Judgment of the Lords of the Judicial Committee of the Privy Council on the Consolidated Appeal and Cross-Appeal of Payne and others v. *The King; and of The King* v. *Payne and others, from the Supreme Court of Victoria; delivered the 9th July* 1902.

Present at the Hearing:

LORD MACNAGHTEN.
LORD DAVEY.
LORD ROBERTSON.
LORD LINDLEY.
SIR FORD NORTH.
SIR ARTHUR WILSON.

[*Delivered by Lord Macnaghten.*]

The Appellants who are also Respondents in the Cross-Appeal are the executors of the will of the late Thomas Budds Payne a gentleman of great wealth who died on the 27th of August 1897 domiciled in Victoria at the time of his death.

The proceedings out of which the Appeal and Cross-Appeal arose were commenced by a Petition of Right, whereby the executors sought to recover back probate duty paid in respect of three several sums of 45,000*l*., 75,000*l*. and 63,000*l*. and the interest accrued on those sums respectively at the time of the testator's death. The three principal sums were secured by three statutory mortgages of land in New South Wales which are referred to in the proceedings as Kiddle's mortgage, McVean's mortgage and McCulloch's mortgage.

The sum of 45,000*l*. secured by Kiddle's mortgage and the greater part of the sum of

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75,000*l.* secured by McVean's mortgage were made over by the testator in the year 1896 without consideration to his eldest son the Appellant John Frederick William Payne and both mortgages were taken in his name. The first question is, were these transfers made "with "intent to evade the payment of duty" within the meaning of Section 115 of the Administration and Probate Act of Victoria 1890. The answer must depend on the true construction of that enactment and on the proper inference to be drawn from the evidence as to the real nature of the transaction between father and son.

The question in controversy with regard to McCulloch's mortgage is whether or not the principal sum secured thereby with the interest accrued at the date of the testator's death was an asset in Victoria so as to render it liable to duty there. This question would also have to be considered in reference to Kiddle's mortgage and McVean's mortgage in the event of it being held in accordance with a contention put forward on behalf of the Respondent that the transfers of the two sums secured thereby were merely colourable.

The case came on to be heard before Madden C.J. He decided the first question in favour of the executors the second in favour of the Crown. On appeal the position was reversed. The Full Court determined the first question in favour of the Crown and the second in favour of the executors.

Section 115 of the Act of 1890 contains the following enactment:—

"If any person has made or shall hereafter make any con-
" veyance or assignment gift delivery or transfer of any estate
" real or personal or of any money or securities of money with
" intent to evade the payment of duty under this part of this
" Act in case such person should die the property contained in
" any such conveyance or assignment or the subject-matter of
" any such gift delivery or transfer shall upon the death of
" such person be deemed to form part of his estate for the
" purposes of this part of this Act upon which duty shall be

" payable under this part of this Act and the payment of the " duty upon the value of such property may be enforced " against such property in the same way that duty under this " part of this Act is enforceable and as if such person had " bequeathed or devised the said property to the person to " whom the same may have been conveyed assigned given " delivered or transferred."

The section then goes on to deal (1) with conveyances or assignments gifts deliveries or transfers intended to take effect upon the death of the person making the same which are to be " deemed to have been or to be made as the case " may be with intent to evade the payment of " the duty " under the Act and (2) with donations *mortis causâ* which are " to be deemed to " form part of the deceased's property for the " purposes of estimating the duty."

The question of the meaning of the expression " with intent to evade the payment of duty " was discussed in the Judgment of this Board delivered by Lord Hobhouse in *Simms* v. *Registrar of Probates* (1900 A. C. 323). Although the construction of the South Australian Act which was there in question involved the consideration of points not to be found in the present case, their Lordships are of opinion that the principle of the decision must be applied and that in conformity with that decision it must be held that the enactment contained in the earlier part of Section 115 of the Victorian Act of 1890 extends to and strikes at colourable transactions only. It will be observed that in its terms the enactment is absolute without limitation of time or amount. It is difficult to suppose that the Legislature could have intended that on the death of a person dying after the passing of the Act a strict account should be taken of all transfers and gifts which the deceased had ever made in the whole course of his life being moved thereto more or less by the desire of avoiding payment of death duties, a motive which in conjunction with others operates

frequently in the case of gifts to charitable institutions and certainly not unfrequently in the case of gifts to near relatives.

Then comes the question:—Was the transaction as regards Kiddle's mortgage and McVean's mortgage real or only colourable? On the one hand there is the uncontradicted statement of Mr. John Frederick William Payne who was examined and cross-examined on the subject. He seems to have given his evidence fairly and frankly. He was believed by the Chief Justice and not disbelieved by the Court of Appeal. He declared positively that in the case of both mortgages the gift to him was an absolute gift out-and-out not qualified by any reservation or trust or secret understanding of any sort or kind. On the other hand there is a circumstance which at first sight tends to create suspicion. Mr. John Frederick William Payne paid substantially the whole of the interest accruing on these mortgage debts to his father's account, and invested it or allowed it to be invested with his father's moneys. The learned Chief Justice thought that the peculiar position in which Mr. John Frederick William Payne was placed suggested an adequate and satisfactory explanation of his conduct. Mr. Payne the father had been a conveyancer. He retired from the profession but still kept his office in Melbourne and there he devoted his time and talents to the accumulation of money by prudent investments. Mr. John Frederick William Payne also began life as a conveyancer but about 20 years ago at his father's instance he too gave up his profession. He was unmarried. He went to live in his father's house and assisted his father in the management of his business. He received no salary for his services but he had the advantage of living in his father's house. There he had all he wanted. He had some means of his own and from time to time he received presents

from his father. He had no expensive tastes: his personal expenditure was not more than 300*l.* or 400*l.* a year. Then the intended disposition of his father's estate was no secret. There were three sons. They were to be residuary legatees in equal shares and they were to bring into hotch-pot all capital sums received from their father during his life. The gifts to Mr. John Frederick William Payne large as they seem were far short of his expectations under the will. The object of these gifts was as he says to accustom him to the management of business and the responsibilities of property and to make him feel independent of his father and possibly, he thinks, to induce him to marry. A younger brother who was married at the time had been advanced on his marriage. In these circumstances it does not seem so very extraordinary that the father should make large advances to his eldest son and that the son instead of hoarding the interest (which might have given rise to jealousy and ill-will) should throw the income which he did not care to spend into a common fund investing it with his father's moneys for the ultimate benefit of himself and his brothers. Mr. Payne the father had such command of money and such skill in dealing with it that probably the son lost little or nothing by not keeping his own money in his own hands. On the whole their Lordships see no reason to dissent from the conclusion at which the Chief Justice arrived. The Judgment of the Full Court was based on a view which their Lordships cannot accept. They thought that there could be no "reason-"able motive" for making the gifts in question unless it were found in the intent to evade payment of duty. "The motive for saving "probate duty" they say "reconciles with "reason what would otherwise appear to be "useless proceedings." Though the gift might be a perfected gift and the conveyance might

fulfil all legal requisites a manifest desire on the part of the donor to avoid payment of duty was in their opinion enough to prove an intent to evade payment of duty within the meaning of the enactment.

There remains the question as to McCulloch's mortgage. That was the testator's property at the time of his death. The debtor as well as the testator resided in Victoria and was domiciled there. The debt though a specialty debt in New South Wales was a simple contract debt in Victoria. That being so it seems to their Lordships that the Chief Justice and Hood J. who dissented on this point from his colleagues were right in holding that the debt was an asset in Victoria and recoverable under a Victorian Probate although it may well be that in order to discharge the mortgage Probate duty would also have to be paid in New South Wales and the debt if recovered in Victoria might be retained in Court until the mortgagees were in a position to discharge the mortgage. This result seems to their Lordships consistent with the practice as established in England and their Lordships see no reason why a similar rule of practice should not be held to apply in an analogous case in the States of the Australian Commonwealth.

Their Lordships will therefore humbly advise His Majesty that the Order of the Full Court should be discharged, each party paying his own costs of the Appeals thereto, and the Order of the Chief Justice restored.

As the Appellants have succeeded in their Appeal and the Respondents are successful in the Cross-Appeal there will be no Order as to costs here.