*Privy Council Appeal No.* 127 *of* 1913.

**John Herbert Syme** - - - - - - *Appellant,*

*v.*

**The Commissioner of Taxes for the State of Victoria** - - - - - - *Respondent.*

FROM

**THE SUPREME COURT OF THE STATE OF VICTORIA.**

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 28TH JULY 1914.

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*Present at the Hearing:*

LORD DUNEDIN. LORD SUMNER.
LORD ATKINSON. SIR JOSHUA WILLIAMS.

[*Delivered by* LORD SUMNER.]

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The question on this appeal is shortly whether a portion of the appellant's income is assessable to income tax as income derived by him from personal exertion or as income derived by him from the produce of property within Victoria, within the Income Tax Acts, 1895 and 1896, of the State of Victoria. The appellant returned this sum under the former head; the Commissioner of Taxes assessed him under the latter, and thereby doubled the rate of tax chargeable. Mr. Syme objected, and paid under protest, and his objection was duly transmitted for hearing and determination to a Judge of County Courts, who stated a case for the opinion of the Supreme Court which raised the above question. The Supreme Court decided against him on the authority of *Webb* v. *Syme* (10 C. L. R. 482)

[74] J. 366. 80.—8/1914. E. & S.

in which the same question, on practically the same state of facts, had been answered by the Supreme Court of the State of Victoria in Mr. Syme's favour and against him by the High Court of Australia. So far as questions of principle and of construction of the Acts are concerned, this case is therefore in effect an appeal from *Webb* v. *Syme*.

Briefly, the facts are these. Mr. David Syme was a newspaper proprietor, and printed and published "The Age," "The Leader," and "Every Saturday." The business was large and lucrative. He had also separate businesses, relatively inconsiderable, in connection with the properties known as Killara and Melbourne Mansions, and a farm at Mordialloc. He called the publishing concern "The Age business" after the principal and well-known newspaper. In 1908 he died, leaving a widow, five sons, of whom the appellant is the eldest, and two daughters. The debts and funeral expenses of the testator had been paid prior to 1910. On this one point the facts in this case differ from those in *Webb* v. *Syme*, and for what it is worth it is in the appellant's favour. In *Webb* v. *Syme* some reliance was placed on the possibility that in the year of assessment then in question there might be debts of the testator still to be discharged. There were none in the year in question now.

David Syme left certain specific legacies, and then gave the residue of his estate, consisting principally of the above businesses, to trustees. The "Age business" they were to carry on, the other businesses and the rest of the residuary estate they were to convert, with power to postpone the conversion and to manage in the meantime. Out of the income of the residuary estate and out of the profits of the "Age business" and the other businesses while carried on, the

trustees were to pay to the widow an annuity, which is the first charge thereon, to set aside certain capital sums for the benefit of the testator's daughters, and also of a charity to be called by his name, and then, as to the residue, to divide the income equally among the five sons. This is being done at present, and the ulterior trusts are not now material.

It so happens that the will names the appellant as one of the trustees, but it is rightly agreed that this is for present purposes of no consequence, as he might be removed and replaced by someone else. It also happens that as one of the managers of the "Age business" he is paid an appropriate salary, but nothing turns on this. His salary is clearly income derived by him from personal exertion, and is so assessed, and is outside the area of matters in dispute.

Having cleared the testator's estate of debts the trustees are now carrying on the businesses. In the main they do so at a large profit. For 1910 the newspaper business yielded a profit of 81,759*l.* 15*s.* 1*d.*, and the Melbourne Mansions business a profit of 3,715*l.* 16*s.* Losses were incurred at Killara and Mordialloc, but they only amounted together to 376*l.* 4*s.* 8*d.* On the whole there was 85,397*l.* 13*s.* 10*d.* to divide, of which the appellant's one-fifth share is 17,079*l.* 10*s.* 9*d.* This he returns as 17,025*l.* 17*s.* 3*d.* derived from personal exertions, and only 53*l.* 13*s.* 6*d.* from the produce of property. The Commissioner claims and the Supreme Court has held, as the High Court held in *Webb* v. *Syme*, that the 17,025*l.* 17*s.* 3*d.* is also derived from the produce of property.

There is no doubt that this money is made in business, and Section 2 of the Income Tax Act, 1895, as amended by Section 4 of the Income Tax Act, 1896, which Acts are to be read as one Act, defined "income derived by any person from

" personal exertion " as among other things, " all " income arising or accruing from any trade " carried on in Victoria, although the income has " not arisen or accrued or been . . derived from " the taxpayer's own personal exertion or trade," and " trade " is defined to include every business. Under the same sections " income derived by " any person from the produce of property " is defined as meaning " all income derived in or " from Victoria, and not derived from personal " exertion," which again " shall include income " of the taxpayer, although the same has not " been derived from his own property." The charging section, which is Section 5 of 1895, classifies the tax according as the income taxed falls within one or other of the above categories.

Their Lordships are unable to hold that the portion of the appellant's income in question is not " income arising or accruing from any trade " carried on in Victoria," and therefore is " income derived from the produce of property," and this for several reasons.

In saying " any trade carried on in Victoria " the definition does not say by whom such trade is carried on. The amending section enlarges " personal exertion " and extends it to trade carried on by vicarious exertion without stating the legal relationship between the real and the vicarious trader, or defining the capacity in which the business must be carried on by the latter. Their Lordships were informed that the provision in the Act of 1896 was inserted to settle a doubt whether a person could claim the lower, or personal exertion, rate, when all the work in his business was done for him by his agents. Be this as it may in fact, the enactment is general in form : it does not make the definition of 1895 affirmatively include business carried on by agents, but it provides negatively that a business may be carried on by personal exertion for the

purposes of this Act, even when there is no personal exertion on the part of the person who benefits by the business, but everything is done for him. Again, the Act does not say for whom the trade is carried on. When a trade is carried on by trustees there is no doubt that they carry it on for the beneficiaries and not for themselves, save in so far as their remuneration is provided for by law or by the trust deed. Unless the definition clause, as amended, is interpreted as though it ran: "any trade carried on by the "tax-payer or his agents," for which the language of this taxing Act affords no sufficient warrant as against the subject, the definition of "income derived from personal exertion" is wide enough to cover the present case. What the appellant gets is "income arising . . . . "from a trade carried on in Victoria" by trustees, for the benefit of himself and others, entitled equally with him, "although the same has "not accrued . . . . from his own per- "sonal exertion" in his capacity as such a beneficiary.

Again, it is not disputed that in certain events the trustees are assessable in respect of the appellant's one-fifth share of the earnings of the "Age business," and the appellant contends that they are assessable in respect of the entire five-fifths in any event at the option of the Commissioner. Now there is no doubt that these Income Tax Acts do not contemplate taxing the same fund twice over. If the trustees are assessed, they must be assessed upon "income derived from personal exertion," for by the personal exertion of themselves or their agents, they make the money in trade. How then can the appellant be assessed otherwise when the assessment is made directly upon him? If the same money is to be regarded as two incomes, as it must be if it is to be assessable on two

different bases, there would be double taxation of the same money, which no one suggests; and if there is no double taxation of the same money, then since the same money is, at any rate in some events, assessable in the alternative either on the trustees, who make it, or on the beneficiaries who enjoy it, the assessment must in either case be made on the personal exertion basis, for that and that alone fits the case of an assessment on the trustees. For this purpose it matters not whether the cases in which either the trustee or the *cestuis que trustent* can be assessed in the Commissioner's option, be few, as the Commissioner argues, or many, as the appellant submits. In either event the logical result is the same. Since both the trustees and the *cestuis que trustent* can be assessed on this money, either both must be assessed at the same rate, and that rate must be the personal exertion rate, for to tax the trustees at the produce of property rate on what they earn themselves would be impossible; or they must be taxed at different rates in the option of the Commissioner, although the subject-matter of taxation is one and the same fund.

There is no escape from this dilemma except the one adopted by the majority of the High Court of Australia in *Webb* v. *Syme*, and supported by the respondent on this appeal, and the crux of the case has been: is this a way out?

The argument is that the Act must be deemed to contemplate the assessment of the persons, who are the final recipients of an income and can spend it as they please, since it provides (Section 9 (2) of Act No. 1374) that, in estimating the balance of income liable to be taxed, on the one hand rent of dwelling-houses, maintenance of families and other personal disbursements shall not be deducted, and on the other (Section 9 (3)

of Act No. 1374) that premiums of insurance on the taxpayer's life, calls or contributions on shares held by him in companies in liquidation or reconstruction, and losses incurred in other trades which he may carry on, may be deducted. These are all matters neither known to nor any concern of trustees. This is so; but there is nothing to limit persons, who can be assessed, to such persons as may wish to deduct the expenses of their families, or be in a position to deduct premiums, because they have families for whose benefit they insure their lives. Such persons are included and taxed no doubt, and may be a large proportion of the taxpayers, but others, trustees among them, are included; and when trustees are assessed (Section 34 (2) provides sufficient machinery to enable the *cestui que trust* to obtain the benefit of such deductions in the shape of a refund, direct or indirect, of tax overpaid by a trustee, who was ignorant of or for any other reason did not or could not claim the deductions, which his *cestui que trust* might have made. Next it is said that Sections 15 (2) and 41 (1) of Act No. 1374 and 12 (1) (c) of Act No. 1467 show that the Legislature intended to impose assessment upon a trustee only as a secondary liability, failing payment of the tax by the *cestui que trust*, or failing the opportunity of assessing him in the first instance. Their Lordships are unable to accept the contention. The Acts say nothing about the primary liability of the *cestui que trust* and the secondary liability of the trustee; they do not make the trustee a surety for his *cestui que trust's* income tax; at most they give him a right of recourse in case he is compelled to pay it. The Acts, in so far as they make trustees assessable, do so upon the same footing as the *cestui que trust*, and this is for the more convenient collection of the revenue, and cannot

therefore by any implication increase the burthen on the taxpayer.

Lastly, it is said that the income is not the same income, and the fund, which produces it, is not the same fund, when the trustees are assessed as when the *cestui que trust* is assessed. They carry on several businesses, one great and the rest relatively small, some at a profit and some at a loss. They set off losses against profits, and bring down a balance on profit and loss account; they discharge sundry prior charges, and then divide an ultimate balance. All this is true, but all this is mere book-keeping. It does not follow when the appellant receives the cheque for his share that he is getting a part of a new mixed fund or that the connection between his income and the newspaper business is lost. There is no difficulty, either in fact or in theory, in keeping the "Age business" apart from the other businesses, and all the businesses apart from those concerns the income of which is the produce of property. The Commissioner's argument conceived the fund, out of which the appellant is paid, as a reservoir, fed by various streams descending from sundry sources and blending their waters in one basin, out of which they flow indistinguishably and indissolubly. With all respect to the learned Judges, the majority in the High Court of Australia in *Webb* v. *Syme*, who adopted this figurative way of putting a very plain set of facts, their Lordships are only able to regard this argument as fallacious. There is no question here of showing whence the sovereigns came in the first instance which were ultimately paid to the appellant. In the ordinary course of business the trustees may mix all the sums that come to their hands from all sources, and with them discharge indiscriminately all or any of the obligations which fall upon them whether at law or in equity, but they

keep accounts all the time, and there is no doubt whatever that the appellant's 17,025*l.* 17*s.* 3*d.* comes from the "Age business" and that of the Melbourne Mansions Company, was made in them, and is his solely because under his father's will they are carried on for him and the other members of the family. What was the produce of personal exertion in the trustees' hands till they part with it does not, in the instant of transfer, suffer a change, and become the produce of property and not of personal exertion, as it passes to the hands of the *cestui que trust.*

Their Lordships are accordingly of opinion that the appellant's contention is right that the question stated in the special case should have been answered in his favour, and that the judgment of the Supreme Court of Victoria should be set aside, and judgment should be entered for the now appellant for the amount paid by him under protest and in excess of his contention, and they will humbly advise His Majesty that the appeal should be allowed with costs here and below, and that judgment as above stated should be entered for Mr. Syme.

In the Privy Council.

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JOHN HERBERT SYME

*v.*

THE COMMISSIONER OF TAXES FOR THE STATE OF VICTORIA.

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DELIVERED BY LORD SUMNER.

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