[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXES . . . APPELLANT;

AND

THE EXECUTORS OF THE ESTATE OF MARK RUBIN, DECEASED . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1930.

BRISBANE, *June* 12, 13.

SYDNEY, *Aug.* 14.

Isaacs C.J., Rich and Starke JJ.

Income Tax (Q.)—Net gains or profits arising from sale of property—Shares held by testator—Executors' liability to taxation—Fictional sale—Charging statute—Basis of assessment—Market price—Private company—Shares not listed on stock exchange—Shares never offered to public—No marketable price ever quoted—Income Tax Acts 1902-1920 (*Q.*) (2 *Edw. VII. No.* 10—10 *Geo. V. No.* 35), *sec.* 12A*—*Income Tax Act Amendment Act* 1921 (*Q.*) (12 *Geo. V. No.* 19), *sec.* 4.*

The testator and two others carried on business in a partnership which was subsequently converted into a private company, all shares being held by the testator, the members of the testator's family, his two former partners, and the members of their families. Under the articles of association of the company the shares could not be listed on the stock exchange. The shares

* The *Income Tax Acts* 1902-1920 (Q.) provide, by sec. 12A, that "incomes liable to tax shall expressly include—(I.) *As income derived from personal exertion* . . . (2) All net gains or profits arising from the sale of any personal property whatsoever—whether or not arising or accruing from any business carried on by the taxpayer." By sec. 4 (5) of the *Income Tax Act Amendment Act of* 1921 it is provided that "For the purpose of any of the foregoing provisions under this heading (I.) . . . (*a*) Transfers of any property including live-stock by any person to any other person by way of gift or for a nominal or manifestly inadequate consideration, or to any beneficiary under any will or in the distribution of any intestate estate; or (*b*) the taking over of a taxpayer's estate on his death by an executor or administrator, shall be considered to be sales, and the selling price in the case of all such property other than live-stock shall be the market price of the property transferred or taken over as at the date of transfer or death, and in the case of live-stock shall be the price per head at which the late owner returned the same class of live-stock in the last income tax return in which he returned his live-stock on hand at the close of the year in respect of which such return was made, or, if purchased during the year for which the return is made, at the actual purchase price, to which in each case shall be added, for the purpose of arriving at the purchasing price to any beneficiary, executor, or administrator as aforesaid, the amount of any probate duty, succession duty, or estate duty paid in respect of such live-stock."

were never offered to members of the public, and were never quoted as marketable at a price. On the death of the testator the shares passed under his will to his executors, who took them over as part of the estate. The Commissioner of Taxes treated the taking over by the executors as a sale within the meaning of sec. 4 (5) of the *Income Tax Act Amendment Act of* 1921, and assessed the executors to income tax, under sec. 12A of the *Income Tax Acts* 1902-1920, on the difference between the amount paid up by the deceased and the value placed upon the shares at his death as income from personal exertion. In the Court of Review evidence was given as to the price per share a prudent purchaser would have been prepared to give, had the shares been offered to him.

Held, by *Isaacs* C.J. and *Starke* J. (*Rich* J. dissenting), that the *Income Tax Act Amendment Act of* 1921 was a taxing statute, and sec. 4 (5) thereof imposed a liability to taxation on the fictional sale from the testator to the executors.

Held, by *Rich* and *Starke* JJ. (*Isaacs* C.J. dissenting), that income tax as assessed by the Commissioner was not payable:

By *Rich* J., on the ground that sec. 4 (5) of the *Income Tax Act Amendment Act of* 1921 did not create a liability to taxation;

By *Starke* J., on the ground that there was no evidence as to what was the market price of the shares.

Decision of the Supreme Court of Queensland (Full Court): *Commissioner of Taxes* v. *Executors of the Estate of Mark Rubin*, (1929) S.R. (Q.) 302, affirmed on other grounds.

APPEAL from the Supreme Court of Queensland.

Mark Rubin, late of 32-34 Holborn Viaduct, London, and 52 Rue Lafayette, Paris, dealer in pearls, died on 6th November 1919. He left a will which was proved in Western Australia by his executors. On 29th August 1921 probate of this will was sealed in Queensland under the *British Probates Act* 1898. At the time of his death, the testator, who left other estate in Queensland, was the registered and beneficial holder of 83,332 shares of £1 each in the Northampton Pastoral Co. Ltd. on each of which the sum of 11s. was deemed to be paid. These shares passed under the will to the executors, who took them over as part of the testator's estate. The testator, together with James Clark and Peter Tait, had carried on business in partnership as pastoralists in Queensland under the firm name of Clark & Tait. The three partners were interested in equal shares, and the assets of the partnership comprised certain pastoral holdings, improvements and sheep thereon. In September 1915 the partnership formed itself into the Northampton Pastoral

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Co. Ltd., which was incorporated and registered under the Queensland *Companies Acts* 1863 to 1913, on 29th September 1915. The assets of the partnership together with its liabilities were transferred to the Company, which had a nominal capital of £700,000, represented by 700,000 shares of £1 each, allotted as follows: 4 to four nominal shareholders, and the balance to the three partners or their nominees in equal numbers, namely, 233,332 shares to each interest. The shares so allotted were paid up to 7s. each, representing £245,000, the net value of the partnership assets assigned to the Company. Of Clark's interest 1,000 shares were held by his son and daughter respectively, the remainder being held by Clark the father. The Tait interest was divided into fourths, each of 58,333 shares, held by the father, his wife, son, and daughter respectively. The Rubin interest was held as follows: Mark Rubin, the testator, 83,332 shares, and his wife and two sons 50,000 shares each. The shares were held exclusively by the three families. Under the articles of association of the Company any member desiring to sell his shares must notify the directors of his wish to sell and the price he desires to obtain, whereupon the Company has the option of finding a purchaser. If a purchaser cannot be found within sixty days, then the shares may be sold to any person approved by the directors and at any price. These shares have never been offered to any members of the public outside the three families, and have never been quoted as marketable at a price. The Company carried on business, making large profits; and up to the time of the death of the testator there had been no distribution of profits among the shareholders. The Company was in a very sound financial position, having created large reserves of undistributed profits, namely, £157,712, as well as an annual £20,000 depreciation reserve to meet the decreasing term of the leases. On 23rd April 1926 the Commissioner of Taxes (Q.) gave the executors notice of amended assessment to income tax and super tax, in respect of the year ended 30th June 1920, in the sum of £5,157 15s. 7d. Included in this notice is the sum of £29,166, assessed upon as income from personal exertion. The said sum of £29,166 represents 7s. per share on the 83,332 shares held by the testator at the date of his death and taken over by the executors. The executors objected, and, on the objections

being disallowed, they requested the Commissioner to treat the objections as an appeal and to forward them to a Court of Review for hearing and determination.

The appeal was heard in the Court of Review by *Macrossan* S.P.J. (*In re Income Tax Acts* 1902-1920 [*No.* 1] (1)). In allowing the appeal *Macrossan* S.P.J. expressed himself as satisfied from the evidence of Mr. Hudson, a sharebroker, that a prudent investor with sufficient capital, if offered the 83,332 shares held by the testator, would have been prepared to pay for them the sum of 13s. 2½d. per share, and his Honor found that the value of the shares at the date of the testator's death was 13s. 2½d. per share. The Commissioner for Taxes applied to *Macrossan* S.P.J. to state a special case for the opinion of the Supreme Court of Queensland, and a special case setting out the facts mentioned above was stated accordingly.

The questions asked by the learned Judge for the opinion of the Court were :—

1. (*a*) Was I right in deciding that no portion of the said sum of £29,166 was liable to be assessed upon as income from personal exertion ?

(*b*) (i.) Had the 83,332 shares in the Northampton Pastoral Co. Ltd. an ascertainable market price at the date of the death of the said Mark Rubin ? (ii.) If so, how should such market price be ascertained ?

(*c*) In arriving at the taxable profit, if any, from the alleged sale of the said 83,332 shares in accordance with the provisions of sec. 12A (I.) (1), (2), of the *Income Tax Acts* 1902-1920 (Q.), as amended by sec. 4 of the *Income Tax Act Amendment Act of* 1921 (Q.), was I right in holding that (i.) a deduction of 4s. 8d. per share for each of the said 83,332 shares could be made from the gross sum arrived at as representing the market price of such shares at the date of the death of the said Mark Rubin ; or (ii.) alternatively that a sum of 3s. 6d. per share should be so deducted.

(*d*) How is the profit, if any, on the alleged sale of the said 83,332 shares to be arrived at for the purpose of determining

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the sum liable to be assessed upon as income from personal exertion ?

2. By whom should the costs of this special case be paid and borne ?

The appeal, by way of special case, was heard by the Full Court, and was dismissed: *Commissioner of Taxes* v. *Executors of the Estate of Mark Rubin* (1).

From this decision the Commissioner of Taxes now appealed to the High Court.

Macgroarty A.G. for Q. (with him *Real*), for the appellant. By sec. 4 (5) of the *Income Tax Act Amendment Act of* 1921 certain transactions are deemed to be theoretical sales, and the taking over by the executors of the estate of the testator is regarded as a sale and taxable as such under sec. 12A of the *Income Tax Acts* 1902-1920. The fictional sale is established in clear and unambiguous language. It is the net gains or profits made by the executors on the fictional sale from the testator which are taxable. Should it be the income of the testator which is taxable, the testator is assumed to be alive for the purpose of assessment. The question is to determine the net gains or profits which arise from the sale. In this case the net gain is the difference between 13s. 2½d., the value of the shares, and 7s., the amount paid in respect of the shares. Although these shares have never been offered for sale on the market, they have a market price, which is the price a prudent purchaser would pay for them if they were on the market. The evidence shows that price to be 13s. 2½d.

Fahey (with him *McGill*), for the respondents. There is no liability to income tax on the fictional sale created by sec. 4 (5) of the *Income Tax Act Amendment Act of* 1921. That section fixes a purchasing price so that the net gain or profit may be fixed on a subsequent sale of the property. Clearly, with regard to live-stock, the section is not intended to be a charging section. The intention is to fix a starting price for future sales, and there is no reason why live-stock should be differentiated from any other species of property which

(1) (1929) S.R. (Q.) 302.

might pass on the death of the testator. That there should be no differentiation is certain from the use of the words " in each case," which refer to the case of property other than live-stock, and to the case of live-stock. Even if it were a charging section, it is not stated on whom the taxation is to be imposed. The section does not say who is the purchaser or who is the vendor. The net gains or profits do not belong to the executors, who under a phantom sale would be in the position of purchasers. If the testator is the vendor he has received nothing on which he could be taxed. Further, a dead man could not be taxed. The section does not say how the net gains or profits are to be estimated. These shares have no market price, and therefore the net gains or profits could not be ascertained. On the evidence the cost to the testator was in excess of 7s. per share. Some amount should be deducted on account of the undistributed profits. The market value is not necessarily the market price. Many things, for instance speculation, affect the market price. These shares have no market price because there is no available market where they can be bought and sold. Something which cannot be put on the market has no market price (*In re Income Tax Acts* 1902-1920 [*No.* 2] (1)).

Macgroarty A.G., in reply. If there is no net gain or profit, or if there is a loss, on these shares or the estate, the onus of proof lies on the respondents.

Cur. adv. vult.

Aug. 14.

The following written judgments were delivered :—

ISAACS C.J. Mark Rubin died on 6th November 1919, leaving a will which was proved in Western Australia ; and on 29th August 1921 the probate was sealed in Queensland. The Western Australian probate thereupon by force of the Queensland statute called the *British Probates Act* 1898 (Statutes, p. 3394) acquired " the like force and effect " and had " the same operation in Queensland " as if granted by the Supreme Court of Queensland.

The testator's estate in Queensland included 83,332 shares of

(1) (1924) S.R. (Q.) 65.

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£1 each in the Northampton Pastoral Co. Ltd., on which 7s. per share was deemed to be paid up. These shares passed under the will to the executors, together with the rest of the testator's estate, and the first question is whether this involved any liability to income tax.

1. *Liability to Taxation.*—Under the regulations of the Company, where a member desires to sell or transfer any shares he must give certain opportunities to the Company to find a purchaser, and, in case of difference as to price, to ascertain a fair value. Subject thereto, the member may sell to any person approved by the directors at any price. The shares of the Company had not in fact been placed on the market. The Commissioner in 1926 assessed the respondents as Rubin's executors to income tax based on income earned during the year ended 30th June 1920. The tax, so far as concerns these shares, was based on an alleged income of £29,166 derived from personal exertion as upon a sale by the testator of his shares to his executors, and therefore liable to tax payable by them as his executors. The basis of the computation was a selling value of 14s. per share, which assumed a net profit of 7s. per share over the amount paid up. This alleged sale was founded upon the provisions of sec. 4, sub-sec. 5, of the Act of 1921. That provision is by sec. 4, sub-sec. 6, of the Act made retrospective, so as to include the income year for which the assessment was made. The whole of the difficulties that have arisen in this case are centred upon that provision.

Before quoting it, as it is an amendment of an addendum to previously existing law, the relevant provisions of the statute as they existed prior to amendment should be first stated :—By sec. 7 of the principal Act as it then stood, income tax was imposed (*inter alia*) :—7 (1) (i.) : "On all taxable income derived from personal exertion." By sec. 12A (I.) as then standing, it was enacted that "Without limiting the force or effect of any other provision of this Act, incomes liable to tax shall expressly include—(I.) *As income derived from personal exertion*" (*inter alia*) "(1) All net gains or profits arising from the sale of any real property" (with immaterial qualification) "whether or not arising or accruing from any business carried on by the taxpayer . . ." and "(2) All net

gains or profits arising from the sale of any personal property whatsoever—whether or not arising or accruing from any business carried on by the taxpayer." So far, " sales " producing a profit were subject to income tax, but they would have to be actual sales, as the law stood.

In 1921 a new provision was made, and directed to be retrospective. It is contained in sec. 4, sub-sec. 5, of the 1921 Act, and is introduced by these words : " For the purpose of any of the foregoing provisions under this heading (I.) and paragraph (2) under heading (II.)." The provisions under heading I. include both the provisions as to " sale " of real and personal property already quoted. Consequently the new provision was expressly intended to apply to profits on " sales " which were to be included in taxable income. The words of the new provision are : " (*a*) Transfers of any property including live-stock by any person to any other person by way of gift or for a nominal or manifestly inadequate consideration, or to any beneficiary under any will or in the distribution of any intestate estate ; or (*b*) the taking over of a taxpayer's estate on his death by an executor or administrator, shall be considered to be sales, and the selling price in the case of all such property other than live-stock shall be the market price of the property transferred or taken over as at the date of transfer or death, and in the case of live-stock shall be the price per head at which the late owner returned the same class of live-stock in the last income tax return in which he returned his live-stock on hand at the close of the year in respect of which such return was made, or, if purchased during the year for which the return is made, at the actual purchase price, to which in each case shall be added, for the purpose of arriving at the purchasing price to any beneficiary, executor, or administrator as aforesaid, the amount of any probate duty, succession duty, or estate duty paid in respect of such live-stock."

The executors' contention is that no charge is thereby placed on the event as a sale, but that merely a fictional purchasing price is fixed so as to have a starting point for any future possible disposition of the shares by the executors. The executors' view was upheld by the Supreme Court both of first instance and on appeal. A careful analysis of the provision in question leads to the conclusion that the Commissioner's contention is correct.

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Up to a point there can be little room for doubt. The introductory words applying the new provision to heading I. of sec. 12A make it clear that the fictional sales are to "be considered to be 'sales'" within the meaning of the word "sales" in sec. 12A above quoted. They are therefore "sales" for the purpose of making the net profit —if any—taxable income. But whose income, and in respect of what transaction? The Commissioner says of the fictional seller. The executors say of the fictional purchaser, should he ever in the future become in turn a real seller. The latter is hard to understand, even on its mere statement. But as applied to the actual words of the provision and the scheme of the Act, it is unsustainable.

Let us for greater simplicity apply the test to par. (*a*), dealing with transactions *inter vivos*. Assume a gift by A to B of a landed property or of shares in a company, or a sale of such property by A to B for a nominal consideration. When the Act goes on to say that each of those transactions shall be considered a sale, and that the selling price shall be the market price of the property transferred, it means that A shall be taken to have sold to B at a fair market price. The executors' extraordinary contention is that the intention of Parliament was not merely not to tax A on his presumed sale, but also to diminish any taxable liability of B in case he afterwards resold, that is, whatever net profit he in fact made on such resale—a profit ordinarily taxable would be diminished to the extent of the market value of the property when he got it, but which he did not pay. That is a most remarkable intention to impute to a legislature in search of taxation, and a result quite unfair to the general body of taxpayers. Mr. *Fahey* valiantly contended that that result would legally flow from the words of the Act. But if that cannot be accepted—and it cannot—it follows of necessity that equally is the result inadmissible with respect to the taking over by an executor.

Much importance was attached in the Supreme Court, and by learned counsel for the respondents in this Court to the concluding words beginning "in each case" and going to the end of the paragraph. It is difficult to see the importance of those words, but so far as they have any, they tell against the respondents' view.

The whole provision, so far as it concerns par. (*b*), relates to the whole estate, that is, the whole Queensland estate, taken over by

the executors. The whole estate is notionally sold by the testator to the executors. The problem, then, under the earlier portion of sec. 12A is to find the net gains and profits of the testator on that assumed sale. There being no actual selling price, the law provides one. It divides the possible property into two classes, namely, (a) other than live-stock and (b) live-stock. As to the first, which may include land, shares, jewellery, patents, &c., the law directs that " the market price of the property . . . taken over *as* at the date of . . . death " shall be found. As to the second, the live-stock is subdivided into two possible sections, one being stock not purchased during the income year—as to which the price returned *for that class* of live-stock on hand in the late owner's last income tax return is taken; and the other being stock purchased during the year, and for that the purchase price is taken.

The first live-stock section may consist of the same number of cattle as were in hand in the last income tax return, or more, as by progeny or inheritance, or fewer, as by sale or death. If more, then the rate is the same, the amount may be increased, because it is the *selling* price that is so far being considered. The second section certainly equalizes itself. But down to that point, *and no further*, the selling price extends.

But there occurs an addendum, introduced by a declared change of purpose, the significance of which has to be appreciated. So far there has been fixed the " selling price," that is, for the purpose of arriving at the income of the seller; and this applies both to transactions *inter vivos*, and to the notional sale by testators and intestates. The cost price and other permitted computations must, of course, be ascertained as in any ordinary case of actual sale.

Now, on a transaction *inter vivos* the assumed purchaser under this provision has nothing to pay as purchase-money beyond any sum he has agreed to pay. Since he retains all he has purchased, he has nothing to complain of if his purchasing price be taken in future transactions to be identical with the selling price in respect of which his vendor has been taxed. But obviously in the case of a succession on death under this provision there is a difference. To get the property for the statutory price, the beneficiary, executor or administrator must pay duty, that is, probate duty, succession duty

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or estate duty. The Legislature then, for the new purpose "of arriving at the *purchasing* price to any beneficiary, executor, or administrator"—and for that purpose only—allows an addition of the duty, which is naturally a diminution *pro tanto* of the property notionally sold. It may or may not be that the words "in respect of such live-stock" are left in *per incuriam*, it may or may not be that "in each case" refers to live-stock and non-live-stock or to live-stock purchased and live-stock not purchased. But it is quite immaterial, because whichever is correct, the final addition is not for the purpose of swelling the selling price and so affecting the fictional sale, but of increasing the statutory purchasing price only, should the fictional purchaser resell *what is left* of the property assumed to be purchased.

On the main point, then, the Commissioner's contention should be upheld.

2. *Power to assess Executors.*—The next question is one which was mooted by the Supreme Court and supported by strong suggestions. It is that the Act contains no provision for taxing a dead man. That is true, but a man who dies in a current financial year may leave inchoate responsibilities to the revenue. His personal representatives are the natural and accustomed persons to look to for the satisfaction of those responsibilities. As shown, the seller is the taxpayer in both *inter vivos* transactions and the fictional transaction which occurs when the fictional "sale" occurs. A notional sale imputes a notional seller and a notional buyer. The testator is the notional seller. He is called "taxpayer" and "late owner," and the statutory conception supposes that the "selling price" goes into his estate, which has to answer in income tax for the gain or profit it produces. It seems perfectly clear that his executors are the proper persons to assess in that character. Sec. 40A leaves no room for doubt. If the testator had lived long enough after the end of the income year ending 30th June 1920, he would have been "liable to make a return" under the Act for the income year. As he died before the time for making such return, his executors must at some time do so; and then, says the section, "the assessment of income for the period covered by such return shall be made, and the tax shall be payable thereon out of such person's

estate, as if such death had not taken place." The *payment* is to be made as if the death had not taken place, but it does not say that nothing shall be put into the assessment except that which occurred before death. When, therefore, the law itself says that, notwithstanding death, the succession itself shall be deemed a sale by the testator, it creates a legally notional seller in the person of the testator to make the legally notional sale. The objection is not sustainable.

The last objection is as to the ascertainment of the statutory selling price.

3. *Market Price.*—It was contended for the taxpayer that even if all other conditions of the statute were satisfied, there was no "market price" applicable to the shares, since they had never been on the market and the evidence did not establish a market price.

It was definitely established by the House of Lords in *Charrington & Co.* v. *Wooder* (1) that the words "market price" have no fixed invariable meaning. Their meaning depends on the circumstances of and concerning which they are used. "'Market,'" said Viscount *Haldane* L.C. (2), "is a word covering a variety of possible forms." Lord *Kinnear* said (3):—"In ordinary language it is a common word of the most general import. It may mean a place set apart for trading, it may mean simply purchase and sale; and in either sense, there are innumerable markets each with its own customs and conditions. Words of this kind must vary in their signification with the particular objects to which the language is directed." Lord *Dunedin* says (4): "I cannot agree with the view that the term 'market' has any fixed legal significance," and his Lordship proceeds to apply the rule stated by Lord *Blackburn* and adopted by Lord *Davey* that the circumstances of its use must determine its sense. At p. 92 Lord *Atkinson* says: "The word 'market' has many meanings," and, *inter alia*, he says, "it may mean the opportunity of buying and selling." His Lordship, following *Buckley* L.J. (as he then was), asked what was "the broad fair meaning" of the words "fair current market price." At p. 93 he says, "Viewing the expression

(1) (1914) A.C. 71.
(2) (1914) A.C., at p. 79.
(3) (1914) A.C., at p. 80.
(4) (1914) A.C., at p. 82.

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'market price' through the light of the surrounding circumstances," &c. Consequently we have to see what is the broad fair meaning of the words "market price" in the collocation in which we find them here.

In *Belton* v. *London County Council* (1) the fair market price of land to which owners are entitled is described by *Day* J. thus: "They are to get the value of their property just as if they had brought it into the market and exposed it to public competition." The words "market price" in sec. 4, sub-sec. 5, of the amending Act of 1921 (12 Geo. V. No. 19) are used in a very comprehensive sense. They apply to all property other than live-stock that is transferred by one person to another *inter vivos* by way of gift or for a nominal consideration. And even those statements do not exhaust the application of the words. The property to which the words relate, therefore, includes inevitably property as to which there is no current price, and no usual traffic in the market. Applying the observations in the two cases just cited, it is plain that "the market price" in the sub-section under consideration means the price which the property would fetch if offered openly under competition in ordinary conditions and circumstances, where the seller is willing to accept and the purchaser is willing to give the fair value. Obviously, a mansion house, a valuable picture, a patent, a racehorse, a cattle station, apart from the live-stock, shares in a family company not on the Exchange, the goodwill of a business, and even money and choses in action, are all properties to which the Legislature must, by reason of the comprehensive words "estate" and "all such property," have intended the words "market price" to apply. And, if so, the broad signification I have stated is the proper one. It does not exclude the current price if there be one, but neither does it exclude the actual price that could be obtained in similar conditions if so far there be no current price.

The matter is summed up in one passage of the only evidence offered by either side on the subject, that of Mr. Hudson. The learned primary Judge (*Macrossan* S.P.J.), with reference to the sum of 13s. 2½d. which the witness said he would advise a prudent

(1) (1893) 62 L.J. Q.B. 222, at p. 224.

investor to buy at if the shares were offered to him, asked: "If they were on the market?" The witness answered: "Yes, I would advise him to buy at that price at that time." That is to say, if those shares were openly for sale in the market in competition with property of a similar description, a prudent investor would be advised to buy at that price. If so, that is the minimum, because competition of buyers might increase but could not diminish the sum so estimated.

A further contention of the respondents arose as to whether a sum of 4s. 8d. or, alternatively, a sum of 3s. 6d. per share should be deducted from 13s. 2½d., because the undistributed profits of the Company would average one of those sums per share. The reasoning presented for that view was that the undistributed profits really belonged to the individual. It is difficult to follow the argument. Undistributed profits belong to the Company, and until a dividend is declared the shareholder has no legal interest in them. The cases relied on do not relate to legal relations, but to constitutional power to legislate, which depends on considerations which must go further than the actual state of the law at a given moment. Those cases are irrelevant. The price of 13s. 2½d. was arrived at by taking into account the transfer to the purchaser of the same shareholding interest as the seller had at the moment of his death. That must include all interest—if any— in the undivided profits. Even if it could be supposed that the 4s. 8d. or 3s. 6d. belonged to the testator personally, the money would pass in the sale, and have to be taken into account at its own intrinsic value, because its market price could not be less. *Quacunque via*, the contention fails.

In the result, the appeal should be allowed, and the questions answered as follows:—Questions 1 (*a*) and (*b*)—The statutory sale was taxable in respect of a net gain or profit consisting of the difference between 7s. and 13s. 2½d., namely, 6s. 2½d. per share. Question 1 (*c*)—No deduction should be allowed in respect of the sums of 4s. 8d. or 3s. 6d. per share. Question 1 (*d*)—The profit, if any, is to be arrived at by ascertaining the selling price as directed by sec. 4, sub-sec. 5, of the Act of 1921, and then proceeding in other respects as if the sale were an actual sale.

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RICH J. The Queensland Commissioner of Taxes claims that the growth in the value of personal property between the date of its acquisition and the date of the owner's death is income derived by the owner from personal exertion during the year of his death upon which his executors are liable to pay income tax. This does not mean that the Commissioner imagines an increase in the value of property is in truth caused by personal exertion or is anything but an enlargement of capital, or supposes a profit when unrealized has really been "derived" or a capital profit is in fact "income." His contention is that fact has been superseded by a succession of statutory fictions which combine to require the legal conclusion that, when a taxpayer dies and transmits to his executors property which has become more valuable since he acquired it, the increase in value thereupon becomes part of the dead man's income for the current year.

No direct and explicit declaration could be vouched of this statutory intention to establish an income tax as a succession duty, but the Legislature is said to have accomplished this strange fusion, or confusion, by first extending fact by means of fiction and then fiction itself by means of further fiction. Sec. 12A of the *Income Tax Acts* 1902 to 1920 (Q.) certainly began by requiring the assumption that all net gains or profits arising from the sale of property were income. And, doubtless, a further false assumption is required by the amendment (12 Geo. V. No. 19, sec. 4 (5)) which directs that, among other transactions, "the taking over of a taxpayer's estate on his death by an executor or an administrator" shall be "considered" a sale and that the selling price shall be a value. But the question is how far does the second fiction extend the operation of the first ? The first says, in effect, gains, although they be of a capital nature, are to be deemed income. Does the second mean that upon death gains are to be imagined so that the imaginary gains may then be submitted to treatment by the first fiction and thus converted into imaginary income ? It is to be observed that in terms the enactment stops short of dealing with "net gains or profits" or even with gross receipts. It postulates a sale and a price. A sale at a price usually results in receipts, gross and perhaps net. But after all it is one thing to sell a

commodity and another thing to be paid for it. Legislation which proceeds by false hypothesis may stop at any point. No inconvenience may have been seen in requiring the supposition that a transmission on death was a sale to those taking under it, but yet the further supposition that thereupon the price was received by the dead man may have been unthought of and unmeant.

It is also to be noticed that, according to the enactment (12 Geo. V. No. 19, sec. 4 (5)), the hypothesis of a sale and a price is to be adopted only " for the purpose of any of the foregoing provisions under this heading (I.) and paragraph (2) under heading (II.)." What are " the foregoing provisions under " heading (I.) ? What are their " purposes " ? Heading (I.), sec. 12A (*supra*), is the first of two categories. The categories themselves, as distinct from the " provisions " under them, are no more than the objectival endings of a sentence which begins at the commencement of the section. This sentence does not proceed beyond its verb before it reaches " heading (I.)." The " provision " which declares that income includes net gains or profits arising from sale consists of the whole sentence and this is not " under " heading (I.). " Heading (I.) " occurs in its middle. On the other hand, " under " it a number of clauses are interjected containing special directions for ascertaining gains or profits. Each of these is a coherent " provision," and four of them are expressly described by that word. They are concerned with providing some criterion of the cost or the value of the thing sold, and with directing that in ascertaining the gains or profits of the sale this cost or value shall be deducted from the price realized by the sale. When executors sell, such a cost or value would be needed for the purpose of deducting it from the price, but, as executors acquire by transmission, some artificial means of determining this cost or value must be supplied. This is supplied by the clause now in question when it is used " for the purpose " of these " provisions." Why should not its application and its operation be restricted to this purpose ? *Macrossan* S.P.J., in the Court of Review, formed the positive conclusion that this was, indeed, the true meaning of the statute. I do not, however, consider that the reasons he gave for so thinking justify so definite an opinion. The Supreme Court also thought that it appeared affirmatively

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that this was the real intention of the provision; but again some at least of the grounds they assigned seem to be mistaken. But although it may be difficult or impossible to justify the definite conclusion that the statute actually expresses such an intention, there is much reason in the view that the contrary intention does not appear. It is true that turns of phrase and forms of expression occur which may be pitched upon as indications of some such meaning as the Commissioner contends for, but the like may be done on the other side. Indeed, a close examination of these remarkable provisions has convinced me that they supply no certain guide as to what the amendment meant to effect. A positive conclusion as to the intention of the statute can be arrived at only by conjecture. "It is," says Lord *Buckmaster* in *Greenwood* v. *F. L. Smidth & Co.* (1), "important to remember the rule, which the Courts ought to obey, that, where it is desired to impose a new burden by way of taxation, it is essential that this intention should be stated in plain terms. The Courts cannot assent to the view that if a section in a taxing statute is of doubtful and ambiguous meaning, it is possible out of that ambiguity to extract a new and added obligation not formerly cast upon the taxpayer." This exactly describes the present case. We are dealing with "a taxing statute, and if the Crown claims a duty thereunder it must show that such duty is imposed by clear and unambiguous words" (per Lord *Parker of Waddington*, *Attorney-General* v. *Milne* (2)). It has done no such thing. Instead it depends upon faltering inference from an uncertain superstructure of statutory make-believe placed upon a pre-existing substructure of legislative fiction. It invites us to determine the true significance of the last storey of the house that Jack built.

The appeal should be dismissed upon the ground that the provisions of the Act are not effective to impose a new burden upon the subject. If I had arrived at the conclusion that they did impose such a burden, I should have considered that to be a good reason for declining to enlarge the natural meaning of the words "market price" in sec. 4 of 12 Geo. V. No. 19 so as to extend or increase this burden. The words "market price" do not refer to a capital value ascertained by a computation based on earning capacity or

(1) (1922) 1 A.C. 417, at p. 423. (2) (1914) A.C. 765, at p. 781.

the book or any other values of the component parts of a company's assets. In their ordinary meaning they describe a price which is obtainable for a commodity by resorting to some recognized course of commercial dealing whereby the commodity is habitually or commonly bought and sold. It is true that words like "market price," "marketable value," and the like, are not inflexible. Doubtless, examples may be found in statutes *in pari materia*. I notice that in *Stamp Acts* 1894-1926 (Q.), sec. 2, such a phrase as "marketable security" is defined so as to ensure that its application is confined to securities "capable of being sold in" the "stock market." But the natural meaning could not be extended without doing violence to the settled rules upon which taxing statutes are construed unless, indeed, the views of the Full Court were adopted so that the expression could only be applied in relief of the subject.

STARKE J. The *Income Tax Acts* 1902-1921 of Queensland provide that subject to the Acts there shall be charged, levied, collected and paid for the use of His Majesty an income tax in respect of the annual amount of income of all persons, at certain rates. Income includes both income derived from personal exertion and income derived from the produce of property (2 Edw. VII. No. 19, sec. 3; 10 Geo. V. No. 35, sec. 4). And without limiting the force or effect of any other provision of the Acts, incomes liable to tax shall expressly include—(I.) As income derived from personal exertion—(2) All net gains or profits arising from the sale of any personal property whatsoever whether or not arising or accruing from any business carried on by the taxpayer (10 Geo. V. No. 35, sec. 7). For the purpose of any of the foregoing provisions under this heading—(*a*) Transfers of any property, including live-stock, by any person to any other person by way of gift or for a nominal or manifestly inadequate consideration, or to any beneficiary under any will, or in the distribution of any intestate estate, or (*b*) the taking over of a taxpayer's estate on his death by an executor or administrator, shall be considered to be sales (10 Geo. V. No. 35, sec. 7; 12 Geo. V. No. 19, sec. 4). This provision applies to incomes for the year commencing on the first day of

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January 1915 and for each subsequent year, and to this extent the provision has a retrospective operation (12 Geo. V. No. 19, sec. 4 (6)).

Mark Rubin, of London and Paris, died on 6th November 1919, leaving a will whereby he appointed executors, who are the respondents to the appeal now before us. He was the registered proprietor and beneficial owner of 83,332 shares of £1 each in the Northampton Pastoral Co. Ltd., carrying on business in Queensland, on which the sum of 7s. per share had been paid or credited as paid. These shares passed under his will to his executors, who took them over as part of the testator's estate. The Commissioner of Taxes treated the taking over of these shares by the executors of Mark Rubin as a sale of personal property within the provisions of the *Income Tax Acts* already set forth, and assessed them to income tax for the year ended 30th June 1920 in a sum of £29,166, income from personal exertion. The shares had been assessed for succession duty by the Commissioner of Stamps at a value of 14s. per share, and the Commissioner of Taxes took that sum and deducted from it the sum of 7s. paid on each share, for the purpose of arriving at the net gain or profit on the notional sale to the executors.

The Supreme Court of Queensland has held that the last paragraph of sec. 4, sub-sec. 5, of the Act 12 Geo. V. No. 19, does not create any liability to tax on the part of the executors taking over the estate of a deceased person, in respect of the notional sale thereby established and that reasonable effect may be given to the section by treating it as a provision whereby the purchasing price of property is fixed, so that in the case of future sales a cost basis is obtained on which profits may be calculated and made liable to income tax.

The Supreme Court starts from the well settled rule of construction that a new burden by way of taxation must be imposed in clear, plain and unambiguous words. It then holds that the provisions in relation to live-stock result in no liability to tax. And it concludes that if the taking over of such property is not taxable, notwithstanding the fact that it is "considered to be" a sale, then it affords ground for the conclusion that the Act was not intended to create a liability to income tax on the part of the person parting with the property.

The words of the section on which the learned Judges rely are: "and the selling price in the case of all such property other than live-stock shall be the market price of the property transferred or taken over as at the date of transfer or death, and in the case of live-stock shall be the price per head at which the late owner returned *the same class of live-stock* in the last income tax return in which he returned his live-stock on hand at the close of the year in respect of which such return was made, or, if purchased during the year for which the return is made, at the actual purchase price, to which in each case shall be added, for the purpose of arriving at the purchasing price to any beneficiary, executor, or administrator as aforesaid, the amount of any probate duty, succession duty, or estate duty paid in respect of such live stock" (12 Geo. V. No. 19, sec. 4).

The selling price, in the case of live-stock, is not the value or price shown for stock on hand in his last income tax return in which he returned his live-stock on hand at the end of the year, but the price per head at which the late owner returned *the same class of stock*; and so, I think, as to purchased stock. Breeding may have increased the stock in point of numbers (cf. 4 Edw. VII. No. 9, sec. 9); lambs may have become full-grown sheep; ewes may be in lamb or not in lamb; sheep may have varied in age; and so forth: with consequent increases and decreases in value. It is by no means clear to me that the provisions as to live-stock result, in all cases, in no liability to tax. Again, the provision as to the additions of probate, &c., duty in respect of live-stock for the purpose of ascertaining the purchasing price to the beneficiaries or legal personal representatives, throws no light upon the matter. It permits these persons, in assessing the net gain and profits arising from any sale by them of such live-stock, to add duty to the selling-price at which the deceased taxpayer is deemed to have sold the property to them. And it prevents assessments being made against them on the basis that the notional selling price was the price at which they acquired the property. But it does no more.

Further, I take leave to doubt whether the approach of the Supreme Court to this case was entirely satisfactory. The meaning and purpose of the section, in relation to property other than

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live-stock, would, I think, have been clear to the learned Judges but for the provisions as to live-stock. Even if those provisions be doubtful and obscure, and ineffectual to impose any tax, still I doubt if such a result governs the whole provision, or would lead to a similar conclusion in the case of other property were the terms of the section clear and unambiguous as to such property. That must depend upon the construction of the whole provision itself. It declares that a transfer of property to another person "by way of gift or for a nominal or manifestly inadequate consideration" shall be considered a sale at the market price of the property as at the date of the transfer. What obscurity is there in that provision, and what difficulty in giving it full effect? "The taking over of a taxpayer's estate on his death by an executor or administrator" shall also be considered a sale. And "the selling price in the case of all such property other than live-stock shall be the market price of the property . . . taken over . . . as at the date of . . . death." The notional sale is from the deceased owner to his executor or administrator, and the selling price is fixed. But the income liable to tax is only the net gain or profit arising from the sale of any personal property, and before that is ascertained deductions must necessarily be made, e.g., the cost of the acquisition of the property by the deceased owner. In this part of the section too, there is no obscurity in meaning and no difficulty in giving it full effect.

Again, the Supreme Court has held that there is no provision in the *Income Tax Acts* for charging or levying income tax in respect of any other than living persons. That conclusion rests upon the view that no suitable provision can be found in the Acts enabling the executor or administrator of the deceased taxpayer to be assessed. But sec. 67, despite the provisions in sub-sec. 2, is wide enough, in my opinion, to warrant the assessment of the legal personal representative. In any case, it is a necessary implication of the Act, in imposing tax upon the taking over of a taxpayer's estate, on his death, by an executor or administrator, as upon a sale by the taxpayer, that those representing him in law shall discharge the liability placed upon him or his estate, and shall be assessed accordingly.

Finally, there is a point relied upon at the Bar, and adverted to in the Supreme Court but not definitely decided, which, in my opinion, is fatal to the Commissioner's appeal in this case. The selling price in the case of property other than live-stock " shall be the market price of the property . . . taken over . . . as at the date of . . . death." It is not a reasonable price, nor the sum that a prudent person might be expected to give for the property, but the market price—the current price which property of that description fetches in the market. It is not, of course, necessary to establish an appointed place in which property of the description in question is bought and sold, nor dealings upon an Exchange—valuable as such dealings would be as evidence of market price. But to make a market price there must be buying and selling, purchase and sale. And the Act, in using the term " market price," appeals to, or sets up as its standard, the price or value established or shown by sales, public or private, in the way of ordinary business. (Cf. *Acebal* v. *Levy* (1); *Marshall & Co.* v. *Nicoll & Son* (2).) In the present case, the articles of association of the Company contained some restrictions upon the full disposition of the shares (arts. 41-44). Any person desiring to sell or transfer his shares must first notify the directors of his wish to sell, and the price he desires to obtain, whereupon the Company has the option of finding a purchaser at either that price or a fair value to be settled by arbitration in case of dispute. If a purchaser cannot be found within three months, then the person desirous of selling or transferring his shares may do so to a person approved by the directors and at any price. But, so far as the evidence goes, neither Mark Rubin, his executors nor any other shareholder acted upon these provisions, and it is unnecessary to consider whether a price or value obtained in accordance with them would be any evidence of market price. The shares had never been listed or quoted on any Exchange, nor offered for sale, and there was no evidence that shares of a similar description had ever been sold or offered for sale. But the evidence of a valuer and of a stock and share broker, who had examined the balance-sheets and the profit and loss accounts of the Company, was tendered as to what a prudent buyer might be expected to give for shares in

(1) (1834) 10 Bing. 376, at p. 383; 131 E.R. 949, at p. 945.
(2) (1919) Sess. Cas. 244.

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the Company or what an investor might reasonably be advised to pay if he were investing his capital in shares of the Company. Such a sum might or might not approach the current market price—the extraordinary vicissitudes of the pastoral industry in Australia render the matter doubtful; but it is plain, in my opinion, that it is not the price set up by the Act for the purpose of determining the selling price of the property here in dispute: it is not based on any sales or purchases of property of the description in question, nor does it supply evidence of any current price in the market.

It is possible that the Commissioner fails as a matter of evidence in this case, but, if not, then the taxpayer is entitled to stand upon the literal construction of the Acts, and if his case be not covered by them, the remedy is through legislation, and not by forced applications of the Acts.

For these reasons, the appeal ought, in my opinion, to be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *H. J. H. Henchman*, Crown Solicitor for Queensland.

Solicitors for the respondents, *Cannan & Peterson.*

B. J. J.