

[HIGH COURT OF AUSTRALIA.]

PERPETUAL TRUSTEE COMPANY (LIMITED) APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. *Estate Duty—External loan—Bonds—Payment at maturity “without deduction for any taxes,” present or future, imposed by Commonwealth or State—Bondholder domiciled in Australia at date of death—Value of bonds included in assessable estate—Liability to duty—Contractual obligation—Exemption from “stamp duty or other tax”—Estate Duty Assessment Act 1914-1928 (No. 22 of 1914—No. 47 of 1928), sec. 8 (3) (b)—Commonwealth Inscribed Stock Act 1911-1927 (No. 20 of 1911—No. 2 of 1927), sec. 52A—Loans Securities Act 1919 (No. 25 of 1919), sec. 3.*

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SYDNEY,

April 8.

MELBOURNE,

May 30.

Gavan Duffy
C.J., Rich,
Starke, Dixon,
Evatt and
McTiernan JJ.

Sec. 52A of the *Commonwealth Inscribed Stock Act 1911-1927* provides that “stock certificates, stock certificates to bearer, scrip certificates to bearer, Treasury bonds and coupons, transfers of stock or Treasury bonds and documents relating to the purchase or sale of stock or Treasury bonds shall not be liable to stamp duty or other tax under any law of the Commonwealth or a State unless they are declared to be so liable by the prospectus relating to the loan in respect of which they are issued or used.”

In an assessment for estate duty was included the value of certain gold dollar bonds which the deceased, who was domiciled in Australia, possessed at the time of his death. The bonds were issued by the Commonwealth in respect of an external loan of \$75,000,000 raised by it in the United States of America and had been obtained there at the time of issue by the deceased's agent. In each bond, as also in the prospectus relating to the loan, the Commonwealth promised to pay the bearer in New York “in gold coin of the United States of America of the standard of weight and fineness existing on” 15th July 1925 a specified number of dollars and interest “without deduction for any taxes now or at any time hereafter imposed by the Commonwealth of Australia or by any taxing authority thereof or therein.” The executor claimed that protection from estate duty in respect of the bonds was afforded by sec. 52A of the *Commonwealth Inscribed Stock Act 1911-1927*, and also by the contractual obligation entered into by the Commonwealth.

Held, by Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ. (Rich J. dissenting), that estate duty is not a "stamp duty or other tax" within the meaning of sec. 52A of the Commonwealth Inscribed Stock Act 1911-1927 :

By Gavan Duffy C.J., Starke and Evatt JJ., on the ground that the exemption from taxation given by that section applies only to the instruments indicated and does not extend to the property created or transferred by such instruments ;

By Dixon and McTiernan JJ., on the ground that estate duty is not a tax upon instruments or securities as such and it does not select them for any special burden.

Held, further, by Gavan Duffy C.J., Starke, Dixon, Evatt and McTiernan JJ., that the levy of estate duty on the value of the bonds as part of the estate of the deceased was not an infringement of the Commonwealth's obligation under the bonds.

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CASE STATED.

On the hearing of an appeal by the Perpetual Trustee Co. (Ltd.), executor and trustee of the will of Heinrich Robert Werner Reinhold Haege deceased, from an assessment made by the Federal Commissioner of Taxation under the *Estate Duty Assessment Act* 1914-1928 in respect of certain bonds issued in the United States of America by the Commonwealth to an agent of the deceased on his behalf, a case, which was substantially as follows, was stated by *Rich J.*, under sec. 27 of the Act, for the opinion of the Full Court :—

1. At the respective dates of his will and death the deceased was a British subject duly naturalized under the laws of the Commonwealth of Australia, and resident and domiciled in the State of New South Wales.
2. The deceased duly made his last will and testament dated 16th June 1924 whereby he appointed the Perpetual Trustee Co. (Ltd.) sole executor and trustee thereof.
3. The deceased died on 9th March 1928 without having revoked or altered his said will, probate whereof was duly granted by the Supreme Court of New South Wales to the Perpetual Trustee Co. (Ltd.) on 31st May 1928.
4. At the date of his death the deceased was the owner of gold bonds of the face value of \$373,000, being part of an external loan amounting to \$75,000,000, consisting of thirty-year 5 per cent gold bonds floated by the Commonwealth of Australia in the State of New York in the United States of America in the year 1925,

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the said bonds owned by the deceased having been issued by or on behalf of the Commonwealth of Australia in the State of New York to an agent employed by the deceased in the State of New York to apply for and obtain the same, and the same having been held at all times in New York by the said agent on behalf of the deceased.

5. A prospectus issued by the Commonwealth of Australia in connection with the flotation of the loan, stated that principal and interest were "payable in New York City at the office of J. P. Morgan & Co. in United States gold coin of the present standard of weight and fineness, without deduction for any Australian taxes, present or future."

6. The bonds were issued and sold in manner, terms and conditions mentioned in the bonds and in the prospectus by direction of the Governor-General of the Commonwealth of Australia acting with the advice of the Executive Council of the Commonwealth. The said direction and advice are stated in a minute of the Executive Council dated 30th September 1925, a reference having previously been made in such minute to various Commonwealth Acts which authorized the borrowing of money for the purposes therein mentioned, and to sec. 3 of the *Loans Securities Act* 1919, which section was set out in full. Each bond contained the following provision:—"The Commonwealth of Australia (hereinafter termed 'obligor') for value received promises to pay to the bearer on the fifteenth day of July one thousand nine hundred and fifty-five the principal sum of dollars and to pay interest on such principal sum at the rate of five per centum per annum semi-annually on the fifteenth day of January and the fifteenth day of July in each year after the date hereof until such principal sum shall have been paid but only upon presentation and surrender of the coupons for such interest hereto attached as severally they mature. Such principal sum and interest instalments when due respectively will be paid in the Borough of Manhattan City of New York State of New York United States of America at the office therein of J. P. Morgan and Company in gold coin of the United States of America of the standard of weight and fineness existing on July fifteenth one thousand nine hundred and twenty-five without deduction for any taxes now or at any time hereafter imposed by the Commonwealth of Australia or by any

taxing authority thereof or therein." The bonds did not contain any other provision affecting the construction or operation of the provision above set out.

7. The deceased instructed his agent to apply for and obtain the bonds on the faith of the representation contained in the prospectus that principal and interest should be payable in New York City without deductions for any Australian taxes present or future, it having been agreed between the Commonwealth of Australia and the deceased that in consideration of the deceased applying for the same the bonds should be issued to the deceased upon the footing that the principal and interest payable in respect of the bonds should be payable in New York without deduction for any Australian taxes present or future.

8. The bonds issued to the deceased were all in the same form, and were of the value at the date of the death of the deceased of £74,944 2s. 7d., and interest thereon in the amount of £573 11s. was payable in respect of the bonds issued to the deceased at the date of his death.

9. A return of the estate of the deceased was duly made by the Perpetual Trustee Co. (Ltd.) as such executor and trustee pursuant to the *Estate Duty Assessment Act* 1914-1928 showing the bonds as being personal estate of the deceased.

10. The Commissioner of Taxation on 1st September 1930 caused an assessment to be made for the purpose of assessing the amount upon which duty should be levied in accordance with the said Act in the said estate upon the basis that the bonds of the deceased were included within the estate of the deceased within the meaning of the Act.

11. The Perpetual Trustee Co. (Ltd.) duly, on 30th September 1930, lodged an objection in writing with the Commissioner of Taxation against the assessment, objecting to the inclusion of the bonds in the estate on the grounds that they were bought by the deceased on the terms of the promise contained in the prospectus, and that the promises and representations in the prospectus and the bonds were binding on the King on behalf of the Commonwealth, and the inclusion of the bonds for the purpose of assessing estate

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12. The Commissioner of Taxation on 13th January 1931 disallowed the objection, and issued an amended assessment which treated the bonds as so included in the estate.

13. The Perpetual Trustee Co. (Ltd.) on 13th February 1931 duly instituted this appeal to this Court against the disallowance of the objection so far as it related to the inclusion of the bonds in the estate.

14. The appellant contends that the bonds are not comprised within the estate of the deceased within the meaning of the said Act and that the same should be disregarded in arriving at the amount of duty payable in respect of the estate under the Act.

15. The respondent contends that the amended assessment is correct.

16. The appellant has paid the sum of £19,645 17s. 4d. less the sum of £1 to the respondent, and the said sum of £19,645 17s. 4d. is the correct amount of duty payable in the estate if the bonds are comprised in the estate.

17. If the bonds are not comprised in the estate for the purpose of the Act, the amount of duty payable in respect of the estate is £15,711 8s. 6d. and no more.

The question for determination by the Full Court was as follows :—

Are the said bonds comprised within the said estate for the purpose of assessment and levy for duty under the said Act ?

Flannery K.C. (with him *Kitto*), for the appellant. The bonds in question are exempt from taxation of any kind, including estate duty, by reason of sec. 52A of the *Commonwealth Inscribed Stock Act* 1911-1927, which provides that unless made liable by the prospectus Treasury bonds “shall not be liable to stamp duty or other tax under any law of the Commonwealth.” In both the prospectus and the bonds it was declared that payment would be made without deduction for any present or future taxes imposed by the Commonwealth. The provisions of sec. 52A are not confined to stamp duty or taxes of a similar nature upon documents as such, but are of much

wider application. By such provisions the Legislature sought to relieve, in particular circumstances, from Commonwealth and State taxation both the document, which otherwise would require to be stamped, and the obligation evidenced by the document. The words "other tax" in sec. 52A are shown by the context to be referable not merely to a tax on transfers but also to a tax on property secured, as here, by the bond. Under sec. 51B of the Act tax-free bonds may be issued if the Governor-General so directs. By reason of the representations and promises made in the prospectus and the bonds a contract was made between the parties that at due date the bondholder should receive payment in full without deduction of any kind which had its origin in taxation by the Commonwealth or a State.

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E. M. Mitchell K.C. (with him *Dignam*), for the respondent. The provisions of sec. 52A of the *Commonwealth Inscribed Stock Act* are not applicable because the bonds in question are not Treasury bonds; they are designated "gold bonds." The external loan of which the bonds formed part was raised under the authority of the *Loans Securities Act* 1919, which authorizes, notwithstanding the provisions of the *Commonwealth Inscribed Stock Act*, the issue of securities in such form as the Governor-General approves. The language of sec. 52A of the *Commonwealth Inscribed Stock Act* shows clearly that it refers only to stamp duty, that is, "instrument" duty, on the documents themselves, and does not apply to the property referred to in such documents. The contractual obligation of the Commonwealth under the bond is a restricted and specific one: the only obligation is to pay the principal and the interest when they respectively become due in gold in New York without deduction. The Commonwealth's undertaking in this regard is not affected by the fact that on the death of a bondholder domiciled in Australia his estate is called upon to pay estate duty on the then value of the bonds. It is obvious that the prospectus was addressed to foreign investors only, and was not intended as an invitation or offer to persons domiciled in Australia. A restricted meaning should be put upon the words used, to the effect that the liability to estate

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duty remains unaffected (*Plummer v. Coler* (1), affirmed and followed in *Murdock v. Ward* (2)). The case of *Counsell v. Commissioner of Stamps* (3) is distinguishable because the words there under consideration were ambiguous; but here the words are clear and in detail, and leave no doubt as to what was intended.

Flannery K.C., in reply.

Cur. adv. vult.

May 30.

The following written judgments were delivered:—

GAVAN DUFFY C.J., STARKE AND EVATT JJ. Estate duty has been assessed upon the value of the estate of one Haegel deceased, pursuant to the *Estate Duty Assessment Act 1914-1928* (*National Trustees, Executors and Agency Co. of Australasia v. Federal Commissioner of Taxation* (4)). In this assessment was included the value of certain gold dollar bonds issued by the Commonwealth which the deceased possessed at the time of his death. The deceased was domiciled in Australia at the time of his death, and the appellant is his executor. The bonds in question here were issued by the Commonwealth in respect of an external loan of \$75,000,000 raised by it in the United States of America. In each bond, the Commonwealth promised to pay bearer in New York “in gold coin of the United States of America of the standard of weight and fineness existing” on 15th July 1925 a certain number of dollars, and interest, “without deduction for any taxes now or at any time hereafter imposed by the Commonwealth of Australia or by any taxing authority thereof or therein.” The authority to borrow was not questioned, and is set forth in the Executive minute of 30th September 1925. Some question arose whether the bonds were issued pursuant to sec. 3 of the *Loans Securities Act* (No. 25 of 1919) or the *Commonwealth Inscribed Stock Act* (No. 20 of 1911—No. 26 of 1915); but that is immaterial to the argument addressed to us.

The appellant claimed that the value of the bonds should not be included in the value of the estate of the deceased assessed to estate duty, because the *Loans Securities Act* or the *Commonwealth Inscribed*

(1) (1900) 178 U.S. 115.
(2) (1900) 178 U.S. 139.

(3) (1929) S.R. (Q.) 99.
(4) (1916) 22 C.L.R. 367.

Stock Act authorized the issue of the bonds in the form in which they were issued, and so prevented deduction for any such taxes. But there is nothing in the statutes or in the bonds which excludes or renders inoperative the power of the Parliament with respect to taxation, though if a tax were imposed contrary to the terms of the bonds, a breach of the contractual obligation would arise which would sound in damages equivalent to the amount of the tax. Further, as the matter was argued at length, we think it right to say that the levy of an estate duty on the value of the estate of the deceased, including the value of the gold bonds, would not infringe the obligation of the bonds; that obligation is to pay in New York in gold coin of the United States of America the dollars and interest mentioned, and if that amount is paid there without deduction, then the obligation of the bonds is performed according to its tenor and effect. The imposition of an estate duty upon the estate of a domiciled Australian lessens the amount of that estate which is distributable, but his executor is still entitled to and will receive, under such bonds as these, the precise number of dollars, in gold coin of the United States, therein stipulated.

It was also argued that protection from taxation was afforded by the provisions of sec. 52A of the *Commonwealth Inscribed Stock Act* 1911-1927. The section is as follows: "Stock certificates, stock certificates to bearer, scrip certificates to bearer, Treasury bonds and coupons, transfers of stock or Treasury bonds and documents relating to the purchase or sale of stock or Treasury bonds shall not be liable to stamp duty or other tax under any law of the Commonwealth or a State unless they are declared to be so liable by the prospectus relating to the loan in respect of which they are issued or used." These gold dollar bonds are within the terms of this section. The question arising upon its construction is whether it exempts from taxation the property created or transferred by the instruments which it describes, or merely exempts the actual securities and transfers of those securities as such. The latter seems to us the right view. The section prescribes that documents of the character specified shall not be liable to stamp duty. Stamp duty is a duty on the instrument: it is the document that is stamped and not

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the property which it creates or transfers, and there is no reason for supposing that the section goes further and relieves from other exactions not merely the specified instruments but the property they create or transfer. An estate duty is not a tax upon the securities as such, but a tax upon the value of the property forming the estate.

The question stated should be answered in the affirmative.

RICH J. This is a case stated under the provisions of sec. 27 of the *Estate Duty Assessment Act* 1914-1928. At the date of his death which took place in New South Wales where he was resident and domiciled, the deceased was possessed of certain gold bonds, part of an external loan floated by the Commonwealth of Australia in New York. The bonds have been held at all times in New York on behalf of the deceased. The Act in question, by sec. 8, "sweeps into the net real and personal property physically situated in Australia, and also brings constructively within the Act personal property wherever situated." The question propounded by the case stated is whether the bonds are comprised within the estate for the purpose of assessment and levy for duty under this Act. Exclusion from tax is claimed under sec. 52A of the *Commonwealth Inscribed Stock Act* 1911-1927, which is in these terms: "Stock certificates, stock certificates to bearer, scrip certificates to bearer, Treasury bonds and coupons, transfers of stock or Treasury bonds and documents relating to the purchase or sale of stock or Treasury bonds shall not be liable to stamp duty or other tax under any law of the Commonwealth or a State unless they are declared to be so liable by the prospectus relating to the loan in respect of which they are issued or used."

"The subject matter of the *Estate Duties Assessment Act* is a single mass comprising all the property" (described in the Act) "which a deceased person possessed twelve months before his death and which he has not in the meantime disposed of for valuable consideration." That mass is called the property of the deceased (*National Trustees, Executors and Agency Co. of Australasia v. Federal Commissioner of Taxation* (1); *Jackson v. Federal Commissioner of Taxation* (2)).

(1) (1916) 22 C.L.R., at p. 372.

(2) (1920) 27 C.L.R. 503, at p. 508.

Having regard to the terms of sec. 52A of the *Commonwealth Inscribed Stock Act* and the conditions upon which the bonds were issued, is estate duty levied upon the value of the bonds comprised in the assessable amount of the estate in question ?

The relevant conditions of the bonds are that the principal and interest instalments when due respectively will be paid in New York in gold coin of the United States without deduction for any taxes now or at any time hereafter imposed by the Commonwealth or by any taxing authority thereof or therein. The prospectus stated: "Principal and interest payable in New York City . . . in United States gold coin . . . without deduction for any Australian taxes, present or future." The question of the application of sec. 52A to create the immunity claimed is not dissimilar from that dealt with in *The Commonwealth v. Queensland* (1), which established the efficacy of sec. 52B to prevent the indirect imposition of taxation upon interest secured by Treasury bonds. At pp. 14 and 15 of that case the history of the sections is discussed, the significance of the reference to a prospectus is emphasized, and the importance is pointed out of the consideration that the sections were addressed to the general public in Australia and to investors in Great Britain and elsewhere in order to induce them to lend money to the Commonwealth. (See also p. 26). Finally, the familiar principle is relied on that "you cannot do that indirectly which you are prohibited from doing directly." Sec. 52A forbids a stamp duty or other tax upon a number of instruments necessarily employed either to constitute or to evidence the title to Commonwealth loan or interest thereon and also upon documents transferring bonds or stock or relating to the sale thereof. Stock or bonds obtain their value not merely from the security of the obligation which they create but also from their marketable character. Ease of transfer and negotiability are the foundation upon which their ready conversion into cash depends. In the case of Treasury bonds the title to the loan represented thereby passes with the delivery of the paper. Property in the debt and property in the instrument are inseparable. In the case of stock certificates to bearer, although they are evidence of title rather than the expression

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(1) (1920) 29 C.L.R. 1.

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of the obligation itself their negotiability is such that they differ from bonds for present purposes in no material respect. By protecting such securities from tax the statute gives immunity to the owner from any taxation levied in respect of his ownership whether the tax is framed so as to relate to instruments or to the obligation they express. The real difficulty raised by the section turns upon the expression "stamp duty or other tax." Should a construction *ejusdem generis* be applied to the words "other tax" so that it applies only to attempts to impose duties directly upon the securities? The general frame of the section shows that it is not every consequential fiscal burden which may operate to the detriment of a bondholder that is forbidden. On the other hand, it must be remembered that estate duty is not wholly unlike stamp duty, for probate duty is a stamp duty. The provision is directed against taxation of property in the bond. Any tax which adopts property as a criterion of liability seems sufficiently immediate to come within the general notion expressed by the statement "a bond shall not be liable to stamp duty or other tax." Estate duty, as I have described it, is imposed upon a mass of property. It is true that it does not discriminate between the component parts of the mass and select bonds for special liability. It is true also that the tax is measured by the net value of the mass after deduction of liabilities. But it is a tax on property none the less. Property is charged with payment of the tax (sec. 34). If a general capital levy were made upon the owners of securities of all forms, Government and private, I cannot doubt that sec. 52A would protect bondholders. Is it material that estate duty taxes property only upon death? This merely introduces a contingency or condition, and does not alter the inherent nature of the tax. On the whole, I have come to the conclusion that an estate duty is within the scope and object of the prohibition. In these circumstances I find it unnecessary to consider the extent of the special immunity promised by the contract expressed in the bond itself.

In the view I have taken there is, of course, no incompatibility between these provisions, however construed, and the *Estate Duty Assessment Act* as affected by the *Commonwealth Inscribed Stock Act* 1911-1927. In opening the appeal Mr. *Flannery* maintained that

sec. 3 of Act No. 25 of 1919, which authorizes the Treasurer to borrow on such terms and conditions and to issue such securities in such form as the Governor-General approves, enabled the Executive Government to contract with lenders so as to give the securities immunity from existing taxation which otherwise might apply to them. Be this as it may, any such difficulty was removed by the concession made by the counsel for the Commonwealth that the Crown was bound by the true meaning of its contract whatever construction of it might be judicially adopted. I add so much because I am by no means convinced that the true meaning of the contract does not confer immunity from estate duty if otherwise that tax is leviable.

I answer the question in the case stated : No.

DIXON J. A holder of bonds issued by the Commonwealth of Australia as securities in respect of an external loan repayable in gold coin of the United States in New York died domiciled in Australia. If a deceased person is, at the time of his death, domiciled in Australia then his estate for the purpose of ascertaining the value upon which the Commonwealth estate duty is levied is taken to comprise his personal property wherever situate (sec. 8 (3) (b) of *Estate Duty Assessment Act* 1914-1928). The question for decision is whether the bonds held in America by the deceased should be included in his estate for the purpose of assessing its value for estate duty.

The first ground assigned by his executors in support of the contention that the bonds should be excluded does not depend upon any conditions of the loan or upon the fact that the bonds were issued in respect of an external loan, but upon an enactment which applies to securities of the description which it specifies, whether they are issued within or without the Commonwealth. The enactment is contained in sec. 52A of the *Commonwealth Inscribed Stock Act* 1911-1927, which provides that "Stock certificates, stock certificates to bearer, scrip certificates to bearer, Treasury bonds and coupons, transfers of stock or Treasury bonds and documents relating to the purchase or sale of stock or Treasury bonds shall not

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be liable to stamp duty or other tax under any law of the Commonwealth or a State unless they are declared to be so liable by the prospectus relating to the loan in respect of which they are issued or used." Hitherto this provision has been treated as conferring no immunity from estate duty, and, in my opinion, rightly so. My reason for this opinion is that estate duty is not a "stamp duty or other tax" within the meaning of the enactment. I do not base it upon the ground that estate duty is a tax, not upon Treasury bonds, but upon the debt or obligation which they secure. The distinction between the bond and the debt which it secures appears to me to be notional only. It is not a distinction between two possible subjects of taxation, but between two aspects of one subject. A Treasury bond is an instrument the property in which passes by delivery. It is the title to the debt or obligation which it expresses. Property in the instrument is property in the debt or obligation. Whoever owns the paper owns the obligation. To tax one is to tax the other. It is an error to understand the common statement that a stamp duty is a tax on documents and not upon transactions as discriminating between an instrument and what it contains, as treating the writing as taxed and the legal effect produced by the writing as untaxed. An instrument includes the transaction set forth in that instrument (per *Rich J. in Collector of Imposts for Victoria v. Peers* (1)). "When it is said . . . that the statute taxes instruments and does not tax transactions, it is not meant to sever the piece of material on which the transaction is inscribed from the transaction itself, but to distinguish transactions which are not constituted by instruments from transactions which are. If they can be and are effected by other means than an instrument, they are outside the Act; but if by means of an instrument, then the whole matter is within the Act" (per *Curiam in Dent v. Moore* (2)).

I found my opinion that sec. 52A of the *Commonwealth Inscribed Stock Act* 1911-1927 does not exclude Treasury bonds from estate duty upon the meaning of the provision and upon the nature of the duty. The purpose of sec. 52A is not to protect investments in Commonwealth securities from all fiscal burdens however indirect

(1) (1921) 29 C.L.R. 115, at p. 124.

(2) (1919) 26 C.L.R. 316, at pp. 326, 327.

or consequential. For such a purpose the provision would need to be much more widely expressed—so widely that sec. 52B, which specifically deals with income tax, would be unnecessary. Sec. 52A is framed in terms which do not describe the loan or investment. It enumerates the securities used in connection with Commonwealth loans. Some of these instruments merely evidence title, as stock certificates; others, as bonds, are themselves the title to the loan. But the immunity is given to these instruments as such, and it is against a tax levied upon them. The tax specifically inhibited is a stamp tax, a tax that is imposed directly upon instruments in virtue of their character or legal description. The expression “stamp duty or other tax” appears to me to describe taxes levied immediately upon the instruments or securities as such, whether by reference to possession, ownership, transfer or otherwise, but not to include indirect or consequential burdens affecting property in general. The provision, so construed, does not exclude the securities from estate duty. That duty is levied upon the amount by which the value of an aggregation of property exceeds the deceased’s liabilities. The *Estate Duty Assessment Act* assumes that, before the tax is made effective, the administrator has already been clothed with title. It is then imposed on the value as assessed under the Act of the estate in the hands of a person charged as its administrator (*Shelley v. New South Wales Deaf, Dumb, and Blind Institution* (1)). The subject of taxation with which the *Estate Duty Assessment Act* deals is the conglomerate mass called his estate considered as a unity and composed of all such property as he has owned at any time within a year before his death and has not disposed of for value (*National Trustee, Executors and Agency Co. of Australasia v. Federal Commissioner of Taxation* (2)). A duty of this character does not appear to me to be such a tax as sec. 52A of the *Commonwealth Inscribed Stock Act* excludes. It is not a tax upon the instruments or securities as such, and it is not a tax upon the transfer of those securities. It is not imposed directly upon them, and it does not select them for any particular burden. It does no more than include their value in the account from which the taxable net balance is obtained.

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(1) (1919) A.C. 650, at p. 657; 26 C.L.R. 200, at p. 204.

Isaacs J., at p. 378, and per *Gavan Duffy* and *Rich JJ.*, at pp. 379-380.

(2) (1916) 22 C.L.R. 367; see per

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The second ground upon which the objection was based to the inclusion of the bonds in the estate depends upon the conditions contained in the security. Each bond contains a provision that the principal and interest instalments, when due respectively, will be paid in New York in gold coin of the United States without deduction for any taxes now or at any time hereafter imposed by the Commonwealth or by any taxing authority thereof or therein. I think it is not inconsistent with the obligation expressed by this clause to include the value of such bonds in ascertaining the estate of a person dying domiciled in Australia for the purpose of assessing estate duty. The primary purpose of the provision is to confer upon the bondholder a right to repayment in full and in cash. The provision may well carry with it an implication that the Commonwealth shall by no use of its taxing power impair the obligation of the bond but, in my opinion, no such impairment is involved in including the bonds or the debt secured by them among the assets which upon the death of the deceased go to make up the estate liable to estate duty.

For these reasons I think the question in the case stated should be answered: Yes.

McTIERNAN J. I agree with the judgment of my brother *Dixon*, and think that the question in the case stated should be answered: Yes.

Question answered: Yes.

Solicitors for the appellant, *Sly & Russell*.

Solicitor for the respondent, *W. H. Sharwood*, Commonwealth Crown Solicitor.

J. B.