THE ENFORCEMENT OF FOREIGN REVENUE CLAIMS

PERMANENT TRUSTEE COMPANY (CANBERRA) LIMITED v. *FINLAYSON*

BATH v. *BRITISH AND MALAYAN TRUSTEES LIMITED*

Permanent Trustee Company (Canberra) Ltd. v. *Finlayson*:[1] *The Facts*

Shortly before her death, the testatrix who was domiciled and resident in New South Wales, arranged for the bulk of her personal estate which consisted of jewellery, money held in bank accounts, debts secured by deeds and shares in public companies, to be removed from New South Wales to the Australian Capital Territory. As a result, almost all of the testatrix's wealth was now located in the Australian Capital Territory.

At the same time, she made two wills. The first (the Territory will) dealt only with her assets in the Australian Capital Territory (the Territory estate) and appointed the Permanent Trustee Company (Canberra) Limited (the Territory executor), a trustee company incorporated and domiciled in the Australian Capital Territory, her executor and trustee. The beneficiaries named in the Territory will were the four children of the testatrix, who at her death were domiciled and resident in New South Wales. The Territory executor subsequently obtained a grant of probate from the Supreme Court of the Australian Capital Territory. The Territory estate was valued in excess of a quarter of a million dollars.

The second will (the New South Wales will) dealt with all her other assets which for practical purposes were all located in New South Wales (the New South Wales estate) and subsequently valued for probate purposes at less than $3,000. By this will she appointed the Permanent Trustee Company of New South Wales Ltd. (the New South Wales executor), a trustee company incorporated and carrying on business in New South Wales as her executor and trustee. Although in law the two companies were separate entities, the directors of the Permanent Trustee Co. of New South Wales Ltd. were also directors of the Permanent Trustee Co. (Canberra) Ltd. and usually held the board meetings at the same place in Sydney. The beneficial interests in the New South Wales will were parallel to those of the Territory will. Probate was duly granted to the New South Wales executor by the Supreme Court of New South Wales.

The successful outcome of these elaborate procedures was to avoid the payment of some $66,000 in New South Wales death duty which would otherwise have been imposed upon the testatrix's estate.

The relevant provisions of the New South Wales death duty legislation which are contained in the Stamp Duties Act 1920, as amended, are as follows:

Section 102 (1) (a):

> . . . for the purposes of the *assessment and payment* of death duty . . . the estate of a deceased person shall be deemed to include . . . all property of the deceased situate in New South Wales at his death, and in addition, where the deceased was domiciled in New South Wales all personal property of the deceased situated outside New South Wales at his death.

Section 114(1):

> Death duty shall constitute a debt payable to His Majesty out of the estate of the deceased in the same manner as the debts of the deceased and such duty shall be paid by the *administrator* out of all real or

[1] (1968) 43 A.L.J.R. 42.

> personal property vested in him and forming part of the dutiable estate of the deceased . . . and whether the property in respect of which the duty . . . has been assessed is vested in the administrator, or not.

Sub-section 3 of Section 114 limits the liability of the administrator to pay death duty to the value of the assets he has actually received as administrator or might, but for his own neglect or default, have received.

The New South Wales Commissioner of Stamp Duties, in accordance with the provisions outlined, included the Territory estate as part of the testatrix's dutiable estate in New South Wales and issued an assessment of duty to the New South Wales executor. The Territory estate, however, was vested in the Territory executor and all that the New South Wales executor could pay over was the small amount of less than $3,000 realized from the assets left in New South Wales and vested in him, by grant of probate of the New South Wales Supreme Court.

The Commissioner of Stamp Duties attempted to recover the duty from the Territory executor, who commenced an administration suit in the Supreme Court of the Australian Capital Territory to determine whether the Territory estate was liable to New South Wales duty. Before Dunphy, J. the Commissioner's claim was upheld.[2] On appeal to the High Court, in a short judgment by a unanimous Court,[3] the Commissioner's claim was rejected and in passing the High Court hinted that the estate should be so distributed that any further attempt by the Commissioner to obtain payment out of the Territory estate could be defeated.

Dunphy, J.'s Decision

Dunphy, J. upheld the claim for New South Wales death duty, and in so doing delivered a decision that is one of the very few to have ever given substantive effect to the full faith and credit provisions of the Constitution. From the manner in which the High Court dealt with this aspect on appeal, it would appear that it will remain so.

The Territory executor had argued that there was no obligation to pay New South Wales death duty on two grounds. The first was that s. 114(1) of the Stamp Duties Act (New South Wales) imposed a liability on the "administrator" to pay duty "out of all real or personal property vested in him and forming part of the dutiable estate of the deceased". But, according to the Territory executors, this imposed a liability only upon an "administrator" who derived his authority from a New South Wales court and could not impose a liability upon him as the administrator of the Territory estate appointed by the Supreme Court of the Australian Capital Territory. Secondly, even if there was a debt due by the Territory executor to the New South Wales Commissioner of Stamp Duties, the Commissioner was trying to enforce in the courts of the Australian Capital Territory a revenue debt due to the Crown in right of New South Wales which, in accordance with well recognised rules of private international law, was unenforceable in any court other than a court of New South Wales.

Dunphy, J. agreed that the reference in s. 114(1) to an "administrator" referred only to a New South Wales administrator, but found that the dominant intention of the Stamp Duties Act was that all real and personal property in New South Wales and all personal property outside New South Wales is estate liable for assessment and payment of duty and that for the purposes of assessment this is one estate.[4]

He held that the estate was to be treated as a whole despite the separate

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[2] 9 F.L.R. 424.
[3] *Supra* n. 1.
[4] *Supra* n. 2 at 435-36.

administrations. Consequently the effect of s. 114 was to impose death duty as a charge upon the estate as a whole including the assets in the hands of the Territory executor. However, this was an obligation imposed by New South Wales law. The next point was, how could it be enforced in the Australian Capital Territory? Dunphy, J. rightly pointed out that the House of Lords in the case of *Government of India* v. *Taylor*[5] had not considered the question of whether the rule that the courts of one country will not entertain a suit to recover taxes due to another applied between states of a federation where legislation exists comparable with the full faith and credit provisions of the Constitution and the State and Territorial Laws and Records Recognition Act, 1901-1964:

He held that by these provisions Parliament had modified the law laid down in *Government of India* v. *Taylor* and accordingly, he was obliged as a judge sitting in the Supreme Court of the Australian Capital Territory to give full faith and credit in the Territory to the charge imposed by the New South Wales Stamp Duties Act 1920, as amended.[6] Only once before had such a wide effect been given to the full faith and credit provisions[7] and there, too, the effect of giving these provisions this scope was to abrogate the ordinary rules of private international law as between the states and territories of the Commonwealth.

The Decision of the High Court

On appeal the High Court reversed the decision of Dunphy, J. on the basis that it was beyond the constitutional competence of the New South Wales Parliament to impose obligations on the administration of estates in another state or territory.[8] The High Court found it unnecessary to deal with the more sweeping of Dunphy, J.'s considerations of the full faith and credit provisions and how these provisions affect the operation of the foreign revenue rule between the states and territories of the Commonwealth.[9]

Generally, a legal personal representative of a deceased, whether he be an executor or administrator, has two functions. The first is to clear the estate of the deceased of all liabilities by the payment of debts, funeral and testamentary expenses. The second is to distribute the residue of the estate after payment of liabilities amongst the beneficiaries entitled. Where a foreign element is involved, these two functions, administration and distribution, are governed by different choice-of-law rules. Questions of the admissibility of debts and the order in which debts of different kinds are to be paid are treated as matters of procedure and are determined in accordance with the *lex fori*. Accordingly, the admissibility of debts in the Territory was to be determined by the laws of the Territory. Whereas, as the distribution of a deceased person's movable estate is governed by the *lex domicilii*, New South Wales law would have governed the distribution of the Territory estate. In the present case no question of distribution arose. The High Court characterized the issue as one of administration of assets only.

The High Court started from this position and cited as authority in *re Lorillard; Griffiths* v. *Catforth*[10] and *Government of India* v. *Taylor*.[11] In the latter case the rules of the forum forbade the admissibility of foreign revenue debts in the liquidation of a company. The former case turned upon the fact

[5] (1955) A.C. 491.
[6] *Supra* n. 2 at 436 and 439.
[7] *Harris* v. *Harris* (1947) V.L.R. 44.
[8] *Supra* n. 1 at 44.
[9] *Id.* at 44-45.
[10] (1922) 2 Ch. 638.
[11] *Supra* n. 5.

that debts owing by a testator domiciled in New York and not statute barred there, were not admissible in the administration of his estate in England, where they would have been statute barred. Both cases affirm the predominance of the *lex fori* in the question of the admissibility of debts. Thus the question of whether the Territory executor was liable or even entitled to pay out of the Territory assets the amount claimed for New South Wales death duty depended on whether this claim was sustainable according to the law of the Territory.

The following is a summary of the High Court's reasoning which shows both the significance of having two separate administrations and how the Court avoided a discussion of full faith and credit:

1. The claim of the New South Wales Commissioner of Stamp Duties was not a claim for a debt of the testatrix. It was a claim for a tax imposed by a New South Wales Act by reason of the death of the testatrix.[12]

2. The High Court pointed out that even if the New South Wales Act had deemed the duty to be a debt of the testatrix (and presumably this may have clothed it with the status of an ordinary debt to be proved in the normal course), this presumption would not be binding upon a court applying Territory law which could not be bound by the legislative fictions of the New South Wales Parliament.[13] The High Court relied on *Re Brewster; Butler* v. *Southam*[14] for this proposition. In that case it was held by Swinfen Eady, J., sitting in the Chancery Division of the English High Court, that a direction made by a testatrix in a will governed by English law to pay debts out of her residuary estate did not include Victorian death duty on her Victorian property despite the fact that such a debt was deemed to be a debt of the deceased by the relevant Victorian legislation.

3. Section 114(1) of the New South Wales Stamp Duties Act shows on its face that it was intended to apply only to administrations in which New South Wales law governs the course to be followed. Even if the New South Wales legislature had desired to extend the application of the provision to administrators appointed by foreign courts, it would have been beyond its constitutional competence to so provide. The "administrator" in s. 114(1) who is to pay the death duty must therefore be a person whose representative capacity exists by virtue of New South Wales law.[15]

4. The law of the Territory contains nothing to give any provision of a New South Wales Act any operation in the Territory, nor does the law of the Territory make any provision of its own as to the New South Wales death duty.[16]

5. Full faith and credit in this context means giving effect to the New South Wales Stamp Duties Act as achieving all it purports to achieve as an alteration of the law of New South Wales, but it does not mean giving it the extra-territorial effect of altering the law to be applied in the Territory as to Territory administrations which, on its own face, it does not purport to have and which it constitutionally could not have.[17]

6. The fact that the testatrix was domiciled in New South Wales was relevant for the assessment of her dutiable estate in accordance with s. 102(1)(a) of the Stamp Duties Act. The effect of these provisions was that duty was to be assessed and paid upon a figure worked out by a particular computation, but the liability was one cast upon the New South Wales executor to pay

[12] *Supra* n. 1 at 43.
[13] *Ibid.*
[14] (1908) 2 Ch. 365.
[15] *Supra* n. 1 at 43.
[16] *Id.* at 44.
[17] *Ibid.*

out of the real and personal estate vested in him. Thus "nothing is or could validly be provided by the New South Wales Act to place the Territory executor under a corresponding liability to make a payment out of the Territory property, or to affect in any way the law of the Territory as to the course to be followed in the administration of the property there situated".[18]

The same reasoning was used to dispose of an argument based upon s. 120 of the Stamp Duties Act. Section 120(1) provides that where any property is included in the dutiable estate of the deceased and is vested in any person other than the administrator, the duty payable in respect thereof is to be paid by the person entitled thereto to the administrator. The High Court conceded that the Territory executor administering the Territory estate, *prima facie* fell within the terms of the section. However, the Court said that these provisions could be not read as applicable to a person outside New South Wales who acquires property outside New South Wales as this would be inconsistent with the principle of construction laid down by the Privy Council in *Macleod* v. *Attorney-General for New South Wales*.[19] This principle of construction requires that there must be a territorial or other connection with the legislating state. In *Johnson* v. *The Commissioner of Stamp Duties (New South Wales)*[20] it was held that the degree of connection required of a taxing statute is that the property or person to be taxed is within the State. In relation to death duty this means that either the administrator or person controlling the assets or the assets themselves must be within the jurisdiction.

By creating two separate administrations, the testatrix effectively broke the connection which the bulk of her wealth had with New South Wales. If there had been a single will, or two wills appointing the same person as executor, then once that executor had obtained a grant of probate from the Supreme Court of New South Wales, there would have been a sufficient connection. If the Commissioner of Stamp Duties had then made a claim for the duty in a court of the Australian Capital Territory, the questions of full faith and credit and of the applicability of the revenue rule as between the states and territories of the Commonwealth would have had to be faced.

The Distribution of the Estate

Strictly, the only question before the High Court was whether in the administration of the Territory estate, the claim for New South Wales death duties was admissible. How the estate was to be distributed after administration was not before the Court. The usual rules of private international law in relation to the distribution of the movable assets of a deceased is that the distribution is governed by the laws of the domicile. Accordingly, when a grant is made to an administrator of a person who died domiciled elsewhere, the administration is said to be ancillary, as opposed to the principal administration in the place of the domicile and it is usual where the administration is ancillary, for the ancillary administrator to hand over the balance of the estate after administration to the principal administrator to be distributed according to the *lex domicilii*. This is a matter of convenience, as it is felt that the assets available for distribution should be submitted to the law of the domicile for that purpose.

Dicey points out, however, that a court has a discretionary power to restrain the ancillary administrator from handing the assets to the principal administrator and cites *In re Lorillard*[21] and *In re Manifold*[22] for the proposition that "He should therefore seek the guidance of the court if it

[18] *Ibid.*
[19] (1891) A.C. 455.
[20] (1956) A.C. 331.
[21] (1922) 2 Ch. 638.
[22] (1962) Ch. 1.

appears that handing over the balance would alter its ultimate destination".[23]

One of the arguments of counsel for the Commissioner before Dunphy, J. was that the Australian Capital Territory administration was an ancillary administration and the laws of New South Wales determined distribution of the estate. As all Australian Capital Territory debts had been paid and there was a surplus, the Court should order the surplus be paid to the New South Wales executor for distribution. Obviously, once in the hands of the New South Wales executor, he would have been obliged to pay New South Wales death duty. The High Court, having disposed of the question of the liability of the Territory executor to pay duty, therefore, went on in an *obiter dictum* to deal with the distribution, and, in doing so, gave a very broad hint to the Supreme Court of the Australian Capital Territory that it should exercise its discretion to prevent the remission of the assets to the New South Wales executor and so totally defeat the revenue claim. Subsequently in an unreported decision arising out of the same case Fox, J. of the Supreme Court of the Australian Capital Territory adopted that hint and refused an application for an order to transmit the surplus to New South Wales.

The High Court agreed that it was often the better course to submit assets available for distribution to the direct authority of the law of the domicile, but went on to say:

> The court of the *situs* has, however, a discretion in the matter and there is authority for saying that a remission to the representative in the place of the domicile will not be directed if, as is the case here, the result would be to subject the property to a claim which is not enforceable against it in the administration under the *lex fori*; in *Re Lorillard* . . . but this is not a matter in which it is opportune to express any opinion.[24]

In *Re Lorillard*,[25] which was the main authority cited by the High Court on the point, the testator, domiciled in New York, died in England, leaving assets and creditors both in England and in New York. In the English administration, after payment of all creditors there was a surplus available for beneficiaries. In the New York estate the assets were exhausted leaving unpaid certain creditors whose debts were statute barred by the laws of England, but not so by the law of New York. The English court gave the New York creditors a limited time to come in and prove their debts, which they did not do. Eve, J. refused to order that the surplus assets be paid to the New York administrator. The Court of Appeal refused to intervene in the exercise of this discretion. Had the assets been paid to the New York administrator, they would have been used to pay creditors whose debts would not have been allowed in the English administration.

In Re Lorillard was further referred to with approval by the House of Lords in *Government of India* v. *Taylor*[26] and by Buckley, J. in *Re Manifold*.[27] The latter case involved an ancillary administration in England and a principal administration in Cyprus. Two wills had been executed by the testator. The first was valid according to the laws of Cyprus, which was the law of the domicile. The second and later will purported to revoke the earlier will. It was invalid under the law of Cyprus, but in England regarded as validated by the Wills Act 1861, s. 1. Buckley, J. ordered the English administrators not to hand over the surplus assets to the Cyprus administrators but to distribute them themselves according to the second will, even though this

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[23] Dicey & Morris, *The Conflict of Laws* (8 ed.) at 582.
[24] (1968) 43 A.L.J.R. 42 at 45.
[25] *Supra* n. 21.
[26] (1955) A.C. 491.
[27] *Supra* n. 22.

meant that the movable estate of the deceased was distributed otherwise than the law of the last domicile of the deceased would require. Buckley, J. saw no difference in the situation before him in *Re Manifold* than the type of situation which Eve, J. was considering in *Re Lorillard*. From these cases it would appear that a court will prevent the remittal of assets to the administrator of the domicile if their remittal would cause them to be distributed otherwise than it would have been distributed under the law of the forum.

Legislative Postscript

Following considerable agitation by state Treasurers, advised, no doubt, by their respective Attorneys-General that it was constitutionally impossible for their states to legislate against the scheme laid down in *Finlayson's Case*, the Federal Government introduced an amendment to the Administration and Probate Ordinance 1929-1969 of the Territory. The amendments provide that where a person dies domiciled in a state, and administration is granted of that person's estate by the Supreme Court of the Australian Capital Territory, death duties imposed by other states are for the purposes of the administration and distribution of that person's Australian Capital Territory estate assimilated to debts due out of the estate of the deceased.

Although the Australian Capital Territory has now lost its attraction as a "tax haven" for persons not domiciled there, the Northern Territory does not impose local death duties and has not enacted similar legislation and is therefore available to those who wish to gamble that similar legislation will not be enacted.

Bath v. *British and Malayan Trustees Limited*:[28] *The Facts*

The deceased died domiciled in Singapore, leaving a large estate consisting of assets in Singapore, New South Wales and the United Kingdom. By her will the deceased had appointed the British and Malayan Trustees Limited her executor and trustee. The company obtained a grant of probate in Singapore. The bulk of the deceased's estate was left to her two children, the plaintiff who was a resident in New South Wales, and the deceased's daughter who was a resident of the United Kingdom.

Prior to her death the deceased had made some very large gifts to her two children and death duty was assessed on these gifts as well as upon the assets left in her estate. It was clear that Singapore death duties could not be recovered from the deceased's assets in Singapore, nor for that matter from all the assets of her estate, wherever situated, as the effect of the duty on the gifts made by the deceased during her lifetime would have been to swallow up the remainder of her assets.

The Commissioner of Estate Duties in Singapore extracted from the trustee company an undertaking, as a condition upon which he released an extract of the grant of probate, that the net proceeds of the estate overseas, after payment of liabilities and duties, would be remitted to Singapore, provided that there was no order of a court in those countries preventing the remittance of the assets to Singapore. The Commissioner intimated that he would attach the beneficiaries' share in these assets in the event that the duties were not recovered.

The plaintiff, with the consent of the beneficiary resident in the United Kingdom, having been informed of the undertaking, commenced proceedings for a grant to him of administration *cum testamento annexo* of the New South Wales estate of the deceased. The trustee company appointed an attorney in New South Wales to make a similar application on its behalf. The competing

[28] (1969) 2 N.S.W.R. 114.

applications for administration c.t.a. came before Helsham, J. who granted the plaintiff's application.[29]

At the core of the plaintiff's claim was the rule that a revenue claim of a foreign state is not enforceable either directly or indirectly in local courts. In view of the undertaking, it could have been argued that the trustee company's application for administration was an indirect attempt to do what could not be done directly, namely, to enforce the revenue claim of Singapore in the courts of New South Wales. Helsham, J. was quite willing to conclude that as a matter of fact the whole of the New South Wales assets would be used in discharging the claim of the Singapore revenue authorities if the assets were remitted to Singapore.

In *Peter Buchanan Limited* v. *McVey*,[30] the liquidator of the company, pursuing his claims in the Irish courts, tacitly admitted that he was acting on behalf of the Scottish revenue authorities. Kingsmill Moore, J. emphasised: "It is not the form of the action or the nature of the right of the plaintiff that must be considered, but the substance of the right sought to be enforced",[31] and again: "It is not a question whether the plaintiff is a foreign State or representative of a foreign State, or its revenue authority. In every case the substance of the claim must be scrutinized, and if there appears that it is really a suit brought for the purpose of collecting the debts of a foreign revenue, it must be rejected".[32]

It seems clear from Helsham, J's judgment that, in view of the terms of the Singapore trustee company's undertaking to the Commissioner of Estate Duties, he may well have been willing to reject its application for administration simply on the grounds that it was an indirect attempt to do what could not be done directly, namely, to enforce the revenue laws of Singapore.

However, the plaintiff did not seek to base its application on this ground and although the rule as to the unenforceability of foreign revenue debts was at the core of the plaintiff's success in the action, his success depended on other arguments.

1. If the grant of administration were made to the Singapore executor's attorney, it would be open to the plaintiff beneficiary to commence an administration suit for the purpose of having the assets of the estate in New South Wales administered by the Court in its Equitable Jurisdiction.
2. The Probate Court had a discretion to appoint the plaintiff under s. 74 of the Wills, Probate and Administration Act.
3. The plaintiff beneficiary would be successful in restraining the removal of the assets from New South Wales.
4. The Court should exercise its discretion and make a grant to the plaintiff beneficiary in order to prevent a successful administration suit which would stultify the administration of the New South Wales estate and cause unnecessary expense and inconvenience.

The arguments turned on the plaintiff beneficiary's ability to prevent the remission of the surplus of the New South Wales assets, after payment of

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[29] The case centered procedurally around competing applications for administration pursuant to s. 74 of the Wills, Probate and Administration Act, 1898-1968 (N.S.W.), the relevant parts of which are as follows:

> The Court *may* in any case where a person dies:—
> (c) leaving a will and having appointed an executor thereof; where such executor—
> (ii) is resident out of New South Wales,
> if it thinks it necessary or convenient, appoint some person to be the administrator of the estate of the deceased or any part thereof, . . . and every such administration may be limited as the Court thinks fit.

[30] (1955) A.C. 516.

[31] *Id. at* 527.

[32] *Id.* at 529.

all New South Wales liabilities, to Singapore for distribution. This would result in expense and inconvenience in the administration of the New South Wales estate and, accordingly, the Court, it was argued, had a discretion to grant the plaintiff's application to prevent such a state of affairs. Helsham, J. agreed that if the plaintiff had commenced an administration suit, he would be successful in preventing the surplus assets being remitted to Singapore and, as sole authority for this, he cited the *obiter dictum* of the High Court in *Finlayson's Case* where the Court purported to follow *Re Lorillard*. The Singapore executor, had he received the New South Wales assets, would have been bound by the undertaking given to the revenue authorities and the assets would never have been distributed to the beneficiaries.

The plaintiff argued that rather than grant administration to the Singapore executor, he should obtain the grant for the greater convenience of the estate. Where a person dies domiciled in a foreign country a court will in general make a grant to his personal representative under the law of that foreign country or, if there is no representative, then to the person who is by the law of the deceased's domicile entitled to administer the estate.

In *Lewis* v. *Balshaw* the High Court said:

> If the *forum domicilii* has already constituted an administrator of the movable assets, whether he be an executor, administrator, or bear some other name, a grant is made to him without further investigation of his title, unless he is disqualified under our law, or there is some other special reason against the recognition.[33]

In an early case on the United Kingdom predecessor of s. 74, Sir J. P. Wilde had said: "I think the Court ought to act upon that section, and to make a grant in all such cases . . . to the person who has been clothed by the Court of the country of domicile with the power and duty of administering the estate".[34] However, Helsham, J. rejected an argument put forward by the Singapore executor that this meant there was no discretion in the Court but rather said what this meant was that the executor of the domicile had a *prima facie* right to a grant but this right could on the authorities clearly be displaced if the necessity or convenience of the estate so required. Accordingly the approach laid down by Sir Frances Jeune, P. in *The Goods of Loveday*[35] and recently re-stated by Asprey, J.A. in *Bates* v. *Messner*,[36] namely that "the real object which the Court must keep in view is the due and proper administration of the estate and the interests of the parties beneficially entitled thereto"[37] was the correct approach. In *The Goods of Grundy*,[38] a case under the English equivalent of s. 74, a joint grant of administration had been made under the section to a person who would otherwise have had to commence an administration suit in order to protect her interests in the estate. She had otherwise no right to a grant.

This was the only authority directly relevant and there had really been no previous cases of competing applications. It was clearly in the interests of the administration of the New South Wales estate and of the beneficiaries that the administration be placed in the hands of an administrator who would not immediately be faced with a successful suit for administration.

Helsham, J. also rejected the Singapore executor's submission that despite this he should grant the administration to it in his discretion but limit the grant in such a way that the assets could not be remitted outside the juris-

[33] (1935) 54 C.L.R. 188 at 193.
[34] *In the Goods of Earl* (1867) L.R. 1 P. & D. 450 at 453.
[35] (1900) P. 154.
[36] (1967) 87 W.N. (N.S.W.) (Pt. 2) 35.
[37] *Supra* n. 35 at 156.
[38] (1868) L.R. 1 P. & D. 459.

diction. Helsham, J. doubted that he was entitled to limit the grant in this manner and pointed out that the traditional limitations upon grants of administration had not involved a limitation of this type, but involved limitations as to the nature of the assets which the administrator was entitled to get in or with which he was entitled to deal or the activities he was entitled to undertake.

In view of these factors, Helsham, J. said:

> It seems to me that if I am to make an appointment of an administrator in New South Wales for the purpose of enabling the beneficiaries to have the benefit of the assets here to the exclusion of the revenue authorities of a foreign State, then the simplest and most convenient way to do so is to appoint one of them as such administrator.[39]

Conclusion

Basic to Helsham, J.'s decision in *Bath's Case* is the proposition that an Australian court will not order transmission of the surplus of local assets to the executor of the deceased's domicile if to do so would result in the payment of revenue debts not payable under the *lex fori*. Although technically this point was not raised by the facts in *Finlayson's Case*, Helsham, J. recognised the great emphasis with which the *obiter dictum* had been stated by the High Court. The High Court's insistence that only the debts payable under the *lex fori* can be enforced directly or indirectly out of the assets within the forum is difficult to reconcile with a substantive interpretation of the full faith and credit provisions, since this necessarily would mean that the applicable law would not be the *lex fori* but the law of the most relevant jurisdiction. Nor can the High Court's encouragement of a refusal to order transmission of funds to the New South Wales executor be reconciled with the proposition that the revenue rule has no application between the states and territories of the Commonwealth. It may be surmised therefore that had the deceased in *Bath's Case* been domiciled in Western Australia instead of Singapore, this would not have made any difference to the decision. Whether our law should continue to show such tenderness to those who evade their fiscal obligations in other jurisdictions, whether within Australia or abroad, is obviously a question which the legislature must resolve.

T. M. JUCOVIC, Case Editor — Fourth Year Student.

OWNERSHIP OF MATRIMONIAL PROPERTY

PETTITT v. *PETTITT*

GISSING v. *GISSING*

The problem of determining the respective entitlements of husband and wife to matrimonial property acquired during the course of the marriage has received much attention recently from English courts. While the English cases have been primarily concerned with situations where husband and wife approach the court after a breakdown of the marriage for a determination of their property rights, the principles enunciated in the decisions are applicable to any dispute involving the determination of the question of what property a party to a marriage owns.

Claims by spouses to a beneficial interest in property have been based on the following grounds:

[39] *Supra* n. 28 at 121.