[HIGH COURT OF AUSTRALIA.]

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } APPELLANT;
RESPONDENT,

AND

WHITING AND OTHERS . . . . . RESPONDENTS.
APPELLANTS,

Income Tax (Cth.)—Assessment—"Presently entitled"—Trust estate—Liabilities undischarged—Right of beneficiary—Income Tax Assessment Act 1936-1940 (*No.* 27 *of* 1936—*No.* 65 *of* 1940), *ss.* 96, 97, 99.

A beneficiary is not, within the meaning of s. 97 of the *Income Tax Assessment Act* 1936-1940, "presently entitled" to income of a trust estate unless he has a present right to have the income paid to him by the trustee. He has no such right while, in a due course of administration, the estate remains subject to liabilities to such an extent that the income due to him cannot be ascertained.

Decision of *Rich* J. reversed.

H. C. OF A. 1942-1943.

MELBOURNE, 1942. *Oct.* 20, 23.

SYDNEY, *Nov.* 23.

Rich J.

MELBOURNE, 1943. *March* 5, 19.

Latham C.J., Starke and Williams JJ.

APPEAL from *Rich* J.

Objections by trustees of an estate to an assessment of income tax, having been disallowed by the Federal Commissioner of Taxation, were treated as an appeal to the High Court. The appeal was heard by *Rich* J. The facts appear in the judgments hereunder.

Fullagar K.C. and *Spicer*, for the appellants.

Ham K.C. and *Adams*, for the respondent.

RICH J. delivered the following written judgment:—This is an appeal by the trustees of the estate of R. S. Whiting deceased against an assessment upon them of Commonwealth income tax based on income derived by that estate during the year ended 30th June 1940 and issued by an amended notice of assessment dated 3rd April 1941. The grounds relied on by the trustees are set out in exhibit E as follows:— 1942, NOV. 23.

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

Rich J.

(1) The trustees are assessable in respect of profits of the partnership of Clarke & Whiting only (if at all) to the extent of moneys actually distributed to them as trustees out of such profits and held by them as income subject to the trusts of the trust instrument.

(2) The net income of the trust estate within the meaning of the *Income Tax Assessment Act* does not include profits of the said partnership not actually distributed to the trustees as trustees and held by them as income subject to the trusts of the trust instrument.

(3) If and so far as there was any net income of the trust estate within the meaning of the said Act, there are beneficiaries presently entitled to the income of the trust estate within the meaning of the said Act, and the trustees are not liable to be assessed in respect of any part of the net income of the trust estate.

The substantial question raised by the appeal is whether the trustees as such are assessable in respect of the whole of the income derived by their estate ; but there is a subsidiary question whether, whoever may be liable to be assessed, the net income of the estate includes the interest of the estate in the net income of the partnership in which it has a share and in which the trustees are engaged on its behalf, or only on so much of the income of the partnership as the trustees of the two deceased partners have chosen to cause to be distributed to one another. I accept the evidence of Major Walker and Mr. Bossley called for the appellants. No evidence was led on behalf of the respondent. The facts which I consider relevant for the determination of the issues between the parties are as follows :—

Robert Selmon Whiting died on 17th June 1929 leaving a will and five codicils. The appellants are the present trustees of the estate. Henry Joseph Whiting, who was an executor named in the will, died in 1939.

The gross value of the estate of the deceased as sworn for probate duty purposes was £98,604. The liabilities set out in the estate duty statement amounted to £40,154, but other liabilities subsequently discovered brought the total to about £59,000.

The principal assets in the estate were the interest of the deceased in two properties, one in Queensland and the other in Papua, which had been carried on for a number of years by the deceased and Sir Rupert Clarke in partnership. The Queensland property was a pastoral property, and the partnership business carried on thereon was conducted pursuant to the terms of a partnership agreement which provided that the term of the partnership should be for a period of ten years from 4th July 1910 and thereafter until the expiration of six months' notice to determine the partnership.

The property in Papua was a rubber plantation carried on by the deceased and Sir Rupert Clarke in partnership under an agreement which provided that the term of the partnership should be for eighteen months from 30th June 1921, and thereafter until determined by six calendar months' notice.

Sir Rupert Clarke died on 25th December 1926 and after his death R. S. Whiting continued until his death on 17th June 1929 to carry on both businesses in partnership with the trustees of the late Sir Rupert Clarke pursuant to the terms of the partnership deeds (exhibit F).

Since the death of R. S. Whiting the partnership businesses have been carried on by the trustees of the respective estates of Sir Rupert Clarke and R. S. Whiting.

The interest of the deceased R. S. Whiting in the Queensland partnership was valued for estate duty purposes at £63,000, and his interest in the Papuan partnership at £3,400. These values were based upon the difference between the value of the assets in the partnerships and the liabilities of the partnerships at the date of R. S. Whiting's death.

The principal liabilities of the deceased at the date of his death, apart from his liability as a partner for partnership liabilities, were the sums of £25,849 and £9,338 due to the Union Bank, and £3,378 due to the A. M. L. & F. Co.

The deceased was survived by his widow, Mrs. Rose Whiting, one son, Henry Joseph Whiting, and three daughters, Mrs. Hammond Chambers, Mrs. Walker and Mrs. Nathan. The son died in 1939 and his executor is W. J. Byrne. The widow and three daughters still survive. The trustees of the estate have discharged all the personal liabilities which were owing by deceased at the date of his death with the exception of a sum of £5,600 payable by the deceased to his son H. J. Whiting under the terms of a settlement made by the deceased on his son, and the sum of £3,765 payable to E. E. Dye, one of the executors of the deceased, under an agreement between him and R. S. Whiting. The liability to the Union Bank was discharged pursuant to an arrangement made with the widow and children, whereby they made available to the trustees moneys which accrued from life policies which had been settled on them by the deceased. From this source the sum of £32,540 was made available and the beneficiaries concerned are entitled to have refunded to them out of the estate in respect of this transaction the amounts appearing under the heading of " advances made to the estate " in the balance-sheet (exhibit H) of the estate as at 30th June 1940. W. J. Byrne is interested in the amount due to Mrs. Rose Whiting

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

Rich J.

and H. J. Whiting on this account by virtue of an assignment by H. J. Whiting to W. J. Byrne of his interest therein. The other liabilities shown in this balance-sheet, apart from the "contingent liabilities" shown at the foot thereof, as to which no present liability exists, include under the heading "Sundry Creditors" the sums due to the late H. J. Whiting and E. E. Dye, already referred to, the sum of £5,617 11s. 8d., succession duty payable by the trustees to the Commissioner of Taxation in Queensland upon the death of Mrs. Whiting, and a contingent liability to the Queensland Commissioner of Taxation for income tax assessed against the trustees, in respect of which the trustees have lodged objections similar to those taken in this appeal. All the specific legacies, pecuniary legacies and annuities provided for by the will have been satisfied, with the following exceptions set out in the balance-sheet, namely :—

	Amounts unpaid
George Woolff	£1,293 4 1
Mrs. A. A. Russell (Yda Reynolds) ..	700 14 3
Miss A. Buchanan	280 5 8
Arthur Turner	280 5 8
Alfred J. Turner (deceased)	98 12 9
Major G. B. Walker (legacy)	5,000 0 0
Major G. B. Walker (annuity) ..	5,066 8 3

The amount of the legacy payable to George Woolff has been paid to him by Mrs. Whiting, who has taken an assignment of the legacy. Mrs. Whiting has also paid to Alfred J. Turner the amount of his legacy and has taken an assignment of the amount due to him. Mrs. A. A. Russell and Miss Buchanan caused inquiries to be made concerning their legacies some years ago and were informed that in the interests of everybody concerned it was desired to reduce the overdraft on the partnership businesses, and they have not since pressed for payment of their legacies. In the case of the legacy payable to Arthur Turner, no steps have been taken by those entitled to collect the same.

The trustees have realized most of the assets of the deceased, with the exception of his interests in the partnerships. At the date of the death of the deceased it would have been difficult to realize them, because of the economic depression and a drought in Queensland. Since the death of the deceased the partnership businesses have been carried on and their value has considerably increased. Many attempts were made to sell both properties without result and the properties have been carried on as a trust investment under the power contained in clause 25 of the will and with the assent of

the beneficiaries. At the date of the death of the deceased the liability of the partnership to its bankers amounted to £218,763. By 1940 this had been reduced to a sum slightly in excess of £100,000. The Queensland leases upon which the business in Queensland is carried on would have expired between 1933 and 1937. In addition to these improvements in the assets position, the stock has been considerably improved. The evidence was that the added value of the Queensland properties occasioned by the acquisition of the new leases amounted to over £100,000.

This position has been partly brought about by the policy which has been adopted by the trustees and approved by the beneficiaries whereby every effort has been made to reduce the liability of the partnership to its bankers. In conformity with this policy the trustees, with the consent of the beneficiaries concerned, have not paid or set aside any of the respective sums of £20,000 provided for in the will of the deceased, and the beneficiaries entitled to the benefit of such sums or the income thereof have agreed that such sums should not be set aside for the time being, and have also agreed to forego interest thereon for each year up to and including 30th June 1940.

From time to time the trustees have received from the partnership their share of the partnership profits and the amounts so received have been credited to the beneficiaries in the proportion to which those beneficiaries are entitled to share in the income of the ultimate residue of the estate, but no amounts so credited to such beneficiaries have been paid to them. This appropriation by the trustees appears to me to distinguish this case from *Robertson* v. *Deputy Federal Commissioner of Land Tax* (1). That case was decided under a different Act with respect to a will which expressly provided for the payment of debts, &c., before any income became payable to the beneficiary (the University).

The net profit of the Queensland business for the year ended 30th June 1940 amounted to £6,451 17s. 7d., and the net profit of the Papuan business for the same year amounted to £11,600 17s. 5d. The taxable profit, in the case of the Queensland business, was £7,423 0s. 3d. from personal exertion and £183 18s. 9d. from property, and the taxable profit from the Papuan business was £11,763 13s. 3d. from personal exertion and £18 15s. from property. The total net profit for taxation purposes was £19,186 13s. 6d. from personal exertion and £202 13s. 9d. from property.

During the year ended 30th June 1940 the trustees of the estate of Robert Selmon Whiting received from the partnership a total

(1) (1941) 65 C.L.R. 338.

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

Rich J.

sum of £2,465 0s. 1d., which represented their share of profits actually distributed by the partnership in that year. The amount was paid in various sums between August 1939 and May 1940, and the whole of such sums were paid on account of the Queensland business. No portion of the amount received by the trustees on account of profits was paid to the beneficiaries, but each beneficiary was credited with his or her proportion thereof in the proportion to which he or she was entitled to share in the income of the ultimate residuary estate. The amount so credited to each beneficiary is included in the amounts shown in the balance-sheet under the heading of "Beneficiaries' Income Accounts."

It is convenient to deal first with the contention that, in the case of the interest of the estate in the partnership which is being carried on by the trustees of the estates of the two deceased partners, income tax is assessable on so much only of the income of the partnership as the trustees have thought fit to take out of the partnership income and pay into their trust accounts, but not on the interest of the estate in the net income of the partnership. Section 92 of the *Income Tax Assessment Act* 1936-1940 provides that the assessable income of a partner shall include his individual interest in the net income of the partnership in the year of income, his individual interest in a partnership loss being an allowable deduction; and "net income" is defined to mean the assessable income of the partnership, calculated as if the partnership were a taxpayer, less all allowable deductions (s. 90). What is assessable is the partner's individual interest in the net income, that is, the whole individual interest, not so much only of the partner's individual interest as may have been distributed to him. By individual interest is here meant the interest to which a partner is solely entitled, as contrasted with his joint interest in the whole. The fact that one of the partners is a trustee of his share in the partnership does not prevent his interest as trustee in the net income of the partnership from being his individual interest for the purposes of s. 92. If, however, he has an individual interest in the net income of the partnership because he is trustee of a trust estate, s. 96, read in conjunction with s. 95, exempts him from liability as trustee to pay income tax upon his individual interest as trustee in that net income, save to the extent provided for by ss. 98-102. It follows that, in respect of the estate's interest in the net income of the partnership, there is nothing to prevent an assessment being made upon the appropriate person or persons in respect of the whole interest, irrespectively of whether a distribution has been made by the partnership in respect of all or any part of it.

I pass now to the substantial question, namely, whether the trustees as such are liable to be assessed in respect of the whole of the income derived by their estate.

Where income is derived by a person in a representative capacity, the questions whether income tax is payable on the income so derived or on the shares of the beneficiaries therein, and whether by the representative or by the beneficiaries, turn upon the language of the statute which provides for the incidence of the tax.

In the United Kingdom, as regards income derived from property in the case of a resident, income tax is chargeable upon the income derived from all his property, wherever situate, subject to the qualification that if the property is situated outside the United Kingdom and does not consist of stocks, shares or rents, it is chargeable on so much only of the income derived therefrom as is actually received in the United Kingdom. In relation to language such as this it is, or may be, important to determine the *locus* of the property as a criterion of liability. Where it consists of an interest in the residuary estate of a deceased person, it has been held that, for this purpose, until the estate has been fully administered by the personal representatives, the property constituted by the interest is not a proportion of the individual items from time to time making up the residuary estate and therefore situated wherever those items may happen to be, but a right to have the estate administered by the personal representatives and situated therefore at the place from which they are administering it (*Baker* v. *Archer-Shee* (1)). When, however, the estate has been fully administered, and is held in trust for the beneficiaries, their interests become locally situated where the individual items of property are situated, unless the local law determining the nature of their interests otherwise provides (*Baker* v. *Archer-Shee* (2) ; *Archer-Shee* v. *Garland* (3)).

In the United Kingdom, also, a sur-tax is chargeable in respect of the incomes of individuals whose total income exceeds a stated amount, but individuals are not assessable to sur-tax in a representative capacity. In relation to sur-tax, it has been held that until the residuary estate of a deceased person has been fully administered, any income derived from it is income of the executors received in a representative capacity, not income of the life tenants of residue, and that any sums paid out of such income to life tenants are therefore not received by them as income moneys liable to sur-tax (*Corbett* v. *Inland Revenue Commissioners* (4)).

(1) (1927) A.C. 844.
(2) (1927) A.C. 844.
(3) (1931) A.C. 212.
(4) (1938) 1 K.B. 567.

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

Rich J.

It is evident that in relation to legislation so framed it may be of great importance to ascertain whether at a given moment the estate of a deceased person had been fully administered; and this may be a matter of some difficulty. Mr. *Birrell* in his book on *Trustees* informed his readers that Sir John Wickens, a very nice observer, used to tell his pupils that the change from executorship to trusteeship invariably took place in the dead hours of the night. The question has now been held to be one of fact. It is not necessarily concluded by the circumstance that a mortgage debt is still outstanding (*Inland Revenue Commissioners* v. *Smith* (1); *Inland Revenue Commissioners* v. *Wahl* (2)); and an appropriation of particular assets may work a complete administration *qua* them whilst leaving the rest of the estate still in process of administration.

Some of the argument that has been addressed to me in the present appeal has proceeded on the assumption that similar considerations are relevant to the determination of the matters here in issue. This depends on the language of the relevant portions of the Commonwealth Act—*Income Tax Assessment Act* 1936-1940.

By s. 96 it is provided that, except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate. Where any beneficiary is presently entitled to a share of the income of a trust estate and is not under any legal disability, his assessable income shall include that share of the net income of the trust estate (s. 97), and the phrase "the net income of a trust estate" is defined to mean the total assessable income of the trust estate calculated under this Act as if the trustee were a taxpayer in respect of that income, less all allowable deductions (s. 95). A trustee is liable to be assessed and to pay tax in respect of that share of the net income of the trust estate to which any beneficiary under a legal disability is presently entitled (s. 98), and in respect of any part of the net income to which no beneficiary is presently entitled (s. 99), and also in certain other special cases mentioned in ss. 101A and 102.

By s. 6 "trustee" is defined to include an executor or administrator. Hence, the phrase "trust estate" includes the estate of a deceased person vested in a personal representative as such, and the provisions of the sections to which I have just referred must be read as applicable to the income of the estate before as well as after that estate has been fully administered. In these circumstances, authorities dealing with the incidence of income tax based upon language which has been thought to indicate an intention to distinguish between the income of estates which have been and those

(1) (1930) 1 K.B. 713, at p. 728. (2) (1933) 17 Tax Cas. 744.

which have not been fully administered are of no assistance in ascertaining the operation of the sections now in question. This must be determined upon the actual language used, and irrespectively of that distinction.

Reading the sections as a piece of English, I think it reasonably plain that in the case of a beneficiary who is *sui juris* all that is necessary in order to attract liability to him and to divert it from his executor or trustee is that he should be presently entitled to income of the estate. By this, I think, is meant entitled for an interest in possession as contrasted with an interest in expectancy. It is not necessary that he should have received his share of income. This is now made plain by the omission from s. 99 of words which in s. 31 (2) (*b*) of the former Act had given rise to doubts, an omission which would appear to have been occasioned by the observations of this Court in *Federal Commissioner of Taxation* v. *Higgins* (1) and *Executor Trustee & Agency Co. of South Australia Ltd.* v. *Federal Commissioner of Taxation* (2).

The questions whether in any particular case a beneficiary is presently entitled to a share of the income of a trust estate, and if so the amount of his share, are mixed questions of law and fact dependent on rules of law determining the principles upon which the nature and *quantum* of his interest should be arrived at, and on the ascertainment of the facts to which the rules should be applied. Thus, it may be necessary to take into consideration not only the dispositions of the will but the way in which the estate is being administered and the stage which the administration has reached. But if the estate has in fact earned net income which is not required to be accumulated for the benefit of persons interested in expectancy, and is not insolvent, the beneficiaries are presently entitled to that income notwithstanding that for the purposes of other language than that of the relevant sections it might be proper to describe it as income of the executors, and notwithstanding that in the proper administration of the estate the executors may be entitled to withhold payment and apply it to some other purpose, and that actual payment may be exigible only in the course of some later adjustment: Cf. *Horton* v. *Jones* (3). It is, however, certainly not income of the executors for the purposes of the Commonwealth Act.

In a particular case, executorial duties may be in course of performance, the carrying out of which may have an important influence in determining to how much income the respective beneficiaries are presently entitled, in the sense in which that phrase is used in the

(1) (1930) 44 C.L.R. 297, at p. 305.
(2) (1932) 48 C.L.R. 26, at pp. 44, 45.
(3) (1935) 53 C.L.R. 475, at pp. 486, 490.

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

Rich J.

sections. Unpaid pecuniary legatees may be entitled to a share of the income representing the interest on their legacies. If debts or legacies remain unpaid, the share of income to which life tenants of residue are entitled may depend in part upon whether the rule in *Allhusen* v. *Whittell* (1) applies in the State in question and, if so, upon the result of its application, and in a particular case it may depend upon the nature of the direction which the testator has given for payment of his debts and the extent to which it is necessary to give effect to it (*Tewart* v. *Lawson* (2); *In re Darby*; *Russell* v. *MacGregor* (3)). If the executorial duties are in the main completed, questions of this kind may no longer arise, but the ascertainment of shares of income may still be complicated, for example, by the rule in *Howe* v. *Earl of Dartmouth* (4). Further, it may result from the application of some of these rules of administration that none of the beneficiaries presently entitled is entitled to certain portions of the actual net income of the estate, and these portions may have to be applied for the benefit of persons who are entitled only to interests in expectancy in the corpus, with the result that the executors and trustees alone may be assessable upon these portions pursuant to s. 99.

But whatever stage the administration may have reached, and whether the estate is being administered by the executors in their character of executors, or whether so little remains to be done of an executorial nature that it is being administered substantially as a trust estate, it is always possible, although it may be difficult, by applying the appropriate principles of law to the relevant facts, to determine to what share, if any, of the income of the estate each beneficiary is presently entitled. And it must always be remembered that what attracts liability to a beneficiary is the fact that, being entitled in possession to an immediate interest, he is presently entitled to a share of income. The facts that he has not yet actually received the share to which he is presently entitled, and that there may be considerable delay in his getting it, do not affect his liability to be assessed and to pay in respect of it, nor divert the liability from himself to his trustee.

It is, in my opinion, these considerations which should be applied in determining whether the trustees are assessable to income tax in the present case, and if so to what extent. Applying them, it is clear that the assessment appealed against cannot stand. By it, it is sought to charge the trustees with income tax in respect of the whole net income of the trust estate. It is at least clear that they

(1) (1867) L.R. 4 Eq. 295, at p. 303.
(2) (1874) L.R. 18 Eq. 490.
(3) (1939) 1 Ch. 905.
(4) (1802) 7 Ves. 137 [32 E.R. 56].

are not liable for this. The question whether they are liable to be assessed in respect of some portion of the net income has not been raised or debated; and it is not, therefore, desirable to pass upon it or to make any order which would preclude it from being raised hereafter. In this connection, I would refer only to clause 37 of the will, from which, if from nothing else, it would appear that in a given year the whole net income of the trust estate is not necessarily identical with the income thereof to which the beneficiaries are presently entitled.

The appeal is therefore allowed, the assessment is set aside, but without prejudice to the right of the Commissioner to make assessments upon the beneficiaries and to re-assess the trustees, and, since the appeal has been substantially successful, the costs of the appeal are to be paid by the Commissioner.

From this decision the respondent appealed to the Full Court of the High Court.

Ham K.C. (with him *Adams*), for the appellant. The assessment here in question was correct under s. 99 of the Act. There was no income to which the beneficiaries were "presently entitled," within the meaning of s. 97, upon which they were assessable instead of the trustee. *Rich* J. was wrong in attaching to the words "presently entitled" the meaning of "an interest in possession as contrasted with an interest in expectancy." That is not the test. To be assessable under s. 97 the income must be immediately payable to the beneficiary; it must be possible to say of it, at the relevant time, that it is "now" payable to the beneficiary, that the trustee is bound to hand it over to him. Otherwise, no effect is given to the word "presently"; the word "entitled" would of itself be a sufficient description. In the present case the administration of the estate had not reached a stage at which it could be said that the beneficiaries were entitled to anything; in those circumstances the trustees were properly assessed under s. 99: See *Robertson* v. *Deputy Federal Commissioner of Land Tax* (1). [He also referred to *Barnardo's Homes* v. *Special Income Tax Commissioners* (2); *Skinner* v. *Attorney-General* (3); *Lord Sudeley* v. *Attorney-General* (4); *Corbett* v. *Inland Revenue Commissioners* (5); *Inland Revenue Commissioners* v. *Smith* (6); *Federal Commissioner of Taxation* v. *Higgins* (7);

(1) (1941) 65 C.L.R. 338, at pp. 345 et seq. per *Rich* J., at p. 347 per *Starke* J., at p. 349 per *Williams* J.
(2) (1921) 2 A.C. 1.
(3) (1940) A.C. 350.
(4) (1897) A.C. 11.
(5) (1938) 1 K.B. 567, at pp. 575, 578.
(6) (1930) 1 K.B. 713, at pp. 729, 733.
(7) (1930) 44 C.L.R. 297, at p. 305.

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

Executor Trustee and Agency Co. of South Australia Ltd. v. *Federal Commissioner of Taxation* (1).]

Fullagar K.C. (with him *Spicer*), for the respondents. Decisions on English Acts are not in point here. If s. 17 of the Commonwealth Act were the only section applicable, the English authorities would assist, but they throw no light on the meaning of ss. 97 and 99. [He referred to *Corbett's Case* (2); *Williams* v. *Singer* (3).] The beneficiaries in this case are now—that is to say, "presently"—*entitled* to what is given them by the will, notwithstanding that they are not able to obtain immediate payment: This view is supported by s. 101 of the Act (See also ss. 100, 254), and it is submitted that the view taken by *Rich* J. was correct. If this is not correct as to residue because the residue cannot yet be ascertained, it is at least correct as to the specific sums directed to be set aside and the legacy and annuity of the son-in-law. It is clear in respect of those gifts that the beneficiaries are now entitled to income, although they are not actually receiving it, and the assessment is, to that extent, at least, incorrect.

Ham K.C., in reply.

Cur. adv. vult.

1943, March 19. The following written judgments were delivered:—

LATHAM C.J. AND WILLIAMS J. This is an appeal by the Commissioner of Taxation of the Commonwealth of Australia against an order made by *Rich* J. on 23rd November 1942, allowing the appeal by the trustees of the will of the testator, R. S. Whiting deceased, against the assessment of Federal income tax made by the Commissioner in respect of the year ending 30th June 1940, whereby the Commissioner purported to assess the trustees upon the whole net income of the estate, namely, the amount of £9,923: this amount, mainly consisting of the sum of £9,593, representing the share of the profits of the estate of the testator in a pastoral business in Queensland carried on by the trustees in partnership with the trustees of the estate of the late Sir Rupert Clarke under the name of Clarke & Whiting and in a rubber plantation in Papua carried on by a partnership of the same persons.

The testator, who died on 17th June 1929, was survived by his wife and four children, a son and three married daughters. The son died in 1939, the widow and the three daughters and their husbands

(1) (1932) 48 C.L.R. 26, at pp. 44, 45. (2) (1938) 1 K.B., at pp. 576, 577.
(3) (1921) 1 A.C. 65, at pp. 75, 76.

are still alive. One of the daughters was in Italy at the outbreak of war with that country in June 1940 and is still there.

By his will and five codicils thereto the testator, after bequeathing a number of general pecuniary legacies and certain annuities of which the only one still current is an annuity of £500 per annum to his son-in-law, Major Walker, devised all his real estate and bequeathed all his personal estate upon trust to sell, call in, collect and convert the same into money, with power to postpone conversion, and to stand possessed of the net moneys to arise therefrom upon trust to pay thereout his funeral and testamentary expenses and debts and a legacy of £1,000 to his widow and to set aside and appropriate a sum of £20,000 upon trust to invest the same and to pay the net annual income thereof to his widow during the remainder of her life, with power to the widow to appoint this sum by will or codicil, and in the next place after the said sum of £20,000 had been set aside in full to pay to his son the sum of £20,000 for his own use absolutely and in respect of each of his daughters to set aside a sum of £20,000 to be settled upon them for their lives upon protective trusts for their separate use with restraint upon anticipation and after their deaths upon trust for their children or remoter issue as they should by deed or will appoint and subject to any such appointment in trust for their children, sons at twenty-one and daughters at that age or upon marriage under that age and if more than one in equal shares. He directed that until the death of his widow his trustees should divide the residue, if any, of the income arising from his estate, one-quarter to his widow and the remainder of such income between his children or their respective issue in equal shares, and that the shares of the daughters in his residuary estate should be settled with power to the daughters with the consent of the trustees to raise one-half of such share so that such sum when so raised should belong to such daughter absolutely with a proviso that his daughters might appoint that one moiety of their shares of the income of the settled pecuniary legacy and of the residue should be paid to any husband who might survive them should he so long live. He authorized his trustees to postpone the raising of any legacy or sum of money bequeathed or directed to be paid or set apart until the same in their unfettered discretion and judgment could be done conveniently and with due regard to the interests of all parties concerned, and until such raising directed his trustees to pay to his wife interest at the rate of five per cent per annum to be computed from his decease on the legacies of £1,000 and of £20,000 bequeathed to her and subject thereto to pay out of the balance of his estate to his sons and daughters such interest on the legacies

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

Latham C.J. Williams J.

bequeathed to them as the income of his estate after payment of the interest on the legacies to his wife might be sufficient to pay, such interest not to exceed five per cent per annum. As the will does not expressly provide for interest on the other legacies, they would bear interest at four per cent per annum from one year after the death of the testator.

The assets of the estate of the testator, which were valued for estate duty at a dutiable balance of £52,495, included his partnership interest in the Queensland pastoral business already mentioned valued at £62,536, and in the rubber plantation in Papua valued at £3,406. On these valuations the estate at the date of his death was insufficient to pay the annuities and legacies bequeathed by the will. His debts totalled £40,154, the main liability being an overdraft with the Union Bank of Australia, Melbourne, £25,849.

Since the death of the testator his executors, under a power contained in the will, have continued to carry on the above two businesses in partnership with the trustees of the estate of Sir Rupert Clarke. From time to time they have attempted to realize the partnership assets, but have been unable to do so and in consequence the estate has been a difficult one to administer. The executors have paid the funeral and testamentary expenses and death duties other than Queensland succession duty, estimated to amount to £5,617, which they will become liable to pay upon the death of the widow. In order to discharge the testator's overdraft with the Union Bank and certain other liabilities of the estate, the executors borrowed the sum of £32,000 from the widow and children, and no part of this sum has been repaid. Debts still unpaid comprise the sums of £5,600 owing to the son's estate and £3,956 owing to E. E. Dye, one of the executors. The partnership's debt to its bankers at 30th June 1940 exceeded £100,000. The only legacy which has been paid is the £1,000 bequeathed to the widow. No part of the annuity to Major Walker has been paid. No sum has been set aside or appropriated to provide for the five general pecuniary legacies of £20,000 each, totalling £100,000. The widow and children have agreed that they will not claim interest on the debt of £32,000 and have from time to time agreed not to claim interest on their legacies.

Although, therefore, the testator died eleven years before the year of income in question, it is apparent that the administration of the estate has made little progress. The partnerships have made substantial profits from time to time, but these profits have been mainly used to reduce the partnership overdraft, which at the date of the testator's death stood at £218,000. Before the value of the ultimate residue can be ascertained it will be necessary to pay or

provide for the debts of the testator, the legacies and annuity already mentioned, the setting aside of the five sums of £20,000, and for certain further legacies which become payable after these legacies have been set aside. So long as the Queensland stations remain unsold, it will continue to be uncertain whether the estate will be able to meet the debts in full; or, if as appears to be likely, it is able to do so, whether there will be sufficient capital to provide for the annuity and to pay the legacies in full. No ultimate residue can emerge until all these prior obligations, including interest on the interest-bearing debts and on the legacies, so far as it has not been validly released, have been met.

As the three daughters are all married and are restrained from anticipating their income, they can only release any income to which they are entitled after it has become payable. One of these daughters is in Italy, so that it may be impossible to get any such consent from her during the war. The son's executors would not be as free to consent to forego interest or his other rights against the estate as the son would be if he were alive. If the assets prove insufficient to set aside a sufficient capital sum to provide for the annuity to Major Walker and to pay the general pecuniary legacies in full the annuity will have to be valued and treated as a general pecuniary legacy. If the estate is still insufficient to pay the capital value of the annuity and the general pecuniary legacies in full, difficult questions may arise as to the priority of payment of this capital sum and of the legacies, it being clear that legacies in the same order of priority would have to abate ratably. It cannot be ascertained, therefore, at present whether Major Walker will become entitled to the payment of an annuity or of a capital sum or to arrears of the annuity prior to its valuation plus a capital sum, or what amounts will become payable in respect to the legacies, or whether there will be any ultimate residue. As there are possible future husbands as well as daughters and their issue interested in the income or capital of the settled legacies, it is apparent that the estate is not one which, except in minor details, even with the consent of the widow and children, can be administered otherwise than strictly in accordance with the trusts of the will. Even if the widow and children validly release interest on the debts or on the general pecuniary legacies, this will not enure immediately for the benefit of the ultimate residue, but will only make the amounts released available to pay the prior obligations which must be discharged before it can be ascertained.

In the year of income the share of the executors in the profits from the partnerships was the above sum of £9,593, their taxable

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

Latham C.J. Williams J.

income from other sources being £437. The executors did not draw the sum of £9,593 from the partnerships in cash. They drew only a sum of £2,465 to enable them to pay income tax, and the balance was used to reduce the partnership overdraft. But, for the purpose of income tax, the executors purported to allocate the net income of the estate, as to £500 to Major Walker, and, as to the balance, a quarter to the widow and the remaining three-quarters between the children in equal shares, the allocation between the widow and the children being in accordance with the trusts of the income of the ultimate residue. The Commissioner assessed the executors upon the whole net income of the estate as one income and did not treat it as apportioned between the beneficiaries in this way.

The question to be determined upon this appeal is whether the Commissioner was right in assessing the executors under s. 99 of the *Income Tax Assessment Act* 1936-1940 on the whole net income of the trust estate, or whether he should have assessed this sum, or some part of it, to the beneficiaries under s. 97 of the Act. The answer to the question depends upon whether the beneficiaries during the year of income were presently entitled to the income, or any part of it, within the meaning of s. 97.

Section 96 is as follows :—" Except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate." The exceptions to which reference is here made are to be found in ss. 98 and 99.

Section 97 (1) is as follows :—" Where any beneficiary is presently entitled to a share of the income of a trust estate and is not under any legal disability, his assessable income shall include that share of the net income of the trust estate." As already stated, the question is whether this provision applies to the present case.

Section 98 provides that where any beneficiary is presently entitled to a share of the income of a trust estate, but is under a legal disability, the trustee shall be assessed and liable to pay tax in respect of that share of the net income of the trust estate as if it were the income of an individual. Section 99 provides that where there is no beneficiary presently entitled to any part of the income of a trust estate, or where there is a part of that income to which no beneficiary is so entitled, the trustee shall be assessed and liable to pay tax on the whole income, or part of the income, as the case may be, as if it were the income of an individual.

Rich J. considered that the words " presently entitled " appearing in the sections quoted referred to a vested interest in possession as opposed to an interest *in futuro*. On the other hand it is contended that a beneficiary is presently entitled within the meaning of the

sections only when he is entitled to immediate payment of a share of the income of a trust estate. This latter view is, we think, strongly supported by the provisions contained in s. 98. Section 98 deals with the case of a beneficiary who is presently entitled, but who is under a legal disability. In such a case the beneficiary under a legal disability may have a vested interest, but the trustee is nevertheless required to pay the tax. The circumstance which distinguishes this case from the case of a beneficiary presently entitled to whom s. 97 applies is the existence of a legal disability. That legal disability does not prevent the beneficiary from having a vested interest. The effect of it is to prevent him receiving payment, because he is incapable of giving an effective discharge to the trustee. This provision, therefore, supports the view that when the Act speaks of a beneficiary being presently entitled to a share in income, it refers to the right of a beneficiary to obtain immediate payment, rather than to the fact that a beneficiary has a vested interest.

Section 101, which provides that where a trustee has a discretion to pay or apply income of a trust estate to or for the benefit of specified beneficiaries, a beneficiary in whose favour the trustee exercises his discretion shall be deemed to be presently entitled to the amount paid to him or applied for his benefit by the trustee in the exercise of that discretion, fits in with this construction.

In some cases no doubt, and they would include the present case, it will create a hardship for the beneficiaries that the whole income of the estate should be aggregated for the purposes of taxation, but in other cases where the beneficiaries have a substantial income from independent sources it might be a benefit for them that no part of the income of the trust estate should be aggregated with their other income. The main assumption underlying the Act would appear to be that the person who derives the income should be in a position to pay the tax out of the income.

Any other construction of the Act would place beneficiaries in a difficult position. For instance, an annuity is payable from the date of death, so that, if all that is necessary to attract the provisions of s. 97 is that a beneficiary should be entitled to a vested interest in possession, Major Walker should have returned his annuity of £500 per annum as part of his income from property from the date of the testator's death, although he has never been paid and may never be paid any part of it; and although, if he is paid anything eventually, it may be in the shape of a general pecuniary legacy and not of an annuity.

The words "presently entitled to a share of the income" refer to a right to income "presently" existing—i.e., a right of such a kind

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

Latham C.J. Williams J.

that a beneficiary may demand payment of the income from the trustee, or that, within the meaning of s. 19 of the Act, the trustee may properly reinvest, accumulate, capitalize, carry to any reserve, sinking fund or insurance fund however designated or otherwise deal with it as he directs or on his behalf.

A beneficiary who has a vested right to income (as in this case) but who may never receive any payment by reason of such right, is entitled to income, but cannot be said to be " presently entitled " as distinct from merely " entitled." Indeed, it is difficult to see how he can be entitled at all to income which must be applied in satisfaction of some prior claim : See *Allhusen* v. *Whittell* (1).

Thus, in order to ascertain whether such a present right exists, it is necessary to look at the state of the administration of the trust estate.

Numerous authorities, many of which are collected in the recent decision of this Court in *Robertson* v. *Deputy Federal Commissioner of Land Tax* (2), have established that until an estate has been fully administered by payment or provision for the payment of funeral and testamentary expenses, death duties, debts, annuities, and legacies and the amount of the residue thereby ascertained, the income of the residuary estate is the income of the executors and not of the residuary beneficiaries. But his Honour did not consider that the principles enunciated in these authorities were applicable to the provisions of Part III., Div. 6, of the Act. With great respect, it appears to us that these provisions must be construed in the light of the general principles of law applicable to the administration of estates by executors and trustees at law and in equity. The crucial question is at what moment of time, having regard to these general principles and to the provisions of the trust instrument, can it be said that a beneficiary has become presently entitled to a share in the income of a trust estate. A beneficiary under a will may become entitled to a share of such income as an annuitant legatee or a residuary beneficiary. His right to share in such income would be determined by the trusts in the will, these trusts being administered in accordance with such rules of equitable administration (where applicable) as those laid down in such cases as *Allhusen* v. *Whittell* (3) and *Howe* v. *Earl of Dartmouth* (4). The only part of an estate which can be made available to satisfy the claims of the beneficiaries is that part which remains after the funeral and testamentary expenses, death duties and debts have been paid or provided for, if necessary out of the whole estate, including any income earned by the estate during the period of realization. Entries made in the

(1) (1867) L.R. 4 Eq. 295, at p. 303.
(2) (1941) 65 C.L.R. 338.
(3) (1867) L.R. 4 Eq. 295.
(4) (1802) 7 Ves. 137 [32 E.R. 56].

books of the estate to adjust the rights of the beneficiaries in the income and capital of the estate can only operate subject to the satisfaction of the claims of and cannot affect the rights of the creditors. But, as has been made clear in the authorities already mentioned, the existence of mortgage debts does not prevent the administration of the estate advancing from the stage when the liabilities to creditors are in process of discharge to a stage when the beneficial trusts of the will can attach to assets which are not required to satisfy the mortgage debts (*Corbett* v. *Inland Revenue Commissioners* (1)).

The evidence shows that, in the year of income, the administration of the estate had only reached the initial stage during which the whole of the available net income could only be properly applied (as it was in fact applied) in reduction of debts. The second stage will be reached when it will become proper for the executors to apply the estate or some part of it in satisfaction of the annuity and in payment of interest on or the capital of the legacies. The annuitant and the legatees may then become presently entitled to an immediate share in the income of the trust estate within the meaning of s. 97, but it will only be at the third stage, when the debts, the annuity and the legacies have been paid or provided for in full, that there will be any income to which the residuary beneficiaries as such will be presently entitled. The allocation of the net income of the estate amongst the residuary beneficiaries in the books of the executors for the year ending 30th June 1940 was therefore erroneous. If it was possible for the net income of the estate to be re-allocated so as to divide it between the amount of the annuity and amounts representing interest on the legacies and to credit the balance between the residuary beneficiaries, it might be proper, as his Honour ordered, to discharge the existing assessment without prejudice to a fresh assessment; but since, for the reasons already given, it is apparent that there is no income presently available to be dealt with in this way, the whole income of the estate in the relevant year was in fact and in law income to which no beneficiary was presently entitled, so that the Commissioner was right in assessing it as the income of the executors under s. 99.

The appeal should be allowed.

STARKE J. Appeal on the part of the Commissioner of Taxation from a decision of my brother *Rich* allowing an appeal from an assessment by the Commissioner of the respondents, Rose Whiting and others, to income tax for the year 1940-1941.

(1) (1938) 1 K.B. 567.

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

Starke J.

The respondents are the executors and trustees of the will and codicils of Robert Selmon Whiting, who died in 1929. The testator at the time of his death was possessed of considerable assets, but his principal assets were partnership interests, the holding and working of pastoral lands in Queensland and a rubber plantation in Papua. He also had considerable liabilities, both on his own account and on joint account, in connection with his pastoral and plantation interests. Owing to drought, depression, and the present war the executors and trustees of the testator have been unable to realize the pastoral and plantation interests. They have carried on the pastoral and rubber properties in co-partnership with the executors and trustees of the testator's former partner pursuant to powers contained in the will of the testator and with the assent, I gather, of his beneficiaries. But the testator's executors and trustees are still under heavy liabilities incurred by the testator and also by themselves in carrying on the pastoral and rubber properties in co-partnership, as already mentioned.

In December of 1940 the executors and trustees of the testator made a return of income derived by them from all sources in and out of Australia for the financial year 1940-1941 based on the income of the preceding twelve months. This return disclosed an income of £9,593 derived from personal exertion and £437 from property. The Commissioner, however, assessed the executors and trustees for the financial year mentioned in respect of an income of £9,923, of which £9,371 was assessed as income derived from personal exertion and £552 as income from property. My brother *Rich* set aside this assessment without prejudice to the right of the Commissioner to make assessments upon the beneficiaries under the will of the testator and to reassess the executors and trustees.

The validity of the assessment depends upon the proper construction of a few sections of the *Income Tax Assessment Act* 1936-1940.

"Except as provided in this Act, a trustee shall not be liable as trustee to pay income tax upon the income of the trust estate" (s. 96). "Where any beneficiary is presently entitled to a share of the income of a trust estate and is not under any legal disability, his assessable income shall include that share of the net income of the trust estate" (s. 97 (1)). "Where there is no beneficiary presently entitled to any part of the income of a trust estate, or where there is a part of that income to which no beneficiary is so entitled, the trustee shall be assessed and liable to pay tax on the net income of the trust estate, or on that part of that net income as the case may be, as if it were the income of an individual" (s. 99).

My brother *Rich* thought it "reasonably plain that in the case of a beneficiary who is *sui juris* all that is necessary in order to attract liability to him and to divert it from his executor or trustee, is that he should be presently entitled to income of the estate. By this . . . is meant entitled for an interest in possession as contrasted with an interest in expectancy. It is not necessary that he should have received his share of the income." The last-mentioned proposition is true enough, but a beneficiary is not, I think, presently entitled to income unless it can be established that there is income which he is presently entitled to receive: that he is entitled to obtain payment thereof from the trustee.

The sections do not look to the nature of the beneficiaries' title to shares of the income whether they be vested or contingent, but to the right to receive income which is available in the hands of trustees for payment to the beneficiaries. So far as cases throw any light upon the construction of the Act they are, I think, all in favour of this view, from *Lord Sudeley* v. *Attorney-General* (1) down to the case in this Court of *Robertson* v. *Deputy Federal Commissioner of Land Tax* (2). And if this view is right, it is clear that the beneficiaries are not so entitled in the present case.

The testator in this case directed by his will that until the death of his wife, who is still alive, his trustees should divide the residue, if any, of the income arising from his estate as to one fourth part or share of such income to his wife and the remainder of such income between and among his children, of whom there were four, or their respective issue in equal shares. But the testator's estate has not been cleared of debts and other liabilities and the residue has not been and cannot yet be ascertained. So it is impossible to say that the beneficiaries are entitled to the payment of any share of residuary income, and this, I understood, the learned counsel for the executors and trustees in the end conceded, and, as I think, properly conceded. But then he referred to various provisions in the will and codicils of the testator whereby he directed five sums of £20,000 to be paid or set aside for his wife and children and also an annuity and a pecuniary legacy to his son-in-law, which, it was said, carried interest under the terms of the will or by law. So it was contended that the beneficiaries under the will and codicils of the testator were presently entitled in respect of these various gifts to a share of the income of the trust estate and were liable to be assessed pursuant to s. 97 of the Act already mentioned.

In my opinion, this contention cannot be sustained, for the beneficiaries are not entitled to obtain payment of any income

(1) (1897) A.C. 11. (2) (1941) 65 C.L.R. 338.

H. C. OF A. 1942-1943.

FEDERAL COMMISSIONER OF TAXATION v. WHITING.

from the executors and trustees until such time as the estate is cleared of debts and liabilities or at least cleared sufficiently to establish a present right in the beneficiaries to obtain payment of some ascertainable sum of income from the trustees in a due course of administration.

The result is that this appeal should be allowed and the assessment of the Commissioner of Taxation affirmed.

Appeal allowed. Order of Rich J. set aside. Assessment confirmed. Respondents to pay costs of appeal to High Court and of this appeal.

Solicitor for the appellant, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

Solicitors for the respondents, *Whiting & Byrne.*

E. F. H.