[HIGH COURT OF AUSTRALIA.]

MACK AND OTHERS . . . . APPELLANTS;

AND

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES) . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 15, 16, 27.

Knox C.J., Isaacs and Rich JJ.

Duties—Estates of deceased persons—Deed—Covenant to pay money on demand—Debt "actually due and owing"—Gift—Stamp Duties Act 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *secs.* 49, 53—*Stamp Duties* (*Amendment*) *Act* 1914 (*N.S.W.*) (*No.* 3 *of* 1914), *sec.* 36.

Case Stated—Power to draw inferences from facts stated—Stamp Duties Act 1898 (*N.S.W.*) (*No.* 27 *of* 1898), *secs.* 18, 54.

Sec. 49 (2) of the *Stamp Duties Act* 1898 (N.S.W.) as amended by sec. 36 of the *Stamp Duties* (*Amendment*) *Act* 1914 provides that the duties to be levied, collected and paid as therein mentioned shall be charged and chargeable upon (*inter alia*) "(B) all personal estate (not being chattels real) taken under any gift whenever made by such person, of which *bonâ fide* possession and enjoyment has not been assumed by the donee immediately upon the gift, and thenceforward retained to the entire exclusion of the donor, or of any benefit to him of whatsoever kind and in any way whatsoever." Sec. 53 provides that "(1) Where any person dying after the twenty-second day of May, one thousand eight hundred and ninety-four, was at the time of his death domiciled in New South Wales, all debts actually due and owing by him shall be deducted from his estate."

A testator executed in favour of each of his six daughters a deed whereby in consideration of natural love and affection he covenanted and agreed that he would on demand pay to her, her executors, administrators or assigns a certain sum of money and that in the meantime and until such demand were

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made he would pay to her interest on so much of that sum as should for the time being remain unpaid. At the time of the testator's death none of the several sums had been paid by him nor had any demand for payment been made, but the testator had paid interest as agreed.

Held, that the several sums were debts actually "due and owing" within the meaning of sec. 53, and should, pursuant to that section, be deducted from the value of the assets comprised in his estate, and that the amounts of the several debts were not gifts made by the testator so as to be taxable under sec. 49 (2) (B).

Decision of the Supreme Court of New South Wales: *Mack* v. *Commissioner of Stamps*, 20 S.R. (N.S.W.), 339, reversed.

Upon a special case stated under sec. 18 of the *Stamp Duties Act* 1898 (N.S.W.) the Court has no jurisdiction to draw inferences from the facts stated.

APPEAL from the Supreme Court of New South Wales.

A special case which, as amended on the hearing of the appeal to the High Court, was substantially as follows was stated by the Commissioner of Stamp Duties for New South Wales for the decision of the Supreme Court:—

1. The testator, Austin Mack, late of Pallal near Bingara, died on 4th June 1918 leaving a will dated 29th March 1912 and a codicil thereto dated 4th January 1915.

2. Probate of his said will and codicil was granted by this Court on 14th August 1918 to Austin Joseph Gardner Mack, William Rodney Mack and Frank Alexander Mack, the executors therein named.

3-4. Within twelve months before the execution of the indentures hereinafter mentioned, discussions took place between the testator and some members of his family in the course of which the testator on several occasions stated that he desired and intended to divide £18,000 amongst his six daughters in equal shares by way of gift. When expressing his said intention the testator informed his daughters that he intended to carry it out by deed of gift, and that he expected them to leave the money in his station, and that he would pay them interest on it in the meantime, but that he wished them also to understand that they were at liberty to withdraw the money at any time they wished.

5. Six several indentures were accordingly executed on 17th March 1910, the parties to each of them being the testator of the

one part and one of his said daughters of the other part, and the testator thereby in consideration of natural love and affection and for no other consideration covenanted and agreed for himself, his heirs, executors and administrators and assigns with such daughter, her executors, administrators and assigns that he, his executors or administrators would on demand pay to her, her executors, administrators or assigns the principal sum of £3,000, and further that he would in the meantime and until such demand should have been made and complied with pay to her, her executors, administrators or assigns interest on the said sum or on so much of it as should for the time being remain unpaid at the rate of £4 per centum per annum by equal half-yearly payments on the first days of March and September in every year or on the date of the payment of the said principal sum as the case might be.

6. Immediately after the said indentures were executed they were handed to Messrs. Whiting & Aitken, solicitors, of Melbourne, to hold on behalf of the said respective daughters of the testator, and thereafter the said indentures were held by the said solicitors on behalf of the said daughters until after the death of the said testator, when the said solicitors by direction of the said respective daughters sent the said respective indentures to them in New South Wales.

7. No part of the said principal sum was paid by the testator to any of his said daughters, but from the date of the execution of the said indentures the testator made payments from time to time to each of them representing interest on such principal sum as follows: Anna Mack, £975; Catherine Ada Mack, £960; Alice Maud Mack, £965; Ellen Susan Mack, £965; Nancy Clare Mack, £960; Marion Margaret Biscoe, £960.

8. Up to the death of the testator no demand had been made by any of his daughters for the payment of the said principal sums or any part thereof, and at his death the same or any part thereof had not been paid by him to any of them or to any person on behalf of any of them.

9. The said executors claim that they are entitled to deduct the said sums of £3,000 as debts due by the estate of the testator, but the Commissioner disallowed such claim on the ground that such

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sums were not debts actually due and owing by the testator within sec. 53, sub-sec. 1, of the *Stamp Duties Act* 1898.

10. The Commissioner further claims that the said six sums of £3,000 form part of the estate of the testator in respect of which duty is payable under sec. 49, sub-sec. 2 (B), of the said Act as amended by the *Stamp Duties (Amendment) Act* 1914, sec. 36.

11. On the basis that the said six sums of £3,000 cannot be deducted as aforesaid but form part of the estate of the testator the value of his estate for purposes of duty is £60,383.

12. The Commissioner assessed the duty payable in respect of the said estate at £5,837 0s. 6d., being at the rate of £9⅔ per centum on the said sum of £60,383, and also claimed interest on such duty amounting to £207 1s. 11d.

13. The executors paid the said sum of £5,837 0s. 6d. and such interest, but under protest as to the disallowance of the deduction of the said six sums of £3,000, and called upon the Commissioner to state and sign this case.

14. The questions for the determination of this Court are :—

(1) Are the executors entitled to deduct the said six sums of £3,000 as debts of the testator within sec. 53, sub-sec. 1, of the said Act ?

(2) Do the said sums form part of the estate of the testator in respect of which duty is payable under sec. 49, sub-sec. 2 (B) of the said Act ?

(3) What is the duty payable on the said estate ?

(4) How should the costs of this case be borne and paid ?

The case was heard by the Full Court, which by a majority answered the first three questions as follows : (1) No ; (2) Yes ; (3) The amount already paid : *Mack* v. *Commissioner of Stamps* (1).

From that decision the executors now appealed to the High Court.

Maughan K.C. (with him *Watt* K.C. and *Leonard*), for the appellants. The debts created by the several indentures were debts " due and owing " by the testator within the meaning of sec. 53 of the *Stamp Duties Act* 1898, and should be deducted from the testator's assets. They cannot be brought within sec. 49 (2) (B), because the

(1) 20 S.R. (N.S.W.), 339.

making of a promise to pay is not a gift and if it is a gift what is given is a promise and of that promise the donee had immediate possession and enjoyment. Sec. 49 (2) (B) contemplates some personal estate which belonged to the testator and which was passed by him to someone else, and a chose in action created by himself cannot be within the sub-section because it never belonged to him at any time. It cannot be suggested that the donees were not in *bonâ fide* possession and enjoyment of the debts to the exclusion of the donor, for one cannot contemplate a person as being in possession of his own obligation.

[RICH J. referred to *Attorney-General* v. *Earl Grey* (1); *His Majesty's Advocate* v. *M'Taggart Stewart* (2).]

It cannot be suggested that there was a gift of £3,000 to each daughter of which sum the testator retained possession, for the facts do not bear out that view of the transaction.

Langer Owen K.C. (with him *S. A. Thompson*), for the respondent. In order to determine whether the estate of the testator should for the purposes of taxation be lessened by £18,000, the true nature of the transaction must be determined. If the Court determines that the transaction was a gift by the testator of £3,000 to each of his six daughters and that the testator intended to retain those sums until a demand was made for payment of them, then the transaction falls within sec. 49 (2) (B). If that was the nature of the transaction, the six sums of £3,000 were not debts "due and owing" within sec. 53, for they were not payable until demand was made, and the intention was that there should be no debt until demand was made (*In re Brown's Estate*; *Brown* v. *Brown* (3); *Bradford Old Bank* v. *Sutcliffe* (4); *Lord Advocate* v. *Gunning's Trustees* (5)).

[ISAACS J. referred to *In re China Steamship Co.*; *Ex parte Mackenzie* (6).

[RICH J. referred to *Master in Equity of Supreme Court of Victoria* v. *Pearson* (7).]

The following written judgments were delivered :— Nov. 27.

(1) (1898) 1 Q.B., 318.
(2) 43 Sc.L.R., 465, at p. 474.
(3) (1893) 2 Ch., 300.
(4) (1918) 2 K.B., 833.
(5) 39 Sc.L.R., 534.
(6) 38 L.J. Ch., 199.
(7) (1897) A.C., 214.

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KNOX C.J. The respondent having assessed the value of the estate of the testator for purposes of stamp duty at £60,383, and having disallowed a claim by the appellants to a deduction of £18,000, at the request of the appellants stated a case for the Supreme Court under secs. 18 and 54 of the *Stamp Duties Act* 1898, as amended by later Acts. On the hearing before the Supreme Court it was agreed that the case was to be treated as if pars. 3 and 4 had been struck out, and the following paragraph inserted in lieu thereof :—" Within twelve months before the execution of the indentures hereinafter mentioned, discussions took place between the testator and some members of his family in the course of which the testator on several occasions stated that he desired and intended to divide £18,000 amongst his six daughters in equal shares by way of gift. When expressing his said intention the testator informed his daughters that he intended to carry it out by deed of gift, and that he expected them to leave the money in his station, and that he would pay them interest on it in the meantime, but that he wished them also to understand that they were at liberty to withdraw the money at any time they wished." It was also agreed that par. 5 was to be treated as having been amended by substituting for the words " All the said indentures were executed " the words " six several indentures were accordingly executed." We treat the case as if it had been amended accordingly.

By each of the indentures above mentioned the testator covenanted to pay to one of his daughters on demand the sum of £3,000 with interest thereon half-yearly until payment at the rate of £4 per cent. Upon execution of these indentures they were handed to a firm of solicitors to hold on behalf of the respective daughters. No part of the principal sum covenanted to be paid under any of the indentures was paid by the testator in his lifetime, nor was any demand for payment made by any of the daughters. The testator paid interest as agreed.

The executors having claimed to deduct from the assessed value of the estate of the testator the sum of £18,000 owing under these indentures, the respondent disallowed their claim, contending that even if that sum represented debts due and owing within the meaning

of sec. 53, which he denied, the transaction constituted a disposition of personal estate of the testator which came within the provisions of sec. 49 (2) (B) of the Act, and was liable to duty accordingly. The Supreme Court by majority (*Cullen* C.J. and *Pring* J., *Ferguson* J. dissenting) decided that the respondent was right in assessing the value of the estate for duty at £60,383, and it is against that decision that this appeal is brought.

All the learned Judges held that the debts created by the indentures were debts actually due and owing by the testator within the meaning of sec. 53; and in this conclusion I agree. It is sufficient to say that there is nothing in the section to require that the phrase "debts actually due and owing" should be read as meaning "debts actually due and payable," and, on the contrary, in sub-sec. 4 of sec. 53 the expression "due and payable" is used, showing that the Legislature or the draftsman appreciated the difference between the two expressions. Moreover, the construction contended for by the respondent would preclude the deduction of all trade or other debts payable at a date after the death of a testator, and it is impossible to suppose that the Legislature meant to do this.

From this it necessarily follows that the executors are entitled to deduct the sum of £18,000 from whatever is found to be the value of the assets comprised in the "estate" of the testator.

By virtue of sec. 49 the estate assessable to duty includes not only the real and personal property belonging to the testator at the date of his death, which is dealt with by sub-sec. 1, but also certain other real and personal estate specified in sub-sec. 2 which did not belong to him at that time. But it is important to observe that with the exception of property over which the deceased person had a power of appointment all the property brought into the "estate" by sub-sec. 2 is property which at some time belonged to the deceased person but has ceased to belong to him at the date of his death by reason of some disposition made by him. The general object of these provisions plainly is to render liable to taxation on the death of a person property which, but for some disposition made by him during his lifetime, would have passed from him on his death. In the present case it is clear that the assets of the testator at the date of his death

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were unaffected by the execution of the indentures in question. The property real and personal which he had before executing the indentures was not in any way disposed of or affected by their execution. No property which had belonged to him passed to any other person by means of the indentures, nor did they create any charge on any specific property. There was no gift of anything tangible, or of anything at all except an obligation enforceable against the testator. What the testator did was to create a liability, not to dispose of assets. The answer to the contention of the respondent may be found in the fact that while sec. 53 deals wholly with the "liabilities" side of the account, sec. 49 deals wholly with the "assets" side. The provisions of these sections are wholly independent, and the fact that a given obligation is within the scope of the deductions authorized by sec. 53 is irrelevant in considering whether a given transaction does or does not come within the provisions of sec. 49. The two sides of the account must be compiled independently of each other.

So far as the facts stated in the case show, the testator never disposed of any property or assets in his lifetime; and it is with such dispositions that sec. 49 (2) is intended to deal. At the death of the testator the real and personal property belonging to him was of the value of £60,383, and so far as can be gathered from the facts stated in the case every item of real or personal property which belonged to him before the execution of the indentures in question belonged to him at the date of his death. Consequently the "assets" side of the account cannot possibly be increased beyond £60,383, and, as it is clear that under sec. 53 items amounting to £18,000 must be entered on the "liabilities" side, the inevitable result is that the value of the estate assessable for stamp duty is £60,383 — £18,000 = £42,383. The parties have agreed that on this footing the amount to be refunded to the appellants by the respondent is £2,386 17s. 11d.

I should add that we were not asked to draw any inferences from the facts stated in the case, nor do I think we have any power to do so.

The order will be that the appeal be allowed; that the questions be answered as follows—(1) Yes; (2) No; (3) £3,657 4s. 6d; (4) The

costs of the proceedings in the Supreme Court and of this appeal are to be paid by the respondent: and the respondent is to pay to the appellants the sum of £2,386 17s. 11d. with costs of the proceedings in the Supreme Court and of this appeal.

ISAACS J. The judgment appealed from was given upon a "case stated" under the provisions of sec. 18 of the *Stamp Duties Act* 1898 of New South Wales, as incorporated into sec. 54 of the Act. It cannot be too clearly understood that on a "case stated" the facts stated are to be taken as the ultimate facts for whatever purpose the case is stated. The Court is not at liberty to draw inferences unless that power is, by express words or by necessary implication, specially conferred by some enactment. The law is examined with considerable detail in the *Merchant Service Guild of Australasia* v. *Newcastle and Hunter River Steamship Co.* [*No.* 1] (1). To the authorities there cited I add three: *Tancred* v. *Christy* (2), *New Zealand Shipping Co.* v. *Stephens* (3) and *Usher's Wiltshire Brewery* v. *Bruce* (4). No power is contained in sec. 18 of the *Stamp Duties Act* to draw inferences, and the Court's only jurisdiction is to decide "the question submitted" on the basis of what the Commissioner states the facts to be. If, therefore, the matter depended on a conclusion of fact necessary to be arrived at either in addition or contrary to the facts as stated in the case, there would be no jurisdiction in the Court to determine the facts or to give any judgment other than to send the case back for definite statement by the Commissioner as to the conclusion he arrived at.

In the present case, however, notwithstanding the insertion of some evidentiary facts, these may be entirely disregarded, because learned counsel for the Commissioner finally did not contend for any position that is not established by the terms of the documents themselves, regarded as real and operative instruments. So regarding them, the first question arises under sec. 53 of the Act, and it is whether the obligations the testator entered into by the deeds of 17th March 1910 to his daughters were "debts actually due and

(1) 16 C.L.R., 591, at pp. 622-624.
(2) 12 M. & W., 316.
(3) 24 T.L.R., 172.
(4) (1915) A.C., 433, at pp. 472-473.

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owing by him " within the meaning of the first sub-section of that section.

Ultimately the contention of the Commissioner that they were not such " debts " rested on the circumstance that by the terms of the deeds the moneys were covenanted to be paid " on demand." It was said that as no " demand " had been made in the testator's lifetime there was no " debt " at his death. It is perfectly clear that, if that be a sound argument, a great number of ordinary business obligations and ordinary covenants upon valuable consideration to pay moneys " on demand " would be outside the ambit of sec. 53. There is no doubt the obligation is to pay a sum certain, not contingently, but absolutely. It is a liability for that sum not dependent in any way upon the non-performance of some other obligation, but presently existing, and fixed, and independent of any other stipulation. But a " demand " is stipulated for, not in order to create a pecuniary obligation, or even to make it certain in amount, but simply to fix the time of performance so that no litigation for breach is possible until the demand is made. The debt existed. It was, at the date of the testator's death, a debt " actually due and owing," that is, truly and really due and owing; for " due " here only means " debitum," and " owing " only means that which is " owed." " Due " is sometimes used in the sense of " payable "; that, however, is where the context requires it. But, as *Mellish* L.J. said with reference to the phrase " debts due," in *Ex parte Kemp*; *In re Fastnedge* (1), " *primâ facie*, and if there be nothing in the context to give them a different construction, they would include all sums certain which any person is legally liable to pay, whether such sums had become actually payable or not." *Story* J., in *United States* v. *State Bank of North Carolina* (2), says, with reference to the word " due " being synonymous with " owing ": " In the settlement of the estates of deceased persons, no distinction is ever taken between debts which are payable before or after their decease. The assets are equally bound for the payment of all debts." Here the context helps the *primâ facie* meaning, because it would be curious to read " due and owing " as " payable and owing."

(1) L.R. 9 Ch., 383, at p. 387.

(2) 6 Peters, 29, at p. 37.

The debt in this case was not "payable" at the date of the testator's death, because the time for "payment," which is the mode of discharge of an existing debt, had not arrived, and no action could have been maintained (see *Ameer-oon-Nissa* v. *Moorad-oon-Nissa* (1)). That is, however, immaterial—the existence of the debt is what is essential to sec. 53, and this case, on the admitted facts, falls within sub-sec. 1 of the section. The use of the word "payable" in addition to "due" in sec. 40 of the amending Act of 1914 is confirmatory of this view.

The only other question is whether the amounts of these debts, though deductible under sec. 53, still fall within sub-sec. 2 (B) of sec. 49, so as to be taxable as "personal estate taken under any gift," &c. A careful examination of sec. 49 will demonstrate the impossibility of such a result. Sec. 49 establishes a field of taxation by way of "Duties on estates of deceased persons." But that field is marked out into two distinct portions, the dividing line being unmistakable. Sub-sec. 1 embraces "all estate whether real or personal" which "belonged" to the deceased. That is every particle of property he had at his death, and it means the gross amount of that property. Sub-sec. 2 establishes an entirely separate class, consisting of various elements, which, though distinguishable from each other, possess one common characteristic, namely, they did not belong to the deceased at the time of his death. It follows that the class of property embraced in sub-sec. 1 and that embraced in sub-sec. 2 as a whole are mutually exclusive. Now, sec. 53 provides that the "debts actually due and owing by him" shall be deducted from "his estate." That is, *his* debts shall be deducted from *his* estate. After gathering and valuing up in gross the whole of the property *belonging* to him at the time of his death, you deduct part of that gross value, namely, the amount of his debts, so as to get the net amount of his own property. "Deduction" means taking away part of the thing from which the deduction is made. Since the debts are treated as part of the first class and since the two classes are mutually exclusive, it necessarily follows that the debts are not part of the second class, and consequently do not fall within the expression "personal estate" as used in sub-sec. 2 (B) of

(1) 6 Moo. Ind. App., 211, at p. 229.

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sec. 49. It is easy to see how unjustly and irrationally the contrary view would operate. A debt that falls within the third sub-section of sec. 53—as, for instance, a gift such as the present, if the testator had died within three months after the deed was executed—would not only not have been deductible under sec. 53, but would have actually been *added* to swell the taxable estate under sec. 49 (2) (B), making his estate notionally £18,000 more than he ever had or could have had, and simply because he created an obligation against himself. That is absurd, but it is also contrary to the obvious meaning of the section.

The appeal should be allowed.

RICH J. I agree. I preface my judgment by stating that we are not entitled to draw inferences of fact, as the statute under which the special case is stated does not give the Court any power to do so.

It was contended on behalf of the Commissioner that the sum covenanted to be paid by the testator was not a debt "actually due or owing" because no demand had been made for it. "A debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation, *debitum in præsenti, solvendum in futuro*" (*Webb* v. *Stenton* (1)). The intensive force of "actually" is "according to the fact" (*Appleby* v. *Horseley Co.* (2)). The sums of money covenanted to be paid became, upon the execution of the deeds, debts due and owing, but not enforceable by action until the demand stipulated for by the covenantor was made. It is noticeable that the words "due and owing" in sec. 53 are contrasted with the words "due and payable" in sec. 40 of the amending Act, No. 3 of 1914. The claim of the executors, therefore, to deduct the sums due under the covenants in question is, in my opinion, rightly made.

I now turn to the construction of secs. 49 (2) (B) and 53. The whole of sec. 49 (2) is an artificial enlargement of a deceased's estate. The sub-section brings within the area of taxation property which did not belong to the deceased, but that leaves open the question whether what is deducted under sec. 53 is to be added under sec. 49 (2) (B). It would be inconsistent for the Legislature to say

(1) 11 Q.B.D., 518, at p. 527.

(2) (1899) 2 Q.B., 521, at p. 526.

in one section that the same property should be taxed which it says in another section is to be free from taxation. The true construction of the two provisions mentioned is that they relate to different things. Sec. 49 (2) (B) is confined to the artificial enlargement and sec. 53 to the estate actually belonging to the testator. The debts in question are not taxable under sec. 49 (2) (B).

Appeal allowed. Questions answered as follows: (1) *Yes*; (2) *No*; (3) £3,657 4*s*. 6*d*; (4) *Costs of proceedings in Supreme Court and of this appeal to be paid by respondent. Respondent to pay to appellants the sum of* £2,386 17*s*. 11*d*. *with costs of proceedings in Supreme Court and in this Court.*

Solicitor for the appellants, *T. D. Ryan*, Bingara, by *Makinson & d'Apice.*

Solicitor for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.