

Cons <i>Mutual Pools & Staff Pty Ltd v Common- wealth (1994)</i> 119 ALR 577	Cons <i>Mutual Pools & Staff Pty Ltd v Common- wealth (1994)</i> 68 ALJR 216	Appl <i>Mutual Pools & Staff Pty Ltd v Common- wealth (1994)</i> 27 ATR 357	Dist National <i>Trustees Executors & Agency Co v FCT (Cain's case) (1954)</i> 91 CLR 540	Appl Smith, <i>Ferguson, Forth, Grimshaw & Coburn v R (1994) 125</i> ALR 385	Appl <i>Smith v R (1994) 181</i> CLR 339	Foll <i>Wheatley & Repatriation Commission, Re (1996) 41</i> ALD 191	Appl <i>Australian Broadcasting Authority v Project Blue Sky Inc (1996)</i> 141 ALR 397
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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

PERPETUAL EXECUTORS AND TRUSTEES }
ASSOCIATION OF AUSTRALIA LIMITED } APPELLANTS ;
AND ANOTHER }

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

(THOMSON'S CASE.)

Estate Duty—Assessment—Commonwealth bonds—Gold dollar bonds issued in United States—Principal and interest payable in New York without deduction for any Australian taxes—Bonds purchased by person domiciled in Australia —Federal income tax paid on interest—Death of bondholder—Payment of £6,814 to executors by Commonwealth Treasury as refund of tax paid on bond interest—Amended assessment including £6,814 in estate of deceased as value of right of action for unliquidated damages—Loan Securities Act 1919 (No. 25 of 1919), s. 3—Income Tax Assessment Act 1936-1944 (No. 27 of 1936—No. 28 of 1944), ss. 170, 172, 173, 177—Estate Duty Assessment Act 1914-1942 (No. 22 of 1914—No. 18 of 1942), ss. 8, 20, 22, 26, 27.

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MELBOURNE,
June 3, 4, 7,
8.
ADELAIDE,
Sept. 22.
Latham C.J.,
Starke, Dixon,
McTiernan and
Williams JJ.

For the purpose of the *Estate Duty Assessment Act 1914-1942* an expectation on the part of a deceased person of a benefit or payment, however well founded or certain, does not amount to property unless it rests on an actual right, legal or equitable, or a claim to such a right. The receipt by his legal personal representatives after his death of the expected benefit or payment will not make it necessary to include it in the value of the estate : *Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co. Ltd. (Watt's Case)*, (1925) 25 S.R. (N.S.W.) 467 ; 38 C.L.R. 12, followed and applied.

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After the Court had decided in *Magrath v. The Commonwealth*, (1944) 69 C.L.R. 156, that the assessment of the taxpayer in that case to income tax on the interest upon Australian dollar bonds was inconsistent with the terms of the contract of loan, counsel for the Commonwealth adopting the attitude that if it were held inconsistent with the contract the Commonwealth would not rely on the assessability of the taxpayer, another taxpayer made representations in respect of income tax which the latter had paid in respect of interest upon dollar bonds of the same issue. Before receiving an answer to her representations the taxpayer died, but her executors subsequently received from the Treasury a payment representing the calculated equivalent of the income tax levied by the assessments upon such interest during her lifetime.

Held by Latham C.J., Dixon and McTiernan JJ. (Starke and Williams JJ. dissenting) that the payment was *ex gratia* and should not be included in the value of the deceased's property for Estate Duty; because (a) notwithstanding the construction given to the contract in *Magrath v. The Commonwealth*, (1944) 69 C.L.R. 156, the interest was taxable under the *Income Tax Assessment Act 1936*, which could not be interpreted under the principle *generalia specialibus non derogant* as implying an exemption of such interest, (b) that an Act of Parliament was necessarily paramount over the contract, and (c) to assess and collect the tax in accordance with law could not amount to an actionable breach of contract.

The Commissioner of Taxation in his assessment of the value of the estate included the amount of the repayment under the description "refund of income tax". On objection the Commissioner excised the sum, but by an amendment substituted the same sum under the description of the value of a right of action for the recovery of unliquidated damages. *Held* that, if the Court had been of opinion that the amount repaid was liable to estate duty, but not as a right to damages, the executors would not necessarily have been entitled to succeed in their appeal but it would have been open to the Court to vary the assessment so as to describe the dutiable item correctly.

CASE STATED.

On an appeal to the High Court by the executors of the will of Christina Thomson from the assessment of the estate of the deceased to Federal estate duty, *Dixon J.* stated for the Full Court a case which was substantially as follows:—

1. Christina Thomson died on 15th December 1944.
2. By her last will and testament dated 12th August 1940 the deceased appointed the Perpetual Executors and Trustees Association of Australia Ltd. and Colin York Syme, the appellants, to be executors and trustees thereof, and probate thereof was on 20th February 1945 granted to the appellants by the Supreme Court of Victoria.

3. The deceased was at all material times a resident of and domiciled in Victoria and as such liable as a taxpayer to pay Federal income tax under the provisions of the *Income Tax Assessment Acts* of the Commonwealth from time to time in force.

4. On or about 7th May 1938 the deceased purchased in the United States of America from the previous holder or holders thereof one hundred and thirty-three bonds of the Commonwealth of Australia, each bond having a face value of one thousand dollars and having interest coupons attached thereto.

5. The bonds are gold bonds payable to bearer and are part of an external loan of forty million dollars five per cent gold bonds floated by the Commonwealth in the United States of America in the year 1927. They are dated 1st September 1927 and are due 1st September 1957 but are subject to redemption at the option of the Commonwealth (not earlier than 1st September 1947).

6. The bonds are definite bonds which were duly sold and issued to the plaintiff's predecessor or predecessors in title in the United States of America in accordance with the provisions of a contract in writing dated 22nd August 1927 duly made between the Commonwealth by its agent, the Commissioner for the Commonwealth in the United States of America, and two American corporations, namely, J. P. Morgan and Company and National City Company.

7. The bonds were duly issued upon the terms and conditions set forth therein by authority of the Governor-General of the Commonwealth acting with the advice of the Executive Council pursuant to the powers conferred by s. 3 of the *Loans Securities Act* 1919.

8. By the bonds the Commonwealth for value received promises "to pay to the bearer on the first day of September One thousand nine hundred and fifty-seven the principal sum of one thousand dollars . . . and to pay interest on such principal sum at the rate of five per cent . . . per annum, semi-annually on the first day of March and the first day of September in each year after the date hereof until such principal sum shall have been paid, but only upon presentation and surrender of the coupons for such interest thereto attached, as severally they mature. Such principal sum and interest instalments, when due respectively, will be paid in the Borough of Manhattan, City of New York, State of New York, United States of America, either at the office therein of J. P. Morgan and Company or at the principal office of The National City Bank of New York as the holder hereof shall elect, in gold coin of the United States of America of the standard of weight and fineness existing on September one, one thousand nine hundred

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and twenty-seven, without deduction for any taxes now or at any time hereafter imposed by the Commonwealth of Australia or by any taxing authority thereof or therein."

9. By each interest coupon the defendant promises "to pay to bearer" on a date stated in the coupon "in the Borough of Manhattan City of New York United States of America either at the office of J. P. Morgan and Company or at the principal office of the National City Bank of New York, twenty five dollars, gold coin of the United States of America of the standard existing on September 1, 1927, without deduction for any Australian taxes present or future."

12. The deceased from the time she became the owner of the bonds caused the interest coupons to be duly presented and the interest which became due from time to time to be duly collected on her behalf in New York and transmitted to her in Australia.

13. The deceased included in her returns of income made pursuant to the *Income Tax Assessment Acts* of the Commonwealth from time to time in force the following amounts being the value in Australian currency of the sums in United States currency received by her from the Commonwealth by way of interest on the bonds—

Income year ending 30th June 1939	£1,396	15	5
Income year ending 30th June 1940	1,901	1	2
Income year ending 30th June 1941	2,009	2	3
Income year ending 30th June 1942	2,047	3	2
Income year ending 30th June 1943	2,047	3	2

14. In respect of the amounts so included by her, she was assessed to pay and did pay to the respondent Federal income tax amounting in all to the sum of £6,814.

15. By letter dated 6th November 1944 from the solicitors for the deceased to the Deputy Federal Commissioner of Taxation the solicitors stated that in view of the decision in *Magrath v. The Commonwealth* (1) and the attitude reported to have been adopted by counsel for the Commonwealth at the hearing they would be glad to learn whether it was the intention of the Commonwealth to repay to the deceased the income tax so paid. No reply to this letter had been received at the date of her death.

16. On 12th February 1945 the appellants lodged with the respondent a return in respect of the estate of the deceased for the purposes of the *Estate Duty Assessment Act* 1914-1942, which return included the bonds valued at £41,537 14s. 7d.

(1) (1944) 69 C.L.R. 156.

17. Under cover of a letter dated 10th May 1945 the appellants received from the Commonwealth a cheque for £6,814, being refund of the income tax on interest received on the bonds.

18. On 11th June 1945 by letter bearing date that day the appellants informed the Deputy Commissioner of Taxation of the receipt of the sum of £6,814 but contended that it was not an asset in the hands of the deceased or in the hands of her executors at the date of her death and that it must be regarded as a voluntary payment made subsequently to her death and therefore did not form part of her estate at the time of her death.

19. On 7th August 1945 the respondent by notice of assessment dated that day valued the estate of the deceased at £90,157 and assessed duty thereon at £18,049 8s. 7d. Included in the estate as so valued was a sum of £6,814, described in the alteration sheet accompanying the notice of assessment as for "refund of income tax," which was added to the net value of the estate as returned.

20. On 5th September 1945 the appellants gave to the respondent notice of objection to the assessment on the following grounds:—

"The amount of the assessment is excessive by reason of the fact that there has been included in the value of estate for the purpose of assessing the duty thereon a sum of six thousand eight hundred and fourteen pounds which sum is expressed to be a refund of income tax. The said sum was not received until after the death of the deceased and at the date of her death was not a debt owing to her nor was the said sum or any part of it comprised in her estate for the purposes of the *Estate Duty Assessment Acts*."

21. On 11th June 1946 the respondent by notice of amended assessment dated that day allowed the objection and excised the sum of £6,814—refund of income tax—from the value of the estate but further amended the assessment by adding to the value of the estate a sum of £6,814 described in the alteration sheet accompanying the notice of amended assessment as for right of action for recovery of unliquidated damages, valued at the sum paid to the administrators by the Treasury.

22. On 5th July 1946 the appellants gave to the respondent notice of objection to the amended assessment on the following grounds:—

"1. The amount of £6,814 referred to in the alteration sheet annexed to the notice of amended assessment forms no part of the estate of the deceased for purposes of estate duty. 2. The deceased at the date of her death had no right of action against anyone to recover unliquidated damages. 3. The amount of £6,814 received by the executors of the deceased from the Commonwealth on or about the 10th May, 1945, was expressed to be paid as and was

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received as a 'refund of income tax on interest received on gold dollar bonds raised in the United States of America.' 4. Prior to her death the deceased had no right to sue for or recover the said sum of £6,814. 5. The sum of £6,814 which was refunded as afore-said had been paid by the deceased in discharge of obligations validly imposed on her by assessments to income tax duly made under the *Income Tax Assessment Acts*."

23. On 9th August 1946 by letter dated that day the respondent informed the appellants that the last-mentioned objection had been disallowed, and on 26th August 1946 by letter dated that day the appellants requested that that objection be treated as an appeal and forwarded to the High Court of Australia.

24. On 15th April 1947 the solicitor for the respondent gave notice in writing to the appellants that the objection had been forwarded to the High Court of Australia.

25. The respondent advances the following contentions in support of the inclusion of the sum of £6,814 in the value of the estate for Federal estate duty : (i) That the amended assessment in its present form is correct because at the date of her death the deceased had a right of action for the recovery of unliquidated damages which right was properly valued at £6,814 ; (ii) that the Commonwealth's contractual obligation to the deceased was to pay not only the principal and interest agreed to be paid but also the amount of any tax lawfully levied by the Commonwealth of Australia upon her in respect of the receipt by her of such principal or interest and that therefore the deceased at her death had a right of action to recover the sum of £6,814 as a debt due to her by the Commonwealth ; (iii) that the amounts of income tax referred to in par. 14 hereof were not lawfully levied and could have been recovered at law by the deceased during her lifetime ; (iv) that the deceased's claim to the repayment of £6,814 had such a high degree of probability of success and was so well founded in expectation that it should be treated as an asset in her estate and valued at the sum of £6,814.

26. The appellants contend that none of the contentions set forth in par. 25 save the first thereof is relevant to or can properly be determined in the present appeal.

The questions for the opinion of the Full Court were as follows :—

1. Are any of the second, third and fourth of the contentions stated in par. 25 hereof open on this appeal and relevant to its determination ?
2. Subject to question 1, ought the sum of £6,814 or any part thereof to be included in the value of the estate of the deceased for Federal estate duty ?

Coppel K.C. (with him *J. G. Norris*), for the appellants. As to the first question, the Commissioner's contentions to which it relates are not relevant to any issue in this appeal. The appellants are limited to the grounds of their objection (*Estate Duty Assessment Act* 1914-1942, s. 27 (3)). That sub-section defines the subject matter of the appeal, and it follows that the respondent is correspondingly limited. There is no issue in the appeal other than those raised by the objection, and the powers of the Court under s. 27 (5), notwithstanding that it is expressed in wide terms, must be limited accordingly. [He referred to the Act, s. 20 (3), (5); *Danmark Pty. Ltd. v. Federal Commissioner of Taxation* (1).] The contentions in question seem directed rather to showing that the original assessment was correct; they put alternative views: (1) that, on the construction of the taxing Act, the deceased was not liable for income tax on the interest on the bonds; (2) that, as a matter of contract, she was entitled to a refund of the tax paid. Either view would be relevant to the original, but not to the amended, assessment.

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The Court intimated that it would hear counsel for the respondent on this question.

Tait K.C. (with him *T. W. Smith* K.C.), for the respondent. The appellants' objection is "against the assessment" (s. 24 (1)). The assessment is not a list of items of property; it is an assessment of a sum of money as the value of an estate (s. 15). The appellants' argument seeks to treat the appeal as if it was from a particular item, and, further, from that item as described in the alteration sheet. That description is no part of the assessment. The substantial question is whether the Commissioner was right in including the sum of £6,814 (however it might be described) in the assessment. The appellants contend that he was wrong. It must be open to the Commissioner to advance any argument which will combat that contention. The Court has the widest powers under s. 27 (5) and may make any alteration it thinks necessary in the assessment.

Coppel K.C., in reply. Under s. 24 (1) an objection to an amended assessment can only be to the particular item the subject of the amendment. The appellants could not have objected, in relation to the amended assessment, that £6,814, as for a refund of income tax, should not have been included in the estate. The objection forms the appeal, but the objection itself—as distinct from its grounds—is merely an assertion that the assessment is not correct.

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The grounds are arguments in support of that assertion—the only arguments that the appellants can present on appeal. Parliament cannot have intended that the Commissioner should be allowed to present a case on the appeal to which those arguments of the appellants have no relation. [He referred to *R. v. Deputy Commissioner of Taxation* (1).]

PER CURIAM. The Court is not prepared to accept the argument submitted by Dr. Coppel. Reasons for that decision will be given later.

Coppel K.C. As to the second question ; the respondent supports the inclusion of the £6,814 in the amended assessment by the contention (case stated, par. 25 (i)) that the deceased had at the date of her death a right of action for unliquidated damages. This is inconsistent with the facts stated in the case itself, which states that the money received by the estate of the deceased was a refund of income tax and was received by the executors as such. The decision in *Magrath v. The Commonwealth* (2), it is submitted, does not go far enough to support the respondent's contention. However, the appellants will contend—if the Court is prepared to reconsider it—that that case was wrongly decided.

[THE COURT intimated that it would not reconsider that decision.]

The respondent's second contention (case stated, par. 25 (ii)) is inconsistent with *Magrath's Case* (3). As defined by the Court's answer to the only question it answered in that case, the promise of the Commonwealth to the bondholder was that income tax would not be levied on the interest on the bonds—not, as the respondent now expresses it, that the Commonwealth would pay the amount of tax lawfully levied. As to the third contention (case stated, par. 25 (iii)), the first branch of it—that the tax on the interest was not lawfully levied—is met by s. 177 (1) of the *Income Tax Assessment Act* 1936 : The notice of assessment is conclusive evidence of the correctness of the assessment in circumstances such as those of the present case, where the tax was paid without question. The second branch of this contention—that the deceased could have recovered the amount she had paid—gets no support from *Magrath's Case* (3) and is contrary to other authorities (*Ervin v. Federal Commissioner of Taxation* (4)). Cf. *Werrin v. The Commonwealth* (5). If the tax was not lawfully levied, the amount paid would have

(1) (1923) 30 A.L.R. 86.

(2) (1944) 69 C.L.R. 156 : See, particularly, pp. 169, 183.

(3) (1944) 69 C.L.R. 156.

(4) (1935) 53 C.L.R. 235, at p. 242.

(5) (1938) 59 C.L.R. 150 : See, particularly, p. 157.

been paid under a mistake of law and could not have been recovered. There is nothing in the relevant legislation to show that the interest on the bonds was not taxable. The *Income Tax Assessment Act* 1936 contains a number of exemptions from tax, but there is no mention of the interest on these bonds and nothing to indicate that Parliament was aware of the problem. It could only be by the application of the maxim *generalalia specialibus non derogant* that the interest would be exempted, and it is submitted that the maxim does not apply here. As to the application of the maxim, see *Barker v. Edger* (1). The *Loans Securities Act* 1919, under the authority of which the bonds were issued, is not a "special" Act for the purposes of the maxim. That Act contains general provisions for a number of purposes. By s. 3, it authorized the Governor-General to fix the conditions of the bonds, but the Act itself contains nothing to show that Parliament gave its attention to the particular subject of exemption from tax. The maxim cannot be applied so as to impute an intention to Parliament, when it enacted the *Income Tax Assessment Act* 1936, not to derogate from the conditions of the bonds. As to the fourth contention (case stated, par. 25 (iv.)), there is no evidence in the case to show that the deceased had any expectation (or any basis for it) that the amount would be refunded. In any event, unless the deceased had a legal right to recover the amount, it would not be part of her estate—it would not be "property" within the meaning of s. 8 of the *Estate Duty Assessment Act* (*Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co. Ltd. (Watt's Case)* (2)).

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Tait K.C. In the view that the *Income Tax Assessment Act* 1936 subjected the interest to tax, there was a breach of the warranty contained in the bonds that there would be no law imposing tax. When such a law was made, there was a breach of the warranty giving a right of action for damages.

[DIXON J. In this forum does not the promise contained in the bond cease to have effect?]

No. The promise remains in force but is broken so as to give rise to an action for damages. The effect of the promise was that the Commonwealth took on itself the burden of any tax that might be imposed. [He referred to *Reilly v. The King* (3); *Ervin v. Federal Commissioner of Taxation* (4); *Perpetual Trustee Co. Ltd. v. Federal Commissioner of Taxation* (5).] The *Loans Securities*

(1) (1898) A.C. 748, particularly at p. 754.

(2) (1925) 25 S.R. (N.S.W.) 467 (particularly at p. 484); 38 C.L.R. 12.

(3) (1934) A.C. 176, at p. 181.

(4) (1935) 53 C.L.R., at p. 249.

(5) (1932) 47 C.L.R. 402, at pp. 409, 416.

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Act 1919, s. 3, empowered the Governor-General to borrow on such terms and conditions as he approved; it gave a wide authority, sufficient to cover the promise in the present case. As to par. 17 of the case stated, the letter with which the cheque was enclosed did not define, or purport to define, legal rights and liabilities; it merely identified the sum paid. [He referred to *R. v. Fisher* (1); *Eastern Extension etc. Telegraph Co. Ltd. v. Federal Commissioner of Taxation* (2).] As to the contention set out in par. 25 (ii) of the case stated, it is not incorrect to describe the promise in the bond as a promise to pay the amount of any tax lawfully levied. This does not give the promise any different construction in substance from that in *Magrath's Case* (3). The issue argued in that case did not turn on any such distinction as the appellants here seek to make, and that case is not an authority against the view now submitted. As to the third contention, the respondent does not oppose the appellants' view of s. 177 of the *Income Tax Assessment Act* but submits that this does not affect the right of the appellants under the special promise to recover damages. As to the application of the maxim *generalalia specialibus non derogant*, see *Magrath's Case* (4); *London Corporation v. Netherlands Steamboat Co.* (5); *Associated Newspapers Ltd. v. City of London Corporation* (6). [He also referred to *In re Williams* (7); *United Towns Electric Co. Ltd. v. Attorney-General (Newfoundland)* (8).] As to the fourth contention, the question is one of assessing the capital value of the bonds by relation to future probabilities. In this view it does not matter whether the deceased was entitled to the £6,814 as a matter of legal right. It was an accretion to the capital value of the bonds, the prospect of receiving which had a value at the date of the death. The value was fixed with certainty when the amount was paid. Capital valuations often involve the taking into account of prospective elements which are not matters of legal right. This is so in regard to the valuation of the goodwill of a business. A statute-barred debt, where there is a prospect of its being paid, is a similar case. [He referred to *Green, Death Duties*, 2nd ed. (1947), pp. 23, 24, 100, 293; *Attorney-General v. Murray* (9); *Scott Fell v. Federal Commissioner of Taxation* (10); *Adams, Law of Death and Gift Duties in New Zealand*, p. 34 (as to a statute-barred debt); *Hunt v. Stevens* (11); *Attorney-General v. Brunning* (12).]

(1) (1903) A.C. 158, at p. 167.

(2) (1923) 33 C.L.R. 427, at p. 442.

(3) (1944) 69 C.L.R. 156.

(4) (1944) 69 C.L.R., at p. 184.

(5) (1906) A.C. 263.

(6) (1916) 2 A.C. 429.

(7) (1936) Ch. 509.

(8) (1939) 1 All E.R. 423.

(9) (1904) 1 K.B. 165.

(10) (1944) 69 C.L.R. 250.

(11) (1810) 3 Taunt. 113 [128 E.R. 46].

(12) (1860) 8 H.L.C. 243 [11 E.R. 421].

Coppel K.C., in reply, referred, as to the application of the maxim *generalia specialibus non derogant*, to *Williams v. Pritchard* (1); *Pole-Carew v. Craddock* (2); *Associated Newspapers Ltd. v. City of London Corporation* (3); *London Corporation v. Netherlands Steamboat Co.* (4), and, as to the respondent's fourth contention, to *Bakewell v. Federal Commissioner of Taxation* (5).

Tait K.C., by leave, referred to *In re Hawkins* (6); *Mooney v. Commissioner of Taxation (N.S.W.)* (7).

Cur. adv. vult.

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The following written judgments were delivered:—

Sept. 22.

LATHAM C.J. Case stated under s. 28 of the *Estate Duty Assessment Act* 1914-1942. Section 8 (3) of the Act provides that for the purpose of the Act the estate of a deceased person comprises, *inter alia*—“(b) his personal property, wherever situate (including personal property over which he had a general power of appointment, exercised by his will), if the deceased was, at the time of his death, domiciled in Australia.” The Commissioner of Taxation of the Commonwealth has included in an assessment to estate duty an amount of £6,814, representing what is described in the assessment as a “right of action” belonging to the deceased person for “recovery of unliquidated damages valued at the sum paid by the Treasury to the administrators of the deceased person’s estate.” The sum so paid was £6,814.

In May 1944 this Court gave judgment in the case of *Magrath v. The Commonwealth* (8). The plaintiff Magrath was the holder of gold dollar bonds issued in New York in 1927 by the Commonwealth. The bonds provided that the principal was payable to bearer in New York without deduction of any tax then or at any time thereafter imposed by the Commonwealth or by any taxing authority thereof or therein. The interest coupons provided that interest was payable “without deduction for any Australian taxes present or future.” Two questions were submitted to the Full Court in a case stated. The first question was as follows:—

“Whether by the bonds the defendant promised the plaintiff as holder that the interest, after having been paid to him in full, would not form part of his assessable income for the purpose of Federal income tax within the meaning of the *Income Tax Assessment Act*

(1) (1790) 4 T. R. 2 [100 E.R. 862].

(2) (1920) 3 K.B. 109.

(3) (1916) 2 A.C. 429, at p. 457.

(4) (1906) A.C. 263, at p. 269.

(5) (1937) 58 C.L.R. 743, at p. 754.

(6) (1926) Ch. 428.

(7) (1905) 3 C.L.R. 221.

(8) (1944) 69 C.L.R. 156.

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1922, and the *Income Tax Assessment Act* 1936, as respectively amended, or any other *Income Tax Assessment Act* thereafter to be enacted although he was a resident of Australia and liable as a taxpayer within the meaning of those Acts."

This question was answered in the affirmative by the majority of the Court—*Rich, McTiernan and Williams JJ.* Counsel for the appellants in the present case sought to challenge the decision in *Magrath's Case* (1) but the Court refused to allow him to do so. Accordingly, this case must be dealt with upon the basis that the promise made by the Commonwealth by the bonds was that the interest would not form part of the assessable income of the taxpayer within the meaning of the specified *Income Tax Assessment Acts*.

A second question was submitted to the Court in *Magrath's Case* (2). It was as follows:—

"In the event of the first question being answered in the affirmative, whether the plaintiff is entitled to recover from the defendant by way of indemnity or as damages the additional amounts of income tax which the plaintiff has become liable to pay or has paid by virtue of the inclusion of such interest as part of his assessable income derived during the years ended 30th June 1932 to 30th June 1942 inclusive under the provisions of the *Income Tax Assessment Acts* 1922 and 1936 as amended."

This question was not answered. *Rich J.* expressed a doubt whether, upon the construction of the contract adopted by the majority of the Court, such a contract would be valid: see the report (3). *McTiernan J.* (4) considered it unnecessary to answer the question because, though the Executive Government did not have power to bind the Parliament not to impose tax upon the bond interest, the attitude of the Commonwealth was that it would not contend on technical grounds that the plaintiff had no right to recover tax which he had paid on bond interest. *Williams J.* (5) expressed a doubt as to whether the *Income Tax Assessment Acts* of 1922 and 1936 did actually operate to impose taxation upon the bond interest. After the decision of the Full Court upon the case stated, a settlement was effected between the plaintiff and the defendant in *Magrath's Case* (1) upon terms which have not been disclosed.

Mrs. Christina Thomson owned at the time of her death 133 one thousand dollar bonds belonging to the issue which the Court con-

(1) (1944) 69 C.L.R. 156.

(2) (1944) 69 C.L.R. 156, at p. 160.

(3) (1944) 69 C.L.R., at pp. 169, 170.

(4) (1944) 69 C.L.R., at p. 175.

(5) (1944) 69 C.L.R., at pp. 183, 184.

sidered in *Magrath's Case* (1) and containing the provisions which were construed in that case. Mrs. Thomson included in her returns of income made under the *Income Tax Assessment Act* 1936 the amounts of bond interest received in the income year ending 30th June 1939 and thereafter until the income year ending 30th June 1943. The tax paid in respect of this income was £6,814.

After the decision in *Magrath's Case* (1) Mrs. Thomson's solicitors applied to the taxation authorities on 6th November 1944 for repayment of the income tax so paid. They relied upon the decision in *Magrath's Case* (1). Mrs. Thomson died on 15th December 1944, before any reply was received to the letter of her solicitors. On 12th February 1945 a return was lodged under the *Estate Duty Assessment Act*. In this return the bonds were included, valued at £41,537 14s. 7d. On 10th May 1945 the executors received a letter from the Commonwealth with a cheque for £6,814, described as refund of the income tax on the interest received on the bonds.

The Commissioner originally included in his assessment of the estate of the deceased to estate duty a sum of £6,814, described as "refund of income tax." The executors objected on the ground that the sum of £6,814 "was not received until after the death of the deceased and at the date of her death was not a debt owed to her, nor was the said sum, or any part of it, comprised in her estate for the purposes of the *Estate Duty Assessment Acts*." The Commissioner allowed this objection and amended the assessment by excising the refund of income tax £6,814 and adding "right of action for recovery of unliquidated damages, valued at the sum paid to the administrators by the Treasury—£6,814." The executors objected to this amended assessment on the following grounds:—

"1. The amount of £6,814 referred to in the alteration sheet annexed to the Notice of Amended Assessment forms no part of the estate of the deceased for purposes of Estate Duty.

2. The deceased at the date of her death had no right of action against anyone to recover unliquidated damages.

3. The amount of £6,814 received by the executors of the deceased from the Commonwealth on or about the 10th May, 1945, was expressed to be paid as and was received as a 'Refund of income tax on interest received on Gold Dollar Bonds raised in the United States of America.'

4. Prior to her death the deceased had no right to sue for or recover the said sum of £6,814.

5. The sum of £6,814 which was refunded as aforesaid had been paid by the deceased in discharge of obligations validly imposed

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on her by assessments to income tax duly made under the *Income Tax Assessment Acts*."

The Commissioner disallowed the objections and the executors appealed. This case is stated in the executors' appeal.

The case states that the Commissioner relied on certain contentions in support of the inclusion of the sum of £6,814 in the value of the estate for Federal duty. These contentions are as follows (par. 25) :—

- " (i) that the amended assessment in its present form is correct because at the date of her death the deceased had a right of action for the recovery of unliquidated damages which right was properly valued at £6,814.
- (ii) that the Commonwealth's contractual obligation to the deceased was to pay not only the principal and interest agreed to be paid but also the amount of any tax lawfully levied by the Commonwealth of Australia upon her in respect of the receipt by her of such principal or interest and that therefore the deceased at her death had a right of action to recover the sum of £6,814 as a debt due to her by the Commonwealth.
- (iii) that the amounts of income tax referred to in paragraph 14 hereof were not lawfully levied and could have been recovered at law by the deceased during her lifetime.
- (iv) that the deceased's claim to the repayment of £6,814 had such a high degree of probability of success and was so well founded in expectation that it should be treated as an asset in her estate and valued at the sum of £6,814."

The case states two questions for the court :—

" 1. Are any of the second third and fourth of the contentions stated in paragraph 25 hereof open on this appeal and relevant to its determination ?

2. Subject to Question 1 ought the sum of £6,814 or any part thereof to be included in the value of the estate of the deceased for Federal Estate Duty ? "

The appellants contend that the Commissioner is not entitled to rely upon the above-stated contentions, Nos. (ii), (iii) and (iv). The assessment is an assessment of the value of particular property claimed by the Commissioner to be personal property of the deceased at the time of her death. That property is in the assessment described as a claim for unliquidated damages. Such a right, though the precise value of it is unknown at the time of the death, is part of the estate of a deceased person : *Attorney-General v. Brunning* (1).

The assessment is, upon an appeal, prima-facie evidence that the amount and all particulars of the assessment are correct: *Estate Duty Assessment Act*, s. 22 (1) (b). The onus is therefore upon the appellant to displace the assessment to which he has objected. Upon the hearing of his appeal he is limited to the grounds stated in his objection: s. 27 (3). Accordingly, the objector would lose the appeal unless he established a good ground which was stated in his objection. It is contended, therefore, that the Commissioner is limited to meeting the grounds stated in the objection and that he cannot support his assessment by a contention which, if well-founded, does not show that his assessment is correct, but shows only that some other assessment, if it had been made, would have been, or might have been, correct.

The objector can argue all the grounds which he has stated in his objection. Therefore he can argue not only the precise objection, No. 2, that the deceased at the date of her death had no right of action against anyone to recover unliquidated damages, but also the general ground, No. 1, that the amount of £6,814 forms no part of the estate of the deceased for purposes of estate duty. Argument on this objection permits the use of any contention which meets the argument of the appellants that the amount of £6,814 received from the Commonwealth Treasury does not form any part of the estate of the deceased for the purposes of the Act. Contentions (ii), (iii) and (iv) of the Commissioner, if established, would provide an answer to objection No. 1. In my opinion, therefore, it is open to the Commissioner to rely upon all the contentions to which reference was made in the case.

The Full Court is concerned only with the case stated, and not with any questions which may arise if the answers to the questions submitted should show that the assessment of the Commissioner as at present made cannot stand, but that some other assessment in the same amount could be supported. It does not appear that the Commissioner has a right to make a further amendment of the assessment (see s. 20 (3)), if the amendment would increase the liability of the estate in any particular. But s. 20 (7) allows amendment to give effect to the decision of the Court upon an appeal: See also s. 27 (5), which gives wide powers to the Court upon the hearing of the appeal.

Question No. 1 should, in my opinion, be answered: Yes.

The second question inquires whether the sum of £6,814 or any part thereof should be included in the estate of the deceased for Federal estate duty.

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The Commissioner relies upon the answer to the first question in *Magrath v. The Commonwealth* (1), which shows that the promise in the bond to pay interest without deduction for any taxes meant that the Parliament of the Commonwealth would not impose any tax in respect of bond interest. This was a warranty which would be broken if the Commonwealth Parliament did impose such a tax. A breach of contract can be committed only by a party to the contract. The Parliament of the Commonwealth does not make contracts—it makes laws. It would not be the Parliament which would have broken the contract in the bonds if a tax were imposed upon the bond interest. The position would be that the warranty given by the Executive Government would be broken. There would be such a breach only if a tax were lawfully imposed. An unlawful tax creates no duty, and the “law” purporting to impose it can be ignored—independently of any contract with the Crown. An “assessment” made under such a law does not impose any liability, though if a taxpayer pays the amount assessed without objection he may be unable to recover it.

Mrs. Thomson was assessed to tax and paid tax under the *Income Tax Assessment Act* 1936. If for any reason that Act does not impose tax in respect of bond interest, then there was nothing that could be called a breach of contract and there was no ground for any claim based upon a breach of contract.

The bonds were issued under the authority of the *Loans Securities Act* 1919, s. 3, under which the Governor-General may, if an Act authorizes the Treasurer to borrow moneys, authorize the Treasurer to borrow the moneys “on such terms and conditions and issue” such “securities in such form as the Governor-General approves.” The Governor-General approved the form in which the bonds were issued and therefore, it is contended, the contract contained in the bonds was authorized by the statute. Then, it is further argued, the *Income Tax Assessment Act* 1936 is a general Act taxing all income, with certain exemptions, whereas the bond is a special contract to which no express reference is made in the *Income Tax Assessment Act*, so that the maxim *generalia specialibus non derogant* applies so that the bond interest remains exempt, notwithstanding the general provisions of the *Income Tax Assessment Act*. Reference was made to various authorities dealing with special statutes exempting property from tax, which statutes were held to remain in operation even though general taxing Acts covering in their terms the tax-free property were subsequently enacted: see *London Corporation v. Netherlands Steamboat Company* (2); *Associated*

(1) (1944) 69 C.L.R. 156.

(2) (1906) A.C. 263.

Newspapers Ltd. v. City of London Corporation (1) and the cases referred to by *Williams J. in Magrath's Case* (2).

I do not find it necessary to consider whether the maxim relied upon to limit the application of an Act of Parliament is relevant to the consideration of that Act in relation to a prior contract or only to the comparison of two parliamentary enactments. If the contention based on the 1919 Act is well-founded, then the *Income Tax Assessment Act* 1936 did not impose any tax upon the bond interest. There was no breach of contract, and the bond-holder had no legal cause for complaint. Mrs. Thomson, it is true, paid the tax, but if she paid tax which she need not have paid, that act on her part cannot produce the effect of creating a breach of contract where otherwise there was no breach of contract. The assessments under the 1936 Act were made, the amounts assessed were paid and s. 177 of that Act prevents any recovery of those amounts. If Mrs. Thomson had brought an action to recover the amounts paid in tax, the production of the assessment would have been sufficient to establish that "the amount and all the particulars of the assessment" were correct: s. 177 (1). Thus if the *Income Tax Assessment Act* 1936 did not impose tax in respect of the bond interest, Mrs. Thomson at the time of her death had no claim against the Commonwealth for unliquidated damages or for refund of tax.

If, on the other hand, the *Income Tax Assessment Act* 1936 did impose a tax upon the bond interest, and the contract to pay interest without deduction of taxes was valid, the position is that the 1936 Act destroyed an exemption which previously existed. (If the contract was not valid it is obvious that there could be no claim for unliquidated damages.) Parliament may, by a law with respect to a matter which is within its powers, make lawful that which would otherwise be unlawful and, in particular, may so legislate as to deprive an act of the character of a breach of contract. Thus, if the 1936 Act had the effect of rendering the bond interest subject to tax, it was the duty of the Commissioner of Taxation to assess and collect the tax. In so acting he was acting in obedience to law. It was not possible for any Commonwealth authority to give effect to the promise that tax should not be imposed. In *Reilly v. The King* (3), Lord *Atkin* said that it was an elementary proposition "that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged." In such a case the contract is not broken. The legislation makes lawful that which would otherwise have been

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(1) (1916) 2 A.C. 429.

(2) (1944) 69 C.L.R. 156, at p. 184.

(3) (1934) A.C. 176.

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a breach of contract, and therefore discharges the term of the contract performance of which has become unlawful. In that case the appellant claimed that a contract authorized by statute had been made, the effect of which was that he was entitled to remain in a particular office for a certain period. But Lord *Atkin* said (1): "So far as the rights and obligations rested on contract, further performance of the contract had been made by statute impossible, and the contract was discharged. It is perhaps unnecessary to add that discharged means put an end to and does not mean broken. In the result, therefore, the appellant has failed to show a breach of contract on which to found damages." The position is, in my opinion, exactly the same in the present case if it be assumed that the contract was originally a valid contract, but that the Parliament by legislation made it impossible for the Executive Government to carry out its promise.

It is of some interest to compare with the present case the procedure adopted in relation to an agreement between the Commonwealth and Australian Consolidated Industries Limited with respect to the manufacture of motor vehicles. The *Motor Vehicles Agreement Act* 1940 authorized the execution of an agreement in the schedule and contained in s. 4 a provision that duties of customs should not be imposed and collected in respect of certain machinery. By Act No. 1 of 1945 the 1940 Act was repealed, but s. 4 of the repealing Act provided that the rights of the company against the Commonwealth should not be affected by the repeal.

There can be no doubt as to the power of the Commonwealth Parliament to repeal or amend any Act which it has passed and so to make it impossible to perform a contract which has been made. Parliament may, as in the case of the statute last cited, take care to preserve existing rights. But there is no means of compelling Parliament to any particular course of action. Parliament does not have to buy a right to alter the law by compensating persons who suffer loss by reason of the alteration. Thus there can be no objection on purely legal grounds to the abolition by Parliament of the freedom from taxation promised by the bonds. Accordingly, if the *Income Tax Assessment Act* 1936 did impose a tax upon bond interest, then that tax was fully authorized by law and cannot give ground for any action for breach of contract. Accordingly, in my opinion, the claim of the Commissioner that at the time of her death the deceased had a right of action for unliquidated damages against the Commonwealth has not, upon any view of the relevant legislation, been established.

(1) (1934) A.C. at p. 180.

But the Commissioner further argues in his second contention as above-stated that the contract of the Commonwealth was to pay to the deceased the amount of any tax lawfully levied in respect of the bond interest. The answer to this contention is to be found in the answer given to the first question in *Magrath's Case* (1). The contract was not a contract to recoup tax paid. The distinction between an exemption from tax and a promise to recoup tax paid is emphasized in *Eastern Extension, Australasia & China Telegraph Co. Ltd. v. Federal Commissioner of Taxation* (2).

It is next submitted by the Commissioner that the amounts of income tax paid by the plaintiff in respect of bond interest were not lawfully levied and could have been recovered at law by the deceased during her lifetime. If a taxpayer is assessed to income tax and pays without objecting or appealing, s. 177 of the *Income Tax Assessment Act* prevents any recovery of the amount paid. Accordingly, Mrs. Thomson had no right to recover the amounts of income tax paid.

A further contention of the Commissioner is that the deceased's claim for repayment of £6,814 had, by reason of the attitude taken up by the Commonwealth in *Magrath's Case* (1), such a high degree of probability of success and was so well founded in expectation that it should be treated as an asset of her estate and valued at £6,814. There are obvious difficulties in the way of any general proposition that any expectation of benefit without any legal right to benefit is to be treated as property belonging to a deceased person at the time of his death. The argument, however, was supported by reference to cases such as *Attorney-General v. Murray* (3), where the judgment of the Court of Appeal in *Worthington v. Curtis* (4) was applied. In those cases there were insurance policies which were void by reason of the absence of insurable interest in the insured person. It was held, however, that if the insurance company actually paid moneys under a policy the fact that the policy was void did not prevent the moneys being part of the estate of a deceased person. The ground of the decision was that the statute 14 Geo. III., c. 48, which avoided the policies, was effective only to provide the company with a defence if the company chose to raise it. If, on the other hand, the company did not choose to raise the defence, then all the elements of a valid claim existed. The facts of the present case, however, are very different. If there was by reason of the considerations which I have already mentioned no legal ground for any claim against the Commonwealth by Mrs.

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(1) (1944) 69 C.L.R. 156.

(2) (1923) 33 C.L.R. 427, at p. 438.

(3) (1904) 1 K.B. 165.

(4) (1875) 1 Ch. D. 419.

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Thomson, then any payment made to her for the purpose of preserving the credit and reputation of the Commonwealth was not a recognition of a right in Mrs. Thomson to receive the money, but was a gratuitous payment made to her executors. This Court had to consider a similar case in *Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co. Ltd. (Watt's Case)* (1). In that case the executors of a deceased person received certain shares, priority certificates and cash in respect of wool which had been delivered by him and his partners to the Central Wool Committee during the 1914-1918 war. There was no legal obligation to give to the deceased person the shares &c. or anything of value by reason of or in relation to the said delivery of wool. It was held, in the Supreme Court of New South Wales (2) that the shares &c. must be regarded as a gift by the Commonwealth to the executor after the death of the testator and that therefore the value of them did not form part of the estate of the testator at the time of his death for the purposes of the *Stamp Duties Act 1920* (N.S.W.). This Court expressly approved the judgment of *Ferguson J.* upon this point. In that case the testator died on 21st May 1921, at a time when the Government of the Commonwealth had agreed with Bawra Ltd. that shares, priority wool certificates and cash should be issued to the Central Wool Committee for distribution among suppliers of wool. There was certainly at the time when the testator died a high probability that this agreement would be carried out, but the Supreme Court of New South Wales and this Court concurred in holding that the shares &c. were delivered as a gift by the Government to the executor and did not form part of the estate of the deceased. In my opinion this case provides in this Court a conclusive reply to the contention of the Commissioner.

It was also argued for the Commissioner that the chance of getting some payment from the Commonwealth after *Magrath's Case* (3) should be taken into account in assessing the capital value of the bonds. A sufficient reply to this argument is provided by the fact that this appeal has nothing to do with the capital value of the bonds. But, further, the chance of getting some payment from the Commonwealth was personal to a taxpayer who had paid particular sums by way of income tax on the bond interest, and was not an element which could possibly affect the value of the bonds themselves.

I am therefore of opinion that the arguments presented for the Commissioner fail and that the second question in the case should be answered: No.

(1) (1926) 38 C.L.R. 12.

(2) (1925) 25 S.R. (N.S.W.) 467.

(3) (1944) 69 C.L.R. 156.

STARKE J. Case stated pursuant to the provisions of the *Estate Duty Assessment Act 1914-1942*. H. C. OF A. 1948.

That Act provides that estate duty shall be levied and paid upon the value of the estates of deceased persons. The estate of a deceased person for the purposes of the Act comprises *inter alia* the personal property wherever situate if the deceased was domiciled in Australia at the time of death.

Christina Thomson was a resident of Australia. She died on 15th December 1944 domiciled in Australia.

In August of 1945 the Commissioner of Taxation, in the assessment of her estate to duty, included the sum of £6,814 which he described as refund of income tax. The executors of the deceased had advised the Commissioner of her receipt of this sum but stated that they took the view that the sum was "not an asset liable for payment of duty, since at the date of Mrs. Thomson's death the amount of £6,814 could not be regarded as an asset in Mrs. Thomson's hands or in the hands of her executors." In June of 1946 the Commissioner advised the executors that although their objection was technically allowed yet he had altered the assessment so as to include the sum of £6,814 as a "right of action for recovery of unliquidated damages, valued at the sum paid to the administrators by the Treasury." The executors objected to this assessment on various grounds but the objection was disallowed. The Commissioner was requested to treat the objection as an appeal and forward it to this Court, which he did, pursuant to the Act.

It appears that the deceased had received interest under certain gold dollar bonds issued by the Commonwealth in the United States of America. She had been assessed to income tax in respect of the interest so received and had paid in respect of the amounts so included income tax amounting in all to £6,814. These dollar bonds stipulated that the principal and interest instalments due thereunder should be paid in New York in the United States of America in gold coin of the United States of the standard weight and fineness existing on 1st September 1927 without deduction for any taxes now or at any time thereafter imposed by the Commonwealth or by any taxing authority thereof or therein.

It is not disputed that the interest was so paid. But the relevant *Income Tax Assessment Act 1936-1944* of the Commonwealth provided that income tax should be levied and paid upon the taxable income (that is, the income remaining after deducting from the assessable income all allowable deductions) derived during a financial year by any person whether a resident or a non-resident. The assessable income of a taxpayer includes where a taxpayer is a

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resident the gross income derived directly or indirectly from all sources whether in or out of Australia. And it was pursuant to the *Income Tax Assessment Act* of the Commonwealth that the deceased had been so assessed to income tax.

A question arose in an action *Magrath v. The Commonwealth* (1) relating to the obligation of the Commonwealth in respect of the dollar bonds so issued by the Commonwealth. The following question was stated for the opinion of this Court:—

Whether by the bonds the defendant promised the plaintiff as holder that the interest, after having been paid to him in full, would not form part of his assessable income for the purpose of Federal income tax within the meaning of the *Income Tax Assessment Act* 1922, and the *Income Tax Assessment Act* 1936, as respectively amended, or any other *Income Tax Assessment Act* thereafter to be enacted although he was a resident of Australia and liable as a taxpayer within the meaning of those Acts.

And it was answered by a majority of the Court in the affirmative. But it was not decided whether *Magrath* was entitled to recover from the Commonwealth by way of indemnity or damages the additional amounts of income tax which *Magrath* had become liable to pay or had paid. However some settlement was made in the action the terms of which have not been disclosed.

On 6th November 1944 during the life of Christina Thomson her solicitors inquired of the Commissioner of Taxation whether in view of the decision in *Magrath's Case* (1) it was the intention of the Commonwealth to repay Mrs. Thomson the income tax paid by her as the result of the inclusion in her assessable income of interest received by her under the gold dollar bonds.

On 10th May 1945 the executors of the deceased received from the Commonwealth a cheque for £6,814 being refund of the income tax on interest received on the bonds.

There is a provision in the *Income Tax Assessment Act* 1936-1944 that where by reason of any amendment the taxpayer's liability is reduced, the Commissioner shall refund any tax overpaid and that except as otherwise provided every amended assessment shall be an assessment for all the purposes of the Act (see ss. 172, 173). Unless the Commissioner concluded that the interest was wrongly assessed and amended or treated his assessment as amended no warrant or authority existed for refunding income tax to the taxpayer.

The revenues of the Commonwealth cannot be applied by public officers at their discretion to meet what they consider just claims

(1) (1944) 69 C.L.R. 156.

against the Commonwealth. Yet, the argument addressed to the Court is that the Commonwealth was under no obligation whatever to refund the tax to the taxpayer or her executors and did so as a matter of grace and must be treated as having made a gift to the executors subsequent to the death of the taxpayer. All parties, however, regarded the amount of the income tax paid by Mrs. Thomson on the interest received from the dollar bonds as an unauthorized exaction and the Commonwealth conceded its liability to refund the amount. The character of the refund was thus established: it was a repayment of moneys paid by the taxpayer to the Commissioner pursuant to an unauthorized exaction or assessment and so repayable to the taxpayer or her representatives. That the Commonwealth may have had a good defence to the claim made by the deceased and her executors is not decisive for the Commissioner admitted the claim and refunded the interest on the basis that it was wrongly collected and assessed (see *Attorney-General v. Murray* (1)).

Another argument was that the reasons assigned by the Commissioner for the inclusion of the sum of £6,814 in his assessment to estate duty are wrong and that he allowed an objection to the inclusion of the sum in the assessment as a refund of income tax.

The Court rejected this contention during the argument.

The short answer is that the sum of £6,814 was included in the assessment as part of the estate of the deceased and that an erroneous description of the character of the property does not render it immune from estate duty if it is otherwise assessable.

The provision in s. 26 (2) of the *Estate Duty Assessment Act* that the objector is limited on the review to the grounds which he has stated in his objection has no application to the Commissioner and s. 27 (5) enables the Court on the hearing of an appeal to make such order as it thinks fit, and it may by such order confirm, reduce, increase or vary the assessment.

In my opinion, the questions stated do not require categorical answers. It is enough to say that the sum of £6,814 is rightly included in the value of the estate of the deceased for Federal estate duty as a refund of income tax.

DIXON J. The substantial question for our decision is whether a payment made to the executors of a deceased person by the Commonwealth by way of refund of income tax paid by the deceased in her lifetime forms part of her estate for the purpose of estate duty. The question depends upon the peculiar nature of the refund.

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It did not arise from an amendment made in an assessment pursuant to s. 170 of the *Income Tax Assessment Act* 1936-1944 so as to effect a reduction in the liability of the taxpayer. It was therefore not a refund authorized by s. 172. In fact it was not made by the Commissioner but by the Treasurer. It arose from the decision of this Court in *Magrath v. The Commonwealth* (1). Like the plaintiff in that case the deceased had held gold dollar bonds forming part of the issue made by the Commonwealth in the United States in 1927. Like him she was a resident of Australia and had been assessed as such upon the interest derived from the bonds which had been included in her assessable income. Like him she was not a person to whom the bonds had originally been issued, but she had purchased them from a previous holder. She had purchased them in 1938; 133 bonds each of a face value of \$1,000 with interest coupons attached. For the years of income extending from 1st July 1938 to 30th June 1943 the amounts received for interest had been included in her assessable income and she had been regularly assessed accordingly by assessments which still stand. The tax ascribed to the inclusion of the interest amounts in all to £6,814 and it is this amount that has been refunded.

In *Magrath's Case* (1) an action was brought by the taxpayer to recover from the Commonwealth an amount equivalent to the income tax which he had been compelled to pay because the interest he had received in respect of his gold dollar bonds had been included in his assessable income upon which his assessments to income tax had been based. He rested his cause of action upon the contract evidenced by the bonds. They were bearer bonds dated 1st September 1927 containing a promise to pay principal and interest in New York without deduction for any taxes then or at any time thereafter imposed by the Commonwealth of Australia or by any taxing authority thereof or therein.

A case was stated in the action for the opinion of the Full Court. Two questions were asked. The first related to the contract of loan. The plaintiff contended that upon its proper interpretation it amounted to a promise that the interest received from the bondholder would not be liable to income tax and that by imposing the tax on the income of residents from all sources the Commonwealth had broken the terms of the contract. The defendant contended that the bonds meant only that there would be no deduction of tax at the source, not that no bondholder would have his interest included in his assessable income.

(1) (1944) 69 C.L.R. 156.

The decision of the majority of the Court upon this matter of interpretation favoured the plaintiff. As expressed in the answer to the question, the decision was that by the bonds the Commonwealth promised the plaintiff as holder that interest, after having been paid to him in full, would not form part of his assessable income for the purpose of Federal income tax within the meaning of the *Assessment Act* of 1922 or of 1936 as respectively amended or any other *Income Tax Assessment Act* thereafter to be enacted although he was a resident of Australia and liable as a taxpayer within the meaning of those Acts.

The second question in the case stated was asked on the assumption that the Court did so construe the contract and it related to the existence on that footing of a right in the plaintiff to recover from the Commonwealth the tax he had paid in respect of interest either by way of indemnity or as damages. That question the Court was relieved from answering by counsel for the Commonwealth, who informed the Court in effect that if the bond was interpreted as promising that the interest would not be included in the plaintiff's assessable income, the Commonwealth would honour its promise as so interpreted. But both *Rich J.* and *Williams J.*, who with *McTiernan J.* formed the majority adopting the plaintiff's interpretation of the bonds, emphasized the legal impossibility of the contract tying the hands of Parliament or relieving the plaintiff of a tax the legislature decided to impose, if it covered the interest. *Williams J.*, however, suggested that the exemption or immunity conferred by the bonds, which were issued under s. 3 of the *Loans Securities Act* 1919, might not be destroyed by the general provisions of the *Assessment Act* and *Tax Act*, because the latter might receive a construction avoiding that result, in consonance with the maxim *generalia specialibus non derogant*.

After that decision an application was made to the Commissioner on behalf of the deceased with the liability of whose estate the present case is concerned. She was then living. It took the form of a communication inquiring whether, in view of the attitude of counsel for the Commonwealth in *Magrath's Case* (1), it was the intention of the Commonwealth to repay to her the income tax she had paid by reason of the inclusion of the interest on the bonds in her assessable income. The inquiry elicited no reply from the Commissioner, but after the deceased's death her executors received a cheque from the Treasurer for £6,814 described as a refund of the income tax on interest received upon the bonds. Though the executors reported the receipt of this sum to the authorities assessing

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estate duty on the deceased's estate they contended that it formed no part of the estate and should not be included for the purpose of duty. This contention was rejected by the Commissioner, but apparently he found some difficulty in designating the payment. It was first included in the assessment to estate duty under the description "refund of income tax." An objection to this assessment was formally allowed but an amended assessment was issued describing the same sum as "Right of action for recovery of unliquidated damages valued at the sum paid to the administrators by the Treasury."

It was objected on the part of the executors that the Commissioner could maintain his inclusion of the £6,814 in the assessment only by justifying this description. In other words he could not fall back upon some other description or category of recoverability and say that the refund fell within it, so that the right to recover the money formed part of the deceased's estate transmitted to the executors. In particular the Commissioner ought not, so it was said, to be allowed to fall back upon the idea that it was just a refund of income tax improperly exacted. He must show that a right to recover the sum as damages was vested in the deceased or else fail. It is suggested that under s. 20 the Commissioner could not himself again amend the assessment in the particular in question. The answer or, at all events an answer, to the objection appears to me to lie in the very wide powers which the Court possesses under s. 27 (5) of the *Estate Duty Assessment Act* 1914-1942. If the Court is of opinion that all that is wrong with the assessment is that it attributes the payment or refund to an erroneous legal category, the Court may vary the assessment. Sub-section (3) of s. 27 does not qualify this power. It is the objector, not the Commissioner or the Court whom it limits to the issue raised by the objections.

I therefore return to the substantive question whether under any legal description the deceased had such a right to recover in respect of taxation of the interest upon her bonds or to receive a refund that it formed part of her estate transmitted to her executors.

Section 8 (1) of the *Estate Duty Assessment Act* 1914-1942 provides that duty shall be levied and paid upon the value as assessed under the Act of the estates of deceased persons. Sub-section (3) states what, for this purpose, the estate of a deceased person shall comprise. The relevant part of the sub-section is contained in paragraph (b) and consists in the simple expression "his personal property."

No doubt this expression is of the widest character and covers every form of personal property recognized at law or in equity, every possible interest including all choses in action. But it cannot

be satisfied unless some right cognizable at law or in equity exists in the deceased. An expectation, however well founded in fact, and however well warranted by political or business considerations, will not do, if it is devoid of legal title. That is shown by the case relating to the distribution by the Central Wool Committee of 1916-1920 of the priority wool certificates and shares in Bawra representing the Australian share of profits arising under the arrangement for the purchase of wool by the Imperial Government: *Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co. (Watt's Case)* (1), affirmed in this Court (2). The antecedent certainty that the deceased in that case or his estate would participate in the profits in question could not have been greater if it had rested on legal right, but it did not, and as the distribution was made after his death the share received by his executors formed no part of his dutiable property.

No doubt if there is a claim of right, it would not matter that in the deceased's life time it had been disputed, assuming that after his death the claim is paid. But an application for an *ex gratia* payment stands on quite a different footing. It is, I think, clear that a voluntary payment made to executors as such does not form part of the personal property of the deceased merely because it is the outcome of circumstances existing in his life time which warranted an expectation that it would be made. It must be in respect of some accrued or accruing right or claim of right. There are of course rights cognizable at law which, under the distinction English law draws between the existence of a right and the existence of a remedy, may not be enforceable. But that distinction has no relevance to the present case.

The question upon which the dutiability of the sum depends appears to me to be whether it was a mere voluntary payment made by the Crown or on the contrary represented a right or claim of right existing in the deceased to a refund of tax or compensation for a violation of the contract contained in the bonds.

It is to be noticed that the inquiry or request made in her life time was not based on any legal ground, but upon the position adopted by counsel for the Commonwealth in *Magrath's Case* (3). But that is not decisive, because independently of the readiness of the Commonwealth to act upon whatever construction might be placed upon the provision in the bonds, a liability to refund the tax or pay its equivalent may have subsisted.

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(1) (1925) 25 S.R. (N.S.W.) 467.

(2) (1926) 38 C.L.R. 12.

(3) (1944) 69 C.L.R. 156.

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The case now made for the Commonwealth is that s. 3 of the *Loans Securities Act* 1919 authorized the issue of the bonds even with a term bearing the meaning placed upon the bonds by the Court in *Magrath's Case* (1), that it was binding when issued, that a subsequent statute imposing a tax inconsistent with the bond would amount to a breach of contract sounding in damages and that it would not be excused by operation of law. Section 3 empowers the Governor-General in Council to authorize the Treasurer to borrow the moneys for which Parliamentary sanction has been given in such amounts and manner and at such prices and on such terms and conditions and issue such securities in such form as the Governor-General approves. I am not prepared to hold that this provision warrants a term or condition promising immunity from a present or future Act of Parliament applicable according to the true intention of the legislature. But even if it did, a subsequent Act of Parliament inconsistent with the immunity promised would operate as a paramount law destroying the obligation of the promise. Neither the passing of such an Act nor the doing of anything under it which it authorized, as for instance the levying of a tax, could amount to an actionable breach of contract. All the trouble in *Magrath's Case* (1) and in this arises from the adoption in 1930 of residence as a criterion of liability to income tax in addition to the source of the income within Australia: s. 4 of No. 50 of 1930. By that provision every resident of Australia became for the first time liable to tax upon his income from all sources, whether in Australia or elsewhere. At the time when the bonds were issued income tax was imposed only in respect of income derived from sources in Australia. The income consisting of interest on the bonds was derived from a source out of Australia, because both principal and interest were payable in New York and the bonds had been issued in New York under a contract of loan made there.

I do not think that s. 3 authorized a term guaranteeing that the change would not be made by Parliament. But, assuming interest upon the dollar bonds to be included in the expression "income from all sources," the change in the law could not amount to a breach of contract for which the Commonwealth would be liable in damages or otherwise. A statute destroys all contracts which stand in the way of its operation.

The imposition of a tax necessarily involves an intention that when levied it shall not become repayable. Any liability *ex contractu* to repay it in substance, whether as damages, indemnity or recoupment, must be dissolved by force of the statute. On the two

assumptions, first that what the bonds promised extended to an immunity to the bondholder from the inclusion of the interest in his assessment to income tax on the ground of an Australian residence; and, second, that the provision enacted for the first time in 1930 applied to such interest, the case seems "to be determined by the elementary proposition that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged," to borrow the language of Lord *Atkin* in *Reilly v. The King* (1). The second of these assumptions, however, is inconsistent with the suggestion made by *Williams J.* in *Magrath's Case* (2) that, by an application of the principle expressed in the maxim *generalia specialibus non derogant*, the general Assessment Act requiring the inclusion in the case of residents of income from all sources should be read subject to an exception in favour of the immunity which the bonds granted or purported to grant by a condition adopted as under s. 3 of the *Loans Securities Act* 1919. It remains to consider this possible solution of the case. The rule of construction which is invoked was stated by *Coke* in terms which restrict it to the operation of one statute upon another. "Only it must be known, that forasmuch as Acts of Parliament are established with such gravity, wisdom and universal consent of the whole realm, for the advancement of the commonwealth, they ought not by any constrained construction out of the general and ambiguous words of a subsequent Act to be abrogated"—*Dr. Foster's Case* (3). Sir *Orlando Bridgman* stated it too as if it was a principle relating to implied repeal by subsequent enactment. "The law will not allow the exposition to revoke or alter, by construction of general words, any particular statute, where the words may have their proper operation without it": *Lyn v. Wyn* (4). But the rule has been used in relation to the abrogation by statute of a charter or custom and to the interpretation of a single statute containing a special and a general provision.

The principle was expounded by Lord *Sumner* when he was a judge of the King's Bench Division:—"The grounds upon which the courts have construed general words in statutes so as not to interfere with prior special words or special Acts or prior rights publicly granted to bodies corporate or politic rest upon the theory, and (as I think) the fact, of the continuity and justice of English legislation. It is not to be supposed that the mind of the legislature continuously deliberating and expressing itself in statutes

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(1) (1934) A.C. 176, at p. 180.

(2) (1944) 69 C.L.R. 156.

(3) (1615) 11 Co. Rep. 56b, at p. 63a
[77 E.R. 1222, at p. 1232].

(4) (1662) O. Bridg. 122, at p. 127
[124 E.R. 502, at p. 505].

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will, after full special deliberation at one time, subsequently alter the result of that deliberation by mere general words not so expressed as to bring the special matter within their purview. It is not to be supposed that the mind of the legislature so operating and expressing itself will take away the rights previously granted to subjects without compensation and without specific statements to that effect. This is the effect of the cases cited in argument though some possibly would not now be followed, as for example where an Act of Parliament was read as not interfering with a local custom": *Attorney-General v. Exeter Corporation* (1).

The principle has been applied not infrequently with reference to general taxing or rating Acts and earlier special or private Acts containing privileges or exemptions from taxation or rating: see, for example, *London Corporation v. Netherlands Steamboat Co.* (2); *Duke of Argyll v. Inland Revenue Commissioners* (3); *Associated Newspapers Ltd. v. City of London Corporation* (4); *Pole-Carew v. Craddock* (5); *Cadbury Bros. v. Sinclair* (6); *United Towns Electric Co. Ltd. v. Attorney-General for Newfoundland* (7); *Wiltshire County Valuation Committee v. Marlborough and Ramsbury Rating Authority* (8). It is not an easy question whether the principle of interpretation should be applied to the series of dollar bonds issued in the United States in 1927 from which the bonds of the deceased came. But I have come to the conclusion that it is inapplicable. There are three considerations which lead me to that conclusion. (1) The exemption claimed is not contained in a statute. So far as the principle rests upon the conception that the legislature ought not to be taken to intend to repeal or vary a prior particular statute by the use of general words this case lies outside it. The exemption depends entirely on the contract. The *Loans Securities Act* is not one which contemplates the grant of exemptions from existing taxation laws, still less from future taxation laws. No doubt the issue of the bonds and the terms of the contract constitute public facts knowledge of which may be imputed to the legislature. But it was a foreign loan. The provision relied upon was directed to assure the lenders, who were out of reach of any direct operation of Australian law, that tax would not be collected by deduction. The state of the law was such that in any event that could not be done and the foreign lender could not be made liable. The special case of an Australian resident going upon the New York stock market and purchasing bonds of the issue was not a public fact. If the

(1) (1911) 1 K.B. 1092, at p. 1100.

(2) (1906) A.C. 263.

(3) (1913) 109 L.T. 893.

(4) (1916) 2 A.C. 429.

(5) (1920) 3 K.B. 109.

(6) (1933) 149 L.T. 412.

(7) (1939) 1 All E.R. 423.

(8) (1948) 1 All E.R. 694.

legislature had adverted to the exemption in the bonds and to such a case it is more probable that the policy of taxing residents on all income from all sources would have prevailed. *Non haec in foedera veni* would have expressed the more probable legislative judgment, not *pacta sunt servanda*. It was not for the benefit of resident Australians that the clause had been written into the bond.

(2) The clause is not expressed in language amounting to a clear and unambiguous declaration that in no circumstances will the interest ever be taken into account in assessing a taxpayer holding such bonds to income tax even if an Australian resident. The conclusion that it did so was only reached by a process of construction, one involving some use of inference or implication.

(3) The subject of exempting interest on Government loans is one that has been much before the legislature as a matter calling for special provision. Section 52B (1) of the *Commonwealth Inscribed Stock Act* 1911-1933 deals with freedom from State income tax. Sub-section (2) deals with exemptions from Federal income tax where a prospectus had declared interest should be free of such tax. The *Taxation of Loans Act* 1923 dealt specially with the liability of interest on loans raised in Australia to Federal and State taxation. Section 14 (1) (e) of the *Income Tax Assessment Act* 1922-1934 specially exempted interest on War Loans declared by a prospectus to be free of tax. The former Act also dealt with the taxation of interest on loans raised in Australia by countries and Dominions outside the Commonwealth, a subject to which s. 27 of the *Income Tax Assessment Act* 1936 is directed. It is true that these enactments deal with loans raised in Australia, though perhaps the *Commonwealth Inscribed Stock Act* may be capable of a wider application. But they are not unimportant as showing that when the question is of exempting Australians from tax, it has always been treated as a matter for special enactment. The grant or continuance of such an exemption by implication based on the existence of a clause in an issue of bonds abroad is rather remote from the realities of tax legislation.

I am therefore of opinion that the interest on the bonds was lawfully included in the assessable income of the deceased and that she was properly assessed to income tax in respect of the interest as a resident.

Upon that view, so to assess her could not have amounted to an actionable breach of contract. Upon a contrary view the question would arise whether she was not bound by the assessments in fact made so that tax paid thereunder was not recoverable unless by

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amendment, objection or appeal she obtained relief from the assessments, a thing she did not do. It is suggested that an answer to this question is to be found in a provision of the "Loan Contract," which is mentioned in the text of the bonds. Clause 5 of that contract is as follows :—

"All payments in respect of the bonds and the coupons shall be made without deduction for any taxes, imposts, stamp dues and assessments now or at any time hereafter imposed or levied by the Commonwealth of Australia or any of its States or municipalities or other taxing authorities thereof or therein."

The suggestion is that under this clause to assess a bondholder in respect of interest on the bonds would amount to a breach of contract and, on the hypothesis that the Assessment Act did not authorize the inclusion of the interest in the assessable income, there would be no supervening statutory provision inconsistent with the contract. The breach would therefore be actionable. As I reject the hypothesis, I think that it is unnecessary for me to pursue this suggestion.

For the reasons I have given I think that the Commonwealth was under no liability to the deceased in respect of the inclusion of interest on her bonds in her assessable income. It was under no liability either to refund the tax or to pay damages for imposing the tax legislatively, assessing it administratively or receiving it fiscally. In refunding the amount the Commonwealth made a purely voluntary payment to her executors.

The second question in the case should be answered: No. The first question in these circumstances calls for no answer, but if it is to be answered the answer should be: Yes.

McTIERNAN J. I agree with the answers which the Chief Justice proposes should be given to the questions and with his Honour's reasons.

WILLIAMS J. The appellants, who are the executors of the will of Christina Thomson, who died on 15th December 1944, have objected to the inclusion of the sum of £6,814 in the value of her dutiable estate for the purposes of Federal estate duty. This sum was paid to them by the Treasurer of the Commonwealth under the following circumstances. Mrs. Thomson was the holder of certain dollar bonds issued by the Commonwealth in the United States of America similar to the bonds which were the subject matter of the litigation in *Magrath v. The Commonwealth* (1). She was assessed for and paid Federal income tax upon the interest derived from these

(1) (1944) 69 C.L.R. 156.

bonds for the years ending 30th June 1939 to 30th June 1943 inclusive. The total amount of income tax levied and paid on this interest was £6,814. On 29th May 1944 the first question asked in the case stated in *Magrath v. The Commonwealth* (1) was answered in the affirmative. On 6th November 1944 Mrs. Thomson's solicitors wrote to the Commissioner asking whether, in view of the statement of counsel for the Commonwealth in *Magrath v. The Commonwealth* (1) that if the first question was answered in the affirmative the Commonwealth desired to honour its obligations, it was the intention of the Commonwealth to refund this sum to Mrs. Thomson. At the date of Mrs. Thomson's death no reply had been received to this letter and the further proceedings in *Magrath v. The Commonwealth* (1) relating to the second question referred to the trial Judge had not come on for hearing. On 10th May 1945 the appellants received from the Treasurer of the Commonwealth a cheque for £6,814 described in a covering letter as a refund of the income tax paid on the interest received on the bonds. In a notice of assessment under the *Estate Duty Assessment Act* 1914-1942, the respondent included the sum of £6,814 in the value of the dutiable estate of the deceased under the heading "Refund of Income Tax." The inclusion of this item in the assessment was objected to by the appellants on the ground that it was not received until after the death of the deceased and was not a debt owing to her at the date of her death. The respondent then amended the assessment by deleting the item as a refund of income tax but included the same amount in the value of the dutiable estate as a right of action for recovery of unliquidated damages valued at the sum of £6,814 paid to the appellants by the Treasurer of the Commonwealth. The appellants objected to the amended assessment but the respondent disallowed the objection, and the appellants then requested the respondent to treat the objection as an appeal and forward it to this Court.

Paragraph 25 of the case states that "the respondent advances the following contentions in support of the inclusion of the sum of £6,814 in the value of the estate for Federal estate duty (i) that the amended assessment in its present form is correct because at the date of her death the deceased had a right of action for the recovery of unliquidated damages which right was properly valued at £6,814 (ii) that the Commonwealth's contractual obligation to the deceased was to pay not only the principal and interest agreed to be paid but also the amount of any tax lawfully levied by the Commonwealth of Australia upon her in respect of the receipt by her of such

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principal or interest and that therefore the deceased at her death had a right of action to recover the sum of £6,814 as a debt due to her by the Commonwealth (iii) that the amounts of income tax referred to in par. 14 hereof were not lawfully levied and could have been recovered at law by the deceased during her lifetime (iv) that the deceased's claim to the repayment of £6,814 had such a high degree of probability of success and was so well founded in expectation that it should be treated as an asset in her estate and valued at the sum of £6,814."

The first question asked in the case is: "Are any of the second third and fourth of the contentions stated in paragraph 25 hereof open on this appeal and relevant to its determination?" It is the objection which is treated as the appeal (s. 24 (1) (b)). The present objection is in form an objection to the whole of the amended assessment. But the grounds show that the part of the amended assessment objected to is the inclusion of the £6,814 in what s. 15 describes as the amount upon which duty shall be levied in accordance with the Act. All the grounds of objection to this sum being included in this amount are open to argument by either side, and the present grounds are wide enough to include the second, third and fourth contentions stated in par. 25 of the case.

In my opinion the first question should be answered in the affirmative.

The second question asked in the case is: "Subject to question 1 ought the sum of £6,814 or any part thereof to be included in the value of the estate of the deceased for Federal estate duty?" The scheme of the *Estate Duty Assessment Act* is to impose a tax on the beneficial interest in all property owned by the deceased to which his personal representatives acquire a title on his death and on certain other property deemed to be part of his estate for the purposes of duty which he has disposed of during his life by dispositions which are regarded as substitutes for wills. The sum of £6,814 would therefore form part of Mrs. Thomson's dutiable estate if she had at the date of her death a legal right to recover from the Commonwealth a sum equal to the amount of income tax which she had paid on the income derived from the bonds. The bonds provided that all payments of interest should be made without deduction of any tax now or at any time hereafter imposed or levied by the Commonwealth of Australia, and the effect of the affirmative answer to the first question in *Magrath v. The Commonwealth* (1) is that in view of this provision it was a breach of contract for the Commonwealth to tax this interest on the bonds. The contract

was binding on the Commonwealth because the issue of the bonds was authorized by the *Loans Securities Act* 1919. But the Parliament in 1919 could not fetter a future Parliament, if the latter Parliament thought fit to do so, from repudiating the promise that the bonds should be free of taxation; so that if, upon the true construction of the *Income Tax Assessment Acts* of 1922 and 1936, this exemption was abolished in the case of bondholders who were resident in Australia, the Commonwealth would be able to set up that the subsequent statute had made it impossible for the Commonwealth to continue to honour its promise to the plaintiff (*Magrath's Case* (1)). Prior to the amendment of the *Income Tax Assessment Act* 1922 by the *Income Tax Assessment Act* 1930, Australian residents were only liable to pay income tax on income derived from a source in Australia. That Act made such residents liable to pay tax on income derived from any source. The Act in force during the period Mrs. Thomson was assessed was the *Income Tax Assessment Act* 1936 as amended. The *Income Tax Assessment Acts* 1922 and 1936 both contain sections exempting certain income from taxation. There are similar sections in the English *Income Tax Act* 1918. Sections 37 to 39 of that Act exempt from taxation the income or certain income of charities, friendly societies, trade unions, savings banks and other bodies. Sections 46 to 48 exempt from income tax the income on securities issued free of income tax. On the other hand s. 213 provides that no letters patent granted or to be granted by the Crown to any person, city, borough, or town corporate of any liberty, privilege, or exemption from subsidies, tolls, taxes, assessments or aids, and no statute which grants any salary, annuity or pension to any person free of any taxes, deductions or assessments, shall be construed or taken to exempt any person, city, borough or town corporate, or any of the inhabitants of the same, from tax, and all non-obstantes in any such letters patent or statute made or to be made to the contrary effect shall be void. But despite these special provisions, it has been held on several occasions that where property was exempted from tax in earlier Acts by provisions wide enough to include future income tax, the property was still exempt from income tax although it was not only not specifically exempted by the *Income Tax Act* 1918 but was caught by the literal meaning of its general provisions. The court has always held that the subsequent legislation must contain clear words before it should be construed as operating by way of repeal of exemptions granted in express terms. Some of the cases are cited in *Magrath v. The Commonwealth* (2). To these

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(1) (1944) 69 C.L.R. 156, at p. 183.

(2) (1944) 69 C.L.R. 156, at p. 184.

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may be added the recent case in the Court of Appeal of *Wiltshire County Valuation Committee v. Marlborough & Ramsbury Rating Authority* (1). One of these cases is *Cadbury Bros. Ltd. v. Sinclair* (2). This case was recently considered by the House of Lords in *Inland Revenue Commissioners v. Australian Mutual Provident Society* (3), and there is no suggestion in the speeches of their Lordships that the case was not rightly decided. In *Cadbury's Case* (2) the land occupied by the company was the subject of an Act of Charles II. passed in 1660 which exempted the company as occupier from at any time thereafter being taxed to pay any sum or sums of money or to be otherwise charged in any way whatsoever for any manner of public tax whatsoever any law to the contrary notwithstanding. The company was assessed for income tax under Schedule D of the *Income Tax Act 1918* which provides that tax shall be charged in respect of the annual profits or sums from any trade carried on in the United Kingdom or elsewhere. Schedule A provides that tax shall be charged in respect of the annual value of all land in the United Kingdom. Rule 5 of Cases I. and II. of Schedule D provides that the computation of tax shall be exclusive of the annual value of land occupied for the purpose of the trade if such lands are separately assessed and charged under Schedule A. The land occupied by Cadbury's was occupied for the purpose of trade but was not separately assessed under Schedule A because it was exempted by the Act of 1660. It was nevertheless held by the Court of Appeal that the annual value of the lands should not be included in the profits or gains from the company's trade for the purposes of Schedule D because this would be inconsistent with the provisions of the Act of 1660. *Lawrence L.J.* said: "If the contention of the Solicitor-General be right, that by reason of this exemption the annual value of the lands cannot be deducted for the purpose of computing the company's profits and gains, the result would be that the company as occupiers of the lands would be charged for and in respect of those lands within the meaning of the Act of Charles II, for unless the company, in estimating their profits and gains, are allowed to deduct the annual value of the land occupied by them for the purposes of their trade, the tax computed under Schedule D is larger than it would be if that annual value had been deducted, since the gains and profits of the company are increased by reason of the occupation of the lands" (4). In all these cases the exemptions from tax were granted in statutes whereas in the present case the exemption was contained in a

(1) (1948) 1 All E.R. 694.

(2) (1933) 149 L.T. 412.

(3) (1947) A.C. 605.

(4) (1933) 149 L.T., at p. 417.

contract. But I can see no distinction in principle between an exemption contained in a statute and one contained in a contract. A future Parliament can repudiate the exemption either by repealing the statute in which it is contained expressly or by implication, or by putting an end to the contract by legislation which is expressly or impliedly inconsistent with its further existence. These cases are all illustrations of the maxim *generalia specialibus non derogant*, and their principles should in my opinion be applied to the present case and it should not be held that any sufficient intention appears in the *Income Tax Assessment Acts* of 1922 or 1936 to repudiate the promise contained in the bonds. These Acts do not contain any section similar to s. 213 of the English *Income Tax Act* 1918. It was therefore a breach of contract for the Income Tax Commissioner to include the income derived from these bonds in Mrs. Thomson's assessable income. She did not appeal against the assessments but paid the income tax. Section 177 (1) of the *Income Tax Assessment Act* provides that the production of the notice of assessment shall be conclusive evidence of the due making of the assessment and (except in proceedings on appeal against the assessment) that the amount and all the particulars of the assessment are correct. Presumably Mrs. Thomson had other income in addition to the income derived from the bonds and was therefore a person obliged to make a return by the Act. As she did not appeal, she would have had no defence to an action to recover the tax assessed and she did not in fact dispute the assessment but paid the amount assessed (*St. Lucia Usines and Estates Co. Ltd. v. Colonial Treasurer of St. Lucia* (1)). The appellants contended that she had paid the tax assessed upon the income derived from the bonds under a mistake of law and that she could not therefore have brought an action to recover the amount which was subsequently refunded to the appellants. It is to my mind unnecessary to express any final opinion on this contention. If the *Income Tax Assessment Acts* of 1922 and 1936 did not operate to put an end to the immunity from income tax contained in the bonds or in other words did not impose income tax on the income derived from the bonds, then the levying of tax on this income was a breach of contract. As at present advised I fail to see how the provisions of the *Income Tax Assessment Act* 1936 or the voluntary payment of tax levied on the income derived from the bonds under colour of valid assessments could provide any defence to an action brought to recover damages for breach of a contract not to levy such tax. Such an action would be based on a separate legal right altogether outside the provisions

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of the *Income Tax Assessment Act*. Even if the voluntary payment of the tax would afford a defence to the action, the Commonwealth was under no obligation to plead such a defence and the probability that it might do so was at most an element in placing a value on the right of action at the date of death. But we now know that the Commonwealth did not dispute Mrs. Thomson's claim to the refund of tax and paid the claim in full. The value of the right however uncertain it may have been at the date of death was therefore subsequently fixed and determined. The cases cited by Dixon J. in *Willis v. The Commonwealth* (1), to which may be added *Attorney-General v. Quixley* (2) which is very much in point, show that the courts prefer facts to estimates and will in such a case accept the subsequent quantification of the right as its value at the relevant time.

In my opinion the second question should be answered by saying that the sum of £6,814 ought to be included in the value of the estate of the deceased for Federal estate duty.

*Questions in case answered :—(1) Yes. (2) No.
Respondent to pay appellants' costs of case.
Case remitted with these answers to Dixon J.*

Solicitors for the appellants : *Hedderwick, Fookes & Alston.*

Solicitor for the respondent : *H. F. E. Whillam*, Crown Solicitor for the Commonwealth.

E. F. H.

(1) (1946) 73 C.L.R. 105, at p. 116. (2) (1929) 141 L.T. 288.