[HIGH COURT OF AUSTRALIA.]

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

AND

BRASCH . . . . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, 1936, *Dec.* 1.

MELBOURNE, 1937, *Mar.* 8.

Latham C.J., Rich, Dixon, and McTiernan JJ.

Death Duty (N.S.W.)—Final balance of estate—Onerous lease—Future rent—Allowance —"Debts actually due and owing"—Contingent debts—Rent paid within three years after death of deceased—Refund of duty—Stamp Duties Act 1920-1933 *(N.S.W.) (No.* 47 *of* 1920—*No.* 12 *of* 1933), *sec.* 107 (1), (2) (*d*), (3).

By sec. 107 (1) of the *Stamp Duties Act* 1920-1933 (N.S.W.), "in computing the final balance of the estate of a deceased person an allowance shall . . . be made for all debts actually due and owing by him at the time of his death." By sub-sec. 2 of that section, "no allowance shall be made . . . (*d*) for contingent debts." By sub-sec. 3, if any debt disallowed by reason of sub-sec. 2 (*d*) becomes actually payable within three years after the death of the deceased an allowance shall be made therefor and a refund of any death duty paid in excess shall be made to the person entitled thereto.

In computing the final balance of an estate the Commissioner of Stamp Duties, dealing with two leasehold properties in respect of which the deceased had covenanted to pay rent, assessed the value of one and deducted therefrom an estimated liability arising out of the other to the estate. Subsequently, the commissioner amended his assessment and fixed the value of the onerous leasehold at nil and death duty was paid accordingly. No allowance was made in respect of the onerous lease, on the ground that any liability to the estate was not a debt actually due and owing and that it was a contingent debt. Within three

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years of the death of the deceased the estate suffered a loss in respect of the onerous lease and the executor claimed an allowance for the loss and a refund of the excess duty paid.

Held that the liability under the onerous lease to pay future rent was a contingent debt within sec. 107 (2) (*d*) of the *Stamp Duties Act* 1920-1933 (N.S.W.), and was not a debt "due and owing" within sec. 107 (1), but inasmuch as the contingent debt became actually payable within three years after the death of the deceased the executor was entitled under sec. 107 (3) to a refund of the excess duty paid.

Per Rich, Dixon and *McTiernan* JJ.: The executor was entitled to a refund of the death duty referable to so much of the assets of the deceased as had been applied to paying the deficiency in the rent accruing during the three years after appropriation to its payment of the net returns from the land.

Decision of the Supreme Court of New South Wales (Full Court): *Brasch* v. *Commissioner of Stamp Duties*, (1936) 36 S.R. (N.S.W.) 401; 53 W.N. (N.S.W.) 166, affirmed.

APPEAL from the Supreme Court of New South Wales.

An action was brought in the Supreme Court of New South Wales for a refund under sec. 107 (3) of the *Stamp Duties Act* 1920-1933 (N.S.W.) of death duty paid by the plaintiff, Henry Moss Brasch, as executor of Reuben David Brasch, deceased, to the defendant, the Commissioner of Stamp Duties for New South Wales. By the consent of the parties, and pursuant to an order made by the Supreme Court under sec. 55 of the *Common Law Procedure Act* 1899 (N.S.W.), a case, which was substantially as follows, was stated for the opinion of that court without any pleadings:—

1. On 28th April 1932 Reuben David Brasch died having by his will appointed the plaintiff his executor, to whom probate was granted by this honourable court on 12th September 1932.

2. At the date of his death the deceased was the lessee under two leases, namely: (*a*) a lease of premises at the corner of Oxford Street and Wentworth Avenue which was shown in a schedule to the stamp affidavit as being of the value of £14,950; (*b*) a lease of premises known as numbers 4 and 6 Wentworth Avenue, Sydney, which was shown in that schedule as being of no value and on the contrary as involving an estimated liability on the part of the estate of £12,367. Each of those leases had a period of eight years and eight months to run at the date of testator's death.

3. The stamp affidavit filed in connection with the estate showed, *inter alia*, amongst deceased's assets "landed property held under lease—£2,583," this being the balance arrived at after setting off the estimated liability of £12,367 in respect of the leasehold property in Wentworth Avenue, Sydney, against the estimated value of the leasehold property at the corner of Oxford Street and Wentworth Avenue, Sydney, namely, the sum of £14,950.

4. The death duty originally paid in respect of the estate was £17,580 6s. 3d., the date of payment being 26th October 1932. In arriving at this sum the value of the leasehold property "*a*" at the corner of Oxford Street and Wentworth Avenue was fixed at £19,000 and the deduction of £12,367 claimed in respect of the other leasehold property "*b*" was allowed.

5. Subsequently the question of death duty was reopened and the defendant called upon the plaintiff to pay a further sum of £4,054 10s. 10d. in respect thereof. This further sum was paid by the plaintiff on 13th February 1934.

6. In connection with the assessment of this additional duty a reduction to £16,500 in respect of the assessed annual value of property "*a*" referred to in par. 2 hereof was allowed, but the deduction in respect of property "*b*" referred to in that paragraph was considered to have been wrongly allowed, and was disallowed by the then commissioner, by reason of the provisions of sec. 107 sub-secs. 1 and 2 (*d*) of the *Stamp Duties Act* 1920, on the ground that the amount in respect of which the deduction was sought was not a debt actually due and owing by the testator at the time of his death in respect of which an allowance could be made under the provisions of the Act and on the ground that the amount was a debt which par. *d* of sub-sec. 2 of sec. 107 prohibited from being allowed.

7. Death duty was assessed and paid at twenty-three and two-fifths per cent.

8. A true copy of the lease of the property in Wentworth Avenue is hereunto annexed.

9. During the three years next succeeding the death of Reuben David Brasch deceased a loss was incurred by the estate in respect of the leasehold "*b*" in Wentworth Avenue amounting to £4,184 16s. 9d.

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10. The sums constituting that loss became actually payable during the said period of three years under and by virtue of the provisions of the lease.

11. The plaintiff claimed that he was entitled to a refund of death duty which he alleged he has paid in excess by reason of the loss sustained by the estate on property "*b*" during the three-year period in question.

The questions for the opinion of the court were :—

1. Was the loss a debt actually due and owing by the testator at the time of his death within the meaning of sec. 107 (1) of the *Stamp Duties Act* 1920 ?
2. Whether on the facts set forth in the special case the plaintiff was entitled to a refund of portion of the death duty paid by him ?

It was agreed between the parties that if the second question was answered in the affirmative judgment was to be entered for the plaintiff in the sum of £1,857 7s. 11d. with costs on the highest scale, but if the question was answered in the negative judgment was to be entered for the defendant with costs on the highest scale.

In the Supreme Court the argument of counsel for both parties proceeded upon the assumption, which it was agreed the court should accept, that the original deduction accepted by the commissioner and subsequently disallowed represented the estimated total residual liability in respect of rent, rates, taxes, repairs and other outgoings under the covenants in the lease after taking into account all probable receipts from the property. The amount of the refund claimed, namely, £1,857 7s. 11d., was the actual excess of liability after making allowance for rents and other moneys recovered by the plaintiff during the period of three years next succeeding the death of Reuben David Brasch.

The Supreme Court answered question 1 : No., and question 2 : Yes. Judgment was entered for the plaintiff in the sum of £1,857 7s. 11d. with costs on the highest scale : *Brasch* v. *Commissioner of Stamp Duties* (1).

From that decision the defendant appealed to the High Court.

(1) (1936) 36 S.R. (N.S.W.) 401 ; 53 W.N. (N.S.W.) 166.

Weston K.C. (with him *Henry*), for the appellant. Generally, the position is that if, in arriving at the total value of the estate, the interest of the testator in a leasehold property has been valued at nil, and if in arriving at that value regard has been had to the amount of the head rent payable by the testator, a refund can be obtained subsequently under sec. 107 (3) of the *Stamp Duties Act* 1920-1933 upon the basis of the contingent debt becoming actually payable within three years after the death of the testator.

[DIXON J. referred to *In re Midland Coal, Coke and Iron Co.*; *Craig's Claim* (1), *In re New Oriental Bank Corporation* [*No.* 2] (2) and *In re Panther Lead Co.* (3).

[RICH J. referred to *In re the Sydney Land Bank and Financial Co.* (4).]

Sec. 107 relates primarily to debts the existence of which did not necessarily enter into the computation of the value of the testator's estate, and only allows deductions for debts actually due and owing at the time of death. Sub-sec. 2 of sec. 107 engrafts on sub-sec. 1 four exceptions. Sub-sec. 2 (*d*) only permits the deduction of contingent debts if those were debts clearly due and owing at the time of death (*Commissioner of Stamp Duties* (*N.S.W.*) v. *Permanent Trustee Co. of New South Wales Ltd.* (*Hill's Case*) (5)). If that be the construction of sub-sec. 2 (*d*), then sub-sec. 2 (*c*) cannot operate as to a date merely contingent at the time of death. The expression " contingent debts " in sub-sec. 2 (*d*) bears the meaning that they are contingent as to amount. It is significant that sub-sec. 2 is framed in terms of disallowance and not of allowance, that is, of exclusion and not of inclusion, and refers not to debts generally but to " such " debts, that is, debts of the description referred to in sub-sec. 1. On this construction of sub-sec. 2, the operation of sub-sec. 3 is obviously limited. Sub-sec. 3 does not deal with the language or reason assigned when a debt is disallowed, but deals with a particular practical fact. That sub-section is not of general application but applies only in respect of debts not allowed by reason of the provisions of sub-sec. 2 (*d*). Sec. 107 only relates to a case where the assets which a person was possessed of at the time of his death

(1) (1895) 1 Ch. 267.
(2) (1895) 1 Ch. 753.
(3) (1896) 1 Ch. 978.
(4) (1896) 7 B.C. (N.S.W.) 29.
(5) (1933) 49 C.L.R. 293, at pp. 298-301.

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would have been diminished by payment of duty and that has been ignored. It is restricted to debts the incidence of which does not necessarily enter into the value of the assets of the deceased person. There has not been a disallowance in the relevant sense that the head rent has in fact been taken into account on the contra side of the account. Sub-sec. 2 (*c*) predicates a disallowance of the debt; that means a disallowance in every sense, and it is not satisfied if allowance has been made for the debt in valuing the leasehold. The debt, a contingent debt, has been allowed, because in valuing the property some allowance was made for the extent of the liability; therefore sub-sec. 3 does not apply.

[DIXON J. referred to *Mack* v. *Commissioner of Stamp Duties (N.S.W.)* (1) and *H. J. Wigmore & Co. Ltd.* v. *Rundle* (2).]

The court below, although hampered by the special case as stated, was, nevertheless, bound by it.

Teece K.C. (with him *K. A. Ferguson*), for the respondent. The allowance made in valuing the property at nil was not an allowance of the nature referred to in sec. 107, and, therefore, does not come within the scope of sub-sec. 3 of that section. The allowance there referred to is one which has been made in "computing the final balance" of the estate of a deceased person. An allowance within the meaning of the section was not made in respect of the liabilities under the lease. Future rent is not a debt "due and payable;" it is a contingent debt (*Jones* v. *Thompson* (3); *Webb* v. *Stenton* (4); *Barnett* v. *Eastman* (5)). The liability to pay future rent is a contingent liability which may come to be a debt if the term is still existing at the date at which the rent is still to be paid. An allowance was not made in respect of the liability under the lease, and as rent thereunder became actually due and payable the respondent is entitled to the benefit of sub-sec. 3. Sec. 107 refers to debts in general; there is no qualification in the section, and if a contingent liability is within the category of what is known as a contingent debt, it is a contingent debt within the meaning of the section.

(1) (1920) 28 C.L.R. 373, at pp. 383, 384
(2) (1930) 44 C.L.R. 222.
(3) (1858) E. B. & E. 63; 120 E.R. 430.
(4) (1883) 11 Q.B.D. 518, at p. 523.
(5) (1898) 67 L.J. Q.B. 517.

Weston K.C., in reply. The whole scheme of the Act is to take the time of death as the crucial time. Sub-sec. 2 (*d*) should be construed as limited to debts contingent in amount.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a decision of the Full Court of the Supreme Court of New South Wales upon a special case stated under the provisions of the *Common Law Procedure Act.*

The Full Court has held that the executor of Reuben David Brasch is entitled to a refund of death duty paid by him in respect of the dutiable estate of the testator. The testator was the lessee under two leases, one of which was valuable and the other of which was highly onerous. The executor claimed that the value of the second lease was nothing, and further claimed to deduct as a debt in arriving at the dutiable estate a sum of over £12,000 in respect of future liability thereunder. This deduction was originally allowed, but upon subsequent reconsideration the Commissioner of Stamp Duties refused to permit the deduction, and duty was paid upon the basis that the first lease was worth £16,500, that the second lease was worth nothing, but that no deduction should be allowed in respect of the claim that the rent and rates and taxes payable under the second lease exceeded the probable returns to the executor from the leased property. Sec. 107 (3) of the *Stamp Duties Act* 1920 provides for a refund of death duty in cases where allowances have not been made in respect of certain debts if the debts become payable within three years after the death of the deceased. The question is whether a refund should be allowed under this provision.

The *Stamp Duties Act* 1920, sec. 102, provides that for the purposes of the assessment and payment of death duty the estate of a deceased person shall be deemed to include, *inter alia*, his property in New South Wales. Sec. 105 provides that the final balance of the estate of a deceased person shall be computed as being " the total value of his dutiable estate after making such allowances as are hereinafter authorized in respect of the debts of the deceased."

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Sec. 107 (1) authorizes the making of allowances for all "debts actually due and owing by" the deceased person "at the time of his death."

A liability to pay rent in the future under a covenant in a lease does not amount to a debt actually due and owing. Thus it would not have been proper for the commissioner to make any allowance in respect of rent which had not fallen due at the time of the death of the deceased.

Sec. 107, sub-sec. 2, prohibits the making of certain allowances. It provides, *inter alia*, that no such allowance shall be made "(*d*) for contingent debts or any other debts the amount of which is in the opinion of the commissioner incapable of estimation."

Sub-sec. 3 of sec. 107 is in the following words :

"If any debt for which by reason of the provisions of paragraph (*d*) of this section an allowance has not been made becomes at any time within three years after the death of the deceased actually payable or, in the opinion of the commissioner, capable of estimation, an allowance shall be made therefor, and a refund of any death duty paid in excess shall be made to the person entitled thereto, but no action for the recovery of any such refund shall be commenced except within three years after the payment of the duty so paid in excess."

Sub-sec. 3 is applicable in the case of a debt becoming actually payable within three years after the death of the deceased only if "by reason of the provisions of paragraph (*d*)" an allowance has not been made therefor.

The parties agree that the liability for future rent cannot be treated as a debt actually due and owing and that it does amount to a contingent debt. In my opinion they are right in conducting the case upon this basis. The relationship between the parties created by the lease is such that a debt for rent and other payments may actually become payable and if the matter is viewed as at the time of the death of the deceased this liability may properly be described as a contingent debt.

It is contended for the commissioner that, inasmuch as he valued the second lease at nil, he has already made an allowance in respect of the series of contingent debts which may become actual debts

as the term of the lease runs on. In a sense this contention is true, but not, I think, in a relevant sense. The scheme of the Act requires the commissioner first to estimate the value of the property of the deceased and then to make allowances for debts which should be deducted. He does not make allowances for debts in ascertaining the value of the estate. Sec. 105 shows that the value of the estate is first calculated and that then the final balance is to be computed after making the allowances authorized by the Act. Further, sec. 107 (3) deals expressly with the case of a debt " for which by reason of paragraph (*d*) of this section an allowance has not been made." Accordingly, sec. 107 (3) applies wherever an allowance has not been made for a debt because it is contingent or because the amount of it is in the opinion of the commissioner incapable of estimation. In making allowances for debts the commissioner did not make any allowance for the contingent debt or debts in question. An allowance was not made, not because the alleged liability was not a debt, but because it was contingent in character. Therefore the provision of sec. 107 (3) is applicable, and as the debts actually became payable within three years after the death of the deceased the executor of the deceased is entitled to a refund. The parties have agreed the amount at £1,857 7s. 11d. In my opinion the judgment of the Full Court was right and should be affirmed.

This case happens to be a case of an onerous lease where, from a commercial point of view, it may fairly be said that the value of the dutiable estate is reduced by the obligation to pay rent under the unprofitable lease. It may, however, be pointed out that, even if the lease had been a highly profitable lease, the obligation to pay future rents would have created a contingent debt in exactly the same manner as in the present case. In that event it would mean that a refund of duty could have been claimed in respect of three years' rent even though the estate received far more than the amount of the rent in the value of the occupation of the leased premises by a personal representative of the deceased or in rent paid by sub-tenants. This is a strange result, and I have considered whether it is possible to exclude liability for future rents from consideration under the Act, but I have not been able to find satisfactory grounds for doing so. In the first place, a leasehold estate must be valued

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for the purpose of ascertaining the value of the dutiable estate of a deceased leaseholder. It cannot be valued as if it were an unencumbered estate in fee simple. The rent payable must be taken into account in determining the value of the lessee's estate. Secondly, it is difficult to find a sound ground for excluding the question of future rent from the consideration of allowances. It cannot be allowed as a debt actually due and owing. But it does appear to be a contingent debt even though full value may be received for the payment of the rent. When it falls due it is a debt in every sense. No allowance can be made for it, because it is contingent, and not because it can never become a debt or because the Act excludes from consideration any liabilities the discharge of which is attended by a benefit to the estate.

My brother *Dixon*, in his reasons for judgment, has given weighty reasons to support the view that it is only the excess of the rent payable under the lease over the rents and profits received by the executor that can be regarded as a contingent debt of the testator so as to fall within the provisions of sec. 107 (3). The executor who enters, it is true, can be made personally liable in respect of rent to the extent of the rents and profits received, or which he might with reasonable diligence have received, from the land. But the assets of the estate can also be reached by the lessor-creditor, and, as between the executor of the lessee and the lessor, the liability to pay the rent is a contingent debt for which the whole of the assets of the testator may be made liable in a due course of administration. See the statement of the law as to rent accrued after the death of the testator in *Williams on Executors*, 11th ed. (1921), pp. 1368-1376, and especially at p. 1371 : "With respect to the liability of the executor of the lessee to an action of debt for rent accrued after the death of the testator, it is fully established, that the executor will be liable as long as the lease continues, and as far as he has assets, as well in that form of action as in covenant." If the executor has received rents and profits from the land which he has not applied to the payment of rent under the lease, he incurs a personal liability which must be discharged by him if there are not assets of the estate available to satisfy it. But even in such a case there is a liability to the satisfaction of which assets of the estate, if there were such

assets, would properly be applicable. It therefore appears to me, as at present advised, that the fact that an executor is personally liable for rent in certain cases does not displace the proposition that the assets of the estate, including dutiable assets (and not merely moneys received after the testator's death) are properly applicable to the payment of such rent. Thus it seems that the whole amount of the rent is a contingent debt for the purposes of the *Stamp Duties Act* 1920, sec. 107.

In this case, however, the amount of refund claimed has been calculated upon the net loss shown in respect of the leased property during the three years in question. On the expenditure side of the account, rents, rates and taxes, repairs (all of which must be provided for under the lease) are shown, together with expenditure in respect of electric light and other outgoings which are expenses incurred in sub-leasing the building and carrying out the terms of sub-leases. On the income side rents from sub-tenants are shown. Over the three years there was a net loss of £4,481 16s. 9d. The duty to be refunded is estimated by subtracting the last-mentioned amount from the dutiable estate of the testator and re-assessing the duty payable. The parties have therefore agreed that, in this case, the amount to be refunded should be calculated upon the basis which the judgment of my brother *Dixon* declares to be a proper basis, and therefore it is not, in my opinion, necessary to decide whether the commissioner should make a refund based upon treating as a contingent debt the whole amount of the rent or only the excess of that amount over the rents and profits received, or which might have been received, by the executor from the land. No argument upon this question was addressed to the court, and I would prefer to hear argument before deciding it.

For the reasons stated the judgment of the Full Court should be affirmed.

RICH J. I have had the advantage of reading the judgment of my brother *Dixon* and concur in it and agree with his reasons.

DIXON J. Although the facts of this case are simple enough, the application to them of the provisions of the *Stamp Duties Act* 1920

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governing the ascertainment of death duty is a matter of much difficulty. The deceased died possessed of a term of years having an unexpired period of eight years and eight months. The rent reserved under the lease creating the term greatly exceeded the annual value of the land at the deceased's death. The lease contained a covenant on the part of the deceased, binding his legal personal representatives, to pay the rent reserved, and it contained a reddendum. When the final balance of the estate was computed for the purpose of death duty, no value was placed upon the leasehold interest. But the executors claimed an allowance on account of the liability to pay future rent. The Commissioner of Stamp Duties, in the end, refused to make the allowance. The grounds of his refusal were that no part of the future rent was a debt actually due and owing by the deceased at the time of his death, and that future rent was a contingent debt. These grounds refer to sub-secs. 1 and 2 (*d*) of sec. 107 of the *Stamp Duties Act* 1920. The first sub-section provides that, in computing the final balance of the estate of a deceased person, an allowance shall, subject to the provisions of the Act, be made for all debts actually due and owing by him at the time of his death. Sub-sec. 2 (*d*) provides that no such allowance shall be made for contingent debts or any other debts the amount of which is in the opinion of the commissioner incapable of estimation.

The executors did not contest the commissioner's refusal of an allowance in respect of the liability to future rent. But, after three years from the deceased's death had passed, during which the executors had paid the rent reserved by the lease, they claimed from the commissioner a refund of so much of the duty they had paid as represented the excess over that amount of duty which would have been payable if an allowance had been made to the extent of three years' rent, diminished by the net receipts from the land.

The claim to the refund is based upon sub-sec. 3 of sec. 107. The sub-section provides that, if any debt for which by reason of par. *d* of sub-sec. 2 an allowance has not been made becomes at any time within three years actually payable or in the opinion of the commissioner capable of estimation, then an allowance shall be made therefor and a refund made of any death duty paid in excess.

The question for decision is whether the executors are entitled under this provision to any refund in respect of the payments of rent made in the three years succeeding the deceased's death.

It is to be noticed that, although the executors give credit for the net returns from the demised premises against the payments of rent which, during the three years, they have made to the lessor and claim an allowance only in respect of the difference, they base their claim upon the view that the rent paid was at the date of his death a contingent debt of the deceased. If this view be correct and if it apply to the entirety of each instalment of rent payable during the three years following a deceased's death, the strange consequence would apparently ensue that the executors of every lessee who dies possessed of an unexpired term are entitled to an allowance in respect of rent accruing after his death up to three years. The consequence would be strange because it would be altogether independent of the value of the lease. It would be equally true whether the rent reserved was much less than the annual returns from the demised premises or much greater. The credit of the net returns which is conceded by the executors in the present case would be quite gratuitous, and the full amount of the three years' rent would be allowable. The incongruity may be put in another way. The value of a lease for the purpose of inclusion among the assets of the deceased lessee is ascertained by comparing the present value of the future rent with the present value of the estimated annual returns over the unexpired term of the lease. If the lease has a value and t is included on the assets side, a full allowance for future rent must have been made in the process of ascertaining its value. It is, therefore, absurd to allow over again the amount paid in respect of the three years' rent accruing after the lessee's death. These or analogous difficulties arise when the landlord of a company in liquidation seeks to prove for future rent. He may not do so and at the same time keep the term outstanding (*Buckley* on the *Companies Acts*, 10th ed. (1924), p. 472 ; 11th ed. (1930), p. 521. Cp., too, *Rowand* v. *Equity Trustees Executors & Agency Co. Ltd.* (1)).

In my opinion the difficulty is met by a proper application of the provisions to the two very different liabilities in respect of rent

(1) (1896) 22 V.L.R. 1 ; 17 A.L.T. 300.

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which flow from the lessor's express covenant and from the reddendum. Rent issues out of the land, and what may be considered as the primary liability to pay it arises from privity of estate and not from covenant. The lessor's covenant imposes upon him a second liability, which may be considered secondary, and this liability binds the executors independently of the devolution of the term. It is this liability which forms the contingent debt for the satisfaction of which resort is made to the deceased's assets. But the liability arising from the reddendum, as distinguished from covenant, passes with the term, at any rate when the assignee is accepted by the lessor. The executor who enters becomes personally liable in debt as assignee of the term. The legatee to whom the term is bequeathed becomes in turn liable as assignee when the term vests in him in consequence of the executor's assent to the bequest. The executor's liability is restricted, it is true, but the very restriction lends point to the distinction between the covenant and the reddendum. For, as will be explained, the effect of the restriction is to enable the executor to discharge himself from his liability as assignee of the estate by showing that the net returns which he has or ought to have received from the demised premises are insufficient to pay the whole rent, and, as to the excess, that he has fully administered the deceased's assets. This means that the first source for payment of the rent is the rents and profits arising from the land after the deceased's death, and these never did form part of his estate, that is, of the property of which he died possessed. Now, whatever else may be said about sec. 107, I think it clearly must be taken as implying that the debts with which it is dealing are those for which the estate is liable. Its object is to deduct from the aggregate property devolving on death the charges properly payable thereout. In the practical affairs of life, liabilities are rarely if ever incurred which do not bind the obligor's personal representatives. We do not meet with debts due and owing but subject nevertheless to a condition subsequent under which they are avoided or extinguished upon the debtor's death. But there is no theoretical reason why such a condition should not be attached to an obligation, such, for instance, as an obligation to pay a sum of money on demand.

Although a liability to which such a condition attached would fall within the literal description " debts actually due and owing by him at the time of his death," it would not, in my opinion, fall within the true meaning and operation of those words in sec. 107 (1). Now, if it be true that under the reddendum, considered apart from the covenant, a lessee's liability for rent not already accrued ends when the term passes from him, and that this liability affects only the person in whom the term vests, it would follow that no allowance under any of the provisions of sec. 107 could be made for rent accruing after the lessee's death, except in respect of his liability under the covenant. His liability under the reddendum would cease on his death or, at any rate, upon his executor's entry. If the term became vested in a legatee to whom it was bequeathed, the liability in covenant of the executor, as such, for future rent would remain unimpaired, but the secondary character of the liability would be apparent. The legatee would be liable as assignee of the term and, as between the estate and him, his liability would be primary. The lessor's right of recourse against the executor would not become conditional. He could exercise it without first exhausting his remedies against the land and against the legatee in whom the term had vested. But, if, after the term so vested, the questions were considered whether the liability of the executors to future rent was contingent within the meaning of sec. 107 (2) (*d*) and whether there was a right of reimbursement within sec. 107 (2) (*d*), I think the correct answers would be that the liability to future rent was contingent, and one for which there was a right of reimbursement. If a lessee who has assigned his lease becomes bankrupt, his liabilities to his lessor under the covenant in the lease are to be treated as contingent debts capable of proof. This appears from the observations of the Earl of *Selborne* in *Hardy* v. *Fothergill* (1). But the analogous questions upon which the nature of the liability of the deceased depends must be asked, not in relation to the legatee, but to the executor, and, not in relation to a time after the term has vested in the executor, but in relation to the moment of death when it passes from the deceased. The difference is that the two liabilities affect not two different persons but one, the deceased's representative, and that until he

(1) (1888) 13 App. Cas. 351, at pp. 361, 362.

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enters, that person does not incur the liability of an assignee. Nevertheless his entry, when it takes place, will result not only in his assumption of the liabilities arising from privity of estate but also in his receiving the rents and profits of the land, on to which, so far as they extend, rent afterwards accruing is to be thrown. The important fact is that as assignee of the term the executor obtains a source from which future rent is to be paid in relief of the assets of the deceased. Further, in paying rent, he not only performs the deceased's covenant but he discharges the liability under which he rests as the person in whom the term is vested.

In the present case it is highly probable that the executor has come to hold the lease as a trustee, and, if so, this emphasizes the distinction I have drawn. But, whether he now holds it strictly as executor or not, he has in fact possessed himself of the term, received the rents and profits as termor and, to discharge the rent reserved, has resorted to the assets of the deceased only to the extent of the deficiency. This has been done in the due fulfilment of the obligations arising from the devolution of the term. Viewed antecedently from the date of the deceased's death, the executor's duty to follow this course must necessarily determine the characteristics of the deceased's liabilities. It shows that his liability in covenant for future rent cannot be regarded as a charge necessarily falling upon his estate. The extent to which it will fall upon his estate depends successively upon the entry of the executor, the amount of the rents and profits he receives, the vesting of the term in the legatee or some other alienee and the default, if any, of the person in whom the term so vests.

These considerations appear to me to show that the deceased's liability for future rent was contingent and one which might reasonably have been thought incapable of estimation. Clearly it was not a debt due and owing by him at the time of his death. But, in the view taken in this court of the relation of sub-sec. 2 (*d*) to sub-sec. 1 of sec. 107, they provide independent grounds of exclusion (*Commissioner of Stamp Duties* (*N.S.W.*) v. *Permanent Trustee Co. of New South Wales Ltd.* (*Hill's Case*) (1)). If sub-sec. 2 (*d*) operates to exclude a liability, then, although at the time of death the liability may not answer the

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

requirements of sub-sec. 1, I think it may afterwards give rise to a claim for a refund of duty under sub-sec. 3. But when a claim in respect of payments of rent is made under sub-sec. 3, the considerations I have discussed appear to me to give rise to a further restriction upon the right to a refund. For, in so far as the payments have been made out of or are referable to rents and profits received by the executor from the demised premises, the payments do not come within the fair meaning of the provision. As sub-sec. 1 is impliedly limited to debts payable out of the deceased's estate, so sub-sec. 3 appears to me to refer only to the discharge out of the deceased's assets of debts incurred by the deceased. This view is confirmed by sec. 107 (2) (*b*). The general estate is called upon to answer only the deficiency after the rents and profits have been applied to keep down the rent.

The analysis I have made of the situation arising on the death of the owner of a term of years and the application to it of the interpretation I have placed upon sec. 107 appear to me to lead to the result that no refund in respect of rent accruing after the lessee's death can be obtained, except on account of the deficiency over the net rents and profits which arise or ought to arise from the demised premises.

For clearness of explanation, I have not attempted so far to support by authority the correctness of that analysis or to deal with the question whether the lessee's liability under a reddendum, isolated from the covenant express or implied, survives the transfer of the term. The liabilities for rent devolving upon the executor of a lessee were formerly defined in terms of remedies. He could be sued in covenant or in debt for rent accruing after his testator's death. In either case he could be sued at the election of the lessor in his character of executor or in his personal capacity as the person in whom the term was vested. In the former case, subject to proper pleading and proof, he was responsible only *de bonis testatoris* (See *Levy* v. *Kum Chah* (1)). He could be sued in covenant as executor because it was the testator's covenant, or in debt, provided the declaration was in the *detinet* and not the *debet et detinet*, because debt in the

(1) (1936) 56 C.L.R. 159.

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detinet lay upon the testator's contract. He could be sued personally because the term devolved upon him and the covenant runs with the land. He could be sued personally in debt in the *debet* and *detinet* because by his entry he becomes possessed of the demised premises which have devolved upon him and thus he has incurred the liabilities of an assignee (*Dean and Chapter of Bristol* v. *Guyse* (1); *Williams* on *Executors*, 1st ed. (1832), pp. 1076 et seq.; *Tomlin's Law Dictionary* (1835), *s.v.* "Debt" (II.); *Kearsley* v. *Oxley* (2); *Rendall* v. *Andreae* (3)).

But, notwithstanding that an executor was sued personally, he was allowed at common law to limit his liability to the rents and profits obtainable from the land and, if there were a deficiency, to the assets of the deceased in his hands. He could not plead *plene administravit* simply, because he was liable personally to the extent of the profits of the land. But as to rent which the profits he derived or ought to have derived were insufficient to satisfy, he was answerable out of the assets of the testator and might by pleading specially exonerate himself from liability *de bonis propriis*. The rule seems to have been regarded as a concession which it was only reasonable to make, since the executor could not waive the lease (*Billinghurst* v. *Speerman* (4)). But the executor, in order to discharge himself, must show not only that the profits actually received were insufficient to answer the rent but that those which with reasonable diligence he might have obtained were insufficient (*Hopwood* v. *Whaley* (5)). The rule is now applied as one determining the extent of the executor's substantive liability (*In re Bowes*; *Earl of Strathmore* v. *Vane* (*Northcliffe's Claim*) (6); *Rendall* v. *Andreae* (7); and see *Whitehead* v. *Palmer* (8)).

In *Buckley* v. *Pirk* (9), *Parker* C.J. stated the executor's position as follows:—"If the executor of a lessee enters, the lessor may charge him as an assignee for the rent incurred after his entry, in the *debet* and *detinet*; and if the rent be of less value than the lands, as

(1) (1666) 1 Wms. Saund. 111a-112; 85 E.R. 119, 120.
(2) (1864) 2 H. & C. 896, at p. 904; 159 E.R. 371, at p. 374.
(3) (1892) 61 L.J.Q.B. 630; 8 T.L.R. 615.
(4) (1695) 1 Salk 297; 91 E.R. 263.
(5) (1848) 6 C.B. 744; 136 E.R. 1440.
(6) (1887) 37 Ch. D. 128.
(7) (1892) 61 L.J.Q.B. 630; 8 T.L.R. 615.
(8) (1908) 1 K.B. 151.
(9) (1710) 1 Salk. 316, at p. 317; 91 E.R. 279, at p. 280.

the law prima facie supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor, and cannot be applied to anything else : and therefore in such case the defendant cannot plead *plene administravit*, for that confesses a misapplication, since no other payment out of the profits can be justified till the rent be answered. On the other hand, if the rent be worth more than the land, the defendant may disclose that by special pleading, and pray judgment, whether he shall be charged otherwise than in the *detinet* only."

The question whether, apart from covenant, the lessee remains liable for rent accruing after assignment of the lease and acceptance by the lessor cannot be said to be settled. But it has long been so understood (See *Foa* on *The Relationship of Landlord and Tenant*, 6th ed. (1924), p. 189). In *John Williams'* note to *Saunders*, vol. I., 241*c*, it is said : " But though covenant lies against the lessee upon an express covenant after assignment and acceptance of the assignee, yet it seems that such an action does not lie against the lessee upon a covenant in law (such as the words yielding and paying, demise, grant, which are covenants in law both by the lessor and lessee) after assignment and acceptance of the assignee." See, too, vol. II., 302*n*. In such circumstances debt would not lie (*Wadham* v. *Marlowe* (1)).

I think from these authorities it appears (i.) that in contemplation of law rent accruing after the lessee's death is answerable out of the rents and profits which the executor derives or with reasonable diligence might derive from the demised premises ; (ii.) that to that extent the executor is personally liable for such rent ; (iii.) that under the lessee's covenant to pay rent the deficiency is payable in due course of administration out of the assets of the deceased ; (iv) that although the executor as such may be directly liable to the lessor, yet, if there be no *devastavit*, the liability must be satisfied or borne in the manner stated. The lessee's liability as at the date of his death for future rent is, therefore, secondary, and is contingent within the meaning of sec. 107 (2) (*d*). Interpreting sub-sec. 3 as applying whenever the liability is excluded by sec. 107 (2) (*d*), whether it falls within sec. 107 (1) or not, the payments of rent

(1) (1785) 8 East 314 ; 103 E.R. 362.

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within the three years may fall within sub-sec. 3. But they cannot do so to the extent that they represent a discharge of the executor's own personal liability or, to state it another way, a discharge of the primary liability for payment of which the annual value of the land is the proper source. Sub-sec. 3 contemplates only an application of the assets devolving on the testator's death which otherwise would be dutiable.

I am of opinion that the executor was entitled to a refund of the death duty referable to so much of the assets of the testator as have been applied to paying the deficiency in the rent accruing during the three years after appropriation to its payment of the net returns from the land. I assume that the executor has used reasonable diligence to obtain a full return.

I think the appeal should be dismissed with costs.

McTIERNAN J. I agree that the appeal should be dismissed. I agree with the judgment of *Dixon* J.

Appeal dismissed with costs.

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

Solicitors for the respondent, *Ernest Cohen & Linton.*

J. B.