Appl *Beavis Bros Construction Pty Ltd (in liq), Re* 89 FLR 121
Expl *ABCE & BLF v Cth* 66 ALR 363
Cons *MacCormick v FCT* 158 CLR 622
Cons *Beavis Bros Const, Re; DCT (NSW) v Hutchins* 19 ATR 172
Foll *Fernanis v Cheshire Holdings Pty Ltd* 20 ATR 1862
Appr *Fernanis v Cheshire Holdings Pty Ltd* (1990) 1 WAR 373
Appl *F H Faulding & Co Ltd v FCT* (1994) 126 ALR 561
Appl *F H Faulding & Co Ltd v FCT* (1994) 29 ATR 475

Appl *Hoare Bros Pty Ltd v DFCT* (1995) 30 ATR 220
Appl *F H Faulding & Co Ltd v FCT* (1994) 54 FCR 75
Cons *Jones v Deputy Federal Commissioner of Taxation* (1998) 157 ALR 349
Foll *Jones v Deputy Federal Commissioner of Taxation* (1998) 39 ATR 525

[HIGH COURT OF AUSTRALIA.]

DEPUTY COMMISSIONER OF TAXATION FOR THE STATE OF NEW SOUTH WALES OF THE COMMONWEALTH OF AUSTRALIA . . . . . PLAINTIFF;

AND

BROWN . . . . . DEFENDANT.

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SYDNEY, 1957, *Sept.* 30; *Oct.* 1;

MELBOURNE, 1958, *Mar.* 11.

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

Income Tax (Cth.)—Federal Taxation—Death of taxpayer—Estate fully administered—Subsequent assessments upon executors—Claim against beneficiary—Absence of notice—Liability—Alleged equitable debt—Income Tax and Social Services Contribution Assessment Act 1936-1952 (1936-1953), ss. 204, 208, 209, 216, 217, 254—*Judiciary Act* 1903-1955, *s.* 79.

By a suit brought in the High Court in the name of the Deputy Commissioner of Taxation for New South Wales of the Commonwealth of Australia it was sought to recover against the defendant, in a personal judgment, amounts of tax ascertained by assessments and amended assessments duly assessed against and notified to the executors of a deceased person. The executors had fully administered the estate before the assessments and amended assessments were made. The claim against the defendant was based upon the fact that as a person entitled in a distribution of the deceased's estate she had received from the executors in various forms enough to cover the tax assessed upon the executors. It was not alleged that when the defendant did so she had notice of any impending assessment or claim by the commissioner.

Held by *Dixon* C.J., *McTiernan* and *Williams* JJ. (*Kitto* and *Taylor* JJ. dissenting), that the commissioner was not entitled to recover from the defendant any part of the moneys she had received from the executors.

Per Dixon C.J. and *Williams* J.: It is to be gathered from the structure of the Act as a whole and from the provisions contained in it that the liability of any person to pay a debt for unpaid income tax is conditional upon the right of the commissioner to assess that person and upon the correlative right of that person to appeal against the assessment.

Sections 216 and 217 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1952, discussed.

ACTION.

In an action brought in the High Court by the Deputy Commissioner of Taxation for the State of New South Wales of the Commonwealth of Australia against Edith Doris Brown (formerly Edith Doris May) the amended statement of claim was substantially as follows :

1. The defendant is the widow of Isaac Stevens May who died in New South Wales on 9th July 1952.

2. Probate of May's will was granted to the executors named therein, William Aubrey Armstrong and William Malcolm Maclean, by the Supreme Court of New South Wales on 15th September 1952.

3. May did not during his lifetime make full and complete and accurate returns of his income tax for the years ended 30th June 1948 to 30th June 1952 inclusive and thereby escaped full taxation in his lifetime.

4. On 16th March 1955 the plaintiff issued amended assessments upon the above-named executors under the *Income Tax Assessment Act* 1936-1949, the *Social Services Contribution Assessment Act* 1945-1949 and the *Income Tax and Social Services Contribution Assessment Act* 1950-1952 in respect of May's income for the years aforesaid.

5. On 16th March 1955 the plaintiff issued upon the above-named executors an original assessment under the aforesaid Acts in respect of the income derived by May for the period 1st July 1952 to 9th July 1952.

6. The total amount of tax due under the aforesaid amended assessments and original assessment is £3,505 19s. 0d. and was payable to the plaintiff according to the aforesaid notices of assessments on 18th April 1955.

7. By his will May after directing payment of all his just debts and funeral and testamentary expenses gave and bequeathed to Marjorie Dorothy Gwyer the sum of £1,000 and to Ethel Annie Armstrong the sum of £1,000 and devised and bequeathed the residue of his estate to his widow, the defendant, absolutely.

8. May's estate was sworn for probate at the value of £41,665. It included real estate valued at £15,000. Part of the said real estate being land under the *Real Property Act* 1900, as amended, was on 8th May 1953 and still is registered by transmission in the defendant's name. The balance of that real estate being land under common law title was on 7th April 1953 and still is registered in the defendant's name by deed of acknowledgment under the *Wills Probate and Administration Act* 1898, as amended.

9. The assets of May's estate were fully administered and distributed in accordance with the will by the executors before the issue

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of the amended assessments and original assessment referred to above and before any notice to those executors of any intention to issue the said assessments and there are no assets in the executors' hands.

The plaintiff claimed : (i) a declaration that the defendant was liable to pay to the plaintiff the sum of £3,505 19s. 0d.; (ii) an order that the defendant do pay to the plaintiff the sum of £3,505 19s. 0d.; (iii) an order that the defendant do pay the plaintiff's costs ; and (iv) such further or other order as to the Court may seem meet.

The defendant demurred to the whole of the statement of claim on the ground that the facts alleged did not show a cause of action against the defendant.

The grounds in law for the demurrer were : (a) that assessments issued after the death of the taxpayer and after the assets of his estate have been fully administered and distributed in accordance with his will by the executors without notice of any intention to issue the same are not sanctioned by the *Income Tax and Social Services Contribution Assessment Act* 1936-1955 ; and (b) that assessments issued in the circumstances referred to in the statement of claim impose no obligation on a beneficiary under the will of the taxpayer to pay the sums so assessed either from the assets passing under the will or at all.

G. P. Donovan, for the plaintiff. There is no condition in s. 216 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1953 requiring that the estate should, at the time of the assessment, not be either fully or properly administered (*Stapleton* v. *Federal Commissioner of Taxation* (1)). It is sufficient for the purposes of s. 216 that the persons assessed answered or answer to the description of the trustees of the estate. Although they have no absolute personal liability, but only a liability co-extensive with the assets in their hands, the assessment, nevertheless, is validly made and constitutes a debt from the estate to the commissioner. The assessment having been validly made on the trustees by the plaintiff, he then follows the assets in the hands of the beneficiary. [He referred to *Ministry of Health* v. *Simpson* (2) ; *Harrison* v. *Kirk* (3) ; *Noel* v. *Robinson* (4) ; *Hunter* v. *Young* (5) ; *Commissioner of Inland Revenue* v. *Field* (6) and *Stapleton* v. *Federal Commissioner of Taxation* (7).] It is conceded that the assets were

(1) (1955) 93 C.L.R. 603, at pp. 618, 619.
(2) (1951) A.C. 251, at pp. 266-268.
(3) (1904) A.C. 1, at p. 7.
(4) (1682) 1 Vern. 90 [23 E.R. 334].
(5) (1879) L.R. 4 Ex. D. 256, at p. 261.
(6) (1955) N.Z.L.R. 331, at p. 334.
(7) (1955) 93 C.L.R. 603.

fully administered and that no known debts remained unpaid. Reliance is placed on the doctrine that once a person is an executor he will remain an executor for the purposes of any other action that may arise thereafter (*In the Will of Henry Clinton* (1)). In the plaintiff's view the conditions necessary for the exercise of this doctrine are complete.

M. H. Byers, for the defendant. Section 216 applies to sanction an assessment where, at the date of the assessment, there are assets in the hands of the trustees. The section is a charging section (*Stapleton* v. *Federal Commissioner of Taxation* (2)). The liability which the section imposes is one which is imposed upon trustees in their representative character and is imposed upon the estate (*Stapleton* v. *Federal Commissioner of Taxation* (2)). Where there is no estate there is no power to assess. There being no assets and the trustees' liability being confined to assets the assessment is nugatory. The fact that this is an action against a stranger to the taxpayer renders inoperative the making of the assessment and therefore s. 177 does not come to the commissioner's aid. Section 177 is an evidentiary section (*McAndrew* v. *Federal Commissioner of Taxation* (3)). There can be no debt created in respect of this Act except against a person who can be assessed under the Act. The Act contemplates that before any particular person can be made to pay income tax under this Act he must have a right to appeal against his assessment to tax. The debt in *Ministry of Health* v. *Simpson* (4) was an ordinary debt. This assessment did not create any debt because the executors were never bound to pay anything. The right to assess is co-extensive with the right to recover, not *qua* amount but in the sense that every assessment contemplated by the Act is one in respect of which there is a right of recovery. Sections 204 and 208 create the obligation to pay on the part of the recipient of the assessment and they postulate an assessment which imposes that obligation and one cannot have an assessment which does not create any obligation in the hands of the recipient. Section 177 is inoperative to render valid an assessment which would otherwise be invalid. If the plaintiff's submission be correct then a liability to be assessed under s. 216 may exist divorced from a liability to pay the tax assessed ; that would be the result in the present case. Further, on that assumption, one would have an assessment to which s. 204

(1) (1910) 10 S.R. (N.S.W.) 465 ; 27 W.N. 125.
(2) (1955) 93 C.L.R. 603.
(3) (1956) 98 C.L.R. 263.
(4) (1951) A.C. 251.

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could not apply. The estate only becomes liable if the assessment is sanctioned by s. 216 which postulates a trustee possessed of trust assets as the recipient of the assessment. Where a person has administered his trust he cannot, in truth, be called a trustee. The powers and remedies conferred upon the commissioner and the obligations imposed upon the trustees by s. 216 are capable of operation only against the person in the process of administering the trust. Similarly as to s. 254. To describe persons not possessing any representative character as trustees of the taxpayer's estate is to misread the section. The section envisages the trustee, the recipient of the assessment, as possessed of the particular estate of the taxpayer, and of nothing else (*Stapleton* v. *Federal Commissioner of Taxation* (1)). The purpose of s. 217 is to be found in *Aitken* v. *Federal Commissioner of Taxation* (2). The remedies in the Act are exhaustive and do not apply to the beneficiary. The assessment was really unauthorised, *vis-à-vis* the beneficiary he can dispute it because he is not bound by s. 177. Section 220 reinforces the argument put forward on behalf of the defendant. Section 208 contemplates a debt due by the trustee ; the person liable to pay would be the recipient of the assessment. A beneficiary would not be liable to pay under s. 204. There has not been any assessment under s. 169. One cannot get an obligation to pay tax under this Act in respect of an assessment issued upon some other person, and in respect of which one has right of appeal. Wherever trustees are dealt with in the Act one finds them in the course of administration. These persons had terminated their trust and thus ceased to be trustees (*Hull* v. *Christian* (3) : see also *Lewin* on *Trusts*, 15th ed. (1950), pp. 390, 391). On the assumption that the assessments in this case were sanctioned by s. 216, the question is whether the commissioner may have recourse to the doctrine whereby an unpaid creditor is entitled to pursue his remedies against a legatee : see *Hastings and Weir's Probate Law and Practice*, 2nd ed. (1948), p. 298. This matter is in the original jurisdiction of the High Court for the reason that the amount claimed is a debt due to the Queen ; that is the way, apparently, in which the plaintiff seeks to obtain the declaration claimed. This debt is not a debt which falls within the doctrine that an unpaid creditor may recover against a legatee. That doctrine postulates a claim by a person who was a creditor of the deceased and it postulates a claim which can be dealt with in due

(1) (1955) 93 C.L.R. 603.
(2) (1936) 56 C.L.R. 491, at pp. 497, 503, 504.
(3) (1874) L.R. 17 Eq. 546, at p. 548.

course of administration of the estate which has not been dealt with. That conclusion is supported by a description of the remedy contained in *Harrison* v. *Kirk* (1).

[McTiernan J. referred to *Noel* v. *Robinson* (2).]

[He referred to *Ministry of Health* v. *Simpson* (3).] As an alternative, it is submitted that the debt is one created by s. 216 and not by the annual taxing Act for purposes of this doctrine. If so, there was no debt in existence until the administration was determined. Once one comes to the conclusion that s. 216 is a charging section, a tax-imposing section as established by *Aitken's Case* (4); *Patterson* v. *Federal Commissioner of Taxation* (5) and *Stapleton's Case* (6) and there is no escape from the position that it is s. 216 that establishes or creates the debt, then the only way s. 216 can operate to create the debt is not by its operation upon the income of the deceased, but by virtue of an assessment made under its provisions.

G. P. Donovan, in reply. The cases dealing with the determination of a trust as such are not relevant to the particular problem now before the Court. The defendant's submission that one cannot assess a man who is a trustee and who has no assets, ignores the effect of the words in the section that the commissioner is to have the same powers and remedies against the trustees as he would have against the taxpayer himself if the taxpayer were still living (*Stapleton* v. *Federal Commissioner of Taxation* (7)). The commissioner's purposes must be considered. A purpose is to recover tax which has escaped in the taxpayer's lifetime. It would be necessary for the recovery of tax that there be somebody who should be subject to a notice of assessment for the purpose of creating the debt. [He referred to *Aitken* v. *Federal Commissioner of Taxation* (8).] The fallacy in the defendant's argument is the failure to distinguish between a liability attaching to the estate and a recovery from the trustees. The considerations shown in *Stapleton* v. *Federal Commissioner of Taxation* (7) oppose entirely the suggestion that an assessment validly made does not constitute a debt. There is no justification for reading down s. 216 so as to make it applicable only if there are assets in the estate. The dominant purpose of s. 216 is to enable an assessment to be made and to enable the recovery of the tax, the obligation to pay which had attached in the lifetime of the deceased. The obligation to pay comes from

(1) (1904) A.C. 1, at pp. 5-9.
(2) (1682) 1 Vern. 90 [23 E.R. 334].
(3) (1951) A.C., at pp. 266, 268.
(4) (1936) 56 C.L.R. 491.
(5) (1936) 56 C.L.R. 507.
(6) (1955) 93 C.L.R. 603.
(7) (1955) 93 C.L.R., at p. 618.
(8) (1936) 56 C.L.R., at p. 505.

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the taxing Act (*Mortimer Kelly's Case*; *Commissioner of Stamps (W.A.)* v. *West Australian Trustee, Executor & Agency Co. Ltd.* (1)). The authority of that case disposes of the defendant's argument that this is not a case in which the equitable remedy on which the plaintiff relies would be available to the plaintiff in this case. This is a case in which there was a debt owing at the time of the death. [He referred to *Commissioner of Inland Revenue* v. *Field* (2); *Williams* on *Executors and Administrators*, 13th ed. (1953), vol. 2; *In re King*; *Mellor* v. *South Australian Land Mortgage & Agency Co.* (3); *Waller* v. *Barrett* (4) and *Noble* v. *Brett* (5).] The implications are that even though an estate has been administered, if a liability afterwards accrues then it is possible for the creditor to follow the assets of the estate in the hands of the legatee, even though the liability came after the administration.

[KITTO J. referred to *In re Arnold*; *Calvert* v. *Whelen* (6).]

A propos the word "get" see *Inland Revenue Commissioners* v. *Bagnall Ltd.* (7).

Cur. adv. vult.

Mar. 11, 1958.

The following written judgments were delivered :—

DIXON C.J. In this suit, brought in this Court in the name of the Deputy Commissioner of Taxation for the State of New South Wales of the Commonwealth of Australia, it is sought to recover amounts of tax ascertained by an assessment and by amended assessments duly notified. It is sought to recover it against the defendant in a personal judgment. The defendant is not the person assessed, nor the person notified. The assessment is upon the executors of a deceased person. They had fully administered the estate before the assessment and amended assessments were made. The claim against the defendant is based upon the fact that as a person entitled in a distribution of the deceased's estate she received from the executors in various forms enough to cover the tax assessed upon the executors. It is not alleged that when she did so she had notice of any impending assessment or claim by the commissioner. The proceeding is not one to follow a fund in her hands. It is a suit based on the equitable liability under which a beneficiary may come, in an appropriate case, when an unpaid creditor of the estate is able to show that a distribution of assets has been made to the beneficiary without due provision for the debt, the assets being no longer

(1) (1925) 36 C.L.R. 98, at pp. 102, 105, 114-116.
(2) (1955) N.Z.L.R. 331.
(3) (1907) 1 Ch. 72, at p. 78.
(4) (1857) 24 Beav. 413, at pp. 418, 419 [53 E.R. 417, at p. 419].
(5) (1858) 24 Beav. 499 [53 E.R. 450].
(6) (1942) Ch. 272.
(7) (1944) 1 All E.R. 204; 170 L.T. 196.

traceable and the debt being otherwise incapable of recovery. In other words the defendant is sued upon an alleged equitable debt. In my opinion the suit has no basis.

Liability for federal tax must arise from federal law. It must arise from some exercise of the legislative power conferred by s. 51 (ii.) of the Constitution aided perhaps by the legislative power contained in s. 51 (xxxix.). I can find no federal law which imposes the liability upon the defendant. There is certainly no provision in the *Income Tax and Social Services Contribution Assessment Act* 1936-1952 which does so expressly. I shall later give reasons for denying that any implication doing so can be found in that Act.

I am clearly of opinion that s. 79 of the *Judiciary Act* 1903-1955 does not impose the liability. That provision says that when this Court is exercising federal jurisdiction in a State then (in the absence of federal law) the law of that State shall be binding upon it. The Court, as it happens, heard the present demurrer in Sydney. If we deliver judgment in Sydney it will be the law of New South Wales that for the purposes of the case will receive the application contemplated by the section. But the law of New South Wales does not and could not impose liability for federal tax. Section 51 (ii.) with its prohibition of discrimination may not be the same as art. 1, s. 8 of the Constitution of the United States requiring uniformity but what the Supreme Court has said about State law in the collection of federal taxes seems to me to be true of our system. " The provision " of the Constitution " exacting uniformity throughout the United States itself imports a system of assessment and collection under the exclusive control of the general government ": *United States* v. *Snyder* (1). In the administration of s. 79 the rule is that you take the whole law governing the case of the State in which you sit, that is to say the rules of private international law, as well as the rules of municipal law of the State : *Musgrave* v. *The Commonwealth* (2). Otherwise you would make nonsense of the provision and change the basis of decision by changing the place of sitting. It is but taking the absurd as a demonstration of the insufficiency of s. 79 as a source of liability to tax ; but suppose this case had been heard and determined for convenience in Adelaide. Presumably, although that does not appear, there is no element of the case connecting it with South Australia. Does the hypothesis on which the plaintiff invokes s. 79 mean that *pro hac vice* South Australia would in that event provide the law of

(1) (1893) 149 U.S. 210, at p. 214 [37 Law. Ed. 705, at p. 707]

(2) (1937) 57 C.L.R. 514, at pp. 532, 543, 547, 548, but see pp. 550, 551.

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liability ? The rules of the law of South Australia governing the extra-territorial recognition of rights do not extend to the rights to payment of tax under the law of another country. Yet why should the municipal law of South Australia provide the rule of liability ? This is only another way of saying that liability to pay federal tax is a matter of federal law and that the function of s. 79 is not to provide from State law a new source of liability for federal tax.

The suit, as I have already said, is brought in the name of the Deputy Commissioner of Taxation. The authority for instituting a suit in his name is s. 209 of the *Assessment Act*. I think that the provision still refers to that contained in s. 208 which provides that income tax when it becomes due and payable shall be a debt due to the Sovereign on behalf of the Commonwealth and payable to the commissioner in the manner and at the place prescribed. The two provisions formerly were sub-ss. (1) and (2) of s. 57 of the *Assessment Act* of 1922 and before that s. 44 of the *Assessment Act* 1915-1921. What is now s. 209 refers to " tax unpaid " and it is obvious that this refers back to s. 204 and is confined to liability upon an assessment. It means that had there been a basis in s. 79 of the *Judiciary Act* 1903-1955 for treating the defendant as an equitable debtor to the Crown in right of the Commonwealth, the suit would be badly constituted. Part IX of the *Judiciary Act* would of course apply but not s. 209 of the *Assessment Act*. But this is a minor matter and it is mentioned only because it supplies a convenient transition to the question whether any implication can be found in the *Assessment Act* in virtue of which the defendant would become an equitable debtor for the tax to which the executor has been assessed upon the deceased's income.

The general machinery for assessment is only too familiar. It is unnecessary to refer to it except for the purpose of noting the following points, viz.:—(1) that tax is not due and payable until assessed ; (2) that it then becomes a debt to the Crown payable on the date specified in the notice of assessment or, if there be none, on the thirtieth day after service of the notice ; (3) that the assessment of liability is conclusive except upon the processes of review and appeal.

Although there is no judicial decision to that effect, it has, I think, been generally assumed that under the Constitution liability for tax cannot be imposed upon the subject without leaving open to him some judicial process by which he may show that in truth he was not taxable or not taxable in the sum assessed, that is to say that an administrative assessment could not be made absolutely conclusive upon him if no recourse to the judicial power were allowed.

This is not the occasion to go into the basis of this view. All that is necessary is to note that it exists and that hitherto the legislature has respected it. The present is not a case where the deceased was assessed in his lifetime and received a notice of assessment which was unpaid. It is perhaps possible that in such a case s. 217 (1) applies. If it does apply it is because it opens with a double condition, viz. " where at the time of a person's death, tax has not been assessed and paid ". Possibly to fall outside this double negative condition tax must not only have been assessed but paid, before the deceased's death. But unless this be right, the *Assessment Act* leaves the situation arising from the death of a taxpayer who has been assessed to the law relating to debts due to the Crown where the debtor dies. Whether State statutes cutting down the rights of the Crown under the common law apply to the Crown in right of the Commonwealth in this regard is a question into which we shall not enter. Perhaps the *Assessment Act* assumes that they will. But if that is not so I am still of the opinion I expressed in *In re Foreman & Sons Pty. Ltd*; *Uther* v. *Federal Commissioner of Taxation* (1); see *The Commonwealth* v. *Bogle* (2), per *Fullagar* J. It is not however a question that arises in the present case. For it is a case where the death of the taxpayer occurred before assessment and the assessment has been made on the executor under s. 217 (1) of the *Assessment Act*, or possibly s. 216, as affected by s. 254 particularly par. (*b*). There was always difficulty, in the absence of express provision, in imposing liability upon the legal personal representatives of a taxpayer who at the time of his death had not been assessed whether in respect of income fully derived or received by him in his lifetime or in respect of income earned by his efforts but received only after his death. Curiously enough one of the first amendments of the federal income tax law was by the insertion of a provision on the subject, viz. s. 46A of the *Assessment Act* of 1915 (see No. 47 of 1915, s. 10); see further *In re Carden* (3) and on appeal *sub nom. Commissioner of Taxes (S.A.)* v. *Executor Trustee & Agency Co. of South Australia Ltd.* (4). The difficulty was overcome by the provisions now standing as s. 216 and s. 217 which in effect took their source in ss. 46A and 46B of the *Assessment Act* 1915-1918. These provisions give a remedy against the personal representatives under the name of " trustees " (which by definition, s. 6 (1), comprises executors and administrators).

(1) (1947) 74 C.L.R. 508, at pp. 528 et seq.
(2) (1953) 89 C.L.R. 229, at pp. 259, 260.
(3) (1938) S.A.S.R. 175.
(4) (1938) 63 C.L.R. 108.

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The provisions of ss. 216, 217 and 254 are specific : they do not in terms extend beyond the " trustees ". They are interpreted as imposing a liability upon the executors only *quoad* assets and as meaning by assessment to impose a debt owing by the estate : see *Stapleton* v. *Federal Commissioner of Taxation* (1). They provide no positive foundation for any implication importing a liability upon anybody else and nothing to suggest the creation or incorporation of any equitable remedy against beneficiaries. Indeed it would be right to go further and say that if it were possible, which in my opinion it is not, to find elsewhere any ground for such an implication, the terms of these provisions would go far to repel the inference or the implication. They would do so on the principle which is embodied in the third of the categories of *Willes* J. in *Wolverhampton New Waterworks Co.* v. *Hawkesford* (2) : " where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. . . . The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class " (3). That of course is a very general statement of principle and the particular application was remote from this case. It operates however over the whole field of statutory liabilities and it can hardly have a safer application than in a taxing measure.

The assessment was made upon the executor in pursuance of s. 216 or s. 217 as affected by s. 254. He had no assets and had no interest in objecting or appealing in relation to the substance of the liability or its amount. Nevertheless for the purpose of the suit the assessment is treated as ascertaining the liability to tax (i.e. under ss. 216, 217 and 254) and as concluding the defendant who could never contest the correctness of the assessment. To find implications of such a kind in the provisions of the *Assessment Act* is, I think, to go a long way indeed.

The foregoing briefly states the reasons why I venture to think that the suit has no foundation. But I desire to add that I have had the privilege of reading the judgment prepared by *Williams* J. and agree in its conclusions and the reasoning by which they are reached.

In my opinion the demurrer should be allowed and the suit dismissed.

(1) (1955) 93 C.L.R. 603, at p. 618.
(2) (1859) 6 C.B. (N.S.) 336 [141 E.R. 486].
(3) (1859) 6 C.B. (N.S.), at p. 356 [141 E.R., at p. 495].

McTIERNAN J. This action is brought under s. 209 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1955. The plaintiff claims that the assessments pleaded in the statement of claim resulted in the total tax sued for being, by reason of s. 208, a Crown debt payable by the estate of the testator. Facts are alleged in the statement of claim which are intended to support the five amended assessments as duly made under s. 216 (*a*), and the original assessment under s. 217 (1). But it would appear that an action against the executors on the assessments would be fruitless, because, according to the allegations in the statement of claim, they fully administered and wholly distributed the estate before the assessments were made against them, without having had any notice of the tax liabilities of the deceased taxpayer. Accordingly, the action is framed upon the basis that the plaintiff has an equitable right *in personam* to recover the tax from the defendant as residuary beneficiary of the estate—the same equitable right which is given by the equitable doctrines of the Court of Chancery to an unpaid creditor for recovering payment from legatees of a debt not discovered by executors before the estate was wholly distributed. In regard to a residuary beneficiary, the Master of the Rolls made two observations in *Jervis* v. *Wolferstan* (1), which may be conveniently quoted: "I take it that no proposition is better settled than that residuary legatees are liable to refund at the suit of an unpaid creditor . . ." (2). The second observation is: ". . . everybody taking a residue must know that he takes it subject to the testator's liabilities, and takes the risk of its afterwards turning out that there are undiscovered liabilities" (3). This equitable right of an unsatisfied creditor of an estate is fully discussed in *Harrison* v. *Kirk* (4); see also *Ministry of Health* v. *Simpson* (5).

I do not agree with the first ground of the demurrer that a trustee of a deceased estate, who is an executor, cannot be assessed under s. 216 (*a*) or s. 217 (*b*) after he has wholly distributed the estate, if beforehand he had no notice of the outstanding tax liability of the deceased. It seems to me that so to hold would introduce into each of these provisions a limitation on the power of the commissioner which the legislature itself has not seen fit to impose.

The second ground of the demurrer raises the question whether the remedy which the plaintiff is pursuing here is one which is truly available to him. In my opinion, the plaintiff is not entitled

(1) (1874) L.R. 18 Eq. 18.
(2) (1874) L.R. 18 Eq., at p. 25.
(3) (1874) L.R. 18 Eq., at pp. 26, 27.
(4) (1904) A.C. 1, at p. 7.
(5) (1951) A.C. 251.

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to pursue this remedy unless it is provided in the Act. I think that it is right to presume that the Act would not subject beneficiaries not otherwise made liable for unpaid tax to the equitable obligation of refunding unless the Act does so expressly or by necessary implication. It is necessary to remember that the law which we are construing is one " relating to the imposition, assessment, and collection of tax ". The question raised by the second ground of the demurrer in my opinion depends upon the construction of s. 208, because that section says that when tax becomes due and payable it shall be a debt due to the Crown.

I think that in order to uphold the present action it is first necessary to decide that an effect necessarily intended by s. 208 is that proceedings may be brought in equity to saddle a beneficiary with the equitable obligation of refunding. I do not agree that this intention is necessarily implied in the section. The words of the section are fully satisfied if one confines the liability in debt for unpaid tax, created by the section, to the person expressly made liable under the Act to pay that tax. It is clear that the defendant, as beneficiary, is not, apart from the implication sought to be drawn from this section, made liable *in personam* either at law or in equity for the tax sued for in this action. I see no warrant, in the provisions of the Act, for implying and calling in aid the equitable doctrines of the Court of Chancery, which are relied upon, in order to supply remedies for the recovery of tax not provided by the Act. I would therefore allow the demurrer.

WILLIAMS J. This is a demurrer by the defendant to the whole of a somewhat unusual statement of claim. The plaintiff is the Deputy Commissioner of Taxation for the State of New South Wales of the Commonwealth of Australia and the defendant is Edith Doris Brown (formerly Edith Doris May). The statement of claim alleges that the defendant is the widow of Isaac Stevens May who died in New South Wales on 9th July 1952, that probate of his will was granted to the executors named therein William Aubrey Armstrong and William Malcolm Maclean by the Supreme Court of New South Wales in its probate jurisdiction on 15th September 1952, and that the testator did not during his lifetime make full complete and accurate returns of his income tax for the years ended 30th June 1948 to 30th June 1952 inclusive. The statement of claim also alleges that on 16th March 1955 the plaintiff issued amended assessments under the *Income Tax Assessment Act* 1936-1949, the *Social Services Contribution Assessment Act* 1945-1949 and the *Income Tax and Social Services Contribution Assessment*

Act 1950-1952 in respect of the income of the testator for these years and an original assessment under the aforesaid Acts in respect of the income derived by the testator for the period 1st July 1952 to 9th July 1952 (that is to the date of his death) and served all these assessments on the executors, and that the total amount of tax due under them is £3,505 19s. 0d. and was payable to the plaintiff according to the notices of assessment on 18th April 1955. The statement of claim also alleges that by his will the testator after directing payment of all his just debts and funeral and testamentary expenses gave and bequeathed two legacies of £1,000 each and devised and bequeathed the residue of his estate to the defendant absolutely, his estate was sworn for probate purposes at £41,665 and included real estate valued at £15,000 part of which being land under the *Real Property Act* 1900, as amended, was on 8th May 1953 and still is registered by transmission in the name of the defendant and the balance thereof being land under common law title was vested in the defendant by deed of acknowledgement under the *Wills, Probate and Administration Act* 1898 (N.S.W.) as amended, on 7th April 1953 and is still registered in her name. The statement of claim also alleges that the assets of the estate of the testator were fully administered and distributed in accordance with his will by the executors before the issue of the assessments and before any notice to the executors of any intention to issue them and that there are now no assets in the hands of the executors. The plaintiff claims a declaration that the defendant is liable to pay the plaintiff the sum of £3,505 19s. 0d. and an order for payment of this sum. The executors are not joined as plaintiffs but it is admitted that they only distributed the estate of the testator after they had given the notices required by s. 92 of the *Wills, Probate and Administration Act* 1898-1954 (N.S.W.) and in view of the decision in *Hunter* v. *Young* (1) it was not contended that it is not competent for the plaintiff to sue the defendant without first suing the executors or joining them as co-defendants. Section 95 of the *Wills, Probate and Administration Act* contains a provision corresponding to the proviso to s. 29 of the Act 22 & 23 Vict. c. 35 (commonly called *Lord St. Leonard's Act*) that nothing the Act contained should prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of a person or persons who might have received the same respectively. In *Hunter* v. *Young* (1) *Bramwell* L.J., said: " . . . if an executor is not liable to pay, he ought not to be sued; the legislature cannot have intended that the executor should be joined when no remedy can be had against

(1) (1879) L.R. 4 Ex. D. 256.

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him ; the enactment must mean that the suit shall be maintainable against the legatees without joining the executor " (1).

The grounds of the demurrer are (a) that assessments issued after the death of the taxpayer and after the assets of his estate have been fully administered and distributed in accordance with his will by the executors without notice of any intention to issue the same are not sanctioned by the *Income Tax and Social Services Contribution Assessment Act* 1936-1955 ; and (b) that assessments issued in the circumstances referred to in the statement of claim impose no obligation on a beneficiary under the will of the taxpayer to pay the sums so assessed either from the assets passing under the will or at all. It is clear that the *Assessment Act* does not contain any provisions directly authorising the Commissioner of Taxation to sue beneficiaries in estates to recover from them unpaid tax assessed upon income derived by a testator in his lifetime where it cannot be recovered from his trustees because they have distributed the estate in due course of administration without notice of any claims for such tax. If the debt can be recovered from a beneficiary it must be recovered as an equitable debt upon the principle, the classic statement of which appears in the speech of Lord *Davey* in *Harrison* v. *Kirk* (2). This principle has recently been applied by the House of Lords in *Ministry of Health* v. *Simpson* (3). Lord *Davey* said : " In the very able argument of the appellant at your Lordships' bar he did not always bear in mind the distinction between the case where there is still remaining in court a residue or fund legally applicable to the payment of debts, and the case where the whole of the estate has been distributed, and it is necessary in order to obtain payment for the creditor to get back from legatees or others who have been paid, the money which has been paid to them. In the first case the creditor is exercising merely a legal right. In the other he is exercising an equitable right which is given him by the equitable doctrines of the Court of Chancery, because he has no legal right against the legatees ; he has no legal right against the residuary legatee ; his only legal right is against the executor. But the Court of Chancery, in order to do justice and to avoid the evil of allowing one man to retain what is really and legally applicable to the payment of another man, devised a remedy by which, where the estate had been distributed either out of court or in court without regard to the rights of a creditor, it has allowed the creditor to recover back what has been paid to the beneficiaries or the next of kin who derive title

(1) (1879) L.R. 4 Ex. D., at p. 261.
(2) (1904) A.C., at p. 7.
(3) (1951) A.C. 251.

from the deceased testator or intestate. In that case, no doubt, equitable defences may be made to the claim " (1). As a foundation for his claim, the plaintiff relies, in the case of the five amended assessments, upon what is now s. 216 of the *Income Tax and Social Services Contribution Assessment Act* 1936-1956, and in the case of the original assessment upon what is now s. 217 of that Act. These sections were at all material times in the same form. Section 216 provides :—" The following provisions shall apply in any case where, whether intentionally or not, a taxpayer escapes full taxation in his lifetime by reason of not having duly made full complete and accurate returns :—(*a*) The Commissioner shall have the same powers and remedies against the trustees of the estate of the taxpayer in respect of the taxable income of the taxpayer as he would have against the taxpayer if the taxpayer were still living. (*b*) The trustees shall make such returns as the Commissioner requires for the purpose of an accurate assessment. (*c*) The trustees shall be subject to additional tax to the same extent as the taxpayer would be subject to additional tax if he were still living : Provided that the Commissioner may in any particular case, for reasons which he thinks sufficient, remit the additional tax or any part thereof. (*d*) The amount of any tax payable by the trustees shall be a first charge on all the taxpayer's estate in their hands." Section 217 provides :—" (1.) Where at the time of a person's death, tax has not been assessed and paid on the whole of the income derived by that person up to the date of his death, the Commissioner shall have the same powers and remedies for the assessment and recovery of tax from the trustees of that person's estate as he would have had against that person, if that person were alive. (2.) The trustees shall furnish a return of any income derived by the deceased person in respect of which no return has been lodged by him. (3.) Where the trustees are unable or fail to furnish a return, the Commissioner may make an assessment of the amount on which, in his judgment, tax ought to be levied and the trustees shall be liable to pay tax as if that amount were the taxable income of the deceased."

Both of these sections, it will be seen, confer on the commissioner wide powers for the recovery of unpaid income tax from the trustees of the estate of a deceased taxpayer. But the powers are in terms confined to the recovery of tax from the trustees of an estate and do not extend to its recovery from the beneficiaries. It is to be noticed that par. (*d*) of s. 216 is expressly limited to the estate in the trustees' hands. Neither of these sections therefore purports to confer on the plaintiff a statutory legal right to recover the

(1) (1904) A.C., at p. 7.

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unpaid taxes from the defendant. Accordingly he can only succeed against the defendant if he has an equitable right to follow the assets which would have been charged with the debt for the unpaid taxes if they had still remained in the hands of the trustees.

Counsel for the plaintiff relied upon the following passage relating to s. 216 of the *Assessment Act* in the judgment of this Court in *Stapleton* v. *Federal Commissioner of Taxation* (1): " That section applies in any case where, whether intentionally or not, ' a taxpayer escapes full taxation in his lifetime by reason of not having made full, complete and accurate returns ' and for the purposes of considering the validity of this contention it may be assumed that this is such a case. It is, therefore, a case in which the respondent has the same powers and remedies against the trustees of the estate of the deceased in respect of the taxable income of the deceased as he would have had against the deceased if he were still living. By the relevant provisions of s. 216 (*a*) the respondent was, as we understand them, authorised for all purposes relating to the assessment and recovery of tax to regard the trustee or trustees of the deceased's estate as if they were the deceased himself. He might assess the trustees of the estate and proceed against them for the recovery of tax though he could not, of course, recover from them anything in excess of the value of the assets in their hands at the time of the assessment or coming to their hands thereafter (cf. *Patterson* v. *Federal Commissioner of Taxation* (2)). In addition, the respondent, by virtue of s. 216 (*d*) is given a first charge ' on all the taxpayer's estate in their hands '. It was said in the course of argument that the liability of the trustees in such a case is an original and independent liability and, therefore, that it does not constitute a debt provable in the course of a bankruptcy administration but this view must be rejected. The section contemplates the imposition of a liability upon the trustees who represent the deceased taxpayer, the amount of the assessment is enforceable only to the extent of the trust estate in their hands and payment to this extent is secured by a charge on the estate. The liability is one which is imposed upon them in a representative capacity and is truly one which fastens on the estate itself. These considerations dispose entirely of the suggestion that an assessment validly made under s. 216 does not constitute a debt owing by the estate " (3). But there is nothing in this passage which throws any light on the present question. It establishes of course that the debt for unpaid

(1) (1955) 93 C.L.R. 603.
(2) (1936) 56 C.L.R. 507, at pp. 518, 519.
(3) (1955) 93 C.L.R., at p. 618.

tax is a debt owing by the estate and charged upon the estate but it has nothing to say upon the question whether the debt can be recovered not from the trustees or out of the estate whilst it is still in their hands but from a beneficiary to whom the estate or part of the estate has been distributed in due course of administration. In my opinion this question should be answered in favour of the defendant. I venture to repeat, *mutatis mutandis*, what I said in *Federal Commissioner of Taxation* v. *Official Receiver* (1) to the effect that the *Assessment Act* is an Act which provides a complete and exhaustive code of the rights and obligations of the commissioner and other officers of his department to members of the general public who are subject to its provisions and of those members of the general public to his department. In my opinion the whole scheme of the Act, to be gathered from its general structure and its specific provisions, is to confine the liability to pay income tax to persons who can be assessed under the Act and upon whom is conferred the right of appeal against the assessment either by way of reference to a board of review or by appeal to the Court at their option. Reference to some of the more important provisions of the Act make this apparent. Section 6 provides that in the Act, unless the contrary intention appears— . . . taxpayer " means a person deriving income ". Part IV which is headed " Returns and Assessments " contains ss. 161 to 177 inclusive. Section 166 provides that " From the returns, and from any other information in his possession, or from any one or more of these sources, the Commissioner shall make an assessment of the amount of the taxable income of any taxpayer, and of the tax payable thereon ". Section 167 provides :— " If—(*a*) any person makes default in furnishing a return ; or (*b*) the Commissioner is not satisfied with the return furnished by any person ; or (*c*) the Commissioner has reason to believe that any person who has not furnished a return has derived taxable income, the Commissioner may make an assessment of the amount upon which in his judgment income tax ought to be levied, and that amount shall be the taxable income of that person for the purpose of the last preceding section ". Section 169 provides :—" Where under this Act any person is liable to pay tax, the Commissioner may make an assessment of the amount of such tax ". Section 174 provides : " As soon as conveniently may be after any assessment is made, the Commissioner shall serve notice thereof in writing by post or otherwise upon the person liable to pay the tax ". Section 177 (1) provides : " The production of a notice of assessment, or of

(1) (1956) 95 C.L.R. 300, at p. 310.

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a document under the hand of the Commissioner, Second Commissioner, or a Deputy Commissioner, purporting to be a copy of a notice of assessment, shall be conclusive evidence of the due making of the assessment and (except in proceedings on appeal against the assessment) that the amount and all the particulars of the assessment are correct". All these provisions, it will be seen, operate and operate only between the commissioner and some particular member of the public. Section 169 confers on the commissioner a power to make an assessment additional to the power to make an assessment conferred upon him by s. 166 but it is only a power to make an assessment "where any person is liable to pay tax".

Part V, which is headed "Objections and Appeals" contains ss. 178 to 202 inclusive. Sections 185 to 187 confer a right of appeal by reference to a board of review or to the High Court or the Supreme Court of a State upon a taxpayer dissatisfied with any assessment under the Act and upon him alone. Part VI which is headed "Collection and Recovery of Tax" contains ss. 204 to 221 inclusive. Section 208 provides that: "Income tax when it becomes due and payable shall be a debt due to the King on behalf of the Commonwealth, and payable to the Commissioner in the manner and at the place prescribed". Section 209 provides: "Any tax unpaid may be sued for and recovered in any Court of competent jurisdiction by the Commissioner or a Deputy Commissioner suing in his official name". The debt for unpaid tax referred to in these sections is the debt due to the Crown created by the process of assessment, service of notice of the assessment upon the person liable to pay the tax and the expiry of the period specified in the notice after which the debt becomes due and payable. Sections 216 and 217 place the trustees of an estate (subject to their liability being limited to the assets which come to their hands) in the same position as that in which the testator would have been if he had been alive. They can be made to furnish returns and they can be assessed on those returns or if they fail or are unable to make returns the commissioner may issue a default assessment. But, as in the case of a living person, so in the case of the trustees of a deceased person, the debt becomes due and payable because of the assessment, service of notice of the assessment, and expiry of the period specified in the notice within which the tax must be paid.

The liability of the defendant in the present case is said to flow from the assessment and service of the notices of assessment upon the trustees of the estate of the testator. It was submitted that if the notices had been served prior to the distribution of the estate the trustees could have accepted the amounts assessed as correct,

and paid these amounts out of the assets, and need not have appealed. But they would certainly have been under the duty at that stage to satisfy themselves that the amounts assessed were correct and, unless they were so satisfied, to have appealed after having taken judicial advice if necessary whether to appeal or not. To recoup themselves for any expenditure incurred by them for this purpose they would have had an indemnity against the estate. But the position is radically different once they have distributed the estate. They no longer have any assets in their hands wherewith to recoup themselves. It was submitted that they would still be under a duty to notify the beneficiaries that the assessments had been received, that the commissioner might seek to recover the amounts assessed from the beneficiaries, and that the trustees would be willing to examine the correctness of the assessments, and if necessary to appeal, if they were properly indemnified. But this would be imposing a duty on trustees of a novel kind and in my opinion no such duty exists. Trustees who have completed their administration are under no duty to protect the interests of beneficiaries to whom the assets have been distributed. Between such trustees and such beneficiaries the relationship of trustee and *cestui que trust* no longer exists. The trustees are under no duty to protect beneficiaries in respect of any claim by a creditor to follow the assets into their hands. In the case of an ordinary debt, the beneficiaries could avail themselves of every defence which would have been available to the testator if he had been sued in his lifetime or to his trustees if they had been sued after his death. But in the case of a debt for unpaid income tax the beneficiaries would have no means of challenging the assessment and therefore no defence because the *Assessment Act* only confers rights of appeal upon the person assessed. Section 177 of the Act, as has been seen, makes the production of a notice of assessment conclusive evidence of the due making of the assessment and (except in proceedings on appeal against the assessment) that the amount and all the particulars of the assessment are correct. If the plaintiff is right, all that the commissioner would have to do, in order to succeed against a beneficiary, would be to produce the notice of assessment, to prove it had been served on the trustees, that the time for payment had expired, and that the estate had been distributed in due course of administration before the trustees had been notified of the claim. The defendant beneficiary, upon whom no right of appeal against the assessment is conferred by the Act, would then be defenceless. He could not challenge the due making of the assessment however wrong the amount assessed might be. In my opinion the liability

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of any person to pay a debt for unpaid income tax is conditional upon the right of the commissioner to assess that person and upon the correlative right of that person to appeal against the assessment. This flows from the structure of the Act as a whole and is made apparent by the provisions of the many sections which have already been referred to. It is also made apparent by s. 220 of the Act which contains provisions enabling the commissioner to make an assessment where, in respect of the estate of any deceased taxpayer probate has not been granted or letters of administration have not been taken out within six months of his death, and tax has not been assessed and paid on the whole of the income derived by that person up to the date of his death. This section provides that in such a case the commissioner shall cause notice of the assessment to be published twice in a daily newspaper circulating in the State in which the taxpayer resided, and that any person claiming an interest in the estate of the taxpayer may, within sixty days of the first publication of notice of assessment, post to or lodge with the commissioner an objection in writing against the assessment stating fully and in detail the grounds on which he relies, and the provisions of this Act relating to objections and appeals shall thereupon apply in relation to the objection as if the person so claiming an interest were a taxpayer.

As at present advised, I do not think that it is possible under the Constitution for the Parliament of the Commonwealth to provide for the recovery of tax from a person who is given no legal right to contest the correctness of the assessment in a court of law. But that is exactly what the plaintiff contends that the *Assessment Act* does. He claims that upon proof of the facts alleged in the statement of claim his cause of action will be complete and that he will be entitled to judgment. But the point, which was not raised in the argument, need not be pursued because, for the reasons already given, the *Assessment Act* does not do so.

We were referred to the case of *Commissioner of Inland Revenue* v. *Field* (1) where *Barrowclough* C.J. applying *Ministry of Health* v. *Simpson* (2) held the commissioner was entitled to recover a debt for New Zealand income tax, in respect of income derived by the testator, from the beneficiaries to whom the executors had distributed the assets. But none of the considerations here discussed was there adverted to and they may not have been in point in relation to the New Zealand legislation.

For these reasons the demurrer should be allowed.

(1) (1955) N.Z.L.R. 331.

(2) (1951) A.C. 251.

KITTO J. The statement of claim alleges that a debt for income tax in respect of income derived by a deceased person in his lifetime has become due and payable by the deceased's executors, that they have distributed the estate, and that the defendant as residuary legatee has received assets of the estate exceeding the amount of the debt. The plaintiff's case is that, although the defendant is not herself liable for the tax, and is under no common law liability to provide moneys for its payment, a court exercising equitable jurisdiction, seeing that she has received from the estate more than her due and that the plaintiff is the loser thereby, will compel her to pay him the amount which she would need to refund to the estate to enable it to pay the tax.

As no question has been raised as to the right of the plaintiff to pursue such a claim on behalf of the Commonwealth, and an amendment, if one is necessary, could be readily obtained, I shall confine myself to the question of substance which was argued, and shall refer to the plaintiff as if he and not the Commonwealth were the real creditor.

The principle of equity upon which the plaintiff relies is part of the law of New South Wales, and he claims that it is applicable as between the defendant and himself by virtue of ss. 64 and 79 of the *Judiciary Act* 1903-1955 (Cth.). It is a principle developed by the English courts of equity in order to meet a situation for which, without it, there was no remedy. A creditor of a deceased person's estate who has to resort to the courts to recover his debt must, prima facie, proceed against the personal representative. If a personal representative has paid or transferred assets of the estate to beneficiaries, the mere fact that he has done so in good faith and without notice of an outstanding claim against the estate does not excuse him from the payment or satisfaction of it: *Williams* on *Executors and Administrators*, 13th ed. (1953), vol. 2, p. 751. But the creditor may nevertheless fail to obtain payment from the personal representative, for a variety of reasons. The personal representative's own assets, together with any assets still remaining in the estate, may be insufficient to satisfy the debt. The distribution to beneficiaries may have been made under an order of a court of equity in the administration of the estate, so that the representative is protected from personal liability. Or it may have been made after sufficient notices given under s. 92 of the *Wills, Probate and Administration Act* 1898 (N.S.W.), so that he is protected in respect of claims of which he had no notice at the time of distribution. If it happens for any of these or other reasons that the creditor cannot get his debt paid by the personal representative,

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equity will come to his assistance. The rule which it applies is that when, and only when, the creditor has exhausted his remedy against the personal representative, "so that there is no other way", he may obtain a sufficient refund by direct suit against the beneficiaries who have received the assets: *Orr* v. *Kaines* (1); *In re Diplock*; *Diplock* v. *Wintle* (2) and (on appeal) *Ministry of Health* v. *Simpson* (3)—unless, of course, he has so conducted himself that to exercise such a right would be inequitable: *Blake* v. *Gale* (4).

The first point to observe in relation to the statement of claim is that it does not show that the plaintiff has no unexhausted remedy against the executors of the testator. It does allege that there are no assets (*scil.* of the estate) in the hands of the executors, and that the assets were distributed "before the issue of the amended assessments and original assessment" which led to the plaintiff's debt being due and payable and before any notice to the executors of any intention to issue those assessments. But there is no allegation that the executors are without assets of their own sufficient to meet the debt, or that before distributing they gave notices sufficient to attract the protection (if it applies by virtue of s. 64 of the *Judiciary Act*) of s. 92 of the *Wills, Probate and Administration Act* 1898 (N.S.W.), or that they in fact had no notice of the plaintiff's claim when they distributed the estate. The possibility is thus left unexcluded that the plaintiff may be able to obtain payment of his debt from the executors.

For this reason I should have been inclined to think, if it had not been for the case of *Hunter* v. *Young* (5), that the statement of claim discloses no right of action against the defendant and is accordingly demurrable. A similar view seems to have been taken by *Cleasby* B. (6) in the case cited, and it accords with the inclination of opinion of *Baggallay* L.J. (7) in the same case. But the demurrer in that case was nevertheless overruled by the Court of Appeal. The only ground of demurrer expressly relied upon was that the executor was not a party to the action, and that was the point upon which the judgments turned. Indeed it seems to have been thought so likely that the executor was entitled to statutory protection, under legislation corresponding to s. 92 of the *Wills, Probate and Administration Act*, that the absence of express allegations directed to that topic received little attention. If the dependence of the plaintiff's cause of action upon his having exhausted

(1) (1751) 2 Ves. Sen. 194 [28 E.R. 125].
(2) (1948) Ch. 465, at p. 487.
(3) (1951) A.C. 251, at p. 267.
(4) (1886) 32 Ch. D. 571, at pp. 578, 581.
(5) (1879) L.R. 4 Ex. D. 256.
(6) (1879) L.R. 4 Ex. D., at p. 257.
(7) (1879) L.R. 4 Ex. D., at p. 263.

his rights against the executor had been underlined by earlier authority as firmly as it has now been underlined in the *Diplock Case* (1), perhaps the decision would have been different. However, it has stood for a long time, and I am content to treat it as requiring that in such a case as the present the statement of claim should be understood as meaning that the plaintiff cannot obtain payment of his debt by means of any remedy available to him against the executors.

I pass, therefore, to the specific grounds of demurrer. What I have said as to the principle of equity upon which the plaintiff relies is relevant as showing the true nature of his claim. As *Thesiger* L.J. observed in the course of argument in *Hunter* v. *Young* (2), the plaintiff is not claiming payment of a debt due from the defendant; he is simply "following the assets of the deceased", in the sense, not of tracing specific assets, but of resorting to a recipient of assets, that is to the recipient personally, for a refund of the amount or part of the amount by which she has benefited at the expense of persons having rights prior to hers in the administration of the estate.

The action, as I have said, is not one in which the plaintiff sets up a liability of the defendant to pay tax. The true analysis of the situation, as I see it, is that the defendant is said to have received from an estate assets which, it turns out, she was not entitled to receive, and she is being called upon to satisfy a liability of the estate, as a short-cut to the result which would be produced by the restoration of the necessary amount to the estate and the payment of it to the plaintiff by the executors.

Two grounds of demurrer are specified by the defendant, each being based upon the fact conceded in the statement of claim that the assessments in question were issued after the executors, without notice of any intention to issue the same, had fully administered and distributed the estate in accordance with the will. The grounds are that in this state of things the assessments are not sanctioned by the Act, and that they impose no obligation on a beneficiary under the will to pay the sums assessed, either from the assets passing under the will or at all.

The way in which the second of these grounds is expressed makes it desirable to emphasise that the plaintiff does not allege that the defendant is under any liability for tax. He does not suggest that the assessments, or even (to be more precise) the arrival of the time at which the Act made the assessed amount of tax due and payable, operated by force of the Act to give him any right of action

(1) (1948) Ch. 465; (1951) A.C. 251. (2) (1879) L.R. 4 Ex. D., at p. 260.

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against the defendant. He says that it operated by force of the Act to give him a right of action against the executors. That is the first step in his argument, and it is the only one for which he relies on the Act. For the rest he relies on the principle of equity to which I have referred.

Is the first step well taken? Assuming, as we must for the purposes of the demurrer, that the allegations in the statement of claim are true, the situation is this. The deceased derived income in the five years which ended on 30th June 1952 and the nine days of the following year. (He died on 9th July 1952.) He did not make full complete and accurate returns of his income for the five years referred to, and thereby he escaped full taxation in his lifetime. After his death, amended assessments were made in respect of his income of those five years and an original assessment was made in respect of the income of the nine days. At the time of the making of the assessments, his executors had already distributed his estate without notice of an intention to make the assessments. Notices of assessments were served on the executors, and the tax in respect of which the plaintiff now sues has become due and payable according to the notices. Section 204 of the Act makes income tax which is assessed "due and payable by the person liable to pay the tax" on the date specified in the notice, or, if no date is specified, on the thirtieth day after the service of the notice. The statement of claim must mean that either a date was specified in the notices and had passed before the suit was commenced, or that the thirtieth day after the service of the notices had passed before the suit was commenced. The question whether the tax, which according to the notices became due and payable, became in law due and payable must therefore depend on whether the executors were, when the notices were served upon them, the persons "liable to pay the tax".

To show that they were, the plaintiff relies upon ss. 216 and 217. On the assumed facts, the conditions for the application of s. 216 were satisfied with respect to the deceased's income of the five years to 30th June 1952, and the conditions for the application of s. 217 were satisfied with respect to his income of both the five years and the ensuing nine days. It will suffice for the moment to refer to s. 217, which applies where, at the time of a person's death, tax has not been assessed and paid on the whole of the income derived by that person up to the date of his death. The section, when it applies, gives the commissioner the same powers and remedies for the assessment and recovery of the tax from the trustees of the deceased person's estate as he would have had against that person

if that person were alive. " Trustee " is defined by s. 6 to include an executor. It is clear that, if the deceased person with whose estate we are now concerned had been alive at the date of service of the notices of assessment he would have been the person " liable to pay the tax ". The effect of s. 217 seems clearly to be to substitute the executors for the deceased: see *Mortimer Kelly's Case*; *Commissioner of Stamps (W.A.)* v. *West Australian Trustee, Executor & Agency Co. Ltd.* (1) and *Corbett's Case*; *Commissioner of Stamps (W.A.)* v. *West Australian Trustee, Executor & Agency Co. Ltd.* (2). On its very terms it deals with the liability of persons and not of property, though of persons in a representative capacity only. It makes trustees liable to be assessed to tax without regard to the question whether they have any trust assets in their hands available to satisfy the tax when assessed. It is nothing to the point that an executor may be able to protect himself when sued, by pleading *plene administravit* or *plene administravit praeter*, or by relying upon s. 92 of the *Wills, Probate and Administration Act* or an order made by a court of equity in the administration of the estate. The point is that s. 217, clearly as I venture to think, makes the executors as such the persons " liable to pay the tax ". In the present case, therefore, the service of the notices of assessment upon the executors was required by s. 174, and the tax assessed became due and payable by them by virtue of s. 204.

The provisions of s. 216 are broadly similar, but they go further in one respect. After providing that in the conditions which it prescribes the commissioner shall have the same powers and remedies against the trustees of the estate as he would have against the taxpayer if the taxpayer were still living, and after making other provisions which need not be mentioned here, the section adds that the amount of any tax payable by the trustees shall be a first charge on all the testator's estate in their hands. It expressly recognises that the effect of the preceding provisions of the section is to make the tax " payable by the trustees ". It supplements their liability by a charge on the estate, and so makes the commissioner, already a creditor, a secured creditor. Under this section it is even clearer than under s. 217 that the commissioner's power to serve on executors a notice of assessment which will be effectual under s. 204 to give rise to a debt due and payable by them in their representative capacity is not contingent upon there still being assets in their hands to meet the tax at the time when the assessments are made or when the notice is served. Whether the tax so becoming payable can

(1) (1925) 36 C.L.R. 98, at pp. 108, 116.

(2) (1926) 38 C.L.R. 63, at pp. 67, 70, 72.

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be recovered from them is another matter. If they have not enough assets of the estate in their hands,—if, for example, they have distributed amongst beneficiaries the assets they have received—the tax may or may not be recovered from them, according to circumstances. But what matters for present purposes is that by force of s. 204 the tax is due and payable by them as the persons liable to pay it. It is in this sense that the tax is a debt owing by the estate: *Stapleton* v. *Federal Commissioner of Taxation* (1).

Neither of the points of demurrer specifically taken can be sustained. Two further questions have arisen, however, and as the defendant is not confined to his stated grounds these questions must be considered. First, is the plaintiff's debt distinguished from other debts by any characteristic which makes the equitable principle upon which the plaintiff relies inapplicable in relation to it? And, if not, is there anything in the *Income Tax Assessment Act* to make that principle inapplicable in such a case as this?

As to the first of these questions, it may be observed that the deceased was at the time of his death under an actual liability, under taxing Acts already in force, to pay tax on all the income to which the amended assessments and the original assessment relate. Even as to the income of the last nine days this was so, by reason of the provision contained in s. 16 (2) of the taxing Act of 1951 (No. 45 of 1951). That provision was eventually superseded by the Act No. 91 of 1952, but the same basic rates of tax were prescribed by the latter as by the former Act. In this state of the legislation, even those members of the Court who, in *Mortimer Kelly's Case* (2), dissented from the decision that the income tax which there had been imposed, though not assessed, at the death of a deceased person was one of the "debts due by the deceased person" within the meaning of a Western Australian statute, would have held that there was, at the death of the deceased person to whose estate the present case relates, a liability actually existing. The fact that no debt due and payable could arise from the liability until after assessment and the service of a notice of assessment cannot take the case out of the class to which the equitable rule in question applies. Even in respect of a debt arising out of a liability which at the death was contingent and extremely unlikely ever to mature into a present debt, an executor called upon to pay the debt after it has matured has been held entitled to a refund from a beneficiary to whom he has made a distribution with notice that the contingent liability existed: *Jervis* v. *Wolferstan* (3); *Whittaker* v. *Kershaw* (4). *A fortiori* the creditor, having been no party to

(1) (1955) 93 C.L.R. 603, at p. 618.
(2) (1925) 36 C.L.R. 98.
(3) (1874) L.R. 18 Eq. 18.
(4) (1890) 45 Ch. D. 320.

the distribution, must be entitled to get back enough to pay his debt, assuming that there was nothing to make it inequitable that he should. In *Jervis* v. *Wolferstan* (1) itself, *Jessel* M.R. said, in relation to the particular case of residuary legatees: "I take it that no proposition is better settled than that residuary legatees are liable to refund at the suit of an unpaid creditor, . . . everybody taking a residue must know that he takes it subject to the testator's liabilities, and takes the risk of its afterwards turning out that there are undiscovered liabilities. That has always been the law, and I think there is no unusual hardship in that" (2).

It may be mentioned that when *Jervis* v. *Wolferstan* (1) was approved by the Court of Appeal in *Whittaker* v. *Kershaw* (3) its principle was treated as imposing on a beneficiary a personal liability to refund to an executor an amount paid by the latter in respect of a debt which had arisen after the distribution—not merely a liability to pay out of the assets received in the distribution, or assets into which they could be traced. I mention this because to some it may seem that a rule of equity is being applied inequitably when its aid is invoked in order to compel a beneficiary in an estate, who has received money or property of the estate in good faith and has spent it or disposed of it never thinking or having cause to think that any part of it represents unpaid tax, to meet the estate's liability for such tax. The truth is that the case is only an instance of a class of case in which equity has had to make a hard choice—whether to hold the beneficiary liable to meet an unpaid debt of the estate to the extent of what he has received from the estate, or to leave the creditor with no remedy although money enough to pay his debt has gone to someone whose only title was to participate in the surplus remaining after payment of debts. But the choice has been made and a clear answer given. In the words of Lord *Simonds* in *Ministry of Health* v. *Simpson* (4): "Upon the propriety of a legatee refusing to repay to the true owner the money that he has wrongly received I do not think it necessary to express any judgment. It is a matter on which opinions may well differ. The broad fact remains that the Court of Chancery, in order to mitigate the rigour of the common law or to supply its deficiencies, established the rule of equity which I have described and this rule did not excuse the wrongly paid legatee from repayment because he had spent what he had been wrongly paid. No doubt the plaintiff might by his conduct and

(1) (1874) L.R. 18 Eq. 18.
(2) (1874) L.R. 18 Eq., at pp. 25, 26, 27.
(3) (1890) 45 Ch. D. 320.
(4) (1951) A.C. 251.

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particularly by laches have raised some equity against himself; but if he had not done so, he was entitled to be repaid." (1)

Any question as to the justice of the matter being therefore necessarily put aside, it remains only to consider a suggestion made to us that a consideration of the *Income Tax Assessment Act* itself should lead to a conclusion that resort by the commissioner to the rule of equity is impliedly excluded. The Act establishes a system for imposing liability upon individuals and their estates to pay tax in situations which are described, and the system includes a procedure for the assessment of the tax payable in particular cases, and for resort to the courts, by those upon whom liability is imposed, in order to obtain decisions as to whether assessments in fact made correctly carry out the provisions of the Act. In respect of these matters, the Act no doubt shows plainly that it intends to cover the field exhaustively. But the procedures of the Act culminate in the final establishment, as between the commissioner and " the person liable to pay the tax ", of a debt due and payable (s. 204)—due, that is, to the Crown in right of the Commonwealth and payable to the commissioner (s. 208). It is a debt for which the commissioner is given authority to sue in his official name (s. 209). But in what courts, by what procedure, for what specific relief and against what persons the commissioner may take proceedings are matters which the Act leaves to be governed by the general law as to debts. In particular, the Act shows no intention to place the commissioner in any less favourable a position than that of any other creditor as regards remedies which involve the taking of money or property belonging to third parties. One would hardly expect it to do so. In one respect it gives a special advantage to the commissioner *vis-à-vis* third parties, namely that as against them it makes a notice of assessment conclusive evidence of the due making of the assessment and that the amount and all particulars of the assessment are correct (s. 177). This means that the third party may have to pay money to the commissioner in respect of an assessment the correctness of which according to the criteria of the Act he has had no opportunity of contesting. But that is no more than a stipulated consequence of an assessment having become conclusive as between the commissioner and the person who is liable under the Act to pay the tax. That person has had a full opportunity of contesting it, and either has exhausted the opportunity or chosen not to take it. In a case like the present he may not have been under any duty to the third person to contest the assessment and may have had no incentive

(1) (1951) A.C., at p. 276.

to do so. But the Act exhibits no intention to make a right of objection, of application for review, and of appeal to the courts, a condition of any other liability than that which it creates by its own direct operation. I can see no reason, either in constitutional considerations or in any other, for construing the Act as meaning that when the liability of a "person liable to pay the tax" has become finally settled, and a debt has become due to the Crown and payable to the commissioner, those only of the modes by which ordinary creditors may obtain payment of their debts shall be available to the commissioner which involve no depletion of the assets of a third person. If the ordinary law makes a third person liable to meet a debtor's liability in particular circumstances, I can find nothing in the Act to suggest that that law is not to make a third person liable to meet a debtor's liability for tax in those circumstances. Suppose, for instance, that a person liable under the Act to pay tax has given the commissioner a charge over property to secure the tax. In proceedings to enforce the charge against a stranger into whose hands the property has come, s. 177 will arm the commissioner with conclusive evidence of the tax; but the Act cannot mean that it is to be an objection to the proceedings that the person sued has no opportunity to test the correctness of the assessment. Suppose, again, that a person liable under the Act to pay tax applies under s. 210 for a certificate of no objection to his departure from Australia and procures at the commissioner's request a guarantee of his tax liability from a third person. Is that person not liable to be sued on his guarantee, and to have the tax conclusively proved by the production of the notice of assessment, simply because the Act gives him no right to challenge the assessment? It seems to me that a beneficiary who is sued under the rule of equity to which the plaintiff here appeals is in like case.

Only one other suggestion was made on behalf of the defendant as to the intention appearing from the Act. It was that in relation to the particular case of tax payable in respect of income derived by a deceased person in his lifetime, the intention is to confine the remedies of the commissioner to proceedings against the trustees of the estate for recovery of the tax out of the assets. I think the answer is that ss. 216 and 217 follow a course incompatible with the existence of that intention. They take the situation which the Act has created in relation to living persons liable to pay tax, with all that is involved as regards recovering tax from third persons in varying sets of circumstances, and they place the trustees of a deceased person's estate in exactly that situation. They do so by giving the commissioner, not powers and remedies specified

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afresh, but powers and remedies described by reference to those which would be available against the taxpayer if he were alive. All that the sections do beyond that is by way of supplement.

In the result I am of opinion that we have not to reach the conclusion that the Commissioner of Taxation is the one creditor of a deceased person's estate who may not have a remedy established by courts of equity for the purpose of seeing (as Lord *Simonds* said in *Ministry of Health* v. *Simpson* (1)) that the assets of a deceased person are duly administered and come into the right hands and not into the wrong hands.

For these reasons I would overrule the demurrer.

TAYLOR J. The claim of the plaintiff to recover the moneys the subject of his claim, must, if it is to succeed, rest upon one of two foundations; either it is a remedy which, in the circumstances alleged, is given to the plaintiff by the provisions of the *Income Tax and Social Services Contribution Assessment Act* as it existed at the material time, or, it is a remedy available to the plaintiff, in effect, as an unpaid creditor of the deceased against a beneficiary under the deceased taxpayer's will who has been overpaid.

The first proposition may, I think, be shortly answered. The statutory provision upon which the plaintiff relies is s. 216 of the Act and this section provides that in any case where, whether intentionally or not, a taxpayer escapes full taxation in his lifetime by reason of not having duly made full, complete and accurate returns, the commissioner shall have the same powers and remedies against the trustees of the estate of the taxpayer in respect of the taxable income of the taxpayer as he would have against the taxpayer if the taxpayer were still living. An obligation is cast upon the trustees (which term includes executors) to make such returns as the commissioner requires for the purpose of an accurate assessment and they are to be subject to additional tax to the same extent as the taxpayer would be if he were still living. Finally, by sub-s. (*d*), the amount of any tax payable by the trustees is to constitute a first charge on all the taxpayer's estate in their hands.

There are many obvious difficulties in the application of the section but two propositions concerning its operation may now be taken as established. The first is that, although the section accords to the commissioner " the same powers and remedies against the trustees . . . in respect of the taxable income of the taxpayer as he would have against the taxpayer if the taxpayer were still living ", it is clear that the liability to pay tax which is imposed

(1) (1951) A.C., at p. 266.

upon a trustee by virtue of an assessment made pursuant to the section does not extend beyond an obligation to pay out of the assets in his hands at the time of the assessment or coming to his hands thereafter (*Patterson* v. *Federal Commissioner of Taxation* (1) and *Stapleton* v. *Federal Commissioner of Taxation* (2)). The second is that the charge which is given by sub-s. (*d*) attaches only to such assets. This is implicit in the decision in *Stapleton's Case* (3) (see particularly the discussion (2)). It may, therefore, be said that, in the circumstances of the present case, the section neither enables the commissioner to recover the tax outstanding from the trustee nor creates any charge in his favour. But, whether this be so or not, it is clear that the pleading demurred to makes no claim that the assets in the hands of the defendant are subject to any such charge. Although it is alleged by the statement of claim that the defendant is still the owner of the lands which devolved upon her from the testator no claim is made that the plaintiff is entitled to a charge upon them ; the substance of the claim is that by reason of the circumstances alleged the defendant is liable to pay to the plaintiff the amount of the assessment. There is nothing whatever in the section to justify such a claim.

Alternatively the plaintiff seeks to invoke the principle applied in cases such as *David* v. *Frowd* (4) ; *Sawyer* v. *Birchmore* (5) ; *March* v. *Russell* (6) ; *Underwood* v. *Hatton* (7) and *Harrison* v. *Kirk* (8) and recently reviewed in *Ministry of Health* v. *Simpson* (9). The plaintiff, it is asserted, is in the position of a creditor of the deceased who, having exhausted his remedies against the executor, is now entitled as a matter of " common justice " (*Noel* v. *Robinson* (10)) to recover the amount of his claim from the defendant. In a loose sense it may perhaps be said that the plaintiff was a creditor of the deceased. Indeed, for the purposes of Acts imposing death and probate duties, income tax upon a deceased person's income, though not assessed until after his death, has been held to answer the description of " a debt due by the deceased " (*Mortimer Kelly's Case* ; *Commissioner of Stamps (W.A.)* v. *West Australian Trustee, Executor & Agency Co. Ltd.* (11) and cf. *Corbett's Case* ; *Commissioner of Stamps (W.A.)* v. *West Australian Trustee, Executor & Agency Co.* (12)). It may, perhaps, be said that this conclusion depended

(1) (1936) 56 C.L.R. 507, at pp. 518, 519.
(2) (1955) 93 C.L.R. 603, at p. 618.
(3) (1955) 93 C.L.R. 603.
(4) (1833) 1 My. & K. 200 [39 E.R. 657].
(5) (1836) 1 Keen 391 [48 E.R. 357].
(6) (1837) 3 My. & Cr. 31 [40 E.R. 836].
(7) (1842) 5 Beav. 36 [49 E.R. 490].
(8) (1904) A.C. 1.
(9) (1951) A.C. 251.
(10) (1682) 1 Vern. 90 [23 E.R. 334].
(11) (1925) 36 C.L.R. 98.
(12) (1926) 38 C.L.R. 63.

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upon the view that the quoted expression is "apt to include" all sums which might become payable after death in discharge of any legal obligation undertaken by, or imposed by law upon, a deceased person (per *Knox* C.J. (1)). But it is not essential for the application of the principle in question that a claim sought to be asserted against a beneficiary should have constituted a debt or liability of the deceased in his lifetime for the principle has been applied where one or more of the next of kin have been excluded in the distribution of an intestate estate and also where a distribution has been made according to the tenor of a will subsequently found to be wholly or partly invalid. Further it seems to have found ready enough acceptance in cases where, subsequently to a distribution, an antecedent contingent liability of the executors has ripened into a debt (*Jervis* v. *Wolferstan* (2) and *Whittaker* v. *Kershaw* (3)). Consideration of the authorities induces me to think that the relevant initial condition to be satisfied is that there should be found, extant, a liability which is properly chargeable against the deceased's estate and that it is not necessary that the claimant should answer, strictly, the description of a creditor of the deceased or that the liability should represent a debt or demand due and owing or payable by the deceased in his lifetime.

The question then is whether the claim of the plaintiff is made in respect of such a liability. There can, I think, be little doubt that it is. Indeed, it is not disputed that if the assessment had been made prior to distribution the amount now claimed would have been payable out of the assets of the deceased. In that event the liability of the executors would have been precisely the same as if the assessment had been made before the death of the deceased and the debt thereby created had, at his death, remained discharged. But in the latter case no doubt could arise concerning the right of the plaintiff to proceed against the defendant if the executors had distributed the deceased's assets without notice of the assessment. Why, then, it may be asked, should the same remedy be denied when the assessment is not made until after death? The only distinction between the two cases is, of course, that in the former case, the debt created by the assessment would be, strictly, a debt of the deceased, whereas, in the latter case, the debt is a debt owed by his personal representative in his capacity as such though, of course, the assessment represents, merely, the crystallisation of a contingent liability to which the deceased, himself, was subject.

(1) (1925) 36 C.L.R., at p. 102.
(2) (1874) 18 L.R. Eq. 18.
(3) (1890) 45 Ch. D. 320.

Section 216 has, it may be observed, nothing to say with respect to cases which fall into the first category; it deals only with the latter. But it does not, in my view, deal with such cases by formulating an exclusive set of remedies for the commissioner; it merely provides those additional rights which the circumstances of such cases require, that is, in brief, a right to assess the trustee and a right to a charge upon the assets in his hands. There is, I think, no room for a distinction to be drawn between the types of cases mentioned and I am unable to perceive that the provisions of the Act deny to the plaintiff the remedy which he seeks to enforce. That being so I am of opinion that the demurrer should be overruled.

Judgment upon the demurrer for the defendant. The suit to be dismissed. Costs of the demurrer to be paid by the plaintiff.

Solicitor for the plaintiff, *H. E. Renfree*, Crown Solicitor for the Commonwealth.

Solicitors for the defendant, *Matthew McFadden & Co.*

J. B.