HIGH COURT OF AUSTRALIA

Trustees Executors and Agency Company Limited

Vs.

Federal Commissioner of Taxation

(Rich, Starke, Dixon, Evatt and McTiernan JJ.)

3 August 1933

Rich, Dixon and McTiernan JJ.

We are called upon to decide whether movables situated abroad, which passed from a deceased person domiciled in Australia by gift *inter vivos* within one year of his death, are to be included as part of his estate for the purpose of ascertaining the value upon which estate duty is to be levied under the *Estate Duty Assessment Act 1914-1928*. Sub-sec. 3 of sec. 8 provides that the estate of a deceased person comprises his real property in Australia, his personal property wherever situate if the deceased was, at the time of his death, domiciled in Australia, and his personal property in Australia if he was not so domiciled. Sub-sec. 4 then enacts that property which passed from the deceased person by any gift *inter vivos* or by a settlement made within one year before his decease, and certain other interests of which he had divested himself or which were determined or divested at his death, shall for the purposes of the Act be deemed to be part of the estate of the person so deceased.

The first question is whether, as a matter of construction, the operation of sub-sec. 4 should be restricted to property and interests situated in Australia. In our opinion it should not be so restricted. The purpose of sub-sec. 4 is to extend the dutiable estate of the deceased so as to include property which, because of dispositions by the deceased or of the nature of his interest, is not actually part of his estate devolving upon his death. The chief object of sub-sec. 3 is to prescribe the conditions in which, because of its situation abroad, property actually part of the deceased's estate is excluded. The provision is expressed in an affirmative form, but its intended operation is to exclude all real property situated abroad and personal property so situated if the deceased died domiciled out of Australia. The natural interpretation of the two provisions when read together appears to us to be that property, which by force of the statute is "deemed to be part of the estate of the person so deceased," is made subject to exactly the same territorial exclusion and discrimination as the actual estate.

In opposition to this construction the contention is, briefly, that in the absence of a more definite expression of such an intention the general words of sub-sec. 4 should be understood to refer only to property in Australia, and that the charge created by sec. 34 and the apportionments directed or authorized by secs. 35 and 35A cannot be effective upon or against foreign movables of donees whose title is complete under the *lex situs* or *loci actus*. In our opinion these considerations are answered by the general plan and nature of the legislation and the form of the two sub-sections. In the first place, the duty is described as an "estate duty" and the incidence of estate and succession duties upon movables has been much affected by the domicil of the deceased (compare *Winans v. Attorney-General*[1]; and *Harding v. Commissioners of Stamps for Queensland*[2]). In the next

place, the charge of duty upon, and its apportionment to, gifts must often be ineffectual independently of locality; for instance, donees will consume or dispose of the subject matter given. These are matters ancillary and subsidiary to the main purpose, the imposition of the duty upon the total mass of property at a scale graduated according to the value of the whole. Such matters, therefore, cannot have much influence upon the interpretation of the provisions defining the property to be assessed. Finally, the structure and arrangement of sub-secs. 3 and 4 sufficiently show what the real intention of the legislation was, namely, to include for the purpose of duty in the estate of a person dying domiciled in Australia personal property wherever situate, whether falling under sub-sec. 3 or sub-sec. 4.

The second question is whether to do this is beyond the constitutional power of the Commonwealth. Clearly it is not beyond its power.

For these reasons we think both questions in the special case should be answered: Yes.

Starke J.

The facts are fully stated in the case.

The first question is whether certain personal property situate abroad, which passed from a deceased person by gift *inter vivos* within one year before his decease, is part of the estate of the deceased person within the meaning of the *Estate Duty Assessment Act 1914-1928*, sec. 8. The estate of a deceased person comprises (*inter alia*) his personal property, wherever situate, if the deceased at the time of his death was domiciled in Australia (sec. 8 (3) (b)); and any property which passed from the deceased by any gift *inter vivos* within one year before his decease shall be deemed to be part of his estate (sec. 8 (4) (a)). It is said that the proper interpretation of sub-sec. 4 is to confine its operation to property within Australia at the time of the gift or at the time of the death of the deceased person. But the purpose of sub-sec. 4 (a) is to bring back into the estate of the deceased person for the purposes of estate duty property that would have formed his dutiable estate, in whole or in part, if he had not disposed of it. Consequently, it predicates the attributes of the categories of property contained in sub-sec. 3, and cannot be confined in the manner suggested in argument. It is insisted that this view will create many practical difficulties in the apportionment of the duty under secs. 35 and 35A, and in giving effect to the charge under sec. 34; but these considerations cannot control the clear purpose of sec. 8 (cf. *In the Will of Harper; Harper v. Harper*[3]).

The second question is whether the provisions of sec. 8 are *intra vires* of the Constitution. The decision in *National Trustees Executors and Agency Co. of Australasia v. Federal Commissioner of Taxation*[4], resolves this question in the affirmative.

Both questions should therefore be answered in the affirmative.

Evatt J.

The appellants are the executors of the will of George Turnbull Bell who, at the time of his death, was domiciled in Australia. Within one year before his death the deceased made large gifts to his children of British and New Zealand Government bonds and certain New Zealand inscribed stock. It may be taken that the subject of each of these gifts was at the time of gift, and remained until the death of the deceased, situate out of Australia. In the case stated, two questions are asked, namely:—

(1)

Whether the bonds and inscribed stock mentioned in par. 4 of this case were "property ... which passed from the deceased person by any gift inter vivos or by a settlement made before or after the commencement of this Act within one year before his decease" within the meaning of sec. 8 (4) (a) of the *Estate Duty Assessment Act 1914-1928*.

(2)

If the answer to question one be in the affirmative, is the sub-section *intra vires* the Legislature of the Commonwealth?

In *Jackson v. Federal Commissioner of Taxation*[5], *Knox* C.J., *Isaacs* and *Starke* JJ., described the general legislative scheme. They said:—

The scheme of the Act is this:—On the death of any person anywhere in the world who leaves property described in the Act, a duty is imposed on the mass of that property, called "the estate of the deceased person." That estate is defined to include (broadly speaking): (1) all real and personal property actually situated in Australia, and (2) all personal property anywhere if the deceased was domiciled in Australia[6].

The same learned Justices added:—

But further, since experience has shown that gifts *inter vivos* are frequently made in contemplation of death and intended to operate as testamentary dispositions, though not technically such, it has been for many years the recognized practice of legislatures to protect the revenue by regarding, for duty purposes, all such gifts *inter vivos* as if they had not been made. It has further been a recognized test, in order to avoid difficulty, delay and litigation that would often be required to establish that such gifts were in fact made to operate as testamentary gifts, to provide a limit of time before death as determining the question. This has been followed by sub-sec. 4 of sec. 8, and in that case all property within the meaning of that sub-section, which passed from the deceased person by a gift *inter vivos* within a year before his decease, is deemed for the purposes of the Act to be part of the estate. It follows that not merely Australian property, but also foreign property, which a domiciled Australian had within a year before his death and which was not his at the time of his death, may be his "estate" for the purposes of the Act[7].

The plain result of all these considerations is that all the gifts in question, although passing "from the deceased person by ... gift inter vivos ... within one year before his decease" are, for the purposes of the Act deemed to be, contrary to the fact, "part of the estate." It does not follow from sec. 8 (4) (a) that the value of such gifts must, under all circumstances, be included in the subject matter of taxation. That depends upon whether the property answers one of the three descriptions contained in sec. 8 (3). In this case the property so answers because sec. 8 (3) (b) regards the estate as comprising "personal property, wherever situate ... if the deceased was, at the time of his death,

domiciled in Australia."

The appellant's argument that sec. 8 (4) (a) should be interpreted as confined to property within Australia at the time of the gift *inter vivos* cannot be acceded to unless the restrictive interpretation is also applied to sec. 8 (4) (b) to (e) inclusive. The argument misconceives the fundamental purpose of sec. 8 (4) (a) so clearly stated in *Jackson's Case*[8].

The first question should be answered: Yes.

The second question is of considerable importance. It is contended that a Commonwealth law which purports to impose taxation upon, or in respect of the value of, property situate outside Australia is invalid, and it is not rendered valid merely because its former owner happened to be domiciled in Australia within twelve months after his parting with the property. Mr. *Herring* put his argument very shortly, but I have stated his position in perhaps its most plausible form.

It is curious that, from time to time, questions still arise as to the competence in relation to "extra-territorial" matters of the Legislatures of the Australian Commonwealth and of the States; for (1) such a power not only pertains to, but is an essential part of the conception of, self-government, (2) the status of the Commonwealth as a "self-governing" Dominion was fully admitted at the Imperial Conferences of 1926, 1929 and 1930, and (3) the legislative powers of the Australian State Legislatures are, as so clearly appears from the judgment of Viscount *Haldane* L.C. in *Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co.*[9], dealing with the Commonwealth Constitution, of precisely the same general nature and quality as those of the Commonwealth Parliament. A recent illustration where, upon territorial grounds only, power was denied to a State Legislature, is the case of *Commissioner of Stamp Duties (N.S.W.) v. Millar*[10]. It there appeared that the New South Wales Parliament had sought to charge with duty portion of the estate of a domiciled Victorian consisting of shares held by the deceased in a Victorian company, which, at the time of death, was engaged in mining business within New South Wales. *Rich*, *Dixon* and *McTiernan* JJ. said, in denying validity to the law:

Although some connection between the shareholder and New South Wales may be discovered in the existence there of part of the company's undertaking, the enactment goes beyond legislating in respect of that connection[11].

Starke J. agreed in the conclusion as to invalidity, and said:—

In my opinion the tax is not levied in respect of such operations, but upon property—shares in the present case, which are not situate in New South Wales, are not issued by any company incorporated under the laws of New South Wales, and are not owned by any person resident or domiciled in New South Wales. But the Act, on its proper interpretation, extends to such a case, and so far, I agree, is in excess of the powers of the Legislature of New South Wales[12].

The present appellant might, perhaps, have sought for analogy with *Millar's Case*[13]. In that case, as in this, the Legislature sought to include in the dutiable estate the value of property situate outside of the territory. In *Millar's Case*, the property was owned by the deceased at the time of death but the deceased was resident and domiciled outside of New South Wales. In the present case, the

deceased was domiciled in Australia at the time of death, but he was no longer the owner of the property taxed. In *Millar's Case*, a connection with the territory was established by the use to which the property was being put at the time of death, for it was embarked, partly at least, in extracting mineral wealth from the soil of New South Wales. In this case, territorial connection is established by reason of the domicil of the deceased at the time of death. But here, the tax is imposed, not only in respect of all personal property owned at the time when a territorial connection with the owner existed, but also of personal property no longer owned by him at that time. The suggestion in *Millar's Case* was that the authority of the Legislature could not extend further than to tax such part of the value of the deceased person's shares as represented the degree to which the company's share capital was employed in its New South Wales business. So, it might have been argued here, the connection with Australia is found in one fact only, actual domicil in the territory at the time of death, and though that might authorize legislation relating to such connection and so restricted to taxation of personal property, or perhaps all property, owned by the Australian at that time, it could not authorize legislation which, *ex concessis*, taxes personal property owned by a person when he was not associated with Australia in any way. Of course, the argument would not be met by pointing out that, according to the admitted facts of the present case, the deceased was also domiciled here at the time of the gifts to his children, for the legislation proceeds solely upon the foundation of domicil at the time of death.

I do not suggest that there is a sufficient analogy between *Millar's Case*, and the present, but it is far more satisfactory to approach the question of power on broader lines.

Contentions based upon theories which deny the Legislature's power upon "territorial" grounds are becoming so frequent that it may, perhaps, be useful to consider their general validity. It is well known that the modern theory of the necessary invalidity of any Dominion law, so far as it attempted to deal with matters, persons and things outside its borders, is based upon certain *obiter dicta* of Lord *Halsbury* in *Macleod v. Attorney-General for New South Wales*[14]. The theory was very convincingly criticised by Professor *H. A. Smith* (*Canadian Bar Review* (1923), vol. 1, p. 338). He said:—

If Courts were always guided by principle the question of extra-territorial legislation would never have presented any difficulties. Unfortunately the application of the principle has been quite needlessly confused by the interference of an undefined and imperfectly analysed idea, which has sometimes been expressed in the old Latin tag, *Extra territorium jus dicenti impune non paretur*. Like most maxims of its kind the phrase is of little practical help in the solution of actual legal problems. If it means that laws may be disobeyed with impunity where the executive power to enforce them does not extend, the statement is perfectly true but somewhat obvious. If it is meant that a legislature could never attach legal consequences to acts taking place beyond its own territory, the maxim would be palpably absurd and would be clearly contrary to the practice of every legislature in the world. In its original context (*Digest* 11.1.20), it is used quite properly in relation to the jurisdiction of Courts and their power to enforce their decrees. The maxim has nothing whatever to do with the question of legislative competence (pp. 349, 350).

Later the same distinguished authority said (*Law Quarterly Review* (1927), vol. 43, pp. 380, 381):—

It seems clear from the decision in *Ashbury v. Ellis*[15] that there is nothing to prevent a colony from attaching civil consequences within its jurisdiction to acts transacted beyond its borders, and I have

elsewhere given my reasons for thinking that there is no logical reason for denying the competence of colonial legislatures to attach penal consequences within their own territories to criminal acts committed abroad, subject to the restrictions which are in practice observed by the Imperial Parliament in dealing with such matters. This view is supported by the much higher authority of the late Sir *John Salmond*.

Professor *Smith's* reference is to the fact that in 1917 Sir *John Salmond*, after a close consideration of the leading authorities dealing with the presence of extra-territorial elements or features in Dominion legislation came to the conclusion that there was no legal restriction of legislative power merely upon the so-called extra-territorial ground. He concluded:—

The true restriction is one imposed by rules of interpretation which by reference to the presumed intention of the legislature will, notwithstanding the use of general words capable of extra-territorial application, cut out all such applications except where necessitated by the express words of the legislature or by necessary implication, and which, even where extra-territorial application is clearly intended, will restrict that application to its appropriate subject matter (for example, to British subjects or to British or colonial ships) in such manner as to harmonize colonial legislation with the principles of international law and with the requirements of an orderly division of jurisdiction and authority between the competent self-governing portions of the Empire. There is, it is submitted, nothing in the decision in *Macleod's Case*[16] which precludes the adoption of this principle (*Law Quarterly Review* (1917), vol. 33, pp. 130-131).

He also said that:—

It is to be observed that the authentic scope and limits of the authority of colonial legislatures are determined by the statute or other instrument by which the constitution of the colony is established. The authority so conferred is, in accordance with the settled and almost invariable formula, to make laws "for the peace, order, and good government" of the colony. It may be, therefore, that colonial legislation is judicially examinable with reference to the scope of the authority so conferred, and that an enactment which is so clearly unconnected with the peace, order, and good government of the colony that it cannot be regarded as a bona fide exercise of the subordinate legislative power so entrusted to the legislature, may be judicially declared to be *ultra vires* and void (*Law Quarterly Review*, vol. 33, p. 122).

This question of extra-territorial competence is of direct importance because to Australia and New Zealand has not, as yet, been applied sec. 3 of the *Statute of Westminster*. By sec. 3 of the statute "it is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation." Whilst this section is not yet in force in Australia, but has been applied to the Dominion Parliament of Canada and to the Irish Free State and South Africa, it by no means follows that the Parliaments of Australia and New Zealand are incompetent to give their legislation extra-territorial operation. According to the report of the 1929 Conference on the Operation of Dominion Legislation (Cmd. 3479) which was approved by the Imperial Conference of 1930 (Cmd. 3717, p. 18) it was stated:—

The subject is full of obscurity and there is conflict in legal opinion as expressed in the Courts and in the writings of jurists both as to the existence of the limitation itself and as to its extent. There are differences in Dominion Constitutions themselves which are reflected in legal opinion in those Dominions. The doctrine of limitation is the subject of no certain test applicable to all cases, and constitutional power over the same matter may depend on whether the subject is one of a civil remedy or of criminal jurisdiction. The practical inconvenience of the doctrine is by no means to be measured by the number of cases in which legislation has been held to be invalid or inoperative. It introduces a general uncertainty which can be illustrated by questions raised concerning fisheries, taxation, shipping, air navigation, marriage, criminal law, deportation, and the enforcement of laws against smuggling and unlawful immigration. The state of the law has compelled legislatures to resort to indirect methods of reaching conduct which, in virtue of the doctrine, might lie beyond their direct power but which they deem it essential to control as part of their self-government. It would not seem to be possible in the present state of the authorities to come to definite conclusions regarding the competence of Dominion Parliaments to give their legislation extra-territorial operation; and, in any case, uncertainty as to the existence and extent of the doctrine renders it desirable that legislation should be passed by the Parliament of the United Kingdom making it clear that this constitutional limitation does not exist (pars. 38, 39).

The correct general principle is, I have always considered, that applied, not obscurely, in *Ashbury v. Ellis*[17], namely, whether the law in question can be truly described as being for the peace, order and good government of the Dominion concerned. Lord *Hobhouse* there pointed out that the question was whether

the Act of Parliament (15 & 16 Vict. c. 72) which gives to the Legislature of New Zealand power "to make laws for the peace, order and good government of New Zealand, provided that no such laws be repugnant to the laws of England," does not give it power to subject to its judicial tribunals persons who neither by themselves nor by agents are present in the colony. It is not contended that the rules in question are repugnant to the laws of England. In fact, they are framed on principles adopted in England. But it is said that the moment an attempt is made by New Zealand law to affect persons out of New Zealand, that moment the local limitations of the jurisdiction are exceeded, and the attempt is nugatory. This was put at the Bar in so broad and abstract a way, that it might be sufficient for their Lordships to answer it by equally abstract propositions. But it will be more satisfactory to state the material facts which have raised the question[18].

The decision was that

for trying the validity of the New Zealand laws it is sufficient to say that the peace, order, and good government of New Zealand are promoted by the enforcement of the decrees of their own Courts in New Zealand[19].

In this view, the fact of the Legislature's dealing with circumstances, persons or things without the Dominion is always a relevant, but never a conclusive, element in the determination by its own Courts of questions of legislative power. Sir *John Salmond* thought that the supposed limitation was

no more than a *rule* of construction as to the actual intention of the Legislature, and so it should *never* result in a denial of power. Perhaps this view is stated a little too widely, but it closely approximates to the present legal position.

Fortunately, the recent decision of the Judicial Committee in *Croft v. Dunphy*[20], which was based on the position existing apart from the effect of the *Statute of Westminster*, should settle most doubts upon the subject, and should result in confining to a very small compass indeed the supposed territorial restrictions upon the legislative powers of the seven Parliaments of Australia. The judgment of Lord *Macmillan* affirms the broad principle that the powers possessed are to be treated as analogous to those of "a fully sovereign State," so long as they answer the description of laws for the peace, order, and good government of the constitutional unit in question either generally or, in the appropriate case, in respect of subject matters specified in the controlling Constitution. Lord *Macmillan* said:—

But while the Imperial Parliament may be conceded to possess such powers of legislation under international law and usage, the respondent contends that the Parliament of Canada has no such powers. It is not contested that under the *British North America Act* the Dominion Legislature has full power to enact customs laws for Canada, but it is maintained that it is debarred from introducing into such legislation any provisions designed to operate beyond its shores or at any rate beyond a marine league from the coast. In their Lordships' opinion the Parliament of Canada is not under any such disability. Once it is found that a particular topic of legislation is among those upon which the Dominion Parliament may competently legislate as being for the peace, order and good government of Canada or as being one of the specific subjects enumerated in sec. 91 of the *British North America Act*, their Lordships see no reason to restrict the permitted scope of such legislation by any other consideration than is applicable to the legislation of a fully sovereign State[21].

The position may now be illustrated. The Legislature's intention to make its laws operate upon matters, things and persons which are extra-territorial may be clearly expressed. Could the Dominion of New Zealand, apart from sec. 3 of the *Statute of Westminster*, make punishable within its borders an assault committed upon French soil by a Frenchman upon a Frenchman?

If this statement accurately summarizes the nature and effect of the suggested Dominion law, it would, in my opinion, be beyond power. But this is not because non-Dominion matters are dealt with by the law. The true reason for concluding that such a law is *ultra vires* the Dominion, is to be found in answering the relevant question: Can it be regarded as a law for the peace, order, and good government of New Zealand? In truth the conduct aimed at would bear no relation to New Zealand, and the law could forward its welfare in no conceivable way. In a proper case, which must necessarily be a very rare case, the Courts of the Dominion would be bound to pronounce a law invalid upon this ground, which is firmly founded upon the very words used in the New Zealand Constitution.

A distinction will of course have to be made in cases where a Dominion Parliament (e.g., the Commonwealth of Australia) has authority to legislate for its peace, order, and good government, but only with respect to enumerated subject matters. The Constitution then requires that it must be possible to predicate of every valid law that it is for the peace, order, and good government of the Dominion with respect to a granted subject, e.g., customs, taxation, external affairs. In such cases the presence of non-territorial elements in the challenged law has to be considered upon a slightly

different footing, and those affirming its validity have to show not only that the Dominion has some real concern or interest in the matter, thing or circumstances dealt with by the legislation, but that the concern or interest is of such a nature that the challenged law is truly one with respect to an enumerated subject matter. In such an enquiry, a valuable method of approach is indicated in the judgment of Lord *Macmillan* in *Croft v. Dunphy*[22], where the "hovering" provisions of a Canadian customs law were shown to bear a resemblance to customs enactments of other countries. In other words, not only was the Dominion of Canada directly concerned in the legislation, it was concerned because of its legislative power over the subject matter of "customs."

In the case of the Commonwealth of Australia, for instance, the Parliaments of the States have power over the general domain of criminal law, not by direct grant, but because the subject is not (as with the central Parliament of Canada) specifically assigned to the Parliament of the Commonwealth. A Commonwealth criminal law containing extra-territorial elements might therefore be deemed *ultra vires*, not because of the presence of such elements, but because the States alone could enact such a law; and similarly State legislation might be invalid because the subject matter pertained exclusively to the Commonwealth's Legislature.

In the case of the New Zealand Parliament, however, this additional complication does not arise, because, so long as the peace, order and good government of New Zealand are in some way bound up with the law possessing non-New-Zealand elements, the precise ground of concern need not be described, classified, or even stated. For such Parliament has a general jurisdiction over peace, order and good government, and there is no other competing Legislature within that Dominion.

All the leading cases can be reconciled upon these principles. The actual decision in *Macleod v. Attorney-General for New South Wales*[23] turned upon a question of construction, but the statement of Lord *Halsbury* that, if the widest construction were adopted, the Act would have been *ultra vires*, is in direct accord with the principles. For the conduct forbidden, i.e., the commission of bigamy by any person anywhere, was related in no conceivable way to the peace, welfare or good government of the then Colony of New South Wales. *Ashbury v. Ellis*[24] itself lays down and applies the correct principle. In *Peninsular and Oriental Steam Navigation Co. v. Kingston*[25], the act made punishable was the re-entry of a vessel into Commonwealth territory with the seals of the Commonwealth customs broken. The statute was valid as a law with respect to "customs" and the reasoning of the Judicial Committee in *Croft v. Dunphy*[26] applies. It is true that in comments upon *Peninsular and Oriental Steam Navigation Co. v. Kingston*, the mere re-entry of the vessel into Commonwealth waters has often been regarded as the basis of the Commonwealth Parliament's jurisdiction. The principle of *Croft v. Dunphy*[27] would treat the prohibited act, regarded in all its aspects, a seal having been affixed by Commonwealth officers for the protection of its customs revenue, having been broken on the high seas, and the vessel being again brought within the waters of the Commonwealth in that condition, as being of direct and immediate concern to the Commonwealth customs administration, and the law punishing it as being obviously a law for the peace, order and good government of the Commonwealth with respect to customs, although part of the "composite act" punished took place outside Commonwealth territory.

In the judgment of Lord *Macmillan* in *Croft v. Dunphy*, it was suggested that the question whether, according to recognized principles of public international law, a Dominion's extra-territorial legislation had exceeded its "domestic jurisdiction," so recognized in international law, might be an important consideration in determining whether the legislation was valid. Lord *Macmillan* said:—

Legislation of the Imperial Parliament, even in contravention of generally acknowledged principles

of international law, is binding upon and must be enforced by the Courts of this country, for in these Courts the legislation of the Imperial Parliament cannot be challenged as *ultra vires*: per Lord Justice-General *Dunedin* in *Mortensen v. Peters*[28]. It may be that legislation of the Dominion Parliament may be challenged as *ultra vires* on the ground that it is contrary to the principles of international law, but that must be because it must be assumed that the *British North America Act* has not conferred power on the Dominion Parliament to legislate contrary to these principles[29].

I read this as meaning that if, applying established rules of international law, jurisdiction could be denied to an independent sovereign State in the circumstances of the given case, that might be a strong, perhaps conclusive, reason for denying constitutional validity to the Dominion Parliament's breach of international comity. But such an excess of "domestic jurisdiction" is not easily shown. The decision of the Permanent Court of International Justice in the case of the "Lotus" shows that the British and American view and practice of extra-territorial jurisdiction is not recognized in public international law as the full measure of a State's jurisdiction. It is well known that the practice of States even with respect to criminal jurisdiction varies greatly, some claiming a jurisdiction over their subjects wherever they may be, and some claiming a jurisdiction over all persons in respect of acts injuring or calculated to injure either the State in question or even the nationals of that State, wherever they may be.

The extent of extra-territorial jurisdiction permitted, or rather not forbidden, by international law cannot always be stated with precision. But, certainly, no State attempts to exercise a jurisdiction over matters, persons or things with which it has absolutely no concern. Consequently, in actual practice, it would be no hardship for a Dominion to have to mould its legislation in such a way that no foreign State could establish an infringement of the rules of international law on the Dominion's part. *Quoad* foreign States the Dominions are, speaking generally, bound by the rules of international law, and it seems likely that, in a proper case, the Permanent Court of International Justice could exercise direct jurisdiction over the Dominion at the suit of a complainant State.

It is clear therefore that, despite the passage of the *Statute of Westminster 1931*, the question of "extra-territorial operation" of Dominion laws is still of great importance in relation to the legislation of those Dominions, States and Provinces to which sec. 3 of that Act does not apply. Moreover, whether the section operates retrospectively or not, sec. 3 cannot be used as evidence that, until the *Statute of Westminster* was passed, none of the Dominions could exercise their legislative powers so as to affect matters, things and circumstances outside their territory. For one thing, sec. 3 says: "It is hereby declared and enacted," and the form of this provision, which springs directly from the recommendation of the 1929 Conference on the Operation of Dominion Legislation, is at least intended to leave open the question as to what could, apart from sec. 3, be the lawful extra-territorial operation of any Dominion law.

It may be observed that the phrasing of sec. 3 is positive, not negative. There is accorded a direct power to make laws having "extra-territorial operation." This power might seem to extend beyond what was desired by those advocating the fullest and most extensive Dominion autonomy. It might even be contended that, under the terms of sec. 3, the Courts of a Dominion to which it had been applied could not declare *ultra vires* any legislation of the Dominion so long as it answered the description of "a law having extra-territorial operation." I pass by the question whether, upon such footing, any recognition would be accorded to such legislation by the Courts of other countries. And it is unnecessary to consider what force there is in the possible contention that, where sec. 3 is in

force, Dominion laws having extra-territorial operation must, on that account alone, and for that very reason, be regarded as valid though not relating in any way to the Dominion's peace, order or good government.

In those Dominions where sec. 3 of the *Statute of Westminster* has not been applied "as part of the law" the position may therefore be thus stated:—(1) The mere exhibition of non-territorial elements in any challenged legislation does not invalidate the law. (2) The presence of such non-territorial elements may however call attention to the necessity for enquiring whether the challenged law is truly a law with respect to the "peace, order and good government" of the Dominion—the words employed in the constitutional statute to define and limit the legislative power. (3) It is the duty of the Courts of the Dominion to make this enquiry in a proper case. (4) The test is not quite, as Sir *John Salmond* suggested, whether the law is a "bona fide exercise of the subordinate legislative power" (*Law Quarterly Review*, vol. 33, p. 122), because the bona fides of the exercise of legislative power cannot be impugned in the Dominion's own Courts. (5) The test is whether the law in question does not, in some aspects and relations, bear upon the peace, order and good government of the Dominion, either generally or in respect to specific subjects. (6) If it does not bear any relation whatever to the Dominion, the Courts must say so and declare the law void. If it bears any real or substantial relation, then it is a law for the peace, order and good government of the Dominion. (7) In the latter event, it may still be *ultra vires* and void where the Legislature of the Dominion has only power to legislate, under its controlling Constitution, with respect to certain matters. If the law possessing non-Dominion elements is also of Dominion concern, but only of concern to the local as distinct from the central, or the central as distinct from the local, Legislature, the Courts may, in the appropriate case, have to pronounce a central or local law respectively *ultra vires*, as not being a law for peace, order and good government with respect to any granted power.

Applying these principles to the present case, it is obvious that the gathering of a revenue for Commonwealth purposes by any system of taxation is a matter of direct and vital concern to the Commonwealth. The method of taxation adopted can only be criticized from the point of view of hardship or political opinion. Such a criticism is irrelevant.

It may also be said with some truth that the precise connection between the present subject of taxation and the territory of the Commonwealth is not logically dealt with and that sec. 8 (4) (a) departs from the general scheme of taxation by reference to domicil within the territory. But legislation which treats the value of gifts made within a short period before death as a proper subject of inclusion in the estate for purposes of estate or death duty is clearly competent to a "fully sovereign State." It is therefore impossible to deny that the enactment in question is a law "for the peace, order, and good government of the Commonwealth with respect to ... Taxation" (sec. 51 (II.) of the *Commonwealth Constitution*).

Therefore the second question as well as the first should be answered "Yes."

Questions answered as follows:—(1) Yes. (2) Yes. Costs, costs in the appeal.

Solicitors for the appellant, Hedderwick, Fookes & Alston.

Solicitor for the respondent, W. H. Sharwood, Crown Solicitor for the Commonwealth.

[1] (1910) A.C. 27, per Lord Gorell, at p. 39.

[2] (1898) A.C. 769.

[3] (1922) V.L.R., at p. 525; 43 A.L.T., at p. 202.

[4] [1916] HCA 62; (1916) 22 C.L.R. 367.

[5] [1920] HCA 27; (1920) 27 C.L.R. 503.

[6] (1920) 27 C.L.R., at p. 508.

[7] (1920) 27 C.L.R., at pp. 508, 509.

[8] [1920] HCA 27; (1920) 27 C.L.R. 503.

[9] (1914) A.C. 237.

[10] [1932] HCA 63; (1932) 48 C.L.R. 618.

[11] (1932) 48 C.L.R., at pp. 632, 633.

[12] (1932) 48 C.L.R., at p. 636.

[13] [1932] HCA 63; (1932) 48 C.L.R. 618.

[14] (1891) A.C. 455.

[15] (1893) A.C. 339.

[16] (1891) A.C. 455.

[17] (1893) A.C. 339.

[18] (1893) A.C., at pp. 341, 342.

[19] (1893) A.C., at pp. 344, 345.

[20] (1933) A.C. 156.

[21] (1933) A.C., at p. 163.

[22] (1933) A.C. 156.

[23] (1891) A.C. 455.

[24] (1893) A.C. 339.

[25] (1903) A.C. 471.

[26] (1933) A.C. 156.

[27] (1933) A.C. 156.

[28] (1906) 8 F. (J.C.) 93, at p. 101.

[29] (1933) A.C., at p. 164.

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