[HIGH COURT OF AUSTRALIA.]

AFFLECK . . . . . APPELLANT;
DEFENDANT,

AND

THE KING . . . . . RESPONDENT.
INFORMANT,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *March* 2, 5, 6, 12.

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

Probate Duty—Payment of "too little duty"—Asset not included in statement for duty—Claim by Crown for additional duty—Certificate of Master—Meaning of "final and conclusive and subject to no appeal"—"Final balance"—Necessity for fresh statement—Administration and Probate Act 1890 (*Vict.*) (*No.* 1060), *secs.* 97, 98, 99, 100, 105, 106, 108—*Liability of Crown to pay costs—Crown Remedies and Liability Act* 1890 (*Vict.*) (*No.* 1080), *Part I., sec.* 18.

Where the Crown alleges that too little duty has been paid in respect of the estate of a deceased person and seeks to obtain further payment of duty under sec. 105 of the *Administration and Probate Act* 1890 (Vict.), it must be ascertained how much duty ought to have been paid, and, as by sec. 100 the duty payable can only be calculated upon the final balance appearing on the statement of the executor or administrator, there must be a fresh statement made by the executor or administrator.

In making such fresh statement the executor or administrator must state the assets and debts of the testator or intestate as, according to his knowledge when making such fresh statement, they existed at the death of the testator or intestate, and therefore he may insert debts which were by mistake omitted from, or omit assets which were by mistake included in, the original statement upon the basis of which duty was paid.

Quære, to what extent the executor or administrator will be bound by the valuations of the items of assets appearing in such original statement as certified by the Master.

The provision in sec. 108 of the *Administration and Probate Act* 1890 that the certificate of the Master to the statements of the executor or administrator shall be "final and conclusive and subject to no appeal" has reference to proceedings to enforce payment of the duty payable on the basis of those statements.

Subsequently to the payment of duty in respect of the estate of an intestate it was discovered that he was entitled to a sum of money, which was thereafter paid to the administratrix. The Crown thereupon demanded payment of a sum representing the difference between the amount of duty which had been paid, and the amount which would have been payable if the sum so subsequently paid to the executrix had been added to the final balance in respect of which duty had been paid, and on refusal by the administratrix to pay such sum, the Crown sought by information to recover it. The defendant set up by way of defence that the duty actually paid was larger than that payable in respect of the actual value of the estate by reason of the omission of debts and over-valuation of assets in the original statement.

Held, reversing the decision of the Supreme Court, (*The King* v. *Affleck*, (1905) V.L.R., 130; 26 A.L.T., 148), that she was entitled to do so.

Held, also, that no cause of action was disclosed by the information.

In actions brought by the Crown under Part I. of the *Crown Remedies and Liability Act* 1890 costs may be given against as well as to the Crown.

APPEAL from the Supreme Court of Victoria.

An information by the Crown against Frances Mary Affleck, administratrix of the estate of James Phillip Macpherson, deceased, was as follows:—

"1. On 23rd August 1891, James Phillip Macpherson died intestate, being at the time of his death resident and domiciled in Victoria, and administration of his estate was, on 17th September 1891, granted by the Supreme Court of Victoria to the defendant, Frances Mary Affleck (formerly Macpherson), his widow.

"2. Under and pursuant to the *Administration and Probate Act* 1890, the defendant filed in the office of Probate a statement for duty and an affidavit verifying the same, and a certificate was duly issued by the proper officer certifying that the value of the estate of the intestate for the purposes of duty was £29,732 15s. 7d., and the sum of £1,114 18s. 10d. was due to the Crown for duty thereon, which last-mentioned sum was duly paid by the defendant on 5th May 1892, and letters of administration to the said estate were duly sealed and issued to the defendant after such payment.

"3. Before and at the time of his death the intestate, and since his death the defendant as such administratrix, was entitled to a valid legal claim against the trustees of the estate of one John

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Macpherson in respect of one-third part of the sum of £20,000 or thereabouts due by such trustees to the intestate and to the defendant as such administratrix.

"4. On 13th May 1902, under a judgment of the Supreme Court in certain proceedings by the trustees of the estate of the said John Macpherson, it was adjudged that a sum of £5,904 10s. 1d. was due and payable by such trustees in respect of the claim mentioned in paragraph 3 hereof to the defendant as such administratrix, and on 9th August 1902 such sum was paid by them to her in satisfaction and discharge of such claim.

"5. Such claim was not disclosed by the defendant, as it should have been, either in the said statement for duty or in the said affidavit verifying it, nor was any value at any time placed thereon in the said certificate.

"6. Since the said payment of duty it has been discovered that too little duty has been paid in respect of the said estate by the defendant, and that no duty has been paid to His Majesty in respect of the said sum of £5,904 10s. 1d. although the same has been certified by the proper officer to be due and payable by the defendant to His Majesty."

The defendant was also sued for additional duty due to His Majesty on the sum of £5,904 10s. 1d. as for money had and received by the defendant as part of the estate of the intestate.

The amount claimed was £595 12s.*

The defence, so far as is material, denied paragraph 6 of the information, and denied any indebtedness, and continued:—

"5. In preparing the said statement for duty the defendant included as an asset of the intestate's estate 1,588 shares held by him, and, by an error common to her and the proper officer for assessing duty, wrongly stated such shares to be of the value of £2 each, such error being caused by nominal quotations of £2 per share appearing in the daily newspapers shortly before the said duty was assessed, when in truth and in fact no actual sales had been made at £2 per share or at all, and such shares were unsaleable and valueless.

* During the hearing of the appeal to the High Court it was stated by counsel for the Crown that it had only then been discovered that this amount was incorrect, and that the proper amount was £488 13s. 9d.

"6. In addition, there was a liability of £8 per share on each of the said 1588 shares, making in all a liability of £12,704, which liability has in fact accrued by calls being made since the death of the intestate to the full extent of the said liability of £8 per share, and the amount of the liability of the intestate's estate in respect of the said shares was omitted from the list of liabilities deductable from the value of his assets for the purpose of assessing the amount for duty payable in respect of his estate.

"7. At the time of his death the intestate was entitled to certain real estate near Melbourne, and in preparing the said statement the defendant set it down as an asset of the value of £10,657. Such value proved to be excessive, as, after making strenuous efforts to dispose of it, she was unable to do so for a considerable time, and eventually realized £2,530 15s. 6d. The mistake in such value was caused by the fact that at the intestate's death real estate in the suburbs of Melbourne was absolutely unsaleable, and that owing to no sales of land having been effected in the vicinity for a considerable time prior to the intestate's death, the defendant had no materials to enable her to estimate such value.

"9. By reason of the aforesaid facts the defendant submits that too little duty has not been paid in respect of the intestate's estate, and she will contend that, if the present claim by His Majesty is sustainable, the true value of the intestate's estate at the time of his death, as now appearing after deducting the amount of his liabilities and debts as now ascertained, ought to be settled irrespective of the said statement for duty and the aforesaid errors and omissions, and she says that on such basis the balance for duty of the said estate will not amount to the sum upon which duty was in fact paid by her.

By the reply it was contended that the values set upon the assets at the date of death or the taking out of administration, and upon which duty was paid, were in no way affected by error or mistake at the time, or by any fall in values since; and that calls made since the death of the intestate in respect of uncalled liability on the shares held by him at his death could not be deducted from the value of the assets at the time of death.

At the trial before *Hodges* J. the evidence substantially estab-

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lished the allegations of fact set out in the information, and for the purposes of this report the nature of the evidence for the defendant sufficiently appears in the defence set out above.

Judgment was given for the Crown for £595 12s. with costs, and that judgment was, on appeal to the Full Court, affirmed: *The King* v. *Affleck* (1).

The defendant now appealed to the High Court.

Isaacs A.G. (with him *Hayes*), for the appellant. The *Administration and Probate Act* 1890 imposes a duty on the value of the estate of a deceased person as found by the final balance certified by the Master in Equity. If there is power to disregard that final balance, fairness and justice require that the whole matter should be re-opened. The statement made by the executor or administrator is not a mere statement of values, but is a statement also of what property the estate comprises, and when the Act says that the statement is to be final and conclusive, there is no more reason for saying that the conclusiveness should refer to the values than to the property. Sec. 105 reasonably bears the meaning that a further payment of duty is to be made if, taking the final balance as it is, too little duty has been paid. That is to say the section applies if, for example, there has been an error in calculating the amount, or if, under the erroneous belief that the deceased's property was divisible among his wife and children, duty has been paid at a lower rate than ought to have been paid. If that section has a wider meaning, the only way to tell whether too little duty has been paid is to have a proper statement and a proper final balance. The decision in *R.* v. *Smith* (2), which the Full Court followed in this case, is confused, but it decided, contrary to what the Full Court has now decided, that the values may be re-opened. According to the respondent's view sec. 105 must be a code in itself, which it obviously is not. The language of a taxing Act must be clear and unambiguous: *Heward* v. *The King* (3). The best that can be said for sec. 105 is that it is ambiguous, in which case the interpretation most favourable to

(1) 1905 V.L.R., 130; 26 A.L.T., 148.
(2) 9 V.L.R. (L.), 404; 5 A.L.T., 124.
(3) 3 C.L.R., 117.

the subject should be given to it: *Partington* v. *Attorney-General* (1); *Ingram* v. *Drinkwater* (2); *Armytage* v. *Wilkinson* (3); *Cox* v. *Rabbits* (4); *Pryce* v. *Monmouthshire Canal and Railway Companies* (5); *Oriental Bank Corporation* v. *Wright* (6); *Lord Advocate* v. *Fleming* (7); *Simms* v. *Registrar of Probates* (8); *Attorney-General* v. *Earl of Selborne* (9).

Cussen and *Guest*, for the respondent. The contention that the Crown cannot re-open the matter at all, or cannot re-open it without a fresh statement, is not open. It was not one of the grounds of appeal to the Full Court and was not raised there. The appeal to this Court is a re-hearing only so far as the grounds of appeal to the Full Court are concerned. The Court will assume that it is desirable to bring about equality of taxation. That can only be done in this case by taxing the real value of the estate. The principles upon which this Act should be construed were laid down by the Privy Council and the Full Court shortly after the original Act was passed, and they have been acted upon ever since, and the Act has been re-enacted using the same language. Unless there are strong reasons to the contrary, this Court should not disregard those principles. Complete justice is done if the parties agree upon the values of the different items of the estate and these are final and conclusive. The duty is made a debt of the deceased and accrues *eo instanti* on his death, and the estate is liable to duty even if no probate or letters of administration are taken out: *Bell* v. *Master in Equity of the Supreme Court of Victoria* (10). Therefore the liability to duty cannot depend on the statement for duty or the final balance. There is a liability to duty the amount of which is ascertainable in the last resort by the Court under sec. 105. That section combined with the 7th Schedule form a complete code. What is to be taxed is the total value of the estate after deducting the debts: *Armytage* v. *Wilkinson* (11); *Blackwood* v. *The Queen* (12).

The standard by which it is to be decided whether too little

(1) L.R. 4 H.L., 100, at p. 122.
(2) 44 L.J. P.C., 83.
(3) 3 App. Cas., 355 at p. 370.
(4) 3 App. Cas., 473 at p. 478.
(5) 4 App. Cas., 197 at p. 202.
(6) 5 App. Cas., 842 at p. 856.
(7) (1897) A.C., 145 at p. 152.
(8) (1900) A.C., 323 at p. 337.
(9) (1902) 1 K.B., 388 at p. 400.
(10) 2 App. Cas., 560 at p. 564.
(11) 3 App. Cas., 355 at p. 365.
(12) 8 App. Cas., 82 at p. 89.

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duty has been paid is the amount of duty payable under the Act, and that assumes a proper statement. The legislature must be taken in sec. 105 to contemplate the case of a misstatement of the assets, and not merely an arithmetical blunder. What the assets consist of is a matter about which the Master in Equity can know least. "Too little duty" is the antithesis of "too much duty," and sec. 106, which provides for the latter case, refers undoubtedly to an omission from the statement. The liability on the shares was not a debt of the testator's at the time of his death, and such debts alone are within sec. 106: *Whittaker* v. *Kershaw* (1); *The Master in Equity of Supreme Court of Victoria* v. *Pearson* (2); *In re Pearson* (3). *R.* v. *Smith* (4), is not an authority at large on this case, but only for the proposition that the certificate of the Master is not final as against the Crown. The use of the word "discovered" in sec. 105 points to something omitted from the statement rather than to an arithmetical blunder. Assuming another statement to be necessary before the tax accrues, if the administratrix were to die or be removed, that statement would have to be made by someone else, and the administratrix or her estate would be bound by it.

[GRIFFITH C.J. referred to *Coleman* v. *Mellersh* (5); *Bwllfa and Merthyr Dare Steam Collieries* v. *Pontypridd Waterworks Co.* (6); *Potts* v. *Smith* (7), as to re-opening settled accounts.]

Isaacs A.G. in reply referred to *Attorney-General* v. *Smith* (8); *R.* v. *Hunt* (9); *Barker* v. *Edger* (10).

Cur. adv. vult.

GRIFFITH C.J. This is an action brought by the Crown against the appellant to recover the amount of duty said to have been short paid in respect of the estate of one James Phillip Macpherson who died in the year 1891. The question arises under the *Administration and Probate Act* 1890 which imposes a duty payable in respect of all property in Victoria of a deceased person upon his

(1) 45 Ch. D., 320.
(2) (1897) A.C., 214.
(3) 20 V.L.R., 484; 16 A.L.T., 115.
(4) 9 V.L.R. (L.), 404; 5 A.L.T., 124.
(5) 2 Mac. & G., 309.
(6) (1903) A.C., 426.
(7) L.R. 8 Eq., 683.
(8) (1893) 1 Q.B., 239.
(9) 6 El. & Bl., 408.
(10) (1898) A.C., 748.

death. In one view, as has been pointed out in previous cases, the duty is a probate duty, and in another view it may be regarded as a succession duty. It is immaterial in the present case from which point it is regarded. The scheme of the Act for the purpose of collecting the duty is that, as soon as the title of the executor or administrator has been determined by the proper officer, and the instrument of grant is ready to be issued, the executor or administrator is to file a statement of the personal estate of the deceased the right to which vests in such executor or administrator by the grant of probate or letters of administration, and also of the landed estate in Victoria of the deceased at the time of his death. That statement is to include, not only particulars of the assets of the deceased, and of their values, but also a statement of his debts. The statement with the accompanying particulars is then examined by the Master in Equity. He may object to the value put upon any item, and if he does so, provision is made for ascertaining the correct value. In some cases the matter may be referred to a jury to determine the value, and their determination fixes the value. In the event of a question of law arising as to the statement, a case may be stated for the opinion of the Supreme Court. The amount of duty depends upon the aggregate net value of the estate after deducting the amount of the debts. The duty is a progressive one, and the amount upon which duty is to be paid is to be ascertained by the result of an examination of the statement by the Master.

The section imposing the duty is sec. 100, which provides that, with certain exceptions not material to this case, there shall be paid duty "calculated as to its rate at the percentage fixed in the Seventh Schedule to this Act for an estate of the value (after deducting all debts) of the final balance appearing upon such person's statement," with certain deductions in certain cases. "Final balance" is defined by sec. 93 as "the balance appearing upon any statement certified by the Master or the officer," that is, the proper officer in the Master's office. Sec. 100 is the only section which contains an explicit imposition of duty, or any direction as to the basis upon which it is to be calculated. Sec. 102 declares that "the duty payable under this Part of this Act shall be deemed to be a debt of the testator or intestate

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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, and if the personal estate be insufficient to pay such duty, the executor or administrator shall satisfy the same out of the real estate." Sec. 103 provides that the duty may be made to fall upon the different beneficiaries according to the benefits they obtain. Sec. 104 provides that the instrument of probate or letters of administration is not to issue from the office until the duty payable has been paid, and the fact that the duty has been paid is to be certified on the instrument; otherwise it cannot be admitted in evidence. Then comes sec. 105 upon which the question arises in this case. It is as follows:—"If after any duty has been paid under this Part of this Act it shall be discovered that too little duty has been paid the person by whom such duty might have been paid shall pay the additional duty to the Master, and the amount so payable shall be a debt of such person to Her Majesty." Under sec. 102 the duty payable is to be deemed to be a debt of the testator or intestate to Her Majesty, while under sec. 105 the amount payable for additional duty is to be a debt of "the person by whom such duty might have been paid" (whatever that may mean), to Her Majesty. Sec. 106 provides for a refund of duty when too much duty has been paid in consequence of debts of the deceased being discovered which were not included in the statement. That right is given subject to the proviso that the Master is to be satisfied that such debts exist. Sec. 108 provides that "the statements required to be made under this Part of this Act shall contain such particulars of property and of debts and liabilities, and be in such form and be verified in such manner and by the oaths of such persons as the rules may prescribe and any statement may be altered or varied with the permission of the Master or as he may direct, and when finally approved by him shall be certified by his signature or that of the officer, and the certificate of the Master or of the officer shall be final and conclusive and subject to no appeal." There is only one other section to which I need refer, and that is sec. 98, which provides that "if any executor or administrator shall fail to file a statement as required

by the last preceding section of this Act, the Court may on the application of the Master . . . order that such executor or administrator do file such statement."

In the present case, as I have said, the deceased died in 1891. A statement giving particulars of his estate was filed, and upon that statement the Master made his certificate of the final balance, and the duty payable upon that basis was paid in 1892. Subsequently in 1902 it was discovered that deceased had a claim against someone else which turned out to be of the value of £6,000. That debt was recovered by the administratrix, but it had not been included in the original statement. On that state of facts the Crown claimed to add the amount of that debt, which was received by the administratrix in 1902, to the net value of the estate as certified by the Master in 1892. That addition being made, it was claimed that too little duty had been paid, and this action was brought for the extra amount of duty, which, it was claimed, depended upon the mere arithmetical calculation. The defendant objects, first of all, that the final balance appears by the certificate, and that the certificate as to the final balance is, in the words of sec. 108, "final and conclusive and subject to no appeal." Secondly, the defendant contends that, if that is not so, and if the certificate can be re-opened, the matter is at large, and the question is whether too little duty has been paid. To answer that question the defendant contends that you must ascertain what duty ought to have been paid, and that you must ascertain it according to the evidence available at the time when the inquiry is made. She then says that, if an inquiry is made upon that basis, it will appear that, so far from too little duty having been paid, too much has been paid, because the real value of the property of the deceased was considerably less than that appearing in the original statement. The learned Judges of the Supreme Court did not accept that view, and gave judgment for the Crown for the amount claimed (1). From that judgment this appeal is now brought.

The difficulty has arisen, as it often arises, from isolated provisions of one scheme of taxation in force in England being introduced into another scheme derived from an entirely different source. Sec. 105 comes from a very early Act of Geo. III. which

(1) (1905), V.L.R., 130; 26 A.L.T., 148.

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contained a scheme of taxation that has since been abandoned. The scheme of taxation in the Act now under consideration is to ascertain the value of the estate from the statement made by the executor or administrator, as is the practice in England; but sec. 105 makes the test of liability to payment of additional duty the fact that too little duty has been paid, and no provision is expressly made for the executor or administrator making a further statement. The English Statute 55 Geo. III. c. 184, provided that the executor or administrator should make a statement of the value of the estate, and that duty should be paid on the value so stated. It was provided by sec. 41, from which it is suggested that sec. 105 was borrowed, that:— "Where any person on applying for the probate of a will or letters of administration shall have estimated the estate and effects of the deceased to be of less value than the same shall have afterwards proved to be, and shall in consequence have paid too little stamp duty thereon, it shall be lawful for the said Commissioners of Stamps, on delivery to them of an affidavit or solemn affirmation of the value of the estate and effects of the deceased," that is their true value as afterwards discovered, "to cause the probate or letters of administration to be duly stamped, on payment of the full duty which ought to have been originally paid thereon in respect of such value," &c. By another section it was provided that if too little duty was paid in consequence of a mistake or misapprehension, it should be the duty of the executor or administrator to correct the mistake and pay the additional duty.

Sec. 105 taken from this scheme, is put into the middle of a different scheme, no express provision being made for the executor or administrator making a further statement. Then we are confronted by sec. 108, which provides that the statement of the executor or administrator certified by the Master is to be final and conclusive and subject to no appeal. There is an apparent conflict between secs. 105 and 108, which it is our first duty to try to reconcile, because, if possible, some effect must be given to both. The Attorney-General has contended that sufficient effect is given to sec. 105 by holding that it merely applies to a mistake in the amount of duty actually paid, as computed upon the basis

of the final certificate of the Master, which depends, not only upon the value of the estate, but upon the relationship between the deceased and the beneficiaries, which must always be ascertained by extrinsic evidence. That no doubt would give some meaning to sec. 105. It is suggested further that sec. 105 being ambiguous, and there being an apparent inconsistency between it and sec. 108, sec. 105 should be limited in the way I have mentioned. But on consideration I do not think this a case of ambiguity. There are no words in sec. 105 which are in any degree technical, and the section is quite easy of interpretation according to the ordinary rules, applying the ordinary meaning to the words as ordinary persons would use them. The words are "if . . . too little duty has been paid." I can see no reason for limiting the plain meaning of these words. Full effect must be given to them, and, so far as they are inconsistent with sec. 108, I think that section must yield to them, that is, such a construction must if possible be given to sec. 108 as will not be inconsistent with sec. 105, and I think such a construction can be found. It will be observed that the words of sec. 108 are "the certificate of the Master or of the officer shall be final and conclusive and subject to no appeal." Now, if sec. 105 allows a fresh inquiry as to the value of the estate, that is not an appeal from the certificate. It is a provision for re-opening the certificate, just as when an estate is being administered in Court, if the proper officer has made his certificate and the time for appealing from it has passed, nevertheless the Court may in a proper case allow a creditor or a beneficiary excluded by the certificate to come in and re-open it. That is in no sense an appeal from the certificate. Another illustration is the common case under the old practice where it was competent for the defendant to file a bill in Chancery to restrain a plaintiff from enforcing a judgment in an action at law. That was not an appeal from the judgment, but a claim that under the circumstances the judgment ceased to be operative in equity.

So considered, sec. 108 is not inconsistent with sec. 105, and the latter section, according to its plain language, applies whenever it is discovered that too little duty has been paid. The certificate was good as long as it stood. It was the basis upon which the duty was calculated upon payment of which probate

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was issued. But if afterwards it is discovered that too little duty has been paid, then the certificate is not in the way. This view was taken by the Full Court in Victoria in *Reg.* v. *Smith* (1), upon which the Full Court based the judgment now under appeal. It was suggested in that case that a valuable portion of the estate of the intestate had been omitted from the statement under mistake of law. It had been mentioned in the statement but had not been valued, nor was its value included in the final balance certified by the Master. The question raised in that case was whether the estate was liable to pay the additional duty. It was a special case, and that was the only question submitted for the decision of the Court. It was held that that particular estate was liable to pay the additional duty. The question was very fully argued, and an elaborate judgment of the Court, consisting of *Stawell* C.J. and *Williams* and *Holroyd* JJ., on that point was given by *Holroyd* J. After giving judgment that learned Judge added some observations, in reference to which we were asked to say that they represent the opinion of the Court that the certificate cannot be re-opened. But on consideration it will be found that the learned Judge expressed the contrary opinion. The words are these (2):—"In the course of the argument a doubt was hinted whether any sum could be recovered beyond the amount certified by the proper officer, whose certificate is to be final and conclusive, and subject to no appeal (sec. 16)." The learned Judge was merely stating the argument as to sec. 16 (sec. 108 of the present Act) adding an expression of dissent and not of assent. He went on to point out that the certificate "is not final against the Crown as to the amount of the duty, and consequently cannot be final as to the balance upon which the duty is calculated, nor as to the items of which that balance is made up. Probably sec. 13" (sec. 105 of the present Act) "refers to the discovery of facts showing that the estate has been undervalued or the debts over-estimated." So that it is quite in accordance with the opinion of that Court that the certificate is not final and may be re-opened under some circumstances. The one condition upon which it may be re-opened is that it is discovered that too little duty has been paid. Now, in order to

(1) 9 V.L.R. (L.), 404.

(2) 9 V.L.R. (L.), 404, at p. 416.

ascertain whether too little duty has been paid it must be ascertained how much ought to have been paid. Too little duty may have been paid, first, by the omission of some assets from the statement; secondly, by the under-valuation of some of the assets; thirdly, by the over-statement of the debts; fourthly, by miscalculation, having regard to the relationship of the beneficiaries to the deceased, or other extrinsic facts. As to the omission of part of the assets, *R.* v. *Smith* (1) is a direct authority that the statement may be re-opened. As to over-valuation of the debts, it would be very difficult to say that would not be a ground for re-opening the statement. Then, if the question is the over-valuation of items of the estate, I can at present see no reason why that may not be re-opened also when the question whether too little duty has been paid is properly raised. To give an illustration (as to which I express no opinion), suppose that one of the assets of the estate was an estate *pour autre vie*, that the tenant for life was considered to have a probability of life of twenty years, that the estate was valued and duty paid on that basis, and that the *cestui que vie* died on the day after the final balance was certified. The Act makes no provision for an amount clearly overpaid being repaid. In that case, in one sense duty would have been paid on more than the actual value, though not on more than the estimated value. It is said that on a claim afterwards by the Crown that too little duty had been paid those circumstances could not be taken into consideration.

I am of opinion that on an application made by the Crown on the allegation that too little duty has been paid the certificate may be disregarded. But how is it to be ascertained that too little duty has been paid? It is contended for the Crown that that question may be inquired into by a Court of Justice, that the value of the estate is to be ascertained in the ordinary way by the Court, with or without a jury, but that the final certificate is to be taken as a starting point, and that all that the Court can do is to add to it any items as to which there has been no determination. I cannot find that in the Act. The inquiry is what duty ought to have been paid. The Crown is allowed to make that inquiry, and for that purpose to say that the certificate is not to be regarded

(1) 9 V.L.R. (L.), 404.

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as final or conclusive. Such an inquiry, as I have shown, is not in the nature of an appeal. What then is the scope of the inquiry? If there were no more than sec. 105 in the Act, or if there were no words in distinct terms imposing the duty on the actual value of the estate, it might be the duty of the Court to treat the whole matter as at large. But a taxing Act must be construed on the principle that a tax must be imposed in clear and unambiguous language. When we look at the Act to see how this tax is imposed and how it is to be calculated, we find that it is imposed according to the rate fixed by the Seventh Schedule upon the amount of the final balance. I cannot find in the Act any obligation to pay duty other than duty calculated in that way. It is said that sec. 102 provides that the duty payable under the Act is to be deemed to be a debt of the testator or intestate to Her Majesty, but that is a debt calculated in the way I have just mentioned. By sec. 105 the amount payable, where too little duty has been paid, is to be a debt of the person by whom the duty might have been paid to the Crown. Why should not that debt also be calculated in the same way? I think it is impossible, applying the ordinary rules of construction which govern taxing Acts, to say whether too little duty has been paid until it has been ascertained in the way prescribed by the Act what duty ought to have been paid.

That would be sufficient to decide this case, because the amount that ought to have been paid has never been so ascertained. It might be necessary to reject this construction if it were absolutely inconsistent with any other provisions of the Act, but there are provisions which enable full effect to be given to this construction. For under sec. 98 anyone may be ordered to file a statement. That may be read as requiring him to file a true statement, and if it appears from any source that a true statement has not been filed, he may be ordered to file a further statement. If the section is not so read, the obligation to file a further statement must be taken as a necessary incident of the obligation to disclose the value of the estate. As the statement made under sec. 100 is the basis of the taxation, and as the amount of the tax can only be arrived at by ascertaining the final balance as appearing from the statement, there must be some means of obtaining the statement.

In the present case no such statement has been made. It is true that after the lapse of eleven years the Master took upon himself to add to the original statement certified by him a note that too little duty had been paid. But the Act contains no power for the Master to alter the obligation of the subject in that summary way.

For these reasons I think that there is no foundation for this action. Whether too little duty has been paid or not is a matter which has not been ascertained, and it can only be ascertained, in the way prescribed by law. But it is said that that is not the substantial question which is desired to be determined. That question is how far, if the certificate is re-opened, the truth may be inquired into. I see nothing in the Act to prevent the whole truth from being inquired into. We are asked to read sec. 105 as if it ran:—"If . . . . . it shall be discovered that some part of the estate has been omitted from the statement or that the debts have been over-estimated," &c. Those are not the words of the section, but we are asked to read it as if they were, rather than such words as "if the estate has been under-valued." I cannot see why the Crown is not entitled to allege that too little duty has been paid by reason of an under-valuation of the estate, and claim further duty. If so, the other party should be entitled to a corresponding right to allege that the estate has been in part over-valued, and therefore to claim that he should pay less duty in respect of the items over-valued if the Crown claims to go behind the certificate.

In my judgment the question whether the certificate may be re-opened falls exactly within the principle of re-opening a settled account. That principle is stated by Lord *Cottenham* L.C. in *Coleman* v. *Mellersh* (1). His Lordship said:—"A settled account, otherwise unimpeachable, in which an error is proved to exist, may be subjected to a decree to surcharge and falsify, upon the supposition that one error having been proved others may be expected upon investigation to be discovered; but if the relative situation of the parties, or the manner in which the settlement took place, or the nature of the error proved, show that the alleged settlement ought not to be considered as an act binding upon the party signing, and that it would be inequitable for the accounting party to take

(1) 2 Mac. & G., 309, at p. 314.

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advantage of it, the Court is not content with enabling the party to surcharge and falsify an account which never ought to have been so settled, but directs the taking of an open account."

In the construction of this Act I think a similar principle should be applied. The provisions applicable to a case where too little duty has been paid are, in my opinion, intended to be beneficial as well to the subject as to the Crown. The fact to be inquired into is what amount of duty ought to have been paid, and it appears to me that the matter is at large.

I express that opinion in view of the arguments which have been addressed to us, but it is not necessary for the present decision to decide that point. Indeed, I think it highly improbable that such a question will ever come before the Courts for decision, because, if the executor or administrator is called upon to make a fresh statement, it will be his duty to make a true statement, according to the knowledge he has when he makes it. The statement is of the value of the estate at the time of the testator's or intestate's death. If property was omitted from the original statement, he must insert it in the new one. If debts have been over or under-estimated, he must put in the proper amount. If property has been over-valued, he may at any rate seek to correct the valuation. How far he will be bound by the inquiries made and the decision come to by the Master when the original certificate was given, is a matter into which it is not now necessary to decide. But it is not to be supposed that the Crown, which merely seeks to have payment of the amount that ought to have been paid, would set up a technical estoppel, and ask the executor or administrator to pay more than corresponds with the actual value of the estate. When the Crown itself raises the question, it will be time enough to consider how far the original valuation of the estate can be reviewed, and how far the Crown can insist on a certificate given under a mistake of both parties.

For the reasons I have given I am of opinion that there is no foundation for this action. The statement of claim indeed discloses no cause of action. I think that the judgment should be reversed, and judgment given for the defendant. I reserve my judgment as to costs.

BARTON J. I am of the same opinion.

O'CONNOR J. I also am of the same opinion. The decision of the Supreme Court practically narrows down the issue under sec. 105 to an inquiry whether property liable to duty has been omitted from the original statement as certified. It must also be taken as laying it down as law that where a claim is made to extra duty under sec. 105, that claim may be substantiated without going through the process of a statement by the executor or administrator certified by the Master as is required in the case of the original claim for duty. In reference to both these matters it appears to me the decision of the Full Court confirming the decision of *Hodges* J. cannot be supported.

The meaning of the words "final and conclusive and subject to no appeal" in sec. 108 becomes apparent if one looks at the scheme of taxation under this Act. Although there are numerous sections which use such expressions as "the duty payable under this Part of this Act" and "the duty chargeable under this Part of this Act," there is no section which directly imposes duty except sec. 100. Before a debt can become due in respect of the duty there must be an ascertainment of the amount of the duty, and that depends upon two factors, first, upon the rate of the duty, and, secondly, upon the value of the estate. The estate is, from its nature, represented by two sides of an account, and until there is some way by which the balance is to be settled, the value of the estate for duty cannot be ascertained. Therefore, to fix the sum upon which duty is payable, sec. 100 enacts that the duty shall be payable upon the final balance appearing on the statement of the executor or administrator. In order to get that final balance elaborate machinery is provided. The executor or administrator is called upon to make a statement of the real property, of the personal property, and of the debts of the deceased. That statement is made under a severe sanction, and, under sec. 109, if a false statement, or a false alteration in any statement, is made with intent to evade payment of duty, the person making it is guilty of a misdemeanour. The statement is thus made under this very heavy sanction imposed by law. The statement having been made, the executor or administrator

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may be called upon by the Master to make a further statement, and, if he refuses, there is power in the Court under sec. 98 to order him to make it and to enforce obedience to the order. Then the statement comes before the Master for his consideration, and it is for him to decide what is the final balance. If a question as to valuation, or a question of law arises, it may go to the Supreme Court, and then the decision of a jury in the case of a question of valuation, or the decision of the Court in the case of a question of law, becomes final. When the final balance has been arrived at and the certificate of the Master given, the Master may recover the duty payable on the final balance so certified in one of two ways. He may bring an action against the executor or administrator under sec. 102 because the debt is a debt payable by the executor or administrator, or he may under sec. 101 get an order from the Court against the estate under which a sufficient part of the property may be sold and the proceeds applied in payment of the duty. Now, all that process for the ascertainment of the final balance is evidently devised for the express purpose of having the questions which may arise in settling the amount of duty payable tried and determined in the first instance by the Master and not by the Court or by a jury. As to an original payment of duty it therefore became necessary to provide that, when the Master came before the Court to enforce its payment, the statement certified by him should be taken to be final and conclusive and subject to no appeal. That is the meaning of sec. 108, and that is the reason why the certificate is given a conclusive character. The certificate is a final judgment upon the value in respect of which duty is to be paid, and when the Master goes before a Court to obtain payment of the duty due in respect of it then the certificate is final for all purposes. There is no doubt that that is the reason why the words "shall be final and conclusive and subject to no appeal" are used in sec. 108.

Now, in sec. 105 totally different circumstances are dealt with. The duty has been paid and probably the estate has been wound up. Then it is discovered that too little duty has been paid, and the questions arise what is the issue to be tried under that section, and how is it to be proved? First, as to the meaning of "too little duty," I cannot assent to the argument of the Attorney-

General that the meaning of those words is to be restricted as he contended in his first ground. The value of the estate appearing upon the certificate, and the relationship of the beneficiaries towards the deceased also appearing in the certificate, the only ground upon which payment of duty could be re-opened would be, if that contention is correct, that there had been a miscalculation of the amount of duty. I think that is too narrow a view to take of the operation of sec. 105, especially when it is remembered that the miscalculation, if any, would be by the Crown itself. When we look at sec. 106 it is clear that sec. 105 means more than that. Sec. 106 is a section giving to the executor or administrator a right corresponding to that given by sec. 105 to the Crown. In sec. 106 there is a limitation upon the right in these words, "If . . . it shall be found that too much duty has been paid in consequence of debts of the testator or intestate being discovered which were not included in the statement." That clearly opens up the question of value of the estate, and it would be incomprehensible that the question of the proper balance should be allowed to be re-opened for that purpose and should not be allowed to be re-opened for the purpose of obtaining payment of duty which had been underpaid. There is another view of the matter which also bears upon the question of the certificate. Payment of too little duty, as has been pointed out by the learned Chief Justice, may arise from the omission of property from the statement; it may equally arise from the under-valuation of property included in the original statement, or from the over-valuation of the debts included in the original statement. It would certainly be a very extraordinary position that the Crown, in the event of the discovery of some new property, should be able to obtain a further payment of duty, but, where it was apparent that there had been a gross under-valuation of the property or a gross over-valuation of the debts in the original statement, the statement as to both these matters should be conclusive by virtue of sec. 108, and not liable to be re-opened. It appears to me such a reading of sec. 108 would restrict very largely, not only the rights of the executor or administrator, but also those of the Crown in collecting duty where too little duty had been paid.

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Therefore, taking the two secs. 105 and 108 together, it appears to me that the apparent inconsistency disappears when we remember that the conclusive effect given to the certificate by sec. 108 is for the purpose of settling finally the amount of duty payable by the estate when it is originally being inquired into, and that an inquiry under sec. 105 is a different inquiry for a different purpose, which must of necessity involve the re-opening of the statement, and if re-opened for one purpose it must be re-opened for all purposes.

With regard to the other point decided I agree with the learned Chief Justice that there really was no evidence upon which the primary Judge could come to a decision. In ascertaining whether too little duty has been paid, it is necessary to find out what duty was payable. The first certificate makes the duty payable in regard to the final balance thereby certified, but in regard to any further amount of duty afterwards claimed as being payable, no certificate has been given, and in regard to that, therefore, until the certificate is given, no duty is payable. When the fresh statement has been made, and a certificate given in the ordinary way, duty may become payable upon it. Then, when that duty has become payable it will be possible to say upon the evidence that the amount of duty actually paid is not the amount that ought to have been paid, that is to say, that too little duty has been paid. There is no difficulty in the application of sec. 105. There is no reason why the process, used in the first instance for the ascertainment of the duty, should not be followed in the case of the discovery of fresh property, or the re-opening of the account for any purpose. Under sec. 97 the Master may require at any time a statement to be filed by any executor or administrator if the statements required by the earlier portion of the section have not been filed. The earlier portion of the section requires statements to be filed, some with regard to the personal property and some with regard to the real property. If all the estate is not included, that is not a statement within the meaning of the section, and another may be called for. If the demand of the Master for a further statement is not complied with, the processes contained in secs. 98 to 100 to obtain a

statement may be resorted to. When all these processes have been gone through a certificate may be given under sec. 108.

No doubt in this system of collection very large powers are placed in the hands of the Master, but that is the scheme of taxation. In regard to a great many processes for collecting taxes very large powers are given to Government officers—powers to be exercised judicially and with the object of determining conclusively the rights of parties. Those powers are given with the knowledge that the Government can have no interest in acting unfairly or in dealing improperly with the issues submitted to their officers, and on the assumption that the responsibility of the officers is quite a sufficient safeguard that justice will be done. Those powers are given for the necessary purpose of collecting revenue. So it is assumed that a question whether too much or too little duty has been paid will come before the Master just as any other question arising under the Act, with all the opportunities for appeal and further inquiry which are given in the case of an original statement. I think it was not the intention of the Act to put the determination of the question whether too little duty had been paid on the same footing as an ordinary action for debt, but to put a claim by the Crown that too little duty has been paid in the same position as a claim raised under section 106 by the executor or administrator that he has paid too much duty by reason of debts not having been discovered. In the latter case the matter does not go before a jury because, under that section, the Master is to order repayment "upon being satisfied of the existence of such debts by examination of the parties or otherwise as he may think fit." There is no opportunity there for going before the Court. The decision of the Master is to be taken. So here, the decision of the Master, subject to the usual appeal, is to be taken where it is alleged that too little duty has been paid.

For these reasons I am of opinion that the decision of *Hodges* J. was erroneous, and that the Full Court in upholding that decision was wrong, and therefore that this appeal should be allowed. We reserve the question of costs.

On a subsequent day the following judgment as to costs was delivered:—

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GRIFFITH C.J. In this case counsel for the Crown have taken the objection that the Crown cannot be ordered to pay costs. There is no doubt that at common law the Crown is by its prerogative exempt from the payment of costs in any judicial proceeding, and that this right cannot be taken away except by Statute. The words of the Statute need not, however, be express: It is sufficient if the abolition of the privilege appears by necessary implication: *Moore* v. *Smith* (1). The reason formerly given for the rule was that it was beneath the dignity of the Crown either to receive or pay costs. In the case of *Attorney-General* v. *Corporation of London* (2), Lord *Cottenham* L.C., put the rule on the ground of reciprocity of right and obligation, and said that in cases in which the Attorney-General sued for the Crown he ought not to receive costs unless he could if unsuccessful have been ordered to pay them. At the present day it is the ordinary practice in the House of Lords to order the Attorney-General to pay the costs of an appeal in which he is unsuccessful: see, for instance *Attorney-General* v. *Wolverton* (3), in which the costs were given against the Attorney-General, while in *Eastman Photographic Materials Co.* v. *Comptroller-General of Patents* (4), decided three days later, the general rule that costs cannot be given against the Crown was expressly recognized by the House of Lords, as it was by the Judicial Committee in *Johnson* v. *Rex* (5).

The Victorian *Crown Remedies and Liability Act* 1890, is a re-enactment of an Act 28 Vict. No. 241, passed in 1865. It is divided into two Parts, which had before 1865 been embodied in separate Statutes. Under the first Part, which deals with the recovery of debts and property by the Crown, it is provided (sec. 18) that "Her Majesty shall be entitled to full costs of suit in all cases in which a plaintiff in any civil action between subject and subject would be entitled thereto." The second Part of the Statute deals with claims against the Crown. It contains a provision (sec. 23) that "the costs shall follow on either side as in ordinary cases between other suitors any law or practice to the contrary notwithstanding." The second Part of the Act of 1865

(1) 1 El. & E., 597.
(2) 2 Mac. & G., 247.
(3) (1898) A.C., 535.
(4) (1898) A.C., 571.
(5) (1904) A.C., 817.

was in effect a re-enactment of provisions of an Act passed in 1858, 21 Vict. No. 49, while the first Part was taken from an Act passed in the following year (22 Vict. No. 86).

In our opinion, the proper inference to be drawn from the provisions now embodied in sec. 18 is that the legislature when they passed the Act of 1859 intended that, when the Crown took advantage of the provisions of that Act and so became entitled to receive costs from the subject in the event of success, it should not be allowed to claim the privilege of exemption from the liability to pay costs in the event of non-success. We think, therefore, that in actions brought by the Crown under the Act of 1890 costs may be given against as well as to the Crown. The point was expressly left open by the Judicial Committee in *Johnson* v. *Rex* (1). We think that our conclusion is in conformity, not only with the later English practice, but with the principles on which the exemption was originally claimed and with the principles as judicially expounded on which exceptions from the rule were allowed. Our decision has no reference to cases in which the Crown is a litigant in the exercise of its prerogative rights.

Judgment appealed from discharged. Judgment for the appellant with costs. Respondent to pay costs of appeal.

Solicitors, for appellant, *Whiting & Aitken*, Melbourne.
Solicitor, for respondent, *Guinness*, Crown Solicitor for Victoria.

B. L.

(1) (1904) A.C., 817.