Privy Council Appeal No. 9 of 1953

The Commissioner of Stamp Duties of The State of New South Wales – – – – – *Appellant*

v.

Hazel May Pearse and Others – – – – – *Respondents*

AND

Hazel May Pearse and Others – – – – – *Appellants*

v.

The Commissioner of Stamp Duties of The State of New South Wales – – – – – *Respondent*

(CONSOLIDATED APPEALS)

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 9TH DECEMBER, 1953

Present at the Hearing:

VISCOUNT SIMON
LORD REID
LORD RADCLIFFE
LORD ASQUITH OF BISHOPSTONE
LORD COHEN

[*Delivered by* LORD COHEN]

The appeal and cross-appeal in this matter raise two questions in relation to the estate of Mr. Henry Bowen Aylmer Pearse (hereinafter called the Testator) who died on the 19th February, 1946.

The question raised by the appeal is as to the proper basis of valuation for the purposes of the death duty payable under s. 101 of the New South Wales Stamp Duties Act, 1920-1940 (hereinafter called the Act), of certain shares in Plashett Pastoral Company Limited (hereinafter referred to as the Company).

The question raised by the cross-appeal is whether the Commissioners are entitled to levy the higher rate of death duty specified in the Fourth Column of the Seventh Schedule to the Act on the whole or any part of the sum of £250 being the agreed amount of the legal costs which the respondent Langley, a solicitor and a trustee of the will of the Testator, is entitled to charge against the Testator's estate under the provisions of clause 13 of his will.

It will be convenient in the first place to state the relevant provisions of the Act.

Section 101D provides for the payment of a duty (therein called death duty) at the rate mentioned in the Seventh Schedule to the Act upon the final balance of the estate of every person dying after the commencement of the Stamp Duties (Amendment) Act, 1939.

The Seventh Schedule specifies the rates of duty payable. They vary according to (*a*) the amount of the estate and (*b*) the degree of relationship to the deceased of the persons to whom the property passes under his will or upon intestacy. The latter variation is indicated in the headings to the Four Columns into which the schedule is divided. Their Lordships are only concerned with the First and Fourth Columns. So far as material the heading to the First Column reads " on so much of the final balance of the estate as consists of:—(*a*) property which passes under the will . . . to the widow or lineal issue of the deceased ". The heading to the Fourth Column reads as follows " on so much of the final balance of the estate as consists of property not otherwise provided for in the First, Second or Third Columns of this Schedule ".

Section 105 provides by sub-section (1) that the final balance of the estate of a deceased person shall be computed as being the total value of his dutiable estate after making the authorised allowances in respect of his debts. Sub-section (2) provides that where not expressly otherwise provided the value of the property included in his dutiable estate shall be estimated at the date of his death.

Section 117 imposes on the legal personal representatives certain obligations as to supplying information to the Commissioner of Stamp Duties of the State of New South Wales to enable him to assess the duty payable.

Section 124 which is of great importance in determining the question raised by the appeal deals with the right of the legal personal representative to challenge the assessment made by the Commissioner and is so far as material in the following terms :—

" SECTION 124

(1) . . . any administrator liable to the payment of death duty, who is dissatisfied with the assessment of the Commissioner may, within thirty days after . . . notice of the assessment has been given to the administrator . . . , and on payment of duty in conformity with the assessment, and of the sum of Twenty Pounds as security for costs, deliver to the Commissioner a notice in writing requiring him to state a case for the opinion of the Supreme Court.

(2) The Commissioner shall thereupon state and sign a case accordingly, setting forth the facts before him on making the assessment, the assessment made by him, and the question to be decided, and shall deliver the case so signed to the person by whom the same is required (hereinafter referred to as the appellant).

(3) The appellant shall within seven days after receiving the case cause the same to be set down for hearing before the next sittings of the Full Court at which the same can be heard.

(4) On the hearing of the case the court shall determine the question submitted, and shall assess the duty chargeable and also decide the question of costs.

(5) If it is decided by the court that the assessment of the Commissioner is erroneous, any excess of duty paid in conformity with such erroneous assessment, together with any fine paid in consequence thereof, and the sum paid as security for costs shall be ordered by the court to be repaid to the appellant.

(6) If it appears to the court that the facts necessary to enable the questions submitted to be determined are not sufficiently set forth in the case or that such facts are in dispute, the court may direct all such inquiries to be made or issues to be tried as it deems

necessary in order to ascertain such necessary facts, and, if it deems fit, may amend the case. Any such inquiry may be made before a Judge of the court or the Master in Equity and, any such issue may be tried by any such Judge or a Judge of any District Court sitting either with or without a jury as the court may direct.

(7) On the hearing of the case the court shall be at liberty to draw from the facts and documents stated in the case any inference whether of fact or law which might have been drawn therefrom if proved at a trial."

Section 125 empowers the Commissioner to ascertain the value of any property by such means as he may think fit but sub-section (2) provides that his assessment shall be subject to appeal under s. 124 and his powers must also as regards shares be read as subject to s. 127, sub-section (1) of which is in the following terms:—

"SECTION 127.

(1) (*a*) For the purposes of this Act, the valuation of shares in any company, whether incorporated in or out of New South Wales, shall be made upon the basis that the memorandum and articles of association or rules of the company satisfy the requirements prescribed by the committee or governing authority of the stock exchange at the place where the share register in which the shares being valued are registered is, to enable that company to be placed on the current official list of such stock exchange at the relevant time.

(*b*) No provision in the memorandum or articles of association or rules of any company whereby or whereunder the value of the shares of a deceased or other member is to be determined shall be applicable in determining the value of the shares for the purposes of this Act.

(*c*) Notwithstanding anything contained in the foregoing provisions of this sub-section the Commissioner may in his discretion adopt as the value of a share of any class in any company the shares of which of that class are not listed on a stock exchange such sum as in the opinion of the Commissioner the holder of that share would have received in respect of that share in the event of the company being voluntarily wound up on that date upon which the value of the share is to be ascertained for the purposes of this Act."

The Company is admittedly a Company the shares in which were at the date of the Testator's death not listed on a stock exchange and its articles of association contained provisions which would have made it impossible for it to become listed. It was a family company in the sense that with the exception of one ordinary share held by the respondent Langley all the shares were held by the Testator and his brother and sisters or by their respective husbands and children, but the Testator did not hold a majority of the shares and neither he nor his executors could have forced a winding up against the wishes of the other share holders. The Testator had the right to be Managing Director and Chairman for life and had certain powers of appointing Directors. The business of the Company appears to have been the running of a station known as Plashett and its assets consisted almost entirely of land and improvements thereon and livestock.

The ordinary shares in the Company held by the Testator were included by the executors in the inventory of assets which was filed pursuant to section 117 at the value of £2 6s. 6d. per share, this figure being supported by a valuation supplied by a firm of Chartered Accountants Messrs. Robertson Crane & Gibbons. This was based on the average of the net profits for the five years ended 30th June, 1945, which after deducting the Preference dividend left an average of £1,171 9s. 0d. This the accountants capitalised at 7 per cent. in order to arrive at the value of the shares.

The Commissioner refused to accept this figure and in exercise of his powers under section 127 (1) (*c*) adopted the sum of £7 16s. 10d. per share as being the sum which in the opinion of the Commissioner the holders of the shares would have received in a winding-up. He issued his notice of assessment on the 8th July, 1948.

The executors being dissatisfied with the assessment gave notice in writing on the 6th August, 1948, requiring him to state a case for the opinion of the Supreme Court of New South Wales. He did so on the 2nd August, 1950, and included seven questions for the opinion of the Court. In view of the course which the proceedings subsequently took it is sufficient to state the first and fifth questions:—

"(1) Whether in valuing the 2,986 "B" Ordinary Shares in the Company the Commissioner was justified in exercising the discretion conferred upon him by s. 127 (1) (*c*) of the Stamp Duties Act 1920–1940 to value such shares upon a liquidation basis."

"(5) Whether by reason of Clause 13 of the Testator's will duty at the rate set out in the fourth column of the seventh schedule to the Act should be assessed on:

(A) The full amount of £250.

(B) Such amount less office overhead expenses.

(C) The executor-solicitor's share of such full amount.

(D) The executor-solicitor's share of the full amount less his proportion of overhead expenses, or

(E) No part thereof."

As the judges of the High Court point out the exact meaning of the first question is not clear but it is apparent from the judgments delivered in the Supreme Court that the real contest between the parties was whether the Court had jurisdiction to substitute its own discretion for that of the Commissioner as to the mode of valuation to be adopted. The Supreme Court held that it had that jurisdiction and the High Court was unanimous in upholding this decision. On the question raised by the cross-appeal the Supreme Court held that duty at the higher rate was leviable on the whole sum of £250 and this decision also was upheld by the High Court, Dixon C.J., and Fullagar J. dissenting.

Special leave to appeal to this Board against the decision of the High Court on the first point was granted on the 4th September, 1952, on the terms that the costs in Australia remain as directed in Australia and that the respondents' costs as between solicitor and client both of the petition for such leave and of the appeal to Her Majesty in Council should be paid by the petitioner in any event. At that time no application was made by the respondents for leave to appeal against the judgment on the fifth question which held duty to be payable on the said sum of £250, but a petition for such leave was presented shortly before the main appeal was due to be heard. It was not opposed by the appellants and the Board resolved humbly to advise Her Majesty that leave should be granted.

In the very exceptional circumstances of the case to enable appeal and cross-appeal to be heard together the Board agreed to dispense with the lodging of further cases by the parties. This had the result that their Lordships did not have the advantage of seeing on this point the considered statement in writing of the reasons of the parties normally to be found in their respective cases.

The Supreme Court of New South Wales regarded the point raised by the main appeal as concluded by the observations of the High Court in *The Commissioner of Stamp Duties* (*Q*) v. *Beak* (46 C.L.R. 585) where similar provisions in a Queensland Act were under consideration and the following passage is to be found in the unanimous judgment of the Court:—

"The contention of the Commissioner is that the appeal given by section 50 [of the Queensland Act] does not extend to enabling

> the Court to review the value adopted for shares by the Commissioner in the exercise of the discretion conferred by the last paragraph in section 47. . . . Clear words would be needed to withdraw from the general power of review given by section 50 a particular process in making up the assessment essential to the result. A reference to discretion and opinion is not enough for the purpose. The function of valuation is performed by means of discretion and opinion, and it is because as between the Crown and the subject a judgment of an officer of the Revenue should not be conclusive that an appeal is given."

The High Court regarded the matter as open though they quoted the case above cited as authority for the proposition that clear words would be needed to withdraw from the general power of review given by section 124, a particular process in making up the assessment essential to the result. They had, however, no hesitation in coming to the same conclusion as the Supreme Court as to the effect of section 127 (1) (*c*).

Having reached the conclusion that the whole question of valuation was at large both Courts decided that the mode prescribed by section 127 (1) (*c*) was not the proper mode to apply. Their Lordships pause here to observe that they do not read the decisions of the Court as excluding all reference to the value of the assets of the Company in arriving at the proper valuation of the shares but merely as deciding that it was wrong to assess the value of the shares under section 127 (1) (*c*) by reference only to what the holder thereof might have received if the Company went into liquidation on the date of the death of the Testator.

Mr. Wallace for the Commissioner began his argument by disputing the finding of the Supreme Court that the case was concluded against his client by the decision of the High Court in *Beak's* case (*supra*). He pointed out that in that case the Court was considering not the propriety of the exercise by the Commissioner of his discretionary power to value shares in a Company on the basis that the Company went into winding up on the death of a Testator but the correctness of the valuation, no attack being made on the basis selected. Their Lordships agree with this criticism and will therefore treat the observations of the High Court in *Beak's* case so far as they relate to discretion only as *obiter*.

The main submission of Mr. Wallace was that the decision of the High Court was contrary (*a*) to three decisions of this Board on Canadian Statutes and (*b*) to two decisions of the High Courts of Australia.

Before considering these decisions their Lordships would observe that no assistance can be derived from a consideration of those provisions of English Law which provide for an appeal to the Courts by way of case stated, for whether the appeal be from the special or general Commissioners of Income Tax under the Income Tax Acts, from an arbitrator under the Arbitration Act, or from Magistrates under the Summary Jurisdiction Acts, the appeal is from persons exercising judicial functions who are required to find the facts and the appeal is confined to questions of law.

The decisions of this Board on which Mr. Wallace relied were *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1940) A.C. 127, *Minister of National Revenue* v. *Wrights Canadian Ropes Ltd.* (1947) A.C. 109, and *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (1949) A.C. 24.

In the *Pioneer Laundry* case the Court was asked to review the decision of the Minister under a section of the Canadian Income War Tax Act, 1927 (R.S.C. c. 97 s. 5) which provided that income "should for the purposes of that Act be subject to a deduction of such amount as the Minister in his discretion might allow for depreciation." The Supreme Court of Canada had held that there was no power in the Court to review the decision of the Minister. This Board dissented from this view but

to quote the language of Lord Thankerton who delivered the judgment of the Board "the Court would not interfere with the decision unless . . . it was manifestly against sound and fundamental principles."

In the *Wrights Canadian Ropes* case the question at issue arose under section 6 sub-section (2) of the same Act entitling the Minister to "disallow any expense which he in his discretion might determine to be in excess of what is reasonable or normal for the business carried on by the taxpayer." Their Lordships in that case came to the conclusion that the reference to "discretion" meant no more than that the Minister was made the Judge of what is reasonable or normal but expressed their agreement with the views expressed by the Board in the *Pioneer Laundry* case as to the proper approach to be made by the Court when reviewing the decision of the Minister.

In *Fraser's* case the question arose under section 5 (*a*) of the Income War Tax Act, 1927, as amended by a statute of 1940 and the principal question at issue was whether the Minister was authorised under that section to refuse to make any allowance for exhaustion of timber limits or only authorised to determine the amount of the allowance. The Board affirming the judgment of the Supreme Court of Canada decided that the Minister could refuse to make any allowance. Their Lordships are unable to find in the judgment in that case any relevant statement of general principle which assists them in the case now before the Board.

The decisions of the High Court of Australia relied on by Mr. Wallace were *MacCormick* v. *Federal Commissioner of Taxation* (71 C.L.R. 283) and *Denver Chemical Manufacturing Company* v. *Commissioner of Taxation* (79 C.L.R. 296).

The first of these cases arose under the Gift Duty Assessment Act 1941-42 section 14 (i) (ii) of which provided that gift duty should not be payable in respect of any gift concerning which the Commissioner was satisfied that certain conditions were fulfilled. Mr. Wallace relied upon some observations of Latham, C.J., where he said at page 299:—

> "This Court has, in a series of cases involving the interpretation of taxation statutes, held that certain matters are to be determined by the exercise of a discretion by the Commissioner of Taxation, or in accordance with an opinion formed by him, and that upon an appeal the Court cannot substitute the discretion or opinion of the Court for that of the Commissioner. But in those cases the Court has also held that, if it be shown that the discretion was exercised or the opinion formed upon a wrong construction of the relevant statute, or that the discretion exercised or the opinion formed was so irrational as to be not a discretion or an opinion of the character contemplated by the statute, an assessment should be set aside and remitted to the Commissioner for reconsideration in accordance with law."

Dixon J. pointed out at page 307 that in such cases the statute conferring the discretion usually provides for reconsideration on the merits by a Board of Review.

In *Denver's* case the question arose under the Income Tax Management Acts of New South Wales. These statutes conferred on the taxpayer a right of appeal to a "Board of Appeal" and if he exercised it the Act enabled that Board to substitute its decision for that of the Commissioner. Their Lordships deciding that case held that the Court could only interfere with the decision of the Board of Appeal if that Board committed an error in law.

Their Lordships have carefully considered the judgments in the cases cited and the relevant provisions of the statutes there considered. These provisions seem to their Lordships so different from the provisions of the Stamp Duties Act (N.S.W.) that their Lordships are unable to regard the decisions in the cases cited as affording any assistance in the case now

before the Board. They agree with the High Court that the decision in the present case must turn upon the proper construction of the relevant sections in the Stamp Duties Acts.

Their Lordships find themselves in complete agreement with the reasoning of the High Court on that problem as expressed in the following extracts from the judgment prepared by Williams J.

> " There can be no question that if the statute intends that a discretion shall be exercised by a particular person and not by the Court, the jurisdiction of the Court is confined to supervising its exercise so as to ensure that it is exercised according to law. The statute in such a case makes the particular person the sole judge of the existence or non-existence of the fact or other matter upon which the right or liability of the subject depends and the Court is not at liberty to substitute its own opinion for his. If section 127 (1) (*c*) of the Stamp Duties Act means that the Commissioner is to be the sole judge of the appropriate method to adopt in valuing shares in a company not listed on a stock exchange, then the Court in exercising its powers under section 124 cannot interfere unless it can be shown that the Commissioner has acted in contravention of some principle of law. For, to be effective, the discretion must be exercised, in the words of Lord Macmillan delivering the judgment of the Privy Council in *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue, supra,* at p. 36, ' bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally '.
>
> It was not contended for the Commissioner that the Court was bound to accept the amount of the valuation arrived at on the basis of paragraph (*c*). It was admitted that the notional sums attributed to the shares by the Commissioner upon the hypothetical winding up were fully examinable. Its hands were tied only to the extent that it could be directed by the Commissioner to adopt the mode of valuation prescribed by the paragraph. This attitude of counsel for the Commissioner seems somewhat inconsistent. The paragraph would seem to protect the opinion of the Commissioner as to the sums the shares would realise on a liquidation to the same extent as his discretion to adopt this mode of valuation. There is no half-way house. Either each and every activity of the Commissioner under the paragraph is subject to complete judicial review under section 124, or each and every activity can only be reviewed to the same limited extent.
>
> When the wide powers conferred upon the Court of section 124 are considered it is apparent, we think, that it was intended to make the decision of the Commissioner to adopt the paragraph subject to complete judicial review. Section 124 contains elaborate provisions for ascertaining all the facts necessary to enable the questions submitted to be determined, and subsection (4) provides that on the hearing of the case the Court shall determine the question submitted and shall assess the duty chargeable and also decide the question of costs. Duty is payable upon the final balance of the estate, and section 105 provides that the final balance of the estate of a deceased person shall be computed as being the total value of his dutiable estate after making such allowances as are thereinafter authorised in respect of the debts of the deceased. It also provides that, save as in this Act expressly provided, the value of the property included in his dutiable estate shall be estimated as at the date of the death of the deceased. If the duty is imposed upon the Court of itself assessing the duty chargeable, it seems to us necessarily to follow that the Court must itself value the property included in the dutiable estate. That does not mean of course that the Court must value every item. It is only concerned with the items of value which are in dispute."

Mr. Wallace submitted that the High Court had ignored the fact that the only appeal allowed was by way of case stated and suggested that this implied a limitation on the powers of the Court in dealing with the questions submitted but their Lordships would observe that there appears to be no limit on the number or scope of the questions of law or fact which the dissatisfied legal personal representative can require to be raised.

Mr. Wallace also argued that the object of the section was to prevent evasion or undue limitation of the duty and that this object would be defeated if the Commissioner's decision to proceed under section 127 (1) (*c*) was open to review. Their Lordships are unable to accept this contention.

Prior to 1924 shares in companies of a class not listed on a stock exchange were valued by analogy with shares in partnerships on the basis of the interest of the shareholders in the assets of the Company, but in 1924 this provision was altered and a provision substantially in the form of sub-section (1) (*a*) was introduced. In 1931 the present sub-sections (*a*) and (*b*) became law. Williams J. who, their Lordships were informed, had great experience of this class of case, states in his judgment that notwithstanding the alterations of the law in 1924 shares of companies not listed on the stock exchange had in rare instances been valued on the basis prescribed in paragraph (*c*) and he suggests that paragraph (*c*) was introduced to preclude the argument that this course was not permissible even in those cases where it was best calculated to arrive at a fair value of the shares. This explanation seems to their Lordships reasonable but be that as it may their Lordships agree with Williams J. that paragraph (*c*) contains no sufficient indication compelling the Court to attribute to the Legislature the capricious intention that the Court should remain under the duty of deciding a dispute between the subjects and the Commissioner as to the value of the shares but should be handcuffed to the particular mode chosen by the Commissioner.

Before their Lordships Mr. Wallace somewhat faintly sought to resile from the admission made in the High Court and to contend that the Court had only limited powers even to review the opinion of the Commissioner as to value. Their Lordships are unable to accept this argument since they agree with the High Court that as section 124 confers such wide general powers of review both of fact and of law and imposes on the Court the definite obligation to assess the duty chargeable it is impossible to extract from section 127 (1) (*c*) an exclusion from these powers of the right to question both the mode of valuation and the value adopted by the Commissioner.

Reading the provisions of the statute as a whole their Lordships are forced to the conclusion that the intention of the statute was to leave the Court with unfettered power of review of the conclusion reached by the Commissioner. Apart from the considerations referred to by Williams J. there are one or two other matters to which their Lordships may usefully refer. Thus the statute gives no right of appeal to a Board of Review or Board of Appeal so that if the appellant's argument was well founded, it would mean that although the Commissioner had not heard any evidence or conducted anything in the nature of a judicial enquiry his decision would be final. Moreover if the Court directed enquiries as to fact under sub-section 6 and those enquiries disclosed facts which made it obvious that the adoption of the basis of valuation provided for by paragraph (*c*) of sub-section (1) of section 127 would not lead to the ascertainment of the real value of the share, it would none the less, if the argument of the appellant were to prevail, be powerless to rectify the matter.

The cross-appeal turns upon the proper meaning to be given to the Seventh Schedule of the Act. It is obvious that the provisions of this Schedule, which brings in to the law as to death duty considerations which in England were relevant as regards legacy duty but have never been relevant as to estate duty, may give rise to difficulties since the amount on which death duty is chargeable may include sums such as the amount of testamentary expenses to which no beneficiary will ever become entitled.

Their Lordships will however confine themselves to the exact question which they have now to determine viz. whether the amount which the parties have agreed as being the amount which the respondent Langley has received or will receive under clause 13 of the will is assessable at the rate specified in the Fourth Column of that Schedule and not at the rate specified in the First Column of that Schedule.

Their Lordships note that it is the practice of the Australian Courts in questions of law and equity common to both countries to follow the decisions of the Court of Appeal in England where the decisions of the Court of England appear to have settled the law. Their Lordships think that this practice is to the advantage of both systems of law since it will enable the Courts of either country to refer to the decisions of the other country for guidance in any field of law or equity common to both countries.

In the present case the issue is as to whether the amount receivable by the respondent Langley under the authority to charge retain and be paid his usual professional charges contained in clause 13 of the Testator's will ought to be regarded as property not otherwise provided for in the First, Second or Third Columns of the Seventh Schedule.

Their Lordships agree with the majority in the High Court that the decisions to which Williams J. refers and in particular the decisions in *Re Thorley* (1891) 2 Ch. 613 and *Re Brown* (1918) W.N. 118, lead inevitably to the conclusion that such a provision as clause 13 confers a gift on the executor and enables him to take out of the assets of the testator something which the law would not otherwise allow. *Re Brown* (supra) is more directly in point than *Re Thorley* since in that case Eve J. held that the amount which the solicitor Trustee would receive under a charging clause was a legacy which in the event which happened of a deficiency of assets must abate rateably with other legacies. It was not a decision of the Court of Appeal but their Lordships think that it follows inevitably from the reasoning in *Re Thorley* (supra) and *Re Pooley* 40 Ch. D. 1. Their Lordships are unable to accept the explanation of these decisions suggested by Dixon C.J. and Fullagar J. and agree with the observations of the majority that unless the High Court refused to follow the cases cited, the amount of £250 is property which falls within the Fourth Column of the Seventh Schedule of the Act. The decisions of the Court of Appeal in England are not of course binding on this Board and the decisions now under consideration have been criticised in some of the text-books. They have, however, never been doubted in any judicial decision and they have been treated as good law for so long a period that their Lordships are not prepared to depart from the principles therein laid down. Sir Garfield Barwick for the respondents agreed that the expression " pass " in the First Column to the Schedule had no technical meaning and if that is so their Lordships are of opinion that the £250 in question is money to which the respondent Langley became entitled under the will and is not property passing under the will to the widow or lineal issue of the deceased.

Before parting with this part of the case their Lordships would observe that their task has been facilitated by the fact that the parties were able to agree the value of the benefit received or to be received by the respondent Langley at £250. No question was raised as to the benefit being a contingent legacy subject to a condition which had not been and might never be fulfilled. Their Lordships had not to determine the rate of duty which would be payable on such a legacy.

For these reasons their Lordships will humbly advise Her Majesty that the appeal and cross-appeal be dismissed. It was agreed between the parties that in view of what transpired when leave to appeal was granted the proper order as to costs in the event which has happened is that the respondents' costs of the appeal shall be taxed as between solicitor and client and shall be paid by the appellant and that there shall be no order as to the costs of the cross-appeal.

(20169) Wt. 8269—26 125 12/53 D.L.

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DELIVERED BY LORD COHEN

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