[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXES (SOUTH AUSTRALIA) . . . . . } APPELLANT;
RESPONDENT,

AND

THE EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED } RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF SOUTH AUSTRALIA.

H. C. OF A. 1938.

ADELAIDE, *Sept.* 30; *Oct.* 3.

MELBOURNE, *Dec.* 23.

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

Income Tax (S.A.)—Income of professional man—Method of assessment—Earnings or receipts—Book debts—Death of taxpayer—Alteration of mode of assessment—Continuation against executor of commissioner's rights against taxpayer—Amended assessments—Taxation Act 1927-1935 (*S.A.*) (*No.* 1787—*No.* 2233), *secs.* 42, 43, 81, 84, 87.

Sec. 42 (1) of the *Taxation Act* 1927-1935 (S.A.) provides that the legal personal representative of any person who dies after the commencement of the Act shall be a taxpayer in a representative capacity in respect of the income of the deceased person from the first day of July last preceding his decease, up to his decease, and in the period of twelve months immediately prior to the said first day of July, and also in respect of the income of any period not earlier than five years before the death of the taxpayer in respect of which the deceased person was a taxpayer and failed to furnish a return. By sec. 43 the commissioner is given the same powers against an executor as he would have had against the deceased in his lifetime "where, whether intentionally or not, a taxpayer escapes full taxation in his lifetime by reason of not having duly made full, complete, and accurate returns," and provides that "no lapse of time shall prevent the operation of this section." Sec. 84 (1) provides: "If the whole or any portion of the taxable amount of the income of any taxpayer is not included in an assessment in any year, the commissioner may include such whole or portion in the assessment of the taxable amount of the income of such taxpayer for a subsequent year." Sec. 87 provides: "Except on

account of fraud, no assessment for income tax shall be reopened by the commissioner in respect of any return made more than three years last preceding the opening."

For each of the years from 1st July 1929 to 30th June 1935, C., a medical practitioner who practised in South Australia, returned as his gross income for State taxation purposes from his medical practice actual receipts in each year, omitting book debts. The Commissioner of Taxes issued assessments for those years on the basis of the returns. C. died on 15th November 1935. The commissioner made an assessment to income tax on his executor in respect of the period from 1st July 1935 to 15th November 1935 and, relying on sec. 84 (1) of the *Taxation Act*, included in the assessment all outstanding book debts. Further, in case sec. 84 did not apply, the commissioner issued amended assessments in respect of the years 1933-1934 and 1934-1935, including therein fees earned by C. but not actually returned during the relevant period.

Held:—

(1) By *Rich*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting), that, upon the assumption that the deceased should have been taxed upon his earnings, sec. 84 of the Act did not operate either of its own force or by reason of the application of sec. 42 or sec. 43 to authorize the inclusion of unpaid fees earned before 1st July 1935 in an assessment upon the executor in respect of the period from 1st July 1935 to the date of the death of C.

(2) By *Rich*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting), that the commissioner had no authority to issue amended assessments for the years ending 30th June 1934 and 30th June 1935 including therein fees earned but unpaid during the relevant periods, (*a*) as to the year ending 30th June 1934, because even if earnings was the proper basis of assessment, sec. 42 did not operate, since the period was more than twelve months prior to 1st July preceding C.'s decease, and C. had not failed to furnish a return in respect of that period, and also because the commissioner was barred from reopening the assessment by sec. 87, and (*b*) as to the year ending 30th June 1935, because the receipts basis was properly adopted by the commissioner for the assessment and, that basis having been adopted, there was no foundation for an alteration to the assessment.

Held, further, that it was open to the commissioner to adopt the earnings basis in order to ascertain the intermediate income of the deceased earned between the end of the last financial year and the date of his death.

When there is nothing analogous to a stock of vendible articles to be acquired or produced and carried by a taxpayer, where outstandings on the expenditure side do not correspond to, and are not naturally connected with, the outstandings on the earnings side, and where there is no fund of circulating capital from which income or profit must be detached for actual enjoyment, but where, on the contrary, the receipts represent in substance a reward for professional skill and personal work to which the expenditure on the other side contributes in only a minor or subsidiary degree, the receipts basis forms a fair and appropriate basis for estimating professional income for the purpose of the *Taxation*

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA. LTD.

Act 1927-1935 (S.A.), provided there be continuity in the practice of the profession.

So *held* by *Rich*, *Dixon* and *McTiernan* JJ. (*Latham* C.J. dissenting).

Decision of the Supreme Court of South Australia (Full Court): *In re Carden*, (1938) S.A.S.R. 175, and the further decision of the said court of 23rd August 1938 (unreported), affirmed.

APPEALS from the Supreme Court of South Australia.

In an appeal to the Local Court of Adelaide against an assessment for income tax pursuant to the *Taxation Act* 1927-1935 (S.A.) a special case was stated for the opinion of the Supreme Court. This special case, was (so far as material) substantially as follows:—

1. Hubert Cecil Carden late of Kadina, medical practitioner, deceased (hereinafter called "the deceased") was a legally qualified medical practitioner who at all material times resided in South Australia and practised in South Australia as a medical practitioner.

2. The deceased died on 15th November 1935 and Executor Trustee and Agency Company of South Australia Limited (hereinafter called "the company") is the executor of his will.

3. Up to and including the year ended 30th June 1929 the deceased included in his income tax returns the book debts incurred during each income tax year as portion of his gross income for that year and was assessed for tax thereon accordingly.

4. For the years subsequent to the 1st July 1929 the deceased returned each year as his gross income for taxation purposes from his medical practice his actual cash receipts from such practice in each such year (omitting book debts) and deducted therefrom the whole of his expenses and outgoings actually disbursed by him in carrying on such practice in each such year.

5. On 8th January 1936 the company as such executor pursuant to sec. 42 of the *Taxation Act* 1927-1935 lodged a return of the income of the deceased for the period from 1st July 1935 to 15th November 1935.

6. In such return the company showed the gross income from the deceased's medical practice as £598, being the actual cash received in respect of such practice during the period in question. No amount was included for book debts.

7. In respect of such gross income the company claimed deductions amounting to £248 9s., being the whole of the expenses and outgoings actually incurred in the practice during the period in question.

8. At the date of the death of the deceased there were book debts owing to him amounting to £4,556, being book debts incurred in his said practice over a period of years, but not received by him up to the time of his death. Of these book debts the company estimated that debts totalling £2,878 were good debts, that debts totalling £1,192 were doubtful, and that debts totalling £486 were bad debts.

9. On 24th August 1936 the Commissioner of Taxes pursuant to sec. 62 of the said Act caused an assessment to be prepared for the purpose of ascertaining the amount of tax payable by the company in respect of the income of the deceased for the period 1st July 1935 to 15th November 1935.

10. In calculating the taxable amount of the income of the deceased from his said medical practice for the purpose of the said assessment the commissioner (claiming to act under sec. 84 of the said Act) included as portion of such income the sum of £3,274, being the valuation for succession duty purposes of the book debts mentioned in par. 8 hereof.

11. The company duly gave notice of appeal to the Local Court of Adelaide and to the Commissioner of Taxes against the said assessment.

14. The following questions are submitted for the opinion of the Supreme Court :—

(1) Was the respondent entitled to include any and if so what sum in respect of the book debts mentioned in par. 8 hereof in the said assessment ?

(2) If no portion of the book debts should be included in the assessment, should any and if so what adjustment be made in respect of the deduction of £248 9s. claimed by the appellant as the expenses incurred in the production of the gross income from the medical practice ?

Sec. 84 of the *Taxation Act* 1927-1935 (S.A.), which is referred to in the special case, provides that, if the whole or any portion of the taxable amount of the income of any taxpayer is not included in

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

an assessment in any year, the commissioner may include such whole or portion in the assessment of the taxable amount of the income of such taxpayer for a subsequent year. The commissioner also relied on secs. 42 and 43 of the Act. Sec. 42 provides that the legal personal representative of any person who dies after the commencement of the Act shall be a taxpayer in a representative capacity in respect of the income of the deceased person from the 1st July last preceding his decease, up to his decease, and in the period of twelve months immediately prior to the said 1st July and also in respect of the income of any period not earlier than five years before the death of the taxpayer in respect of which the deceased person was a taxpayer and failed to furnish a return. Sec. 43 contains provisions which are to apply in any case where, whether intentionally or not, a taxpayer escapes full taxation in his lifetime by reason of not having made full, complete, and accurate returns. It is expressly provided that no lapse of time shall prevent the operation of this last-mentioned section.

The Supreme Court of South Australia answered the questions in the special case as follows :—

1. The facts stated in the special case do not disclose that Hubert Cecil Carden late of Kadina, medical practitioner, deceased, had escaped full taxation in his lifetime by reason of not having made full complete and accurate returns and in default of a finding by the Local Court of Adelaide to that effect the respondent was not entitled to include in the assessment dated 24th August 1936 anything in respect of the book debts earned on or before 30th June 1935.

2. No adjustment should be made in the said assessment in respect of the deduction of £248 9s. claimed by the appellant as the expenses incurred in the production of the gross income from the medical practice of the said Hubert Cecil Carden deceased.

From this decision the Commissioner of Taxes appealed, by special leave, to the High Court.

Following the decision of the Supreme Court of South Australia, the commissioner issued amended assessments in respect of the years ended 30th June 1934 and 30th June 1935 respectively. The executor again appealed to the Local Court of Adelaide, and a further case was stated for the opinion of the Supreme Court. This special case, which was dated 9th August 1938, was (so far as material) substantially as follows :—

1. Hubert Cecil Carden, late of Kadina, medical practitioner, deceased (hereinafter called " the deceased ") was a legally qualified medical practitioner who at all material times resided in South Australia and practised in South Australia as a medical practitioner.

2. The deceased died on 15th November 1935 and the Executor Trustee and Agency Company of South Australia Limited (hereinafter called " the company ") is the executor of his will.

3. Up to and including the year ended 30th June 1929 the deceased included in his income tax returns the book debts which became due to him in his medical practice during each income tax year, and were outstanding at the close of such year as portion of his gross income for that year and was assessed for tax thereon accordingly.

4. For each of the years subsequent to 30th June 1929 up to and including the year ending 30th June 1935 the deceased returned as his gross income for taxation purpose from his said medical practice his actual cash receipts from such practice in each year (omitting outstanding book debts) and deducted therefrom the whole of the expenses and outgoings actually disbursed by him in carrying on such practice in each such year.

5. On 12th April 1935 the deceased lodged a return of his income for the year ending 30th June 1934. The relevant figures included in the said return and the manner in which they were dealt with by the commissioner are set out hereunder :—

	£	£
Gross income including income from farming ..	1,948	
Business deductions	1,374	
	574	
Claim for deduction for maintenance of wife and two children	90	
		484
Deductions were adjusted by the commissioner as under :—		
Subscription to B.M.A. disallowed	4	
Depreciation reduced	11	
		15
Net income on which assessed ..		499

The assessment in respect of the said income was made on the 30th April 1935.

H. C. OF A. 1938. COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

6. On 31st August 1935 the deceased lodged a return of his income for the year ending 30th June 1935. The relevant figures included in the said return and the manner in which they were dealt with by the commissioner are set out hereunder :—

	Income from Personal Exertion.	Income from Property.	Total.
	£	£	£
Gross income from practice ..	1,856	3	1,859
Business deductions	1,084	—	1,084
	772	3	775
Loss on farming	11	—	11
	761	3	764
Deductions were adjusted by the commissioner as under :—			
Loss on farming £11 adjusted to profit on farming £31 ..	42	—	42
	803	3	806
Federal income tax allowed	4	—	4
Net income on which assessed	799	3	802

The assessment in respect of the said income was made on 14th March 1936.

7. In each of the said returns the deceased included as the gross income from his medical practice the actual cash received by him during the twelve months covered by such return. In neither return was any amount included in respect of the book debts which became due and payable to the deceased in his said medical practice in the period covered by the return and which were outstanding at the end of the said period.

8. Moneys paid to the deceased during his lifetime in respect of these book debts were included by him as part of his gross income in the year of their receipt but at the deceased's death on 15th November 1935 there were owing to him (*inter alia*) book debts which had become due in the years ending 30th June 1934 and 30th June 1935, as follows :—

Year ending 30th June 1934—£572 of which it is admitted and agreed that book debts amounting to £514 are good and the remainder bad.

Year ending 30th June 1935—£528 of which it is admitted and agreed that book debts amounting to £476 are good and the remainder bad.

9. On 4th July 1938 the commissioner issued amended assessments in respect of the deceased's income for the years ending 30th June 1934 and 30th June 1935 respectively and included therein as part of the assessable income of the deceased for those years the said sums of £514 and £476 respectively in respect of the said book debts and made certain consequential adjustments in respect of concessional deductions.

10. On the said 4th July 1938 the commissioner gave particular notice of the said amended assessments to the appellant and the appellant on 3rd August 1938 duly delivered notice of appeal against the said amended assessments to the clerk of the Local Court of Adelaide of full jurisdiction and to the commissioner.

11. Upon the said appeals coming on for hearing the said Local Court this day made an order by consent consolidating the said appeals.

12. The following questions are submitted for the opinion of the Supreme Court :—

(1) Was the commissioner entitled to include in the amended assessments any, and if so, what sum in respect of the book debts referred to in par. 8 hereof ?

(2) Was the commissioner entitled to make an amended assessment in respect of either of the said years ?

The Supreme Court answered the questions in the special case as follows :—

1. The respondent is not entitled to include in the assessments dated 4th July 1938 any sum in respect of the book debts earned during the years ending 30th June 1934 and 30th June 1935.

2. Upon the facts stated in the special case the respondent was not entitled to make an amended assessment in respect of the income earned during either of the said years ending 30th June 1934 and 30th June 1935.

From this decision also the commissioner appealed to the High Court, and the two appeals were heard together.

Other material facts appear from the judgments hereunder.

H. C. OF A. 1938. COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Hannan K.C. (with him *Pickering*), for the appellant. The substantive question is whether book debts are to be treated as part of the income of a professional man for the year in which they came into existence. A book debt is a kind of profit or gain arising in the year of income and is income within the meaning of the Act. The scheme of the Act is that taxpayers must include all debts accruing in each year and may deduct any found to be bad: See definition of " income derived from personal exertion " in sec. 4, sec. 22 (ii), sec. 22 (xiv *a*). As to sec. 22 (xiv *a*), see *Gleaner Co. Ltd.* v. *Assessment Committee* (1); *Konstam's Law of Income Tax*, 3rd ed. (1926), p. 471. In commerce and accountancy book debts are treated as part of the gross income, and there is no way under the Act of calculating income of traders and professional men except by including book debts. As to the meaning of profit and gain, see *British Insulated and Helsby Cables Ltd.* v. *Atherton* (2). There is no doubt that in England book debts are required to be included in the case of professions, and the South Australian Act is in similar terms.

[DIXON J. referred to *Commissioners of Inland Revenue* v. *Morrison* (3); *Ratcliffe, McGrath & Hughes, The Law of Income Tax* (1938), pp. 136, 139.]

If book debts are not income, an ordinary trader need not return them, a position which has not been applied (*Dewar* v. *Inland Revenue Commissioners* (4)). Different rules are applicable to property and personal exertion income, and all that is necessary in the latter case is earning or accrual (*Leigh* v. *Inland Revenue Commissioners* (5); *Hall & Co. Ltd.* v. *Commissioners of Inland Revenue* (6); *Dailuaine-Talisker Distilleries* v. *Commissioners of Inland Revenue* (7)). The Act does not tax something in a trading business and something else in a profession (*Konstam's Law of Income Tax*, 6th ed. (1933), p. 113; *Halsbury's Laws of England*, 2nd ed., vol. 17, p. 85; *Dowell* on *Income Tax Law*, 8th ed. (1919), pp. 427, 429, 459, 496; *Grey* v. *Tiley* (8); *Ormond Investment Co. Ltd.* v. *Betts* (9)). Cases relating to trade income are applicable to professional income

(1) (1922) 2 A.C. 169.
(2) (1926) A.C. 205, at p. 226.
(3) (1932) 17 Tax Cas. 325.
(4) (1935) 2 K.B. 351.
(5) (1928) 1 K.B. 73.
(6) (1921) 3 K.B. 152.
(7) (1930) 15 Tax Cas. 613.
(8) (1932) 16 Tax Cas. 414, at p. 421.
(9) (1928) A.C. 143.

(*St. Lucia Usines and Estates Co. Ltd.* v. *St. Lucia* (*Colonial Treasurer*) (1); *Allen* v. *Trehearne* (2)). As to the meaning of words "profits and gains" in the South Australian Act, see *McLachlan* v. *Commissioner of Taxes* (3). Assuming book debts should be returned as income, the question remains whether the commissioner can reach them by machinery contained in the Act. As regards the broken period from 30th June 1935 to the death of the deceased, the commissioner had power under sec. 42 to make original assessments. He also had power under sec. 81 to make amended assessments for the year ending 30th June 1935 (*Commonwealth Agricultural Service Engineers Ltd.* v. *Commissioner of Taxes* (*S.A.*) (4)). For the previous year (1933-1934) the necessary powers are in sec. 42 (1), or failing that sec. 43. Sec. 87 is no limitation of sec. 43. The assessment is prima facie correct (sec. 127 (2)). If a taxpayer claims that book debts received in a particular year exceed book debts arising during that year the onus is on him to prove it.

No rights can be derived from any acquiescence on the part of the commissioner; he could not agree to accept returns on a wrong basis (*Maritime Electric Co. Ltd.* v. *General Dairies Ltd.* (5); *Gleaner Co. Ltd.* v. *Assessment Committee* (6)). If neither sec. 42 nor sec. 43 empowers the commissioner to re-open assessments, sec. 84 enables him to include in the assessment for the broken period all omitted income. As to deduction of outgoings, see sec. 22 (x). The outgoings produce book debts as well as cash receipts and, if the former are not income, the outgoings should be apportioned (*Colonial Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (7); *Australian Temperance and General Mutual Life Assurance Society Ltd.* v. *Federal Commissioner of Taxation* (8); *Australian Mutual Provident Society* v. *Commissioner of Taxes* (9); *Robert G. Nall Ltd.* v. *Federal Commissioner of Taxation* (10)).

Ligertwood K.C. and *Ross*, for the respondent. Sec. 63 requires the returns to be made in the prescribed form. Prior to 1929 the

(1) (1924) A.C. 508, at p. 512.
(2) (1938) 2 All E.R. 698.
(3) (1912) S.A.L.R. 138, at pp. 152, 156.
(4) (1926) 38 C.L.R. 289, at p. 293.
(5) (1937) A.C. 610.
(6) (1922) 2 A.C. 169.
(7) (1933) 49 C.L.R. 171.
(8) (1933) 48 C.L.R. 452.
(9) (1907) S.A.L.R. 88.
(10) (1937) 57 C.L.R. 695.

H. C. OF A. 1938. COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

form required inclusion of book debts; subsequently the form made no mention of book debts. The taxpayer did not apply to change over to a cash receipt basis. The charging section is sec. 18, and the governing word is income. Arising, accruing, and derived all mean the same—got, obtained or acquired (*Commissioners of Taxation* v. *Kirk* (1); *Harding* v. *Federal Commissioner of Taxation* (2); *Federal Commissioner of Taxation* v. *Clarke* (3); *Lawford* v. *Commissioner of Taxation (N.S.W.)* (4)). The words "income arising or accruing" denote receipts (*St. Lucia Usines and Estates Co. Ltd.* v. *St. Lucia (Colonial Treasurer)* (5)). The word "derived" also denotes receipt (*Federal Commissioner of Taxation* v. *Thorogood* (6); *North Sydney Investment &c. Co. Ltd.* v. *Commissioners of Taxation* (7)). "Income" is not defined, only classified (*McLachlan* v. *Commissioner of Taxes* (8)). The mere creation of a chose in action is not income (*Tennant* v. *Smith* (9)). Acquisition of a book debt is not the acquisition of a realizable asset (*London County Council* v. *Attorney-General* (10); *Commissioners of Inland Revenue* v. *Blott*; *Inland Revenue Commissioners* v. *Greenwood* (11); *Seymour* v. *Reed* (12)). The mere accrual of a debt is not the acquisition of income (*Leigh* v. *Inland Revenue Commissioners* (13); *Grey* v. *Tiley* (14); *Simpson* v. *Maurice's Executors* (15); *Lambe* v. *Inland Revenue Commissioners* (16); *Dewar* v. *Inland Revenue Commissioners* (17); *Champney's Executors* v. *Inland Revenue Commissioners* (18); *Woodhouse* v. *Inland Revenue Commissioners* (19); *Cross* v. *London and Provincial Trust Ltd.* (20))—See also *Halsbury's Laws of England*, 2nd ed., vol. 17, p. 249; *Commissioner of Taxes* v. *Melbourne Trust Ltd.* (21); *R.* v. *Anderson Logging Co.* (22); *In re Income Tax Acts* (23); *In re Income Tax Acts (No. 2)* (24); *Perrott* v. *Deputy*

(1) (1900) A.C. 588, at p. 592.
(2) (1917) 23 C.L.R. 119, at pp. 131, 133.
(3) (1927) 40 C.L.R. 246, at p. 261.
(4) (1936) 4 A.T.D. 99.
(5) (1924) A.C. 508.
(6) (1927) 40 C.L.R. 454, at p. 458.
(7) (1898) 19 L.R. (N.S.W.) 225; 15 W.N. (N.S.W.) 82.
(8) (1912) S.A.L.R. at pp. 151, 152, 153, 157.
(9) (1892) A.C. 150, at p. 163.
(10) (1901) A.C. 26, at p. 35.
(11) (1921) 2 A.C. 171, at p. 195.
(12) (1927) A.C. 554, at p. 560.
(13) (1928) 1 K.B. 73.
(14) (1932) 16 Tax Cas. 414.
(15) (1929) 14 Tax Cas. 580.
(16) (1934) 1 K.B. 178.
(17) (1935) 2 K.B. 351.
(18) (1934) 19 Tax Cas. 375.
(19) (1936) 20 Tax Cas. 673.
(20) (1938) 54 T.L.R. 399.
(21) (1914) A.C. 1001.
(22) (1926) A.C. 140.
(23) (1897) 23 V.L.R. 312.
(24) (1930) V.L.R. 233.

Federal Commissioner of Taxation (*N.S.W.*) (1); *Federal Commissioner of Taxation* v. *Thorogood* (2); *St. Lucia Usines and Estates Co. Ltd.* v. *St. Lucia* (*Colonial Treasurer*) (3); and compare *Commissioner of Taxes* (*Q.*) v. *Burke* (4). English opinion that book debts must be accounted for is not applicable in South Australia. Not even traders are required by the Act to include book debts. They do so because, through practice of commerce and accountancy, it is necessary to include them in the profit and loss account. There is no universal rule that all debts must be brought into account. You bring them in, only if it is the practice of accountancy and is necessary. If it is not the practice and not necessary, you adopt the method which fairly shows the income. The book debts of a professional man are in no sense income (*Lawford* v. *Commissioner of Taxation* (*N.S.W.*) (5)). As to deductions, it is sufficient if the expense is incurred in the course of producing income (*Hughes* v. *Bank of New Zealand* (6)).

[DIXON J. referred to *Amalgamated Zinc* (*De Bavay's*) *Ltd.* v. *Federal Commissioner of Taxation* (7).]

There should be no apportionment. The courses adopted by the commissioner were not open to him. Sec. 42 forms a complete code and does not empower the commissioner to amend assessments made against a taxpayer personally: See sec. 93 (4). Sec. 43 applies only if taxpayer escapes taxation during his lifetime by failing to render full complete and accurate returns. Here the commissioner has failed to show that the taxpayer escaped full taxation during his lifetime (*Victoria City* v. *Bishop of Vancouver Island* (8); *University of Adelaide* v. *District Council of Mitcham* (9)). If book debts should not or need not be included, the returns made were full complete and accurate. Sec. 84 does not empower the commissioner to include the book debts as income for the broken period.

Pickering, in reply. As to whether sec. 84 is a reopening of an assessment, see *Gray* v. *Penrhyn* (10). Professional men are taxed

(1) (1925) 40 C.L.R. 450.
(2) (1927) 40 C.L.R. 454.
(3) (1924) A.C. 508.
(4) (1926) 38 C.L.R. 314.
(5) (1936) 4 A.T.D. at pp. 102, 105.
(6) (1938) 1 All E.R. 778, at p. 784.
(7) (1935) 54 C.L.R. 295.
(8) (1921) 2 A.C. 384.
(9) (1937) S.A.S.R. 288.
(10) (1937) 3 All E.R. 468.

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Dec. 23.

on the same basis as traders (*Halsbury's Laws of England*, 2nd ed., vol. 17, p. 119 ; *Robertson* v. *Commissioner of Taxes* (1)). [Counsel also referred to *Stevens* v. *E. Boustead & Co.* (2).]

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. This appeal raises some important questions under the South Australian *Taxation Acts* 1927-1933. Dr. Hubert Cecil Carden was a medical practitioner residing and practising at Kadina in the State of South Australia. He died on the 15th November 1935. The respondent company is the executor of his will. In his returns for income tax purposes Dr. Carden, up to June 1929, included outstanding debts which had become due to him during the year. In his return for the year ending 30th June 1930 and for subsequent years he returned as his income only moneys actually received in the course of the relevant year, that is, returns were made upon a cash basis as distinct from an earnings basis. This was done with the consent of the Commissioner of Taxes and, indeed, was apparently brought about by an alteration in the terms of the printed form which is provided for the use of taxpayers in making their returns. After the death of Dr. Carden on the 15th November 1935, the executor lodged a return under sec. 42 of the Acts relating to the period from 1st July 1935 to 15th November 1935. In this return the executor followed the recent practice of the testator and returned only the cash received during the period. A claim was made for a deduction of £248 9s. as expenses incurred by the taxpayer in the production of the income.

On 24th August 1936 the commissioner assessed the executor and included in the taxable income a sum of £3,274 as the value of book debts which were due but had not been paid. Upon further examination of the facts the commissioner agreed that the sum of £3,274 should be reduced to £2,119 by reason of the facts that tax had been paid before 1st July 1929 in respect of certain of the debts and that others of the debts had proved to be bad. The executor appealed from the assessment and the Local Court of Adelaide stated a case

(1) (1928) S.A.S.R. 313, at p. 316. (2) (1918) 1 K.B. 382, at p. 390.

in which the following questions were asked :—" (1) Was the commissioner entitled to include any, and if so, what sum in respect of the book debts ? (2) If no portion of the book debts should be included in the assessment, should any, and if so, what, adjustment be made in respect of the deduction of £248 9s. claimed by the appellant as the expenses incurred in the production of the gross income from the medical practice ?"

The Full Court of the Supreme Court determined the case in favour of the executor, answering the questions in the following manner :—" (1) The facts stated in the case do not disclose that " (the deceased) " had escaped full taxation in his lifetime by reason of not having made full complete and accurate returns and in default of a finding by the Local Court . . to that effect the respondent was not entitled to include . . . anything in respect of the book debts earned on or before the 30th June 1935. (2) No adjustment should be made."

Special leave was given to the commissioner to appeal to this court from the judgment of the Full Court.

In the assessment which was the subject matter of the case stated the commissioner had included the whole amount of outstanding book debts in an assessment for the period 1st July to 15th November 1935. Upon the application for leave to appeal the question was raised whether, if the commissioner were entitled to include book debts at all, he ought not to include them as income in the year in which they respectively accrued to the taxpayer rather than include them all in a single assessment for the latest period. A further question might then arise as to whether the commissioner was entitled to re-open any and which past assessments. In order that these questions might also be determined (if necessary) by the court, the commissioner issued amended assessments in respect of the years ending 30th June 1934 and 30th June 1935, and included in these assessments as part of the taxable income of the deceased an estimate by the executor of the amount which will ultimately be realized from the book debts which became due to the deceased in each of those years respectively. These assessments were made upon the company as executor of the estate of H. C. Carden deceased. The company appealed and, upon the appeals coming on for hearing,

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Latham C.J.

the Local Court consolidated them and stated a case for the opinion of the Supreme Court in which the following questions were asked: —"(1) Was the commissioner entitled to include in the amended assessments any, and if so, what sum in respect of the book debts referred to in par. 8 hereof? (2) Was the commissioner entitled to make an amended assessment in respect of either of the said years?"

The Full Court, following the principles which it had applied in deciding the former case, answered the questions in favour of the company. Special leave to appeal from this decision has also been granted to the commissioner.

The Full Court based its judgment in the first place upon the general conception of income as something that comes in and accordingly, prima facie at least, as something that is actually received. This question must be considered in the light of the definition section and other specific provisions of the South Australian statute. In the second place, the Full Court took the view that, in the case of a profession, profits could be ascertained by a simple cash account, with no allowance for book debts, and that (as I read the reasons for judgment) the taxpayer was entitled at his option as a matter of right to adopt this method as the basis of his returns rather than a method which took accrued debts into account. The court found itself unable to take the view that the latter method was "compulsory" as a "method of computation in point of law." The consideration of this question also depends upon the precise terms of the statute. The court accordingly also held that the omission of the book debts did not make the returns other than "full complete and accurate," with the result that sec. 43 of the Act was not applicable. That section provides that when a deceased person has escaped full taxation in his lifetime by reason of not having made full complete and accurate returns, the commissioner may exercise certain powers with respect to his personal representative. But as to the last period (July-November 1935), the court held that the commissioner was not bound to accept returns on a cash receipts basis and could, if he chose, insist on the inclusion of book debts which accrued during that period.

I propose first to inquire whether, if Dr. Carden had still been alive, it would have been open to the commissioner to insist upon

inclusion in his returns of the value of book debts which fell due during the year in respect of which the income was derived and in relation to which a return was being made. If this question should be answered in the affirmative, it will then be necessary to inquire whether the commissioner could properly include the value of such debts in an assessment made after the death of the taxpayer and, if so, upon what basis—whether by including the value of all the book debts in one single assessment for the last period or by including them in amended assessments of the earlier years in which the debts fell due. If the latter procedure should be applicable, a question will then arise as to how far back the commissioner can go.

There has not been any express decision in Australia or in England with respect to the basis upon which professional men should return their income for income tax purposes. There are, however, English and Scotch decisions upon the meaning of the provisions under which both traders and professional men are taxed. If, as in my opinion is the case, these provisions are the same in the relevant respects as the South Australian provisions, the principles stated in these decisions should assist in the solution of the problem which is before the court.

In the case of traders, where tax is imposed upon the profits of a trade, profits are calculated both in Australia and in England on an earnings basis; that is to say, the trade debts which fall due to the taxpayer during the year are credited and allowance is made for bad debts. But in the case of professional men it has been a common, though not a universal, practice both in Australia and in England for the taxation authorities to accept returns made on a cash basis. Where this is done only cash payments received in the year are returned and taxed, and no attention is paid to book debts which are not paid to the taxpayer during the year (*Konstam, The Law of Income Tax*, 6th ed., p. 119).

Although the returns of professional men have often been accepted when prepared on a cash basis, it has not yet been determined by any court that there is a right to be assessed upon that basis: See *Halsbury's Laws of England*, 2nd ed., vol. 17, p. 175 and p. 119.

Both in South Australia and in England the income of professional men is taxed under and by reason of provisions expressed in the same terms as those which govern the case of traders.

H. C. OF A. 1938. COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. Latham C.J.

In the case of a trader it is well established that he must take into account book debts owed to him as part of his income, at least where those book debts fall due during the year in respect of which he is making his return. An allowance may be made under statutory provisions for bad or doubtful debts, but, subject to such an allowance, the book debts must be returned as part of a trader's income. These rules depend in England upon the fact that traders are taxed, under the *Income Tax Act* 1918, Schedule D, clause 1 (*a*) (ii), "in respect of the actual profits or gains arising or accruing to any person residing in the United Kingdom from any trade, profession, employment, or vocation, whether the same be respectively carried on in the United Kingdom or elsewhere." There is a similar provision dealing with non-residents in Schedule D, clause 1 (*a*) (iii). It will be observed that profits or gains from a profession are taxed under the same provisions as those which are appropriate in the case of a trade.

Traders are taxed under Case I. in Schedule D: "Tax in respect of any trade not contained in any other schedule." Professional men are taxed under Case II.: "Tax in respect of any profession, employment, or vocation not contained in any other schedule."

The rules applicable to Schedule D provide, in the rule applicable to Case I. (that is, as to traders) that "the tax . . . shall be computed on the full amount of the balance of the profits or gains upon a fair and just average," &c.

The rule applicable to Case II. (which includes professional men) provides that "the tax . . . shall be computed on the full amount of the balance of profits, gains and emoluments of the professions, employments or vocations upon a fair and just average" &c.

Rule 3 (*i*) of the rules applicable to Cases I. and II. provides that "in computing the amount of the profits or gains to be charged, no sum shall be deducted in respect of any debts, except bad debts proved to be such to the satisfaction of the commissioners and doubtful debts to the extent that they are respectively estimated to be bad."

The rule that traders must include book debts owing to them but still unpaid depends upon the taxation of their income under the

words " profits and gains " and upon the terms of rule 3 (i), which implies that book debts must be included in the return (*Halsbury's Laws of England*, 2nd ed., vol. 17, p. 119, note i). The ascertainment of profits and gains necessarily involves an account with credit and debit items: See *Usher's Wiltshire Brewery Ltd.* v. *Bruce* (1). It is impossible to ascertain the profits of any business or occupation without taking such an account.

Where tax is levied upon a definite sum which is ascertainable without the deduction of any amount, as, for example, upon interest of money under the *Income Tax Act* 1918, Schedule D, clause 1 (*b*), no such account need be taken. In such a case a specific sum of money is subject to the tax. Thus it has been held that such a sum does not form part of the income of the taxpayer until it has been actually received. But trade debts which have accrued due in the relevant year but which have not been paid must be included for the purpose of ascertaining whether or not the business has earned a profit for the year, just as stock in trade at the beginning and end of the year must be taken into account for the same purpose. But only trade debts need be included. Other debts are irrelevant for the purpose of ascertaining the profits of a trade: See *Halsbury's Laws of England*, 2nd ed., vol. 17, p. 85.

The principle that, when it is necessary to ascertain the profits of any enterprise, it is impossible to confine consideration to a cash account of receipts and expenditure was clearly stated by Lord *Clyde* in *Dailuaine-Talisker Distilleries Ltd.* v. *Commissioners of Inland Revenue* (2) :—" It is elementary that a profit and loss account is not an account of receipts and expenditure *in cash* only ; its purpose is to show how the business stands, for better or for worse, on the operations of the year. Thus, if goods have been sold or delivered to a customer within the year, the sum due by the customer is credited to the business and debited to the customer and enters the profit and loss account at the end of the year, whether payment in cash (or otherwise) has been received within the year or not." In the same case Lord *Sands* said (3) :—" At the outset of the argument the question was put to the learned counsel for the appellants :

(1) (1915) A.C. 433, at p. 468. (2) (1930) 15 Tax Cas. at p. 620.
(3) (1930) 15 Tax Cas., at pp. 622, 623.

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA. LTD.

Latham C.J.

'If a trader has sold goods in the course of a year of charge but has not received payment of the price at the expiry of that year, does not the amount of the price fall to be taken into account in estimating the profits of the year?' The answer to that question was in the affirmative. In the present case we are not dealing with the price of goods but with payment for services rendered, but, as it appears to me, the same principle must apply. If there is a book debt for such services rendered during the year standing in the books of the business, this falls to be taken into account in estimating the profits of the year. In neither case does it matter whether non-payment is the result of default or of agreement to postpone payment. The book debt comes into account in estimating profits of the year. The debt has accrued, and in estimating profits which have accrued the debt must be taken into account." If these principles are sound, they determine the answer to the first question which arises in the present appeal, unless there is a distinction between the South-Australian statute and the statute which was being construed in the case to which I have referred.

The provisions of the English statute under which traders are taxed require an ascertainment of the balance of the profit or gains of the trade. In the case of a profession the words are "the balance of the profits, gains and emoluments of the profession." The rule permitting the deduction of bad debts and allowances for doubtful debts applies to both trades and professions. If these features are present in the South Australian legislation then it appears to me that the decisions upon the English *Income Tax Act* which establish that a trader must bring his book debts into account should be applied also to the South Australian Act. Further, if this be the case, as the same words are used for the purpose of taxing the income of professional men, the same result would follow with respect to professional men. I proceed, therefore, to examine the precise provisions of the South Australian statute.

The *Taxation Acts* 1927-1933, sec. 4, provide that "'income derived from personal exertion' includes—(*a*) every kind of profit and every kind of gain, whether arising in the course of business or otherwise howsoever, except gifts, legacies, and bequests; and (*b*) all salaries, wages, allowances, pensions, or stipends; with the

exception of 'income consisting of the produce of property.'" Thus we find that income derived from personal exertion includes profits and gains, and accordingly one of the important features of the English legislation is found in the South Australian statute. This provision makes it necessary to take an account in order to ascertain not only the profits or gains of a business but also any other profit or gain arising from personal exertion.

Sec. 18 imposes a tax on all incomes arising or accruing in or derived from the State and on income received by any person ordinarily resident in the State from dividends from any company with certain exceptions. (The word "received" was altered to "derived" by sec. 8 of Act 2233 (1935) but that amendment is not material for the purpose of these cases.) Sec. 18 is directed towards the definition of the territorial origin of the income and not to the question of the time at which moneys due to a taxpayer are deemed to form part of his income. But the section does show that in the case of the dividends mentioned the income must be received before it is taxable. This provision suggests that in the case of the other incomes mentioned in the same section as arising or accruing in or derived from the State, the element of receipt is not regarded as a necessary element in order to bring about an arising or accruing or derivation. A debt is incurred by the debtor when he becomes subject to an obligation to pay a sum certain in money to his creditor. The debt may be payable forthwith or at some future time. A debt accrues when it becomes due, whether it becomes due immediately or at a future time. When the debt is paid, then the creditor has received the debt, but the debt has accrued when it falls due even though it has not been received: Cf. *Leigh* v. *Inland Revenue Commissioners* (1). This was a case of taxation of interest, and, as already explained, interest is not taxable under the English Act unless it is actually received. In relation to interest it was said by *Rowlatt* J. —"It is to be remembered that for income tax purposes 'receivability' without receipt is nothing. Before a good debt is paid there is no such thing as income tax upon it. The meaning of the section must be 'receivability' speaking of a debt which has been received, and means the date on which it is paid as distinct from the

(1) (1928) 1 K.B., at p. 77.

H. C. OF A. 1938. COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. Latham C.J.

date on which it was accruing " (1). The respondent in this appeal relied very strongly upon this passage, but it should be observed that the learned judge was dealing with interest, which is taxed simply as interest: he was not dealing with the taxation of profits and gains. The last sentence in the passage quoted shows the distinction between the receipt of a debt and the accrual of a debt. In the South Australian statute the word " accruing " is used in sec. 18 and in sec. 22. It was not present in the provision which was interpreted in *Leigh's Case* (1).

Sec. 22 of the *Taxation Acts* deals with the period of time in respect of which the taxpayer is to make a return of his income. It contains the following provision :—" Subject to the other provisions of this Part, the taxable amount of the income of any taxpayer shall be ascertained as follows :—1. The accounts of income derived from personal exertion, and of income the produce of property, shall be calculated separately: 2. As to income derived from personal exertion, as well as to income consisting of the produce of property, the amount accruing to the taxpayer during the period of twelve months immediately preceding the time for calculation shall be taken as the basis for calculation."

As to income derived from personal exertion, the word " accruing" is used in relation to the period of time for which returns are to be made. If an amount accrues to a taxpayer during the relevant period then it must be included in his income. As already stated, a debt accrues due when it has become payable and not when it has been paid. If it has become payable during a particular period, it has accrued during that period. It must be included as income in the taxpayer's return even though it has not been paid.

Sec. 22 (xiv *a*) provides the other element which, in England, leads to the conclusion that book debts must be included in a return of income. It corresponds to rule 3 (*i*) applying to cases I. and II. contained in Schedule D in the English Act. This rule, it will be remembered, is at least part of the foundation of the rule that traders must include trade debts in their income. Sec. 22 (xiv *a*) is in the following terms :—" In calculating the net amount of income there shall be deducted debts actually written off as bad debts

(1) (1928) 1 K.B., at p. 77.

during the period in which the income was derived to the extent that such debts are proved to the satisfaction of the commissioner to be bad debts and are in respect of—(1) amounts which have been brought into account as gross income by the taxpayer in his return for any year; or . . . Except as provided in this subdivision, no deduction for bad or doubtful debts shall be made."

This provision allows debts which have become bad to be written off in a year subsequent to that in which they were brought into account. It was substituted for an earlier provision corresponding with a provision which, in *Gleaner Co. Ltd.* v. *Assessment Committee* (1), had been held to limit the deduction of bad debts to debts which arose in the year in respect of which the return was made. The important provision in that case was sec. 10 of the *Income Tax Law* 1919 of Jamaica which prohibited any deduction in respect of any debts except bad debts proved to be such to the satisfaction of the Assessment Committee and doubtful debts to the extent that they were respectively estimated by the Assessment Committee to be bad. The Privy Council rejected the contention that the debts might be deducted, in any year in which they were found to be bad, from the profit of that year, and accepted the argument for the taxation authority that any deduction under this provision must be made in the year in which the debts had been included in the return. Referring, however, to the general principles of ascertaining profits and gains of a business, their Lordships said :—" The income that is to be returned is the net income after deducting the expenses of acquiring the same, and, but for sec. 10, it might well be argued that in the case of a business debts not actually received formed no part of the income at all, although, as is well known, the annual profits or gains of a trader are not properly measured by considering only the moneys taken. There must, in every profit and loss account, be an examination of the debts and a careful distinction between those that are good, doubtful and bad " (2). This statement involves the proposition that in the case of a trader, when his *profits and gains* are being ascertained, debts owed to him must be included in his income, even though it might be argued that they need not be included if the tax were imposed upon " income " and not, in terms,

(1) (1922) 2 A.C. 169.

(2) (1922) 2 A.C., at p. 173.

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Latham C.J.

upon " profits and gains." By parity of reasoning, where the profits and gains of a professional man are to be returned, debts due but not paid should, in my opinion, also be included.

The respondent relied strongly upon certain authorities which establish that in some cases income tax is imposed upon moneys only when they are actually received and not when they accrue due. An examination of these cases, however, will show that in every instance the tax was imposed upon something other than " profits and gains." Reference has already been made to *Leigh* v. *Inland Revenue Commissioners* (1), where the tax was payable in respect of interest of money. It has been pointed out that in that case it was held that the interest must be received before it can be taxed. It may be noted that in such a case income tax is deducted at the source and is paid to the revenue authorities by the person who is liable to pay the interest. It is obvious that in such a case no account of profits or gains need be, or indeed can be, taken.

In *St. Lucia Usines and Estates Co.* v. *St. Lucia* (*Colonial Treasurer*) (2) the Privy Council had to consider whether a company was liable to pay income tax upon " income arising and accruing " in the year 1921. The sum in question was part of the purchase price of land which fell due in 1921 but was not paid in that year though it was paid subsequently. It was held that the amount was not chargeable with tax in respect of the year 1921. It was said : " The words ' income arising or accruing ' are not equivalent to the words ' Debts arising or accruing ' " (3), and " a debt has accrued to him but income has not. It does not follow that income is confined to that which the taxpayer actually receives. When income tax is deducted at the source the taxpayer never receives the sum deducted but it accrues to him. It is said, and truly, that a commercial company, in preparing its balance-sheet and profit and loss account, does not confine itself to its actual receipts—does not prepare a mere cash account—but values its book debts and its stock in trade and so on and calculates its profits accordingly. From the practice of commerce and of accountants and from the necessity of the case this is so. But this is far from establishing that income arises or accrues

(1) (1928) 1 K.B. 73.
(2) (1924) A.C. 508.
(3) (1924) A.C., at p. 512.

from (as above instanced) an investment which fails to pay the interest due." It will be seen that the Judicial Committee was dealing with a case where the only provision under which tax could be charged was a provision relating to income arising or accruing. There was no provision for the ascertainment of profits and gains and for taxation upon profits and gains when ascertained. The words of the Judicial Committee show that where it is necessary to calculate profits it is necessary to value and to take into account book debts. Thus this case is distinguishable from the present case where profits and gains as such are expressly included within the definition of income.

Lambe v. *Inland Revenue Commissioners* (1) is a case in which it was held that where interest on a loan had not been paid and might never be paid, the amount of interest due ought not to be included in computing the taxpayer's income for income tax purposes for the year during which it was payable. This was a case similar to *Leigh's Case* (2) dealing with interest due on a loan where " the tax is deducted at the appropriate rate " (by the person liable to pay the interest) " and the income is brought in as part of the income of the recipient " (3).

In *Dewar* v. *Inland Revenue Commissioners* (4) a legatee was entitled to claim payment in a particular year of interest on a legacy. He did not claim the interest and did not receive any interest. It was held that as the respondent had not received any of the interest there was no income in respect of it on which he could be charged to tax. This is also a case of taxation of interest under Schedule D, clause 1 (*b*) and the principles upon which it was decided are the same as in *Leigh's Case* (2). All these cases, therefore, are distinguishable from the present case.

Grey v. *Tiley* (5) was a case in which it was held that where a commission earned in one year had been paid, part in that year and part in later years, the income arose in the years when the payments on account were received. But the question in the case arose under case VI. of Schedule D dealing with casual profits.

(1) (1934) 1 K.B. 178.
(2) (1928) 1 K.B. 73.
(3) (1934) 1 K.B., at p. 186.
(4) (1935) 2 K.B. 351.
(5) (1932) 16 Tax Cas. 414.

H. C. OF A. 1938. COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. Latham C.J.

Rowlatt J. (1) explained that no help was to be obtained from cases which really depended " on the accounts of a trader or profession or anything of that kind." He said that in cases " where the question was as to trading profit, in cases of that kind of course at the end of the year you would show your profits in accounts which took into consideration debts earned, debts due as assets."

The rest of this sentence is perhaps not perfectly clear in the report, but it is clear that the learned judge regarded it as essential to take into account debts accrued, but not paid, when the profits or gains of a trade or profession were being ascertained. Thus this case really supports the contention of the appellant in this appeal.

In *Commissioner of Taxation (N.S.W.)* v. *Lawford* (2) this court dealt with a case where income tax was claimed in respect of fees earned by a solicitor but paid after his death to his executrix. It was held that the moneys were not income derived by the executrix in her representative capacity. The commissioner did not in that case contend that the fees, when they accrued due as debts, were income of the deceased. It was sought to tax only moneys received by his personal representative under the terms of a section which referred to " income derived by (an executor) in his representative capacity." The only decision of this court was that the fees were not income of the executrix in her capacity as executrix and were not derived by her. Thus the decision does not assist the respondent in the present case, where the question does directly arise whether the fees of a professional man earned, but not paid in a certain year, are part of his income for that year under the provisions of the South Australian statute.

In the present case the commissioner for a number of years accepted returns upon a cash basis, and it is suggested that he is estopped therefore from claiming that the returns should have been made upon a different basis. The requirements of an estoppel, however, are not satisfied. In the present case there is no evidence that the taxpayer altered his position to his prejudice by taking advantage of the willingness of the commissioner to accept returns upon a cash basis. The only result of what the commissioner has done is that the taxpayer has not been required to pay amounts of

(1) (1932) 16 Tax Cas., at p. 421. (2) (1937) 56 C.L.R. 774.

income tax which he would otherwise have been compelled to pay. This temporary benefit to the taxpayer cannot be described as an alteration of his position to his prejudice brought about by an act of the commissioner. But, further, the commissioner has no power to excuse taxpayers from the duty of paying taxes in accordance with the law unless the statute expressly authorizes him to do so. The commissioner is bound by the statute and cannot, in the absence of express provision, relieve citizens from their obligation to obey the statute. If any other principle were adopted the public revenue could be prejudiced by mistakes on the part of the commissioner which could never be corrected, although it would still be open to taxpayers, upon objection and appeal, to challenge any act of the commissioner which was against their interests. There is, in my opinion, no reason for adopting a rule that a mistake of the commissioner in favour of a taxpayer cannot be corrected while an error of the commissioner against a taxpayer may be corrected. This opinion is in accordance with the decision of the Privy Council in *Maritime Electric Co.* v. *General Dairies Ltd.* (1), where it was pointed out that estoppel is only a rule of evidence and that no estoppel can avail to release persons from an obligation to obey a statute which imposes a duty of a positive kind. The statute there in question was a statute which defined the charges to be made for the supply of electric energy. A taxing statute is a statute which imposes positive duties upon taxpayers which cannot be reduced or abolished at the will of the public officer upon whom the duty of administering the statute is imposed. Thus the objection founded upon estoppel fails.

It is argued that the court should approve "the practice" of returning cash receipts because it is a recognized practice and because the question is really a business question. The answer to this argument is, I think, threefold. In the first place, there is no evidence whatever as to what the practice is. In the second place, any practice, even if it were universal, cannot control the statute if, upon its true construction, the practice is wrong or irrelevant. It has frequently been argued that the ascertainment of income is a "business" matter, so that, for example, a court must take

(1) (1937) A.C. 610.

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Latham C.J.

" profits " as determined by business men, with such deductions as are reasonable and proper from a business point of view, and must then apply income tax provisions to profits so ascertained. (Contentions as to allowances for depreciation of plant, &c., provide a good illustration.) *Warrington* L.J., referring to an argument of this character, in *Inland Revenue Commissioners* v. *Von Glehn* (1) said :—" The question whether this deduction is to be allowed is one that must be determined by the rules regulating the assessment of income tax and not by rules regulating what may be allowed in the preparation either for a company, an individual, or a firm, of the balance-sheet or the profit and loss account. A firm or a company carrying on business may within certain limits treat as a deduction from profits such sums as it pleases, but for the purposes of income tax the deductions which may be allowed from the gross profits are strictly regulated by the *Income Tax Acts*." If the relevant Act deals with a matter in a particular manner, it is quite immaterial that taxpayers prefer to deal with it in another manner. It is for this reason that I have based my judgment entirely upon the statute and upon decisions which seem to me to be in point. If I were of opinion that no clear conclusion could be drawn from the words of the statute, the position, of course, would be very different. In the third place, the argument in favour of the receipts basis was that it was " a " proper or appropriate method. No clear reply was given to the question whether the taxpayer had a right to choose his own method for himself, though it was denied that the commissioner had a right to impose a method upon him " compulsorily "—to use the language of the Supreme Court. But this denial was qualified by a willingness to concede that the commissioner perhaps was entitled to insist upon the earnings basis in respect of the period after the death of Dr. Carden. It was not explained why the commissioner could so insist in respect of one period and not in respect of a preceding period—except by the contention based upon estoppel, to which I have already referred. Further, the view that either method is permissible must involve one of two results : (1) that the taxpayer can change over from year to year as he chooses—a contention which has not been supported by argument

(1) (1920) 2 K.B. 553, at p. 567.

and the adoption of which would obviously produce very strange results: or (2) that, when the taxpayer has once adopted one method, he must go on for ever following the same method unless (possibly) the commissioner consents to the adoption of the other method. There are several objections to this second proposition. In the first place, the Act does not, as I read it, permit of the introduction of such a principle either generally or in the case of professional men. Separate returns are made for each year. It has never yet been decided that the making of a return upon a particular basis for one year either entitles or binds the taxpayer to continue to make returns on the same basis for subsequent years. There are many decisions in this court in which the court has held that a long-continued practice was wrong simply because it was contrary to the terms of a taxation Act. The adoption of any other view would involve the result that the meaning (not merely the result of the application) of the Act in any particular case might vary according to the practice of the particular taxpayer concerned if that practice had not been challenged by the taxation authorities upon its initiation. Further, for reasons already stated, the commissioner cannot "consent" to any practice if that practice is inconsistent with the Act. The Act contains a number of provisions which enable the commissioner to determine certain questions—for example, secs. 6 (4), 8, 9, 22 (xiv *a*), 22 A, 22 B, 23, 24 and other sections. If he exercises such powers and in a particular case accepts the view or contention of a taxpayer, he may be said to have given a "consent" which is effective. But it is effective, not as a consent, but as a decision; and it is effective only by reason of the express terms of the statute. If there is an imperative provision in the statute, the commissioner is bound to obey it, and he cannot, by any process of consent, in effect repeal it in the case of any taxpayer. If, upon the true construction of the Act, a professional man is bound to declare his profits and gains upon an earning basis, the fact that he has, in the past, declared them upon a receipts basis is irrelevant in relation to any return which is within any time limit permitted by the Act for reconsideration or re-assessment.

For the reasons stated I am of opinion that the taxpayer ought to have included in his returns book debts which fell due within the

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Latham C.J.

year in respect of which he was making a return of his income. But the taxpayer died on 15th November 1935. Can the commissioner now assess the company as Dr. Carden's executor in respect of book debts which had not in fact been included by him in any return? The *Income Tax Acts* contain a number of provisions dealing with the death of a taxpayer and with the responsibility of executors. These provisions overlap to some extent.

In the first appeal the question which is raised is whether the commissioner is entitled to include the whole of the unpaid book debts (now agreed at a sum of £1,155) in a single assessment of the executors. The commissioner claims that he is entitled to make such an assessment by virtue of sec. 84 (1) of Act 1927 which is as follows: "If the whole or any portion of the taxable amount of the income of any taxpayer is not included in an assessment in any year, the commissioner may include such whole or portion in the assessment of the taxable amount of the income of such taxpayer for a subsequent year."

If Dr. Carden had still been alive the commissioner could under the clear words of this section have included in an assessment made in 1935 the whole of the taxable amount of the taxpayer's income which had not been included in prior assessments. Unless sec. 84 is so construed according to the natural meaning of its words it is difficult to give any meaning to the provision. It is true that sec. 87 provides that, except on the ground of fraud, no assessment for income tax shall be re-opened by the commissioner in respect of any return made more than three years last preceding the opening. But when the commissioner applies sec. 84 he does not re-open any assessment for past years. He simply includes in one assessment income omitted from prior assessments. So also sec. 88 does not operate to limit the power of the commissioner under sec. 84. Sec. 88 provides that "Except in case of default in furnishing an income return, or of any fraudulent return, no taxpayer shall be required to give any account of his income for more than three years from the date of the inquiry." No question arises as to the power of the commissioner to compel the taxpayer to give any account of income for more than three years from any particular date. The commissioner has the necessary information and simply includes the omitted income in a return by virtue of sec. 84.

But it is contended that sec. 84 only applies to the taxpayer himself and that it cannot be applied to his executor. It relates to the income of " any taxpayer " and to an assessment of the taxable amount of the income of " such taxpayer." It is argued that these words cannot be so interpreted as to impose any liability upon an executor of a taxpayer. This contention makes it necessary to examine sec. 41 and sec. 42 of the Act.

Sec. 41 provides that every executor shall be a taxpayer in his representative capacity. Sec. 42 provides that the legal personal representative administering the estate of persons who died after the commencement of the Act shall be a taxpayer in a representative capacity in respect of—(1) the income of a deceased person from the 1st July last preceding his decease up to his decease ; (2) the income of the deceased person in the period of twelve months immediately prior to the said first day of July ; and (3) the income of any period not earlier than five years before the death of the taxpayer in respect of which the deceased person was a taxpayer and failed to furnish a return.

It has been contended that the concluding words refer only to " periods in respect of which " the deceased person was a taxpayer and not to income of the periods in respect of which he was a taxpayer and failed to furnish a return. If this is the true construction, then the provision marked (3) has no application in the case of any year if the taxpayer has sent in any return for that year, even if he admittedly omitted income in that return. If the real income was £10,000 and the taxpayer only returned £100, the provision would not apply to his executors. If this is the true construction, it must be accepted, but the result is so surprising that the question should be carefully considered before such a construction is adopted. In my opinion the provision should not be so construed. I read the section as dealing with the income of three periods—the whole income of the first and second periods, and any income of the third period in respect of which no return has been furnished. In (1) and (2) the substantive description of the income of the periods mentioned is unqualified. In (3) the substantive description of such income is qualified by the words " in respect of which the deceased person was a taxpayer and failed to furnish a return." The deceased person

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Latham C.J.

would be a taxpayer in respect of " the income " as well as in respect of " the period." If there were no income, there would be no tax. It is the receipt of income and not merely the transition of a period which creates a liability to taxation. The result of this construction is that the personal representative would be liable to make returns in respect of all the income of the periods mentioned in (1) and (2), but only in respect of the income of any other periods included in (3) which had not been returned by the deceased. So construed the section is a very reasonable provision. The words are capable of this construction and the arrangement of the whole section suggests such a construction. The contrary view, which attaches the final words to " period " and not to " income," would permit avoidance of taxation admittedly otherwise payable if a purely nominal and false return had been made for a particular year, though it would secure full taxation if no return at all had been made. The other construction secures proper taxation, not only in the case of complete omission to make any return, but also whenever income which has not been returned should have been returned. In my opinion this latter construction is more reasonable than the other—the words are readily capable of it and it should be adopted.

Thus the company in the present case as the executor of Dr. Carden is a taxpayer in a representative capacity in respect of his income (1) from 1st July 1935 to 15th November 1935, (2) in the period 1st July 1934 to 30th June 1935, (3) of the period 15th November 1930 to 15th November 1935 in respect of any income in respect of which Dr. Carden was a taxpayer and failed to furnish a return.

Sec. 42 (2) provides that the personal representative shall in respect of the income referred to in the section furnish the returns which the deceased person should if living have furnished. Sec. 42 (3) entitles the commissioner at any time by particular notice to require the personal representative to furnish the returns of income in respect of which the personal representative is taxable in a representative capacity. Under these provisions, therefore, the commissioner can require the company to furnish the returns which Dr. Carden should have furnished and in particular may require the company to furnish returns in respect of income during the periods

specified in sub-sec. 1. Sub-secs. 3 (*b*) and (*c*) entitle the commissioner to make assessments of the personal representative on the returns so furnished or to make assessments in default of such returns or without requiring any return. Sec. 42 (2) (c) confers on the personal representative a right of appeal against assessments in the manner and time and upon the ground in and upon which the testator if living might have appealed.

These provisions therefore entitle the commissioner to assess the executor just as if the executor were the deceased person and that person were living, and they also confer upon the executor all the rights which the testator would have had if he had been alive. If the testator had been alive sec. 84 would have applied and the commissioner is therefore entitled to make an assessment upon the basis of sec. 84 against the executor in respect of Dr. Carden's income ascertained in accordance with the true construction of the provisions of the Act.

The commissioner is therefore entitled, in my opinion, to include in the assessment which is the subject of objection in the first appeal the whole amount of the book debts, namely, £1,155, which ought to have been included in assessments for earlier years. If the commissioner should insist upon exercising the rights conferred upon him by sec. 84, it would be unnecessary to answer the questions which arise upon the second appeal, which relates to assessments in which the book debts have been assigned as income to past relevant years.

But though the commissioner is entitled to apply sec. 84 he is not bound to apply it. The addition of the total amount of book debts to the last assessment would apparently mean in this case that a higher rate of tax would become payable upon the disputed amount than would otherwise be the case. Assessments distributing the book debts over the years in which they accrued would be fairer and more favourable to the taxpayer's estate. If the commissioner is content to tax upon the more considerate basis, he is able to do so if sec. 43 is applicable. The amended assessments would then be at the rates payable in respect of the years for which income tax ought to have been paid. Sec. 43 applies to all cases where, whether intentionally or not, the taxpayer escapes full taxation in his lifetime

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Latham C.J.

by reason of not having duly made full, complete, and accurate returns. In the present case the taxpayer has, upon the view which I have taken of the Act, escaped full taxation by reason of the fact that he did not include all his income in his returns. It is true that he made these returns by the permission and with the consent of the commissioner, but it was the absence of accuracy in the returns, and the misunderstanding both of the commissioner and of the taxpayer as to what was required in order that returns should be accurate, which brought about the result of the taxpayer escaping full taxation. Therefore, in my opinion, the section is applicable. Upon any other view the commissioner could never apply sec. 43 so as to review any assessment upon returns which he at the time had accepted as full, complete and accurate and which the taxpayer had also regarded as full, complete and accurate. It could always be argued in such a case that the taxpayer had escaped full taxation by reason of the consent of the commissioner and not by reason of not having made full, complete and accurate returns. I can see no reason for limiting the operation of the section by any such reference to the mental attitudes of the commissioner and of taxpayers.

Where sec. 43 is applicable the assessment is to be at the rates payable in respect of the years for which the income tax ought to have been paid (sec. 43 (*c*)) and must obviously be an assessment with respect only to the income of those years respectively.

But action under sec. 43 involves alteration of prior assessments and therefore, in this case, the re-opening of assessments made in respect of the years ending 30th June 1934 and 30th June 1935. The return for the former year was made on 12th April 1935 and for the latter year on 31st August 1935. The re-assessments which are the subject of the second appeal were made on 4th July 1938, that is, more than three years after the date of the return for the year ending 30th June 1934. The re-assessment for the year ending 30th June 1935 was made within three years of the date (31st August 1935) when the return for that year was made.

Sec. 87 provides that, except in the case of fraud, no assessment shall be re-opened in respect of any return made more than three years last preceding the re-opening. There is no fraud in the present case. If the section is applicable, the commissioner cannot re-open

the assessment for the earlier year, but he is not prevented by the section from re-opening the assessment for the later year.

But it may be suggested that the general provision contained in sec. 87 is not applicable after a taxpayer has died. The argument would be that sec. 42 is a special provision for the case of a taxpayer who has died; the section specifically makes the executor of the deceased liable in respect of the income of a five-year period before the death of the taxpayer; therefore the application of sec. 87, limiting re-opening of assessments to a three-year period is excluded in all cases falling under sec. 42, where a five-year limitation only is relevant. In my opinion, this argument is not well-founded. Sec. 43 does not impose upon the executor any greater liability than the Act would have imposed upon the deceased if he had been alive. If he had been alive sec. 87 would, except in the case of fraud, have prevented the re-opening of any assessment upon a return made three years before the re-opening. The same provision applies in the case of his executor. If there had been fraud, the deceased himself would during his life have been subject to the risk of having all past assessments affected by fraud re-opened without any time limit. Sec. 43, however, in the case of an executor, imposes a five-year limit even in the case of fraud by the deceased. Thus the section does not increase, but on the contrary it diminishes, the liability of the executor as compared with that of the deceased.

Under sec. 42 the liability of the executor extends to a period of five years before the death of the taxpayer. The taxpayer died on 15th November 1935. The commissioner does not, in the re-assessments made, seek to go further back than to the period beginning on 1st July 1933. Thus sec. 42 presents no obstacle to the commissioner by way of time limitation. But, for the reasons stated, I am of opinion that sec. 87, if taken by itself, does prevent any re-opening of the assessment in respect of the year ending 30th June 1934 because the taxpayer's return for that year was made on 12th April 1935—more than three years before the re-opening of the assessment by the re-assessment of 4th July 1938. There is no such obstacle to prevent re-assessment for the year ending 30th June 1935.

But sec. 87 cannot be taken by itself. It must be read in conjunction with the other provisions of the Act. Sec. 43 is a special

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Latham C.J.

provision applying only in the case of the death of a taxpayer. Par. *d* of that section provides in unequivocal terms: "No lapse of time shall prevent the operation of this section." Thus, if a case falls within the section, the commissioner is not limited by sec. 87. Any other view would deprive par. *d* of all meaning—it could have no operation whatever in any case. The three years limitation in sec. 87 would be effective; the five years limitation in sec. 42 would be effective; but the exclusion of any time limitation in sec. 43 would never be effective. Accordingly I am of opinion that, in this case, to which, as I have already said, I think sec. 43 applies, there is no time limitation which prevents the commissioner from requiring and making assessments for both of the years in question.

The special cases also raise the question whether an amount of £248 representing the expenses of Dr. Carden in carrying on his practice from 1st July 1935 to the date of his death can properly be allowed as a deduction. Expenses can be deducted if they were "actually incurred by the taxpayer in the production of the income" (sec. 22 (x)). If the income which is taxable includes cash receipts, but not book debts, then, the commissioner contends, only such portion of the expenses as can be shown to have been incurred in the production of the cash receipts during the period can be deducted: some portion must be attributed to the cases which Dr. Carden treated in respect of which he was not paid his fees before his death and that portion cannot be deducted under sec. 22 (x). But upon the view which I take as to the first question asked in the special cases this question with respect to deduction does not arise. If the book debts accruing during the period, as well as the cash receipts, must be returned as income of the period, then plainly the whole amount of the expenses mentioned must be allowed as a deduction. Thus no answer to the second question in the first case is required.

The questions in the first case should be answered as follows:—(1) Yes—£2,119. (2) No answer.

The questions in the second case should be answered as follows:—(1) Yes, (*a*) for the year ending 30th June 1934, the sum of £514, (*b*) for the year ending 30th June 1935, the sum of £476. (2) Yes for both of the said years.

Although in my opinion the respondent company should fail in these appeals, I think that there should be no order for costs in the proceedings. The taxpayer altered the form in which his returns were made by reason of a change in the printed form provided by the taxation department for making returns If the commissioner succeeded upon the appeals he would do so only by challenging the basis upon which he invited the taxpayer to make his returns. In these circumstances there should, I think, be no order as to the costs of any of the proceedings even if the judgment of the court were in accordance with the views which I have expressed.

RICH J. I have had the advantage of reading the judgment of *Dixon* J. and agree with it. The reasons stated by him express very clearly the opinion I have always held as to the manner of assessing professional incomes, and I can now adhere to my opinion with greater confidence.

DIXON J. Dr. Carden practised medicine in South Australia for many years before his death, which occurred on 15th November 1935. On his death the Commissioner of Taxation learned that his assets included a substantial amount of unpaid professional fees.

These appeals arise out of the attempts of the commissioner, who is the appellant, to assess his executors, who are the respondents, to income tax in respect of the whole or some part of the unpaid fees.

Up to the year of income beginning 1st July 1929, Dr. Carden included in his returns of income all the fees he had earned during the particular accounting period, whether he had received payment or not.

Under the now repealed *Taxation Act* 1927-1933 (S.A.), which governs these matters, it is for the Governor in Council, by regulations having the force of law, to prescribe the returns to be furnished by any party and the form and contents thereof (sec. 112). The Act provides also that where forms of return applicable in any particular case are supplied by the commissioner to the public, the return shall be in the form so supplied, and shall contain all the particulars indicated in the form which are applicable to the particular case (sec. 63 (1)).

H. C. OF A. 1938. COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. Dixon J.

For the year of income beginning 1st July 1929 Dr. Carden changed the basis upon which he made up his return of professional income. Instead of returning, as theretofore, the fees earned, whether paid or unpaid, during the year of account, he returned the fees received in that year. The special case does not state whether this was done because of any change in the form or the instructions supplied by the commissioner. It was suggested by counsel for the taxpayers that the change in Dr. Carden's method of computation was so to be accounted for. But I am not sure that counsel for the commissioner acquiesced in the suggestion. However, the basis of the returns must have been clear to the commissioner, and it was a basis which he allowed, if he did not invite it.

Since that time Dr. Carden's professional income has been returned year by year in the same way, that is, by including his actual receipts for the period of account and disregarding fees earned but unpaid. In continuing to return his professional income on the basis of actual receipts, Dr. Carden took a consistent course and one which, if it was not directed by the forms of instruction given to taxpayers, appears to have been conformable with the commissioner's requirements. It was the basis adopted by the commissioner, and he assessed Dr. Carden accordingly during his lifetime. The last assessment was in respect of the income year preceding his death, namely, that ending 30th June 1935. But, except under some special statutory provision, the system of assessing upon actual receipts cannot be applied to the receipts of executors in respect of fees earned by their testators. For an executor obtains such payments, not as income earned by him in his representative capacity, but as part of the capital assets of the estate (*Commissioner of Taxation (N.S.W.)* v. *Lawford* (1)). The commissioner, therefore, deserted the basis of assessment he had followed in Dr. Carden's lifetime, and proceeded to assess the unpaid fees to income tax upon the footing that they ought to have been returned by him during the various years in which they were earned. A little consideration will show that when, as at 30th June 1929, the change was made in the mode of return and of assessment a rigid adherence to the receipts basis of assessment would have resulted in the inclusion of

(1) (1937) 56 C.L.R. 774; 4 A.T.D. 253.

the same fees in two different assessments, fees earned before 1st July 1929 but paid on or after that date. If this was done the commissioner was, so to speak, providing in advance against the future contingency of Dr. Carden's ceasing to be a taxpayer at a time when professional earnings were outstanding and unpaid. To adhere rigidly to the receipts basis, disregarding the fact that some of the receipts represent fees which have been included as earnings in a prior assessment, would, I think, have been by no means indefensible. For the two methods of ascertaining the income of a professional man are rival systems of account, each put forward by its supporters as an appropriate and satisfactory basis of computation. There is, therefore, no abstract reason why, when a change from one to the other is made, an adjustment should be attempted by excluding from the later assessments receipts in respect of fees already included in earlier assessments made on an earnings basis. Indeed, there is the authority of the Court of Session for the view that such an adjustment must not be made: See *Commissioners of Inland Revenue* v. *Morrison* (1). But if such receipts were not excluded, there would be no justification for deserting the receipts standard after Dr. Carden's death. Whether in fact such an adjustment was made or attempted is the subject of doubt. The language of the special cases is hardly consistent with its having been done. They say that for each of the years after 1st July 1929 the deceased returned as his gross income for taxation purposes from his medical practice his actual receipts from such practice in each year omitting book debts. But *Napier* J., in delivering the judgment of the Full Court, stated the fact to be that the actual receipts in cash (omitting the payment of debts incurred prior to 1929 upon which tax had been paid) were returned as the gross income.

When the commissioner first put forward his claim against the executors, he mistakenly included unpaid fees earned before 1st July 1929. But, as a result of adjustments and modifications, the claim he now makes is to assess the executors to tax in respect of an amount of £2,119, representing debts which he considers that the executors will recover in respect of fees all earned since 1st July 1929. Of this amount £514 was earned in the year of income

(1) (1932) S.C. 638; 17 Tax Cas. 325, at pp. 328, 330, 331.

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Dixon J.

beginning on 1st July 1933 and ending on 30th June 1934; and £476 in the year of income beginning 1st July 1934 and ending on 30th June 1935, and £156 in the broken period beginning on 1st July 1935 and ending with Dr. Carden's death on 15th November 1935. The remaining amount, £973, was earned sometime between 1st July 1929 and 30th June 1934.

Two alternative methods of assessment have been adopted by the commissioner for the purpose of bringing the unpaid fees into tax. The method which he followed in the first instance was to include in his assessment of the executors in respect of the period from 1st July 1935 to 15th November 1935 the amount of the fees considered recoverable, without regard to the year of income in which they were earned. This was done upon the assumption that sec. 84 (1) applied to the case. That sub-section provides that, if the whole or any portion of the taxable amount of the income of any taxpayer is not included in an assessment in any year, the commissioner may include such whole or portion in the assessment of the taxable amount of the income of such taxpayer for a subsequent year. It having been decided by the Supreme Court that sec. 84 has no direct application when what is under consideration is the assessment of executors upon the income of their testator, and that its indirect application was of a very limited description, the commissioner, in order to submit to the decision of this court the question of the executors' liability in as wide a form as possible, issued amended assessments in respect of the years ended 30th June 1934 and 1935 by which the respective sums of £514 and £476 were included in the assessable income of the deceased. It was not intended that these last assessments should stand if the court was of opinion that sec. 84 applied. If, however, it was of the contrary opinion, the commissioner intended to fall back upon the two separate assessments for the years ended 30th June 1934 and 1935. All this is, of course, upon the assumption that Dr. Carden should have been taxed on his earnings and not on his receipts.

The first question for decision is whether, upon this assumption, sec. 84 authorizes the inclusion of unpaid fees earned before 1st July 1935 in the assessment for the period between that date and Dr. Carden's death on 15th November 1935. In my opinion it does not

do so. It has not a direct application of its own force. For its terms do not cover the inclusion in an assessment upon an executor of income omitted from an assessment made upon a testator in his lifetime. When it authorizes the commissioner to include the omitted income of a taxpayer "in the assessment of the taxable amount of the income of such taxpayer," it supposes an identity of the taxpayer who is assessed. Dr. Carden, however, is one taxpayer and his executors form another and independent taxpayer. It is true that an assessment of the executors to income tax upon the taxable income for the broken period from 1st July to 15th November 1935 is an assessment of the taxable income of Dr. Carden for a subsequent year and it is true that he was a taxpayer. But he did not fill that description when the assessment for the subsequent year was made. Even that description cannot be fastened upon the dead. But the commissioner relies upon two provisions relating to the income of deceased persons, one or other of which, according to his contention, takes up sec. 84 and makes it applicable to the assessment of the executors so as to authorize him to include the omitted income of a deceased person for a past year in an assessment of his executors in respect of a subsequent year. One of the two provisions is sec. 43. The purpose of that section in the event which it specifies is to give to the commissioner the same powers and remedies against an executor as he would have had against the deceased in his lifetime, and to do so notwithstanding lapse of time, and, further, to impose a penal liability for double the amount of tax. But the section applies only in the specified event which, in the language of the provision, is "where, whether intentionally or not, a taxpayer escapes full taxation in his lifetime by reason of not having duly made full, complete and accurate returns."

As is shown by the imposition of a penal liability for tax, the section relates to a default on the part of the taxpayer in relation to his returns, a default "by reason" of which he "escaped" full taxation. I do not think that the facts of Dr. Carden's case satisfy this condition. It may well be doubted whether, seeing that he made his returns in the form allowed, if not authorized, by the commissioner, he did not make full, complete and accurate returns, even if it be true that according to law the basis of computing the tax

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Dixon J.

imposed by the statute is that of " earnings " and not of " receipts." But in any case I do not think that it was " by reason " of his returns that he was not taxed on the earnings basis. It was by reason of the commissioner's adopting the receipts basis for professional income. The commissioner was not misled. He was fully aware of the two modes of computation and chose receipts and not earnings. The taxpayer's return was in accordance with the commissioner's choice.

The second of the two provisions relied upon by the commissioner for the purpose of making sec. 84 applicable to such a case as the present is sec. 42. Sec. 42 (1) provides that the legal personal representative of a deceased person " shall be a taxpayer in a representative capacity in respect of the income of the deceased person from the first day of July last preceding his decease, up to his decease, and in the period of twelve months immediately prior to the said first day of July, and also in respect of the income of any period not earlier than five years before the death of the taxpayer in respect of which the deceased person was a taxpayer and failed to furnish a return."

This provision does not, in my opinion, make sec. 84 applicable so as to enable the commissioner to include in an assessment upon an executor income which accrued in the lifetime of the deceased in a past year, but was not included in the deceased's assessment in respect of that year. The purpose of the provision is to empower the commissioner to make the executor a taxpayer in respect of the three periods it specifies. But it makes the executor an independent taxpayer and it does not treat him as, so to speak, an extension or continuation of the deceased's personality and identity as a taxpayer. It leaves untouched the effect of death in interrupting the continuity of a deceased's character of taxpayer, but makes his legal personal representative a taxpayer liable to furnish returns in respect of the deceased's income and bound by assessments whether upon the deceased or upon an executor or administrator himself. This is made clear by sub-secs. 2, 3, 4 and 5, which it is unnecessary to set out. Sub-sec. 5 is a special provision dealing with the rates of tax and it may be remarked, as a subsidiary consideration, that in some circumstances it would be difficult, if not impossible, to apply it to an assessment under sec. 84.

I am of opinion, therefore, that sec. 84 has no application to income alleged to have been omitted from assessments made upon Dr. Carden.

The special case which raises this question appears to imply that assessments were made upon him in respect of the years of income up to that in the course of which he died, that is, up to 1st July 1935.

But the second special case says that the assessment in respect of the year of income ending 30th June 1935 was made on 14th March 1936, that is, after his death. It does not appear whether it was made in his name as if he were alive or upon the executors under sec. 42.

In the former case the executors would be bound under sub-sec. 2 (*b*) of sec. 42 : but I do not think that sec. 84 would apply to income omitted therefrom, so as to allow of its inclusion in the assessment on the executors for the broken period of the following year. In the latter case, it is possible that sec. 84 would apply in respect of income not included in the assessment for the year ending 30th June 1935. The question has not, however, been raised and the facts upon which it depends are left unstated. But, subject to this question, I think that the commissioner was not empowered to include in the assessment upon the executors in respect of the period from 1st July 1935 to 15th November 1935 any of the income which he alleges was not included in the assessments for the five years of income from 1st July 1929 to 30th June 1935.

It is, therefore, necessary to consider the alternative assessments relied upon by the commissioner, which are the subject of the second special case. They are two in number and are amended assessments for the years of income ending 30th June 1934 and 1935 respectively. They are made under the combined operation of sec. 42 and of sec. 81, which provides that it shall be lawful for the commissioner in any case to alter (or reduce) any assessment.

As to the year ending 30th June 1934, I think it falls outside the authority given by sec. 42 (1). It clearly does so unless it can be brought within the last words of the sub-section, viz., " and also in respect of the income of any period not earlier than five years before the death of the taxpayer in respect of which the deceased person was a taxpayer and failed to furnish a return."

Dr. Carden did not fail to furnish a return in respect of the period consisting of the year ending 30th June 1934, and for this reason I think that the words do not apply. It is suggested, however, that

H. C. OF A. 1938. COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. Dixon J.

in the return which he made he did not include income represented by the difference between that computed by the receipts method which he followed and the amount computed by the earnings method, and that it might, therefore, be said that he failed to furnish a return in respect of that income. It does not appear that the amounts resulting from a computation of income on a receipts basis for that particular year was less than the amount computed on an earnings basis and there is no reason for supposing that it would be so. But this consideration may be put on one side as raising a question of fact which might require investigation. Resting upon the view that there was on the part of Dr. Carden a failure to furnish a return in respect of some income of that year, the commissioner contends that such a failure is enough to fulfil the condition laid down by the last words of sub-sec. 1 of sec. 42. He begins by attaching the words " in respect of which " to the word " income " and not to the last antecedent, viz., the word " period." With this foundation of syntax as a starting point, he makes the expression " *the* income of any period " include any part of the income derived in the period.

I am unable to adopt this interpretation of the clause. The sub-section is dealing with periods. When it reaches the longest retrospective period, it introduces a condition that the deceased shall have failed to furnish a return. The natural meaning of these words is failure to furnish any return of income. There is a clear distinction between omitting items of income or understating income in a return and failing to furnish a return. This distinction the Act makes in terms. Sub-sec. 1 of sec. 64 provides that every taxpayer who fails to furnish any return shall be guilty of a misdemeanour; sub-sec. 3 says that, notwithstanding sub-sec. 1, a taxpayer who fails to include in his return any income or includes an amount of expenses in excess of that incurred shall pay additional tax. It is possible that sub-sec. 1 of sec. 64, which refers back to sec. 63, is speaking of a failure to furnish a return setting forth a full and complete statement of income. But there is no such reference in sec. 42 (1) and sec. 64 clearly marks the distinction. Further, what I should take to be the natural sense of the expression is borne out by the grammar. For prima facie the grammatical antecedent of the relative " which," in the expression " in respect of which," is the

word " period." In any case to furnish a return in respect of income computed on an erroneous basis is hardly to fail to furnish a return in respect of the income.

I am, therefore, of opinion that no affirmative power can be found supporting the amended assessment for the year ending 30th June 1934. But that amended assessment is also attacked as being out of time. Sec. 87 provides that " except on account of fraud, no assessment for income tax shall be reopened by the commissioner in respect of any return made more than three years last preceding the reopening."

The return was made more than three years before the amendment. This appears to me to be a fatal bar.

But, in respect of the year ending 30th June 1935, I think that sec. 42 (1) operates to enable the commissioner under sec. 81 to alter the deceased's assessment by increasing the amount, that is, of course, if in point of law it ought to be made up on the earnings basis and if to do so would result in a greater amount of income for that year. Sec. 81 authorizes alterations imposing additional tax: Cf. secs. 87 and 89. Although the particular provisions of sub-secs. 2 and 3 of sec. 42 do not expressly include alterations, I see no reason why the general words of sub-sec. 1 should not subject the executors to liability under an altered assessment. The result is that, in my opinion, the powers of the commissioner under sec. 42 enabled him to make an altered or amended assessment upon the executors for the year ending 30th June 1935. The question whether he ought to have done so depends upon the substantive question whether to assess Dr. Carden's professional income upon the basis of receipts was not in accordance with law. For the broken period, the commissioner clearly had power to assess the executors. But the substantive question for that period may perhaps be more accurately stated to be whether it is wrong on the part of the commissioner to compute the professional income upon an earnings basis. For one view suggested is that a choice between the two methods is permitted by law and that choice lies with the commissioner.

The question whether one method of accounting or another should be employed in assessing taxable income derived from a given pursuit is one the decision of which falls within the province of

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Dixon J.

courts of law possessing jurisdiction to hear appeals from assessments. It is, moreover, a question which must be decided according to legal principles. In the dichotomy between questions of fact and of law upon which courts so continually insist in dealing with the problems of income tax they are called upon to solve, there are thus grounds enough for placing it under the category of questions of law. But it is, I think, a mistake to treat such a question as depending upon a search for an answer in the provisions of the legislation, a search for some expression of direct intention to be extracted from the text, however much it may be hidden or obscured by the form of the enactment.

Income, profits and gains are conceptions of the world of affairs and particularly of business. They are conceptions which cover an almost infinite variety of activities. It may be said that every recurrent accrual of advantages capable of expression in terms of money is susceptible of inclusion under these conceptions. No single formula could be devised which would effectually reduce to the just expression of a net money sum the annual result of every kind of pursuit or activity by which the members of a community seek livelihood or wealth. But in nearly every department of enterprise and employment the course of affairs and the practice of business have developed methods of estimating or computing in terms of money the result over an interval of time produced by the operations of business, by the work of the individual, or by the use of capital. The practice of these methods of computation and the general recognition of the principles upon which they proceed are responsible in a great measure for the conceptions of income, profit and gain and, therefore, may be said to enter into the determination or definition of the subject which the legislature has undertaken to tax. The courts have always regarded the ascertainment of income as governed by the principles recognized or followed in business and commerce, unless the legislature has itself made some specific provision affecting a particular matter or question. Familiar but striking examples of this necessary reliance upon commercial principles and general business understanding may be found in the case law dealing with expenditure laid out for the purpose of trade, with outgoings on account of capital, with capital profits, and with the

question whether items should be taken into consideration for any given accounting period rather than for that which follows or perhaps for that which preceded. Speaking in reference to a fire insurance company, Viscount *Haldane* said in *Sun Insurance Office* v. *Clark* (1) :—" It is plain that the question of what is or is not profit or gain must primarily be one of fact, and of fact to be ascertained by the tests applied in ordinary business. Questions of law can only arise when . . . some express statutory direction applies and excludes ordinary commercial practice, or where, by reason of it being impracticable to ascertain the facts sufficiently, some presumption has to be invoked to fill the gap."

It is, perhaps, true that with the growth of experience in the taxation of income and the widening of the area and increase in the weight of liability, the legislative tendency has been to add to the number of specific provisions governing the ascertainment of taxable income. But it is worth noticing that the British Income Tax Codification Committee decided that, in dealing with the computation of profits from businesses, their draft code should first contain a statement that the computation is to be made on ordinary commercial principles and should then set out a list of specific matters allowed or disallowed in computing profits for income tax purposes (2).

The tendency of judicial decision has been to place increasing reliance upon the conceptions of business and the principles and practices of commercial accountancy. In the case cited, Lord *Loreburn* (3) went even further than Viscount *Haldane*. He said :— " There is no rule of law as to the proper way of making an estimate. There is no way of estimating which is right or wrong in itself. It is a question of fact and figures whether the way of making the estimate in any case is the best way for that case."

But the process by which the principles and practices evolved in business or general affairs are drawn upon for the solution of questions presented to courts of law almost inevitably leads to a development in the law itself. For, under our system of precedent, a decision adopting or resorting to any given accounting principle or application of principle is almost bound to settle for the future the rule to be

(1) (1912) A.C. 443, at p. 455.
(2) (1936) Cmd. 5131, p. 49.
(3) (1912) A.C., at p. 454.

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Dixon J.

observed and the rule thus comes to look very like a proposition of law. But in some matters, particularly in the attribution of expenditure between capital and income, the courts have found it impossible to formulate a principle as an induction from commercial practice and have left the matter almost as much as ever in the realm of fact or discretionary judgment. Thus, in *Lothian Chemical Co. Ltd.* v. *Rogers* (1) Lord *Clyde* says :—" It has been said times without number—it has been said repeatedly in this court—that in considering what is the true balance of profits and gains in the *Income Tax Acts*—and it is not less true of the Act of 1918 than of its predecessors—you deal in the main with ordinary principles of commercial accounting. They do expressly exclude a number of deductions and allowances, some of which according to the ordinary principles of commercial accounting might be allowable. But where these ordinary principles are not invaded by statute they must be allowed to prevail. It is according to the legitimate principles of commercial practice to draw distinctions, and sharp distinctions, between capital and revenue expenditure, and it is no use criticizing these, as it is easy to do, upon the ground that if you apply logic to them they become more or less indefensible. They are matters of practical convenience, but practical convenience which is undoubtedly embodied in the generally understood principles of commercial accounting."

In the present case we are concerned with rival methods of accounting directed to the same purpose, namely, the purpose of ascertaining the true income. Unless in the statute itself some definite direction is discoverable, I think that the admissibility of the method which in fact has been pursued must depend upon its actual appropriateness. In other words, the inquiry should be whether in the circumstances of the case it is calculated to give a substantially correct reflex of the taxpayer's true income. We are so accustomed to commercial accounts of manufacturing or trading operations, where the object is to show the gain upon a comparison of the respective positions at the beginning and end of a period of production or trading, that it is easy to forget the reasons which underlie the application of such a method of accounting to the purpose of ascertaining taxable income. Although the field of profit-making which it covers in practice is probably much greater than any other among

(1) (1926) 11 Tax Cas., at pp. 520, 521.

the manifold forms of income or revenue, it is a system of accounting which does not represent the primary or basal position from which an investigation of income for taxation purposes begins. Speaking generally, in the assessment of income the object is to discover what gains have during the period of account come home to the taxpayer in a realized or immediately realizable form. Thus, in *Thorogood's Case* (1), where the question was whether, in a business of buying land and selling it in subdivision on instalment contracts, future instalments of purchase money should be taken into the account of taxable income derived during the accounting period, the court pronounced decisively against the inclusion of the present value of these future payments. *Isaacs* J. said: "'Derived' is not necessarily actually received, but ordinarily that is the mode of derivation." Substantially the same thing is said in reference to the words "arising or accruing" by Sir *Houldsworth Shaw* and Mr. *Baker* in their work on the *Law of Income Tax*, and they place the distinction upon the difference between trading and other sources of income. They say:—"There is an important distinction between debts due to a trading company and unpaid in a particular year or period and other income which is not a trade receipt. Trading debts due but not yet paid must be included in arriving at the balance of profits or gains. With regard, however, to other income there must be something 'coming in'; that is, for income tax purposes, receivability without receipt is nothing" (*Law of Income Tax*, p. 111). Compare the article on Income Tax by the same authors in *Halsbury's Laws of England*, 2nd ed., vol. 17, p. 85; and cf. *St. Lucia Usines and Estates Co. Ltd.* v. *St. Lucia* (*Colonial Treasurer*) (2).

The reasons which underlie the practice of estimating for taxation purposes the income from trade or manufacture by means of a commercial profit and loss account consist in the impracticability of computing income in any other way and in the adoption for fiscal purposes of recognized commercial principles. The computation of profits from manufacture and trading has always proceeded upon the principle that the profit may be contained in stock-in-trade and "outstandings." Whether this is to be explained on some view

(1) (1927) 40 C.L.R., at p. 458. (2) (1924) A.C., at p. 512.

H. C. OF A. 1938.

COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD.

Dixon J.

that the purpose is to ascertain what is the detachable increase in circulating capital, or more simply on the ground of common sense and the teachings of experience, the result for the purposes of taxation is the same. The result is that a tax upon the profits or income of such a business must be understood as a tax upon the profits or income computed according to the system, because, according to common understanding and commercial principles, that is the method of determining the profits. The basis of a trading account is stock on hand at the beginning and end of the period and sales and purchases. In such an account book debts represent what before sale was trading stock and it is almost inevitable that they should be taken into consideration upon an accrual and not a cash basis. But nearly all income tax legislation is against the practice which obtains commercially of making a reserve for bad debts or discounting the amount of book debts by a percentage for bad or doubtful debts. Specific provision is usually made for the deduction from the book debts accruing during the accounting period of such debts only as have proved to be bad during that period and have been written off. Usually the deduction is authorized also of book debts included in a previous accounting period which in the year under assessment prove to be bad and have been written off. Then book debts written off as bad which in a subsequent accounting period are nevertheless paid are to be brought in as receipts of that subsequent period : Cf. *Elder Smith & Co. Ltd.* v. *Commissioner of Taxation (N.S.W.)* (1).

The *Taxation Act* 1927-1933 (S.A.) contains a provision of this kind (sec. 22 (xiv*a*)). The words with which it concludes give the key to the purpose of the provision :—Except as provided in this subdivision, no deduction for bad or doubtful debts shall be made. I do not regard sec. 22 (xiv*a*) as implying that in every case where the business or pursuit of the taxpayer involves the giving of credit, the debts or book debts owing to him must be brought into the computation of his taxable income without regard to the accounting period within which they are paid or payable. The distinction, if not opposition, between the mode of accounting sometimes called the accrual system and that based upon actual receipts

(1) (1932) 47 C.L.R. 471.

and disbursements is widely known. The foundation of the accrual system is the view that the accounts should show at once the liabilities incurred and the revenue earned, independently of the date when payment is made or becomes due. It plainly is not applicable to every pursuit by which income is earned. The *Taxation Act* 1927-1933 (S.A.) does not appear to me to intend to fix it upon every business and vocation which involves the giving of credit. But it does contemplate the application of the system, whether with severe consistency or in modified form, to many, if not most, undertakings and enterprises and for that reason directs specifically what deduction on account of bad and doubtful debts shall be allowed.

In the language employed by the statute in describing the subject of the tax, I am unable to find any special guidance or anything distinguishing the South Australian statute from other income tax legislation in reference to the choice between the accrual and the receipts basis of calculation. The tax is imposed on all incomes arising or accruing in or derived from the State (sec. 18 (1)). To obtain the taxable amount of income, calculations of income the produce of property and of income from personal exertion must be separately made and for the purposes of calculating the latter the amount to be taken is that accruing to the taxpayer during the previous twelve months (sec. 22 (i) and (ii)). Income from personal exertion includes, by definition, every kind of profit and every kind of gain not being income from property, subject to certain exceptions (sec. 4). The word " derived " is the equivalent of " arising " or " accruing ": See per *Isaacs* J. in *Harding* v. *Federal Commissioner of Taxation* (1). At all events none of these three words contains any particular indication of intention upon the question in hand. Nor does the use of the word, " profit," " gain " and " income " appear to me to throw any light upon it. They do not decide the question. They in no way remove the necessity of discovering whether, as a matter of fact, the basis of the accounting is or is not appropriate to reflect truly the professional income of Dr. Carden. The considerations which appear to me to affect any such question are to be found in the nature of the profession concerned and, indeed, the actual mode in which it is practised in a given case. Where

(1) (1917) 23 C.L.R. 119, at p. 133.

H. C. OF A. 1938. COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA LTD. Dixon J.

there is nothing analogous to a stock of vendible articles to be acquired or produced and carried by the taxpayer, where outstandings on the expenditure side do not correspond to, and are not naturally connected with, the outstandings on the earnings side, and where there is no fund of circulating capital from which income or profit must be detached for actual enjoyment, but where, on the contrary, the receipts represent in substance a reward for professional skill and personal work to which the expenditure on the other side of the account contributes only in a subsidiary or minor degree, then I think according to ordinary conceptions the receipts basis forms a fair and appropriate foundation for estimating professional income. But this is subject to one qualification. There must be continuity in the practice of the profession. To this qualification it is necessary to return. Both in Great Britain and Australia it has been a common practice to return and to assess professional incomes upon a receipt basis. There is little judicial authority dealing with the practice. But in *Commissioners of Inland Revenue* v. *Morrison* (1), both Lord *Clyde* and Lord *Morison* appear to me to have treated the practice as well founded. The case related to a professional engineer's business. Lord *Clyde* said :—" In assessing the profits of such a professional business as this, one or other of two modes of computation are in use, which have, no doubt, been found alternatively convenient and appropriate according to particular circumstances. It is obvious that the usual mode which applies to the assessment of the profits of a trading business which buys and sells, or to a manufacturing business which buys raw material and makes it up and sells the finished product, would not be practically capable of application to an ordinary professional business in which the professional man markets nothing but his own services and ingathers nothing but professional fees. The two alternative modes of computation are known as the ' cash ' basis mode and the ' earnings ' basis mode. According to the first, the profits of the business are estimated according to the excess of the actual cash receipts during the year over the cash outlays and expenses actually disbursed or paid during the year. This mode takes no account of what are called ' outstandings,' that is, fees earned but not yet ingathered,

(1) (1932) S.C. 638 ; 17 Tax Cas. 325.

either at the beginning or at the end of the year. According to the 'earnings' basis mode, the actual cash receipts during the year and the actual cash outlays during the year are treated in the same way as before; but, to the favourable balance thus brought out, there is added the amount of the fees earned but not yet collected at the end of the year, and then there is deducted the amount of the fees earned but not yet collected at the beginning of the year. Both modes appear to be somewhat rough and ready; but I suppose that—one year with another—they are found to work with sufficient accuracy. The first has the merit of avoiding all the trouble which the second imposes on the taxpayer in calculating the 'outstandings' on current jobs" (1).

Lord *Morison* said:—"The words 'profits and gains' are not defined in the statute. I think, however, that the word 'profits' for income tax purposes is, in general, to be understood in its natural and proper meaning and that the assessable profits are to be ascertained on the ordinary principles of commercial accounting. At the same time, profits are, in practice, given a somewhat elastic meaning, and so taxable income is in some exceptional cases arrived at on what is called the 'cash' basis which I understand reaches the amount of taxable income by ascertaining the difference between the incomings of a particular year and the actual expenditure necessary to earn them" (2).

For the reasons I have given I think that Dr. Carden's professional income was properly assessed upon actual receipts.

To state the case at its lowest, actual receipts formed a basis the choice of which was clearly lawful and proper. The special cases contain very little or no information about the nature of Dr. Carden's practice. If in a given medical practice there is but little certainty about the payment of fees, I should have thought that a receipts basis of accounting would alone reflect truly the income and for most professional incomes it is the more appropriate. But to a great degree the question whether income of a particular kind can be properly calculated on one basis alone or upon either, must depend upon the nature of the source of income.

(1) (1932) S.C. 638; 17 Tax Cas., at p. 330.
(2) (1932) S.C. 638; 17 Tax Cas., at p. 332.

H. C. OF A. 1938. COMMISSIONER OF TAXES (S.A.) v. EXECUTOR TRUSTEE AND AGENCY CO. OF SOUTH AUSTRALIA. LTD. Dixon J.

In the present case the commissioner properly adopted a receipts basis for the assessment of Dr. Carden's income for the year ending 30th June 1935. Having done so, there was no foundation for his alteration of that assessment and the alteration should be cancelled and the assessment restored to its former condition.

But in two respects the broken period, ending on 15th November 1935, stands upon a different footing. In the first place, the commissioner did not adopt a receipts basis. He assessed the executors upon an earnings basis for that period. In the second place, it was not a complete period forming part of a continuous practice. As Dr. Carden died during the period, the assessment which the commissioner was called upon to make was not an ordinary assessment of his income for an accounting period forming a division of time in a continuous process of derivation of income. It was a special assessment for the purpose of determining what was the income of a deceased person since the conclusion of the last regular accounting period (sec. 42).

On the whole I think that it was in these circumstances open to the commissioner to adopt the earnings basis in order to ascertain the intermediate income of the deceased to his death.

The views I have expressed accord, I believe, with those contained in the judgment of the Supreme Court delivered by *Napier* J. upon the first case stated. Upon the second case stated the Supreme Court adhered to that judgment and answered the questions in favour of Dr. Carden's executors. The question numbered two in the first special case does not arise.

In my opinion both appeals to this court should be dismissed with costs.

McTIERNAN J. I agree with the judgment of my brother *Dixon*.

Appeals dismissed with costs.

Solicitor for the appellant, *A. J. Hannan*, Crown Solicitor for South Australia.

Solicitors for the respondent, *Baker, McEwin, Ligertwood & Millhouse.*

C. C. B.