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[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMPS
(WESTERN AUSTRALIA) . . . }

APPELLANT ;

AND

THE WEST AUSTRALIAN TRUSTEE,
EXECUTOR AND AGENCY COM-
PANY LIMITED . . . }

RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

Probate Duty—Deduction from value of assets—“ Debts due by the deceased ”—Income tax—Taxing Act passed after death—Return made before death under Assessment Act—Administration Act 1903 (W.A.) (No. 13 of 1903), secs. 86-88—Land and Income Tax Assessment Act 1907 (W.A.) (No. 15 of 1907, No. 14 of 1917, No. 24 of 1918, No. 17 of 1922, No. 40 of 1922), secs. 2, 16, 29 (1), 32 (1), 53, 55, 62a, 62b—Land Tax and Income Tax Act 1923 (W.A.) (No. 57 of 1923), sec. 2.

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MELBOURNE,
May 18, 19 ;
June 10.

Held, by Knox C.J. and Starke J. (Higgins J. dissenting), that the tax imposed by the *Land Tax and Income Tax Act 1923* (W.A.) for the financial year 1923-1924 was not, within the meaning of sec. 88 of the *Administration Act 1903* (W.A.), a debt due by a person who died during that year but before the former Act was assented to, notwithstanding that before his death he had, pursuant to a notice under sec. 32 (1) of the *Land and Income Tax Assessment Act 1907* (W.A.), made a return of the income derived by him during the year ended on 30th June 1923.

Knox C.J.,
Higgins and
Starke JJ.

Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. Ltd., (1925) 36 C.L.R. 98, distinguished.

Decision of the Supreme Court of Western Australia (Full Court) reversed.

APPEAL from the Supreme Court of Western Australia.

In April 1924 the West Australian Trustee, Executor and Agency Co. Ltd., as executor of the will of Michael Corbett, who died on 14th November 1923, was served with a notice of assessment by the

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State Commissioner of Taxation based on income derived during the year ended 30th June 1923, whereby the State income tax and super-tax payable by the Company as such executor for the financial year 1923-1924 was assessed at £1,591 13s. 4d. The Company paid such sum on 21st May 1924. On 28th March 1924 the Company filed with the Commissioner of Stamps a statement in the prescribed form in pursuance of sec. 88 of the *Administration Act* 1903 (W.A.), but in such statement did not include such sum of £1,591 13s. 4d. as a debt due by the testator, the notice of assessment not having at that time been received by the Company. Duty was assessed by the Commissioner of Stamps on the testator's estate without deducting the sum of £1,591 13s. 4d., and the amount of duty so assessed, namely, £3,113 3s. 9d. was paid by the Company on 9th April 1924 and a further amount assessed at £28 2s. 9d. on 29th April 1924. On 6th September 1924 the Company requested the Commissioner of Stamps to amend his assessment of duty on the ground that the sum of £1,591 13s. 4d. should be allowed as a deduction from the value of the estate before duty thereon was assessed. On 4th July 1925 the Commissioner of Stamps refused to allow the deduction on the ground that the *Land and Income Tax Act* 1923 was not assented to during the lifetime of the testator. From that refusal the Company appealed to the Supreme Court by way of originating summons. The questions of law arising on the appeal were referred to the Full Court, which made an order reversing the decision of the Commissioner of Stamps and varying his assessment on the ground that the sum was a debt due by the testator within the meaning of sec. 88 of the *Administration Act* 1903 and was a proper deduction.

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

Ham, for the appellant. The tax was imposed by the *Land Tax and Income Tax Act* 1923 (W.A.) and not by the *Land and Income Tax Assessment Act* 1907 (W.A.), and therefore the tax was imposed after the death of the testator. This case, therefore, is different from *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co.* (1), in which the taxing Act was passed

before the testator's death. The tax was not imposed by the *Land and Income Tax Assessment Act* 1907. Unless and until the Tax Act was enacted, there was no liability to pay the tax.

[HIGGINS J. referred to *Whitney v. Inland Revenue Commissioners* (1).]

On its true construction the *Administration Act* 1903 had the effect of taxing the balance ascertained by deducting the debts due by the deceased from the value of his estate. The intention is not to tax the amount of the estate which was to be divided among the beneficiaries (see secs. 86, 87, 88). Sec. 62b of the *Land and Income Tax Assessment Act* recognizes that after a person's death a tax cannot be imposed upon him and it imposes upon his representative the liability which would have fallen upon the deceased if he had been alive. A debt which is not presently payable must be a sum which will become payable by virtue of a present obligation (*Webb v. Stenton* (2)).

Owen Dixon K.C. (with him *Gavan Duffy*), for the respondent. The effect of sec. 16 of the *Land and Income Tax Assessment Act* is to impose an obligation to pay such tax as may thereafter be declared. The obligation to pay tax is not made complete until the declaration is made; but when the declaration was made by the *Land Tax and Income Tax Act* 1923 it operated retrospectively so as to apply to every person who was alive at the beginning of the financial year 1923-1924 (see secs. 29 and 32 of the Assessment Act). Sec. 62b follows that up by directing the representative of a person who died after the beginning of that year to pay the tax out of the assets of that person's estate. For the purposes of the *Administration Act* 1903 the word "debts" includes all sums which an executor has to pay as representing his testator and not merely those which he has to pay as a person administering the estate. The rate of the stamp duty is only applicable to funds which are capable of being enjoyed as part of the surplus of the estate. Until there is found to be a distributable surplus, it is not possible to ascertain the duty. From that it should be inferred that the word "debts" is used to express every liability which the executor incurs

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(1) (1926) A.C. 37.

(2) (1883) 11 Q.B.D. 518, at p. 527.

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by reason of his being the legal personal representative of his testator (see secs. 86, 88, 111). It includes every obligation to which the executor succeeds, and the *Land and Income Tax Assessment Act* says that this income tax is such an obligation. [Counsel also referred to *Lilly v. West Australian Trustee, Executor and Agency Co.* (1); *St. Lucia Usines and Estates Co. v. Colonial Treasurer of St. Lucia* (2).]

*Ham*, in reply, referred to *Tennant v. Smith* (3); *Farhall v. Farhall* (4).

*Cur. adv. vult.*

June 10.

The following written judgments were delivered :—

KNOX C.J. On 31st October 1923 James Corbett made a return as required by the *Land and Income Tax Assessment Act* of the income derived by him during the year ended 30th June 1923. It was admitted at the Bar that the return was made in compliance with a notice given under sec. 32 of the Act. He died on 14th November 1923, and the respondent is executor of his will. In December 1923 the *Land Tax and Income Tax Act* 1923 was passed, whereby income tax was imposed for the financial year 1923-1924 on the income chargeable under the Assessment Act of all taxpayers at the rates prescribed. In April 1924 the respondent as executor of James Corbett was assessed to income tax for the financial year 1923-1924 in the sum of £1,591 13s. 4d., and, having paid that amount, now claims to deduct it from the amount at which the estate of the testator was valued for estate and succession duty. The deduction can only be allowed if the amount paid was a debt due by the testator within the meaning of that expression as used in sec. 88 of the Act. The decision of this Court in *Commissioner of Stamps (W.A.) v. West Australian Trustee, Executor and Agency Co. (Mortimer Kelly's Case)* (5) establishes that a debt may be due within the meaning of the section although not payable in testator's lifetime, but I do not think it affords any further support to the respondent's contention in this case. In *Mortimer Kelly's Case* the Tax Act

(1) (1911) 13 C.L.R. 416, at p. 427.

(2) (1924) A.C. 508, at p. 513.

(3) (1892) A.C. 150, at p. 154.

(4) (1871) L.R. 7 Ch. 123.

(5) (1925) 36 C.L.R. 98.



was passed in testator's lifetime, and the decision was founded on the proposition that the obligation to pay the tax was imposed by that Act and was therefore an obligation of the testator. The observations quoted by the learned Chief Justice of Western Australia from the reasons given by me in that case were no more than an expression of the view which I was then inclined to accept on a question which, as I pointed out, it was not necessary to decide.

The question for decision in this case is whether the income tax assessed against the respondent was a debt due by the testator within the meaning of sec. 88 of the Act. The death of the testator after making a return brought into operation sec. 62b of the Assessment Act, which provides that, where a person dies after 1st July in any year and after furnishing a return of his income for the preceding year, the Commissioner shall have the same powers and remedies for the assessment and recovery of the tax from the executor or administrator as he would have had against the deceased person if he were alive. It seems to me that the effect of this provision is no more than to substitute for the deceased person, who, being dead, can no longer be a "taxpayer," his executor or administrator, who then becomes a taxpayer within the meaning of the Act. The Assessment Act of itself, apart from subsequent legislation, imposed no obligation on any person to pay either presently or at some future time any sum by way of income tax in respect of the financial year 1923-1924. Until the *Land Tax and Income Tax Act* 1923 was passed no income tax had been imposed or rate of tax declared for that financial year, and it seems to me to follow that until the passing of that Act no person was under any obligation in respect of income tax for that year except, possibly, the obligation to make returns required by the Assessment Act. The Tax Act imposed the tax on the income chargeable of all taxpayers. At the time when that Act became law the testator was not and could not be a taxpayer, but his executor was a taxpayer within the meaning of the Assessment Act, which is incorporated by reference in the Tax Act. Accordingly it seems to me that the effect of the Tax Act was to impose the obligation to pay income tax for the financial year 1923-1924, not on the testator, but on the executor. It may be that the obligation laid on the executor is an

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obligation to pay, not out of his own money, but out of the assets coming to his hands as executor; but even so the obligation did not exist in the lifetime of the testator. I do not think the phrase "debts due by the deceased person" can be extended to cover a debt arising out of an obligation which did not come into existence till after the death of the person in question.

For these reasons I am of opinion that the appeal should be allowed.

HIGGINS J. I am of opinion that this appeal should be dismissed—that the tax payable to the Crown on the net assets of a deceased person is not payable on a liability to the Crown for income tax (£1,591 13s. 4d.), and, a fortiori, is not payable on that liability when it has been discharged. The West Australian Legislature has not, in framing these Acts, been guilty of any such injustice or absurdity. The liability to pay this income tax when imposed was a direct debt of the testator Corbett; and this debt must be deducted from the testator's assets before we find the "final balance" on which death duty is payable.

Such difficulty as there is seems to be due to a section inserted by amendment in 1922 in the *Land and Income Tax Assessment Act* (No. 15 of 1907), sec. 62b. I propose to consider the law as it stood before that section, and then to consider the effect of the section on that law.

Under the Act of 1907 the testator Corbett was required to furnish a return for the purpose of assessment as a person "liable to taxation personally" (sec. 32 (1)); and he did furnish the return on 31st October 1923, for the purposes of an income tax if it should be imposed for the year July 1923 to July 1924. (This fact does not appear in the affidavits, but it is referred to in the judgment of the Supreme Court of Western Australia, and it was admitted before us.) Having been required to make such a return, Corbett was a taxpayer (sec. 2—"Taxpayer"). He died on 14th November 1923; and the Act to impose an income tax for the year July 1923 to July 1924 was passed on 22nd December 1923 (No. 57 of 1923). By this Act, income tax for the year was imposed on "the income chargeable of all *taxpayers*" at a rate stated (sec. 2 (2)). The



income tax was for the year 1923-1924, but it had to be calculated on the amount of his taxable income for the year 1922-1923 (Act No. 15 of 1907, sec. 29 (1)). This income tax is to be deemed, when the same becomes due and payable, to be a debt due to His Majesty (sec. 55); but it did not become actually due and payable until thirty days after service by the Commissioner of notice of assessment (sec. 53). Sec. 55 has nothing to do with death or with executors; it makes the liability of all taxpayers a Crown debt, with all the Crown's priorities, when the tax becomes due and payable after assessment. The testator, therefore, if he had lived over April 1924 (when notice of assessment was sent), would be liable to be sued for the tax, as for a debt due to the Crown; but, as he had died, his executor could be sued and judgment given against the executor (this Company) *de bonis testatoris*. An executor can be sued for any debt owing by the testator unless there be statutory provision to the contrary.

I quite agree with counsel for the Commissioner that on 14th November 1923, when the testator died, there was no obligation on him to pay any income tax for the year 1923-1924; that the obligation to pay was not created until the taxing Act No. 57 was passed on 22nd December; that it was open to the Legislature to refuse to impose the tax; and that if it had so refused there would have been no obligation on the testator to pay income tax for this year 1923-1924. But the testator, having been required by sec. 32 (1) to furnish a return as a person "*liable to taxation*" (not a person actually *taxed*), was a taxpayer; and he must be treated as a taxpayer though dead, just as a shareholder in a company has to be treated as remaining a shareholder though dead. The duty to furnish a return applies to persons liable to taxation whether a tax be imposed for the year or not. When the taxing Act No. 57 was passed the obligation put upon taxpayers to pay any income tax imposed for the year was complete (subject to assessment); and as soon as the tax for that year had become due and payable after notice of assessment, it could be recovered from the taxpayer's estate. The explosive had been laid in order by the Assessment Act 1907; but there was lacking the spark to produce the explosion until the taxing Act No. 57 had been passed. There was a debt

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of the testator but not immediately payable till after notice of assessment, and it was paid by the executor out of the testator's assets on 21st May 1924.

So far, I have ignored the effect of sec. 62b, inserted in 1922. There is nothing in that section, or elsewhere that I can find, to take away this direct liability of the testator or his estate to the tax. Sec. 62b provides (*at the most*) that the executor shall be liable for the tax as well as the testator, and liable to pay from the executor's own assets (with, no doubt, an implied incidental right to indemnity from the testator's assets). I shall assume, in favour of the Commissioner, that the section does not merely affirm the direct liability of the testator's estate for the tax. The words are: "Where a person dies after the first day of July in any year, and after furnishing a return for his income for the preceding year, the Commissioner shall have the same powers and remedies for the assessment and recovery of the tax from the executor or administrator as *he would have had against the deceased person, if that person were alive.*" As already said there is nothing in these words to take away the direct liability of the taxpayer and his estate to pay the tax; the Legislature merely makes the path of the Commissioner simpler and easier. It had already, by sec. 62a, made the path simpler and easier, by requiring the executor to furnish a return if the testator had not done so. But there is no indication of any intention to take away any existing remedy of the Commissioner. There is no *substitution* of remedy, no negating of the existing remedies. It is unnecessary to cite cases to show that the law as it existed up to 1922 cannot be treated as repealed by implication by this sec. 62b, where the section gives a new right against the executor personally which is not inconsistent with the old right remaining (*Maxwell on Statutes*, 6th ed., p. 280).

Taking it, then, that the testator was liable for income tax for the whole year 1923-1924 (though calculated on his income for 1922-1923), the *Administration Act* 1903 applies. Under secs. 86-88 of this Act a death duty has to be paid to the Commissioner on the "final balance" of the testator's estate, and the "final balance" has to be found by deducting the debts of the testator from the value of his estate (sec. 88); and this includes *all* his debts



—present, future or contingent. The debts to be deducted are the debts which the executor must pay before the beneficiaries become entitled to the estate (cf. sec. 10, which speaks of debt “in the ordinary course of administration”). In the ordinary course of administration, executors would be guilty of a *devastavit* if they were to distribute without making provision for future or contingent obligations such as calls on shares, obligations on guarantees, liabilities as assignors of leases (*Taylor v. Taylor* (1)). There is no “final balance” under the *Administration Act* until all such obligations that ripen into debts have been satisfied.

I may add that from its very form of expression sec. 62b implies that the testator was himself directly liable for the tax although he had not been assessed; and assessment comes after the rate has been fixed—after the taxing Act. The words are: “The Commissioner shall have the same powers and remedies for the *assessment and recovery of the tax from the executor . . . as he would have had against the deceased person, if that person were alive.*”

As for the form of order made by the Full Supreme Court, all that was referred to that Court by *Northmore J.* was the “questions of law” arising; but the order is that the decision of the Commissioner be reversed and his assessment varied; and the Commissioner is ordered to pay costs of the whole proceedings. But the parties assent to this course.

The fact, moreover, that the proceedings do not show on their face (as the summons and the notice of assessment show) that the Company is a party as executor of Corbett and not in its own right tends to obscure, though it does not alter, the fundamental position.

STARKE J. Michael Corbett died on 14th November 1923. On that date State income and super-tax had not been imposed by the State of Western Australia for the financial year beginning on 1st July 1923 and ending on 30th June 1924. Consequently Corbett was not liable for any tax on the date of his death, and it cannot be said that any debt was due by the deceased on that day in respect of any tax for that financial year.

(1) (1870) L.R. 10 Eq. 477.

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On 22nd December 1923 the *Land Tax and Income Tax Act* 1923 was enacted by the Parliament of Western Australia (1923, No. 57). It imposed, for the year ending 30th June 1924, an income tax and also a super-tax on the income chargeable of all taxpayers. It is to the Assessment Act, however, that we must turn for the purpose of ascertaining who are taxpayers ; and that Act, by sec. 2, provides that any person is a taxpayer who is liable to pay tax whether in his own behalf or in a representative capacity, or who is required to make a return relating to income tax assessment whether liable to taxation or not.

It is quite impossible, in my opinion, on these words to affirm that the deceased was a taxpayer on the day of his death. There was no imposition of a tax, as we have seen, until some time after his death, and the Assessment Act must be read in connection with and in relation to the particular Act imposing taxation. It does not give the taxing Act a retroactive effect in the sense of providing that tax shall be imposed as from an antecedent date. It provides machinery for assessing and recovering the tax imposed, and the date of the imposition of the tax is still 22nd December 1923, though the items assessable may relate to a past time.

I pass, therefore, to secs. 62a and 62b which were mainly relied upon during the argument. The former section deals with the case of persons dying on or after 1st July in any year before furnishing a return of their income for the preceding year, and the latter with the case of persons dying after that date and after furnishing returns of their income for the preceding year. In the former case it is provided that the executor or administrator shall furnish a return and shall be assessable in respect thereof, and chargeable with and pay tax thereon. It is the executor who is the taxpayer ; and he is made the taxpayer, not because the deceased whom he represents was assessed or is liable as a taxpayer, but because the deceased was not liable to be assessed as a taxpayer or to pay the tax, and the revenue would suffer if the executor or administrator were not made responsible for it. No doubt he can look to the estate which he administers for an indemnity against a payment so made (*Dowse v. Gorton* (1) ).



In the latter case, the Act provides, in sec. 62b, that the Commissioner shall have the same powers and remedies for assessment and recovery of the tax from the executor or administrator as he would have had against the deceased person if that person were alive. I do not think these words differentiate the cases. Again, it is the executor who is the taxpayer and who is to pay the tax, not as a debt or liability of the deceased, but as a liability which would have fallen upon the deceased had he lived.

On the whole, the liability imposed upon the executor by force of the Assessment Act, secs. 62a and 62b, cannot, in my opinion, under any reasonable use of the words be called "a debt due by the deceased" within sec. 88 of the *Administration Act*. The appeal should, therefore, be allowed.

*Appeal allowed. Order of the Supreme Court discharged and summons dismissed. Appellant to pay costs of appeal to High Court pursuant to his undertaking.*

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

Solicitors for the respondent, *Stawell, Hardwick & Fenton*, Perth, by *Malleson, Stewart, Stawell & Nankivell*.

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