

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Blackwood v. The Queen, from the Supreme Court of the Colony of Victoria, delivered 9th December 1882.

Present :

LORD FITZGERALD.

SIR BARNES PEACOCK.

SIR MONTAGUE E. SMITH.

SIR RICHARD COUCH.

SIR ARTHUR HOBHOUSE.

In this case an action was brought by Her Majesty the Queen in the Supreme Court of Victoria against the Appellant as executor of James Blackwood, for the recovery of 5,000*l.* for duty claimed under the "Duties on the Estates of Deceased Persons Statute, 1870." It appears that James Blackwood died domiciled in Victoria, and that, besides his property in Victoria, he was the owner of certain property both real and personal in New South Wales and New Zealand. The Crown claimed duty on so much of the foreign assets as consisted of personal estate, and the Appellant resisted the claim. By consent a special case was stated, setting forth in a schedule the foreign assets on which duty was claimed, and concluding as follows:—

"5. The question for the opinion of the Court is:—

"Whether the personal estate in the said schedule or any part thereof belonging to the deceased and locally situated outside the Colony of Victoria, is liable to duty under 'The Duties on the Estates of Deceased Persons Statute, 1870.'

"6. If the Court shall be of opinion in the affirmative, then judgment shall be entered up for Her Majesty for an amount to be ascertained by the Court, or in such manner as the Court may direct, with the costs of suit.

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"7. If the Court shall be of opinion in the negative, then judgment of *nol. pros.* with costs of defence shall be entered up for the Defendant.

" The Schedule of Personal Property above referred to.

" 1. A share in station property in New South Wales, held under occupation from the Crown, with improvements, stock, &c., thereon.

" 2. Capital in the mercantile business of Dalgety Blackwood and Company in New South Wales, and accumulated profits in that business to date of death, payable in that Colony.

" 3. A share in station property in New Zealand with stock improvements &c. thereon."

The Court directed judgment to be entered for the Crown for the amount found to be due on so much of the scheduled property as was of a moveable nature so as to fall within the maxim "*Mobilia sequuntur personam.*" They held that the nature of the property should be ascertained by inquiry with reference to the laws of New South Wales and New Zealand. The correctness of that decision is challenged by the present appeal. No copy of any order is set out in the Record, as ought to have been done, and their Lordships take the decision to be as described in the judgment of the Chief Justice.

The statute under discussion was passed in the year 1870, and is numbered 388. Its general scheme is to make the representatives of a deceased person, as regards both real and personal estate, liable to pay the duty mentioned in the schedule (Sect. 8), which duty is (Sect. 10) to be deemed a debt due from the deceased to the Crown. For this purpose (Sect. 7), the representatives are to file statements specifying the particulars and value of the personal and real estate and of the debts due by the deceased, and showing the balance remaining after deducting the debts from the value of the estate. The duty payable is (Sect. 8) to be calculated upon the final balance appearing by the statements. The time of payment is to be fixed by rules made by the

Governor. In the cases of legal personal representatives the Act contemplates (Sect. 7) a grant of probate or administration prior to the filing of statements, but provides (Sect. 12) that the actual probate or letters of administration shall not issue until the duty has been paid, nor be receivable in evidence unless endorsed with a certificate by the proper officer certifying the fact of payment and its amount. The same principle applies to administrations of freehold lands and rules to administer. In the case of heirs-at-law (Sect. 7, Sub-sect. IV.), if the heir does not file his statement in proper time, the Master in Equity may assess the duty. When the legal personal representative comes to distribute the property, he is (Sect. 11), unless a testator has made a different disposition, to deduct from every devise bequest and legacy an amount equal to the duty upon such devise bequest or legacy, calculated at the same rate as is payable on the estate. The schedule imposes duty upon the estate in bulk at a percentage rate, increasing from 1 to 5 per cent., as the value of the estate increases, but (Sect. 24) a more favourable rate is allowed to the widow and children of the deceased.

There has been a great deal of discussion, both in the Court below and at the bar here, on the question whether the duty imposed by this statute is to be considered a Probate Duty or a Legacy Duty. If those terms are used merely as short descriptions familiar to English lawyers of two classes of statutes, the principle of one being to tax the property to which probate gives title and to levy that tax at a time prior to administration, and the principle of the other being to tax the property which actually falls to the successors of the deceased and to levy the tax at the time when the enjoyment accrues, they may be conveniently used for the purposes of the argument. If used for any more exact

application, they are misleading. The statute under discussion does not make any such distinction as the English law has made between Probate and Legacy duties. It imposes a single duty on the property of deceased persons. That duty resembles our Probate duty in being made a condition of the issue of the Probate, and in being taken from the estate while it is yet in bulk and before the process of administration begins. In other respects, notably by reason of its incidence on real estate, and of its being chargeable against every legatee, and of the difference in its rate according to the relation of the successor to the deceased, it more resembles our Legacy or Succession duties. The one term or the other will seem more appropriate to the statute according to the point from which it is approached or the operation it is called on to perform.

This discussion therefore is not very profitable. The essential question is whether the Victorian Legislature intended that a legal personal representative in Victoria should state accounts of all personal or all moveable estate belonging to the deceased wherever actually situate, or only accounts of so much as comes under his control by virtue of his probate. That question must be decided by a careful examination of the statute itself.

There are decisions on the construction of English statutes with reference to English methods of taxation which would be of great value if it were first found that the Victorian Legislature had adopted any such method, but which are of little value until that conclusion has been reached. It appears to their Lordships that the Court below has first searched for a rule of law, and has then bent the statute in accordance with it; whereas, until the true scope and intention of the statute has been discovered,

it cannot be seen what rules of law are applicable to it.

The words of the statute which directly affect the Appellant are to be found in Section 7, Sub-section II., and run as follows:—

“ Every executor and every administrator with
 “ the will annexed shall within the prescribed
 “ time from the grant of probate or letters of
 “ administration to him, or such further time as
 “ the Master may allow, file in the office of the
 “ Master a statement specifying the particulars
 “ of the personal estate of or to which the
 “ deceased was at his death possessed or entitled,
 “ and of the real estate comprised in such will,
 “ and the value thereof, and of the debts due by
 “ the deceased, distinguishing between secured
 “ and unsecured debts, and stating the nature of
 “ the security held for the same and the esti-
 “ mated value of such security, and showing the
 “ balance remaining after deducting the amount
 “ of the debts from the value of the estate of the
 “ testator.”

The Chief Justice says, “ *Primá facie*, the
 “ expressions ‘ personal estate ’ and ‘ real estate ’
 “ refer to estates in Victoria, affect persons resi-
 “ dent there, and relate to property within the
 “ limits of the country.” Mr. Justice Higin-
 botham says, “ In the absence of words indicating
 “ a clear intention to extend the duty beyond
 “ Victoria, the duty must be held to be limited
 “ to real and personal estates within the limits
 “ of the colony.” But then he adds, “ As there
 “ are no words of limitation, I think that the
 “ Legislature must be deemed to have intended
 “ that the duty shall be paid upon all real
 “ and personal estates whatsoever which are in
 “ contemplation of law situate in Victoria.”
 Thus, he appears to treat the absence of quali-
 fying words as indicating a clear intention to
 extend the duty beyond the *primá facie*

meaning of the words which impose it. Then it is said that personal estate is governed by the law of the country in which the owner at the time of his death was domiciled. The result of the two latter propositions is that the duty is to be paid on all personal estate, wherever situated, which belonged to the testator in this case. But the Court qualify that result by confining the duty on foreign personal estate to such part of it as is of a moveable character. The Counsel of the Respondent followed the same line of argument at this bar, excepting that they do not admit that the *prima facie* construction of the statute is against them.

It does not appear to their Lordships that the doctrines relied on are by any means conclusive of the present question. In the first place, the statement that personal estate is governed by the law of its owner's domicile must be taken with material qualifications. To say nothing of other limitations, it is limited just at the point which is material for the present purpose. The grant of probate does not of its own force carry the power of dealing with goods beyond the jurisdiction of the Court which grants it, though that may be the Court of the testator's domicile. At most it gives to the executor a generally recognized claim to be appointed by the foreign country or jurisdiction. Even that privilege is not necessarily extended to all legal personal representatives; as, for instance, when a creditor gets letters of administration in the Court of the domicile. And when the legal personal representative has been constituted in the foreign country, whether he be the executor of the domicile or another, the administration of assets must take place in the foreign country, with the effect of giving the foreign creditors priority as regards the foreign assets; as is shown by the cases of *Preston v. Melville*, 8 Cl., and *Fin. 1*; *Cook v.*

Gregson, 2 Dr. and Sm., 286. For the purpose of succession and enjoyment the law of the domicile governs the foreign personal assets. For the purpose of legal representation, of collection, and of administration, as distinguished from distribution among the successors, they are governed not by the law of the owner's domicile, but by the law of their own locality.

It is true that under the English Legacy Duty Acts, which impose a tax on the succession at the time when the enjoyment of it takes place, it has been held that the intention of the Legislature was to tax all the property of a domiciled English testator, the enjoyment of which is carried and regulated by his will. That is settled by the cases of *re Ewin*, 1 Cr. and Jer., 151; *A. G. v. Napier*, 6 Exch., 221, and other well known cases. But it is not easy to see why it should be thence inferred that the Victorian Legislature, when imposing a tax on the property while yet in bulk and waiting for administration, and as a condition precedent to the issue or validity of the instrument which is the foundation of the right to administer, intended to tax the same class of property.

The Supreme Court, as above stated, thinks that, *primá facie*, the words "personal estate" relates to property within the limits of the colony. In their strict and literal meaning the words clearly include all personal estate, wherever it may be. By their *primá facie* meaning the learned Judges perhaps intend to indicate the meaning they are calculated to bear when the subject matter of the statute is ascertained, and before legal rules and maxims are applied to it. But then they ought to have decided that the duty attaches only on the property so indicated. For their Lordships find no reason assigned for enlarging the meaning of the words so interpreted, except the application of the maxim "*Mobilia*

sequuntur personam.” And the foregoing considerations appear to them to preclude the application of that maxim to a duty like the present, unless it is made apparent by the Act itself that the Legislature intended it to apply.

Before entering into verbal criticism of the statute, it is to be remarked that no one contends for any construction of it without substantial modification of its literal meaning. According to that meaning the duty would be levied in respect of all the property of every deceased person. But the Supreme Court think that the necessary correlative of holding that the foreign assets of a domiciled Victorian must be taken into account is that the Victorian assets of one who, though resident in Victoria, had a foreign domicile, escape taxation altogether. It appears that they have so decided in the case of Bagot's estate. That question is not before their Lordships, and they express no opinion upon it.

Their Lordships conceive that one of the safest guides to the construction of sweeping general words which it is difficult to apply in their full literal sense, is to examine other words of like import in the same instrument, and to see what limitations must be imposed on them. If it is found that a number of such expressions have to be subjected to limitations or qualifications, and that such limitations or qualifications are of the same nature, that forms a strong argument for subjecting the expression in dispute to a like limitation or qualification. But that is exactly what we do find in the statute under discussion. Sub-section II. of Section 7 which has been quoted above must be read with the other sub-sections, and in them we find repeated use of the expressions of “personal estate” and “real estate,” without qualifying words, while it is impossible to read them as unqualified.

In Sub-section III. of Section 7 it is enacted that every administrator of freehold lands shall file a statement specifying the situation and extent of the freehold lands of or to which the deceased died seized or entitled. Now this general expression is clearly to be modified by confining it not only to lands in Victoria but to lands comprised in the grant of administration. For if a man dies testate as to a portion of his land, it is (by Sub-section II.) the duty of the legal personal representative to file a statement as to the real estate comprised in the will. If both these enactments are to receive a literal construction two statements would be required of, and double duty would be assessed on, the same property; and the administrator would be required to pay in respect of land which does not pass to him.

Precisely the same remark is to be made of Sub-section IV. There the heir-at-law of an intestate is directed to file a statement of the freehold lands of or to which the deceased died seized or entitled. But the meaning can only be that he shall state the freehold lands in Victoria which he takes as heir-at-law.

Again by Sub-section I. every administrator is directed to state the particulars of which the personal estate of the deceased consisted at his death, and the debts due by the deceased. An administrator is defined to be one to whom administration of the goods, chattels, rights, and credits of any person deceased intestate is granted by the Supreme or any other Court. This definition must necessarily refer to personal estate situate in Victoria. It is hard to suppose that the Legislature has required a statement of any other personal estate than that which it specified as passing to the administrator especially as an administrator does not necessarily hold the same position as an executor in a foreign Court of

Probate. And their intention not to require any statement out of the strict line of the administrator's business is shown by the direction that he is not to state debts fully secured by mortgage of real estate; evidently because it is considered that he will probably have nothing to do with those debts.

In these three cases therefore words requiring persons to make statements of all real or all personal estate have clearly to be modified by confining them to statements of property coming to the person in the character in which he is required to make the statement.

Coming to Sub-section II., the one under which the present claim for duty is made, we find that the same statement which is to specify the personal estate of the deceased is also to specify the real estate comprised in his will. A will may comprise foreign real estate. It is said that the expression "real estate" carries its own limitation with it, because it is something inconceivable—almost a violation of the law of nations—that a State should tax its subjects on the basis of their foreign real estate. But in fact personalty in England is as far beyond the direct power of the Victorian Legislature as realty in England. Suppose that a testator domiciled in Victoria has property of both kinds in England, that he gives his English realty and his Victorian personalty to a domiciled Victorian, and that for his English personalty he appoints an English executor, and gives it to a domiciled Englishman. In such a case the Victorian Government has no point of contact with the English personalty; but as regards the English realty the owner of it is the subject of that Government, and so much the richer and more able to pay taxes by reason of his ownership. There is nothing in the law of nations which prevents a Government from taxing its own subjects on the basis of their foreign

possessions. It may be inconvenient to do so. The reasons against doing so may apply more strongly to real than to personal estate. But the question is one of discretion, and is to be answered by the statutes under which each State levies its taxes, and not by mere reference to the laws which regulate successions to real and personal property. Agreeing that the statement required by Sub-section II. is not meant to include foreign real estate, their Lordships consider that construction to be a distinct modification of the literal sense of the words there used.

It is observable that the person who is directed to state the particulars of the real estate is the executor, who did not at the time nor until the passing of Act No. 427 two years afterwards, take the real estate by force of the probate. This circumstance, and this alone, makes it impossible to say that the statements required by Section 7 are in every case to be limited to the property which the person making the statement takes in that character in which he is required to make it. It is possible that this may have been an oversight, as other passages in the Act, corrected by Act 427, are alleged to have been; but their Lordships must read Act 338 as it stands.

We find then that the framers of this Act have required four descriptions of persons to state particulars of property in general terms which clearly require limitation; that in three cases the statement is to be confined to the property which the person making it takes in the character in which he is required to make the statement; and that in the fourth case the statement is to be confined to property situate in Victoria. That supplies, as it were, a key to the meaning of such general terms in this statute, and a strong reason for subjecting them to a like modification in the one other passage in which they occur.

Further passages of the Act were brought in aid of this construction, because they contain expressions which, literally construed, would embrace all the deceased's property; whereas, so it was argued, they must necessarily be confined to his Victorian property. But their Lordships do not now enter into those discussions, because the point to be decided is what statements are required by Section 7, and they think that the meaning of that section is quite clear by itself.

Other arguments were pressed at the bar, founded on considerations external to the Act. The Acts relating to curators were referred to as proving that in the view of the Legislature the property for which a curator has to account, which is clearly confined to Victoria, and the property for which an executor has to account, are coextensive. And the difficulties thrown in the way of Victorian administration by previously requiring an account of foreign assets were dwelt on, to show the improbability that the Legislature could intend such an arrangement. Their Lordships think there is force in both these lines of argument, but they do not refer to them in detail, because they find more satisfactory ground for their decision in the Act itself.

What their Lordships find is that the Victorian Legislature have imposed a tax payable by an executor, as a condition precedent to the issue and efficacy of the probate necessary for his action, out of the estate while it is in bulk, and before distribution or administration has commenced. All these things, the person to pay, the occasion for payment, the fund for payment, and the time for payment, point to the Victorian assets as the sole subject of the tax. The reasons which led English Courts to confine Probate Duty to the property directly affected by

the probate, notwithstanding the sweeping general words of the statutes which imposed it, apply in full force to this case. The circumstance that in the ultimate adjustment of the estate each beneficiary is to contribute to the duty appears to their Lordships to have no bearing on the present question. It was not because the duty fell on the residuary legatee instead of the pecuniary or specific legatees, that the English Courts placed a limitation on the general expressions of the Probate Duty Acts. It was because they thought that the Legislature could not intend to levy a tax on the grant of an instrument in respect of property which that instrument did not affect. Their Lordships think that, in imposing a duty of this nature, the Victorian Legislature also was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction. And they hold that the general expressions which import the contrary ought to receive the qualification for which the Appellants contend, and that the statement of personal property to be made by the executor under Section 7 Sub-section II. of the Act, should be confined to that property which the probate enables him to administer.

The result is that the question put by the special case should be answered in the negative, and judgment of *non pros.*, with costs of defence, should be entered up for the Defendant. The costs of this appeal must follow the result. Their Lordships will humbly advise Her Majesty in accordance with this opinion.

