[HIGH COURT OF AUSTRALIA.]

THE PUBLIC OFFICER OF THE STUDEBAKER CORPORATION OF AUSTRALASIA LIMITED (AS AGENT FOR THE STUDEBAKER CORPORATION OF AMERICA) . . . . . APPELLANT;

AND

THE COMMISSIONER OF TAXATION FOR NEW SOUTH WALES . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1921.

SYDNEY, *March* 31; *April* 18.

Knox C.J., Rich and Starke JJ.

Income Tax (*N.S.W.*)—*Assessment*—*Income derived from source in New South Wales*—*Foreign company*—*Sale of goods to purchaser in New South Wales*—*Interest on purchase money*—*Income Tax* (*Management*) *Act* 1912 (*N.S.W.*) (*No.* 11 *of* 1912), *secs.* 4, 9, 10 (*g*), 11 (*d*)—*Income Tax Management* (*Amendment*) *Act* 1914 (*N.S.W.*) (*No.* 9 *of* 1914), *sec.* 2—*Income Tax Management* (*Further Amendment*) *Act* 1914 (*N.S.W.*) (*No.* 32 *of* 1914), *sec.* 2.

The *Income Tax* (*Management*) *Act* 1912 (N.S.W.), as amended by the *Income Tax Management* (*Amendment*) *Act* 1914 (N.S.W.) and the *Income Tax Management* (*Further Amendment*) *Act* 1914 (N.S.W.), provides, by sec. 4, that unless the context requires another meaning "income" means "income derived from any source in the State or earned in the State"; by sec. 9, that income tax at such rates as may be fixed by any Act shall be paid in respect of "taxable income"; and, by sec. 10, that nothing in the Act shall apply to "(*g*) income derived from sources outside the State."

By an agreement made in America between a company incorporated in America and carrying on there the business of a manufacturer and vendor of motor-cars and a company incorporated in New South Wales, it was agreed that the American company should sell to the Australian company motor-cars to be from time to time agreed upon between the parties. The cars were to be

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delivered on rail at the American company's factory in the United States, and to be at the sole risk of the Australian company from that point. The price f.o.b. rail was fixed by the agreement, and the Australian company was to pay freight, insurance, customs duty, packing and all other incidental forwarding charges, and was allowed five months from the date of the arrival of the cars in Australia within which to pay for the cars, but, if time was taken for payment, interest at a certain rate was chargeable on the amount shown in the particular invoice after the expiration of fifteen days from the date of the invoice. Motor-cars were ordered and supplied pursuant to the agreement, and time was taken for payment, and interest became payable and was paid to the American company.

Held, that such interest arose from business transacted and wholly carried out in America, and therefore was not income of the American company arising from a source in New South Wales, and was not assessable to income tax under sec. 9 of the *Income Tax (Management) Act*.

Decision of the Supreme Court of New South Wales: *Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation (N.S.W.)*, 20 S.R. (N.S.W.), 602, reversed.

APPEAL from the Supreme Court of New South Wales.

On the hearing of two appeals to the Court of Review by the Public Officer of the Studebaker Corporation of Australasia Ltd. against assessments of that corporation, as agent of the Studebaker Corporation of America, for income tax for the years 1917 and 1918, his Honor Judge Scholes stated for the decision of the Supreme Court a case from which the following facts appeared:—By a notice of assessment for the year 1917 the income of the American company was assessed at £5,168 as being income from personal exertion, and the amount of tax was assessed at £323. By a notice of assessment for the year 1918 the income of that company was assessed at £6,500, and the amount of the tax was assessed at £406 5s. From these assessments appeals were brought to the Court of Review on the grounds (1) that the amounts on which tax was assessed and levied were not taxable under any law of the State, and (2) that the income was not income derived from any source in the State of New South Wales or earned in that State, nor was it interest derived from any source in the State. At the hearing of the appeals the following facts were admitted by the parties:—

(*a*) At all material times the Studebaker Corporation of America, hereinafter called the "American company," was a corporation duly

incorporated and existing under the laws of New Jersey in the United States of America, and having a principal place of business in Indiana and carrying on in the United States of America the business of manufacturers and vendors of motor-cars.

(*b*) At all material times the Studebaker Corporation of Australasia Ltd., hereinafter called the "Australasian company," was a company duly incorporated in New South Wales and carrying on there the business of dealers in motor-cars.

(*c*) From time to time motor-cars and parts thereof manufactured by the American company in America were supplied to the Australasian company under the terms of the agreement of 10th January 1917 as varied by the agreement of 3rd January 1918.

(*d*) From time to time under and by virtue of the said agreements the American company charged interest against the Australasian company on the balance outstanding for motor-cars supplied to the Australasian company, under the said agreements; and in the profit and loss accounts of the Australasian company for the years 1917 and 1918 the amounts of such interest are shown as debits, and were allowed as deductions by the Commissioner to the Australasian company.

(*e*) By virtue of the said notices of assessment the respondent purported to levy tax upon the appellant as agent for the American company in respect of the said interest as being taxable income of the American company within the meaning of the said Act.

The agreement of 10th January 1917 mentioned in par. (*c*) was, so far as material, as follows:—

"An agreement made the tenth day of January one thousand nine hundred and seventeen between the Studebaker Corporation of America, a corporation duly organized and existing under the laws of the State of New Jersey in the United States of America and having a principal place of business in the City of South Bend, Indiana (hereinafter called the 'vendor company') of the one part, and the Studebaker Corporation of Australasia Limited, a company duly incorporated and carrying on business in the State of New South Wales (hereinafter called the 'purchasing company') of the other part, whereby it is agreed as follows:—

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"1. The vendor company shall sell and the purchasing company shall purchase, during the year 1917 and from year to year thereafter, as hereinafter provided, the motor-cars and other goods specified in schedules, which shall from time to time be agreed upon between said purchasing company and said vendor company at the prices mentioned therein, and the purchasing company shall pay for such motor-cars and other goods in five months from the date of the arrival of such cars and other goods in Australia, and fifteen days after the invoice date of such shipments such amounts as shown by the invoice shall draw interest at the rate of six per cent."

"3. All motor-cars and goods ordered by the purchasing company shall be sold and purchased according to the prices terms and conditions of payment set forth herein or in said schedules.

"4. All motor-cars and spare parts shall be delivered on rail at the Studebaker factory in the United States of America. Freight, insurance, customs duty, packing and all other incidental forwarding charges shall be paid by the purchasing company.

"5. The motor-cars and spare parts shall be shipped according to the instructions given by the purchasing company, and shall be at the sole risk and expense of the purchasing company from the time of delivery, f.o.b. rail at the Studebaker factory in the United States of America, and shall be sold by the purchasing company as 'Studebaker Cars.'"

"7. If, from any good cause, the vendor company shall be unable to supply the said cars or spare parts, or to perform any subsequent order to be given by the purchasing company, or if at any time the vendor company shall become reasonably dissatisfied as to the financial standing of the purchasing company, the vendor company shall be at liberty to decline to proceed with the said order, or to fulfil any subsequent orders to be given by the purchasing company, without being liable for any losses or damages whatsoever occasioned thereby, provided always that this clause shall not be construed as relieving the vendor company from liability to deliver any motor-cars and spare parts for which payment shall actually have been made by the purchasing company."

"9. In the event of the purchasing company giving guaranties in a form approved by the vendor company, with reference to new

"Studebaker' cars sold by the purchasing company, and of the purchasing company being called upon to supply any spare parts under such guaranty, the vendor company agrees to supply to the purchasing company the spare parts required to comply with the guaranty free of cost, f.o.b. Detroit, Michigan, U.S.A.

"10. This agreement shall remain in force for the term of twelve months from 10th January 1917 and from year to year thereafter unless and until terminated by either party hereto upon regular notice, said notice being given when letter is mailed.

"11. This agreement shall be construed as an agreement made in accordance with the laws of the Commonwealth of Australia."

This agreement was signed by the Vice-President of the American company on behalf of that company and by the managing director of the Australasian company on behalf of that company.

By the agreement of 3rd January 1918, after reciting the agreement of 10th January 1917, it was agreed as follows:—"(1) That no interest charge of any kind shall be made for the months of October, November and December nineteen hundred and seventeen. (2) That beginning with January first, nineteen hundred and eighteen, the said interest charge as provided in said contract of 10th January 1917, shall be figured at the rate of four per cent. per annum upon monthly balances: Provided however that said six per cent. rate shall be restored when said conditions shall again become normal."

At the hearing of the appeals the questions of law argued were whether the appeals should be sustained upon the grounds stated, and the learned Judge decided that the appeals should not be sustained and dismissed them accordingly.

The questions submitted by the case were as follows:—

(1) Whether the amount of tax as assessed and levied against the appellant for the years 1917 and 1918 was taxable under any law of the State.

(2) Whether interest charged by the American company against the Australasian company on the balance outstanding for motor-cars supplied by the American company to the Australasian company as in the special case mentioned

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was income derived from any source in the State of New South Wales or earned in such State or was interest derived from any source in the State.

The New South Wales Full Court answered the questions in the affirmative: *Studebaker Corporation of Australasia Ltd.* v. *Commissioner of Taxation (N.S.W.)* (1).

From that decision the Public Officer of the Australasian company, as agent for the American company, now appealed to the High Court.

Leverrier K.C. (with him *H. E. Manning*), for the appellant. The interest is derived from the business carried on by the American company in America. It must stand on the same footing as other profits earned by that company. No distinction can be drawn between the interest and the debt in respect of which it is payable. The obligation to pay the interest is a term of the contract just as is the obligation to pay the debt, and the obligation to pay both is to pay in America. A debt cannot be said to have a locality except for the special purpose of probate or succession (*Commissioner of Stamps* v. *Hope* (2)), and therefore it cannot be said that the interest has a source in New South Wales because the debtor is there.

[KNOX C.J. referred to *Lord Sudeley* v. *Attorney-General* (3).]

Being derived from the business carried on in America, the interest is not derived from a source in New South Wales so as to be taxable income for the purposes of the *Income Tax (Management) Act* 1912. [Counsel referred to *Income Tax (Management) Act* 1912, secs. 4, 9, 10 (*g*); *Income Tax Management (Further Amendment) Act* 1914, sec. 2].

Brissenden K.C. (with him *McMinn*), for the respondent. A debt produces the interest which is payable upon it, and in this case the interest is separate altogether from the transaction of sale. It is payment for money forborne at interest. A simple contract debt has a locality, and it is the place where the debtor is (*Webb* v.

(1) 20 S.R. (N.S.W.), 602. (2) (1891) A.C., 476, at p. 481.
(3) (1897) A.C., 11, at p. 16.

Campbell (1); *R.* v. *Lovitt* (2); *Commissioners of Taxation* v. *Armstrong* (3)).

[RICH J. referred to *In re Maudslay, Sons & Field*; *Maudslay* v. *Maudslay, Sons & Field* (4); *Toronto General Trusts Corporation* v. *The King* (5).

[STARKE J. referred to *Walsh* v. *The Queen* (6).]

If the debt is the source of the interest then the interest is derived from a source in New South Wales, where the debtor is.

Leverrier K.C., in reply.

Cur. adv. vult.

April 18.

THE COURT delivered the following written judgment:—

The Studebaker Corporation of America is a corporation organized under the laws of the State of New Jersey in the United States of America. It carries on in the United States the business of a manufacturer and vendor of motor-cars and their parts. An agreement was made on 10th January 1917 between the American company and the Studebaker Corporation of Australasia Ltd., which was incorporated in the State of New South Wales, whereby it was arranged that the American company should sell to the Australian company motor-cars and other goods from time to time agreed upon between the parties. The goods were to be delivered on rail at the Studebaker factory in the United States, and were at the sole risk of the purchasing company from that point. The price f.o.b. rail was fixed by the agreement, and the purchasing company was to pay freight, insurance, customs duty, packing and all other incidental forwarding charges. The purchasing company was allowed five months from the date of arrival of the goods in Australia in which to pay for the goods, but if time were taken for payment of goods interest at the rate of six per cent. per annum was chargeable on the amount shown on the invoice after the expiration of fifteen days from the date of the invoice. By a subsequent agreement dated 3rd January 1918 the

(1) 25 V.L.R., 506, at p. 509; 21 A.L.T., 227, at p. 228.
(2) (1912) A.C., 212, at p. 218.
(3) 1 S.R. (N.S.W.), 48.
(4) (1900) 1 Ch., 602.
(5) (1919) A.C., 679, at p. 683.
(6) (1894) A.C., 144.

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right to charge interest during October, November and December 1917 was abandoned and the rate of interest was reduced to four per cent. after 1st January 1918 until conditions again became normal. Goods were ordered and supplied pursuant to these agreements. Time was taken for payment, and interest became payable and was paid to the American company.

The Commissioner of Taxation assessed the interest as taxable income, and notified the Public Officer of the Australian company, as agents for the American company, of the assessment accordingly.

An appeal was made against the assessment, and a case was stated for the decision of the Supreme Court of New South Wales, which raised the question whether the interest was income derived from any source within the State of New South Wales. The Supreme Court decided this question in the affirmative, and an appeal is now brought to this Court.

The question turns upon the proper construction of the *Income Tax (Management) Acts* 1912 to 1914. The relevant sections are 9, 10 (*g*), 11 (*d*) and 4. Shortly, these sections provide that income derived from any source in the State shall be assessable to income tax, and that the Act shall not apply to income derived from sources outside the State. The Act divides income into income (1) derived from personal exertion and (2) derived from property. The facts already set forth make it plain that the contract for the supply of the goods was made in America, that the goods were delivered there, and that payment for the same was to be made there. It is clear that the interest assessed to tax was not the result of any business carried on or of any personal exertion or labour in Australia, and the learned Judges of the Supreme Court so held. Was the interest then income derived from property, that is, income derived from some source in the State other than personal exertion? The learned Judges of the Supreme Court, in answering this question in the affirmative, relied upon two distinct lines of reasoning:—(1) The liability to pay interest only became a binding obligation when the purchaser exercised his right to defer payment for five months. The interest therefore constituted something in the shape of income that could not be attributed to any personal exertion in

the United States ; it was a source of income which might continue beyond five months because the obligation to pay interest would subsist until the debt was discharged. It (the interest) arose in New South Wales because of the exercise of the option in New South Wales to withhold payment in consideration of interest to go to the appellant Company. We cannot agree with this statement of the transaction. It obscures a plain state of facts. The purchaser was to pay the price for the goods and interest thereon for such time as it remained unpaid after the expiration of fifteen days from the date of the invoice. It was part and parcel of the one business transaction. The obligation to pay and the right to receive the interest flowed from the agreement made in America. It is impossible to divide the transaction into two distinct parts, and treat one as referable to America and the other (the exercise of the so-called option) as referable to New South Wales. (2) A simple contract debt, like any other debt, is a species of property. It is a chose in action. So far as it can have a location it has all through been located here, and on principle the right to interest cannot be distinguished from the ownership of property in New South Wales which brings in an income to the appellant company. This view overlooks the fact that the Legislature in using the words "derived from any source in the State" was not dealing with legal concepts, but with what was the real source of income as a practical hard matter of fact (*Nathan* v. *Federal Commissioner of Taxation* (1) ; *Lovell & Christmas Ltd.* v. *Commissioner of Taxes* (2)). Thus, in *Nathan's Case* and in *Murray* v. *Federal Commissioner of Taxation* (3) the fact that the income was payable and paid out of Australia did not negative the fact that its source was within Australia. So, here, the attribution of locality to the obligation to pay interest is not decisive. The facts must be examined, and when we find that the interest arises from business transacted and wholly carried out in America the conclusion must be that it was not derived from any source within New South Wales.

The appeal must, in our opinion, be allowed.

(1) 25 C.L.R., 183, at pp. 189-190.
(2) (1908) A.C., 46.
(3) 29 C.L.R., 134.

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Appeal allowed. Decisions of Supreme Court and Court of Review set aside. Question of law raised by question 2 of the special case answered in the negative. Assessments appealed against quashed. Any money paid under the assessments to be repaid. Respondent to pay appellant's costs in High Court and Courts below.

Foll *R v Mills* [1986] VR 617

Solicitors for the appellant, *Norton, Smith & Co.*

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

B. L.

[HIGH COURT OF AUSTRALIA.]

STEWART . . . . . APPELLANT;

AND

THE KING . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1921. SYDNEY, *April* 26, 29. Knox C.J., Gavan Duffy, Rich and Starke JJ.

High Court—Jurisdiction—Appeal from Supreme Court of State—Court of Criminal Appeal of New South Wales—Whether separate Court from Supreme Court—Criminal Appeal Act 1912 (*N.S.W.*) (*No.* 16 *of* 1912), *secs.* 3, 10, 12, 24 (2)—*The Constitution* (63 & 64 *Vict.* c. 12), *sec.* 73 (II.).

Criminal Law—Evidence—Admissibility—Evidence of accused given in former trial—Evidence as to character—Miscarriage of justice—Crimes Act 1900 (*N.S.W.*) (*No.* 40 *of* 1900), *sec.* 407

Held, that the *Criminal Appeal Act* 1912 (N.S.W.) does not create a new Court, but merely directs that the Supreme Court, constituted as therein prescribed, shall act as the Court of Criminal Appeal, and, therefore, that an appeal lies from the Court of Criminal Appeal to the High Court under sec. 73 (II.) of the Constitution.