No. 1 of 1943

IN THE HIGH COURT OF AUSTRALIA.

The Commissioner of Taxes

v.

Jones + anor, Trustees of the Estate of Benjamin Nathan, deceased.

ORIGINAL

REASONS FOR JUDGMENT.

Judgment delivered at Sydney

on Wednesday, 14th April 1943

H. J. Green, Govt. Print., Melb.

C.2774

THE COMMISSIONER OF TAXES

V

JONES AND ANOTHER

TRUSTEES OF THE ESTATE OF BENJAMIN NATHAN DECEASED

O R D E R

Appeal dismissed with costs.

THE COMMISSIONER OF TAXES.

v.

JONES AND ANOTHER,
TRUSTEES OF THE ESTATE OF BENJAMIN NATHAN DECEASED.

REASONS FOR JUDGMENT. LATHAM C.J.

THE COMMISSIONER OF TAXES.

v.

JONES AND ANOTHER,
TRUSTEES OF THE ESTATE OF BENJAMIN NATHAN, DECEASED.

REASONS FOR JUDGMENT. LATHAM C.J.

This is an appeal from a judgment of the Full Court of the Supreme Court of Tasmania affirming a judgment of the Chief Justice who, sitting as a Court of Review under the Land and Income Taxation Act 1910, allowed an appeal against 21 amended assessments to income tax made under that Act. The assessments were made on the executors of Benjamin Nathan deceased. Benjamin Nathan carried on business in Tasmania throughout the period from 1915 to 25th July, 1935, when he died. On 6th October, 1938, the Commissioner of Taxes issued amended assessments to income tax in respect of each financial year from the year ending 30th June, 1915, to the year ending 30th June, 1935, inclusive. The learned Chief Justice and the Full Court have held that the Commissioner had no power to issue the amended assessments because the existing law as to amendment of assessments, which was passed in 1935, applied only to assessments made in respect of a specified future year, and the former statutory provision relating to this subject was repealed by the Act of 1935 without any saving clause.

The Land and Income Taxation Act 1910 as amended from time to time was in force from 1910 until the Land and Income Taxation Act 1935 came into operation on the 16th June, 1936. The latter Act contains, in sections 165 and 166, provisions enabling the Commissioner to make assessments upon the executors of a deceased person who has not paid full income tax in his life time. These sections provide that where a taxpayer escapes full tax in his life time by reason of not having duly made full, complete and accurate returns (section 165), or where, at the time of a person's death, tax has not been assessed and paid on the whole of the income derived by

him /

him up to the date of his death (section 166), the Commissioner shall have the same powers and remedies against the trustees of the estate of the taxpayer as he would have against the taxpayer if the taxpayer were living. In section 166 these powers and remedies are limited to powers "for the assessment and recovery of tax from the trustees". The term "trustees" is defined by section 2 to include executors and administrators.

These provisions were in operation at the time of Nathan's death. They conferred upon the Commissioner, however, only such powers and remedies as he would have had if Nathan had then been living. The particular power which is in question is a power to make a new assessment in respect of a year after an assessment for that year has already been made. From what source would the Commissioner have derived such a power if Nathan had been alive in 1938 when the Commmissioner issued the amended assessment? Such a power could not have been derived from sec. 127 in the 1935 Act. That section provides that where "under this Act" any person is liable to pay tax, the Commissioner may make an assessment of such tax. It cannot be argued that Nathan, even if alive, was liable to pay tax in respect of the years from 1915 to 1935 "under this Act", which did not come into operation until 16th June 1936. Section 128 allows the Commissioner to make amended assessments, but it expressly provides that no such amendment shall be made after the expiration of three years from the date upon which the tax became due and payable under the assessment which the Commissioner seeks to amend. The Commissioner does not rely upon this provision in the present case. Further, all the sections mentioned, 165, 166, 127 and 128, are limited in their application by section 4, which provides that the amendments effected by the 1935 Act shall have effect in relation to all assessments of income in respect of the year of income ending on 30th June 1936. In my opinion, therefore, counsel for the Commissioner was right in disclaiming reliance upon these provisions.

The only other possible source of power to amend an assessment is to be found in the provisions of the 1910 Act. Section 58 of that Act provided that in each year the Commissioner should

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cause an assessment book to be prepared and that alterations or corrections in any assessment book authorised to be made upon objections, and all other necessary alterations, corrections and additions, should be made, as the occasion arose, in the assessment book. Section 59 provided for the deposit of an assessment book upon completion in the office of the Commissioner, and section 60 required the Commissioner, upon the completion of every assessment book, to give notice to taxpayers of the particulars of their assessments. Section 61, upon which the Commissioner relies in the present case, was as follows:

> "61 During the time that any assessment book is in force the Commissioner may from time to time -
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> I. Place thereon the name of any person of whose liability to taxation he is satisfied, and erase therefrom the name of any person not so liable:
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> II. In his discretion, whether notice of objection has been given or not, alter or reduce any assessment or class of assessments.
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> The prescribed notice shall be given to the persons affected (if any) of the addition to, or alteration or amendment of, the assessment book or any assessment:
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> III. Every person affected by any such addition, alteration, or amendment shall be entitled to object thereto in the same manner as from an original assessment. All notices and other proceedings prescribed with respect to original assessments, and objections thereto, and the hearing thereof, shall, so far as possible, apply with respect to such additions, alterations or amendments, and objections thereto:
>
> IV. Subject to such right to object as aforesaid, every assessment so added to, reduced, altered, or amended, shall have the same effect, and be accompanied by the same consequences as an original assessment, and the assessment book so added to, altered, or amended shall be the assessment book for the district for which it relates."

Paragraph II of this section entitles the Commissioner, so long as an assessment book is in force, from time to time to make amendments in assessments according to his discretion. It is difficult to attach any satisfactory meaning to the words "during the time that any

assessment /

assessment book is in force": see Anonymous 1904 2 N. & S. 230; In re Portland Cement Co. Ltd. 1 Tas. L.R. 141: Davies v. Commissioners of Taxation (N.S.W.) 13 C.L.R. 197. In the view which I take of the present case it is not necessary to reach a decision as to the meaning of these words.

If section 61 cannot be regarded as being still in operation in relation to the relevant past years, the Commissioner must fail in this appeal, because, apart from statute, there would be no power to amend an assessment upon which tax had been fully paid. In such a case the Commissioner would have completely exercised all the powers conferred upon him, and the taxpayer would have completely performed the duty imposed upon him: cf. Davies v. Commissioners of Taxation (N.S.W.) 13 C.L.R. 197 at p. 205. The answer to the question whether section 61 is still in operation in the relevant sense depends in the first place upon the construction of the 1935 Act. This Act is entitled "an Act to amend the Land and Income Taxation Act 1910". Section 2 is as follows: "The enactments enumerated in the schedule are hereby repealed to the extent therein enacted". The enactments set forth in the schedule include the provisions of the Land and Income Taxation Act 1910 which deal with income tax (except provisions which relate to the administration of the Act by a Commissioner and similar provisions). Section 61 is included in the sections which are repealed. Nineteen Acts amending the 1910 Act are completely repealed.

Section 3 of the Act provides - "The Principal Act is hereby amended: I. By substituting for repealed section two

thereof /

thereof the following new section two ....". Then follow sections numbered from 2 to 227, containing a complete scheme of income taxation which is substituted for the former scheme and which differs in many respects from the repealed provisions.

Section 4 of the 1935 Act is as follows: "The amendments effected by this Act shall have effect in relation to all assessments of income in respect of the year of income ending on the thirtieth day of June nineteen hundred and thirty-six". It is therefore clear that the new sections introduced by section 3 apply in respect of the income year specified and that they have no application to prior years.

The argument for the respondents is very simple. It is contended that section 4 of the 1935 Act obviously, and, indeed, admittedly, prevents the Commissioner from making amended assessments by virtue of the new section 128 relating to amended assessments in respect of all of the past years in question, and that section 61 which, if it were still in force, would have justified the amended assessments in question, has been repealed by section 2.

On the other hand, it is argued for the Commissioner that section 2 repeals certain provisions and section 3 introduces what are described as amendments. The operation of the amendments is limited to assessments in respect of the year of income ending the 30th June, 1936. The amendments, therefore, relate to the future, but it is said that the Act draws a distinction between these amendments, which are prospective in character, and the repealing provision of the Act contained in section 2-that the old provisions are left to apply to the past, while the new provisions apply only to the future. The result of this argument, if it is accepted, is that the Commissioner is still at liberty to apply, in respect of income years prior to that ending on the 30th June, 1936, the legislation which was in force in relation to each of those years respectively.

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It is a well known and common practice to include a saving clause in an Act which repeals an earlier Act in whole or in part. An example of such a saving clause is to be found in the 1910 Act, section 3, which, it may be observed, was itself repealed by section 2 of the 1935 Act. This saving clause provided that the repeal of certain Acts should not affect (inter alia) the past operation of the Acts, or the payment or recovery of any tax which had become payable thereunder and that it should not interfere with any assessment made "or to be made thereunder " or any appeal against any such assessment. This section also specifically provided that the repealed Acts should, notwithstanding the repeal thereof, "remain in force as to prior taxation and taxes thereunder and to all matters and purposes connected therewith". The contention now submitted for the Commissioner is that, in spite of the absence of such a clause from the 1935 Act, the position is the same as if the last quoted provision had been enacted in that Act.

I find myself unable to accept this argument. In the absence of a saving clause, the well established common law rule applies. The common law rule is fully expressed in the cases cited in the judgment of Dixon J. in Victorian Stevedoring and General Contracting Co. Pty. Ltd. and Meakes v. Dignan, 46 C.L.R. 73, at p. 105:-

> "'The general rule of law is that a repealed statute cannot be acted upon after its repeal, although all matters that have taken place under it before its repeal are valid and cannot be called in question' (per Lord Campbell C.J., R. v. Inhabitants of Denton (18 Q.B. 761, at p. 770)). 'What has been perfected under operation of the statute is not to be disturbed; but if the statute be necessary for any further step, it must be in force at the time of taking that farther step' (per Coleridge J., 18 Q.B. 761, at p. 770). 'I take the effect of repealing a statute to be, to obliterate it as completely from the records of the Parliament as if it had never been passed; and it must be considered as a law that never existed, except for the purpose of those actions which were commenced, prosecuted, and concluded whilst it was an existing law' (per Tindal C.J., Kay v. Goodwin (1830) 6 Bing. 576, at pp. 582-583). "It has long been established, that, when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed' (per Lord Tenterden C.J., Surtees v. Ellison (1829) 9 B. & C., at p. 752)."

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See also Bird v. John Sharp & Sons Pty. Ltd., 1942 A.L.R. 314 at pp.315, 319, 321: Craies on Statute Law 3rd ed. pp. 344 et seq.

The result of applying these principles to the present case is that the repeal of section 61 without any saving clause prevents the Commissioner from putting it into operation in respect of the years to which, before its repeal, it was applicable.

But it is argued for the Commissioner that the Acts Interpretation Act 1931, section 16 (1) III and V prevents this result from following in the present case.. Section 16 (1) provides - "Where an Act repeals any other enactment then, unless the contrary is expressly provided, such repeal shall not -

I. -

II. -

III. Affect any right, privilege, obligation, or liability acquired, accrued, or incurred under any enactment so repealed:

IV. -

V. Affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability ..... as aforesaid:"

It is argued that these provisions preserve the right of the Commissioner to make an amended assessment under section 61 of the 1910 Act, the obligation or liability of the executors to pay tax under that Act, and the right of the Commissioner to enforce payment of such tax. The right to recover the tax can be preserved under paragraph V of the sub-section only if it is a remedy in respect of any "such" right, obligation or liability - i.e. of a right which had accrued or an obligation or liability which had been incurred prior to the repeal of the enactment by virtue of which they came into existence. The first question, therefore, is whether any relevant accrued right in the Commissioner or any relevant incurred liability in Nathan's executors was preserved by section 16 (1) III. If this question cannot be answered favourably to the Commissioner, paragraph V

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of the sub-section is plainly immaterial. But paragraph V is irrelevant in these proceedings for another reason. The question which arises in these proceedings is whether the amended assessments were lawfully made - not whether there is any remedy to recover the tax claimed by them. Accordingly it is not necessary to consider arguments which were intended to establish the proposition that income tax was recoverable under Tasmanian legislation without any prior assessment of tax. In order to avoid possible misunderstanding, however, I add that I do not regard those arguments as well-founded, whether they were directed towards the establishment of a right to enforce payment of tax without assessment or of liability to pay tax without assessment.

The only "accrued" right which can be relevant in this case is the right, if any, of the Commissioner to issue amended assessments, and the only "incurred" liability which can be relevant is the corresponding liability of a taxpayer to be assessed. If there is no such right, there is no such liability. The right which the Commissioner claims is really a right to put the repealed statute into operation against particular persons after the statute has been repealed. Such a "right" is not an "accrued right" within the meaning of the Acts Interpretation Act. Such a claim is inconsistent with the conception of repeal. It is unnecessary to seek to define affirmatively and exhaustively the meaning of a "right accrued" under the Act. It is sufficient to say that the person who claims that a right has been preserved as a "right accrued" must be able to point to something more than the former existence of a statute together with some action taken after the repeal of the statute. The provision in the Acts Interpretation Act does not preserve "abstract rights". It applies

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only to specific rights given to an individual upon the happening of specified events: Hamilton Gell v. White, 1922 2 K.B., 422. I agree with the learned Chief Justice that Abbott v. Minister for Lands, 1895 A.C., 425 states a principle which is applicable to the Commissioner and which deprives him of any assistance from the Acts Interpretation Act. In that case (p. 431) it was said that "the mere right (assuming it to be properly so-called) existing in the members of the community or any class of them to take advantage of an enactment without any act done by an individual towards availing himself of that right cannot properly be deemed a 'right accrued' within the meaning of the enactment."

The appellant, however, strongly relied upon two cases which, it was contended, established that the liability to income tax was a liability which had been incurred before the repeal of the Act, so that the Acts Interpretation Act operated to preserve the liability, notwithstanding the repeal of the Act, and (with the liability) to preserve also the right of the Commissioner to enforce the liability. The cases were The Commissioner of Stamps (W.A.) v. The West Australian Trustee Executor and Agency Company Limited, 36 C.L.R. 98 and The Commissioner of Stamps (W.A.) v. The West Australian Trustee Executor and Agency Company Limited, 38 C.L.R. 63. In the latter case the former case was distinguished and it is necessary to refer only to the earlier decision. In that case it was held that for the purposes of the Administration Act 1903 (W.A.), which imposes probate duty, unassessed federal income tax was a debt to be taken into account in arriving at the dutiable balance of the value of the estate of a deceased person. In that case the relevant statutes were in full operation, both during the lifetime of the deceased person and thereafter. No question arose as to the effect of any provision in an Acts Interpretation Act in preserving rights accrued or liabilities incurred. The case is an authority for the proposition that for the purpose of an Act such as the West Australian

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Act imposing probate duty an unassessed liability to income tax may be regarded as a debt. But the decision has no bearing upon the question whether this liability was a liability already incurred, or whether the right to impose the liability was a right already accrued before the death of a deceased person and before any assessment had been made. It is quite consistent with the two cases mentioned to hold that the liability to pay income tax, though to be regarded as a debt for the purpose of assessing probate duty, was not a liability which had been incurred within the meaning of the Acts Interpretation Act. Similar considerations apply to the right which it is suggested had accrued. Thus these authorities do not disturb the conclusion which has been stated that the Acts Interpretation Act does not assist the Commissioner in the present case.

For the foregoing reasons I am of opinion that the Commissioner had not power to issue the assessments in question.

This conclusion makes it unnecessary to consider arguments for the respondent that the Tasmanian statutes declaring rates of income tax are invalid by reason of inconsistency with the Constitution of Tasmania, or arguments for the appellant intended to meet difficulties arising from the repeal of certain Income Tax Acts (Rating Acts) and from the absence of any provision in statutes before 1924 applicable to the assessment of the executors of deceased persons after the lapse of time which has occurred in this case.

In my opinion the appeal should be dismissed with costs.

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JUDGMENT. MR JUSTICE RICH.

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Judgment. Rich, J.

I agree that the appeal should be dismissed. The contentions urged ~~in support of the appeal~~ on behalf of the respondents by Mr Baker in his earnest and able argument are fully dealt with in the Chief Justice's judgment in which I concur and I do not propose to add anything to His Honour's reasons.

Have telegraphed Sir Isaac Rich re this

THE COMMISSIONER OF TAXES

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JUDGMENT STARKE J.

Appeal from a decision of the Supreme Court of Tasmania which dismissed an appeal from a judgment of the Chief Justice of that Court declaring that the Commissioner of Taxes had no power under the Land and Income Taxation Act 1910 of Tasmania to alter his assessments of Benjamin Nathan, deceased, to income tax for certain financial years and allowing objections to alterations of such assessments of income tax. Nathan had been assessed to income tax in the State of Tasmania for the financial years 1915 to 1935 inclusive, which ended on 30th June in each year pursuant to various Income Tax Acts and the Land and Income Taxation Act 1910 of that State - the latter Act providing for the assessment of income tax. All these assessments were paid or discharged by Nathan in his lifetime. Nathan died on the 25th July 1935, and the respondents are his executors and trustees.

On the 5th October 1938 the Commissioner, according to an agreed statement of facts, made an assessment of the "Trustees of Estate of Benjamin Nathan" in respect of each of the financial years above-mentioned based on his assertion that the deceased had omitted, and after his death the respondents had omitted, to make a full and true disclosure to the Commissioner of all the material facts necessary for Nathan's assessment in respect of each of the said several years. Notices were given to the Trustees

that the Commissioner, in accordance with the Land and Income Taxation Act 1910, had altered the assessment of State income tax in respect of the several financial years already mentioned in the manner indicated in the notices relating to those respective years. The result of the so-called alterations was to increase the total amount of tax by no less than £5,107, which it is admitted is not excessive.

But the Commissioner cannot, I apprehend, reassess a taxpayer who has been assessed pursuant to law and who has discharged the liability so assessed without some statutory provision enabling him so to do. And the personal representatives of the taxpayer stand in the same position.

All the Acts fixing or imposing rates of tax passed prior to 1924 were repealed prior to the alterations in the assessments made by the Commissioner, as was, I understood, admitted at the Bar, and at all events is so stated in the judgment of Clark J. on appeal from the Chief Justice. It is clear, I think, that the Acts Interpretation Act 1931, S. 16(Tasmania), preserved no right under these Acts in respect of tax that had not been assessed before their repeal. Except as to transactions past and closed, or rights saved by the Acts Interpretation Act, the repealed Tax or Rating Acts must be treated as if they never existed: Victorian Stevedoring and General Contracting Co. Pty. Ltd. & Meakes v Dignan, 46 C.L.R. 73. Consequently none of the altered assessments or reassessments made by the Commissioner for the years prior to the year 1924 and which were notified to Nathan's trustees in October 1938 can be sustained.

But none of the Acts imposing or fixing the rates of tax subsequently to the year 1924 were repealed, and they are still subsisting legislative provisions. They

were all much in the same form and purported to impose income tax at rates declared in the Act. But the provisions of the Land and Income Taxation Act 1910 were repealed by the Land and Income Taxation Act 1935 to the extent indicated in the Schedule to that Act. The Act of 1910 itself was not repealed but amended. The amendments substantially recast the Act. Thus SS. 27 to 69 were repealed and other sections substituted. Assessable income was enlarged, exemptions and deductions were altered. And sections in this Act of 1935 which were numbered 127 and 128 provided for assessments and amendments thereof. They take the place of SS. 58 and 61 in the 1910 Act, which provided for an Assessment Book and authorised the Commissioner in his discretion, whether notice of objection had been given or not, to alter or reduce any assessment, notice being given to any person or persons affected thereby, who might object thereto in the same manner as from an original assessment. The substituted sections 127 and 128 provide that "where under this Act any person is liable to pay tax the Commissioner may make an assessment of the amount of such tax". Further, that "the Commissioner may, subject to this section"(128), "at any time amend any assessment by making such alterations therein or additions thereto as he thinks necessary, notwithstanding that tax may have been paid in respect" thereof. Then sub-sec. 2 of the same section(128) provides that "where a taxpayer had made to the Commissioner a full and true disclosure of all the material facts necessary for his assessment, and an assessment is made after that disclosure, no amendment of the assessment increasing the liability of the taxpayer in any particular shall be made except to correct an error.....or a mistake of fact; and no such amendment shall be made after the expiration of three years from the date upon which the tax became due and payable under that assessment". An amended assessment is "an assessment for all the purposes of this Act"(S.128 (10)). Notice must be given to "the person liable to pay

the tax"(S. 130), and by S. 134 a taxpayer dissatisfied with any assessment under "this Act" may object thereto and have it reviewed by a Court of Review.

The alterations or reassessments made by the Commissioner for the years 1924 to 1935 cannot be sustained under these provisions.

In the first place these provisions relate to assessments made "under this Act", which is the Land and Income Taxation Act 1935 (See 1935 Act, S. 1), and not the principal Act of 1910 (See 1935 Act, S. 3). The provisions in the Acts Interpretation Act 1931, S. 8, do not appear to me to conflict with this view, having regard to the express provision in SS. 127 & 128. Indeed it would be difficult to apply SS. 127 & 128 to assessments under the 1910 Act, for the whole basis of assessment was so greatly altered. But S. 4 of the Act of 1935 does not, I think, throw any light on this question; it merely provides that the amendments effected by the 1935 Act shall have effect in relation to all assessments in respect of the year of income ending on 30th June 1936, which is the financial year preceding the year of tax (See 1935 Act, S. 2, "Year of Income"). It provides for a period which includes part of the year 1935 before the Act was passed, but it does not confine the Act to assessments made for that period alone. Again, I should not think that SS. 127 &128 have any application to assessments of taxpayers who are dead. An Act might so provide, but a common expedient in such cases is to make a provision for assessing and charging personal representatives. Aitken v Federal Commissioner of Taxation, 56 C.L.R. 491, at p. 502. Further, the provision for amendment of assessments in S. 61 of the 1910 Act cannot sustain the Commissioner's assessments, for it was repealed, and in any case had not, I think, any application to the case of assessments of taxpayers who were dead. The authority to amend is not such a right as is preserved by the Acts

Interpretation Act 1931(Tasmania); Abbott v Minister for Lands, (1895) A.C. 425. But there were provisions in the Act of 1910, and there are now provisions in the Act of 1935, dealing with the case of deceased taxpayers. The first relevant provision was in S. 32 of the 1910 Act, but it was repealed in 1924(15 Geo. V No. 70, S. 3) and another section substituted as follows:-

> "(1) When, at the time of a person's death, income 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 income tax from the executors or administrators of that person as he would have had against him if that person were alive.
>
> "(2) The executors or administrators shall furnish a return of any income derived by the deceased person in respect of which no return has been furnished by him".

This section was repealed by the Act of 1935, S. 2, and the following new sections 165 and 166 inserted in the 1910 Act(See enacting provision following S. 160 in the 1935 Act):-

> S. 165 "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 -
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> "I. 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". And the trustees (par. II.) are required to make such returns as the Commissioner requires for the purpose of an accurate assessment.

S. 166:"(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". And the trustees are by sub-sec. 2 required to furnish a return of any income derived by the deceased person in respect of which no return has been lodged by him.

These sections, it must be remembered, are inserted in the 1910 Act but apply only from the date of the passing of the 1935 Act. But the terms of the Act are explicit and cover all cases in which a taxpayer escapes full taxation in his lifetime whether by reason of inaccurate return on his part (S. 165) or otherwise(S. 166). The provision is not limited to tax assessed or assessable income under the 1935 Act but is wide enough in its language to cover any income tax imposed by law. It is executors or trustees who are charged, not as a substitute for the deceased, but on a liability that would have fallen on the deceased were he "still living" or if he "were alive" (Cf. Aitken's Case 56 C.L.R., at p. 502), and no Statute of Limitations operates

to bar the remedy (See 1910 Act, S. 99). In the cases mentioned in the sections the Commissioner is given the same powers and remedies against the executors and trustees of the taxpayer as he would have against him if he were "still living" or "were alive". These latter words measure the extent of the liability of executors or trustees; they are charged and subjected to tax by force of the powers and remedies given to the Commissioner in the cases mentioned in the sections. In my opinion, this liability of executors and trustees must be ascertained by reference to the law in force at the death of the taxpayer and not by reference to the law in force at the time the Commissioner assesses them, which manifestly might operate in an arbitrary and capricious manner. It is true that the repeal of the legislation imposing taxation in the lifetime of taxpayers before they were assessed or fully assessed would relieve them of taxation if the legislation or the Acts Interpretation Act 1931 did not preserve their liability. But the repeal of the legislation after their death would not allow such taxpayers to escape, if they were liable at their death to assessment. This view supports the Commissioner's assessments of the executors and trustees since 1924, for at the time of the taxpayer's death in this case, namely, July 1935, the Act of 1910 had not been repealed. The Royal assent to the repeal was given, as already noticed, on the 16th January 1936. See Acts Interpretation Act 1931, S. 9. The taxpayer's assessments were, pripr to the date of his death, subject to alteration and amendment whereby the liability imposed upon him under the various Acts in force in relation to income taxation which he had escaped or failed to pay was ascertainable and enforceable. And in my opinion the provisions of S. 165-166 of their own force and effect maintain for the purpose of these sections against exe-

cutors and trustees the provisions for assessing income tax under the Tax or Rating Acts and the Act of 1910. And the respondents, his executors and trustees, are by force of S. 165-166 chargeable as if he were "still living" or "were alive".

The respondents also challenged the validity of the relevant Tax Acts and contended that each and all of them infringed the provisions of the Constitution Act 1926, S. 8, or 1934, S. 41, of Tasmania. It is undesirable to express any concluded opinion upon the question whether the Tax Acts are or are not contrary in form to those provisions, for the decision of this Court in McCawley v The King, 26 C.L.R. 9, is conclusive that those provisions may be altered by legislation inconsistent with its terms. Attorney-General (N.S.W.) v Trethowan, 44 C.L.R 394; (1932) A.C. 526, is not inconsistent with McCawley's Case, for there amendments of the constitutional provision were required to be made in a prescribed manner and form.

The result is that I would allow this appeal and affirm the Commissioner's assessments against the respondents other than those relating to years prior to 1924.

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Judgment — Williams J.

I agree with the Chief Justice that both the contentions to which he refers must be decided against the appellant, and that the rejection of these contentions disposes of the appeal.

With respect to the first contention, I base my agreement upon the absolute and unqualified repeal by sec.2 of the Land and Income Tax Taxation Act 1935 of the sections of the Land and Income Tax Taxation 1910 contained in the schedule to the Land and Income Taxation Act 1935, and of the whole of the subsequent Land and Income Tax Taxation Amending Acts contained in that schedule. The Land and Income Tax Taxation Act 1910 had dealt with two subjects of taxation, income tax and land tax, and the effect of these repeals was to repeal the whole of the provisions relating to income tax in the Act of 1910 as subsequently amended; and to introduce a new code for determining the liability for income tax, for the making of assessments and for the recovery of the tax. The authorities cited in the judgment of the Chief Justice show that it is a general rule of law that when an Act of Parliament is repealed, it must be considered (except as to transactions past and closed) as if it had never existed.

But it is contended that the Act of 1935, which is intituled an Act to amend the Land and Income Tax Act 1910, when construed as a whole, sufficiently indicates an intention that the repeals referred to in the schedule were only to come into force in relation to all assessments of income for the year of income ending on 30th June 1936 and subsequent years. The contention is based upon sec.4, which provides that the amendments effected by this Act shall have effect in relation to all assessments of income in respect of the year of income ending on the

thirtieth day of June 1936. Read in an absolutely literal sense, the section could mean that the amendments were to apply to the assessments for the one year only, but this would lead to an absurd result; and a more reasonable construction, which is open on the language, is to read the section as meaning that the amendments are to commence to have effect in respect to the year ending thirtieth day of June 1936.

But I am unable to find any sufficient intention in the language of the Act to indicate that the repealed sections of the Act of 1910 and the subsequent amending Acts were to continue in force with respect to assessments for the years prior to this year. The Act of 1935 does not contain any express words to this effect so that they would have to be implied, and the general rule is not to import into Statutes words that are not to be found there. In the present case it would be necessary to import a wide and comprehensive savings clause without any definite indication as to its contents. The effect of the importation contended for by the appellant would be to preserve indefinitely the liability of persons who were liable under the repealed Acts to make returns and to pay tax so long as such persons were alive; or, if they were dead, to preserve indefinitely the liability of their executors for the years subsequent to 1924; although by sec.128 of the amendment introduced by sec.3 of the Act of 1935 the right of the Commissioner to make an amended assessment is limited to three years from the date upon which the tax became due and payable under that assessment if the taxpayer is still alive, and by sec.165 he has only the same right against the executors of a deceased taxpayer as he would have against the taxpayer if he were still living.

The practice in Tasmania has been to pass an annual Act declaring the rates at which income is to be taxed. The annual Rating Acts previous to those commencing in 1924 have been repealed; but the subsequent annual Rating Acts are still in force. But it is impossible to imply from this fact any clear intention that the Act of 1910 as amended was to remain in force in respect of the year 1924 and the subsequent years, so as to permit

amended assessments to be issued with respect to these years so long as the Rating Acts since 1924 remained unrepealed.

As to the second contention I have nothing to add to the Judgment of the Chief Justice.

The appeal should in my opinion be dismissed.