[HIGH COURT OF AUSTRALIA.]

THE EQUITY TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

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MELBOURNE, *June* 8, 9.

SYDNEY, *Aug.* 13.

Starke, Dixon and Evatt JJ.

Estate Duty (Cth.)—Assessment—Deductions—"Debts"—Probate and succession duties payable to States—Duty payable by company on death of shareholder—Estate Duty Act 1914 (*No.* 25 *of* 1914)—*Estate Duty Assessment Act* 1914-1928 (*No.* 22 *of* 1914—*No.* 47 *of* 1928), *secs.* 3, 8, 10-15, 17, 18—*Succession and Probate Duties Acts* 1892 *to* 1931 (*Q.*) (56 *Vict. No.* 13—22 *Geo. V. No.* 49)—*Companies (Death Duties) Act* 1901-1931 (*N.S.W.*) (*No.* 30 *of* 1901—*No.* 13 *of* 1931).

In assessing the value of an estate for the purposes of Federal estate duty, probate and succession duties payable under State Acts are deductible from the gross value of the estate.

A person who died domiciled in Victoria was at the time of death the owner of shares in a company which was incorporated in Victoria and which carried on business in Queensland and New South Wales. In the assessment of the value of the deceased's estate for Federal estate duty the executors claimed to deduct amounts paid by them to the company to recoup it for duty paid under the *Succession and Probate Duties Acts* 1892 *to* 1931 (Q.) and the *Companies (Death Duties) Act* 1901 (N.S.W.). Under those Acts duty was payable by the company on the value of the deceased's shares and payment of the duty was deemed to be a payment on behalf of the personal estate of the deceased.

Held that the duties imposed by the State Acts were succession duties, and the amounts paid by the executors were deductible as "debts" within the meaning of the *Estate Duty Act* 1914 and the *Estate Duty Assessment Act* 1914-1928.

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CASE STATED.

On an appeal to the High Court by the Equity Trustees Executors and Agency Co. Ltd., the executor and trustee of Violet Victoria Howard-Smith deceased, against an assessment to Federal estate duty, a case, which was substantially as follows, was stated for the opinion of the Full Court :—

1. Violet Victoria Howard-Smith (hereinafter referred to as " the deceased ") died on 10th March 1934, leaving a will dated 19th April 1930 by which she appointed the above-named appellant her executor. The deceased was at the time of her death domiciled in the State of Victoria in the Commonwealth of Australia.

2. On 4th May 1934 probate of the will was granted to the appellant by the Supreme Court of the State of Victoria.

3. At the date of her death the deceased was the holder of the under-mentioned shares, the certificates for which she held in Victoria :—(*a*) 62,000 £1 6 per cent cumulative preference shares in Howard-Smith Ltd., registered in the share register of the company kept in the State of Victoria. (*b*) 177,039 £1 ordinary shares in Howard-Smith Ltd., registered in the share register of the company kept in the State of Victoria. (*c*) 7,600 £1 7½ per cent cumulative preference shares in Australian Iron & Steel Ltd., registered in the share register of the company kept in the State of Victoria. (*d*) 550 £1 shares in Goldsbrough Mort & Co. Ltd., registered in the share register of the company kept in the State of Victoria.

4. Howard-Smith Ltd. and Goldsbrough Mort & Co. Ltd. were incorporated in the State of Victoria according to the *Companies Acts* of that State ; Australian Iron & Steel Ltd. was incorporated in the State of New South Wales according to the *Companies Acts* of that State and has a share register in the State of Victoria. All the companies carry on business and have assets in the State of Queensland and are registered as foreign companies in the State of Queensland under the *Companies Acts* of that State. The companies also have registered offices in the State of Queensland for the purposes of the *Succession and Probate Duties Acts* 1892 *to* 1931 (Q.).

5. Australian Iron & Steel Ltd. and Goldsbrough Mort & Co. Ltd. each carry on in the State of New South Wales one or more of the businesses described in secs. 4 and 10 of the *Companies* (*Death*

Duties) *Act* 1901 (N.S.W.). Goldsbrough Mort & Co. Ltd. has a registered office in the said State for the purposes of the said Act.

6. In the month of April 1934 Howard-Smith Ltd. caused to be delivered to the Commissioner of Stamp Duties of the State of Queensland a return giving the name of the deceased, the date of her death and the number, description and value of the shares in the said company held by her at the time of her death.

7. On 12th May 1934 Howard-Smith Ltd. received from the Commissioner of Stamp Duties of the State of Queensland an assessment of the amount of duty expressed to be payable by the company on the shares of the deceased under the *Succession and Probate Duties Acts* 1892 *to* 1931 (Q.). The amount of duty so assessed was £2,161 0s. 5d. On 1st June 1934 the company paid the sum of £2,161 0s. 5d. to the Commissioner of Stamp Duties at Brisbane. The amount so paid by the company was at the direction of the appellant deducted by the company from dividends declared on the shares and not paid, and the balance of such dividends remaining after such deduction was paid to the appellant on 5th June 1934.

8. In the month of July 1934 the Australian Iron & Steel Co. Ltd. caused to be delivered to the Commissioner of Stamp Duties of the State of Queensland a return giving the name of the deceased, the date of her death and the number, description and value of the shares in the company held by her at the time of her death.

9. On 31st July the Australian Iron & Steel Co. Ltd. received from the Commissioner of Stamp Duties an assessment of the amount of duty expressed to be payable by the company on the shares of the deceased under the *Succession and Probate Duties Acts* 1892 *to* 1931 (Q.). The amount of duty so assessed was £5 8s. 1d. On 13th August 1934 the company paid the sum of £5 8s. 1d. to the Commissioner of Stamp Duties at Brisbane. The appellant paid to the company on 16th August 1934 the sum of £483 0s. 9d., which included the sum of £5 8s. 1d., on account (*inter alia*) of the duty so paid.

10. In the month of April 1934 Goldsbrough Mort & Co. Ltd. caused to be delivered to the Commissioner of Stamp Duties of the State of Queensland a return giving the name of the deceased, the

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date of her death and the number, description and value of the shares in the said company held by her at the time of her death.

11. On 7th May 1934 Goldsbrough Mort & Co. Ltd. received from the Commissioner of Stamp Duties of the State of Queensland an assessment of the amount of duty expressed to be payable by the company on the shares of the deceased under the *Succession and Probate Duties Acts* 1892 *to* 1931 (Q.). The amount of duty so assessed was £4 3s. On 2nd May 1934 the company paid the sum of £4 3s. to the Commissioner of Stamp Duties at Brisbane. The appellant paid to the company on 7th June 1934 the sum of £17 19s. 8d., which included the sum of £4 3s., on account (*inter alia*) of the duty so paid.

12. The amount of duty expressed to be payable under the *Companies* (*Death Duties*) *Act* 1901 (N.S.W.) on the value of the shares of the deceased in the Australian Iron & Steel Ltd. was assessed in or about the month of July 1934 and the amount of duty so assessed, viz., the sum of £477 12s. 8d., was paid by the company to the Commissioner of Stamps on 17th August 1934. The appellant paid to the company on 16th August 1934 on account (*inter alia*) of the duty so expressed to be payable the sum of £483 0s. 9d. as aforesaid, which sum included the sum of £477 12s. 8d.

13. The amount of duty expressed to be payable under the *Companies* (*Death Duties*) *Act* 1901 (N.S.W.) on the value of the shares of the deceased in Goldsbrough Mort & Co. Ltd. was assessed in or about the month of May 1934, and the amount of the duty so assessed, viz., the sum of £13 16s. 8d., was paid by the company to the Commissioner of Stamps on 12th June 1934. The appellant paid to the company on 7th June 1934 on account (*inter alia*) of the duty so expressed to be payable the sum of £17 19s. 8d. as aforesaid, which sum included the sum of £13 16s. 8d.

14. The estate of the deceased has been assessed for Federal estate duty by the respondent at a net assessable value of £322,616. For the purpose of the assessment the shares were valued as follows :—(*a*) 62,000 £1 cumulative preference shares in Howard-Smith Ltd., £68,200. (*b*) 177,039 £1 ordinary shares in Howard-Smith Ltd., £106,223 8s. (*c*) 7,600 £1 7½ per cent cumulative preference shares in Australian Iron & Steel Ltd., £8,170. (*d*) 550 £1

shares in Goldsbrough Mort & Co. Ltd. £982 2s. 6d. In arriving at the values the respondent made no allowance for any duty payable in respect of such shares under the *Succession and Probate Duties Acts* 1892 *to* 1931 (Q.) or under the *Companies* (*Death Duties*) *Act* 1901 (N.S.W.), or for the existence of any lien over such shares for the amount of any duty so payable, nor were any such duties allowed as deductions from the gross value of the assessable estate for the purpose of assessing the value for duty of the estate of the deceased.

The following questions were stated for the opinion of the Full Court :—

(1) For the purpose of assessing the value for duty of the deceased's estate under the *Estate Duty Assessment Act* 1914-1928 should any and if so what deduction from the gross value of the estate of the deceased have been made in respect of the duty expressed to be payable under the *Succession and Probate Duties Acts* 1892 *to* 1931 and/or under the *Companies* (*Death Duties*) *Act* 1901 by the companies in which the shares were held, or any and if so which of such companies ?

(2) In determining the value of the shares for the purpose of the *Estate Duty Assessment Act* 1914-1928 should the respondent have taken into account the amount of the duty payable in respect of the shares under the *Succession and Probate Duties Acts* 1892 *to* 1931 and/or under the *Companies* (*Death Duties*) *Act* 1901 or any and what part thereof ?

Herring K.C. (with him *Spicer*), for the appellant. The payments made under the *Succession and Probate Duties Acts* 1892 *to* 1931 (Q.) and the *Companies* (*Death Duties*) *Act* 1901 (N.S.W.) were payments of succession duty and are deductible under the *Estate Duty Assessment Act* 1914-1928. Secs. 10-15 of that Act set out the way in which a dutiable balance is to be assessed by the commissioner, and the definition of " debts " in sec. 3 brings in any payment of succession duty as a liability. Sec. 17 does not contain an exhaustive statement of what is to be deducted. It must be read with sec.

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18. If it were exhaustive, charges and contingent liabilities could not be taken into account. These provisions were taken from the *Stamp Duties Act* 1894 (N.S.W.), which was repeated in the Act of 1898, sec. 53 (1) and (2). The Act could be worked quite satisfactorily without these provisions. Other sections of the Act show that it is only meant to impose duty upon that part of the estate which passes to the beneficiaries (secs. 8 (5), 34, 35, 36; Statutory Rules 1929 No. 32; *Estate Duty Act* 1914). Both the Queensland and the New South Wales Acts impose succession duty within the meaning of sec. 3 of the *Estate Duty Assessment Act*. When that Act was passed in 1914 the State Acts in question were in existence, and since then the character of the imposition has not been essentially changed. Succession duty means any death duty which was in 1914 reasonably called a succession duty. Further, both impositions are succession duties in the strict sense (*Succession and Probate Duties Act* 1892 (Q.), secs. 4, 12, 46; *Succession and Probate Duties Act of* 1898 (Q.), sec. 2; *Succession and Probate Duties Act of* 1904 (Q.), sec. 11). The last Act was amended in 1918. All these Acts must be read together, and the impositions thereby made are directed at the estate of the deceased person although in some cases it can and is to be collected from a company in which a deceased person was a shareholder. This does not alter the nature of the tax. *Colonial Gas Association Ltd.* v. *Federal Commissioner of Taxation* (1) is an analogous case. The *Companies (Death Duties) Act* 1901 (N.S.W.) must be read with the *Stamp Duties Act* 1898. In 1914 none of the State Acts imposing death duties imposed succession duty strictly in accordance with the English definition, but in sec. 3 the word "succession" is to be read as descriptive of the duties then in operation. [Counsel referred to the *Succession Duties Act* 1893 (S.A.) and the *Deceased Persons Estates Management Act* 1903 (Tas.).]

Wilbur Ham K.C. (with him *T. W. Smith*), for the respondent. If the payments in question were succession duties they are not deductible under the *Estate Duty Assessment Act* 1914-1928. The only deductions authorized by that Act are those set out in secs.

(1) (1934) 51 C.L.R. 172.

17 and 18. Sec. 14, when read with sec. 24 (8), shows that duties becoming payable after the death of a deceased person are not allowable deductions. The only use of an interpretation clause is to enable an extended meaning to be read into any provision where the defined expression is used. The definition of " debts " in sec. 3 is useless and is the relic of an intention which was subsequently revised. The position is similar to that disclosed in *Commissioner of Taxes* v. *Union Trustee Co. of Australia* (1). If succession duties are deductible, the payments made by the executors of the deceased were not payments of succession duty. The Queensland and New South Wales Acts in question impose company taxation, not succession duty on property passing at death. Succession duty is defined in *Halsbury's Laws of England*, 1st ed., vol. 13, p. 181. The Act does not impose a tax upon the passing of a beneficial interest. The tax would be payable even if no beneficial interest passed, e.g. if a person holding shares as a trustee died. Any tax created by State legislation on the shares of a deceased person, even if valid, cannot be taken into account, because it arises after death (*Commissioner of Stamps (W.A.)* v. *West Australian Trustee, Executor and Agency Co. Ltd.* (2)). In this case all the executor has done is to indemnify the companies which paid the tax imposed. The right of indemnity contained in the State Acts is worthless and the payments were merely gratuitous (*Companies Act* 1928 (Vict.), sec. 273 ; *Spiller* v. *Turner* (3) ; *Erie Beach Co. Ltd.* v. *Attorney-General for Ontario* (4) ; *Attorney-General* v. *Higgins* (5) ; *Brassard* v. *Smith* (6)). Even if such payments could be enforced by the company, the duty would not be a succession duty.

Herring K.C., in reply. In order to come within sec. 39 of the *Estate Duty Assessment Act* the payment does not have to be made by the estate. If it does, then by reason of the provisions of the particular Acts these payments were made for and on behalf of the estate (*Archibald* v. *Commissioners of Stamps* (7)).

(1) (1931) A.C. 258.
(2) (1926) 38 C.L.R. 63, at p. 68.
(3) (1897) 1 Ch. 911.
(4) (1930) A.C. 161.
(5) (1857) 2 H. & N. 339 ; 157 E.R. 140.
(6) (1925) A.C. 371.
(7) (1909) 8 C.L.R. 739, at p. 752.

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Fullagar K.C. and *D. I. Menzies* applied for leave to intervene on behalf of the State of Queensland in order to support the validity of the *Succession and Probate Duties Acts* (Q.). As the validity of these Acts was not attacked, the application was withdrawn.

Cur. adv. vult.

Aug. 13.

The following written judgments were delivered :—

STARKE J. Case stated pursuant to the provisions of the Commonwealth *Estate Duty Assessment Act* 1914-1928.

Shortly, it appears that Violet Victoria Howard-Smith, who was domiciled in Victoria and died in 1934, held at the time of her death a number of ordinary and preference shares in Howard-Smith Ltd., cumulative preference shares in Australian Iron and Steel Ltd., and also shares in Goldsbrough Mort & Co. Ltd. The estate of the deceased was assessed for estate duty under the Act already referred to, and the shares above mentioned were included in the assessment. But the appellant, who is the legal personal representative of the deceased, claims to deduct certain duties paid in respect of the shares, under the *Succession and Probate Duties Acts* 1892 *to* 1931 of Queensland and the *Companies* (*Death Duties*) *Act* 1901 of New South Wales. The *Estate Duty Act* 1914, No. 25, imposed an estate duty upon the estates of persons dying after the commencement of the Act. The rates of duty are set forth in the schedule to the Act, and are payable upon the total value of the estate after deducting all debts. The *Estate Duty Assessment Act* 1914-1928, which is incorporated and read as one with the *Estate Duty Act* 1914, No. 25, requires the Commissioner of Taxation to make assessments, and for the purpose of assessment the legal personal representative of every deceased person is required to prepare and furnish a statement of all the estate in Australia of the deceased person whose estate he represents, and the statement must set forth the descriptions and values of the items comprising the estate before deducting any debts or charges upon the estate, also all the debts and other charges upon the estate (See secs. 15, 10). " Debts " includes probate and succession duties payable under any State Act, but does not include voluntary debts (Act, sec. 3). So far, I should think that the right is given, explicitly

and clearly, to deduct probate and succession duties payable under any State Act. The provisions of secs. 17 and 18 however, are relied upon. They deal with deductions from the gross value of the assessable estate in the cases of domiciled and non-domiciled persons respectively. In the case of domiciled persons (sec. 17) " all debts due and owing by the deceased at the time of his death . . . shall be deducted," and in the case of non-domiciled persons (sec. 18) " the debts which may be deducted from the gross value of the assessable estate shall be debts due and owing to persons resident in Australia." But sec. 17 does not, in terms exclude any debt from deduction, and if debts other than those covered by the section were allowed by other provisions to be deducted, there is nothing in sec. 17 to exclude them. Such provisions I find in the Tax Act itself (which only imposes estate duty upon the total value of the estate after deducting all debts) coupled with secs. 3, 10, and 15 of the Assessment Act. But if this conclusion be erroneous, then the Act, in secs. 10 and 15, contemplates and implies that debts due and owing by the deceased at the time of his death include probate and succession duties. Such duties are included in the term " debts " by sec. 3, and that term, in the context in which it is found, must mean debts of the deceased. And if the duties be a debt of the deceased, then they must notionally have become due and owing by the deceased at the time of his death. The provisions of sec. 18 raise some difficulties of their own, which do not now arise. But it will be noted that the language changes : " The debts which may be deducted . . . shall be debts due and owing to persons resident in Australia." In my opinion, the appellant in this case was entitled to deduct from the gross value of the estate of the deceased probate and succession duties payable in respect of the shares above mentioned under any State Act.

It was next contended that the duties payable under the *Succession and Probate Duties Acts* 1892 *to* 1931 of Queensland and the *Companies (Death Duties) Act* 1901 of New South Wales were not probate or succession duties within the meaning of the *Estate Duty Assessment Act* 1914-1928. The name which the State Act gives to the duty is not decisive : the duty imposed must operate as and be a probate or succession duty. But these words do not bear any precise meaning

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in law. Under English legislation probate duty was leviable in respect of personal estate and effects required to be covered by a grant of probate or administration: it was, it has been said, the price of obtaining probate. The duty has been superseded by the estate duty, which is leviable in respect of all property, both real and personal, which passes or is deemed to pass on the death of the deceased. "What it taxes is not the interest to which some person succeeds on a death, but the property in respect of which an interest ceased by reason of death." "Succession duty" under the English legislation "is a tax placed on the gratuitous acquisition of property which passes on the death of any person, by means of a transfer (called either a disposition or a devolution) from one person . . . to another person." (*Hanson* on *Death Duties*, 7th ed. (1925), pp. 2, 38). At the time of the passing of the Commonwealth *Estate Duty Act* 1914 there were in existence various statutes enacted by the States, imposing duties on the estates of deceased persons. Thus, Queensland had, in 1886, enacted a *Succession Duties Act*, which was repealed in 1892 and replaced by the *Succession and Probate Duties Act* 1892. So far as successions were concerned, the Act followed fairly closely the English *Succession Duty Act* of 1853. A *Succession and Probate Duties Act Amendment Act* was passed in 1895. By this Act it was declared that, upon the issue of any grant of probate or administration in Queensland, succession duty was chargeable in respect of all property within Queensland, although the deceased person may not have been domiciled in Queensland; and it was enacted that, where probate or administration was granted in Queensland upon the death of a member registered in a branch register of a company incorporated in Queensland, the share or other interest of the deceased member should be deemed part of his estate situated in Queensland for or in respect of which succession duty was payable. No probate or administration, the Act prescribed, should be granted to a person not usually resident in Queensland, unless security were given for payment of all duty payable on succession in respect of the estate of the deceased. In 1904 a further *Succession and Probate Duties Act* was passed. By this Act a company incorporated outside Queensland which carried on certain businesses in Queensland was

required, after the death of any member, to make a return giving the name of the member, the date of death, and the value of the shares or other interest held by such member at the time of his death, and to pay duty thereon. Payment by the company of such duty in respect of shares or other interest was deemed to be a payment on behalf of the personal estate of the deceased member. In 1918 yet another *Succession and Probate Duties Act* was passed. By this Act a company incorporated outside Queensland (called a foreign company) which carried on business and had assets in Queensland was required after the death of any member to make a return giving the name of the member and the date of his death, the value of the shares or other interest in the company held by such member at the time of his death, and to pay duty thereon; and it was enacted that upon the death of a member of any such foreign company the shares or other interest of the deceased member should be deemed to be part of his estate in Queensland for or in respect of which succession duty was payable. The duty was payable by the company, but deemed to be a payment on behalf of the personal estate of such member. A compilation of these Acts in pamphlet form, called the *Succession and Probate Duties Acts* 1892 *to* 1931, was supplied to the court, and embraces in concise form the effect of the Acts already mentioned. The 1892 Act, it was held in *Harding* v. *Commissioners of Stamps for Queensland* (1), did not apply to movable property belonging to persons of foreign domicil, but the later Acts made all property within Queensland chargeable with the duty.

The competency of the Queensland Acts of 1895, 1904 and 1918 was not challenged, and we must therefore assume their validity for the purpose of this appeal, whether other countries or States will or will not recognize and give effect to their provisions. But is the duty payable under the 1918 Act, which is one of the series of Acts called the *Succession and Probate Duties Acts* 1892 *to* 1931, a probate or succession duty within the meaning of the Commonwealth *Estate Duty Act*? It resembles the English estate duty, but, having regard to the terminology of the Queensland Acts of 1904 and 1918, I doubt if it can be described as a probate duty, whatever may be said of

(1) (1898) A.C. 769.

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the duties imposed by the 1895 Act. But duties of this character, imposed in and since 1904, have been described as succession duties in Queensland Acts, and the Commonwealth *Estate Duty Act* 1914 was enacted and was to operate with regard to State Acts so framed. Moreover, the duty is imposed upon the death of a member of a company, and looks to the transmission of his shares or other interest to some other person. The duty, if paid, is deemed to have been made on behalf of the personal estate of such member, and is not payable if succession duty has been already paid. The Queensland Acts treat the duty payable in respect of the shares or other interest of a deceased member of a company as a succession duty. And as the Acts look to the death of the member and the transmission of his share or interest to some other person, the duty falls, I think, within the signification of a succession duty, both in the Federal *Estate Duty Act* and in the legitimate sense of that expression in English.

The *Companies (Death Duties) Act* 1901 of New South Wales contains analogous provisions to those contained in the Queensland Acts. But the New South Wales Act does not refer to the duty as a succession duty, but as a duty imposed on the death of shareholders in certain companies. Where a company incorporated according to the laws of some country or possession other than New South Wales carries on certain businesses, and a member of the company dies, then, wheresoever he may have been domiciled, a duty is imposed on the value of the shares and stock in the company held by such member at the time of his death. These provisions also apply to companies incorporated in New South Wales that carry on in New South Wales like businesses and have a share register outside New South Wales. But they do not apply in respect of shares and stock registered in the share register of a company kept in New South Wales. The duty is payable by the company, but, as in Queensland, payment of the duty is deemed to be a payment on behalf of the personal estate of the deceased member. No duty in respect of the shares or stock is payable under the Act in a case where the duty payable on the grant or sealing or probate or administration of the estate of any member of the company has been duly paid in respect of all shares and stock held by such member at the

time of his death. It is described as a death duty, and falls in line with the death duties imposed by the *Stamp Duties Act* of New South Wales, 1920 No. 47, secs. 100-123. (See *Companies (Death Duties) Act* 1901, sec. 10 (1), proviso *d.*) Such duties are payable on assessment, or within six months from the death of the deceased. They are imposed in New South Wales upon the final balance of the estate of a deceased person ascertained in the manner required by the Act, and necessarily contemplate the transmission of his estate to another. Moreover, the Act prescribes that no probate or administration shall issue until the duty is paid or security given therefor, and the administration duly stamped (See secs. 114, 117, 119). Such a duty falls, I think, within the description of a probate or succession duty, in the legitimate sense of that expression in English, and, having regard to the legislation of New South Wales, such as the *Stamp Duties Act* of 1898, Part III., must be regarded as probate or succession duties for the purposes of the Federal *Estate Duty Act.*

All that remains is to indicate how the deductions claimed by the appellant arose. Howard-Smith Ltd. and Goldsbrough Mort & Co. Ltd. were incorporated in Victoria, Australian Iron and Steel Ltd. was incorporated in New South Wales. All the companies carried on business, and had assets, in Queensland, and had registered offices in that State, as required by its *Succession and Probate Duties Acts* 1892 *to* 1931. Howard-Smith Ltd. was assessed to duty under sec. 11 of that Act in respect of the shares held by Violet Victoria Howard-Smith in the company at the time of her death. The amount of the duty was paid by the companies, but was paid or refunded to them by the appellant. The duty was, in my opinion, as already indicated, a succession duty payable under the *Succession and Probate Duties Acts* of Queensland 1892-1931, and therefore the amount paid was one of the debts of the deceased within the meaning of the Federal *Estate Duty Assessment Act,* which the appellant was entitled to deduct from the gross value of the assessable estate of Violet Victoria Howard-Smith. Australian Iron and Steel Ltd., and Goldsbrough Mort & Co. Ltd. each carried on in New South Wales one or more of the businesses covered by the *Companies (Death Duties) Act* 1901 of that State. Australian Iron and Steel

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Ltd. had a register outside New South Wales, namely, in Victoria. Both companies were assessed to duty under the *Companies (Death Duties) Act* 1901 (See secs. 10 and 11A) in respect of the values of the shares held by Violet Victoria Howard-Smith in each company. The companies paid the duties assessed to them, and the appellant repaid or refunded the same to the companies. These payments are likewise deductible as debts of the deceased, being probate or succession duties payable under a State Act, namely, the New South Wales *Companies (Death Duties) Act* 1901.

The first question stated in the case should be answered in the affirmative.

DIXON AND EVATT JJ. This case stated relates to a claim by executors for deductions from the gross value of the estate of the deceased in calculating the value for duty under the *Estate Duty Assessment Act* 1914-1928. They claim to deduct amounts paid under sec. 11 (7) of the Queensland *Succession and Probate Duties Act* 1904, as amended, and under sec. 10 (2) of the New South Wales *Companies (Death Duties) Act* 1901-1931. The payments were made to the revenue of the respective States by companies falling within those provisions. They were made in respect of shares in such companies which were held at her death by the deceased, who was domiciled in Victoria. The sums paid were recouped to the companies out of the deceased's estate. The executors assert that the payments are succession duties and that, in assessing the value for estate duty, probate and succession duties payable under State Acts are deductible. The Commissioner denies both propositions.

The question whether the *Estate Duty Assessment Act* 1914-1928 authorizes the deduction of State probate and succession duties depends upon provisions which it is difficult to reconcile. Sec. 3 begins by defining the word "debts" as including probate and succession duties payable under any State Act. Sec. 10 imposes upon the executor or administrator the duty of preparing and furnishing a statement setting forth a full and complete return of the deceased's Australian estate. The statement must set forth the descriptions and values of the items before deducting any debts or other charges upon the estate. It must also set forth in detail

all the debts and other charges upon the estate. It must be in a prescribed form. Sec. 15 provides that, from the returns and other sources of information, the commissioner shall cause an assessment to be made for the purpose of ascertaining the amount upon which duty shall be levied in accordance with the Act. So far, it would appear to be reasonably clear that the amount of the estate for duty consists of the value of the items of property less the deceased's debts, probate and succession duties and charges on the estate. This view was adopted in the form of return prescribed by the regulations, which specifically refers to probate and succession duties. But secs. 17 and 18 provide expressly for the deduction of debts, and there can be little doubt that probate and succession duties are not included under sec. 17. Under sec. 8 (3) a distinction is drawn between deceased persons who were domiciled in Australia and those who were not. The personal property of the former wherever situated must be included, while no personal property of the latter is included unless situated in Australia. Secs. 17 and 18 make a corresponding distinction. Sec. 17 deals with the deduction of debts when the deceased was domiciled in Australia; sec. 18, when he was not. In the former case, there is no territorial restriction in respect of the debts deductible; in the latter case, debts are not deductible unless owing to a person resident in Australia or payable in Australia or charged on property situate in Australia. But sec. 17 contains a further limitation. It requires that the debts of the domiciled person must be due and owing by him at the time of his death. Plainly this condition cannot be satisfied in the case of probate and succession duties.

The commissioner says that secs. 17 and 18 are exhaustive statements of the "debts" deductible, and, accordingly, that probate and succession duties are not allowable deductions, at any rate when the deceased is domiciled in Australia.

The executors, on the other hand, say that the office of secs. 17 and 18 is to make a necessary distinction between persons domiciled and not domiciled in order to ensure that, in the latter case, Australian debts only are thrown against Australian personalty; that the sections do not mean exhaustively to state what "debts" are allowable as deductions.

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In our opinion the word " debts " does not bear its defined meaning either in sec. 17 or sec. 18; in both sections it means debts contracted or incurred by the deceased in his lifetime. The definitions contained in sec. 3 are applicable unless the contrary appears. The contrary does appear in each section. In sec. 17 it appears from the fact that the debts must be due and owing by the deceased at the time of his death; in sec. 18 it appears from the requirement that they must be contracted to be paid in Australia or charged on property situate in Australia or due and owing to persons resident in Australia, a description scarcely appropriate to the Crown in right of the States. We think, therefore, that the subject matter dealt with by these sections is the deceased's " debts " in the ordinary, and not the extended, meaning of that expression. If they are exhaustive provisions, they exhaust only that subject matter. The deduction of probate and succession duties would, in our opinion, involve no inconsistency with these sections. But it is not enough that such a deduction would not be inconsistent. It cannot be made unless it is positively authorized. If secs. 17 and 18 were absent, we should have thought that secs. 10 to 15 did impliedly authorize the deduction of debts and other charges, including in the word " debts " probate and succession duties. But, does the presence of secs. 17 and 18 negative the implication on which this view is based ? On the whole, we think not. According to the opinion we have already expressed these provisions do not cover the whole ground included in the expression " debts and other charges upon the estate." To regard the existence of secs. 17 and 18 as showing that in the preceding sections there was no intention to authorize deductions would be to take all effective operation from the words " other charges upon the estate " as well as from the definition of " debts " by which that word is extended to probate and succession duties. When the taxing Act, the *Estate Duty Act* 1914, refers to the value by which the rate of duty is to be calculated, it describes it as " the total value of the estate, after deducting all debts." Here " debts " bears its defined meaning under the Assessment Act, which is incorporated in the taxing Act. We think it sufficiently appears from a consideration of the whole statute

that it means to authorize the deduction of State probate and succession duties.

The difficult question remains whether the payments which the executors in the present case claim to deduct fall within the description " probate and succession duties payable under any State Act." Neither expression has an exact legal meaning; but each of them has long been used in England as the name of a class of tax the levy of which is connected with death. Although in Australia " probate duty " is often used with a much wider meaning than in England, we do not think that the payments now in question could be brought within any reasonable interpretation of that expression. The duties in respect of which they were made are levied altogether without reference to the necessity or even the possibility of a grant of probate or administration being obtained and independently of the existence of a personal representative.

The executors' claim depends, we think, on the application to the payments in question of the description " succession duties." In ascertaining the meaning of that expression as it occurs in the definition of " debts " in sec. 3 of the *Estate Duty Assessment Act* 1914-1928, the object of the provision must be considered. The evident purpose is to exclude from the value of the deceased's estate liable to the Federal duty that portion which State fiscal legislation has intercepted and taken on the same ground as the Federal duty is imposed, namely, because of the death of the person entitled. If, to use an obsolete expression, a State has already " confisked " part of the estate, that part shall not be included in its value for Federal estate duty. A succession duty may operate to impose a tax which could not be chargeable on the assets of the deceased. For instance, on the death of a tenant for life the English succession duty is imposed upon the estate which falls into possession and it is payable by the remainderman (Cf. *Halsbury*, 2nd ed., vol. 13, p. 381). Indeed it is the successor who is primarily liable in every case under that legislation, and the title to the interest to which he " succeeds " on the deceased's death may be quite independent of the deceased's will or the operation of the law of intestate succession. It may, on the other hand, be property of the deceased completely in his disposition, and the successor may

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take either as his next of kin or his devisee or legatee. In such cases the personal representative as well as the successor is accountable. It is to duties borne by the estate, or some part of it, that the expression in the Commonwealth Act looks. No one, we think, would claim that under sec. 10 (2) a duty which did not fall on any part of the estate should be shown in the statement as a deduction. The phrase "probate and succession duties payable under any State Act" is, therefore, not intended to describe and completely to embrace two taxes separately conceived, each of a technical description. It appears to us to be intended as a compound description of those duties which fall upon the estate of the deceased devolving upon his death.

The legislation of Queensland and New South Wales under which the payments were made aims at bringing under a charge for duty shares of deceased persons which otherwise would not be reached. The provisions of the two States are similar but by no means identical. It is convenient to deal with the Queensland enactment first. In 1892 that State adopted an Act imposing a succession duty, the provisions of which reproduced the English model with much fidelity: the *Succession and Probate Duties Act* 1892. Another Act, the *Succession and Probate Duties Act* 1892 *Amendment Act of* 1895, as since amended, dealt with the territorial basis of the tax. The duty upon a succession to movables situated in Queensland was imposed by the original Act only when the person to whom they belonged had a domicil in Queensland at his death (See *Harding* v. *Commissioners of Stamps for Queensland* (1)).

The second Act provides that duty shall be chargeable if the movables are situated in Queensland although the deceased is domiciled elsewhere (sec. 2). As a consequential measure, shares on branch registers of companies incorporated in Queensland were brought under liability. Such shares would be considered as situate out of Queensland. But it was enacted that, upon the death of the shareholder, the shares so registered should be deemed part of his estate and effects situated in Queensland in respect of which succession duty is payable as if he were on the Queensland register (sec. 2). Responsibility for paying the duty thereon was

(1) (1898) A.C. 769.

thrown upon the company, which was required to return the death of the shareholder to the Commissioner of Stamp Duties within a given time. As the provision has been amended, the company is required to pay duty at graduated rates of duty specified according to the value of the shares; whereas ordinary succession duty is graduated on a somewhat different scale and according to the value of the estate or aggregate succession (see sec. 12 of the *Succession and Probate Duties Acts* 1892 *to* 1931). But no duty is to be payable by the company where probate and succession duty have been paid in Queensland in respect of the shares or the deceased's interest therein. If the company pays the duty, it is to be deemed a payment on behalf of the personal estate of the deceased. This provision does not affect the present case, because the companies concerned were not incorporated in Queensland and, except in the case of one company, the deceased's shares were not on a branch register. But the provision is a model from which the Queensland Legislature proceeded to an enactment affecting shares in companies carrying on business in Queensland but not incorporated there. By sec. 11 of the *Succession and Probate Duties Act of* 1904, as now amended, such companies, which are called foreign companies, must register with the Commissioner of Stamps and make a return of the deaths of members within a specified time of their occurrence. Upon the death of a member of such a foreign company his shares are for the purpose of the *Succession and Probate Duties Acts* to be deemed part of his estate and effects situated in Queensland in respect of which succession duty is payable as if the company were incorporated in Queensland. Within the time limited for returning the death (six months) the company must pay the duty on the shares, which is to be a debt due by the company to the Crown (sec. 11 (7)). The duty is to be paid by the company at a scale like that applicable to Queensland companies in respect of shares on a branch register. It is graduated according to the value of the shares, not of the estate, and differs from the ordinary succession duty both in that respect and in the amounts. But, for the purpose of levying the duty, as distinguished from ascertaining its rate, a special value is to be attributed to the shares if the foreign company carries on business in Queensland and elsewhere. It is to be such proportion of the full

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value of the shares as the value of the company's assets in Queensland bears to the value of its total assets. If the company pays the duty, it is to be deemed to be a payment on behalf of the personal estate of the deceased member. There is a provision that the company may deduct the amount from the moneys payable by it to the personal representatives and may recover it from them by action and shall have a paramount lien on the shares (sec. 11 (9)). Finally, if succession duty is paid in Queensland in respect of the shares in the company held by the deceased at the time of his death, no duty is payable by the company under the enactment.

Upon the construction of these provisions we are of opinion that they seek not only to impose the liability we have described upon the company, but also to make the shares part of the property of the deceased upon which ordinary succession duty is payable. When sec. 11 (7) requires that, for the purpose of the Acts of 1892 to 1931, the shares are to be deemed part of his estate situate in Queensland in respect of which duty is payable as if the company were there incorporated, it directs that an assumption should be made which, if strictly pursued, would make the shares directly liable to succession duty under sec. 12 of those Acts only if the deceased was domiciled in Queensland or registered upon the principal share register of the company. If he was not domiciled in Queensland and was on a branch register, the assumption would, if strictly followed, bring the case under sec. 2 of the Act of 1895, as amended. But we think the important words in sec. 11 (7) are " in respect of which succession duty is payable," and that these words mean to bring the shares directly under charge for ordinary succession duty. The first proviso to the sub-section contemplates payment of this duty and relieves the company if it is made. As a result of sec. 43 of the Acts of 1892 to 1931 the " successor " becomes a debtor to the Crown in respect of this duty, and, under sec. 46, the executors become accountable also. If the company pays the duty imposed upon it, the amount so paid is, under sec. 12 (4) (*a*), to be deducted from the duty on the shares payable by the successor and the executors. Assuming that all the provisions of sec. 11 are within the legislative power of the Queensland Parliament and none of them is void for extra-territoriality, they operate to impose liabilities

under the law of Queensland enforceable by the appropriate remedies within that State. Thus for the ordinary succession duty in respect of the shares the executors might be sued in the Supreme Court of Queensland, if the requirements of the law of Queensland with respect to service of process could be fulfilled. The company in like manner could sue them in that Court to enforce the statutory indemnity and recover the duty paid by it to the commissioner in respect of the shares. If a winding up of any of the companies took place under the provisions of the Queensland *Companies Acts* relating to foreign companies, then, in the application of the Queensland assets, the statutory lien over the shares would be enforced.

In the States where the companies are incorporated and in that where the deceased was domiciled none of these liabilities may be recognized. Apart from any special provision in the companies' articles of association, it may be that the laws of those States do not allow the company to deduct the payments of duty made by it from the moneys otherwise due to the shareholder (*Indian and General Investment Trust Ltd.* v. *Borax Consolidated Ltd.* (1); *London and South American Investment Trust Ltd.* v. *British Tobacco Co. (Australia) Ltd.* (2)). Further, it may be that personal service of process issuing out of the Supreme Court of Queensland could not be effectively made upon the executors, whether the suit was by the Crown to enforce payment of the duty, or by a company to enforce the statutory indemnity (Cf. sec. 11 (1) of the *Service and Execution of Process Act* 1901-1931, but see *Luke* v. *Mayoh* (3)). But, assuming validity, the legislation produces under the law of Queensland the following situation:—The executors are liable for succession duty upon the aggregate amount of the deceased's Queensland property including the shares, less debts of the deceased owing to creditors residing in Queensland (sec. 12 (3) (*a*) of the Acts 1892 to 1931). If there be a net value which devolves on a successor, the successor is also liable for that duty. If it is not paid within six months, each company must pay the duty, differently computed, in respect of the shares, and in that case the company may recover it from the executors by deduction from moneys then or afterwards

(1) (1920) 1 K.B. 539. (2) (1927) 1 Ch. 107.
(3) (1921) 29 C.L.R. 435.

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becoming payable to them by the executors, or by process out of a Queensland court subject to complying with the requirements for service. The payment made by the company operates also in reduction of the duty for which the executors are liable.

The Commissioner of Taxation expressly abstained from impugning the validity of any of the material provisions of the Queensland or New South Wales enactments. It is easy to understand his reasons for taking this course, representing, as he does, the Crown in right of the Commonwealth. But it is a course which makes it necessary for the court to decide the matter not absolutely, but on an assumption. The correctness of the assumption that all these provisions are valid laws of Queensland is, no doubt, a matter of law, but it is not one which can or ought to be investigated and decided by the court unless it is raised and argued. The decision of the litigation between the parties should, we think, proceed upon a complete acceptance of the assumption and of all its consequences. This does not mean that we are bound to assume that the law of the States where the companies are incorporated recognizes the provisions of the Queensland Acts as sources of liability. But, in our opinion, a refusal on the part of those States to do so is not material to the question we are called upon to decide. We are applying an Act of the Commonwealth Parliament which gives a deduction in respect of payments of a particular description made in pursuance of State enactments. Whether the payments answer the description depends upon their legal nature. Their legal nature, if judged by the law of Victoria, which may fail to recognize any liability in the executors, may not appear the same as it does if judged by the law of Queensland, which treats the executors as under an immediate liability to the Crown and to the companies. In considering their legal nature for the purposes of Federal law, it is the law of the State under which they arise that must be regarded. Both on the terms of the definition of " debts " in sec. 3 of the *Estate Duty Assessment Act* and upon principle, the degree of recognition accorded in other States to the liabilities arising under valid laws of the State imposing the tax cannot affect the characteristics which may bring it within the Federal provision.

But the question whether the tax is a succession duty is not solved by attributing full effect to the Queensland provisions. Even so, there are features which are said to be inconsistent with that description. The direct liability upon the company is imposed without regard to the actual devolution of the shares. No doubt the beneficial interest in the shares must, on the shareholder's death, devolve on someone unless the shareholder was a trustee or in the administration of his estate the shares are applied in payment of his debts. Possibly sec. 4 of the Acts of 1892 to 1931 may, under sec. 1 of the Act of 1904, be read with sec. 11 so as to raise an implication against the imposition of duty when the deceased shareholder is merely a trustee. But, however this may be, the insolvency of the deceased shareholder's estate appears to be no answer to a claim upon a company for duty. Then the duty payable by the company differs in amount from ordinary succession duty, it is payable six months after death and it is a primary liability of the company. Notwithstanding these features, we think the payments should be held to come within the description " succession duty " used in the definition of " debts." The Queensland statute imposes two alternative liabilities which arise immediately on the shareholder's death. One, that imposed upon the personal representative, is, we think, plainly a succession duty. That imposed upon the company need not be discharged until a future time, namely, within six months, but its obligation attaches immediately on death. It is an evident substitute for the succession duty payable by the executors which the effective authority of the law of Queensland may fail to collect from them. Although the company is made directly liable to the Crown, every provision is made for the purpose of putting the incidence of the tax upon the estate. The difference in the calculation of the duties is to be accounted for by the nature of the difficulty which the imposition on the company is designed to meet. In the absence of information as to factors upon which ordinary succession duty would be computed, some arbitrary approximation must be adopted. Further, the territorial restrictions upon the legislative power, apart from considerations of fairness, made it desirable to calculate the duty only on so much of the value of the shares as might be regarded as corresponding to the Queensland assets. The

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fact that, to the extent we have indicated, the duty may fall where there is no actual succession is attributable to the necessity of adopting a fixed rule to overcome the territorial difficulties of ascertaining and enforcing the general liability of the executors. The company's liability need not be discharged if in the meantime the executors fulfil that imposed upon them, and, if afterwards, they come to pay ordinary succession duty, the amount already paid by the company is deducted. The payments by the executors to the companies in respect of the Queensland duty were made in compliance with Queensland law. It may well be that, from the point of view of Victorian law, they were voluntary, but this, for the reasons we have given, we regard as immaterial.

On the whole, we think the payments were in respect of a "succession duty under a State Act."

The New South Wales *Companies (Death Duties) Act* 1901 varies but little from sec. 11 of the Queensland Act of 1904. But the duty imposed by the *Stamp Duties Act* 1920 (N.S.W.), to which the special duty is alternative (See sec. 10 (1) (*b*) of the *Companies (Death Duties) Act*), is less plainly a succession duty than that imposed by the Queensland Acts 1892 to 1931. But we do not think there can be any doubt that the duty imposed by the Stamps Act comes within the meaning of the expression "probate and succession duties under any State Act" in the definition of debts. We do not regard the limitation of the companies affected to those carrying on particular industries as of any importance. The limitation suggests no more than that experience had disclosed a greater use in those industries than in others of companies incorporated outside New South Wales. Sec. 11A of the New South Wales Act applies the system to companies incorporated in that State having a share register elsewhere. In the present case one company by whom duty was paid fell within that provision. The deceased was registered on the branch register as a shareholder. We see in that no distinction bearing upon the nature of the tax as a succession duty. Nor does it appear to us material that the executors paid the duty to the company a day before the company paid it to the Crown. A beforehand payment to meet an actually accruing liability has the same effect for the purpose in hand as a payment after its accruing due.

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We think the payments under the New South Wales Act come within the definition of "debts."

We think the first question in the special case should be answered in favour of the taxpayer.

First question in case stated answered :—Yes. A deduction of the amounts mentioned in pars. 7, 9, 11, 12, and 13. Costs in the appeal.

Solicitors for the appellant, *Krcrouse, Oldham & Bloomfield.*

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

Solicitor for the State of Queensland, *H. J. H. Henchman*, Crown Solicitor for Queensland.

H. D. W.

Cons
John Kaldor Fabricmaker v Mitchell Cotts Freight (Aust) Pty Ltd 90 ALR 244

[HIGH COURT OF AUSTRALIA.]

McCLELLAND . . . . . APPELLANT;
DEFENDANT,

AND

TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED . . . . } RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 27, 29; *Sept.* 9.

Starke, Dixon, Evatt and McTiernan JJ.

Private International Law—Mortgage of land in New South Wales—Proper law—Mortgage executed in Victoria—Parties resident in Victoria—Statute of New South Wales abolishing personal covenant in mortgages—Action on covenant in Victoria—Moratorium Act 1930-1931 (*N.S.W.*) (*No.* 48 *of* 1930—*No.* 43 *of* 1931), *secs.* 11, 25.

A mortgage of land in New South Wales was given by a resident of Victoria to a company incorporated in Victoria. The instrument of mortgage was