Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Alfred Degilbo Walsh, Manager of the Union Mortgage and Agency Company of Australia, Limited, on behalf of the said Company, v. *The Queen, from the Supreme Court of Queensland; delivered* 3*rd February* 1894.

Present:

THE LORD CHANCELLOR.
LORD WATSON.
LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD SHAND.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The Union Mortgage and Agency Company of Australia, Limited, are incorporated, and have their principal office in London, with branches in the Australian Colonies. As their name indicates, their business mainly consists in lending money upon the security of real and personal estate situated in one or other of these Colonies. The Appellant Walsh is the Manager of their branch in Queensland; and, in that capacity, he is charged with the statutory duty of making an annual return, on behalf of the Company, to the Treasurer of the Colony, for the purposes of "The Dividend Duty Act of 1890" (54 Vict., No. 10).

The object of the statute is to impose a yearly duty, at the rate of five per centum, upon that proportion of the total dividends declared

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by the company during the year which has been earned by their business in the Colony of Queensland. With that view, sect. 8 provides that the company shall, on or before the 1st day of April in each year, forward to the Colonial Treasurer a return, in prescribed form, under the hand of and made by their manager, "shewing the total average amount of the assets of the company during the preceding calendar year, the average amount of such assets in Queensland during that year, the amount of all dividends declared by the company during that year, and the dates when they were respectively declared." The same section enacts that duty is to be charged upon so much of the total dividends declared during the year "as is proportionate to the average amount of the capital of the company employed in Queensland during the year as compared with the total average capital of the company during the year."

Sect. 9 enacts, that the proportion between the capital employed in Queensland and the total capital of the company "shall be deemed to be the same as the proportion between the value of the assets of the company in Queensland and the value of the total assets of the company wherever situate." For the purposes of the section it is declared that the term "assets" means "the gross amount of all the real and personal property of the company of every kind including things in action and without making any deduction in respect of any debts or liabilities of the company."

An information was laid against the appellant, as representing the company, by the Attorney-General for the colony, claiming a penalty of £500 under the provisions of sect. 20, upon the allegation that the return made for the year 1890 contained a false statement of the value of the average amount of the company's assets in Queensland during that year. The true value

of these assets was alleged to be greatly in excess of 22,838*l.* 9*s.* 4*d.*, the sum at which they were estimated in the return.

In his defence the Appellant affirmed the accuracy of the return, and also made some explanatory statements, upon which the present controversy depends. These are in substance that, in addition to the assets returned as situated in Queensland, the Company had, during the year 1890, made advances outside that Colony, upon the security of real and personal property within it, to debtors, some of whom did, whilst others did not reside in the Colony; that, in many instances, the securities so given were collateral with securities over property of the debtor in other Colonies; that, in all cases, it was a condition of making the advance that the principal should be repaid, and also that interest as it accrued thereon from time to time should be paid, at the office by which the advance was made; and that their branch at Melbourne, in the Colony of Victoria, made the advances in question, and was in possession of the mortgages and other documents by which they were secured. The Appellant alleged that, in these circumstances, the moneys advanced in Melbourne, if they were brought to Queensland, which he did not admit, were taken thither by the borrower, and were not capital of the Company employed there by the Company.

The Attorney-General demurred to the defence thus stated. The case was then heard before a full bench of the Supreme Court, consisting of Sir Charles Lilley, C.J., with Harding, Real, Cooper, and Chubb, J.J., who unanimously allowed the demurrer, and ordered judgment to be entered for the Plaintiff with costs.

The only case presented by the Appellant in the argument addressed to their Lordships was that these secured debts, viewed as assets

of the company, are really situated either in London, the head-quarters of the company, or in Melbourne, where the transactions between them and the debtors took place, and where the latter are bound to pay, and not in Queensland. He maintained that, according to the condition in which these assets stood during the year 1890, the substance of each asset consisted in the personal obligation held by the company; that the legal situs of that obligation must determine the locality of the asset for the purposes of the Dividend Duty Act; and that the securities, being merely accessory to the personal obligation, can have no effect in regulating the nature or locality of the asset, until the creditor has, by virtue of them, entered into possession. It is obvious enough that, if the first of these propositions fails the whole argument falls to the ground.

Their Lordships do not think it necessary to consider what the result would be if these assets were regarded as personal debts due to the company by individuals, some of whom resided in and others beyond the Colony. Though resting partly upon personal obligation the debts are all charged upon real and personal estate which the appellant himself alleges to be "in Queensland." Although the debt be not yet due and payable, so that the creditor has had no occasion to resort to his security, it is in vain to suggest that a debt covered by security is in the same position with one depending on personal obligation only. The market value of assets of that kind is, in most cases, so greatly enhanced by what the appellant represents as an immaterial and accessory right, that they are generally known and dealt in as securities. It is unnecessary to attempt a precise definition of the relation in which a mortgagee or other incumbrancer who has not taken possession stands

to the subjects of his security. It is sufficient for the purposes of this case to say that he has, not merely a *jus ad rem*, but a present interest in and affecting these subjects, which is preferable to the interest of the mortgagor. Is such an interest in property admittedly situated in Queensland an asset in Queensland within the meaning of the Act? That is the sole question arising for decision in this appeal, and its merits lie within a very narrow compass.

The Appellant's counsel did not dispute that the debtor's interest in the subjects which he assigned in security was an asset in Queensland; and they went so far as to admit that the creditor's interest would also be so, if he enforced his security by entering into possession. Independently of any concession in argument, neither of these propositions appears to be attended with doubt. Laying aside, as plainly untenable, the theory that, until he has attained possession, the creditor's right consists in the bare personal obligation of his debtor, it would be difficult to find any good reason for holding that it includes no interest in the subjects of the security which is capable of valuation. The personal obligation to pay may not be an asset in Queensland; but it does not follow that the debt due, so far as it is charged upon estate within the Colony, and gives the creditor a real and preferable interest in that estate, is not an asset in the Colony. Such an interest is certainly property of the Company, and property in the Colony, because it affects estate which is admittedly situated there. In that view, it is made an asset in the Colony, for the purposes of the Act, by the express provisions of Section 9.

It may be right to notice that, the asset returnable being the charge upon Colonial property, and not the personal debt, the amount of the debt is not necessarily conclusive of its

value. It is obvious that the value of the Queensland incumbrance may fall short of the amount of the debt; and also that, when the company hold collateral securities elsewhere, it may be proper to take these into account in valuing for the purposes of the Dividend Duty Act. These matters, however, are not hujus loci; because, this being a question in demurrer, the appeal must necessarily fail if any substantial part of the assets omitted ought to have been included in the return.

For these reasons their Lordships will humbly advise Her Majesty that the judgment appealed from ought to be affirmed. The appellant must bear the costs of this appeal.