As the authorities stand my judgment must be that this appeal be allowed.

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Appeal allowed. Judgment entered for defendant. Respondent to pay costs of the action, of appeal to Supreme Court and of this appeal.

Solicitors for the appellant, *Parkinson & Wettenhall.*

Solicitors for the respondent, *Boothby & Boothby.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXES FOR VICTORIA . . . . APPELLANT;

AND

LENNON . . . . RESPONDENT.*

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Oct.* 21.

SYDNEY, *Nov.* 16.

Knox C.J., Higgins and Starke JJ.

Probate Duty (Vict.)—Gifts inter vivos—Rate of duty—Aggregation of several gifts—Statute—Interpretation—Consolidating statute—Alteration of law—Administration and Probate Act 1915 (*Vict.*) (*No.* 2611), *secs.* 122, 128, 143-146.

Sec. 143 (1) of the *Administration and Probate Act* 1915 (Vict.) provides that "Every conveyance or assignment gift delivery or transfer of any real or personal property, whether made 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 before the death of the donor; or (*b*) if made at any time relating to any property of which property *bonâ fide* possession and enjoyment has not been assumed by the donee immediately upon the

*As to this case, see now the *Administration and Probate Act* 1921 (Vict.) (No. 3154).—*Ed. C.L.R.*

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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 this Act as though part of the estate of the donor."

Held, by *Knox* C.J. and *Starke* J. (*Higgins* J. dissenting), that, where a testator has made more than one such conveyance, &c., the value of the property to which each separate conveyance, &c., relates should be added to the net value of the estate of the testator at the time of his death, and the rate of duty appropriate to the amount so ascertained is the rate of duty payable in respect of such property.

Heward v. *The King*, 3 C.L.R., 117, followed and applied.

Ferguson v. *The King*, (1920) V.L.R., 451 ; 42 A.L.T., 52, approved.

Brunton v. *Acting Commissioner of Stamp Duties* (*N.S.W.*), (1913) A.C., 747, discussed.

In construing a consolidating Act, the Court is bound by the precise words used by the Legislature, even though their effect is to alter the law.

Decision of the Supreme Court of Victoria (*Mann* J.) affirmed.

APPEAL from the Supreme Court of Victoria.

On the assessment of probate duty in respect of the estate of John Lennon deceased, the Commissioner of Taxes for Victoria stated a case, which was substantially as follows, for the determination of the Supreme Court :—

1. John Lennon died on 27th September 1920 leaving real and personal estate in the State of Victoria.

2. By his last will and a codicil thereto he appointed John Philip Lennon sole executor thereof, and the said John Philip Lennon has applied for and obtained from the Supreme Court of Victoria a grant of probate of the said will and codicil thereto as such executor.

3. The said executor filed in the office of the Commissioner of Taxes a statement specifying the particulars required by sec. 122 of the *Administration and Probate Act* 1915.

4. It appeared from the said statement that prior to his death the above-named John Lennon deceased had made divers separate gifts to each of his respective children ; each of such gifts related to property of which *bonâ fide* possession and enjoyment had not been assumed by the donee thereof immediately upon the gift or thenceforward retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

5. The Commissioner intimated to such executor his intention of assessing the duty in relation to such gifts by adding the total value of all such gifts to the net value of the above-named John Lennon's estate at his death and adopting a rate of duty in respect to the gifts appropriate to the total value thus obtained.

6. Such executor thereupon contended that, in assessing the amount of the duty upon such gifts, the value of each separate gift should be added to the net value of the testator's estate at his death and the rate of duty appropriate to the total thus obtained adopted in relation to such gift. Such executor relied upon the decision of the Full Court in *Ferguson* v. *The King* (1). Alternatively, such executor contended that the total value of all the gifts given to each separate person should be added to the net value of the testator's estate at his death and the rate of duty appropriate to the total thus obtained should be adopted in assessing the duty payable upon the gifts to such person.

7. The question thereupon arose with regard to the said statement of the particulars as to what rate of duty should be adopted upon such gifts. Upon the contention of the Commissioner the total amount of duty is £651 17s. 11d. Upon the contention first stated of such executor the total amount of duty is £575 18s. 2d.; upon the alternative contention of such executor the total amount of duty is £591 0s. 5d.

8. It was agreed between the Commissioner and such executor that a case should be stated by the Commissioner for the purpose of having such question determined, and the Commissioner pursuant to such agreement states this case.

9. Such executor has, pending the decision of such case, paid the amount of £651 17s. 11d. to the Commissioner under protest.

The question for the opinion of the Court is:

Which of the three sums above mentioned is the amount of duty payable by such executor?

The case was heard by *Mann* J., who, following the decision of the Full Court in *Ferguson* v. *The King* (1), answered the question by saying that the sum of £575 18s. 2d. was the amount of duty payable by the executor.

(1) (1920) V.L.R., 451; 42 A.L.T., 52.

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From that decision the Commissioner of Taxes now, by special leave, appealed to the High Court.

A. H. Davis, for the appellant. The intention of sec. 143 of the *Administration and Probate Act* 1915 is, where there are several conveyances, &c., which are hit by the section, to make the aggregate value of the property which is the subject matter of those conveyances, &c., liable to duty, and not to make the subject matter of each conveyance, &c., separately taxable. The word "every" in the section is not synonymous with "each" but with "all." A comparison with secs. 144, 145 and 146 supports this view, and the use in them of the phrases "all property of any kind whatsoever" and "any conveyance or assignment" does not suggest that the word "every" was used as meaning "each." It is also supported by sec. 122, which provides that all property that falls within any one of secs. 143 to 146 is to be included in the executor's statement and the value of the whole added to the value of the testator's estate for the purpose of ascertaining under sec. 128 the rate of duty payable. It cannot be deduced from *Heward* v. *The King* (1) that each conveyance, &c., is to be assessed for duty separately. In fact, in that case and in *Lang* v. *Webb* (2) and *Horsfall* v. *Commissioner of Taxes for Victoria* (3) there was an aggregation of several gifts or conveyances for ascertaining the rate of duty.

[KNOX C.J. referred to *Brunton* v. *Acting Commissioner of Stamp Duties* (*N.S.W.*), (4).]

If the decision in *Ferguson* v. *The King* (5) is a necessary corollary of that in *Heward* v. *The King* (1) the latter decision should be reconsidered, inasmuch as it is opposed to the provisions of secs. 122 and 128. [Counsel also referred to *Osborne* v. *Federal Commissioner of Taxation* (6).]

Owen Dixon, for the respondent. There is no ambiguity in sec. 143. That section does not contemplate aggregation in any true sense, but it contemplates the taxation of specific property, the rate

(1) 3 C.L.R., 117.
(2) 13 C.L.R., 503.
(3) 24 C.L.R., 422.
(4) (1913) A.C., 747.
(5) (1920) V.L.R., 451; 42 A.L.T., 52.
(6) 29 C.L.R., 169.

at which such taxation is to be calculated being based on the addition of the value of the specific property to that of the testator's estate. Under sec. 143 there is a charge created upon the specific property of the duty payable in respect of it (*In re Draper*; *Graham* v. *Draper* (1); *National Trustees, Executors and Agency Co.* v. *O'Hea* (2)). There is a reason for distinguishing between transactions which fall within sec. 143 and those which fall within the three following sections; and it is that the former are *bonâ fide* dispositions of property and the latter are contrivances for evading duty. The word "every" in sec. 143 means "each separate"; it is distributive and not collective. The words of sec. 143, being plain and unambiguous, should be given their plain meaning (*Commissioner of Stamp Duties (N.S.W.)* v. *Simpson* (3)). *Heward* v. *The King* (4) is a definite authority for the decision in *Ferguson* v. *The King* (5). If the words "shall be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under this Act as though part of the estate of the donor" are susceptible of more than one meaning, the only alternatives are, on the one hand, that the property to which each gift relates is a separate subject of taxation, and, on the other hand, that the subject matter of the gift is to be deemed to be part of the estate of the testator for all purposes of taxation. In *Heward* v. *The King* (4) the Court adopted the former alternative.

A. H. Davis, in reply, referred to *Young* v. *Gentle* (6).

[KNOX C.J. referred to *Pacific Co-operative Steam Coal Co.* v. *Railway Commissioners of New South Wales* (7).]

Cur. adv. vult.

Nov. 16.

The following written judgments were delivered:—

KNOX C.J. AND STARKE J. The Commissioner of Taxes stated a case for the opinion of the Supreme Court of Victoria pursuant to sec. 124 of the *Administration and Probate Act* 1915 as to the amount of duty payable in respect of certain gifts mentioned in the case.

34. (1) (1910) V.L.R., 376; 32 A.L.T., 52.
(2) 29 V.L.R., 814; 25 A.L.T., 230.
(3) 24 C.L.R., 209, at p. 215.
(4) 3 C.L.R., 117.
(5) (1920) V.L.R., 451; 42 A.L.T.,
(6) (1915) 2 K.B., 661, at p. 668.
(7) (1904) A.C., 795.

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The facts and the contentions of the parties are fully set forth in that case. The parties on the hearing of the case admitted that the decision in *Ferguson* v. *The King* (1) governed the present case in all respects, and *Mann* J. gave judgment in accordance with the principles there laid down. An appeal was brought by special leave to this Court. This appeal, therefore, is in substance an appeal from the decision in *Ferguson* v. *The King*.

The case of *Heward* v. *The King* (2) decided that real or personal property the subject of a conveyance or assignment, &c., of real or personal property falling within the ambit of sec. 11 of the *Administration and Probate Act* 1903 (now sec. 143 of the *Administration and Probate Act* 1915) must, for the purpose of calculating duty under that Act, be treated as an estate in itself, and not as part of the estate of a deceased person. It also decided that such property must be aggregated with the estate of the donor for the purpose of determining the rate of duty on that separate estate.

In *Ferguson* v. *The King* (1) the Supreme Court held that it was a necessary corollary of this decision that such property though aggregated with the estate of the donor for the purpose of determining the rate of duty could not be aggregated with property the subject of other conveyances or assignments, &c., of real and personal property by the donor falling within the ambit of sec. 143 of the Act of 1915. This conclusion is well founded. The order in *Heward's Case* (2) did apparently aggregate two separate assignments of property falling within sec. 11 of the Act of 1903, but the point apparently escaped the attention of the parties and the Court.

In the present case *Mann* J. held that the value of each separate gift should be added to the net value of the donor's estate at his death for the purpose of determining the rate of duty on that gift, and he rejected the Crown's contention that the total value of all gifts should be added to the donor's estate for the purpose of determining the rate of duty on each gift. This decision was a proper application of the principles established in *Heward* v. *The King* (2) and *Ferguson* v. *The King* (1). But on the argument before this Court our brother *Higgins* pointed out that secs. 122 and 128 had been altered since the decision in *Heward* v. *The King* was

(1) (1920) V.L.R., 451; 42 A.L.T., 52. (2) 3 C.L.R., 117.

pronounced. Apparently these alterations passed unnoticed in the Court below, or if noticed were regarded as unimportant. It is clear that the draftsman did not contemplate any alteration in the law (see Explanatory Paper, vol. I. of the Statutes of 1915, p. xiv.), but we are bound by the precise words now enacted by the Legislature. If the law has been altered we must attribute it to one of those slips unavoidable in consolidation. Now sec. 122 preserves the distinction between real and personal property of which the estate of the deceased person consisted at his death and property which is deemed to be made chargeable with payment of duty under sec. 143 of the Act. Further, sec. 122, sub-sec. 1, does not direct that any balance be struck as did sec. 97 of the Act of 1890. It simply requires a statement specifying certain particulars. An alteration of the law cannot be deduced from this section alone. So we must turn to sec. 128, which prescribes that duty shall be paid by every person to whom has been granted probate or letters of administration calculated as to its rate at the percentage fixed in Part I. of the Tenth Schedule for an estate of the value (after deducting all debts) of the final balance appearing upon such person's statement. The section, with some immaterial alterations so far as this case is concerned, remains in the same form as it was when *Heward's Case* (1) was decided. Does this section then direct that the value of all the property mentioned in sec. 122 (*a*) and (*b*) be aggregated and that duty be paid on the balance remaining after deducting the debts and liabilities of the deceased? The opening words of sec. 128, which contain an exemption from liability for duty in the following words, "except in the case of any person to whom has been granted probate or letters of administration in respect of any estate the total value of which after deducting therefrom all debts does not exceed two hundred pounds," clearly relate to the estate of a deceased person properly so called. The exception is as to an estate in respect of which probate or letters of administration have been granted. In this case an aggregation of all the property described in sec. 122 (*a*) and (*b*) is not contemplated. Again secs. 143 and 122 differentiate between the estate of a deceased person and an estate which is not in fact the estate of a deceased person but which is chargeable

(1) 3 C.L.R., 117.

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with the payment of duty at a rate determined by the aggregation of that estate and "the estate of the donor" (*cf. Brunton* v. *Acting Commissioner of Stamp Duties* (*N.S.W.*) (1)). The words "calculated as to its rate at the percentage fixed in Part I. of the Tenth Schedule for an estate of the value (after deducting all debts) of the final balance appearing upon such person's statement" require consideration. The rates fixed for estates in the Schedule are rates for the estates real and personal of deceased persons, which would no doubt include property which the Legislature directed should be treated as part of the estate of a deceased person. Instances of such a direction can probably be found in secs. 144, 145 and 146 of the Act. But when we find that sec. 143, according to the decision in *Heward's Case* (2), treats certain property as a separate estate from that of the deceased person for the purpose of duty, and that sec. 122 preserves this distinction in the very words of sec. 143, then sec. 128 should be so construed as to give effect to that separation and not to defeat it. Therefore the duty payable under sec. 128 must be the duty payable on the final balance appearing upon the statement for the estate in respect of which it is chargeable. Thus the rate of duty payable in respect of the estate of a deceased person will be that fixed by the statute on the amount of the final balance appearing upon the statement of that estate, whilst the rate of duty for the estate described in sec. 143 will be that fixed by the statute on the amount of the final balance appearing upon the statement of that estate aggregated with the estate of the donor. These balances can be computed from the particulars filed pursuant to sec. 122.

The decision of *Mann* J. was therefore correct, and the appeal should be dismissed.

HIGGINS J. This is an appeal by the Victorian Commissioner of Taxes from a decision of the Supreme Court on a case stated. *Mann* J., sitting as the Court, followed, as in duty bound, a decision of the Full Supreme Court in *Ferguson* v. *The King* (3); and the question is really as to the soundness of that decision.

The testator, John Lennon, died on 27th September 1920. Before

(1) (1913) A.C., 747.
(2) 3 C.L.R., 117.
(3) (1920) V.L.R., 451; 42 A.L.T., 52.

his death the testator made separate gifts to each of his children— gifts of property which admittedly came within sec. 143 (*b*) of the *Administration and Probate Act* 1915. Under this section every conveyance or gift of property under such circumstances "shall be deemed to have made the property to which the same relates chargeable with the payment of the duty payable under this Act *as though part of the estate of the donor.*" The Commissioner contends that the value of all the gifts should be added to the value of the estate passing under the will, and the rate of duty (it is a progressive duty) ascertained on the basis of the total value of the gifts and the estate. The executor's main contention, as stated in par. 6 of the case, is that the value of each separate gift should be added to the value of the estate proper actually left by the testator and the rate of duty for the gift (but not for the estate proper) ascertained on the basis of the total. For this contention the executor relies on *Ferguson's Case* (1); and in *Ferguson's Case* the Full Court of Victoria relied on expressions used in a case in this Court (*Heward* v. *The King* (2)).

There are certain differences in the form of language used in sec. 143 as compared with the language used in sec. 144 (as to transfers made by the testator to himself and another jointly), in sec. 145 (as to the testator exercising a general power of appointment), and in sec. 146 (as to gifts with intent to evade the payment of duty). But, passing by these variations in language for the present, the effect of sec. 143 would seem to be, if taken by itself, that every such conveyance or gift is to be treated as making the property conveyed or given chargeable with duty "as though *part* of the estate of the donor." That is to say, the value of each conveyance or gift is to be added to the value of the estate left by the will, and the rate of duty is to be calculated on the aggregate of values. Then secs. 122 and 128 point clearly to the same conclusion. Under sec. 122 (1) the executor has to file a statement specifying "(*a*) the real and personal property of which the estate of the testator consisted at his death; (*b*) all property which pursuant to the provisions of secs. 143, 144, 145 and 146 is deemed to be made chargeable with the payment of duty" (as expressed in sec. 143) "or to form part of the estate of the deceased" (as expressed in

(1) (1920) V.L.R., 451; 42 A.L.T., 52. (2) 3 C.L.R., 117.

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secs. 143, 144, 145, 146) "for the purpose of estimating the duty payable under this Act; (*c*) the value of the property referred to in paragraph (*a*) or paragraph (*b*); (*d*) the debts and liabilities of the deceased; and (*e*) the relationship (if any) to the deceased of the person or persons entitled under the will." Then follow several sections with regard to the settlement of these particulars; and sec. 128 prescribes that, except as to estates not exceeding £200 and as otherwise expressly provided, "there shall be paid to the Commissioner . . . duty calculated as to its rate as the percentage fixed in Part I. of the Tenth Schedule for *an estate* of the value (after deducting all debts) of the *final balance* appearing upon such person's statement."

But for what was said in *Heward's Case* (1) there seems to be no room for doubt under these provisions that the property comprised in all the gifts and the property passing by the will are to be aggregated together, and duty paid according to the value of the aggregate. In *Heward's Case* (2), however, the late Chief Justice *Griffith* said:—"So far as the duty on that property" (the assigned property, the property given *inter vivos*) "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 not surprising, therefore, that the Full Supreme Court felt constrained by *Heward's Case* to answer the special case adversely to the Commissioner. But when *Heward's Case* was decided (1905) the present consolidated Act had not been passed; and there was no such provision as that in sec. 122 (1) (*b*), bringing all the property subject to sec. 143 (as well as

(1) 3 C.L.R., 117.

(2) 3 C.L.R., at p. 124.

property subject to secs. 144-146), with the property actually passing by the will, into the particulars of assets from which the debts are to be deducted in order to find the "final balance" on which duty is to be paid. Whatever doubts there may have been as to the meaning of the Act as it stood in 1905, the position seems to be now perfectly clear. This Court in *Heward's Case* (1) unanimously held that the property the subject of the gift is just as much chargeable with duty as if it had remained part of the actual estate of the testator, but that the duty on the estate proper should not be calculated at a higher rate by reason of this artificial addition. Personally, I think that *Heward's Case*, introduced unnecessary complications into the interpretation of the Act. But now, under secs. 122 and 128, no duty is payable at all except on the aggregate sum of the values of the estate actual and the estate artificial (less debts), and at the rate for the composite balance as fixed in Part I. of the Tenth Schedule. The words of sec. 128 are not that duty is to be calculated on "*the*" estate, or the actual estate, of the testator, but "for *an estate* of the value (after deducting all debts) of the final balance appearing" on the statement prescribed in sec. 122—that is, on an hypothetical estate consisting of both the actual and the artificial estates. It is quite true that neither in sec. 122 nor in sec. 128 is there any express direction to strike a balance and to state it, as there was in the Act of 1890 (sec. 97). But when we find in sec. 122 a direction to make a statement setting out the particulars and values of the assets and the debts, and in sec. 128 a direction that duty is to be calculated, &c., for an estate of the value (after deducting all debts) of the "final balance appearing" on the statement, it is necessarily implied that someone must deduct the total debts from the total assets, and that the result of the deduction should appear as the final balance. Even if this provision of sec. 122 taken with sec. 128 was meant to express the then existing law, and not to alter the law, it is our duty to act on the words of the consolidating Act of 1915 as expressing the present will of the Victorian Parliament (per *Cozens-Hardy* M.R. in *Bristol Tramways and Carriage Co.* v. *Fiat Motors Ltd.* (2)).

As for the variances in the language used in secs. 144, 145, 146,

(1) 3 C.L.R., at p. 123. (2) 79 L.J. K.B., 1107, at p. 1109.

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they are not sufficient, in my opinion, to negative the clear effect of the sections to which I have referred. Sec. 144 prescribes that "all property" the subject of a joint transfer, &c., shall on the death of such person "be deemed . . . to form part of his estate for the purpose of estimating the duty"; sec. 145 prescribes that all property appointed under a general power shall upon his death "be deemed to form part of his estate for the purpose" &c.; sec. 146 prescribes that "if any person . . . makes any conveyance," &c., "with intent to evade the payment of duty" the property shall be "deemed to form part of his estate . . . upon which duty shall be payable under this Part." Sec. 143, as it was adopted from an English Act, uses different phraseology; but the property is chargeable with duty "as though *part* of the estate of the donor." The conveyance or act of giving is to be deemed, as it were, as containing a clause or term making the property chargeable with the duty "as though part of the estate of the donor." The language is clumsy as it stands in this Act; but the effect is clear. There is sound sense in the statements contained in *Maxwell's Interpretation of Statutes*, 6th ed., pp. 557, 564, to the effect that, although it is always well to use the same word for the same thing and not to change the language unless a change in meaning is intended, the presumption that arises from variations in language is of very slight force if the words in themselves are sufficiently clear.

There is a decision of the Judicial Committee of the Privy Council under an analogous Act of New South Wales (*Brunton* v. *Acting Commissioner of Stamp Duties* (*N.S.W.*) (1)), to the effect that under that Act there is to be no aggregation of the estates actual and artificial for the purpose of determining the rate of duty on the whole. The decision is, of course, based on a careful scrutiny of that Act as amended, and of the law as it existed at the time of the amendment; and the familiar principle is followed that an intention to increase a tax or duty already imposed cannot be inferred from ambiguous words. Perhaps it is enough to say that the words are not the same in the Victorian Acts as in the New South Wales Acts; but I may also point out that in the New South Wales Act there was no such

(1) (1913) A.C., 747.

provision with regard to the property the subject of dispute (property as to which the deceased had a special power of appointment) as there is in the Victorian Act with regard to the property the subject of dispute (property given *inter vivos*): there was no provision that the property was to be treated as *part* of the estate of the donor—"chargeable with the payment of the duty payable under this Act as though *part* of the estate of the donor." Their Lordships actually pointed out the distinction between the language of sec. 52 of the Act of 1898 and the language of sec. 21 of the Act of 1904 (the section in question), inasmuch as sec. 52 provided that a gift with intent to evade duty, or a *donatio mortis causa*, was to be deemed "*part* of the estate" of the deceased; whereas sec. 21 provided merely (as to property under a power of appointment) that "such estate shall for the purposes of those Acts be deemed to be *the estate of the person dying*." These latter words merely meant that what was not actually estate of the deceased was to be deemed to be an estate of his for the purposes of duty (see p. 758). Moreover, there was not in the New South Wales Act any such provision as that contained in the Victorian Act (secs. 122 and 128 combined) —to the effect that the actual estate and the artificial estate are to be added together, in values, the debts deducted, and the duty—one sole duty—calculated on the final balance struck.

I am of opinion that the appeal should be allowed; and that the question should be answered in favour of the £651 17s. 11d. as contended by the Commissioner.

Appeal dismissed with costs.

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitors for the respondent, *Cleverdon & Fay.*

B. L.