CASE NOTES

LIVINGSTON v. THE COMMISSIONER OF STAMP DUTIES[1]

Succession and administration duties (Queensland)—Right of appeal when accountability denied—Specific assets in different jurisdiction—Interest of beneficiaries while administration incomplete

'Into this dark jungle, full of surprises and mysteries, it is our duty to peer.' Thus Kitto J.[2] described the task that confronted the High Court in dealing with this problem arising out of Queensland's Succession and Probate Duties Acts 1892 to 1952.

When Mrs Coulson died in a motor accident in 1950, she was residuary beneficiary as to one-third of her deceased first husband's estate. He had died domiciled in New South Wales and probate of his will was granted in that State, in October 1949. At the date of her death, her husband's estate had not been fully administered. Certain New South Wales death duties and Commonwealth Estate Duties were still outstanding, and therefore the exact residue of which Mrs Coulson was beneficiary was not exactly ascertained at her death. Part of the real and personal property left by her husband's will included assets situate in Queensland.

Mrs Coulson died intestate, domiciled in New South Wales, and her son, the appellant in this case, was served with a notice of succession duty, and administration duty[3] both levied by the Queensland Commissioner of Stamp Duties[4] upon the parts of her estate allegedly situate in Queensland. Livingston appealed against this assessment, and his appeal was upheld by the High Court.

The substance of Livingston's case was that his mother on her death had no assessable interest under the Queensland Act.[5] In the Supreme Court of Queensland it was, however, held that the Court had no jurisdiction to deal with these appeals, which therefore failed. As well as the substantive question, the High Court was thus put to decide a preliminary issue of jurisdiction.

The appeals were brought by way of petition under section 50 of the

[1] (1960) 34 A.L.J.R. 425. High Court of Australia; Dixon C.J., Fullagar, Windeyer, Kitto and Menzies JJ.

[2] *Ibid.* 438.

[3] Succession duty is duty paid upon property which passes upon death. Administration duty is duty paid upon the process of administering the deceased's estate. In New South Wales (Stamp Duties Acts 1920-1959, s. 101), Victoria (Administration and Probate Act 1958, s. 116), and Tasmania (Deceased Persons Estate Duties Act 1931, s. 4), only probate or administration duty is payable. In Queensland (Succession and Probate Duties Acts 1892-1959, ss. 12, 55), South Australia (Succession Duties Acts 1929-1959, s. 7) and Western Australia (Administration Acts 1903-1960, ss. 69, 85), succession duty is also payable on death.

[4] Succession and Probate Duties Acts 1892-1959, s. 47, (Qld). See also The Succession and Probate Duties Acts Declaratory and Amendment Act 1935, s. 2, (Qld).

[5] *Ibid.* s. 4. 'Every past or future disposition of property by reason of which any person has become or shall become beneficially entitled to any property . . . upon the death of any person . . . and every devolution by law of any beneficial interest in property or the income thereof . . . shall be deemed to confer on the person entitled . . . a "succession".'

Queensland Act[6] which provides that 'any accountable party dissatisfied with the assessment of the Commissioner' may appeal to the Supreme Court.

It was contended for the Commissioner, that since Livingston was denying any liability to pay duty at all, he could hardly bring a petition under a section dealing with disagreements with the *amount* of duty levied. This argument was somewhat strengthened by a reference to the later words of section 50 which speak of 'the amount admitted by the appellant'.

On the question of construction of the words: 'any accountable party' the Court was unanimous in holding that this could be widely construed, and read as 'any accountable party or party who would be accountable if the assessment were correct'. Perhaps the most convincing explanation of the manner in which the words could be so interpreted was given by Kitto J. He suggested that there was significance in the *1918* amendment[7] (succession duty) and the 1935 amendment[8] (administration duty), providing for the Commissioner to make assessments of duty even where no account and estimate had been delivered. Since one of the prime reasons for a person not submitting an account and estimate could be that he denied liability at all, the words in section 50 'appeal against such assessment' must be related to the enlargement of the powers of assessment and therefore must be taken to include an appeal against the fact of an assessment being made at all.

While it may be true to say, with the Chief Justice, that such an interpretation 'accords with legislative policy'[9] and, with Fullagar J., that the acceptance of any other view 'would create an absurd position',[10] the view taken by the Full Court of the Supreme Court of New South Wales on this matter is perhaps more in accord with the normal rules of statutory interpretation.

An interesting problem also arose since it was not until 1935 that an express power was given to the Commissioner to make an assessment of administration duty whether or not a grant of Probate or Letters of Administration was sought or made. This power was limited to 'any real property of a less tenure than an estate of freehold or any personal property. . . .'[11] and this would not apparently seem to include the alleged equitable interest of Mrs Coulson in her deceased husband's as yet unadministered estate. This point was raised by the Chief Justice in

[6] 'Any accountable party dissatisfied with the assessment of the Commissioner may, upon giving, within twenty-one days after the date of such assessment, and on payment of duty in conformity therewith notice in writing to the Commissioner of his intention to appeal against such assessment and a statement of the grounds of such appeal. . . .

'The costs of any such appeal shall be in the discretion of such court or judge, having regard to the extent to which the Commissioner's assessment exceeds the amount admitted by the appellant before the appeal commenced, and the extent to which the Commissioner's assessment is upheld or varied.'

[7] The Succession and Probate Duties Acts Amendment Act 1918, s. 3, (Qld).

[8] The Succession and Probate Duties Acts Declaratory and Amendment Act *1935*, s. 2, (Qld). [9] (1960) 34 A.L.J.R. 425, 430. [10] *Ibid.* 437.

[11] The Succession and Probate Duties Acts Declaratory and Amendment Act *1935*, s. 2, (Qld).

dealing with the question of jurisdiction but he felt that 'on the whole it may be right'[12] to hold that an assessment can be made for administration duty in cases of this nature.

In relation to the substantive question of the appeal, however, Dixon C.J. and Windeyer J. dissented strongly from the majority judgments of Fullagar, Kitto, and Menzies JJ.

Fullagar J. first distinguished succession duty from administration duty before establishing that both revolved around the same question: '. . . whether her estate comprised assets locally situate in Queensland.'[13] The only possible answer, he said, is that it does not comprise such assets, since her rights in the unadministered property are rights against the executors. Applying the principle enunciated in *Lord Sudeley v. Attorney-General*,[14] he stated that the equitable interest in the estate is a single interest, localized at death of testator, and not changing its locality as investments are bought and sold in the course of administration. His Honour easily disposed of *Skinner v. Attorney-General*,[15] which appears to interpret *Lord Sudeley's* case as not asserting that a party like Mrs Coulson has only a right situate in the place of administration. *Skinner's* case, he said,[16] decided nothing more than that, in the context of the problem there raised, there was an 'interest' in property. The question of whether this constituted an asset was quite irrelevant, whereas here it was all-important. Finally, His Honour suggested that the problems of the reconciliation of *Cooper v. Cooper*[17] with *Lord Sudeley's* case which Jordan C.J. found so troublesome in the New South Wales case of *McCaughey v. Commissioner of Stamp Duties*[18] are really non-existent, and have been reconciled by Younger J. in *Vanneck v. Benham*.[19]

Kitto J.'s approach was somewhat more straightforward for he felt that arguments about distinctions between rights *in rem*, and rights *in personam*, while perhaps superficially of some help, could only tend to confuse the issue. Some of the controversies that have arisen among text-writers might seem to confirm this view.[20] Clearly Mrs Coulson had a beneficial interest in the assets, but of what rights did this interest comprise? This must accord with the nature of the interest in the residue as a whole, which since it is likely to, or possibly may, disappear to creditors, has a 'most substantial connexion'[21] with the place of administration. *Lord Sudeley's* case, he goes on, did not assert that the residuary beneficiaries have no interest of any kind in the individual assets. Rather, says Kitto J.,[22] it:

> attribute[s] a local situation to the totality of rights, fixing on the place with which the totality is specially connected; and there is no need to

[12] (1960) 34 A.L.J.R. 425, 430. [13] *Ibid.* 433. [14] [1897] A.C. 11. [15] [1940] A.C. 350.
[16] (1960) 34 A.L.J.R. 425, 436. [17] (1874) L.R. 7 H.L. 53.
[18] (1945) 46 S.R. (N.S.W.) 192. [19] [1917] 1 Ch. 60.
[20] Hanbury, *Essays in Equity* (1934); Scott, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17 *Columbia Law Review* 269; Stone, 'The Nature of the Rights of the *Cestui Que Trust*' (1917) 17 *Columbia Law Review* 467; R. W. Turner, *The Equity of Redemption* (1931) 152; Paton, *A Textbook of Jurisprudence* (1951) 432. Hanbury, 'A Periodical Menace to Equitable Principles' 44 *Law Quarterly Review* 468. [21] (1960) 34 A.L.J.R. 425, 440. [22] *Ibid.*

go further in order to attribute their proper situation to the rights which exist as to the particular assets.

Menzies J. asserts the same conclusion for similar reasons, and otherwise concurs with Fullagar J.'s analysis of the authorities.[23]

From the dissent of Dixon C.J., with whom Windeyer J. largely concurred, it is possible to see that he was troubled by the apparent lapse of the beneficial interest in the Queensland properties, so far as Queensland law was concerned. He states that rights arising under New South Wales law in relation to the process of administration do not affect the existence of rights arising under Queensland law—the *lex loci rei situae.* He endorses the statement of Jordan C.J. in *McCaughey v. Commissioner of Stamp Duties* where he said:[24]

> The idea that beneficiaries in an unadministered or partially administered estate have no beneficial interest in the items which go to make up the estate is repugnant to elementary and fundamental principles of equity.

It is perhaps questionable whether anyone has ever asserted such an idea to be true. The question of construction of the right of a beneficiary in the estate of a testator before it is finally executed or administered has troubled Australian courts for some years, although the position seems to have been very clear in England. In dealing with this question, the *locus classicus* is *Lord Sudeley's* case[25] where the House of Lords, in considering the liability for English duty of A's wife on certain New Zealand mortgages left to her by A's as yet unadministered estate, concluded that the asset was situated in England, and hence duty was payable.

Though the converse of the present case, as here, the location of the asset was the crucial point, not the fact of its existence as part of the estate, and it was held to be most closely connected with the place of administration. Lord Herschell described the right of the wife at the time of her death as being a 'right . . . to require the executors of her husband to administer his estate completely',[26] and this was clearly most closely connected with the process of administration.

That this question appears to go to the very basis of any equitable right in property is quite evident. Is it a right to the property, a proprietary right *in rem,* or is a *cestui que trust* nothing more than an individual with a mere right to force the trustee to perform his duties, holding a right *in personam*?

This problem which has plagued text-writers for many years can be avoided if it is remembered that whether the equitable right is considered as existing in Queensland, or in New South Wales, it is still one and the same right, and its most appropriate location should depend in given circumstances upon the state with which it has the closest

[23] Other cases used by Fullagar J. include *Thomson v. Advocate-General* (1845) 12 Cl. & Fin 1; *Harding v. Commissioners of Stamps* [1898] A.C. 769; *Re Ewing* (1881) 6 P.D. 19; *Re Smyth* [1898] 1 Ch. 89; *Favorke v. Steinkopff* [1922] 1 Ch. 174.

[24] (1945) 46 S.R. (N.S.W.) 192, 204. [25] [1897] A.C. 11. [26] *Ibid.* 19.

connection. Hence there is no difficulty in reconciling *Lord Sudeley's* case with the older, and apparently (at least to Jordan C.J. in *McCaughey's* case) contradictory case of *Cooper v. Cooper.*[27] The question of the location of the equitable right arose with regard to a different question in each.[28]

But in Australia, the law has not been so clear, and while this decision has accorded with what would seem the correct and logical as well as practically most useful view of the law[29] its weight must be at least partially offset by the failure of the whole Court to concur, and especially by virtue of the strong dissent of the Chief Justice.

In *McCaughey's* case[30] Jordan C.J. severely criticized the rule which he thought was involved in *Lord Sudeley's* case, and stated it should be overruled, even though he felt constrained by its authority to follow it in the case with which he was dealing.[31] Also in *Smith v. Layh*[32] the High Court, without really going into the question, seemed to accept Jordan C.J.'s view of the law, without attempting to see whether there might not be any closer reconciliation with principle than that which the then Chief Justice of New South Wales had been able to deduce.

Thus, despite the clarity of English doctrine, followed through from *Lord Sudeley* by cases such as *Baker v. Archer-Shee,*[33] and *Barnardo's Homes v. Special Income Tax Commissioners*[34] in England, *Stannus v. Commissioner of Stamp Duties*[35] in New Zealand, and *Minister of National Revenue v. Fitzgerald*[36] in Canada, there has been some confusion in Australia.

As the majority clearly point out, this confusion has arisen unnecessarily, and it is notable that the practice of the office of the Commissioner of Probate Duties in Victoria has always been in accordance with the majority view. It is to be hoped that this decision is taken as settling any doubts that may have existed on this question in Australia.

It remains to be considered how far this decision can be taken as affecting the law generally, in cases where the estate is fully administered. Fullagar J. suggests that there may be no limitation to cases where there is an unadministered estate, or where there is only a single beneficiary.[37] In *Green's Death Duties*[38] there is the statement that the principle of *Lord Sudeley's* case is applicable to residuary real estate if it is subject to an operative trust for sale, as well as to personalty, and may even extend to property specifically devised or bequeathed, if such property is in fact required to be sold for payment of debts, *etc.,* but a

[27] (1874) L.R. 7 H.L. 53.

[28] In *Cooper v. Cooper* the court was dealing with a right to election. In *Lord Sudeley's* case the question, was as to a liability to duty. The same criterion *i.e.* the purpose for which it is desired to know the nature of the beneficiary's right can explain the apparent contradiction of current doctrine with that contained in the statement in *Bacon's Abridgement Tit. Executors and Administers* I, s. 4, Vol. III, 75

[29] It seems obviously far more convenient for duties to be levied only by one State, upon a deceased's estate, and for that State to be the one already concerned with the administration of the estate.

[30] (1945) 46 S.R. (N.S.W.) 192.

[31] This course was criticized by Dixon C.J. in the present case. (1960) 34 A.L.J.R. 425, 429.

[32] (1953) 90 C.L.R. 102.

[33] [1927] A.C. 844.

[34] [1921] 2 A.C. 1.

[35] [1947] N.Z.L.R. 1.

[36] [1949] 3 D.L.R. 497.

[37] (1960) 34 A.L.J.R. 425, 433.

[38] *Green's Death Duties* (4th ed. 1958) 514-515.

balance will be left.[39] Certainly the judgments in the High Court did not attempt to specifically narrow the principle, and the better view might be that it accords with the practical theories of equitable ownership herein advocated, that the courts must decide each case in this field along a criterion of 'closest connection' and practicability rather than any abstract conceptions of the nature of the rights involved.

A. R. CASTAN

WATTS v. RAKE[1]

Tort—Injuries to plaintiff—Shifting burden of proof—Reasonable foresight

Watts sued Rake in the Supreme Court of Queensland for damages arising out of a motor-car accident. The action was tried by Mansfield C.J., who awarded the plaintiff special damages of £4,669 5s. 10d. and general damages of £8,000. Watts appealed to the High Court of Australia on the ground that the learned Chief Justice had made a mistake in law in assessing the general damages. The appeal succeeded, with the result that the general damages were increased to £12,000.

The appellant (plaintiff), a young man of 27, had been struck by a motor-car driven by the respondent (defendant), who admitted his negligence. It was not disputed that before the accident the plaintiff was in apparent good health and that he lived a full and active life. Nor was it disputed that after the accident the plaintiff was, *inter alia,* 'very disabled and unable to move freely', that he could only 'hobble with crutches' and 'not sit down properly'.[2] It was accepted by Mansfield C.J., despite a conflict in the medical evidence, that most of these misfortunes could be attributed to ankylosing spondylitis. But here was the difficulty; it was established that before the accident the plaintiff's good health was only superficial and that he had had, even then, within himself the seeds of this disease, so that according to the medical evidence which was preferred by the court the plaintiff would have reached, even without the mishap, his present state of incapacity within 13 years of the date of the accident; but it was not proved at what stage or stages within those 13 years his various disabilities would have manifested themselves.[3]

On this basis it was answered for the defendant

> first, that [the plaintiff] was predisposed to many or at least some of the arthritic and other conditions which have so seriously and rapidly developed as a consequence of the accident, considered at all events as a precipitating cause. Secondly, that part of his present condition is traceable to causes other than the accident, and thirdly, that had there been no accident he would eventually and prematurely have been incapacitated by the seeds of disability within him.[4]

[39] With regard to the case where there is a trust for sale involved, see *Re Smyth, Leach v. Leach* [1898] 1 Ch. 89.

[1] (1960) 34 A.L.J.R. 186. High Court of Australia; Dixon C.J., Menzies, Windeyer JJ.

[2] *Ibid.* 188, *per* Menzies J. quoting Mansfield C.J.

[3] *Ibid.* 188, *per* Menzies J. [4] *Ibid.* 187, *per* Dixon C.J.