*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of the Commissioner of Stamps* v. *Hope, from the Supreme Court of New South Wales; delivered* 25*th July* 1891.

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Present:

LORD FIELD.
LORD HANNEN.
MR. SHAND (LORD SHAND).

[*Delivered by Lord Field.*]

The appeal in this case is from an order of the Supreme Court of New South Wales of the 6th March 1890 on a special case stated for the opinion of the Court, by which order the Appellant was directed to repay to the Respondent the sum of 4,114*l.*, erroneously assessed upon and paid by her by way of probate duty, as executrix of the will of George Hope.

At the time of the testator's death he was resident and domiciled in the Colony of Victoria, but he died possessed of estate liable to probate duty within the jurisdiction of the Supreme Court of New South Wales, and it became necessary, therefore, for the Respondent to clothe herself with probate from that Colony.

By the Royal Charter of Justice for New South Wales, the Supreme Court is authorized to grant probates of the last wills and testaments of the inhabitants of the Colony, limited, however, to such "money, goods, chattels, and "effects as the deceased person shall be entitled

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" to within that part of the said Colony within " the Island of New Holland," and by various Stamp Duty Acts duties are authorized to be charged upon "all estates, whether real or personal, which belonged to any testator." It was also provided that the applicant for probate should lodge an affidavit and inventory setting forth an account of the estate of the deceased, with power to the Commissioner of Stamps for the Colony, if dissatisfied with the account so given, to cause a new account and inventory to be made, upon the footing of which he is to assess the duty, subject to a right of appeal, of which the present case is an exercise.

Under this Act the Respondent accordingly furnished an inventory, in which she admitted assets within the Colony to the value of 26,114*l.*, but the Appellant was dissatisfied with this account, and assessed the duty upon the footing of a new inventory, in which he charged the estate with duty upon the unpaid balance of certain promissory notes to the testator, which had been given to him under the following circumstances.

The testator, in the year 1882, was the owner of a station within the Colony of New South Wales called Beemery, which he in that year agreed to sell to Alfred Kirkpatrick and two other persons, the agreement being that the purchasers should pay to the testator the sum of 46,316*l.* 13*s.* 4*d.*, part of the purchase money, in cash, and that the sum of 92,633*l.* 6*s.* 8*d.*, the balance, with interest, should be paid by twelve promissory notes, falling due at various dates, and the due payment of which should be secured by mortgage of the station.

The cash payment was accordingly made, and the notes set out in the inventory, and dated the 21st July 1882—the last of which was payable on the 24th July 1886 (after the testator's death)—were handed over, and possession of the station

was given, and on the 12th March 1883 the purchasers executed the agreed mortgage by deed under seal. By this deed the station and effects were assigned to the testator, with the powers and provisions usual in the case of mortgage. The deed also contained a proviso for the execution of a release by the testator if the mortgagors duly retired and paid the promissory notes at maturity, the usual power of entry and sale in case of default, and in particular an express covenant by the mortgagors with the deceased "to retire " and pay the said several promissory notes as " and when the said several promissory notes " respectively shall become due and payable " according to the effect and tenor thereof " respectively."

This deed, therefore, clearly created a debt by "specialty," in which, under ordinary circumstances and without any expression or implication of a contrary intention, the simple contract debts created by the promissory notes would have been merged. But such was not the intention of the parties, and accordingly the deed contained a proviso of great importance, that "no " simple contract shall be considered as having " merged in the specialty created by or contained " in these presents, and that in any action upon " any simple contract the defence that such simple " contract was merged in or extinguished in any " specialty created by or contained in these " presents shall not be available or be used, and " that no negotiable security or securities taken " for or in respect of any moneys for the time " being owing on the security of these presents " shall in any way postpone or affect this security, " or all or any of the powers or provisions hereof " or hereby created." The latter part of the proviso was intended to meet a provision in the mortgage by which, if default was made in the payment of any of the promissory notes, the

whole of the moneys thereby secured should become immediately due and payable, and an analogous provision in the declaration of trusts of the proceeds of any sale made in the event of such default so to appropriate the proceeds. So that in such event the remedy under seal might, at the option of the deceased, at once be brought into operation for the whole remaining balance.

The testator died on the 25th April 1884. Such of the promissory notes as fell due during his lifetime had been duly paid, leaving the balance to become payable as the notes respectively should come to maturity. The testator, as before stated, resided within the Colony of Victoria at the time of his death, and had at that time the deed with him in that Colony; the debtors were resident in New South Wales; the promissory notes were held by a bank in Victoria. It was stated in the case, and apparently is the fact, that the Respondent was assessed in the Colony of Victoria, and paid duty upon this debt; but the Appellant insisted upon his right to charge the duty in New South Wales, and the Respondent therefore paid the amount under protest, and subject to the decision of the Supreme Court upon a special case, which was agreed to between the parties, and in which the question was whether the balance of 75,727*l.* 15*s.* was liable to probate duty in New South Wales as assessed.

Upon the argument of the case it was correctly held by the Supreme Court, upon the authority of the case of Blackwood *v.* The Queen (L.R., 8 Appeal Cases, 82) decided by this Board, that the general words in the Statute "personal estate" must be read as limited to such estate as the grant of probate confers jurisdiction to administer, and that the Appellant therefore, in order to establish the liability he alleged, must make out that the asset is one existing within

the local area of the limited jurisdiction created by the Act. Now a debt *per se*, although a chattel and part of the personal estate which the probate confers authority to administer, has, of course, no absolute local existence, but it has been long established in the Courts of this country, and is a well settled rule governing all questions as to which Court can confer the required authority, that a debt does possess an attribute of locality, arising from and according to its nature, and the distinction drawn and well settled has been and is whether it is a debt by contract or a debt by specialty. In the former case, the debt being merely a chose in action—money to be recovered from the debtor and nothing more—could have no other local existence than the personal residence of the debtor, where the assets to satisfy it would presumably be, and it was held therefore to be *bona notabilia* within the area of the local jurisdiction within which he resided; but this residence is of course of a changeable and fleeting nature, and depending upon the movements of the debtor, and inasmuch as a debt under seal or specialty had a species of corporeal existence by which its locality might be reduced to a certainty, and was a debt of a higher nature than one by contract, it was settled in very early days that such a debt was *bona notabilia* where it was "conspicuous," *i.e.*, within the jurisdiction within which the specialty was found at the time of death (see Wentworth on the Office of Executors, Ed. 1763, pp. 45, 47, 60).

This rule received an apt illustration in the comparatively modern case of Gurney *v.* Rawlins (2 M. and W., 87). In that case executors claimed to recover under a diocesan probate, and the subject matter of their claim was a policy of insurance under seal, by which the capital stock of an Insurance Company was made chargeable with the amount assured. The

Defendants disputed the authority of the Plaintiffs to recover under that probate, alleging that they were resident in London, and that the capital stock of the Company was out of the diocese, so that a Prerogative Probate was essential but the replication that the policy was within the diocese at the time of death was held good, on the ground that the debt was by specialty and so *bona notabilia* where it was found at the time of death.

The correctness and application of the rule was not disputed at their Lordships' bar, but it was contended on the part of the Appellant that under the circumstances of this case the debt was one by simple contract. It was urged that in substance it was the balance of the purchase money, or at the least that it was due by virtue of the promissory notes, and that it was part of the testator's estate in New South Wales, where the debtors resided at the time of death, and it was urged that the mortgage was under the circumstances of the case merely a collateral security, was never in fact acted upon, and was of no value. On the other side their Lordships were asked to hold that such was not the case, but that the taking of the mortgage under seal operated by act of law as a merger or satisfaction of the prior simple debt, and it was contended that such was the case, notwithstanding the express contract of the parties to the contrary.

This contention was founded upon the authority of the case of Price *v.* Moulton (10 C. B., 561), which was decided by Judges of very great authority. That case, however, was decided upon special demurrer, and the pleadings, as observed by the Court, are far from clear. The pleading in answer to the *indebitatus* count certainly admitted that a subsequent contract under seal, identical with the parol contract pleaded to, had been entered into between the parties, and thus

a good technical answer to the claim under the *indebitatus* count was undoubtedly set up. But the Plaintiff sought to get rid of this technicality, not by setting out the deed which would have shown its nature and specific terms, and whether it did or did not operate as a merger, but by an averment that it was made by way of security and so expressed; and it seems to their Lordships that the Court may well have considered that this mode of pleading did not deny that the terms of the deed in themselves effected the merger, but only asserted the intention of the parties that it was to be by way of collateral security only. The reported language of the Court in some places indeed seems to imply a larger and broader meaning, but, if that is to be understood as importing that a merger of a simple contract debt in a debt of a higher nature is effected by law, merely by the existence of an identical covenant, and notwithstanding the plain intention of the parties to the contrary, that is a proposition which their Lordships would hesitate to assent to.

It would appear to be contrary to other decided cases (Twopenny *v.* Young, 3 B. and C., 208), and the authorities collected and classified in 2, Fisher on Mortgages, Sections 1328 to 1334. Indeed, in the subsequent case of Boaler *v.* Mayor (19 C. B., N. S., 76), in the same Court, one of the learned Judges, who had been a party to and concurred in the judgment in Price *v.* Moulton, seems to have implied that the Court in the case of Price *v.* Moulton had no intention of laying down any such general rule, and to have done so with the assent of the very learned Counsel who had argued the case in the contrary sense.

But it does not seem to their Lordships to be necessary, for the decision of the case now before them, to come to any definite conclusion

as to the effect which ought to be given to the case of Price *v.* Moulton. If merger is an implication of law, so strong that it takes effect even against intention, then the simple contract in the present case was undoubtedly merged and extinguished, and the debt was no other than a debt by speciality. But, upon the contrary supposition, that the effect of the proviso was to preserve the remedies by simple contract to the extent stipulated for, it appears to their Lordships that the debt was still a specialty debt. The deed contains an express covenant to retire and pay the promissory notes; between the same parties it was an existing security under seal, at the time of the testator's death, for the balance then due; it would continue to be a security for a much longer period, and would be attended with advantages not belonging to debt by simple contract. Although it never became necessary to act upon the deed by taking possession or seeking any remedy under it, it was and remained a registered deed under the system of colonial registration, and of full force and validity. There is but one debt, whether in Victoria or New South Wales, and their Lordships fail to see how it can be said that that debt has not become a debt by specialty.

This is the conclusion at which the Supreme Court has arrived, and their Lordships think it is correct, and they will therefore humbly advise Her Majesty that the order below should be affirmed.

The Appellant must bear the costs of this appeal.