[PRIVY COUNCIL.]

SHELLEY AND OTHERS . . . . APPELLANTS;
DEFENDANTS AND PLAINTIFFS,

AND

THE NEW SOUTH WALES INSTITUTION FOR THE DEAF, DUMB AND THE BLIND AND ANOTHER . . . } RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE HIGH COURT.

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Estate Duty — Apportionment of payment — Will — "Different disposition" — Direction to pay testamentary expenses out of residue—Direction to pay expenses of preceding trusts out of residue—Estate Duty Assessment Act 1914 (*No.* 22 *of* 1914), *secs.* 34, 35.

The duty payable under the *Estate Duty Assessment Act* 1914 is not a testamentary expense, and therefore a direction in a will to pay testamentary expenses out of the residuary estate is not a "different disposition" within the meaning of sec. 35 of that Act.

A testator by his will, after creating certain trusts, directed his trustees out of the proceeds to arise from the sale, conversion and getting in of his residuary estate "in the first place except where herein otherwise directed to pay or retain all the expenses incident to the execution of the preceding trusts and my debts funeral and testamentary expenses."

Held, that there was no "different disposition" within the meaning of sec. 35 of the *Estate Duty Assessment Act* 1914, and therefore that the duty assessed under the Act should be apportioned in the manner provided by that section.

Decision of the High Court: *New South Wales Institution for the Deaf, Dumb and the Blind* v. *Shelley*, 23 C.L.R., 351, affirmed.

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* Present—Viscount Haldane, Lord Finlay, Viscount Cave, Lord Dunedin and Lord Phillimore.

APPEAL to the Privy Council from the High Court.

This was an appeal by Harry Mansfield Shelley and others from the decision of the High Court: *New South Wales Institution for the Deaf, Dumb and the Blind* v. *Shelley* (1).

The judgment of their Lordships, which was delivered by VISCOUNT HALDANE, was as follows:—

This is an appeal from a judgment of the High Court of Australia, which varied a judgment of the Supreme Court of New South Wales delivered by *Harvey* J. The question for decision is whether on the construction of the will of Norman Shelley, deceased, there is in the will a direction, within the meaning of sec. 35 of the *Estate Duty Assessment Act* 1914 of the Commonwealth of Australia, in terms of which direction a duty, that would otherwise be apportioned among all the beneficiaries under the will in proportion to the value of their interests, is to be paid out of the proceeds to arise from the sale, conversion and getting in of the testator's residuary estate in such a way that it will fall on the residuary legatees alone. The High Court decided that there was no such direction, and that the appellants, who are among the specific and other legatees and devisees under the will, ought, in common with the residuary legatees, to bear apportioned shares of the duty as prescribed by the Act in the absence of any direction to the contrary.

Under the Constitution of Australia, as established by the *Commonwealth of Australia Constitution Act* of 1900, the States preserve their powers of regulating their own affairs in regard to, among other things, the probate of testamentary dispositions, and the imposition of probate duties on the estates of deceased persons. An Act of the Legislature of New South Wales passed in 1898 prescribes taxation to be levied in, among other cases, that of the probate of a will under which real or personal estate is disposed of. By sec. 57 no probates or letters of administration are to issue until duty under the Act has been paid or security has been given for them, and the probate has been duly stamped. Sec. 51 of the Constitution confers on the Commonwealth Parliament wide powers of taxation, but does not affect the legislative capacity of the States in regard to

(1) 23 C.L.R., 351.

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testamentary dispositions. In 1914 the Commonwealth Parliament passed an Act relating to duties on the estates of deceased persons. This Act provided that estate duty should be levied and paid upon the value of the estates of persons dying (as did the testator) after the date of the Act. By sec. 10 the administrator (which term includes an executor to whom probate has been granted) is to furnish a statement in due form of all the estate of the deceased person of which he is administrator. The statement is to set forth the descriptions and values of the items in the estate before deducting debts or other charges. Sec. 17 enacts that for the purpose of assessing the value for duty of the estate, the debts due and owing by the deceased at the time of his death are to be deducted from the gross value of the assessable estate if the deceased died domiciled in Australia. Sec. 34 provides that the duty assessed under the Act is to be a first charge on the estate in priority over all other encumbrances, and that there is to be no disposition of any part of the estate until payment of the duty or a certificate that security has been given for its payment, and an administrator who disposes of the estate in contravention of this provision is made personally liable for the duty. Sec. 35 is the crucial one for the purposes of the present appeal. It enacts that " subject to any different disposition made by a testator in his will, the duty payable in respect of an estate," with certain exceptions which are not material, " shall be apportioned by the administrator among the persons beneficially entitled to the estate " in proportion to the value of their interests, again with exceptions which need not be considered. There are also provisions enabling the authority to make separate assessments of the duty payable in respect of the separate interests of individual beneficiaries, which in that case are to be exclusively charged. The only other part of this Commonwealth Statute that need be referred to is the definition of debt in sec. 3 as including probate and succession duties payable under any State law.

By his will, which became operative on his death subsequent to 1914, the testator, after appointing an executor and trustee and making various specific bequests and devises, gave his residue, real and personal, upon trust for conversion, and out of the proceeds to arise from it in the first place to pay all the expenses incident

to the execution of certain preceding trusts and also his debts, funeral and testamentary expenses. He then, after directing other payments to be made, divided the surplus proceeds arising from the conversion into seven portions, and prescribed how these should be applied. The respondent institutions are beneficially entitled to part of the residuary surplus so dealt with.

The testator left real and personal estate of the net assessable value for the purposes of the Commonwealth taxation under consideration of over £146,000, and on this the Federal Government were paid over £19,000 for duty under the Act of 1914. A summons was then taken out by the trustees of the will to have it determined whether the provision in the will that there should be paid out of the proceeds of the conversion the expenses incident to the execution of the preceding trusts and the testamentary expenses, amounted to a "different disposition" within the meaning of the words of exception in sec. 35 of the Act of 1914, prescribing general apportionment among the beneficiaries under a will. This summons came before *Harvey* J., who held, in favour of the beneficiaries generally, including the present appellants, that payment of the estate duty imposed by the Commonwealth Act was, in the State of New South Wales, a testamentary expense, and also an expense incident to the trusts in the will preceding the direction in question.

On appeal to the High Court, *Isaacs* J. delivered a judgment, concurred in by *Barton* and *Rich* JJ., reversing this decision. The learned Judges of the High Court were of opinion that the expression in the will "expenses incident to the execution of the preceding trusts" referred only to the expenses attendant on actually carrying out the prior directions of the will, after the trustee was clothed with the necessary authority, such as the payment of rates, taxes, and outgoings in connection with certain house property devised on trust to be kept up as a residence. As to the other point, that the duty was a "testamentary expense," the High Court held that the payment of the duty need not take place before the issue of probate, and that it was not a condition precedent to the complete investiture of the administrator with title.

Their Lordships have arrived at the same conclusion as did the High Court. The expression "testamentary expense," in

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certain decisions in the Courts of England which have been cited to them, has been given a wide meaning. But this meaning was in each of these decisions derived from a context different from that in the will before them read in conjunction with the Commonwealth Statute. That Statute is not concerned with the grant of probate, which is matter for the law of the State of New South Wales. The Federal Parliament directs its legislation merely to the imposition of a tax on the value as assessed under its Act of the estate in the hands of a person charged as its administrator. That administrator, who derives his appointment from the law of New South Wales, is directed by the Federal Act to apportion the duty payable among the beneficiaries generally in proportion to the value of their interests, unless a different disposition is made in the will. Their Lordships think that this enactment assumes that before the tax is made effective he has already been clothed with title, and that the payment by him of the tax is the discharge neither of a testamentary expense nor of any expense incident, within the meaning of the language of the will before them, to the execution of " the preceding trusts," which they interpret as bearing the restricted meaning to which reference has already been made. If so, there is in the will no " different disposition " which excludes the ordinary principle of apportionment prescribed by the Statute.

Their Lordships are accordingly of opinion that the appeal fails, and they will humbly advise His Majesty that it should be dismissed. The appellants will pay the costs of this appeal of the New South Wales Institution for the Deaf, Dumb and the Blind and the Royal Alexandra Hospital for Children.