

In the Privy Council.

UNIVERSITY OF LONDON
 W.C. 1.
 19 FEB 1957
 INSTITUTE OF ADVANCED
 LEGAL STUDIES

ON APPEAL

FROM THE COURT OF APPEAL OF NEW ZEALAND.

BETWEEN

THE COMMISSIONER OF STAMP DUTIES . *Appellant*

150'8

AND

THE NEW ZEALAND INSURANCE COMPANY
 LIMITED (Administrator of the Estate of
 FRANCIS JOSEPH ROLLESTON deceased) . . *Respondent.*

10

Case for the Appellant

RECORD.

1. This is an Appeal by leave of Her Majesty in Council given 24th November 1954 against the judgment and order of the Court of Appeal of New Zealand dated 18th December 1953 whereby the said Court reversed the judgment of the Supreme Court of New Zealand given 17th December 1952 in favour of the Appellant ordering that the Respondent was not entitled to the allowance of a certain amount in arriving at the final balance of the estate of Francis Joseph Rolleston deceased (of which estate the Respondent is Administrator) for the assessment of Estate Duty under the provisions of the Death Duties Act 1921 of New Zealand and whereby the said Court of Appeal adjudged and ordered that the Respondent was entitled to such allowance.

p. 22.
p. 21.
p. 12.

2. The Appellant is the Commissioner for Stamp Duties of New Zealand and it is his duty under the Death Duties Act 1921 of New Zealand (hereinafter called "the said Act") to assess duty on a deceased estate; for this purpose the Appellant is under a duty to compute the final balance of the deceased estate upon which such assessment is made. Under section 62 of the said Act provision is made whereby an administrator of a deceased estate who is dissatisfied with any assessment of death duty made by the Commissioner may by notice in writing require the Commissioner to state a case for the opinion of the Supreme Court. In the present case this course was taken by the Respondent in relation to the Appellant's assessment of death duty on the estate of Francis Joseph Rolleston deceased and in particular as to the Appellant's computation of the final balance of that estate upon which the assessment for duty was made. The opinion of the Supreme Court in favour of the Appellant was reversed on the Respondent's appeal to the Court of Appeal of New Zealand.

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3. The question with which this Appeal is concerned is whether on the true construction of the said Act the liability of a deceased under contract with a life annuitant who survives him for payment of such sums as may accrue due after the death of the deceased constitutes—

(A) a contingent debt ; or

(B) another debt the amount of which is in the opinion of the Commissioner incapable of estimation ;

so that by section 9 (2) (d) of the said Act an allowance therefor is prohibited on the computation of the final balance of the deceased estate for assessment of estate duty save to the extent that allowance therefor is required to be made by section 9 (3) of the said Act (viz. for the debt becoming actually payable, or, in the opinion of the Commissioner, capable of estimation, within three years after the death of the deceased). 10

pp. 4-7.

4. By a Deed dated 16th April 1941 and made between Rosamond Mary Teschemaker, Lancelot William Rolleston, John Christopher Rolleston and the deceased of the first part and their sister Helen Mary Rolleston (hereinafter called " the said annuitant ") of the second part it was recited that Elizabeth Mary Rolleston late of Christchurch, Widow, who died in New Zealand on the 4th June 1940 had been remitting £31 5s. a month to the said annuitant for her maintenance and support, that by her will dated 1st December 1935 the said Elizabeth Rolleston had bequeathed a pecuniary legacy of £2,000 and one-seventh of the residue of her estate to the said annuitant that the parties of the first part were satisfied that it was the intention of the said Elizabeth Mary Rolleston that the provision made in her will should be sufficient to maintain the said annuitant in the same standard of living as she had enjoyed during the lifetime of the said Elizabeth Mary Rolleston but owing to various causes operating since the date of the said will the estate of the said Elizabeth Mary Rolleston and consequently the share to which the said annuitant was entitled therein is of less value than at the date of the will and might be further reduced in value and that such share would therefore not be sufficient for the maintenance of the said annuitant to the same standard as she had hitherto enjoyed and they had agreed to continue the remittance of £31 5s. a month to the said annuitant on the terms thereafter set out and the said Deed witnessed that with a view to settling any claim that might legally be made by the said annuitant for an increased allowance out of the estate of the said Elizabeth Mary Rolleston it was agreed and declared between the parties thereto that the parties of the first part should jointly and severally agree " to remit to (the said annuitant) in London or in such other place as she shall from time to time direct during her lifetime the sum of £31 5s. in New Zealand currency on the first day of each and every calendar month, the first of such payments having been made on the 1st July 1940 " and in consideration therefor the said annuitant assigned to the said parties of the first part absolutely in equal shares as tenants in common a legacy of £2,000 given to her under the will of her deceased mother Elizabeth Mary Rolleston and all her one-seventh share and interest under the said will in the residuary estate of the said Elizabeth Mary Rolleston. 20 30 40

5. The said deceased died at Timaru, New Zealand, on 8th September 1946 and probate of his last will was granted by the Supreme Court of New Zealand at Timaru on 12th November 1946 to the Respondent. 50

6. The said deceased was survived by the said annuitant.

7. The Death Duties Act 1921 of New Zealand provides *inter alia* as follows :—

Section :

“ 2. In this Act, unless a contrary intention appears, . . . ‘ Debt ’ includes any pecuniary liability, charge or encumbrance.”

10 “ 3. In the case of every person who dies after the commencement of this Act, whether in New Zealand or elsewhere, and wherever the deceased was domiciled, there shall be payable to the Crown on the final balance of the estate of the deceased, as determined in accordance with this Act, a duty (hereinafter called estate duty) at the rate and in accordance with the provisions prescribed by this Act.”

“ 4. Estate duty shall be charged and assessed as a percentage of the amount of the final balance of the estate, in accordance with the graduated scale of percentages set out in the First Schedule hereto.”

20 “ 5. (1) In computing for the purposes of this Act the final balance of the estate of a deceased person his estate shall be deemed to include and consist of the following classes of property :—

(a) All property of the deceased which is situated in New Zealand at his death, and to which any person becomes entitled under the will or intestacy of the deceased, except property held by the deceased as trustee for another person.

* * * * *

(2) The estate of a deceased person computed and constituted as provided in this section is in this Act referred to as his dutiable estate.

* * * * *

30 “ 6. (1) The final balance of the estate of the deceased shall be computed as being the total value of his dutiable estate after making such allowances as are hereinafter authorised in respect of the debts of the deceased and in respect of other charges.

(2) All such property shall be valued as at the date of the death of the deceased, save that where by the last preceding section it is provided that the local situation of any such property shall be determined as at any other date, the value of that property shall be determined as at the same date.”

“ 9. (1) In computing the final balance of the estate of the deceased, allowance shall, save so far as otherwise provided by this Act, be made for all debts owing by the deceased at his death.

40 (2) No such allowance shall be made—

* * * * *

(d) For contingent debts or any other debts the amount of which is, in the opinion of the Commissioner, incapable of estimation.

(3) If any debt for which by reason of the provisions of paragraph (d) of this section an allowance has not been made becomes at any time within three years after the death of the deceased actually payable or, in the opinion of the Commissioner, capable of estimation, an allowance shall be made therefor, and a refund of any estate or other duty paid in excess under this Act shall be made to the person entitled thereto, but no action for the recovery of any such refund shall be commenced except within three years after the payment of the duty so paid in excess."

" 33. (1) In order to ascertain the amount payable as death 10
duty under this Act, every administrator shall, within six months from the grant of administration, deliver to the Commissioner a statement in writing in the prescribed form, containing the prescribed particulars with respect to the dutiable estate of the deceased, and with respect to the interests of the several successors of the deceased, and containing such other particulars (if any) as may be prescribed for the purposes of this Act."

" 34. On the delivery of the aforesaid statement by the administrator the Commissioner shall proceed to assess the death duties payable, and shall give notice of his assessment to the 20
administrator. If the Commissioner is of opinion that no such duty is payable, he shall certify to the administrator accordingly."

" 62. (1) Any administrator who is dissatisfied in point of law or of fact with any assessment of death duty made by the Commissioner and any donor who is dissatisfied in point of law or of fact with any assessment of gift duty so made, may, within twenty-one days after notice of the assessment has been given to him, deliver to the Commissioner a notice in writing requiring him to state a case for the opinion of the Supreme Court.

* * * * *

(4) On the hearing of the case the Supreme Court shall determine 30
the questions of law or fact submitted, and the Commissioner shall thereupon assess the duty payable in accordance with that determination."

Section 62 of the said Act was also supplemented by section 5 of the Death Duties Amendment Act 1925 of New Zealand which provided that :—

" (4) Any allegations of fact comprised in a case stated by the Commissioner pursuant to the aforesaid section 62 of the principal Act (being the said Act of 1921) may be disputed by the appellant on the hearing of the appeal, but, in the absence of sufficient evidence adduced by the appellant to the contrary, all such allegations shall 40
be presumed to be correct."

8. The Respondent claimed that the debts owing by the deceased at the date of his death included the liability of the deceased under the said deed for his proportion of the monthly sums that might accrue after his death to the said annuitant. The Respondent estimated the amount

of such liability at £4,209 16s. and claimed an allowance for one-quarter (being the deceased's proportion) of the said sum of £4,209 16s., viz., £1,052 9s.

9. The Appellant computed the final balance of the deceased's estate at £44,739 14s. 3d. and assessed death duty upon that amount. In computing such balance the Appellant refused in view of the provisions of section 9 (2) (d) of the said Act to make any allowance for any amount accruing or to accrue due to the annuitant after the death of the deceased in respect of the monthly payments under the said deed covenanted to be
10 made except that under section 9 (3) of the said Act the Appellant made an allowance of £281 5s. being the deceased's proportion of the amount which had become actually payable to the annuitant within three years after the deceased's death and took such allowance into consideration in computing the said final balance of the deceased's estate.

10. The Respondent objected to the Appellant's assessment of the death duties payable in respect of the deceased estate in that in computing the final balance thereof no allowance had been made otherwise than as aforesaid. The Respondent therefore pursuant to section 62 of the said Act required the Appellant to state a case for the opinion of the Supreme
20 Court as to whether or not the Respondent was entitled to such allowance as claimed.

11. The Appellant pursuant to the Respondent's written notice on pp. 1-3. 23rd May 1952 stated a case for the opinion of the Supreme Court. The question raised for the opinion of the Court was "whether in computing the final balance of the estate of the deceased the Appellant (now the Respondent) is entitled to an allowance in excess of the sum of £281 5s. in respect of the liability of the deceased under the said Deed allowed pursuant to section 9 (3) of the said Act and, if so, what is the allowance to which the Appellant (now the Respondent) is entitled ? "

30 It is to be observed that in the said case it was stated that "if it is material the Respondent (now the Appellant) is of opinion that the liability of the deceased under the said deed as from his death is incapable of estimation." This statement was not disputed by the Respondent and so far as it constitutes a finding of fact pursuant to section 5 of the Death Duties Amendment Act 1925 is deemed to be correct. p. 3, ll. 11-12.

12. The Respondent appealed to the Supreme Court on the said case and that Court by Mr. Justice Northcroft on 17th December 1952 dismissed the appeal and held that in computing the final balance of the estate of the deceased the Respondent (then Appellant) was not entitled to an allowance
40 in excess of the sum of £281 5s. in respect of the liability of the deceased under the said Deed which sum had been allowed pursuant to section 9 (3) of the said Act. p. 12.

13. In giving the reasons for the said judgment, Northcroft, J., said:—

" My attention was also drawn to section 2 of the New Zealand Act in which occurs among other definitions : ' Debt ' includes any pecuniary liability, charge or encumbrance. It was urged upon me p. 9, ll. 30-46. p. 10, ll. 1-5.

that section 9 (1) of the New Zealand Act was mandatory and required an allowance to be made for all 'debts owing by the deceased at his death,' which by reference to the definition of 'debts' meant 'any pecuniary liability owing, etc.' With this was contrasted section 107 (1) of the Australian Act which provided for an allowance 'for all debts actually due and owing by him at the time of his death.' Had the matter rested there the distinction between the two Acts might have been significant. It is to be noted, however, that the decision in the Australian case in the High Court and in this one rests not upon the subsection authorising or directing the making of an allowance for debts but upon subsection (2) forbidding the making of an allowance 'for contingent debts or any other debts the amount of which is, in the opinion of the Commissioner incapable of estimation.' Under either Act a debt by way of annuity would be allowable were it not for the prohibition against contingent debts and other debts incapable of estimation. 10

An annuity debt is a contingent debt in that it is dependent upon the continued life of the annuitant. Inasmuch as the period of the annuitant's life is not capable of determination in advance an estimation of the quantum of the contingent indebtedness or 'pecuniary liability' cannot be made." 20

Northcroft, J., also accepted and followed the unanimous judgment of the High Court of Australia in the case of *Permanent Trustee Co. of New South Wales v. Commissioners of Stamp Duties* (1933), 49 C.L.R. 293 that an annuity of a similar character to that in the present case was a contingent debt for which allowance should not be made in computing the balance of an estate for assessment of death duty under the New South Wales legislation saying:—

p. 10, ll. 5-11.

"Even if this view (being the view firstly quoted above) be questioned the authoritative judgment of the High Court in the Australian case is still conclusive against the Appellant (now Respondent). In the High Court of Australia the members of the Court were Rich, Starke, Dixon, Evatt and McTiernan JJ. The Court was unanimous and each of the Judges based his opinion on the proper construction of section 107 (2) (d) (of the New South Wales Act) which is in precisely the same language as section 9 (2) (d) of the New Zealand Act." 30

After quoting from the judgments of the High Court of Australia in the case cited, Northcroft, J., added:— 40

p. 12, ll. 18-20.

"I am strongly fortified in the opinion I have formed that the debt in question here comes fairly within the prohibition against allowance as is contained in section 9 (2) (d)."

14. An appeal as of right against the judgment of the Supreme Court became barred by lapse of time but the Respondent applied to the Court of Appeal of New Zealand for leave to appeal upon the grounds *inter alia* that the same question as has arisen in the Respondent's case had already arisen in the case of another of the parties jointly liable to the annuitant

under the said deed and was likely to arise in the case of others of those parties and that the matter was of public importance. The Appellant concurred in such application for these reasons and particularly because the construction of the said Act which he had followed in the case of the deceased had been adopted and consistently followed since the year 1909 (when the first Death Duties Act of New Zealand with comparable provisions had passed into law) without challenge before the Courts. The Court of Appeal granted special leave to the Respondent to appeal against the judgment and order of the Supreme Court and the Respondent appealed p. 13.
10 accordingly.

15. On 18th December 1953 the Court of Appeal (Fair, Stanton and Hay JJ.) allowed the Respondent's appeal and set aside the judgment of the Supreme Court dated 17th December 1952 in favour of the Appellant ; p. 21.
the Court of Appeal further ordered that the question in the case stated be answered in favour of the Respondent and that the allowance to which he is entitled for the liability of the deceased under the said deed to the annuitant be estimated on the proper actuarial basis in respect of the valuation of the annuity payable thereunder to the said annuitant.

16. The reasons given by the Court of Appeal for the said judgment
20 and order may be summarised as follows :—

(1) that the debt in question was not a "contingent debt" within section 9 (2) (d) of the said Act ;

(2) that the debt in question was not a debt the amount of which in the opinion of the Commissioner was incapable of estimation ;

(3) that the opinion of the Commissioner that so far as it was material the said debt was one the amount of which was incapable of estimation was wrong ;

30 (4) that the decision of the High Court of Australia in *Permanent Trustee Co. of New South Wales v. Commissioner of Stamp Duties* (1933), 49 C.L.R. 293, which was on any view not binding upon the New Zealand Courts, was distinguishable ;

(5) that the debt in question was one in respect of which the Respondent was entitled to allowance on the basis provided for in the Order of the Court of Appeal upon the computation of the final balance of the deceased's estate for the purposes of death duty.

17. In the reasoned judgments in the Court of Appeal, Fair, J., said :— p. 15, ll. 10-22.

40 " . . . the first question to be decided is as to what is the meaning of 'contingent debts' in section 9 (2) (d) of the Act. There seems no doubt that it has two meanings. In its strict and most correct sense, it means a debt that may never become due. An example of such debt is a guarantee of a bank overdraft which, owing to the financial position of the principal debtor, is certain never to be required to be paid. It is not unreasonable to exempt such a debt from deduction from an estate because it may never become due and payable. No doubt there are many similar instances.

Where, however, there is an existing legal liability, and although the amount of it may be uncertain and depend, as in this case, on the duration of life, there does not seem to be any justification for refusing to allow its deduction unless it is incapable of reasonable estimation.

* * * * *

p. 15, ll. 40-46.

In this case, there is here an existing pecuniary obligation—not contingent but vested—although the amount of the liability may possibly be considered dependent on a contingency. Admittedly it was incurred for full consideration in money or money's worth, wholly for the deceased's own use and benefit. It therefore falls within the definition of a debt in section 2 of the Act inasmuch as it is a 'pecuniary liability,' and possibly a 'pecuniary charge.'

p. 16, ll. 1-13.

It is to be noted, too, that the word 'other' in the second half of section 9 (2) (d) implies that the contingent debts referred to are to be such as are incapable of estimation. For these reasons, I think that the words 'contingent debt' in section 9 (2) (d) must be confined to the narrower class of debts, although I am aware that in many of the cases it has been used with a wider meaning. In a revenue statute, however, in a provision which is directed towards avoiding the deduction of a technical debt, or one the value of which it is impossible to estimate on any reasonable basis, the words, if ambiguous, should be construed in a sense favourable to the taxpayer. It is a well-settled rule of law that all charges upon the subject must be imposed in clear, unambiguous language. The subject is not to be taxed unless the language of the statute clearly imposes the obligation; Maxwell on the Interpretation of Statutes 9th Ed. 291.

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p. 16, ll. 27-41.

If the value of an annuity can be estimated, as it is for many other business purposes, I think it is impossible to hold that it is incapable of estimation here.

It is to be noted, too, that, under section 14 of this Act, if the uncertain duration of life is regarded as a contingency, there is an appeal under section 14 to the Court which is governed by the provisions contained in section 21.

Section 21 (2) provides that an appeal shall lie to the Supreme Court from any decision of the Commissioner in the same manner as if that decision was a determination of a question of law. In my view, this gives the Supreme Court and the Court of Appeal the right to determine any questions of fact as if they were questions of law. It modifies the almost unfettered discretion ordinarily conferred by the words 'in the opinion of'; and it is unnecessary in order to reverse the opinion of the Commissioner that the Court should be satisfied that either it was not honest, or proceeded upon a wrong application of the principles to be applied.

* * * * *

p. 17, ll. 1-10.

With regard to the case relied on in the Court below, and which that Court thought was indistinguishable, the terms of the New

South Wales Act are different from those in our Act. The most striking difference is the provision made in the section corresponding to section 9 (1) of our Act for the deduction subject to the provisions of the Act of all debts *actually due* and owing by the deceased at the time of his death. The words I have italicised are not contained in our section. Obviously they make a vital and essential distinction. Moreover, as Mr. Wild pointed out, section 2 of our Act defines 'debt' as including 'a pecuniary liability, charge or incumbrance'."

10 Stanton, J., said :—

“ Mr. Byrne, for the Commissioner, contends that ‘ contingent p. 18, ll. 5-26.
debts ’ include not only debts where a liability is contingent, but also debts where liability is certain, but the ultimate amount that will be payable depends on a contingency. Consequently, he says, the second limb of the provision does not apply to contingent debts, but means some classes of debts, which, though not contingent debts, are in the Commissioner’s opinion incapable of estimation. If that be so, it is very difficult to see what debts could be included
20 under the second limb which are not within the expression ‘ contingent debts.’ I fail to see how there could be a debt incapable of estimation for any reason other than that either liability under it or the ultimate amount of liability was dependent on a contingency. If, however, the expression ‘ contingent debts ’ is confined to the strict meaning of that phrase—namely, debts where all liability is contingent, and the second limb is considered as applying to debts where, although some liability is certain, the ultimate amount of such liability is incapable of estimation, you would give significance and meaning to both limbs of the clause instead of reducing the
30 second limb to a useless and redundant excrescence. An example of a contingent debt properly so called is the uncalled liability on shares or a claim which has been made against the deceased and repudiated by him. Liability under a guarantee might also be a contingent debt, but such a liability is excluded by paragraph (b) of section 9 (2).

Apart from authority, I would think there could be no doubt p. 18, ll. 27-36.
that section 9 (2) (d) should be interpreted by giving to the phrase ‘ contingent debts ’ the strict meaning I have indicated, and treating the second limb as not applying to ‘ contingent debts ’ at all. The learned Judge in the Court below considered that the decision of the
40 High Court of Australia in *Commissioner of Stamp Duties v. Permanent Trustee of N.S.W.* ((1933) 49 C.L.R. 293), (Hill’s case) was an authority against this view which he ought to follow. I think that case is distinguishable for the reasons elaborated by Fair, J., but, even if it were not, this Court is not bound to follow it, and, in my view, should not do so.

In the instant case, the liability of the deceased to pay the p. 18, ll. 37-39.
annuity is not, therefore, a ‘ contingent debt,’ but it is suggested that, even so, it is a debt which is properly ‘ incapable of estimation.’

* * * * *

p. 18, ll. 46-47.
p. 19, ll. 1-22.

The estimation of the amount or value of periodical payments during an uncertain period is a common practice, both in commercial and legal transactions, and, in each case, the result obtained is not claimed to be the amount that will be payable or receivable in any particular case, but is an estimate which is recognised as fair. In cases under the Bankruptcy Acts, although the statutory definition of 'debt' is different, it has been frequently laid down that the test of a provable debt in the case of a contract to make such periodical payments is whether its amount can be fairly estimated. In *ex parte Blakemore* ((1877), 5 Ch. D. 372) the debt was an annuity 10 given to a woman during her life or widowhood. The Court of Appeal held that the amount of the debt for purposes of proof was 'capable of being fairly estimated.' The same result was achieved in *ex parte Neal* ((1880), 14 Ch. D. 579), although the separation deed there in question provided that the annual payments should cease if the annuitant did not lead a chaste life, or if the marriage should be dissolved, and the payments were to be proportionately reduced if she became entitled to other income. This latter case was followed by Chapman, J., in *In re Odium* ((1922), G.L.R. 488), 20 where he held that payments due for maintenance of a wife and children under a separation deed could be valued and commuted for a lump-sum payment. In the instant case, complications such as existed in the cases cited do not occur; the single contingency arising is the length of the annuitant's life, and it seems to me clear that the amount of the annuity can be fairly estimated by the usual actuarial calculation. It is to be noted that the subsection refers to debts 'in the opinion of the Commissioner' incapable of estimation. It was not contended by Mr. Byrne that this provision entitled the Commissioner to disallow debts merely because he 30 thought them to be incapable of estimation, and, as was pointed out by North, J., in *Commissioner of Stamp Duties v. International Packers* ((1954), N.Z.L.R. 25, 48) the decision of the Commissioner in such cases must be made in accordance with law. It seems to me that the right of appeal under sections 14 and 21 of the Act would not apply to a decision of the Commissioner under section 9(2)(d) as those provisions seem to refer to contingencies affecting the value of interests in the estate of the deceased, and not to the determination of such a question as to whether or not a debt was capable of estimation. In the view I have expressed, the debt here in question is not a contingent debt at all, but a debt which is properly 'capable 40 of estimation' within the meaning of the section."

p. 19, ll. 23-37.

Hay, J., said :—

p. 20, ll. 10-21.

"I respectfully adopt the cogent reasoning of Stanton, J., as to the proper meaning to be given to the language of section 9 (2) (d) of the Act in the context in which it occurs (*ante*, p. 251). That meaning leads to the harmonious interpretation of all the relevant provisions of the Act, so as to make clear the intention of the Legislature. It is the primary duty of a Court of construction to ascertain that intention from the language of the statute itself.

I also respectfully agree with both my brethren that the liability of the deceased to pay or contribute towards the annuity cannot, in the circumstances, constitute it a debt the amount of which is incapable of estimation. It can, in fact, fairly be estimated according to the recognised and standard practice in such cases.

10 The debt in question accordingly not falling within the prohibitory provisions of section 9 (2) (d) it has then to be considered whether it comes within the dominant words of section 9 (1) as a debt owing by the deceased 'at his death.' To my mind, it plainly does, especially when regard is had to the wide meaning given to the term 'debt' in section 2. p. 20, ll. 22-26.

* * * * *

20 It was argued by Mr. Byrne that, despite the absence of an extended definition of 'debt' in the New South Wales statute which was under consideration in *Hill's* case ((1933), C.L.R. 293), and the presence of the words 'actually due and owing,' that case would have reached the same conclusion on the basis of our own legislation. With that submission, I completely disagree. It is evident from the judgments in that case that the presence of the words 'actually due and owing' had a vital bearing upon the decision, and the case is clearly distinguishable on those grounds." p. 20, ll. 38-46.

18. The Appellant applied for leave to appeal against the judgment and order of the Court of Appeal of New Zealand but that Court on 14th July 1954 refused leave to appeal. Thereafter Her Majesty in Council by order made 24th November 1954 granted the Appellant leave to appeal against the said order and judgment. pp. 22-24.

19. The questions which arise for consideration on the present Appeal are as follows :—

30 (A) whether upon the true construction of section 9 (2) (d) of the Death Duties Act 1921 the liability of the deceased under the said deed for the payment of sums falling due to the annuitant surviving him after the date of his death was a "contingent debt" so that allowance therefor in computing the final balance of the deceased estate for the assessment of death duty was prohibited save in the event and to the extent provided for in section 9 (3) of the said Act ;

(B) whether upon the true construction of section 9 (2) (d) of the said Act the said liability constituted an "other debt" the amount of which in the Appellant's opinion was incapable of estimation with the like consequence as in (A) above ;

40 (C) whether on the true construction of section 9 (2) (d) of the said Act the words "the amount of which in the opinion of the Commissioner is incapable of estimation" qualify both "contingent debts" and "any other debts" referred to in the said section or only "other debts" so referred to ;

(D) whether, assuming that the words “ the amount of which is in the opinion of the Commissioner, incapable of estimation ” apply to the liability in question, the Court of Appeal was entitled having regard to the provisions of section 62 of the said Act and of section 5 (4) of the Death Duties Amendment Act 1925 of New Zealand to disregard or overrule the statement and finding of the Appellant that in the present case the amount of the said liability was in his opinion incapable of estimation.

20. In relation to the above questions it is submitted that :—

(A) the liability in the present case was a “ contingent debt ” 10
because the question whether or not there was any obligation to make any further payment to the annuitant after the death of the deceased as well as the quantum of such obligation depended upon the contingency up to 1st October 1946 and thereafter from time to time of the annuitant's survival. There is no doubt that a liability existed but whether or not it would become enforceable as well as the quantum payable depended on this contingency. It is submitted that the present case is indistinguishable from the liability of the holder of partly paid shares in a company in respect of such calls as may in future be made upon him. There, as here, 20
the obligation to pay as well as the quantum of the payment depends on the contingency of a call and of the amount of such call. There is no basis to support the view of Stanton, J., in particular, that the present liability could be distinguished from the uncalled liability upon partly paid shares in a company. Further, the view of Fair, J., that the term “ contingent debts ” used in section 9 (2) (d) applied only to cases in which it was uncertain whether or not there would be a liability on the deceased is ill-founded. The definition of “ debt ” given in section 2 of the said Act makes it clear that allowance in computing the final balance of a deceased estate can 30
only be made when there is a *liability* existing at the date of the death and the effect of section 9 (2) is to prohibit the allowance of certain types of liability ; subsection (d) makes it clear that *contingent* liability falls within the prohibited categories. Stanton J. was also wrong in treating the present case as one in which some liability only was contingent (as to quantum) but some liability (as to obligation) was certain ; if there was no certain liability as to obligation there would be no debt within the definition provided but merely the prospect of a liability. In the present case, just as in the illustrations given of liability on a guarantee for a third party 40
debt or on partly paid shares for the uncalled balance, there was a subsisting obligation but whether that obligation matures into a liability to pay and what its quantum will be are matters dependent upon events outside the control of the person liable and which may or may not occur ; so that the liability can be properly and only regarded as contingent ;

(B) the deceased's liability in the present case did not constitute an “ other debt ” on the true construction of section 9 (2) (d) of the Act ; it is apparent on the language of the section that it is intended to deal with two different and distinct categories of debts viz., 50

p. 18, ll. 22-24.

p. 15, ll. 13-18.

p. 18, ll. 16-22.

(i) contingent debts and (ii) any other debts the amount of which is (in the opinion of the Commissioner) incapable of estimation. These categories are by the clear language of the section distinguished and opposed. If a liability falls within the former category, it cannot fall within the latter. Stanton, J., was wrong in taking the view that if the Appellant's contentions were correct, so that an established liability the enforceability and quantum of which depended on contingencies fell within the former category, there was nothing left to fall within the latter. There may be liabilities certain and subsisting but incapable of quantification at a particular time for reasons other than contingencies (e.g. because they depend upon the ascertainment of matters of fact upon which quantum is dependent) which would clearly fall within the latter category. Assuming, however, that the Appellant's primary contention that the liability here was a contingent debt and not an "other debt" be ill-founded, it is then submitted that whether or not the amount of such debt is incapable of estimation is a matter which is to be determined by the Appellant and that since the enforceability and quantum of any obligation upon the deceased after the date of his death were both dependent upon future events the nature and circumstances of which were at such date uncertain, the Appellant was right in treating allowance therefor as prohibited upon that part of section 9 (2) (d) which relates to debts other than contingent debts ;

p. 18, ll. 10-16.

(c) on the true construction of section 9 (2) (d) of the said Act the words "the amount of which is, in the opinion of the Commissioner, incapable of estimation," qualify only the words "any other debts" and not the words "contingent debts." The submission made by the Appellant that the subsection is intended to and does create two different and distinct categories of debts (see under (B) above) is supported by the terms of section 9 (3) of the said Act. But taken simply as a question of the proper and grammatical construction of the words used which are, it is submitted, free of ambiguity the Appellant's submission on this point is correct. In determining the impact of a contingent debt there are two factors for consideration, firstly, the question of the occurrence or otherwise of an uncertain event, secondly, the question of the amount if such event occurs. In the case of "other debts" the first of these considerations does not arise because the liability is as a matter of obligation certain ; it is for this reason that in determining the impact of "other debts" the Commissioner is to regard the estimation of "amount" a process which would not be sufficient in determining the impact of a "contingent debt" in which amount is only one of the relevant factors ;

(D) the Appellant's main submission here as below is that the liability in the present case was a "contingent debt" and that such being the case the opinion of the Commissioner as to whether or not the amount was incapable of assessment did not and does not arise for decision ; should this submission be wrong, then it is contended that the Appellant having on the material before him formed and stated his opinion that the amount of the liability

was incapable of estimation the Court of Appeal was not entitled to disregard or over-rule such opinion; firstly, because there is nothing in the said Act to entitle the Court to exercise a supervisory or appellate jurisdiction in respect of matters which by the Act are left to the opinion of the Commissioner; secondly, because the expression of the Commissioner's opinion on the capability or otherwise of estimation must be regarded as constituting or incorporating a finding of fact which in the absence of challenge (as provided in section 5 of the Death Duties Amendment Act 1925) must be taken to be correct; thirdly because, in the absence of any suggestion of *mala fides* or excess of statutory powers, the Court has no power to vitiate the Commissioner's opinion still less to substitute its own opinion on the matter in question for that of the Commissioner. 10

21. In the premises the Appellant submits that the order and judgment of the Court of Appeal of 18th December 1953 reversing the order and judgment of the Supreme Court of 17th December 1952 was wrong and should be set aside and that the order and judgment of the Supreme Court should be restored, for the following amongst other

REASONS

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- (1) THAT the liability here in question was a "contingent debt" within the meaning of section 9 (2) (d) of the Death Duties Act 1921 of New Zealand.
- (2) THAT the liability here in question did not fall within the category of "any other debt the amount of which is, in the opinion of the Commissioner, incapable of estimation" as provided by the aforesaid section; alternatively that if it did so, the said liability was such a debt the amount of which was in the opinion of the Commissioner incapable of estimation. 30
- (3) THAT the Respondent was not entitled to an allowance in respect of the said liability for the purpose of computing the final balance of the deceased estate for the purposes of assessment of death duty otherwise than as provided and given pursuant to section 9 (3) of the said Act.
- (4) THAT so far as material the opinion of the Commissioner that the said liability constituted a debt the amount of which was incapable of estimation was final and conclusive and not open to review by the Court of Appeal. 40
- (5) THAT the judgment of the Supreme Court was right for the reasons therein and in this case set forth.
- (6) THAT the judgment of the Court of Appeal was wrong for the reasons herein set forth.

NEIL LAWSON.

In the Privy Council.

ON APPEAL
from the Court of Appeal of New Zealand.

BETWEEN
THE COMMISSIONER OF
STAMP DUTIES *Appellant*

AND

THE NEW ZEALAND
INSURANCE COMPANY
LIMITED (Administrator
of the Estate of FRANCIS
JOSEPH ROLLESTON
deceased) *Respondent.*

Case for the Appellant.

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