Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Henry Henty and Thomas Colles, Executors of the Will of William Edward Stanbridge, deceased, v. *Her Majesty the Queen, from the Supreme Court of Victoria; delivered 28th July* 1896.

Present:

LORD WATSON.
LORD HOBHOUSE.
SIR RICHARD COUCH.

[*Delivered by Lord Watson.*]

The late William Edward Stanbridge, who had his domicile of succession in the Colony of Victoria, died there in April 1894, leaving a last will, dated the 24th day of February 1892, by which he appointed the Appellants, Henry Henty and Thomas Colles, to be executors and trustees of the will. The Appellants accepted office, and duly obtained probate, with the will annexed, from the Supreme Court of Victoria, which conferred upon them an administrative title to the whole estate of the deceased, real or personal, situated in the Colony. In terms of the Administration and Probate Act 1890 (54 Vict., cap. 1060), it became incumbent upon the Appellants to file a statement of the particulars of the estate thus placed under their administration, in order to the assessment of the Government duties payable in respect thereof, under the seventh schedule of the Act.

Besides real and personal estate in the Colony, the deceased was, at the time of his death, possessed of an interest in certain freehold,

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leasehold and licensed lands, situated in the Colony of New South Wales, known as the Gogeldrie Station, which had been purchased, in three equal shares, from George Henry Hebden and Charles Spencer Bransby Hebden, by the deceased and two persons of the name of Waugh, in the year 1889. At the time of their purchase, these lands were affected by a mortgage for the principal sum of 50,000*l.*, with interest, which had been granted by the sellers to Dalgety & Co., a limited company carrying on business in the city of Melbourne. It was a condition of the sale, that the lands should be transferred under burden of the mortgage; and, in pursuance of that arrangement, the three purchasers, including the deceased, on the 19th May 1891, entered into a deed of covenant with Dalgety & Co., Limited, by which they jointly and severally undertook to fulfil the personal obligations contained in the mortgage for repayment of principal and interest, whilst Dalgety & Co. discharged the original obligees. It is not immaterial for the purposes of this case, to observe that the Appellants have not, in the course of the proceedings, alleged that the real security held by Dalgety & Co., Limited, is insufficient.

The Appellants, in pursuance of the Act of 1890, lodged a detailed statement, showing all assets in the Colony falling under their administration, and also purporting to show the liabilities attaching thereto, which they had to discharge in due course of administration. The Crown, who is the Respondent in this appeal, takes no exception to the principle upon which the statement is framed. It concedes, and the Appellants did not dispute, that the statutory object of such a statement is to disclose, on the one hand, the amount and value of the deceased's assets in the Colony falling within the probate,

and, on the other hand, all liabilities which the executors, in the course of their colonial administration, may be required to satisfy out of these assets ; and that probate duty is payable upon the amount, if any, by which the value of the assets exceeds these liabilities. No question has been raised by the Crown as to the correctness of that part of the Appellants' statement, which sets forth the amount and value of the real and personal estate of the deceased within the Colony. The controversy in this appeal is confined to a single item in that part of the Appellants' statement which professes to disclose the liabilities which ought to be borne by the assets which they administer. Inasmuch as that item considerably exceeds the total value of the assets, the result of its being admitted would be to leave no balance upon which probate duty is payable.

The Appellants claim the right to treat as a liability, and to deduct from the value of the assets, the sum of 50,000*l.*, together with 945*l.* 4*s.* 1*d.* of interest accrued thereon, being the debt due to Dalgety & Co., Limited, as constituted by their mortgage over Gogeldrie station, and the relative deed of covenant between the Company, and the purchasers of the station. The assessing officer disallowed the claim, and charged the Appellants with probate duty upon a balance of assets calculated on that footing. The Appellants paid the duty, and then brought the present suit for its repayment.

The case was tried, on the 22nd August 1895, before Mr. Justice Hodges, who ordered judgment to be entered for the Crown with costs. The present appeal is taken against that order. The learned Judge did not assign any reasons for his decision, it having been admitted by the parties that the case was covered

by the decision of the Full Court in *Virgoe and another* v. *the Queen* (11 V. L. R., 517). In that case, the facts were very similar; and although its decision depended upon certain provisions of "The Duties on the Estates of "Deceased Persons Statute" (Act No. 388 of 1870), these provisions have been substantially re-enacted by the Administration and Probate Act 1890 which governs the present case.

By Section 97, sub-section 2, of the statute of 1890, it is enacted 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 par-"ticulars 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 estimated 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. Secured "debts shall mean any debts in respect of which "there exists any mortgage charge or lien on "the testator's or intestate's real or personal "estate."

The sub-section is obviously framed in general and comprehensive terms, so as to meet the exigencies of every case that can come within its scope; but it does not, in their Lordships' opinion, necessarily follow that the expressions real and personal estate, and secured and unsecured debts, must in every case mean the whole estate of the deceased, and his

whole debts secured or unsecured. Real and personal estate must, in their opinion, signify all assets within the Colony, which alone are chargeable with duty, according to the decision of this Board in *Blackwood* v. *the Queen* (8 Ap. Ca. 82.), which construed similar enactments in the statute of 1870; and debts of the deceased, secured or unsecured, must refer, not to the whole debts of the deceased, but to such debts as are properly chargeable upon these colonial assets in assessing them for duty. Were those expressions otherwise interpreted, the whole purpose of sub-section 2 would be defeated. The statement filed would not show the assessable balance in the Colony, although it might contain the materials from which a statement showing such balance could be extracted. The debts falling to be deducted, in assessing duty, from Victorian assets will necessarily vary according to circumstances. When the deceased died domiciled in Victoria, and had no estate outside the Colony, the whole of his property real or personal, and the whole of his debts, which in that case are domiciled with him, must be disclosed in the statement. When the deceased died domiciled in another country, but had assets situated in Victoria, his Victorian assets must be fully stated, and from these are to be deducted, for the purpose of ascertaining the amount liable to colonial duty, only those debts which are Victorian. It was so held by the Supreme Court of the Colony in *Regina* v. *Smith* (9 V. L. R. 404). In a case like the present, where the deceased was domiciled in Victoria, but had estate in another country, the purposes of the Act do not require that his executors shall include foreign assets, to which their Victorian probate gives them no title, although, in such a case, there may be debts due by the deceased to foreigners which, for the

purpose of assessing duty, form a legitimate charge upon the assets reached by their probate.

Keeping in view the main and only purpose of Section 97 (2), which is, to compel a statement of assets and liabilities by the executor or administrator, which will enable the proper officer to assess the amount or value of the Victorian assets chargeable with duty, their Lordships are of opinion that it was not incumbent upon the Appellants to set forth the value of the deceased's interest in the Gogeldrie station, and that they were not required to state, and are not entitled to deduct, any debt secured upon his estate in New South Wales. That view was maintained by the Counsel who represented the Respondent, and it was accepted by Counsel for the Appellants, to this extent, that they were under no obligation to state the value of the deceased's interest in Gogeldrie station. The only point upon which the parties were at issue related to the right of the Respondents to deduct the amount of the mortgage debt due to Dalgety & Co., Limited, from the free assets in Victoria.

If a debt, for which he was personally bound, has been made a valid charge upon particular estate belonging to the deceased, it is not, if the security be sufficient, in any sense chargeable upon the other free assets left by him. In any question as to probate duty, it is a burden which adheres to, and tends to diminish or, it may be, to extinguish the value of the asset upon which it is charged. The mortgage debt in question will diminish the value of the deceased's interest in the Gogeldrie station, for fiscal and other purposes, in New South Wales; but there is no reason why it should diminish the value of his assets, for the purpose of probate duty, in Victoria. If the amount of the mortgage debt had exceeded the value of the station upon which it is secured,

to the extent of the excess it would have been an unsecured debt, and might have to that extent constituted a debt for which the Appellants were, in the circumstances of this case, entitled to take credit. But the Appellants have not shewn, and have hardly attempted to suggest, any legal ground upon which they would be justified, in the course of their Victorian administration, in making payment of any part of the mortgage debt to Dalgety & Co., Limited.

Counsel for the Appellants, in order to avoid the difficulties which they had to encounter, if the mortgage were treated as a secured debt, and therefore as only affecting the value of a New South Wales asset of the deceased, chiefly based their argument upon the view that, by the terms of sub-section (2), it ought to be regarded as an unsecured debt, resting upon the personal obligation undertaken by the deceased in the deed of covenant. The reasons urged in support of that view were that the debt, in so far as the Colony of Victoria was concerned, was simply personal, that the creditors and their documents of debt were in Melbourne, and that, in terms of the mortgage and deed of covenant, payment was to be made to them in Melbourne. Their Lordships must observe, that even if that argument were well-founded, they cannot understand upon what principle the Appellants could claim to deduct the full amount of the debt from the Victorian assets of the deceased. He had two co-obligants, whose solvency is not impeached, and who have given security to their common creditor for the fulfilment of their personal obligations. It is needless to dwell upon that point, because it is contrary to fact to suggest that the debt is unsecured; and according to the principles recognised by this Board in *Walsh* v. *The Queen* (1894, Ap. Ca. 144), the security held by Dalgety & Co. is as much an asset in New South Wales as the real

estate there which it affects. Their Lordships can find no ground for the contention that a debt, for which the creditor holds ample security elsewhere, can be treated as unsecured, for the purpose of reducing the dutiable value of assets in Victoria.

For these reasons, their Lordships will humbly advise Her Majesty to affirm the order appealed from. The costs of this appeal must be borne by the Appellants.