

2018
Cannane &
Visbeck Pty
Ltd v Official
Trustee
1906) 136
ALR 406

[HIGH COURT OF AUSTRALIA.]

WELDON (COMMISSIONER OF TAXES FOR
VICTORIA) }

APPELLANT ;

AND

THE UNION TRUSTEE COMPANY OF
AUSTRALIA LIMITED }

RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Probate Duty—Valuation of estate—Time as at which valuation to be made—Interest in property subject to annuity—Valuation of annuity—Death of annuitant before valuation made—Administration and Probate Act 1915 (Vict.) (No. 2611), secs. 122, 128.

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For the purpose of assessing the duty payable under sec. 128 of the *Administration and Probate Act 1915* (Vict.) on the estate of a deceased person, the value of the estate must be ascertained as at his death. Therefore, where A was entitled at the date of his death to a share in a sum of money which was subject to the payment of an annuity, the fact that the annuitant died shortly after A's death was immaterial in ascertaining the value of the annuity for the purpose of assessing the duty payable on A's estate.

Decision of the Supreme Court of Victoria (Full Court): *In re Jameson*, (1925) V.L.R. 7 ; 46 A.L.T. 116, affirmed.

Knox C.J.,
Isaacs, Higgins,
Rich and
Starke JJ.

APPEAL from the Supreme Court of Victoria.

A case was stated by Robert McIntyre Weldon, Commissioner of Taxes for the State of Victoria, under the provisions of sec. 124 of the *Administration and Probate Act 1915*, in which the following facts were stated :—Margaret Mary Jameson died on 8th January 1921 and probate of her will, dated 15th May 1920, was on 6th December

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1921 granted by the Supreme Court of Victoria to the Union Trustee Co. of Australia Ltd., the executor named therein. At the date of her death Mrs. Jameson was entitled under the will of Timothy Twomey deceased to a 5/16ths share in the corpus of his estate, that corpus being subject to an annuity for life of £1,200 in favour of Timothy Twomey's widow (Annie Twomey), who survived him and died on 30th April 1921, about twelve weeks after the death of Mrs. Jameson. The duty payable on the estate of Mrs. Jameson other than her interest in Timothy Twomey's estate was assessed by the Commissioner of Taxes and was paid, leaving open the question of the duty payable in respect of that interest. For the purpose of estimating the value of that interest an actuarial calculation of the value of the annuity at the date of Mrs. Jameson's death was, on 2nd July 1923, made on behalf of Mrs. Jameson's executor. A supplementary statement as to the value of that interest so calculated was lodged with the Commissioner of Taxes, who, on 17th July 1923, assessed the duty payable in respect of that interest on the basis of the value so ascertained, and the duty so assessed was paid. On 15th November 1923 the Commissioner made a further assessment based on the actual fact that Mrs. Twomey, the life tenant, died twelve weeks after Mrs. Jameson's death, and he demanded a further amount of duty. The sum so demanded was paid by the executor under protest on 16th January 1924. The death of Mrs. Twomey was known to the parties before the actuarial valuation was made. The executor contended that the net value of the estate of Mrs. Jameson should be assessed as on the exact date of her death, and therefore that the value of the annuity should be calculated as on that date, such calculation to be based on the ordinary probabilities of life and death (as adopted in all valuations of life interests) regardless of the fact that the annuitant died twelve weeks after that date. The Commissioner contended that, as Mrs. Twomey had died before the supplementary statement was lodged, the value of the annuity was a matter of definite calculation based on the fact that the annuitant survived Mrs. Jameson twelve weeks only, and should not be ascertained by actuarial calculation as to the life of the annuitant based on the ordinary probabilities of life and death as adopted in all valuations of life interests.

The question for the opinion of the Court was as follows :—

In estimating the value of the said annuity, should the same be based on the fact that the annuitant survived Mrs. Jameson twelve weeks only, or be ascertained according to an actuarial calculation as to the life of the annuitant as at the date of the death of Mrs. Jameson based on the ordinary probabilities of life and death as adopted in all valuations of life interests ?

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The Full Court of the Supreme Court answered the question thus : In estimating the value of the annuity such estimate should not be based on the fact that the annuitant survived Mrs. Jameson twelve weeks only, but the value should be ascertained by means of an estimate based upon the facts and probabilities in existence at the time of Mrs. Jameson's death which would ordinarily affect that value as in the case of the valuation of life interests: *In re Jameson* (1).

From that decision the Commissioner of Taxes now, by special leave, appealed to the High Court.

Herring, for the appellant. Although the value of a testator's estate for the purposes of probate duty under secs. 122 and 128 of the *Administration and Probate Act* 1915 (Vict.) is to be taken as at the death of the testator, if the property is of such a kind that the value can ordinarily only be ascertained by making an estimate, all the facts that are known when the valuation is made should be taken into account, and, if at that time the actual value is known, that is the value that is to be taken (see *Affleck v. The King* (2); *Lilly v. West Australian Trustee, Executor and Agency Co.* (3)). The Court will not take a calculated value of an annuity if there is any other evidence of its value (*In re Parker-Jervis*; *Salt v. Locker* (4)). [Counsel also referred to *Todd v. Bielby* (5).]

[RICH J. referred to *Chesterman v. Federal Commissioner of Taxation* (6); *Carr v. Ingleby* (7).

(1) (1925) V.L.R. 7; 46 A.L.T. 116. (6) (1923) 32 C.L.R. 362, at pp. 387, 398.
(2) (1906) 3 C.L.R. 608, at p. 617.
(3) (1911) 13 C.L.R. 416, at p. 427. (7) (1827-1831) 1 DeG. & Sm. 362, at p. 363.
(4) (1898) 2 Ch. 643, at p. 655.
(5) (1859) 27 Beav. 353.

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[HIGGINS J. referred to *Master in Equity of Supreme Court of Victoria v. Pearson* (1) ; *In re Pearson* (2).]

Pigott and *Fullagar*, for the respondent, were not called upon.

KNOX C.J. In my opinion the Supreme Court was clearly right in rejecting the contention of the present appellant that, in valuing the interest of Margaret Jameson under the will of Timothy Twomey deceased, the fact that Mrs. Twomey, the annuitant under that will, died twelve weeks after Margaret Jameson should be taken into consideration. The value of Margaret Jameson's interest was to be ascertained at the date of her death, and, in my opinion, only the facts and circumstances existing at that time should be taken into consideration in valuing it. As Mr. *Pigott* raises no objection to the form of the answer given by the Supreme Court to the question submitted, it is not necessary to express an opinion on the question whether the Supreme Court was right in holding that an actuarial calculation was not the proper method of ascertaining the value, but that the estimate was to be based on the facts and probabilities existing at the date of Mrs. Jameson's death. In the absence of evidence as to the usual method of valuing life interests or annuities, I desire to reserve my opinion on this point.

The appeal should be dismissed with costs.

ISAACS J. I agree that the appeal should be dismissed. In my opinion the accident that the annuitant died at a particular date after the death of the testator does not affect the issue, which is: What was the actual value as at the date of the testator's death of the property of which the estate of the testator consisted at his death?

HIGGINS J. In my opinion Mr. *Herring* has made the best of a bad case; we clearly cannot give a decision in favour of the Commissioner.

Sec. 122 (1) of the Act provides that the executor shall file a statement specifying: "(a) the real and personal property of which

(1) (1897) A.C. 214.

(2) (1894) 20 V.L.R. 484; 16 A.L.T. 115.

the estate of the deceased consisted *at his death* ” ; and then “ (c) the value of the property referred to in paragraph (a) ” ; and then “ (d) the debts and liabilities of the deceased.”

Under sec. 128 duty has to be paid according to the rate fixed in the Tenth Schedule for an estate of the value (after deducting all debts) of the final balance appearing on the statement. The value to be regarded is the value at the date of the death of the testator. The only thing that at all justifies any doubt is a certain expression of the late Chief Justice *Griffith* in his judgment in *Lilly v. West Australian Trustee, Executor and Agency Co.* (1), but fortunately there is a correction in the same breath. Looking at the statement there, it is perfectly clear what the late Chief Justice meant. He said :—“ 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.*” Those last words have, I think, been misconstrued. It is evident that you have to find the value as at the date of the death of the testator, but that you are entitled to look at any evidence relevant to that issue, even if that evidence was not available at the date of the death of the testator ; but that evidence must be relevant to the question of the value as at the date of the death.

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RICH J. I agree.

STARKE J. I also agree.

Appeal dismissed with costs.

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitor for the respondent, *E. Fitzgerald*.

B. L.

(1) (1911) 13 C.L.R., at p. 427.