

*Inheritance Tax; administration and collection; executor as personal representative delivering account of property of deceased containing estimated values; whether executor made fullest enquiries that were reasonably practicable in the circumstances; whether executor negligently delivered incorrect account; penalty; mitigation; Inheritance Tax Act 1984 sections 216, 247 and 249*

**THE SPECIAL COMMISSIONERS**

**JAMES KEITH ROBERTSON Appellant**

**- and -**

**THE COMMISSIONERS OF INLAND REVENUE Respondents**

**Special Commissioner: J GORDON REID QC**

**Sitting in Edinburgh on 4<sup>th</sup> December 2001**

**for Mr Robertson, Mr G Dean, Shepherd & Wedderburn WS, Solicitors, Edinburgh**

**for the Inland Revenue, Mr D Wishart, Solicitor, Inland Revenue Solicitor's Office, Edinburgh**

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**DECISION**

**INTRODUCTION**

This is a Hearing to determine matters raised in an "information" laid before the Special Commissioners by the Capital Taxes Office. In response to the "information" the Special Commissioners, on 23<sup>rd</sup> November 2001 summoned James Keith Robertson, 64 High Street, Kingussie, Inverness-shire to appear before them to "answer the information and to be further dealt with according to law". In broad summary, the Hearing was concerned with whether, in an Inventory of a deceased's estate, submitted both to the Capital Taxes Office for Inheritance Tax purposes, and the Sheriff Clerk for the purposes of Confirmation, Mr Robertson negligently submitted an incorrect return, in his capacity as executor of a lady named Stanley, by listing certain items in the estate as estimated values, and thus rendered himself liable to a very substantial statutory penalty.

The proceedings had the flavour of a summary criminal trial although the statutory provisions refer to the personal representative of the deceased as the defender. Mr D Wishart, solicitor, Inland Revenue Solicitor's Office, Edinburgh appeared on behalf of the Inland Revenue. He opened the Hearing and led the evidence of Mr Paul Wilkinson, a compliance adviser with the Inland Revenue Capital Taxes Office, Nottingham. Mr G. Dean, of Shepherd & Wedderburn WS, Solicitors, Edinburgh, appeared on behalf of Mr Robertson who gave evidence. There was no other oral evidence. Both parties produced a bundle of documents. The authenticity, transmission and receipt of these documents were agreed. Included among the documents produced was a Statement of Agreed Facts. For the purposes of this introduction it is sufficient to state that (1) a Mrs Stanley, an elderly lady, died on 10/10/99 leaving substantial estate, and a Will by which she appointed Mr Robertson and a Mr Louis J Paterson to be her executors. They accepted office. Mr Robertson is a solicitor and carries on business as a sole practitioner in Kingussie under the name Robertson & Company. (2) Mr Robertson compiled an Inventory of her Estate and submitted it with a cheque for the Inheritance Tax payable thereon based upon the values stated in the Inventory. Certain of the Items in the Inventory contained estimated values and this was expressly therein stated. (3) Subsequently, professional valuations were obtained for these estimated figures, and the appropriate additional tax paid. A Corrective Inventory was also lodged correcting one of the Items in the original Inventory and adding a new item. In that broad background, the Revenue contended at the Hearing that Mr Robertson has failed to comply with his statutory duty to make the fullest enquiries that were reasonably practicable in the circumstances to ascertain the exact value of two items of property belonging to the deceased and had thus negligently delivered to the Board an incorrect account rendering him liable to the penalty set out in section 247(1) of the Inheritance Taxes Act 1984 (the "1984 Act"). Proceedings were also brought against Mr Robertson's co-executor, Mr Paterson, but these were subsequently abandoned prior to the Hearing.

The Revenue sought to introduce and indeed led evidence about a third item, namely shares in ANZ Bank Group, an Australian company. These shares did not appear in the original Inventory at all but appeared in the Corrective Inventory. In my view, the Revenue were quite wrong to introduce this third Item. Standing the terms of the "Information" the evidence was not competent. Even if it were, I was not satisfied that the Revenue had established any negligence or breach of statutory duty on the part of Mr Robertson.

From the evidence and the documents I find the following facts admitted or proved ( I have incorporated the Statement of Agreed Facts into these findings): -

#### FINDINGS-IN-FACT

1. Mrs Charlotte Catherine Stanley, otherwise Wentworth-Stanley, (the "deceased") died on 10<sup>th</sup> October 1999. She resided formerly at Ingleside, Kincaig, Inverness-shire. She was 89 years old at the time of her death. She lived alone.
2. She left a Will dated 7<sup>th</sup> October 1994, registered in the Books of Council and Session on 13<sup>th</sup> October 1999, by which she appointed Mr Robertson and Mr Louis John Paterson, residing at Carrington Kincaig, Inverness-shire as her co-executors. In her Will, she bequeathed *inter alia* individual pecuniary legacies to many charitable or similar bodies and to her numerous grandchildren, great grandchildren and god children, and to many other individuals. The residue of her estate was to be divided among

five individuals of whom three resided in England, one in the United States of America and one in Spain.

3. At the date of her death, the deceased was the heritable proprietrix of Ingleside, mentioned above. She also owned the furniture, furnishings and contents thereof. By purpose SIX of her Will she bequeathed Ingleside together with the carpets and curtains to the Church of Scotland, expressing the wish that it should be accepted for use as a home for retired Ministers or retired Medical Missionaries. The remaining contents of Ingleside were bequeathed equally among four individuals.
4. At the date of her death, the deceased also owned real estate in England, described as a cottage, known as Jeffs, High Wych, by Sawbridgeworth, Herts. She had resided there with her husband until the late seventies when he died. She then moved to Ingleside. By purpose FIVE of her Will she directed her executors to offer to sell the Cottage to the then tenants (ie at the date of her Will) provided they were still tenants; further provision was made for valuation and for the proceeds of sale to form part of the residue. Although described in the Will as a cottage, the property included about five acres of grounds. Mr Robertson was unaware of this until he received the valuation report referred to below.
5. Shortly after the deceased's death, Mr Robertson and Mr Paterson visited Ingleside. They "went through" the contents and searched for papers and relevant documents. Their search through the papers belonging to the deceased was as thorough as it could be in the circumstances. It was a difficult and time consuming task as papers were "stuffed" in drawers in various rooms, and were not in any order. They considered that a valuation of the contents of Ingleside would be required.
6. Thereafter, Mr Robertson proceeded with this stage of the executry in accordance with the common or standard practice adopted by solicitors of ordinary skill exercising ordinary care in such circumstances. Mr Robertson was and is an experienced general practitioner. He was in 1999 and is experienced and skilled in acting for executors and fulfilling personally or on behalf of others the duties of executors in the winding up of estates in accordance with the law of Scotland. He qualified as a solicitor in about 1974. He was a partner in two other firms for about twenty years before branching out on his own in 1994. Throughout his career as a solicitor, he has been a general practitioner spending about 30% of his time on executry work, 50% on conveyancing and the remainder on a mixed bag of legal work. He has been appointed and has acted as an executor on many occasions; he has also acted for executors in his capacity as solicitor on many occasions. The majority of the executries he has dealt with did not require Inheritance tax to be paid but over the years he has dealt with at least about one hundred executries where Inheritance tax had to be paid.
7. The stage referred to in the preceding paragraph was the process of identifying the extent of the estate of the estate, and preparing an Inventory thereof for the purposes of Inheritance Tax and for the purposes of obtaining Confirmation to the estate from the sheriff court. For both purposes, a value has to be placed on each item of estate identified in the Inventory thereof.
8. Mr Robertson had prepared the deceased's Will and held the title deeds for Ingleside. Other than that, he had not acted for the deceased in any other matter. He was unaware of the nature or extent of her estate. In particular, he had no knowledge of her income tax affairs and was unaware whether an accountant acted for her. The deceased was somewhat secretive about her affairs and "kept herself to herself".
9. In the course of his visit to Ingleside, Mr Robertson found a letter indicating that the property in England, described as a cottage, was

occupied by longstanding tenants and that the rent was £260 per annum. He also found an old photograph of the property which showed what appeared to be a small cottage. He ascertained that the title deeds were held by a firm of solicitors named Longmuirs who had a place of business in Hertford. By Letter dated 12/10/99 he wrote to them requesting the titles, seeking advice on a suitable local valuer and seeking information about any lease and outstanding rent. He received no reply to that letter but after following it up with a telephone call, the titles were eventually delivered to his office at some point before 24<sup>th</sup> November 1999. He looked at the title deeds but it was not apparent to him that the Cottage was set in five acres of grounds. It was.

10. By letter to Mr Robertson dated 19<sup>th</sup> October 1999, the Church of Scotland raised the possibility of Ingleside being sold and the proceeds being retained by the Church as part of their General Funds. Subsequent discussions with Mr Robertson made it clear that the Church of Scotland would be unlikely to be able to find someone to occupy it and that their wish would be that it be sold.
11. The executors therefore became anxious to ensure that Ingleside could be placed on the market and sold as soon as possible. They wished to avoid retaining the property over the whole winter. It was Mr Robertson's practice not to advertise executory properties for sale until Confirmation had been issued or at least applied for, to ensure that the executors would have full title validly to convey the property to a purchaser.
12. By letter dated 22<sup>nd</sup> October 1999, Mr Robertson requested Loves of Perth, Auctioneers and Valuers, to carry out a valuation of the contents of Ingleside. A Mr Reid of Loves carried out the valuation in the presence of Mr Robertson at or about the end of October 1999. On conclusion of his work he did not give any indication to Mr Robertson of the likely value of the furnishings and contents.
13. Having identified a firm of valuers in the Yellow Pages, Mr Robertson telephoned Messrs Marshall Shepherd & Redmond, Chartered Surveyors, Hertford on 16<sup>th</sup> November 1999. They agreed to provide a valuation of the Cottage. Mr Robertson sent them a formal letter of instruction on 18<sup>th</sup> November 1999.
14. By letter to Mr Robertson dated 18<sup>th</sup> November 1999, the Church of Scotland intimated that Ingleside should be sold as they could not find a suitable occupier.
15. Between about November and February, the property market in Scotland is generally "slower" than at other times of the year and it is generally difficult to sell domestic heritable property during that period. Mr Robertson was keen to sell Ingleside before the end of the year if possible, and avoid the possible deterioration of the property over the winter months.
16. On or about 24<sup>th</sup> November 1999 Mr Robertson submitted an Inventory of the deceased's estate to the Capital Taxes Office, on form Cap Form A3(1977). The printed form, which Mr Robertson signed, contained a declaration on page 2, which provided inter alia as follows: -

"5 That the Inventory on pages (5-7\*) annexed hereto is a full and complete Inventory of the heritable estate in Scotland belonging to the deceased ...of the moveable estate of the deceased, of the real and personal estate of the deceased situated in England ....and of the estate of the deceased elsewhere ....

6 That confirmation of the estate ....amounting to £1,249,632\*\* is required.

All of which is true to the best of my knowledge and belief"

\* the number 7 was inserted in by Mr Robertson or one of his employees.

\*\* this figure was likewise inserted

17. At the bottom of page 2 of the form the following is stated: -

**"Warning to Executors**

You may be liable to penalties or prosecution if you fail to make full enquiries and to include all property on which Inheritance Tax is payable"

18. Pages 5-7 of the printed form made provision for the listing of the various items of the deceased's estate. The pages of the form signed by Mr Robertson included the following entries: -

*No of Item*

*Description*

*Price of shares*

£

1

ESTATE IN SCOTLAND

Dwellinghouse, Ingleside, Kincaig, Inverness-shire .... Estimated value

60,000

2

Furnishings and contents

Estimated value

5,000

12

ESTATE IN ENGLAND AND WALES

Heritable property known as Jeffs, Sawbridgeworth, Herts—estimated value

£50,623

19. These estimated values were, in the circumstances, reasonable. At or about the end of November 1999, Mr Robertson received Loves' valuation of the furnishings and contents of Ingleside. It amounted, in total, to £24,845.
20. By letter dated 30<sup>th</sup> November 1999, Messrs Marshall Shepherd & Redmond formally accepted instructions to carry out a valuation of the Cottage.
21. The remainder of the printed form dealt with the calculation of the Inheritance Tax payable. Page 9 contained a further Declaration that to the best of the knowledge and belief of the executor, pages 5-9 of the account specified all appropriate property and its value. This further declaration was also signed by Mr Robertson. Beside the declaration on page 9 was a further warning in identical terms to the one quoted above.
22. Page 12 of the printed form made provision for a summary of the tax payable. As completed, it stated that £409,852 was payable. This sum was paid by Mr Robertson on submitting the Inventory. A receipt therefor dated 29/11/99 is endorsed thereon by the Capital Taxes Office. In order to pay the Inheritance Tax a bank overdraft was obtained for the whole amount of the tax due.
23. Confirmation in favour of the deceased's executors was issued from the Commissariat of the Sheriffdom of Grampian, Highland and Islands at Inverness on or about 7/12/99.
24. Ingleside was advertised for sale in December 1999. Missives were concluded before Christmas with entry at the end of January 2000. The sale price was £82,000. This price was subsequently accepted by the District Valuer on behalf of the Capital Taxes Office as the date of death open market value of those subjects for Inheritance Tax purposes.
25. Mr Robertson's office was closed for about two weeks over the Christmas period in 1999/2000. He received Messrs Marshall Shepherd & Redmond's valuation report, dated 21<sup>st</sup> December 1999, on about 5<sup>th</sup> January 2000 on his return to business. The report described the Cottage as an old property kept in reasonable condition; suitable for mortgage security; it was situated within grounds of approximately five acres in a rural position on the edge of the popular village of High Wych; it had four bedrooms; there was a wooden garage; the grounds were mainly used for agricultural purposes. The property was understood to be subject to a protected tenancy and valued subject to that tenancy as at 10/10/99 at £315,000. That valuation was subsequently accepted by the District Valuer as the open market value of these subjects as at the date of the deceased's death for Inheritance Tax purposes.
26. At some point between about December and 12/1/2000, Mr Robertson or his co-executor, who was keeping an eye on Ingleside and collecting mail delivered there, discovered a dividend relating to 10333 Ordinary shares in the Australian company ANZ Banking Group.

27. On 12/1/00, Mr Robertson sent a Corrective or additional Inventory, form D1 1997 to the Capital Taxes Office, together with a cheque in settlement of additional tax of £119,538.
28. Mr Roberson completed that part of the printed form D1 headed "**ADD:** Any estate ...undervalued or omitted (Use description in Confirmation)" as follows: -

Estate in England and Wales

1 Dwellinghouse, "Jeffs", Sawbridgeworth, Herts

Valued at £315,000

Less value on original Inventory - £50,623 £264,377

Note of Estate Elsewhere

Estate in Australia

ANZ Banking Group Ltd

10333 Ordinary Shares \$A 10.19

£41,749

29. The form D1, as completed, also disclosed that the value of the deceased's gross estate had increased to £1,514,009 and that the total additional tax payable on this form was £119,538. Notwithstanding these figures, paragraphs 17 and 18 of the Statement of Agreed Facts provides as follows: -

"17. The total value of the deceased's estate as at 10 October 1999 for Inheritance Tax purposes was £1,505,978.56, representing an increase of £258,345.44 from the estate originally declared of £1,247,632.

18. The Inheritance Tax due on the estate of £1,505,978.56 is £506,792.20, representing an increase of £100,139.40 from the tax of £406,652.80 due on the estate originally declared."

30. The Corrective Inventory, form D1, signed by Mr Robertson, was submitted to the Capital Taxes Office without unreasonable delay.
31. On 2<sup>nd</sup> February 2000, the Capital Taxes Office wrote to Messrs Robertson & Co asking the basis on which the household and personal effects had been valued in the sum of £5,000 and who had carried out the valuation. In reply, Messrs Robertson & Co, by letter dated 7<sup>th</sup> February 2000, explained that the value of the furnishings and contents as stated in the Inventory was a provisional one estimated by the executors and that a formal valuation had been obtained from Loves Auction Rooms, Perth. A report dated November 1999 prepared by Messrs Loves was enclosed with the letter showing a total valuation of the deceased's furniture and contents of Ingleside as at 10<sup>th</sup> October 1999 for Inheritance Tax purposes of £24,845.
32. On 10<sup>th</sup> March 2000, the Revenue wrote to Mr Robertson making further enquiries including a request for further information as to why the original Inventory was completed before Love's valuation was available and before

Messrs Marshall Shepherd & Redman's valuation was available . By letter in reply, dated 16<sup>th</sup> March 2000, Mr Robertson stated that "time was of the essence" as the deceased's house (Ingleside) was to be sold and the executors were anxious to put this in hand before the end of the year. He further stated that it was for this reason that the executors considered that "there was an urgency to obtain Confirmation", adding that the figure in the original Inventory was felt to be reasonable at the time. In relation to the English property, the cottage known as Jeffs, he stated that the property appeared to be a modest cottage subject to a secure tenancy and that he was aware that the estimated value would be subject to adjustment in due course. In relation to the Australian shares, Mr Robertson stated in the letter that the executors were unaware of their existence when the Inventory was made up. A dividend warrant in respect of the shares was subsequently received through the post. Mr Robertson concluded his letter by intimating that Ingleside had been sold at the price of £82,000.

33. The explanations contained in the letter dated 16<sup>th</sup> March 2000 summarised in the preceding paragraph were reasonable in the circumstances. The course of action taken by Mr Robertson, in his capacity as executor and solicitor was reasonable in the circumstances.
34. The total value of the deceased's estate as at 10<sup>th</sup> October 1999 for Inheritance Tax purposes was £1,505,978.56 representing an increase of £258,345.44 (sic). The Inheritance Tax due on the estate of £1,505,978.56 is £506,792.20, representing an increase of £100,139.40 from the tax of £406,652.80 due on the estate originally declared.
35. On 19<sup>th</sup> May 2000, the Capital Taxes Office wrote to Messrs Robertson & Co advising them that, if executors do not fulfil their obligations under section 216 of the Inheritance Tax Act 1984 with the result that an incorrect account is delivered to the Inland Revenue, a penalty may be due under section 247 of the Act. The Capital Taxes Office further advised that it was considered that the executors were liable to such a penalty and that the amount of the penalty was being considered. On 16<sup>th</sup> August 2000, the Capital Taxes Office wrote again to Messrs Robertson & Co advising that it was considered that a penalty of £10,000 should be charged, calculated by reference to 10% of the culpable tax of £101,639.40 and taking into account the fact that the executors had voluntarily disclosed the relevant information and co-operated fully with the office.
36. The amount of the penalty was subsequently discussed in a telephone conversation between Mr Robertson and a member of the Capital Taxes Office on 31<sup>st</sup> October 2000. The Capital Taxes Office informed Mr Robertson that it was prepared to accept £9,000. Mr Robertson stated that he considered that a penalty of this sum was excessive and was not prepared to agree to the proposal.
37. The Revenue subsequently presented an "Information" to the Special Commissioners on 18<sup>th</sup> April 2001. It is in the following terms: -

A.1. "Having regard to the provisions of section 216(1), section 216(3) and section 247(1) Inheritance Tax Act 1984, you negligently delivered, furnished or produced to the Commissioners of Inland Revenue in November 1999 an incorrect account ("the Account") of the property which formed part of the Deceased's estate immediately before her death and of the value of that property. The account was signed by you on 24 November 1999.



2.1 On page 5 of the Account (the Inventory) you showed under the heading "Dwelling house, Ingleside, Kincaig, Inverness-shire", at item 2 "Furnishings and contents Estimated value £5,000".

2.2 In your letter of 16 March 2000 to The Registrar, Capital Taxes Office, Edinburgh, you stated the following:

"Whilst neither executor is skilled in the valuation of household goods, the deceased's house was a relatively small one and although the furnishings in some rooms were of obvious good quality, in others they were of poor quality and obviously not of great value. Although we would normally use a local valuer to carry out the valuation of furnishings in executry estates, in this case it was felt that there was the possibility that some items might be of specific antique value and Loves Auction Rooms, Perth were therefore requested to carry out the valuation as they were considered to be more knowledgeable than the local valuers. Unfortunately, although they were instructed shortly after the death of the deceased, due to distance and other commitments, the valuer was unable to travel North until 27 October and there was subsequently a delay before the issue of his report which did not reach us until over a month later. Although we did telephone the valuer before finalising the Inventory, he was unable at that point to supply a figure as he had to carry out research to establish the value of several particular items. It was not appreciated at that stage just how high the value of certain items would be and this only became apparent once the valuation was received by which time the Inventory had been lodged. Unfortunately, the valuer had not indicated to us that some of the items were of considerable value which has resulted in the substantial difference between the executors estimate and the final valuation. We confirm that all items have been transferred to the beneficiaries named in the Will rather than being sold. Whilst, ideally, we should have preferred to await the valuation before lodging the Inventory, time was of the essence as the deceased's house was to be sold and we were anxious to put this in hand before the end of 1999. It was for this reason that the executors considered that there was an urgency to obtain Confirmation. The figure was felt to be reasonable at the time".

2.3 At paragraph 2 of your letter of 7 February 2000 to the Capital Taxes Office you stated: "We confirm that the value of the furnishings and contents stated in the Inventory was a provisional one estimated by the Executor and a formal valuation has now been obtained from Loves Auction Rooms, Perth, a copy of which is enclosed". That valuation, in the sum of £24,845 is dated November 1999.

2.4 Section 3A of the above Act provides that "If the personal representatives, after making the fullest enquiries that are reasonably practicable in the circumstances, are unable to ascertain the exact value of any particular property, their account shall in the first instance be sufficient as regards that property if it contains –

(a) a statement to that effect;

(b) a provisional estimate of the value of the property; and

(c) an undertaking to deliver a further account of it as soon as its value is ascertained."

The Account neither contained such a statement, nor has any indication been given that you enquired of the valuers whom you had instructed whether your estimate of £5,000 would be the best to their knowledge and belief.

3.1 On page 6 of the Account under the heading "Estate in England & Wales" at item 12 you showed "Heritable property known as Jeffs, Sawbridgeworth, Herts – estimated value £50,623." [The figure of £50,000 appears for this property on page 8 of the Account.]

3.2 At paragraph 4 of the said letter of 7 February 2000, above, you stated: "The Executors were advised that the heritable property in England was a small cottage and it was on this basis that they (sic) estimated value was placed. After the Inventory was lodged however, a professional valuation came to hand from Messrs Marshall Shepherd and Redman, Surveyors, a copy of which we enclose". That firm provided a valuation in the sum of £315,000 on 21 December 1999.

3.3 At paragraph 2 of the letter of 16 March 2000 referred to above, you stated: "The executors had difficulty initially in obtaining the Titles of this property to ascertain its extent. Some photographs were available from which it appeared that the property was relatively modest and it is also subject to a secure tenancy. As soon as the Titles were received from Solicitors in England, the valuers were instructed on 18 November but unfortunately the tenant then went on holiday and the valuers were unable to obtain access until mid December. The executors placed what they considered to be a reasonable value upon it on an estimated basis. They were of course aware that the valuation would in any event be subject to adjustment between us in due course and were reluctant to delay lodgement of the Inventory for until the valuation was available for the reason stated above. Although we did discuss the matter with the valuer briefly, he was unable to offer any opinion on the value prior to viewing the property".

3.4 The contents of paragraph 2.4 are reiterated.

B. You have rendered yourself liable to a penalty under section 247(1) of the Act not exceeding £1,500 and the amount of the tax for which you are liable less the amount of that tax if the facts were as shown in the Account provided to the Inland Revenue.

You are therefore summoned to appear ..."

38. Immediately prior to the rendering of the original Inventory, Mr Robertson, in his capacity as executor and as solicitor had made the fullest enquiries that were reasonably practicable in the circumstances to identify the property forming the estate of the deceased and its value. In the circumstances obtaining at that time, it was not reasonably practicable to ascertain that the deceased was the holder of the Australian shares mentioned above. In the circumstances obtaining at the time, it was not reasonably practicable to ascertain the exact value of (i) Ingleside, (ii) the contents thereof, and (iii) "Jeffs", the cottage in England. The original Inventory contained a statement in respect of these three items of estate that the value stated for each item was estimated. The original Inventory contained no undertaking to deliver a further Inventory containing an account of the value of these items. Nevertheless, the Corrective

Inventory mentioned above contained such an account in relation to item (iii) and also included an account relating to the Australian shares. The values stated in the Corrective Inventory have been accepted by the Revenue as accurate date of death valuations. The sale price of Ingleside, referred to above, has been accepted by the Revenue as an accurate statement of the value of that property at the date of death of the deceased. The valuation of the furnishings and contents have been similarly accepted.

39. Mr Robertson did not negligently fail in his capacity as executor foresaid to deliver a correct account, information or document to the Board of the Inland Revenue. On the contrary, he acted prudently throughout and exercised reasonable care in his capacity as executor. Insofar as he was acting in his capacity as solicitor, he conducted himself throughout at least in the manner and with the skill of a solicitor of ordinary skill exercising ordinary care in relation to executry work, and in particular, in relation to the identification of a deceased's estate, its valuation and disposal and the preparation and submission of inventories for Inheritance Tax purposes.
40. The Inventory of the estate of the late Mrs Susan Campbell was prepared and submitted to the Revenue by Mr Robertson in 1999. It includes estimated values of heritable estate and furnishings and personal effects. Loves Auction Rooms subsequently prepared a valuation of the furnishings and personal effects, which was greater than the estimated value. The value of the heritable estate was subsequently agreed in correspondence with the District Valuer. No complaint by the Revenue of Mr Robertson's handling of that estate has been made.
41. Production R12 is a print of the Capital Taxes Office Booklet IHT13 entitled "Inheritance tax and penalties" issued in August 2000

#### THE SUMMONS OR INFORMATION

This is a curious document. It was prepared by the Capital Taxes Office in April 2001, and sent to the Office of the Special Commissioners, where it was endorsed and served, rather like a summary criminal complaint. I shall refer to it as a Summons. The statutory language of section 249 of the 1984 Act, with its references to the Court of Session and to a "defender," indicates that the proceedings are to be regarded as civil proceedings. The gravamen of the Summons was (i) in relation to the furnishings and contents of Ingleside, that the original Inventory did not contain a statement to the effect that after making the fullest enquiries that were reasonably practicable in the circumstances, the personal representatives were unable to ascertain the exact value of that property, (ii) in relation to those furnishings and contents, that no indication has been given that Mr Robertson enquired of the valuers whom he had instructed whether his estimate of £5000 would be to the best of their knowledge and belief, (iii) in relation to the property in England, the cottage known as "Jeffer's", that the original Inventory did not contain a statement to the effect that after making the fullest enquiries that were reasonably practicable in the circumstances, the personal representatives were unable to ascertain the exact value of that property, and (iv) in relation to that English property, no indication has been given that Mr Robertson enquired of the valuers whom he had instructed whether his estimate would be to the best of their knowledge and belief.

It should be noted that the Summons contains no complaint (1) about the Australian shares, (2) that the Inventory fails to contain "a provisional estimate of the value of the property," (3) that the Inventory does not contain "an undertaking to deliver a further account of the [the property whose values have been estimated] as soon as their values are ascertained," and (4) that the

Corrective Inventory failed to state the correct valuations for Ingleside and the furnishings and contents thereof. In my view, the Summons is of doubtful relevancy. However, no challenge to the relevancy of the Summons was made except perhaps for a short submission by Mr Dean that the Australian shares were a red herring. I suspect that was a challenge to the competency of the evidence relating to these shares. I have therefore made findings-in-fact on matters that are not strictly necessary to deal with the gravamen of the complaints outlined above. No application was made to amend the Summons, and I am therefore not prepared to make any finding against Mr Robertson in relation to the Australian shares or the valuation of Ingleside. As can be seen from the findings and the discussion below, I have accepted Mr Robertson's explanation in relation to these shares and that valuation, and would, in any event, have exonerated him had a complaint about these shares and the valuation of Ingleside been properly before me. I therefore agree with Mr Dean's challenge relating to the Australian shareholding.

It is true that there is no mention of the furnishings and contents in the Corrective Inventory. Mr Robertson put this down to oversight. The matter was disclosed in correspondence with the Revenue shortly after the Corrective Inventory was submitted. I would not have classified this omission as negligence in the circumstances, had the matter properly been before me. The Summons is, however, concerned only with the original November 1999 Inventory. The sale price of Ingleside falls into precisely the same category as the furnishings and contents at Ingleside, and the Cottage in England. All three items were included in the original Inventory at estimated figures which subsequently had to be increased. No explanation was given at the Hearing as to why the omissions from the Corrective Inventory (Ingleside and its contents) have not been pursued by the Revenue. It may be that the sale price of Ingleside was not included in the Corrective Inventory because as at the date of its submission the settlement of the transaction relating to the sale of Ingleside had not taken place. The purchaser might have been unable to pay the price and the property might have had to be re-advertised and sold. Whether a subsequent sale would have affected the District Valuer's views is not known. Alternatively, agreement may have already been reached with the District Valuer and it was not thought necessary to include the property in the Corrective Inventory. I would have expected an explanation from the Revenue particularly as the difference between the estimated value and sale price is greater than the difference between the estimated value and the professional valuation of the furnishings and contents of Ingleside. However, none of these matters was explored at the Hearing. No finding can be made against Mr Robertson in respect of the increase in value from the original estimate of the value of Ingleside, its contents and the English property and the omission of Ingleside and its contents from the Corrective Inventory.

#### STATUTORY DUTY

The Summons appears to complain of a breach of section 216(3A)(a) (see summary of the gravamen of the complaints in the Summons summarised above para (i) ). It should also be noted that there was a statutory duty on Mr Robertson to use the form of account prescribed by the Board. There was no suggestion at the Hearing that the Inventory either original or Corrective was on the incorrect form. Mr Wilkinson, in his evidence, devoted some time to explaining that new forms and procedures had been introduced and that seminars etc had taken place throughout the country explaining these to practitioners. Whatever value this evidence may have had it was destroyed by the unchallenged evidence of Mr Robertson that he used the "old" forms. It appears that a new

form (IHT200) was introduced in Scotland on 25/9/00 with the old A3 form still being valid until 4/12/00 ( see R/13 page 2).

One might have expected the relevant form to contain an express printed declaration that, where an item of estate is given an estimated value, it is to be taken that it is given after the fullest enquiries that were reasonably practicable in the circumstances had been made. In relation to the form completed by Mr Robertson, this must be taken to be inferred from the statement that the Inventory is compiled to the best of the signatory's knowledge and belief, in the light of the printed warning on the form quoted in finding-in-fact 18, and the fact that the items for the furnishings and contents of Ingleside, and Jeffs are stated to be estimated values. I therefore conclude that the appropriate statutory statement has been made under section 216(3A)(a) in respect of these two items. This conclusion seems to me to be consistent with the view expressed in the latest (8<sup>th</sup>) edition of *Currie on Confirmation of Executors, 1995*, paras 10.86-10.88. [see production A/17].

Whatever branches (ii) and (iv) of the gravamen of the complaints are intended to mean ( and I am not sure that they are relevant at all) the Revenue wholly failed to satisfy me that Mr Robertson did not make the fullest enquiries that were reasonably practicable in the circumstances, and thus, in some way negligently delivered, furnished or produced to the Board an incorrect account, information or document. On the contrary, I was satisfied for the reasons given below that Mr Robertson, in the circumstances that prevailed, made all reasonably practicable enquiries in relation to Ingleside's contents and the English property. Other, subsidiary statutory duties need not be considered here as they form no part of the complaints specified in the summons.

## STANDARD OF PROOF

The solicitor for the Revenue conceded that the *onus* lay on the Revenue to prove the complaints specified in the Summons and that the standard of proof was "beyond reasonable doubt" rather than on a balance of probabilities. I am not entirely convinced that the concession was correctly made and I reserve my position on its soundness. Whatever standard is applied, I am of the view that the Revenue have failed to discharge the onus incumbent upon them for the reasons set out below.

## EVIDENCE

I found the evidence of Mr Robertson to be wholly reliable and credible and many of the findings-in-fact have been taken from his evidence. He was plainly an experienced general practitioner, with a great deal of experience in executry work. He qualified as a solicitor in 1974 and has spent about 30% of his working life dealing with executries. He proceeded with this executry in the usual way, identifying the deceased's estate, instructing valuations where necessary and proceeding forthwith to lodge an Inventory for Confirmation so that the advertising and sale of Ingleside could proceed as soon as possible. What he did was, in my view, consistent with standard practice in the legal profession in Scotland and indeed with common sense. His practice was not to advertise an executry property for sale until he had either applied for or obtained Confirmation. The purpose of proceeding forthwith to obtain Confirmation, even

although the valuation of the furnishings and contents of Ingleside, and the valuation of the English property were outstanding, was to ensure that Ingleside could be marketed before the end of the year and that the executors had title to convey the subjects of sale. An executor or his solicitor would be criticised if, by the date of settlement of the transaction (completion in English parlance), the executor was unable to grant a marketable title because Confirmation in his favour had not yet been issued. The evidence discloses that his actings were justified as missives of sale of Ingleside were concluded in December 1999 and the transaction settled at the end of January 2000. Had he waited until the valuation of Jeffs had been obtained there might well have been a considerable delay in the sale of Ingleside.

With regard to the English property, Mr Robertson explained that he was aware that figures would be negotiated with the District Valuer. The estimated figure noted on the Inventory was £50,623. In answer to my questions, Mr Robertson explained that his estimate was £50,000 but due to an arithmetical error caused by an erroneous entry of £623 elsewhere in the Inventory that had to be deleted, it was necessary, in order to preserve the accuracy of the arithmetical calculations in the remaining part of the completed Inventory, to add in £623; he simply added it to the estimate of £50,000.

By inserting estimates for the three items on the Inventory, Mr Robertson explained that he was simply doing what he had done in the past without difficulty from the Revenue. He knew that figures would be adjusted in due course. He cited another estate, that of Mrs Susan Campbell where he had proceeded in the same manner as the present executry without difficulty. It was put to him in cross examination that urgency was self imposed. However, standing the findings-in-fact, that line of argument cannot be accepted. What he did was prudent in the circumstances and accorded with standard practice.

The evidence led for the Revenue was somewhat curious. The only witness was Paul Wilkinson. He was an experienced official. I have no doubt that he gave his evidence honestly and to the best of his ability. He was a compliance adviser with the Revenue's Capital Taxes Office at Nottingham. He advised other officials on matters relating to penalties. He was part of the Revenue's Compliance Support Team. The Team provided advice to other officials with a view to ensuring fair and reasonable investigations and uniformity of approach to penalties. However, he had no legal qualifications and no experience of executry practice in Scotland.

He devoted part of his evidence to explaining that he had given seminars and presentations on the new Inheritance Tax accounts forms and to a discussion of the contents of the Capital Taxes Office Booklet IHT13 entitled "Inheritance tax and penalties" issued in August 2000. It describes *inter alia* how penalties under section 247(1) of the Inheritance Taxes Act 1984 are "worked out" where the Revenue believe that an account is incorrect because of fraud or negligence. If there are mitigating circumstances, the Revenue will seek a lower penalty depending on the extent of (1) disclosure, (2) co-operation, and (3) the gravity of the offence. Percentages of the calculated penalty may be deducted in respect of each of these three factors all as more fully set forth in the booklet. He discussed these with reference to the valuation of the furnishings and contents of Ingleside. In summary, his view was that this was a fairly serious matter, there being two under valuations (the furnishings and contents of Ingleside, and the English property) and one clear omission (the Australian shares). No mention was made of the valuation of Ingleside (ie the heritable property). He also referred to IHT Newsletter dated December 2000 (R/13). It had a section setting out the Revenue's practice in relation to obtaining grants, presumably of Probate or

Confirmation, urgently. His assessment of the correspondence was that it did not disclose an urgent need to obtain Confirmation, thus justifying the imposition of a penalty. I am unable to accept that assessment. It is manifest from the findings-in-fact that it was prudent to obtain Confirmation forthwith. The way that was done was entirely sensible and in accordance with standard practice. Whether that amounts to an "urgent" need does not matter as the statutory provisions do not deploy the concept of urgency.

Mr Wilkinson went on to discuss the Revenue's approach to penalties and settlement over the years. (He did not make the decision in this case to seek a penalty.) Every case had been settled, and of the thousands of cases considered since the introduction of Capital Transfer Tax in 1975, no penalty case had come before the Special Commissioners. This line of evidence was apparently adduced to show how fair and reasonable the Revenue were. It seems to me, however, that such evidence is of little value; each case is no doubt different, and unless one were to examine each settlement, no concluded view could be reached on whether the Revenue were being fair or unfair from some sort of objective standpoint, whatever value that might have in the current proceedings. Mr Wilkinson also reviewed a colleague's assessment in relation to the present proceedings. He said that his Team dealt with applications for urgent grants, usually one or two a week, and generally relating to the sale of real estate. He did not recall any applications for an urgent grant in relation to a Scottish executry. Significantly, he accepted that paragraph 10.87 of *Currie*, referred to above, was an accurate reflection of what required to be disclosed, and that estimated values in Inventories were common.

He was asked about the estate of Mrs Susan Campbell and why similar proceedings had not been brought in relation to Mr Robertson's actings. Mr Wilkinson had not examined the Revenue file on this executry but had read a note [which was not produced] prepared by another official. In re-examination, Mr Wilkinson indicated that it was not too late to seek penalties in the Campbell executry.

## SUBMISSIONS AND DISCUSSION

Mr Wishart, for the Revenue began by identifying the statutory obligations set forth in section 216(3)(A) of the 1984 Act. He submitted that under this Act, unlike income tax, the personal representative did not have first hand knowledge of the deceased's affairs. Income tax penalty cases were therefore not helpful. His argument, at least initially, was that the Revenue's complaint was one of "timing". The Inventory was completed with undue haste. Interest was not payable for six months (1984 Act section 233(1)(b) ) and no account needed to be lodged until about twelve months following the deceased's death ( section 216(6)(a) ). By failing to wait until the valuations had been obtained, Mr Robertson ignored the warning on the Inventory form. So far as the furnishings and contents of Ingleside are concerned, the complaint was not just a matter of timing; Mr Robertson knew, having regard to the terms of his letter dated 16/3/00, that the contents included antiques; moreover; the furnishings and contents were excluded from the Corrective Inventory. Mr Robertson was only entitled to put in an Inventory after making the fullest possible enquiries. He criticised the lack of evidence as to when the existence of the ANZ shareholding was discovered. The reference to *negligence* in section 247(1) of the 1984 Act meant careless breach of duty. He relied on *R v Havering Commissioners ex parte Knight 49TC 161 at 175*. He accepted that the *onus* was on the Revenue and in relation to his concession referred to above drew my attention to *King v Walden 2001 STC 822 at 881 paragraph 71* and to *paragraphs 98 and 99* in relation to

the amount of penalty and mitigation. He submitted that in view of the amount of additional tax, over £100,000, this was not a trivial matter.

I am unable to accept all of Mr Wishart's submissions. These submissions do not address the gravamen of the complaints in the Summons as noted above. Leaving that aside, the thrust of his submissions ignores the statutory phrase reasonably practicable in the circumstances in section 216(3A). Each case must be considered having regard to its own particular circumstances. What amounts to the *fullest enquiries* in one set of circumstances may not be reasonably practicable in other circumstances. I was not addressed on how the phrase *reasonably practicable* should be construed. It is a familiar phrase in cases involving employer's liability, but there the context is very different. The findings-of-fact disclose that Mr Robertson made a thorough examination of the deceased's home shortly after her death. He appreciated that a valuation of the contents would be required. He instructed a valuation promptly. In the meantime, in accordance with accepted practice he inserted an estimated valuation in the Inventory and disclosed that it was an estimate. It was prudent in the circumstances to proceed with the preparation and lodging of the Inventory to obtain Confirmation so that Ingleside could be sold as soon as possible. I cannot classify Mr Robertson's actings as amounting to negligently delivering an incorrect account. In the first place, I do not consider the account to be incorrect. The valuation was an estimate, ie an approximation and was not stated to be the exact value. The exact value, insofar as such a valuation can ever be "exact" was greater than the estimate, but that does not necessarily mean that an incorrect account has been negligently delivered, furnished or produced. It seems to me that the fullest enquiries that were reasonably practicable in the circumstances were made. Mr Robertson was not acting in careless or wilful breach of statutory duty

In the second place, it seems to be assumed that if section 216(3A) is breached then there has been negligent delivery of an incorrect account. That does not automatically follow. Here for example, if there has been a technical breach of section 216(3A), that arises not because of any negligence on the part of Mr Robertson but because he has followed, what on the evidence, is acceptable practice in the legal profession, accords with the standard text book in this field, and is in conformity with the form of account which at the time the Revenue required to be used.

In the third place, the evidence discloses that Mr Robertson appreciated that some of the items within Ingleside might have a significant value but he had no idea how much, hence the need to instruct a professional valuation. That does not cast any doubt on the validity of his estimate or suggest that there has been a negligent delivery of an incorrect account. Fourthly, the case relating to the Australian shares was not the subject of the Summons. In any event, the Revenue adduced no evidence to show how there had been negligent delivery of an incorrect account beyond the fact of the omission of these shares from the original Inventory. That proves that the account was incorrect but it does not prove negligence. Mr Robertson gave a wholly credible explanation. The existence of the shareholding was not known at the time of the presentation of the original Inventory. Its existence was not disclosed on such bank statements as were available. The deceased's papers were in a state of disarray. She had no known accountant. A dividend warrant was subsequently delivered to Ingleside and the shareholding thus discovered. Although Mr Robertson subsequently completed an income tax form on behalf of the deceased for the period up to her date of death, the circumstances relating to its completion and its contents were not explored in evidence and I have made no findings about it. The shareholding was inserted in



a Corrective Inventory reasonably promptly. It is surprising that this matter was raised at all. In the foregoing circumstances, I am of the view that the Revenue has wholly failed on the facts to establish, either beyond reasonable doubt or on a balance of probabilities, that Mr Robertson negligently delivered, furnished, or produced to the Revenue in November 1999 an incorrect account of the deceased's property. On the contrary, on the evidence, I conclude that Mr Robertson fulfilled his common law duties as executor, and indeed as solicitor acting in an executry, and made full enquiries as to the nature and extent of the deceased's estate, inserting estimated figures where it was proper, in the circumstances, to do so. Moreover, I conclude that he did not at any stage negligently deliver an incorrect account of the property of the deceased.

In these circumstances, it is not necessary to consider the two authorities cited by Mr Wishart in any detail. *Haverling* concerned penalty proceedings under the Taxes Management Act 1970 relating to a cattle dealer's income tax assessments; there were many issues including questions of jurisdiction, prematurity and *res judicata*; these were considered in the Court of Appeal and decided against the taxpayer. The penalty issue was concerned with whether the taxpayer had fraudulently or negligently submitted incorrect accounts in connection with the ascertainment of his liability to income tax (1970 Act section 95(1) ). Earlier proceedings had established wilful default on the part of the taxpayer; this had the effect of extending the time within which penalty proceedings might be brought. It was argued that wilful default was not within section 95. This argument was rejected by the Court, Russell LJ holding that section 95 embraced careless breach of duty ie negligence and careful breach of duty ie wilful default (at 175B). If the test under the 1984 Act is careless breach of duty, then, having regard to the findings-of-fact that I have made, I hold that there has been no careless, or indeed, careful or wilful breach of duty on the part of Mr Robertson.

*King v Walden* also raised a wide range of issues. The taxpayer was found to be in wilful default or neglect in relation to out of time assessments. Interest and penalties were imposed. It was held in the Chancery Division (Jacob J) that the imposition of penalties for fraudulent or negligently delivery of incorrect accounts or returns was criminal for the purposes of Article 6(2) of the "Convention" [para 71]. There was also discussion at paragraph 98 of how penalties are assessed and negotiated by the Revenue, but it is unnecessary to consider this aspect of that case further.

Most of the submissions made by Mr Dean, on behalf of Mr Robertson, have been considered in the above discussion. In summary, his submissions were that (1) the Revenue's case failed to consider what was reasonably practicable in the circumstances, (2) the allegations relating to the Australian shares were not made in the summons, (3) on the evidence, Mr Robertson acted in accordance with accepted practice, the only evidence of practice coming from him, (4) the Revenue failed to show what a prudent executor would have done in the circumstances, and (5) Mr Wilkinson's evidence was unsatisfactory as he was not directly involved at all in the proceedings. In broad terms, I agree with these submissions for the reasons discussed above.

If I am wrong, and the true position is that Mr Robertson has negligently delivered an incorrect account, I would not regard the failure as a serious one at all; rather, I would regard it as a narrow, technical failure. In my view, on the evidence, there has been full and complete disclosure and co-operation on the part of Mr Robertson throughout his dealings with the Revenue. This is clear from the prompt and full replies to the Revenue's queries in the first few months of

2000. In these circumstances, I would have regarded the failure as minor, in spite of the amount of tax involved, and would have determined that the penalty should be nominal.

#### RESULT

I determine that (i) Mr Robertson has not negligently delivered, furnished or produced to the Board an incorrect account, information or document, (ii) the Revenue has failed to establish the allegations in the Summons and Mr Robertson falls to be assoilzied or exonerated therefrom, and (iii) Mr Robertson is not liable to any penalty under section 247 or 249 of the Inheritance Tax Act 1984, as amended, in respect of the Summons.

I reserve all questions of expenses and allow the parties twenty eight days from the release date of this decision to make any written application they consider appropriate relating to expenses

**J GORDON REID QC**  
**SPECIAL COMMISSIONER**

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