[HIGH COURT OF AUSTRALIA.]

THE EAST LONDON HOSPITAL FOR CHILDREN AND DISPENSARY FOR WOMEN } APPELLANT;
DEFENDANT,

AND

WILBERFORCE COBBETT AND OTHERS . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF TASMANIA.

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HOBART, *Feb.* 14.

SYDNEY, *April* 27.

Knox C.J., Isaacs, Gavan Duffy and Starke JJ.

Duties—Estates of deceased persons—Apportionment among beneficiaries—Deductions in respect of duties paid in other parts of British Dominions—Deceased Persons' Estates Duties Act 1915 (*Tas.*) (6 *Geo. V. No.* 66), *secs.* 5, 30, 32, 55, *Sched.* (2).

Sec. 30 of the *Deceased Persons' Estates Duties Act* 1915 (Tas.) provides that "Subject to any special provision by a testator for the payment of the duty imposed by this Act, every executor or administrator with the will annexed shall deduct from each and every devise, bequest or legacy, and in every case of intestacy an administrator shall deduct from each distributive share an amount equal to the duty upon the same respectively, calculated at the same rate as is payable on the estate. Subject to any special provision by a settlor or donor or maker of any such instrument for the payment of duty, the beneficial interests under a settlement or deed of gift or any such instrument as by this Act is required to be registered shall contribute proportionally to the duty payable on the estate of the settlor at the same rate as is payable on the estate. In each case regard shall be had to the relationship of the beneficiary to the testator, intestate, settlor, or donor, as the case may be." Sec. 32 (1) provides that "Subject to the provisions of this Act and to any specific direction appearing in any will, or any such instrument to the contrary, every executor, administrator, or trustee shall adjust any duties, and the incidence of any duties payable or paid by him, so as to throw the burden thereof upon the respective properties on which the same shall be ultimately chargeable." Sec. 55 provides that "Where the Registrar is satisfied that in any part of

His Majesty's Dominions other than this State, duty—not being duty payable under any Commonwealth Act—is payable by reason of a death occurring after the commencement of this Act in respect of any property situate therein and passing on such death, he shall allow a sum equal to the amount of that duty to be deducted from any duty payable under this Act in respect of that property on the same death. In this section 'property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitations."

Per Isaacs and *Starke* JJ. (*contra*, *per Knox* C.J. and *Gavan Duffy* J.), that the amount of duty to be adjusted under secs. 30 and 32 of the Act was the duty payable under the Act after making the deductions allowed under sec. 55.

Decision of the Supreme Court of Tasmania affirmed.

APPEAL from the Supreme Court of Tasmania.

Professor Pitt Cobbett, who was domiciled in Tasmania, died there, leaving real and personal property in Tasmania and personal property in several of the States of Australia, in England, in New Zealand and in the Federated Malay States; the value of the whole being more than £65,000, and of the estate in Tasmania about £8,000. Probate, estate and succession duty amounting to about £4,200 was paid in each of the countries other than Tasmania in respect of the property in them. By his will and two codicils Professor Pitt Cobbett appointed his brother Wilberforce Cobbett, and James Robison Chapman and the National Executors and Trustees Co. of Tasmania Ltd., his executors and trustees. He devised to his trustees certain real estate in Tasmania upon trust for his brother Wilberforce Cobbett and his cousin Hugh R. N. Cobbett, in successive estates tail, with a direction that in default of issue the property should be held and disposed of as part of his residuary real and personal estate. He then directed his trustees out of his trust fund to set apart a sum of £20,000 upon certain trusts in favour of Wilberforce Cobbett and Hugh R. N. Cobbett, gave certain legacies, and gave all his residuary real and personal estate to his trustees upon trust to realize and to hold the proceeds, called his trust fund, upon certain trusts which it is not material to state, and he directed his trustees to pay the residue of his trust fund to the East London Hospital for Children and Dispensary for

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Women. By one of the codicils he directed his trustees out of his trust fund to pay his debts and funeral and testamentary expenses.

An originating summons was taken out by the trustees for the determination by the Supreme Court of a certain question (among others) in respect of which the Full Court, by a majority (*Nicholls* C.J. and *Crisp* J., *Ewing* J. dissenting), declared that "the probate, estate and succession duties paid or payable on assets outside Tasmania (other than duty paid or payable on assets within Australia under the Federal *Estate Duty Act*) are chargeable against the residuary estate of the testator and the applicants are only entitled to deduct the net actual amount of duties payable to the State Commissioner of Taxes in Tasmania and the Federal Commissioner of Taxes from the respective devises bequests and legacies given under the said will and codicils in the proportions provided by the Tasmanian and Commonwealth Acts respectively."

From that decision the East London Hospital for Children and Dispensary for Women appealed to the High Court.

A. I. Clark (*Murdoch* with him), for the appellant.

M. W. Simmons, for the respondent trustees other than Wilberforce Cobbett.

Lodge and *W. F. D. Butler*, for the respondents Wilberforce Cobbett and certain other beneficiaries.

P. L. Griffiths, for the respondent Hugh R. N. Cobbett.

During argument reference was made to *In re Barr Smith*; *Martin* v. *Barr Smith* (1); *Peter* v. *Stirling* (2); *In re Maurice*; *Brown* v. *Maurice* (3); *In re Brewster*; *Butler* v. *Southam* (4); *In re De Sommery*; *Coelenbier* v. *De Sommery* (5); *In re Scott*; *Scott* v. *Scott* (6).

Cur. adv. vult.

(1) (1917) S.A.L.R., 1.
(2) (1878) 10 Ch. D., 279.
(3) (1896) 75 L.T., 415.
(4) (1908) 2 Ch., 365.
(5) (1912) 2 Ch., 622.
(6) (1915) 1 Ch., 592.

The following written judgments were delivered :—

KNOX C.J. AND GAVAN DUFFY J. The only question discussed before us in this case was whether a deduction allowed by the Registrar under sec. 55 of the *Deceased Persons' Estates Duties Act* 1915 (6 Geo. V. No. 66) is to be taken into consideration in estimating the deduction from beneficial interests directed by sec. 30; and we shall confine our attention to that point.

Sec. 5 of the Act is as follows: "Every executor and administrator shall pay to the Registrar duty on the final balance of the real and personal estate of the deceased, according to the provisions of Schedule (2) to this Act, in the cases and at the rates directed by that Schedule." Parts I. and III. of Schedule (2) together provide a uniform rate at which duty shall be "payable and chargeable on the estate of any person dying after the commencement of this Act" subject to the discrimination made in Part II. of the Schedule, and makes that rate the minimum rate at which duty must be paid on every part of the aggregate property constituting that estate. Parts II. and III. of the Schedule together provide for an adherence to or a departure from the uniform rate in respect of each portion of such aggregate property according to stated circumstances. The result of sec. 5 and Schedule (2) is that payment must be made of a total sum consisting of various sums, each of which is based on the value of the aggregate property constituting the estate, the proportionate value of the portion of the property taken by the beneficiary, and his relationship or want of relationship to the testator.

Sec. 30 provides that there shall be deducted from each and every "devise, bequest or legacy," &c., "an amount equal to the duty upon the same respectively, calculated at the same rate as is payable on the estate." The words "calculated at the same rate as is payable on the estate" by the joint operation of Parts I. and III. of the Schedule, are inserted for the purpose of insuring that the amount to be deducted from each distributive share of the beneficiaries shall be calculated, as was the duty payable on that share, at the rate appropriate to the value of the whole property, not merely at a rate appropriate to the value of the distributive shares. The section then proceeds: "In each case regard shall be had to

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the relationship of the beneficiary to the testator, intestate, settlor, or donor, as the case may be." These words ensure that the variation, if any, from the rate fixed by the value of the aggregate property, which operated on the calculation of the amount of duty payable with respect to each distributive share, shall equally operate in the calculation of the amount to be deducted from such distributive share.

Sec. 55 is as follows:—" Where the Registrar is satisfied that in any part of His Majesty's Dominions other than this State, duty —not being duty payable under any Commonwealth Act—is payable by reason of a death occurring after the commencement of this Act in respect of any property situate therein and passing on such death, he shall allow a sum equal to the amount of that duty to be deducted from any duty payable under this Act in respect of that property on the same death. In this section 'property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitations." The question for our consideration is whether a deduction made under this section can be taken into account in making the calculation prescribed by sec. 30. It is said that a deduction made under sec. 55 reduces the amount of duty payable in Tasmania by the amount of such deduction; and this is true if the proposition means no more than that the effect of the transaction is to excuse the payment of the sum deducted. But the sum from which the deduction is to be made is " any duty payable under this Act," and it is difficult to see how the remainder after the deduction has been made should still be the duty payable under the Act. Surely it must be such duty less the amount of the deduction, and sec. 30 provides for the incidence of the duty imposed by the Act and not of any other sum. But suppose the remainder is the duty imposed by the Act, how can that affect the method of calculation prescribed by sec. 30? If what we have already said be correct, the deductions from each distributive share under that section are regulated, not by the total amount of duty paid, but by the total value of the aggregate property in the estate and the nearness or remoteness of the relationship existing between the deceased and the beneficiary.

In our opinion the Supreme Court was in error in deciding that the deduction authorized by sec. 55 was to be taken into account in determining the amount to be deducted under sec. 30 of the Act from each devise, bequest or legacy.

ISAACS J. The appellant is the residuary legatee of a trust fund of which there are prior general beneficiaries. The testator was domiciled in Tasmania, and had real and personal property there, and had also personalty in New South Wales and elsewhere in the British Dominions. The amount of the estate as aggregated for the purposes of duty was over £65,000, and the amount of duty—apart from sec. 55 of the Act—was about £6,000, from which a deduction of nearly £4,200 has been made under sec. 55, leaving at present, and subject to any further deduction in respect of a very small amount of property in Malay States, about £1,800 as the amount due to Tasmania. The question is whether, in the statutory adjustment under sec. 30 of the Tasmanian Act (6 Geo. V. No. 66), the deductions should in each case include a portion of the £4,200 or be confined to the £1,800. The ultimate residue coming to the appellant is, of course, affected. The proper construction of sec. 30 so as to give full effect to its literal terms, and to the manifest object the Legislature had in view as shown by the general tenor of the whole section, requires careful regard to the nature of the Act and its provisions, where they are clear and unmistakable; and then, I think, a firm conclusion is possible.

The Act, for the purpose of duty, includes, as part of the estate of a deceased person who was domiciled in Tasmania, not merely his Tasmanian property at the time of his death, but also foreign personalty then belonging to him or over which he had a general power of appointment exercised by his will. And, what is very material, it also includes property not then belonging to him, if the subject of certain trusts, voluntary dispositions, settlements and gifts, &c., even if it be foreign personal property (secs. 10 and 16). By sec. 5, it is provided that every executor and administrator "shall pay" duty on the final balance according to the provisions of Schedule (2) in the cases and at the *rates* directed by that Schedule. The Schedule in Part I., clause 1, recognizes the distinction between

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the two classes of estates above mentioned, viz., (*a*) his own property and (*b*) other persons' property, and it says that, subject to the discrimination in Part II., the rate chargeable shall be uniform on both classes of cases. But the difference between "uniformity" and "discrimination" is that which exists between one rate covering a subject and more than one rate covering the same subject. Consequently the use of the word "discrimination" connotes that on the same estate there may be two or three different rates. There is nothing incongruous in this, because in the sense in which the word "*rate*" is used in this Act *it means only a proportion of the property taken.*

Clause 2 of Part I. is preparatory to the declaration by Part II. of the discriminatory rates. It provides that for the purpose of determining "such rate"—that is, the rate payable and chargeable —"on the estate" in the case of "each class"—showing that each class is for this purpose regarded separately —the "estates" (that is, the estates above referred to as (*a*) and (*b*)) "shall be aggregated." Then come some words which seem to me to give the key to any difficulty in interpreting sec. 30. They are: "And such rate shall be the rate prescribed by Part II. of this Schedule in respect of an estate whose value is the total value of the estates so aggregated." In other words, the legislative direction so far is that, in dealing with a beneficiary in any specific class, in order to find the discriminatory rate on the estate applicable to him, "the rate" is to be found by looking at Part II. and at his classification, and the total aggregate value of the estates, if more than one. Each beneficiary is regarded separately for this purpose. When this is applied to sec. 30 all difficulty disappears. I pass over the third clause as immaterial here.

Then, coming to Part II., the classes are four, viz., (1) widow, widower, descendant and ancestor; (2) brother, sister or the descendant of a brother or sister or any other person collateral to testator or settlor &c. not beyond the third degree; (3) illegitimate child; (4) persons related beyond the third degree or unrelated. In each case the words are, not "taking the estate," but "taking the property"; and the duty "in respect of the property so taken" is the phrase employed in fixing the rates. Part III. gives the "Rates of Duty,"

and provides that for the "aggregated estates" after deducting debts "duty *in respect of every Part* shall be" at rates mentioned.

So far the duty, which by sec. 5 the executor or administrator "shall pay," or, to use the equivalent expression in Part I., clause 1 of the second Schedule, is "payable and chargeable," is at "a rate" or rates on possibly aggregated estates, which may be either uniform or discriminatory. In other words, it may be at a single rate or several rates. But, whether one or the other, it is so far at an unqualified rate; that is, once the rate is ascertained in accordance with Schedule (2), that, when applied to the final balance in accordance with the Schedule, gives the amount of duty payable. But sec. 55 makes a special provision which is to some extent an inter-Imperial recognition of comity and justice. Domicile by a fiction attracts personalty; and so foreign personalty is taxed by reason of Tasmanian domicile, that is, so far as Tasmanian jurisdiction can tax it. But the fiction is not by this Act carried so far as to disregard the local law of any other part of the King's Dominions when that law demands duty in respect of local transmission of property within that jurisdiction. In such case the Tasmanian law remits its charge *pro tanto*, and directs the Registrar to "allow a sum equal to the amount of that duty to be deducted from any duty payable under this Act in respect of that property." This is an obvious reduction of the "duty" imposed by the Act. Sec. 3 defines "duty" as meaning the "duty payable under this Act," not "under Schedule (2)," and sec. 7 makes "the duty payable under this Act" a "debt" and directs it to be "paid," &c. And therefore, though sec. 5 directs the executor and administrator to "pay" duty according to Schedule (2), he is, in a case covered by sec. 55, relieved of that obligation *pro tanto*, and it is the remaining sum, and that only, which in the result is the "duty imposed by this Act." No more is made a charge upon the estate or could be recovered in an action of debt under sec. 7, once the necessary facts are established. And when a case arises, as here, where sec. 55 applies, there is then payable on the estate, in respect of whatever property or share is affected by sec. 55, not the simple unqualified rate under Schedule (2), but that rate minus whatever sum is to be allowed in respect of that portion of the estate.

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Now we come to sec. 30 itself. It opens with a significant limitation: "Subject to any special provision by a testator for the payment of the duty imposed by this Act." That means the duty which in the ascertained circumstances is required by the Act to be paid to the Crown. Where sec. 55 applies, the "amount allowed" is not part of the duty imposed by the Act. Sec. 30 then proceeds to require the executor or administrator to make a deduction from the share of every beneficiary. What he is directed to deduct is "an amount equal to the duty upon the same respectively." I stop there for a moment to observe that if the paragraph of the section went no further a difficulty would at once arise. What is the duty "upon" the devise, bequest, legacy or distributive share? Would you, to find that duty, simply take the money value of that interest, and apply to it the rate specified in the Schedule as applicable to such a sum? Observe the passage quoted does not say the duty "paid" upon the share. It means the duty "payable" or, going back to the earlier part of the section, the duty "imposed" by the Act upon the share; and, going back to sec. 7, that means the sum which by the Act is made a "debt" and recoverable as such.

It seems so plain to me that there is no need to call in aid the well-known canon of construction in taxing Acts, that where ambiguity exists the doubt is resolved in favour of the subject. The appellant's construction of sec. 30 makes the words "the rate payable on the estate"—that is, ultimately payable—include money which, by sec. 7, is not duty payable or recoverable as a "debt." The word "rate" is not so intractably rigid in any sense as to require that. But it is obvious, from what has gone before, that it is impossible to say what duty is "upon" the share unless the process prescribed by the Schedule is observed. The concluding words of the first paragraph of sec. 30 show how that duty is to be calculated, namely, "at the same rate as is *payable*" (not paid) "on the estate." That is a short form incorporating the provisions of clause 2 of Part I. of the Schedule.

Before applying those words, let us consider the rest of sec. 30. The second paragraph deals with the second class of estates which may be included in the aggregation. After a limitation corresponding to that in the first paragraph, it is provided that the beneficial

interests in the (*b*) class of estates shall contribute proportionally to the duty payable on the estate of the settlor "at the same rate as is payable on the estate." But the final paragraph directs that "in each case regard shall be had to the relationship of the beneficiary to the testator, intestate, settlor, or donor, as the case may be." The dominant conception of sec. 30 is that, subject to the declared will of the deceased, the beneficiaries are by Tasmanian law to bear the burden on a footing of equality of the sum taken out of the estate by Tasmanian law, modified only by degrees of relationship. It does not concern itself with general administration of the estate, but deals simply with the one item of the statutory duty. It excludes, for instance, as I apprehend, compelling a legatee of (say) money in a New South Wales bank who has already had by the law of New South Wales the amount of duty deducted there out of "that property" (sec. 55) again by Tasmanian law to submit to a fresh deduction in respect of a sum which Tasmanian law has declared not to be payable.

The true conception of sec. 30 is composite, and is to be carried out, as I apprehend, in the following manner:—To ascertain the deduction under sec. 30 from the share of any given beneficiary under a will or intestacy—(1) ascertain the aggregate value of the relevant property; (2) calculate, in the first instance, what the rate of duty would be upon such an aggregation, if it were all taken by that beneficiary, apart from sec. 55: (3) the rate so calculated, in case sec. 55 does not operate as to any part of the estate, is the rate to apply to the share of the beneficiary in question, and the amount of the deduction is obtained accordingly. For instance, suppose it is a question of the widow's deduction under sec. 30, where the aggregated value of the estate is £10,000, the widow's share being £5,000 and the remaining share of £5,000 going to a stranger. Apart from sec. 55 the rate is 4 per cent. in respect of the widow's share, because in her case that would be the rate payable on the whole estate if she were the sole beneficiary. Her deduction would be £200. But the rate payable on the estate in respect of the stranger would be 10 per cent., and that is the rate to govern the amount of his deduction, which would be £500. The rate is discriminatory. If sec. 55 has operated, but not in any

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way so as to affect the property or share of the given beneficiary, you disregard it as to him. If sec. 55 operates so as to affect his share, then a distinction arises from the way his share is affected. If, as in the present case, an allowance is made under sec. 55 in respect not of the given beneficiary's property but of the whole fund in which he and all the other beneficiaries are interested, you reduce the schedule rate by the rate represented by the allowance and apply the reduced rate to all the beneficiaries. Thus: aggregated estate of £10,000; amount allowed under sec. 55, £100, equal to a rate of 1 per cent. The rate under the Act if the whole estate goes to the first class is 4 per cent., and, after deducting 1 per cent. for the allowance, the rate payable under the Act is, in the result, 3 per cent. That rate governs the deductions under sec. 30. If the widow's share was £5,000, there would be a deduction therefrom under sec. 30 of £150. The amount of allowance under sec. 55 does not always lend itself to exact percentages, but in practice the same result may be thus obtained:— Ascertain the amount allowed, and reduce the deduction otherwise to be made under sec. 30 by an amount which bears the same proportion to the total amount allowable under sec. 55 as the value of beneficiary's share bears to the aggregate value of the whole estate. The widow's deduction, apart from sec. 55, would be £200, but as the value of her share is one-half that of the estate, you reduce her deduction by one-half the amount allowed under sec. 55, the result being, as before, £150. If, however, sec. 55 operates in respect of the given beneficiary's share solely or separately, then ascertain the amount allowed in his favour under sec. 55 and deduct it all from the amount of duty otherwise to be borne by him by way of deduction, and the difference is his net statutory deduction under sec. 30.

If the question is as to a beneficiary under a settlement, &c., of the (*b*) property, it is, on the face of it, a proportional *contribution* (*not deduction*), but still a contribution to "the duty payable" on the estate of the settlor "at the same rate as is payable on the estate."

It seems to me inconceivable that the second paragraph can be read so as to make its words include such a sum as the £4,000 here, which the Tasmanian Government does not claim. But if so, how

can a different result be reached for the prior paragraph, because a deduction is in reality a contribution.

Much of the foregoing is, of course, unnecessary to the result of this particular case, but is necessary to a basic interpretation of sec. 30 if a guide is desired to its proper understanding both for this case and in future.

STARKE J. The *Deceased Persons' Estates Duties Act* 1915 of Tasmania levies certain duties, and by sec. 55 enacts as follows :— " Where the Registrar is satisfied that in any part of His Majesty's Dominions other than this State, duty—not being duty payable under any Commonwealth Act—is payable by reason of a death occurring after the commencement of this Act in respect of any property situate therein and passing on such death, he shall allow a sum equal to the amount of that duty to be deducted from any duty payable under this Act in respect of that property on the same death. In this section 'property passing on the death' includes property passing either immediately on the death or after any interval, either certainly or contingently, and either originally or by way of substitutive limitations." The Act also provides in sec. 32 that, subject to any special provisions by a testator or settlor, &c., to the contrary, executors and trustees shall adjust any duties payable or paid by them so as to throw the burden thereof upon the respective properties on which the same shall be payable. And sec. 30 enacts as follows :—" Subject to any special provision by a testator for the payment of the duty imposed by this Act, every executor or administrator with the will annexed shall deduct from each and every devise, bequest or legacy, and in every case of intestacy an administrator shall deduct from each distributive share an amount equal to the duty upon the same respectively, calculated at the same rate as is payable on the estate. Subject to any special provision by a settlor or donor or maker of any such instrument for the payment of duty, the beneficial interests under a settlement or deed of gift or any such instrument as by this Act is required to be registered shall contribute proportionally to the duty payable on the estate of the settlor at the same rate as is payable on the estate. In each case regard shall be had to the

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relationship of the beneficiary to the testator, intestate, settlor, or donor, as the case may be."

The late Professor Pitt Cobbett died domiciled in Tasmania, leaving considerable property in Tasmania and elsewhere in the British Dominions. Under sec. 55 of the above Act deductions were allowed from the duty otherwise payable in Tasmania, consisting of duty paid or payable in other British Dominions in respect of certain property situate in those Dominions and passing on the death of Professor Pitt Cobbett. The only question brought for our determination on this appeal is whether the amount to be adjusted under secs. 30 and 32 should be the duty payable under the Tasmanian Act without taking into account the deductions allowed under sec. 55, or whether it should be the balance remaining after making the deductions allowed under that section. The Supreme Court of Tasmania, by a majority (*Nicholls* C.J. and *Crisp* J.), upheld the latter view, and, in my opinion, their decision ought to be sustained.

The effect of sec. 55 is, in my opinion, to lessen or reduce the duty payable under the Act; in substance, to forego so much of the duty as is allowed to be deducted under it. I assent to the reasoning of my brother *Isaacs* on this point. If this be true, then the duty which must be adjusted pursuant to the provisions of secs. 30 and 32 is this reduced sum. It is the duty "payable or paid" under the Act (*cf.* sec. 32). This conclusion is perhaps all that is necessary for the determination of this particular case. But it is desirable to look ahead somewhat, and to ascertain how on this view the deductions allowed by sec. 55 are to be made, and how the adjustment directed by secs. 30 and 32 can be carried out.

So far as the deduction is attributable to specific property the deduction would be from the amount payable in respect of that property, calculated in accordance with the schedule rates, without reference to sec. 55. But if, as in this case, the deduction is attributable to a fund divisible amongst several beneficiaries, then the deduction must be in such proportions as will ensure equality among the beneficiaries. Any method that will secure this result can be adopted. The adjustment of the duty presents the real problem. Until sec. 55 was introduced into the Act the provision of sec. 30

was clear. There was thrown upon each legacy, &c., or distributive share an amount equal to the duty upon the same respectively. The words "calculated at the same rate as is payable on the estate" reinforce the former words, and perhaps emphasize the real object of the section, namely, that each beneficiary should bear the duty payable or paid in respect of the property given to him. The calculation necessarily produced this result, for it took for its basis the rate upon which duty was charged in respect of each devise and share. But when sec. 55 operates the calculation prescribed by sec. 30 will not, in my opinion, work. It does not give the reduced duty payable under the Act, but the duty payable as if no deduction had been made. An executor would deduct from the beneficiaries' shares more duty than he actually paid. The appellant suggests that the difference falls into the residue for its benefit. This is rather a strange result, and may lead to confusion and injustice if the duty deducted has not been paid out of the residue.

My brother *Isaacs* has come to the conclusion that the word "rate" in sec. 30 should be construed as meaning the proportion of the property taken. I myself am unable to take his view, though it certainly solves the difficulties that the provisions of sec. 55 have introduced into the working of sec. 30 of the Act. The rate in sec. 30 means, I think, the rate or rates set forth in the Schedule and payable upon the total value of the estate aggregated in accordance with the Act. My solution is perhaps a bold one, but it has at least the merit of giving effect to the real object of sec. 30. The duty of the executor or trustee is, as I construe the Act, to adjust the duties paid or payable by him so as to throw upon each legacy or distributive share the duty paid or payable upon that legacy or share. There is no difficulty, in point of fact, in accurately ascertaining this amount. If no deduction is allowable under sec. 55, the calculation prescribed in sec. 30 will determine the amount. If a deduction be allowed, the calculation prescribed by sec. 30 will not effectuate the main purpose of sec. 30, namely, the throwing upon each beneficiary the duty paid or payable in respect of the property given to him. And as this, in the case suggested, is the "reduced" duty, then, in my opinion, the calculation in sec. 30 must be rejected and the main purpose of the Act carried into effect.

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One other matter I desire to mention. A codicil to the will directs that the testator's trustees pay out of his trust fund his debts and funeral and testamentary expenses. The question of the effect of this clause is not raised by the originating summons, and cannot be considered on this appeal. Nor can anything decided on this appeal affect the construction and operation of that clause in the due administration of the estate of the testator. The parties must act in relation to the clause as they may be advised.

Appeal dismissed. Decision of Supreme Court affirmed. Trustees' costs as between solicitor and client to be paid out of the trust fund.

Solicitors for the appellant, *Murdoch, Jones & Cuthbert.*

Solicitors for the respondents, *Simmons, Wolfhagen, Simmons & Walch*; *Butler, McIntyre & Butler.*

B. L.