PERMANENT TRUSTEE COMPANY (CANBERRA) LIMITED v. FINLAYSON AND OTHERS; COMMISSIONER OF STAMP DUTIES (N.S.W.), THIRD PARTY[1]

Private international law—Constitutional law—Rule that courts will not permit the enforcement of foreign revenue laws—Full faith and credit.

There is a touch of irony about the circumstance that when the rule of private international law that a court will not enforce the revenue laws of a foreign state came to be considered in an Australian court, that court was the Supreme Court of the Australian Capital Territory, a court of a territory whose very existence arose from the fact that the six " foreign " Australian colonies decided in the latter years of the nineteenth century to cease to be " foreign " one to another and to unite and form a federal state. The rule was called in aid in these circumstances : a testatrix who was domiciled and resident in New South Wales had drawn up two wills, one dealing with her New South Wales estate and appointing a New South Wales executor, the other dealing with her personal property which had been transferred to the Australian Capital Territory and appointing an executor in the Australian Capital Territory ; the latter will was probated in the Australian Capital Territory and the New South Wales Commissioner for Stamp Duties assessed the estate disposed of by this will for New South Wales estate duty together with the estate disposed of by the will appointing a New South Wales executor which had been probated in New South Wales.

The New South Wales Stamp Duties Act 1920-1965 was adequate to cover this situation and clearly, given the constitutionality of section 102 (1) (a),[2] which never appeared to be seriously in doubt, and the adequacy of the legislation to attach liability for duty to the executor of the Australian Capital Territory will, it only remained for the Commissioner to satisfy the Court that the rule of private international law against the enforcement of foreign revenue laws did not apply between the States and Territories of Australia. The early cases in English law where this rule was applied were cases of actions on contracts or commercial documents where the defendant pleaded non-compliance with a foreign revenue law, for example, failure to affix a stamp to the document, in order to defeat the otherwise substantiated case of the plaintiff ; the English court disregarded the foreign revenue law and

[1] (1967) 9 F.L.R. 424. Supreme Court of the Australian Capital Territory ; Dunphy J.

[2] Section 102 provides, *inter alia*:

> For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:—
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> (1) (a) All property of the deceased which is situate in New South Wales at his death. And in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death . . . .

gave the plaintiff his remedy.[3] Eventually, however, the wording of the rule received literal application and was used to deny a remedy to a foreign state seeking to satisfy its revenue laws in an English court. In 1955 in *Government of India, Ministry of Finance (Revenue Division) v. Taylor and Another*[4] the House of Lords refused to allow the Indian Government to collect a capital gains tax imposed on a company then in liquidation which had previously carried on business in India ; the House of Lords held that the rule was not to be modified in the case of a country belonging to the British Commonwealth of Nations.

The House of Lords in *Government of India v. Taylor* was referred to the trend of authority on this question which appeared in decisions of courts of States of the United States of America. Viscount Simonds in that case, after expressing his willingness to examine American decisions, said nevertheless, that he would not be influenced by a development " which is not universal, and is in any case confined to relations between State and State within the Union . . . ".[5] The trend of authority to which the House of Lords had been referred was not clearly in one direction. Early decisions leant in favour of upholding a rule that one State of the United States would not permit its courts to be used to enforce the revenue laws of another State. However, more recent decisions were opposed to the existence of such a rule. In *State ex rel. Oklahoma Tax Commission v. Rodgers et al.*[6] the St Louis Court of Appeal, Missouri, decided that the doctrine had no place in a union of States such as the United States where the Constitution guarded against many of the abuses which the rule was intended to overcome. This decision was followed in the Court of Appeals of Kentucky in *State of Ohio v. Arnett*[7] where the Court adopted wholesale the reasoning given in the Missouri decision. In addition, there is the question, as there is in the United States, of the impact of the rule that in the courts of an Australian State, full faith and credit is to be given to the laws of another Australian State.[8] In the Convention Debates of 1891, Sir Samuel Griffith referred to the position of a foreign revenue law in the framework of the full faith and credit provision which it was intended would be inserted in the Australian Constitution. The future Chief Justice considered that full faith and credit would not result in the enforcement of one State's revenue laws in the courts of another State. He said :

> so far as a revenue law might be in force in South Australia, providing that certain probate and succession duties should be payable there, no court would recognise that as creating an obligation to pay duties in Victoria and New South Wales.[9]

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[3] *James v. Catherwood* (1823) 3 Dowl. & Ry. (K.B.) 190.
[4] [1955] A.C. 491.
[5] *Ibid.* 507.
[6] (1946) 193 S.W. 2d. 919.
[7] (1950) 234 S.W. 2d. 722.
[8] Constitution section 118.
[9] Official Report of the National Australasian Convention Debates (1891) 687.

He went on to express the view that the full faith and credit provision would not support Commonwealth legislation forcing the administration of an estate into the hands of one executor and by reason of such a transfer allow a State the opportunity to collect estate duty.

Despite these views expressed so long ago in the Convention Debates, and expressed at a time when the full faith and credit provision was first suggested for inclusion in the Australian Constitution, Dunphy J. was of the opinion that the full faith and credit provision of the Australian Constitution, together with section 18[10] of the State and Territorial Laws and Records Recognition Act 1901-1964 (Cth), did in fact mean that a State could enforce its revenue laws in the courts of another State. His line of reasoning did not necessitate his deciding whether or not the rule against enforcement of foreign revenue laws would apply between the States of Australia in the absence of the full faith and credit provision although his Honour spoke in terms of the common law doctrine being overruled by Parliament,[11] and consequently, his opinion is open to the construction that in the absence of full faith and credit provisions the rule would have force between the States of Australia.

The judgment in *Permanent Trustee Company* suggests certain weaknesses in counsels' research or argument. The Court does not appear to have been referred to the decision of the Supreme Court of the United States in *Milwaukee County v. M. E. White Company*[12] where Stone J. seems to have clearly rejected the idea that the rule against enforcement of foreign revenue laws applied between the States of the United States. This decision was mentioned in *State of Ohio v. Arnett* and it is possible that counsel referred his Honour to the *dicta* in *Milwaukee County* and Dunphy J. decided not to avail himself of them in his judgment. However, there is a more obvious example of counsels' lack of research into the American decisions in that it was argued before the Court that reciprocity was a relevant factor in determining whether or not one State would allow its courts to be used as a forum for the enforcement of the revenue laws of another State. Counsel developed this line of argument from references made in the Missouri and Kentucky decisions. However, the Supreme Court of the United States in *Morris v. Jones*[13] had decided that full faith and credit in the United States was in no way dependent on arrangements made between States. Counsel also

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[10] Section 18, which carries out the intention of s. 118 of the Constitution, states:
> All public acts records and judicial proceedings of any State or Territory, if proved or authenticated as required by this Act, shall have such faith and credit given to them in every Court and public office as they have by law or usage in the Courts and public offices of the State or Territory from whence they are taken.

[11] After referring to an observation in *Government of India v. Taylor* that Parliament could overrule the doctrine, Dunphy J. stated:
> This, it seems to me, Parliament has done through s. 118 of the *Commonwealth of Australia Constitution Act* and s. 18 of the *State and Territorial Laws and Records Recognition Act* 1901-1964.

(1967) 9 F.L.R. 424, 436.

[12] (1935) 296 U.S. 268.

[13] (1947) 329 U.S. 545.

confronted Dunphy J. with a rather interesting argument that might be described as an *argumentum omissum* argument. This argument turned on the fact that the High Court of Australia in *O'Sullivan v. Dejneko*,[14] a case involving a South Australian who failed to meet certain requirements of the Road Maintenance (Contribution) Act 1958 (N.S.W.), did not consider the foreign revenue rule although they were prepared to allow the South Australian court to be used for a purpose that was in effect enforcing a New South Wales revenue law.

P. A. PATERSON

[14] (1963-1964) 110 C.L.R. 498.