Foll Dent v. Commissioner of Stamp Duties (1909) 9 CLR 406

[HIGH COURT OF AUSTRALIA.]

HEWARD . . . . . APPELLANT;
SUPPLIANT,

AND

THE KING . . . . . RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Nov.* 21, 22, 25.

Griffith C.J., Barton and O'Connor JJ.

Probate duty—Statement for duty—Gifts inter vivos—Liability of donor's estate to pay duty—Rate at which duty is payable—Administration and Probate Act 1890 (*Vict.*) (*No.* 1060), *sec.* 102—*Administration and Probate Act* 1903 (*Vict.*) (*No.* 1815), *sec.* 11, *First Schedule, Part I.*

By virtue of sec. 11 of the *Administration and Probate Act* 1903,* First Schedule, Part I., where a gift is made within twelve months immediately preceding the death of the donor, duty is payable in respect of the property given as if it were the property of the donor at the date of his death, and that duty is payable by the representative of the donor out of the estate of the donor.

In such a case the duty in respect of the property given is to be calculated at the rate applicable to an estate valued at the sum of the values of such property and of the donor's estate, but the rate of duty in respect of the donor's estate is not increased.

* Sec. 11 of the *Administration and Probate Act* 1903 is as follows:—

"Every conveyance or assignment gift delivery or transfer of any estate real or personal and whether before or after the commencement of this Act purporting to operate as an immediate gift *inter vivos* whether by way of transfer delivery declaration of trust or otherwise shall—

"(*a*) if made within twelve months immediately preceding the death of the person so dying; or

"(*b*) if made at any time relating to any property of which property *bonâ fide* possession and enjoyment shall not have been assumed by the donee immediately upon the gift and thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise

"be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under the Administration and Probate Acts as though part of the estate of the donor."

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Judgment of the Full Court of Victoria, *Heward* v. *The King*, (1905) V.L.R., 548; 27 A.L.T., 50, varied.

APPEAL from the Full Court.

Jesse Frederic Heward died on the 3rd November, 1904, leaving a will dated 15th February, 1904, by which he appointed his wife, Margaret Lilian Heward, his executrix, to whom probate was granted. In the affidavit verifying the statement for duty, Mrs. Heward stated that within twelve months immediately preceding his death, the testator had made various gifts of money to her amounting in all to £570; and that in May, 1903, he had bought a certain freehold property in her name for which he had paid £600, and which she valued at £610. These gifts were not included in the statement for duty. The balance for duty in the statement as sworn to was £1976 15s. 6d. The officer to assess duty added to such balance the sums of £570 and £610, certifying that the final balance was £3156 16s. 6d. The amount of duty claimed under Part II. of the First Schedule to the *Administration and Probate Act* 1903 was £115 15s., being at the rate of £3 13s. 4d. per cent. This amount Mrs. Heward paid under protest, and thereupon by petition brought an action to recover so much of the duty as was attributable to the sums of £570 and £610, being included in the final balance for duty. By the petition she submitted that "on the true interpretation of the Administration and Probate Acts, whilst she admits that the gifts of money and the freehold property hereinbefore referred to did come within the provisions of sec. 11 of the *Administration and Probate Act* 1903, and were chargeable with duty, duty was not payable out of the estate of the testator in respect thereof, or alternatively, that, if duty was payable in respect of the said moneys and freehold property, the duty payable upon the estate of the testator should not have been calculated at a higher rate by reason of the said moneys and freehold property being chargeable with such duty." By the answer the questions of law raised by the petition were submitted to the judgment of the Court, and were subsequently referred to the Full Court.

The Full Court held that the sums of £570 and £610 were properly included in the balance for duty, and that the proper

amount of duty had been levied and paid: *Heward* v. *The King* (1).

From this decision the suppliant now appealed to the High Court.

Irvine and *Starke*, for the appellant. Whatever sec. 11 of the *Administration and Probate Act* 1903 means, it merely charges the property to which it relates, and has nothing to do with the executor. The scheme of the Administration and Probate Acts is that on the grant of probate all the assets forming the estate of the testator pass under the control of the executor. His first duty is to pay the probate duty, and he has power to apportion the payment among the beneficiaries. Having paid it, probate is issued to him. Apart from sec. 11 of the Act of 1903, he has only to pay duty on something which he has, and it was never intended by that section to impose on him an obligation to pay duty on property which previous to his testator's death was transferred to some other person, and which may have been dissipated or ceased to exist. This section makes nothing chargeable except the property to which the conveyance, &c., relates, and creates a charge on that property in the hands of whomsoever it may be. Even if the estate of the testator is by sec. 11 chargeable with payment of duty, the rate of duty on that estate is not thereby increased. The rate of duty on the property included in the conveyance, &c., may be that which is payable in respect of the sum of the values of that property and of the estate of the testator, but one reading of sec. 11 is that that rate is the same as that which would be paid on the estate of the testator. Clear enactments are required for the imposition of taxation: *Simms* v. *The Registrar of Probates* (2). [Counsel also referred to the *Administration and Probate Act* 1890, secs. 6, 100, 101, 102, 112; *Hardcastle on Statutes*, 3rd ed., pp. 122-130; *Payne* v. *The King* (3).]

Cussen and *Dethridge*, for the respondent. Broadly there is no distinction between the construction of taxing Acts and that

(1) (1905) V.L.R., 548 ; 27 A.L.T., 50.

(2) (1900) A.C., 323, at p. 337.

(3) (1902) A.C., 552.

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of other Acts. Starting with the assumption that there is no taxation, one has to see whether the Act does impose it. But having come to the conclusion that the tax is imposed, and the only question being on whom it is imposed, the principles referred to on behalf of the appellant do not apply. The only questions here are on whom is the tax imposed, and what is the property on which it is imposed. There should be equality of taxation, and the Act did not intend that one person or his property should escape taxation because the taxing officials did not know that the circumstances had arisen under which he or it was taxable. That would be the result if the executor need not include in his statement for duty property of the kind referred to in sec. 11. The word "chargeable" in that section does not mean subject to a lien, but it means a liability to be charged in respect of that property, that is, that duty is payable in respect of that property. That is the meaning of "chargeable" in secs. 12 and 13. See *The Direct Spanish Telegraph Co. Ltd.* v. *Shepherd* (1). That meaning is consistent with the spirit of the Administration and Probate Acts. Under the *Administration and Probate Act* 1890 resort to land follows upon non-payment of duty in certain cases. See secs. 112 and 115. But specific provisions are made in order to enable that resort to be had. It has been held in *The Queen* v. *Austin* (2), that the executor is liable to pay the duty imposed by sec. 115 of the *Administration and Probate Act* 1890, and in *National Trustees, Executors and Agency Co. of Australasia Ltd.* v. *O'Hea* (3), *à Beckett* J. held that the executor must pay the duty under sec. 11 of the *Administration and Probate Act* 1890.

Counsel also referred to *Bell* v. *Master-in-Equity of the Supreme Court of Victoria* (4); *Blackwood* v. *The Queen* (5); the *Administration and Probate Act* 1890, secs. 97, 108.

Starke, in reply.

Cur. adv. vult.

Nov. 25.

GRIFFITH C.J. In this case the Court is called upon to construe sec. 11 of the *Administration and Probate Act* 1903, which

(1) 13 Q.B.D., 202; 53 L.J. Q.B., 420.
(2) 24 V.L.R., 335; 20 A.L.T., 116.
(3) 29 V.L.R., 814; 25 A.L.T., 230.
(4) 2 App. Cas., 560.
(5) 8 App. Cas., 82.

provides: [His Honor read the section, and continued]. In the case before us an event contemplated by that section had happened with respect to property amounting in value to £1180. The testator had, within twelve months immediately preceding his death, given or conveyed property to his wife, whom he afterwards appointed his executrix. Two questions are raised by the case: First, whether, under the terms of this section, the duty, which is claimed to be payable, is payable out of the estate of the testator; and secondly, whether, if it is payable out of the estate of the testator, the section operates so as to increase the rate of duty payable upon the testator's estate proper which he had at his death, and which passed by his will.

The question depends upon the terms of the Administration and Probate Acts which impose the duty. It is not necessary to discuss them in detail, but it will be sufficient to refer to the general scheme. The scheme of the Acts is to impose progressive duty in respect of property the title to which passes by virtue of probate or letters of administration, and to include real as well as personal property, the amount of the duty depending on the aggregate value of the estate. In this view the duty is a probate duty as distinguished from a succession duty and it is payable by the executor or administrator. By sec. 102 of the *Administration and Probate Act* 1890, it is provided that: "The duty payable under this Part of this Act shall be deemed to be a debt of the testator or intestate to Her Majesty, and shall be paid by any executor or administrator out of the personal estate of the testator or intestate after payment of the testamentary and funeral expenses in priority to all debts of the testator or intestate," &c. But in another sense the duty is in the nature of a succession duty, because the executor is to deduct from the share of each beneficiary a proportionate share of the duty. Sec. 115 of that Act provides that in the case of certain assignments, gifts &c. of property made with intent to evade payment of duty, the property the subject of the assignment, gift &c., shall, upon the death of the assignor, donor &c., "be deemed to form part of his estate for the purposes of this Part of this Act upon which duty shall be payable under this Part of this Act," &c. It has been settled by the Judicial Committee of the Privy Council that that section only

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applies to colourable assignments of property, so that the property really remains the property of the testator, and the value of it is dutiable like the rest of the property which nominally as well as really was his at the time of the death, and probate duty is payable upon the aggregate amount. So the law stood up to the passing of the *Administration and Probate Act* 1903, which contains the section I read at the outset. That Act introduced a new scale of what are called probate duties.

It happens that in the present case the executrix is materially affected by the construction that is put upon the section. If the value of the property given by the testator within twelve months before his death is taken into consideration as part of his estate, and added to the value of what really was his estate at the time of his death, the aggregate value exceeds £3,000, and probate duty is to be calculated at the rate of $3\frac{2}{3}$ per cent. If, on the other hand, the value of that property is not taken into consideration and is not added to the value of the estate proper, the aggregate value is under £2,000, and in that point of view probate duty is to be calculated at the rate of only $1\frac{1}{2}$ per cent. So that the difference in favour of the estate will be the difference between $3\frac{2}{3}$ per cent. and $1\frac{1}{2}$ per cent. on the value of the estate proper.

The difficulty in construing sec. 11 is in one sense increased, and in another diminished, by reference to the two following sections. Sec. 12 provides that where a person has voluntarily transferred property of his own, or has vested it in himself and some other person jointly, so that a beneficial interest passes by survivorship on his death to that other person, that property "shall on the death of such person be deemed to the extent of such beneficial interest to form part of his estate for the purpose of estimating the duty payable under the Administration and Probate Acts and shall be chargeable with duty thereon accordingly." Sec. 13 contains a similar provision in the same words with respect to property over which the deceased person had, at the time of his death, a general power of appointment. There is no difficulty in giving a meaning to the language of those two sections. They say distinctly that, to the extent of the beneficial interest which passes, in one case by survivorship, and without limitation in the other, the property shall be deemed to form part of his

estate for the purpose of estimating the duty payable under the Administration and Probate Acts and shall be chargeable with the duty thereon accordingly. It is clear that under those circumstances the value of the property in question must be added to the rest of the testator's estate, and duty is chargeable on the aggregate value. The mode of computing the duty is that the executor or administrator is required to file a statement verifying the value of the property of the testator or intestate, and of the debts due by him, and duty is payable on the final balance. That duty is required to be paid before the instrument of probate or letters of administration leaves the office. Now, if the language of sec. 11 is synonymous with that of secs. 12 and 13 the contention for the Crown is right. If the contention for the suppliant is right, she is entitled to some reduction of the duty charged. It is necessary then to refer to the exact language of the section to see what the legislature has done.

In the case of a taxing Act we have no right to conjecture what is meant. It cannot be said that the intention of Parliament is absurd or unreasonable, since Parliament can make any provision it pleases. Our only duty is to see what Parliament has done or said. The enactment in sec. 11 is that an assignment of a particular sort shall "be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under the Administration and Probate Acts as though part of the estate of the donor." Those words are plain enough. The property is just as much chargeable with duty, that is, duty is just as much payable in respect of the property, as if the assignment had not been made. If the assignment had not been made, the estate would have been of the value of over £3,000, and duty would have been paid at the rate of $3\frac{2}{3}$ per cent. on the whole estate, including the property the subject of the assignment. So far as that property is concerned there therefore can be no serious difficulty. Moreover by sec. 102 of the *Administration and Probate Act* 1890 the duty is deemed to be a debt of the testator, and therefore the duty payable in respect of the assigned property was a debt of the testator, and that property is chargeable with payment of probate duty as though part of the estate, that is, as though it remained part of the estate. I think it must be

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deemed to have remained part of his estate for all purposes, and that duty is to be charged in respect of it as though it were part of his estate. In this case that is at the rate of $3\frac{2}{3}$ per cent., because if that property were part of the estate, the aggregate value would be over £3,000.

It is said that a difficulty arises because the executor may not know that property has been assigned by the testator within twelve months of his death. That may be so. There always is difficulty in ascertaining what assets a testator had at the time of his death, and the legislature devises the best schemes it can for dealing with such a case. The probate duty being a debt of the testator, the executor has to pay it. Whether the executor should include this property in the ordinary statement of assets, or whether he should put it in a supplementary statement, is not of much consequence. And in that point of view it does not much matter whether the duty is to be treated as a debt payable by the executor out of the estate, or whether it is payable before the instrument of probate is issued. So far as the duty on that property is concerned it is payable at such a rate as if the property actually, as well as notionally, formed part of the estate of the testator at time of his death.

But it does not follow that the rest of the estate—the estate proper—is affected, so as to be made liable to pay duty at a higher rate. Though the property assigned is chargeable with duty as though it were part of the estate of the donor, it is not made part of his estate. That particular property is affected as if it were part of the estate, but there are no express words saying that the estate of the donor, which is really his estate, shall be affected by the liability to duty on the property assigned, or saying that the persons entitled to the benefit of the estate which passes under the testator's will shall be liable to pay a higher rate of duty on that estate. It is possible that the words are open to that construction. If so, we must apply the canons of construction which are usually resorted to when problems of this sort have to be solved. The rule is laid down in *The Oriental Bank Corporation* v. *Wright* (1) by Lord *Blackburn* in the following terms:—"Their lordships, therefore, having regard to the rule that the

(1) 5 App. Cas., 842, at p. 856.

intention to impose a charge on the subject must be shown by clear and unambiguous language, are unable to say that the obligation of the bank to make the return applied for, and its consequent liability to pay duty on the notes put into circulation by its *Kimberley* Branch, are so clearly and explicitly imposed by the present Act as to satisfy this rule." The view I take is strengthened by the fact that in the two subsequent sections, in which the legislature intended to bring about the result of increasing the rate of duty, they have said so in plain language. It is difficult to see any reason why, when the legislature in the same Act uses two expressions which *primâ facie* have different meanings, they should nevertheless be held to have the same meaning. That would be violating the rule of interpretation to which I have referred.

For these reasons I am of opinion that the contention of the appellant is to this extent correct, viz., that the duty payable upon the estate proper of the testator should not have been calculated at a higher rate by reason of the property assigned being chargeable with duty. To that extent then the order appealed from should be varied.

BARTON J., after stating the facts, said: — The question depends upon the construction of sec. 11 of the *Administration and Probate Act* 1903, viewed in the light which the Crown thinks is thrown upon it by the provisions of secs. 12 and 13 of the same Act, and of the *Administration and Probate Act* 1890. The contention of the appellant is that the decision of the Full Court in favour of the Crown, holding the estate liable for the whole amount of duty exacted, and dismissing her petition, should be reversed. She claims that the estate is only chargeable under the schedule with duty at 1½ per cent. on £1,976 15s. 6d., it having been left to her and her children, on the ground that sec. 11 was not intended to affect the value of the estate itself. Alternatively, she claims that the section was not intended to raise the rate of duty payable by the estate itself, and, in that event, that the larger amount of refund should be recovered.

Sec. 115 of the *Administration and Probate Act* 1890, which was passed in reference to "any conveyance or assignment gift

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delivery or transfer of any estate real or personal or of any money or securities for money with intent to evade the payment of duty under this Part of this Act," went on to enact that upon the death of the person making the conveyance, &c., the property comprised in it should "be deemed to form part of his estate for the purposes of this Part of this Act upon which duty shall be payable under this Part of this Act." It further provided that conveyances, &c., made in escrow or otherwise to take effect upon the death of the person making the same, should be deemed to be made with intent to evade the payment of duty, and that property the subject matter of a *donatio mortis causâ* should, upon the death of the person making it, be deemed to form part of his property for the purpose of estimating the duty payable, and that duty should be paid upon it. There is a difference between the phraseology of this section and that of sec. 11 of the Act of 1903 in the important particular the subject of contest here. Sec. 11 is to be read with the Act of 1890 and, we are told, was passed in consequence of the decisions of the Privy Council in *Simms* v. *The Registrar of Probates* (1), and *Payne* v. *The King* (2). Sec. 11 provides: [His Honor read the section and continued]. Sec. 12 provides, shortly, that property which a person has transferred to himself and another person jointly, so that a beneficial interest therein passes by survivorship to that other person, shall, on the death of such person, "be deemed to the extent of such beneficial interest to form part of his estate for the purpose of estimating the duty payable under the Administration and Probate Acts and shall be chargeable with duty thereon accordingly." Sec. 13 provides that all property over which a deceased person had at the time of his death a general power of appointment shall, upon his death, "be deemed to form part of his estate for the purpose of estimating the duty payable under the Administration and Probate Acts and shall be chargeable with duty thereon accordingly."

In the first place there is to be noted the difference between sec. 115 of the Act of 1890 and sec. 11 of the Act of 1903. The literal effect of the former is that, for the purpose of computation of duty, the property in question is to be "deemed to form part

(1) (1900) A.C., 323. (2) (1902) A.C., 552.

of the estate," that of the latter is that the property in question shall be chargeable with duty "as though it were part of the estate." Then in secs. 12 and 13 again the property in question is to be deemed to form part of the estate. The contention for the suppliant is mainly founded on those differences. It is contended, on the other hand, that, taking the whole scope of the legislation into consideration, the provision in sec. 11 should be treated as identical in meaning with the corresponding provisions in secs. 12 and 13. That is the construction which the Supreme Court has put on the section.

We cannot, I think, be too careful in construing Acts of Parliament to say as the ordinary rules of construction say, that the legislature should be deemed *primâ facie* to mean what it has said—that it is to be taken at its word—and, when the legislature, using clear language, impresses differences in character or treatment upon two sets of transactions, unless there are to be collected from some other source reasons which justify us in treating these different things as being one and the same thing, we are bound to follow the ordinary meaning of the words. One need not quote the often quoted golden rule of Lord *Wensleydale*, but that is a rule we are bound to follow unless there is a reason for not doing so which we cannot escape. As to the construction of taxing Acts I quote from *Hardcastle on Statutes*, 3rd. ed., p. 126, because it contains a valuable summary of the decisions and an expression of the rule to be applied to an enactment which it is contended imposes a charge on the people:—"If a statute professes to impose a charge, 'the rule,' said the Judicial Committee in *Oriental Bank* v. *Wright* (1), is 'that the intention to impose a charge upon a subject must be shown by clear and unambiguous language.' 'A taxing Act,' said Lord *Cairns* in *Cox* v. *Rabbits* (2), 'must be construed strictly; you must find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed.' 'And in construing such Acts,' said Lord *Halsbury* in *Lord Advocate* v. *Fleming* (3), 'we have no governing principle of the Act to look at; we have simply to go to the Act itself, to see whether the duty claimed is that which

(1) 5 App. Cas., 842, 856. (2) 3 App. Cas., 478.
(3) (1896) A.C., 152.

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the legislature has enacted.' 'This rule, said Lord *Cairns* in *Pryce* v. *Monmouthshire* (1), 'probably means little more than this, that inasmuch as there was not any *à priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the taxpayer and the taxing authority, no reasoning founded upon any supposed relationship of the taxpayer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the taxpayer has a right to stand upon the literal construction of the words used, whatever might be the consequence.' And this rule, while valuable as a caution, cannot be taken as substantially varying the ordinary rules for construing all statutes. In *Att.-Gen.* v. *Carlton Bank* (2), Lord *Russell* L.C.J., said: 'I see no reason why any special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, viz., to give effect to the intention of the legislature, as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular tax is by the Statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by considerations of hardship or business convenience, or the like.'" I do not apprehend that the expressions of Lord *Russell* there cited are intended to convey any substantial difference of opinion from Lord *Cairns's* utterance in *Pryce* v. *Monmouthshire* (3) above quoted. It means this, that you must give effect to Acts of Parliament according to their language, and with respect to matters as to which rights are concerned, those rights are not to be taken away by implication. We are to consider Acts of Parliament as meaning what they say, and unless, upon their literal meaning, they show an intention not to charge a person, we must give effect to that construction and hold him harmless.

(1) 4 App. Cas., 202.
(2) (1899) 2 Q.B., 158, 164.
(3) 4 App. Cas., 197, at p. 202.

The question, then, in construing this Act is whether we are to take sec. 11 as meaning what it says, especially taking into consideration the difference of phraseology between it and that of secs. 12 and 13 and of sec. 115 of the Act of 1890. The ordinary canons of construction meet the case, whether there is a stricter rule for the construction of taxing Acts or whether that rule is only a part of the ordinary rules of construction. The meaning of sec. 11, if it means what it says, is that the conveyance or transfer is to be deemed to have made the property chargeable with the payment of duty as if it were part of the estate of the donor. As to the estate of the donor, apart from those two sums amounting to £1180, it amounts to £1976 15s. 6d. I find nothing in this section which makes the estate of the donor chargeable with a higher rate of duty because of the two alienations or transfers made within twelve months of the testator's death. Construing the section by what it contains—and I can construe it in no other way—it seems clear that the estate of the donor is not included in this section. There is no enactment apart from sec. 11 which assumes to make this £1180 part of the estate. It is property to be dealt with in a special way under the provisions of that section, and that section does not contain, nor does the Statute anywhere else contain, any words that I can see which carry that property into the estate in such a way as to make the estate itself subject to a higher rate of duty. I am therefore of opinion that the estate itself is not subject to be charged the higher rate of duty claimed, but is only subject to be charged duty at the rate of $1\frac{1}{2}$ per cent.

As to the £1180, that seems to me to stand upon a different basis. It had been part of the estate of the testator, and had been taken out of that estate by the transactions which occurred. By this enactment a penalty is visited on the property by nominally adding it to the estate so that a higher rate of duty can be collected upon that part of the estate which the testator by his disposition has put out of the estate. It must be remembered that the transaction is not impeached, and the property the subject of it belongs to the donee. But the section, passed as it was to make the grip of the law closer than it was under sec. 115 of the Act of 1890, according to the decision of the Privy Council, must

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be given full effect to, and that is done by interpreting it as imposing a liability to extra duty only upon the property the subject of the transfer.

Sec. 102 of the Act of 1890, which says that the duty is to be deemed to be a debt of the testator or intestate to the Crown, and to be paid by the executor or administrator out of the personal estate, or, if that is insufficient, then out of the real estate, appears to lay down the rule upon which we must proceed in this case. So that duty upon the amounts in question, £570 and £610, at the higher rate, must be paid by the executrix, the suppliant. As to the estate itself, its value is under £2000 and, as it is given to the wife and children only, the rate of duty is one-half of 3 per cent., that is $1\frac{1}{2}$ per cent. As to the sum of £1180 the duty is payable by the executor at the rate of $3\frac{2}{3}$ per cent., the rate payable on an estate valued at over £3000. The total amount that should have been paid is £72 18s. 4d. The amount which was actually paid is £115 15s. 2d. So that the suppliant is entitled to a refund of £42 16s. 10d.

O'CONNOR J. I agree that the appeal must be upheld. I concur in the reasons given by my brothers, and do not think it necessary to add more than a few words. It is impossible, in my opinion, to properly give effect to the intention of the legislature in sec. 11 of the Act of 1903 without giving due effect to the difference in phraseology between that section and secs. 12 and 13, and sec. 115 of the Act of 1890. There are four instances in which these Acts deal with attempts to evade payment of duty. The first is sec. 115 of the Act of 1890. That is a case in which a conveyance or assignment is executed with intent to evade payment of duty. The law there treats the document as conveying no title, and giving no right to possession. The property so attempted to be dealt with therefore really remains part of the estate, and, in imposing duty in that case, the section uses the expression, that the property shall for the purposes of the Act be deemed to form part of the estate of the testator upon which duty shall be payable, "and the payment of the duty upon the value of such property may be enforced against such property in the same way as duty under this Part of this Act is enforceable." Thus

directly enacting that the property purported to be conveyed, but which really never was conveyed, shall remain part of the estate, and pay duty as part of the estate. Then sec. 12 of the Act of 1903 deals with the case where a testator has conveyed property to himself and another person, in such a way that and a beneficial interest has accrued by survivorship to that other person on the death of the testator. In that case the testator retains an interest in the property, and the legislature provides that on the death of the testator the property "shall be deemed to the extent of such beneficial interest," that is, the beneficial interest of the joint owner with the testator, "to form part of his estate for the purpose of estimating the duty payable under the Administration and Probate Acts and shall be chargeable with duty thereon accordingly," that is, treating the share as though it were still part of the estate. The next case is under sec. 13, where there is property over which a deceased person had a power of appointment which was not exercised before his death. In that case the property still remains part of the estate, and the section enacts that the property "shall upon his death be deemed to form part of his estate for the purpose of estimating the duty payable under the Administration and Probate Acts and shall be chargeable with the duty thereon accordingly." In these three cases, in which it will be noticed that the Statute treats the property as if the testator had never transferred it, the expression always used is that the property shall be deemed to form part of the estate for the purpose of estimating the duty. When we come to sec. 11 of the Act of 1903 a different class of cases is dealt with—that is, cases where there was no fraudulent intention to evade duty, but yet there has been in effect an evasion of the duty—the Statute recognizes that the property was effectually conveyed in the testator's lifetime and at his death was not in his possession. Under these circumstances the legislature deals with the matter in quite a different way. It provides that the conveyance, &c., shall "be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under the Administration and Probate Acts as though part of the estate of the donor." It does not declare that it shall be deemed to be part of his estate as in the other cases, but it charges the property with payment of duty,