HOUSE OF LORDS.

Tuesday, April 7, 1914.

(Before the Lord Chancellor (Viscount Haldane), Lords Dunedin, Atkinson, and Parker.)

ATTORNEY-GENERAL *v.* MILNE.

Revenue—Finance Act 1894 (57 *and* 58 *Vict. cap.* 30), *sec.* 5, *sub-sec.* 1 (*a*)—*Settlement Estate Duty—Property Passing on Death.*

Section 1 of the Finance Act 1894 enacts that estate duty should be leviable on the principal value of all property, real or personal, settled or not settled, which passes on the death of the deceased.

Section 2, sub-section 1, as amended by section 59 of the Finance (1909-10) Act 1910, enacts—"Property passing on the death of the deceased shall be deemed to include" property taken under a disposition purporting to act as an immediate gift *inter vivos*, unless the disposition was made three years before the death of the disponer.

Section 5, sub-section 1, enacts—When property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property (*a*) a further estate duty called settlement estate duty on the principal value of the settled property shall be levied.

Held that *qua* section 5 of the Finance Act 1894 the property must "pass at the death of the deceased," not constructively but actually. Therefore where an immediate life-interest is taken under a settlement, settlement estate duty is not payable under section 5, sub-section 1 (*a*), upon the death of the settlor within three years of the execution of the deed.

Judgment of the Court of Appeal, 1913, 2 Q.B. 606, *affirmed*, Lord Dunedin *dissenting*.

Appeal from the judgment of the Court of Appeal—COZENS-HARDY, M.R., BUCKLEY and KENNEDY, L.JJ.—*reversing* the judgment of HORRIDGE, J., 1913 1 K.B. 337.

The *facts* appear from their Lordships' considered judgment.

Their Lordships took time to consider their judgment.

LORD CHANCELLOR—At the conclusion of the case made for the Crown the inclination of my opinion was that the Attorney-General had succeeded in shaking the foundation on which the judgment of the Court of Appeal rested. After further consideration I have arrived at a different conclusion, for which I will state my reasons.

The question is whether settlement estate duty became payable under sec. 5 of the Finance Act 1894 on the death of Henry Ernest Milne, which took place on the 8th December 1911, within three years of a voluntary settlement of property made by him on the 20th May 1909. By sec. 2 of the Act of 1894 property taken under a disposition purporting to act as an immediate gift *inter vivos* is, unless the disposition was made twelve months before the death of the disponer, deemed to be property passing on his death, and is accordingly liable to estate duty at all events. The period of twelve months was, by sec. 59 of the Finance Act of 1910, extended to three years in the case of dispositions made after the 30th April 1908. That estate duty became payable on the death of the deceased is not disputed. But as the first taker under the disposition succeeded for life only, and was alive when he died, whereby no further estate duty could become payable until the death of a person taking under the settlement and competent to dispose, the question is raised whether settlement estate duty is not payable.

The answer to this question depends mainly on the interpretation to be placed on four sections of the Finance Act 1894. By sec. 1 estate duty is to be levied upon the principal value of property, settled or unsettled, which passes on death. By sec. 2 'property passing on the death of the deceased shall be deemed to include" certain specified cases of property which does not actually pass on death, like the property to which sec. 1 relates. The meaning of sec. 2 was discussed in this House in *Earl Cowley* v. *Commissioners of Inland Revenue*, [1899] A.C. 198, and was explained to be that the section was not a definition of the field of sec. 1, but was framed for the purpose of rendering liable to taxation certain kinds of property that do not actually pass on death but are sufficiently analogous to property so passing as to make it proper to tax them. Sec. 2 is thus not a definition section but an independent section operating outside the field of sec. 1.

I think that this view of sec. 2 as not being a definition section is the correct one. It is confirmed by the presence in sec. 22 of what is a real definition of property passing on death as including property passing at a period ascertainable only by reference to death. I now come to sec. 5. It is in these terms—"Where property in respect of which estate duty is leviable is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property—(*a*) A further estate duty called 'settlement estate duty' on the principal value of the settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or a husband of the deceased."

The section therefore applies only to a case in which certain conditions are fulfilled. The property must be property on which estate duty is leviable. It must then be either settled by the will of the deceased, and so be property falling within sec. 1, or it must be settled by some other disposition and pass under that disposition on the death

of the deceased to a person not competent to dispose. If the disponer is someone other than the deceased a case of the kind in question is outside sec. 2 altogether. What happens is the event of passing in point of fact on death according to the natural meaning of the words. The only case to which a notional passing under that section can possibly extend is one where the disposition which creates the settlement is that of the deceased himself.

For reasons already indicated I have after consideration come to the conclusion that sec. 2 cannot properly be read as extending the category of a notional passing on death beyond what is requisite for the special purpose of bringing certain cases within sec. 1 in order to impose the particular tax which sec. 1 levies. Sec. 2 does not purport to contain a general definition made applicable to every reference to passing on death in the subsequent sections of the Act. Such a definition occurs only in sec. 22—a real definition section which is general in its application but which does not affect the question before us. If this be so, then sec. 5 ought to be read literally as referring only to an actual passing under his disposition on the death of the settlor and as excluding the notional passing which sec. 2 recognises for special purpose of sec. 1. The duty imposed by sec. 5 is a new and quite different duty.

It may be that what Parliament thought it was doing in inserting after "passing" the words "under that disposition" was, as the Attorney-General suggested, merely to provide against the event of the passing to a person not competent to dispose taking place under some disposition made independently of the deceased. It may be that if probabilities, apart from the words used, are to be looked at, there is on the construction which the Court of Appeal have put on the statute a *casus omissus* which the Legislature was unlikely to have contemplated. But all we are permitted to look at is the language used. If it has a natural meaning we cannot depart from that meaning unless reading the statute as a whole the context directs us to do so. Speculation as to a different construction having been contemplated by those who framed the Act is inadmissible, above all in a statute which imposes taxation. It is not only possible but natural to give to the words of section 5 the meaning contended for by the respondents—a meaning which restricts them to what has taken place in fact.

The only legitimate consideration that could justify a different interpretation would be one which resulted from section 2 being read as defining what was meant by "passing on death" throughout the Act. A close examination of the structure of the Act has satisfied me that this section lays down no such general canon of construction, but is confined in its operation to the limited function of adding to the cases in which the duty enacted by section 1 is imposed. In other words, section 2 has no reference to the settlement estate duty which section 5 imposes as a new and separate duty. Having come to this conclusion, I see no answer to the reasoning of Buckley, L.J., in the Court of Appeal.

I am therefore of opinion that the appeal fails, and ought to be dismissed with costs. I move accordingly.

LORD DUNEDIN—Put in a single sentence, the question in this case may be stated thus—Does the word "passes" in section 5 (1) of the Finance Act of 1894 mean "passes in the sense of this Act," or does it not? Unfortunately, to answer that question, as to which there has been a difference of judicial opinion, it is necessary to speak more at length.

I am not aware that, as a mere question of terminology, "to pass" has any technical meaning. I do not know if it has been used in other Acts of Parliament before the Finance Act. I have myself only succeeded in finding it in the Succession Duty Act of 1853. It is not there used in the taxing sections—which speak of dispositions and devolutions of law conferring a "succession"—but it is used in section 14, which enacts that "Where the interest of any successor in any personal property shall, before he shall have become entitled thereto in possession, have passed by reason of death to any other successor," then only one duty shall be payable. It is obvious that the word is here treated as a word of ordinary language, and the meaning in the context is plain enough.

The Finance Act itself does not define it. Section 22, the definition section (*l*), provides that the expression "property passing on the death" shall include certain things, but there, again, the word "passing" is not itself defined. We are therefore left to the meaning of ordinary language, subject to such light as the general use of the word in the Act and the context may give. I shall revert to this, but first I wish to treat it in reference to the general scheme of the Act.

The paramount enacting section of the Act is undoubtedly to be found in section 1. I need not quote it. The duty which it is the object of the Act to levy is imposed on property, real and personal, settled or not settled, which "passes" on the death of any person dying after the commencement of the Act. Now although the word "passes" is what I may call a neutral or vague word, it is so naturally associated with the idea of "from" and "to," and "on the death" so directs attention to the death of a person who leaves property behind him, that had that section stood alone it is reasonably clear that much property would have escaped which the framers of the Act wished to tax. Accordingly we have section 2. That section was authoritatively discussed in your Lordships' House in the case of *Earl Cowley*. Whether Lord Macnaghten was strictly correct or not in saying that the two sections were mutually exclusive seems to me to matter little. At any rate—and that is all that is material—section 2 sweeps into the net various things which section 1 would have failed to secure, or as Lord Watson put it in the case of *Attorney-General* v. *Beech*, [1899] A.C. 53, 59, "it extends it to all cases where a survivor of the deceased takes a

succession, or I should say rather derives a benefit by reason of the death of the deceased dependent upon and emerging upon the death of the deceased."

How does section 2 do this? It does not do it by being conceived in the words of a taxing section imposing the duty on certain specified kinds of property. It does it by saying that property passing on the death of the deceased—which is already taxed by virtue of section 1—shall be deemed to include the property following, that is to say, and then follow the various sub-sections.

It seems to me that that is as much as to say that the words "property passing on the death" in the first section are to be read as if the words "including the property following, that is to say, and then all the sub-sections," had been there inserted. In other words, I do not think that anyone can criticise Lord Macnaghten because in *Earl Cowley* v. *Commissioners of Inland Revenue*, [1899] A.C. 198, he talks of property being "deemed to pass," although that expression is not actually used. The net result is that the expression "property which passes," in the first section, must include property which is deemed to pass by virtue of the second section, for section 1 is the only taxing section.

I now pass to section 5, but before I examine it minutely let me look at the situation as it would have been if there had been no section 5 at all.

By section 1 and 2 a tax is imposed whenever, to use very untechnical language, a death occurs, and somebody in consequence gets property which he did not have before; and this tax is imposed on the property according to its value, irrespective of the question of the kind of interest which the new taker gets, and of his or her relation to the deceased person. It is very clear that had the matter rested there the successive takers, under settlement, of interests less than a full fee would be very hardly dealt with. The whole object therefore of section 5 is to temper this hardship, and the paramount provision of it is sub-section 2, which enacts that once estate duty has been paid since the date of the settlement in respect of settled property, then no more shall be paid till the death of a person competent to dispose. But if sub-section 2 had stood alone the property under settlement would in a series of years have come off advantageously in comparision with settled property. It was therefore thought right to arrange for a further estate duty, to be called settlement estate duty, to be levied upon settled property, and that is done by section 1 (*a*).

So far, then, it would seem that there are two questions to be answered—(1) Is property liable to estate duty? That is answered by answering whether it does or does not pass on a death, either as under section 1 or as under section 2. Then (2) if it is so liable, is it also liable to settlement estate duty? Now *prima facie* one would expect that the scope of the two sets of provisions would be the same, *i.e.*, in other words, that the question must be answered as to those kinds of property which are swept in by section 2, just as much as to those which fall under section 1. Inasmuch, however, as this is a taxing statute and the duty here is an additional duty, I consider that it must be shown that the words would clearly cover the individual case to which it is right to apply them.

I now take the words of section 5 (1) (*a*). Now I think there we have three conditions expressed — 1. The property must be property in respect of which estate duty is leviable. That obviously includes property brought in by section 1 and also that brought in by section 2. 2. It must be settled either (*a*) by the will of the deceased or (*b*) by some other disposition. 3. If it falls within the case 2 (*b*), *i.e.*, is settled by some disposition other than the will of the deceased, it must pass under that disposition on the death of the deceased to a person not competent to dispose.

It is common ground that as regards the property here in question conditions 1 and 2 (*b*) are fulfilled. It is property in respect of which estate duty is leviable. It is settled by a disposition other than the will of the deceased. The whole controversy arises as to whether it fits the words of condition No. 3. Now let me suppose for a moment that the words "on the death of the deceased" had been omitted. I imagine there could have been little controversy. Why, then, are these words inserted? The opponents of the Crown say in order to make sure that the passing is a natural passing which synchronises with the death, and here there was no such passing, for the property passed when the disposition was made two years before the death.

I think the words were introduced for quite another purpose. We must notice that here we are making an inquiry which is unnecessary as regards the duty imposed by section 1. That duty, the regular estate duty, is imposed quite irrespective of who is the taker of the passing property or of what his interest therein is. But here we wish to know whether, the property being settled, the taker is a person who is not competent to dispose. Now that necessitates a time element as applied to the different and successive interests possible to be taken by some one under the settlement. That time element is given by these words. If they were not there, consider what might be the result. A settlement might be made two years ago. A succession of limited interests are created with an eventual remainder in full fee. By the time the death occurred all the possible takers of the limited interests might have died, and the actual taker would be a person competent to dispose. It would be very unfair that he should have to pay a settlement duty for a settlement which had, so to speak, evaporated as a settlement before the time for paying the tax arrived.

I therefore come to the conclusion that the word "passes" in this section is used in the same sense as it is used in every other section, as equivalent to passes within the meaning of the Act — inclusive, that is to say, of such passing as is described in section 2. When I say every other section I

allude particularly to sections 4, 7 (4), 7 (10), 8 (4).

As I understand the argument against me, it is that what I may call the non-natural meaning of passing explained by section 2 is limited to the purposes of the duty imposed by section 1, and that section 5 imposes a new duty, and therefore being a taxing statute, as the non-natural meaning is not repeated in so many words as regards the new duty, the natural meaning must be reverted to.

I quite bow to the rule as to taxing statutes. But after all the question is what the words mean, and the expressions used must be given fair play. If, as here, where the word "passes" is used in any section except the 5th you are bound to give it the extended meaning to make sense, I think it is not giving the words used fair play suddenly to revert to another meaning in section 5—a section which is inextricably intertwined with the other sections, and which if construed as that argument would construe it leaves a perfectly obvious *casus improvisus*, for why should a will bring liability for the duty—other dispositions bring none?

I am therefore of opinion that the appeal should be allowed and the judgment of Horridge, J., restored.

LORD ATKINSON—The facts have been already stated. I think the decision of the Court of Appeal was right, and that this appeal should be dismissed.

The question turns upon the construction of the 5th section of the Finance Act of 1894. To succeed the Crown must bring the case within the letter of that enactment. It is not enough to bring the case within the spirit of it, or to show that if the section be not construed as the Crown contends it should be construed, property which ought to be taxed will escape taxation or will enjoy, under section 5, sub-section 2, an immunity from successive levies of estate duty. These evils, if such they be, must, if they exist, be cured by legislation. The judicial tribunals must in interpreting these taxing Acts stick to the letter of the statute —*Partington* v. *Attorney-General*, L.R., 4 E. & I. A. 100; *Attorney-General* v. *Earl of Selborne*, [1902] 1 K.B. 388.

The passing of property within the meaning of the 1st section of the Act has been conveniently styled "actual passing," and that under the 2nd section "notional" passing—that is, passing which in fact takes place before it is to be taken to have taken place. Under this latter section the property, the subject of this settlement of the 20th May 1909, which in fact passed from the settlor to the trustees and the beneficiaries at that date, was deemed to pass on the 8th December 1911, and by virtue of that assumption became liable to estate duty.

Now the conditions which must be fulfilled in order to render, under the 5th section, property subject to the additional duty styled settlement estate duty are these—first, estate duty must be leviable upon it. That condition has been fulfilled. Second, the property must be settled by one or other of two kinds of dispositions.

"Settled property" is by the definition clause, section 23, defined to be property comprised in a "settlement," and a "settlement" is defined to be "any instrument, whether relating to real or personal property, which is a settlement within the meaning of section 2 of the Settled Land Act 1882, or if it related to real property would be a settlement within the meaning of that section, and includes a settlement effected by a parole trust."

Under this section a settlement must limit land or any estate or interest in land to or on trust for persons by way of succession, and whether it does so or not is to be determined (sub-section 4) by the state of facts and the limitations of the settlement at the time of the latter's taking effect. In the case of a settlement by will this time of course must be at the death of the testator, since the will only speaks from that date. The "notional" passing of property cannot in any way relate to the first mode of settlement mentioned in section 5. The second mode of settlement must, like the first, create a succession, and whether it does so or not must in this case, as in the first, be determined by the condition of things and the limitations of the settlement at the time that settlement takes effect. This in the present case must be the date of the instrument. The limitations of the settlement then become operative, and to be within this section must provide that under them and by virtue of them the property should on a certain event pass to some person not competent to dispose of it. That event is the death of some person not necessarily the settlor.

The words "under that disposition," in my view, can only mean that the settlement itself is to indicate the event upon which the property is to pass, the person to whom it is to pass, and the estate or interest which is to pass to that person. *Prima facie* the word "death" naturally means a real death, not a "notional death." There is no such thing provided for in the Act as a "notional death"—no clause to the effect that a person shall be deemed to be dead when in fact he is alive. There is a provision that there shall be a "notional" passing of property, not, however, to any person named or indicated, or for any particular estate or interest. Section 2 no doubt enacts that property which in fact has passed while a person was alive shall in certain cases be deemed to have passed as if he were then dead. This section, however, is not a definition section. It is supplementary to section 1, and is designed to make liable to estate duty certain dispositions of property which are outside the scope and beyond the reach of section 1. Even if the words of section 5 were so altered as to run "by some other disposition passes, or is deemed to pass, under that disposition on the death of the deceased to some person not competent to dispose of the property," as in effect the Crown I think contend they should, it does not appear to me that it would be sufficient for the purpose of the Crown, because the property would then pass not under the "disposition" but under section 2 of the Act, while it would not be carried by that section to the person to whom it must

under section 5 be carried, namely, one not competent to dispose of it.

I do not think the provision of the settlement can be put aside in part and retained in part in this way—put aside where they fix the event on which the property is to pass—actual death—and retained when they designate the individual to whom it is to pass. Neither do I think words can be interpolated into the section to fix a burden on the subject not imposed by the letter of the statute. If there be a *casus omissus* in the Act it must be provided for by legislation. The appeal should, I think, be dismissed with costs.

LORD PARKER—The first section of the Finance Act 1894 imposes in the case of every person dying after the 1st August 1894 a duty, called "estate duty," leviable on the capital value of all property which passes on the death of such person. The expression "property passing on the death" includes, according to the definition contained in the 22nd section of the Act, property passing either immediately on the death or after any interval either contingently or certainly, and either originally or by way of substitutive limitation, and the expression "on the death" includes "at a period ascertainable only by reference to death." The expression "passing on the death" is not further defined, but is evidently used to denote some actual change in the title or possession of the property as a whole which takes place at the death. For the purpose of this section it is absolutely immaterial to whom or by virtue of what disposition the property passes.

The second section of the Act, by providing that property passing at the death shall be deemed to include certain kinds of property which do not in fact pass at the death, artificially enlarges the ambit of the expression "property passing at the death." It also artificially limits such ambit by expressly excluding certain kinds of property which do in fact pass at the death. It is in no sense a definition section.

It cannot be disputed that by virtue of section 2, coupled with section 59 of the Finance (1909-10) Act 1910, the property passing on the death of Henry Ernest Milne is to be deemed to include the settled property, and estate duty on such settled property is therefore clearly payable.

The 5th section of the Finance Act 1894 imposes an additional estate duty (called settlement estate duty), not on all property in respect of which estate duty is leviable, but where property on which estate duty is leviable is settled by the will of the deceased, or having been settled by some other dispositions, passes under that disposition on the death of the deceased to some person not competent to dispose of the property. It was argued that the initial words of this section, "where property in respect of which estate duty is leviable," raise some inference or presumption as to the kinds of property in respect of which settlement estate duty is intended to be charged.

I do not think that this is so. The words in question merely make it clear that in no case when estate duty is not leviable is it intended to impose settlement estate duty. The kinds of property on which, where estate duty is leviable, it is intended to impose the additional duty must be gathered from the following words, and consist of (1) property settled by the will of the deceased; and (2) property which, having been settled by some other disposition, passes under that disposition on the death of the deceased to some person not competent to dispose of the same. Clearly the property comprised in the settlement does not pass under the will of the deceased; nor, though it was settled by some other disposition, does it pass under that disposition on the death of the deceased. How, then, is it proposed to show that it is subject to settlement estate duty. The argument to that effect may be stated as follows:—First, it is said that by virtue of the second section the settled property must be deemed to pass on the death of Henry Ernest Milne; secondly, it is said that, this being so, it must be deemed to pass under the settlement to the person in possession of it at that death; and thirdly, it is said that this person is a person not competent to dispose of the property.

In my opinion this argument reads into that second section a great deal more than it contains. The second section, even if it be construed as providing that the settled property is to be deemed to pass on the death of Henry Ernest Milne, certainly does not provide to whom or under what disposition it shall be so deemed to pass. Indeed, these points seem to me to be immaterial for the purpose of the second section, which merely enlarges on the one hand and narrows on the other the ambit of the expression, "passing on the death." For the purpose of the imposition of estate duty it does not matter to whom or under what disposition the property passes. It is otherwise for the purpose of the settlement estate duty, and had the object of section 2 been to create a notional passing for the purpose of settlement estate duty as well as for the purpose of estate duty, one would have expected section 2 to contain some provisions as to whom and by what disposition the property was to be deemed to pass. Further, the 5th section is so worded as, in my opinion, to point to an actual as distinguished from a notional passing on death. I do not think, therefore, that the argument I have referred to ought to prevail. The Finance Act is a taxing statute, and if the Crown claims a duty thereunder it must show that such duty is imposed by clear and unambiguous words. All the words of section 5 can be satisfied without having recourse to any notional passing of property, and in my opinion considerable violence would be done to these words if the idea of a notional passing of property were introduced into the section.

In my opinion the appeal fails.

Their Lordships dismissed the appeal.

Counsel for the Appellants—Sir J. Simon, K.C. (A.-G.) — Sir S. Buckmaster, K.C (S.-G.)—Sheldon. Agent—Solicitor of Inland Revenue.

Counsel for the Respondents — Danckwerts, K.C.—Harman. Agents—Rooke & Sons, Solicitors.