THE NATURE OF THE INTEREST OF A RESIDUARY BENEFICIARY IN AN UNADMINISTERED ESTATE

COMMISSIONER OF STAMP DUTIES v. *LIVINGSTON*[1]

Hugh Duncan Livingston (herein called "the testator") died in 1948 domiciled and resident in New South Wales and at the time of his death portion of his estate consisted of real and personal property situated in Queensland. Probate of his will was granted by the Supreme Court of New South Wales to the three executors named therein (all of whom were domiciled and resident in New South Wales), and by his will the testator devised and bequeathed one-third of his residuary estate to his widow, Jocelyn Hilda Coulson, who died intestate before administration of his estate had been completed. Letters of administration of the widow's estate were granted by the Supreme Court of New South Wales to her son, the respondent in the present appeal.

Section 4 of The Succession and Probate Duties Acts (Queensland), 1892-1955, provided (insofar as is material):

> Every . . . disposition of property by reason of which any person . . . shall become beneficially entitled to any property or the income thereof upon the death of any person . . . and every devolution by law of any beneficial interest in any property . . . upon the death of any person . . . shall be deemed to . . . confer on the person entitled by reason of such disposition or devolution a "succession" . . . .

Section 12 of the Act imposed duty at the prescribed rates in respect of every such succession and s. 2 of The Succession and Probate Duties Act 1892 Amendment Act, (Queensland) 1895, provided that succession duty was chargeable in respect of all property within Queensland even though the testator may not have had his domicile in that State.[2] Administration duty was imposed by s. 55 of the Act, the relevant part of which reads:

> . . . there shall be paid, in respect of every grant of probate or letters of administration made in respect of the estate of any person dying . . . duties at the rates mentioned in the Schedule to this Act.

Section 2 of The Succession and Probate Duties Act Declaratory and Amendment Act, (Queensland) 1935, provided that such duty was payable if possession was taken of Queensland property or if it was administered in any way by persons claiming the right to possess or deal with it by virtue of a death even though a formal grant had not been made.

The Commissioner of Stamp Duties (Queensland) assessed both succession and administration duties in respect of Jocelyn Hilda Coulson's interest in the residuary estate of her late husband. The Full Supreme Court of Queensland dismissed an appeal from this assessment[3] and by a majority,[4] the High Court of Australia reversed this decision.[5] An appeal to the Privy Council was dismissed.[6]

It was axiomatic that the Queensland legislation could not impose duty on successions to property wherever the same occurred, and the Privy Council

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[1] (1964) 3 All E.R. 692; (1964) 112 C.L.R. 12.

[2] This section was inserted to overcome the effect of the decision of the House of Lords in *Wallace* v. *Attorney-General* (1865) L.R. 1 Ch. App. 1, where Cranworth, L.C., held that succession duty was not chargeable in respect of the personal property in England of a testator domiciled in France. The effect of the section is that duty is imposed on successions to interests in real or personal property which are situate in Queensland irrespective of the domicile of the deceased. The rule *mobilia sequuntur personam* has no application.

[3] *Re Coulson Decd., Livingston* v. *Commissioner of Stamp Duties* (1961) Qd. R. 118.

[4] Fullager, Kitto and Menzies JJ., Dixon C.J. and Windeyer, J. dissenting.

[5] *Livingston* v. *Commissioner of Stamp Duties* (Qld.) (1962) 107 C.L.R. 411.

[6] *Commissioner of Stamp Duties* (Qld.) v. *Livingston* (1964) 8 All E.R. 692.

held that the words of s. 4 should be qualified so as to extend only to devolutions by the law of Queensland of beneficial interests in property. As succession to immovables is governed by the *lex situs* and as s. 2 of the 1895 Act equated the position of movables (for this purpose) to that of immovables, it followed that Jocelyn Hilda Coulson must have died possessed of a beneficial interest in real property situated in Queensland, or of beneficial personal property interests locally situated in Queensland, before duty could be imposed. Expressed in less general terms, she must have had either an equitable interest in the specific Queensland assets which formed part of the testator's estate, or the rights which she had with respect to that estate must have been locally situate in Queensland.

In the High Court, Fullager, J. considered that the "interest" of a residuary beneficiary in an estate, the administration of which had not been completed, was a right against the executors to have the estate administered according to the will and according to law. In cases where it was necessary to determine the locality of such a right, his Honour considered that the nature of the right should be examined and it should be localised in the place where it had to be enforced or where it would normally be enforced. In this case the right was a chose in action which from its nature had to be treated as situate in the place of administration, New South Wales, irrespective of the physical situation of the assets with respect to which it existed.

Kitto, J. was of the opinion that, whilst Mrs. Coulson had only one set of rights, these rights could be categorised in two different ways: they could be described as a right to have administration completed and to have one-third of the ultimate residue transferred to her; or as a right to have every individual asset of the estate dealt with in due course of administration. In view of the second permissible categorisation, his Honour considered that Mrs. Coulson was entitled to a beneficial interest in the individual assets of the estate:

> The legal personal representatives as such have no beneficial interest . . . and it is axiomatic that, with the one exception provided by the law of charities, the whole beneficial interest must reside in some individual or collection of individuals.[7]

However, although the beneficiaries were entitled to an interest in the individual assets of the estate, that interest did not entitle them to demand any asset *in specie*, for each asset was liable to disappear from the estate in the course of administration:

> . . . the nature of the beneficiaries' interests in the particular assets necessarily accords with the nature of their interests in the residue as a whole.[8]

Having examined the nature of the relevant interest, Kitto, J. proceeded to determine its location. His Honour considered that generally an interest in property was most closely connected with the place where the property itself existed, but in this case the nature of the rights which comprised the interest in question rendered the forum of administration the place with which there was the most substantial connection. "The law . . . accords to the interest in the individual asset, no less than to the interest in the whole estate, a local situation at that place."[9]

Menzies, J. agreed in substance with Fullager, J. and held that:

> . . . because the intestate's interest was in the totality of the estate of the testator and because she had no separate or separable property in the Queensland assets of that estate, her interest in the estate of the testator

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[7] (1962) 107 C.L.R. 411 at 449.
[8] *Id.* at 451.
[9] *Id.* at 451 and 452.

was property situated in New South Wales, where the trustees were domiciled and not as to any part in Queensland.[10]

The dissenting judgments of Dixon, C.J. and Windeyer, J. reveal a fundamental difference of approach from that adopted by the other members of the Court. The Chief Justice was of the opinion that although the forum of administration might treat a right to share in the residuary estate when ultimately ascertained as a single right devolving under that law and taxable by that law, it did not follow that no beneficial interest in the property existed according to the *lex loci rei sitae* devolving under the latter law and accordingly taxable by it. His Honour approved the statement in *Smith* v. *Layh*[11] that the right of a residuary beneficiary to have the estate properly administered and to receive payment of the net balance gave him an equitable interest in the totality of the estate, hence in the assets of which it was comprised. The interest was *a jus in personam ad rem*. Windeyer, J. agreed with the Chief Justice and said:

> I think that if a person has an interest in Queensland land, of a kind recognised by the law of Queensland, then, for the purposes of Queensland law, that interest is in Queensland and is property there.[12]

His Honour thought it to be an inevitable result of our system of equity that the rights of a beneficiary could be regarded as a right against the trustee who held the property, or as an interest in the property itself.[13]

It will be noticed that Fullager and Menzies, JJ. denied that the beneficiary had an interest in the specific assets of the estate and that Dixon, C.J., Kitto and Windeyer, JJ. admitted the existence of such an interest, but differed as to its nature, extent and location.

Before proceeding with an examination of the advice of the Privy Council, it is convenient to deal with some of the decisions upon the basis of which the judgment of the High Court was delivered. First in point of importance is that of the House of Lords in *Sudeley (Lord)* v. *The Attorney-General (on behalf of Her Majesty)*.[14] In that case a testator died domiciled in England and by his will devised and bequeathed one-quarter of his estate to his widow. Probate was granted by the English Courts to executors who were resident in England, and the testator's widow died during the course of administration of the estate, which included mortgage debts owed by persons in New Zealand and secured by mortgages of land in that country. The question for decision was whether the widow's interest in the mortgages was liable to be included in her estate for the purpose of assessment of duty. Their Lordships held that the widow's interest was a right against the executors to compel the proper administration of the estate, that this right had its location in England, and that it was taxable accordingly. She had no interest in the specific New Zealand property. It is noteworthy that none of the High Court Judges was prepared to give full effect to *Sudeley's Case*.

The second case is *Cooper* v. *Cooper*,[15] a decision of the House of Lords delivered prior to that in *Sudeley's Case* and not cited during the hearing of it. That was a case in which it was necessary to decide whether the interest of beneficiaries in an unadministered estate was sufficiently specific to put them to their election between different interests, at a date when administration was still pending. Lord Cairns held that, whilst the rights of beneficiaries might only be asserted by action against the personal representative, ". . . as regards substantial proprietorship the right of the next of kin remains clear

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[10] *Id.* at 458.
[11] (1953) 90 C.L.R. 102.
[12] (1962) 107 C.L.R. 411 at 461.
[13] *Id.* at 462.
[14] (1897) A.C. 11.
[15] (1874) L.R. 7 H.L. 53.

to every item of the personal estate of the intestate subject to those paramount claims of creditors".[16] His Lordship went on to state that, had the intestate made a will, then the residuary legatees would have had a clear and tangible interest in the specific assets of the estate.

The last case is *Skinner* v. *Attorney-General*,[17] another decision of the House of Lords mainly concerned with the meaning of the word "interest" in the English Finance Act, 1894, but important for present purposes for the reference made by Lord Russell of Killowen to *Sudeley's Case*:

> . . . the interest which was being repudiated was a proprietary interest. The case is not in any way a decision that the widow or her executors had no interest in the mortgages . . . .[18]

The Privy Council refuted any suggestion that a beneficiary in an unadministered estate had an equitable interest in the assets of that estate, and affirmed the proposition that the sole right of such a person was to require the proper administration of the estate. This was a chose in action situated, in this case, in New South Wales. Their Lordships held that property coming into the hands of an executor by virtue of his office came to him in full ownership for the purpose of carrying out the duties of administration, which duties would be enforced by the Court. Accordingly no beneficial interest in any item of the testator's estate belonged to Mrs. Coulson at the date of her death.

Their Lordships admitted of two possible objections to this proposition and proceeded to dispose of both of them. It was said that *Sudeley's Case* was inconsistent with the earlier decision of *Cooper* v. *Cooper* and had been restricted by later decisions such as *Skinner* v. *Attorney-General*. Their Lordships considered that

> . . . Lord Cairns' speech in *Cooper* v. *Cooper* cannot possibly be recognised today as containing an authoritative statement of the rights of next of kin or residuary legatees in an unadministered estate. His language is picturesque, but inexact.[19]

Whilst *Cooper* v. *Cooper* might be an authority on the beneficiary's duty of election, their Lordships held it to be of no authority as an exposition of the general law. *Cooper* v. *Cooper* was a case dealing with election as between beneficiaries and had nothing to do with death duty or succession duty Acts. Similarly their Lordships rejected the apparent qualification to *Sudeley's Case* made by Lord Russell of Killowen in *Skinner* v. *Attorney-General* and held that the decision was based upon the popular use of the word "interest" as it appeared in the Act there in question.

Secondly, their Lordships considered that the supposition that residuary legatees must have had a beneficial interest in the assets of an unadministered estate, because such a beneficial interest could not lie in the executor, was founded upon the misconception that the law required the separate existence of the legal and equitable estates in property for all purposes and at all times. The whole right of property vested in the executor and the Court would control the executor in the use of those rights "by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets".[20] In *McCaughey* v. *Stamp Duties Commissioner*,[21] Jordan, C.J., in delivering the opinion of the Full Court, stated:

> . . . although the beneficiaries in the residuary estate of a deceased person have undoubtedly beneficial proprietary interests in each and every item

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[16] *Id.* at 65.
[17] (1939) 3 All E.R. 787.
[18] *Id.* at 790.
[19] (1964) 3 All E.R. 692 at 699.
[20] *Ibid.*
[21] (1946) 46 S.R. (N.S.W.) 192.

> of that estate whether it has been fully administered or not, nevertheless when questions of income tax or locus of property in relation to liability to death duties have to be determined, if the estate has not been fully administered the beneficial interests in the items must be treated as non-existent and the beneficiaries must be regarded as having nothing but a chose in action in the nature of a right *in personam* against the personal representative.[22]

At page 204 of the judgment his Honour stated:

> 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.

Their Lordships rejected this proposition and implied that in this instance Sir Frederick Jordan was himself ignorant of these elementary and fundamental principles. Fortunately this is a heresy not often uttered in this country. In their Lordships' opinion, whilst a beneficiary might in a non-technical way be said to have an interest in the totality of the assets, he does not have an equitable interest in any particular one of those assets. The Privy Council held that the right of the residuary beneficiary was a chose in action which was locally situate where the executors resided, which place constituted the proper forum of administration. It followed that if there were no liability for succession duty, then there could be no liability for administration duty.

The advice of the Privy Council represents an extremely personalist view of the nature of equitable rights. Most of the members of the High Court were prepared to concede that the rights of the beneficiary might be regarded as either a right against the executor, or as an interest in the property itself. The right lay neither entirely *in personam*, nor *in rem*, and for purposes other than private international law and taxation its categorization as one or the other was only of academic importance. Their Lordships insisted that the right lay entirely *in personam* and created no *in rem* interest in the specific property itself. This seems to deny the validity of the proposition that by acting *in personam*, equity may create equitable interests, and that the equitable interests created are coincident with the equitable remedies available for their enforcement.

If the Privy Council intended to hold that:

(a) the legal and equitable interests in the assets of the estate are vested in the executor;
(b) the court will control the executor in his dealings with those assets merely because he holds the office of executor;
(c) the court will exercise such control without the necessity of admitting the existence of equitable rights of property in those assets;

then it could be said that a specific legatee acquires no equitable right of property in the particular assets of the estate whilst it remains unadministered. If the reason that a residuary beneficiary has no such interest is that the same is vested in the executor, it follows that a specific legatee could not be regarded as holding equitable rights of property in the specific assets of the estate, for the same considerations would apply. Their Lordships held that equity recognizes equitable rights only where recognition is necessary to give effect to its doctrines. It is submitted that if the rights of a residuary beneficiary are to be protected without the recognition of equitable rights of property in the assets of an estate, then logic requires that the same be said of the rights of a specific legatee.

Their Lordships inferred that a distinction existed between the position of a residuary beneficiary and that of a specific legatee because residue does not come into existence until the estate has been fully administered.[23] A

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[22] *Id.* at 205.

[23] (1964) 3 All E.R. 692 at 696.

residuary beneficiary cannot, in their Lordships' opinion, be said to have an equitable interest in the specific assets, because they may disappear from the estate in the course of administration and not form part of residue when the same is ultimately ascertained. If this is to be the distinction between the nature of the interest of a residuary beneficiary and that of a specific legatee, then it is submitted that it is illusory. Property which has been specifically devised or bequeathed is always liable to disappear from the estate in the course of administration in the same way as that which may ultimately form part of residue. Until the estate has been fully administered, or at least until all the debts and duties have been paid, there can be no certainty as to whether the legatee or devisee will receive the specific property, or its value resulting from marshalling amongst the beneficiaries. Indeed, there can be no certainty as to what such a beneficiary will receive, if he is to receive anything at all.

The difficulties in determining when a person ceases to hold as executor and begins to hold as trustee are well known. At some stage in the administration of the estate an executor becomes a trustee of the property in his hands, and there is a concurrent transformation of a chose in action against an executor into a proprietary right *in rem* in specific items of property. *Livingston's Case*, whether it be regarded as applying to specific beneficiaries or not, emphasises the importance of determining exactly when this transformation takes place. It used to be sufficient to recite the hallowed incantation that an administrator becomes a trustee when he has paid all the debts and reduced the estate to a distributable form. The decision of the Court of Appeal in *Harvell* v. *Foster*[24] seems to indicate that administration continues as long as there are assets falling into the estate and whilst any of his duties to the beneficiaries remain unperformed. If this is so, then a residuary beneficiary would not acquire an equitable interest in the specific property until such time as the executor or administrator declared himself to be, or became, a trustee of the property by a method appropriate to the nature of the property in question.

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[24] (1954) 1 All E.R. 851.