[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . } APPELLANT;
DEFENDANT,

AND

MILLAR AND ANOTHER . . . . . RESPONDENTS.
PLAINTIFFS,

MILLAR AND ANOTHER . . . . . APPELLANTS;
PLAINTIFFS,

AND

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1932.

SYDNEY, *Nov.* 16, 17; *Dec.* 8.

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

Death Duty—Dutiable estate—Property wrongly included—Shares in company not registered in State—Company engaged in mining operations within State—Deceased shareholder neither domiciled nor resident within State—Constitutional Law—Legislative power of State Parliament—Claim for refund—Action against Commissioner—Proof to satisfaction of Commissioner—"Mistake in the construction of this Act"—Constitution Act 1902 (*N.S.W.*) (*No.* 32 *of* 1902), *sec.* 5—*Stamp Duties Act* 1920-1924 (*N.S.W.*) (*No.* 47 *of* 1920—*No* 32 *of* 1924), *sec.* 103 (1) (*b*)*—*Stamp Duties Act* 1920-1931 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 13 *of* 1931), *sec.* 140 (1), (3)*."

Sec. 5 of the *Constitution Act* 1902 (N.S.W.), so far as material, provides that "The Legislature shall, subject to the provisions of the *Commonwealth of Australia Constitution Act*, have power to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever."

* Sec. 103 of the *Stamp Duties Act* 1920-1924 (N.S.W.) provides:—"(1) The estate of a deceased person whether domiciled at the time of his death in or out of New South Wales shall also be deemed to include . . . (*b*) every share and all stock held by such person at the time of his death in any company, corporation or society, whether registered or incorporated within or out of New South Wales, and carrying on the business of mining for gold or other

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Gavan Duffy* C.J. and *Evatt* J. dissenting), that the provisions of sec. 103 (1) (*b*) of the *Stamp Duties Act* 1920-1924 (N.S.W.) which, for the payment of death duty, purported to authorize the inclusion in the dutiable estate of a person, dying resident and domiciled out of New South Wales, of shares held by him in a company incorporated out of and having no share register within that State, but which carried on the business of mining within the State, were in excess of the powers of the Legislature of New South Wales.

Per Rich, *Dixon* and *McTiernan* JJ.: A shareholder has no property legal or equitable in the assets of the company.

By the provisions of sec. 140 (1) of the *Stamp Duties Act* 1920-1931 (N.S.W.) no refund of death duty shall be made in respect of any property wrongly included in the dutiable estate of a deceased person "by reason of any mistake in the construction of this Act."

Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ., that the inclusion by the Commissioner of certain shares in the dutiable estate of a deceased person upon the erroneous supposition that sec. 103 (1) (*b*) of the *Stamp Duties Act* 1920-1924 was valid was due not to a mistake in the construction of the Act, but to a mistake as to the extent of the legislative power.

An action may be brought under sec. 140 (3) of the *Stamp Duties Act* 1920-1931 (N.S.W.) irrespective of whether it has been proved to the satisfaction of the Commissioner that the property in question had been wrongly included in the dutiable estate of the deceased person.

So *held* by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ.

Perpetual Trustee Co. Ltd. v. *Commissioner of Stamp Duties*, (1930) 30 S.R. (N.S.W.) 100, disapproved.

Decision of the Supreme Court of New South Wales (Full Court): *Millar* v. *Commissioner of Stamp Duties*, (1932) 33 S.R. (N.S.W.) 157, reversed.

APPEALS from the Supreme Court of New South Wales.

Fanny Beatrice Millar and the Trustees and Executors and Agency Co. Ltd., the executrix and executor of the will of Edwin Franks

minerals as defined in the *Mining Act* 1906 in New South Wales, or of treating any such minerals, or the business of pastoral or agricultural production or timber-getting in New South Wales."

Sec. 140 of the *Stamp Duties Act* 1920-1931 (N.S.W.) provides:—"(1) Where it is proved to the satisfaction of the Commissioner that any property has been wrongly included in the dutiable estate of a deceased person the death duty paid in respect of such property shall be repaid by him, but (except in accordance with an order of the Court under section one hundred and twenty-four) no refund shall be made in respect of any property wrongly included in the dutiable estate of any person . . . by reason of any mistake in the construction of this Act. . . . (3) Any claim for a refund of duty so paid in excess may be enforced by action or suit against the Commissioner in his official name as nominal defendant on behalf of the Crown in any Court of competent jurisdiction and not otherwise."

H. C. OF A. 1932.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. MILLAR.

MILLAR v. COMMISSIONER OF STAMP DUTIES (N.S.W.)

Millar, deceased, brought an action under sec. 140 of the *Stamp Duties Act* 1920-1931 (N.S.W.) against the Commissioner of Stamp Duties of New South Wales to recover death duty paid in respect of property alleged to have been wrongly included in the dutiable estate of the testator. The facts alleged in the declaration were that the deceased was domiciled and resident in Victoria; that he held shares in some companies which, though they carried on the business of mining or of treating minerals in New South Wales, were incorporated in Victoria, and had no share register in New South Wales; that the shares were treated as included in the dutiable estate of the deceased in New South Wales; and that duty was assessed and paid upon them. The declaration contained three counts and each count was demurred to. The first and second counts were said to be bad upon the grounds that they did not allege that the shares were not wrongly included in the dutiable estate of the deceased by reason of any mistake in the construction of the *Stamp Duties Act* 1920-1931—the allegation was merely that the shares were not wrongly included in the dutiable estate "by reason of any mistake in construction." The Supreme Court held that the allegation as appearing in the respective counts was sufficient. A further ground upon which the first count was demurred to was that it did not allege that it was proved to the satisfacton of the Commissioner that any of the shares in question were wrongly included in the dutiable estate of the deceased. The Supreme Court followed the decision in *Perpetual Trustees Co.* v. *Commissioner of Stamp Duties* (1) and held that the point was well taken. The third count set out facts showing that the deceased was resident and domiciled outside New South Wales; and that the shares in question were shares in companies registered outside New South Wales, and having no share register in New South Wales, and then instead of alleging, as in the second count, that it was proved to the satisfaction of the Commissioner that the shares had been wrongly included in the dutiable estate, it alleged that "all the above-mentioned facts have been and are proved to his satisfaction" and that repayment of the amount of death duty paid in respect of the shares had been requested and had been refused. The Commissioner demurred to

(1) (1930) 30 S.R. (N.S.W.) 100.

this count on the ground that the facts therein alleged as having been proved to his satisfaction did not constitute proof to his satisfaction that the shares were wrongly included in the deceased's dutiable estate, and, further, that the count did not allege that it was proved to his satisfaction that the shares in question were wrongly so included. The Supreme Court, in applying the principle laid down by *Isaacs* J. in *Moreau* v. *Federal Commissioner of Taxation* (1), decided that the facts alleged in the third count were such that the Commissioner's disregard of them "was so irrational as to be outside the limits of administrative discretion with which" he was invested and was "really in disregard of the statutory condition" contained in sec. 140 (1) of the *Stamp Duties Act*, and held that the legislative powers conferred upon the Parliament of New South Wales did not authorize it to impose duties as it purported to do under sec. 103 (1) of the Act upon the estate of a deceased person who was neither domiciled nor resident within New South Wales in respect of property not situate within New South Wales. Judgment on the demurrer was given for the Commissioner on the first count and for the plaintiffs on the second and third counts: *Millar* v. *Commissioner of Stamp Duties* (2)

From this decision, as regards the second and third counts, the defendant now, by special leave, appealed to the High Court. The plaintiffs also appealed from the decision of the Supreme Court in respect of the first count.

In pursuance of an undertaking given upon the application for special leave to appeal the following facts were admitted by the parties:—That the deceased was at the date of his death resident and domiciled in the State of Victoria; that the deceased duly made his will, and died on 26th May 1928, without having revoked such will; that probate of the will was granted by the Supreme Court of Victoria to the plaintiffs, as executrix and executor respectively, on 27th August 1928; that the probate was resealed by the Supreme Court of New South Wales on 28th September 1928; that the deceased at the date of his death was the registered holder and the owner of (*inter alia*) certain shares in certain companies duly incorporated under the laws in force in the State of Victoria, and not

(1) (1926) 39 C.L.R. 65, at p. 69. (2) (1932) 33 S.R. (N.S.W.) 157.

H. C. OF A. 1932.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. MILLAR.

MILLAR v. COMMISSIONER OF STAMP DUTIES (N.S.W.)

otherwise, as companies limited by shares, and having no share register in the State of New South Wales, which companies at the date of the death of the deceased carried on the business of mining for minerals, as defined in the *Mining Act* 1906 (N.S.W.), in New South Wales, or of treating such minerals; that the defendant for the purposes of the assessment in the estate of the deceased of death duty payable under the *Stamp Duties Act* 1920-1924 treated such shares as included in his dutiable estate and assessed death duty upon such estate upon that basis, and not otherwise; that the plaintiffs as executrix and executor as aforesaid paid death duty to the defendant accordingly; that all the above-mentioned facts had been and are proved to the satisfaction of the defendant; that the plaintiffs as such executrix and executor had requested the defendant to refund and repay to them the amount of death duty so paid in respect of such shares; and that the defendant had refused and still refused to refund or repay such duty or any part thereof to the plaintiffs or either of them.

Teece K.C. (with him *Betts*), for the Commissioner of Stamp Duties. The provisions of sec. 103 (1) (*b*) of the *Stamp Duties Act* 1920-1924 were not in excess of the powers conferred upon the Legislature of New South Wales by sec. 5 of the *Constitution Act* 1902, and could be applied to the shares of a foreign company carrying on the business of mining for gold in New South Wales. The Legislature is entitled to regard a shareholder of such a company as being a member of a partnership operating in New South Wales (*Morgan* v. *Deputy Federal Commissioner of Land Tax (N.S.W.)* (1)), and the whole of the interest of such a shareholder is liable to duty (*Commissioner of Stamp Duties* v. *Salting* (2)). What is meant by a "mining company" is shown in sec. 3 of the Act. The pleader should state clearly in the declaration why he alleges that the company is not caught by the Act. The matter comes within the jurisdiction of the New South Wales Legislature because the deceased was a partner in a statutory partnership carrying on business in New South Wales. Alternatively, the intention of the Legislature was to tax only the shares in those companies over which it in fact

(1) (1912) 15 C.L.R. 661, at p. 669. (2) (1907) A.C. 449.

has jurisdiction, that is, companies confined to New South Wales (*Commissioner of Stamp Duties* v. *Salting* (1)). As, by virtue of sec. 117 of the *Stamp Duties Act*, death duty must be paid prior to the granting of probate or letters of administration, such duty is a probate duty in the true sense of the term ; and the duty required to be paid in connection with the property here in question is part of the price of probate, the amount of which is determinable by the Legislature (*R.* v. *Lovitt* (2) ; *New South Wales Institution for the Deaf, Dumb and the Blind* v. *Shelley* (3)).

[DIXON J. referred to *Bank of Toronto* v. *Lambe* (4).]

On the facts set out in the third count the duty was paid owing to a mistake as to the validity of the Act ; therefore such duty cannot be recovered by the respondents as such a mistake is a " mistake in the construction " of the Act within the meaning of sec. 140. " Construction " includes not only the meaning of the words but also their legal effect (*Chatenay* v. *Brazilian Submarine Telegraph Co.* (5) ; *National Pari-Mutuel Association* v. *The King* (6)).

[DIXON J. referred to *R.* v. *Roberts* ; *Ex parte Whitworth* (7).]

The Act should be construed so as not to exceed the legislative power of New South Wales, and is valid to that extent (*Australian Railways Union* v. *Victorian Railways Commissioners* (8) ; see also sec. 144 *Stamp Duties Act* 1920-1931 (N.S.W.)). The third count is also bad because it does not allege that the shares were not wrongly included by reason of any mistake in the construction of the Act. The count should have negatived the exception. The declaration is bad because it does not specifically allege that it had been proved to the satisfaction of the Commissioner that the shares had been wrongly included in the dutiable estate (*Perpetual Trustee Co.* v. *Commissioner of Stamp Duties* (9)). It is not sufficient to allege facts on which, if he properly interpreted the law, the Commissioner ought to be satisfied. The condition in sec. 140 that the wrong inclusion must be " proved to the satisfaction of the Commissioner " must be literally complied with (*Cornell* v. *Deputy Federal Commissioner of Taxation (S.A.)* (10) ; *Thomson* v. *Federal Commissioner*

(1) (1907) A.C., at p. 453.
(2) (1912) A.C. 212, at p. 223.
(3) (1917) 23 C.L.R. 351.
(4) (1887) 12 App. Cas. 575.
(5) (1891) 1 Q.B. 79, at p. 85.
(6) (1930) 47 T.L.R. 110.
(7) (1924) 40 T.L.R. 769.
(8) (1930) 44 C.L.R. 319, at p. 374.
(9) (1930) 30 S.R. (N.S.W.) 100.
(10) (1920) 29 C.L.R. 39.

H. C. OF A. 1932.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. MILLAR.

MILLAR v. COMMISSIONER OF STAMP DUTIES (N.S.W.)

of Taxation (1); *Federal Commissioner of Taxation* v. *Australian Boot Factory Ltd.* (2): see also *Verner* v. *General and Commercial Investment Trust* (3)).

[EVATT J. referred to *J. C. Williamson's Tivoli Vaudeville Pty. Ltd.* v. *Federal Commissioner of Taxation* (4).]

Weston, for Fanny Beatrice Millar and the Trustees and Executors and Agency Co. Ltd. Death duty is a charge on an estate through the executor or administrator; it is a misnomer to refer to it as a price paid for probate (see *Stamp Duties Act*, secs. 100-123, particularly sec. 116). The provisions of sec. 117 simply ensure the payment of the duty, but the grant of probate is not dependent upon such payment. The correct construction of sec. 103 of the Act is that it relates to a company carrying on any business anywhere provided it carries on business of a designated character in New South Wales. The Act does not tax the operations or activities of the company from the products but taxes the value of the share outside New South Wales, which the Legislature is not competent to do (*Commissioners of Stamps (Q.)* v. *Wienholt* (5)).

[STARKE J. referred to *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [*No.* 3] (6).

[EVATT J. referred to *Nathan* v. *Federal Commissioner of Taxation* (7).]

The primary test of territorial jurisdiction is that the subject of the legislation must be a person, thing, or circumstance within the territory (*Commissioners of Stamps (Q.)* v. *Wienholt* (8)).

[EVATT J. referred to *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners' Association* [*No.* 3] (6), as showing a distinction between the Commonwealth power limited and the State power unlimited except by the phrase "in all cases whatsoever."]

The test is, in the main, territoriality. Unless the duty is imposed only on property over which the State has territorial jurisdiction,

(1) (1923) 33 C.L.R. 73.
(2) (1926) 38 C.L.R. 391, at pp. 396, 397.
(3) (1894) 2 Ch. 239.
(4) (1929) 42 C.L.R. 452, at p. 469.
(5) (1915) 20 C.L.R. 531.
(6) (1920) 28 C.L.R. 495.
(7) (1918) 25 C.L.R. 183.
(8) (1915) 20 C.L.R., at pp. 539-541.

it is invalid (*Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. (Watt's Case)* (1) and *Merchant Service Guild of Australasia* v. *Commonwealth Steamship Owners Association* (2); see also *London and South American Investment Trust* v. *British Tobacco Co. (Aus.)* (3)). The legislative jurisdiction is territorial, and the jurisdiction so attracted is limited to legislation to the person, thing or circumstance in the territory, so that when a company is carrying on a business in New South Wales the jurisdiction of that State, whatever it may be, which is attracted by that circumstance does not extend to impose a tax by way of a charge upon a person domiciled in (say) Victoria who happens to be a shareholder in that company. An incorporated company is not a partnership, the incidences associated with, and the law referable to partnerships being very different in many material respects from those associated with and referable to companies. The question of constitutionality was neither argued nor considered in *Nathan* v. *Federal Commissioner of Taxation* (4). By the provisions of sub-sec. 3 of sec. 140 of the *Stamp Duties Act* an independent power is conferred upon the Court irrespective of the provisions of sub-sec. 1 of that section. The words "so paid" in sub-sec. 3 mean "paid in consequence of a wrongful inclusion in the estate." The Supreme Court was right in saying that in the declaration satisfaction might be imputed to the Commissioner.

Teece K.C., in reply. The correct principles were applied by the Supreme Court in *Perpetual Trustee Co.* v. *Commissioner of Stamp Duties* (5) and in this case (*R.* v. *Commissioners of Inland Revenue*; *In re Nathan* (6)). The satisfaction of the Commissioner cannot be reviewed by the Court. As to the validity of sec. 103 of the *Stamp Duties Act*, once there is some circumstance that attracts the jurisdiction of the State Legislature this Court cannot limit the extent of the taxing power (*Bank of Toronto* v. *Lambe* (7)).

[EVATT J. referred to *R.* v. *Lovitt* (8).]

(1) (1926) 38 C.L.R. 12, at pp. 31-33.
(2) (1913) 16 C.L.R. 664, at pp. 689 *et seqq.*
(3) (1927) 1 Ch. 107.
(4) (1918) 25 C.L.R. 183.
(5) (1930) 30 S.R. (N.S.W.) 100.
(6) (1884) 12 Q.B.D. 461.
(7) (1887) 12 App. Cas. 575.
(8) (1912) A.C., at p. 223.

H. C. OF A. 1932.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. MILLAR.

MILLAR v. COMMISSIONER OF STAMP DUTIES (N.S.W.)

Dec. 8.

The word " construction " as appearing in sec. 140 (1) of the *Stamp Duties Act* 1920-1931 also means " interpretation," and includes consideration of the validity or otherwise of an enactment (*Commissioners of Stamps* (*Q.*) v. *Wienholt* (1)).

Cur. adv. vult.

The following written judgments were delivered :—

GAVAN DUFFY C.J. AND EVATT J. The present appeal raises an important question as to the validity of sec. 103 (1) (*b*) of the New South Wales *Stamp Duties Act* 1920-1924. The sub-section, for purposes of death duty, includes in the estate of persons wheresoever domiciled, every share held by such persons in any company, whether registered or incorporated within or without New South Wales, which, at the time of the death of the shareholder, carries on in New South Wales the business of mining for any mineral or certain other business.

By the New South Wales Act No. 20 of 1894, sec. 1 (1) (*b*), it was provided that where application was made in New South Wales for probate or letters of administration, or for an order to collect in respect of the estate of any person dying domiciled without New South Wales, the estate should, for the purposes of the *Stamp Duties Acts* 1880 and 1886, be taken to include every share held by that person in any company carrying on the business of mining for any mineral in New South Wales, notwithstanding that the shares were not at the time of the death of the said person *bona notabilia* within New South Wales. In the consolidating Act of 1898, sec. 1 (1) (*b*) of the 1894 Act reappeared as sec. 51 (1) (*b*), but the words " where application is made for probate or letters of administration, or for an order to collect in respect of the estate," were not repeated as it was made clear elsewhere that the duty was to be collected as at the time of a New South Wales grant in respect of the estate. The Act of 1920 repeats the provision from the Act of 1898, but also affects businesses other than those of mining for minerals.

The case was argued in the Supreme Court upon demurrer to each of three counts of the declaration of the plaintiffs, who sued the appellant as nominal defendant under sec. 140 of the *Stamp*

(1) (1915) 20 C.L.R., at p. 539.

Duties Act, claiming that certain shares of the testator had been "wrongly included" in the estate of which they were executors. If sec. 103 (1) (*b*) is not beyond the competence of the New South Wales Legislature, it is clear that the Commissioner is entitled to judgment, because each of the three counts complains of the very inclusion in the estate of company shares of the character expressly described in sec. 103 (1) (*b*) of the Act.

It appears from the pleadings that the testator was domiciled in Victoria, and that the respondent executors applied to the Supreme Court of New South Wales in its probate jurisdiction for a reseal by that Court of the original Victorian probate. By sec. 107 (2) of the *Wills, Probate and Administration Act* 1898 such probate, when so sealed by the Supreme Court of New South Wales, has the same operation in New South Wales, and every executor is subject to the same duties and liabilities, as if probate had been originally granted by the Supreme Court of New South Wales. By sec. 97 (1) of the same Act the executor applying for, and obtaining, such sealing, is deemed resident in New South Wales, and, if not actually residing, must, before the issue or sealing of the probate, file with the Registrar a Sydney address, service at which is to be deemed personal service. By sec. 108 (1) it is provided that the seal of the Court shall not be fixed to any foreign probate until all such probate and stamp duties have been paid, as would have been payable if the probate had been originally granted in New South Wales.

The *Stamp Duties Act* also contains a provision that no probate shall issue from the Supreme Court Office until death duty has been paid and the probate duly stamped (sec. 119).

It therefore appears that the respondent executors applied to the Supreme Court of New South Wales for a reseal of the original Victorian probate, because assets other than the shares in question were situate within New South Wales, that, in order to administer such New South Wales assets, they were compelled to seek the authority of the New South Wales Court, and that they obtained it only upon fulfilment of the statutory condition of payment of duty in respect, not only of the locally situated assets, but also of the shares the inclusion of which is now said to be beyond the competence of the New South Wales Legislature. Mr. *Teece*, for

H. C. OF A. 1932.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. MILLAR.

MILLAR v. COMMISSIONER OF STAMP DUTIES (N.S.W.)

Gavan Duffy C.J. Evatt J.

the Crown, argued strenuously that, by invoking the jurisdiction of the Supreme Court in Probate, upon the clearly defined statutory conditions, the respondents placed themselves in the position of having to pay the full duty as the price of obtaining the seal and authority of the New South Wales Court so as to enter lawfully upon the administration within that State. He contended with much force that the quantum of duty chargeable in such circumstances was a matter entirely within the discretion of its Legislature, which, over all property and all State tribunals within its borders, has full control and authority.

But it is unnecessary to elaborate further upon that aspect of the case. The jurisdiction of the New South Wales Legislature is subject to the *Commonwealth of Australia Constitution Act*, which distributes powers of legislation between Commonwealth and State Parliaments. But no question of competing or overriding power arises in this case; and the only ground upon which the validity of the enactment contained in sec. 103 (1) (*b*) of the *Stamp Duties Act* has been attacked is that it is beyond the territorial jurisdiction of the New South Wales Legislature. Unlike the powers of the Commonwealth Parliament, those of the New South Wales Parliament are not defined by reference to subject matter, but, subject to the powers of the Commonwealth Parliament, extend to the peace, welfare and good government of the State in all cases whatsoever. It is, in our opinion, competent to the New South Wales Legislature to select any event, circumstance, or course of activity within its borders as the foundation of liability to contribute to the revenue of the State. In the present case, at the time of the testator's death, the company in which he had share capital embarked, was carrying on the business of primary production in New South Wales. The incorporation of the company, the technical legal situs of the shares, the residence and domicile of the testator, were all outside New South Wales. But, as has already been indicated, the Legislature thought fit, as long ago as 1894 with respect to companies carrying on mining businesses within New South Wales, to make a levy upon the capital which was, partly at least, employed in extracting or endeavouring to extract wealth

from the soil of the State. The moment selected for the levy was that of the death of the holder of any part of the share capital.

In our opinion, the holding of shares in a company carrying on business within the State, furnishes a connection between the holder and the State which is sufficient to found a taxing jurisdiction. The decisions of this Court in *Nathan* v. *Federal Commissioner of Taxation* (1) and in *Murray* v. *Federal Commissioner of Taxation* (2), although relating to Commonwealth income tax, tend to show that the New South Wales Legislature's jurisdiction cannot be challenged in such a case, although there may be practical difficulties in collection. In the latter case *Knox* C.J. said (3): "We are all of opinion that *Nathan* v. *Federal Commissioner of Taxation*, rightly decided that dividends on shares in a foreign company resulting directly from profits derived in Australia are properly subjects of taxation under the *Income Tax Assessment Act* in the hands of a shareholder." In the case of a shareholder being taxed upon the dividends he receives from a company which carries on a business within New South Wales, the Legislature may lawfully treat New South Wales as the territorial source of the shareholder's income, although he has no legal interest in any part of the company's property within that State. And in such a case, can it be asserted that the power of the Legislature is limited to the imposition of a tax upon that part only of the dividends paid which is referable to the profits made by the company in New South Wales? It is possible that the company may be deriving income from businesses carried on, not only within New South Wales, but without it. The ascertainment of the precise part of the dividends which is attributable to the New South Wales business, may be impossible, and we do not see why the Legislature may not resolve this practical difficulty by saying that, in such cases, all the dividends received from such a company may be taxed. The wisdom and expediency of such legislation are none of our concern.

So, too, in the case of the inclusion of the shares in the estate of the shareholder dying domiciled outside New South Wales. If the State (and the Commonwealth) may lawfully levy income tax upon

(1) (1918) 25 C.L.R. 183. (2) (1921) 29 C.L.R. 134.
(3) (1921) 29 C.L.R., at p. 138.

H. C. OF A. 1932.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. MILLAR.

MILLAR v. COMMISSIONER OF STAMP DUTIES (N.S.W.)

Gavan Duffy C.J. Evatt J.

his dividends, it may levy a capital tax upon his shares; and for the same reason. He belongs to the class of persons who are sufficiently identified with a New South Wales activity or concern to become subject to the power of the New South Wales Legislature in respect of their business connection with it. He may say, and with truth, that only part of his interest in the company's New South Wales business is referable to New South Wales, because another part of its business is conducted elsewhere. The broad answer to his contention is that, given jurisdiction because of the business connection between the shareholder and the State, the Legislature cannot be pinned down to any one scheme or method of taxing the shareholder in relation to that business connection. The argument of the respondent—that there must be a "logical" relation between the amount of the tax and the circumstance which founds jurisdiction, and that the Legislature can tax only such part of the value of the shares as is ascertained by fixing a ratio between the property owned by the company in New South Wales and that owned by it elsewhere, cannot prevail. The impossibility or great difficulty of undertaking such an elaborate quantification of the value of the subject matter of tax, and the great improbability that companies of the specified character will also be carrying on substantial businesses elsewhere, led the New South Wales Legislature to impose taxation upon the total value of the shares. This being in our opinion within its powers, as a law for the peace, welfare and good government of New South Wales, the appeal should be allowed, the cross-appeal dismissed, and the defendant's demurrer to each of the three counts of the declaration should be upheld.

RICH, DIXON AND MCTIERNAN JJ. The first question raised by this appeal is whether before its repeal par. (*b*) of sec. 103 (1) of the *Stamp Duties Act* 1920-1924 operated to require that, in the dutiable estate of a person dying resident and domiciled out of New South Wales, there should be included shares held by him in a company incorporated out of the State and having no share register within the State, if the company carried on the business of mining for minerals in New South Wales or of treating such minerals. This statutory provision purported to include in the dutiable estate of

a person domiciled elsewhere every share and all stock held by him at the time of his death in any company, corporation or society whether registered in New South Wales or elsewhere and carrying on the business of mining for gold or other minerals as defined in the *Mining Act* 1906 in New South Wales or of treating such minerals, or the business of pastoral, agricultural production or timber-getting in New South Wales. The language of this provision, in our opinion, will not bear an interpretation which restricts it to companies whose entire business or property is confined to New South Wales. It is intended to include a foreign company whose business, if of the required description, extended to New South Wales.

In the Supreme Court the provision was held to exceed the territorial limitation imposed upon the legislative powers of the State. *Street* C.J. said (1): "The intention to include in the dutiable estate of a deceased person shares and stock wherever locally situated in any company carrying on specified operations in the State, and irrespective of whether the deceased owner was domiciled here or not, is plain and express, and it is equally plain that this was an imposition in excess of the powers of the Legislature of this State." We agree with the conclusion that the provision goes beyond the legislative powers of the State. The duty imposed by the *Stamp Duties Act* is not conditioned upon the grantor sealing probate or letters of administration under the law of New South Wales. If the legislation had selected the acquisition of such a right or title under the law of the State as the occasion of the duty, it may be conceded that it might have measured the quantum of the duty by reference to the property of the deceased wherever situated. But the duty is levied upon the assets independently of any grant or authentication of title to administer the assets. Indeed, the duty is levied although no administrator is constituted whether in or out of the State; see secs. 115 and 116. Secs. 113 (2) and 114 provide no more than machinery for collection when probate or administration is obtained. Among the assets upon which duty is thus levied sec. 103 (1) (*b*) assumed to include the shares in foreign companies. If its operation were restricted to deceased persons who had been connected by residence or domicile with New South

(1) (1932) 33 S.R. (N.S.W.), at p. 164.

H. C. OF A. 1932.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. MILLAR.

MILLAR v. COMMISSIONER OF STAMP DUTIES (N.S.W.)

Rich J. Dixon J. McTiernan J.

Wales, then again it might be conceded that a sufficient territorial connection would have existed to support the imposition of the duty. But the duty is not based upon any personal connection of the deceased with New South Wales. As a shareholder the deceased had no property, legal or equitable, in the assets of the company (*Macaura* v. *Northern Assurance Co.* (1)). The shares held by him considered as property were not situated in New South Wales. A shareholder is not a principal acting by the company as his agent. The existence in New South Wales of a business conducted by the company does not make the shareholder a person who has by his representative come under the legislative jurisdiction of the State. Let it be assumed that, in so far as the shareholder obtains an actual advantage from the possession by the company of property in New South Wales, that advantage may be taxed by the State. It may be the case that the Legislature can disregard the legal character of the relation between the assets of the company and the shareholders, and can fasten upon the actual benefit or economic advantage which the shareholder derives from property situated in or operations conducted in the State. But the subject of taxation selected by the present enactment is not this advantage or benefit. The subject is the entire value of the share. The business in New South Wales of the company may be a small part of its whole undertaking. It may be a source of little profit or, indeed, of continual loss. The operations in New South Wales may not account at all for any of the value contained in the share. What the Legislature fastens upon as the subject of taxation is the share, not the economic advantage derived by the connection with New South Wales. It does not supply the measure, the quantum, of tax by reference to the share and impose the tax so measured upon some act occurring or thing situate within its jurisdiction. It assumes to tax the share as property out of the jurisdiction, but does so because of the existence of the company's business within the jurisdiction. In doing so, it adopts a connection which is too remote to entitle its enactment to the description a law "for the peace, welfare, and good government of New South Wales": sec. 5 of the *Constitution Act* 1902. Or, to state the matter in another way, although some

(1) (1925) A.C. 619.

connection between the shareholder and New South Wales may be discovered in the existence there of part of the company's undertaking, the enactment goes beyond legislating in respect of that connection. It does not seem possible to construe the provision so as at once to confine it within the ambit of the power of the State Legislature and to include the facts of the present case within its operation.

The second question raised by the appeal is whether in an action brought under sub-sec. 3 of sec. 140 of the *Stamp Duties Act* 1920-1931 duty overpaid because of the unauthorized inclusion of shares in purported pursuance of sec. 103 (1) (*b*) may be recovered unless it has been first proved to the satisfaction of the Commissioner that they were wrongly so included. In *Perpetual Trustee Co.* v. *Commissioner of Stamp Duties* (1) it was decided that sub-sec. 3 did not enable the subject who had overpaid duty because property had been wrongly included in the dutiable estate to sue the Commissioner unless the Commissioner had been first satisfied that it was wrongly so included. We are unable to adopt this construction of sec. 140. In the first place, it leaves little practical operation for sub-sec. 3. If he is satisfied under sub-sec. 1 of the wrongful inclusion of property, the Commissioner is required by that sub-section to repay the excess duty. It seems needless to provide a special procedure to enforce this duty which only arises from his own opinion that it ought to be performed and may therefore be said to be self-imposed. In the next place, considered grammatically, sub-sec. 3 does not appear to incorporate by reference so much of sub-sec. 1 as requires that the Commissioner should be satisfied The words " duty so paid " in sub-sec. 3 refer back to the expression in sub-sec. 1 " death duty paid in respect of such property," and in that expression " such " relates to the words " wrongly included in the dutiable estate " and does not contain any reference to the requirement of proof to the satisfaction of the Commissioner. The effect of sub-sec. 1 is to authorize and require the Commissioner to make a refund of duty when, as an administrative officer, he is of opinion that the subject had overpaid duty because of the erroneous inclusion of property in the dutiable estate. The effect of sub-secs.

(1) (1930) 30 S.R. (N.S.W.) 100.

H. C. OF A. 1932.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. MILLAR.

MILLAR v. COMMISSIONER OF STAMP DUTIES (N.S.W.)

Rich J.
Dixon J.
McTiernan J.

3 and 4 is to provide that within three years the Commissioner may be sued in his official name as nominal defendant in respect of a claim to such a refund. An action to "enforce a claim" is a proceeding which supposes the claim has not been acceded to. It appears to us to have been provided for on the footing that in the Courts the claim would be examinable although the Commissioner had rejected it. In construing sec. 140, it is desirable to remember that if the payment of excessive duty were made in order to obtain an actual issue of probate or letters of administration, it would be recoverable at common law in the absence of any statutory provision. Thus the construction adopted in *Perpetual Trustee Co.* v. *Commissioner of Stamp Duties* (1) means that the right otherwise existing to recover an excessive exaction would be abridged.

The third question in the appeal is whether the amendment introduced by sec. 7 (*d*) of Act No. 13 of 1931 into sub-sec. 1 of sec. 140 operates to prevent the recovery of the duty which has been overpaid because shares have been wrongly included in the dutiable estate upon the supposed authority of par. (*b*) of sec. 103 (1). This amendment adds to sub-sec. 1 the words: "but (except in accordance with an order of the Court under section one hundred and twenty-four) no refund shall be made in respect of any property wrongly included in the dutiable estate of any person whether dying before or after the passing of the *Stamp Duties (Amendment) Act* 1931 by reason of any mistake in the construction of this Act." It is contended that this amendment affects the right of action referred to in sub-sec. 3 and disables the subject from recovering an excess payment of duty attributable to a mistake in the construction of the Act. Whether this is so or not, we are of opinion that when the Commissioner included the shares in the estate acting upon the supposition that par. (*b*) of sec. 103 (1) was altogether within the power of the Legislature, he did not do so by reason of any mistake in the construction of the *Stamp Duties Act*. His mistake related to the extent of the legislative power, not to the construction of the enactment.

In our opinion the appeal should be dismissed with costs and the cross-appeal should be allowed with costs.

(1) (1930) 30 S.R. (N.S.W.) 100.

STARKE J. Under the *Stamp Duties Act* of New South Wales, No. 47 of 1920, death duty is payable upon the final balance of the estate of a deceased person. And by sec. 103 (1) (*b*)—now repealed (see Act No. 13 of 1931, sec. 6 (*c*) (i.))—the estate of a deceased person, whether domiciled at the time of his death in or out of New South Wales, includes "every share . . . held by such person at the time of his death in any company . . . whether . . . incorporated within or out of New South Wales, and carrying on the business of mining for gold or other minerals as defined in the *Mining Act* 1906 in New South Wales, or of treating any such minerals." Pursuant to this Act, the Commissioner included in the dutiable estate of Edwin Franks Millar certain shares held by him at the time of his death, and duty was paid by his executors in respect of these shares. An action was then brought by the executors founded upon the provisions of sec. 140 of the *Stamp Duties Act* 1920-1931 to recover the duty so paid. In their declaration the executors alleged the following facts:—(1) That Millar was domiciled and resident in Victoria; (2) that Millar at the time of his death was the owner of certain shares in companies incorporated under Victorian law as companies limited by shares and having no share register in the State of New South Wales; (3) that those companies at the time of Millar's death carried on the business of mining for minerals as defined by the *Mining Act* 1906 in New South Wales or of treating such minerals; (4) that the Commissioner, for the purpose of the assessment of the estate of Millar to death duty, included the said shares in his dutiable estate, and assessed duty upon the estate upon that basis; (5) that the executors of Millar paid the death duty so assessed; and (6) that the shares were wrongly included in Millar's dutiable estate. The declaration contained other allegations, which I postpone for the moment because they are not material for the consideration of the question raised under sec. 103. The Commissioner demurred to the declaration.

The Supreme Court of New South Wales held that the duty levied was in excess of the constitutional power of the Parliament of New South Wales to make laws for the peace, welfare, and good government of New South Wales in all cases whatsoever (*Constitution Act*

H. C. OF A. 1932.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. MILLAR.

MILLAR v. COMMISSIONER OF STAMP DUTIES (N.S.W.)

Starke J.

1902, sec. 5). *Street* C.J. thus expressed the opinion of the Court (1): "The intention to include in the dutiable estate of a deceased person shares and stock wherever locally situated in any company carrying on specified operations in the State, and irrespective of whether the deceased owner was domiciled here or not, is plain and express, and it is equally plain that this was an imposition in excess of the powers of the Legislature of this State."

The authority of every State to tax persons and property within its territory is, of course, unquestionable. In the present case, however, neither the person nor the property was within its territory. But it was said that the legislative authority of New South Wales was attracted for either of two reasons. First, because the companies in which Millar held shares, carried on mining operations or had a business situated in New South Wales (*Morgan* v. *Deputy Commissioner of Land Tax (N.S.W.)* (2); *Commissioners of Stamps (Q.)* v. *Wienholt* (3); *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. (Watt's Case)* (4)). It is true that Millar was interested in the companies, but still it was the companies that carried on business as such, and Millar's rights as a shareholder were quite distinct. The connection, therefore, between the companies' operations and Millar's interest is somewhat attenuated. It is not important, however, to consider how far the business operations carried on by the companies in New South Wales attract the taxing power of the State as against Millar or his estate, for in my opinion the tax is not levied in respect of such operations, but upon property —shares in the present case, which are not situate in New South Wales, are not issued by any company incorporated under the laws of New South Wales, and are not owned by any person resident or domiciled in New South Wales. But the Act, on its proper interpretation, extends to such a case, and so far, I agree, is in excess of the powers of the Legislature of New South Wales. Second, because the tax was a *quid pro quo*—a price—in return for the sealing in New South Wales of probate of the will of Millar (*R.* v. *Lovitt* (5)). The right to tax exists, so it was argued, because the representatives of the deceased required the help of the State to

(1) (1932) 33 S.R. (N.S.W.) at p. 164.
(2) (1912) 15 C.L.R. 661.
(3) (1915) 20 C.L.R. 531.
(4) (1926) 38 C.L.R. 12.
(5) (1912) A.C. 212.

acquire a right or privilege conferred by the State in the grant or resealing of probate. But it is unnecessary, in the present case, to consider whether the right to tax based upon such considerations extends to the assets wherever situate of a deceased person who was never resident or domiciled within the State. An examination of the *Stamp Duties Act* satisfies me that the payment of death duties is not the price of probate. The duties are imposed upon death, and are assessed upon the final balance of the estate of the deceased, and constitute a debt due to the Crown and a charge upon the whole dutiable estate of the deceased, which is not exempt by reason of the fact that no grant of administration has been or need be or can be made in New South Wales. (See secs. 101, 114, 115, 116.) The provisions of secs. 117, 118 and 119 provide a convenient method of collection and nothing more.

Another question raised by the demurrer turns upon the proper construction of sec. 140 of the *Stamp Duties Act* 1920-1931. It is as follows:—"(1) Where it is proved to the satisfaction of the Commissioner that any property has been wrongly included in the dutiable estate of a deceased person the death duty paid in respect of such property shall be repaid by him, but (except in accordance with an order of the Court under section one hundred and twenty-four) no refund shall be made in respect of any property wrongly included in the dutiable estate of any person whether dying before or after the passing of the *Stamp Duties (Amendment) Act* 1931, by reason of any mistake in the construction of this Act. . . . (3) Any claim for a refund of duty so paid in excess may be enforced by action or suit against the Commissioner in his official name as nominal defendant on behalf of the Crown in any Court of competent jurisdiction and not otherwise." It has been held that the satisfaction of the Commissioner that property has been wrongly included in the dutiable estate is a condition of the right to obtain a refund of duty under the provisions of sub-sec. 3 (*Perpetual Trustee Co. v. Commissioner of Stamp Duties (N.S.W.)* (1)). I apprehend that, but for the section, a claim might have been made under the *Claims against the Government and Crown Suits Act*, No. 27 of 1912. The special provisions of sec. 140, however, contemplate, I think,

(1) (1930) 30 S.R. (N.S.W.) 100.

H. C. OF A. 1932.

COMMISSIONER OF STAMP DUTIES (N.S.W.) v. MILLAR.

MILLAR v. COMMISSIONER OF STAMP DUTIES (N.S.W.)

Starke J.

the case of the Commissioner being satisfied that property has been wrongly included in the dutiable estate, and also the case of the Commissioner being not so satisfied. In the former, it is his duty as a matter of administration, to repay the amount overpaid; in the latter, the subject may bring his action under sub-sec. 3. The addition to sub-sec. 1 by the Act No. 13 of 1931, sec. 7 (*d*), rather confirms this view, for it precludes the Commissioner making refunds in respect of property wrongly included in the dutiable estate by reason of any mistake in the construction of the Act. The definitive interpretation of an Act is hardly the function of an administrative officer, and usually falls for determination by the Courts of law. Hence the proviso, which makes for uniformity and equality in the application of the law.

Some suggestion was made that the proviso inserted in sec. 140 by the Act No. 13 of 1931, sec. 7 (*d*), is a limitation upon the right of action given by sub-sec. 3. In my opinion, it is not; but, if it be, then the answer is that the overpayment of duty in the present case is not by reason of any misconstruction of the *Stamp Duties Act*, but because the Act was not within the competence of the Legislature.

The appeal should be dismissed and the cross-appeal allowed.

Appeal dismissed with costs. Cross-appeal allowed with costs.

Solicitor for the appellant, *J. E. Clark*, Crown Solicitor for New South Wales.

Solicitors for the respondents, *Norton, Smith & Co.*

J. B.