App. at 557-558, 580-587 - 79 W.N. 271; 625 R. 455
r. at 589 - 106 C.L.R. 448

[HIGH COURT OF AUSTRALIA.]

NATIONAL TRUSTEES EXECUTORS AND AGENCY COMPANY OF AUSTRALASIA LIMITED . . . . . APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

(CAIN'S CASE)

H. C. OF A. 1954.

MELBOURNE, *May* 18, 19, 20.

SYDNEY, *Nov.* 29.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Estate Duty (Cth.)—Assessment—Amendment—"Personal property" of deceased—Right to share of profit under Wool Realization (Distribution of Profits) Act 1948 *—Valuation of right as at date of death—Disclosure by executor of material facts before assessment—Estate Duty Assessment Act* 1914-1947 (*No.* 22 *of* 1914—*No.* 16 *of* 1947), *ss.* 8 (3) (*b*), 20 (2) (3)—*Wool Realization (Distribution of Profits) Act* 1948 (*No.* 87 *of* 1948), *ss.* 7, 11, 28, 29.

A testator, who had carried on the business of wool-grower and had, pursuant to the *National Security (Wool) Regulations*, submitted for appraisement certain wool shorn by him in the seven wool seasons of the war period, died after the enactment of the *Wool Realization (Distribution of Profits) Act* 1948 but before notification that any sum was available for distribution under the Act. The estate duty return as submitted on 16th August 1949 by the testator's executor contained no reference to any rights in respect of wool submitted for appraisement. On 24th November 1949 an amount was declared by the Minister to be available for distribution and on 5th December 1949, the sum of £2,816 15s. 9d. was paid by the Australian Wool Realization Commission to the executor and an additional sum of £14 3s. 1d. to the testator's wool brokers as their commission. On 3rd November 1950 the solicitors for the executor sent to the Commissioner of Taxation, who had not assessed duty on the estate, a letter stating "We have been instructed to advise you of the following additional asset—appraised value of participating wool held by Australian Wool Realization Commission £45,295 2s. 2d. 6¼% of which is equivalent to £2,830 18s. 10d.". The commissioner, in assessing duty, on 9th March 1951, included the last-mentioned sum as an asset which he described in an alteration sheet accompanying the notice of assessment, as "Wool payments as advised 3/11/50—£2,831". The assessment was not objected to and the duty, as assessed, was paid. On or about 28th March 1952 the executor received a further sum equal in amount to the first sum, which

further sum was distributed pursuant to a declaration made by the Minister on 27th March 1952. Although the executor did not inform the commissioner of the receipt of this further sum, he learned of it and, on 30th May 1952, issued a notice of amended assessment increasing the amount of the duty by adding to the net value of the estate the sum of £2,831, describing the addition as " on a/c. : Second Wool Distribution £2,831 ". It appeared that, before the original assessment was made, although both the executor and the commissioner were aware of the provisions of the *Wool Realization (Distribution of Profits) Act* 1948, and believed that a further distribution of profit would be made, neither of them had any knowledge, information or belief as to when such a distribution would be made or how much would be distributed.

Held, by *Dixon* C.J., *Fullagar* and *Kitto* JJ. (*McTiernan* and *Taylor* JJ. *contra*) that the right of the testator to share in distributions formed part of his " personal property " within the meaning of s. 8 (3) (*b*) of the *Estate Duty Assessment Act* 1914-1950.

Ritchie v. *Trustees Executors & Agency Co. Ltd.* (1951) 84 C.L.R. 553 ; *Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.* v. *Maslen* (1952) A.C. 215 ; (1951) 88 C.L.R. 401 ; *Federal Commissioner of Taxation* v. *Squatting Investment Co. Ltd.* (1954) A.C. 182 ; (1954) 88 C.L.R. 413 discussed.

Commissioner of Stamp Duties (N.S.W.) v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (1926) 38 C.L.R. 12 ; *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation (Thomson's Case)* (1948) 77 C.L.R. 1 distinguished.

Held, further, that for the purposes of the *Estate Duty Assessment Act*, the right to share in distributions should be valued as at the date of testator's death.

Held, further, by *Dixon* C.J., *Fullagar* and *Kitto* JJ. (*McTiernan* and *Taylor* JJ. expressing no opinion) that there was no power to issue the amended assessment because the executor had, in the circumstances, made a full and true disclosure of all the material facts necessary for the making of the assessment and there was no error in calculation or mistake of fact to be corrected.

CASE STATED by *Fullagar* J.

In an appeal by the National Trustees Executors & Agency Co. of Australasia Ltd. as executor of the estate of Walter Cobbold Curphey Cain deceased, against an amended assessment of estate duty, *Fullagar* J., on 30th April 1954 with the concurrence of the parties and pursuant to s. 28 of the *Estate Duty Assessment Act* 1914-1947 stated a case for the opinion of a Full Court, which was substantially as follows :—

2. The testator died on or about 30th April 1949 leaving a will bearing date 20th October 1948, probate of which was granted to the appellant, the executor named therein, on 7th September 1949 by the Supreme Court of the State of Victoria.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

3. On or about 16th August 1949, the appellant submitted to the respondent an estate duty return of the testator's estate pursuant to the *Estate Duty Assessment Act* 1914-1947 showing personal estate valued at £131,311 12s. 1d.

4. The testator had during the years 1939 to 1946 carried on the business of a pastoralist and wool-grower and the wool shorn by the testator in the seven wool seasons 1939/40 to 1945/46 inclusive was acquired by the Commonwealth pursuant to the *National Security* (*Wool*) *Regulations*.

[Paragraphs 5-28 inclusive, were, with immaterial alterations, identical with the like numbered paragraphs of the case stated in *Squatting Investment Co. Ltd.* v. *Federal Commissioner of Taxation* (1).]

28A. On 7th September 1942 in answer to the following questions, the Prime Minister of the Commonwealth gave the following answers in the House of Representatives :

Questions

1. What is the position with regard to the excess profits on resale of wool under the original wool agreement with Britain ?

2. Has any change been made in these conditions in the recent review of that agreement ?

3. Will the Australian share of these profits be distributed to the rightful owners, the wool-growers, at the conclusion of the war ?

Answers

1. The arrangement provides that the United Kingdom Government shall pay to the Commonwealth Government fifty per cent of the profits made by the former Government on Australian wool sold for use outside the United Kingdom. As wool is still being sold for use outside the United Kingdom from all three clips handled since the scheme was inaugurated in September 1939 (namely, wool seasons 1939/40, 1940/41, 1941/42), it is not possible to take an account of the profits made on such re-sold wool, season by season. The taking out of the profits of such sales of wool outside the United Kingdom must, therefore, await the winding-up of the wool scheme at the conclusion of the war-time purchase arrangement made with the United Kingdom Government.

2. No.

3. Yes, in proportion to their contributions of wool to the whole scheme during its operation.

(1) (1953) 86 C.L.R. 570, at pp. 573 et seq.

[Paragraphs 29-34 inclusive were with immaterial alterations identical with the like numbered paragraphs of the case stated in (1).]

35. The operation of the Joint Organization in respect of Australian wool in the years subsequent to 30th June 1947 and up to 22nd January 1952 may be summarized as follows :—

Year ended 30th June 1948				
				£ stg.
Stock at 30th June 1947 ..	3,076,000 bales, book value			38,942,444
purchase during year (where other bids did not reach reserve price) ..	22,298	,,	cost	231,247
sales during year ..	825,559	,,	price	31,092,880
Profit realized during year	£17,272,237			
Year ended 30th June 1949				
Stock at 30th June 1948 ..	2,271,000 bales, book value			26,846,728
purchase during year (where other bids did not reach reserve price) ..	3,335 bales, cost			50,567
sales during year ..	1,008,000	,,	price	36,481,185
Profit realized during year	£22,377,505			
Year ended 30th June 1950				
Stock at 30th June 1949 ..	1,254,000 bales, book value			14,430,678
purchase during year (where other bids did not reach reserve price)	146	,,	cost	2,595
sales during year	857,000	,,	price	40,360,645
Profit realized during year	£29,702,248			
Year ended 30th June 1951				
Stock at 30th June 1950 ..	379,100 bales, book value			4,452,783
Purchase during year ..	Nil			
sales during year	356,600 bales, price			37,799,009

(1) (1953) 86 C.L.R. 570, at pp. 573 et seq.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

		£ stg.
Profit realized during year	.. .. £33,451,276	

Period 1st July 1951 to 22nd January 1952 (date of liquidation)

Stock at 30th June 1951 ..	11,800 bales, book value	175,324
purchase during period ..	Nil	
sales during period ..	11,800 bales, price	754,004
stock at 22nd January 1952	Nil	Nil
Profit realized during period 1st July 1951 to 22nd January 1952 ..	£602,118	

After adjustment consequent on scouring and carbonising, etc.

Profit realized	£ stg.
1st August 1945—30th June 1947	21,349,884
1st July 1947—30th June 1948	17,272,237
1st July 1948—30th June 1949	22,377,505
1st July 1949—30th June 1950	29,702,248
1st July 1950—30th June 1951	33,451,276
1st July 1951—22nd January 1952	602,118
£ stg.	124,755,268

36. In effect the total profit of £ stg. 124,755,268 includes an appropriate proportion of the adjusted sum of £ stg. 19,489,233 which was on 31st July 1945 standing to the credit of the Divisible Profits accounts. In the year ended 30th June 1950 payments on account of profit were made to each of the governments interested in the Joint Organization and the amount paid to the Commonwealth Government was £ stg. 20,000,000. Between 1st July 1951 and 22nd January 1952 further payments on account of profit were made to each of the governments interested in the Joint Organization and the amount so paid to the Commonwealth Government was £ stg. 51,300,000. At 22nd January 1952 the amount standing to the credit of the Commonwealth Government in the books of the Joint Organization as its share of the surplus was £ stg. 831,673. There were also unrealized assets. The aforesaid profits reflected the very substantial increase in world prices for wool (as well as other commodities) after the resumption of the sale of wool by auction in September 1946. The extent of these increases in world

wool prices is indicated by the following table of prices based upon the base figure of 100 being the average over the period 1934/38:

	Merino Wool (Average 64s.)	Crossbred Wool (Average 46s.)
Base figure (average 1934/38)	100	100
June 1946	144	175
June 1947	213	190
June 1948	413	225
June 1949	359	240
June 1950	546	503
June 1951	659	782
June 1952	507	442

37. The trading operations of the Joint Organization thus consisted of the disposal or realization by sale of the stocks of wool taken over by it on 1st August 1945, and additional wool purchased by it. The capital with which it acquired those stocks was provided or deemed to have been provided, so far as Australian wool was concerned, equally by the United Kingdom Government and the Commonwealth Government. This amount was provided first by applying to the original cost of the wool the balance standing to the credit of the Divisible Profits account as at 31st July 1945 (which balance was under the Wool Purchase Arrangement to be shared equally between the United Kingdom Government and the Commonwealth Government) and the remainder of the cost was to be provided equally by the two governments. The United Kingdom Government's share was provided by the transfer of the wool itself and the Commonwealth Government's share was to be paid by the Commonwealth Government to the United Kingdom Government over four years but was to be provided in the first place out of the Commonwealth Government's share of the proceeds of the sale of the wool as it was disposed of by the Joint Organization. In fact the Joint Organization's trading operations were so successful that the Commonwealth Government's share of the remainder of the capital was fully paid out of such proceeds by 30th June 1947 and the sale over the period 1st August 1945—30th June 1950, of the Joint Organization's stock of wool, resulted after the repayment of the capital cost of its stocks of wool, in the profit of £ stg. 124,755,268 referred to in par. 36 above.

38. On the 9th day of August 1946 the Minister for Supply and Shipping of the Commonwealth stated in the House of Representatives: "The war-time wool purchase arrangement under which

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

the United Kingdom Government acquired Australian wool clips during the seasons 1939 to 1945, provided that, should the sale by the United Kingdom Government of acquired raw wool for use outside the United Kingdom produce a profit over the whole period of the arrangement, such profit would be divided equally between the two governments. An essential feature of the arrangement was that profits, if any, could be determined only at the winding up of the whole scheme. In 1942, the then Prime Minister Mr. Curtin, in answer to a question in Parliament, gave an undertaking that the Commonwealth's share of any such profits would be distributed to the wool-growers in proportion to their contribution of wool to the scheme during its operation. The war-time arrangement was merged into the Wool Disposals Plan, which is set out in the schedule to the *Wool Realization Act* 1945, and forms the pattern of an orderly marketing of the huge wool stockpile concurrently with current clips. The Disposals Plan, in turn, provides that, should a profit or a loss ultimately arise from the operations of the Joint Organization in Australian wool it will be shared or borne equally between the Commonwealth and United Kingdom Governments. I now desire to make it quite clear that the Government intends that any ultimate profit which might accrue to the Commonwealth under the Disposals Plan will be distributed to those growers who supplied wool for appraisement under the war-time arrangement in the proportion that the appraised value of their wool bore to the total appraised value of all wool over the operation of the war-time scheme. In this manner the Government considers that the undertaking given in 1942 will be honoured, and the equity of each wool-grower who supplied wool under the war-time arrangement safeguarded."

39. Neither the Central Wool Committee established by the *National Security* (*Wool*) *Regulations* nor the Australian Wool Realization Commission established by the *Wool Realization Act* 1945 made any determination pursuant to reg. 30 (2) of the *National Security* (*Wool*) *Regulations* and no distribution was made of any of the moneys there referred to save insofar as the payment of amounts by way of flat rate adjustment may have constituted such a determination and distribution. Neither the Central Wool Committee nor the Australian Wool Realization Commission received from the United Kingdom Government under or in connection with the Wool Purchase Arrangement referred to in the *National Security* (*Wool*) *Regulations* any amount over and above the purchase price payable by such Government thereunder. The surplus funds arising

from the operations of the Central Wool Committee and which became vested in the Australian Wool Realization Commission pursuant to the provisions of the *Wool Realization Act* 1945 were paid by the commission to the Treasurer of the Commonwealth pursuant to the *Wool Industry Fund Act* 1946.

40. The *Wool Realization (Distribution of Profits) Act* 1948 (No. 87 of 1948) which came into operation on 21st December 1948 made provision for the distribution among the persons who supplied participating wool for appraisement of a fund called the "Wool Disposals Profit" which includes the Commonwealth Government's share in the ultimate balance of profit arising from the transactions of the Joint Organization. By s. 6 (1) of the Act it is provided that the Minister may, if he is satisfied that the financial position under the Disposals Plan justifies his so doing, by notice published in the *Gazette*, declare an amount to be available for distribution under the Act out of the expected net profit. By a notice published in the Commonwealth *Gazette* (No. 86 of 24th November 1949) and bearing date 24th November 1949 the Minister of State for Commerce and Agriculture declared the amount of £A25,000,000 to be available for distribution under the *Wool Realization (Distribution of Profits) Act* 1948.

41. Pursuant to the regulations, the testator submitted for appraisement all wool shorn by him in the wool seasons 1939/40 to 1945/46 inclusive, and all such wool was duly delivered to the Commonwealth by Dennys Lascelles Ltd., the wool-selling broker through whom the same was submitted for appraisement. All such wool was duly appraised and was listed as "participating wool" in the appraisement catalogues used by the appraiser for the purpose of such appraisement.

42. The appraised price of the wool submitted for appraisement by the testator in each of the wool seasons 1939/40 to 1945/46 was as set out below—

Season	1939/40—appraised value			..	..	£5,526	0	4
,,	1940/41—	,,	,,	..	..	6,526	10	0
,,	1941/42—	,,	,,	..	..	7,576	9	11
,,	1942/43—	,,	,,	..	..	6,690	17	4
,,	1943/44—	,,	,,	..	..	7,094	12	0
,,	1944/45	,,	,,	..	..	5,868	13	11
,,	1945/46—	,,	,,	..	..	6,011	18	8
						£45,295	2	2

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

The appraised prices as set out above were duly received by the testator and in each wool season, save the 1945/46 season, were received in two instalments, viz. appraised price less retention money within fourteen days of appraisement and retention money in the month of July immediately following the conclusion of the wool season. The figures set out above include the amount of retention money.

43. In addition to the appraised price as set out in par. 42, the testator received from the Central Wool Committee and the Wool Realization Commission a further amount in respect of each wool season, being the amount of flat rate adjustment. The amounts received in respect of the flat rate adjustment were received in the month of July immediately following the conclusion of each wool season and were as follows :—

Season 1939/40— $8\frac{1}{2}\%$	£469 14 3
,, 1940/41—11%	717 18 4
,, 1941/42— $9\frac{1}{2}\%$	719 15 4
,, 1942/43—11%	735 19 11
,, 1943/44—$11\frac{1}{4}\%$	798 2 10
,, 1944/45—$12\frac{1}{2}\%$	733 11 9
,, 1945/46—13.888%	834 18 6
	£5,010 0 11

44. On or about the 5th day of December 1949, the appellant received from the Australian Wool Realization Commission through Dennys Lascelles Ltd., the wool-selling broker through whom the testator's wool had been submitted for appraisement, a cheque for £2,816 15s. 9d. in respect of the distribution of the declared amount of profit referred to in par. 40 above, being an amount calculated at six and one-quarter per cent of the appraised values of the wool submitted for appraisement by the testator as referred to in par. 42 above, less broker's commission at the rate of one-half of one per cent, i.e. £2,830 18s. 10d. less £14 3s. 1d. The said cheque was accompanied by a credit note indicating how the said amount was made up. The said credit note was as follows :—

"

Wool Realization (Distribution of Profits) Act 1948
Credit Note

Interim distribution to Australian wool-growers of profits arising from the war-time purchase of the Australian wool clips by the

Government of the United Kingdom and from the operations of U.K.—Dominion Wool Disposals Ltd.

Amount available for distribution as declared by the Minister for Commerce and Agriculture ..	£25,000,000	
from which a payment will be made equivalent to ..	6¼%	
of the appraised value of participating wool catalogued between 28th September 1939 and 30th June 1946		

Appraised value of participating wool submitted by you through, Dennys Lascelles Ltd.
as shown in the official list prepared and held by the Australian Wool Realization Commission £45,295 2 2
6¼% of which is equivalent to £2,830 18 10
Less approved commission ½% 14 3 1
£2,816 15 9

Sent by Dennys Lascelles Ltd.
Wool Selling Broker,
by agreement with the Australian Wool Realization Commission.

"

45. On the 3rd November 1950 the appellant's solicitors sent to the commissioner a letter, as follows :—

re Federal Estate Duty CED28086
Estate of Walter C. C. Cain, decd.

We have been instructed to advise you of the following additional asset—

Appraised value of participating wool held by Australian Wool Realization Commission
£45,295/2/2—6¼% of which is equivalent to .. 2,830 18s. 10d.

By a notice of assessment No. 13846 dated 9th March 1951 the commissioner assessed the estate duty payable on the testator's estate at £6,117 10s. 4d. upon a net dutiable estate of £50,558. The said assessment was based upon the inclusion in the testator's estate of the said sum of £2,830 18s. 10d. which said sum was included

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

under the description " Wool payment as advised 3/11/10—£2,831 " in an alteration sheet accompanying the notice of assessment. The said duty was duly paid by the appellant and no objection was lodged against the said assessment.

46. By a notice published in the *Gazette* (No. 26 of 1952) and bearing date 27th March 1952, the Minister of State for Commerce and Agriculture declared the amount of £A25,000,000 to be available for distribution under the *Wool Realization (Distribution of Profits) Act* 1948. On or about 28th March 1952 the appellant received from the Australian Wool Realization Commission through the said Dennys Lascelles Ltd., a cheque for £2,816 15s. 9d. in respect of the said distribution of the said declared amount of £25,000,000 profit, being an amount calculated at six and one-quarter per cent of the appraised values of the wool submitted for appraisement by the testator as referred to in par. 42 above, less broker's commission at the rate of one-half of one per cent (i.e. £2,830 18s. 10d. less £14 3s. 0d.). The said broker received the said sum of £2,830 18s. 10d. from the Australian Wool Realization Commission and retained the said sum of £14 3s. 0d. The said cheque was accompanied by a credit note indicating how the said amount was made up. The said credit note was with immaterial alterations identical with that set out above.

47. The appellant did not at any time inform the commissioner of the receipt of any further sum from the Australian Wool Realization Commission other than that referred to in par. 45. On 20th May 1952 an officer of the commissioner made a routine search of the Victorian Probate Duty Office for the purpose of comparing particulars of the testator's estate as returned by the appellant to the commissioner with particulars of the testator's estate as recorded in the Victorian Probate Duty Office and this search revealed to the commissioner for the first time that the Probate Duty Office records stated that the appellant had received a second distribution from the Australian Wool Realization Commission of £2,830 18s. 10d. The commissioner was not previously aware of the receipt by the appellant of a further distribution from the Australian Wool Realization Commission or of the amount thereof. Thereupon by a notice of amended assessment dated 30th May 1952 the commissioner assessed the appellant for further estate duty on the testator's estate by adding to the net value of the testator's estate as previously assessed an amount of £2831 as being " on account of second wool distribution ". The said notice of amended assessment read as follows :—

In accordance with the *Estate Duty Assessment Act* 1914-1950, the assessment notified to you on 9/3/51 has been altered as hereunder :—

Value of estate as previously assessed	£50,558	
Amended on account of—		
As per alteration sheet herewith		
Net increase	581	
Value of Estate as now assessed	51,139	
Less statutory exemption		
Value for duty of estate as now assessed	51,139	
Duty at 12.22% thereon	6,249 3 8	
Duty	6,249 3 8	
Total amount payable	6,249 3 8	
Amount previously paid	6,117 10 4	
BLCE. DUE	£131 13 4	

The alteration sheet accompanying the said notice of amended assessment was as follows :—

Details of alterations	Amount	Total
	£	£
Net value of estate as previously assessed		50,558
Add on A/c. : Second wool distribution ..	2,831	
Oats Pool final payment ..	7	2,838
		53,396
Less on A/c. : Exempt estate increased (3/4 of net increase of £2,324) ..	1,743	
Additional Vict. Probate Duty	514	2,257
Value of estate ..		51,139

The commissioner thought the alterations and additions to the original assessment made by the said amended assessment were necessary to correct a mistake of fact or to prevent avoidance of duty.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

48. At all times material the appellant was aware of the provisions of the *Wool Realization Act* 1945 and the *Wool Realization (Distribution of Profits) Act* 1948 and after the dates of the receipt of the credit notes referred to in pars. 44 and 46 above was aware of the information contained therein and did, after the receipt of the first of such credit notes, believe that a further distribution of profits under the latter of the said Acts over and above that made on 5th December 1949 would be made. Save as aforesaid the appellant was not at any time prior to 30th May 1952 aware of the facts stated in pars. 33-37 inclusive of this case and had no knowledge, information or belief as to when any such further distribution would be made or as to the amount of such further distribution. At all times material the appellant further believed that the commissioner was aware of the provisions of the said Acts and that the commissioner after 3rd November 1950 also believed that a further distribution of profits would be made over and above that made on 5th December 1949.

49. The commissioner was at all times material aware of the provisions of the *Wool Realization Act* 1945 and the *Wool Realization (Distribution of Profits) Act* 1948 and from 3rd November 1950 of the information contained in the letter referred to in par. 45 hereof and did after that date believe that a further distribution of profits under the latter of the said Acts over and above that referred to in that letter would be made. In or about the month of July 1951 the commissioner was informed of the facts set out in pars. 33 to 37 inclusive of this case insofar as they covered the period up to 30th June 1950 and did by July 1952 accept those facts as correct. Save as aforesaid the commissioner was not at any time up to and including 30th May 1952 aware of the facts stated in pars. 33-37 inclusive of this case and had no knowledge information or belief as to when any such further distribution would be made or as to the amount of such further distribution save such as was revealed in the aforesaid search made on 20th May 1952.

50. By a notice of objection dated 26th day of June 1952, the appellant objected to the said amended assessment upon the following grounds :—

1. The said amended assessment is excessive and wrong in law.
2. The said sum of £2,831 received by the executor pursuant to the *Wool Realization (Distribution of Profits) Act* 1948 was not an asset of the estate of the said deceased at the date of his death.
3. The said sum of £2,831 is not part of the estate of the said deceased for the purposes of the *Estate Duty Assessment Act* 1914-1947.

4. Payments received by the executor of the said deceased as distributions under and pursuant to the *Wool Realization (Distribution of Profits) Act* 1948 were not assets of the estate of the said deceased at the date of his death and are not part of his estate for the purposes of the *Estate Duty Assessment Act*.
5. Alternatively to 2, 3 and 4 hereof, if any part of the said payments received by the executor pursuant to the *Wool Realization (Distribution of Profits) Act* 1948 forms part of the estate of the said deceased for the purposes of the *Estate Duty Assessment Act*, the same should not have been included in the said estate at the full amount of such payments but at some lesser amount.
6. The commissioner was wrong in that he had no power under the *Estate Duty Assessment Act* to amend the assessment of estate duty by the inclusion in the value of the estate of the said deceased of the said sum of £2,831 or any part thereof in that :
   (a) the executor made to the commissioner full and frank disclosure of all the material facts necessary for the making of an assessment and/or
   (b) there has been no avoidance of duty and/or
   (c) there has been no error in calculation or mistake of fact.

51. By letter dated 10th July 1952 the commissioner disallowed the said objection to the amended assessment and by letter dated 22nd July 1952 the appellant requested the commissioner to treat the said objection as an appeal and to forward it to the High Court of Australia.

52. The right of each party to take objection to the admissibility of any of the foregoing facts on the ground of irrelevance is expressly reserved.

53. The parties desire that certain questions raised by the said appeal should be determined by a Full Court of the High Court and I accordingly state the following questions for the opinion of a Full Court :—

(1) Should the said amount of £2,831 (being £2,830 18s. 10d. to the nearest pound) referred to in par. 46 above be included in the estate of the testator for the purposes of the *Estate Duty Assessment Act* 1914-1947 ?

(2) If question (1) is answered " no ", should any sum in respect of the distribution under the *Wool Realization (Distribution of Profits) Act* 1948 made pursuant to the notice referred to in par. 46 hereof be included in the testator's estate for the purposes of the *Estate Duty Assessment Act* 1914-1947 and

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

if so what sum should be so included or how should such sum be calculated ?

(3) If question (1) is answered " yes ", did the commissioner have power under the *Estate Duty Assessment Act* 1914-1947 to issue the said amended assessment ?

K. A. Aickin, for the appellant. The first question in the case should be answered " no ". The sum received was a statutory gift made, not to the testator, but to his personal representative under s. 11 of the *Wool Realization (Distribution of Profits) Act* 1948, to be held on trusts ascertained by reference to testator's will or the statutes of distribution. [He referred to *Maslen* v. *Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.*, per *Fullagar* J. (1); *Federal Commissioner of Taxation* v. *Squatting Investment Co. Ltd.* (2); *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (3); *Ritchie* v. *Trustees Executors & Agency Co. Ltd.* (4).] Up to the moment of payment of a sum distributed under the Act, there is no more than a chance or expectation that a payment will be made. If such a payment, when made, forms part of a supplier's estate it is not part of his dutiable estate for estate duty purposes. [He referred to *Poulton* v. *The Commonwealth* (5); *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation (Thomson's Case)*, per *Latham* C.J. (6), per *Dixon* J. (7); *Lord Advocate* v. *Bogie* (8); *In re Cousen's Will Trusts*; *Wright* v. *Killick* (9); *Ex parte Coote* (10); *In re Rule's Settlement* (11); *In re Davis, dec'd.* (12).] If the testator had a right at the date of death which formed part of his dutiable estate it was a right to successive distributions under the Act, which must be valued as at the date of death by discounting back to that date the amounts of distributions made from time to time. Brokerage is deductible from a distribution in arriving at the net dutiable asset. [He referred to *Moss* v. *Federal Commissioner of Taxation* (13).] The commissioner had no power under s. 20 of the *Estate Duty Assessment Act* 1914-1950 to issue the amended assessment. There had been a " full and true disclosure " by the executor and there was no mistake of fact

(1) (1950) 82 C.L.R. 101, at pp. 126-127; (1951) 88 C.L.R. 401, at p. 411.
(2) (1954) 88 C.L.R. 413, at pp. 429 et seq.
(3) (1926) 38 C.L.R. 12.
(4) (1951) 84 C.L.R. 553, at pp. 577-578.
(5) (1953) 89 C.L.R. 540, at p. 600.
(6) (1948) 77 C.L.R. 1, at p. 20.
(7) (1948) 77 C.L.R., at pp. 26-27.
(8) (1894) A.C. 83.
(9) (1937) Ch. 381.
(10) (1948) 49 S.R. (N.S.W.) 179; 66 W.N. 28.
(11) (1915) V.L.R. 670.
(12) (1953) V.L.R. 639.
(13) (1947) 77 C.L.R. 184.

by the commissioner. [He referred to *Federal Commissioner of Taxation* v. *Westgarth* (1); *Foster* v. *Federal Commissioner of Taxation*, per *Latham* C.J. (2), per *Dixon* J. (3).]

D. I. Menzies Q.C. (with him *G. H. Lush*), for the respondent. After the enactment of the *Wool Realization (Distribution of Profits) Act* 1948, a supplier of wool had a property right in respect of participating wool submitted for appraisement, which right was restricted only by the limits imposed by ss. 28 and 29 of the Act (as to enforceability and alienation) and possibly by s. 11. In the case of a supplier dying after the commencement of the Act, this right is given by s. 7. It is the same right which is transmitted on death to his executors, either by s. 11 or by operation of law. Section 11 refers primarily to a person who has died before the Act comes into operation, its principal concern being to protect those who died when they merely had an expectancy. [He referred to *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomson's Case*), per *Latham* C.J. (4), per *Dixon* J. (5); *Commissioner of Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (*Watt's Case*), per *Ferguson* J. (6); per *Isaacs* J. (7), per *Starke* J. (8); *Ritchie* v. *Trustees Executors & Agency Co. Ltd.* (9); *Ex parte Coote* (10); *Federal Commissioner of Taxation* v. *Squatting Investment Co. Ltd.* (11); *Poulton* v. *The Commonwealth* (12); *Maslen* v. *Perpetual Executors Trustees & Agency Co.* (*W.A.*) *Ltd.*, per *Fullagar* J. (13).] Alternatively, if the testator did not die possessed of a right under the *Wool Realization (Distribution of Profits) Act* 1948 cognizable at law and forming part of his personal property under the *Estate Duty Assessment Act* 1914-1947 then, by s. 11 (*b*) of the former Act, the amount of any distribution to the testator's executor is approximated to part of his estate and exposed to estate duty. [He referred to *In re Davis* (14).] The commissioner had power to issue the amended assessment in dispute either under s. 20 (2) (*b*) of the *Estate Duty Assessment Act* 1914-1947 because the executor had not made a "full and true disclosure" and there was an "avoidance of duty", or under s. 20 (3), because the commissioner had made a mistake of fact.

(1) (1950) 81 C.L.R. 396.
(2) (1951) 82 C.L.R. 606, at p. 614.
(3) (1951) 82 C.L.R., at p. 619.
(4) (1948) 77 C.L.R. 1, at pp. 19-20.
(5) (1948) 77 C.L.R., at pp. 26-27.
(6) (1925) 25 S.R. (N.S.W.) 467, at pp. 486-487; 42 W.N. 191.
(7) (1926) 38 C.L.R. 12, at p. 33.
(8) (1926) 38 C.L.R., at p. 46.
(9) (1951) 84 C.L.R. 553, at pp. 577-580.
(10) (1948) 49 S.R. (N.S.W.) 179; 66 W.N. 28.
(11) (1954) 88 C.L.R. 413, at pp. 423-424, 429, 430.
(12) (1953) 89 C.L.R. 540.
(13) (1950) 82 C.L.R. 101, at pp. 120-127; (1951) 88 C.L.R. 401, at pp. 410-411.
(14) (1953) V.L.R. 639, at pp. 641-643.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

A measure of the full disclosure required of an executor is given by reference to s. 10. " Executor's values " must be disclosed. The executor's letter disclosing the first distribution merely stated a sum of money and not the executor's true opinion as to the value of the right to share in wool scheme distributions. Alternatively, the commissioner clearly made a mistake of fact in treating the item included in the original assessment as a sum of money rather than as rights under the *Wool Realization (Distribution of Profits) Act* 1948 requiring to be valued. [He referred to *Federal Commissioner of Taxation* v. *Westgarth* (1).]

K. A. Aickin, in reply.

Cur. adv. vult.

NOV. 29.

The following written judgments were delivered :—

DIXON C.J. On the argument of this case stated I formed a definite opinion that the appeal out of which it arose was bound to succeed on the simple ground that the appellant had before the making of the assessment for estate duty " made to the commissioner a full and true disclosure of all the material facts necessary for the making of the assessment ", within the meaning of those words in s. 20 (2) of the *Estate Duty Assessment Act* 1914-1947, with the consequence that the condition precedent to the only relevant power of amendment possessed by the commissioner was not fulfilled. Four months before the date of the assessment the solicitors for the appellant executor wrote a letter to the respondent commissioner which appears to me to give the latter all the information there was to be had as to the deceased's title to participate in the distributions made by the Australian Wool Realization Commission under the *Wool Realization (Distribution of Profits) Act* 1948, namely that the appraised value of his participating wool was £45,295 2s. 2d. It is true that the letter is expressed as advice of an additional asset consisting in the receipt by the executor of the first dividend of six and one quarter per cent amounting to £2,830 18s. 10d. So to describe the dividend implies a legal misconception. But that is not material ; the disclosure of fact was there. Nor is it material that the commissioner shared the misconception. The letter conveyed all the information needed by the commissioner or possessed by the executor. In order to fix upon an estimate of the present value of the deceased's distributable share as at the time of his death, it might be necessary for the commissioner to form some anticipatory opinion of the amount of the fund that was likely to

(1) (1950) 81 C.L.R. 396.

arise in the commissioner's hands and become available for distribution. But on that question the executor could know no more than the commissioner. So far as it could be guessed at, by anybody outside the Wool Realization Commission, it depended upon public general information. The deceased's title to share in the distribution of the fund in respect of the participating wool he had submitted for appraisement depended, of course, entirely upon the *Wool Realization (Distribution of Profits) Act* 1948. The commissioner perhaps knew more about that than the executor but in any case it is a matter of law not fact. There were therefore no facts of which full and true disclosure was not made to the commissioner.

This conclusion means that to determine the appeal it is not necessary to decide the question whether the value of the deceased's title to share in the distributions under the *Wool Realization (Distribution of Profits) Act* 1948 formed part of his personal property within s. 8 (3) of the *Estate Duty Assessment Act* 1914-1947. But it is doubtless an important question and I agree that we should express our opinions upon it. Mine may be stated very briefly indeed, for I have had the advantage of reading the reasons prepared by *Fullagar* J. and those prepared by *Kitto* J. The two judgments are to my mind in complete harmony and I desire to express my general agreement with both of them, not only upon the question whether the title of the deceased to share in the distribution of the wool profits formed property, but also on the question of the competence of the amendment. All I desire to say for myself on the former question I can add in a few sentences. I think that the *Wool Realization (Distribution of Profits) Act* 1948 created in suppliers of participating wool what may properly be called a title to share in the distributions afterwards to be made. I use the word " title " as a convenient way of referring to the existence of certain vestitive facts which are prescribed by law as giving rise to an advantage which the law creates for the enjoyment of given persons whom it specifies by reference to such facts. In other words the statute here states certain conditions the fulfilment of which will, when the course prescribed by its provisions is followed, result in the receipt of a dividend in the distribution calculated in a specified manner. The existence of the prescribed facts raised at least a valuable expectation and the expectation depended on the statute. It may be said generally that an interest protected by law amounts to a right and certainly the deceased's expectation was an interest capable of forming a right of property, if protected by law. How the law protects an interest is not so important as the recognition which the law gives to it as something which the law intends to be

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Dixon C.J.

enjoyed. The question seems to me to be whether the statute does mean to give, as from the commencement of the Act, an interest protected by its provisions to the suppliers of participating wool.

I agree entirely in the view that s. 11 (*a*) gives no new or original title to an executor but provides for payment to him as the person on whom the title to payment has devolved. When the provisions of the Act are examined I think that it is a proper conclusion from them that the legislature meant to create in the suppliers of participating wool an immediate interest sufficiently protected by the machinery it established, although deprived of voluntary alienability and of enforceability by suit.

That amounts, I think, to a sufficient right of property to be assessable under s. 8 of the *Estate Duty Assessment Act* 1914-1947.

The view which has been adopted by *Fullagar* and *Kitto* JJ. and myself does not allow of categorical answers to the precise questions contained in the stated case.

The following answers, I think, would be appropriate and would suffice to dispose of the appeal:

1. If, contrary to the answer to the third question, it had been competent to the commissioner to amend the assessment, the figure of £2,830 18s. 10d. was wrongly adopted.
2. On the same hypothesis the present value as at the time of the deceased's death of his expected share or dividend in the distribution of wool profits should have been estimated.
3. The commissioner did not have power under the *Estate Duty Assessment Act* 1914-1950 to issue the amended assessment.

McTIERNAN AND TAYLOR JJ. The fundamental question in this case is whether the provisions of the *Wool Realization (Distribution of Profits) Act* 1948 operated to confer upon one Walter Cobbold Curphey Cain, in his lifetime, any right which may properly be regarded as property for the purposes of the *Estate Duty Assessment Act* 1914-1947.

Cain was a person who in the period between the years 1939 and 1946 supplied "participating wool" within the meaning of the former Act but he died on 30th April 1949, some four months after that Act came into operation, and nearly seven months before the notification, on 24th November 1949, by the Minister of State for Commerce and Agriculture, that an amount of £25,000,000 was available for distribution under the Act. This notification was made under s. 6 (1) of the Act as also was the second notification of 27th March 1952 (see case stated pars. 40 and 46) that a further

sum of £25,000,000 was available for distribution. In the distribution of each of these sums by the Australian Wool Realization Commission payments were made to the appellant who is and was at all material times the executor of the deceased. For reasons which appear upon a consideration of the case stated no question arises in relation to the payment made in the course of the distribution of the first sum above-mentioned and the inquiry in the case is limited to the second distribution and the antecedent right, if any, which the deceased, in his lifetime, had with respect to a share in it.

In the course of the second distribution the appellant received, on 28th March 1952, the sum of £2,816 and on 30th May 1952 an amended assessment, which purported to include this amount in the value of the deceased's estate for duty pursuant to the *Estate Duty Assessment Act*, was issued by the respondent. To this assessment the appellant objected upon a number of grounds which, *inter alia*, raised the question to which we have already adverted.

For the purpose of endeavouring to clarify the point in issue on this aspect of the case it may at once be said that the mere receipt of the sum in question on 28th March 1952 by the executor of the deceased did not, and could not, operate to fix that sum with the character of property of the deceased *at the time of his death*. But if it was paid to the executor pursuant to some legal obligation owed to the deceased at the time of his death then it may be said that the complementary right of the deceased to receive or recover it at some future time constituted part of his estate as being part of his personal property within the meaning of the *Estate Duty Assessment Act*. In such circumstances, however, it would be the value of that right which should be included and not necessarily the quantum of the amount subsequently received by his executor.

These observations bring to the forefront of the case the provisions of the *Wool Realization (Distribution of Profits) Act* 1948 and immediately raise the question whether they conferred upon the deceased a right to participate in any future distribution of surplus profits which might properly be classified as property. Several of the provisions of the latter Act have already been the subject of judicial consideration and it is unnecessary to refer to them in great detail. But it is of importance to notice some of the fundamental provisions of the Act. In the first place it is of importance to observe that Pt. III—"Persons Entitled"—contains provisions for ensuring that any payments made shall be made, primarily, to the persons who supplied the participating wool for appraisement. We say primarily because special provision is made,

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

McTiernan J. Taylor J.

inter alia, for cases where any such person has, since supplying wool of that character, become bankrupt or has died or, being a company, has become defunct. In the case of a person who has died any amount which would otherwise be payable under the Act to that person is to be payable to the personal representatives of that person and, by sub-s. (*b*) of s. 11, the rights, duties and liabilities of the personal representatives in respect of any such amount are to be the same as if it were part of the proceeds of a sale of the wool by the deceased person made at the time of the supply of the wool for appraisement. Similarly where participating wool was supplied for appraisement by a partnership which has been dissolved, any amount which would otherwise be payable under the Act to the partnership may be paid by the commission to any former partner or partners and, by sub-s. (3) of s. 10 where any such amount has been paid pursuant to the last-mentioned provision the rights, duties and liabilities of the person to whom it is paid in respect of the amount are to be the same as if it were part of the proceeds of a sale of the wool by the partnership made at the time of the supply of the wool for appraisement. At first sight it may appear that the terms of s. 11 (*b*) dispose of the question in this case. This would be so if the provisions of that sub-section require, in the fullest sense, that the payments made to the deceased's executor be regarded as being made in satisfaction of an obligation to account for the balance of the proceeds of a sale of the subject wool made by the deceased at the time of the supply of the wool for appraisement. In those circumstances the payment would, in law, be in discharge of a debt owed to the deceased at the time of his death. But this view of the effect of s. 11 is not open in view of the decision of the Judicial Committee in *Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.* v. *Maslen* (1) and *Federal Commissioner of Taxation* v. *Squatting Investment Co. Ltd.* (2). In the former case the Judicial Committee was concerned with a deed of assignment by which one of two former partners purported to assign " all his right title and interest in . . . (*d*) the benefit of all contracts and engagements and book debts " to which he and his former partner might be entitled in connection with the former partnership business. The partnership had during its currency supplied participating wool and one question which arose was whether, having regard to the provisions of s. 10 (3), the view should be taken that a subsequent payment in the course of a distribution of surplus profits should be regarded as a payment in discharge of a debt existing *at the time of*

(1) (1952) A.C. 215; (1951) 88 C.L.R. 401.

(2) (1954) A.C. 182; (1954) 88 C.L.R. 413.

the assignment and appropriately described by the language of the deed of assignment. The Judicial Committee held that it should not be so regarded and if the true basis of that decision is not made clear by the reasons in that case it is made abundantly so by their Lordships' reasons in the second of the two cases to which we have referred. In our view the basis of the decision in the former case is quite clear and our somewhat tentative observation is made merely in view of the argument which was advanced to their Lordships by the respondents in the latter case. In *Maslen's Case* (1) their Lordships stated the competing contentions of the parties and pointed out that the respondents' argument depended upon the effect to be given to s. 10 (3). The relevant contention of the respondents and their Lordships' conclusion is stated in the following passage :—" The respondents, on the other hand, draw attention to the fact that the provisions of s. 7 (3) are stipulated to be subject to the Act, and rely on the terms of ss. 10 and 11 as distinguishing this from a case where a living partner claims the benefit of the payment. Section 10 (3), they say, no doubt authorizes payment, where a partnership is dissolved, to a former partner or his representatives. But when the money has been paid to him, his duties in dealing with it are prescribed by ss. 10 and 11. Those duties, they contend, are to treat the payment as part of the proceeds of the sale of the wool made at the time of its supply for appraisement, i.e. as if the supplier was entitled to the payment at that time. An identical obligation is, they maintain, imposed upon a personal representative under s. 11 since he is enjoined not to treat the sum paid as part of the personal estate but as having the quality of the proceeds of a sale made by the deceased supplier at the time when he furnished the wool for appraisement.

Their Lordships have to choose between these two constructions. Obviously the recipient, whether he be a former partner or a personal representative, cannot keep the money for himself. If he be a member of a dissolved partnership, he must account to his former partner, and if he be a personal representative, he must treat the money as part of the estate which he is administering. But do the provisions go further and stipulate that it is to be dealt with as if it were the result of a contract or debt which came into existence when the wool was supplied for appraisement ? So to construe the wording would be to do violence to the admitted fact that it is a gift. No doubt the wording might be clearer but prima facie the sums received are payable to the supplier and it is for the claimants to establish the contrary.

(1) (1952) A.C. 215 ; (1951) 88 C.L.R. 401.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

McTiernan J. Taylor J.

The correct view, in their Lordships' opinion, is that it is a true gift to the supplier of the wool. It is not and never was part of the assets of the partnership. If it were to be regarded as part of the assets of the partnership there would be no necessity for the provision in s. 7 (4) that where two or more persons jointly supplied participating wool they were, for the purpose of determining their claims in relation to that wool in any distribution under the Act, to be treated as one person. As partners they would be so treated, but if they are individually entitled to a gift, a provision as to their joint right to receive payment would be required. In the opinion of the Board the respondents have not made out their claim." (1).

In the *Federal Commissioner of Taxation* v. *Squatting Investment Co. Ltd.* (2) their Lordships cited most of the above passage and proceeded :—" In that passage the Board rejects the suggestion that s. 10 (3) of the Act of 1948 has the result that a debt, equal to the amount of the subsequent payment, must be regarded as having been owed to the suppliers of the wool as from the date on which they supplied it. The suggestion thus rejected was the basis of the claim put forward by the assignees. They had contended that a debt of this amount must be deemed to exist at the date of supply, and as that date was prior to the assignment of 1946 the debt must be deemed to have been included in the assets assigned to them. The rejection of that suggestion, and the consequent refusal of that claim, was the only decision given by the Board in *Maslen's Case* (3) " (4).

These passages appear to us to be direct authority for the proposition that the provisions of s. 11 (*b*) do not operate to create, retrospectively, a debt which must be deemed to have arisen at the time when wool was supplied for appraisement. Indeed it would be strange if the legislature, in enacting ss. 10 (3) and 11 (*b*), intended to produce such a result with its obvious consequence in the case of partnerships which had been dissolved or persons who had died before receipt of payment made in the course of distributions under the Act and yet made no such provision in respect of that general class of persons who by surviving to the date of any such distributions would become entitled to receive their payments pursuant to the provisions of s. 7. Perhaps it may be said that if the legislature intended that payments made in the course of any distribution should be regarded as having been made in discharge of obligations

(1) (1952) A.C., at pp. 228-229 ; (1951) 88 C.L.R., at pp. 410-411.
(2) (1954) A.C. 182 ; (1954) 88 C.L.R. 413.
(3) (1952) A.C. 215 ; (1951) 88 C.L.R. 401.
(4) (1954) A.C., at pp. 211-212 ; (1954) 88 C.L.R. at p. 429.

arising at the time of the supply of participating wool and existing from then until the date of payment some provision appropriate to produce this result might have been inserted in or in relation to s. 7 and that, if this course had been adopted, there would have been no necessity thereafter to make special provision for the death or bankruptcy of any supplier after the date of supply and before payment. In such circumstances the interest, retrospectively created, of any such person would be regarded as devolving upon his trustee in bankruptcy or his executor or administrator as the case might be. There is, we think, no doubt that the provisions of s. 11 (*b*) operate only to impress the amount of payments, *when made*, with a particular notional character in order that the legislature's intentions with respect to the beneficial destination thereof might be effectuated and, in our opinion, the two decisions of the Judicial Committee to which we have referred are authority for this proposition. It should be observed that the subject matter which assumes the specified character is the amount which is paid to the legal personal representative and that specified character is assumed only when it is paid. The sub-section does not purport to create any antecedent right to receive payment or to invest with any specified character the right to or expectation of payment which may be said to arise from other provisions of the Act. Accordingly no support for the impeached assessment can be obtained from its provisions.

The next question for consideration is whether the other provisions of the Act confer upon a supplier of participating wool any right or interest which may for the purposes of the *Estate Duty Assessment Act* be regarded as the personal property of the deceased. Speaking of the provisions of s. 8 of that Act *Dixon* J. (as he then was) in *Thomson's Case* (*Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation*) (1) said :— " 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

(1) (1948) 77 C.L.R. 1.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

McTiernan J. Taylor J.

however well warranted by political or business considerations, will not do, if it is devoid of legal title " (1). We respectfully agree with these observations and it is with their significance in mind that the other provisions of the *Wool Realization (Distribution of Profits) Act* must be approached and considered. But before going to them it is convenient to make two other preliminary observations. The first of these is that it is clear that before the passing of the Act no supplier of participating wool had any right or interest in the future surplus profits which could, upon any meaning of the term, be classified as property. *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd. (Watt's Case)* (2) is clear authority for this. The facts of that case showed, to use again the language of *Dixon* J. (as he then was) in *Thomson's Case* (3) that :—" 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 " (4). The other preliminary observation which we wish to make is that the question whether the Act, the operation of which commenced before the deceased died, conferred upon the deceased in his lifetime any right or interest in the nature of property must be considered quite independently of those events which occurred after his death. For if the Act conferred some such right or interest upon him it would be of no consequence in reaching that conclusion that no surplus profits subsequently accrued or that no payments out of ascertained surplus profits were subsequently made. Likewise if the Act did not confer any such right or interest upon him in his lifetime it would be quite immaterial that later events showed that if the deceased had survived he would have received substantial payments, or that, not having survived, other persons received payments pursuant to the special provisions of s. 11. In the latter case the payments or the beneficial interests in them would be received by such persons not by way of devolution from the deceased but in substitution for him.

The Act is expressed to be an Act to provide for the distribution of any ultimate profit accruing to the Commonwealth under the Wool Disposals Plan, and for other purposes. As a condition precedent to any distribution s. 5 provides that as soon as practicable after the wool disposals profit has been ascertained, the Treasurer

(1) (1948) 77 C.L.R., at pp. 26-27.
(2) (1926) 38 C.L.R. 12.
(3) (1948) 77 C.L.R. 1.
(4) (1948) 77 C.L.R., at p. 27.

shall notify the amount thereof in the *Gazette*, and the amount so notified shall, for all purposes of the Act, be the amount of the wool disposals profit. The provisions of s. 6 authorize what may be called interim distributions after the making of a declaration by the Minister for that purpose with the approval of the Treasurer. Thereupon s. 7 provides that, subject to the Act, an amount equal to each declared amount of profit shall be distributed by the commission in accordance with the Act. The general basis of distribution is prescribed by sub-ss. (2) and (3) of s. 7 and those subsections are in the following terms :—" (2) There shall be payable by the commission, out of each amount to be distributed under this Act, in relation to any participating wool, an amount which bears to the amount to be distributed the same proportion as the appraised value of that wool bears to the total of the appraised values of all participating wool. (3) Subject to this Act, an amount payable under this Act in relation to any participating wool shall be payable to the person who supplied the wool for appraisement ". Part IV of the Act deals with the general method of distribution but it is not necessary to refer to those provisions in detail. That Part deals with the preparation of a list of those persons who, in the opinion of the commission, are entitled to share in distributions under the Act and with the obtaining and recording of relevant information. Section 28 provides that no action or proceedings shall lie against the commission or the Commonwealth for the recovery of any moneys claimed to be payable to any person under the Act, or of damages arising out of anything done or omitted to be done by the commission in good faith in the performance of its functions under the Act, while s. 29 provides that subject to the Act and the regulations, a share in a distribution under the Act, or the possibility of such a share, shall be, and be deemed at all times to have been, absolutely inalienable prior to actual receipt of the share, whether by means of, or in consequence of, sale, assignment, charge, execution or otherwise.

These provisions, it is said by the respondent, were enacted at a time when it was apparent that large surplus profits would be available for distribution and it was with this circumstance in mind that the Act was passed. We take this to mean that at the time the Act was contemplated and passed it was not merely possible but practically certain that there would be surplus profits available and that the Act was intended to provide for their future distribution in some equitable manner. With this statement we agree but it leaves untouched the vital question whether the Act conferred upon the deceased in his lifetime any right or interest in the nature

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

McTiernan J. Taylor J.

of property. Whether or not it did this can be ascertained not by an appreciation of the *general* purpose for which the Act was passed but by an examination of the provisions of the Act itself. The question is did the Act during the life of the deceased vest in him any right or interest which could, properly, be described as his "personal property"? Counsel for the respondent did not, of course, baulk at this inquiry but rather sought to examine the Act in the light of his general statement as to its purposes and we have merely paused in order to indicate that consideration of its general purposes will not help in determining the particular question involved. Consideration of the provisions of the Act lead us to the view that it did not, and did not intend, to create, immediately, private rights of any description. We agree, of course, that in the circumstances in which it was passed it produced a situation in which the certainty that the deceased or some other person in substitution for him "would participate in the profits in question could not have been greater if it had rested on legal right". But the Act created this certainty, not by creating present rights, but by providing that the surplus profits when ascertained and after an appropriate declaration should be distributed. In the meantime, the expectation of the supplier did not, as far as we can see, present one single attribute of "a right cognizable at law". The fact that it was not open to a supplier to secure a share of any undistributed profits by legal process may not, of itself, be of great significance for many illustrations may be given of "property" which does not possess this attribute. A classic illustration is the proprietary interest of an owner of chattels which will continue to subsist although he is not in possession of them and his right to sue for their recovery has become statute barred. Nevertheless, he is still the owner of them and may assert his right as owner by retaking possession of them (cf. *Williams on Personal Property*, 16th ed. (1906), at pp. 28, 29). Other interests not enforceable by action, such as foreign government securities, are so much a subject of trade that it would be idle to deny that a holder, being possessed of a saleable commodity, is not the owner of property. It should, perhaps, be mentioned that the absence of a right to resort to legal process is not a feature of a Commonwealth Government security (cf. *McGrath* v. *The Commonwealth* (1)) and the creation of securities which do not afford such a right would be regarded in the Commonwealth, at least, as unusual. Many other illustrations may be given but in each one it will, we think, be found that the interest

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

under consideration possesses, at least, some of the attributes of " property " which are capable of enjoyment by the owner.

The case of the respondent would, we think, be stronger if upon consideration of s. 7 of the Act alone, it were assumed that its provisions conferred a *right* upon every person who had supplied participating wool for appraisement. On that hypothesis it might be said that the provisions of ss. 28 and 29 do not annihilate the right previously given. We think, however, that this is not a permissible approach to the question whether the Act operated to create interests in the nature of " property " and that this question can be determined only upon a fuller examination of the provisions of the Act. In any such examination ss. 28 and 29 must be considered, not for the purpose of determining whether their provisions annihilate a right previously given, but for the purpose of determining whether the effect of the legislation was to create *rights* at all. As we have already said the expectation of a person who had supplied participating wool for appraisement bore none of the indicia of " a right cognizable at law ". It did not confer any benefits capable of enjoyment; it could not be disposed of or charged and upon the making of any distribution after the death of the supplier the appropriate payment would be made to his legal personal representatives. The provisions of s. 11 were designed to operate in respect of payments made after the death of a supplier, even if he had in his lifetime purported in the clearest language to dispose of his expectation otherwise. Further, his expectation was not property for the purposes of judicial execution, nor would it pass, upon bankruptcy, to the official receiver. It is true that, with significant exceptions, s. 9 makes provision for payments to be made to the trustee in bankruptcy if, at any time after the supply of participating wool for appraisement, the affairs of the supplier have been administered in bankruptcy, but this consequence follows as the result of the special provisions of the section and not because the expectation is " property of the bankrupt ". Indeed, it seems that the provisions of s. 9 would operate notwithstanding an order of discharge under s. 119 of the *Bankruptcy Act* 1924-1950 and in spite of the provisions of s. 91 of that Act insofar as they specify that the property of a bankrupt divisible among his creditors shall include all property which belongs to or is vested in the bankrupt, or is acquired by or devolves on him *before his discharge.* Section 10 makes special provision for other cases. Where the supplier was a company which has become defunct the payment which otherwise would be made to the company is to be made to " such person as appears to the commission to be justly entitled to

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

McTiernan J. Taylor J.

receive it ". The exercise of the discretion conferred by this section appears to us to be inconsistent with the proposition that prior to its dissolution the expectation which the company had enjoyed constituted its " property " in any sense. Considerations such as these lead us to think that it would be erroneous to say that s. 7 created rights " cognizable at law " and that the succeeding sections did no more than make appropriate provision for the devolution and transmission of the " property " of the supplier of participating wool for appraisement. In our view the Act did not create interests in the nature of property and did not purport or intend to make provision for devolution and transmission of the interest of a supplier. Rather it declared the policy of the legislature with respect to such surplus profits as might arise and, in doing so, selected, primarily, as the objects of any future distribution, the suppliers of participating wool for appraisement whilst, in the circumstances respectively specified in ss. 9, 10 and 11 the provisions of those sections were designed to take effect in substitution for the provisions of s. 7. In these circumstances we find it impossible to regard the expectation created by the Act as property for the purposes of the *Estate Duty Assessment Act*. Such an expectation was not, so far as we are able to see, property for any other purpose and we can see no reason why it can be so regarded for the purposes of that Act.

The view we have formed renders it unnecessary to consider the other points raised by this appeal and for the reasons which we have given the appeal should be upheld.

FULLAGAR J. In this case I have had the advantage of reading the judgment prepared by *Kitto* J. So far as it deals with the question whether the benefits derivable by the late Mr. Cain or his executor under the *Wool Realization (Distribution of Profits) Act* 1948 were part of his personal property at his death for the purposes of the *Estate Duty Assessment Act* 1914-1947, I am in complete accord with that judgment, but there are one or two observations that I wish to add.

Some reliance was placed by the appellant on s. 11 of the Act of 1948. I might have felt more difficulty over that section if I had not found occasion to consider it alongside s. 10 (which was the then immediately relevant section) in *Maslen* v. *Perpetual Executors Trustees & Agency Co. (W.A.) Ltd.* (1). I then formed the view, which I have seen no reason to change, that the effect of s. 11 (*b*) was that the executor or administrator received the deceased person's share of the wool profit *as* executor or administrator, and

(1) (1950) 82 C.L.R. 101, at pp. 126-127.

was required to deal with it as part of the deceased person's estate. As from the moment of receipt it was to assume in the hands of the executor or administrator the character of the proceeds of a sale of wool in the lifetime of the deceased. It would be available for payment of the debts of the deceased. I thought that it might have been specifically bequeathed by will, s. 29 applying only to dispositions *inter vivos*. I thought also that it would pass under a general bequest of personalty, and that, in the case of an intestacy, the beneficial interest would belong to the persons entitled under the relevant statutes of distribution. I cannot find anything in the judgment of their Lordships, when the case went before the Privy Council (1) to cast any doubt on the views which I expressed on s. 11, and, if those views are correct, they seem to me not merely to dispose of any argument based by the appellant taxpayer on that section, but to provide a strong argument for the commissioner. It is not merely that s. 11 does not express a purely arbitrary choice of recipient. On the contrary, the real benefit which it gives is not substitutional but derivative. The testator had an interest, which was not contingent on his survival to any particular time. It was something which was within his disposition *post mortem*, and would have been within his disposition *inter vivos* if it had not been for the express provisions of s. 29. The case thus differs widely from such cases as *Lord Advocate* v. *Bogie* (2).

The position can be put in another way. There are theoretically three points of time as at which s. 11 may become operative—(1) the date of the commencement of the Act, (2) the date of the publication in the *Gazette* of the notice under s. 6, and (3) the date of actual payment. But it seemed to me in *Maslen's Case* (3) and it still seems to me, that the only reasonable and practicable view is that s. 11 applies wherever the death of the supplier has occurred before actual payment is effected. For all purposes of the present case the date of the death of Mr. Cain is the material date. He died after the commencement of the Act, but before any payment was made. As at that date the position was governed by s. 7 of the Act. If at that date s. 7 gave him a right, which was part of his estate, within the meaning of the *Estate Duty Assessment Act*, that position could not be altered or affected by s. 11 unless that section had the effect of depriving him of that right in the event of his death before payment. But, so far from depriving him of what s. 7 gave him, s. 11 really gives effect to that right in the only way

(1) (1952) A.C. 215; (1951) 88 C.L.R. 401.
(2) (1894) A.C. 83.
(3) (1950) 82 C.L.R. 101.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Fullagar J.

in which effect can be given to it, viz. by directing payment to his personal representatives.

I felt at one stage some difficulty in distinguishing from the present case the cases of *Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. Ltd.* (*Watt's Case*) (1) and *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomson's Case*) (2). I think, however, that each of these cases is clearly enough distinguishable.

So far as *Watt's Case* (3) is concerned, there seems indeed to be some force in what is said by *Higgins* J. in his dissenting judgment (4). But the position at Mr. Watt's death was very materially different from the position at Mr. Cain's death. Watt died on 21st May 1921. Before that date the company commonly known as " Bawra " had been incorporated, and it had been agreed between that company and the Central Wool Committee that the company would " issue in the names of such companies firms and persons as the Central Wool Committee (for and on behalf of the Commonwealth Government) should nominate " 12,000,000 shares and £10,000,000 " priority wool certificates ", with a proviso for cash payments to be made in certain cases. But it was not until 12th July 1921 that the Central Wool Committee nominated the " companies firms and persons " who were to receive shares, certificates and cash. Before that date, in the view of the majority of the Court, it was impossible to say that any company, firm or person, had any right of any sort or kind against the Commonwealth or the Central Wool Committee or Bawra. In the present case Cain died on 30th April 1949, and the *Wool Realization* (*Distribution of Profits*) *Act* had come into force on 21st December 1948. That Act did, in my opinion, confer rights—contingent rights, it is true, but rights in the relevant sense.

In *Thomson's Case* (2) in the view of the majority of the Court, nothing in the nature of a right ever came into existence. The Commonwealth had simply made certain refunds of income tax, which it was under no obligation to make. In *Thomson's Case* (2) the payment was not made until after death, and there could not be said to have been, at the date of death, anything more than a hope or belief that the payment would be made : there was not even, as there was in *Watt's Case* (3) an expectation founded on an honourable understanding and a long course of conduct. *Dixon* J. (as he then was) referring to the expression " his personal property " in s. 8 (1) (*b*) of the *Estate Duty Assessment Act*, said :—" No doubt

(1) (1926) 38 C.L.R. 12.
(2) (1948) 77 C.L.R. 1.
(3) (1926) 38 C.L.R. 12.
(4) (1926) 38 C.L.R., at pp. 39-40.

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 " (1). And his Honour refers to *Watt's Case* (2). It is plain from what follows in his judgment that his Honour was not here using the word " cognizable " as meaning " enforceable by action or suit ". He was referring to a right existing by virtue of the common law or of equity. For he says : " 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 " (3). The distinction, though often criticised from a theoretical point of view, is, of course, a commonplace of English law, and is capable of involving important practical consequences.

It is, I think, such a right that is given by the Act of 1948. Before the Act there had been an expectation—"well founded in fact " and " well warranted by political and business considerations "—but no more than an expectation. After the Act there was, in my opinion, a right. It was, of course, at Mr. Cain's death a contingent right, because it depended on the taking of various steps by the Treasurer and the Minister. But, if and when those steps were taken, it became an accrued right, and, if it were not for the express provisions of s. 28, it would be enforceable by action against the Wool Realization Commission. It was obviously of value, and, if it were not for the express provisions of s. 29, it would be readily saleable even before it became an accrued right. It was, in my opinion, property within the meaning of the *Estate Duty Assessment Act*. It would have to be valued as at the date of Mr. Cain's death, but valuation would present no serious difficulty. The conclusion that it should be regarded as part of his estate is, I think, supported by much that was said in *Ritchie* v. *Trustees Executors & Agency Co. Ltd.* (4) and *Squatting Investment Co. Ltd.* v. *Federal Commissioner of Taxation* (5). In the former case, for example, it is said that the Act of 1948 converted " the expectations which existed into claims which, though not actionable, became claims with a legal foundation " (6). In the latter case it was held by the Privy Council that the payments made were the proceeds of a

(1) (1948) 77 C.L.R., at pp. 26-27.
(2) (1926) 38 C.L.R. 12.
(3) (1948) 77 C.L.R., at p. 27.
(4) (1951) 84 C.L.R. 553.
(5) (1953) 86 C.L.R. 570 ; (1954) A.C. 182 ; (1954) 88 C.L.R. 413.
(6) (1951) 84 C.L.R., at p. 577.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Fullagar J.

business carried on by the taxpayer. There is real difficulty in saying that a claim with a legal foundation (even though not enforceable by action) to receive proceeds of a business carried on by him is not an asset—property—in the hands of a man who dies before actual payment is made.

The other question in the case is whether the commissioner had power to amend his original assessment of estate duty. On this question also I am in accord with *Kitto* J., but I have felt some difficulty over it, and again I wish to add a few words. This question arises in this way. Section 10 of the *Estate Duty Assessment Act* requires an executor to furnish to the commissioner "a full and complete return of all the estate in Australia" of his testator. I think that I ought to have included in the case, which I stated, a copy of the return lodged in this case, but its omission seems to be of no consequence, because it is common ground that no reference was made in it to any actual or contingent rights of the testator in respect of profits arising out of the wool scheme. On or about 5th December 1949 the appellant company received from the Wool Realization Commission through the testator's brokers a cheque for a sum of £2,816 15s. 9d. This sum represented the share of the testator, or his estate, in a first distribution made under the Act of 1948, and was calculated as six and one-quarter per cent of the appraised value of wool which had been submitted by the testator for appraisement less a small sum for broker's commission. On 3rd November 1950 the solicitors of the appellant wrote to the commissioner a letter saying: "Re Estate of Walter C. C. Cain deceased: We have been instructed to advise you of the following additional asset—Appraised value of participating wool held by Australian Wool Realization Commission £45,295 2s. 2d.—$6\frac{1}{4}\%$ of which is £2830 18s. 10d." The amount stated was the gross amount before deducting broker's commission. All these things took place before the commissioner made any assessment of estate duty.

The original assessment was notified to the appellant company on 9th March 1951. The notice of assessment was accompanied by a statement showing certain alterations which had been made in the dutiable estate as shown by the return. These alterations included an addition of "Wool payments as advised 3/11/50—£2831." The duty so assessed was paid in due course. On or about 28th March 1952 the appellant company received from the Wool Realization Commission a second cheque for £2,816 15s. 9d. in respect of a second distribution under the Act of 1948. The amount was calculated in exactly the same way as in the case of the first payment. The appellant company did not at any time

inform the commissioner of this second payment. The fact that it had been made was first discovered by the commissioner in the course of what is described as a " routine search " at the Victorian Probate Duty Office on 20th May 1952. On 30th May 1952 the commissioner issued a notice of the amended assessment which is now challenged. The amendment added to the gross value of the estate " Second Wool Distribution—£2831 ". Certain consequential amendments were necessitated by this addition, and the net amount of additional duty claimed was £131 13s. 4d.

The question whether the amendment of the original assessment was authorized by law depends on s. 20 of the *Estate Duty Assessment Act*. It is not, I think, irrelevant to observe at the outset that the situation to which that section has to be applied was one in which both the taxation office and the taxpayer thought that the Act of 1948 had, or probably had, brought an asset into existence, but neither had any clear conception of the nature of the asset. Actually, the question whether the benefit given by the Act of 1948 was " property " of the testator, and therefore part of his dutiable estate, was itself a question of very considerable difficulty. But, if that question were to be answered in the affirmative, the position was quite clear, and it is not now in dispute. The position was not that payments made under the Act had to be added to the gross value of the estate, as and when received. It was simply that the value, as at the testator's death, of future payments receivable under the Act had to be included in the estate, and duty assessed and paid once and for all. Both the original assessment and the amended assessment, therefore, proceeded on a wrong basis. I do not know that even now it is placed beyond doubt that assessment on a correct basis would have led to more duty being payable than has in fact been paid, but I should think it could be safely assumed that this would be so, and it has in fact been assumed throughout. The case states that the commissioner became aware in or about July 1951 of the facts which it would be necessary to know in order to make something like an accurate valuation, but the facts necessary for making a valuation were readily ascertainable before the date of the original assessment, and at no stage would a valuation have presented any serious difficulty.

I do not think that it is possible for the commissioner to justify the amended assessment under sub-s. (3) of s. 20. That sub-section applies where the executor has made, before assessment, " a full and true disclosure of all the material facts necessary for the making of an assessment ", but it authorizes only amendments " to correct an error in calculation or a mistake of fact ". Clearly there had

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Fullagar J.

been no error in calculation, and the mistake which had been made by the commissioner was one of law and not of fact. Nor, for that matter, did the amended assessment make any attempt to correct the mistake which had really been made.

If, therefore, the amended assessment is to be justified, it must be under sub-s. (2) of s. 20, and this means that the commissioner must establish that the executor did *not* make, before the original assessment, a " full and true disclosure of all the material facts necessary for the making of an assessment." It is quite clear, I think, that the original return under s. 10 did not make the necessary full disclosure. I have already said that I think it must be taken that that return contained no reference to anything that might belong or accrue to the estate under the Act of 1948. It would, of course, be nothing to the point to say that the executor honestly believed that any " rights " given by the Act were not " property ". To omit an asset in the honest but mistaken belief that it is not an asset is to fail to make the full disclosure which s. 20 (2) requires. But did the letter of 3rd November 1950 (which has been set out in full above) make the necessary " full disclosure " ? I have felt some doubt about the matter. Section 10 (2) requires the executor to " set forth the descriptions and values of the items comprising the estate ", and, with regard to the " item " in question, the letter certainly did not do that. I would think, however, that there might be full and true disclosure for the purposes of s. 20, although there was not a strict compliance with s. 10. On the other hand, I would be disposed to take a very strict view of what is meant by full disclosure, and, generally speaking, I would hold (as I held in *Australasian Jam Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1)) that it is not enough for the taxpayer to disclose so much as might be expected to cause the commissioner to ask questions or make inquiries.

I have, however, come to the conclusion that the letter does make sufficient disclosure of the facts necessary for the making of an assessment. The executor knew that the distribution was an " interim distribution ", because the " credit note " accompanying the payment had told him so, and the executor did not expressly tell the commissioner that the payment represented an interim distribution. On the other hand, it did tell the commissioner, in effect, that the testator had supplied participating wool for appraisement during his lifetime to an appraised value of £45,295 2s. 2d. The letter is, on its face, highly ambiguous . But in truth it is not merely ambiguous. It is practically meaningless unless it is read

(1) (1953) 88 C.L.R. 23.

in the light of a knowledge of the "wool scheme" and of the provisions of the Act of 1948. And the decisive factor to my mind is that these matters were more or less matters of general knowledge —at least in a world in which the commissioner must be presumed to dwell—and the case stated sets out that the commissioner was at all times material aware of the provisions of the Act of 1948, and believed that "a further distribution of profits" under that Act would be made "over and above that referred to in the letter" of 3rd November 1950.

In the end it has seemed to me that, on the one hand, to one who has no knowledge of the wool scheme and the Act of 1948, the letter of 3rd November is simply unintelligible, while on the other hand, to one who has such knowledge, the true position must appear clearly enough even through the inaccurate and garbled language of the letter. It must appear to such a person that during the war the testator supplied wool for appraisement to a total value of £45,295, that that wool was catalogued as wool entitled to participate in any profit resulting from the wool scheme, and that his estate has received, or become entitled to receive, six and one-quarter per cent of the appraised value, which is £2,831. I think the letter would be so understood in the taxation office: that it was in fact so understood may almost be inferred from the language of the notice of assessment. Given the assumed knowledge, I do not think that the commissioner needed to be told more than the letter told him, and I think that there was full and true disclosure. It follows that the amendment of the original assessment was not authorized by s. 20 of the *Estate Duty Assessment Act*.

KITTO J. The Court has before it a case stated in an appeal by the executor of one Walter Cobbold Curphey Cain deceased (who will be referred to as the testator) against an amended assessment of the estate duty payable in respect of the testator's estate under the provisions of the *Estate Duty Assessment Act* 1914-1947.

The testator who carried on the business of a pastoralist and a wool-grower, died on 30th April 1949, domiciled, apparently, in Australia. In his lifetime he had submitted for appraisement, in accordance with the *National Security* (*Wool*) *Regulations*, certain wool which he had shorn in the seven wool seasons of the war period. The submission for appraisement operated as a compulsory acquisition of the wool by the Commonwealth. All the testator's wool was listed as participating wool in the appraisement catalogues used by the appraisers for the purposes of the appraisements made under the regulations. The testator had received in his lifetime the

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Kitto J.

full appraised prices of his wool and certain further payments known as flat rate adjustments, and thus had received the full amount of the compensation payable in respect of the acquisition of his wool.

On 21st December 1948, approximately four months before the testator died, the *Wool Realization (Distribution of Profits) Act* 1948 came into operation. By reason of the manner in which the testator's wool had been listed in the appraisement catalogues it was " participating wool " within the meaning of that Act (s. 4). After his death, a distribution under the Act was made, and the executor's share in that distribution amounted to £2,830 18s. 10d. This sum was received by the brokers through whom the testator had submitted his wool for appraisement, and the balance remaining after deducting broker's commission was paid by the brokers to the executor on 5th December 1949.

By an amended assessment the commissioner claimed estate duty on the footing that the estate of the testator chargeable to estate duty included the full amount of the executor's share in the distribution. For this he relied upon par. (*b*) of s. 8 (3) of the *Estate Duty Assessment Act*, which provides that for the purposes of the Act the estate of a deceased person comprises, *inter alia*, " 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 executor appealed against the amended assessment, and on the hearing of the appeal *Fullagar* J. stated this case for the opinion of a Full Court upon three questions. The first two questions require the Court to consider whether the testator, by virtue of having supplied participating wool for appraisement, had at his death personal property consisting of a right in respect of distributions to be made under the *Wool Realization (Distribution of Profits) Act*.

That Act has been considered on previous occasions both in this Court and in the Privy Council and only its leading provisions need be mentioned here. It provides for the distribution by the Australian Wool Realization Commission, by means of both interim and final distributions, of amounts equal in the aggregate to a sum called " the wool disposals profit." This expression is defined in s. 4 to mean the credit balance, if any, found to have accrued to the Commonwealth upon the taking of an account of (*a*) the Commonwealth's share in the ultimate balance of profit (or loss) arising from the transactions of the Joint Organization, and (*b*) the moneys received by the Commonwealth from the Government of the United Kingdom in pursuance of the arrangement between them for the

sharing of profits arising from the disposal of sheepskins acquired under the *National Security* (*Sheepskins*) *Regulations*. Section 24 provides for the establishment of the fund in the hands of the commission. Sub-section (1) of that section refers to an amount which, before the commencement of the Act, the Commonwealth had paid to the Australian Wool Realization Commission, representing the sheepskin profits specified in par. (*b*) of the definition, and it provides that this amount shall be applied by the commission for the purposes of and in accordance with the Act. Sub-section (2) provides that, when the Commonwealth has received the moneys representing the share of profit (if any) specified in par. (*a*) of the definition, an amount equal to those moneys shall be payable to the commission by the Commonwealth, out of moneys lawfully made available by the Parliament, for the purposes of the Act. Section 25 authorizes arrangements to be made with the Commonwealth Bank by the Minister with the approval of the Treasurer, for advances to the commission for the purposes of the Act; and s. 24 (2) makes the repayment of such advances (including interest) purposes of the Act.

The distribution in which the testator's executor received the above-mentioned sum of £2,830 18s. 10d. was one of the interim distributions under the Act. The authority for such distributions is sub-s. (1) of s. 7 as it operates in conjunction with sub-ss. (1) and (2) of s. 6. The commission is required by s. 7 (1) to distribute an amount equal to each "declared amount of profit", an expression which s. 4 defines to mean an amount specified in a notice published in the *Gazette* in pursuance of s. 6. Sub-section (3) of s. 6 deals with the publication in the *Gazette* of a notice declaring available for distribution a final amount equal to what may be described as the portion not already distributed of the net profit remaining after deducting certain expenses and charges from the wool disposals profit. Sub-sections (1) and (2) of that section, read together, however, provide for the publication in the *Gazette*, at any time before the wool disposals profit has been ascertained, of notices declaring amounts available for distribution out of the net profit which it is expected will remain after deducting certain expenses and charges from the Commonwealth's share in the ultimate balance of profit arising from the transactions of the Joint Organization, i.e. ignoring any sheepskin profits.

The persons to whom shares in distributions are to be payable are defined in Pt. III of the Act, which commences with s. 7. Sub-section (2) of that section provides that there shall be payable by the commission, out of each amount to be distributed under the

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Kitto J.

Act, in relation to any participating wool, an amount which bears to the amount to be distributed the same proportion as the appraised value of the wool bears to the total of the appraised values of all participating wool. The amount of each share in a distribution being thus fixed, and a duty to pay it being thus imposed upon the commission, sub-s. (3) makes the general provision that, subject to the Act, an amount payable under the Act in relation to any participating wool shall be payable to the person who supplied the wool for appraisement. Then follow provisions directing that the payment be made to other persons in certain cases where circumstances have changed since the wool was submitted for appraisement. The case where the person who submitted the wool has died before the making of the distribution is governed by s. 11 which (so far as material) makes two provisions : (*a*) that any amount which would otherwise be payable to the deceased person shall be payable to the personal representatives of that person ; and (*b*) that the rights, duties and liabilities of the personal representatives in respect of the amount shall be the same as if it were part of the proceeds of a sale of the wool by the deceased person made at the time of the supply of the wool for appraisement.

It will be seen that by force of these provisions and by reason of the fact that the testator with whose estate we are now concerned had supplied participating wool for appraisement, the commission in the testator's lifetime came under a statutory duty to pay to the testator if he should be living, and to his personal representatives if he should be dead, a fixed proportion of each amount to be distributed under the Act. Any moneys paid to him by the commission in his lifetime in performance of this duty would be income in his hands : *Federal Commissioner of Taxation* v. *Squatting Investment Co. Ltd.* (1). Amounts paid to his executor after his death, however, could not be income of his estate. This is made clear by the case of *Commissioner of Taxation (N.S.W.)* v. *Lawford* (2) in which it was held, under an Act which did not contain any such provision as s. 101A of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953, that professional costs earned by a solicitor in his lifetime and received by his executrix after his death were not assessable income of the executrix. In that case *Dixon* J. (as he then was) (3) pointed out that the debt owing to the deceased at his death formed part of the assets which devolved upon the executrix ; and clearly enough the position would be similar in the present case if the *Wool Realization (Distribution of Profits) Act* had had the effect of

(1) (1954) A.C. 182 ; (1954) 88 C.L.R. 413.

(2) (1937) 56 C.L.R. 774.

(3) (1937) 56 C.L.R., at p. 781.

creating a debt, in the ordinary sense of the word, owed by the commission to the testator. It could not matter that the debt was contingent by reason of the fact that before any amount could become presently payable in respect of it a number of events prescribed by the Act would have to occur, including the provision of funds by means of an appropriation Act or an advance from the Commonwealth Bank under an arrangement made by the Treasurer; for the fact that a right is contingent, though it may affect the value of the right, does not prevent it from being a right of property so as to be included as a dutiable asset of an estate: see *In the Estate of McClure* (1).

No doubt the position would be different if the operation of s. 7 (3) and s. 11 in relation to the testator's wool were correctly described, as counsel for the executor sought to describe it, by saying that upon the passing of the Act the commissioner came under a duty to pay to the testator personally a share in such distributions as should be made in his lifetime, and under an independent duty to pay to the testator's legal personal representatives, by virtue of an original title given by the Act to them as *personae designatae*, a share in such distributions as should be made after his death. If that were the situation, the right arising upon the testator's death in favour of the executor could not be regarded, upon any view of its character, as forming part of the testator's estate chargeable to estate duty. The executor would be bound to apply any moneys received in a distribution as if they had been part of the estate: *Long* v. *Watkinson* (2); *In re Cousen's Will Trusts*; *Wright* v. *Killick* (3); but the right to receive such money would not in fact be part of the estate: *Lord Advocate* v. *Bogie* (4); *Attorney-General* v. *Loyd* (5), even though the testator might be said to have had a general power of appointment consisting of the power to determine by his will who should have the money when it came in: *Re Estate of Isles* (6). But although s. 7 (3) is by express provision subject to the Act and is therefore subject to s. 11, the former is the principal provision, embodying what may be described as the general principle of the Act, while the operation of the latter is only to prescribe the manner in which the broad principle shall be given effect to where death has made literal compliance with s. 7 (3) impossible. As was said by the Court in *Ritchie*

(1) (1947) 48 S.R. (N.S.W.) 93, at p. 96; 65 W.N. (N.S.W.) 18, at p. 20.
(2) (1852) 17 Beav. 471 [51 E.R. 1116].
(3) (1937) Ch. 381.
(4) (1894) A.C. 83.
(5) (1895) 1 Q.B. 496.
(6) (1946) 47 S.R. (N.S.W.) 33, at p. 39; 63 W.N. (N.S.W.) 196, at p. 198.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

KITTO J.

v. *Trustees Executors & Agency Co. Ltd.* (1): " The Act provides for devolutions, transmissions and the like, but subject thereto it is the person who supplied the wool who is to be paid " (2). If the making of distributions had been prescribed in terms of the rights of participants, instead of being prescribed in terms of the duties of the commission, a provision vesting in a person who supplied wool for appraisement a right to receive a defined share in each distribution would have sufficed without more to entitle his legal personal representatives to be paid his share in each distribution made after his death. But the course adopted is to state in the Act the duties of the commission, leaving the correlative rights to be implied; and accordingly the general direction to pay a share in every distribution to each person who supplied wool for appraisement is supplemented by a subsidiary direction that if such a person is no longer alive when the time for making a distribution arrives the payment shall be made to his personal representatives.

The operation of s. 11, therefore, is to entitle the executor, as such, to receive in the testator's place money which he would have been entitled to receive himself if he had not died. This is exactly the operation of the general law in respect of every debt. Why, then, is not the right to receive, in respect of the testator's wool, a share in each distribution under the Act to be counted amongst the assets which answer the description " his personal estate ", in a statute which taxes the estates of deceased persons according to value?

The broad answer which is offered by the executor is, in effect, that although in a sense it is correct to say that the Act gives a " right " to every person to whom it requires the commission to pay a share in each distribution—for indeed the Act itself speaks of such a person, particularly in ss. 16, 17, 18 and 19, as " entitled " to a share in a distribution—yet there is in truth no more than an expectancy; there is no right which falls within the conception of " property " as that word is to be understood in the *Estate Duty Assessment Act*. The expectancy is not different in kind, the argument asserts, from that which existed in relation to the testator's wool before the Act was passed. Since the Act there is, of course, more solid reason to expect that distributions will be made, for a positive duty to make them in stated circumstances is now laid upon the commission, and there is a precise ascertainment, which was formerly lacking, of the persons who are to participate and the proportions they are to receive. But the Act itself which has this effect makes the duty of the commission dependent upon both

(1) (1951) 84 C.L.R. 553. (2) (1951) 84 C.L.R., at p. 576.

executive and legislative action which may in fact never be taken ; it denies to the intended participants in distributions all power of alienation of their shares ; and it precludes all resort to the courts to enforce the duty of the commission to make statutory payments, even after the events have happened which make that duty absolute. A " right " so hedged about, it is said, cannot be placed on a higher level than that of a bare expectation.

In one aspect the argument sought to bring the case within the authority of *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomson's Case*) (1) and the earlier case of *Commissioner of Stamp Duties* (*N.S.W.*) v. *Perpetual Trustee Co. Ltd.* (*Watt's Case*) (2) which establish that an expectation of a future payment, if it be unaccompanied by a right grounded in the law, is not property upon which estate duty is chargeable, however strong may be the practical or moral considerations which support it. In *Thomson's Case* (1) a sum of money was received by an executor from the Commonwealth by way of an *ex gratia* refund of an amount of income tax which had been paid by the deceased in his lifetime. The tax had been validly assessed, but powerful reasons affecting the public credit of the country led the Commonwealth to decide to repay it. The deceased had requested the refund in her lifetime, and at her death there was a probability amounting to a practical certainty that the request would be granted ; but the Court held that the expectation of receiving the refund was not property of the deceased in respect of which estate duty could be charged. *Watt's Case* (2) was similar in principle, though its facts more closely resembled those of the present case. It related to distributions by the British Australian Wool Realization Association Ltd. in respect of profits made on the sale of wool which had been acquired from growers under regulations in force during the war of 1914-1919. There, however, the distributions in question were made in the exercise of an administrative discretion and not in performance of a statutory duty. In both the cases cited there was at the death an expectation which in every practical sense was assured of fulfilment ; but, because it fell short of a " right cognizable at law or in equity ", being " devoid of legal title " (3) it could not be charged to duty as property of the deceased.

That was exactly the situation which existed before the *Wool Realization* (*Distribution of Profits*) *Act* came into force, in respect of profits from the sale of wool supplied for appraisement under the

(1) (1948) 77 C.L.R. 1.
(2) (1926) 38 C.L.R. 12.
(3) (1948) 77 C.L.R., at p. 27.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

KITTO J.

regulations in force in the war of 1939-1945. But as the Court said in *Ritchie* v. *Trustees Executors & Agency Co. Ltd.* (1) in a passage quoted by the Privy Council in *Federal Commissioner of Taxation* v. *Squatting Investment Co. Ltd.* (2) that Act "removed the whole matter of the disposal of profits from the province of administrative discretion and placed the distribution upon a defined statutory basis". If, therefore, it is to be held that the persons to whom the Act directs payments to be made are not invested with any right possessing the character of property, the ground cannot be that there is nothing but an expectation devoid of foundation in the law. As to whether the events will happen which are conditions precedent to the commission's duty to make a distribution, there is, of course, only an expectation, with a high degree of probability. But nevertheless the position differs in a crucial respect from that which existed before the Act, when no legal duty lay upon anyone to make a distribution in any circumstances amongst those who supplied wool for appraisement; for now there is a statutory duty on the part of the commission to make payments, and a correlative statutory right in the designated recipients to have payments made. Such a right, because it is conferred by the law, is not to be excluded from the category of property by anything that was said in *Watt's Case* (3) or *Thomson's Case* (4).

Some reliance was placed for the executor upon a passage in the judgment of the Court in *Poulton* v. *The Commonwealth* (5) in which the expression "the possibility of a share", as used in s. 29 of the Act, was treated as meaning the chance which the Act gives that an amount will become payable to a person in a distribution, and the observation was added that in point of law it is no more than a chance, however great the probability attaching to it. But the distinction was not being drawn between a possibility lacking in legal foundation and a right properly to be regarded as property. What was being pointed out was that the right which the Act gives to receive a share in a distribution, being subject to conditions which, theoretically at least, may not be fulfilled, is a chance which is not inaptly described as "the possibility of such a share" in a section which observes a distinction between such a possibility and the actual share which is to become payable if and when the conditions are fulfilled. There is nothing in *Poulton's Case* (6) which has any bearing upon the present problem.

(1) (1951) 84 C.L.R. 553, at p. 577.
(2) (1954) A.C. 182, at p. 206; (1954) 88 C.L.R. 413, at p. 424.
(3) (1926) 38 C.L.R. 12.
(4) (1948) 77 C.L.R. 1.
(5) (1953) 89 C.L.R. 540, at p. 600.
(6) (1953) 89 C.L.R. 540.

The executor, however, falls back upon a contention that the inherent characteristics which the right has by reason of the provisions of the Act upon which it rests, that is to say the impossibility either of alienating it (s. 29) or of enforcing it by means of judicial process (s. 28), prevent it from being recognized as a form of property. Only the unenforceability of the right, however, requires much consideration. It may be said categorically that alienability is not an indispensible attribute of a right of property according to the general sense which the word " property " bears in the law. Rights may be incapable of assignment, either because assignment is considered incompatible with their nature, as was the case originally with debts (subject to an exception in favour of the King) or because a statute so provides or considerations of public policy so require, as is the case with some salaries and pensions ; yet they are all within the conception of " property " as the word is normally understood : *Ex parte Huggins* ; *In re Huggins* (1) ; *Hollinshead* v. *Hazleton* (2). Indeed, there was a tendency at one time to regard the non-assignability of a right as qualifying it to be classified as a *chose in action* : *Holdsworth, History of English Law*, 2nd ed. (1937), vol. vii, pp. 529, 531. " The law started with the idea that a chose in action is a personal non-assignable right " : *op. cit.*, p. 541. In the context of the *Estate Duty Assessment Act* there is nothing to justify the adoption of a definition of " property " which would exclude a statutory right to receive a payment of money on the ground that the statute, by a provision against alienation, prevents persons other than those within the immediate contemplation of the legislature from obtaining the fruits of the right.

The executor finally relies upon s. 28 in the endeavour to establish that the right which the testator had under the Act formed part of his personal property. That section provides that no action or proceedings shall lie against the commission or the Commonwealth for the recovery of any moneys claimed to be payable to any person under the Act, or for damages arising out of anything done or omitted to be done by the commission in good faith in the performance of its functions under the Act. This provision of course does not detract in the least from the imperative nature of the duty imposed upon the commission. Its effect is simply that controversies as to what is proper to be done in order to carry the provisions of the Act into execution are to be resolved by administrative and not by judicial action, and that the remedy for non-performance of a duty which becomes absolute is to be found, not in the application

(1) (1882) 21 Ch. D. 85, at p. 91. (2) (1916) 1 A.C. 428, at p. 447.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Kitto J.

of force under the authority of a court, but in action by the executive government and, if necessary, by the Parliament itself. It is therefore inaccurate to speak of a right to a share in distributions as unenforceable. The most that can properly be said is that the method of enforcement which the law provides for the enforcement of most money demands is made unavailable. If this were equivalent to saying that the right is not one which is recognized by the law, no doubt the logical consequence would be that the right cannot be fitted into the concept of property, since that is a concept of the law. But the statements are obviously not equivalent, and it would be impossible to maintain that the law does not recognize a right which the law itself has created. To assert that the prohibition of actions and proceedings for recovery of moneys under the Act prevents the courts from recognizing the right as a legal right is to assert that, because the usual occasions for judicial recognition of the right cannot arise, the right is incapable of judicial recognition as property belonging to the person for whose benefit it exists. The *non sequitur* is obvious.

The argument for the executor on this part of the case seems to involve and depend upon two propositions: first, that all personal property known to the law must consist either of choses in possession or of choses in action, and, secondly, that choses in action comprise only rights enforceable by action in the courts. But the term chose in action "furnishes an instance of the subject-matter of property having outgrown its nomenclature": *Goodeve, Personal Property*, 9th ed. (1949), p. 195; and the second proposition needs to be recast in more flexible terms if the first is to be accepted. The expression now comprises a heterogeneous group of rights which, as *Goodeve* observes, (*loc. cit.*) have only one common characteristic, viz. that they do not confer the present possession of a tangible object. Sir *William Holdsworth* considered the history of the subject in his *History of English Law*, 2nd ed. (1937), vol. vii, pp. 515 et seq., and showed that although "the original meaning of a chose in action—a right to be asserted by an action—has never been wholly lost sight of" (p. 517), the meaning of the term has become progressively extended to accommodate many forms of personal property which were not within the original conception. The topic has been developed by Sir *Howard Elphinstone*, Mr. *Cyprian Williams* and Mr. *Charles Sweet* in learned articles in the *Law Quarterly Review*, vol. 9, p. 311; vol. 10, pp. 143, 303; vol. 11, pp. 223, 238.

It must have been from early times that liquidated money demands were recognized, even if unenforceable in the courts, as choses in action, and therefore as personal property. It is difficult

to suppose that a debt could ever have been considered to lose the character of property whenever it became, and so long as it remained, statute barred. *Holdsworth*, *op. cit.*, p. 529 mentions, as having ultimately prevailed, an argument of *Catesby* in a case in 1482, that " though the grantee of an annuity had no tangible thing, but only a right, that right, *whether enforceable by action or not* (the italics are mine), was, like the right to a rent, a thing which could be assigned." But more closely akin to the right we are now considering are such undoubted forms of property as stock in the public funds, government bonds, and government debts generally. Until a right of action against the Crown was allowed by statute—and that did not occur in England until the *Crown Proceedings Act*, 1947 came into operation—no debt of the central government could be sued for in the courts. In appropriate cases the courts could entertain a petition of right, but the consent of the Crown in the form of the Attorney-General's fiat was required before the petition could be filed, and the judgment could not do more than declare what the suppliant was found entitled to: *Petitions of Right Act*, 1860, 23 & 24 Vic. c. 34, s. 9. No enforceable judgment could be given, and it was not unknown for a petition of right to produce no benefit: *Macbeath* v. *Haldimand* (1) cited by *Evatt* J. in *New South Wales* v. *The Commonwealth* [*No.* 1] (2). Where the judgment established a right to a sum of money, the *Petitions of Right Act* required the Commissioners of Treasury to pay the amount " out of any monies in their hands for the time being legally applicable thereto, or which may be hereafter voted by parliament for that purpose " *ibid*, s. 14. Thus the creditor of the government was in a position which differed in only one respect from the position of a person to whom a share in a distribution becomes payable under the *Wool Realization* (*Distribution of Profits*) *Act*: the former could have the validity of his claim declared by a court, while the latter must have it passed upon by the Australian Wool Realization Commission. Substantially the same may be said concerning a claim against the Commonwealth or a State which is litigated under the *Judiciary Act* 1903-1950. The appropriate judgment consists only of a declaration of right. Neither execution nor attachment can be issued (s. 65); and there is no way of obtaining payment of the debt which the judgment declares, except by procuring the Treasurer of the Commonwealth or the State as the case may be to perform the duty, which s. 66 imposes upon him, of satisfying

(1) (1786) 1 T.R. 172, at p. 176-177 [99 E.R. 1036, at pp. 1038-1039].

(2) (1932) 46 C.L.R. 155, at p. 199.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

KITTO J.

the judgment out of moneys legally available: *New South Wales* v. *Bardolph* (1); *Grace Bros. Pty. Ltd.* v. *The Commonwealth* (2). Yet no one could doubt that a debt owed by a government is personal property. Government bonds and stock are, indeed among the commonest forms of such property. The relevant Act may specifically provide that they shall be personal property, as does the *Commonwealth Inscribed Stock Act* 1911-1946, s. 13, but even if, like the *Funded Stock Act* of 1892, 56 Vic. No. 1 (N.S.W.), it contains no such provision, bonds and stock held under it are forms of property, and are classed as choses in action in the enlarged sense of the term: *R.* v. *Capper* (3). They are "a species of property, grown up, since all these distinctions were settled in our law", as Sir *William Grant* M.R. observed during the argument in *Wildman* v. *Wildman* (4). "The interest in stock", he said in giving judgment, "is properly nothing but a right to receive a perpetual annuity, subject to redemption: a mere right therefore: the circumstance, that government is the debtor, makes no difference" (5). So, too, Lord *Cairns* in *Ex parte The Bank of England*; *In re Price* (6) described bank stock as property of the holders, whom he called the owners and proprietors thereof; and Lord *Blackburn* in *Colonial Bank* v. *Whinney* (7) referring to "new kinds of property like stock in the funds", quoted Lord *Thurlow* as thinking choses in action "an apt expression to use with respect to such things". Sir *George Jessel* in *Ex parte Huggins*; *In re Huggins* (8) said: "There are many cases in which property arises from a contract, quite independently of the fact that no judicial tribunal can enforce it . . . If a man died possessing nothing but French or Italian bonds no one would say that he had died without any property. Such bonds are not *choses in action* in the ordinary sense, and that cannot be the definition of property. The mere fact that you cannot sue for the thing does not make it not 'property'. I am not going to attempt to define 'property', that would be too dangerous. But there can be no doubt that these foreign bonds, both in common language and in the language of lawyers, are 'property'. Nor can I doubt that if a man had a bond for £10,000 of the British Government it would be 'property'. The annuities which were granted by the kings of England in former days, charged on the tonnage and poundage dues, were always

(1) (1934) 52 C.L.R. 455.
(2) (1946) 72 C.L.R. 269, at pp. 283, 294, 303.
(3) (1817) 5 Price 217 [146 E.R. 587].
(4) (1803) 9 Ves. Jun. 174, at p. 176 [32 E.R. 568, at p. 569].
(5) (1803) 9 Ves. Jun., at p. 177 [32 E.R., at p. 570].
(6) (1867) L.R. 2 Ch. App. 662, at p. 667.
(7) (1886) 11 A.C. 426, at p. 439.
(8) (1882) 21 Ch. D. 85.

dealt with as property, and they formed the subject of numerous decisions of the Courts. But you could not sue the Crown for them, and they could not even be made the subject of a petition of right, because they were granted out of the voluntary bounty of the Crown. But still they were property . . . " (1).

The contention of the executor that the estate of the testator did not include at his death any right in respect of future distributions under the *Wool Realization (Distribution of Profits) Act* should for these reasons be rejected. It follows from this conclusion that in the making of the original assessment it would have been correct to include the value of that right, estimated as at the testator's death, as an ingredient in the value of the estate. What in fact was done must now be examined.

The estate duty return was submitted by the executor on 16th August 1949, but it contained no reference to any rights in respect of wool submitted for appraisement. The first distribution made under the Act was a distribution of an amount equal to six and one-quarter per cent of the appraised value of all participating wool catalogued between 28th September 1939 and 30th January 1946, and was made out of a sum of £25,000,000 declared by the Minister under s. 6 (1) on 24th November 1949 to be available for distribution. The testator's participating wool catalogued in that period was of the appraised value of £45,295 2s. 2d., of which sum six and one-quarter per cent is £2,830 18s. 10d. The latter amount was paid on 5th December 1949, as to £2,816 15s. 9d. to the executors through the testator's wool brokers, and as to the remaining £14 3s. 1d. to the brokers as their commission under s. 21. On 3rd November 1950, the solicitors for the executor sent to the Commissioner of Taxation, who had not yet assessed the estate duty, a letter referring to the subject of estate duty on the testator's estate and stating: " We have been instructed to advise you of the following additional asset—Appraised value of participating wool held by Australian Wool Realization Commission £45,295 2s. 2d.—$6\frac{1}{4}\%$ of which is equivalent to £2,830 18s. 10d."

The commissioner assessed the duty on 9th March 1951, and in doing so he included £2,830 18s. 10d. as an asset which he described, in an alteration sheet accompanying the notice of assessment, as " Wool payments as advised 3/11/50—£2,831 ". The assessment was not objected to, and the assessed amount of duty was paid. Then a second distribution, equal in amount, was made pursuant to a declaration made by the Minister under s. 6 (1) on 27th March 1952. The executor received the estate's share in this distribution

(1) (1882) 21 Ch. D., at pp. 90-91.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

KITTO J.

on the next day but did not inform the commissioner of it. He learned of it from an inspection of the records in the Victorian Probate Duty Office on 20th May 1952, and ten days later he issued a notice of amended assessment increasing the amount of the duty by adding to the net value of the estate the sum of £2,831, describing the addition as " on a/c : Second Wool Distribution £2,831 ".

The method by which the commissioner dealt with the amounts received from the two distributions was conceded by his counsel to be incorrect. The proper method was to value as at the death the entire right to share in distributions under the Act in relation to the testator's wool ; and amounts in fact paid out by the commission in relation to that wool could not be brought into the calculation as if they were themselves assets of the estate. No doubt the fact that the right which had to be valued did in the event produce those amounts might be treated as material in making the valuation, but only if the broker's commission (which was remuneration for acting in the distribution as agents of the commission and not of the executor) were deducted and the balance were discounted back to the date of death. Accordingly it is necessary to give the answer No to the first of the questions in the stated case, which is, in effect, whether the £2,831 received in the second distribution should be included in the estate of the testator for the purposes of the *Estate Duty Assessment Act*. The next question is whether any sum in respect of the second distribution should be included in the testator's estate, and, if so, what sum should be so included and how should it be calculated. For the reasons which have been given, the first portion of the question should be answered : by saying that if the commissioner had power to make an amended assessment at all, he should have included the value, as at the death, of the share which vested in the executor.

The third question is whether the commissioner had power under the *Estate Duty Assessment Act* to issue the amended assessment. The argument on this question dealt with the application of sub-ss. (2) and (3) of s. 20 of the *Estate Duty Assessment Act*, each of which qualifies the general provision in sub-s. (1) of that section that the commissioner may at any time amend any assessment by making such alterations therein or additions thereto as he thinks necessary. The terms of sub-ss. (2) and (3) need not be set out. It will suffice for the present to say that if the proper view of the facts of the case is that before the original assessment was made the executor made to the commissioner a full and true disclosure of all the material facts necessary for the making of such an assessment as would deal correctly with the right to share in distributions under

the *Wool Realization (Distribution of Profits) Act* in relation to the testator's wool, the amendment of the assessment was forbidden by sub-s. (3) unless it was made to correct a mistake of fact.

The question whether there was the requisite full and true disclosure must be answered by considering the terms of the letter of 3rd November 1950, for only in that letter was any relevant disclosure made. It must be considered, however, in the light of the construction which the court has placed upon the relevant words in s. 20, the result of which is that the executor was not obliged to direct the commissioner's attention to facts of which he was already aware, or to facts which the executor did not know or believe or (perhaps) possess the means of knowing: see the review of the authorities by *Fullagar* J. in *Australasian Jam Co. Pty. Ltd.* v. *Federal Commissioner of Taxation* (1).

It appears from the stated case that before the original assessment was made, both the executor and the commissioner were aware of the provisions of the *Wool Realization (Distribution of Profits) Act* 1948, as well as of the *Wool Realization Act* 1945 under which the operations of the Australian Wool Realization Commission, as the Australian subsidiary of the Joint Organization, were conducted. Though the commissioner had received information which, if correct, showed that large profits had resulted from the transactions of the Joint Organization, and he believed, as did the executor, that a further distribution would be made under the 1948 Act, as to when such a distribution would be made and how much would be distributed neither of them had any knowledge, information or belief. It is against this background that the sufficiency of the letter of 3rd November 1950 as a disclosure must be considered. Its proclaimed purpose was to bring to the commissioner's notice an additional asset of the estate of the testator. Its phraseology was imperfect, but to anyone acquainted, as the commissioner was, with the relevant Acts and with the general character of the operations of the Joint Organization, the letter could not fail to convey these five facts: first, that the testator in his lifetime supplied participating wool for appraisement; secondly, that the appraised value of the wool was £45,295 2s. 2d.; thirdly, that the executor as such was entitled to participate in distributions under the 1948 Act to an extent commensurate with that value; fourthly, that the executor's right so to participate had been recognized by the Australian Wool Realization Commission by its placing on the distribution list the executor's name, with the appraised value of the testator's wool as the amount by reference to which the executor's

(1) (1953) 88 C.L.R. 23, at p. 33.

H. C. OF A. 1954.

NATIONAL TRUSTEES EXECUTORS AND AGENCY CO. OF AUSTRALASIA LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Kitto J.

share in distributions was to be ascertained (see s. 19); and fifthly, that an amount calculated at the rate of six and one-quarter per cent on the appraised value, and amounting to £2,830 18s. 10d. had become payable, if it had not actually been paid, to the executor. All these things were true. What further fact relevant to the making of a correct assessment and not already known to the commissioner could the executor have disclosed?

It was suggested by counsel for the commissioner that there was no disclosure of the precise asset by means of a correct description of it, and there was no disclosure of the value placed upon the asset by the executor. As regards value, it is obvious that the executor did not know, and had no means of learning, any facts relevant to valuation except those which the commissioner either knew already or was told in the letter. The executor is not shown to have had any opinion of its own or to have obtained any opinion from anyone else on the question of value. There simply was no disclosure of any fact bearing in any way upon that question which the executor could have made and failed to make. It is true, on the other hand, that the letter did not define the asset, by any form of words, as the right which passed at the death from the testator to the executor to receive a share in each distribution to be made under the 1948 Act. But that was in truth the only dutiable asset which the information in the letter showed to exist. The suggestion which the letter was calculated to convey was, no doubt, that the amount of £2,830 18s. 10d. which had been received in the first distribution was itself a dutiable asset of the estate; and it may be inferred that the mistake which occurred in the commissioner's office when the assessment came to be made was that this suggestion was accepted and acted upon. It was, of course, an erroneous suggestion, but the error consisted in failing to appreciate that a capital sum which comes in as part of an estate after the death of the deceased does not itself constitute property which the *Estate Duty Assessment Act* requires to be included in the estate for duty purposes, and that what the Act makes dutiable is the asset which existed at the death and which the moneys subsequently received represent wholly or in part. There was, therefore, no failure to make true and full disclosure and no mistake of fact; there was only a mistake of law. Neither party misapprehended any fact. They were both well aware that the £2,830 18s. 10d. was the first fruits, and probably not the last, of a right under the 1948 Act which had devolved upon the executor, but they treated as dutiable in law the proceeds of that asset instead of the asset itself. Then when the receipt by the executor of an amount in the second distribution was discovered

by the commissioner's officers, the same mistake was made again in amending the assessment. But we are not concerned with the incorrectness of the amended assessment; the question is whether there was any power to make it at all. And the answer to that question must be that, as the original assessment was made after a full and true disclosure to the commissioner of all the material facts not already known to him which the executor was in a position to disclose, and as there was no mistake of fact to be corrected, s. 20 (3) precluded the making of any amended assessment.

Accordingly the third question in the stated case should be answered, No.

Questions in the case stated answered as follows:—

Question 1. *If, contrary to the answer to the third question, it were competent for the Commissioner of Taxation to amend the assessment, the figure of* £2,830 18s. 10d. *was wrongly adopted.*

Question 2. *On the hypothesis stated in the answer to the first question, the present value as at the time of the death of the deceased of his expected share or dividend in the distribution of wool profits should have been estimated.*

Question 3. *The commissioner did not have power under the Estate Duty Assessment Act* 1914-1950 *to issue the amended assessment.*

Costs of the case stated reserved for the judge disposing of the appeal.

Solicitors for the appellant, *Oswald Burt & Co.*

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth of Australia.

R. D. B.