patent may legally issue. As it is clear that there has been an infringement of that patent by the defendant, I am of opinion that, on the whole case, the plaintiff is entitled to the damages and injunction awarded him, that the judgment of Mr. Justice *Power* should be, with the exception mentioned by the Chief Justice, restored, and the appeal upheld. As to costs, I agree with the judgment of the Chief Justice.

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WILLMANN v. PETERSEN.

O'Connor J.

Appeal allowed. Judgment of Full Court reversed. Judgment of Power J., restored with costs of action except so far as they were incurred by the claim in respect of Patent No. 4799. *Respondent to pay costs of appeal to the Full Court and of this appeal.*

Solicitors for the appellant, *Atthow & McGregor*, Brisbane, for *H. B. Wright*, Mackay.

Solicitors for the respondent, *Roberts & Roberts*, for *Alex. G. Stuart*, Mackay.

H. E. M.

[HIGH COURT OF AUSTRALIA.]

DAVIES AND JONES . . . . . PLAINTIFFS;

AND

THE STATE OF WESTERN AUSTRALIA . DEFENDANT.

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PERTH, *Oct.* 13.

SYDNEY, *Dec.* 23.

Griffith, C.J., Barton and O'Connor, JJ.

Commonwealth of Australia Constitution Act, [*sec.* 117]—*Discrimination*—"*Resident*"—*Administration Act* (*W. A.*)] (1903, *No.* 13), *sec.* 86—"*Bonâ fide residents of and domiciled in.*"

The *Administration Act* of Western Australia (1903, No. 13) sec. 86, imposes a duty on the final balance of the real and personal estate of the deceased according to fixed rates, and contains a proviso that in so far as beneficial interests pass to persons *bonâ fide* residents of and domiciled in Western Australia, and occupying towards the deceased a certain relation-

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ship, duty shall be calculated so as to charge only one-half of the percentage upon the property so acquired by such persons. The plaintiffs, executors of the will of E.W.D., late of Western Australia, paid succession duty at the rate of nine per cent. under the above section on a sum of £8,055, representing the value of property passing under the will to one A.E.D., who, at the death of the testator was a British subject, *bonâ fide* resident, and domiciled in Queensland, and who occupied towards the deceased the required relationship. The payment was made under protest, and the plaintiffs now sued to recover half the amount paid, on the ground that the section of the Act under which it was claimed, worked a discrimination contrary to sec. 117 of the Constitution.

Held, that the real ground of the discrimination prescribed by the section of the *Administration Act* was domicil and not residence, and that, consequently, the enactment was not void under sec. 117 of the Constitution, as setting up a discrimination between the residents of different States.

Per Barton J.—"It is discrimination on the sole ground of residence outside the legislating State that the Constitution aims at in sec. 117."

DEMURRER to statement of claim. The plaintiffs were the executors of the will of Edward William Davies of Fremantle, Western Australia, and claimed to recover from the State of Western Australia £362 9s. 10d. excess probate duty, paid by them to the probate officer under protest under the following circumstances:—Under the will of the testator his son Alfred Ernest Davies, who was alleged to be then a *bonâ fide* resident of and domiciled in Queensland, took a beneficial interest of the value of £8,055 7s. 6d. The executors proved the will, but the probate officer refused to issue probate unless and until they paid as estate duty £724 19s. 8d., being 9 per cent. on the value of the interest which the son of the testator took. The officer based the claim on sec. 86 of the *Administration Act* (W. A.) 1903, which provides that:—"Every executor and administrator shall pay the Commissioner of Stamps duty on the final balance of the real and personal estate of the deceased, according to the rules set forth in the second schedule; provided that in so far as beneficial interests pass to persons *bonâ fide* residents of and domiciled in Western Australia, and occupying towards the deceased the relationship set forth in the Third Schedule, duty shall be calculated so as to charge only one half of the percentage on the property acquired by such person." The relationship of Alfred Ernest Davies, being a son of the testator, came within the provisions of the Third

Schedule. The plaintiffs claimed the same concession that would be made if the beneficiary were a *bonâ fide* resident of and domiciled in Western Australia. The plaintiff now sought to recover the excess of the probate duty paid on the ground that the provision in the Act under which the duty was exacted, was in violation of sec. 117 of the Constitution inasmuch as it imposes upon the beneficiary a discrimination to which he would not be subject if he were a resident of the State of Western Australia. The defendant State demurred on the ground that the statement of claim disclosed no cause of action.

Pilkington (with him *Barker*), for the defendants, in support of the demurrer. The demurrer should be upheld on two grounds: —(1) That it is not a discrimination under the Constitution for the State legislature to provide immunity for some class of its subjects from taxation, *e.g.*, immunity of clergymen; and (2) that if there is anything in sec. 86 inconsistent with the Constitution, it is the proviso that should be struck out. If it is struck out the plaintiffs are still bound to pay the higher duty.

Section 117 of the Constitution precludes any State from imposing on the property which citizens of other States may own, or the business which they may carry on within its limits, any higher burdens by way of taxation than are imposed upon the corresponding property or business of its own citizens: *Harrison Moore's Commonwealth of Australia*, p. 297 and illustration (*in notis*).

[GRIFFITH C.J.—The general trend of that argument is against the defendant.]

It would be against the defendant in so far as this section deals with residence and domicil. If "residence" is used there contrary to the Constitution it may be struck out.

A resident does not mean a mere casual visitor, but a person domiciled. The Act provides exemption for a very small class, viz., persons domiciled in Western Australia, and in close relationship to the deceased; and, therefore, the class is immune.

[O'CONNOR J.—Then a resident of Western Australia not domiciled is for the purposes of this Act in exactly the same position as a person domiciled in Queensland?]

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Yes; a person domiciled in Queensland, and resident in Western Australia is not entitled to the benefit of the proviso. Mere residence in a country is not sufficient to show that a domicil in that country has been chosen: *Winans* v. *Attorney-General* (1).

If the proviso is contrary to the Constitution it is void and must be struck out. The defendant is then entitled to succeed.

[O'CONNOR J.—It could not be that a resident of Queensland is in a better position than a resident of Western Australia in respect of the Western Australian Succession duty.]

The provisions of the American Constitution are very different. They provide expressly that when once a State confers an immunity on citizens of one State, that immunity is conferred on the citizens of all the States: Art. IV., sec. 2 and XIV. Amendment sec. 1. The plaintiff contends that the Western Australian Legislature, having conferred immunity on a class of citizens in Western Australia, is also to be taken to have done the same in regard to citizens of other States. The distinction between the two is clear. By the American Constitution a penalty is imposed on a State, viz.: That where a privilege is conferred on citizens of one State, citizens of other States may come in and obtain the benefit. The Australian Constitution is very different. The plaintiff is not entitled to the benefit of the proviso because he is not domiciled in Western Australia.

[GRIFFITH C.J.—Unless "resident" in sec. 117 is used in the wider sense and includes domicil. Suppose a man is domiciled and resident in Queensland, is not that sufficient under the Constitution to give him the same privileges as a person resident and domiciled in another State?]

No; and here the sec. requires domicil in Western Australia and close relationship to deceased. "Resident" in the Constitution could not mean domiciled. The word "residence" is often used to denote a person's habitual physical presence in a place or country which may or may not be his home: *Dicey's Conflict of Laws*, p. 80.

[O'CONNOR J.—Would not one test be to find out if, supposing

(1) (1904), A.C., 287.

the party to be resident in Western Australia, he would stand in the same position as any other resident of Western Australia who is not domiciled. You must read in after "is applicable" the words "under the same conditions."]

On the wording of the Constitution everything contrary to the Constitution is *pro tanto* void. This section does not impose a disability, it confers a favour upon a certain class; and, in so far as it confers a favour on residents of Western Australia, and not elsewhere, it is void, and the whole proviso must be struck out. Analogous cases are those in which it has been held that covenants to pay higher rates of interest under mortgages where the payments have been unpunctual are in the nature of penalties, and unenforceable, though, *secus*, if the covenant was for the payment of a lower rate of interest on punctual payment: *Thompson* v. *Hudson* (1). But the section in question confers a benefit on persons "resident and domiciled" in Western Australia.

[GRIFFITH C.J.—I think there are American decisions that when part of a Statute is unconstitutional the whole provision unless severable, must be rejected.]

[O'CONNOR J.—There is no section in the American Constitution corresponding to sec. 109 of the Australian Constitution.]

Therefore sec. 109 is strongly in the defendant's favour to the extent of the inconsistency. Sec. 109 means that, if an Act be passed in a State contrary to the Constitution, the part so contrary must be struck out. A suggestion was made that the mere fact of residence out of Western Australia would prevent the plaintiff taking the benefit of the Act. If there is anything in that, the proviso is void only so far as the words "is resident" are concerned.

The person who is to pay duty is the executor or administrator. It is not a debt of the beneficiary, but of the deceased, *i.e.*, the Legislature points out to the personal representative from what particular fund he is to reimburse himself for his payment to the Crown on behalf of the deceased. Therefore this section cannot be one discriminating between residents of Western Australia and of other States. The section makes known to residents of

(1) L.R. 4 H.L., 1, at p. 15.

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Western Australia that on their demise certain property is taken by the Crown. But if these conditions combine (*a*) relationship, (*b*) *bonâ fide* residence in Western Australia, and (*c*) domicil, then portion of the duty will be remitted. The object and intention of the Legislature is plain. The money goes to persons resident in the country, and who, by reason of their domicil guarantee residence in that State.

[O'CONNOR J.—That argument is not sound. The executor has to pay the duty in the first instance. That duty comes out of the share going to another State. That is just the same thing as taxing directly the resident of another State.]

The object is to cause the testator to leave less to persons outside Western Australia.

Draper, for the plaintiffs. Sec. 86 of the *Administration Act* authorizes a duty to be charged as in the second schedule; that is one not discriminating between residents and non-residents, but is charged according to amount.

Sec. 117 of the Constitution was passed in order to bring about in a negative form the substance of Article IV., sec. 2, of the American Constitution. The Fourteenth Amendment was passed after the war of 1864, and fixed for the first time the definition of a citizen of a State. It enacts (sec. 1) that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Under that section residence is necessary.

In *Blake* v. *McClung* (1), "residents," in the Tennessee Statute there in question, was held to "refer to those whose residence in Tennessee was such as indicated that their permanent home or habitation was there without any present intention of removing therefrom, and having the intention when absent from that State

(1) 172, U.S.R., 239, at p. 247.

to return thereto—such residence as appertained to or inhered in citizenship." Under American law permanent residence was necessary to qualify for citizenship of a State: *Slaughter-House Cases* (1). When the section of the Australian Constitution was framed, the members of the Convention had these cases before their minds, and they intended that residence should be of such a kind as would constitute domicil. Practically the same meaning is indicated by the words of sec. 86 of the *Administration Act*. The words "domiciled in Western Australia" are really to show what was meant by residence. It was to mean, not merely temporary residence, but residence *animo manendi*.

In sec. 117, "resident" means practically resident.

A person's domicil is the place where his habitation is fixed without any present intention of removing therefrom: *Lord* v. *Colvin* (2); and *Whicker* v. *Hume* (3).

[O'CONNOR J.—Suppose a privilege were conferred upon a class because they comply with certain conditions, would you contend that that privilege should be accorded to all citizens of Australia?]

No.

[O'CONNOR J.—Do not persons domiciled as well as resident in Western Australia form a distinct class? How do you distinguish between the two cases?]

Domiciled and resident mean the same thing, and are both included in the term resident. The only classes distinguished are residents and non-residents.

[O'CONNOR J.—Your contention amounts to this, that residence in sec. 117 of the Constitution must be equivalent to domicil, and whatever privilege a resident of Western Australia has, a resident of any State has.]

Yes, that would appear to be the case from *Paul* v. *Virginia* (4), where it was held that the privileges and immunities secured to the citizens of each State in the several States by Art IV., sec. 2, are those which are common to citizens in the latter States under their Constitution and laws by virtue of their being citizens. This clause had for its object the placing of citizens of each State

(1) 16 Wall, 36.
(2) 28 L.J., Ch. 36, at p. 366.
(3) 28 L.J., Ch., 396, at p. 400.
(4) 8 Wall, 168.

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upon the same footing as citizens of other States so far as the advantage resulting from citizenship in those States is concerned.

As to the contention that the whole proviso should be struck out, sec. 109 only renders void the portion which is inconsistent with the Constitution.

[O'CONNOR J.—Sec. 117 prevents a disability being imposed; it does not grant a privilege.]

Where there are two provisions in a Statute, the one constitutional and the other not, the unconstitutional provision may be rejected and the other stand: *Re Mahoney's Estate* (1); *Sprague* v. *Fletcher* (2).

Sec. 117 cannot be evaded by putting in a proviso to the section of the State Act.

[GRIFFITH C.J.—Is succession duty a taxation of the person at all? The property can only be claimed under the law of Western Australia. Is there a discrimination at all? The tax comes out of the capital.]

The plaintiff must have the same rights under the Succession Laws as residents of this State. But the effect of the section is that he gets less than his share.

Pilkington in reply.

Cur. adv. vult.

The following judgments were read:—

Melbourne, 23rd Dec.

GRIFFITH C.J. Sec. 86 of the Western Australian *Administration Act* 1903 provides that: "Every executor and administrator shall pay to the Commissioner of Stamps Duty on the final balance of the real and personal estate of the deceased according to the rules set forth in the second schedule. Provided that, in so far as beneficial interests pass to persons *bonâ fide* residents of and domiciled in Western Australia and occupying towards the deceased the relationship set forth in the third schedule, duty shall be calculated so as to charge only one half of the percentage on the property acquired by such person," Under this Act the plaintiffs, who are executors of the will of E. W. Davies,

(1) 133 Cal., 180.

(2) 69 Vt., 69.

late of Fremantle, Western Australia, were called upon to pay succession duty in Western Australia, upon the estate of their testator, including duty upon a sum of £8,055 representing the value of property passing under the will to one A. E. Davies, who at the death of the testator was alleged to be a British subject *bonâ fide* resident and domiciled in the State of Queensland. The rate of duty for the estate in question according to the rules in the second schedule is 9 per cent., and A. E. Davies is a person occupying to the deceased the relationship set forth in the third schedule. The Commissioner of Stamps demanded from the plaintiffs in respect of his share duty at the full rate of 9 per cent., which the plaintiffs paid under protest, and they now sue to recover one-half of that sum, claiming that under sec. 117 of the Constitution, A. E. Davies is entitled to the benefit of the provision in favour of persons *bonâ fide* residents of and domiciled in Western Australia. Sec. 117 is as follows: "A subject of the Queen resident in any State shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State." The defendants contend (1) that a privilege conferred upon a particular class of residents is not a discrimination within the meaning of sec. 117 of the Constitution, and that the real discrimination made by the Statute in question is not between residents of Western Australia and residents in other States, but between persons domiciled in Western Australia and other persons; and (2) that if the Western Australian Act offends against the Constitution it is the proviso only and not the principal enactment, under which duty is payable at 9 per cent., which is obnoxious to the rule, and that it must therefore be rejected. It was further contended that the testator, who must be taken to have known the law, himself adopted the discrimination by giving a benefit to a person who, as he also knew, could not take it without becoming liable to the higher rate of duty. This last argument however was not pressed, and is obviously not tenable.

I will deal first with the second contention, on the assumption that a discrimination is made by the Statute between residents of Western Australia and residents of other States. This Court has

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had occasion more than once to point out that in construing the Constitution regard must be had to substance and not to mere form. If the two enactments contained in sec. 86 of the *Administration Act* had been transposed, so as to say that *bonâ fide* residents of Western Australia should be liable to duty at one rate, and all other persons should be liable to duty at a double rate, it cannot be doubted that there would be a discrimination within the meaning of the Constitution between *bonâ fide* residents of Western Australia and other persons. In my opinion, every enactment in every State Act must be read subject to the provisions, if any, of the Constitution applicable to the case. Assuming, then, that sec. 117 is applicable, sec 86 should be read: "Subject to the provisions of sec. 117 of the Constitution, every executor and administrator shall pay &c., provided &c." Persons entitled to the benefits of sec. 117 would then be clearly brought within the benefit of the proviso. For, otherwise, the discrimination prohibited by the Constitution would become effective. Or, to express still more definitely the implied qualification, the section should be read: "Subject to the provisions of the Constitution which prohibit any discrimination against British subjects residents in any other State, every executor and administrator shall pay &c., provided," &c. The substance of sec. 117 is, in short, that whatever privileges are conferred upon residents of a State by its laws are to be taken to be equally conferred upon residents of other States, and that every enactment conferring such privileges is to be construed as including residents of other States.

The suggestion that the proviso might be treated as invalid, and that all persons, whether *bonâ fide* residents of Western Australia or not, are liable to duty at the double rate, but that the Western Australian Government might, if they pleased, disregard the proviso, and enforce payment at the full rate, is manifestly inconsistent with the intention of the legislature. And, although it is true that as a general rule *utile per inutile non vitiatur*, that maxim does not apply when the invalid portion of an enactment is so bound up with the rest that its omission would result in an entire departure from that intention. Moreover, such a construction would enable any State Govern-

ment by an exercise of the dispensing power to evade altogether the prohibition of the Constitution. No doubt, such a power of dispensation may in fact be exercised by the Executive authority. But it would be unwarranted by law. And our duty is to construe the Statute as we find it, and to give it such a construction as is consistent with the Constitution. The only way in which practical effect can be given to the provisions of sec. 117 of the Constitution is by allowing residents of other States to claim the same privileges as are formally given to residents of the particular State. And this is the view which has been accepted in enforcing analogous provisions in English Statutes. By the Act 8 Vict. c. 20 (*The Railways Clauses Act* 1845), sec. 90, it is provided that: "All tolls shall be at all times charged equally to all persons and after the same rate, whether per ton, per mile, or otherwise, in respect of all passengers, and of all goods or carriages of the same description conveyed or propelled by a like carriage or engine passing only over the same portion of the line of railway under the same circumstances, and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway." Under this Act it was the practice for persons complaining of an undue preference to apply for an injunction restraining the railway company from giving the undue preference, and enjoining them to give the same advantages to the complainants: See *In re Harris and Cockermouth Railway Co.* (1). Applying this principle, if the money has been illegally exacted contrary to the provisions prohibiting preference, it may be recovered by action, as is sought to be done in the present case.

I pass now to the other contention of the defendants.

The word "resident" is used in many senses. As used in sec. 117 of the Constitution, I think it must be construed distributively, as applying to any kind of residence which a State may attempt to make a basis of discrimination, so that, whatever that kind may be, the fact of residence of the same kind in another State entitles the person of whom it can be predicated to claim the privilege attempted to be conferred by the State law upon its own residents of that class. The difficulty arises upon the words

(1) 3 C.B., N.S., 693.

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"*bonâ fide*" and "domiciled." The word "domicil" is a technical legal word with a definite legal meaning, although it may, no doubt, be used in a popular or more enlarged sense, of which the case of *McMullen* v. *Wadsworth* (1) affords an illustration. But it is not so clear that the word "domiciled" is a technical term with a definite legal meaning. Two constructions of the words of the section are, in my opinion, open, one that the adjectival or adverbial expression "*bonâ fide*" qualifies "domiciled" as well as "residents," the other that its qualifying effect is limited to "residents," and that "domiciled" is equivalent to "having their legal domicil" in Western Australia. In the former view the use of the adverbial expression would indicate that the concept intended to be expressed by the word "domiciled" is one the quality of which depends upon the intention of the person of whom it is predicated, and not upon the application of rules of law. In the latter view, taking the word "domiciled" by itself and without qualification, that inference would not arise. Which then is the more probable construction? It will be convenient, in this connexion, to consider briefly the rules of law as to the acquisition of domicil of choice as distinguished from domicil of origin.

In the leading case of *Whicker* v. *Hume* (2), the Lord Chancellor (Lord *Chelmsford*) said (3):—"It seems to me, that the nature of his (the testator's) residence and his constant returns from the continent, bring that residence completely within the definition of domicil which is given in the Digest (4). *Unde cum profectus est, peregrinari videtur; quod si rediit, peregrinari jam destitit.*"

Lord *Cranworth*, after referring to the definition of domicil quoted by the Lord Chancellor from the Digest, which he said was also to be found in the Code (5), and was a principle of Roman law, added (6): "There have been many others, but I never saw any of them that appeared to me to assist us at all in arriving at a conclusion. In fact, none of them is, properly speaking, a definition. They are all illustrations in which those who have made them have sought to rival one another by

(1) 14 App. Cas., 631.
(2) 7 H.L.C., 124.
(3) 7 H.L.C., at pp. 146-47.
(4) Book 50, tit. 16, s. 203.
(5) Book 10, tit. 39, s. 7.
(6) 7 H.L.C., at pp. 159-60.

endeavouring, as far as they can, by some epigrammatic neatness or eloquence of expression, to gloss over the fact that, after all, they are endeavouring to explain something *clarum per obscurum*. By domicil we mean home, the permanent home; and if you do not understand your permanent home, I am afraid that no illustration drawn from foreign writers or foreign languages will very much help you to it." He then referred to the passage in the Code (afterwards quoted at length by Lord *Wensleydale*), and added: "I think that is the best *illustration*, and I use that word rather than *definition*, to describe what I mean."

Lord *Wensleydale* said (1): "There are several definitions of domicil, which appear to me pretty nearly to approach correctness. One very good definition is this: Habitation in a place with the intention of remaining there for ever, unless some circumstance should occur to alter his intention; I also take the definition from the Code, which is epigrammatically stated, and which I think will be found perfectly correct, that domicil is: "*In eo loco singulos habere domicilium non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit; unde rursus non sit discessurus si nihil avocet; unde cum profectus est, peregrinari videtur, quod si rediit, peregrinari jam destitit.*"

This may be thus rendered: "It is not in doubt that every man has his domicil in the place where he sets up his household shrine and his principal establishment, whence he has no intention of again departing, unless something should call him away, so that when he goes thence he regards himself as a wanderer, whereas when he returns his wandering is ended."

In *Udny* v. *Udny* (2) Lord *Westbury* said: "Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. . . . . There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed

(1) 7 H.L.C., at p. 164.

(2) L.R. 1 H.L., Sc., 441, at p. 458.

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not for a limited period or particular purpose, but general and indefinite in its future contemplation. It is true that residence originally temporary, or intended for a limited period, may afterwards become general and unlimited, and in such a case as soon as change of purpose, or *animus manendi*, can be inferred the fact of domicil is established."

These passages, which authoritatively declare the English law on the subject of domicil, establish that the essential quality of domicil of choice is permanent residence. And, if the words "*bonâ fide*" qualify the word "domiciled" in sec. 86, it would appear to follow that the legislature was speaking of domicil of choice, which, being residence of a particular kind or quality, would entitle all persons of whom residence of the same kind or quality in another State can be predicated to claim the same privileges.

I will now proceed to consider how the matter stands if the word "domiciled" is read alone, as meaning "having their legal domicil" in Western Australia. To simplify the question, I treat the matter as if the additional qualification of being *bonâ fide* residents were omitted. I take first the case of a person whose domicil of origin is not in Western Australia, and who has not acquired a domicil of choice in that State. Is he entitled to the benefit of the proviso? The answer must be "No," for he does not fall within its terms. It follows that a person who is a *bonâ fide* resident of Western Australia, but whose domicil of origin, still subsisting, is in Queensland, is in this respect in the same position as a resident of Queensland whose domicil of origin is in Queensland. In this view the ground of discrimination is not residence at all. Take, next, the case of a person whose domicil of origin was elsewhere, but who has acquired a domicil of choice in Western Australia. In the supposed case (*bonâ fide* residence not being a necessary qualification) he would be entitled to the benefit of the proviso, whether he resided in Western Australia or not. If, then, the word "domiciled" is construed with reference to the technical meaning of domicil, whether meaning domicil of origin or domicil of choice, the test of discrimination imposed by the section does not depend upon residence.

It is a general rule of construction that technical terms used

in a Statute should receive their technical meaning unless it is clear from the context, or the subject-matter, that the legislature has used the term in a popular and more enlarged sense. Conversely, the context or subject-matter may clearly indicate that the legislature has used a word in a limited as opposed to the popular sense. Now the subject matter of this provision is Succession Duty. Every State can impose such duties in respect of the whole of the personal property of the domiciled citizens of the State, whether that property is situate within or beyond its territorial limits. The State may, therefore, derive a much larger revenue from the estates of such persons than from those of others who merely reside in the State without having their domicil in it. The area of taxation being larger in their case, the legislature may well think it reasonable to reduce the rate in their favour. Moreover, it is a well-known fact that the double liability to death duties, as they are called, *i.e.*, the liability to pay them both to the State of domicil and the State in which the property is situate, has considerable operation upon the minds of investors, and the legislature might reasonably offer such a reduction as that in question as an inducement to persons to make their permanent home in Western Australia.

Again, I think it is a sound rule of construction that a State Act should if possible be so interpreted as not to make it inconsistent with the Constitution—*ut res magis valeat quam pereat.* These reasons have led me—not without some fluctuation of opinion—to the conclusion that the word "domiciled" should be read without the qualifying words "*bonâ fide*" and should be construed as meaning "having their legal domicil" in Western Australia.

On this construction, the discrimination effected by the Act is not a discrimination as between residents of Western Australia and others, but as between persons having their legal domicil in Western Australia and others, and A. E. Davies, not having such a domicil, is not entitled to the benefit of the reduction claimed. Whether, if his legal domicil were in Western Australia instead of in Queensland, he would be entitled to claim the reduction, is a question which it is not necessary to consider.

I have assumed throughout my judgment that the word

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"domiciled" is used in the statement of claim in the sense which I think it bears in the *Administration Act*.

For these reasons I think that the demurrer must be allowed and judgment given for the defendants.

BARTON J. Arthur Elvin Davies and Frederick Jones, executors of the will of Edward William Davies, of Fremantle, Western Australia, deceased, were refused the issue of probate by the Commissioner of Stamps for that State unless and until they paid him as estate duty £724 19s. 8d., being 9 per cent. on the value of certain property, the beneficial interest in which passed to Alfred Ernest Davies under the will. They insist that the duty lawfully chargeable is only 4½ per cent., and they sue to recover from the defendant State £362 9s. 10d., the difference of one half between the sum paid under protest and the sum which, as they contend, is all the Commissioner was entitled to demand.

The testator died at Fremantle in January, 1904, and the plaintiffs proved the will in the Supreme Court of Western Australia in February. Under it a beneficial interest of the value of £8,055 7s. 6d. passed to Alfred Ernest Davies, a son of the testator. The Western Australia *Administration Act* of 1903 enacts in its 86th sec. that: "Every executor and administrator shall pay to the Commissioner of Stamps duty on the final balance of the real and personal estate of the deceased according to the rules set forth in the second schedule. Provided that in so far as beneficial interests pass to persons *bonâ fide residents of and domiciled in Western Australia*, and occupying towards the deceased the relationships set forth in the third schedule, duty shall be calculated so as to charge only one half of the percentage on the property acquired by such person."

The rate of duty on the final balance of the estate, according to the second schedule, is 9 per cent. The relationship of Alfred Ernest Davies to the testator is one of those set forth in the third schedule. But he is not a "*bonâ fide* resident of and domiciled in Western Australia." He is a *bonâ fide* resident of and domiciled in Queensland. It is quite clear therefore that the plaintiff executors cannot make the Western Australian enactment the basis of their claim, because Alfred Ernest Davies is not one of

the class of beneficiaries preferred by the 86th section. But they contend that the preference of one class is a discrimination against others, and they call to their aid the 117th section of the Constitution, which is in these words: "A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State." They say, "our beneficiary is a subject of the King resident and domiciled in Queensland. He must not be subjected in Western Australia to any discrimination which would not be equally applicable to him if, being a subject of the King, he were one of the residents of Western Australia who are domiciled there." In remitting half the duty on property passing to certain beneficiaries, who are *bonâ fide* residents of and domiciled in Western Australia, the State enactment, the plaintiffs urge, discriminates against beneficiaries, *cæteris paribus*, who are not *bonâ fide* residents of and domiciled in Western Australia. Consequently it discriminates against certain residents of other States, and is within the prohibition of the Constitution in sec. 117, and therefore invalid.

This argument involves two chief propositions which will be considered in order. The first is that the enactment, while professing to confer a privilege, really works a discrimination. In that contention the plaintiffs appear to be right. The meaning of the section is the same as if it set out by subjecting the property passing to beneficaries under the third schedule, residents of and domiciled in Western Australia, to $4\frac{1}{2}$ per cent. duty, and went on to prescribe that the property passing to beneficiaries not so resident and domiciled must pay 9 per cent. In that case the discrimination would be manifest, and the difference in the section as it stands is one of form and not of substance. Constitutional safeguards could be evaded with impunity if any other view were taken, and the matter is too clear to justify extended discussion. The other principal proposition involved in the argument for the plaintiffs is that it is as residents that beneficiaries, such as Ernest Alfred Davies, are discriminated against. Unless that proposition could be maintained, it seemed to be realized

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that the 117th section of the Constitution could not help the plaintiffs. To support this contention Mr. Draper, for the plaintiffs, urged that the word "domiciled" was employed in the *Administration Act* merely for the purpose of qualifying the word "residents" and that it had not in this connection the technical meaning which would be carried by the words "having their domicil." It is possible indeed to read the qualification "*bonâ fide*" into a conjunction with "domiciled" as well as with "residents."

The result of this process would be to help the plaintiffs' argument so far as to deprive the word "domiciled" of all or part of what to my mind is its ordinary signification (at any rate in a Statute of a technical kind, such as this one), namely, "having their domicil"; that is, their domicil whether of origin or of choice. But with the qualification which the expression *bonâ fide* would attach to the word "domiciled," the character of mere intention—that is, the *animus manendi*, would be so far involved as to at least reduce the meaning to "having their domicil of choice," if indeed the word did not become merely an indication of more or less permanent residence. But I see no reason, in the context or otherwise, to suppose that the term "*bonâ fide*" is intended to qualify anything more than the noun which immediately follows it—namely "residents." That word and "domiciled," being to legal minds distinctive in relation to each other, it is not easy to believe that they were selected by the draftsman only to be so qualified by one and the same term as to make it a question whether the legislative mind had not erroneously identified or confused them. In my opinion the section intended that the persons to be preferred should be *bonâ fide* residents of Western Australia "having their domicil" in that State. Domicil of origin as well as domicil of choice would thus be included. And nothing has been suggested to render it even possible that the legislature intended strangely to discriminate against those born and bred in Western Australia in favour of settlers choosing that State as their permanent home and making it their domicil. It appears then that the qualifications of *bonâ fide* residence in Western Australia, and of domicil therein, have both been prescribed. True, they must concur to give a title to the

preference, that is to enable their possessor to escape the discrimination. But though Mr. Alfred Ernest Davies is discriminated against, it is not as a "resident" of a State other than Western Australia. Mere residence in Western Australia does not give any of its inhabitants a better right to resist the higher rate of duty than Mr. Davies has, residing as he does in Queensland. But when residence and domicil concur, the concept of residence is so absorbed in that of domicil that it has no separate existence in thought. Residence in the place of domicil is the normal condition, and residence away from it is in the view of law not permanent until it becomes of such a kind as to merge in its turn into a domicil of choice. Consequently without the Western Australian domicil, there is no discrimination between subjects of the King residing in Queensland and those residing in Western Australia.

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It is discrimination on the sole ground of residence outside the legislating State that the Constitution aims at in the 117th section. I do not think that is the ground of the discrimination in the Western Australian *Administration Act*, and therefore I am of opinion that the plaintiff has failed to establish one of the two propositions, the demonstration of both of which was essential to his success. His action therefore fails, and the validity of the enactment he has attacked is not affected.

The demurrer must be allowed.

O'CONNOR J. The plaintiffs are executors of the will of the late Edward William Davies of Fremantle, Western Australia, and they claim to recover from the State of Western Australia £362 9s. 10d., excess probate duty, paid by them to the probate officer after protest under the following circumstances :—

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A portion of the testator's estate passed under the will to Alfred Ernest Davies, his son, then *bonâ fide* resident and domiciled in Queensland. Under sec. 86 of the Western Australian *Administration Act* of 1903, probate duty is payable by executors at the general rate of 9 per cent. on the final balance of the real and personal estate of the deceased. But the section provides that where a beneficial interest passes to a person "*bonâ fide* resident of and domiciled in Western Australia," and occupying towards the

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deceased a certain relationship, including that of son, the duty payable by the executors in respect of that interest shall be half the general rate. As the beneficiary Alfred Ernest Davies was not at the death of the testator a *bonâ fide* resident of and domiciled in Western Australia, the probate officer demanded the full duty of 9 per cent. in respect of the interest passing to him, and insisted upon its being paid before probate was issued. The plaintiffs protested against the payment, and claimed the same concession that would be made if the beneficiary were a *bonâ fide* resident of and domiciled in Western Australia. In order, however, to obtain probate they paid the duty demanded, and are now suing by a statement of claim setting out these facts to recover the excess on the ground that the enactment under which the duty was exacted is a violation of sec. 117 of the Constitution, inasmuch as it imposes upon Alfred Ernest Davies a discrimination to which he would not be subject if he were a resident of the State of Western Australia. The defendant State has demurred on the ground that the plaintiff's statement of claim discloses no cause of action. On the demurrer the question for our determination is whether or not the Western Australian enactment imposes a discrimination against a resident of another State contrary to section 117 of the Constitution.

The proviso to sec. 86 of the Western Australian *Administration Act* of 1903 is in the following words:—"Provided that in so far as beneficial interests pass to persons *bonâ fide* residents of and domiciled in Western Australia and occupying towards the deceased the relationship set forth in the third schedule duty shall be calculated so as to charge only one half of the percentage upon the property so acquired by such persons."

In determining the question raised regard must be had to the substance and not to the form of the enactment. Although section 117 of the Constitution uses the words "shall not be subject in any other State to any disability or discrimination," a State enactment will be equally invalid whether it imposes the unconstitutional "disability" or "discrimination" by direct prohibition against the residents of other States, or by granting a privilege applicable only to residents of a particular State. In other words this enactment must be read as if it provided expressly that,

where beneficial interests passed to persons within the named degrees of relationship, and *bonâ fide* residents of and domiciled in Western Australia, the duty should be at the rate of 4½ per cent., but in respect of beneficial interests passing to any other persons the duty should be double. It is conceded that the section does discriminate in favour of persons "*bonâ fide* residents of and domiciled in Western Australia." But it is not every discrimination that is prohibited. Section 117 of the Constitution contemplates that there may be a disability or discrimination, the imposition of which would be legal, that is to say a disability or discrimination which would be equally applicable to the person complaining if he were a resident of the State complained against. For example, if the Statute under consideration had exempted all ratepayers permanently residing within municipal areas in Western Australia from payment of probate duty in respect of beneficial interests passing to them, a resident of Queensland could not complain that he was not allowed the benefit of the exemption in respect of a beneficial interest passing to him, because in that case he would be in exactly the same position as any resident in Western Australia who was not a ratepayer residing within a municipal area. In other words the exemption in that case would arise, not from mere residence in Western Australia, but from the superadded condition of residence as a ratepayer within a municipal area in Western Australia. It therefore becomes important to inquire whether the lower rate of duty allowed in this case, and claimed as a discrimination, arises from the mere residence in Western Australia, of persons within the named degrees of relationship, or whether it arises from residence accompanied by some superadded condition. That brings me directly to the crucial question—what is the the true interpretation of the words "*bonâ fide* residents of and domiciled in Western Australia?" It is a well known rule of interpretation that as far as possible its full meaning must be given to every word of a Statute. It will be necessary therefore to examine with some care the words under consideration. There is no difficulty about the first few words—"*bonâ fide* resident" is an expression frequently used in the legislation of all the Australian States. It may be said to have acquired a settled meaning as

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conveying the idea of "habitual physical presence" in a locality, or in other words, "permanent residence."

As to the words "domiciled in Western Australia" I attach no importance to the participial form in which "domiciled" is used. I take "domiciled in" to have exactly the same meaning as "having their domicil in" or "whose domicil is in." The real question is what is the true interpretation of the word "domicil" in the context in which it stands. The word has a well known legal meaning; it also has acquired a popular meaning, A very good definition showing both uses of the word is to be found in *Dicey's Conflict of Laws*, at p. 79: "The domicil of any person is, in general, the place or country which is in fact his 'permanent home,' but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of Law." The law ascribes to every man a domicil, that is to say, a country by whose laws his rights of property are in certain respects to be regulated. For instance, questions arise as to the laws to be applied in the distribution of or succession to property on the death of its owner, as to the laws which govern the validity of his will, or the liability of his property to legacy duty. None of these questions can be settled until it is determined in what country the deceased person was domiciled at the time of his death. To ascertain therefore the country which the law ascribes to a man as his domicil at the time of his death well-known rules of law are applied. Generally speaking the country in which a man permanently resides is his domicil, but that is not always so. Of this the case of *Winans* v. *Attorney-General* (1) cited to us in argument is a very strong illustration. Lord *Westbury* in *Bell* v. *Kennedy* (2) explains the distinction between residence and domicil. "Residence and domicil are two perfectly distinct things. It is necessary in the administration of the law that the idea of domicil should exist, and that the fact of domicil should be ascertained, in order to determine which of two municipal laws may be invoked for the purpose of regulating the rights of parties. We know very well that succession and distribution depend upon the law of the domicil. Domicil, therefore, is an idea of the law. It is the relation which the law creates between an individual and a particular

(1) (1904) A.C., 287.

(2) L.R. 1 H.L. Sc., 307, at p. 320.

locality or country. To every adult person the law ascribes a domicil, and that domicil remains his fixed attribute until a new and different attribute usurps its place." Such is the well recognized legal meaning of "domicil." In the popular meaning which is also given in *Dicey's* definition the word is generally used to describe a man's "permanent residence" the place or country in which he has his "home." The important question for our consideration is in which sense has the word been used in this enactment. Has it been used in its ordinary legal sense, or has it been used in the popular sense to which I have last referred. A very sound rule of interpretation is laid down by Lord *Truro* in *Stephenson* v. *Higginson* (1): "In construing an Act of Parliament, I apprehend every word must be understood according to the legal meaning, unless it shall appear from the context that the legislature has used it in a popular or more enlarged sense." Taking the context as a guide it seems plain that "domicil" has not been used in the popular sense. "*Bonâ fide* resident" has practically the same meaning as "domicil" in its popular sense. It is difficult to suppose that the latter expression was used by the legislature merely to repeat the idea already conveyed by the words immediately preceding it. Again, let us look at the subject matter. The legislature in making this concession were giving up revenue. It is certainly more probable that they would limit the concession to those persons, the distribution of whose property after death, would be regulated by and under the laws of Western Australia, and whose estates would pay probate duty to the State of Western Australia, than that they would allow the concession to every permanent resident of Western Australia within the named degrees of relationship wherever his legal domicil might be. And in this connection we are, I think, entitled to consider the circumstances under which, as is well known, Western Australia has drawn a large portion of her population from the Eastern States of Australia. We must take it that the legislature was well aware that there were many thousands of persons who were in fact permanent residents of Western Australia, but who yet maintained homes for their families in the Eastern States, and who in law would still be regarded as having their domicils in one or other of those States.

(1) 3 H.L.C., 638, at p. 686.

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Having regard therefore to the words of the enactment, to their correlation in the section, to the context, and to the subject matter, I find myself unable to avoid the conclusion that the expression "domiciled in Western Australia" was used by the legislature not in its popular sense but in the legal and technical sense which I have explained. So interpreting the section and expanding the expression "domiciled" into its full meaning, the discrimination is in favour of persons within the named degrees of relationship who are "*bonâ fide* residents of Western Australia and whose domicil the law deems to be in Western Australia." It follows therefore that no resident of Western Australia can claim the reduction of duty unless he also has his legal domicil in Western Australia, and the Queensland resident not domiciled in Western Australia is in this respect subject to precisely the same discrimination, and to no further and no other. In other words if Alfred Ernest Davies had before the testator's death become a *bonâ fide* resident of Western Australia and still retained his Queensland domicil he would be subject to the discrimination of which the plaintiffs now complain. Next follows the question, is that discrimination a violation of sec. 117 of the Constitution? The section is in the following words: "A subject of the Queen resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State." This is the only section of the Constitution which recognizes in express terms a common citizenship amongst the States. It is no doubt intended to serve the same purpose as Article IV. sec. 2 of the United States Constitution which provides that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." It will be observed that the Commonwealth Constitution does not use the word "citizen" and that it confers equality of rights in very different terms. Indeed we know as a matter of history that the Convention deliberately rejected the United States plan of dealing with the question. Clause 17 of the Draft Constitution of 1891, which followed somewhat the lines of the 14th amendment of the United States Constitution, and which was retained

in the first draft of the 1897 Bill, was in the final sittings of the Convention eliminated, and sec. 117 in its present form was passed. "Residence" is there made the basis of equality of rights. Whatever rights the laws of a State give its own residents by virtue of residence must be equally accorded to the residents of other States. The word "resident" is not defined. As to what are its limitations, and to what extent, if at all, it corresponds to the word "citizen" as used in the American Constitution we are not called upon at present to decide. For the purposes of this case it is only necessary to say that the word has quite a different meaning from "domiciled" in its legal sense as I have explained. If the concession given by sec. 86 of the Western Australian *Administration Act* of 1903 were given "to all *bonâ fide* residents of Western Australia" coming within the named degrees of relationship to the testator, the plaintiffs in this case would have good ground to complain that a discrimination contrary to the Constitution had been made against a resident of Queensland, but the section has not made the concession to all *bonâ fide* residents of Western Australia coming within the named degrees of relationship, but only to those who, in addition to being *bonâ fide* residents of Western Australia, are persons to whom the law ascribes Western Australia as their country of domicil. In my opinion the Constitution does not prohibit a State from conferring special privileges upon those of its own people who, in addition to residence within the State, fulfil some other substantial condition or requirement such as that which is made the condition of the concession allowed in this enactment. The power of raising money by probate taxation remains with the State of Western Australia, under section 107 of the Constitution, and the State can in raising that taxation make such concessions to, and confer such privileges on, its own people as it thinks fit so long as in doing so no provision of the Constitution is violated. As the enactment in question does not violate the Constitution it must stand good. It follows that the duty enacted by the probate officer was legally payable, that the plaintiffs' action must fail, and that judgment on the demurrer should be entered for the defendant.

Solicitor, for the defendant, *W. F. Sayer.*

Solicitor for plaintiffs, *Crossman.*