therefore, the language of the definition is in form inclusive, and not exhaustive, it must be read as if the words "besides absolute owners" were inserted after "includes." So read, the definition is exhaustive, and this, we think, is the true construction.

Mr. *Starke* did not dispute that the beneficiaries are in one sense equitable owners of the land, but for the reasons we have given they are not taxable as owners under the Act.

Question answered accordingly.

Solicitors, for the appellant, *Blake & Riggall.*

Solicitor, for the respondent, *Gordon H. Castle,* Crown Solicitor for the Commonwealth.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONERS OF STAMPS (QUEENSLAND) . . . . } APPELLANTS;

AND

ARNOLD WIENHOLT AND OTHERS . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

Stamp Duty—Acts of Legislature with limited powers—Stamp Duties Acts—Mortgage of Queensland property—Deed executed out of Queensland—Non-registration—Liability to duty—Effect of non-payment of duty—Attested copy—Queensland Constitution Act 1867 (31 *Vict. c.* 38), *sec.* 2—*Stamp Duties Act* 1866 (*Qd.*) (30 *Vict. No.* 14), *secs.* 3, 18, 19, 27—*Stamp Duties Amendment Act* 1876 (40 *Vict. No.* 7), *secs.* 1, 2, 4—*Stamp Act* 1894 (58 *Vict. No.* 8), *secs.* 4, 81.

Where the Constitution of a State merely empowers the Legislature to make laws for the peace, welfare and good government of the State in all cases, one

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of the canons of construction to be applied in regard to the Stamp Duties Acts of the State is that unless either by express words or necessary implication such Acts are shown to violate the principle of territoriality they must be construed as limited in their operation to that State, and, consequently, as not selecting as the subject matter of taxation any person, thing or circumstance not within its territory.

In the absence of express words or necessary implication, Stamp Duties Acts will not be construed to be retrospective.

In a taxing Statute the duty claimed by the Crown must be clearly shown, by the letter of the law, to be payable.

Sec. 3 of the *Stamp Duties Act of* 1866 (Qd.) provides that "there shall be levied collected and paid for the use of Her Majesty . . . . for and in respect of the several matters described or mentioned in this Act . . . . or for or in respect of the parchment or paper upon which the same respectively shall be written" certain duties.

Sec. 18 provides (*inter alia*) that no deed or instrument liable by law to any stamp duty "shall be pleaded or given in evidence or admitted to be good or available in law or equity until the same shall be duly stamped" in the prescribed manner.

Sec. 19 makes provision for the Commissioners stamping "any deed or instrument signed or executed by any party thereto at any place out of the Colony" without fine if brought to the Commissioners within a certain time after arrival.

Held, that under the *Stamp Duties Acts of* 1866 and 1876 (Qd.) it was the instrument—not the transaction, nor the fact of execution—which was made dutiable; consequently, it was the instrument itself when it was within the jurisdiction which was the subject of taxation under the law of the State.

Held, also, that by virtue of the provisions of the *Stamp Duties Act of* 1866, as a consequence of the instrument being made "liable to duty" under the above-mentioned Acts it was invalidated until the duty was paid, and the holder might, if he chose, abstain from paying the duty, and allow the instrument to remain a nullity.

Held, also, that under those Acts the duty was payable on the instrument itself, not on an attested copy of it.

Held, also, that the *Stamp Act* 1894 (Qd.) does not apply to an instrument which was executed prior to that enactment where the instrument was not liable to duty under the previous Acts.

In 1888 a deed relating to the sale and mortgaging of property in Queensland was executed in England by all the parties thereto, but was never registered in Queensland. In order to vest the legal estate in trustees to secure payment of mortgage debentures to be issued by the purchasers (an English company) nominations of trustees were registered in 1889 in Queensland under

sec. 78 of the *Real Property Act of* 1861, and with them an attested copy of the deed was lodged in the Registrar-General's Office under that section for safe custody and reference, but not for registration. The company was not registered in Queensland under the *British Companies Act* 1886 until 1889. The Commissioners of Stamps first knew in 1911 of the deed being in Queensland, where it had been brought after the debentures had been paid and the mortgage debt thereby extinguished. The Commissioners obtained production of the deed, and assessed it for mortgage duty under the *Stamp Duties Act of* 1866.

Held, that, even if the deed contained a mortgage and was not affected by the *British Companies Act* 1886, it was not assessable for duty.

Decision of the Supreme Court of Queensland: *Wienholt Estates Co. Ltd.* v. *Commissioners of Stamps*, (1914) S.R. (Qd.), 249, affirmed.

APPEAL from the Supreme Court of Queensland.

Prior to 13th October 1888 the firm of Wienholt Brothers were the owners in Queensland of certain real and personal property in Queensland. At that date a joint stock company known as the Wienholt Estates Company of Australia Limited was duly constituted and incorporated under the Companies Acts of Great Britain for taking over the business and property of the firm, but until 8th April 1889 such Company was not registered in Queensland in accordance with the Queensland *British Companies Act* 1886.

On 15th October 1888 a deed called a "deed of mortgage and trust" entered into in England between the Company of the one part, the said firm of Wienholt Brothers of the second part, and three persons all resident outside Queensland and called "the trustees" of the third part, after reciting that the partners had by the Company's Articles of Association contracted to convey the real and personal property of the partnership and that such conveyance was to take place or to be deemed to have taken place on 3rd December 1888, and that in the meantime the partners were to hold the said premises in trust for the Company, and that the Company had been formed for the purpose of taking over the partnership business and property, and that the Company had determined to raise a loan of £200,000 by the issue of debentures the principal whereof was to be paid not later than 11th November 1898, and that it had been agreed that the due payment of the said debentures and interest should be secured in

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the manner therein appearing, the indenture witnessed that the Company transferred to the trustees all the interest of the Company in the real and personal property which the firm had contracted to convey and to hold unto and to the use of the trustees in trust for the use and benefit of the proposed debenture holders for £200,000. It further witnessed that each of the partners covenanted and agreed that the Company and the partners would convey to the trustees all the said real and personal property so as to vest the same in the trustees in trust for the proposed debenture holders and to secure the payment of the debentures and the interest thereon. The Company appointed the trustees attorney of the Company. The Company and the partners covenanted with the trustees that they would do all things requisite for procuring the property to be vested in the trustees, and would execute all documents necessary to give complete effect to the provisions of the deed. The partners covenanted as to their title, and that they would up to 31st December 1888, or to such other time as the Company should enter into possession, work and carry on the business. It was then declared and agreed between the parties that certain steps should be taken to secure the repayment to the proposed debenture holders; and that, if after payment of the principal and interest secured by the said mortgage debentures there should remain in the hands of the trustees any part of the mortgage property such property should be transferred to the Company.

This document and every duplicate original thereof were executed in England, and remained without the State of Queensland until the month of November 1909.

Debentures were issued, and were in fact paid off prior to 1st January 1900.

In January 1889 Wienholt Brothers, the partners in the firm, executed in favour of the trustees and in accordance with the laws of Queensland, and in the form therein provided, nomination of trustees of the real estate, which they caused to be registered in the Real Property Office in Queensland, and conveyances of the leaseholds which they caused to be registered in the Lands Office in Queensland. The schedule of trusts to the nomination of trustees set forth that the lands were held "upon trusts for

the purposes and with, under and subject to the powers authorities promises agreements declarations stipulations and conditions applicable thereto expressed and contained in a certain indenture or deed of trust bearing date 15th October 1888, between the parties thereto," *i.e.*, the above-mentioned deed.

One duplicate original of this deed was brought into Queensland for the first time in the month of November 1909. The Commissioners of Stamps, having become aware of its presence within Queensland, required it to be produced to them, and upon production assessed the amount of stamp duty payable thereon at £1,000, alleged by them to be the mortgage duty payable in accordance with the provisions of the Stamp Duties Acts of 1866-1876.

The trustees of the indenture, having paid the duty in conformity with such assessment, and having required a case to be stated for the opinion of the Supreme Court under the provisions of the *Stamp Act* of 1894, the Commissioners stated a case accordingly, asking, as one of the questions for decision, whether the indenture was correctly assessed by them with such duty.

The Supreme Court (*Cooper* C.J., *Chubb* and *Lukin* JJ., *Real* J. dissenting) answered the question in the negative: *Wienholt Estates Co. Ltd.* v. *Commissioners of Stamps* (1).

From this decision the Commissioners of Stamps now appealed to the High Court.

Stumm K.C. and *Gore Jones*, for the appellants. By the Stamp Duties Acts of 1866 and 1876 duty is imposed on instruments wherever executed, if such instruments relate to property in Queensland. Immediately upon the execution of the instrument the duty is payable. The introduction of the instrument into Queensland merely affords the opportunity of getting payment of the duty. In 1889 the Registrar-General should not have registered the nomination of trustees, and should have refused to receive the copy, unless shown that the original was stamped. His failure to do this did not relieve the parties from the obligation to pay the duty. The *Stamp Act* 1894 preserves all rights and liabilities that had arisen under the previous Acts.

(1) (1914) S.R. (Qd.), 249.

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[Counsel referred to *Cobar Corporation Ltd.* v. *Attorney-General for New South Wales* (1); *Hughes* v. *Munro* (2); *Commissioners of Inland Revenue* v. *Maple & Co. Ltd.* (3); *Lord Suffield* v. *Commissioners of Inland Revenue* (4); *United Realization Co.* v. *Commissioners of Inland Revenue* (5); *Alpe on Stamp Duties*, 12th ed., pp. 2, 187; *Tilsley*, 3rd ed., pp. 14, 20; *Real Property Act* 1861 (Qd.), sec. 78; *Stamp Duties Act* 1866 (Qd.), secs. 3, 7, 13, 18, 19, 27; *Stamp Duties Act* 1876 (Qd.), secs. 4, 13, 19; *Stamp Act* 1894 (Qd.), secs. 4, 81; *Acts Shortening Act* 1867 (Qd.), sec. 3; *Acts Shortening Act Amendment Act* 1903 (Qd.), sec. 2 (2).]

Feez K.C., with him *A. D. Graham*, for the respondents. The indenture cannot be a mortgage as the Company, being a foreign company, could not own land in Queensland, and therefore could not mortgage it. The instrument is an agreement for a mortgage, but not a mortgage. The instrument became dutiable, if it became so at all, only at the time it arrived in Queensland, in 1909, when its incidents and powers as a mortgage were spent. No rights to claim duty against such a document had been preserved in the *Stamp Act* 1894. [Counsel referred to the *British Companies Act* 1886 (50 Vict. No. 31), sec. 10; *R.* v. *Inhabitants of Ridgwell* (6).]

Stumm K.C., in reply, referred to *Alpe on Stamp Duties*, 12th ed., p. 16; *Halsbury's Laws of England*, vol. XXIV., p. 710, note (*g*); *Gray on Limitations of Taxing Power* (1906), pp. 120, 168*a*; *Ashbury* v. *Ellis* (7).

Cur. adv. vult.

Aug. 2.

The judgment of the COURT, which was read by ISAACS J., was as follows:—

The facts material to this appeal may be very shortly summarized. Wienholt and others were registered proprietors of

(1) 9 C.L.R., 378, at p. 396.
(2) 9 C.L.R., 289.
(3) (1908) A.C., 22.
(4) (1908) 1 K.B., 865, at p. 890.
(5) (1899) 1 Q.B., 361.
(6) 6 B. & C., 665.
(7) (1893) A.C., 339, at p. 344.

about 70,500 acres of freehold and nearly 1,300,000 acres of leasehold station property in Queensland, on which they had stock and other chattels, and there they carried on in partnership the business of pastoralists. An English company was formed to purchase, and agreed with the Wienholts to purchase, that property in consideration of shares and money. The Company borrowed the money on debentures payable not later than 12th November 1898. It was not registered in Queensland. On 15th October 1888 an indenture was executed in England to which the partners, the Company, and certain persons as trustees for the debenture holders, were respectively parties.

The scheme of the deed was in effect this:—(1) Acknowledgement of the sale by the partners to the Company, transfer and delivery to be or to be taken to be on 31st December 1888, and in the meantime the partners held in trust for the Company; (2) the Company assigned and transferred to the trustees all their interest in the premises and all their own property, including uncalled capital, on trust to secure mortgage debentures to be issued for £200,000—the security so given being, as to the chattels and stock, a floating security only; (3) covenants for further assurance; (4) ancillary covenants by the Company in a usual form relative to the debentures. The deed was not stamped with any Queensland stamps. The money was lent, and debentures were issued. The deed was never brought to Queensland until 1909, long after the debentures were paid, and the mortgage debt thereby extinguished. In January 1889, however, nominations of trustees were executed by the partners to the trustees of the deed in pursuance of its provisions, and these nominations were then registered in Queensland under sec. 78 of the Act of 1861, thereby vesting the legal estate in the trustees. Along with these documents there was deposited in the office of the Registrar-General, in accordance with that section, an attested copy of the deed, as the section says for safe custody and reference, but not to be registered. The non-registration of trusts is part of the scheme of registration of titles of land. On the registration of the nominations, stamp duties were duly paid as on conveyances, but no duties were asked for or paid on the attested copy of the deed, as a mortgage or otherwise. In April 1889 the Company

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was registered in Queensland under the local *British Companies Act* 1886. In 1909 and 1911, new trustees were appointed, and on the last mentioned occasion the Commissioners of Stamps first knew that the deed was actually in Queensland, and thereupon required it to be produced to them for assessment. Non-production would have involved a penalty. It was produced. The Commissioners assessed it as a mortgage at £1000, which was paid under protest, and the trustees appealed to the Supreme Court. That Court, by a majority, decided that the Commissioners had no right to assess the document as liable to a duty of £1000, or any sum. The Commissioners have appealed against that decision.

The Stamp Acts in force in 1888, when the deed was executed, were the Acts of 1866 and 1876. The latter enactment contains the definition of "mortgage"; and the former contains the imposition of the tax. So also the law stood in January 1889, when the nominations of trustees were registered.

In 1890 the Act of 1876 was repealed, and a substituted definition of "mortgage" was enacted.

In 1894 the then existing stamp legislation was repealed, and new provisions made. Sec. 81 is a saving clause as to prior conditions, the extent of which is in controversy here; but apart from that the Act is not retrospective, and therefore does not apply to the indenture in this case, which was executed before the enactment. The only relevancy of the Act of 1894—apart from any guide it might afford by way of interpretation of the preceding legislation—is with regard to the ambit of sec. 81. As to that the question is whether, supposing the deed were, immediately before the passing of the Act, definitely and finally liable to duty under the Acts of 1866 and 1876, that liability was preserved and continued notwithstanding the repeal of those Statutes. If any further circumstance, as, for instance, the presence of the deed in Queensland, were essential to such liability, then sec. 81 could not apply. If there was no such liability, the Act of 1894 may be entirely disregarded.

Similarly as to the Act of 1890. If there existed immediately before that Act was passed such a liability either by reason of the original execution of the deed, or by reason of the registration

operations of January 1889, the question of how far the repeal of the Act of 1876 and the substantive enactments of the Act of 1890 preserved that liability is important—otherwise not.

Apart from the direct line of consideration, an additional objection was considered by the Supreme Court, namely, that until April 1889, the Company not being previously registered in Queensland, it was not capable of giving the mortgage. We do not find it necessary to decide whether the view expressed by the Full Court is right or wrong. If we were called upon to determine that point, then, *inter alia*, it would have to be considered how far the limitation of the prohibition in sec. 10 of the Act of 1886 to "estates of freehold" affected the vast proportion of land given as security, and consisting of leasehold. Passing that by, it is apparent that the central point for determination is whether up to 1890 there was any definite and final liability to pay stamp duty in respect of the indenture. If there was not, there is an end to the matter. That depends entirely on the meaning and legal force of the Acts of 1866 and 1876. We shall for this purpose assume, without deciding, that the indenture contained a mortgage within the meaning of the enactments, and that the *British Companies Act* of 1886 did not affect it.

The general nature of Stamp Acts has been elaborately stated by this Court in *Cobar Corporation Ltd.* v. *Attorney-General for New South Wales* (1), and the Acts we have to consider do not, in their essential features, depart from that general nature. In that case, however, the document was executed in New South Wales, where the controversy arose; in the present case the document was executed outside the territorial limits of Queensland, the Statutes of which are invoked. Nothing that was said in the *Cobar Case* had in view the position now under consideration, and any observation as to the time of execution had reference not to the fact of execution being the subject or criterion of taxation, but as conveniently indicating the point of time when a document in fact executed within the jurisdiction first became subject to the operation of the Act.

In the case of an Imperial Act the question is always one of mere construction. Even there, certain *primâ facie* presumptions assist in the construction (see cases cited in *Merchant Service*

(1) 9 C.L.R., 378.

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Guild of Australasia v. *Commonwealth Steamship Owners Association* (1), and see *Krzus* v. *Crow's Nest Pass Coal Co. Ltd.* (2)), but, once the construction is reached, the Act binds all British Courts (*Colquhoun* v. *Heddon* (3) and *Earl Russell's Case* (4)). The construction is never affected by any consideration of invalidity; in other words, an Imperial Statute is never interpreted on the principle *ut res magis valeat quam pereat*. To the Statute of a limited Legislature, however, that principle sometimes has strong application, as in *Macleod* v. *Attorney-General for New South Wales* (5), and see the observation on that case by Lord *Halsbury* in *Swifte* v. *Attorney-General for Ireland* (6). When the Court is construing the enactment of a body whose powers are limited, it is material to bear in mind that the intention of the legislating body must have been to make its enactment effectual, and that it knew its effort would be futile if those limits were transgressed. Any such transgression must arise from inadvertence in expression, or from a mistaken belief as to the extent of power. In either case the error must clearly appear from the language used, and cannot be assumed.

Now, the power of the Queensland Parliament is "to make laws for the peace, welfare and good government of the Colony in all cases whatsoever" (sec. 2 of the State Constitution). Under that general power taxation is necessarily limited to the territory. Any extra-territorial taxation must depend upon some special authority from the Imperial Parliament. The opposite view would result in endless confusion and collision.

Under practically identical words in the Newfoundland Constitution (see the preamble to the Imperial Act 5 & 6 Vict. c. 120 (1842)) the Legislature of that Colony, while competent to impose taxation on cables within its territorial jurisdiction, is not competent to lay a tax on cables outside its territorial jurisdiction (*Commercial Cable Co.* v. *Attorney-General for Newfoundland* (7)).

Unless, therefore, either by express words or necessary implication, the Stamp Acts are shown to violate the principle of territoriality, they must be construed as limited in their operation to the State of Queensland, and, consequently, not to select

(1) 16 C.L.R., 664, at p. 689.
(2) (1912) A.C., 590, at pp. 596, 597.
(3) 25 Q.B.D., 129, at pp. 134, 135.
(4) (1901) A.C., 446.
(5) (1891) A.C., 455.
(6) (1912) A.C., 276, at p. 278.
(7) (1912) A.C., 820, at p. 826.

as the subject of taxation any person, thing or circumstance not within the territory. That is the first canon of construction applicable here. Another is that, in the absence of similar indications, they will not be construed retrospectively. A third is that in a taxing statute the duty claimed by the Crown must be clearly shown by the letter of the law. (See, for instance, *Attorney-General* v. *Milne* (1) and *Lumsden* v. *Inland Revenue Commissioners* (2), as the two most recent illustrations).

Taking these guides to construction, we have to see what the Acts declare.

Sec. 3 enacts that "there shall be levied collected and paid . . . . for and in respect of the several matters described or mentioned in this Act and in the . . . schedules of duties hereto annexed or for or in respect of the parchment or paper upon which the same respectively shall be written the several duties," &c.

It is a corollary from the constitutional limits referred to, that, *primâ facie*, the subject of taxation, namely, the "matters described or mentioned in this Act," and the "parchment or paper" on which they are written, are to be limited to such as are in Queensland.

Whatever instruments in Queensland, executed after the passing of the Act, answer the description are subject to the duty.

It is evident from secs. 18 and 19 that instruments, whether executed within or without the Colony, were, when once within the Colony, equally liable to what may be called the primary duty. The local circumstance common to both classes of instruments is their presence in Queensland, and so, in the absence of any language indicating that the fact of execution is the dutiable fact, that cannot be implied.

What is made dutiable, then, is the instrument and not the transaction, and again the instrument itself and not the fact of execution. If originating in Queensland, the fact of execution conclusively evidences, so to speak, or necessarily carries within itself, the existence of the instrument, but it is the concrete existing instrument itself within the jurisdiction, and not the abstract incident of execution, which is the subject of taxation. If originating outside the jurisdiction, it is also so far outside the

(1) (1914) A.C., 765, at p. 781. (2) (1914) A.C., 877, at pp. 896, 897.

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ambit of the Statute. When it comes in, and answers the description, it becomes, as a concrete subject, then dutiable under the law of the State.

But the crucial question is: What is meant by sec. 3 when it makes an instrument "liable to duty"—to use the Legislature's own expression in sec. 18? In other words, when, how, and in what circumstances, does the law insist on payment of the duty?

Apart from some additional provisions for penalty, limited to certain specified instruments, the answer may be embodied in a phrase. It is by invalidating the instrument until the proper duty is paid. If the holder of the instrument prefers the invalidity—if he is content to let his instrument remain a nullity—he may have it so. If he desires the recognition or assistance of the law to effectuate the instrument or concede to it any force or effect, he must pay the duty. In the case of an instrument originating in Queensland, he must after thirty days from execution pay a fine—really an extra duty—if he desires, but only if he desires, to avail himself of the instrument; if it originates outside Queensland, he has an extra term of grace, but otherwise the position is precisely the same.

This is the effect of construing the Act as a whole and particularly of reading secs. 3, 18, and 19 together.

If up to 1890, at all events, the holders of the deed had found it necessary to produce and insist on the deed in Queensland, the law would not have given effect to it—assuming it to answer the description of a mortgage—unless and until the duty had been paid.

But that is all. It follows that its mere presence in Queensland before 1890 would not have entitled the Commissioners to call upon the holders to produce it, and, after assessment, pay any duty, either by way of action or by the compulsion of retaining the deed until payment. It follows also, that the fact that the mortgage debt has been paid is an immaterial fact, and, unless it were sought to enforce the deed, the holder might rest content with its invalidity.

As to what would have been the case if the Acts of 1866 and 1876 had continued in force, and for any purpose it became necessary to put the document in evidence or register it, notwithstanding that the mortgage debt had been paid off and its vitality as a

mortgage—assuming it ever was a mortgage—was exhausted, we say nothing.

The Act of 1894 (sec. 26) adopts a markedly different policy. How that section stands, in view of the territorial limits of the Queensland Parliament, does not present itself in this case; it may be worth the consideration of the Legislature.

The circumstance that in January 1889 an attested copy of the deed had been deposited with the Registrar-General was urged as a sufficient reason for creating the necessity to pay duty.

Real J. has stated the effect of this circumstance with the utmost force. But the true answer is that there is no duty on an attested copy, and as the deed itself was not in Queensland it was not subject to the Act. It might be conceded, only for the purpose of the argument, that the Registrar-General could have refused to accept the attested copy unless it was stamped, or unless it bore evidence of the original being stamped, and that he could have refused to register the nominations until compliance; but, even so, that would only have left the parties presenting the nominations the option of compliance or of declining to proceed.

Error on the Registrar-General's part in receiving the attested copy cannot raise the obligation to pay duty on the original. Nothing in the Act supports such a view, and the liability does not depend on equitable or moral considerations, but on the clear legal effect of the Statute.

The result is that the document is not, up to the present moment at all events, a document assessable for duty. The money paid was paid under compulsion, and was unlawfully demanded, and Mr. *Stumm* very properly did not, in the circumstances, assert any intention to contest its return if held to be wrongly claimed.

The appeal must be dismissed.

Appeal dismissed with costs.

Solicitor, for the appellants, *T. W. McCawley*, Crown Solicitor for the State of Queensland.

Solicitors, for the respondents, *Feez, Rüthning & Baynes.*

R. G.