[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMPS (WESTERN AUSTRALIA) . . . . . APPELLANT;

AND

THE WEST AUSTRALIAN TRUSTEE, EXECUTOR AND AGENCY COMPANY LIMITED . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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MELBOURNE, *May* 19, 20; *June* 16.

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

Probate Duty—Deduction from value of assets—"Debts due by the deceased"—Federal income tax not assessed at death—Administration Act 1903 (*W.A.*) (*No.* 13 *of* 1903), *secs.* 4, 10, 62, 86*, 88*, 89, 111-113—*Income Tax Assessment Act* 1915-1918 (*No.* 34 *of* 1915—*No.* 18 *of* 1918), *secs.* 3, 10 (1), 28, 31, 36, 41, 44, 46A, 52—*Income Tax Assessment Act* 1922 (*No.* 37 *of* 1922), *secs.* 4, 13 (1), 32, 35, 40, 54, 57, 62, 89—*Income Tax Act* 1919 (*No.* 9 *of* 1919), *secs.* 2, 3, 8—*Income Tax Act* 1920 (*No.* 37 *of* 1920), *secs.* 2, 3, 9—*Income Tax Act* 1922 (*No.* 38 *of* 1922), *secs.* 2, 3, 7.

Held, by *Knox* C.J., *Higgins* and *Starke* JJ. (*Isaacs* and *Rich* JJ. dissenting), that Federal income tax in respect of income derived by a person during a period antecedent to his death imposed by an Act passed during his lifetime, although not assessed or otherwise ascertained during his lifetime, is after his death a "debt due by the deceased person" within the meaning of sec. 88 of the *Administration Act* 1903 (W.A.).

* Sec. 86 of the *Administration Act* 1903 (W.A.) provides that "Every executor and administrator shall pay to the Commissioner duty on the final balance of the real and personal estate of the deceased" &c. Sec. 88 provides that "For the purpose of ascertaining the amount of duty, every executor and administrator shall . . . file with the Commissioner a statement in the prescribed form, verified by affidavit, specifying full particulars of . . . (*b*) The debts due by the deceased person, distinguishing between secured and unsecured debts, and stating the nature of the security held, and the estimated value thereof; (*c*) The balance remaining after deducting the amount of the debts from the value of the estate of the deceased person"; &c.

Decision of the Supreme Court of Western Australia (Full Court): *West Australian Trustee, Executor and Agency Co. Ltd.* v. *Commissioner of Stamps*, (1924) 27 W.A.L.R. 40, affirmed.

APPEAL from the Supreme Court of Western Australia.

Mortimer Kelly deceased died at Perth on 18th November 1922, and probate of his will, dated 24th June 1922, was granted to the West Australian Trustee, Executor and Agency Co. Ltd. on 18th December 1922. After the death of the testator and before 1st March 1923 the Company, as executor of the testator, was served with assessments made by the Federal Commissioner of Taxation of income tax payable by the testator and/or his estate, as follows: (1) Amended assessment for income tax on income earned during the year ended 30th June 1919, £1 10s. 5d.; (2) assessment for income tax on income earned during the year ended 30th June 1920, £284 4s. 2d.; (3) assessment for income tax on income earned during the year ended 30th June 1922, £32 5s. 1d.—a total of £317 19s. 8d. The Company prepared and filed with the Commissioner of Stamps of Western Australia a verified statement in the prescribed form in pursuance of sec. 88 of the *Administration Act* 1903 (W.A.), and in such statement included the sum of £317 19s. 8d. as being "debts due" by the deceased. The Commissioner of Stamps refused to allow that sum as a deduction and, having determined the value of the estate accordingly, demanded payment of duty in conformity with such determination. The Company paid the amount so demanded under protest. The Company then, by originating summons, applied to the Supreme Court for an order that the decision of the Commissioner in refusing to allow the three sums aggregating £317 19s. 8d. as deductions was wrong, and should be reversed and his assessment varied accordingly. The summons having been referred to the Full Court, the Full Court declared that the decision of the Commissioner should be reversed and his assessment varied on the ground that the three sums aggregating £317 19s. 8d. were debts due by the deceased within the meaning of sec. 88 of the *Administration Act* 1903 and were proper deductions: *West Australian Trustee, Executor and Agency Co. Ltd.* v. *Commissioner of Stamps* (1).

(1) (1924) 27 W.A.L.R. 40.

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

Ham, for the appellant. None of the three sums in question were "debts due by the deceased" within the meaning of sec. 88 of the *Administration Act* 1903. The word "debts" in that section means sums which there was a legal liability upon the deceased to pay, and does not include contingent liabilities. Under the *Income Tax Assessment Act* 1915-1918 and the *Income Tax Assessment Act* 1922 and the relevant Federal Income Tax Acts, until an assessment is made there is no sum certain and no legal liability to pay, and therefore there cannot be a debt (see secs. 10 (1), 31, 41, 44, 46A and 46B of the *Income Tax Assessment Act* 1915-1918; secs. 13 (1), 35, 54, 57, 61 and 62 of the *Income Tax Assessment Act* 1922; *Income Tax Acts* 1919, 1920, 1922, secs. 2 and 3). In *Chesterman* v. *Commissioner of Stamp Duties* (1) and *Mack* v. *Commissioner of Stamp Duties (N.S.W.)* (2) the words interpreted were "debts actually due and owing," and it was held that those words did not imply that the debts were presently payable. But the words "debts due" mean sums certain which any person is legally liable to pay either presently or in the future (*Ex parte Kemp*; *In re Fastnedge* (3); *Irish Land Commission* v. *Massereene* (4); *Master in Equity of Supreme Court of Victoria* v. *Pearson* (5); *Hanson's Death Duties*, 6th ed., pp. 146, 151).

[ISAACS J. referred to *Whittaker* v. *Kershaw* (6); *In re Stockton Malleable Iron Co.* (7); *In re Russian Spratts Patent Ltd.*; *Johnson* v. *Russian Spratts Patent Ltd.* (8).

[HIGGINS J. referred to *Bide* v. *Harrison* (9); *Taylor* v. *Taylor* (10).]

C. Gavan Duffy, for the respondent. In sec. 88 of the *Administration Act* 1903 the word "debts" should be given the meaning of "all liabilities" (*In re Melbourne Locomotive and Engineering Works Ltd.*;

(1) (1922) 22 S.R. (N.S.W.) 648.
(2) (1920) 28 C.L.R. 373.
(3) (1874) L.R. 9 Ch. 383, at p. 387.
(4) (1904) 2 I.R. 502, at p. 513.
(5) (1897) A.C. 214.
(6) (1890) 45 Ch. D. 320, at p. 325.
(7) (1875) 2 Ch. D. 101, at p. 103.
(8) (1898) 2 Ch. 149.
(9) (1873) L.R. 17 Eq. 76.
(10) (1870) L.R. 10 Eq. 477.

Neave's Case (1); *Bainbridge* v. *Bainbridge* (2); *In re St. George's Steam-Packet Co.* (3)).

[KNOX C.J. referred to *Holt* v. *Abbott* (4).]

The purpose of probate duty is to tax property which comes to persons who have given nothing for it. If the word "debts" were given its narrow meaning, it might have the effect that the tax would fall upon some person having a lawful claim upon the estate. Even if the word "debts" is given its narrower meaning, on the proper construction of the Income Tax Assessment Acts and the Income Tax Acts the income tax is a debt. The sums in question were liabilities of the testator imposed by law, the liabilities being to pay certain ascertained or ascertainable sums. The liability to pay was imposed by the several Income Tax Acts and not by the Assessment Acts.

[HIGGINS J. referred to *Gordon* v. *Whitehouse* (5).]

Ham, in reply.

[HIGGINS J. referred to *Brown* v. *Great Eastern Railway Co.* (6).]

Cur. adv. vult.

June 16.

The following written judgments were delivered :—

KNOX C.J. The testator, Mortimer Kelly, died on 18th November 1922 and the respondent is the executor of his will. After his death assessments to Federal income tax in respect of income derived by the testator during the several years ending on 30th June 1919, 30th June 1920 and 30th June 1922 were served on the respondent as his executor, returns in respect of income derived during those years having been made by the testator in his lifetime. The respondent having paid the taxes assessed, amounting in all to £317 19s. 8d., claimed that, in determining the amount of duty payable on the testator's estate under the *Administration Act* 1903, the sums so paid should be deducted from the value of the estate as being debts due by the deceased. The appellant having rejected

(1) (1895) 21 V.L.R. 442, at p. 446; 17 A.L.T. 213, at p. 215.
(2) (1837) 7 L.J. Ch. 4.
(3) (1852) 21 L.J. Ch. 832.
(4) (1851) Legge (N.S.W.) 695.
(5) (1856) 18 C.B. 747.
(6) (1877) 2 Q.B.D. 406.

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the claim, his decision was reversed on appeal to the Supreme Court and a declaration made that the sums in question were debts due by the deceased and should be deducted accordingly. From that judgment this appeal is brought by special leave.

The first question for consideration is as to the meaning to be attributed to the phrase "debts due by the deceased" in sec. 88 of the *Administration Act*. It is, I think, clear that this phrase does not mean "debts due and payable"; and I do not understand that the appellant contends that it bears that meaning. The alternative is that it includes debts owing but not payable at the date of testator's death and has the same meaning as "debts due and owing." This phrase was considered by this Court in *Mack's Case* (1), and I see no reason to depart from the opinion I then expressed. If it be conceded that the right of deduction extends to debts which are not presently payable at the death of the testator or intestate, the phrase "debts due by the deceased" seems to me apt to include at least all sums which were at his death or might thereafter become payable in discharge of any legal obligation undertaken by, or imposed by law upon, the deceased in his lifetime. In *Stephen's Commentaries*, 10th ed., vol. II., p. 151, it is said:— "Whenever a man is subject to a legal liability to pay a sum of money to another he is said to owe him a debt to that amount. If by Act of Parliament a penalty be annexed to some particular offence and it be made recoverable by the first informer any person committing the offence will become indebted in the amount of the penalty to the first informer as soon as the information is laid."

It is not necessary to decide, in the view which I take of this case, whether the expression used in sec. 88 of the Act has a wider meaning and includes all sums which are or may become payable out of the estate of the deceased by the executor before he is entitled to distribute the assets to the beneficiaries, but I am inclined to think this is its true meaning, and the provisions of sec. 86 and secs. 111 to 113 of the Act point in this direction.

The question then is whether an obligation or liability to pay presently or at some future time income tax on income derived by the testator during the several years in question was imposed by law

(1) (1920) 28 C.L.R. 373.

on him in his lifetime. The answer to this question depends on the construction of the relevant provisions of the Acts under which the several amounts of tax were levied. The tax in respect of the income during the year ending 30th June 1919 was imposed by the *Income Tax Act* 1919, which incorporated the *Income Tax Assessment Act* 1915-1918; that in respect of the income derived during the year ending 30th June 1920, by the *Income Tax Act* 1920, which incorporated the same Assessment Act; and that in respect of the income derived during the year ending 30th June 1922, by the *Income Tax Act* 1922, which incorporated the *Income Tax Assessment Act* 1922. There is no substantial difference for the purpose of this case between the relevant provisions of the *Income Tax Assessment Act* 1915-1918 and those of the *Income Tax Assessment Act* 1922, or between the relevant provisions of the several Income Tax Acts; and it will be convenient to deal with the case as if the only tax in question was that paid in respect of the income derived by the testator during the year ending 30th June 1922.

The *Income Tax Act* 1922 was assented to on 18th October 1922 during the lifetime of the testator. The relevant provisions of that Act are as follows :—Sec. 2 provides that the *Income Tax Assessment Act* 1922 is to be incorporated and read as one with the Act. Sec. 3 enacts that "income tax *is imposed* at the rates and amounts declared in this Act." Sec. 7 provides that income tax shall be levied *and paid* for the financial year beginning on 1st July 1922. The relevant provisions of the *Income Tax Assessment Act* 1922 are as follows :—By sec. 4 income tax is defined as meaning, unless the contrary intention appears, "the income tax imposed as such by any Act as assessed under this Act." Sec. 13 (1) provides that, subject to the provisions of the Act, income tax shall be levied and paid for each financial year upon the taxable income derived during the previous year. Sec. 32 requires a return to be made by every person whose total income derived from all sources in Australia amounts to £200. By sec. 35 assessments are to be made *for the purpose of ascertaining the taxable income* on which income tax shall be levied. By sec. 40 notice in writing of the assessment is to be given to the person liable to pay tax but the omission to give such notice is not to invalidate the assessment. Sec. 54 provides that income tax shall

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be due and payable thirty days after the service by post of a notice of assessment, or in certain cases on such other date as the Commissioner notifies to the taxpayer. Sec. 57 provides that income tax shall when it becomes due and payable be deemed to be a debt due to the King and payable to the Commissioner, and may be recovered in any Court of competent jurisdiction. Sec. 62 provides that, if at a person's death tax has not been paid on the whole of the income derived by him in his lifetime, the Commissioner shall have the same powers and remedies for the assessment and recovery of tax from his personal representatives as he would have had against the first-named person if he were alive. Sec. 89 provides that an executor shall be assessed in his representative capacity only, and may deduct the amount paid from any money in his hands as executor and, except in certain specified events, shall not be personally liable for the tax.

In my opinion, the *Income Tax Act* imposed on every person who during the year ending 30th June 1922 derived from sources in Australia income which was " taxable " according to the provisions of the Assessment Act an obligation to pay income tax at the rate declared. The obligation, I think, existed from the moment when the *Income Tax Act* became law. That this is so in the case of a person who during the relevant year won a prize in a lottery is, I think, indisputable (see sec. 6 of the Act); and the only difference between that case and the case of a person who derived income from a less precarious source is that in the former the amount of tax payable is ascertained by mere arithmetical calculation while in the other it is necessary, in order to ascertain the amount of tax, to take into consideration all the relevant provisions of both Acts. In my opinion, the fact that the method of ascertaining the amount payable as tax is more complicated in the latter case than in the former does not affect the question. A sum of money is none the less certain because the method by which it is to be ascertained is complicated or involves a decision by some specified person (see *Gordon* v. *Whitehouse* (1)). It follows that the liability imposed by the *Income Tax Act* 1922 on a person who derived taxable income during the preceding year was, in my opinion, a liability to pay a

(1) (1856) 18 C.B., at p. 753.

" sum certain " in the sense that it was a sum capable of being ascertained by the application of a prescribed method. Whether that method was simple or complex or whether it involved considerations outside mere arithmetical calculations was, in my opinion, quite irrelevant.

Counsel for the appellant contended that no obligation to pay income tax was created before the assessment by the Commissioner. In my opinion this contention cannot be sustained. It is true that income tax is not payable until thirty days after assessment, but the liability or obligation to pay imposed by the *Income Tax Act* comes into existence on the passing of that Act. It is true also that " income tax " is defined in the *Income Tax Assessment Act* as meaning the income tax imposed by any Act as assessed under this Act. But this seems to me to mean no more than that the amount payable in discharge of the obligation created by the *Income Tax Act* is to be ascertained according to the method prescribed by the *Income Tax Assessment Act*. In effect, the assessment is no more than a demand for the payment of a definite sum which had not theretofore been precisely ascertained. There are certain cases in which the ascertainment of the amount of tax involves the exercise of a discretion by the Commissioner, but in the great majority of cases the amount of tax payable could be accurately determined by any skilled person conversant with the relevant facts.

In my opinion the appeal should be dismissed.

ISAACS AND RICH JJ. We concur in the view taken by the Supreme Court of Western Australia that the turning-point of this case is the point of time when the liability to Federal income tax becomes a " debt " within the meaning of the Federal *Income Tax Assessment Act*. We are, however, unable to arrive at the same conclusion as that to which their Honors came.

From what has been said, it follows that we do not hold the opinion that the word " debts " in the *Administration Act* 1903 extends to anything other than a true debt—due either at law or in equity at the date of the testator's death. It does not, therefore, as we think, include the " debts " the subject of this action. These are two entirely distinct questions and must be separately considered.

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1. *Income Tax Act.*—The Act imposing the tax is not the Assessment Act but the Tax Act (No. 38 of 1922). The Constitution so requires (sec. 55). The Assessment Act is machinery. It is the Tax Act, sec. 7, which directs that the tax shall be levied and paid. That Act incorporates the Assessment Act, but, as has been explained in earlier cases, that is only for definitions and other purposes consistent with the Constitution. The Tax Act, then, by incorporating the Assessment Act does not purport to make a universal and unqualified declaration of income tax. The persons, the incomes, the deductions, the methods of computation, of collection and of remedy are all adopted as found in the Assessment Act. This is placed beyond discussion when it is observed that the definition of "income tax" by sec. 4 is that it "*means* the income tax imposed as such by any Act *as assessed under this Act.*" To that Assessment Act we have therefore to look in order to see whether there is any express declaration as to the nature of the liabilities of the designated taxpayers.

Nothing is better settled than that where Parliament in a taxing Act or any other statute creating a new obligation makes an express provision as to the nature of the tax or obligation, there is no room for implication on that subject (*McCawley* v. *The King* (1), citing Lord *Dunedin* in *Whiteman* v. *Sadler* (2); see also *Pasmore* v. *Oswaldtwistle Urban District Council* (3)). The Assessment Act has made express and very distinct provisions as to the incidence of the tax, the relations of the persons charged towards the Crown, their duties, rights and obligations. In Part III., under the heading "*Liability to* Taxation," sec. 13 provides: "*Subject to the provisions of this Act*, income tax shall be levied and paid for each financial year upon the taxable income derived" &c. This is not, in our opinion, the section creating the debt or imposing the liability to pay. Sec. 13 is directed to fixing the taxable year of income. The introductory words are necessary to indicate the purpose of the periods stated. The words "subject to the provisions of this Act," make it clear that the right of the Crown to levy the tax and the duty of the taxpayer to pay the "income tax"—that is, the "income

(1) (1918) 26 C.L.R. 9, at p. 62. (2) (1910) A.C. 514, at p. 527.
(3) (1898) A.C. 387

tax" as defined by sec. 4—depend on other provisions in the Act. The levy and the payment are to be found regulated elsewhere. The taxpayer is under an obligation, when required, to make a return of income, and is liable to be assessed. *Until assessed, the statute places no obligation whatever upon him to pay anything.* The taxpayer, as he is called, is a person "chargeable with income tax," (sec. 4). But in Part VI., headed "Collection and Recovery of Tax," the nature of the pecuniary obligation of the taxpayer is definitely declared. Sec. 54 (1) says: "Income tax shall be due and payable thirty days after the service by post of a notice of assessment." Now, if nothing further were said, it might be open to some discussion whether the Legislature treated the inchoate obligation to pay whatever sum might ultimately be the amount of assessment as a "debt" as from some antecedent date, that debt becoming "due and payable" upon assessment. It would be very difficult to sustain such a proposition even if nothing more were said. Would a "debt" exist, say on 2nd July or 31st December, accruing *de die in diem*? In view of increased rates or possible losses, that seems impossible. Suppose the income stopped then, does the "debt" then arise? Or would it arise only on 30th June of the following year? What words in the Act make the debt arise on 30th June if it does not arise before? Questions of that kind would obviously present serious difficulties. But Parliament has settled it by sec. 57 in the only sensible way possible. Manifestly regarding all the preliminary operations as mere machinery to ascertain and establish a fixed liability, it declares that, *when* that liability is established—even provisionally it may be—by assessment, *then* there is to be a "debt." It says: "(1) Income tax shall be deemed when it becomes due and payable to be a debt due to the King on behalf of the Commonwealth and payable to the Commissioner in the manner and at the place prescribed." Reading secs. 54 and 57 together, we find the income tax payable by any taxpayer to be *deemed* (that is, a Court shall so hold) to be a "debt" when it becomes "due and payable" —that is, normally, thirty days after notice of assessment, and by sec. 57, sub-sec. 2, then recoverable by suit. This is made even more forcible by sub-secs. 2 and 3 of sec. 54, and particularly the latter sub-section. Sec. 63 is an analogous instance of the Legislature

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declaring the liability of a person to be "a debt," but that is only as from the time of payment, notwithstanding the prior statutory obligation to pay.

The death of a person after the tax year has expired and before assessment is provided for. Sec. 62 provides that the Commissioner is to have the same power to assess the executor or administrator as he would have had against the decedent if alive. By that means the executor or the administrator becomes the "taxpayer" because "chargeable with income tax" (sec. 4). Assessment upon him makes the tax a "debt" due from and payable by him.

It is, of course, simply a question of parliamentary intention. That intention we have found by reading the affirmative words of the Act. No express words exist, it is true, which negative the idea of there being a "debt" before assessment or negative the notion that assessment is a mere arithmetical calculation. But there is sufficient to show inconsistency with those hypotheses. If it is a "debt" before assessment for one taxpayer, it is for all. Now, take, for instance, sec. 21, the case of a company as to which the Commissioner may decide that an additional tax is payable. Or take sec. 28, the case of a company controlled from abroad, and assessed by the Commissioner on such percentage of receipts as he thinks proper. Or, again, take a much more common case than either. Under sec. 23, sub-sec. 1 (*e*), in order to arrive at taxable income a deduction from assessable income is to be made of such sum as the Commissioner thinks just and reasonable for wear and tear of machinery, rolling stock, animals, &c. Under sub-sec. 1 (*j*) the deduction of income by an employer of labour who sets aside income for a fund for employees is allowable provided the Commissioner is satisfied of certain things. Under sub-sec. 1 (*m*) the Commissioner's satisfaction is necessary as to certain mortgage interest. Again, under sec. 25 (*k*) payments made between husband and wife are not deductible unless the Commissioner is satisfied. How can there be a debt except for the tax; and how can the amount of tax be calculated until the exact amount of taxable income is determined; and how can the amount of taxable income be known until the Commissioner's decision or opinion is given? In other words, Parliament, in view of the inconsistency of assuming a "debt"

until certainty—provisional it may be—is attained, has enacted secs. 54 and 57 in the affirmative way we have already indicated.

In our opinion, therefore, so far as the income tax law is concerned, the liability to taxation is, by force of its express enactment, a "debt" only upon the happening of the events declared by Parliament to be the conditions precedent to its becoming a debt, and therefore all ordinary common law doctrines of what would constitute a "debt," if the matter were left unexpressed, are irrelevant.

2. *Administration Act* 1903.—The determining section is sec. 88; and the controversial expression is in sub-sec. (*b*), namely, "the debts due by the deceased person." From what we have said it follows that the word "debts" in sub-sec. (*b*) of sec. 88 does not include the Federal income tax in question, unless the word "debts" in the State Act extends to the mere liability of a person to pay whatever may subsequently become a "debt" within the meaning of the income tax law. That a State Act may use the word "debt" in that unusual sense is, of course, possible. The same may be said of any document. Its express terms may so declare. Its implication may effect the same result. But the implication must arise from the context or the history, or the adoption of judicial exposition. The *Administration Act* makes no express declaration on the subject. Sec. 88 has no history behind it which would give a secondary or extended meaning to the word "debts." No judicial exposition has been adopted by the Western Australian Parliament. The ordinary meaning of the word "debt" is against the suggested extension. There remains only the context to consider.

The Act is a consolidating and amending Act. It deals with several distinct subjects. One subject is dealt with by Part II., namely "Probate and Administration"—secs. 4 to 57. Another totally separate subject is in Part VI., namely, "Duties on Deceased Persons' Estates and Succession Duties"—secs. 85 to 126. The first is regulative of personal rights; the second is fiscal. Obviously there is no necessary or natural dependence of these subjects on each other. For convenience, the various subjects formerly in separate enactments are bound up together in the one Act of consolidation and amendment. We are not able, therefore, merely

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because in one division of the Act the word "debts" may have a more or less extensive application, to attribute the same signification to the word in another division. The same word may be used in two different senses even in the same section, as in *In re Smith*; *Green* v. *Smith* (1). It is needless to multiply instances. When, however, as here, the nature and purposes of the several divisions are different, it is practically the same as if they were different Acts, and the admonition of Lord *Loreburn* L.C. in *Kydd* v. *Liverpool Watch Committee* (2) has to be borne in mind.

Sec. 10 was strongly relied on in argument as showing the extensive connotation given by the Legislature to the expression "debts of the deceased." Not only, however, do we think there is no necessary connection between sec. 10 and sec. 88 (*b*) in this respect, but the history of sec. 10 and the context of the expression there, when contrasted with sec. 88, seem to us to operate in quite the opposite direction. We deal with sec. 10 as concisely as possible. The provisions of that section are the modified adoption of the English Act 3 & 4 Will. IV. c. 104. A testamentary charge of debts on real estate had been given a broad application and the English statute had been interpreted (see *Hamer's Devisees' Case* (3)) with the same liberality. The testamentary charge, for instance, had been held to apply the term "debt" to damages recovered after the testator's death for breach of his covenant for quiet enjoyment (*Morse* v. *Tucker* (4) and *Bermingham* v. *Burke* (5)). Therefore, said Lord *St. Leonards* L.C., in *Hamer's Devisees' Case* (3), "it having been decided that when a testator has charged his real estate with the payment of debts generally, future debts arising out of a previous liability are included, and the object of the Act being to supply the omission of an express charge by a testator, the present claim, supported as it is by the cases of *Morse* v. *Tucker* and *Bermingham* v. *Burke*, appears to me to fall within the operation of that statute." The "debt" there was the payment by the testator's daughter of contributory calls in respect of shares held by the testator. But the reason there given is wholly foreign to

(1) (1883) 24 Ch. D. 672, at p. 678.
(2) (1908) A.C. 327, at p. 331.
(3) (1852) 2 DeG. M. & G. 366, at p. 373.
(4) (1846) 5 Ha. 79.
(5) (1845) 2 Jo. & Lat. 699.

Part VI., which is a mere taxing enactment. The recognized judicial reason for the broad interpretation of " debts " in sec. 10, or its prototype, is wholly inapplicable when sought to be used for attributing the same extensive meaning to the word " debts " in sec. 88 (*b*). That reason, by reference back to the testamentary charge cases, is stated by Lord *St. Leonards*, when Lord Chancellor of Ireland, in *Bermingham* v. *Burke* (1) in these words: " Before the Legislature bound all the assets by debts of the present description, a man was said to sin in his grave who did not sufficiently provide for his debts." Upon this foundation the Court of Chancery in the administration of estates has established a very broad interpretation of the word " debts." For instance, a claim for dilapidation was said to be in the nature of a " debt," though lower than a simple contract debt (*Bisset* v. *Burgess* (2)). A contingent debt and an equitable debt are similarly treated (*Willson* v. *Leonard* (3)). How far that can be carried is shown by what *Lindley* L.J. says in *London, Chatham and Dover Railway Co.* v. *South-Eastern Railway Co.* (4). He points out that equity, treating a man as having done what he ought to have done, will treat as a debt in equity, though it is not a debt at law, a sum which would have been payable under an agreement if he had not wrongfully prevented anything from becoming due.

But all this line of cases on administration really creates a fiction for the purpose of doing moral justice by preventing a man stultifying himself by defeating obligations he has himself created. The fiction is that the " debt," which, whether legal or equitable, arose in fact after his death, is supposed for administration purposes to have been included in the testator's contemplation or within the Act because of the root obligation on which it is founded. But fictions must be confined to their own purposes. And very eminent Judges have shown that the extensive doctrine of " debts " in administration will not be applied beyond the purpose mentioned. In *King* v. *Malcott* (5) *Turner* V.C. refused to apply it to the suit of a lessor for administration of the estate of his lessee and to have a sufficient

(1) (1845) 2 Jo. & Lat., at p. 711.
(2) (1856) 23 Beav. 278, at p. 281.
(3) (1840) 3 Beav. 373, at p. 381.
(4) (1892) 1 Ch. 120, at p. 143.
(5) (1852) 9 Ha. 692, at pp. 694, 695.

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part of the assets impounded to answer future possible breaches of covenant. The Vice-Chancellor disposed of the claim in words which, without quoting them *in extenso*, indicate very clearly that the broad interpretation relied on here could not be extended to a different purpose. He points out that, even if rent became due after the testator's death, "the creditor, *not being so at the time of the decease* of the testator, but having *afterwards* become a creditor by reason of the testator's covenant, was not entitled to go in under the decree"—that is, the general decree for administration with the usual reference to take "an account of *all debts due and owing from the testator*" (1). In *Dodson* v. *Sammell* (2) *Kindersley* V.C. took the same view. This has been followed by *Byrne* J. in *In re Nixon*; *Gray* v. *Bell* (3) and by *Neville* J. in *In re King*; *Mellor* v. *South Australian Land Mortgage and Agency Co.* (4).

There are other reasons for not attaching to sec. 88 (*b*) the artificial interpretation of "debts" applicable to sec. 10. Sec. 10 looks to future administration, and therefore may with some show of reason include future debts if they be brought in by reason of former obligations. But the obligations themselves are not treated as the debts. They must mature into actual debts. Sec. 88 (*b*), on the other hand, looks not to the future. It looks to the past, and to one exclusive point of time—the moment of the decedent's death. A subsequent event is immaterial. How inconsequential it would be to apply practically the doctrine of extension can be demonstrated. The case of income tax does not at first sight appear so anomalous. But let it be attempted to apply it to such cases as *Morse* v. *Tucker* (5) and *Bermingham* v. *Burke* (6) and *Hamer's Devisees' Case* (7). The Act requires, not the "value," but the "amount" of the debts to be stated (see sub-sec. (*c*)). The *value* of the estate is to be stated, and from that is taken the *amount* of the debts. How is it possible to state the *amount* of the debts if all outstanding obligations, which may or may not eventuate later in debts, have to be taken into consideration? There is no provision here analogous to the Bankruptcy Acts. In *King* v. *Malcott* (8) *Turner* V.C.

(1) (1852) 9 Ha., at p. 695.
(2) (1861) 1 Dr. & Sm. 575, at pp. 578, 579.
(3) (1904) 1 Ch. 638, at pp. 644, 645.
(4) (1907) 1 Ch. 72, at p. 80.
(5) (1846) 5 Ha. 79.
(6) (1845) 2 Jo. & Lat. 699.
(7) (1852) 2 DeG. M. & G. 366.
(8) (1852) 9 Ha., at p. 696.

said: "A contingent debt is a sum which it is altogether doubtful whether it will ever be taken out of the assets." But, if so, how can a conjectural breach of an obligation be treated as a "debt" for the purpose of reducing the value of an estate to find the probate duty? How long must elapse to see whether the duty so reduced was properly reduced? What tribunal would assess the probability of breaches of covenants in the future more or less remote; and how could the quantum of damage be gauged? The whole scheme would break down under a confused mass of impracticable and inconsistent attempts to apply an irrelevant fiction.

There is some valuable precedent to guide us in the matter. *In re Pearson* (1) was a case stated for the opinion of the Supreme Court of Victoria and was heard by the Full Court. So far as relevant the case was this:—William Pearson died in August 1893 possessed of shares in four banks. The shares were contributing shares, and at his death there remained capital unpaid as follows: in respect of the shares of bank A, the sum of £6 10s. per share; of bank B, £2 10s. per share; of bank C, £5 15s. per share; and of bank D, £7 10s. per share. These were shares issued under schemes of reconstruction and were shares in the new banks, so that the capital was unpaid just as in an ordinary unreconstructed company. But a special arrangement had been made by the schemes, namely, a certain amount was to be paid on dates named, that is, was to be what is termed "called up" capital: as to bank A this amount was £2, as to bank B it was £1 5s., as to bank C it was £5 15s., and as to bank D it was £2 10s. The question was whether *the sums agreed to be paid on dates named* were "debts" under the *Administration and Probate Act* in view of the fact that the shares had no market value. The schemes of reconstruction were part of the case, and show the above position very clearly. The Court held that the amounts called up, though payable in future, were "debts." *à Beckett* J. said (2): "As the capital on the shares had been called up at his death what he had to pay upon the shares in respect of such capital must be regarded as debts of the testator." That learned Judge was specially conversant with this branch of the law, and his summation of the position in the words quoted we respectfully

(1) (1894) 20 V.L.R. 484; 16 A.L.T. 115. (2) (1894) 20 V.L.R., at p. 488.

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adopt. The Privy Council dismissed an appeal from this decision (1). The problem was stated by Sir *Richard Couch* for the Judicial Committee (2) as above narrated. In the judgment it is said (3): "Their Lordships may add that in their opinion the amount of these debts is the amount actually payable, under deduction (it may be) of any interest which might accrue upon the money required for their payment in the hands of the executors, before payment is actually made." By "payable" is obviously meant called up as definitely to be paid. No trace appears that the notion of assimilating the duty section with the administration section in respect of the connotation of "debts" had entered the minds of the Judicial Committee; but the contrary stands plain to us. Less direct—because referring to another class of statute but not less apposite, being based on the same principle—are the cases of *Whittaker* v. *Kershaw* (4) and *In re Russian Spratts Patent Ltd.*; *Johnson* v. *Russian Spratts Patent Ltd.* (5), and the judgment of Lord *Macnaghten* in *Guardians of West Ham Union* v. *Churchwardens &c. of St. Matthew, Bethnal Green* (6), where he uses the expression "liability only inchoate."

For the reasons we have given, we are of opinion that the appeal ought to be allowed.

HIGGINS J. In my opinion, the decision of the Full Supreme Court was right. Under the relevant *Income Tax Act* (secs. 3 and 7) income tax was imposed and was to be levied and paid for the year beginning 1st July 1919, the year beginning 1st July, 1920 and the year beginning 1st July 1922 respectively. Under sec. 13 of the Assessment Act, the income tax "shall be levied and paid for each financial year upon the taxable income derived" during the preceding twelve months. When the testator died (18th November 1922) he was under an actual obligation to pay the tax for each of the three years, although the amounts to be paid were not yet ascertained or included in assessments served on him: *debitum in præsenti solvendum in futuro.* The question is, were these amounts "debts" due by the testator, debts to be deducted from his assets

(1) (1897) A.C. 214.
(2) (1897) A.C., at pp. 215, 216.
(3) (1897) A.C., at p. 217.
(4) (1890) 45 Ch. D. 320.
(5) (1898) 2 Ch. 149.
(6) (1896) A.C. 477, at p. 487.

for the purpose of ascertaining the duty payable on his estate, under sec. 88 of the *Administration Act* 1903 of Western Australia. According to sec. 88 itself, " secured " debts are included in debts ; and secured debts would include debts not presently payable. The word " debts " in sec. 88 does not necessarily mean obligations to pay such as would be classed as debts—present debts—for the old action of debt ; the word must be given as wide a meaning in sec. 88 as in sec. 10 of the same Act ; and sec. 10 makes the real estate assets for the payment of all duties and fees, and of the " debts of the deceased in the ordinary course of administration." Payment of the debts of the deceased in the ordinary course of administration, includes, of course, payment of debts which at the time of the death are contingent or unascertained, such as liability for calls on shares held by the deceased, liability for rent for assigned leaseholds, &c. Frequently, executors get permission from Courts of equity to distribute assets to the beneficiaries notwithstanding the existence of liabilities of this nature—sometimes on the condition of retaining sufficient assets ; but such a permission does not relieve the estate of the testator from the obligation to pay—it compels the creditor to look to the beneficiary to refund, not to the executor to pay (*In re King* ; *Mellor* v. *South Australian Land Mortgage and Agency Co.* (1)).

It is true that under sec. 54 (1) of the *Income Tax Assessment Act* 1922, income tax becomes due and *payable* thirty days after service of a notice of assessment ; but the obligation to pay when assessed lay on the testator previously. The executor has to make the necessary returns, if not made by the testator (sec. 89 (*a*), (*b*), (*c*), (*d*)) ; he is required to retain out of moneys which came to him as executor sufficient to pay the income tax " which is *or will become* due," and he becomes personally responsible if he distribute the estate among the beneficiaries without providing for the tax (sec. 89 (*e*) and (*f*)). The word " trustee " in sec. 89 includes an executor (sec. 4). Sec. 62 clearly indicates what has to be done by the executor : " Where at the time of a person's death, tax has not been assessed and paid on the whole of the income derived by that person up to the date of his death, the Commissioner shall have the same powers

(1) (1907) 1 Ch. 72.

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and remedies for the assessment and recovery of tax from the executors and administrators as he would have had against that person, if that person were alive." If the testator were alive, the Commissioner—after service of notice of assessment—could recover the tax from the testator; after the testator dies, the Commissioner can recover the tax in an action against the executors in their representative capacity—as executors of the will of Mortimer Kelly—and the judgment and execution would be *de bonis testatoris* (*Williams on Executors*, 11th ed., pp. 1078, 1332).

I confess that I was puzzled for some time by sec. 16 of the *Administration Act* 1903 of Western Australia, which expressly expands the category of obligations to be deducted from assets, but only for a certain purpose. That section enables the Court to expend the whole of an infant's share of an estate, if the net value does not exceed £2,000, in the infant's maintenance, &c.; and the net value is ascertained by deducting from the gross value "all debts, funeral and testamentary expenses, and all other lawful liabilities and charges to which the said property may be subject." There are no such additional words in sec. 88, as to the final balance for duty. But this fact is not, in my opinion, sufficient to justify us in whittling down the ordinary meaning of "debts" in the administration of an estate (cf. *Whitmore* v. *Oxborrow* (1)).

The Commissioner did not rely on this sec. 16 in his argument. His attitude is chiefly due to sec. 54 and sec. 57 of the *Income Tax Assessment Act*, which provides:—"(1) Income tax shall be deemed when it becomes due and payable to be a debt due to the King on behalf of the Commonwealth and payable to the Commissioner in the manner and at the place prescribed. (2) Any income tax unpaid . . . may be sued for and recovered in any Court of competent jurisdiction by the Commissioner," &c. The words of this section are not happily chosen, but they do not mean that there is nothing owing in the ordinary sense until the money becomes *payable*. This is a procedure section, and means that when proceedings have to be taken to recover the debt it is to be treated as a Crown debt, with any privileges and priorities that a Crown debt has.

(1) (1842) 2 Y. & C. C. C. 13.

As for the income derived during the year ending on 30th June 1922, this income stands on the same footing as the other incomes, on the case as presented to the Full Supreme Court. But I wish to direct attention to sec. 62 (4) of the Assessment Act; under which, as I understand it, no income tax is payable on the income derived during 1921-1922 if the estate was liable to estate duty.

STARKE J. During the years 1919, 1920 and 1922, Mortimer Kelly derived income from sources within Australia, and was assessable to income tax pursuant to the provisions of the Federal Income Tax Acts. He died in November 1922, and certain assessments were made upon his executors in respect of the income so derived by him (see *Income Tax Assessment Act* 1922, sec. 62). The tax amounted to £317 19s. 8d., and was paid by the executors. Under the *Administration Act* 1903 of Western Australia a duty is imposed upon the final balance of the real and personal estate of the deceased, and that balance is arrived at by ascertaining the value of the real and personal estate of which the deceased person was possessed at his death and deducting the debts due by him (see Act, secs. 86, 88). The executors sought to deduct the sum of £317 19s. 8d., as a debt due by the deceased person, from the value of his real and personal property for the purpose of ascertaining the duty payable under sec. 86 of the *Administration Act*. The Supreme Court of Western Australia held that the executors were entitled to make the deduction; and, in my opinion, that decision should be affirmed. The deduction of "debts due by the deceased" is clearly allowed for the purpose of ascertaining the value of the real and personal property left by the deceased, and the phrase is, I think, one of wide import. It is not necessary that the debts should be actually payable at the time of the death: it is enough if the liability arises out of some obligation imposed upon the deceased by some statute such as the Federal Income Tax Acts, or out of some contract entered into by the deceased which subsequently falls due or ripens into a debt. Thus, the wide import of the phrase "debts of the deceased" in the *Administration Act* is rather well illustrated in sec. 10: the real as well as the personal estate of every deceased person "shall be assets in the hands of the executor . . . for the payment . . . *of the*

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debts of the deceased in the ordinary course of administration." Here, at all events, the phrase covers all the liabilities of the deceased which his legal personal representative must discharge as such. (See *Williams on Executors*, 11th ed., vol. II., pp. 1077 *et seqq.*) The Income Tax Acts imposed the liability for income tax upon the deceased in respect of the income derived by him from sources within Australia during the years in question in this case, and assessment is but a method of ascertaining the extent of that liability. The deceased was bound to discharge the liability, and, in cases within sec. 62 of the *Income Tax Assessment Act*, the obligation to discharge that liability is thrown, in the event of his death, upon his legal personal representative as such—which shows, I think, that the liability is the liability, or debt in the large sense, of the deceased person. The provisions of sec. 89, sub-secs. (*c*) and (*f*) support this view. Consequently the appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *F. L. Stow*, Crown Solicitor for Western Australia, by *Lawson & Jardine*.

Solicitors for the respondent, *Stone, James & Co.*, Perth, by *Blake & Riggall*.

B. L.