[HIGH COURT OF AUSTRALIA.]

TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED AND ANOTHER . . } APPELLANTS;
APPLICANTS,

AND

THE COMMISSIONER OF TAXES (VICTORIA) RESPONDENT.
RESPONDENT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *May* 23; *June* 4.

Rich A.C.J., Starke and Williams JJ.

Death and Succession Duties—Probate duty (Vict.)—Valuation of estate—Rate of duty—Dependent on value of widow's interest—Value of life estate of mortally injured widow—Whether value is to be based on actuarial calculation of a normal life—Administration and Probate Act 1928 (*Vict.*) (*No.* 3632), *sec.* 159.

For the purposes of sec. 159 of the *Administration and Probate Act* 1928 (Vict.) it is permissible for the Commissioner of Taxes, in valuing a life estate given to a widow, to take into account the facts and probabilities in existence at the time of the testator's death which would ordinarily affect the value of that interest.

Held, accordingly, that, where at the testator's death the widow was mortally injured and survived the testator only half an hour, the commissioner, in assessing probate duty, was not bound to take the actuarial value of the life estate, based on the ordinary probabilities of life of a woman of the age of the widow, but could properly assess the estate on the basis that in the circumstances the life estate was practically valueless.

Decision of the Supreme Court of Victoria (*Gavan Duffy* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

On 29th January 1940, Colin Albert Dunne of Warrnambool, grazier, was driving a motor car in which his wife, Eileen Ethel Kitty Dunne, was a passenger. The motor car came into collision with another vehicle, with the consequence that Dunne was killed instantaneously and his wife was fatally injured, surviving Dunne

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by about half an hour. By his will Dunne had bequeathed his residuary estate, valued at £37,878, to his wife for life and after her death to his children. He died without any children surviving him. Probate of the will was granted to the Trustees Executors and Agency Co. Ltd. and Ivor Stephenson, the surviving executors named in the will, and, on an originating summons issued from the Supreme Court of Victoria, they obtained a declaration that, although Dunne was younger than his wife he, in fact, had predeceased her.

Under the provisions of the *Administration and Probate Act* 1928 (Vict.) probate duty was payable on the estate, but under sec. 159 (4) the amount of duty depended on the value to be assigned to the wife's life estate. The Commissioner of Taxes assessed duty on the basis that, owing to the physical condition of the wife at the instant of Dunne's death, her life estate was practically valueless. The executors, however, objected to this method of assessment, contending that the state of health of the wife was immaterial, and that the value of her life estate should be the actuarial value of her interest based on the ordinary probabilities of the normal life-span of a woman of her age. The effect of this contention would have been that the duty, instead of being £4,005 3s. 2d. as assessed by the commissioner, would have been reduced to £3,668. The commissioner rejected the objection, and the executors obtained an order nisi from the Supreme Court of Victoria ordering the commissioner to show cause why a writ of mandamus should not issue directed to him commanding him, on payment to him by the executors of the duty payable in respect of the property devised and bequeathed by Dunne to his wife for life calculated on the value thereof to be ascertained by an actuarial calculation, together with the duty properly payable in respect of the remainder of the estate, to certify by indorsement on the probate of the will that the duty payable under the *Administration and Probate Act* had been paid and the amount thereof. On 28th March 1941 the order nisi came on for hearing before *Gavan Duffy* J., and was discharged.

The executors appealed to the High Court.

Walker, for the appellants. Under sec. 162 of the *Administration and Probate Act* 1928 probate duty becomes a debt to the Crown *eo instanti* on the death of the testator (*Bell* v. *The Master in Equity of the Supreme Court of Victoria* (1)). The death of the life tenant shortly after the death of the testator is not a matter to be considered in valuing the life estate of the widow (*In re Jameson* (2)). In

(1) (1877) 2 App. Cas. 560, at p. 565.
(2) (1925) V.L.R. 7; on appeal, 36 C.L.R. 165.

principle, there is no distinction between the life tenant dying twelve weeks, twelve days or twelve minutes after the testator. The only practicable method of calculating the value of a life estate or of an annuity is the actuarial method (*Chesterman* v. *Federal Commissioner of Taxation* (1)). The Supreme Court of Victoria in *In re Jameson* (2) went too far when it said that the health of the life tenant was a matter for consideration in determining the value of the life estate. This is inconsistent with its decision that the death of the life tenant cannot be taken into account. If the health of the life tenant is a matter in issue, then death following would be conclusive evidence of the state of health. The only method to cover all cases is to calculate the actuarial value of the life estate. There is no provision in the Act for the commissioner to make an inquiry as to the state of health of life tenants. The practice in England and Victoria is to calculate the actuarial value; any other method would lead to confusion.

Tait, for the respondent. The actual decision in *In re Jameson* (3) is to be distinguished on the facts. In that case, at the relevant date, that is, the death of the testator, there was no evidence that the life of the life tenant was anything but normal. In this case, however, the death of the life tenant resulted from the same accident as that which killed her husband. At his death, her condition was very low, and the commissioner was right in taking into account her state of health when valuing her life estate. Under the *Administration and Probate Act* 1928 it is the value of the estate of the testator which has to be ascertained. There is no rule for ascertaining the value. It is a question of fact to be decided in the circumstances of each case. It is the value of the life estate at the death of the testator which is relevant. It is not suggested that the mere fact that the life tenant died shortly afterwards is relevant, but it is relevant that at the instant of the testator's death the circumstances then existing are such that the probable duration of the life interest was so short that it was valueless (*Chesterman* v. *Federal Commissioner of Taxation* (4); *In re Pearson* (5)). [Counsel referred to *Williamson* v. *John I. Thornycroft & Co.* (6).]

Walker, in reply.

Cur. adv. vult.

(1) (1923) 32 C.L.R. 362, at pp. 388, 397, 398.
(2) (1925) V.L.R. 7.
(3) (1925) V.L.R. 7; on appeal, 36 C.L.R. 165.
(4) (1923) 32 C.L.R. 362.
(5) (1894) 20 V.L.R. 484.
(6) (1940) 2 K.B. 658.

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June 4.

The following written judgments were delivered :—

RICH A.C.J. This is an appeal from an order of *Gavan Duffy* J. discharging an order nisi for a prerogative writ of mandamus directed to the respondent, the Commissioner of Taxes. The purpose of the writ which the appellants sought was to command the commissioner to certify by indorsement on the probate of the will and codicil of C. A. Dunne deceased that the duty payable under the *Administration and Probate Act* 1928, as amended, had been paid, although the amount thereof was calculated in a manner contended for by the appellants, and not in the manner which appeared to the commissioner to be correct.

The difference between the two contentions depends on the application of sec. 159 of the Act, which in effect provides for a lower rate of duty in respect of what a widow takes under a will or on an intestacy. Under the will of the deceased a life interest in residue was bequeathed to his widow. It appears, however, that the deceased and his wife died on the same day. They were killed in a collision between two motor cars, in one of which the deceased and his wife were driving. It was established that his death was instantaneous, and that his wife lingered for about half an hour after the accident. By an order not now under appeal and made in other proceedings *Lowe* J. declared that the testator's wife survived him.

In these circumstances the appellants, who were the executors of the will, claim that in calculating the duty the widow should be regarded as taking a life interest, the value of which should be ascertained by taking the average expectation of life of a person of her age and applying the ordinary annuity tables. If the widow's life interest were valued in this manner, the amount of duty payable in respect of the estate would be £3,668.

The Commissioner of Taxes, on the other hand, contends that as the widow was in a dying condition at the very moment the life interest vested in her, her interest had no value, and should be disregarded when calculating the amount of duty payable in respect of the deceased's estate. On such a footing the duty would amount to £4,005.

Gavan Duffy J. accepted the commissioner's contention, and in doing so referred to *In re Jameson* (1).

In my opinion the decision of the learned judge was right. It is clear that the widow was moribund at the instant of the testator's death. It may be conceded that the calculation of duty upon the deceased's estate is not controlled by events subsequent to the death

(1) (1925) V.L.R. 7.

of the deceased. But subsequent events may be taken into account as evidence of what were the facts at the date of the testator's death. In the present case it must have been clear that the widow's life interest was worthless even during the half-hour for which she survived her husband. In *Weldon* v. *Union Trustee Co. of Australia Ltd.* (1), on appeal from *In re Jameson* (2), it was held that the question in a case like the present was "what was the actual value as at the date of the testator's death of the property of which the estate of the testator consisted at his death." It was said: "You are entitled to look at any evidence relevant to that issue, even if that evidence was not available at the date of the death of the testator; but that evidence must be relevant to the question of the value as at the date of the death." The present appeal simply involves the estimation of the value of an interest for life of a dying person. For at the moment of her husband's death it must have been evident to everybody that the life of the widow was not worth an hour's purchase. Adapting what was said by *Schutt* J. in *In re Jameson* (3), "the value should be ascertained by means of an estimate based on the facts and probabilities in existence at the time of" the testator's death "which would ordinarily affect that value, as in the case of the valuation of life interests."

In my opinion the learned judge was right in discharging the order nisi, and this appeal should be dismissed with costs.

STARKE J. This appeal concerns the assessment of probate duty upon the estate of Colin Albert Dunne, deceased, under the *Administration and Probate Act* 1928 of Victoria. Dunne and his wife were killed in 1940 as the result of a motor-car accident and left no children surviving them. The wife, however, survived her husband but died within half an hour of his death. The fact that she survived her husband was declared in proceedings in the Supreme Court, and the statutory presumption raised by sec. 184 of the *Property Law Act* 1928 is inapplicable to the case.

Dunne by his will directed his trustees, in the events which happened, to stand possessed of his residuary estate and to pay the income from the investment thereof to his wife during her life, and after her death the residuary estate was given to his children, but there were none, and the trust never therefore took effect.

A duty is imposed by the *Administration and Probate Act* 1928 upon the value of the estate of a deceased person at the time of his death ascertained in the manner prescribed by the Act. But a lower

(1) (1925) 36 C.L.R., at pp. 168, 169. (2) (1925) V.L.R. 7.
(3) (1925) V.L.R., at p. 12.

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rate is enacted in respect of the distributive share of widows and children in the estate or in respect of property devised or bequeathed to them by the will of the deceased person (Act, secs. 152, 158, 159; *In re Jameson* (1); *Weldon* v. *Union Trustee Co. of Australia Ltd.* (2)). Consequently, the higher the value of the life interest given to the wife under Dunne's will, the lesser the amount of the duty, and, conversely, the lesser the value of that interest, the greater the amount of the duty. Accordingly, the executors of Dunne, the appellants here, contend that the value of the life interest given by Dunne to his wife should be ascertained by calculation based upon the ordinary probabilities of life ascertained from tables of mortality and other materials in use by actuaries and regardless of the fact that Dunne's widow was mortally injured at the time of his death, whilst the Commissioner of Taxes insists that, in the circumstances already stated, the life interest was valueless and ought to be disregarded in calculating the duty payable. The difference in the amount of duty, in this particular case, is about £337.

In my opinion, the commissioner was entitled, in ascertaining the value of the life interest given by Dunne to his wife, to take into consideration the fact that the wife was mortally injured at the time of his death. The case is analogous to the valuation of annuities: Cf. *In re Richardson*; *Richardson* v. *Richardson* (3) and *In re Jameson* (1), affirmed in this court, *sub nom. Weldon* v. *Union Trustee Co. of Australia Ltd.* (2). In *Weldon's Case* (4) it was held that in estimating the value of an annuity such estimate should not be based upon the fact that the annuitant survived the testator for twelve weeks only, but the value should be ascertained by means of an estimate based upon the facts and probabilities in existence at the time of the testator's death which would ordinarily affect that value, as in the case of a valuation of life interests. *Higgins* J. said: "It is evident that you have to find the value as at the date of the death of the testator, but that you are entitled to look at any evidence relevant to that issue, even if that evidence was not available at the date of death of the testator; but that evidence must be relevant to the question of value as at the date of the death" (5). The circumstances of the death were not proved or stated in that case: it was apparently fortuitous or without any known cause, and was therefore irrelevant to the question of value at the date of the death of the testator. Here the circumstances of the death of the widow are known and the fact that she was mortally injured and dying at the time of the death of Dunne.

(1) (1925) V.L.R. 7.
(2) (1925) 36 C.L.R. 165.
(3) (1915) 1 Ch. 353.
(4) (1925) 36 C.L.R.: See p. 168.
(5) (1925) 36 C.L.R., at p. 169.

The fact is relevant to the determination of the value of her life interest at the time of Dunne's death : indeed, so relevant that one may say that no person would entertain the purchase of the life interest in such circumstances.

The matter, it may be mentioned, has been the subject of consideration in other directions. Thus, in the course of administration of estates insufficient to satisfy legacies and annuities, authority exists for the proposition that in determining the value of annuities for the purpose of fixing the proportion in which they must abate regard should be had to the events which happened up to the time of the valuation. "It does not appear at all unreasonable," said Sir *William James* V.C. in *Potts* v. *Smith* (1), "that in estimating the values of annuities we should take the facts, as far as the facts assist us, and calculate the contingency at the last moment, when we are obliged to come in and cut the knot" : See also *Todd* v. *Bielby* (2) ; *Jarman* on *Wills*, 7th ed. (1930), vol. 2, p. 1147. So also in bankruptcy where an annuitant carried in proof against the estate of a bankrupt for a sum which was admittedly the actuarial value of her annuity at that time, but died before the proof was admitted, regard was had to that fact and proof was admitted only of the amount due to the annuitant at the time of her death (*In re Dodds* ; *Ex parte Vaughan's Executors* (3)).

The appeal should be dismissed.

WILLIAMS J. On 29th January 1940 the testator, Colin Albert Dunne, was killed in a collision in which his wife was fatally injured. His death was instantaneous, but the wife, who was unconscious when picked up, lived for about half an hour, and then died without regaining consciousness. The evidence does not give her age, but the court was informed that she was a young woman in the twenties with an expectation of life under normal circumstances of more than forty years.

By his last will and testament dated 22nd March 1938 the testator gave his residuary estate to his wife for life and after her death to his children. This estate was valued for Victorian probate duty at £37,878.

By virtue of sec. 159 of the *Administration and Probate Act* 1928 (Vict.) duty on that part of the estate which passes to the widow and children is calculated at a lower rate than in the case of gifts to strangers.

(1) (1869) L.R. 8 Eq. 683, at p. 686. (2) (1859) 27 Beav. 353 [54 E.R. 138].
(3) (1890) 25 Q.B.D. 529.

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The question at issue between the appellants, who are the executors of the will, and the respondent Commissioner of Taxes is whether the value of the widow's life estate should be calculated for the purposes of duty on the actuarial basis that she would reach an age based on the ordinary probabilities of life and death ascertained from tables of mortality appropriate in the particular case; or whether the valuation is one of fact having regard to all the circumstances existing at the material date, namely, the instant the testator died.

In my opinion the latter method is correct. It would not, however, be feasible or decent to make a medical examination of the health of every life tenant and annuitant whose interest has to be valued. In any event the examination would usually be futile, because expert opinion would probably vary as to the likelihood of and the extent to which the state of health would affect his or her normal expectation of life. In every apparently normal case, therefore, the ordinary and sensible practice is to estimate the duration of the interest on an actuarial basis. Where, however, the life is at the material instant of time subject to some disability which destroys the probability that it will run its normal course, it would be opposed to all reality to assume that such a life would do so. To take the extreme case of a young life tenant condemned to be executed half an hour after the testator's death, could it possibly be said there was at that instant of time any reasonable probability that he would live another forty years? A similar situation would arise where the life tenant was suffering from an incurable disease such as advanced tuberculosis or cancer.

In the present case the unfortunate wife must have been so seriously injured by the accident that, when the testator died, there was no reasonable probability that her span of life would be more than momentary.

In *Chesterman* v. *Federal Commissioner of Taxation* (1), this court held that the valuation of an annuity for the purposes of Federal estate duty was in each case a question of fact, the answer of *Rich* J. (2) that the annuity should be valued according to the ordinary actuarial principles being justified because there were no abnormal circumstances affecting the life in question. In *Weldon* v. *Union Trustee Co. of Australia Ltd.* (3) this court again held that the actual value had to be determined, taking into consideration the facts and circumstances existing at the material date. In that case the death of the annuitant twelve weeks after this date was not connected in

(1) (1923) 32 C.L.R. 362. (2) (1923) 32 C.L.R., at p. 398.
(3) (1925) 36 C.L.R. 165.

any way with any fact or circumstance then existing. The practice in England has been to value a determinable interest upon the basis of its actual duration, where the event upon which it determines has occurred prior to the valuation having been made (*Todd* v. *Bielby* (1); *Potts* v. *Smith* (2); *In re Dodds* (3); *In re West*; *Denton* v. *West* (4); *Williamson* v. *John I. Thornycroft & Co.* (5)). The state of health of the life involved at the relevant date was considered to be material in the last-mentioned case and also in *Faber* v. *Inland Revenue Commissioners* (6).

If the life tenant or annuitant is in danger of death when the testator dies, and succumbs before the assessment is made, there appears to me to be no reason why the life estate should not be valued on the basis of its actual duration.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *Desmond Dunne, Harty & Dwyer* by *Mahony, O'Brien & Harty.*

Solicitor for the respondent, *F. G. Menzies*, Crown Solicitor for Victoria.

O. J. G.

(1) (1859) 27 Beav. 353 [54 E.R. 138].
(2) (1869) L.R. 8 Eq. 683, at p. 686.
(3) (1890) 25 Q.B.D. 529.
(4) (1921) 1 Ch. 533.
(5) (1940) 2 K.B. 658.
(6) (1936) 1 All E.R. 617, at p. 622.