[HIGH COURT OF AUSTRALIA.]

DE ROMERO . . . . . APPELLANT;
PLAINTIFF,

AND

READ AND ANOTHER . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1932.

SYDNEY, *Nov.* 30; *Dec.* 19.

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

Income Tax (N.S.W.)—Annuity—Covenant by settlor to pay State income tax—Validity of covenant—"Altering the incidence" of the tax—Unemployment relief tax—Income Tax (Management) Act 1928 (*N.S.W.*) (*No.* 35 *of* 1928), *sec.* 83*—*Prevention and Relief of Unemployment Act* 1930 (*N.S.W.*) (*No.* 34 *of* 1930), *secs.* 14 (1)*, 22.*

By a deed of separation a husband covenanted to pay his wife during her lifetime the clear annual sum of £10,000 free from all State income tax, "the intention being" that he should pay all State income tax assessed against, or payable by, her in respect of the annuity, and that, in the event of any such State income tax being paid by her, he would refund and repay to her any such amount. The husband died in 1928, and in that and the two subsequent

Sec. 83 of the *Income Tax (Management) Act* 1928 (N.S.W.) provides: "Every contract, agreement or arrangement made or entered into, in writing or verbally, whether before or after the commencement of this Act, shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly—(*a*) altering the incidence of any income tax; or (*b*) relieving any person from liability to pay any income tax or make any return; or (*c*) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or (*d*) preventing the operation of this Act in any respect, be absolutely void, but without prejudice to its validity in any other respect or for any other purpose."

The *Prevention and Relief of Unemployment Act* 1930 (N.S.W.), Part IV., provides:—By sec. 14 (1): "This Part of this Act shall be read with the *Income Tax (Management) Act*, 1928, as amended by subsequent Acts, which Act as so amended is in this Part referred to as the principal Act." By sec. 22: "The provisions of . . . sections thirty-eight to ninety-two inclusive of the principal Act . . . shall be applicable to the unemployment relief tax as if such tax were the income tax under the principal Act."

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years the wife paid certain sums in respect of State income tax and, for the year 1930, an amount levied under the *Prevention and Relief of Unemployment Act* 1930 (N.S.W.) as unemployment relief tax in respect of the annuity. On a case stated for the determination of the question whether the defendants, as executors and trustees of the deceased husband, were liable to pay to the wife the amounts so paid by her:

Held, by *Gavan Duffy* C.J., *Rich*, *Starke* and *Dixon* JJ. (*Evatt* J. dissenting), that the covenant, if it operated, would have the effect, within the meaning of sec. 83 (*a*) of the *Income Tax* (*Management*) *Act* 1928 (N.S.W.), of "altering the incidence" of tax. To the extent to which it purported so to operate it was therefore void, and the executors were not liable for the amounts paid by the wife in respect of either State income tax or unemployment relief tax, to which the provisions of sec. 83 (*a*) had been made applicable by sec. 22 of the *Prevention and Relief of Unemployment Act*.

Per Evatt J.: The meaning, in the covenant, of the phrase "income tax" considered.

Decision of the Supreme Court of New South Wales (Full Court): *de Romero* v. *Read*, (1932) 32 S.R. (N.S.W.) 607, affirmed.

APPEAL from the Supreme Court of New South Wales.

A special case, stated under sec. 55 of the *Common Law Procedure Act* 1899 (N.S.W.) for the opinion of the Supreme Court, showed the following facts. On 10th June 1919 a deed of separation was executed between Lebbeus Hordern and Olga Clare Hordern, his wife, under which Hordern covenanted to pay to his wife during her life or widowhood the clear annual sum of £8,000 free from all income and land tax, both State and Federal. In the event of the wife's re-marriage the annual sum of £8,000 was to be reduced to an annual sum of £4,000. By a supplemental indenture made on 12th April 1924, after reciting that doubts had arisen as to the rights of the parties under the principal indenture, Hordern, on behalf of himself, his executors and administrators, covenanted with his wife that, in lieu of the provisions contained in the principal indenture, he would during her lifetime "pay to her the clear annual sum of ten thousand pounds in lieu of the said annual sum of eight thousand pounds free from all State income tax the intention being that the said Lebbeus Hordern shall pay all State income tax assessed against or payable by the said Olga Clare Hordern in respect of the said annuity of ten thousand pounds and in the event of any such

State income tax as aforesaid being paid by the said Olga Clare Hordern in respect of any such State income tax assessment as aforesaid will refund and repay to the said Olga Clare Hordern any such amount so paid by her as aforesaid And provided also that nothing herein contained shall impose on the said Lebbeus Hordern any obligation to pay in respect of such income tax or taxes as aforesaid any such sum which shall be in excess of the amount or amounts which would be assessed against or which the said Olga Clare Hordern would be called upon to pay in respect of such income tax or taxes if the amount paid to the said Olga Clare Hordern by the said Lebbeus Hordern or the trustee of the settlement (to secure the payment of the annuity hereby covenanted to be paid) were the only income of the said Olga Clare Hordern." Hordern died in 1928 and his wife, some time later, re-married. She paid State income tax in respect of the annuity of £10,000 for the years 1928, 1929 and 1930, amounting in all to £2,040 3s. 6d., and she also paid tax levied under the *Prevention and Relief of Unemployment Act* 1930 (N.S.W.) on the annuity for the year 1930, amounting to £194 5s., and she claimed to be entitled to recover the amounts so paid from the defendants, who were the executors and trustees of Hordern's will. The defendants denied liability, relying, as to the income tax, on the provisions of sec. 83 of the *Income Tax (Management) Act* 1928 (N.S.W.), and, as to the unemployment relief tax, on the provisions of the indenture, and, alternatively, on the provisions of sec. 22 of the *Prevention and Relief of Unemployment Act*.

The question in the special case upon which the opinion of the Supreme Court was sought was whether the defendants as executors and trustees were liable to pay to the plaintiff either of the sums of £2,040 3s. 6d. and £194 5s. mentioned above.

It was agreed between the parties that, if the answer were in the affirmative, judgment should be given for the plaintiff in the amounts claimed with costs, and, if in the negative, judgment should be given for the defendants with costs. By a majority, the Full Court of the Supreme Court answered the question in the negative, and judgment was accordingly given for the defendants: *de Romero* v. *Read* (1).

(1) (1932) 32 S.R. (N.S.W.) 607.

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From this decision the plaintiff now appealed to the High Court.

Watt K.C. (with him *Bowie Wilson*), for the appellant. The view expressed by the majority in the Court below that sec. 83 of the *Income Tax (Management) Act* 1928 (N.S.W.) was not intended in any way to prohibit, or to interfere with, the disposition of property is in conflict with the opinion of *Knox* C.J. in *Deputy Federal Commissioner of Taxation* v. *Purcell* (1). The intention of the Legislature as conveyed by the section was to provide for the collection of revenue with a minimum of interference with arrangements made between private individuals. The arrangement here was that the incidence of the tax should fall on the appellant, and she did in fact pay the tax.

[EVATT J. referred to *Groongal Pastoral Co.* v. *Falkiner* (2).]

The arrangement there in question was given effect to although it involved the payment by one person of another person's tax and came within the literal wording of the section.

[DIXON J. referred to *Harris* v. *Sydney Glass and Tile Co.* (3), as to the meaning of the word "incidence."]

Sec. 83 should be construed as providing simply for the protection of the Revenue (*Brooke* v. *Price* (4)). "Incidence" is a vague word and some restriction should be given to its meaning.

[DIXON J. referred to *Deputy Federal Commissioner of Taxation* v. *Purcell* (5).]

The type of transaction aimed at by the section is shown in *Jaques* v. *Federal Commissioner of Taxation* (6), in which case a similar provision was dealt with by the Court. It was not the intention of the Legislature to interfere in an arrangement between husband and wife where such arrangement in no way attempted to evade payment of income tax (*Deputy Federal Commissioner of Taxation* v. *Purcell* (7)). If, as contended by the respondent, par. (*a*) of sec. 83 was intended to cover any arrangement for reimbursement for tax paid, sec. 82 would be unnecessary. The

(1) (1921) 29 C.L.R. 464, at p. 468.
(2) (1924) 35 C.L.R. 157.
(3) (1904) 2 C.L.R. 227, at p. 246.
(4) (1917) A.C. 115.
(5) (1921) 29 C.L.R., at p. 473.
(6) (1924) 34 C.L.R. 328, at pp. 338, 339, 358, 360 and 361.
(7) (1921) 29 C.L.R., at p. 466.

decision in *Groongal Pastoral Co.* v. *Falkiner* (1) is contrary to such contention. That part of the covenant which is in question is not struck at by sec. 83, because it only comes into operation after the tax has had its full incidence. The tax under the *Prevention and Relief of Unemployment Act*, being a tax imposed by the State on income, is State income tax. After meeting certain specified obligations the surplus of the fund created by the Act is paid into Consolidated Revenue.

[STARKE J. referred to *South Australian Brewing Co.* v. *Hill* (2).]

Flannery K.C. (with him *Owen*), for the respondents. The terms of the covenant bring the matter within the scope of par. (*a*) of sec. 83 of the *Income Tax* (*Management*) *Act* 1928. Upon reference to the other paragraphs in the section it is clear that par. (*a*) was intended to have effect *inter partes*. The question is: To what extent? The solution of this question involves the meaning of the word "incidence" as appearing in par. (*a*). "Incidence" means burden of tax borne by the parties respectively. The reason for the Legislature's enactment of the provision in sec. 83 (*a*) is as appears either in *Jaques* v. *Federal Commissioner of Taxation* (3), or in *G. G. Crespin & Son* v. *Colac Co-operative Farmers Ltd.* (4).

[EVATT J. referred to *City of Halifax* v. *Fairbanks' Estate* (5).]

The word "incidence" was there used in the sense of "burden," which agrees with the use given to the word by *Rich* J. in *G. G. Crespin & Son* v. *Colac Co-operative Farmers Ltd.* (6). If "incidence" means what is contended for by the appellant, the problem of construction before the Court in *Groongal Pastoral Co.* v. *Falkiner* (1) would not have arisen. The contentions as regards sec. 83 (*a*) put forward by the appellant and respondent respectively were considered in *Blount* v. *Blount* (7).

[DIXON J. referred to *Patterson* v. *Farrell* (8).]

The meaning of "burden" and "incidence" was discussed in *John Hicks Ltd.* v. *John Hicks & Co.* (9). The agreement is bad

(1) (1924) 35 C.L.R. 157.
(2) (1919) A.C. 519, at p. 525.
(3) (1924) 34 C.L.R., at p. 338.
(4) (1916) 21 C.L.R. 205, at pp. 218, 219.
(5) (1928) A.C. 117, at p. 126.
(6) (1916) 21 C.L.R., at p. 224.
(7) (1916) 1 K.B. 230, at p. 235.
(8) (1912) 14 C.L.R. 348.
(9) (1917) S.R. (Q.) 20.

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because it provides not only that the appellant shall have an income but also that the burden of paying tax on that income shall be borne by the husband. Such an agreement comes within sec. 83 and is void. The Legislature has determined that the recipient of the income shall pay the tax thereon. An agreement to pay a sum to be ascertained by reference to some other sum comes within the argument in *Groongal Pastoral Co.* v. *Falkiner* (1) and *Blount* v. *Blount* (2). The incidence is the burden cast by the Act on the individual taxpayer, the recipient of income; to alter the incidence of taxation is to alter the obligation *inter partes*, and if the words of an arrangement have the purpose or effect of altering the incidence they are bad. The intention of the parties can be accomplished in two alternative ways, of which one is caught by the section and the other is not (*Blount* v. *Blount*). Although the tax levied under the provisions of the *Prevention and Relief of Unemployment Act* may be income tax, it is not, having regard to the language used by them, such a tax as was contemplated by the parties.

Watt K.C., in reply. *Harris* v. *Sydney Glass and Tile Co.* (3) is the only case which decides that an agreement between private parties fails by reason of the provisions made as to who pays tax. All other cases are between the Commissioner and the taxpayer.

Cur. adv. vult.

Dec. 19.

The following written judgments were delivered:—

GAVAN DUFFY C.J. AND STARKE J. This appeal from the judgment of the Supreme Court of New South Wales depends upon the interpretation of the following section of the *Income Tax (Management) Act* 1928 of New South Wales: "83. Every contract, agreement or arrangement made or entered into, in writing or verbally, whether before or after the commencement of this Act, shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly . . . altering the incidence of any income tax . . . be absolutely void, but without prejudice to its validity in any other

(1) (1924) 35 C.L.R. 157. (2) (1916) 1 K.B. 230.
(3) (1904) 2 C.L.R. 227.

respect or for any other purpose." We had to deal with the interpretation of a provision in the Federal *Income Tax Assessment Act* 1915-1916, sec. 53, in identical terms, in the case of *Deputy Federal Commissioner of Taxation* v. *Purcell* (1). We there said :—" The section . . . does not prohibit the disposition of property. Its office is to avoid contracts, &c., which place the incidence of the tax or the burden of tax upon some person or body other than the person or body contemplated by the Act. If a person actually disposed of income-producing property to another so as to reduce the burden of taxation, the Act contemplates that the new owner should pay the tax. The incidence of the tax and the burden of the tax fall precisely as the Act intends, namely, upon the new owner. But any agreement which directly or indirectly throws the burden of the tax upon a person who is not liable to pay it, is within the ambit of sec. 53." We adhere to that interpretation of the section. So, when the Income Tax Act here in question prescribes that a contract shall not directly or indirectly alter the incidence of any income tax, it necessarily means that the burden imposed upon any person by force of the Act shall remain where it falls, and not be thrown by contract, &c., upon, or undertaken by, any other person.

In the present case Lebbeus Hordern covenanted that he would during the lifetime of Olga Clare Hordern pay to her the clear annual sum of £10,000 free from all State income tax, the intention being that the said Lebbeus Hordern should pay all State income tax assessed against or payable by the said Olga Clare Hordern in respect of the said annuity of £10,000, and in the event of such State income tax as aforesaid being paid by the said Olga Clare Hordern in respect of any such State income tax assessment as aforesaid, would refund and repay to the said Olga Clare Hordern any such amount so paid by her as aforesaid. It was suggested that the true construction of the covenant was that Lebbeus Hordern should pay £10,000 plus such sum representing income tax as when deducted from the principal sum would leave a clear annual sum of £10,000 (*Blount* v. *Blount* (2)). But that construction is impossible upon the language of the covenant. The Act throws upon Olga Clare

(1) (1921) 29 C.L.R., at p. 473. (2) (1916) 1 K.B., at p. 235.

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Hordern the burden of the tax which it attaches to her income. The covenant purports to shift that burden from Olga Clare Hordern to Lebbeus Hordern, and would have that effect if valid. The covenant thus alters the incidence of that tax and falls within the precise words of sec. 83, and is therefore void in so far as it so operates.

The decision of the Supreme Court was therefore right and this appeal should be dismissed.

RICH J. Under a deed of separation and supplemental deed, the late Lebbeus Hordern covenanted to pay to his wife (the appellant) during her lifetime the clear annual sum of £10,000 free from all State income tax, the intention being that he should pay all income tax assessed against or payable by her in respect of the annuity, and, in the event of any such income tax being paid by her, that he should refund and repay the same, the obligation imposed on him being limited to the amount of tax which would be assessable against his wife if the amount paid to her by him were her only income. Although a reference occurs in the deed of separation to " the trustee of the settlement (to secure the payment of the annuity hereby covenanted to be paid) " it was conceded that the right to the annuity depends upon the covenant and that we are not concerned with any question of property.

The appellant was assessed to income tax under the provisions of the *Income Tax (Management) Act*, No. 35 of 1928, and amending Acts, and also to unemployment relief tax under the provisions of the *Prevention and Relief of Unemployment Act*, No. 34 of 1930, and amending Acts. These assessments were levied on the annuity and were paid by the appellant. In a case stated to the Supreme Court of New South Wales the question was asked whether the respondents, who are the executors and trustees of the will of the late Lebbeus Hordern, are liable to pay to the appellant the sums or either of them so paid by her. The Supreme Court answered the question in the negative, affirming the contention of the respondents that they were relieved from the liability under sec. 83 of the *Income Tax (Management) Act* 1928, which provides that every contract,

agreement or arrangement shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly, altering the incidence of any income tax, be absolutely void, but without prejudice to its validity in any other respect or for any other purpose.

The main contention on the part of the appellant was that sec. 83 was exclusively concerned with the Crown's sources of revenue and had no other purpose than the protection of the Crown from avoidance and evasion of the tax.

The provision of sec. 83 (*a*) is not new, and, as it stood in sec. 63 of No. 15 of 1895, was dealt with by this Court in *Harris* v. *Sydney Glass and Tile Co.* (1), where the expression "incidence of the tax" was defined by *O'Connor* J. (at p. 246) to mean "the burden of the tax, both as regards the person upon whom it falls in the first instance, the contribution which he is authorized to obtain from others, and the proportion in which the burden of the tax falls upon the original taxpayer and upon the contributor." It is, of course, indisputable that pars. (*b*) and (*c*) of secs. 83 are directed to avoidance and escape of taxation, and in this respect the identical provision contained in sec. 93 of the Commonwealth *Income Tax Assessment Act* 1922-1932 has been examined by this Court in *Jaques' Case* (2) and in *Clarke* v. *Federal Commissioner of Taxation* (3). But it does not follow that par. (*a*) of the section is restricted to the same purpose; on the contrary, it would be superfluous if it were thus restricted. No reason could be suggested for giving it any other meaning in an Income Tax Act than it possesses in a Land Tax Act. The section seems a favourite with the Federal Legislature, which has included it in its *Land Tax Assessment Act*, its *Income Tax Assessment Act* and its *War-time Profits Tax Assessment Act*, although it appears to have taken its origin in New Zealand.

The expression "incidence of taxation" is commonly used in economic discussions to describe the manner in which the burden of a tax falls upon different members of the community. I think that it is impossible to escape the conclusion that sec. 83 (*a*) was intended to make void any contract, agreement or arrangement having the purpose or effect of removing the burden from the person

(1) (1904) 2 C.L.R. 227. (2) (1924) 34 C.L.R. 328.
(3) (1932) 48 C.L.R. 56.

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indicated by the statute as the proper subject of the charge and placing it upon some other person wholly or in part. As was pointed out from the Bench during the argument, this does not necessarily mean that every contract under which money is obtained by a taxpayer which he might or should apply in relief of the burden is invalidated. The incidence of the tax must be altered as such, and it is possible to imagine cases in which the taxpayer obtains relief without throwing the burden of the tax as such upon anybody else. However, we are not concerned with ascertaining the exact limits of the operation of par. (*a*) of the section, because the covenant in the present case has for its purposes the continuous assumption by the covenantor of the burden of the tax payable by the covenantee. It was suggested that perhaps par. (*a*) of sec. 83 did not affect a contract which placed elsewhere the burden imposed on a taxpayer by the statute unless within the four corners of the statute some intention could be discovered that that taxpayer should bear the burden. I do not think that sec. 83 (*a*) can be restricted to such a consequential or subsidiary function. The fact that the tax is primarily imposed upon a given taxpayer and that there is no indication that his burden shall be taken or shared by some other person is enough to fix the incidence of the tax, and any transfer of that incidence by contract, agreement or arrangement is invalidated. English authorities were relied upon in the dissenting judgment of *Davidson* J., but, as was pointed out in *Harris's Case* (1), the difference in the enactments renders them of very little assistance. But even in England a covenant in the form of the present case would, I think, be considered void (cf. *Blount* v. *Blount* (2)). The covenant could not be justified as an attempt to fix a larger annuity in order to enable the annuitant to pay the tax and yet retain a fixed net sum. It was conceded that sec. 83 (*a*) applied to unemployment relief tax levied under the authority of the *Prevention and Relief of Unemployment Act* 1930 even if that tax is within the words of the covenant. For the reasons I have given, sec. 83 (*a*) would destroy the operation of the covenant upon that tax as well as upon the income tax.

(1) (1904) 2 C.L.R. 227.

(2) (1916) 1 K.B. 230.

The answer to the question in the case stated should be in the negative, and the appeal should be dismissed.

Dixon J. Sec. 83 (*a*) of the *Income Tax* (*Management*) *Act* 1928 of New South Wales provides that "every contract, agreement or arrangement . . . shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly—(*a*) altering the incidence of any income tax . . . be absolutely void, but without prejudice to its validity in any other respect or for any other purpose." A deed of separation made between the appellant and her late husband, whose executors are the respondents, contains a covenant with her by her husband to pay to her during her lifetime a clear annual sum free from all State income tax, the intention being that he should pay all State income tax assessed against or payable by her in respect of the annuity, and, in the event of her paying such an assessment, that he should refund and repay the amount to her. A proviso to the covenant limits the obligation imposed to the amount of tax which would be assessable against the appellant if the amount paid to her by her husband were her only income. The Supreme Court (*Street* C.J. and *James* J., *Davidson* J. dissenting) has held that sec. 83 renders the covenant inoperative in so far as otherwise it would require the respondents to pay to the appellant any amount representing income tax paid or payable by her in respect of the annuity.

Three questions appear to me to be involved in this decision, namely :—

1. Is the nullification by sec. 83 of contracts altering the incidence of any income tax confined to attempts to transfer the direct liability to pay the Crown from the person upon whom the statute imposes it to another, so that it relates only to transactions which would or might impede the collection of the tax, or, on the contrary, does the nullification extend to attempts to throw the burden arising from payment of the tax from one person to another although no avoidance or impairment of the direct liability to the Crown is produced or intended ?

2. If the enactment does annul agreements altering the burden that results from payment of the tax, does it apply whenever the

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mere operation of the legislation, uncontrolled by agreement or the like, would leave the party under such a burden, or is its application restricted to those cases in which from other provisions of the enactment a positive intention appears as to the manner in which the burden arising from payment shall be ultimately distributed and borne ?

3. If sec. 83 does apply to prevent a transfer of the burden from the place where it would lie as a result of the mere operation of the Act, yet upon a proper understanding of the covenant does it have or purport to have the purpose or effect of changing the burden arising from the imposition of the tax, or does it do no more than fix the amount of an annuity at a sum greater, because of the annuitant's liability to tax thereon, than otherwise might or would have been adopted by the parties ?

I deal with these questions in order.

1. In my opinion the expression " altering the incidence of any income tax " cannot be confined in its application to the relations between the Crown and the taxpayer. I think the provision refers to the loss or detriment suffered as a consequence of discharging that liability, and makes ineffectual attempts by agreement to place that burden, as between subject and subject, where the legislation does not mean that it shall be borne. It is true that pars. (*b*) and (*c*) of sec. 83 are wholly concerned with the claims of the Crown and that par. (*d*) has them prominently in view. But the expression " incidence of taxation " has long been familiar in the discussion of fiscal questions (see the quotations in the *Oxford English Dictionary*, *s.v.* " Incidence," 7 (*b*) ; and cp. p. 461, vol. 26, 11th ed., and p. 840, vol. 21, 14th ed., *Encyclopædia Britannica*), as, indeed, have the phrases " shifting," " altering " or " changing " the incidence of a tax. Whether it is regarded as a combination of common English words or as part of the language usually employed in relation to the special subject of revenue, the expression appears to me properly to denote the burden arising from the imposition of a tax. If it referred only to the immediate liability to pay the Treasury imposed upon the taxpayer, par. (*a*) of sec. 83 would add nothing to the remaining three paragraphs of the section ; perhaps it may be said that independently of these paragraphs it would accomplish

nothing, because the "incidence," in such a sense, of that liability necessarily could not be altered by contract, agreement or arrangement. Sec. 83 is doubtless transcribed from sec. 93 of the Federal *Income Tax Assessment Act* 1922-1930, which in 1915 was transcribed from sec. 63 of the Federal *Land Tax Assessment Act* 1910-1914, itself taken from sec. 103 of the New Zealand *Land and Income Assessment Act* 1908. But a somewhat similar provision is contained in sec. 63 of the New South Wales *Land and Income Tax Assessment Act* 1895, which, since No. 11 of 1912, has operated only upon land tax. *Harris* v. *Sydney Glass and Tile Co.* (1), a case between lessor and lessee, was decided upon this provision. *O'Connor* J. (at p. 246) said:—"That section aims directly at every contract, agreement or understanding which has or purports to have, or which might have, the effect of in any way affecting the incidence of any tax payable under the Act. The 'incidence' of the tax must mean the burden of the tax, both as regards the person upon whom it falls in the first instance, the contribution which he is authorized to obtain from others, and the proportion in which the burden of the tax falls upon the original taxpayer and upon the contributor. One illustration will be sufficient to show that 'incidence' of the tax cannot be restricted to the narrow meaning of 'payment of the tax directly to the Commissioners.' A direct guarantee by a tenant to repay the landlord the amount of tax paid by him to the Commissioners as provided by the Act would certainly not affect the incidence of the tax in that narrow sense, because the landlord would in that case still remain the taxpayer; yet no one could say that such an agreement would not be contrary to law if the section is to have any practical operation." The decision of the Court was that an attempt by agreement to distribute between landlord and tenant the burden of the land tax in a manner differing from that specified by other provisions of the statute was void because it amounted to a contract which, if valid, might have the effect of affecting the incidence of the land tax.

In *Patterson* v. *Farrell* (2), it was decided that an agreement was valid which apportioned between vendor and purchaser, as at the date of possession, all annual outgoings in respect of the property,

(1) (1904) 2 C.L.R. 227.

(2) (1912) 14 C.L.R. 348.

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an expression construed to include Federal land tax. The ground of the decision was that no greater tax was thrown upon the purchaser than the amount payable in respect of the purchased land without aggregation with other land and attributable to the period after the date of possession, and that, as the whole scheme of the *Land Tax Assessment Act* 1910 is that the burden of land tax shall fall upon the beneficial owner, the incidence of the land tax contemplated by the enactment was not altered. *Griffith* C.J. said (at p. 353) that, as to the interesting question whether a contract made for valuable consideration by a person liable to pay land tax with another person that that other shall pay the tax is a contract which alters the incidence of the land tax, it was not necessary to express any opinion, and he offered none. This observation may have been intended to intimate a doubt whether the only alteration of the incidence of taxation nullified is one which would operate upon the liability to the Crown, but it may relate only to difficulties which arise rather in the second or third of the questions I have propounded. But, however this may be, in the Privy Council sec. 63 (*a*) of the *Land Tax Assessment Act* 1910-1928 has been construed as applying to attempts to throw the burden of the tax from one person to another. In *South Australian Brewing Co.* v. *Hill* (1), the Judicial Committee held that a covenant made before the Act by a lessee with a lessor to pay all taxes imposed in respect of the demised premises, which was construed to include Federal land tax, operated only so far as allowed by sec. 30. In the course of their opinion, their Lordships said (2) :—"Sec. 63 of the Act renders absolutely void every contract, agreement, or arrangement made or entered into, whether before or after the commencement of the Act, altering or purporting to alter, directly or indirectly, the incidence of any land tax, except as provided by sec. 30 of the Act. The effect of this section would be to render the covenant in the lease absolutely void so far as it purports to transfer the liability to pay the Federal land tax from the appellants to the respondent, except so far as may be provided in sec. 30 of the Act."

The policy disclosed by enactments for imposing a tax upon unimproved land values makes it natural to understand such a

(1) (1919) A.C. 519.

(2) (1919) A.C., at p. 525.

provision as intended to prevent transfers of the burden of tax from, e.g., the owner of the first estate of freehold to a tenant or the holder of some other estate or interest in the land. It is less easy to see why the burden of income tax should not be cast upon any person ready to relieve the taxpayer. On the other hand, it is difficult, if not impossible, to give to the provision occurring in the *Income Tax Assessment Act* a meaning quite different from that which it should receive in the *Land Tax Assessment Act*. In New Zealand the same section applies both to land and income tax. Sec. 162 of the *Land and Income Tax Act* 1916 provides that "every contract, agreement, or arrangement . . . shall be absolutely void in so far as, directly or indirectly, it has or purports to have the purpose or effect of in any way altering the incidence of land tax or income tax, or relieving any person from his liability to pay such tax." Land is taxed as owned on 31st March in each year. In *Charles* v. *Lysons* (1), *Hosking* J., speaking for himself, *Stout* C.J., *Sim* J. and *Stringer* J., said:—"In our opinion a contract or agreement by which the liability of the person who is the owner, or who under the Act is to be deemed to be the owner, of the land at noon on the 31st March to pay the tax is cast upon or undertaken by some other person is a contract or agreement which purports to alter the incidence of the tax, and within sec. 162 of the *Land and Income Tax Act*, 1916, and that it is equally so if the undertaking applies only to part of the tax. The incidence of the tax is by the Act explicitly cast upon such owner, and but for the contract he would have had to bear the whole of the tax out of his own resources. To ensure this appears to us to be the manifest purpose of the prohibition enacted in sec. 162, for we are unable to see any possible mode by which a contract or agreement between an owner and a third person could alter the incidence of the taxation as between such owner and the Crown, when the Act expressly casts the incidence on him and affords no means of shifting the incidence. The section must therefore be construed as directed to contracts or agreements altering the incidence as between the owner and third parties. This is the only escape if it is to receive any effect at all." The Court proceeded to

(1) (1922) N.Z.L.R. 902, at p. 910.

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consider the application of the view adopted in *Patterson* v. *Farrell* (1), that the purchaser was in the contemplation of the statute, as beneficial owner, the proper party to bear the tax, and declined to apply it to the New Zealand statute.

As a provision relating to income tax, the provision annulling agreements altering the incidence of the tax has not come before this Court for direct consideration. But in *Groongal Pastoral Co.* v. *Falkiner* (2) the Court dealt with a case in which *Gordon* J. (3) had held that a covenant by a mortgagor with a mortgagee to pay interest " free from exchange, income tax and all other deductions " operated to affect or alter the incidence of taxation within the meaning of such provisions. In the judgment of this Court another construction was given to the covenant, but the question of the meaning of the covenant was stated in terms which either conceded or assumed the correctness of the operation which the learned Judge had given to the enactment. Again, in the course of their judgment in *Deputy Federal Commissioner of Taxation* v. *Purcell* (4), *Gavan Duffy* J., as he then was, and *Starke* J., speaking of what is now sec. 93 of the *Income Tax Assessment Act* 1922-1932, say: " But any agreement which directly or indirectly throws the burden of the tax upon a person who is not liable to pay it, is within the ambit of " the section. These authorities appear to me to lend much support to the interpretation of sec. 83 (*a*) of the New South Wales *Income Tax (Management) Act* 1928 by which it makes void any attempt by contract, agreement or arrangement to shift to a person, who would not otherwise bear it, the burden arising from liability to income tax, an interpretation which, in my opinion, the words of the provision themselves require.

2. The annuity payable to the appellant is liable to income tax by reason of sec. 11 (*e*) of the *Income Tax (Management) Act* 1928, which provides that the assessable income of any person shall include money received as an annuity. Beyond this simple inclusion of annuities in assessable income there is no indication of any legislative intention of where the burden of the tax shall be borne. The statute, however, contains some provisions which in one way or

(1) (1912) 14 C.L.R. 348.
(2) (1924) 35 C.L.R. 157.
(3) (1923) 24 S.R. (N.S.W.) 122.
(4) (1921) 29 C.L.R., at p. 473.

another prescribe how, between a person liable to pay the Crown and some other person or persons, the tax is to be found, recouped or distributed (see secs. 17 and 18, 25 (2), 34, 63, 64, 65 (4), 80 (*c*) and 82). Should sec. 83 (*a*) be understood as no more than ancillary to these provisions and avoiding agreements calculated to disturb their operation? Or, on the other hand, should it be interpreted as extending to the general imposition of tax by the statute where there is no further or other indication of how the enactment intends the tax to be borne? The latter appears to me to be the true meaning of the statute. The selection of the person deriving income as a taxpayer primarily liable to the Treasury, the imposition of a tax at a rate increasing with the amount of income, and the averaging provisions are all considerations relevant to the incidence of the tax, and when, in an enactment based upon them, a general provision occurs annulling agreements altering the incidence of taxation, there is no sufficient justification for implying a restriction upon its operation excluding that incidence which results from an unqualified imposition upon the recipient of income as the primary taxpayer.

3. Under the provisions which are now contained in rr. 21 (1) and 23 (2) of the General Rules in the First Schedule of the *Income Tax Act* 1918 of Great Britain, the person by whom certain annual payments are made, including annuities, is authorized and required to deduct a sum representing the amount of the tax thereon and to account to the Revenue therefor: and every agreement for payment in full without allowing the deduction is made void. Decisions upon these provisions show that they do not prevent or invalidate an agreement to pay such a gross annual sum as will after the deduction of tax thereon leave a specified net amount (see *Booth* v. *Booth* (1).) In *Groongal Pastoral Co.* v. *Falkiner* (2), this Court appears to have applied the same doctrine to sec. 93 of the Federal *Income Tax Assessment Act* 1922, notwithstanding the difference between a graduated tax upon aggregate income payable by the person deriving it and a tax at a flat rate levied at the source. But in my opinion the present covenant cannot be treated as amounting to no more than an obligation to pay a gross sum which, after deducting tax,

(1) (1922) 1 K.B. 66. (2) (1924) 35 C.L.R. 157.

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will leave a fixed net sum. It is in fact a definite agreement to provide the tax on the annuity, whatever that tax may be. It is, I think, within *In re Gretton's Indenture* (1).

Sec. 83 (*a*) is made applicable to the unemployment relief tax.

For these reasons I am of opinion that the appeal should be dismissed with costs.

EVATT J. During his lifetime, the late Lebbeus Hordern and his wife, who is the present appellant, entered into a deed of separation dated January 10th, 1919. In respect of three of its clauses (clauses 4, 5 and 6), the deed was subsequently amended by an indenture dated April 12th, 1924. So far as appears, Hordern honored all the terms of the agreement until his death, which took place on September 10th, 1928. On December 14th, 1928, the New South Wales Legislature passed the *Income Tax (Management) Act*, No. 35 of 1928, and sec. 83 of that Act is now being relied upon by Hordern's executors and trustees, who are the respondents to this appeal, for the purpose of declaring null and void an essential part of the original bargain between husband and wife.

The material clause of the deed, as amended in 1924, is as follows :—

> "The said Lebbeus Hordern will during the lifetime of the said Olga Clare Hordern pay to her the clear annual sum of ten thousand pounds in lieu of the said annual sum of eight thousand pounds free from all State income tax the intention being that the said Lebbeus Hordern shall pay all State income tax assessed against or payable by the said Olga Clare Hordern in respect of the said annuity of ten thousand pounds and in the event of any such State income tax as aforesaid being paid by the said Olga Clare Hordern in respect of any such State income tax assessment as aforesaid will refund and repay to the said Olga Clare Hordern any such amount so paid by her as aforesaid And provided also that nothing herein contained shall impose on the said Lebbeus Hordern any obligation to pay in respect of such income tax or taxes as aforesaid any such sum which shall be in excess of the amount or amounts which would be assessed against or which the said Olga Clare Hordern would be called upon to pay in respect of such income tax or taxes if the amount paid to the said Olga Clare Hordern by the said Lebbeus Hordern or the trustee of the settlement (to secure the payment of the annuity hereby covenanted to be paid) were the only income of the said Olga Clare Hordern."

(1) (1923) 1 Ch. 77, at p. 89.

The meaning of this covenant is clear enough. Hordern undertook (1) to pay all State income tax assessed against the appellant in respect of the annuity of £10,000 created by the deed, and (2) that, in the event (which has occurred) of the appellant's paying the State assessment, he would refund and repay to her the amount thereof.

The general nature of the New South Wales *Income Tax (Management) Act* may now be described. Sec. 8 (1), dealing with the incidence of the tax, provides that income tax, at such rates as may be fixed by any Act, shall be paid to the Commissioner in respect of taxable income derived by any person during any income year. "Income tax" means the income tax imposed as such by any Act as assessed under the Management Act (sec. 4). The subject of taxation, "taxable income," means the gross income, after excluding all income exempt from taxes, and deducting all sums allowed as deductions (sec. 4). By sec. 38, and notices issued thereunder, there is cast upon persons an obligation to furnish to the Commissioner in the prescribed manner a return of the income derived during the income year. The Commissioner causes assessments to be made (sec. 41) and causes notices in writing to be given to the persons liable to pay (sec. 47). Income tax is deemed a debt due to the King (sec. 56), but it is due and payable to the Commissioner on the day fixed in the notice of the assessment (sec. 54).

Sec. 83, upon which the respondents rely, provides :—

> "Every contract, agreement or arrangement made or entered into, in writing or verbally, whether before or after the commencement of this Act, shall, so far as it has or purports to have the purpose or effect of in any way, directly or indirectly—(*a*) altering the incidence of any income tax; or (*b*) relieving any person from liability to pay any income tax or make any return; or (*c*) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or (*d*) preventing the operation of this Act in any respect, be absolutely void, but without prejudice to its validity in any other respect or for any other purpose."

This section has been transcribed almost verbatim from the *Income Tax Assessment Act* 1922-1930 of the Commonwealth of Australia. The Federal enactment, in turn, had its source in sec. 103 of the New Zealand *Land and Income Assessment Act* 1908, which was subsequently repealed and replaced by sec. 162 of the New Zealand *Land and Income Tax Act* 1916.

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The respondents to the appeal contend that so much of the deed of separation as represents a covenant by Hordern to indemnify the appellant against payments by her of State income tax referable to the annuity of £10,000 constitutes an agreement, made before the commencement of the *Income Tax (Management) Act*, which had both the purpose and effect of "altering the incidence of," and relieving her from liability to pay, the income tax assessed from time to time against the appellant; and so it is said to be included within the denotation of (*a*) and (*b*) in sec. 83. With that contention the majority of the Supreme Court agreed. In succinct terms, the learned Chief Justice (*Street* C.J.) stated his conclusion as follows:—

> "What was that but an arrangement for altering the incidence of the income tax by transferring the burden of it from her shoulders to his, and what was it but an arrangement to free her from liability to pay any income tax in respect of the annuity? On the plain language of the section, therefore, it seems to me that this transaction comes within it" (1).

But *Davidson* J. strongly dissented from this conclusion, and the importance of the controversy compels a close examination of the conflicting views.

In the first place, the question is not decided by any authority binding upon this Court which relates to the "incidence" of income tax (cf. *Patterson* v. *Farrell* (2)). The only Australian decision relating to income tax to which we have been referred is that of *Lukin* J. in *John Hicks Ltd.* v. *John Hicks & Co.* (3), but there a broader description was employed by the Legislature which invalidated agreements the purpose of which was to "relieve any person from *the burden or incidence* of income tax or from liability to pay such tax" (*Income Tax Act* 1902-1912 (Q.), sec. 73).

It will be observed that sec. 83 of the New South Wales Act is designed to strike at agreements which have the purpose or effect of relieving any person from liability to make any return (sec. 83 (*b*)). Inasmuch as the statute has already imposed upon persons deriving income the obligation of making a return of such income, it would not ordinarily be possible for the Courts to give any legal efficacy to any arrangement or agreement purporting to relieve the income recipient from the statutory obligation.

(1) (1932) 32 S.R. (N.S.W.), at p. 611.

(2) (1912) 14 C.L.R., per *Griffith* C.J., at p. 353.

(3) (1917) S.R. (Q.) 20.

Further, sec. 83 (*c*) and (*d*) avoid agreements and arrangements, the effect of which is to avoid any duty or liability imposed upon persons by the Act, or to prevent the operation of the Act in any respect. The question again suggests itself, how could statutory liability imposed upon persons, or the obligations thrown by the Act upon persons, ever be avoided or prevented by private bargaining?

These considerations, amongst others, undoubtedly influenced the New Zealand Court of Appeal when, in the year 1922, they had to consider sec. 162 of the *Land and Income Tax Act* 1916. It has already been pointed out that the earlier enactment (sec. 103 of the Act of 1908) was in terms not distinguishable from the section now before us. *Hosking* J., speaking for the New Zealand Court, said :—

> "We think the draftsman must have realized the idleness of the provision in the extension of it to contracts or agreements purporting to relieve persons from duties to the Crown which the Act itself imposes, for whereas in the Act of 1908 the prohibition extended to contracts or agreements relieving persons from making returns, and so on, that extension is appropriately not found in the present legislation. No contract or agreement between the person upon whom, for example, the duty of making a return is cast by the statute, and a third person, could possibly relieve him of that duty. As the section now stands, advantage has not been taken of it to idly prohibit the alteration by private agreement of the incidence of a person's statutory duties and liabilities as between him and the Crown, but is wholly consistent with the prohibition of agreements attempting to alter the incidence as between him and third persons. We are therefore of opinion that the stipulation in question in this case, if it is to be construed as casting on the purchaser the burden of an apportioned part of the vendor's land tax, is void by force of sec. 162" (*Charles* v. *Lysons* (1)).

It is clear that the New Zealand Court attached importance to the subsequent amendment by its Legislature of an important part of sec. 103 of the 1908 Act. But sec. 83 of the New South Wales statute must be construed as a whole, and it includes the very provisions which were denounced as "idle" by the New Zealand Court. Whether the New South Wales Legislature has sufficiently expressed an intention to nullify all attempts to "shift the burden" of income tax, has to be investigated.

Now, I think one is entitled to approach the present question from the point of view stated by Lord *Tomlin* in the case of *In re Gordon's Settlement* (2), and that such an enactment as sec. 83

> "is a provision which must be construed strictly, because it is very much of the same character as a forfeiture clause or penal provision. It invalidates

(1) (1922) N.Z.L.R., at p. 911.

(2) (1924) 1 Ch. 146, at p. 154.

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something which otherwise would be valid, and I think the onus (if one may use that phrase in regard to what is more or less a question of construction) is upon those who allege that a provision is bad to bring it strictly within the terms of the section."

To the same general effect are Earl *Loreburn's* observations in *Brooke* v. *Price* (1), where he speaks of worrying "private people in managing their own affairs without any benefit to the Revenue."

Both sides seem to have agreed that the present question mainly turns upon the meaning of the word "incidence" in sec. 83 (*a*). Does it refer to the initial or immediate falling of liability upon the recipient of the income, or does it, as *Street* C.J. thought in the passage already quoted, have regard to the question, with whom shall the real burden of the tax abide? Is the intention of the Legislature to ensure, on the one hand, that no arrangement between private persons shall be operative to prevent the discharge by the taxpayer of his statutory liability, or, on the other, that no taxpayer can effectively make any "arrangement" to recoup himself for the money he must forward to the revenue authorities?

The word "incidence" is capable of referring to immediate, or mediate, or ultimate burden. In my opinion, having regard to the collocation in which the word is found in sec. 83 (*a*), it refers to the initial and immediate obligation which will be imposed upon a person deriving income as and when a tax is imposed upon that subject matter by any Act of Parliament of New South Wales.

From the report of the Royal Commission on the income tax (1920) (Cmd. 615), it appears that the Commission was asked to inquire into the income tax of the United Kingdom "in all its aspects, including the scope, rates, and incidence of the tax." The Commission reported:

> "We have interpreted the words 'incidence of the tax' as used in our terms of reference to connote matters relating to the way in which the tax is to fall upon the taxpayer, such matters, for example, as whether he should bear it by direct assessment or by deduction from his income, whether it should fall at an equal pound rate on incomes of all sizes or according to a graduated scale, and whether or not it should fall with the same weight on all kinds of income" (p. 24, par. 104).

(1) (1917) A.C., at p. 124.

In the report of the Colwyn Committee on National Debt and Taxation (1927) (Cmd. 2800), it was stated :—

> "We may now pass to a discussion of the incidence and effects of the several existing taxes. By way of preface, we may explain the meaning which we think it convenient to attach to the term 'incidence of taxation.' In general usage the term covers not only the initial burden of a tax, but also the whole range of consequential effects. Economists, however, have given it a narrower meaning. For them 'incidence' is only concerned with the question on whom the more immediate burden of the tax as a tax rests. This is the first thing to be decided about any tax. It is to be distinguished from the question of further effects, which may be exceedingly important" (p. 106, par. 288).

These quotations tend to show that, in the present case, the choice before the Court is between limiting the word incidence to the first falling of the tax upon a taxpayer in respect of his taxable income and extending it to cover any and every arrangement by which A, a taxpayer, seeks to secure that, after he meets his liability to the revenue authorities, he shall be recouped the moneys which represent part or all of the tax he has paid. The latter view seems to be difficult of acceptance. If it were accepted, it would seem to imply that, even where there is no express reference in the contract to the fact or amount of A's income tax, if it is discovered that the contract has the effect of A's obtaining a recoupment of all or some of his tax from B, the contract is void although B may receive good consideration from A, and the transaction may be in the ordinary course of business. It would also seem to imply that many commercial transactions entered into by a payer of income tax, the motive or purpose of which is to put the taxpayer in funds again after his payment to the Revenue, must be void.

It seems to be conceded on all sides that sec. 83 does not affect contracts by which A undertakes to pay B such an annual sum (say, £X) as will, after payment by B of income tax on the £X, leave B with £10,000 per annum. If such an agreement is not avoided, it is obvious enough that A would be bound in similar circumstances, if he undertook, without any actual mention of B's income tax, to pay a sum, calculated by reference to some basis or formula, with the object of securing to B exactly the same result as in the case just mentioned, namely, a net £10,000 per annum.

I can see no distinction between the two cases in their relation to sec. 83, because that section invalidates the agreements to

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which it applies, equally, whether the agreement has the direct effect of altering the incidence of the tax or relieving from liability to pay it, or whether those consequences are brought about indirectly. Let it be assumed for the moment that both the arrangements I have mentioned are not hit at by sec. 83. If so, it must be because neither arrangement, in purpose or effect, directly or indirectly, causes any alteration of the incidence of income tax upon B in respect of his annuity. Presumably, the incidence of the tax remains unaltered because (1) B's income is £X per annum; (2) the "incidence" of the income tax is upon B with respect to the whole of the £X and (3) B is bound to, and does, pay income tax in respect of £X. At no moment of time does B's liability to the Commissioner become diverted from B to A and the final result, that B secures £10,000 clear of income tax, is only a short statement of the consequences of a transaction in which incidence is never altered, and liability to pay is not relieved from. It is nothing to the point that B has not to bear any further burden or outgo by way of income tax upon his £10,000, although the very purpose and effect of the transaction is to secure to B £10,000 per annum clear, all claims of the Commissioner having been met.

In my opinion the concession is rightly made that sec. 83 (*a*) does not vitiate arrangements of the character just discussed. Is the present case any different in principle? The covenant we are considering enables the appellant only to recoup herself the sum of money she will have to pay the Commissioner by reason of the inclusion of the sum of £10,000 in her assessable income.

It is true that part of the covenant by the husband in the present case was a direct promise to pay the appellant's income tax. But the appellant is clearly entitled to have the case considered upon the footing of a mere undertaking to recoup her in the event of her being assessed for tax and paying the tax. The question of validity arises only in relation to a simple promise of indemnity, because sec. 83 operates to preserve all severable undertakings and promises which, of themselves, would not be invalidated.

Perhaps the most intriguing part of the present controversy is this. The consequence of holding the promise of indemnity void under sec. 83, is to deprive the Commissioner of a substantial sum

of money representing the tax which the appellant would have to bear in respect of the annual payments to her by way of recoupment for her payments of income tax due to the inclusion of the £10,000 in her asssessable income. I agree with *Davidson* J. that it is clear that the periodical payments, for which the appellant now sues and in respect of which sec. 83 alone stands in her way, would themselves be portion of her assessable income and result in increasing her liability to income tax (cf. *North British Railway Co.* v. *Scott* (1) and *Hartland* v. *Diggines* (2)).

Difficult as the section is to construe, it is extremely unlikely that the Legislature proposed to avoid a stipulation when the only result to the revenue authorities of such an avoidance would be an actual loss of income tax. Everyone agrees that the main object of sec. 83 is to secure the payment to the Revenue of every penny of income tax.

There is an important distinction between the operation of sections like sec. 83 upon income tax and upon taxation of land values. In the latter case, the subject matter of tax can be abstracted from the person of the taxpayer, so that a separate and independent question may arise as to which of a number of persons interested in the land should fill the role of taxpayer. And it may appear, upon an examination of the particular statute, that it is of its very essence that it should operate in a defined way upon the persons interested, and their respective interests, in the subject matter of the tax. In such circumstances, contractual arrangements which are deemed inconsistent with the statutory scheme, may be invalidated by a section like sec. 83 (*a*) because "the incidence" of the tax itself includes a final apportionment of the tax between the persons interested.

But, in the case of such an income tax system as that embodied in the present New South Wales Management Act and the various Tax Acts passed from time to time in pursuance of it, the position is quite different because the subject matter of the tax, income, cannot be abstracted from the person of the recipient of the income. It does not therefore become a separate question to determine, as part

(1) (1923) A.C. 37. (2) (1926) A.C. 289.

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of the scheme, who is to be the taxpayer. That question is already answered once the subject matter of the tax is described.

It appears that the phrase " incidence " of a tax may itself involve a postulate or determination, not that A shall pay, but that A and B and C shall pay according to some statutory system of apportionment. Whether a contract or arrangement between private individuals " alters the incidence " of a tax necessarily depends upon what the precise " incidence " of the tax is.

If, contrary to what I think, sec. 83 has the very general application contended for by the respondents, sec. 82 (1) (*b*) would appear to have been quite unnecessary. For such provision avoids any stipulation in agreements entered into, so far as they impose upon a mortgagor the obligation of paying to the mortgagee any income tax upon the interest payable under the mortgage. On the whole, I think that the special provisions found in sec. 82 indicate that sec. 83, of itself, has not the wide and burdensome operation suggested.

There is no doubt that sec. 83 covers a wide field and does invalidate many transactions and arrangements the effect of which is to relieve persons from liability to pay taxation. Such transactions may be sufficiently real and genuine to escape the danger of being treated as void before a Court of law. By them, income may be caused to arise from personal exertion rather than from property, and so be subject to the less onerous rate of tax. In order to carry out such transactions, the formation and continuous control of a company is a method occasionally adopted. There is no limit to the number of arrangements, lawfully valid and binding, by virtue of which the initial burden of the income tax may be made less heavy or may even be avoided altogether. The predominant intent of sec. 83 is to protect the Revenue against defeat or delay in such circumstances. I cannot think that it means to destroy such an agreement as the present, where every penny of tax is secured to the taxing authority, and where the only result of its destruction is to deprive the Revenue of the tax attributable to those very payments by way of recoupment for which the appellant has been forced to sue in these proceedings.

As to the second question, whether the "unemployment relief" tax, imposed by the *Prevention and Relief of Unemployment Act* 1930, is included in the expression "all State income tax" in the covenant, too much has, I think, been made of the fact that the unemployment tax goes to a special fund and must be used for a special purpose. It seems to me that the judgment of the Privy Council in *Morris Leventhal* v. *David Jones Ltd.* (1), gives no countenance to such a distinction. In that case, as was pointed out by Lord *Merrivale* (at p. 270), the Bridge tax did not extend to land generally throughout New South Wales, but only within a limited area, and the purpose of the tax was to provide funds, not for the common purposes of the State, but for a particular scheme of betterment. None the less, it was held that the impost was "land tax" within the meaning of a certain covenant.

In the recent case of *In re Reckitt*; *Reckitt* v. *Reckitt* (2), the Court of Appeal held that the phrase "free of income tax" appearing in a will had to be treated as inclusive, not only of income tax itself, but of super-tax. Lord *Hanworth* said (at p. 336):—

> "As I have pointed out, whatever you may call it, call it super-tax, or call it sur-tax, it still remains in essence an additional income tax and, that being so, there being no indication to restrict the words to income tax as known for so many years, it must follow that immunity is given in respect of what is additional income tax, and the freedom must be from both the income tax, as we know it, and the additional income tax to which has now been given the name of sur-tax."

I think that both these decisions are pertinent to this minor part of the present controversy. It is true that the tax in question is not called "income" tax but "unemployment relief" tax. But in essence it is an additional income tax assessed in accordance with the *Income Tax (Management) Act* itself. The subject matter of the tax, so far as it affects the present case, is "net assessable income," which means the gross income after excluding all income exempt from tax and after making the allowed deductions. By sec. 18 of the *Prevention and Relief of Unemployment Act*, "net assessable income" is to be assessed in like manner as taxable income under the *Income Tax (Management) Act* 1928, the principal Act. Sec.

(1) (1930) A.C. 259.

(2) (1932) 101 L.J. Ch. 333.

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22 brings into play the machinery of income tax assessment, including sec. 83 itself.

In my opinion the label attached to the tax imposed does not affect the real substance of the covenant between the present parties, and the unemployment tax levied upon that part of the appellant's income comprised of the £10,000 was an additional income tax. It should therefore be included in the phrase " all State income tax " used in the covenant, and Hordern's promise of indemnity extended to the appellant's payment of unemployment tax upon the material portion of her income, as well as to income tax itself.

In my opinion the appeal should be allowed and judgment entered for the appellant for the amount claimed.

Appeal dismissed with costs.

Solicitors for the appellant, *C. P. White & Co.*

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

J. B.