CASES

DECIDED IN THE HOUSE OF LORDS,

ON APPEAL FROM THE

COURTS OF SCOTLAND.

1845.

[18*th February*, 1845.]

JOHN THOMSON, Attorney for the Executors of John Grant of Demerara, deceased, *Plaintiff in Error.*

HER MAJESTY'S ADVOCATE GENERAL, *Defendant in Error.*

Legacy Duty.—The liability of a testator's estate to legacy duty, depends upon the locality of his domicile at his death, whether as being within the kingdom or beyond it; and not upon the circumstance of his will having been confirmed or proved, and acts of administration having taken place under it, within the kingdom.

ON the 4th of April, 1837, John Grant, a British-born subject, died in the island of Demerara, where he was then domiciled, leaving large personal estate, arising out of money which he had remitted from Demerara to Scotland, for safe custody and investment, and which at his death was owing to him from the parties to whom he had made the remittance.

He left a will bearing date the 16th of December, 1829, by which he appointed executors who were resident in Demerara.

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

The executors appointed Thomson, resident in Scotland, to be their attorney. Thomson confirmed, (or proved,) the will in Scotland, received payment of the money owing to the testator in that country, and out of it paid, in Scotland, several legacies bequeathed by the will to parties resident there.

Demerara was a colony which had been acquired by this country from Holland long prior to the making of Grant's will, and thenceforward to the present time, the law of Holland was the law of the colony. By the law of Holland no duty is payable on legacies as in this country, nor any duty similar to it; neither is such duty payable in the island of Demerara.

In these circumstances, Her Majesty's Advocate filed an information against Thomson in the Court of Exchequer, in Scotland, for payment of £1800, as duty payable on the legacies given by Grant's will.

Thomson demurred to the information. The Court disallowed the demurrer, and gave judgment for the debt with costs. Thomson brought his writ of error.

On the 4th of August, 1842, the case was fully argued by two counsel of a side; *Mr. Pemberton* and *Mr. Anderson*, being for the plaintiff in error, and the Solicitor General, (*Sir William Follett*,) and *Mr. Crompton* for the defendant. But the House, considering the question involved to be one of great and general importance, directed the case to stand over, to be again argued in presence of the Judges of England.

This day, the Judges being present, the case was again argued by one counsel of a side.

Mr. Kelly for the plaintiff in error.—The ground upon which the liability for duty is rested by the Crown is the fact of the money having been locally within the kingdom, and having been administered there under the will. The obvious inconvenience and impracticability of this will be seen by supposing that the parties in Scotland, to whom the money

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

was remitted, had upon the testator's death re-transmitted it to his executors in Demerara. There could not then have been any pretext for attaching liability upon the fund, because in that case no administration would have been necessary, and even if liability could have been set up there would not be any means by which the Crown could make it effectual; the debtor would have honestly performed his duty to his creditor, and the money would be withdrawn beyond the reach of the Crown, without any possibility of legacy duty being exacted. On the other hand, no doubt, if the debtor should act dishonestly and not remit his debt, then proof of the will would be necessary in this country, and in this way the Crown might be enabled to obtain payment of the duty, through the liability of the executor proving the will. It is evident, however, that there must be a fallacy in a liability which for its efficacy depends on the honesty or dishonesty of a third party.

The true test of liability is the domicile of the testator; if that be adopted it then becomes immaterial where the property or the executor is, or what the nature of the property is, whether a debt, a chattel, or stock; or whether the testator be a subject or a foreigner. This test is reconcileable with the terms of the statute and the current of authorities.

The 36 Geo. III., cap. 52, in its 2nd section, imposes a duty on "every legacy given by any will or testamentary instrument of "any person." On every principle of legal construction this must be confined to British wills, of persons domiciled in Britain, and cannot be extended either to British colonies or to foreign countries, as none of them are mentioned. If it will embrace the colonies it will equally embrace Ireland, and yet there is another statute expressly imposing legacy duty in Ireland, so that in the case supposed, legacy duty might be twice payable out of an Irish testator's estate. In that view Ireland and the colonies would be taxed without either of them having been mentioned in the statute, or any means having been provided for enforcing payment.

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

If it be said that where a testator leaves part of his property in this country, the duty attaches upon that part, and the other goes free, there is no authority in the terms of the statute for any distinction as to parts; it says "every legacy," which means the whole and not a part. Again, if half the estate were in this country and half abroad, and the whole bequeathed to parties abroad, how much is each legatee to pay; is the duty to be apportioned among them; if so the words of the statute are departed from, and the tax would in fact be one on property, and not on legacies; and how could the apportionment be made, where the legatees stood in different degrees of relationship, and partial payments had been made in the foreign domicile?

Again, the 6th section says that the duties imposed shall be paid by the executor, and shall be a debt against him. This debt then is due at the death of the testator. In a case such as the present, is the debtor of the testator debtor to the Crown, and bound to pay; or is the executor to be the debtor, and the Crown to wait till the executor come within the kingdom? But if the debtor should have given a bill for his debt to the testator in his lifetime, which did not fall due till after his death, must he dishonour his acceptance so that he may enable the Crown to get the duty? Or if the debtor have a branch of his house at Demerara, that branch may be compelled to pay, and what then becomes of the duty, how could it be recovered?

The 27th section requires that, on payment of every legacy, a stamped receipt shall be taken, and without a stamp a receipt shall not be evidence of payment. But no duty is imposed upon receipts in Demerara, which only shows again that the estates of persons resident in Britain was contemplated, otherwise this section would indirectly impose a stamp duty where none was leviable directly.

These and many other inconveniences which might be suggested, all arise from losing sight of the rule that debts follow the person of the creditor, and confounding legacy with probate duty.

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

That rule was pointed out and recognised in Pipon *v.* Pipon, 1 *Amb.* 25, and in Thorne *v.* Watkins, 2 *Ves. Senr.* 35; in both of which cases it was held that a fund administered to by an executor, was to be distributed, not according to the law of the country in which the fund was locally situated at the death of the testator, but of the country in which the testator was domiciled at his death. So in Bruce *v.* Bruce, *Mor.* 4617, the testator was by origin a Scotchman, but was domiciled in India, and part of his estate was in England, subject to the execution of letters of attorney for its investment in Scotland, sent to persons resident there, and it was held that the estate was to be distributed according to the law of the domicile.

In re Ewin, 1 *Cro.* & *Jer.* 151, the testator was domiciled in England, and the estate upon which the question arose consisted of foreign funds transferable in the foreign countries; there it was held that the testator having been domiciled in England, legacy duty clearly attached. Justice Bayley, speaking of Logan *v.* Fairlie, 2 *Sim.* & *Stu.* 284, and Hay *v.* Fairlie, 1 *Russ.* 117, said, "These cases do not seem to me to bear upon the present "question, because there the party was not domiciled within the "limits within which the duties referred to by this Act of Par-"liament reach." In re Bruce, 2 *Cr.* & *Jer.* 436, the testator was a British-born subject domiciled in America, whose assets were partly in England, where his executor and many of the legatees resided; and it was held that the property, though locally in England, was American, and that the duty did not attach. That case was on all fours with the present.

In Jackson *v.* Forbes, 2 *Cro.* & *Jer.*, and 8 *Bli.* 15 *N. S.*, the testator was resident in India, and his estate was locally situated there, but having been sent home by the executors to be distributed in England, which was done without proof of the will, (see 2 *My.* & *Cr.*, 272, *per* Lord Cottenham,) it was argued by the Crown, as it is in this case, that the property having been distributed by parties in England, acting in execution of the will,

legacy duty attached. This was met by explicit argument, which, without denying the distribution alleged, insisted that the statute implied that the property should be situate, and the owner resident in Great Britain, and upon this argument the Court of Exchequer, to whom the case had been sent out of Chancery, returned a certificate that legacy duty was not chargeable.

Arnold *v.* Arnold, 2 *My. & Cr.* 256, was a case somewhat similar. The testator was resident, at his death, in India, where he had long been on military service, and his estate was situated there, but after his death was sent to England, and was there being distributed in a suit in Chancery against the executors, and in the course of the suit, proof of the will being necessary to make the suit perfect, the Crown made a claim for legacy duty. The executors resisted the claim expressly upon the ground that the right of the Crown depended upon the domicile of the testator, and they relied upon Bruce *v.* Bruce as showing that the domicile was India; the Crown again met this by the argument that the liability depended simply upon the fact whether the legacy was paid out of assets administered in Britain, without reference to the domicile of the testator, and as authorities for this the cases of Attorney General *v.* Cockerel, and Attorney *v.* Beatson, and of Logan *v.* Fairlie, were relied upon. Lord Cottenham, after expressing his opinion that upon the terms of the statute the duty was not chargeable, and noticing the authorities relied upon for the Crown, rested his judgment upon Jackson *v.* Forbes, as having authoritatively settled the question that the claim for duty did not depend upon the act of the executor in proving or not proving the will in Britain, but whether, within the meaning of the statute, the property out of which the legacies were payable was the property of a person which passed by the will of that person within the meaning of the Act, which in the previous part of his judgment he had held that it was not, because he was not a person resident in Britain, to whom and to whose property alone the Act could by its terms apply.

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

These cases show conclusively that the domicile of the testator is the test of liability, and the latter case of Arnold *v.* Arnold, is, In re Coales, 7 *Mees.* & *Wels.* 390, where the testator was domiciled in England, treated by *Baron Parke* as having proceeded on that footing; and the Vice Chancellor of England, in the Commissioners of Charitable Donations *v.* Devereux, 13 *Sim.* 14, rests his judgment upon the fact whether the testator had his residence in this country or abroad.

Mr. Solicitor General for the Crown.—In terms the statute is limited in its operation to Great Britain, but that operation is not further limited by the fact of the testator's domicile having been within or without Great Britain. If it were so, the discussions which took place in the various cases cited could hardly have arisen; all that would have been necessary on that supposition would have been to inquire as to the fact of domicile; that ascertained, there would have been an end of the case. If this were the law, should the testator have been domiciled in the colonies, the duty would not attach although the whole property might be situated and administered within Great Britain. But in all the cases the question has been, whether there was an act of administration within Great Britain by a person in a representative capacity acting in execution of the will. That has been the test of liability; and the question of domicile has been raised, only to the effect of ascertaining where the party making distribution resided, and where the fund to be distributed was situated. We do not maintain that on any principle it can be possible in every case to make the statute attach; even if that of domicile be adopted, should the testator's estate and his executor be in a foreign country, the duty could not be levied. It is easy to multiply cases of possible inconvenience whatever principle be adopted.

In all the statutes prior to 36 Geo. III., the duty was levied by a stamp on the receipt for the legacy; and the argument that upon the construction contended for by the Crown, duty might

be leviable from inhabitants of colonies or countries where no duty is imposed, would have had equal application to the administration of the law under these statutes; for if the payment were to be made within Great Britain, it could only validly have been made upon a receipt on which the duty was impressed without regard to the domicile of the testator, whether foreign or native. This was changed by the substitution of a duty payable by the executor, but there is no indication in the statute of any intention to alter the liability.

In Attorney General *v.* Cockerell, 1 *Price* 165, the decision went on the fact of the money having come to the hands of the executor within England, for the purpose of being administered according to the will. In Attorney General *v.* Beatson, 7 *Pr.*, 560, the domicile of the testator had been in Madras, but the duty was held to attach, because the estate had been applied in England. In Logan *v.* Fairly, 2 *S.* & *S.*, 284, Sir J. Leach laid down that if part of the assets are in England unappropriated, such part is to be considered as administered in England, and the duty will attach. In another branch of the same case, 1 *My.* & *Cr.* 59, Sir C. Pepys said the observations of Sir J. Leach were consistent with the view the Lords Commissioners took of the case. In Attorney General *v.* Jackson, 2 *Cro.* & *Jer.*, 382, the case turned on the will not having been proved in England, the executors deriving their authority from a foreign jurisdiction, and on the appropriation having been made in India.

In Arnold *v.* Arnold, 2 *My.* & *Cr.*, 256, the Master of the Rolls held, that the duty did not attach, because the administration was unnecessary; and in Hay *v.* Fairlie, 1 *Russ*, 117, because there had been a specific appropriation by the executors in India.

Domicile may regulate the succession to the testator, but it is difficult to see how it is in any way involved in a question of fiscal regulation. In re Ewin *supra*, the first case in which the

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

question of domicile was raised, the decision was not rested on that, but on the act of administration.

The facts of the present case, so far as regards the question at issue, are precisely the same as in the Lord Advocate *v.* Grant, a case not reported, which occurred in the Scotch Court of Exchequer in the year 1825, in the time of Chief Baron Shepherd, who said the question was, whether the legatees, being foreigners, were to have their legacies reduced by the duty, *i. e.*, whether they were to be subject to the taxes of this country: the duty was in truth an impost upon property.

[*Lord Chancellor.*—Was the legacy in that case out of real estate?]

It was out of money to be raised upon land.

[*Lord Chancellor.*—The estate there could not follow the domicile of the testator.. That case does not seem to have application.]

The question is not one of convenience or policy. If it were, domicile would not answer the end, for that question is itself often one of very great difficulty; whereas, the act of administration is the most convenient and the most reasonable, because, if the property be under British protection, it is but reasonable that it should bear British burdens.

The House, without hearing the plaintiff in error in reply, put the following question to the Judges, the Chancellor observing that he had framed it in the terms in which it is expressed, because it was one which equally affected England and Scotland:—

"A. B., a British subject, born in England, resided in a "British colony, made his will and died domiciled there. At the "time of his death, debts were owing to him in England: his "executor in England collected those debts, and, out of the "money so collected, he paid legacies to certain legatees in "England—are such legacies liable to the payment of the legacy "duty?"

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

The Judges presently returned the following answer, which was delivered in by Lord Chief Justice Tindal:—

"The question which your Lordships have put to Her "Majesty's Judges is this: 'A. B., a British-born subject, born "'in England, resided in a British colony; he made his will and "'died domiciled there. At the time of his death he had debts "'owing to him in England; his executors in England collected "'these debts, and, out of the money so collected, paid legacies "'to certain legatees in England. The question is: Are such "'legacies liable to the payment of legacy duty?'

"In answer to this question, I have the honour to inform "your Lordships that it is the opinion of all the Judges who "have heard this case argued, that such legacies are not liable to "the payment of legacy duty.

"It is admitted in all the decided cases, that the very general "words of the statute, 'every legacy given by any will or testa-"'mentary instrument of any person,' must of necessity receive "*some* limitation in their application, for they cannot in reason "extend to every person every where, whether subjects of this "kingdom or foreigners, and whether, at the time of their death, "domiciled within the realm or abroad; and, as your Lordships' "question applies only to legacies out of personal estate strictly "and properly so called, we think such necessary limitation is, "that the statute does not extend to the wills of persons, at the "time of their death, domiciled out of Great Britain, whether "the assets are locally situated within England or not; for we "cannot consider that any distinction can be properly made be-"tween debts due to the testator from persons resident in the "country in which the testator is domiciled at the time of "his death, and debts due to him from debtors resident in "another and different country, but that all such debts do equally "form part of the personal property of the testator or intestate, "and must all follow the same rule, namely, the law of the "domicile of the testator or intestate.

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

" And such principle we think may be extracted from all the " later decided cases, though sometimes attempts have been " made, perhaps ineffectually, to reconcile with them the earlier " decisions. There is no distinction whatever between the case " proposed to us and that decided in the House of Lords, Forbes " *v.* Jackson, and the Attorney General *v.* Jackson, except the " circumstance that in the present question the personal property " is assumed to be, for the purposes of the probate, locally situated " in England at the time of the testator's death; but that cir- " cumstance was held to be immaterial in the case *ex parte* Ewin, " 1 *Crompton* & *Jervis*, where it was decided that a British " subject, dying domiciled in England, legacy duty was payable " on his property in the funds of Russia, France, Austria, and " America.

" And again, in the case of Arnold *v.* Arnold, where the " testator, a natural born Englishman, but domiciled in India, " died there, it was held by Lord Cottenham that the legacy " duty was not payable upon the legacies under his will, his " Lordship adding: ' It is fortunate that this question, which has " ' been so long afloat, is now finally settled by an authoritative " ' decision of the House of Lords.'

" And as to the argument at your Lordships' bar, on the part " of the Crown, that the proper distinction was, whether the " estate was administered by a person in a representative charac- " ter in this country, and that in case of such administering, the " legacy duty was payable; we think it is a sufficient answer " thereto, that the liability to legacy duty does not depend on the " act of the executor in proving the will in this country, or upon " his administering here, the question, as it appears to us, not " being whether there be administration in England or not, but " whether the will and legacy be a will and legacy within the " meaning of the statute imposing the duty.

" For these reasons we think the legacies described in your " Lordships' question are not liable to the payment of legacy " duty."

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

The House then gave judgment in these terms:—

LORD CHANCELLOR.—My Lords, in consequence of something that was thrown out at your Lordships' bar, I think it proper to state that it was not from any serious doubt or difficulty which we considered to be inherent in this question in the former argument, that we thought it right to ask the opinion of the Judges, but it was on account of its extensive nature, and because the question applied only to Scotland in the form in which it was presented to your Lordships' House, whereas in reality and in substance it applies to the entire kingdom, not only to Great Britain, but in substance to Ireland and to all the British possessions. We thought it right therefore, in consequence of the extensive nature and operation of the question, that the case should be argued a second time; and we also thought, from the nature of the question, that it was proper to request the attendance of Her Majesty's Judges upon the occasion, because we thought that the opinion of your Lordships' House being in concurrence with the opinion of the learned Judges, would possess that weight with your Lordships, and that weight with the country, which, upon all occasions, the opinions of Her Majesty's Judges are entitled to receive.

My Lords, it appeared to me, in the course of the argument, that the question turned, as it must necessarily turn, upon the meaning of the statute. In the very first section of the statute the operation of it is limited to Great Britain; it does not extend to Ireland, it does not extend to the colonies; and therefore notwithstanding the general terms contained in the schedule, those terms must be read in connection with the first section of the Act; and it is clear therefore, that they must receive that limited construction and interpretation which is only consistent with the first section of the Act. Accordingly, my Lords, it has been determined, in the case that was cited at the bar, In re Bruce, that it does not apply, notwithstanding the extensive terms, to the case of a foreigner residing abroad, and a will made abroad,

although the property may be in England, although the executors may be in England, although the legatees may be in England, and although the property may be administered in England. That was decided expressly in the case In re Bruce, which decision has never been quarrelled with, that I am aware of, and in which the Crown seems to have acquiesced.

Also, my Lords, it has been decided in the case of British subjects domiciled in India, and having large possessions of personal property in India, that the legacy duty imposed by the Act of Parliament, does not apply to cases of that description, although the property may have been transmitted to this country by executors in India to executors in this country, for the purpose of being paid to legatees in England. Those are the limitations which have been put upon the Act by judicial decisions.

But then this distinction has been attempted to be drawn, and it is upon this distinction that the whole question turns. It is said that in this case a part of the property was in England at the time of the death of the testator, a circumstance that did not exist in the case of the Attorney General *v.* Jackson, and which did not exist in the case of Arnold *v.* Arnold; and it is supposed that some distinction is to be drawn with respect to the construction of the Act of Parliament arising out of that circumstance. I apprehend that that is an entire mistake; that personal property in England follows the law of the domicile—that it is precisely the same as if the personal property had been in India at the time of the testator's death. That is a rule of law that has always been considered as applicable to this subject; and, accordingly, the case which has been referred to by the learned Chief Justice, the case of Ewin, was a case of this description: an Englishman made his will in England—he had foreign stock in Russia, in America, in France, and in Austria; the question was, whether the legacy duty attached to that foreign stock, which was given as part of the residue, the estate being administered in England; and it was contended, I believe, in the course of the argument, by

my noble and learned friend who argued the case, in the first place that it was real property, but finding that that distinction could not be maintained, the next question was, whether it came within the operation of the Act, and although the property was all abroad, it was decided to be within the operation of the Act as personal property, on this ground, and this ground only, that though it was personal property, it must in point of law be considered as following the domicile of the testator, which domicile was England.

Now, my Lords, if you apply that principle, which has never been quarrelled with, which is a known principle of our law, to the present case, it decides the whole point in controversy; the property, or part of the property, being in this country at the time of the death of the testator, it is personal property; and taking the principle laid down in the case of Ewin, it must be considered as property within the domicile of the testator in Demerara; and it is admitted, that if it was property within the domicile of the testator in Demerara, it cannot be subject to legacy duty. Now, my Lords, that is the principle upon which this case is decided; the only distinction is that to which I have referred, and which distinction is decided by the case In re Ewin, to which the learned Chief Justice has referred.

Now, my Lords, that being the case, and the principle upon which I think this question should be decided, I was desirous of knowing what were the grounds of the judgment of the Court below. I find that the judgment was delivered by two, or rather that the case was heard by two, very learned Judges, Lord Gillies and Lord Fullerton. The judgment was delivered by the late Lord Gillies. I was anxious, therefore, from the respect which I entertain for those very learned persons, to know what were the grounds upon which their judgment was rested.

The first case to which they referred, for it was principally decided upon authority, was a case decided before Sir Samuel Shepherd, Chief Baron of Scotland. That case in the judgment

was very shortly stated; and I am very happy that the Solicitor General gave us the particulars of that case; for it appears that the legacy was charged upon real estate, and therefore it would not come within the principle which I have stated, and there might therefore have been a sufficient ground for the decision in that case. It is sufficient to say that it does not apply to the case which is now before your Lordships' House.

Then the next case which was referred to was the case of The Attorney General *v.* Dunn; but, my Lords, that could hardly be cited as an authority. It is true the point was argued, but it was not necessary for the decision of the case; and no decision, in fact, was given upon the point. The Chief Baron expressly reserved his opinion, and said, that he should not express what his opinion was. Also the learned Judge near me, Mr. Baron Parke, expressed the same thing. It is true that one of the learned Judges said, that at that moment, according to the impression upon his mind, he rather thought the duty would be chargeable: he expressed himself in those terms according to his immediate impression, but no decision was given upon the point; it was a mere *obiter dictum;* and surely such a *dictum* as that ought not to be cited as the foundation of a judgment of this description. Looking at the authorities, therefore, they appear to me not properly to support the judgment of the Court below.

The third authority was that of my Lord Cottenham. Now my Lord Cottenham, in the case of Arnold *v.* Arnold, expressly states in terms that the two cases, The Attorney General *v.* Cockerell, and the Attorney General *v.* Beatson, he considered to have been overruled. He states that in precise terms. A particular passage is selected from the judgment of my Lord Cottenham to support the opinion of the learned Judges in the Court below; but I am quite sure, when that passage is read in connection with the whole judgment of that very learned person, every person reading it with attention must be satisfied, that the inference drawn from that particular passage that was cited is not consistent with the whole tenor of the judgment.

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

It appears to me, therefore, that none of the authorities which were cited by the Court below sustained the judgment; and I am of opinion, therefore, independently of the great respect which I entertain for the judgment of the learned Judges who have assisted us upon this occasion, that upon the true construction of the Act of Parliament, and applying the known principles of the law to that construction, the legacy duty is not in a case of this description chargeable. I shall move, therefore, with your Lordships' consent, that the judgment in this case be reversed.

LORD BROUGHAM.—My Lords, I entirely agree with my noble and learned friend in the view which he takes of the construction of this statute, and of the authorities and of the argument, endeavouring to differ this case from the Attorney General *v.* Jackson, which must be taken with the matter of Ewin, also in the Exchequer. I so entirely agree upon all those three heads with my noble and learned friend, that I do not think it necessary for me to do more than generally to express my concurrence.

I wish also to add, that my recollection coincides perfectly with his as to the reasons for troubling the learned Judges to attend in this case. It was not only that it was a Scotch case from the Scotch Exchequer, but it was a case which must impose a construction upon the general Legacy Act applicable to England and the British colonies, and other foreign colonies, as well as in this case arising in Scotland, and therefore we considered that it was highly expedient to have a general consideration of the case and the assistance of the learned Judges. But we also felt this, which I am sure the recollection of my noble and learned friend will bear me out in adding, and which the recollection of my noble and learned friend near me, who was also present at the former argument, has entirely confirmed, namely, that we considered this to be a case in which there was a conflict of decisions, a conflict of authorities, which made it highly expedient that it should be settled after the fullest and most mature

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

deliberation, with the valuable assistance of the learned Judges; for there was the authority of the Attorney General *v.* Jackson in the Exchequer, and afterwards before me in Chancery, and ultimately before your Lordships in this House by appeal on a writ of error; there was that authority on the one hand, with the decision of the Exchequer not appealed against in the matter of Ewin, on the other hand; and the authority of those decisions appeared to be in some discrepancy at least—more, perhaps, real than apparent—with the two former cases of the Attorney General *v.* Beatson and the Attorney General *v.* Cockerell (I think those are the names of the two cases). It became therefore highly expedient that we should maturely weigh the whole matter before we held that that decision of the House of Lords, in the Attorney General *v.* Jackson, had completely overruled those other cases; the rather because certainly words were used in disposing of the Attorney General *v.* Jackson, which seemed to intimate the possibility of those former cases standing together with the latter cases. Upon full consideration, however, I am clearly of opinion, with my Lord Cottenham, who expressed that opinion, as it has been stated by my noble and learned friend, very strongly in the case of Arnold *v.* Arnold, that those two cases of the Attorney General and Cockerell, and the Attorney General and Beatson, cannot stand with the case of the Attorney General *v.* Jackson. Then, my Lords, the Attorney General *v.* Jackson must be considered, not merely by itself as regards its bearing upon the facts of the present case, but it must be taken into consideration, coupled with the case of *The matter* of Ewin, because otherwise ground might be supposed to exist for differing the two cases, inasmuch as it might be, and has been contended, and ably contended at the Bar, that part of the funds were locally situated in this country. But, then, take the matter of Ewin, and your Lordships must perceive at once, as my noble and learned friend has done, and as the learned Judges have done, that those two cases together in fact exhaust the present case; because, what

was wanting in the Attorney General *v.* Jackson is supplied by the decision in the matter of Ewin. I will not say supplied in terms, but what comes to the same thing, in the argument upon the construction of the statute, in the legal application of the principle, the converse was decided. Here it is a case of money or property brought over here, and administered here, the domicile of the testator or intestate being abroad out of the jurisdiction. There in the matter of Ewin it was the converse—an administration by a person domiciled here, and a testator or intestate domiciled here, and the funds locally situate abroad; it is perfectly clear that no difference can be made in consequence of that, because the principle of *mobilia sequuntur personam*, as regards their distribution and their coming or not within the scope of this revenue Act, must be taken to apply to the two cases; and the rule of law, indeed, is quite general, that in such cases the domicile governs the personal property; not the real, but the personal property is in contemplation of the law, whatever may be the fact with regard to the domicile of the testator or intestate.

I entirely agree with my noble and learned friend in the views which he has taken of the grounds of the decision of the Court below; whether that decision was before or subsequent to the decision in the case of the Attorney General *v.* Jackson, and the matter of Ewin I am not informed.

[LORD CHANCELLOR.—It was subsequent.]

LORD BROUGHAM.—Then their Lordships ought clearly to have taken it into account, and more especially if they had the light thrown upon the subject by Arnold *v.* Arnold.

[LORD CHANCELLOR.—They cite Arnold *v.* Arnold.]

LORD BROUGHAM.—That makes it still more clear that the foundation of their decision was unsound. It is to be taken into account that Lord Cottenham does not give his opinion in Arnold *v.* Arnold, merely upon the authority of the Attorney General *v.* Jackson, because he expressly says, and very candidly and fairly says, doing justice to the grounds of the decision of your Lord-

ships in this House, that independently of authorities, he is of the same opinion, and should have come to the same opinion as we did in the Attorney General *v.* Jackson, notwithstanding the conflict of other cases. We have therefore the clearest reason for saying, that if my noble and learned friend had not been unfortunately absent to-day, he would have concurred entirely in this view of the case.

Upon the whole, therefore, I entirely concur in the opinion of my noble and learned friend, and acknowledge fully and with thanks the assistance which we have derived from the learned Judges, giving the reason which I have given for our wishing to have their attendance, rather than from any great doubt or difficulty which we felt the case to be encumbered by; and, therefore, my Lords, I second my noble and learned friend's motion, that judgment be given for the plaintiff in error.

LORD CAMPBELL.—My Lords, I confess in this case I did entertain very considerable doubts, and I was exceedingly anxious that your Lordships should have the assistance of my Lords the Queen's Judges in a case that admitted of great doubt, as it seemed to me, and where the decisions were directly at variance with each other. Having heard the opinion of the learned Judges, it gives me extreme satisfaction to say that I entirely concur in it, and that the doubts which I before entertained are now entirely removed. Having heard the opinion of the learned Judges, I defer to it with the greatest respect, as I certainly could not have done if it had not satisfied my mind; in that case of course I should have found it my duty to act upon the result of my own judgment. But with the assistance of the learned Judges under the present circumstances I am removed from anything of that sort, because I agree with the learned Judges in the result at which they have arrived, and the reasons which they have assigned for the opinion they have given to your Lordships.

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

At the same time, my Lords, I believe that if the Chancellor of the Exchequer, who introduced this bill into Parliament, had been asked his opinion, he would have been a good deal surprised if he had heard that he was not to have his legacy duty on such a fund as this, where the testator was a British-born subject, and had been domiciled in Great Britain, and had merely acquired a foreign domicile, and had left property that actually was in England or in Scotland at the time of his decease. The truth is, my Lords, that the doctrine of domicile has sprung up in this country very recently, and that neither the Legislature nor the Judges, until within a few years, thought much of it; but now it is a very convenient doctrine—it is now well understood, and I think that it solves the difficulty with which this case was surrounded. The doctrine of domicile was certainly not at all regarded in the case of the Attorney General *v.* Cockerell, or the case of the Attorney General *v.* Beatson; if it had been the criterion of that time, *cadet questio*, there would have been no difficulty at all in determining this question; but now, my Lords, when we do understand this doctrine better than it was understood formerly, I think that it gives a clue which will help us to a right solution of this question.

It is impossible that the words of the statute can be received without limitation; at once foreigners must be excluded. Then the question is, what limitation is to be put upon them, and I think the just limitation is the property of persons who die domiciled in Great Britain; on such property alone I think can it be supposed that the Legislature intended to impose this tax. If a testator has died out of Great Britain with a domicile abroad, although he may have property that is in Great Britain at the time of his death, in contemplation of law that property is supposed to be situate where he was domiciled, and therefore does not come within the Act. This seems to me to be the most reasonable construction to be put upon the Act of Parliament—it is the most convenient—any other construction would lead to

THOMSON *v.* THE ADVOCATE GENERAL.—18th February, 1845.

very great difficulties; and I think the rule which is laid down by the learned Judges may now be safely acted upon, and will prevent any doubts arising hereafter. But I think that this caution should be introduced, that this applies only to legacy duty, not to probate duty, because with regard to probate duty it is not as I understand at all the opinion of the learned Judges. With respect to the probate duty, if it is necessary to take out the probate, the property being in Britain, for the purpose of that probate duty, the property would still be considered as situate in Great Britain, and the probate duty would attach. All the cases respecting probate duty are considered untouched; but with respect to the legacy duty, those two cases, the Attorney General *v.* Cockerell, and the Attorney General *v.* Beatson, must be considered as completely overturned; and domicile with respect to legacy duty is hereafter to be the rule.

LORD CHANCELLOR.—There is no question as regards the probate duty. It cannot be supposed for a moment that this affects the probate duty.

Ordered and adjudged, That the judgments given in the said Court of Exchequer in Scotland for the defendant in error be reversed.

J. TIMMS—LAW and ANTON, Agents.