case* is not sustainable on the legislation in force in New South Wales.

The appeal should, in our judgment, be allowed.

Appeal allowed.

Solicitor, *F. W. Barker*.

B. L.

(1) 20 N.S.W.L.R. (Eq.), 137. (2) 13 S.R. (N.S.W.), 322.