

our now entering judgment for the plaintiff but for the fact that, in order to save expense, the parties have consented that we may do so. Fortunately the learned Judge assessed the amount—50*l.*—which he would have given as damages, if he had decided in the plaintiff's favour. From that amount should be deducted the sum of 28*l.* already paid to the plaintiff.

Appeal allowed, with costs, to be taxed. Judgment for plaintiff for 22*l.* Defendant to pay plaintiff's costs of the action in the County Court and of the application for a new trial, which costs are to be taxed.

Appeal allowed.

Solicitor for the appellant: *P. J. Ridgeway.*

Solicitors for the respondent: *Elder & Graham.*

C. E. D.

FERGUSON and Another v. THE KING.

Administration and probate—Probate duty—Gift of property within 12 months before death of donor—Twelve assignments—Principle upon which duty calculated—Assignments to be valued separately—Assignment of foreign property—Sale—Receipt of proceeds in Victoria prior to donor's death—Whether taxable—Administration and Probate Act 1915 (No. 2611), s. 143.

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(IRVINE, C.J.,
CUSSEN AND
MANN, JJ.)
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October 11, 12, 13,
18.

Where there are several gifts of property falling within sec. 143 of the *Administration and Probate Act 1915*, duty is to be assessed upon the value of the property contained in each gift, together with the value of the private estate of the donor at his death, and not upon the aggregate value of the property contained in all the gifts, together with the value of his private estate.

Heward v. The King ([1905] 3 C.L.R. 117) discussed.

Foreign property, comprised in gifts which are taxable under sec. 143 of the Act, does not become subject to duty by reason of its having been sold, and the proceeds having been received in Victoria, prior to the death of the donor.

PETITION under *Crown Remedies and Liability Act 1915* referred by consent to the Full Court.

This was a petition by Albert George Hotham Ferguson and Mephan John Ferguson, the executors of the will of Mephan Ferguson, deceased, to which His Majesty the King was respondent.

The petition set out that the abovenamed Mephan Ferguson (hereinafter called the settlor) died domiciled in Victoria on the

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2nd November 1919; and that, by his will, he appointed the petitioners as his executors; and that probate of the will was granted on the 19th December 1919.

On and prior to the 18th November 1918 the settlor was entitled to certain freehold real estate situated in Western Australia and to the proceeds of 4999 shares in a Scottish company, incorporated under the British *Companies Acts* and registered at Edinburgh, and then in liquidation; and also to the proceeds of 20,000 deferred shares in the said company. On and prior to the 18th November 1918 the settlor was also entitled to certain policies of insurance effected in Victoria on his life and to certain shares in Mephan Ferguson Pty. Ltd., a company incorporated and carrying on business in Victoria.

By six instruments under seal, dated the 18th November 1918, the settlor for natural love and affection assigned to each of his six children, or to trustees for them, a one-seventh share of his interest in the above-mentioned property, either absolutely or upon certain trusts, and retained for himself the other one-seventh interest therein. On the 9th April 1919 the settlor by six instruments under seal for natural love and affection assigned the remaining one-seventh interest in the above-mentioned property to the same persons. All the above instruments were duly stamped under the *Stamps Act* 1915 as deeds of gift.

The value of the property transferred by the twelve instruments was assessed at 80,430*l.* 8*s.* 8*d.* The settlor at his death left real and personal estate in Victoria of the value of 16,292*l.* 13*s.* 11*d.* The Commissioner of Taxes assessed the duty payable on the twelve instruments in question, under sec. 143 of the *Administration and Probate Act* 1915, and on the private estate of the settlor, at 7753*l.* 12*s.* 9*d.* This amount was arrived at by the Commissioner by calculating the duty on the private estate of the settlor at 994*l.* 18*s.* 11*d.*, being at the rate of $5 \frac{4}{5}$ per centum on the 16,292*l.* 13*s.* 11*d.*, and by calculating the duty on the properties comprised in the said instruments at 7882*l.* 3*s.* 8*d.*, being at the rate of $9 \frac{4}{5}$ per centum on the 80,430*l.* 8*s.* 8*d.*, and by deducting from the said sum of 7882*l.* 3*s.* 8*d.* the sum of 1073*l.* 9*s.* 10*d.*, being the amount of *ad valorem* duty paid on the instruments under the *Stamps Act*, leaving the balance of 7753*l.* 12*s.* 9*d.* The proportion of tax on the property comprised in the twelve instruments was 6808*l.* 13*s.* 10*d.*

The Commissioner included in the value of the property taxed the sum of 3887*l.* 9*s.* 9*d.*, representing the value of the proceeds of sale of the freehold estate in Western Australia, and also the sum of 6037*l.* 6*s.* 11*d.*, representing the value of the proceeds of the Scotch shares.

It was admitted that the real estate in Western Australia and the shares were sold, and the proceeds received in Victoria, before the death of the settlor.

The concluding paragraphs of the petition were as follows:—

“20. Your suppliants submit that the said sum of 6808*l.* 13*s.* 10*d.* so fixed as the duty payable in respect of the properties comprised in the said twelve instruments is erroneous and excessive for the following reasons, viz.:—

“(a) The Commissioner included in the value of the said properties the sum of 3887*l.* 9*s.* 9*d.* representing the freehold estate situate in the State of Western Australia mentioned in paragraph 2 of this petition, and such amount should have been excluded from the value of the said properties for the purpose of assessing duty, as the provisions of sec. 143 of the *Administration and Probate Act* 1915 do not extend to property situate outside of Victoria, and such property so situate is not subject to Victorian duty.

“(b) The Commissioner also included in the value of the said properties the sum of 6037*l.* 6*s.* 11*d.*, representing the proceeds of the 4999 ordinary shares in Mephan Ferguson Lock Bar Pipe Company Ltd. (in liquidation) and also the proceeds of 20,000 deferred shares in the said company, and such amount should have been excluded from the value of the said properties for the purpose of assessing duty, as the said company was a company incorporated under the law of Great Britain and carried on its business there, and its liquidators were domiciled and resident in Scotland, and such proceeds were not subject to Victorian duty.

“(c) The properties comprised in each of the said twelve instruments for the purposes of sec. 143 of the *Administration and Probate Act* 1915 should have been separately valued on the basis prescribed by that section—viz., by adding the value of the property comprised in each instrument to the value of the private estate of the settlor and by fixing the rate of duty chargeable on the property comprised in each instrument at the rate prescribed by part 2 of the 10th Schedule to the said Act for the property

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of the aggregate value so ascertained. Instead of adopting this course the Commissioner has treated the said twelve instruments as if they constituted one settlement, and as if the aggregate properties comprised in such twelve instruments constituted one property subject to the provisions of such settlement, and your suppliants submit that the course adopted by the Commissioner is erroneous.

“ 21. For the reasons aforesaid your suppliants submit that the value of the said properties as assessed for duty by the Commissioner is excessive by the sum of 9924*l.* 16*s.* 8*d.*, and that the rate of duty fixed—viz., nine and four-fifths per centum—is too high.

“ 22. Your suppliants being unable to obtain the issue to them of probate of the said will without payment of the amount fixed and demanded by the Commissioner—viz., 7753*l.* 12*s.* 9*d.*—accordingly paid the same to him under protest on the 25th June 1920, and have by writing of that date claimed interest on the amount paid by them in excess of the amount properly payable at the rate of 6*l.* per centum per annum until repayment.”

The facts above stated appeared partly in the petition and partly in the Attorney-General's answer and in admissions of fact made between the parties.

The petition coming on for hearing before Irvine, C.J., on the 15th September 1920, was by consent referred to the Full Court, and now came on for hearing accordingly.

R. E. Hayes for the petitioner—The Commissioner has assessed the duty upon the transferred properties by taking their aggregate value and adding thereto the value of the private estate in accordance with the rule laid down in *Heward v. The King* (a), and has thus produced a total which, if his system were correct, would entitle him to charge the duty at the rate of 9 $\frac{4}{5}$ per cent. under part 2 of the 10th Schedule of the Act. It is submitted that, in taxing the aggregate value of all the settlements as though they constituted one settlement, the Commissioner was wrong. Sec. 143, unlike secs. 144, 145, and 146, does not say that the transferred property is to be deemed to form part of the deceased's estate for the purposes of duty. Sec. 143, using different language, says that every conveyance, etc., is to be deemed to have made the property to which the same relates chargeable with the pay-

(a) [1905] 3 C.L.R. 117.

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ment of duty "as though part of the estate of the donor." The consequence is that each assignment or settlement of property must be taxed separately together with the value of the private estate, with the result that a much lower rate of duty is chargeable than under the system of aggregation adopted by the Commissioner. The important consideration is that under sec. 143 the particular property transferred by the instrument is to be taxed as though it were part of the testator's estate—that is to say, it is to be separately taxed. The reasoning of the High Court in *Heward v. The King*, and of the same tribunal in *Re Horsfall's Settlements* (b), supports this conclusion. As regards the Western Australian and Scottish properties, the time for ascertaining whether or not the property comprised therein is taxable is the date of the instrument. It is immaterial that the proceeds of sale were received in Victoria prior to the settlor's death.

Counsel referred to *Dent v. The Commissioner of Stamp Duties* (c).

A. H. Davis for the respondent—So far as the taxation of the transferred properties under sec. 143 is concerned, there is no essential difference between the operation of sec. 143 and the other sections referred to. It is the property transferred within 12 months of the settlor's death, which is to be taxed. And it is immaterial whether that property is transferred by one assignment or settlement or by twelve instruments. Under the *Stamps Act* the instruments of transfer are taxed. But under the *Administration and Probate Act* it is the property which is made subject to duty. It is pointed out by Griffith, C.J., in *Heward's Case* that the property transferred is just as much chargeable with duty as if the assignment had not been made; and that it is deemed to have remained part of the estate of the settlor for all purposes. In *Horsfall's Case* Barton, J., at p. 247, states that duty is charged, not on any individual gift, but upon the whole property to which the deeds relate, as though part of the estate of the settlor. And at p. 252 (of [1918] V.L.R.) Rich, J., says:—"The object of the section is to prevent evasion of duty by substitutes for wills, and to tax property passing by semi-testamentary dispositions as if it had been disposed of by will or the deceased had died intestate in respect of it. This object is accomplished by treating the disposi-

(b) [1918] V.L.R. 242; 24 C.L.R. 422. (c) [1909] 9 C.L.R. 406.

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tions as nullities. For the purpose of taxation the property remains part of the estate of the deceased." The property comprised in the twelve instruments is therefore taxable as if those instruments were nullities and the property remained part of the estate; in which case it would clearly be taxed in the aggregate. Sec. 122 of the Act contemplates one statement for duty and one assessment. The argument for the petitioners requires twelve assessments: *Cf. Affleck v. The King (d)*. It is to be observed that in *Heward's Case* and in *Horsfall's Case* there were two separate settlements, yet the Court determined that duty should be assessed upon the aggregate value of the properties transferred. The same position arose in *Lang v. Webb (e)*. This practically settles the main question raised by the petitioners. Moreover, if the petitioners' contention is correct, it would be possible for a testator possessed of 5000*l.* to make ten settlements of 500*l.* each, with the result that each settlement would be below the minimum, and no duty would be chargeable on the property transferred. As regards the Western Australian and Scottish properties, inasmuch as, according to the High Court, the properties transferred are to be treated as if they had remained part of the estate of the testator, the time for determining whether or not the transferred property is within the jurisdiction is the death of the settlor. Upon that basis the proceeds of these properties are taxable. The determining question is whether or not if the property had remained part of the estate of the testator the executors would have had control over it: *Blackwood v. The Queen (f)*. In *Re Currie's Settlements (g)* Hood, J., held that duty was payable in respect of so much of the property comprised in the settlements as was in Victoria at the death of the settlor. It follows also from the decision in *Horsfall's Case* that property which is not in the jurisdiction at the time of the settlement may be liable to duty.

R. E. Hayes in reply.

Cur. adv. vult.

IRVINE, C.J., read the judgment of the Court:—Petition of right, under the *Crown Remedies and Liability Act* 1915, referred to the Full Court by order of a Judge, by consent, for determination

(d) [1906] 3 C.L.R. 608.

(f) [1882] 8 A.C. 82.

(e) [1911] 13 C.L.R. 503.

(g) [1915] V.L.R. 675.

(and counsel at the hearing agreed) of certain questions of law on admissions of fact. On the admissions it appears that Mephan Ferguson, by several instruments under seal, for natural love and affection, assigned to each of his elder sons, Albert and Mephan, one equal seventh share in—(a) freehold estate in Western Australia; (b) shares in a British company, registered in Scotland, and then in liquidation; (c) interests in Victorian life policies; (d) shares in a Victorian company; and that on the same day, by other several instruments under seal, for natural love and affection, he assigned to his said sons as trustees for his third son and his three daughters respectively one-seventh share in the same properties upon trusts therein stated. It also appears that on the 9th of April 1919 Mephan Ferguson, by similar several instruments, voluntarily disposed of further interests in the same properties in favour of the same persons. The settlor died in Victoria on the 2nd of November 1919, having made a will, dated the 18th November 1918, making his sons Albert and Mephan, who are the suppliants, executors, and leaving real and personal estate in Victoria of the value of 16,292*l.* 13*s.* 11*d.*

The Victorian Commissioner of Taxes assessed the whole of the properties comprised in the assignments as one property of the aggregate value of 80,430*l.* 8*s.* 8*d.*, and, after allowing for the amounts paid for stamp duty on them, assessed the duty payable in respect of the properties comprised in them under sec. 143 of the *Administration and Probate Act* 1915 at the rate of 9 $\frac{4}{5}$ per centum at 6808*l.* 13*s.* 10*d.*

The first contention raised by the suppliants is that the Commissioner was wrong in arriving at the rate of duty by aggregating these several gifts, and that the proper course was to take the property comprised in each instrument separately, and, adding it to the value of the estate of the settlor, adopt the rate of duty applicable to the amount so arrived at. We think this contention must be upheld as the necessary consequence of the interpretation placed on sec. 143 by the High Court in the case of *Heward v. The King* (h). See also *Dent v. The Commissioner of Stamp Duties* (i). The High Court in that case clearly held that the language of sec. 11 of the *Administration and Probate Act* 1903, which is identical with that of sec. 143, in contrast with the language of the succeeding sections, did not make the property

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(h) [1905] 3 C.L.R. 117.

(i) [1909] 9 C.L.R. 406.

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to which the instrument related "part of the settlor's estate for the purpose of estimating the duty payable under this Act." We think it a necessary corollary to this decision that the duty with which each property out of several given by different instruments is chargeable is a duty calculated at the rate applicable where that property is treated for this purpose "as though part of the estate of the donor," and not where that and other properties are treated as though part of the estate of the donor.

We have not overlooked the fact that in *Heward's Case* the actual order of the Court did in fact aggregate more than one gift, and did in fact operate to fix a higher rate than would be proper under the construction we hold to be correct. But this question was not brought before the Court in argument, nor considered, and it is our duty to have regard to the construction which the Court placed upon the section rather than to the effect of the actual order as between the parties in that case.

The next contention of the suppliants is that, so far as regards the properties situate in Western Australia and Scotland (which, counsel admitted, for this purpose stand in the same position), the instruments do not fall within the provisions of sec. 143 at all. This contention, we think, must also be upheld. It is established law that properties, the subject of such dispositions as these, are not, if outside Victoria, subject to duties of the kind imposed in this Act; but it was argued that, on the admission that the land and shares were sold by the donees or by the trustees, and the proceeds received by their agents in Western Australia and in Scotland respectively, and by them forwarded to the trustees in Victoria before the death of the donor, the settled properties were Victorian property at the time of the death of the donor, and thus came within the operation of sec. 143. This view, we think, is unsound. "The property to which the instrument relates" is, we think, the property of the donor disposed of thereby, and not the proceeds of a sale or sales by the donee. If the subject of the conveyances had been land in Victoria, which had afterwards been sold by the donees, and the proceeds happened to be invested, or not invested, outside Victoria, it would be difficult to contend that the property transferred escaped the Victorian duty.

The parties, by their counsel, having asked us to state only the principles of law governing the facts, we hold—(1) that each of the twelve instruments referred to in the petition must be dealt with

as a separate instrument independently of all the others, and that the value of the property comprised in it must be added to the value of the estate proper for the purposes of determining the rate of duty, and (2) that the real estate in Western Australia and the shares of the Scotch company must be taken as not comprised in the gifts, both for purposes of duty and of rate of duty. The suppliants to have the costs of the petition.

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Judgment for suppliants.

Solicitors for the suppliants: *Fink, Best & Miller.*

Solicitor for the Crown: *Guinness*, Crown Solicitor.

C. E. D.

[IN THE HIGH COURT OF AUSTRALIA.]

H.C. OF A.

(ON APPEAL FROM THE SUPREME COURT OF VICTORIA.)

1920

[Coram KNOX, C.J., ISAACS AND RICH, JJ.]

June 1, 2, 3, 4, 8,
9, August 31.

CRAINE, *plaintiff, appellant*, v. THE COLONIAL MUTUAL
FIRE INSURANCE CO. LTD. and *Another, defendants*,
respondents.

Insurance—Fire policy—Conditions—Failure to make claim within stipulated time—Waiver—Estoppel—Conduct of parties at trial—Effect of acts expressed to be done “without prejudice”—Distinction between waiver and estoppel.

The plaintiff, having had certain motor-cars destroyed by fire, claimed to recover under certain policies of insurance against the defendants, with whom the cars had been insured. The defendants relied upon conditions* in the policies and (*inter alia*) alleged that the plaintiff's claim should, by reason of condition (11), have been lodged not later than 12 o'clock on the 26th October 1917, whereas in fact it was not lodged until 3 o'clock on that date. The

* The terms of the policies sued upon were identical, and the relevant provisions were as follows:—

“Occurrence of a Fire.

“11. On the happening of any loss or damage the insured must forthwith give notice in writing thereof to the company, and must within fifteen days after the loss or damage, or such further time as the company may in writing allow in that behalf, deliver to the company a claim in writing for the loss and damage containing as particular an account as is reasonably practicable of all the articles or items of property damaged or destroyed, and of the amount of the loss or damage thereto respectively, and of any other insurances; and must at all times at his own expense produce and give to the company all such books, vouchers,