

not allow her husband to have access to her nor will they allow anybody else to interfere with her and that they will produce her as and when required by this Court or by the District Judge. We will direct the District Judge to proceed at once with the appointment of a suitable guardian for the minor in his discretion. It must be distinctly understood that if Musammatt Kaulashia or Ncoruddin commit the slightest breach of the undertaking offered by them they will be committed to prison.

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When the matter of the appeal came up for admission we directed a rule to issue against the appellants to shew cause why they should not be punished under the Contempt of Courts Act. In the circumstances we see no reason to proceed further with that matter and the rule is discharged.

ROWLAND, J.—I agree.

Order accordingly.

REFERENCE UNDER THE INCOME-TAX ACT, 1922.

Before Courtney Terrell, C.J. and Fazl Ali, J.

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Income-tax Act, 1922 (Act XI of 1922, as amended by Act III of 1928), section 26(2), meaning and significance of—"succession" what amounts to—test—legal opinion, statement of, in petition, whether proper.

Section 26(2) of the Income-tax Act, 1922 (as amended by Act III of 1928), provides :—

“Where, at the time of making an assessment under section 23, it is found that the person carrying on any business, profession or vocation has been succeeded in such capacity by another person, the assessment shall be made on such person succeeding as if he had been carrying on the business, profession or vocation throughout the previous year, and as if he had received the whole of the profits for that year.”

Held, (i) that the words “where at the time of making an assessment under section 23” merely mean “when the time comes to make an assessment”;

* Miscellaneous Judicial Case no. 41 of 1931.

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(ii) that the plain meaning of the words "succeeded in such capacity by another person" is that if a business, profession or occupation which was formerly carried on by a person has been taken over by another person who continues the business that transference of ownership, whether it be by operation of law or by transfer *inter vivos*, amounts to a succession.

The real test of whether there has been a succession or not is to be decided by an examination of the business.

Where, therefore, there had been no change in the character of the business or in its management or where the business had not been wound up and restarted, and where the business was continued after a change of ownership in the business, *held*, that there was a succession within the meaning of section 26(2).

Bell v. National Provincial Bank of England(1), followed.

No petition to any officer who has to administer the law should contain or have annexed to it any opinion by members of the legal profession. The correct course for the tribunal in such cases is to state that the petition cannot be considered until the statements as to the opinion are removed.

Reference under section 66(2) of the Income-tax Act, 1922.

The facts of the case material to this report will appear from the judgment of Courtney Terrell, C.J.

Sir Sultan Ahmed (with him *K. P. Jayaswal*, *S. M. Gupta* and *R. Misra*), for the assessee.

C. M. Agarwala, for the Commissioner of Income-tax.

COURTNEY TERRELL, C.J.—The late Maharajadhiraj of Darbhanga died on the 3rd July, 1929, and was succeeded by the present Maharajadhiraj. The deceased at the time of his death was the owner of a very extensive money-lending business and of other business undertaking and on the death of his father the present Maharajadhiraj immediately came into ownership of these concerns. A notice had been

(1) (1904) 4 K. B. 149.

served by the Income-tax Officer under section 22(2) of the Income-tax Act on the late Maharajadhiraj in respect of the income for the year ending on the 30th September, 1928. It was served upon a person who had no authority to receive it and it was accordingly cancelled and a fresh notice was served on the person who admittedly was in a position to deal with it. Time was requested of the Income-tax Officer for the purpose of making a return which time was granted. Before the extended time for making the return had expired the late Maharajadhiraj died. Later on the Income-tax Officer purported to apply section 26(2) of the Income-tax Act and decided that under that section the present Maharajadhiraj had become liable for the tax which the Income-tax Officer assessed after a return by the present Maharajadhiraj of the income of the late Maharajadhiraj for the year ending the 30th September, 1928. The return made by the present Maharajadhiraj was made together with a statement of his contention that he was not liable to be assessed in respect of this particular period of his father's ownership of the estate but he very properly supplied the necessary figures and the principal matter of the liability remained over for subsequent decision. It is that matter of liability which is raised for our decision in the form of the questions ultimately stated by the Commissioner of Income-tax.

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The questions which have been stated for this Court are thus formulated :—

(a) Does the law contemplate taxation of a dead man's income in the hands of an heir?

(b) Does section 26 (2) apply to the petitioner in the circumstances of the case? And if it does apply, was there a succession in law to justify an assessment on the petitioner?

The broad matter raised in question (a) does not really arise at all and it is not necessary for us to answer it whatever the right answer may be. The really material question is involved in question (b).

Two main contentions are raised on behalf of the assessee upon the question as to whether section 26(2)

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is applicable to the circumstances of the case. The first contention is made with regard to the opening sentence of the sub-section

“ Where at the time of making an assessment under section 23.”

It is contended that section 23, which is the only section of the Act which deals with the matter of assessment, does not come into operation unless and until there has either been a return made by the assessee or he has failed to make an accurate return, and the assessee (for this purpose) being the late Maharajadhiraj of Darbhanga, he had not at the time of his death either made a return or failed to make a return and accordingly it is said that section 23 had not come into operation and, therefore, sub-section (2) of section 26 has no application at all. In my opinion this contention is not well founded. Section 23 is the only section under which an assessment can be made and, therefore, the real meaning of the words “ where at the time of making an assessment under section 23 ” merely mean “ when the time comes to make an assessment ”. Secondly, the assessee is the person liable for the payment of the tax and the assessee in this particular case is not the late Maharajadhiraj but is the present Maharajadhiraj and he has in fact made a return and, therefore, an assessment could be made and was properly made under section 23.

The second contention on behalf of the assessee is based upon the words “ succeeded in such capacity by another person ” and the argument throughout on his behalf has been that such words can only apply to a transference of ownership of the business, profession or occupation inter vivos and is not capable of meaning succession by operation of law. It is a little difficult to follow the subtlety with which that argument is presented but, as I understand it, it is put somewhat in this way: On the one hand it is said that although the present Maharajadhiraj may have succeeded to the late Maharajadhiraj in ownership of his property he has not succeeded in the capacity of being the person to carry on the business, profession or occupation

but has succeeded by reason of the filial relationship existing between himself and his father. On the other hand it seemed that there was another way of putting the argument and I may attempt to summarise it thus:—It was said that the new Maharajadhiraj might, had he so chosen, have wound up the business from the moment when he came into ownership of it and that the continuance of the business cannot be treated as being the business of the late Maharajadhiraj but must be considered in law as being the business of the present Maharajadhiraj. In other words, the argument is that the present Maharajadhiraj has succeeded to a capital asset and that there has not been a continuing business. The argument does not appeal to me. I think that the plain meaning of the words is that if there is a business, profession or occupation which was formerly carried on by a person and that property has been now taken over directly by another person who continues the business that transference of ownership whether it be by operation of law, as in this case, or by transfer inter vivos, it is a succession. The real test of whether there has been a succession or not is to be decided by an examination of the business. Given the fact that there has been a business carried on by one person and after a certain date carried on by another, the question of whether or not it is a new business or it is the old business which is carried on in succession is to be found in the case which was cited on behalf of the assessee, the case of *Bell v. National Provincial Bank of England*⁽¹⁾. The court in that case had also to apply the word "succession". The material words of the rule which were being applied are quoted by the Master of the Rolls in his judgment as follows:—

"If any person shall have succeeded to any trade, manufacture, adventure, or concern, or any profession within such respective periods as aforesaid."

Now what had happened in that case in fact was this. A large banking company had purchased the business of a small local bank and carried it on. It

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carried it on in the same premises with the same clerks and apparently with no material alteration in the character of the business. It was argued by the purchasing company that there had been no succession to the old business but that it was simply a new capital adventure by the purchasing company and that it was, if anything, the start of a new business or that the new concern when taken over became part of the business carried on by the purchaser. The test applied by Cozens Hardy, L.J. in his judgment is expressed in the following words:—

“ Since the time of that purchase the respondents have been carrying on a business of the same character as was previously carried on by the County of Stafford Bank, on the same premises, and with the same staff of clerks as before. It appears to me impossible to say that there was not a succession by the respondents to the business of the County of Stafford Bank, within the meaning of the Fourth Rule, unless we are to hold that the Rule only applies to cases where the successor was not, at the time of the succession, carrying on a business of the same kind as that succeeded to, or where that business is isolated and kept apart from any other similar business previously carried on by him.”

Applying that test to the circumstances of this case the facts are all the more clear. It is not suggested for a moment that there has been any change in the character of the business, any change in the character of its management, that the business has been wound up and restarted or anything of the sort and, therefore, in my opinion, the business having been continued and there having been a change of ownership in the business there has been a succession to the business within the meaning of section 26(2).

It is not, in my opinion, necessary to answer the broad question as to whether the law contemplates the taxation of a dead man's income in the hands of his heir because no problem arises for solution in this case requiring an answer to that question but as to the second question as to whether section 26(2) applies to

the petitioner in the circumstances of this case. I would answer it in the affirmative in agreement with the very clear and logical opinion expressed by the Commissioner of Income-tax. The assessee will pay Rs. 250 as the costs.

We notice upon an examination of the record that the Income-tax Officer, in the course of hearing the learned Advocate on behalf of the assessee, seems to have asked him for opinions in favour of his contention and thereupon with that pressure upon him and, we are told, as the result of a practice which has sprung up the learned Advocate supplied the Income-tax Officer with the opinions of a large number of very eminent practitioners. This practice is to be deprecated. It would be in the highest degree improper for an assessee who was presenting what might be a novel, but at the same time a perfectly sound, point to be unable to impress the Income-tax Officer unless he could produce opinions which might even be against him or which might involve him in a great deal of expense. It is just as undesirable that that practice should be followed as that the learned Advocate who is conducting the case on behalf of a client should be asked what his own opinion of the matter is. That is obviously impossible and we have not the Roman custom of fortifying an argument by the opinion of "jurisconsults" especially when they are still in actual practice. I would recommend that the Department cease this custom forthwith. The opinions are often embarrassing to the Advocates who have to support the argument and not only so but they tend to embarrass the tribunal before which the case comes for decision.

FAZL ALI, J.—I agree.

COURTNEY TERRELL, C.J. AND FAZL ALI, J.—*September 1.*—Mr. Manohar Lal on behalf of the Commissioner of Income-tax has recalled our attention to this case. He informs us that most careful enquiries have revealed the fact that we were misinformed as to the practice prevailing before Income-tax-Officers in the matter of requiring from assesseees

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legal opinions in support of their case. It appears that in fact no such practice exists and we accept the statement of the officer that no such request was in fact made by him in this case but the petitions of assessees sometimes have annexed to them, as in the case under consideration, opinions by learned members of the legal profession. The Income-tax Officer has not felt justified in rejecting the petitions on this ground though neither he nor any superior officer has been influenced by the names of those who furnish the opinions. We are glad to find that the supposed practice which we reprobated has no existence in fact. Nevertheless we think it necessary to say that no petition to any officer who has to administer the law should contain or have annexed to it any such opinions. It is quite legitimate that the petitioner should state his legal contentions but the fact that such contentions have the support of the opinion of any practitioner is entirely irrelevant and the statement of such fact is improper. The correct course for the tribunal in such cases is to state that the petition cannot be considered until the statements as to the opinion are removed. It is not open to petitioners to include in their petitions improper and irrelevant matters and the position is analogous to that in which a petitioner might set forth matters of an irrelevant and scandalous nature, and in all such cases the petition should be returned for excision of such matter and after such excision, but not until it shall have been effected, the petition may be considered on its merits. These observations will form part of our judgment.

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*Income-tax Act, 1922 (Act XI of 1922), section 10(2) (vi)—
 "original cost thereof to the assessee", meaning of—words,*

* Miscellaneous Judicial Case no. 2 of 1931.