[HIGH COURT OF AUSTRALIA.]

DALY AND OTHERS . . . . . PLAINTIFFS;

AGAINST

THE STATE OF VICTORIA . . . . DEFENDANT.

H. C. OF A. 1921.

MELBOURNE, *Oct.* 4, 5, 17.

Knox C.J., Higgins and Starke JJ.

Probate Duty—Exemption—Charitable bequest—Victorian institution—Assets of testator in Victoria and in another State—Bequest not specific—Administration and Probate Act 1915 (Vict.) (No. 2611), secs. 128, 130.

Sec. 130 of the *Administration and Probate Act* 1915 (Vict.) provides that "(1) No duty shall be payable under this Act in respect of any public charitable bequest . . . . (2) In this section the term 'public charitable bequest' means a devise bequest or legacy of real or personal property of whatever description to or for any public institution situate in Victoria" &c.

Held, that the exemption conferred by the section did not extend to a bequest to a public institution in Victoria which was not specifically of Victorian property of the testator and to pay which it was not necessary to resort to such property.

R. v. *Butler*, 18 V.L.R., 239; 13 A.L.T., 291, applied.

SPECIAL CASE.

In an action brought in the High Court by Patrick Daly, Frederick William Tietyens and William Percy Daly, the executors of the will and codicil of John Daly deceased, against the State of Victoria, a special case, which was substantially as follows, was stated by the parties for the opinion of the Court:—

1. This action was commenced in the High Court on 14th July 1920 by a writ of summons whereby the plaintiffs claim (*a*) a declaration that no duty is payable under the *Administration and Probate Act* 1915 of the State of Victoria in respect of the public charitable bequests or settlements contained in the will of the

H. C. OF A. 1921.

DALY v. STATE OF VICTORIA.

testator, John Daly deceased, whereby he bequeathed or settled sums amounting in all to £1,750 which are to go after his wife's death in favour of certain public charitable institutions situate in Victoria, being public charitable institutions admittedly under sec. 130 of the *Administration and Probate Act* 1915; (*b*) a declaration of what amount of duty is rightly payable in respect of the Victorian estate of the said testator; (*c*) the return of the probate duty paid under protest to the Victorian Commissioner of Taxes in respect of the said sum of £1,750 bequeathed or settled as aforesaid, the plaintiffs having been unable to obtain probate of the will and codicil of the said testator sealed by the Supreme Court of Victoria without payment of such duty.

2. The parties have concurred in stating the questions of law arising herein in this special case for the opinion of the Court.

3. The plaintiffs are residents of the State of New South Wales, and are the executors of the will and codicil of John Daly deceased, who was at all times material domiciled in the State of New South Wales; and they sue as such executors.

4. The said John Daly deceased died on 30th June 1918 leaving property in New South Wales not exceeding in value £40,584 and property in Victoria not exceeding in value £5,797.

5. On 3rd October 1918 probate of the said will and codicil was granted to the plaintiffs by the Supreme Court of New South Wales in its probate jurisdiction: the said probate was sealed with the seal of the Supreme Court of Victoria on 11th May 1920.

6. The testator by his said will bequeathed (*inter alia*) the following sums payable after the death of his widow, who is sixty-nine years of age, namely, (*a*) £500 to the Little Sisters of the Poor, Northcote, Victoria; (*b*) £500 to St. Vincent's Hospital at Melbourne, Victoria; (*c*) £750 to St. Augustine's Roman Catholic Orphanage at Geelong, Victoria, for the general purposes of the Orphanage. The assets of the testator in Victoria are amply sufficient to pay all the said legacies in full.

7. The plaintiffs and the defendant agree that the above-mentioned legacies are public charitable bequests within the meaning of sec. 130 of the *Administration and Probate Act* 1915, but the defendant

claims that duty is payable under the said Act in respect of such bequests.

8. The defendant claimed duty on the whole sum of £5,797, the value of the testator's property in Victoria, according to the rates set out in Parts I. and II. of the Tenth Schedule of the *Administration and Probate Act* 1915 as follows: under Part I., £3,367 at 6 per cent., £202 0s. 5d.; under Part II., £2,430 at 3⅓ per cent., £81—Total, £283 0s. 5d.

9. The plaintiffs have at all times material claimed that no duty is payable in respect of the said public charitable bequests; and they say that the amount of duty rightly payable on the testator's property in Victoria is to be calculated on the sum of £4,774—that is to say, on the value of the testator's property in Victoria after deducting £1,023, the agreed present value of the said charitable bequests. If duty were so calculated the amount payable would be £221 12s. 10d.

10. It was necessary for the plaintiffs, in order to carry out their duties, to obtain the issue to them of the probate sealed with the seal of the Supreme Court of Victoria. They were unable to obtain the issue thereof until they paid to the defendant the said sum of £283 0s. 5d. claimed by the defendant as duty. The plaintiffs, being so compelled, paid the said amount on 10th May 1920; but paid under protest as to £61 7s. 7d., the part thereof payable by reason of the inclusion in the sum upon which duty was calculated of £1,023, the present value of the said bequests.

The question for the opinion of the Court is:

Is duty payable under the *Administration and Probate Act* 1915 in respect of the said public charitable bequests?

If the Court shall on the first question be of opinion in the negative, then judgment shall be entered up for the plaintiffs for the amount of £61 7s. 7d. and costs of the suit (including the costs of this special case). If the Court shall be of opinion in the affirmative, then judgment shall be entered up for the defendant with its costs of defence and of this special case.

The special case now came on for hearing before the Full Court.

R. E. Hayes (with him *Hassett*), for the plaintiffs. These charitable

H. C. OF A. 1921. DALY v. STATE OF VICTORIA.

gifts are within the very words of sec. 130 of the *Administration and Probate Act* 1915 (Vict.), and are exempt from payment of duty. It is sufficient to show that the gifts may be properly paid out of the Victorian assets of the testator. The Court may disregard the fact that there are assets in another State (*In re Buzzard* (1)). The onus is not on the plaintiffs to bring the case within the exemption (*Armytage* v. *Wilkinson* (2)).

[KNOX C.J. referred to *Swinburne* v. *Federal Commissioner of Taxation* (3); *Hogg* v. *Parochial Board of Auchtermuchty* (4).]

From the facts that all the testator's gifts to charities are larger than the Victorian assets and that those assets are ample to pay the gifts to Victorian charities, an inference can be drawn that the testator intended that the gifts to Victorian charities should be paid out of the Victorian assets. When administration auxiliary to a foreign administration is granted, it is subservient to the rights of creditors and legatees resident in the country where the auxiliary administration is granted (*Story's Conflict of Laws*, 8th ed., p. 716; *Williams on Executors*, 11th ed., pp. 1276 *et seq.*).

[STARKE J. referred to *In re Klœbe*; *Kannreuther* v. *Geiselbrecht* (5).]

That preference to Victorian creditors and legatees was intended is shown by sec. 56 (*d*) of the Act, which was passed in consequence of the decision in *Permezel* v. *Hollingworth* (6) (see also *In re Watmough* (7)).

Latham, for the defendant. The exemption given by sec. 130 is in respect of property which otherwise would be chargeable with duty. The only property which is so chargeable, and of the value of which a statement must be made under sec. 122, is property which is locally situated in Victoria (*Blackwood* v. *The Queen* (8); *Commissioner of Stamps* v. *Hope* (9)). In *R.* v. *Butler* (10) it was decided that the reduction of the rate of duty in respect of a devise or bequest to the widow of a testator is only allowable where property in

(1) 2 S.R. (N.S.W.), 42.
(2) 3 App. Cas., 355.
(3) 27 C.L.R., 377.
(4) 7 Rettie, 986.
(5) 28 Ch. D., 175.
(6) (1905) V.L.R., 321; 26 A.L.T., 213.
(7) (1913) V.L.R., 435.
(8) 8 App. Cas., 82.
(9) (1891) A.C., 476.
(10) 18 V.L.R., 239; 13 A.L.T., 291.

Victoria is specifically devised or bequeathed to the widow, or where the devise or bequest must necessarily be paid out of Victorian property. The principle of that decision applies also to bequests to charities. [Counsel also referred to *Henty* v. *The Queen* (1); *R.* v. *Smith* (2); *McLaughlin* v. *The Queen* (3).]

R. E. Hayes, in reply.

Cur. adv. vult.

Oct. 17.

The following written judgments were delivered :—

KNOX C.J. The testator, John Daly, had at the time of his death property both in New South Wales and in Victoria. The value of his New South Wales property was £40,584 and of his Victorian property £5,797. By his will he bequeathed a number of legacies payable on the death of his wife. Among these were legacies of £500 to the Little Sisters of the Poor, Northcote, Victoria, £500 to St. Vincent's Hospital at Melbourne, and £750 to St. Augustine's Orphanage at Geelong. It is admitted for the purpose of this case that these three legacies are public charitable bequests within the meaning of sec. 130 of the *Administration and Probate Act* 1915. The will contained no direction as to the fund out of which these legacies were to be paid.

The defendant claimed duty on the sum of £5,797—the net value of the testator's assets in Victoria. The plaintiffs paid the amount claimed under protest as to £61 7s. 7d., contending that by virtue of sec. 130 of the Act the sum of £1,023, being the present value of the three charitable bequests mentioned above, was exempt from liability to duty. The question is whether duty is payable in respect of the whole sum of £5,797. The decision of this question depends on the interpretation of sec. 130 of the *Administration and Probate Act* 1915. The material portion of that section is as follows :—(1) "No duty shall be payable under this Act in respect of any public charitable bequest or public charitable settlement, whether the public institution in whose favour such bequest or

(1) (1896) A.C., 567, at p. 572.
(2) 9 V.L.R. (L.), 404, at p. 415; 5 A.L.T., 124, at p. 127.
(3) 23 V.L.R., 638; 19 A.L.T., 248.

H. C. OF A. 1921. DALY v. STATE OF VICTORIA. KNOX C.J.

settlement is made is or is not in existence at the time of the making of the bequest or settlement. (2) In this section the term 'public charitable bequest' means a devise bequest or legacy of real or personal property of whatever description to or for any public institution situate in Victoria and being" of certain specified classes. The enactment in sub-sec. 1 extended by taking in the definition of the expression "public charitable bequest" contained in sub-sec. 2 reads as follows: "No duty shall be payable under this Act in respect of any devise bequest or legacy of real or personal property of whatever description to or for any public institution situate in Victoria" of the classes specified in the subsequent portion of sub-sec. 2. In order to sustain their contention the plaintiffs must establish that the bequests above mentioned are "bequests of real or personal property" within the meaning of this section.

It is clear from the words of sub-sec. 1 that the object of the section is to exempt from liability to duty property in respect of which duty would, but for the provisions of the section, have been payable under the Act. It follows that in order to bring a bequest within the exemption it must be a bequest of property in respect of which but for the section duty would have been payable. Now, duty is only payable under this Act in respect of Victorian property (*Blackwood* v. *The Queen* (1)), and consequently the only bequests which can be brought within the exemption given by sec. 130 are bequests of Victorian property. The question therefore is whether the three bequests above mentioned are bequests of Victorian property. Under the terms of the will the executors are at liberty to pay these bequests out of either the New South Wales or the Victorian property of the testator; and neither the provisions of the will nor the circumstances of the estate require that they shall be paid wholly or in part out of the Victorian property. While the executors may, if they choose, properly pay these legacies out of the Victorian property, they are not bound to do so. On this state of facts I am of opinion that the legacies are not bequests of the Victorian property of the testator. A similar question arose on another provision of the Act in *R.* v. *Butler* (2). The decision in that case

(1) 8 App. Cas., 82. (2) 18 V.L.R., 239; 13 A.L.T., 291.

was that the words "property devised or bequeathed to the widow of a testator" in sec. 129 relate to property in Victoria and, strictly construed, would justify a reduction of the percentage chargeable for duty only in cases where property in Victoria is specifically devised or bequeathed to the widow, but where it can be proved that a general legacy is necessarily payable either wholly or in part out of the proceeds of property in Victoria a reduction in the duty may be allowed. Where a legacy to a widow is not specific and it appears that there is property outside Victoria from which it might be paid, the burden of proving that the duty is subject to a reduction lies upon the executor. Mr. *Latham*, for the defendant, did not challenge the correctness of that decision, and it is therefore unnecessary to consider whether it was not unduly favourable to the executors. Accepting it as correct, I think it is in point in the present case. In that case as in this the executors might lawfully have satisfied out of the Victorian property of the testator the bequest in respect of which they claimed to be entitled to a reduction of duty, but in that case as in this neither the provisions of the will nor the circumstances of the case compelled them to do so.

In my opinion the exemption conferred by sec. 130 extends only to cases in which it is necessary for the executors either by reason of the provisions of the will or by reason of other circumstances to resort to the Victorian property of the testator in order to pay the charitable bequest.

For these reasons I am of opinion that the question submitted should be answered in the affirmative, and that judgment should be entered for the defendant with its costs of defence and the special case.

HIGGINS J. I concur in the opinion that the question should be answered in the affirmative. Under sec. 128 duty is payable on the "final balance" of assets over liabilities—that is to say, Victorian assets over Victorian liabilities, as decided in *Blackwood's Case* (1). But under sec. 130 no duty is payable "in respect of any public charitable bequest"; and "public charitable bequest" means "a devise bequest or legacy of real or personal property of

(1) 8 App. Cas., 82.

H. C. OF A. 1921.

DALY v. STATE OF VICTORIA.

Higgins J.

whatever description to or for any public institution situate in Victoria " of certain specified kinds. The executors cannot, therefore, bring themselves within the exemption of sec. 130 unless they can show that the assets—Victorian assets— for which they seek exemption are devised, bequeathed or given to such an institution. This does not depend on presumptions as to construction, but rests on the plain, necessary intendment of the Act. Here we cannot find that any Victorian assets are devised, bequeathed or given to these institutions. These legacies, under the will, may be paid out of the New South Wales assets, as well as the numerous similar legacies given to New South Wales institutions. None of the Victorian assets are ear-marked or dedicated to the Victorian institutions. The exemption provided by sec. 130 is not an exemption of assets everywhere of testators who give legacies to such Victorian institutions: it is an exemption of Victorian property only which would be liable to duty but for the fact that it is given to Victorian public charitable institutions. Sec. 130 is an exception to sec. 128; and sec. 128 refers to Victorian assets only. As the Chief Justice says, the same point, substantially, was decided in the case of *R.* v. *Butler* (1). There the Act provided a lower rate of duty for assets given to a widow than for assets given to strangers; and it was held that the lower rate did not apply to a gift to a widow unless there were a specific devise or bequest of Victorian property to the widow, or, at the least, unless it were shown that in the circumstances of the estate Victorian property had necessarily to be used in order to satisfy the legacy. The words of the section in that case corresponded closely with sec. 129 (4) of the present Act— " When other persons are entitled under such will the duty shall be calculated so as to charge only one-half of the percentage mentioned in the Seventh Schedule upon the property devised or bequeathed to the widow of a testator " (see sec. 116 of the *Administration and Probate Act* 1890). The words are different from the words of the present Act, but counsel have not been able to point out any such difference in the words as would justify the application of a different construction.

I may add that our construction of the Act will not make one

(1) 18 V.L.R., 239; 13 A.L.T., 291.

penny difference to the institutions concerned, as the will directs that all the legacies are to be paid free of State and Federal estate duties. The general residue bears all the burden of duty.

H. C. OF A. 1921. DALY v. STATE OF VICTORIA.

STARKE J. I concur in the opinion given by my brother *Higgins*.

Judgment for the defendant with costs.

Solicitors for the plaintiffs, *Emerson & Tietyens*, Albury, by *W. E. Pearcey*.

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

B. L.

[HIGH COURT OF AUSTRALIA.]

LENNON . . . . . PLAINTIFF;

AGAINST

SCARLETT & CO. . . . . DEFENDANT.

H. C. OF A. 1921. MELBOURNE, *Oct.* 6, 7, 19. Knox C.J., Higgins and Starke JJ.

Contract—Formation—Offer and acceptance—Telegrams—Request for written contract—Intention of parties—Subsequent negotiations—Sale of maize—Anticipatory breach by purchaser—Measure of damages—Goods Act 1915 (*Vict.*) (*No.* 2663), *sec.* 54.

On 1st June 1920 the plaintiff in Cairns sent to the defendant in Melbourne a telegram offering to sell 500 tons of prime maize at £16 a ton free on board at Cairns for delivery in July or August at seller's option. On the same day the defendant sent in reply a telegram accepting the offer, and adding "Please forward contract." The plaintiff by telegram on the same day acknowledged receipt of the last-mentioned telegram, adding "Confirm sale 500 tons." On 9th June the plaintiff sent to the defendant a contract note containing terms in addition to those stated in the telegrams; and on 19th June the defendant wrote in reply stating that he objected to certain of the added