

The Commissioner of Stamp Duties – – – – – *Appellant*
v.
Hugh Duncan Livingston – – – – – *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 7TH OCTOBER 1964

Present at the Hearing:

VISCOUNT RADCLIFFE.

LORD REID.

LORD EVERSHERD.

LORD PEARCE.

LORD UPJOHN.

[*Delivered by* VISCOUNT RADCLIFFE]

The main question raised by this appeal from the High Court of Australia concerns a claim by the appellant that the respondent as administrator of the estate of a Mrs. Coulson deceased or, alternatively, as one of her next of kin is liable to pay Succession Duty under the Queensland Succession Duty Act in respect of certain items of property situate in Queensland in which, according to his claim, her death conferred a succession on those becoming entitled to her estate. There is also a minor question as to his liability to Administration Duty in Queensland in connection with the same death.

These questions have produced a diversity of opinion in the Australian Courts. In Queensland the Full Court of the Supreme Court (Philp, Wanstall and Stable JJ.) held that the respondent was liable to both duties; whereas in the High Court a majority (Fullagar, Kitto and Menzies JJ.) were of opinion that neither duty was exigible on Mrs. Coulson's death, while a minority (Dixon C.J. and Windeyer J.) took the same view as that taken by the Supreme Court in Queensland and were in favour of upholding their judgment, subject to a small alteration that is not now material.

In their Lordships' opinion the decision of the majority of the High Court is clearly right, and this appeal cannot succeed. Before coming to their reasons they must set out so much introductory matter as is required for the understanding of the case. The facts themselves are not in dispute. The whole issue is one of law.

Mrs. Coulson had two husbands, her first being one Hugh Duncan Livingston the elder, the respondent's father. Mr. Livingston died on the 17th November 1948 domiciled in New South Wales. By his will he appointed three executors, his widow Mrs. Coulson herself, a Mr. Cassidy and a Mr. Hesslein. The three executors also were domiciled in New South Wales, and on 13th October 1949 they proved the will in the Supreme Court there.

In the will Mr. Livingston, after appointing the three named persons to be the executrix, executors and trustees of his will and making a bequest to his widow, proceeded as follows "I give, devise and bequeath all my real and the residue of my personal estate of whatsoever nature or wheresoever situate . . . to my trustees (hereinafter referred to as "my trust property") subject to the payment thereof of all my just debts funeral and testamentary expenses and all death, estate and other duties upon trust as to one-third thereof for my said wife absolutely and as to the remaining two-thirds

shares thereof to use and apply the income thereof . . . for the maintenance, education and advancement in life of my sons Hugh Duncan Livingston and John Angus Livingston until they respectively attain the age of 23 years." The will then set out further provisions for the outright transfer of his share to each son on his attaining the specified age and for a gift over of the share of either son dying under that age.

The testator's assets consisted of real and personal estate in New South Wales and real and personal estate in Queensland. Mrs. Coulson died on the 8th July 1950, intestate, having married her second husband on 22nd June 1950. She thus survived her first husband by less than two years, and at the date of her death his estate was still in the course of administration, no clear residue had been ascertained, and, consequently, no final balance payable or attributable to the shares of residuary beneficiaries had been determined. It is essential to the decision of this case that Mrs. Coulson's rights at her death were the rights of a person interested in a dead man's unadministered estate.

At the date of her death the Queensland assets of Mr. Livingston's estate fell into three categories, which have been itemised as follows:—(a) freehold and leasehold grazing property, together with stock and plant, (b) an interest in a leasehold grazing property, together with stock and plant, which he had owned in partnership with others, and (c) an undivided fourth share in certain other freehold and leasehold grazing properties. These are the properties in which the appellant claims that a dutiable succession arose on the occasion of Mrs. Coulson's death. Their Lordships have not found it necessary to make any distinction between the various categories of property for the purposes of their opinion.

No Letters of Administration for Mrs. Coulson's estate have been granted or resealed in Queensland. There is nothing in the agreed statements of facts to suggest that there has been any reason for such representation to be required.

The claim is made under the Succession and Probate Duties Acts 1892 to 1955 of Queensland. They are hereinafter referred to as "the Act". The succession duty imposed by it is a succession duty analogous to that created for the United Kingdom by the Succession Duty Act 1853. So far as the effective charging sections and the structure of the Act are concerned the language of the latter Act is to a large extent reproduced in the Queensland Act. By section 3 it is declared that the term "succession" denotes any property chargeable with duty under the Act; that the term "property" alone includes real property and personal property; that the term "real property" includes all freehold, leasehold and other hereditaments, whether corporeal or incorporeal, in Queensland, and all estates in any such hereditaments; and that 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.

The appellant's argument laid some stress on the fact that, whereas the definition of real property refers expressly to hereditaments in Queensland, no similar qualification is attached to the definition of personal property. Their Lordships have not found any significance in this. Considering that the accepted understanding of the range of succession duty was that it charged the successions of all persons "claiming by virtue of the law" of the taxing country (see *Wallace v. Attorney-General* L.R. 1 Ch. App. 1), it would have been surprising if "personal property" had been defined as referring only to such property situate in Queensland. It is convenient to notice at this point that by section 2 of the Succession and Probate Duties Act 1892 Amendment Act of 1895 it was declared that succession duty was chargeable in respect of all property within Queensland, "although the testator or intestate may not have had his domicile in Queensland". This amendment was presumably intended to make a substantial alteration of the principle laid down in *Wallace's* case, so far as concerned the mobilia in Queensland of a person dying domiciled outside the State: but neither its construction nor its operation can be made to have any significant bearing upon the question raised in this appeal.

The charging section of the Act is section 4. The material words of that section can be set out as follows:—

“ Every past or future disposition of property by reason of which any person . . . shall become beneficially entitled to any property or the income thereof upon the death of any person . . . , and every devolution by law of any beneficial interest in property, or the income thereof upon the death of any person . . . to any other person, in possession or expectancy shall be deemed 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.”

By section 12 of the Act duties on a prescribed scale are levied and charged in respect of “ every such succession as aforesaid ”, according to its value when the succession takes effect; and section 20 requires the duty to be paid at the time when the successor or any person in his right or on his behalf becomes entitled to his succession or to the receipt of the income and profits arising therefrom.

What then could be the “ beneficial interest in property ” that was charged by this Act as the subject of a succession on Mrs. Coulson’s death? It is axiomatic that a Queensland succession duty Act does not affect to charge to duty successions in property arising in every part of the world. There is therefore some necessary limitation to the width of the language used. It is not disputed that this limitation is to be found in the idea that only those successions are to be charged which occur by virtue of the law of Queensland, subject to the material qualification that was introduced in 1892 that in the case of mobilia in Queensland the duty was to be exigible even though the owner of the mobilia was domiciled elsewhere at death. Mrs. Coulson died domiciled in New South Wales: so did Mr. Livingston. The devolution of interest that occurred on her death therefore did not operate by virtue of the law of Queensland. One way or the other then, if there is to be a taxable succession, it must be because she died owning a beneficial interest in real property in Queensland or had beneficial personal property interests locally situate in Queensland. This is the way in which the issue has been posed in the judgments of the High Court of Australia, and in their Lordships’ view it is the correct formulation of the problem.

When Mrs. Coulson died she had the interest of a residuary legatee in his testator’s unadministered estate. The nature of that interest has been conclusively defined by decisions of long established authority, and its definition no doubt depends upon the peculiar status which the law accorded to an executor for the purposes of carrying out his duties of administration. There were special rules which long prevailed about the devolution of freehold land and its liability for the debts of a deceased, but subject to the working of these rules whatever property came to the executor *virtute officii* came to him in full ownership, without distinction between legal and equitable interests. The whole property was his. He held it for the purpose of carrying out the functions and duties of administration, not for his own benefit; and these duties would be enforced upon him by the Court of Chancery, if application had to be made for that purpose by a creditor or beneficiary interested in the estate. Certainly therefore he was in a fiduciary position with regard to the assets that came to him in the right of his office, and for certain purposes and in some aspects he was treated by the Court as a trustee. “ An executor ”, said Kay J. in *Re Marsden* 26 Ch.D. 789, “ is personally liable in equity for all breaches of the ordinary trusts which in Courts of Equity are considered to arise from his office.” He is a trustee “ in this sense ”.

It may not be possible to state exhaustively what those trusts are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed “ duties in respect of the assets ” as trusts. What Equity did not do was to recognise or create for residuary

legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests. But it never was done. It would have been a clumsy and unsatisfactory device, from a practical point of view; and indeed it would have been in plain conflict with the basic conception of Equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be. Even in modern economies, when the ready marketability of many forms of property can almost be assumed, valuation and realisation are very far from being interchangeable terms.

At the date of Mrs. Coulson's death, therefore, there was no trust fund consisting of Mr. Livingston's residuary estate in which she could be said to have any beneficial interest, because no trust had as yet come into existence to affect the assets of his estate. The relation of her estate to his was exactly the same as that of Mrs. Tollemache's estate to that of her deceased husband's, as analysed in the well-known decision of *Sudeley v. Attorney-General* [1897] A.C. 11. Just as Mr. Tollemache's rights in the mortgages of New Zealand land were the property of his executors for the purposes of the administration of his estate and no one else had any property interest in them, so Mr. Livingston's property in Queensland, real or personal, was vested in his executors in full right, and no beneficial property interest in any item of it belonged to Mrs. Coulson at the date of her death. In their Lordships' opinion the decision of the *Sudeley* case is conclusive on this issue. It is sufficient to quote the words of Lord Herschell, which do no more than reflect the reasoning and views of all the members of the House who took part in the decision. "I do not think", he said, speaking of Mrs. Tollemache's executors, "that they have any estate, right or interest, legal or equitable, in these New Zealand mortgages so as to make them an asset of her estate."

It is evident that there would not have been the divisions of opinion in the Australian Courts that have arisen in this case, if the proposition laid down by the *Sudeley* decision had always been regarded as being as final and comprehensive as, in their Lordships' opinion, it was intended to be. There has been a reluctance to accept Lord Herschell's words at their face value and, it would seem, a feeling that they ought to be treated as subject to some limitation that does justice to the "interest" that a residuary legatee possesses in his testator's estate. The judgment of Jordan C.J. in *McCaughey v. The Commissioner of Stamp Duties* 46 N.S.W. Reports 192 contains a reasoned statement of some of these misgivings, which were again referred to in the High Court of Australia in *Smith v. Layh* 90 C.L.R. at 108/9; and cases in England such as *In re Cunliffe-Owen* [1953] Ch. 545 indicate a certain unease at relating *Sudeley* to other English decisions. Basically, these criticisms appear to arise from an incomplete assessment of the legal position of assets which belong to an executor for the purposes of his administration and from a use of the word "interest" that is not sufficiently precise to meet the requirements of a taxing Act to which questions of locality and valuation are all important. But since these criticisms have been made, it is desirable that this opinion should notice and comment upon them.

First, it is said that *Sudeley's* case cannot properly be treated as laying down a general proposition about unadministered estates, because, if it were, such a proposition would be inconsistent with the earlier decision of the House of Lords in *Cooper v. Cooper* 7 H.L.C. 53. *Cooper v. Cooper* was a case about election as between beneficiaries and had nothing to do with death duty or succession duty Acts. There had been an intestacy and a devolution of property on intestacy, and the only question to be decided was whether persons

interested in the intestate's estate could be put to their election between different interests at a date when the administration of his estate was still proceeding. The question was said to be whether they had by then an interest "sufficiently specific to raise a case of election". It was held that they had.

In the course of his speech in *Cooper v. Cooper* Lord Cairns expressed himself as follows in describing the interest of next of kin in an intestate's unadministered estate:—" . . . it was very much pressed on your Lordships . . . that the interest of a next of kin in the estate of an intestate is an undefined and intangible interest, that it is a right merely to have the estate converted into money and to receive payment in money after the debts and expenses are discharged. My Lords, no doubt the right of a next of kin is a right which can only be asserted by calling upon the administrator to perform his duty, and the performance of the duty of the administrator may require the conversion of the estate into money for the purpose of paying debts and legacies. But I apprehend that the rule of law, or the rule laid down by the statute, which requires the conversion of an intestate's estate into money, is a rule introduced simply for the benefit of creditors and for the facility of division. For the benefit of creditors and the facility of division among the next of kin the estate is to be turned into money, but as regards substantial proprietorship the right of the next of kin remains clear to every item of the personal estate of the intestate, subject only to those paramount claims of creditors."

Lord Cairns then referred to a passage of Bacon's Abridgment for authority for the law as he was stating it—a passage which, incidentally, supports his statement only to the extent that it lays down the undoubted rule that the interest of a person entitled to a distributive share on intestacy is transmissible, even though he dies in the course of the executor's year, just as the interest of a residuary legatee in an unadministered estate has always been held to be transmissible—and continued:—" If we look on the Statute of Distributions, as I think that we ought to look on it, as in substance nothing more than a will made by the legislature for the intestate, and liken this to the case of a person having made a will, and having directed his debts and expenses to be paid and having given over his clear residue to his widow and three children—if, I say, we look at the case as if it had assumed these features, I apprehend your Lordships will be perfectly clear that the residuary legatees under such a will had a clear and tangible interest in specie in the Pains Hill estate, just in the same way as the youngest of the three brothers, Frederick John, who directly took one-third of the proceeds of the estate."

It is said that Lord Cairns' description of the next of kin as having a "substantial proprietorship" in every item of an intestate's personal estate and of residuary legatees of what, presumably, he was regarding as an unadministered estate as possessing "a clear tangible interest in specie" in a particular item of the estate contradicts the statement of the position which was made by Lord Herschell and others in the *Sudeley* case. So indeed it does, in the sense that Lord Cairns' words cannot be treated as an accurate statement of the law in the light of the later decision. But what is to follow from this? *Cooper v. Cooper*, certainly, was not cited during the argument of *Sudeley v. Attorney-General*, and it has apparently been suggested that, if it had been, the law as laid down in that case would somehow have been stated in a different or qualified form. Their Lordships can give no encouragement at all to this speculation. The members of the House who decided *Sudeley* were dealing with a branch of the law that was familiar and well established, and they were dealing with it with the precision that they regarded as being required by the particular issue that was before them. The law as they there stated it was reaffirmed by the House in the same terms in *Dr. Barnardo's Homes v. Commissioner of Inland Revenue* [1921] 2 A.C.1. It is sufficient to quote two short passages from speeches in that case. Lord Finlay said at page 8: "The legatee of a share in the residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete"; while at page 10 Lord Cave says: "When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is

entitled to have the residue, as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration". Similar explicit statements of the true position will be found in the judgments of Sterndale M.R., when the *Barnardo* case was in the Court of Appeal, see [1920] 1 K.B. 468 at 479, and of Greene M.R. in *Corbett v. Commissioner of Inland Revenue* [1938] 1 K.B. 567 at 575/577.

In their Lordships' opinion the truth of the matter is that Lord Cairns' speech in *Cooper v. Cooper* cannot possibly be recognised to-day as containing an authoritative statement of the rights of next of kin or residuary legatees in an unadministered estate. His language is picturesque, but inexact; and while it was no doubt sufficient to enforce the point with which he was concerned to deal, a beneficiary's right or duty of election, and the decision of the case remains an authority on that point, it would be idle to try to set it up as an exposition of the general law in opposition to what was said and laid down in the *Sudeley* and *Barnardo* cases.

A second line of criticism has occasionally been expressed to the effect that it is incredible that Lord Herschell should have intended by his proposition to deny to a residuary legatee all beneficial interest in the assets of an unadministered estate. Where, it is asked, is the beneficial interest in those assets during the period of administration? It is not, *ex hypothesi*, in the executor: where else can it be but in the residuary legatee? This dilemma is founded on a fallacy, for it assumes mistakenly that for all purposes and at every moment of time the law requires the separate existence of two different kinds of estate or interest in property, the legal and the equitable. There is no need to make this assumption. When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property, any more than there is for the property of a full beneficial owner. What matters is that the Court will control the executor in the use of his rights over assets that come to him in that capacity; but it will do it by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets. Equity in fact calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines.

Criticisms of this kind arise from the fact that the terminology of our legal system has not produced a sufficient variety of words to represent the various meanings which can be conveyed by the words "interest" and "property". Thus propositions are advanced or rebutted by the employment of terms that have not in themselves a common basis of definition. For instance, there are two passages quoted by the learned Chief Justice in his dissenting judgment in this case which illustrate the confusion. There is the remark of Jordan CJ. in *McCaughey's* case, "The idea that beneficiaries in an unadministered or partially administered estate have no beneficial interest in the items which go to make up the estate is repugnant to elementary and fundamental principles in equity". If "by beneficial interest in the items" it is intended to suggest that such beneficiaries have any property right at all in any of those items, the proposition cannot be accepted as either elementary or fundamental. It is, as has been shown, contrary to the principles of equity. But, on the other hand, if the meaning is only that such beneficiaries are not without legal remedy during the course of administration to secure that the assets are properly dealt with and the rights that they hope will accrue to them in the future are safeguarded, the proposition is no doubt correct. They can be said therefore to have an interest in respect of the assets, or even a beneficial interest in the assets, so long as it is understood in what sense the word "interest" is used in such a context.

Similarly with the passage from the High Court's judgment in *Smith v. Layh* 90 C.L.R. at 108/109 . . . "it is not the consequence that the residuary legatee or next of kin has no right of property in the totality of assets forming the residue of the intestate estate. The beneficial interest is not vested in the

legal personal representative, subject to the rights of creditors. The right of the next of kin or residuary legatee to have the estate properly administered and to receive payment of the net balance gives them an equitable interest in the totality and therefore in the assets of which it is composed." With all respect, that cannot be taken as an exact statement of the law without some further definition of terms. For its expressions would have to be reconciled with the authorities that deny to the residuary legatee any property at all in any specific asset while administration proceeds and with the fact that "residue" cannot come into existence in the eyes of the law until administration is completed. Therefore, while it may well be said in a general way that a residuary legatee has an interest in the totality of the assets, (though that proposition in itself raises the question what is the local situation of the "totality"), it is in their Lordships' opinion inadmissible to proceed from that to the statement that such a person has an equitable interest in any particular one of those assets, for such a statement is in conflict with the authority of both *Sudeley* and *Barnardo* and is excluded by the very premise on which those decisions were based.

Nor can the solution of the difficulty be advanced by referring to those cases in Equity Courts in which a creditor or a pecuniary or residuary legatee has been allowed to follow and recover assets which have been improperly abstracted from an estate. The basis of such proceedings is that they are taken on behalf of the estate and, if they are successful, they can only result in the lost property being restored to the estate for use in the due course of administration. Thus, while they assert the beneficiary's right of remedy, they assert the estate's right of property, not the property right of creditor or legatee; indeed the usual situation in which such an action has to be launched is that in which the executor himself, the proper guardian of the estate, is in default, and thus his rights have to be put in motion by some other person on behalf of the estate.

Lastly, their Lordships must refer to the House of Lords decision in *Skinner v. A.G.* [1940] A.C.351, because it is that decision that led Philp J. in the Supreme Court of Queensland to hold that he was bound to decide in favour of the appellant, and it is evident that there is thought to be an argument for saying that the *Skinner* decision has in some way modified the law as laid down in the *Sudeley* case. The appellant's argument before the Board rested in the main upon this point. In their Lordships' opinion the contention is misconceived. *Skinner's* case can only be understood as one confined to the special or, as it was said, the "popular" meaning of the word "interest" when used in section 2 (1) (b) of the Finance Act 1894 of the United Kingdom. It does not contain any proposition of law of any general significance, such as could with safety be applied to the interpretation of succession duty Acts, and the qualifications and distinctions which are inserted in the judgments of Lord Greene, M.R., in the Court of Appeal and of Lord Russell of Killowen in the House of Lords must always be read as an essential element of the decision.

In *Skinner's* case an annuitant to whom an annuity had been bequeathed by a Will died while the testator's estate was still in course of administration. The executors of the testator, who had died domiciled in Northern Ireland, had invested some part of the estate funds in English securities. Their residence too was in Northern Ireland. One of the main questions raised by the case was whether in those circumstances any interest in the English securities had ceased on the annuitant's death within the meaning of S.2 (1) (b) of the Finance Act 1894.

Under that Act the death of an annuitant whose annuity is charged on property causes *pro tanto* a passing of property and gives rise to a claim for estate duty. The general proposition has not been in doubt since the decision of *A. G. v. Watson* [1917] 2 K.B. 427. The reason there relied upon was that the estate out of which the annuity was payable constituted a fund to which the annuitant was entitled to have recourse. This reason presumably would hold good whether the estate was administered or unadministered, and in the argument of the case no distinction was drawn between those two situations. The property that passes however for the purpose of Estate Duty is what is

generally spoken of as a "notional slice" of the fund upon which the annuity is charged, that is, such an amount of capital as would be required to produce an annual sum equal to the amount of the annuity. The real question raised on this point in the *Skinner* case, which is not perhaps very clearly answered in the judgments that decided it, is what is the local situation of that "notional slice", when at the date of the annuitant's death the estate to which recourse can be made is an unadministered one and the administration forum is outside England.

The answer returned by Lord Greene, M.R., in the judgment of the Court of Appeal was that on the annuitant's death some interest in the English securities came to an end, presumably because he regarded the "notional slice" that passed as being a proportionate share of the English assets. The word "interest" in section 2(1)(b) of the Finance Act 1894 was to be understood, he thought, in a popular sense. In that sense the annuitant had an interest in the English securities, but in so holding "we do not, of course, assert that for the purposes of the general law an annuitant has a right to or an interest in any particular property forming part of the estate". The problem in the case before him was not, he explained, "to discover the locality to be attributed to a right either as a general proposition or for the purposes of probate".

The appeal, when it reached the House of Lords, was disposed of in the single judgment of Lord Russell of Killowen. It will probably always be a matter of speculation upon what exact ground he intended that his opinion should rest. It does not appear from the words that he used that he attached any importance to the fact that the estate in question was an unadministered estate. His reference to *Sudeley* was in the following terms: "the interest which was being repudiated was a proprietary interest. The case is not in any way a decision that the widow or her executors had no interest in the mortgages, and it is certainly no authority against the view that an annuitant whose annuity is charged on the estate of the testator has an interest in the different items of which the estate from time to time consists".

Their Lordships have not been able to find any secure means of reconciling Lord Russell's assertion that the *Sudeley* case was "not in any way a decision that the widow or her executors had no interest in the mortgages" with the apparent fact that it was just the existence of such an interest that was denied by the opinions of the members of the House who decided that case. They think it best to assume that Lord Russell was intending to use the word "interest" in some general and undefined sense, which he regarded as appropriate to the issue that was before him. Probably however his main purpose was to distinguish between an annuitant, who has, pending administration, the rights of an unpaid legatee, and a legatee of a share of residue, whose right is what he calls a "proprietary interest" in a fund which has not yet come into being. On that basis it is plain enough that the *Skinner* decision, whatever its exact significance, can be no authority for the present case, which concerns a "proprietary interest" and in which the determination of the location of the asset is all important.

Their Lordships therefore must reject the idea that the *Sudeley* decision, which relates to a residuary share of an unadministered estate, has been in any way qualified by *Skinner's* case. Where, as here, the question is whether a succession arose on a death in respect of a "devolution by law of any beneficial interest in property", and the necessary limitations of the Queensland Succession Duty Act reduce that question to one whether there was a beneficial interest in Queensland property belonging to her at her death, it is necessary, to use Lord Greene's words, to "discover the locality to be attributed to a right", and this requirement involves a precise analysis of the nature of the right. It is not enough for this purpose to speak of an "interest" in a general or popular sense. It is apt to recall what Lord Halsbury said on this point in his speech in the *Sudeley* case (see page 15):—"With reference to a great many things it would be quite true to say that she had an interest in the New Zealand mortgages—that she had a claim on them: in a loose and general way of speaking no one would deny that was a fair statement. But the moment you come to give a definite effect to the

particular thing to which she becomes entitled under his will, you must use strict language, and see what it is that the person is entitled to; because upon that in this case depends the solution of the question. It is idle to use such phrases as that she had an interest in this estate." If the present appeal is tried by this test, which they accept as the correct one, their Lordships regard it as clearly established that Mrs. Coulson was not entitled to any beneficial interest in any property in Queensland at the date of her death. What she was entitled to in respect of her rights under her deceased husband's will was a chose in action, capable of being invoked for any purpose connected with the proper administration of his estate; and the local situation of this asset, as much under Queensland law as any other law, was in New South Wales, where the testator had been domiciled and his executors resided and which constituted the proper forum of administration of his estate.

For these reasons their Lordships agree with the view of the law that is expressed in the opinions of those members of the High Court, Fullagar, Kitto and Menzies JJ. who formed the majority on this appeal. They have studied too the reasoning of the Supreme Court of Canada on a similar issue in *Re Steed. Minister of National Revenue v. Fitzgerald* [1949] S.C.R. 453, and they note that the views that they have expressed in this opinion coincide with the judgments delivered by four out of five of the members of that Court.

It remains only to deal with a much shorter point concerned with the appellant's claim to administration duty under the same Queensland Act. This duty is imposed by section 55 and, plainly enough, it is imposed as a form of Probate Duty. "There shall be paid", the section begins, "in respect of every grant of Probate or Letters of Administration in respect of the estate of any person dying . . . 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 . . ." Section 55A illustrates that the duty is essentially one connected with a Queensland grant of rights of administration obtained for the purpose of administering property in Queensland or under the law of Queensland. "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."

Now it is not suggested that the respondent as Mrs. Coulson's administrator has ever applied for any grant or resealing of his Letters in Queensland. Why should he? So far as concerns the Queensland properties affected by the Succession Duty claim, he has no right to administer them as part of her estate. His right is to make sure that Mr. Livingston's executors administer them properly and account for her share to the Coulson estate. He does not need Queensland Letters for that purpose.

The only other section which can contribute anything is section 2 of the Succession and Probate Duties Acts Declaratory and Amendment Act of 1935, which says:

"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.

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.”

The purpose and range of this amending section appear to their Lordships to be reasonably clear. Putting aside the special case of real property of freehold tenure, which did not devolve through the hands of legal personal representatives, all property in Queensland, real or personal, was to be subject to administration duty, if it was taken possession of or administered in any way by persons claiming the right to possess or deal with it by virtue of a death, even though they had not, as they should have done, obtained the necessary powers of administration from the Queensland Court. In other words, the failure to apply for the legal right of administration in Queensland, by original grant or resealing, was not to prevent the exigibility of the duty that would have been chargeable under the Act if the proper application had been made.

But their Lordships are unable to see how this amending section can help the appellant. Two reasons will suffice, although others might be adduced. First, there is no property in Queensland over which the respondent can claim to exercise powers as the administrator of Mrs. Coulson. Secondly, there is nothing in the agreed statement of facts to suggest that, even if he were in a position to exercise such powers in theory, he has ever in fact “ taken possession of or in any manner administered such property ”. In their Lordships’ opinion the appellant’s claim to administration duty is unmaintainable.

Their Lordships will humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent’s costs .

TABLE 1. Summary of the data.

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In the Privy Council

THE COMMISSIONER OF STAMP DUTIES

v.

HUGH DUNCAN LIVINGSTON

DELIVERED BY VISCOUNT RADCLIFFE

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