[HIGH COURT OF AUSTRALIA.]

BAKEWELL . . . . . APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION (SOUTH AUSTRALIA) . RESPONDENT.

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ADELAIDE, 1936, *Sept.* 6, 7.

MELBOURNE, 1937, *Mar.* 23.

Latham C.J., Starke, Dixon, Evatt and McTiernan JJ.

Estate Duty (Cth.)—Assessment—Deductions—"Debts"—"Due and owing" at time of death—Deceased's covenant to pay annuity during life—Whether present value deductible—Beneficial interest in property—Annuity charged on future fund—Whether chargee's interest in fund liable to duty—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.

M. and his wife entered into a separation deed under which he covenanted to pay her £2,500 per annum, free of taxes. He was a partner in a trading firm. He charged the annual payments on his share of the profits of the firm, and his partners covenanted with the wife to pay the annuity out of that share. He also covenanted that, upon his ceasing to be a partner, he would pay to a trustee £40,000 out of any moneys received by him in respect of his share in the partnership. The trustee was to hold this sum of £40,000 upon trust to pay the annuity to the wife. The partnership continued till M.'s death. The surviving partners paid £57,738 to M.'s executors as purchase money of his share. The whole of this sum was included in an assessment of M.'s estate for purposes of Federal estate duty.

Held, by the whole court, that the present value of the annuity was not a debt or charge, and was not deductible as such in ascertaining the value of the estate for the purposes of the *Estate Duty Assessment Act* 1914-1928, but that there had been a good equitable assignment or charge of the share in the partnership as a fund out of the income of which the annuity was answerable, and, by *Starke, Dixon, Evatt* and *McTiernan* JJ. (*Latham* C.J. dissenting), that in respect of the £40,000 representing part of that share no new interest or

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property accrued to the annuitant on the death of M., and the sum of £40,000, less the present value of the deceased's reversionary interest therein, should be excluded in ascertaining the value of the estate for the purposes of estate duty.

In re Robertson, (1897) 18 L.R. (N.S.W.) 239; 14 W.N. (N.S.W.) 46, approved.

Equity Trustees Executors and Agency Co. Ltd. v. *Federal Commissioner of Taxation*, (1936) 55 C.L.R. 459, referred to.

CASE STATED.

On an appeal to the High Court by William Kenneth Bakewell, one of the executors and trustees of Clive Gordon Milne deceased, against an assessment of Federal estate duty, a case was stated for the opinion of the Full Court. The facts were agreed between the parties substantially as follows :—

1. Clive Gordon Milne, late of Adelaide in the State of South Australia, wine and spirit merchant, deceased, died on 12th March 1933. He is hereinafter referred to as " the deceased."

2. Probate of the will of the deceased was granted by the Supreme Court of South Australia on 8th May 1933 to the Executor Trustee and Agency Company of South Australia Limited of Grenfell Street Adelaide and William Kenneth Bakewell of Adelaide, solicitor, the executors and trustees therein named. William Kenneth Bakewell is the appellant herein.

3. The deceased was married to Mary Jessie Milne, who is still living. She was born on 8th December 1885.

4. On 3rd November 1927 Mary Jessie Milne filed a petition in the Supreme Court of South Australia in its matrimonial causes jurisdiction against the deceased as respondent, praying for a dissolution of her marriage with him. The deceased filed an answer to the petition. On 5th December 1928 the proceedings, being ready for trial, were compromised with the leave of the court upon the terms and conditions contained and set out in a memorandum dated 5th December 1928 filed in the court.

5. On 21st December 1928 pursuant to the terms of compromise the deceased of the first part and Mary Jessie Milne of the second part entered into a deed of separation in which George Milne of North Adelaide in the said State, Roy Melville Milne of Mount Lofty in the said State and the deceased, trading together as

Milne & Co., of the third part joined. Under this deed the deceased covenanted that during his wife's life, so long as she should be his wife or widow, he would pay her yearly an amount which, after deducting State and Federal income tax, would leave a clear sum of £2,500. He charged the yearly payments on his share of the profits of the partnership and covenanted that, on his ceasing to be a partner, he would, out of the moneys received by him from the firm, lodge with a trustee the sum of £40,000 upon trust to pay the income thereof, not exceeding £2,500 free of deductions, to her for life and subject thereto upon trust for himself. The deceased's partners also covenanted with his wife that at his request and with his authority, so long as he remained a partner in the firm and until the sum of £40,000 was settled, the firm would pay to the wife out of the deceased's share in the profits the annuity or so much thereof as should not be paid to her by the deceased himself.

6. On 5th February 1929 the deceased executed a deed of settlement with the Executor Trustee and Agency Co. of South Australia Ltd. Under this deed the deceased covenanted that, if and when he ceased to be a partner in the firm, he would pay to the trustee £40,000 out of the moneys received by him from the firm in respect of his share, to be held upon the trusts above stated.

7. From 1st August 1921 until his death the deceased was at all times a partner in the firm of Milne & Co. of Adelaide, wine and spirit merchants. The other partners in the said firm during the whole of that period were George Milne and Roy Melville Milne. The articles of partnership provided (*inter alia*) that the partnership should be determined by one of the partners giving notice to the others of his desire to determine ; that George Milne should have power to determine the partnership as regards any other partner ; that the partnership should determine on the deceased's death and that the continuing partners might, within three months, purchase his share at a valuation.

8. At the time of the death of the deceased no notice of determination had been given under the articles.

9. Shortly after the deceased's death his share in the business and assets of the firm was sold to George Milne and Roy Melville Milne for the sum of £57,738 9s. 8d., being the agreed value thereof.

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10. On 27th February 1934 the appellant as one of the executors of the will of the deceased declared a return under the *Estate Duty Assessment Act* 1914-1928 in respect of the estate of the deceased. The return was lodged with the Deputy Federal Commissioner at Adelaide on 28th February 1934.

11. On 2nd August 1935 the Deputy Commissioner of Taxation issued a notice of assessment of estate duty on the value of the estate of the deceased, accompanied by an estate-duty alteration sheet. In assessing the value of the deceased's estate, his interest in the partnership was put down at £57,738 9s. 8d.

12. On 30th August 1935 the appellant lodged with the Deputy Commissioner of Taxation at Adelaide (who is hereinafter referred to as "the respondent") a notice of objection to the assessment which stated:—(*a*) That the value placed upon the deceased's interest in the estate of Sir William Milne was excessive. (*b*) That the adopted value of the deceased's share and interest in the partnership was excessive. By reason of the deceased's covenant made in the deed of settlement pursuant to the deed of separation that the sum of £40,000 should be paid to the Executor Trustee and Agency Co. Ltd. when he ceased to be a partner, his share and interest stood charged with the payment of the sum of £40,000, and the true value at the time of his death was the sum of £17,738 9s. 8d. Alternatively, that the sum of £40,000 was a debt due and owing by the deceased to the Executor Trustee and Agency Co. of South Australia Ltd. at the date of his death and should be deducted from the gross value of the estate. (*c*) That the deputy commissioner wrongfully omitted to deduct the sum of £760 0s. 3d., which was a debt due and owing by the deceased at the time of his death to his wife, such sum representing the Federal income tax payable by her in respect of the period ending 30th June 1931 which the deceased was liable to pay to make up the clear yearly sum of £2,500. (*d*) That the deputy commissioner wrongfully omitted to deduct the sum of £29,900, being the sum of £55,980, the estimated present value of the liability of the deceased to his wife under the covenants contained in the deed of separation, less the sum of £40,000 charged upon the interest in "Milne & Co." plus the sum of £13,920, the estimated

value of the deceased's reversionary interest in such sum of £40,000, which sum of £29,900 was deductible (i.) as portion of a debt due and owing by the deceased at the time of his death, or, in the alternative, (ii.) as a charge upon the estate of the said deceased whereby its value was decreased. (*e*) In the alternative to reasons *b* and *d*, that the adopted value of the deceased's share and interest in the partnership was excessive for the reason that the deceased had during his lifetime by the deed of separation and deed of settlement charged his share of the profits of the firm with the payment to his wife of the yearly sum of £2,500 and had also charged his share and interest in the firm with the payment of the sum of £40,000 to be held upon the trusts of the deed of settlement, by reason whereof his share and interest in the firm was depreciated to the extent of his liabilities under the covenants of the deeds. For those reasons the true value of the share and interest at the time of the death of the deceased was the sum of £1,758 9s. 8d., being the sum of £57,738 9s. 8d. less the sum of £55,980, the estimated present value of the liability under the covenants, and the share should have been valued for the purposes of assessing such duty at the sum of £1,758 9s. 8d. and no more.

13. On 27th March 1936 the respondent issued a letter and a notice of amended assessment notifying the appellant that the original assessment had been altered by deducting the sum of £46 from the net value of the estate of the deceased previously assessed, as a result of the allowance of the appellant's contention contained in par. 12 (*a*) (*supra*) and that he disallowed the remainder of the claims.

14. On 15th May 1936 the respondent issued a further letter and notice of amended assessment notifying the appellant that the amended assessment had been altered by deducting from the net value of the estate of the deceased previously assessed the sum of £760, as a result of the allowance of the appellant's contention contained in par. 12 (*c*) (*supra*).

15. On 23rd April 1936 the appellant, being dissatisfied with the decision of the respondent on the appellant's objection, appealed to the High Court of Australia at Adelaide.

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

1. Whether the commissioner in arriving at the net assessable value of the estate of the above-named deceased for the purpose of assessing the estate duty payable in respect thereof should have allowed as a deduction an amount equal to the present value as at the time of the death of the deceased of the liability of the deceased his executors and his estate to Mary Jessie Milne to pay to her (pursuant to the covenants contained in the deed of separation dated 21st December 1928) the yearly sum of £2,500 on the ground that the same is deductible as (*a*) a debt due and owing by or a debt of the deceased at the time of his death, or (*b*) a charge upon the whole of the estate of the deceased at the time of his death, or (*c*) a charge upon the interest of the said deceased in the firm of Milne & Co. at the time of his death.
2. If yes to question 1, whether in arriving at the present value of such sum there should be taken into consideration (*a*) the sum of £2,500 per year only, or (*b*) such a sum as will leave a clear sum of £2,500 per year after deducting the income tax (both State and Federal) which it is estimated that the said Mary Jessie Milne will have to pay in respect thereof during the remainder of her life.
3. If no to question 1, whether the commissioner in arriving at the net assessable value of the said estate for the purpose of assessing the said duty should have allowed as a deduction the sum of £40,000 (i.) covenanted to be lodged with Executor Trustee and Agency Co. of South Australia Ltd. by the said deed of separation, (ii.) covenanted to be paid to the said company by the deed of settlement dated 5th February 1929, on the ground that the same is deductible (*a*) as a debt due and owing by or a debt of the deceased at the time of his death, or (*b*) as a charge upon his whole estate, or (*c*) as a charge upon his interest in Milne & Co., and should have included in the estate the value of the reversionary interest of the deceased in the said sum valued as at his death.

4. Whether the commissioner in arriving at the net assessable value of the said estate (i.) should have assessed the value of the deceased's interest in the firm of Milne & Co. as at £17,738 9s. 8d., being £57,738 9s. 8d. less the sum of £40,000 and should have included in the estate the value of the deceased's reversionary interest therein, or (ii.) should have assessed the value of the said interest at £57,738 9s. 8d. less the difference between £40,000 and the value of the deceased's reversionary interest as at his death in the sum of £40,000 ?

Ligertwood K.C. and *F. E. Piper*, for the appellant. Sec. 3 of the *Estate Duty Assessment Act* 1914-1928 defines " debts." This definition applies in interpreting the schedule to the *Estate Duty Act* 1914, which refers to the " total value of the estate, after deducting all debts." " All debts," in the schedule, includes all sums which were due at the testator's death or might become payable in discharge of any obligation imposed by law on the deceased during his lifetime (*Commissioner of Stamps (W.A.)* v. *West Australian Trustee Executor and Agency Co. Ltd.* (1)). This case was decided on the words " debts due " and applies *a fortiori* to the word " debts " in the *Estate Duty Act* (*Commissioner of Stamp Duties (N.S.W.)* v. *Permanent Trustee Co. of New South Wales Ltd.* (*Hill's Case*) (2)). The *Estate Duty Assessment Act* emphasizes the wide meaning of " debts " (See sec. 10). " Debts " includes every charge by which an estate is affected at death. A contrary argument will, no doubt, be founded on secs. 17 and 18 (*Equity Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (3)). The question in that case is similar to the present one. The definition in sec. 3 is not exhaustive, but merely includes certain duties as debts (Cf. *Hill's Case* (4) with *In the Will and Estate of Kininmonth* (5) ; *Mack* v. *Commissioner of Stamp Duties (N.S.W.)* (6)). Whether the debt for the payment of the annuity is contingent or not, it is deductible under the Federal legislation. It

(1) (1925) 36 C.L.R. 98, at pp. 102, 115, 117.
(2) (1933) 49 C.L.R. 293, at p. 300.
(3) (1936) 55 C.L.R. 459.
(4) (1933) 49 C.L.R. 293.
(5) (1897) 23 V.L.R. 134 ; 19 A.L.T. 17.
(6) (1920) 28 C.L.R. 373.

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is a debt, because it is payable under a covenant, and it is immaterial whether it is present, future or contingent. Therefore it comes within the taxing act, which is reinforced by sec. 10 of the assessment Act. Secs. 17 and 18 do not cut down the meaning of sec. 10 (*Equity Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1)). If it is not a debt (because contingent), it is a charge on the estate, because the executors cannot deal with the estate without providing for the annuity. Even if the annuity is not a debt, the £40,000 to be paid to the trustee under the deed of settlement is. If this is not a debt, it is a charge. As to the provision for the payment of income tax on the annuity, the only point is whether this can be valued at all (*Kininmonth's Case* (2)). The test is: What amount would have to be set aside by the executors to provide for the annuity? The difficulty of the estimation is immaterial (*Lord Advocate* v. *Pringle* (3); *Talbot* v. *Staniforth* (4)).

Mayo K.C. (with him *Brebner*), for the respondent. The duty payable is an estate duty charged *in globo* on the whole estate, subject to specified deductions, and is not a succession duty (See *Estate Duty Assessment Act* 1914-1928, secs. 8 (1), 17 and 18; *Estate Duty Act* 1914, sec. 3; *Elder's Trustee and Executor Co. Ltd.* v. *Deputy Federal Commissioner of Taxation* (5)). Therefore "debts" does not mean everything deductible before distribution to beneficiaries. Secs. 13 to 23 of the Assessment Act come under the heading "Assessments"; secs. 10 to 12, under "Returns." The headings of the Act are to be deemed part of the Act (*Acts Interpretation Act* 1901-1932, sec. 13; *Inglis* v. *Robertson* (6); *Saunders* v. *Borthistle* (7); *Metropolitan Gas Co.* v. *Federated Gas Employees' Industrial Union* (8)). Secs. 10 to 12 relate only to information to be contained in the returns (*Equity Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1). Sec. 15 raises no real difficulty. As to the meaning of "debts," sec. 17

(1) (1936) 55 C.L.R. 459.
(2) (1897) 23 V.L.R., at p. 142; 19 A.L.T., at p. 20.
(3) (1878) 5 Rettie 912; 15 Sc. L.R. 624.
(4) (1861) 1 John. & H. 484; 70 E.R. 837.
(5) (1934) 51 C.L.R. 694.
(6) (1898) A.C. 616, at p. 630.
(7) (1904) 1 C.L.R. 379, at p. 389.
(8) (1925) 35 C.L.R. 449, at p. 456.

is the section to look to, but, even if one has to go to sec. 10, the present claim for a deduction is not supported. The last words of sec. 10 show that " charges " are expected to be " debts," and sub-sec. 2 of sec. 10 is the only section that uses the word " charges " in relation to deductions. Only debts, which means liabilities at the date of death (though possibly payable in the future), and additional items contemplated by sec. 3 can be deducted. This is so even if sec. 10 applies. An annuity is not a debt. It is not a liability except contingently (*Hill's Case* (1); *In re Hargreaves*; *Dicks* v. *Hare* (2); *O'Driscoll* v. *Manchester Insurance Committee* (3); *Re Bacon*; *Grissell* v. *Leathes* (4); *In re Poyser*; *Landon* v. *Poyser* (5); *In re Robertson* (6); *H. J. Wigmore & Co. Ltd.* v. *Rundle* (7)). There can be no difference between the right to deduct an annuity secured by a charge and one not so secured. The notional value of an annuity is not a debt. There is no justification in the Act for the deduction of a notional amount; it contemplates the value of assets only, not of debts (See secs. 10 (2), 14, 15, 17, 18 and 19). *Clark Tait & Co.* v. *Federal Commissioner of Land Tax* (8) shows that, if there is no method provided for the deduction of an annuity, it cannot be deducted. No value can be attached to the probability of remarriage, nor to income tax. The annuity is a sum unascertained and unascertainable in advance; therefore no formula can be applied to it to ascertain a notional debt. [Counsel referred to *Harris* v. *Sydney Glass and Tile Co.* (9); *Deputy Federal Commissioner of Taxation* v. *Purcell* (10); *Brett* v. *Barr Smith* (11).] The only charge created is over the profits of the firm. The sum of £40,000 paid to trustees on the deceased's death was money belonging to the estate, part of the deceased's share in the partnership. If there were any charge, it was in favour of the deceased to protect his estate; there was no charge in favour of the annuitant. If there were a charge, it does not attach until the money reaches the executors. Nor is the £40,000

(1) (1933) 49 C.L.R. 293.
(2) (1890) 44 Ch. D. 236, at p. 241.
(3) (1915) 3 K.B. 499, at pp. 516, 517.
(4) (1893) 68 L.T. (N.S.) 522.
(5) (1910) 2 Ch. 444.
(6) (1897) 18 L.R. (N.S.W.) (L.) 239, at p. 244; 14 W.N. (N.S.W.), 46, at p. 47.
(7) (1930) 44 C.L.R. 222, at p. 229.
(8) (1929) 43 C.L.R. 1.
(9) (1904) 2 C.L.R. 227.
(10) (1921) 29 C.L.R. 464.
(11) (1919) 26 C.L.R. 87.

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a debt; it is money which is to be held for the settlor, and after his death the interest is to be paid to his widow. Sec. 8 (4) (*e*) shows that this is part of the deceased's property. If the deed of settlement creates a debt, it is a voluntary debt. There was no obligation to execute the settlement. If the settlement varies the deed of separation, the beneficiaries are not bound by the former, and, if the deduction is not justified by the latter, the former will not authorize it. [Counsel also referred to *Commissioner of Stamps (W.A.)* v. *West Australian Trustee Executor and Agency Co. Ltd.* (1).]

Ligertwood K.C., in reply. However difficult it may be, you must put a value on the annuity as best you can (*Victor* v. *Victor* (2)). The overriding scheme of the Act is to place a duty on the value of the estate in the hands of the testator.

Cur. adv. vult.

1937, Mar. 23. The following written judgments were delivered :—

LATHAM C.J. Clive Gordon Milne died on 12th March 1932. Questions arise as to the value of his estate for the purposes of the *Estate Duty Assessment Act* 1914-1928.

In 1927 divorce proceedings were taken against Milne by his wife and were compromised with the leave of the court. In pursuance of this compromise a deed of separation was executed on 21st December 1928 by the deceased, his wife, and two other persons, who, together with the deceased, constituted the firm of Milne & Co. The deed contained clauses under which husband and wife undertook not to molest each other. The wife undertook to maintain and educate the children and not to claim maintenance or alimony. Milne agreed to pay his wife, so long as she remained his wife or widow, by equal quarterly payments in advance, for the maintenance and support of herself and the children of the marriage, such a sum yearly as, after the deduction of State and Federal income tax, would leave a clear sum of £2,500 per annum. Milne covenanted that this annuity should be a first charge on his share in the profits of the firm. He also covenanted that, upon his ceasing for any reason whatsoever to be a partner in the firm, he would,

(1) (1926) 38 C.L.R. 63.

(2) (1912) 1 K.B. 247, at p. 251.

out of the moneys to be received by him from the firm, lodge with a trustee company the sum of £40,000. This sum was to be held by the company upon trust to invest and to pay the income up to £2,500 per annum, free of income tax, to Milne's wife during her life " with remainder " to Milne. It was provided that the income in excess of the amount of the annuity could be used for making good arrears in the annuity, and, subject to these provisions, the company was to hold the sum of £40,000 and the income thereof in trust for Milne. The partners entered into a covenant with the wife, at the request and with the authority of Milne, that, so long as he remained a partner in the firm, and until the sum of £40,000 was settled in accordance with the provisions before mentioned, the firm would pay to the wife out of Milne's share in the profits the annuity or so much as should not be paid to her by Milne himself. The deed also contained an irrevocable authority from Milne to his partners to make the payments of the annuity to the wife out of his share of the profits or other moneys belonging to him which were in their hands.

On 5th February 1929 Milne and the trustee company executed a deed under which Milne covenanted that he would, if and when he ceased to be a partner in the firm of Milne & Co., pay £40,000 to the company out of the moneys received by him from the firm in respect of his share in the firm, the said sum to be held upon the trusts mentioned in the deed of separation, which were the trusts to which I have already referred.

The partnership deed of the firm, dated 10th March 1922, provided that the partnership should be determined by notice of termination or by the death of a partner. It also contained a provision that, in the event of the determination of the partnership by notice or by the death of a partner, the remaining partners should be entitled to purchase the share of the deceased partner at a valuation. When Milne died his partners exercised this right and purchased his share for the sum of £57,738. The question is whether estate duty should be charged upon the said sum of £57,738, or whether, on the other hand, some and what deduction should be made by reason of the liability of Milne's executors to pay an annuity to the wife or to pay the sum of £40,000 to the trustee company upon the terms mentioned.

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The *Estate Duty Assessment Act* 1914-1928, sec. 17, provides that, for the purpose of assessing the value for duty of the estate of a deceased person, all debts due and owing by the deceased at the time of his death (together with certain taxes) shall be deducted from the gross value of the assessable estate, if the deceased, at the time of his death, was domiciled in Australia. Milne was so domiciled, and therefore all debts due and owing by him at the time of his death should be deducted from his estate in order to ascertain its value for duty.

It is clear that under this provision any quarterly payment which had become payable to the wife before Milne's death should be deducted. It is contended, however, that the executors were entitled to deduct the present value of the wife's right to the annuity. In my opinion the present value of the annuity cannot be described as either a debt due and owing by the deceased at the time of his death or as a debt of any description. The deceased did not at the time of his death owe this sum to any person nor did his executors owe it to any person. The obligation to pay the £2,500 a year is an obligation the result of which is to create a debt from quarter to quarter if the wife is alive on the relevant quarter day. The present value of the annuity is simply the result of calculating what such an annuity is worth to persons who buy or sell annuities. It cannot in any sense be described as a debt. If the wife were to die at any time no further moneys would become payable. The liability may, it is true, be described as a contingent debt, but the phrase " contingent debt " merely means the possibility of a debt. Until the possibility becomes an actuality there is no debt (See *Commissioner of Stamp Duties* (*N.S.W.*) v. *Permanent Trustee Co. of New South Wales Ltd.* (*Hill's Case* (1) ; *Barnett* v. *Eastman* (2))—a debt " must be *debitum*—that is, due. It must be a debt, the time for payment of which, although it is future, will certainly arrive." The debt may be *debitum in praesenti, solvendum in futuro,* but such a debt is to be distinguished from what can only be described as something which will probably or possibly ripen into a debt. This view is in accordance with the decision of the Full Court of the Supreme

(1) (1933) 49 C.L.R. 293.

(2) (1898) 67 L.J. Q.B. 517.

Court of New South Wales in *In re Robertson* (1), where the court said : " In the ordinary grammatical meaning of the words a future contingent liability is not ' a debt due and owing '—it not only is not due, but being contingent, never may become due." In my opinion the decision of the Full Court of Victoria in *In the Will and Estate of Kininmonth* (2), to the contrary effect, cannot be supported.

For the reasons given I am of opinion that the estimate of the value of the annuity or of the burden which the obligation to pay the annuity casts upon the estate cannot be regarded as a debt so as to be deducted for the purpose of ascertaining the value of the estate of the deceased for the purposes of the Act.

This conclusion renders it unnecessary to consider the questions asked by the case with respect to the effect upon the valuation of the annuity of the provision for payment of the annuity free from income tax.

The next question is whether in arriving at the net assessable value for the purpose of assessing estate duty the commissioner should have allowed the sum of £40,000 as a deduction, including, however, in the dutiable estate, the value of the reversionary interest of the deceased in the said sum of £40,000.

Estate duty is chargeable under sec. 8 of the Act. Under sec. 8 (3) estate duty is to be levied and paid upon the real and personal property belonging to a deceased person at the time of his death and also, under sec. 8 (4), upon certain property which is deemed for the purposes of the Act to be part of the estate of the deceased person.

The first question which arises therefore is : " What was the property of the deceased at the time of his death ? " This question must be considered in relation to his interest in the firm. As far as his other property was concerned, it cannot be said to have been diminished, as property, by the obligation resting upon the executors to pay the annuity. By the documents mentioned, Milne had charged the whole of his profits from the firm with the annuity, and had *pro tanto* diminished that part of his property, i.e., his interest in profits, during his lifetime. After his death his estate was not entitled to

(1) (1897) 18 L.R. (N.S.W.) (L.), at p. 244 ; 14 W.N. (N.S.W.), at p. 47.
(2) (1897) 23 V.L.R. 134 ; 19 A.L.T. 47.

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receive a share in the profits of the firm. But he had also covenanted that, whenever he ceased to be a partner, £40,000 out of any purchase money for his interest in the firm should be paid to the trustee company for the purpose of answering the annuity, with what is described in the deed as a remainder to himself. Upon his ceasing to be a partner by reason of his death this covenant became operative, and the £40,000 has been paid (as the court has been informed) to the trustee company. I agree with what my brother *Dixon* says as to this transaction constituting a good equitable assignment of the sum of £40,000 in such a way that the interest of the deceased is represented by the sum of money (£57,738) paid to his executors as the purchase money of his interest minus £40,000 and plus the value of Milne's interest, whatever that may be, "in remainder." In this case there was, as a result of the charge of the wife's annuity upon the sum of £40,000, a disposition of assets, of an interest in a specific future fund, and not merely the creation of a liability (See, per *Knox* C.J., *Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1)). Thus, I am of opinion that Milne's property at the time of his death consisted of all his assets diminished by this equitable assignment. Accordingly, if it were necessary to consider, for the purposes of the Act, only Milne's actual real or personal property (sec. 8 (3)) at the time of his death, that property should be regarded as so diminished in amount.

But certain other property is, for the purposes of this Act, to be deemed to be part of the estate of the deceased person (sec. 8 (4)). Included in this other property is that which is described by par. *e* of sub-sec. 4—"property . . . being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person."

By virtue of the agreements made between Milne and his wife and between Milne and the trustee company a beneficial interest in the income of the sum of £40,000 passed to his wife, and, for reasons which I state later, it passed on his decease. Sec. 8 (4) (*e*) is not applicable, however, unless that beneficial interest was a

(1) (1920) 28 C.L.R., at p. 380.

beneficial interest in property which Milne himself had at the time of his decease. If the effect of the agreement between Milne and the trustee company is merely to reduce rights which Mrs. Milne previously had and not to confer upon her any new right, then it cannot be said that the section applies. It is necessary, therefore, to examine the precise rights of Mrs. Milne before her husband's death and her rights after his death. Before his death the wife had a right under the personal covenant to be paid a clear £2,500 a year while she remained his wife or widow. This right was not affected by her husband's death. It is a personal right and does not constitute an interest in her husband's property. Further, the wife had, so long as her husband was a partner in the firm, a first charge on his share of the profits of the firm up to £2,500. This right ceased to exist when Milne ceased to be a partner by reason of his death and ceased to be entitled to any profits. It did not include any right with respect to her husband's interest in the capital of the firm, either upon purchase of her husband's share by his co-partners or upon realization of the assets of the firm. If he ceased to be a partner of the firm and if his partners bought his interest (as they in fact did) a new beneficial interest in property accrued to the wife. She then obtained a right to have a capital sum of £40,000 set aside out of the purchase price, with a further right to receive the income of that sum up to £2,500 a year. This is a right of property which she did not possess before. Her former right of a proprietary nature was a right to receive money out of profits. That right ceased upon her husband's ceasing to be a partner, and, in my opinion, completely new rights were substituted for it, namely, a right to have the purchase money for the deceased's interest in the firm (up to £40,000) held by a separate trustee, and a right to receive the income thereof up to £2,500 a year. This right cannot, it appears to me, be described as a limitation or diminution of her right to receive moneys out of the profits of the firm. It is a distinct and different right.

Can it be said that this right, newly acquired by the wife upon the death of her husband, is a beneficial interest in property which her husband had at the time of his decease ? Her husband at the time of his decease had various rights under the partnership deed.

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Some of these, such as a right to take part in the management of the business as defined in the deed, are irrelevant for this purpose. He did, however, have one right which appears to me to be very relevant, namely, a right (if he ceased to be a partner and his co-partners exercised their option to purchase) to require them to pay to him or to his personal representatives the value of his share in the partnership assets after valuation in accordance with the deed. He, therefore (apart from the deeds which he executed), had a right to receive, and to spend as he liked, the whole of the money paid as the purchase price. If he chose, he could invest the money and use the income as he pleased. It must be remembered that the right to receive the value of his share when the option was exercised is not limited to a right arising upon his death. If he had ceased to be a partner by giving a notice or by receiving a notice under certain provisions of the deed, the position would have been the same. If he ceases to be a partner by reason of death, then his executors have the right mentioned. What the agreements with his wife and the trustee company did was to remove the control of £40,000 (part of the price) from his executors to the trustee company and to transfer to his wife the right to receive the income of that £40,000 up to £2,500 per annum. This was a right which, apart from the agreements, belonged either to Milne or to his executors. In my opinion, therefore, the wife, by virtue of the agreements, obtained a beneficial interest in property, and that beneficial interest was an interest which her husband had at the time of his death.

This beneficial interest in property passed or accrued to the wife, in my opinion, " on or after the decease " of her husband. In fact it did so pass or accrue, but the words of the section should, I think, be construed to mean that the settlement or agreement in question must be so expressed as to provide that the decease of the person who owned the beneficial interest is the occasion of that interest passing or accruing to the other person (Cf. *Rosenthal* v. *Rosenthal* (1)). I think that the agreements made by Milne satisfy this requirement. The beneficial interest of the wife in the income of the sum of £40,000 arises under the separation deed " upon his ceasing for any reason whatsoever to be a partner in the said firm

(1) (1910) 11 C.L.R. 87, at pp. 93, 96.

of Milne & Co." Similar words are found in the agreement with the trustee company. Reference to the partnership deed shows that in the event of his death he ceases to be a partner. Thus, the agreements, in providing that the wife's interest arises when Milne ceases to be a partner, include the case of his decease. His decease constituted the fulfilment of a condition which brought about the result that the beneficial interest in the property in question passed or accrued to the wife. I am therefore of opinion that this interest passed or accrued " on or after the decease " of Milne within the meaning of sec. 8 (4) of the Act.

For these reasons I reach the conclusion that the sum of £40,000 is property within the meaning of sec. 8 (4) of the *Estate Duty Assessment Act* 1914-1928 which should be regarded as part of the estate for the purpose of assessing estate duty. The questions asked in the case should be answered in accordance with this view.

STARKE J. Case stated under the *Estate Duty Assessment Act* 1914-1928.

Clive Gordon Milne died in 1933, and his estate was assessed to duty under the foregoing Act. Until his death the deceased was a partner in a firm known as Milne & Co., but his death determined the partnership. The partnership deed provided that the remaining partners might purchase his share in the business and assets of the firm, as at the determination of the partnership, at a price agreed upon or fixed by valuation. The deceased's share was his proportion of the partnership assets when realized and converted into money, and after all partnership debts and liabilities were paid and discharged (See *Lindley* on *Partnership*, 7th ed. (1905), p. 377). But the remaining partners purchased his share for £57,738. The commissioner adopted this sum as the value of the deceased's share in the partnership business, and assessed his estate to duty in respect thereof. In 1928, however, a deed of separation had been entered into between the deceased and his wife. By this deed the deceased covenanted to pay his wife during her life and so long as she remained his wife or his widow the clear sum of £2,500 as an annuity for the maintenance and support of herself and her children. This annuity was made a first charge on the deceased's share of the profits of the

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partnership. The deceased also covenanted that upon his ceasing for any reason whatsoever to be a partner in the firm he would, out of the moneys received by him from the firm, lodge with the Executor Trustee and Agency Co. of South Australia Ltd. (called the trustee) the sum of £40,000 upon trust to invest, and pay the income to his wife during her life. But, if the income in any year exceeded the sum of £2,500, then the trustee, out of such excess, should make good to the wife any deficiency or accumulated deficiency in the annuity payable to her. And, subject as aforesaid, the sum of £40,000 and the income thereof was to be held upon trust for the deceased. By a separate deed entered into between the deceased and the trustee, the deceased covenanted with the trustee that he would, if and when he ceased to be a partner in the firm, pay to it out of moneys received by him from the firm in respect of his share in the firm, as and when received, the sum of £40,000. It was declared that the sum of £40,000 should be held upon trust to invest and to pay the whole income thereof to the wife of the deceased so long as she should be his wife or his widow, up to, but not exceeding, the clear sum of £2,500 as an annuity. The trustee might retain any portion of any surplus income to make up any deficiency in the wife's annuity. Subject as aforesaid, the trustee was to stand possessed of the trust fund and the income thereof upon trust for the deceased absolutely. The case does not state whether the sum of £40,000 was handed over to the trustee, but I understand that it was. The question is whether the value of this annuity of £2,500, or the settled fund of £40,000, or any part of it, should be deducted from the gross value of the assessable estate of the deceased.

The *Estate Duty Act* and the *Estate Duty Assessment Act* plainly direct that the debts of the deceased are to be deducted from the gross value of his assessable estate. I do not share the view that sec. 17 of the *Estate Duty Assessment Act* is an exhaustive statement of the debts that can be deducted in the case of domiciled persons. The section clearly does not cover the case of probate and succession duties, and the view mentioned naturally leaves the words "or other charges upon the estate," in sec. 10, almost meaningless (*Equity Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1)). But there remains for consideration the

(1) (1936) 55 C.L.R., at p. 467.

meaning of the word " debts " of the deceased. The words of the Act must be given their ordinary and natural signification, and decisions and opinions of judges upon the language of other Acts are an unsafe guide. The debts of a deceased certainly include all sums payable by him at future dates (*Master in Equity of the Supreme Court of Victoria* v. *Pearson* (1)). But sums which are only payable on the contingencies that a person lives and remains the wife or widow of a given person cannot, in the ordinary signification and use of the English language, be called debts, or even sums payable at a future time. It follows that the annuity of £2,500 given to the wife of the deceased cannot be deducted from his estate under the *Estate Duty Assessment Act* 1914-1928. Further, it cannot be regarded as a charge upon the estate, for it was only payable out of profits of the partnership so long as the deceased remained a member of the firm.

It was next contended that the sum of £40,000 which the deceased covenanted to pay to the trustee upon the trusts already mentioned should be deducted, either because it was a debt of the deceased, or because it did not form part of his property for the purposes of the *Estate Duty Assessment Act*. The obligation to provide this sum of £40,000 cannot be described as a debt of the deceased. But the question whether the sum should be included in the assessable value of the deceased's estate depends upon the effect of the covenants contained in the separation deed and the deed entered into with the trustee, and the following provision in sec. 8 (4) (*e*) of the Act: " Property . . . being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person, shall for the purposes of this Act be deemed to be part of the estate of the person so deceased." The covenants already mentioned are supported by valuable consideration, and are binding on the conscience of the covenantor. Do they so bind the subject matter of the contract as to amount to an equitable assignment or charge ? A valid assignment or charge of property or of a fund not yet in existence but to arise

(1) (1897) A.C. 214, at pp. 216, 217.

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thereafter may be made if the property or fund is of such a nature and "so described as to be capable of being ascertained and identified" when it comes into existence (*Rodick* v. *Gandell* (1); *Brice* v. *Bannister* (2); *Tailby* v. *Official Receiver* (3); *Palmer* v. *Carey* (4); *Lush, Husband and Wife*, 4th ed. (1933), pp. 459 et seq). Any words which show a clear and definite intention of assigning or charging property or a chose in action for valuable consideration in favour of another constitute an equitable assignment (*William Brandt's Sons & Co.* v. *Dunlop Rubber Co.* (5)). Now the fund out of which the £40,000 was to be provided was capable, when it came into existence, of being ascertained and identified. There was a covenant to pay £40,000 out of that fund to the trustee, and there was a creation of trusts in relation to that sum. It is thus a plain case of an equitable assignment or charge. But, subject to the provision in favour of the wife, the covenantor retained a beneficial interest for himself, and that interest, at all events, must come into the assessment of his estate for the purposes of estate duty. It is contended, however, that the beneficial interest of the wife in the fund must be deemed part of the deceased's estate by force of sec. 8 (4) (*e*) of the *Estate Duty Assessment Act*. But the separation deed and the deed made with the trustee completely defined the rights of the parties in the fund, and, as soon as it came into existence, the assignee or chargee took precisely the same right and interest in it as if it had actually belonged to the assignor or had been within his disposition and control at the time the contract was made. The deceased was given, and had, no beneficial interest in the fund, to the extent of the provision made for the wife. It is true that the fund out of which the £40,000 was to be provided came into existence after the determination of the partnership on the death of the deceased. But the assignee's rights were referable to the contract, which operated as an assignment or charge, and gave a good title so soon as the fund came into existence. No beneficial interest passed to the wife from the deceased on or after his decease; but, so soon as the fund came into existence, equity, treating as done that which ought to be done, fastened upon the

(1) (1852) 1 DeG. M. & G. 763; 42 E.R. 749.
(2) (1878) 3 Q.B.D. 569.
(3) (1888) 13 App. Cas. 523.
(4) (1926) A.C. 703.
(5) (1905) A.C. 454, at p. 462.

fund and the contract, and the assignment thus became complete (*Collyer* v. *Isaacs* (1)). The provisions of sec. 8 (4) (*e*) of the Act therefore have no relevance to this case.

The result, in my opinion, is that the first question stated for the opinion of this court should be answered in the negative, and the third and fourth questions answered to the effect that a deduction should be allowed in respect of the sum of £40,000, to the extent of the value of the beneficial interest of the wife of the deceased in that sum arising from the gift of the income thereof to her.

DIXON AND EVATT JJ. The deceased was a member of a partnership carrying on a commercial business. The articles contained a provision that the partnership should determine on his death and that the continuing partners might within three months purchase his share at a valuation.

Some years before his death he and his wife entered into a deed of separation. Under the deed he covenanted that during her life, so long as she should be his wife or widow, he would pay her yearly an amount which after deducting State and Federal income tax would leave a clear sum of £2,500. He charged the yearly payments on his share of the profits of the partnership and covenanted that on his ceasing to be a partner he would, out of the moneys received by him from the firm, lodge with a trustee the sum of £40,000 upon trust to pay the income thereof, not exceeding £2,500 free of deductions, to her for life and subject thereto upon trust for him. By an indenture made between the deceased and the trustee six weeks later, he covenanted with the trustee that if and when he ceased to be a partner in the firm he would pay to the trustee the sum of £40,000 out of the moneys received by him from the firm in respect of his share. A clause provided that it was to be held upon the trusts already stated, namely, to pay the income, not exceeding £2,500 per annum free of deductions, to her for life so long as she should be his wife or widow and, subject thereto, to hold the fund upon trust for him absolutely. The partnership remained on foot and the annuity was paid until the deceased's death, which occurred on 12th March 1933. He was survived by his wife. The continuing

(1) (1881) 19 Ch. D. 342, at p. 351.

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partners elected to purchase the deceased's share, and it was valued for the purpose of the purchase at £57,738.

In the assessment of the value of the deceased's estate for the purpose of Federal estate duty his interest in the partnership was put down at that sum. No reduction was made in the amount in respect of the £40,000 payable thereout to the trustee under the deed of separation and the subsequent indenture. Nor was it, or any part of it, included among the deductions; and no deduction was allowed in respect of future payments of the annuity. The assessment was based on the view that the existence of the widow's rights in respect of the annuity and of the £40,000 by which it was secured could not operate to diminish the value of the estate for duty.

The correctness of this view is the question for decision.

In dealing with this question the first step is to define the personal liabilities arising under the covenants the effect of which we have briefly stated, and to determine whether they contained anything amounting to an assignment or alienation of property which otherwise would form part of the deceased's estate. In our opinion they imposed upon the deceased a personal obligation binding his legal personal representatives to pay to his wife, until her death or remarriage, an annual sum sufficient after the deduction therefrom of income tax to provide £2,500. They also imposed upon the deceased a second personal obligation binding his legal personal representatives. The tenor of this obligation, in the events that have happened, was to pay after his death to the trustee a sum of £40,000 out of the moneys received for his share of the partnership assets. But the covenant or covenants giving rise to this obligation had a further operation. They operate as an equitable assignment of property. The covenant in the deed of separation was not voluntary but for consideration. It was followed by the indenture which carried it into further execution. It forms part of a contract which courts of equity would specifically enforce (*Wilson* v. *Wilson* (1)). There is a definite fund, even if it be considered not a present but a future fund—the share of the deceased on dissolution. A specific sum is to be paid thereout. Nothing further is needed to create an equitable assignment of that sum, a charge of that sum upon the fund.

(1) (1848) 1 H.L.C. 528; 9 E.R. 870.

But the charge or assignment cannot be regarded as something distinct and separate from the personal obligation devolving on the executors to pay the £40,000 out of the fund. That is only the common-law liability correlative with the equitable interest in the fund which the covenant gives. It serves to support the equitable interest and amplify it with a legal remedy. The consequence of the equitable assignment was, in our opinion, that at the death of the deceased, to the extent of £40,000, his interest in the partnership did not form part of his estate. But, unless his share of the partnership had proved insufficient to provide the £40,000, his estate could not also be regarded as subject to a liability in respect of the £40,000 for which a deduction could be claimed. The assignment of £40,000 necessarily affected the personal liability of the deceased which devolved on his executors to pay an annuity producing, after the deduction of income tax, a yearly sum of £2,500. For the income of that sum is to be paid to the annuitant in discharge *pro tanto* of the annuity. The personal liability thus becomes an obligation to pay out of the general assets the difference between the sum in fact obtained from the income of the £40,000 and the full amount of the annuity.

The question how far these burdens upon the deceased's estate result in diminishing its value for Federal estate duty depends on the very difficult provisions of the *Estate Duty Assessment Act* 1914-1928.

In *Equity Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1) it was decided that probate and succession duties payable under a State Act were allowable deductions because the artificial definition of " debts " in sec. 3 included them, and the word bore its defined meaning in sec. 10, which requires the executor to " set forth in detail all the debts and other charges upon the estate," and in the schedule to the *Estate Duty Act* 1914, which graduates the rate of duty according to " the total value of the estate after deducting all debts." Secs. 10 and 15 of the assessment act and the schedule of the duty Act, together with the definition of " debts," appeared to imply that a deduction of " debts " in the defined sense was authorized. The specific provisions contained in secs. 17 and 18 as to the deduction of debts

(1) (1936) 55 C.L.R. 459.

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were not considered to exclude an allowance on account of State probate and succession duties which, otherwise, would be impliedly authorized under the earlier sections. It is true that sec. 17 confined the deduction of debts for which it provides to " debts due and owing by the deceased at the time of his death." In our joint judgment we treated the proposition as undeniable, that the probate and succession duties payable under State law on the deceased's estate could not be debts due and owing by him at the time of his death. But we thought that what it showed was that in sec. 17 the word " debts " did not bear its defined meaning, a view which we took also of the use of the word in sec. 18. We considered that these sections were confined to debts in the ordinary or proper sense, and accordingly, if the statement they contained of the conditions under which debts should be deducted was intended to be exhaustive, that it was exhaustive in relation only to the subject matter with which the sections dealt and that subject matter did not extend to probate and succession duties. Thus, in our opinion, neither of the sections was inconsistent with the authority which otherwise we found implied in the legislation to deduct those duties when payable under State law. The effect of the material part of our reasoning may be expressed in two steps. The provisions contained in secs. 10 to 15 of the assessment Act coupled with the schedule to the taxing Act, if considered apart from secs. 17 and 18, appeared to us impliedly to authorize a deduction of " debts," in the defined meaning, and of other charges upon the estate. Then, turning to secs. 17 and 18, we were content to suppose that they did state the only conditions in which a deduction of debts should be allowable, because we thought that their operation was confined to debts in the natural as distinguished from the defined meaning of that expression. We said :—" 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 " (*Equity Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1)). For the purpose of that case it was enough that an intention appeared in other parts of the legislation to authorize a deduction of debts,

(1) (1936) 55 C.L.R. at p. 474.

including probate and succession duties, and of other charges on the estate, and that secs. 17 and 18 contained nothing to impair or restrict the intended authorization in relation to probate and succession duties. Accordingly, we did not decide whether these sections do contain an exhaustive statement of the conditions in which debts proper may be deducted, so as to restrict the generality of intention elsewhere implied to allow their deduction. But in the present case this question must be determined. For the claim to deduct the present value of the annuity as a debt depends upon it.

In our opinion secs. 17 and 18 do exhaustively state what debts may be deducted in computing the value of estates for duty. It is manifestly so in the case of sec. 18 ; for its main purpose is to confine the deduction, when a deceased person is domiciled out of Australia, to debts owing to persons here resident, to debts payable here, and to debts charged on property situate here. Sec. 17, on the other hand, means to give a deduction which is independent of the locality of the debt or any other territorial consideration. But we think its explicit limitation to debts due and owing by the deceased at the time of his death necessarily implies that debts falling outside the limitation shall not be deductible. It follows that a debt cannot be deducted unless it was " due and owing by the deceased at the time of his death."

There is a further consequence which affects the operation, or possible operation, of the words contained in sec. 10, " other charges upon the estate." It is not easy to say what these words may comprehend. They appear at least to cover claims upon the estate analogous to debts, as, for instance, equitable obligations to make payments in money. But, whatever otherwise might be their extent, we think it is a necessary consequence of sec. 17 that no deduction can be made under them of pecuniary liabilities of the deceased which at the time of his death were not " due and owing " and for that reason are excluded from the deduction expressly authorized by sec. 17. The condition described by the words " due and owing at the time of his death " is certainly not fulfilled by the liability of the deceased, which devolved on his executors, to pay out of his general estate the difference between the income produced by the £40,000 and the full amount of the annuity. The liability for each

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future payment is dependent upon the widow's then living. At the time of the deceased's death, it could not be foretold with certainty that even one payment would fall due. The liability was altogether contingent. The values of life annuities are, of course, regularly ascertained by computations based on tables of mortality. But in every case the length of the annuitant's life is fixed for the purpose according to " the laws of probability, so true in general, so fallacious in particular," as *Gibbon* expresses it. In every particular case the contingency remains completely uncertain. " Due and owing " does not necessarily mean due and payable (*Mack* v. *Commissioner of Stamp Duties* (*N.S.W.*) (1)). But the expression does require that an obligation to pay shall have accrued. It cannot include a liability to pay if and when a future uncertain event occurs. In *In re Robertson* (2) the Supreme Court of New South Wales decided that the capitalized value of an annuity payable under a covenant was not a debt due and owing, because not only was it not true of the capitalized amount, or of the future payments it represented, that they were due, but they might never become due. This decision was, we think, clearly right.

We turn to the sum of £40,000 payable out of the deceased's share in the partnership. Quite different considerations affect the inclusion of this sum in the value of the estate for duty. As we have already said, it was, in our opinion, effectually assigned upon the trusts expressed in the indenture and in the deed of separation. We do not think that the full share of the deceased in the partnership formed part of the property of the deceased falling within sec. 8 (3) of the Assessment Act. To the extent to which it was diminished by the assignment it was not his property. It is the primary source for the payment of the annuity and is not a mere security for the performance of the personal covenant. But the assignment was to trustees, and, under the trusts upon which they are to hold, the deceased took subject to the application of the income in satisfaction or part satisfaction of his widow's annuity. This interest did, of course, form part of his property.

The question remains whether the interest of the widow under the trusts upon which the £40,000 was assigned is made dutiable under

(1) (1920) 28 C.L.R. 373.
(2) (1897) 18 L.R. (N.S.W.) (L.) 239; 14 W.N. (N.S.W.) 46.

sec. 8 (4) of the Assessment Act. The relevant paragraph of that sub-section is par. *e*. It provides that property, being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person, shall for the purposes of the Act be deemed to be part of the estate of that person so deceased. Now, if the sum of £40,000 be considered entirely free of the annuity up to the time of the deceased's death, then upon that assumption we should think that its assignment would fall within this provision. The assignment was to take effect on the deceased's ceasing to be a partner. Any mode of dissolution would satisfy the condition; but that which took place was by death. The words "passing on death" are wide and include a change of title to a beneficial interest taking place on death (*Adamson* v. *Attorney-General* (1)). The beneficial interest of the widow in the sum would, therefore, pass or accrue to her on the death of the deceased. The instruments by virtue of which this took place fall under the description "agreement," even if they do not come within the statutory definition of "settlement" contained in sec. 3. And we see no reason why so much of them as assigns the £40,000 and declares the trusts on which it is to be held does not come within that definition. But all this is on the assumption that up to the deceased's death the £40,000 had not been subject to the annuity. It is, however, at this point that the greatest difficulty of the case is encountered. Par. *e* of sec. 8 (4) does not apply except when a beneficial interest passes, accrues or devolves which the deceased had at his decease. The beneficial interest which the instruments confer on the widow is a right to the income during her life or widowhood up to the amount of her annuity. Did this beneficial interest really pass from the deceased on his death? Up to dissolution the annuity stood charged on the whole of the deceased's share in the profits of the partnership. The deed of separation made the annuity a first charge upon the profits so long as the partnership continued, and even after dissolution, if the business should be carried on for purposes of winding up. The charge was supported by a covenant

(1) (1933) A.C. 257, at p. 267.

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on the part of the other members of the firm that they would, out of the deceased's share of the profits, pay the annuity or so much of it as should not be paid by the deceased. The effect of the charge was to give to the annuitant a then present interest in the deceased's share of profits. The form of the covenants of the deceased and of his co-partners made the profits the primary, or at least the prima facie, source of the annuity. For not only is it a first charge, but it must be paid thereout except to the extent the deceased might pay it. There was thus an appropriation of the income of the deceased's share in the partnership to answer the annuity. It operated as a diminution *pro tanto* of his beneficial interest in that income. The relation between this diminution of his interest in the profits during his life, on the one hand, and, on the other hand, the beneficial interest in the £40,000 after his death taken by his widow, is better seen, if the nature of the deceased's share in the partnership is considered. His share in the partnership consisted, not of a title to specific property, but of a right to his proportion of the surplus after the realization of the assets and payment of the debts and liabilities of the partnership (*Darby* v. *Darby* (1); *In re Ritson*; *Ritson* v. *Ritson* (2); *Forbes* v. *Steven*; *MacKenzie* v. *Forbes* (3); *Attorney-General* v. *Hubbuck* (4); *Rodriguez* v. *Speyer Bros.* (5)). His, or his executors', right to have the assets applied in the payment of debts, to have the surplus ascertained and to receive his share out of it, came to an end when the partners who survived him elected to purchase his share. It was converted into a right to receive the price (*Ewing* v. *Ewing* (6)). But, although his rights underwent a change of form, no new beneficial interest came into existence. The share in the partnership in which he was beneficially interested was transformed into a fund arising from its purchase. The deceased had made a disposition of the income of the share to the extent of the annuity. The fund, he had disposed of by appropriating the income of £40,000 thereof to answer the annuity. Does the change from the one to the other involve a passing or accrual to his widow of a beneficial interest in property which

(1) (1856) 3 Drew. 495, at pp. 503, 504; 61 E.R. 992, at p. 995.
(2) (1898) 1 Ch. 667; (1899) 1 Ch. 128.
(3) (1870) L.R. 10 Eq. 178.
(4) (1884) 13 Q.B.D. 275.
(5) (1919) A.C. 59, at p. 68.
(6) (1882) 8 App. Cas. 822, at p. 826.

he had at the time of his death ? In our opinion it does not. Under the instruments the effect produced by his death upon his beneficial interest appears to us to have been to restrict, and not to increase, the amount of the income appropriated to provide the annuity. The annuity before his death was a first charge upon the income of his entire share. After his death the annuity became answerable out of the income of part only of the fund into which that share was converted. If it proved insufficient, the balance of the annuity depended on personal obligation only. The fund arising from the purchase of the deceased's share by his partners and the share itself constitute one corpus. The profits of the partnership and the interest earned by the fund represent the income of that corpus. The fact that at one stage the assets representing it were held by the firm, and at another stage some of them became vested in trustees, does not in itself affect the beneficial interest in the corpus. Whether it was affected must depend upon the equitable rights existing at the respective stages. To the extent of the yearly payments of the annuity, the deceased disposed of the income of the corpus during the continuance of the partnership, that is, in the event, until his death. In our opinion no new or increased disposition of his beneficial interest in the income took effect on that event. As for his beneficial interest in the corpus itself, of that he made no disposition at all. Subject to the annuity, he remained entitled to the full beneficial interest. The burden of the annuity on the income continued, but was restricted to the income of £40,000 thereof. Thus, no beneficial interest which the deceased had at the time of his death passed or accrued to his widow by virtue of the instruments on or after his death, and no such interest devolved upon her on or after that event.

Our conclusion is that the widow's beneficial right in the income of the sum of £40,000 should be excluded in ascertaining the value of the estate duty, but that otherwise no deduction is allowable on account of the annuity. If the income produced by the sum of £40,000 could exceed the yearly payments of the annuity, it might be necessary to consider the question how the difference between the net £2,500 and the gross amount which would produce it, after deducting income tax, should be dealt with. But it is so unlikely

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that enough income will be produced by the fund to keep down the annuity, that we do not think the question calls for decision.

Of the questions contained in the case stated, that numbered 4 (ii.) appears to cover the exclusion from the assessment of the widow's interest in the income of the £40,000. We think that question should be answered: Yes. The first question should be answered: No. The remaining questions need not be answered.

McTIERNAN J. I agree with the judgment of my brothers *Dixon* and *Evatt*.

Question 1 *in the case stated answered: No. Question* 4 (*ii.*) *answered: Yes. Remaining questions not answered. Costs of case stated costs in the cause.*

Solicitors for the appellant, *Piper Bakewell & Piper.*

Solicitor for the respondent, *W. H. Sharwood*, Crown Solicitor for the Commonwealth, by *Fisher, Powers, Jeffries & Brebner.*

C. C. B.