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The special leave will therefore be rescinded.

Special leave to appeal rescinded.

Solicitor for the appellant, *F. F. Mitchell*, Cooma, by *P. B. Colquhoun & King.*

Solicitor for the respondent, *J. V. Tillett*, Crown Solicitor for New South Wales.

B. L.

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF TAXES FOR VICTORIA . . . . . Appellant;
Defendant,

AND

CURRIE AND OTHERS . . . . Respondents.
Plaintiffs and Defendant,

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *Feb.* 22, 23, 24.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Settlement—Duty—Trusts to take effect on death of settlor—"Property comprised in such settlement"—Alteration of property settled—Locality of property—Administration and Probate Act 1890 (*Vict.*) (*No.* 1060), *sec.* 112—*Administration and Probate Act* 1903 (*Vict.*) (*No.* 1815), *secs.* 9, 15, *Sched.* 2.

Sec. 112 of the *Administration and Probate Act* 1890 (Vict.), as amended by the *Administration and Probate Act* 1903 (Vict.), provides that "Every settlement of any property made on or after the 16th day of December 1870 by any person containing trusts or dispositions to take effect after his death, shall upon the death of the settlor be registered within the prescribed time . . . and no such trusts or dispositions shall be valid unless such settlement be so registered. No settlement shall be registered unless the trustees or some other person interested under the settlement have filed a statement setting forth

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the nature of the property comprised in such settlement and the value thereof . . . . The trustees of any settlement or some other person shall before registration pay the duty mentioned in Part II. of the Seventh Schedule to this Act as re-enacted in the Second Schedule to the *Administration and Probate Act* 1903 . . . . If any such settlement be not registered within the prescribed time . . . . the Master may assess in the prescribed manner the duty payable under this Part of this Act in respect of such settlement, and if such duty be not paid within the prescribed time . . . . the Master or any person interested may apply to the Court which may order that a sufficient part of the property included in such settlement be sold and the proceeds of such sale applied in payment of the duty and of the order and sale and consequent thereon."

The Second Schedule to the *Administration and Probate Act* 1903 (Vict.) states that " on all settlements of property both real and personal " duty shall be payable according to the " total value of the property " at a rate per cent. which varies with that total value.

Held, that under that section duty is payable in respect of such property as is comprised in the settlement at the date of the settlor's death and would have been liable to probate duty in Victoria had it belonged to the settlor at that date.

Decision of the Supreme Court of Victoria (*Hood* J.): *In re Currie's Settlements*, (1915) V.L.R., 675; 37 A.L.T., 166, affirmed.

APPEAL from the Supreme Court of Victoria.

On 20th August 1891 and 10th December 1892, respectively, Archibald Currie executed in Victoria two indentures of settlement. At the respective times of making the settlements the assets comprised therein consisted of real estate in Victoria, shares in companies and a building society registered in Victoria and whose head office was there, debts owing on mortgage in Victoria, deposit receipts in a company registered in Victoria and whose head office was there, household furniture and effects in Victoria, and shares in three companies incorporated in New South Wales and having their head offices there. Certain of the assets were realized by the trustees during the life of the settlor and were reinvested from time to time in other investments, and at the date of the settlor's death, which occurred in August 1914, the assets comprised in the settlements consisted of the real estate in Victoria already mentioned and other real estate in Victoria, the household furniture and effects already mentioned, certain of the shares in companies registered in Victoria already mentioned, the shares in one of the

companies incorporated in New South Wales already mentioned, cash in hand, certain real estate in New South Wales and certain South Australian Government Inscribed Stock. The settlement contained trusts to take effect after the death of the settlor. At all material times the settlor was domiciled in Victoria.

After the death of the settlor the trustees of the settlements, who were Archibald Currie, the younger, and William Herald Thomson, presented the settlements for registration to the Commissioner of Taxes for Victoria. The Commissioner claimed that under sec. 112 of the *Administration and Probate Act* 1890 duty was payable in respect of the value of the whole of the property comprised in the settlements, and the trustees paid the amount claimed under protest.

An originating summons was then taken out by the trustees to which the Commissioner and Jessie Currie, one of the beneficiaries, were made defendants asking for the determination of the following question :—" Is any, and what, duty payable under the Administration and Probate Acts in respect of the said indentures, or either of them, and the property respectively comprised in them ? "

The summons was heard by *Hood* J., who answered the question by saying that " duty is payable in respect of such property comprised in the said settlements at the date of the death of the settlor as would have been liable to probate duty had it belonged to the settlor at that time " : *In re Currie's Settlements* (1).

From that decision the Commissioner of Taxes now appealed to the High Court.

Weigall K.C. (with him *Gregory*), for the appellant. Under sec. 112 of the *Administration and Probate Act* 1890 duty is payable in respect of the whole of the property which at the date of the settlor's death is subject to the trusts of the settlements, whether that property is Victorian or not. If that is too wide, then duty is payable in respect of so much of the property which at the date of the settlor's death is subject to the trusts of the settlement as represents what had been Victorian property at the date of the settlement. Sec. 112 must be construed as being subject to such restrictions as are imposed

(1) (1915) V.L.R., 675; 37 A.L.T., 166.

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upon the Parliament of Victoria by reason of its territorial limits: See *Harrison Moore's Commonwealth of Australia*, p. 324. In that view the settlements comprised in the section are settlements which are made in Victoria and which either are made by a Victorian subject or are settlements of Victorian property. The Victorian Legislature has full power to deal with settlements of any land made by a domiciled Victorian or Victorian subject. The words "comprised in such settlement" in sec. 112 mean "for the time being comprised" in it (*In re Moore*; *Moore v. Bigg* (1)); so that duty is payable in respect of property which, although not comprised in the settlement at the date of its execution, was comprised in it at the testator's death. None of the reasoning in *Blackwood* v. *The Queen* (2), which decided that the settlement to be made by executors should only include property which would pass to the executor by virtue of the Victorian probate, applies to sec. 112. [Counsel also referred to *Attorney-General* v. *Johnson* (3).]

Sir William Irvine K.C. (with him *Starke*), for the respondent. Reading sec. 112 with the Schedule, it is a provision for imposing a tax upon certain property in relation to the death of a particular person. It taxes existing interests in certain property which arise at the time of the death of the settlor. The section contemplates an order by the Supreme Court for the sale of the property and a consequent sale of it. See also sec. 114. That shows that the section only contemplates a tax upon property over which the Supreme Court has jurisdiction, and it has jurisdiction over Victorian property only. The tax, then, being one in respect of interests in Victorian property which arise upon the death of the settlor, in deciding what is Victorian property the rule in *Blackwood* v. *The Queen* (2) is directly applicable. Applying that rule, the property in respect of which the tax is imposed is the property which at the death of the settlor is comprised in the settlement, and which, if it were the property of the settlor, would vest in his executor.

Weigall K.C., in reply. The object of the section is to prevent a

(1) (1906) 1 Ch., 789.
(2) 8 App. Cas., 82.
(3) (1907) 2 K.B., 885.

person by a non-testamentary disposition of property which is to take effect on his death from stripping himself of Victorian property which otherwise would be dutiable. It was directed to the Victorian property which he gave away, and the intention was to tax that which at the settlor's death represented the Victorian property which he had so given away. According to the contention of the other side, if the settlement were wholly of real property outside Victoria and the trustees had disposed of it and acquired Victorian property which they held at the settlor's death, the tax would be payable in respect of that Victorian property. The tax is a tax upon the instrument in the nature of a stamp duty. It is not a tax upon the property comprised in the settlement, but the value of that property is the measure of the tax.

GRIFFITH C.J. The only question arising for consideration in this case is as to the construction of sec. 112 of the *Administration and Probate Act* 1890. That section is included in Part V. of the Act which is headed "Duties on Deceased Persons' Estates," and deals entirely with that subject. Part V. is a re-enactment of earlier provisions which were first found in a Statute of 1870.

The general scheme is that executors and administrators must make statements giving particulars of the estates of deceased persons, which are to be examined by an officer of the Court. Duty on the value as ascertained by him at the rate fixed by the Act is payable by the executors or administrators before the grant of probate or administration. It was decided in *Blackwood* v. *The Queen* (1) that under those provisions duty is payable only on property which is subject to the legislative authority of the Parliament of Victoria. Immediately following upon those provisions is sec. 112, of which I will read the material parts. "Every settlement of any property made on or after the 16th day of December 1870" (which is the date of the commencement of the original Act of 1870) "by any person containing trusts or dispositions to take effect after his death, shall upon the death of the settlor be registered within the prescribed time . . . and no such trusts or dispositions shall be valid unless such settlement be so registered . . . . No

(1) 8 App. Cas., 82.

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settlement shall be registered unless the trustees or some other person interested under the settlement have filed a statement setting forth the nature of the property comprised in such settlement and the value thereof. . . . The trustees of any such settlement or some other person shall pay the duty mentioned in the Seventh Schedule to this Act . . . If any such settlement be not registered within the prescribed time . . . the Master may assess in the prescribed manner the duty payable under this Part of this Act in respect of such settlement, and if such duty be not paid within the prescribed time . . . the Master or any person interested may apply to the Court" (that is, the Supreme Court of Victoria) "which may order that a sufficient part of the property included in such settlement be sold and the proceeds of such sale applied in payment of the duty and of the order and sale and consequent thereon." The rate of taxation fixed by the Act of 1890 was exactly the same as in the case of probate or administration, but it has since been altered by the *Administration and Probate Act* 1903.

It must be observed, in the first instance, that the settlement to be registered is a settlement subsisting at the death of the settlor. Its original date is quite immaterial, provided it is after the date mentioned in the section. It is equally immaterial to consider what property was originally comprised in the settlement. The only question is what is the property subject to the trusts of the settlement at the death of the settlor.

The next question is what is the meaning of the words "any property"? According to ordinary rules of construction those words must be limited to property in respect of which the Parliament of Victoria has power to legislate. I do not cite authority for that position, as none is needed. Further, the reasoning in *Blackwood* v. *The Queen* (1) is exactly applicable to this case, and no reason can be suggested for imputing to Parliament a different intention in respect of settled property from that which they had with respect to property passing to executors or administrators. The word "property" in the phrase "the property comprised in such settlement" must be read in the same sense.

(1) 8 App. Cas., 82.

If there were any room for doubt as to the intention of the Legislature, it is, in my opinion, removed by the provision in the last paragraph of sec. 112 for the recovery of the duty. The obligation to pay the duty is not imposed upon any particular person, but if it is not paid the Supreme Court has jurisdiction given to it to dispose of a sufficient part of the property to pay it. It is inconceivable that the Legislature intended to enact a futile provision that property not subject to the jurisdiction of the Supreme Court might be ordered by it to be sold. *Hood* J. was of that opinion. He expressed it by the declaration which he made, namely, that "duty is payable in respect of such property comprised in the said settlements at the date of the death of the settlor as would have been liable to probate duty had it belonged to the settlor at that time." As the subject matter of taxation is the same in both cases, that is, the case of a settlement and the case of a will or intestacy, that is a convenient formula for describing the property in respect of which the duty is payable.

The appeal therefore fails, and should be dismissed.

BARTON J. I am of the same opinion.

ISAACS J. read the following judgment:—This appeal gives rise to two questions—the first is the true scope and meaning of sec. 112 of the *Administration and Probate Act* 1890 as amended by the Act of 1903, and the second is the application of the section, when properly construed, to the facts of this case.

1. Sec. 112.—The provision was originally introduced in its main form in 1870 in the Statute No. 388 and called the "Duties on the Estates of Deceased Persons Statute 1870." That Act, actually assented to on 29th December 1870, provided, by sec. 1, that it should come into operation on and from 16th December 1870. It provided for duties on probate of wills and letters of administration (sec. 8), and in respect of settlements of property made after 15th December 1870 to take effect after the death of the settlor (sec. 20). From the outset, therefore, the second set of duties was complementary to the first, and part of the same scheme. The consolidation Act of 1890 made no change. The Act No.

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1815, passed in 1903, extended the scope of the enactment as to settlements, altered the scale of taxation, and made some subsidiary provisions.

Looking at its language as applied to the subject-matter and at its history, and bearing in mind the primary rule of construction that legislation is primarily territorial (*Cooke* v. *Charles A. Vogeler Co.* (1) and *Blackwood's Case* (2)), the meaning of sec. 112, in my opinion, may be thus stated. On the death of any person, which is the common feature in the case of wills, intestacies and settlements, the question arises whether there then takes effect any settlement made by him in any part of the world on or after 16th December 1870 of property which, by reason either of its actual corporeal situation or its legal attribute of locality (see *Commissioner of Stamps* v. *Hope* (3) and *Payne* v. *The King* (4)), is, at the time of the settlor's death, in Victoria. The local attribution of locality is entirely independent of the domicile of the settlor (*Blackwood's Case* (2)). If there is a settlement which then takes effect as to such property, the settlement must be registered; otherwise it is, as to the trusts and dispositions of such property, but not further, inoperative in Victoria. Registration of the settlement in Victoria is thus made essential to title, and so placed on the same footing as the grant of probate of a will or the issue of letters of administration.

Similarly, also, a statement of the property comprised in the settlement, that is, *then* comprised in the settlement, is required both as to nature and value. And when the Commissioner certifies that statement as correct, duties are collected as directed by the Schedule. The Schedule says "on all settlements of property both real and personal" &c.; then follow the graduated rates. The crux of the matter is what is meant by "property real and personal"? Does it mean property in Victoria only, as the respondents contend; or does it mean, as the appellant contends, either property in Victoria originally settled and continuing in the same form down to the settlor's death, or property anywhere else in the world provided it is subject to the settlement as representing in a changed form originally settled Victorian property?

(1) (1901) A.C., 102, at p. 107.
(2) 8 App. Cas., 82.
(3) (1891) A.C., 476.
(4) (1902) A.C., 552, at p. 560.

The appellant's interpretation is met by the rule of territorial construction already referred to. The words "property real and personal" in the Schedule mean primarily property in Victoria, and there are no words to extend them to property outside Victoria.

The decision in *Blackwood's Case* (1), it is true, was concerned with probate of a will and administration in intestacy whereby the local Legislature authorized dealing with local property; and it is true the present case deals with an instrument of a party which might affect property anywhere. But the Legislature, by making title depend on local registration also, is affecting the title to property which must on ordinary principles of legislative authority be in Victoria. Indeed, in *Blackwood's Case*, one of the reasons given by the Judicial Committee was expressed in these terms (2):—"Their Lordships think that, in imposing a duty of this nature" (probate), "the Victorian Legislature also was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction." I cannot suppose in a case really complementary of that, where registration of an instrument is made the analogue of the probate of a will or the issue of letters of administration, that the Legislature has changed its intention and brought into its taxing and invalidating provisions property not within its jurisdiction. Not only is this improbable on the face of it, but the enforcing provisions by sale in sec. 112 itself and by vesting order in sec. 114 are consistent only with an intention to apply them to property within the territory, if the full validity of the enactment is to be maintained. The transmutation argument is based on the notion that the settlor's Victorian property once settled becomes forthwith charged, so to speak, with the duty, payable when the settlor dies, and thus the duty cannot be evaded. But as it is conceded that the statement of property is to contain only the substituted property, and that the value of that substituted property is to govern the amount of duty paid, it is evident that the dutiable value has no relation whatever to the value of the original property and may be more or less than that value. Indeed, if before the settlor's death all the trust property has vanished, there is nothing payable,

(1) 8 App. Cas., 82. (2) 8 App. Cas., at p. 98.

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however great the property originally settled. In *Rosenthal* v. *Rosenthal* (1) I said of a settlement:—"Events may affect its operation so that the person who might have taken the property under it does not take any interest by virtue of the settlement. In that case the consequence is that there is nothing to invalidate, that registration is unnecessary, and that the words of the taxing Schedule would not apply to the case." I adhere to that now. But if there is substituted trust property, the new property, having been substituted in the lifetime of the settlor by persons he has placed in a position to do so, may well be regarded as settled by him instead of the original property, and it is really the settled interest in the substituted property which passes on his death to the beneficiary, and is taxable, provided it is Victorian.

2. The second question is how to apply those doctrines to the settlement now under consideration. It is accepted by both sides that the property comprised in the settlement at the settlor's death consisted of the eleven items enumerated in par. 4 of the affidavit of the respondents (plaintiffs). The matter is therefore free from any controversy as to breach of trust calling for determination as to the real trust property, and is to be determined precisely as if it were a case of probate in respect of the enumerated properties, and without reference to the history of the transaction or transactions by which that property became subject to the trust.

I agree that the appeal should be dismissed.

GAVAN DUFFY J. read the following judgment:—I agree. In my opinion the general intention of the Legislature was to enforce the registration of settlements containing trusts to take effect after the death of the settlors in order that property which then would have been liable to pay probate duty if the settlements had not been made might not escape taxation. It is probable that the Legislature assumed that the property originally settled would always remain unchanged in its nature from the time of the making of the settlement till the death of the settlor, at all events I can find nothing in the Statute sufficient to establish the proposition which was submitted to us by Mr. *Weigall* with his accustomed

(1) 11 C.L.R., 87, at p. 96.

lucidity, and which may be stated thus: If property originally settled be such that had the settlor died immediately before the date of the settlement it would have been liable to pay probate duty, then so much of such property and of the proceeds thereof arising through realization and reinvestment as is comprised in the settlement at the death of the settlor remains liable to taxation under sec. 112 of the *Administration and Probate Act* 1890. I therefore think that the judgment appealed from is right, and the appeal should be dismissed.

RICH J. I agree.

Appeal dismissed with costs.

Solicitor for the appellant, *E. J. D. Guinness*, Crown Solicitor for Victoria.

Solicitors for the respondents, *Davies & Campbell.*

B. L.

[HIGH COURT OF AUSTRALIA.]

FLEMMICH . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . } RESPONDENT.

Land Tax—Assessment—Joint owner also owning land in severalty subject to lease—Assessment as secondary taxpayer—Deduction to avoid double taxation—Method of ascertaining amount of deduction—Value of whole of land of taxpayer—Deduction of value of lease—Land Tax Assessment Act 1910-1914 (*No.* 22 *of* 1910—*No.* 29 *of* 1914), *secs.* 28, 38, 43, 43A.

Where a joint owner of land is also an owner in severalty of other land and is separately assessed under sec. 38 (3) of the *Land Tax Assessment Act* 1910-1914 in respect of his whole interests, the land held by him in severalty is to be assessed according to the ordinary rules for assessing land so held.