REPORTS OF CASES argued and decided in the House of Lords, on Appeals and Writs of Error, and Claims of Peerage, during the Session 1845-46. By C. CLARK and W. FINNELLY, Barristers-at-Law. Vol. XII.

JOHN THOMSON,—*Plaintiff in error;* HER MAJESTY'S ADVOCATE GENERAL,—*Defendant in error* [July 12, 19, Aug. 4, 1842; Feb. 17, 18, 1845].

[Mews' Dig. viii. 268, 270; xii. 215. S.C. 9 Jur. 217; 4 Bell 1. Discussed and followed in numerous cases, among which it may suffice to refer to *A.-G.* v. *Napier*, 1851, 6 Exch. 217; *Wallace* v. *A.-G.*, 1865, L.R. 1 Ch. 6; *In re Badart's Trusts*, 1870, L.R. 10 Eq. 296; *Chatfield* v. *Berchtoldt*, 1872, L.R. 7 Ch. 198. Distinguished in *A.-G.* v. *Campbell*, 1872, L.R. 5 H.L. 528; and see *Colquhoun* v. *Brooks*, 1887, 19 Q. B. D. 408.]

Legacy Duty—Domicile.

Personal property having no *situs* of its own, follows the domicile of its owner.

The law of the domicile of a testator or intestate decides whether his personal property is liable to legacy duty.

A British born subject, died, domiciled in a British Colony. At the time of his death he was possessed of personal property locally situate in Scotland. Probate of his will was taken out in Scotland, for the purpose of there administering this property: and out of the fund thus obtained by the executor, legacies were paid to legatees residing in Scotland:

Held, reversing a judgment of the Court of Exchequer in Scotland, that Legacy Duty was not payable in respect of these legacies.

John Grant, a British-born subject, and native of Scotland, made his will 1829, and died in 1837. At the time of his death he was domiciled in the British colony of Demerara, where the law of Holland was in force. There is not any local duty in the nature of legacy duty payable in that colony.

At the time of the death of John Grant, he was entitled to a large personal debt due to him in Scotland, which arose from money acquired by him whilst domiciled in [2] Demerara, and transmitted by him to Scotland for safe custody. After his death, John Thomson took out probate of his will, so far as related to the debt in Scotland, and there, from money arising from the said debt, paid in pursuance of the will, certain legacies, above the amount of twenty pounds, and paid over the rest as part of the residue of the personal estate of John Grant.

In July, 1840, an information in debt, setting forth these facts, was filed in the Court of Exchequer in Scotland by her Majesty's Advocate General against John Thomson, who appeared and put in a general demurrer, on the ground of insufficiency. Joinder in demurrer. The demurrer came on for argument upon the 29th January, 1841, before the Court of Exchequer in Scotland, and the only question raised was, whether the fact of the domicile of Grant in Demerara, prevented the legacy duty

(under the 55 Geo. 3, c. 184. Schedule, part 3 *) from attaching on his personal property in Scotland. The Court of Exchequer took time to consider, and on 10th February following, overruled the demurrer, and gave judgment for the crown (3 Dunl., Bell, Mur. and Dona., 1309).

A writ of error was brought on this judgment. The case was argued in 1842, by Mr. Pemberton and Mr. Anderson, for the plaintiff in error; and by the Solicitor General (Sir W. Follett) and Mr. Crompton, for the defendant in error. It was then directed by their Lordships to be argued before the Judges by one counsel on a side. This argument did not take place till February, 1845, when the case was argued by Mr. Kelly (with whom was Mr. Anderson) for the plaintiff in error: and by the Solicitor General (Sir F. Thesiger, with whom was Mr. Crompton) for the defendant in error.

[3] Mr. Pemberton and Mr. Anderson for the plaintiff in error.—The question here is the same as if the party was an English subject, and the property had been transmitted from Demerara to England. That question is whether the legacy is payable in any case except where the party is domiciled in one part of the United Kingdom. It is now settled by this House that personal property has of itself no *situs*, that it must follow the domicile of the owner. That principle applies to this case, and defeats the claim of legacy duty. *The Attorney General* v. *Forbes* (*Ante*, Vol. II., p. 48), and *Pipon* v. *Pipon* (Ambler, 26), are in point. When *Logan* v. *Fairlie* (2 Sim. and Stu. 284; 1 Myl. and Cr. 59) was first decided, the great principle on which these cases depend was not understood. It is not true, as there stated, that administration must be taken out in England in order that the personal property in England of a testator domiciled abroad, should be administered here. [Lord Campbell.—In that case the principle of domicile was not applied.] It was not. That case was decided on the supposed authority of *The Attorney General* v. *Cockerell* (1 Price, 165), and *The Attorney General* v. *Beatson* (7 Price, 560). *Logan* v. *Fairlie*, was in substance reversed in the case of *Arnold* v. *Arnold* (2 Mylne and Cr. 256), by Lord Chancellor Cottenham. And *The Attorney General* v. *Cockerell* was distinctly reversed in *The Attorney General* v. *Forbes* (*Ante*, Vol. II., p. 48; nom. *Attorney General* v. *Jackson*, 8 Bli., N. S. 15). *In re Ewin* (1 Cr. and Jer. 151; 1 Tyr. 92) was exactly the converse of this case. That case shews that if a party is domiciled in England, he pays legacy duty on personal property situated abroad. The domicile gives the law. The property there had not even been transmitted to this country, and yet the duty was held payable, because the party was domiciled here at the time of his death. That **[4]** case clearly establishes that personal property for all purposes whatever follows the domicile of the owner. [The Lord Chancellor.—It was treated there precisely as if it was money in the different countries abroad. But the administrator had dealt with it in England.] Not quite so; the case is still stronger, for he had taken measures for the very purpose of avoiding the payment of legacy duty, by not dealing with it, but transferring it by means of foreign powers of attorney. In the case of *In re Bruce* (2 Cr. and Jer. 436; 2 Tyr. 475), it was held that the property of an American citizen, situated in England, the testator dying abroad, was not liable to legacy duty. The only distinction between that case and the present is, that the party there was a foreigner: he having, upon the peace which followed the American Revolution, elected to be an American, and not a British subject. In all other respects that case is identical with the present. That difference alone does not affect the principle on which this case is to be decided. The next case is that of *Logan* v. *Fairlie* (1 Myl. and Cr. 59), upon its second discussion. There it was argued that *Attorney General* v. *Forbes* had overruled the decision previously given in that case by the Vice-Chancellor. On the other hand it was answered that the Lord Chancellor, in the House of Lords, had expressly declared that that case did not overrule any of the previous cases. But the Lords Commissioners, in deciding the case then before them, treated the previous decision as in substance overruled, and the domicile of the party was held to settle the law as to the administration of personal

* Which declares that duty shall be payable "for every legacy, specific or pecuniary, or of any other description, of the amount of £20 or upwards given by any will or testamentary instrument of any person out of his or her personal or moveable estate, or charged upon his or [her real or] heritable estate," etc.

property, and therefore as to the duty which was payable on it. *Arnold* v. *Arnold* (2 Myl. and Cr. 256) is exactly in point with the present case. There the party was a British subject, domiciled in India, and the property had been remitted to England, and the legacy duty was **[5]** held not to be payable. [Lord Campbell.—It seems to be assumed there that an Englishman who holds in India a civil or military appointment, acquires thereby an Indian domicile. But has that been decided?] There has been no direct decision to that effect. The latest case is that of *The Attorney General* v. *Dunn* (6 Mee. and Wels. 511), and there legacy duty was held to be payable because circumstances did not shew that the deceased had obtained a foreign domicile; and his English domicile was therefore held to remain. The doubts there hinted at do not affect the decision. Then came *In re Coales* (7 Mee. and Wels. 390), and there the legacy duty was held to be payable because the testator was domiciled in England at the time of his death, and that domicile affected his foreign property.

The question of domicile is that alone on which these cases depend; and it must be so, for personal property having of itself no *situs*, the moment you get the domicile of the party, you get the *situs* of the property. This case was expressly decided on the erroneous notion that the principle that personal property has no *situs* of its own was not applicable. The duty must be payable according to the law which regulates the succession of the property. The law of succession of personal property is that of the domicile of the party leaving it. Is the property of a testator to pay legacy duty both in the country where it is situated, and in that in which the testator dies, or only in the country where the property is situated? and, if the latter, how is the property to be calculated, and how is the duty to be apportioned? There would be immeasurable difficulties attending the application of a rule subject to so many variations. The only sensible rule is to make the property subject to the duty, which the law of the domicile of the testator indicates.

The Solicitor General (Sir W. Follett), and Mr. Crompton, for the defendant in error.—This is the first **[6]** time in which mere domicile has been put forward as entirely deciding the question of the liability to legacy duty. The party here has the burden of the execution of the will cast upon him, and in respect of that burden the legacies he pays must be subject to legacy duty. The words of the 36 Geo. 3, c. 52, shew this. [Lord Campbell.—You say that the statute attaches on the executor. Then you must make a partition. You cannot say that the statute attaches upon him in respect of property over which it does not give him control. You cannot say that the property abroad must pay English duty.] The statute has not imposed the duty on such property. It is the property which he deals with under the English law that is liable to duty. Before the 36 Geo. 3, c. 52, the legacy duty was only a receipt tax. That speaks decisively as to the place where the duty was to be paid; namely, where the legacy was paid by one party and received by another. In some respects that is kept up by the 27th sec. of the 36 Geo. 3, where a receipt is still required to be taken. The case of *In re Bruce* (2 Cr. and Jer. 436) is no authority the other way; for there the testator was a foreigner. [Lord Campbell.—Then you rely on the circumstance that the testator in this case was an English subject.] That is so. The property of a British subject is, under the clear and comprehensive expressions of the statute, liable to legacy. But there is no reason why the property of a foreigner, situated in this country, should not pay legacy duty. It is administered here, and is, therefore subject to duty. In *Logan* v. *Fairlie* (1 Myl. and Cr. 59), the decision by the Lords Commissioners proceeded on grounds that by no means affect the present case. That case was much relied on in *Arnold* v. *Arnold*, which, for the same reason, is not applicable here. Both proceeded on the question of appropriation of the money. The introduction of the question of appropriation shews on what the payment of the legacy duty must depend. It depends entirely on the place where the will is administered, and where the **[7]** executor takes on himself the burden of that administration. In the present instance that place was Scotland, and the Scotch law, therefore, attached upon it.

The Lords, interrupting the argument, intimated that as this was a case of considerable importance, affecting the whole empire, it ought to be argued in the presence of the Judges; but the argument must then be by only one counsel on a side.

This further argument took place on the 17th February, 1845, when Lord Chief

Justice Tindal, Justices Maule, Coltman, and Creswell, and Barons Parke, Rolfe, and Platt attended in the House.

Mr. Kelly (with whom was Mr. Anderson, for the plaintiff in error.)—The domicile of the testator or intestate decides the question whether the legacy duty is or is not payable. In this case the domicile was at Demerara, where, by the law of the colony, no legacy duty is payable. None therefore can be demanded. It will be contended for the crown that the duty is payable because the testator was a British subject, and that the very general and extensive words employed in the statute embrace such a case as the present. It will further be argued, that as the property was in part at least locally situated in this country, the duty attaches upon it; but it is submitted that the *situs* of the property does not in the least degree affect the question.

As to the first point, the words of the statute are confined to the wills of persons domiciled in Great Britain, and do not apply to the wills of persons domiciled either in Ireland or the colonies, and cannot certainly apply to the wills of persons domiciled in foreign countries. The words of the statute, however extensive, are not of universal application. To make all these classes of persons subject to the duties imposed by the statute, they should have been expressly named in its provisions. That has not been done, and they cannot by mere implication be rendered liable to burdens of this sort. The decision now impeached **[8]** would, if maintained, operate as a premium on fraud. The legacy duty is claimed because it is said that the debts in Scotland due to the deceased constituted personal estate, to obtain which it was necessary to put the law in motion. Had the Scotch debtors acted honestly, they would have remitted the money to Demerara without the intervention of the law, and according to that argument, no legacy duty would then have been payable.

It cannot be said that the duty payable under this statute is payable upon legacies under wills made in Ireland, for if so, such legacies would have to pay duty twice over, since there is a separate act of parliament imposing a duty on legacies in Ireland. Nor can it be contended that because the testator was a British subject, his property in Demerara was liable to this duty, for that would be to levy a tax in the colonies under the authority of an English Act of Parliament, a right to do which has been distinctly and formally disclaimed by the crown. If the duty attaches at all in this case, it does so only upon the property in this country. But even that ground of liability cannot be insisted on. In the first place, the act makes no distinction as to parts of the property. It does not declare that one part here shall pay, and another part, situated elsewhere, shall not pay. It makes the whole of the personal property liable together, and in respect of one and the same title. Suppose a man to die in Demerara, and to leave £40,000 of personal property; that of that sum £20,000 were in Demerara, and £20,000 were in this country; and, suppose the executor to come to this country to realize the money here, how is the government to apportion the duty, when the legacies are paid as much out of the Demerara as out of the English funds. The statute has not provided for any such case. The liability to probate duty is altogether a different matter, for no doubt wherever the party takes out a probate, he must pay the duty upon it. The cases of *Thorne* v. *Watkins* (2 Ves. 35), and *Pipon* **[9]** v. *Pipon* (Ambler, 26), explain the confusion, which, upon this point, has arisen in the argument on the other side. So that on the terms of the statute itself it is contended that this duty is not payable.

Then as to the authorities: *The Attorney General* v. *Cockerell* (1 Price, 165), and *The Attorney General* v. *Beatson* (7 Price, 560), can no longer be considered as law. The case of *In re Ewin* (1 Cr. and Jerv. 151; 1 Tyr. 92) clearly settles that the local situation of the property does not affect the question. [The Lord Chancellor.—In the case of *Jackson* v. *Forbes* (2 Cr. and Jerv. 382; see also the *Attorney General* v. *Forbes*, *ante*, Vol. II. p. 48; nom. *Attorney General* v. *Jackson*, 8 Bli. N.S. 15), the property at the time of the death of the testator was in this country; in Ewin's case it was in the funds of four different foreign countries, so that, putting the two cases together, the circumstances are exactly what they are here.] That is so, and taking the cases together, they form a complete answer to the claim set up here. The words of the act cannot apply to all persons whatever. They must be limited in some way: then how are they to be limited? The authorities shew that they are to be limited by the domicile of the party at the time of his death. *In re* Ewin is a clear authority for that proposition. And so is *In re* Bruce (2 Cr. and Jerv. 436; 2 Tyr. 475), where

property belonging to a foreigner who died abroad, though such property was situated in England, and was administered by an English executor, was held not liable to legacy duty. The doctrine thus laid down was acted on in *Arnold* v. *Arnold* (2 Myl. and Cr. 270), where Lord Cottenham said, " When the act speaks of the will of ' any person whatever,' and makes this duty payable out of the personal estate, it must, I think, be considered as speaking of persons and wills and personal estates in this country." Acting upon that construction, his Lordship held that a testator **[10]** domiciled in India was not a person who fell within the provisions of the act. To the same effect is the final decision in *Jackson* v. *Forbes*, which was first decided in the Court of Exchequer (2 Cr. and Jerv. 382), then went into Chancery, where the decision was affirmed as of course, and finally came here (*ante*, Vol. II. p. 48; 8 Bli. N.S. 15). It is true, that in moving the judgment on that case in this House, Lord Brougham said (*ante*, Vol. II., p. 83), that he did not overrule any of the former cases; but still it is clear that the judgment of this House proceeded on the law of the domicile, as that which decided the liability to legacy duty, a circumstance which was quite inconsistent with two of the cases there referred to in argument. The case of *In re* Coales (7 Mee. and Wels. 390), which occurred some time afterwards in the Court of Exchequer, shewed that the law as laid down in the *Attorney General* v. *Forbes*, was considered as settled. The question came again to be considered in the *Commissioners of Charitable Donations* v. *Devereux* (6 Jurist, 616), where, though the will was that of a British subject, and the executors were likewise British subjects, and the property was situated in this country, the Vice Chancellor held, that the domicile of the testator determined the question, and as that domicile was in a foreign country, the duty was not payable.

On the authorities therefore, as well as on the construction of the act itself, the judgment of the court below ought to be reversed.

The Solicitor General (Sir F. Thesiger,) with whom was Mr. Crompton, for the Crown.—The question which arises in the present case has never yet been settled. Its importance and difficulty appear to have been felt by this House. The whole argument upon the other side is made to rest upon the domicile of the party. It is most remarkable that in no other cases but those of Ewin and of Bruce were **[11]** the decisions rested on the principle of domicile. That is not the true principle by which the law, applicable to such a case as the present, is to be determined. The duty attaches here, wherever there is a person acting in this country in execution of the will. That is the principle which must govern the decision, and which will alone reconcile all the cases.

By all the statutes passed before the 36 Geo. 3, the legacy duty was payable on the receipt of the money. If a native paid a legacy to a foreigner, that legacy would, on the payment being made, have been liable to the receipt stamp duty. That shews that there was no statutory distinction as to liability. In passing that statute it was not the intention of the legislature to change the liability, and merely to impose a higher rate of duty. The liability remained as before. That liability depends on the act of administering the fund. The question, therefore, is whether the act of administering the fund in Scotland was the act of paying legacies, whether it was an act done in Great Britain, so as to enable the provisions of the statute to attach upon it; for it must be admitted that in terms this is a statute limited to Great Britain. No one can doubt that here has been an act of paying legacies within Great Britain; and the provisions of the statute do therefore attach upon it. What are the words of the statute 55 Geo. 3, c. 184? They are (adopting those used in the 36 Geo. 3, c. 52, s. 2) that " for every legacy, specific or pecuniary, given by any will of any person out of his personal or moveable estate, or out of or charged upon his real or heritable estate," the duties imposed by that act shall be payable. It is impossible to employ words more general and comprehensive, and the burthen of shewing that these legacies are not liable to the duty, lies upon those who claim the exemption, and must be made out by something more direct than the supposed application of a principle of law, which, however well established, must be deemed inapplicable to **[12]** the fiscal regulations of a country. Here there is a British subject " taking on himself the execution of the will," that being the very expression used in the earliest acts of parliament, and paying legacies out of the personal estate. Where the case is so clearly within the words of the statute, the principle of domicile cannot

apply to make those words inoperative. The property, the executor, and the legatees, were in this country, and the executor was obliged to take out probate here in order to administer that very property. The honesty or dishonesty of the debtor does not affect the matter. The question is whether a probate was necessary or not—was the unappropriated property in this country, which the party got possession of in his representative character,—a character with which the English law clothed him, and did he distribute it to legatees in this country? These questions must be answered in the affirmative. It may be admitted that, if after probate taken out, the money had been voluntarily paid by the bankers: the mere act of taking out probate would not of itself decide the question, whether the legacy duties were payable or not. The real question is whether the party obtained the money in his representative character under the probate, or only as the mere attorney or agent of the testator. The argument on the other side would go to relieve a party from the payment of the legacy duty, though some of the legacies were specifically payable abroad; and some specifically payable here. Now, not one of the authorities goes further than to say that where the appropriation of the fund has been made abroad, and the fund is transmitted here, and a mere act of payment by an agent under the authority of that foreign appropriation is made here, the legacy duty is not payable. No such specific appropriation was made here. So that even if the law was as thus stated, it would not exempt the party in this instance from the payment of the duty.

The domicile may fix the law of the succession; but it does not affect the payment of the legacy duty. The earlier **[13]** authorities are all supposed to have been overruled by the case of *The Attorney General* v. *Forbes* (*ante*, Vol. II., p. 48), but though the authority of *The Attorney General* v. *Cockerell* (1 Price, 165), and *The Attorney General* v. *Beatson* (7 Price, 560), may, perhaps, not be sustainable to the full extent of what was once supposed to be the rule they laid down, they are consistent with the principle now submitted as that on which the House will decide, namely, that the liability to duty attaches on administration of the fund in this country; and to that extent at least they are valid authorities. In the latter of these two cases especially, Mr. Murray, who was the residuary legatee, and, as such, entitled to the whole of the money, might have received it from the agents to whom it was transmitted; but he, unnecessarily, took out administration with the will annexed, and the Court therefore held that the legacy duty attached upon the property afterwards received by him. The case of *Logan* v. *Fairlie* (2 Sim. and Stu. 284) does not impeach this principle. On the contrary, the principle now contended for was laid down in the first decision there by the Vice Chancellor, and was subsequently applied by Lord Cottenham (1 Myl. and Cr. 59, 68), who, however, excepted that case from its operation, because he held that there the money had been directly appropriated in the East Indies, and devoted to a particular and distinct purpose here; so that all that was done here was the mere act of paying by the hands of an agent. [The Lord Chancellor.—The last case of *Logan* v. *Fairlie*, is nothing more than this: The Court did not decide any other question than whether there had been or not an appropriation in India.] But Lord Cottenham must be taken to have admitted the rule as to the liability to duty laid down by the Vice Chancellor. [The Lord Chancellor.—Nothing was decided but the question of appropriation.] The case of *Jackson* v. *Forbes* (2 Cr. and Jerv. 282) is no **[14]** authority for the plaintiff in error; for that turned on the question whether the fund had or had not been appropriated in India. The same observation may be made on that case, when under the name of *The Attorney General* v. *Forbes* (*ante*, Vol. II., p. 48), it came before this House. Lord Brougham there (Id. 82) referred to the two cases of *Attorney General* v. *Cockerell*, and *Attorney General* v. *Beatson*, and said that the House did not overrule any of the preceding cases, but that each rested on its peculiar circumstances. The next case is that of *Arnold* v. *Arnold* (2 Myl. and Cr. 256) and though it must be admitted that that case cannot be reconciled with the cases of the *Attorney General* v. *Cockerell*, and *The Attorney General* v. *Beatson*, yet in delivering judgment there, Lord Cottenham took great care to shew that it did not fall within the authority of *Logan* v. *Fairlie*. [The Lord Chancellor.—I consider that in all these cases domicile was the basis of the whole judgment; the only question was what was the effect of the other circumstances upon the rule of domicile.] It seems difficult to come to that conclusion, since the rule as to domicile would have rendered quite unnecessary any dis-

cussion as to the appropriation of the fund. Domicile, in some of these cases, never was argued upon, and was not made the ground of the decision. This is especially to be observed in the case of *Arnold* v. *Arnold.* [The Lord Chancellor.—In that case all the funds were sent here from India, to be administered here according to the will.] No; they were sent for the mere purpose of being paid to the legatees. Strictly speaking, there was no administration here—that is a term of a technical nature. If the fund is sent over to be divided, it is sent over for the purpose of administration; but if it is sent merely to be paid, the person paying it would exercise no discretion, and then there would be no administration.

If this statute does not apply to property coming from abroad to be distributed in this country, how can the pro-**[15]**-bate duty be payable? There can be no distinction in principle between probate and legacy duty. Both are the subjects of the fiscal regulations of this country. [The Lord Chancellor.—If a will is made by a foreigner resident abroad, and it is necessary to administer his estate in England, probate must be taken out for that purpose, and probate duty becomes payable upon the mere taking out of the probate; but the question here is, whether under such circumstances, legacy duty will be payable.]

In the case of *In re* Bruce (2 Cr. and Jer. 436), the Court asked whether Bruce was a foreigner. That question would not have been put, if domicile could have given the rule. According to *Doe* v. *Acklam* (2 Barn. and Cres. 779), there could be no doubt that Bruce having elected the United States as his country, was a citizen of those states, and the case proceeded on that fact, and he was held entitled to transmit property to this country free from any British burden. That, however, is bad law. Property in this country is liable to British burdens, although it may be a foreigner's property. *In re* Coales (7 Mee. and Wels. 590). The income tax is a proof of this.

The *Attorney General* v. *Dunn* (6 Mee. and Wels. 511) is the first case in which the question of domicile was distinctly submitted to the Court; but, as the Court held that in fact the testator had an English domicile, that question was not decided. The last case on the subject is that of *The Commissioners of Charitable Bequests* v. *Devereux* (6 Jurist, 616; since reported 13 Sim. 14), and it is impossible that the Vice Chancellor could have said what is there imputed to him, for he is made to refer to *Re* Bruce, and to say, "whether the testator there was a British subject does not appear;" when it does most clearly appear from several parts of that case that Bruce was a foreigner. [The Lord Chancellor.—The decision as reported in the Jurist is right, but the judgment is wrong in terms. It does not matter, **[16]** for the purpose of this argument, what are the expressions used, but what was the point decided? According to my view of the subject, the decision there was correct, for the domicile was in France.]

There is one case decided in Scotland, by Lord Chief Baron Shepherd, which, if considered an authority, must govern the present. It is the case of the *Advocate General* v. *Col. F. W. Grant.* There the party was domiciled abroad; he made a will; the executor resided in Scotland. The testator had real and personal property in Scotland, and he left legacies (which were charged on the realty,) to persons who were resident there. The will was administered in Scotland, and the Court held that the legacy duty attached. This case is stated from the copy of the notes of the Chief Clerk of the Remembrancer's office in Scotland, and is directly in point with the present. The Court there said that the executor being resident in Scotland, the question as to the testator residing, and the will being made abroad, did not arise, and that the real principle was that the law affected British property, that is to say, property to which the party derived title from British law and British courts.

This case differs from the Indian cases in one very important respect. In them, the property, at the time of the death of the testator, was in India; here it was in Scotland. In them, therefore, the question arose whether the property was appropriated before it reached this country. That question cannot arise here. Those cases are therefore inapplicable to the present, so far at least as they are put forward as authorities which must decide it. The fund in this case was here, the executor was here, the administration of the fund was here, and that fund, therefore, became liable to the payment of British legacy duty. The judgment of the Court below must be affirmed.

The Lord Chancellor.—The Solicitor General has, in my view of the case, stated

every thing that the subject [17] admits of. The argument has been an able one; but, notwithstanding what has fallen from him, we do not think it necessary to hear Mr. Kelly in reply. I propose to put the following question to the Judges:—"A., a British born subject, born in England, resided in a British colony. He made his will, and died domiciled there. At the time of his death he had debts owing to him in England. His executors in England collected these debts, and out of the money so collected paid legacies to certain legatees in England. The question is, are such legacies liable to the payment of legacy duty?"

Lord Chief Justice Tindal, in the name of his brethren, requested time to consider the question.

The request was acceded to, and the House was adjourned during pleasure. In about an hour the House was resumed.

Lord Chief Justice Tindal then delivered the unanimous opinion of the Judges. Having read the question put to the Judges he said: In answer to this question I have the honour to inform your Lordships that it is the opinion of all the Judges who have heard the case argued, that such legacies are not liable to the payment of legacy duty.

It is admitted in all the decided cases, that the very general words of the statute, "every legacy given by any will or testamentary instrument of any person," must of necessity receive *some* limitation in their application, for they cannot in reason extend to every person, everywhere, whether subjects of this kingdom or foreigners, and whether at the time of their death domiciled within the realm or abroad. And as your Lordships' question applies only to legacies out of personal estate, strictly and properly so called, we think such necessary limitation is, that the statute does not extend to the will of any person who at the time of his death was domiciled out of Great Britain, whether the assets are locally situate within England or [18] not. For we cannot consider that any distinction can be properly made between debts due to the testator from persons resident in the country in which the testator is domiciled at the time of his death, and debts due to him from debtors resident in another and different country; but that all such debts do equally form part of the personal property of the testator or intestate, and must all follow the same rule, namely, the law of the domicile of the testator or intestate.

And such principle we think may be extracted from all the later decided cases, though sometimes attempts have been made, perhaps ineffectually, to reconcile with them the earlier decisions. There is no distinction whatever between the case proposed to us and that decided in the House of Lords, the *Attorney General* v. *Forbes* (*ante*, Vol. II., p. 48), except the circumstance that in the present question the personal property is assumed to be, for the purpose of the probate, locally situated in England, at the time of the testator's death. But that circumstance was held to be immaterial in the case *In re Ewin* (1 Cr. and Jerv. 151), where it was decided that a British subject dying domiciled in England, legacy duty was payable on his property in the funds of Russia, France, Austria, and America.

And again in the case of *Arnold* v. *Arnold* (2 Myl. and Cr. 256), where the testator, a natural born Englishman, but domiciled in India, died there, it was held by Lord Chancellor Cottenham, that the legacy duty was not payable upon the legacies under his will, his Lordship adding: "It is fortunate that this question which has been so long afloat is now finally settled by an authoritative decision of the House of Lords."

And as to the arguments at your Lordships' bar on the part of the Crown, that the proper distinction was, whether the estate was administered by a person in a representa-[19]-tive character in this country, and that in case of such administering, the legacy duty was payable, we think it is a sufficient answer thereto that the liability to legacy duty does not depend on the act of the executor in proving the will in this country, or upon his administering here; the question, as it appears to us, not being whether there be administration in England or not, but whether the will and legacy are a will and legacy within the meaning of the statute imposing the duty.

For these reasons we think the legacies described in your Lordships' question are not liable to the payment of legacy duty.

The Lord Chancellor:—My Lords, in consequence of something that was thrown out at your Lordships' bar, I think it proper to state that it was not from any serious

doubt or difficulty which we considered to be inherent in this question in the former argument, that we thought it right to ask the opinion of the Judges, but it was on account of its extensive nature; and, because though the question applied only to Scotland in the form in which it was presented to your Lordships' house, it did in reality and in substance apply to the whole empire—not only to Great Britain, but in substance to Ireland, and to all the British possessions. We thought it right, therefore, in consequence of the extensive nature and operation of the question, that the case should be argued a second time; and we also thought, from the nature of the question, that it was proper to require the attendance of Her Majesty's Judges upon the occasion, because we thought that the judgment of your Lordships' house being in concurrence with the opinion of the learned Judges, would possess that weight with your Lordships, and with the country, which upon all occasions it is desirable it should receive.

My Lords, it appeared to me in the course of the argu-**[20]**-ment that the question turned, as it must necessarily turn, upon the meaning of the statute. In the very first section of the statute the operation of it is limited to Great Britain. It does not extend to Ireland. It does not extend to the colonies. And, therefore, notwithstanding the general terms contained in the Schedule, those terms must be read in connection with the first section of the act, and it is clear, therefore, that they must receive that limited construction and interpretation, which is alone consistent with the first section of the act. Accordingly, my Lords, it has been determined in the case that was cited at the bar, *In re Bruce* (2 Crom. and Jer. 436), that it does not apply, notwithstanding the extensive terms in which it is framed, to the case of a foreigner residing abroad, and a will made abroad, although the property may be in England, although the executors may be in England, although the legatees may be in England, and although the property may be administered in England. That was decided expressly in the case *In re Bruce*, which decision, so far as I am aware, has never been disputed, but in which the Crown seems to have acquiesced.

Also, my Lords, it has been decided in the case of British subjects domiciled in India, and having large possessions of personal property, which come to be disposed of in England, that the legacy duty imposed by the Act of Parliament does not apply to cases of that description, although the property may have been transmitted to this country by executors in India to executors in this country, for the purpose of being paid to legatees here. Those are the limitations which have been put upon the act by judicial decisions.

But then this distinction has been attempted to be drawn, and it is upon this distinction that the whole question here turns. It is said that in this case a part of the property **[21]** was in England at the time of the death of the testator, a circumstance that did not exist in the case of the *Attorney General* v. *Forbes*, and which did not exist in the case of *Arnold* v. *Arnold;* and it is supposed that some distinction is to be drawn with respect to the construction of the Act of Parliament arising out of that circumstance. I apprehend that that is an entire mistake, that personal property in England follows the law of the domicile, and that it is precisely the same as if the personal property had been in India at the time of testator's death. That is a rule of law that has always been considered as applicable to this subject; and accordingly the case which has been referred to by the learned Chief Justice, the case of *In re Ewin* (1 Crom. and Jer. 151), was a case of this description. An Englishman made his will in England: he had foreign stock in Russia, in America, in France, and in Austria. The question was whether the legacy duty attached to that foreign stock, which was given as part of the residue, the estate being administered in England; and it was contended, I believe, in the course of the argument by my noble and learned friend who argued the case, in the first place, that it was real property, but, finding that that distinction could not be maintained, the next question was whether it came within the operation of the act, and although the property was all abroad, it was decided to be within the operation of the act as personal property, on this ground, and this ground only, that as it was personal property, it must, in point of law, be considered as following the domicile of the testator, which domicile was England.

Now, my Lords, if you apply that principle, which has never been quarrelled with, which is a known principle of our law, to the present case, it decides the whole

point in controversy. The property, personal property, being in this country at the time of the death, you must take the [22] principle laid down in the case of *In re Ewin* (1 Cr. and Jerv. 151), and it must be considered as property within the domicile of the testator, which domicile was Demerara. It is admitted that if it was property within the domicile of the testator in Demerara, it cannot be subject to legacy duty. Now, my Lords, that is the principle upon which this case is to be decided. The only distinction is that to which I have referred, and which distinction is decided by the case *In re Ewin* to be immaterial.

Now, my Lords, such being the case and the principle upon which, I think, this question should be decided, I was desirous of knowing what were the grounds of the judgment of the Court below. I find that the judgment was delivered by two, or, rather, that the case was heard by two very learned Judges, Lord Gillies and Lord Fullerton. The judgment was delivered by the late Lord Gillies. I was anxious, therefore, from the respect which I entertain for those very learned persons, to know what were the grounds upon which their judgment was rested.

The first case to which they referred, for it was principally decided upon authority, was a case decided before Sir Samuel Shepherd, Chief Baron of Scotland. That case in the judgment was very shortly stated, and I am very happy that the Solicitor General gave us the particulars of that case, for it appears that the legacy was charged upon real estate, and, therefore, it would not come within the principle which I have stated; and there might, therefore, have been a sufficient ground for the decision in that case. It is sufficient to say, that it does not apply to the case which is now before your Lordships' House.

Then the next case which was referred to was the case of the *Attorney General* v. *Dunn* (6 Crom. and Mee. 511); but, my Lords, that could hardly be cited as an authority. It is true the point was argued; but it was not necessary for the decision of [23] the case; and no decision, in fact, was given upon the point. The Lord Chief Baron pointedly reserved his opinion, and said, that he should not express what his opinion was; also the learned Judge near me, Mr. Baron Parke, expressed the same thing. It is true, that one of the learned Judges said that, at that moment, according to the impression upon his mind, he rather thought the duty would be chargeable; he expressed himself in those terms according to his immediate impression; but no decision was given upon the point, it was a mere *obiter dictum*—and surely such a *dictum* as that ought not to be cited as the foundation of a judgment of this description. Looking at the authorities, therefore, they appear to me not properly to support the judgment of the Court below.

The third authority was that of Lord Cottenham. Now, Lord Cottenham in the case of *Arnold* v. *Arnold* (2 Myl. and Cr. 256), expressly states in terms, that the two cases, *The Attorney General* v. *Cockerell* (1 Price, 165), and *The Attorney General* v. *Beatson* (7 Price, 560), he considered to have been overruled. He states that in precise terms. A particular passage is selected from the judgment of Lord Cottenham to support the opinion of the learned Judges in the Court below, but I am quite sure when that passage is read in connection with the whole judgment of that very learned person, every person reading it with attention must be satisfied that the inference drawn from that particular passage that was cited is not consistent with the whole tenor of the judgment. It appears to me, therefore, that none of the authorities cited by the Court below sustained the judgment; and I am of opinion, therefore, independently of the great respect which I entertain for the judgment of the learned Judges who have assisted us upon this occasion, that upon the true construction of the Act of Parliament, and apply-[24]-ing the known principles of the law to that construction, the legacy duty is not in a case of this description chargeable. I shall, therefore, move that the judgment in this case be reversed.

Lord Brougham:—My Lords, I entirely agree with my noble and learned friend in the view which he takes of the construction of this statute, and of the authorities, and of the argument, so far as it is there endeavoured to distinguish this case from that of *The Attorney General* v. *Forbes* (*ante*, Vol. II. p. 48), which must be taken with *In re Ewin*, a case that also arose in the Exchequer, and when the two cases are thus considered, no doubt can be felt upon the matter. I so entirely agree upon all those three heads with my noble and learned friend, that I do not think it necessary for me to do more than generally to express my concurrence. I wish, however, also to add that my recollection coincides perfectly with his as to the reasons for troubling

the learned Judges to attend in this case. It was not only that it was a case from the Scotch Exchequer, but it was a case which must impose a construction upon the General Legacy Act, applicable to England and to all the British colonies, and to foreign countries; and, therefore, we considered that it was highly expedient to have a general consideration of the case, and the assistance of the learned Judges. But we also felt this, which I am sure the recollection of my noble and learned friend will bear me out in adding, and which the recollection of my noble and learned friend near me, who was also present at the former argument (Lord Campbell), has entirely confirmed, namely, that we considered this to be a case in which there was a conflict of decisions, a conflict of authorities, which made it highly expedient that it should be settled after the fullest and most mature deliberation, with the valuable assistance of the learned Judges; for there was **[25]** the authority of *Jackson* v. *Forbes* (2 Crom. and Jerv. 382), in the Exchequer, and afterwards before me in Chancery, and ultimately before your Lordships in this House, by appeal on a Writ of Error *nom. The Attorney General* v. *Forbes, ante*, Vol. II., p. 48; and *nom. The Attorney General* v. *Jackson*, 8 Bli. 15); there was that authority on the one hand, with the decision of the Exchequer not appealed against, in the matter of Ewin (1 Crom. and Jerv. 151) on the other, and the authority of those decisions appeared to be marked by some discrepancy at least, more apparent perhaps than real, with the two former cases of *The Attorney General* v. *Cockerell* (1 Price, 165) and *The Attorney General* v. *Beatson* (7 Price, 560). It became, therefore, highly expedient that we should maturely weigh the whole matter, before we held that that decision of the House of Lords in *The Attorney General* v. *Forbes* had completely overruled those other cases, the rather because certainly words were used in disposing of the *Attorney General* v. *Forbes* which seemed to intimate the possibility of those former cases standing together with the latter case. Upon full consideration, however, I am clearly of opinion with Lord Cottenham, who expressed that opinion very strongly in the case of *Arnold* v. *Arnold*, that those two cases of *The Attorney General* v. *Cockerell*, and *The Attorney General* v. *Beatson*, cannot stand with the case of the *Attorney General* v. *Forbes*. Then, my Lords, that last case must be considered not merely by itself, as regards its bearing upon the facts of the present case, but it must be taken into consideration coupled with the case of *In re Ewin*, because otherwise ground might be supposed to exist for distinguishing the two cases, inasmuch as it might be, and has been contended, and ably contended at the bar, that the one case does not apply to the other, because part of the funds were in the present case locally situated in this country. But then take the case of Ewin, **[26]** and your Lordships must perceive at once, as my noble and learned friend has done, and as the learned Judges have done, that those two cases together in fact exhaust the present case, because what was wanting in the *The Attorney General* v. *Forbes*, is supplied by the decision in the matter of Ewin; I will not say, supplied in terms; but in what comes to the same thing, in the argument upon the construction of the Statute, and in the legal application of the principle, the converse was decided. Here it is a case of money or property brought over here and administered here, the domicile of the testator or intestate being abroad out of the jurisdiction. There, in the matter of Ewin, it was the converse, administration being by a person domiciled here, and a testator or intestate domiciled here, and the funds locally situate abroad; it is perfectly clear that no difference can be made in consequence of that, because the principle, *mobilia seguntur personam*, as regards their distribution and their coming or not within the scope of this Revenue Act, must be taken to apply to two cases precisely similar; and the rule of law, indeed, is quite general that in such cases the domicile governs the personal property, not the real; but the personal property is in contemplation of the law, whatever may be the fact, supposed to be within the domicile of the testator or intestate.

I entirely agree with my noble and learned friend in the view which he has taken of the grounds of the decision of the Court below; whether that decision was before or subsequent to the decision in the case of *The Attorney General* v. *Forbes* and the matter of Ewin I am not informed.

The Lord Chancellor:—It was subsequent.

Lord Brougham:—Then their Lordships ought clearly to have taken it into account, and more especially if they had the additional light which is thrown upon the subject by the case of *Arnold* v. *Arnold*.

The Lord Chancellor:—They cite *Arnold* v. *Arnold.*

[27] Lord Brougham:—That makes it still more clear that the foundation of their decision was unsound. It is to be taken into account that Lord Cottenham does not give his opinion in *Arnold* v. *Arnold* merely upon the authority of the *Attorney General* v. *Forbes*, because he expressly says, and very candidly and fairly says, doing justice to the grounds of the decision of your Lordships in this House, that, independently of authorities, he is of the same opinion, and should have come to the same opinion as we did in that case, notwithstanding the conflict that appears to exist between other cases. We have, therefore, the clearest reasons for saying that if my noble and learned friend had not been unfortunately absent to day, he would have concurred entirely in this view of the case.

Upon the whole, therefore, I entirely concur in the opinion of my noble and learned friend, and acknowledge fully, and with thanks, the assistance which we have derived from the learned Judges (giving the reasons which I have given for our wishing to have their attendance rather than from any great doubt or difficulty which we felt the case to be encumbered by); and, therefore, my Lords, I second my noble and learned friend's motion, that judgment be given for the plaintiff in error.

Lord Campbell:—My Lords, I confess that in this case I did once entertain very considerable doubts; and I was exceedingly anxious that your Lordships should have the assistance of the Queen's Judges in a case that admitted, as it seemed to me, of great doubt, and where the decisions were directly at variance with each other. Having heard the opinion of the learned Judges, it gives me extreme satisfaction to say that I entirely concur in it, and that the doubts which I before entertained are now entirely removed. Having heard the opinion of the learned Judges, I defer to it with the greatest possible respect, as I certainly should have done under any circumstances, [28] though, if it had not satisfied my mind, of course, I should have found it my duty to act upon the result of my own judgment; but with the assistance of the learned Judges, under the present circumstances, I am relieved from anything of that sort, because I agree with them in the result to which they have arrived, and in the reasons which they have assigned for the opinion which they have given to your Lordships.

At the same time, my Lords, I believe that if the Chancellor of the Exchequer, who introduced this bill into Parliament, had been asked his opinion, he would have been a good deal surprised to hear that he was not to have his legacy duty on such a fund as this, where the testator was a British born subject, and had been domiciled in Great Britain, and had merely acquired a foreign domicile, and had left property that actually was in England or in Scotland at the time of his decease. The truth is, my Lords, that the doctrine of domicile has sprung up in this country very recently, and that neither the Legislature nor the Judges, until within a few years thought much of it; but it is a very convenient doctrine, it is now well understood, and I think that it solves the difficulty with which this case was surrounded. The doctrine of domicile was certainly not at all regarded in the case of *The Attorney General* v. *Cockerell*, nor in that of *The Attorney General* v. *Beatson.* If it had been the criterion at that time, there would have been no difficulty at all in determining this question; but now, my Lords, when we do understand this doctrine better than it was understood formerly, I think that it gives a clue which will help us to a right solution of this question.

It is impossible that the words of the statute can be received without any limitation; foreigners must be excluded. Then the question is what limitation is to be put upon them? and, I think, the just limitation is, the property of persons who die domiciled in Great Britain. On such property alone, I think, can it be supposed that the [29] Legislature intended to impose this tax. If a testator has died out of Great Britain with a domicile abroad, although he may have personal property that is in Great Britain at the time of his death, in contemplation of law that property is supposed to be situate where he was domiciled, and, therefore, does not come within the act: this seems to be the most reasonable construction to be put upon the Act of Parliament; it is the most convenient, any other construction would lead to very great difficulties, and, I think, the rule which is laid down by the learned Judges may now be safely acted upon, and will prevent difficulties and doubts arising hereafter. But I think that this caution should be introduced, that this applies only to legacy duty, not to probate duty. With respect to the probate duty, if it is necessary to take

out probate, the property being in Great Britain, for the purpose of administering that property, the property would still be considered as situate in Great Britain, and the probate duty would attach. All the cases respecting probate duty are considered untouched; but, with respect to the legacy duty, those two cases, *The Attorney General* v. *Cockerell* and *The Attorney General* v. *Beatson*, must be considered as completely overturned, and domicile with respect to legacy duty is hereafter to be the rule.

The Lord Chancellor:—There is no question in the case as regards the probate duty, it cannot be supposed for a moment that this affects the probate duty. Your Lordships will allow me, in your name, to tender our best thanks to the learned Judges for their attendance to this case.

Judgment of the Court below reversed.

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[30] EDWARD HENRY RICKARDS and SAMUEL WALKER, *Appellants;* HER MAJESTY'S ATTORNEY GENERAL,—*Respondent* [Feb. 25, 1845].

[Mews' Dig. xi. 898; S.C. 9 Jur. 383; and below, 6 Beav. 444; 12 L.J. Ch. 393; 7 Jur. 362; 1 Ph. 383; 13 L.J. Ch. 238; 8 Jur. 230.]

Practice—Information—Relator—Impertinence.

An information filed by the Attorney General at the relation of A. and B., praying for the Crown the benefit of a judgment in outlawry against C., and that a deed executed by C., conveying his property to trustees, might be set aside as fraudulent and void against the Crown, contained short statements shewing the interest of the relators, and alleging that the motives for the deed were to defraud C.'s creditors:—

Held that these statements were not impertinent.

Exceptions for impertinence cannot be sustained unless it appears clearly that the statements excepted to cannot be material at the hearing of the cause.

Although it is not necessary that a relator in an information should have an interest in the subject of the suit, yet a statement shewing his interest is not impertinent, as in the event of the suit failing, the costs may be more easily apportioned.

The question in this appeal was whether certain statements and interrogatories in an information filed by the Attorney General, at the relation of Frederic Engler, John Stulz and Samuel Housley, against the appellants, and against Arthur Annesley—who was out of the jurisdiction—were or were not impertinent. (The passages alleged by the appellants to be impertinent are printed in italics).

The information stated, among other things, that in **[31]** the year 1817, the said Annesley, then residing in Devonshire, passed his bond for £300 to George Stulz, upon whose death in 1832, the said Engler became his legal personal representative, and *that by indenture of assignment, bearing date the* 19*th of August* 1833, *the said Frederic Engler, for good and valuable considerations, duly assigned the said bond and all principal monies and interest due or to become due thereon unto the said John Stulz and Samuel Housley, both of Clifford Street, etc.;* and thenceforth the said debt remained due to the said Engler at law; *but in trust as to the beneficial interest therein for the said J. Stulz and S. Housley.*

The information then stated that in an action brought on the said bond, a judgment of outlawry was obtained against Annesley in 1835, and the same was duly registered on the 31st July, 1841. That a writ of *capias utlagatum* was then issued to the sheriff of Oxfordshire, who held an inquisition pursuant thereto on the 18th of October, 1841, and by his return certified that the said Annesley was seised in fee of estates in that county, of the yearly value of £3000, all which the said sheriff had seised into her Majesty's lands; that the said return was quashed on the 11th of Nov. 1841, and on the 17th of that month a new writ of *capias utlagatum* was issued to the same sheriff, returnable on the 11th of Jan. 1842; that the said sheriff accordingly held an inquisition on the 8th of Jan., 1842, at which the appellant, Rickards, a solicitor, attended on behalf of Annesley, and produced an indenture or deed of trust dated