

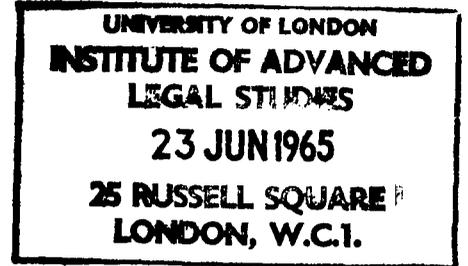
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Judgment
45, 1964

appeal
51 OF 1962

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA



B E T W E E N :-

THE COMMISSIONER OF STAMP DUTIES
(Queensland) (Respondent) Appellant

78678

- and -

HUGH DUNCAN LIVINGSTON
(Petitioner) Respondent

Case for the Respondent

LAYTONS,
21 Old Buildings,
Lincoln's Inn,
London, W.C.2.

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B E T W E E N :-

THE COMMISSIONER OF STAMP DUTIES
(Queensland) (Respondent) Appellant

- and -

HUGH DUNCAN LIVINGSTON
(Petitioner) Respondent

CASE FOR THE RESPONDENT

Record

- 10 1. This is an Appeal, by Special Leave, from a Judgment of the High Court of Australia (Dixon C.J., Fullagar, Kitto, Menzies and Windeyer JJ) delivered on the 16th day of December, 1960 whereby the said High Court by a majority (Fullagar, Kitto, and Menzies JJ., Dixon, C.J. and Windeyer, J., dissenting) allowed the appeals of the Respondent (Petitioner) from a Judgment of the Full Court of the Supreme Court of Queensland (Philp, Wanstall and Stable JJ.) dismissing the appeals of the Respondent under Section 50 of the Queensland Succession and Probate Duties Acts, 1892 to 1955 against assessments made by the Appellant (Respondent to the Petition) in respect of assessments of Succession Duty and Administration Duty in the Estate of Jocelyn Hilda Coulson deceased. The Appeal to the said High Court of Australia as to the assessment of succession duty was instituted as of right; having regard to the amount involved, the appeal relating to administration duty only lay with the leave of the said High Court, which was duly given, the Appellant not objecting.
- 20 Pp.141-2.
Pp.77-136.
Pp.50-66.
- 30 2. The facts as set out in the Respondent's Petitions and in an agreed Statement of Additional facts filed with both Petitions are not in dispute. The salient facts are :-
- (i) Jocelyn Hilda Coulson (hereinafter called "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
- P.80. 1 48
P.81. 13
Pp.2-10;
17-23;
26-35;
37-43.

were granted to the Respondent by the Supreme Court of New South Wales.

(iii) Mr. Coulson died resident and domiciled 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 (hereinafter called Hugh Duncan Livingston the elder) late of "Booloroo" Moree in the state of New South Wales, Grazier.

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(v) The said Hugh Duncan Livingston the elder died resident and domiciled 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.

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(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 thereof for Mrs. Coulson absolutely and as to the remaining two-thirds 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 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

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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 net 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 Mrs. Coulson and by his said sons, 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.

(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 :-

(a) A freehold and leasehold grazing property (being Crown Leaseholds held under the provisions of the Lands Act 1910 to 1957) together with stock and plant thereof whereon the said Hugh Duncan Livingston the elder had carried on grazing on his own account until the date of his death and,

(b) a nine fortieths 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 Stephen Gillespie and was carried on under the name or style of Maranoa Downs Pastoral Company. This partnership was registered in the State of Queensland as a firm under the provisions of The Registration of Firms Act, 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.

- 10 (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. 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 and either in the State of New South Wales or elsewhere. The assessment of duties was made in that estate in the State of New South Wales on the 12th day of January 1951.
- 20 (xii) At the date of death of Mrs. Coulson the estate of the said Hugh Duncan Livingston the elder had not been fully administered either in the State of Queensland or in the State of New South Wales, 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.
- 30 (xiii) On being required so to do, the Respondent filed an account in the usual Form C 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 was payable on the death of Mrs. Coulson.

By a Notice of Assessment dated the 20th day of April, 1956 and addressed to the Solicitors for the Respondent the Appellant 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.

40 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.

3. Probate and Administration Duty is imposed by Section 55 and the Schedule to the Queensland Succession and Probate Duties Acts, 1892 to 1955.

The said Section 55 provided as follows :-

"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" 10

And the relevant parts of the said Schedule provide as follows :- 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."

4. Administration duty therefore being a stamp duty, Section 30 of the Intestacy Act of 1877 is also relevant to the Respondents arguments in relation to the applicability of this duty. It reads as follows :- 30

"No stamp duty to be charged in respect of land - No duty shall be charged or chargeable under 'The Stamp Duties Act of 1886' in respect of any land whereof administration is granted under this Act".

The 1866 Act has been repealed but, it is provided by Section 2 of the Succession and Probate Duties Act, 1892. Amendment Act 1895 as follows :-

"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 40

10 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.

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)."

And it is further provided by Section 9 of the Acts Interpretation Act of 1954 as follows :-

20 "Where an Act repeals and re-enacts with or without modification any provisions of a former Act, references in any other Act to the provisions so repealed shall, unless the contrary intention appears, be construed as references to the provisions so re-enacted."

5. Succession Duty is imposed by Section 12 of the said Act which is in the following terms :-

30 "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"..... Section 4 thereof, which defines a "succession" for this purpose is in the same terms as Section 2 of the English Succession Duty Act of 1853."

Section 2 of the Succession and Probate Duties Act 1892 Amendment Act 1895 provides

"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....."

40 6. The main question argued before the said Full Court of the Supreme Court of Queensland was whether a New South Wales Estate could be subjected to either of

these duties in Queensland on the interests of that estate in an unadministered estate part of which was situated in Queensland, the Executors of which were domiciled and resident in New South Wales. A subsidiary question relating to wool distribution monies (which in view of concessions made by the Appellant no longer arises) was also argued.

7. After the Appeals had been argued on the substantive points and judgment had been reserved, the said Full Court of its own motion required argument to be addressed to it on certain further points namely :- 10

1. Whether there is any right of appeal whatever with respect to probate or administration duty.

2. Whether there is any right of appeal with respect of succession duty if the person who has purported to appeal has paid the duty (even though under protest and with a denial of all liability for duty) and claims that he is not an accountable party, or whether the right of appeal is restricted to the case where the appellant is and admits that he is an accountable party and admits liability for some amount of duty but disputes the amount claimed by the Commissioners. 20

Pp.50-66. 8. By the Judgments delivered on the 26th day of March, 1959 the said Full Court dismissed the Respondent's said appeals. In his Judgment (in which Wanstall and Stable JJ concurred) Mr. Justice Philp first of all decided (and the decision of the said Full Court was reversed by the said High Court of Australia, and the Appellant does not now seek to challenge their decision) that no appeals lay under the relevant legislation, the remedy of a person who alleges that he is not liable to pay any duty at all not being to pay under protest and appeal, but not to pay at all. 30

9. As the said Full Court realised that the case would probably go further, and as the matter had been fully argued before them, Mr. Justice Philp expressed his views on the merits of the case as follows :-

As to administration duty

P.61..1 36. "The probate duty which was the subject of 40
-P.62..1 27. consideration in Lord Sudeley and others v. The Attorney-General [1897] A.C.11 was imposed originally on the "estate and effects of the deceased for or in respect

of which the probate or letters of administration is or are granted"

Some of the relevant Acts are adverted to by Lord Esher in the Court of Appeal in Lord Sudeley and others v. The Attorney-General (1896 1 Q.B. 354 at p. 359) He does not refer to The Customs and Inland Revenue Act, 1880, s. 10 which makes it plain that the duty is imposed on "the personal estate of the deceased for or in respect of which the grant is made".

10 It thus seems to me that for administration duty purposes the "property" which Mrs. Coulson had at the time of her death derived under her husband's will was of the same nature as that had by the Mrs. Tollemache referred to in Lord Sudeley's case at the time of her death.

20 According to that case Mrs. Coulson's "asset" or "property" consisted of an equitable chose in action, since the testator's estate was un-administered at her death and as all the trustees resided in New South Wales, her "property" for administration duty purposes was situated in New South Wales. I would be bound by that case to hold that that property is not subject to administration duty in Queensland."

As to succession duty

30 "It appears to me that the words construed in Skinner's Case Skinner v. Attorney-General 1940 A.C. 350 are the same as the words to be construed in the instant case. In the result while Mrs. Coulson did not "own" property in Queensland at her death, she had I think, an interest in all the property which was subject to the trust in her favour or more exactly an interest in each part of the property held by her husband's executors. It will be noticed that in Skinner's case no trust was declared by the testamentary instruments and there was no appointment of trustees - see p.351 of the report - and yet it was held that the annuitant had an interest in each part of the property in the unadministered estate.

P.66
11 14-38.

40 I think that the decision in Skinner's case binds us and that the dicta and decisions on the question involved made in respect of income tax are not binding; they deal with statutory provisions different from that with which we are dealing.

I should hold then that there did devolve on Mrs. Coulson's death her interest in the property in Queensland which was owned by her husband's executors."

P.66
11 39-44 As regards the wool distribution monies the learned Judge considered that they were not property which was subject to either administration duty or succession duty.

Pp. 67-69
Pp. 139-140 10. Accordingly, by two Orders of the said Full Court of the 2nd day of December 1959, the Respondent's said two appeals were ordered to be dismissed. From the said Orders the Respondent appealed to the High Court of Australia, special leave so to do having been obtained (the Appellant not objecting) from the said High Court in relation to the Order dismissing the said Appeal in relation to Administration Duty. 10

Pp. 77-136 11. Judgments were delivered in the said High Court on the 16th day of December, 1960. The said High Court was unanimously of opinion that the original appeals by way of Petition lay, and that such procedure was available in respect of the assessments of duty under the relevant Acts, even where the Appellant contested liability to account and to pay any duty. Those members of the High Court who dissented from the majority view nevertheless also took the view that the wool realisation monies did not form part of or contribute to Mrs. Coulson's equitable interests in Queensland, and so did not fall to be taken into account in assessing either duty. The Appellant herein does not desire to contest either of these points further. 20 30

12. The approach of Mr. Justice Fullagar to the merits of the Respondent's appeal are set out in the following quotations from his Judgment :-

As regards Administration Duty

P. 97
11 21-43. "So far as what has been called in this case "administration duty" - the duty imposed by s. 55 - is concerned there is no difficulty in stating the question upon which the liability of Mrs. Coulson's next-of-kin depends. That duty belongs to a well-known class of death duties. It is a true "probate duty". It is payable, in effect as the price of a grant of probate or letters of administration. It is well settled that such a duty is, unless a contrary intention appears, payable in respect of, and only in respect of, assets which cannot be administered by an executor or 40

administrator without the grant which he seeks. That is to say, it is payable in respect of, and only in respect of, assets locally situate within the territorial jurisdiction: see Blackwood v. The Queen (/1882/ 8 App. Cas.82) and Commissioners of Stamps v. Hope (/1891/ A.C. 476). The liability of Mrs. Coulson's next-of-kin to "administration duty" depends therefore on whether her estate comprised assets locally situate in Queensland."

As regards Succession Duty

10 "With regard to succession duty, the position is not quite so simple. The original Queensland Act of 1892 made it quite plain that the charge fell on successions to real property which was situate within the territorial jurisdiction, but not on successions to real property which was outside that jurisdiction: see the definition of real property in s.2. But neither Act contained any express definition or limitation of the successions to personal property which were to be chargeable with duty. In England the question of what successions to personal property were chargeable under the English Act of 1853 came before Lord Cranworth L.C. in Wallace v. The Attorney-General ((1865) L.R. 1 Ch App. 1). His Lordship held that succession duty was not chargeable in respect of the personal property in England of a testator domiciled in France. In holding that the question in every case of personal property was "not where the property was situate but what was the domicil of the testator" His Lordship followed an earlier decision of the House of Lords in Thomson v. Advocate General ((1845) 12 Cl. & Fin 1), which was a case of legacy duty. He said (at p. 9) "Parliament has, no doubt, the power of taxing the succession of foreigners to their personal property in this country; but I can hardly think we ought to presume such an intention, unless it is clearly stated". Lord Cranworth's decision was applied by the Privy Council to the Queensland Act of 1892 in Harding v. The Commissioners of Stamps for Queensland (/1898/ A.C. 769.) The property there in question included debts secured by mortgages of land in Queensland, freehold and leasehold lands in Queensland and shares in a company incorporated in Queensland, but the testator was domiciled in Victoria. It was held that the Queensland Act did not extend to personal property given by the Will, or devolving on the intestacy, of a person domiciled outside Queensland whether that property were locally situate in Queensland or not.

P.97 1 44
- P.99 1 33

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If the matter had stopped there, it would seem that on no view of the nature of Mrs. Coulson's "interest" in the residue of the testator's estate could the succession to it had been charged with duty in respect of his interest in the partnership. For, whatever might have been the position in relation to the testator's freehold and leasehold lands, which were real property within the meaning of the Act, his interest in the partnership was personal property, and Mrs. Coulson was not domiciled in Queensland. However, in 1895 the Queensland Parliament passed an amending Act. s.2 of which provided. "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". This Act had in fact been passed before Harding's case (supra) came before their Lordships, but the testator had died before its commencement. It was argued for the Crown that it was retrospective in operation, but this argument was rejected. If we disregard the curious fact that it does not appear to refer to successions under settlements, the effect of s.2 of the Act of 1895 read with s.4 of the original Act, seems to be, so far as presently material that the duty falls irrespective of the domicile of a testator or intestate, on successions to interests in real or personal property which are locally situate in Queensland. It is unnecessary to consider whether it falls also on interests, wherever situate, in the personal property of a testator or intestate who was domiciled in Queensland.

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It seems clear, therefore that, as a result of s.2 of the 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 their liability to administration duty depends. That question is whether her estate comprised assets locally, situate in Queensland. The answer to that question is, in my opinion, determined by clear authority."

The learned Judge then proceeded to review all the relevant authorities, and decided that in principle the situation of the interest of a beneficiary in a residuary estate had been determined by Lord Sudeley v. Attorney General [1897] A.C. 11 and was accordingly in the present instance in New South Wales. He accordingly held that neither duty was exigible, and that the Appeals should be allowed accordingly.

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13. The Judgment of Mr. Justice Kitto followed similar lines. He dealt with the interpretation which the

minority judgments sought to place upon Lord Sudeley v. Attorney General as follows :-

"An interest in property is no doubt often so much more closely connected with the place where the property itself exists than with any other place that it is naturally to be considered as situate there; but generalisation on the point is, in my opinion, unwarranted, for it denies the prime necessity to take account of the nature of the rights which are comprised in the interest under consideration in the particular case. 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 form 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 I understand 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.

P.119
1 36 -
P.121
1 18.

That is what I understand to be laid down in Lord Sudeley and others v. Attorney-General (1897 A.C. 11). It is true that expressions used by some of their Lordships in the course of their ex tempore speeches in that case have been understood at times as meaning that residuary beneficiaries have no interest of any kind in the individual assets of an unadministered estate; and those who have so understood what was said have not unnaturally exhibited signs of shock at the apparent contradiction of the considered pronouncements of Lord Cairns and other great lawyers in Cooper and others v. Cooper ((1874) L.R. 7 H.L. 53); see e.g. McCaughey and another v. The Commissioner of Stamp Duties (1945 46 S.R. (N.S.W.) 192, at p. 205). With others, incredulity at such seeming apostasy has led to interpretation; though not all have felt so badly about the need for that process as to join in the acid comment of Holmes L.J., that "Lord Cairns, in addition to great knowledge and experience, was such a master of language and logical exposition that he has perhaps an unfair advantage when his judgments are compared with those of lawyers of equal learning."; Tevlin v. Gilsean (1902 1 I.R. 514, at p. 537). Bearing in mind what has been said of Lord Sudeley v. Attorney-General in cases decided since, I think that the judgments in that case should be understood as meaning that in considering the application of a statute which is concerned with "the

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estate and effect of the deceased" in England to the interest of a deceased residuary beneficiary, it is not to the point to refer to the locality of individual assets of the head estate. The beneficiary in his lifetime had no "proprietary" interest in those assets (to use the expression of Lord Russell of Killowen in Skinner v. Attorney-General (1940 A.C. 350, at p. 355) if by that is meant such an interest that he might have said of any of the assets "this is mine. Hand it over to me". Vanneck v. Benham (1917 1 Ch. 60, at p. 76); In re Cunliffe-Owen. Mountain v. Inland Revenue Commissioners (1953 Ch. 545, at p. 554); and there is no logical or legal justification for subdividing the mass of his rights as residuary beneficiary so as to separate his rights with respect to each asset from his rights with respect to the others and attribute to each set of rights a separate local situation derived from the situation of the separate assets. You must, according to the law as laid down in Lord Sudeley v. Attorney-General, attribute 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 go further in order to attribute their proper situation to the rights which exist as to the particular assets."

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He accordingly also agreed that the Appeals should be allowed.

14. Mr. Justice Menzies in the course of his Judgment (in which he expressed his agreement with the survey of the authorities made by Fullagar J) put the matter succinctly as follows :-

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P.128 1 39

- P. 129 1 5.

"The conclusion that I have reached is 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 was property situated in New South Wales, where the trustees were domiciled, and not as to any part in Queensland. Indeed, prior to the administration she had but one asset, not as many assets as there were assets in the estate of that testator. Were the executors of the testator's will to realise Queensland assets to pay debts, it could not, I think, with accuracy be described as property of the intestate that was being sold; her right was to share in residue ascertained by administration in due course."

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15. Chief Justice Dixon and Mr. Justice Windeyer dissented. The kernel of the dissenting Judgment of the Chief Justice lies in the following passage therefrom:-

"But it is none the less true that in 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."

P.87 1 35
- P.88 1 2

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16. Much the same general reasoning led Mr. Justice Windeyer to dissent. He opened his Judgment with the following passage :-

"On the questions of substance concerning succession duty and administration duty, I can state my conclusions shortly, for I fear they are naive: 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. It matters not, I think, what in juristic theory is the nature of the interest or by what name it is called. And similarly I think that 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."

P.132 1 38
- P.133 1
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17. From the Judgment of the majority of the said High Court and the Orders of the same day allowing the said Appeals, this Appeal is preferred, Special Leave so to do having been granted by Her Majesty in Council on the 30th day of July, 1962.

Pp. 137-
140
Pp. 141-
142.

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18. It is humbly submitted that the Judgments of the majority of the said High Court were correct in their analysis of the nature and situs of the interest of a residuary legatee in an unadministered estate, which was accurately analysed by the House of Lords in Sudeley v. Attorney General, and which case it is submitted governs

the present one. Any misconceptions as to the precise interpretation of that case are, it is respectfully submitted, fully and exhaustively dealt with in the passage from the Judgment of Mr. Justice Kitto cited in paragraph 13 above.

19. In particular :-

- (a) The decision in Skinner v. Attorney-General [1940] A.C. 350 casts no doubt whatsoever upon the validity of the decision in Lord Sudeley v. Attorney-General, nor of the reasoning which led up to that decision; 10
- (b) The decision in Cooper and Others v. Cooper (1874) L.R. 7 H.L. 53, does not assist, the decision therein amounting to no more than that an interest in an intestate's estate is sufficiently specific to raise a case of election.

20. No member of the said High Court dealt with the Respondent's contentions that the effect of Section 30 of the Intestacy Act of 1877, taken in conjunction with Section 2 of the Succession and Probate Duties Act, 1891, Amendment Act, 1895, prevented any charge of Administration Duty in respect of real estate. 20

21. It is accordingly submitted that the present appeal should be dismissed for the following among other

REASONS

- 1. Because Mrs. Coulson's relevant interest under the said Will was an interest in the unadministered residue of the estate of the Testator, which interest, as established by Lord Sudeley v. Attorney-General, was at all material times situate in New South Wales. 30
- 2. Because neither Administration nor Succession duty is payable in Queensland except in relation to a beneficial interest belonging to Mrs. Coulson under the Will of the said Hugh Duncan Livingston the elder which can be properly considered as being situate in Queensland.
- 3. Because the legatee of a share of residue has no interest in any of the property of the testator until the residue has been finally ascertained.
- 4. Because the decision in Lord Sudeley v. Attorney-General was correct and governs the present case. 40

5. Because the Judgments of the Majority of the said High Court were, for the reasons therein stated, correct.

6. Because the Judgments of the Minority of the said High Court were, for the reasons stated in the said Majority Judgment, wrong.

7. Because, for the same reasons, the Judgment of the said Full Court on the question of succession duty was wrong.

10 8. Because no Administration Duty is properly assessable in relation to real property.

PETER FOSTER

RAYMOND WALTON

IN THE PRIVY COUNCIL

ON APPEAL FROM THE HIGH COURT OF
AUSTRALIA

THE COMMISSIONER OF STAMP DUTIES

- and -

HUGH DUNCAN LIVINGSTON

Case for the Respondent

LAYTONS,
21 Old Buildings,
Lincoln's Inn,
London, W.C.2.