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Judgment
45/1964

IN THE PRIVY COUNCIL

No. 51 of 1962

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

23 JUN 1965

25 RUSSELL SQUARE
LONDON, W.C.1.

B E T W E E N

THE COMMISSIONER OF STAMP
DUTIES (QUEENSLAND) ...

Appellant

78677

- and -

HUGH DUNCAN LIVINGSTON ...

Respondent

CASE FOR THE APPELLANT

Record

- 10 1. This is an Appeal by special leave from a majority judgment of the High Court of Australia (Fullagar, Kitto and Menzies, JJ., Dixon C.J., and Windeyer, J., dissenting) delivered on the 16th day of December 1960 allowing an Appeal by the Respondent from a judgment of the Full Court of the Supreme Court of Queensland (Philp, Wanstall and Stable, JJ.) delivered on the 2nd day of December 1959 whereby Appeals by the Respondent against an assessment to Succession Duty and an assessment to Administration Duty both of which were made by the Appellant on the Respondent in respect of the estate of Jocelyn Hilda Coulson deceased were dismissed.
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- 30 2. The said assessments were made in respect of the interest of Jocelyn Hilda Coulson deceased (hereinafter called "Mrs. Coulson") in certain assets in Queensland of the unadministered estate of Hugh Duncan Livingston the elder. The said Hugh Duncan Livingston the elder had died in 1948 domiciled and resident in New South Wales. By his Will he appointed Mrs. Coulson
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(who was his widow and later re-married) and two other persons all of whom were at all material times domiciled and resident in New South Wales as the executors and trustees of his Will. Under the terms of his said Will he gave his real estate and the residue of his personal estate to his executors and trustees on trust after payment of debts, testamentary expenses and duties, as to one third of the residue thereof to his widow, Mrs. Coulson, absolutely. 10
Before the administration of the estate of Hugh Duncan Livingston the elder had been completed and the residue ascertained Mrs. Coulson died intestate on the 8th day of July 1950 domiciled and resident in New South Wales. Letters of Administration of her estate, which included the one third interest in the residue of the unadministered estate of Hugh Duncan Livingston the elder, were granted by the Supreme Court of New South Wales on the 13th day of November 1951 20
to the Respondent, the son of Hugh Duncan Livingston the elder.

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At the time of the death of Mrs. Coulson the estate of Hugh Duncan Livingston the elder included certain real estate and personal estate in Queensland. The Appellant assessed the Respondent to Queensland Succession Duty and to Queensland Administration Duty in respect of the estate of Mrs. Coulson by Notices dated the 20th day of April 1956. The question in this appeal is whether the Appellant was entitled to assess the Respondent to Queensland Succession and Administration Duties in respect of the interest of Mrs. Coulson at the time of her death in the Queensland assets of the unadministered estate of Hugh Duncan Livingston the elder. The Respondent contends, and the majority of the High Court held, that there was no interest subject to the Queensland Duties because Mrs. Coulson possessed only a right to administration which was situated in New South Wales and not in Queensland. The Appellant contends, and the minority of the High Court held, that notwithstanding the situation of any right to administration Mrs. Coulson had a sufficient interest in the Queensland assets of the estate of Hugh Duncan Livingston the elder deceased to attract the Queensland Succession and Administration Duties. 30 40

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3. The facts of the case are set out in the petitions of the Respondent to the Supreme Court 50

of Queensland, and in the statement of additional facts filed with each petition, and may be summarised as follows:-

- (i) Mrs. Coulson wife of Bruce Thomas Coulson died intestate on the 8th day of July 1950.
- (ii) On the 13th day of November 1951 Letters of Administration of the estate of Mrs. Coulson were granted to the Respondent by the Supreme Court of New South Wales.
- (iii) Mrs. Coulson died domiciled and resident in the State of New South Wales.
- (iv) Mrs. Coulson married the said Bruce Thomas Coulson on the 22nd day of June 1950. Before such marriage she was the widow of Hugh Duncan Livingston the elder late of "Booloroo" Moree in the State of New South Wales, Grazier.
- (v) The said Hugh Duncan Livingston the elder died domiciled and resident in the State of New South Wales on the 17th day of November 1948 having first duly made and executed his last Will and testament bearing date the 9th day of December 1944 whereby he appointed Mrs. Coulson, John Evelyn Cassidy of Sydney in the State of New South Wales and Max Bernhard Hesslein of Sydney aforesaid to be the executrix, executors and trustees thereof. The said executrix, executors and trustees are and were at all material times domiciled in the State of New South Wales.
- (vi) By his said Will the said Hugh Duncan Livingston the elder inter alia gave and bequeathed to Mrs. Coulson to be paid to her as soon as possible after his death the proceeds of all policies of assurance of his life and he gave devised and bequeathed to his said trustees all his real and the residue of his personal estate of whatsoever nature and wheresoever situate (in the Will called his "trust property") subject to the payment thereof of all his just debts funeral and testamentary expenses and all death estate and other duties upon trust as to one-third

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thereof for Mrs. Coulson absolutely and as to the remaining two-third shares thereof upon trust to use and apply the income therefrom or such part thereof as his trustees might in their absolute discretion think fit for the maintenance education and advancement in life of his sons Hugh Duncan Livingston (the Respondent) and John Angus Livingston until they should respectively attain the age of 23 years and to pay and transfer half of the said remaining two-thirds of his said trust property and all unapplied income thereof to each of his said sons upon his attaining that age. The Will also empowered his trustees in their absolute discretion to carry on the business of a grazier on all or any of the properties which should belong to his estate for such time as they should think expedient, and if at the time of his decease he should be engaged in any partnership or partnerships they should have power to continue the same or to enter into further or other partnership or partnerships with his brothers and/or sister or their or any of their respective legal representatives for such period or periods as his trustees in their absolute discretion should think fit. He gave them further powers in relation to the carrying on of business including powers in relation to land and leaseholds, and he gave them power generally to act in all matters whether specifically mentioned in his Will or not, relating to such stations or pastoral properties or any of them as if they were the absolute owners thereof. By his Will the said testator also empowered his trustees to sell and dispose of any of his trust property and declared that without in any way restricting the power of sale his trustees should not be bound to sell any portion of his trust property until the younger of his said sons should attain the age of 23 years and until the power of sale should be exercised he directed his trustees to pay to Mrs. Coulson one-third of the nett annual income of his trust property.

- (vii) Probate of the said Will was granted to the said trustees by the Supreme Court of New South Wales on the 13th day of October 1949. An exemplification thereof was not resealed

in Queensland until the 13th day of February 1952.

- (viii) The said Hugh Duncan Livingston the elder was survived by his widow the said Mrs. Coulson and by his said sons, Hugh Duncan Livingston (the Respondent) and John Angus Livingston, aged respectively 19 years and 17 years at the date of his death. The younger son attained the age of 23 years on the 30th day of May 1954.
- 10
- (ix) The assets in the estate of the said Hugh Duncan Livingston the elder consisted of real and personal estate in the State of New South Wales and real and personal estate in the State of Queensland.
- (x) The assets in the said estate in the State of Queensland at the date of death of Mrs. Coulson consisted of :-
- 20
- (a) A freehold and leasehold grazing property together with stock and plant thereof whereon the said Hugh Duncan Livingston the elder had carried on grazing business on his own account until the date of his death. The said leasehold property consisted of Crown Leaseholds held under the provisions of the Land Acts 1910 to 1957, and,
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- (b) An interest in a leasehold grazing property together with stock and plant thereon on which a grazing business had been carried on by Hugh Duncan Livingston the elder in partnership until the date of his death. Such partnership was that of the said Hugh Duncan Livingston the elder, his brother John Hector Livingston, Kenneth Huthwaite Stokham Livingston his sister Nancy Florence Livingston and Alan
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- Stephen Gillespie and was carried on under the name or style of Maranoa Downs Pastoral Company. Hugh Duncan Livingston the elder had a nine-fortieths interest in the partnership. The partnership was registered in the State of Queensland as a firm under the provisions of The Registration of Firms Acts 1942 to 1953 with its place of business in the District of Mitchell in the State of

Queensland; Hugh Duncan Livingston the elder retired by death from the said firm of Maranoa Downs Pastoral Company on the 17th day of November 1948 and Mrs. Coulson (then Jocelyn Hilda Livingston) John Evelyn Cassidy and Max Bernhard Hesslein as the executors and trustees of the estate of the said Hugh Duncan Livingston the elder became members of the said firm as from the 17th day of November 1948; Mrs. Coulson as executrix of the estate of the said Hugh Duncan Livingston the elder deceased retired by death from the said firm on the 8th day of July 1950; and

- (c) One undivided fourth interest in certain other freehold and leasehold grazing properties

Such partnership and also the said Hugh Duncan Livingston the elder's own grazing business in Queensland were carried on by the said trustees and the surviving trustees of the said Hugh Duncan Livingston the elder at all material times subsequent to his death

- (xi) On the 17th day of October 1949 the said trustees of the estate of the said Hugh Duncan Livingston the elder lodged with the proper authorities in the State of New South Wales accounts of the said estate for the purpose of the assessment in the State of New South Wales of duties payable upon his death. The assessment of duties was made in that estate in the State of New South Wales on the 12th day of January 1951. No assessment of duties and no payment thereof had been made in the estate of Hugh Duncan Livingston the elder at the date of death of Mrs. Coulson either in the State of New South Wales or elsewhere, except that the following amounts in respect of duties to be assessed in New South Wales in that estate were paid on the dates set out hereunder:-

30th May 1949	£11,941.12. 0
26th October 1949	9,297. 8. 0
16th December 1949	9,995. 0. 0
31st January 1951	3,021.12. 3
Interest thereon	<u>621.19.11</u>
	<u>£34,877.12. 2</u>

(xii) At the date of death of Mrs. Coulson the estate of the said Hugh Duncan Livingston the elder both in the State of Queensland and in the State of New South Wales was in the course of administration, the residue had not been ascertained, and the final balance payable to the beneficiaries (including the share of Mrs. Coulson therein) had not been determined

10 (xiii) On being required by the Appellant so to do, the Respondent filed an account in the usual form C under The Succession and Probate Duties Acts 1892-1955 (Queensland) showing details of all the real and personal estate and of the successions arising on the death of Mrs. Coulson. The account was filed under protest and without prejudice to his contention that no Succession or Administration Duty under The Succession and Probate Duties Acts 1892 to 1955 was payable on the death of Mrs. Coulson.

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By a Notice of Assessment dated the 20th day of April 1956 and addressed to the Solicitors for the Respondent the Appellant (the Commissioner of Stamp Duties, Queensland) assessed Succession Duty under The Succession and Probate Duties Acts, 1892 to 1955 in the sum of £4,437. 7. 1. and interest £962. 2.10. to the 30th day of April 1956 total £5,399. 9.11.

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p.16

By a Notice of Assessment dated the 20th day of April 1956 and addressed to the Solicitors for the Respondent, the Appellant assessed Administration Duty under The Succession and Probate Duties Acts 1892 to 1955 in the sum of £607

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4. The relevant statutory provisions are contained in The Succession and Probate Duties Acts 1892 to 1955, The Intestacy Act of 1877 and

40 The Public Curator Acts, 1915 to 1954.

(a) The relevant provisions of The Succession and Probate Duties Acts, 1892 to 1955 read:-

"3. The term 'Succession' denotes any property chargeable with duty under this Act;

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The term 'Property' alone includes real property and personal property;

The term 'Real Property' includes all freehold, leasehold, and other hereditaments, whether corporeal or incorporeal, in Queensland, and all estates in any such hereditaments;

The term 'Personal Property' does not include leaseholds, but includes money payable under any engagement, and all other property not comprised in the preceding definition of real property." 10

"4. Every past or future disposition of property, by reason of which any person has become or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately, or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of such disposition or devolution a 'succession'; and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived." 20 30

"11B. (1) Save as hereinafter provided, any person who takes possession of or in any manner administers any real property of a less tenure than an estate of freehold or any personal property whatsoever in Queensland or any interest therein belonging to any person who dies after the first day of July, One thousand nine hundred and eighteen, shall be liable to a penalty not exceeding one hundred pounds and also to a further penalty of 40

10 ten pounds per centum on the amount of all probate and succession duty payable in Queensland, in respect of such property, unless within twelve months after the death of the deceased, or within four months after the determination of any action or dispute respecting the will or the right to administration which is not ended within eight months after the death of the deceased, probate or administration of such property has been granted in Queensland, or, if probate or administration of such property has been granted in any place out of Queensland, unless within twelve months after such grant is made such probate or administration has been resealed in Queensland in accordance with 'The British Probates Act, 1898':

20 Provided that a judge of the Supreme Court, on being satisfied that the omission to obtain such grant of probate or administration or to have any probate or administration resealed was unavoidable or accidental or due to inadvertence, may, in his discretion, extend any time limited as aforesaid.

(2) This section shall not apply -

30 (a) Where it is shown to the satisfaction of the Commissioner that the total value of such property or interest does not amount to two hundred pounds; or that the total value of the estate of the deceased does not exceed one thousand five hundred pounds and the deceased was domiciled in Queensland and the
40 successor is the wife or the lineal issue of the deceased;

(b) To any policy moneys which may be paid in accordance with section thirty-nine of 'The Life Assurance Companies Act of 1901';

(c) To deposits not exceeding two hundred pounds in the Queensland Government Savings Bank;

(d) To the Public Curator;

(e) To any person taking possession of or administering the estate of a deceased member of any company registered under 'The Companies Acts, 1863 to 1913', in so far as relates to the shares or other interest of such member recorded on the branch register of such company outside Queensland, or to any such company permitting any dealing with such shares or other interest as aforesaid without a grant of probate or administration or a resale thereof as aforesaid." 10

"12. There shall be levied and paid to His Majesty in respect of every such succession as aforesaid, according to the value thereof at the time when the succession takes effect, the following duties, that is to say.....".

"20. The duty imposed by this Act shall be paid at the time when the successor, or any person in his right or on his behalf, becomes entitled in possession to his succession, or to the receipt of the income and profits thereof; 20

except that if there is any prior charge, estate, or interest, not created by the successor himself, upon or in the succession, by reason of which the successor is not presently entitled to the full enjoyment or value thereof, the duty in respect of the increased value accruing upon the determination of such charge, estate, or interest shall, if not previously paid, compounded for, or commuted, be paid at the time of such determination; 30

and except that in case of real property or an annuity, or property hereby made chargeable as an annuity, the duties shall be paid by such instalments as are hereinafter directed or referred to: 40

Provided that no duty shall be payable upon the determination of any lease purporting at the date thereof to be a lease at rackrent, in respect of the increase accruing to the successor upon such determination;"

10 "46. The following persons, besides the successor, shall be personally accountable to Her Majesty for the duty payable in respect of any succession, but to the extent only of the property or funds actually received or disposed of by them respectively after the time appointed for the commencement of this Act - that is to say: Every trustee, guardian, committee, or husband in whom respectively any property, or the management of any property, subject to such duty, is vested, and every person in whom the same is vested by alienation or other derivative title at the time of the succession becoming an interest in possession.

20 And all such trustees, guardians, committees, husbands, and persons are hereby authorised to compound or pay in advance or commute any duty, and retain out of the property subject to any such duty the amount thereof, or to raise such amount and the expenses incident thereto at interest on the security of such property, and shall have power to give effectual discharges for the same, and such security shall have priority over any charge or incumbrance created by the successor.

30 In the event of the non-payment of such duty as aforesaid, every person hereby made accountable shall be a debtor to Her Majesty in the amount of the unpaid duty for which he shall be so accountable."

40 "47. The persons hereby made accountable for the payment of duty in respect of any succession, or some of them, shall, in the case of personal property, at the time of the first payment, delivery, retainer, satisfaction, or other discharge of the same, or any part thereof, to or for the successor or any person in his right, and, in the case of real property, when any duty in respect thereof first becomes payable, give notice to the Commissioner or to his officers of their liability to such duty, and shall at the same time deliver to the Commissioner or to his officers a full and true account of the property for the duty whereon they are respectively accountable, and of the value thereof, and of the deductions claimed by

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them, together with the names of the successor and predecessor, and their relation to each other, and all such other particulars as are necessary or proper for enabling the Commissioner fully and correctly to ascertain the duties due.

The Commissioner may require any such account to be verified by declaration under the "Oaths Act of 1867".

And the Commissioner, if satisfied with such account and estimate as originally delivered, or with any amendments that may be made therein upon their requisition, may assess the succession duty on the footing of such account and estimate; but the Commissioner, if dissatisfied with such account and estimate, or if no account and estimate have been delivered as prescribed, may himself take an account and estimate or cause the same to be taken by any person or persons to be appointed by himself for that purpose, and may assess the duty on the footing of such last-mentioned account and estimate, subject to appeal as hereinafter provided. 10 20

If there is no appeal against such last-mentioned assessment, then it shall be in the discretion of the Commissioner, having regard to the merits of each case, to charge the whole or any part of the expenses incident to the taking of such last-mentioned account and estimate on the interest of the successor in respect whereof the duty is due, in increase of such duty, and to recover the same forthwith accordingly; and if there is an appeal against such last-mentioned assessment, then the payment of such expenses shall be in the discretion of the Court of Appeal hereinafter appointed. 30

The Commissioner may, in his discretion, adopt as the value of any shares or stock in any company or corporation such sum as, in the opinion of the Commissioner, the holder thereof would receive in the event of the company being voluntarily wound up on the date when the succession took effect." 40

"48. If any person required to give any such notice or deliver such account as

10 aforesaid wilfully neglects to do so at the prescribed period, he shall be liable to pay to Her Majesty a sum equal to five pounds per centum upon the amount of duty payable by him, and a like penalty for every month after the first month during which such neglect continues; and if any person liable under this Act to pay any duty wilfully neglects after such duty has been finally ascertained to pay the same within twenty-one days, he shall also be liable to pay to Her Majesty a sum equal to five pounds per centum upon the amount of duty so unpaid, and a like penalty for every month after the first month during which such neglect continues.

20 Without prejudice to the right to the recovery of any of the penalties herein mentioned, if any person accountable for or chargeable with duty on being required by the Commissioner to deliver an account makes default in so doing, the Commissioner may, by summons before a judge of the Supreme Court in chambers, call upon such person to show cause why he should not deliver the account and pay the duty and costs, and thereupon such order shall be made as the judge thinks just.

30 Such summons may be served on such person by being sent to him in a registered post letter addressed to his last known place of abode or business within or beyond the State."

40 "49. Every person who under the provisions of this Act delivers any account or estimate of the property comprised in any succession shall, if required by the Commissioner, produce before him such books and documents in the custody or control of such person, so far as the same relate to such account or estimate, as may be capable of affording any necessary information for the purpose of ascertaining such property and the duty payable thereon; and the Commissioner may, without payment of any fee, inspect and take copies of any public book; but all such information shall be deemed to be confidential, and the Commissioner shall not disclose the same, or the contents of any document or book, to any person, otherwise than for the purposes of this Act.

If any person offends against the provisions of this section he shall be liable to a penalty not exceeding one hundred pounds, and, in the case of a refusal to produce a book or document, to a further penalty of five pounds for every day during which the default continues."

"50. 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, which statement shall be furnished within the further period of thirty days, appeal by petition accordingly to the Supreme Court of Queensland; and such court, or a judge thereof sitting in chambers, shall have jurisdiction to hear and determine the matter of such appeal and the costs thereof, with power to direct, for the purposes of the appeal, any inquiry, valuation, or report to be made by any officer of the court, or other person, as such court or judge may think fit: 10 20

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." 30

"55. 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 after the time appointed for the commencement of this Act, duties at the rates mentioned in the Schedule to this Act, the payment of which duties shall be denoted by impressed Stamps impressed on the Probate or Letters of Administration: And no Probate or Letters of Administration shall be issued from the office of the Registrar of the Supreme Court unless payment of the duty payable in respect thereof is denoted thereon by such impressed Stamps; and a Probate or Letters of Administration granted in respect of the estate of any person dying after the time appointed for the commencement of this Act shall not be admitted in evidence in any Court of Justice unless the payment of duty is so denoted thereon." 40

The Schedule referred to in Section 55 reads:-

"The Schedule

£. s. d.

10	When an order to administer the goods or lands has been granted to the Curator of Intestate Estates and administration duty has been paid by him: Upon any subsequent Grant ...	nil
	When a Grant of Probate has been made to one or more executors, with leave to another executor or other executors to come in and apply: Upon any such subsequent Grant ...	nil
	Any grant de bonis non when duty on the original Grant has been paid in Queensland ...	nil
20	When the net value of the property of the deceased person in respect of which the Grant of Probate or Letters of Administration is made does not amount to £300 ...	nil
	When such value amounts to £300 or upwards, for every £100 or part thereof ...	1. 0. 0

30 This Schedule applies so that no probate or administration duty shall be payable where the total value of the estate does not exceed five hundred pounds.

40 Note. For probate and administration purposes, in estimating the net value of the property of the deceased person, there shall be included any accumulation of interest and any dividends, rents, or other increments paid or accrued since the death of the deceased person and the date of application for the grant; for probate purposes no deduction shall be allowed on account of any debt secured by mortgage upon real property."

"55A. The Stamp duties payable by law upon Probates of Wills, or Letters of

Administration with will annexed, shall be levied and paid in respect of all the personal estate and effects or rents or other moneys whatsoever coming into the hands of the executor or administrator or recoverable by him under such grant as aforesaid in respect of any property whatsoever; and where any testator has disposed of any personal property by will, under any power or authority enabling him to dispose of the same as he thinks fit, such estate and effects shall be deemed to be the estate and effects of the testator in respect of which Probate of the Will or Letters of Administration with the will annexed is or are granted as aforesaid. " 10

"56A. (1) In all legal proceedings instituted by or on behalf of the Crown in pursuance of this Act or the regulations, the averment that - 20

- (i) Any person executed any instrument; or
- (ii) Any assessment or reassessment has been duly made; or
- (iii) Any requisite prescribed or satisfactory accounts, returns, or particulars have or have not been made or given; or
- (iv) Any duty has or has not been paid; 30

shall be sufficient evidence of the fact until the contrary is proved.

(2) In all legal proceedings -

- (i) The production of any assessment or any document under the hand of the Commissioner purporting to be a copy of an assessment shall -
 - (a) Be conclusive evidence of the due making of the assessment; and
 - (b) Be conclusive evidence that the amount and all particulars of the assessment are correct, except in proceedings on appeal against the assessment when it shall be prima facie evidence only; 40

(ii) The production of any document under the hand of the Commissioner purporting to be a copy of or extract from any return or assessment shall for all purposes be sufficient evidence of the matter therein set forth without the production of the original:

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(iii) The production of any document or certificate under the hand of a Commissioner that all or any duty or interest or penalties have not been paid, or that any penalties have been imposed by a Commissioner for breaches of this Act or any regulations made thereunder, shall be conclusive evidence.

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(3) The validity of any assessment shall not be affected by reason of any interim assessment having been made or that any provisions of this Act have not been complied with."

Section 2 of The Succession and Probate Duties Act 1892 Amendment Act of 1895 reads:-

"2. It is hereby declared that succession duty is chargeable in respect of all property within Queensland, although the testator or intestate may not have had his domicile in Queensland....."

(Then follow seven paragraphs dealing solely with limited companies).

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Section 2 of The Succession and Probate Duties Acts Declaratory and Amendment Act of 1935 reads:-

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"2. It is hereby declared that duties at the rates mentioned in the Schedule to the Principal Act are and always have been payable in respect of any real property of a less tenure than an estate of freehold or any personal property whatsoever in Queensland or any interest therein belonging to any person who dies or has died after the first day of July, one thousand nine hundred and eighteen, taken possession of or in any manner administered without the grant in Queensland of probate or administration or, if probate or administration of such property has been granted in any place outside Queensland, without the reseal in Queensland of such probate or administration, and that all such

duties are and always have been payable to the same extent as they would be payable in respect of the grant in Queensland of probate or administration made in respect of the estate of such person.

It is hereby further declared that the Commissioner is and always has been empowered and authorised to assess and recover under the Principal Act duties at the rates mentioned in the Schedule thereto on all such property as aforesaid and notwithstanding that probate or administration of such property has not been granted in Queensland or, if probate or administration of such property has been granted in a place other than Queensland, notwithstanding that such probate or administration has not been resealed in Queensland. 10

All such duties are and always have been payable and the Commissioner is and always has been empowered and authorised to assess and recover all such duties notwithstanding that by reason of any other Act or law such property may be taken possession of or administered without the grant in Queensland of probate or administration or, if probate or administration of such estate has been granted in any place outside Queensland, without the reseat in Queensland of such probate or administration. 20 30

Nothing in this section contained shall limit or prejudicially affect or be deemed to limit or prejudicially affect section 11B of the Principal Act:

Provided that nothing in this section shall prejudice or affect the rights of any party to any judgment of any court of competent jurisdiction in any case where such judgment was given prior to the first day of August, one thousand nine hundred and thirty five, nor prejudice or affect the rights of any party upon appeal from such judgment. 40

In this section the term 'Schedule to the Principal Act' shall mean and include the Schedule to 'The Succession and Probate Duties Act, 1892' (as amended by subsequent Acts)."

(b) The relevant provisions of The Intestacy Act 1877 read:-

10 "12. Administrator of land may be appointed. - The Supreme Court or a judge thereof may by a grant of letters of administration in the manner heretofore used as to personal estate appoint any person to be administrator of the land of any such deceased person and upon such appointment being made all the land of such deceased person whereof he had not disposed by his will shall be divested from the Public Curator and become vested in the administrator so appointed.

20 No application for any such grant shall be made until seven days after notice in writing of the intention to make such application shall have been left at the office of the Public Curator."

30 "14. The title of every administrator to have relation back to the death of the owner. - The title of any administrator appointed under this Act to the land to be administered and to the rents and profits thereof shall upon such appointment being made relate back to and be deemed to have arisen upon the death of the owner of such land as if there had been no interval of time between such death and appointment.

40 Provided that any acts lawfully done by the Public Curator before the appointment of the administrator shall be as valid and effectual as if they had been done by the administrator."

"30. No stamp duty to be charged in respect of land - No duty shall be charged or chargeable under 'The Stamp Duties Act of 1866' in respect of any land whereof administration is granted under this Act."

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(c) The relevant provisions of The Public Curator Acts, 1915 to 1954 read:-

"30. When any person dies, being at the time of his death seized or possessed of or otherwise entitled to any property within Queensland, and has not by his will disposed of such property, then such property shall, instead of descending to his heir-at-law or next-of-kin, pass to and become vested in the public curator; and in the case of property of persons dying intestate before the commencement of this Act, where any part thereof was vested in the Chief Justice or other judge of the court, the same shall be divested from him and vested in the public curator as from the commencement of this Act."

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"36(1). Subject to this Act, an order to administer when made shall give to the public curator the same power over the property of the deceased as he would have had if letters of administration of such property had been granted to him.

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(2). Upon obtaining an order to administer, the title of the public curator to any property in the estate, and to the rents and profits thereof, shall relate back to and be deemed to have arisen upon the death of the owner of such property, as if there had been no interval of time between such death and appointment:

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Provided that any acts lawfully done by a prior administrator shall be as valid and effectual as if they had been done by the public curator.

(3). After the public curator has obtained an order to administer any estate, no person shall institute any action or other proceeding for the administration of such estate; and any such action or proceeding previously commenced shall, on the application of the public curator, be stayed on such terms as to costs and otherwise as the court thinks fit."

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5. The Respondent appealed against the said assessments to the Full Court of the Supreme Court of Queensland. The case came on for hearing

before the Full Court (Philp, Wanstall and Stable, JJ.) on the 16th day of May 1958. On the 2nd day of December 1959 the Full Court unanimously dismissed the appeal on the procedural ground that it was not competent for them to determine whether the Respondent was liable to pay the duty because the Respondent did not have a right of appeal on the question of liability under the statutory provisions. The High Court held that there was such a right of appeal and the Appellant respectfully accepts that that is correct.

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pp. 50-66

In the Full Court of Queensland Philp J. delivered a judgment with which Wanstall and Stable JJ. concurred. Philp J. said that he would state his opinion on the substantive point of the case as this had been fully argued. He differentiated between the Succession Duty and the Administration Duty. He held that the subject of Administration Duty was "estate" or "net property" of the deceased situated in Queensland and on the authority of Lord Sudeley and Others v. Attorney General (1897) A.C.II. he said that he was bound to hold that Mrs. Coulson's property for Administration Duty purposes was in New South Wales: on the other hand he held that the subject of Succession Duty in Queensland was any interest in property; that Sudeley's case was only authority for the proposition that Mrs. Coulson had no "property" in Queensland and, on the authority of Skinner v. Attorney General (1940) A.C.350 Philp J. held that Sudeley's case did not decide that Mrs. Coulson had no "interest" in the Queensland property: he thought that he was bound by Skinner's case to hold that Mrs. Coulson had such an interest which was subject to Succession Duty.

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pp. 50-66
pp. 60-61
p. 61

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The Respondent had submitted to the Supreme Court of Queensland and to the High Court of Australia that by reason of the provisions of Section 30 of The Intestacy Act of 1877 Administration Duty being a "stamp" duty could not in any circumstances be imposed in respect of the net value of land situate in Queensland and the Appellant had submitted that The Succession and Probate Duties Acts, 1892 to 1955 imposed Administration Duty on the net value of land situate in Queensland and which was part of the net property of a deceased person as referred to in the Schedule to these Acts. This question of law was not dealt with directly in the

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judgment of the Justices of the Full Court of Queensland or in the judgments of the Justices of the High Court of Australia.

- p. 66 6. The Appellant had included in both the assessments a sum in respect of moneys received by the trustees of the estate of Hugh Duncan Livingston the elder under the Wool Realisation (Distribution of Profits) Act 1948-1952. Philp J. in his judgment decided against the Appellant that these were not subject to Administration or Succession Duty. The same view was taken by the dissenting minority in the High Court and the Appellant respectfully accepts that this is correct. The assessments of duty are thereby reduced to £595.0.0. in respect of Administration Duty and to £4,262.15.4. in respect of Succession Duty and interest £923.6.4. 10
- p. 69-71 7. By Notice of Appeal dated the 16th day of December 1959 the Respondent appealed against the decision of the Full Court of Queensland. The case came on for hearing before the High Court of Australia (Dixon C.J., Fullagar, Kitto, Menzies and Windeyer, JJ.) on the 14th day of June 1960. On the 16th day of December 1960 the High Court delivered judgment allowing the Appeal by a majority (Dixon C.J. and Windeyer J. dissenting) and ordered that the assessments should be discharged. 20
- pp. 93-132
pp. 77-93
pp.132-136 8. Each of the Justices in the High Court gave his reasons for the judgment. Fullagar J. considered that as a result of Section 2 of The Succession and Probate Duties Act 1892 Amendment Act of 1895 the question upon which the liability of Mrs. Coulson's next of kin to Succession Duty depends is the same question as that on which the liability to Administration Duty depends. The question is whether her estate comprised assets locally situate in Queensland. He considered that the right of Mrs. Coulson as residuary legatee to the Queensland assets of her husband's estate, before the administration of the estate was complete, was only a right against the executors of the estate to have the estate duly administered and the residue ascertained and disposed of according to Will. He further considered that even though the beneficiaries in a partially administered estate may, for some purposes, have a beneficial equitable interest in the items which go to make up the estate, the beneficial interest cannot have a local situation in the State where the assets 30 40 50

10 are situate if the forum of administration is in another State. He further considered that from the nature of the right of the beneficiary it follows that it must be treated as situate in the place of administration, or principal place of administration, of that estate - the place where the executors are, or where they must, or most naturally, would be sued. The locality, naturally or artificially ascribed, of the assets comprising the estate is immaterial.

20 9. Kitto J. said that the central question to be considered in regard to Succession Duty is whether any beneficial interest under the Will of Hugh Duncan Livingston the elder which was the subject of a devolution by law upon the death of Mrs. Coulson is to be considered as having been situate in Queensland; and, in regard to Administration Duty, it is whether any property, consisting of an interest under Livingston's Will, which belonged to Mrs. Coulson and formed part of her estate at her death, is to be considered as having been then situate in Queensland; and that since one way of describing Mrs. Coulson's interest as a residuary legatee is to say that she had a right in respect of each individual asset of the Livingston Estate that asset should be dealt with, and dealt with only in a due course of administration so that she might receive her share in the ultimate distribution, it is in accordance with the ordinary terminology of English law and with the terminology of the Acts to say that among the beneficial interests which devolved by law on Mrs. Coulson's death was a beneficial interest in the Queensland assets of Livingston's estate and that that interest was property which belonged to her at her death. To maintain that a residuary legatee has no beneficial interest in the individual assets of the estate, or has no such interest in them as itself constitutes property, would be to deny to the word 'interest' its accepted meaning in the law. The interests of the beneficiaries under a general residuary gift must absorb the whole beneficial interest in the assets not otherwise disposed of (subject of course to their diminution by the discharge of liabilities and other payments in the course of administration); for the legal personal representatives as such have no beneficial interest, those who would take on intestacy are excluded, and it is axiomatic that, with the one exception provided by the law of charities, the whole beneficial interest in property must reside

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p.115 1.34

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in some individual or collection of individuals; hence the law of resulting trusts. That a clear example of its application is found where land is among the assets included in a residuary disposition, and a question arises while the administration is still incomplete, and while the land remains in the estate, as to whether a residuary beneficiary has, as such, an interest in land. Kitto J. stated that the answer to that question is plainly, Yes.

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p.118 1.1

Kitto J. considered that the existence of a beneficial interest was one thing whilst the nature of it was another. He classed the interest as intangible property and, for some purposes, such as for the exercise of probate jurisdiction or for the application of statutes which depend upon a local situation, the law must attribute a notional locality to such property. He stated that the interest of a residuary beneficiary in an asset of an unadministered estate consisting, as it does, of rights with respect to that asset which forms an integral part of the beneficiary's rights with respect to the whole estate, possess most substantial connection with the place of the appropriate forum for enforcing the due administration of the estate; and the law, if he understood it correctly, for that reason accords to the interest in the individual asset, no less than to the interest in the whole estate, a local situation at that place. He considered that this proposition was established by the case of Lord Sudeley and Others v. Attorney-General (1897) A.C.11.

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p.128 1.40

10. Menzies J. held that because the interest of Mrs. Coulson was in the totality of the estate of Hugh Duncan Livingston the elder and because she had no separate or separable property in the Queensland assets of that estate, her interest in the estate of Hugh Duncan Livingston the elder was property situated in New South Wales where the trustees were domiciled and not as to any part in Queensland; and that prior to administration she had but one asset, not as many assets as there were in the estate of Hugh Duncan Livingston the elder.

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p.81 1.44

11. Dixon C.J. in his dissenting judgment considered that in the appeals against Succession Duty and Administration Duty the Court was primarily concerned with the Law of Queensland and that a special feature of that law was that

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10 the Legislature of Queensland did not follow the
other Australian Colonies in providing that upon
death realty should vest in the personal
representative and the rule that it passed
directly to the devisee continued. In the
Courts of Queensland the law of New South
Wales is not foreign law in the same sense as
it was before federation because there is Section
118 of the Commonwealth Constitution and there
is also the State and Territorial Laws and
Records Recognition Act 1901-1960. In
Australian Courts where the law of all parts of
the Commonwealth and its territories is a matter
of judicial notice the law of New South Wales
is ascertained on that footing. But neverthe-
less it is the law of Queensland that governs
the case. He drew attention to Sections 30 and
36 of The Public Curator Acts 1915 to 1956 and
to Sections 12 and 14 of The Intestacy Act of
20 1877. He considered that as Probate of the
Will of Hugh Duncan Livingston the elder was not
resealed in the State of Queensland until the
13th February 1952 that at the time of the death
of Mrs. Coulson on the 8th July 1950 the
devolution or vesting of his assets in
Queensland was governed by the general law and
that the real estate vested in her and the two
executors as devisees. A transmission to them
in that character was produced at the Real
30 Property Office in Brisbane, Queensland and
entered upon the titles after her death. Under
the law of Queensland this registration meant
that she must be considered as one of the three
proprietors of the legal estate in the land in
question at the time of her death. The law of
Queensland would also regard the chattels
personal and chattels real as vesting in them
as well as the testator's interest in the
partnership. The beneficial interest would of
40 course depend upon the Will. In these appeals
the Court was concerned with the law of
Queensland which governed the case, and it was
necessary to determine whether under that law
Mrs. Coulson had at the time of her death any
beneficial interest in the property in
Queensland comprised in her husband's estate.
It was true that her right was to have her
husband's estate duly administered and that this
right was located in New South Wales, but the
50 important question was not this but whether
under the law of Queensland she had no equitable
interest in the estate's property in Queensland.
The decision in Lord Sudeley and Others v. The

p.81 1.20

Attorney-General (1897) A.C.11 was a source of much difficulty and misunderstanding, but in Skinner v. The Attorney-General (1940) A.C.350. Lord Russell of Killowen had explained that case by saying it dealt only with proprietary interests and did not decide that the widow had no interest at all.

p.84 l.21

Dixon C.J. in his dissenting judgment also stated that it is devolution or succession that is the subject of the present question and devolution or succession as recognised by the forum situs, if not by the lex loci situs. No one need doubt that the forum concursus or lex loci concursus may treat a right to share in the ultimate distribution as a single right devolving under that law and subject to whatever tax may by that law be imposed on devolution. That is what is done by the actual decision in Lord Sudeley's case (1897) A.C.11. But to do so does not imply a denial of the existence under the lex loci rei sitae of a beneficial right in the property and devolution of that right taxable under the law of that place. Lord Sudeley's case itself appears to provide an example. For according to the report of the argument (74 L.T. 88, at p.92, 2nd col.), counsel for the defendant executors said that the defendants had registered in New Zealand a claim to the mortgaged property and had paid a sum for probate duty there. But the contention that Mrs. Coulson had at her death no equitable interest in the property in Queensland forming part of her deceased husband's estate is put less upon the basis of the law of his domicile, less on the lex loci concursus, than upon a positive doctrine attributed to the law, of law and of equity, which apparently is taken to be part of the law of Queensland. That would mean that according to the law of Queensland the items of property that have been enumerated forming part of the estate of Livingston, deceased, vested in his executors (whether as devisees or as executors) subject to their duties of administration but not beneficially and yet subject to no equitable estate or interest of any kind in a cestui que trust. It would mean that the beneficial interest is nowhere until the completion of their duties of administration. Moreover the theory seems to be that the forum to which those who would become interested in residue when ascertained must resort to enforce performance of such duties is the Supreme Court of New South Wales.

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10 Dixon C.J. in his dissenting judgment said that by virtue of her share in the residue of her first husband's estate Mrs. Coulson was entitled at her death to an equitable interest in the Queensland property forming part of his estate. The interest is not to be defined in the terms appropriate to legal estates or chattels real. But it is an equitable interest capable of description by reference to the rights which it gives to share in the residue after debts, death duties or other liabilities have been discharged or otherwise cleared. That equitable interest is in or in respect of land and other property situate in Queensland and as such it devolved on the death of Mrs. Coulson upon her next-of-kin and, if he survived her for any interval of time, her husband.

20 12. Windeyer J. in his dissenting judgment at the hearing by the High Court of Australia held 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. It matters not what in juristic theory is the nature of the interest or by what name it is called. And similarly an interest in the undertaking and assets of a partnership in a station in Queensland is for the purposes of Queensland law property in Queensland and he stated that if then it be correct to regard Mrs. Coulson as having had an interest in the several items of property that make up the estate of Livingston, where is that interest situate? It is where that property is. The land and stock and plant of the station are in Queensland. The partnership business of conducting Maranoa Downs was carried on in Queensland. That does not contradict the parallel proposition that Mrs. Coulson would ordinarily have had to assert her rights under Livingston's Will by insisting that Livingston's executors perform their duties, and that the proper tribunal to compel them to do so would be the New South Wales Court. But the land and other physical things and the partnership in which Mrs. Coulson had an interest were all in Queensland. Her interest in those things existed only so far as the law of Queensland recognised it and would aid the New South Wales Courts in enforcing it. It was not accurate to say, as was said, that proceedings in relation to her rights in those things could only be taken in a court in New South Wales and

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those rights protected only by that court. The Queensland Court would, in some circumstances, exercise jurisdiction at her suit certainly in relation to the Queensland realty, provided of course that the executors of Livingston were made parties, as they could be by service outside Queensland.... The matter must be judged from the point of view of Queensland law; the opposite situation from that under consideration in Sudeley's case (1897) A.C.11.

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pp. 141-142

13. An Order of Her Majesty in Council granting to the Appellant special leave to appeal from the decision of the High Court was made on the 30th day of July 1962.

14. The Appellant humbly submits that the decision of the High Court is wrong and should be reversed and that the Appeal should be allowed with costs here and below for the following amongst other

R E A S O N S

- (1) BECAUSE under Queensland law Mrs. Coulson at the date of her death had an interest in the specific property in Queensland which formed part of the partially administered estate of Hugh Duncan Livingston the elder, viz., Queensland real property, Queensland Crown leasehold property and other personal property. 20
- (2) BECAUSE the said interest in the specific property in Queensland is within the assessment to Succession and Administration Duty imposed by the Queensland legislature. 30
- (3) BECAUSE Sudeley's case (1897) A.C.11 is only authority for the proposition that the right to administration is situated in the forum of administration. It does not, on the authority of Skinner's case (1940) A.C.350, establish that no interest in the assets to be administered can exist outside the forum of administration. 40
- (4) BECAUSE the fact that New South Wales is the forum of administration for an estate does not lead to the conclusion that a beneficiary in that estate which is under administration, has no interest

in the Queensland assets in that estate within the purview of The Succession and Probate Duties Acts 1892 to 1955, upon the death of that beneficiary.

(5) FOR the reasons given by Dixon C.J. and Windeyer J. in the High Court.

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(6) Queensland law is unlike that of the other Australian States in regard to the vesting of realty passing under a Will and in regard to devolution on an intestacy. It is submitted that due weight was not given to this important factor by the Justices who comprised the majority in the Court which heard the Appeals in the High Court of Australia.

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(7) BECAUSE the reasoning of the judgments of the majority in the High Court is wrong and the decision ought to be reversed.

MILNER HOLLAND

MICHAEL NOLAN

No. 51 of 1962

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N

THE COMMISSIONER OF
STAMP DUTIES
(QUEENSLAND) Appellant

- and -

HUGH DUNCAN
LIVINGSTON Respondent

CASE FOR THE APPELLANT

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