Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Bell and others v. *the Master in Equity of the Supreme Court of the colony of Victoria, from the Supreme Court of the colony of Victoria; delivered 24th April* 1877.

Present:

SIR JAMES W. COLVILE.
SIR BARNES PEACOCK.
SIR MONTAGUE E. SMITH.
SIR ROBERT P. COLLIER.

THIS is an appeal against an order of the Supreme Court of the colony of Victoria reversing an order of a single Judge (Mr. Justice Molesworth), whereby the Master in Equity of the Supreme Court was directed forthwith to issue probate of the will of Mr. John Bell to his executors (the Appellants) upon the terms therein mentioned. The only question between the parties was whether the property left by the testator was to pay the higher legacy duty imposed by one of the Colonial Acts or the lower duty imposed by another.

The facts material to the decision of the case are these. The testator died on the 27th January 1876. An application was made for probate, and probate was granted on the 30th March 1876. A certain statement required by Statute was filed on the 28th June 1876, and probate, though granted before, was actually issued after that. At the time of the death of the testator, the Act in force was No. 388 of 1870; but in the year 1876 another Act was passed, which is to be read with the former Act, and this Act was passed on the

41838. 100.—6/77. Wt. 6305.

7th April 1876; but there is a provision in it that it is to take effect retrospectively as far back as the 24th February 1876. It appears, therefore, that the testator died while the first Act was in operation and that probate was applied for and granted before the second Act was passed, but after the time fixed for its coming into operation retrospectively.

The Act, No. 388, is intituled "An Act to "enforce and collect duties on the estates of "deceased persons," and among other provisions enacts (sec. 7) that "every executor "shall within the prescribed time from the "granting of probate or letters of administration to him, or such further time as the "Master may allow, file in the office of the "Master a statement specifying the particulars "of the personal estate of or to which the "deceased was at his death possessed or entitled, "and of the real estate comprised in such will "and the value thereof, and of the duties due "by the deceased, distinguishing between secured and unsecured debts, and stating the "nature of the security held for the same and the "estimated value of such security, and showing "the balance remaining." Then section 8 says, "Except as herein otherwise provided there "shall be paid to the Master, to be paid by him "into the consolidated revenue of Victoria, by "every administrator, executor, administrator "with the will annexed, administrator of "freehold lands, and heir at law, the duty "mentioned in the schedule to this Act, which "shall be calculated upon the final balance "appearing upon his statement." This, their Lordships observe, appears to be an Act for the purpose of enforcing duties to the state upon the estates, whether real or personal, of all persons deceased; the duties cannot strictly speaking be called probate or administration duties; they

are more in the nature of succession duties, although the word "succession" is not used. If no administration is taken out, and if there be no executor who seeks for probate, nevertheless the estate must pay duty, for by section 9 the rules may prescribe the time of notice after which the duty payable under this Act must be paid, and if it be not paid the Master may apply to the Supreme Court, and it may order part of the testator's property to be sold.

Then comes a provision which seems to their Lordships very material. The 10th section enacts, "The duty payable under this Act shall " be deemed a debt of the testator or intestate " to Her Majesty, her heirs and successors, and " shall be paid by any executor or administrator " with the will annexed out of the personal " estate of the testator, after payment of the " testamentary and funeral expenses, in priority " to all debts of the testator; and if the personal " estate is insufficient to pay such debt, the " executor or administrator with the will " annexed or any person interested may apply " to the Supreme Court, which may order that " a sufficient part of the real estate of the " testator may be sold to pay the said duty."

Here the legislature in express words declares that the duty payable shall be deemed a debt of the testator to Her Majesty. The High Court, which reversed the decision in favour of the Plaintiff of Mr. Justice Molesworth in the Court below, treat the language of the section as if it had been "The duty payable under this Act shall " be a debt of the testator." They observe that these words enact what is impossible, and must therefore receive some construction other than that which would be put upon them according to ordinary rules. But the words have not been correctly quoted by the Supreme Court. These words are, "The duty payable under this

Act "*shall be deemed* to be a debt of the testator," not an uncommon expression in Acts of Parliament, the meaning of which here is that although in strictness of language it was not actually a debt of the testator during his lifetime, it shall be deemed and taken to be such for the purposes of the Act, *i.e.* for the purpose of giving it a certain priority, and possibly for the purpose of preventing any dispute as to the time from which it shall be reckoned. In other words, the Legislature declare the duty to be a Crown debt accruing *eo instanti* at the death of the testator. It follows that on the 27th January 1876, when the testator died, there was an actual debt to the Crown, a debt in the calculation of which the principal factor was ascertained—the rate of duty to be paid. The only other factor was the amount of property upon which that duty was to operate, which might or might not have been ascertained at the time. If that amount was then known, the debt to the Crown could have been immediately expressed in figures; if not, further time would be required for ascertaining the nature and extent of the property, not the rate of duty. The Act passed in the April following, and had a retrospective effect, but that retrospective effect is stated to be the 24th February, and did not affect a Crown debt which was really due on the 27th January.

Their Lordships are of opinion that this case should be decided upon the terms of the Colonial Act, which are undoubtedly very special, and that recourse to the law of this country is not essential for its determination. With reference to an analogy which has been drawn between this duty and the probate duty in England, it may be enough to observe that the probate duty in England is a stamp duty, payable on what is supposed to be the value of the property the subject of the

probate at the time it is granted. It was said in a case of the Attorney General *v.* Partington (1st Hurlstone and Norman, page 474), by Baron Bramwell, "It was rightly said by "Mr. Lush that probate or administration "duty is a duty which attaches upon the "estate and effects of the testator or intestate "at the time of his death, but is to be calculated "upon the value of the estate at the time pro- "bate or administration is granted." Whether the calculation of the colonial estate duty differs from that of the probate duty or not, on the ground that the words which have been referred to in the 7th section of the Colonial Act require the second factor in the calculation of duty to be the value of the estate at the time of the death of the testator instead of at the time of the application for probate, it is not very material to inquire; but there would appear to be this rule common to both, that the duty attaches upon the estate and effects of the testator at the time of his death. Their Lordships, however, do not think it necessary to refer further to the English law than to mention one case, which appears to have a good deal of bearing upon this, viz., the Estate and Effects of the Earl of Cornwallis (11th Exchequer, page 581). It seems that a testator died, having bequeathed certain annuities, on the 21st May 1852. The Succession Duty Act passed on the 19th May 1853, and came into operation on that day. The 31st section of that Act says: "Where it shall be "required to calculate, for the purposes either of "this Act or of the Legacy Duty Acts, the value "of any annuity, or of any interest chargeable "with duty as an annuity, such value shall, "after the time appointed for the commence- "ment of this Act, be calculated according "to the tables in the schedule annexed to this "Act, and not according to the tables in the

" schedule annexed to the Act of the 36th " Geo. 3, cap. 52, and such annuity or interest " shall be chargeable with duty accordingly." It was argued that the Succession Duty Act having come into force, and declaring that all legacy duty should be calculated upon certain tables different from those which previously prevailed, the duty in this case was to be calculated upon the new tables; but it was held by the Court that although the calculation was not made till after this Act came into operation, still, the testator having died before it came into operation, the calculation was to be made on the tables in force at the time of his death; Mr. Baron Martin observes, "At the " time of the testator's death a certain amount " of duty became payable, and we ought not, " without clear language, to hold that another " amount is payable;" and finally the Court thought that "the 31st section must be applied " only to annuities given after the 19th May " 1853." That case appears to their Lordships to have a very strong bearing upon the present.

On the whole, their Lordships are of opinion that the order of Mr. Justice Molesworth was correct, and that the order of the Supreme Court was erroneous; and they will humbly advise Her Majesty to reverse that order, and in lieu thereof to direct that the appeal against the order of Mr. Justice Molesworth do stand dismissed, and the latter order affirmed, without costs to either party. The Appellants, however, must have the costs of this appeal.