



RECORD IN  
CROSS APPEAL

(a) As to whether the Company is liable to the Commissioner for payment of Estate Duty in respect of the estate of the late Alan Davis (the deceased) under Section 31(1) of the Estate and Gift Duties Ordinance (the Ordinance), and

(b) As to the quantum of Estate Duty for which the Company is so liable.

3. The issue as to the Company's liability under Section 31(1) of the Ordinance is raised by the Company's appeal (the Cross Appeal). 10

4. The issue as to the quantum of the Company's liability is raised by the Commissioner's appeal (the Appeal).

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5. The deceased died in Fiji on 28th February 1972, domiciled in California. At the time of his death he was the holder of shares, some registered in his name alone, and some registered in the joint names of himself and his wife, in two Fiji companies which subsequently became shares in the Company (the shares). 20

p.2, Ll.38-51

p.3, L.2

6. By his last will the deceased appointed the First National City Bank of San Jose California (the Bank) as his executor.

p.3, L.5

7. Probate of such will was granted to the Bank by the Superior Court of California and an unsuccessful attempt was made to obtain a grant of Probate from the Supreme Court of Fiji by way of resealing the California grant. 30

p.3, Ll.8-30

8. The Bank and the widow sold the shares and transfers were lodged with the Company for registration.

p.3, Ll.34-35

9. The Company registered the transfers although no local grant of Probate to the Bank was produced and although no such grant then existed.

10. The Commissioner claimed that all the assets of the deceased and his wife in Fiji at the time of his death were their community property under the law of their domicile, viz. California. 40

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11. The Commissioner further claimed that the widow's beneficial half-interest in such assets was liable for Estate Duty because the deceased's powers of management, control and disposition

of community personal property under the law of California brought such interest within certain provisions of the Ordinance which deemed such property to form part of his dutiable estate. This claim by the Commissioner was disputed. There was no dispute that the deceased's own half share of the community property was liable to duty and the sum of \$23,708.20 being the estimated duty was paid by the Bank to the Commissioner on 22nd October 1973.

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12. The Commissioner claimed that the Company by registering the transfers had rendered itself liable under Section 31 for payment of Estate Duty in respect of the shares and that such liability extended to include Estate Duty alleged to be payable in respect of the widow's beneficial half-interest therein.

13. Section 31(1) (of the Ordinance) provides as follows :-

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"If any person takes possession of or in any manner deals with any part of the estate of any deceased person without obtaining administration of his estate .....the Commissioner may apply to the Supreme Court for an order that the person so taking possession or dealing as aforesaid deliver to the Commissioner....a statement as required by subsection (1) of Section 28 of this Ordinance and to pay such duty as would have been payable if administration had been obtained, together with the costs of the proceedings, or to show cause to the contrary."

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14. On 8th September 1976, the Commissioner commenced proceedings against the Company in the Supreme Court under Section 31(1).

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15. On the 29th November 1976 the Bank obtained Probate of the deceased's will from the Supreme Court of Fiji.

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p.3, L1.34-35

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16. The parties agreed that the proceedings be split into two parts and that the question whether the Company had brought itself within Section 31 should be determined first and that the amount of Estate Duty payable by the Company should be determined subsequently.

p.2, L.21

17. The first stage of the proceedings was heard by Mr. Justice Stuart who, on the 9th November 1977, held that the Company had

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brought itself within the section by registering the transfers prior to the grant of Probate in Fiji.

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pp. 10-16

18. An appeal by the Company to the Court of Appeal was dismissed on the 3rd August 1978. The Company's cross appeal to the Board is brought from this first decision of the Court of Appeal.

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19. The second stage of the proceedings was later heard by Mr. Justice Williams.

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pp. 13-34

20. On the 15th November 1979 Mr. Justice Williams held that the assets of the deceased and his wife in Fiji were community property and that the wife's beneficial interest therein was liable for Estate Duty.

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21. The Company appealed to the Court of Appeal which, on the 3rd October 1980, allowed the appeal holding that the widow's beneficial half interest in the community assets in Fiji was not liable for Estate Duty.

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pp. 67-94

p. 95

22. The Commissioner's appeal is brought from this second decision of the Court of Appeal.

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23. The amount of Estate Duty, including interest, in dispute in the appeal is believed to substantially exceed \$F.80,000. The amount of additional Estate Duty for which the Company would still be liable if the appeal fails, after credit is given for the sum of \$23,708.20 paid by the Bank on 22nd October 1973 is believed to be approximately \$F.2,000. In these circumstances the cross appeal has been brought essentially by way of defence against the appeal, and subject to any direction by the Board, the Company would not wish to proceed with its cross appeal if the appeal were to fail. However in the event of the appeal otherwise succeeding the Company does wish to press its cross appeal in order to establish, if possible, that it is under no liability to the Appellant.

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24. Accordingly this case will deal firstly with the Commissioner's appeal and then with the Company's cross appeal.

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COMMISSIONER'S APPEAL (GENERAL)

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25. There are concurrent findings that at the time of the deceased's death the property in question was the community property of the deceased and his wife under the law of California

which was applicable by virtue of their then domicile.

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26. Accordingly prima facie the one-half share of such property which belonged beneficially to the wife was not liable for Estate Duty on the death of the deceased.

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10 27. The Commissioner claimed that the wife's beneficial half interest in such property was deemed to form part of the dutiable estate of the deceased under the Ordinance, because it fell within one or other of paragraphs (e), (h) or (i) of Section 5(1). This claim succeeded as to paras. (h) and (i) before Williams J. in the Supreme Court but failed in the Court of Appeal.

CLAIM TO DUTY UNDER PARA.(e) JOINTLY OWNED PROPERTY

28. Section 5(1)(e) brings to duty :-

20 "The beneficial interest held by the deceased immediately before his death in any property as a joint tenant or joint owner with any other person or persons if that property was situate in Fiji at the death of the deceased."

29. The questions which arise under this paragraph appear to be as follows :-

- 30 (a) Under Californian law are husband and wife joint tenants or joint owners of community property, and
- (b) Does the paragraph bring to duty property owned in common, i.e. are the words "joint owner" used in a loose sense so as to include property owned in common as well as jointly owned property in the strict sense?
- (c) In any event does the paragraph bring to duty the wife's half share in such property?

40 30. The Company submits that paragraph (e) only brings to duty property which was jointly owned in the strict sense by the deceased and one or more other persons.

31. The words "the beneficial interest held by the deceased immediately before his death" make it plain, we submit, that the effect of

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the paragraph is to catch the deceased's interest in joint property which accrued or passed by survivorship on his death.

32. The relevant provision of the Californian Civil Code which defines the rights of the spouses in community personal property is Section 5105 which provides :-

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"5105. Interests in community property

The respective interests of the husband and wife in community property during continuance of the marriage relation are present, existing and equal interests under the management and control of the husband as is provided in Sections 5125 and 5127. This section shall be construed as defining the respective interests and rights of husband and wife in community property."

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33. Joint tenancies and tenancies in common exist and are recognized under the law of California (see Civil Code Section 5110), but the interests of the spouses in community property are not stated to be interests held as joint tenants, and neither of the experts who gave evidence of the law of California suggested that the interest of a deceased spouse in such property passes or accrues on death to the survivor.

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34. While in an appropriate context the words "joint owners" and similar references to joint ownership may be held to include ownership in common, we submit that in para.(e) the context shows that the word "joint" is used with its ordinary technical meaning.

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35. In any event the paragraph only brings to duty the beneficial interest or the former beneficial interest of the deceased. It cannot bring to duty the beneficial interest of the survivor.

pp.72, 74-75

36. Accordingly we submit that, substantially for the reasons given by the Court of Appeal, the wife's half interest was not dutiable under section 5(1)(e).

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CLAIM TO DUTY UNDER PARA.(h) NO GENERAL POWER OF APPOINTMENT

37. Section 5(1)(h) brings to duty :-

"Any property situate in Fiji at the death of the deceased over or in respect of which the deceased had at the time of his death a general power of appointment."

10 38. The Commissioner contended before the Courts of Fiji that the deceased's powers of management, control, and disposition of the community personal property constituted a general power of appointment so as to bring the widow's beneficial half interest in such property within this paragraph.

39. The Company advanced two principal submissions to the contrary namely :-

(a) The deceased's powers did not constitute a general power of appointment because they were not exercisable as he thought fit for his own benefit, and

20 (b) The paragraph only applied to testamentary powers because only such powers survived the death of the deceased so as to be powers "which the deceased had at the time of his death".

40. The Court of Appeal accepted the first of these submissions but rejected the second. The Company wishes to maintain both submissions before the Board.

pp.75-78  
pp.78-82

30 41. The remainder of this part of the case will deal with the first submission. The second submission will be dealt with in the next section of the case.

42. Section 2 defines a general power of appointment as including, unless the context otherwise requires,

40 "any power or authority which enables the donee...to obtain or appoint or dispose of any property or to charge any sum of money upon any property as he thinks fit for his own benefit, whether exercisable orally or by instrument inter vivos or by will or otherwise howsoever, but does not include any power exercisable by a person in a fiduciary capacity under a disposition not made by himself,....."

43. This definition which extends but does not exclude the ordinary meaning of the expression, only applies to powers which the donee can

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exercise "as he thinks fit for his own benefit", and specifically excludes powers "exercisable by a person in a fiduciary capacity under a disposition not made by himself".

pp.75-76

44. The Court of Appeal held that the deceased's powers of management, control, and disposition over the community personal property were not exercisable by the husband "as he thinks fit for his own benefit", and that they were exercisable by him "in a fiduciary capacity under a disposition not made by himself".

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pp.76-78

pp.75-76

45. The Court of Appeal held that under the law of California the deceased could not dispose of the community property or his wife's interest therein "as he thinks fit for his own benefit". Thus

p. 75

(a) He could not appoint any part of the community property or his wife's interest therein in favour of himself absolutely;

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pp.38,44

(b) He could not dispose of such property or his wife's interest therein by will,

pp.39-44

(c) He could not make a gift of such property;

pp.39,44,48

(d) He could not sell such property for inadequate consideration;

pp.38,42,  
50-52

(e) Having disposed of any such property for adequate consideration to a third party the proceeds of sale would become community property in the hands of the husband so that such disposal would enure for the benefit of both spouses;

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(f) The wife may resort to appropriate judicial remedies to protect and safeguard the community property against inconsiderate and fraudulent acts of the husband.

pp.54,77  
p. 42

46. Under the law of California a husband's powers of management, control, and disposition of community personal property are fiduciary in character. Moreover the community property system attaches by operation of law upon the acquisition of a domicile of choice in California, so that such powers did not arise under a disposition made by the husband.

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47. It is of course well settled under our rules of private international law that obligations and interests with respect to moveables arising under the law of the domicile are recognized and enforceable under the *lex situs*

*De Nicols v. Curlier* (1900) A.C. 21  
c.f. *Attorney General of Ceylon v. Chettiar*  
(No.1) (1957) A.C. 513.

10 48. The Company respectfully adopts the reasoning of the Court of Appeal for rejecting the Commissioner's submission that "a person in a fiduciary capacity" must be a person to whom such a description would apply in respect of a fiduciary relationship recognized by Fiji law. The Court said

pp.77-78

"We can see no reason so to construe the provision which as a whole is clearly wide enough to include powers over property rights governed by foreign law."

p. 77

20 49. We would add that the fiduciary relationships recognized by Fiji law include not only those governed by the internal law of Fiji, but also those governed by systems of foreign law recognized by the rules of private international law in force in Fiji.

50. Accordingly we submit that, substantially for the reasons given by the Court of Appeal the wife's half interest was not dutiable under section 5(1)(h).

pp.75-78

30 CLAIM TO DUTY UNDER PARA.(h) POWER NOT TESTAMENTARY

51. Paragraph (h) brings to duty property over or in respect of which the deceased had "at the time of his death" a general power of appointment.

52. Paragraph (e) brings to duty property in which the deceased held a beneficial interest "immediately before his death".

40 53. The contrast in the language of these two paragraphs in the same section of the Ordinance strongly suggests that paragraph (h) does not catch property subject to a general power of appointment which existed immediately before the death of the donee, but which had ceased to exist at the time of his death.

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54. On this basis testamentary powers would be within paragraph (h), but powers exercisable only inter vivos would not be caught.

55. The Company further submits that the words "at the time of his death" taken in their ordinary and natural meaning refer to the moment of death, that is to the instant when death has become a fact and the person in question is no longer alive. This meaning is, we submit, reinforced by the context namely an Ordinance which imposes a tax on the estates of deceased persons. C.f. sec.3.

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56. This construction of paragraph (h) is supported by a course of authority in Australia on death duty legislation which in our submission is in pari materia to the Fiji Ordinance. See

(a) Re Russell (1968) V.R. 285

(b) Re Silk (1976) V.R. 60, and on appeal Equity Trustees etc. -v- Commissioner of Probate Duties (Vic) 135 CLR 268.

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57. In support of the submission that the words "at the time of his death" in paragraph (h) refer to the point of time when death has taken place the Company also relies upon the decision in Robertson v. F.C.T. 86 CLR 463 especially at p.486 where Kitto J. said

"It is not until there is an estate of a deceased person that the Act speaks."

pp.78-82

58. The Court of Appeal rejected this submission because the definition of general power of appointment in section 2 embraced powers exercisable otherwise than by will. The Court said

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"...his submission that subsection (1) (h) was confined to testamentary powers ....makes the terms 'orally or by instrument inter vivos.....or otherwise' surplusage and of no effect. We can see no reason why the definition in Section 2 should not be applied to subsection (1) (h) when construing its meaning."

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59. However with respect we would submit that:-

(a) The definitions in section 2 only apply unless the context otherwise requires, and

(b) The words of the definition of general power of appointment which include powers exercisable only inter vivos would not be rendered mere surplusage by the construction contended for by the Company.

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60. The expression general power of appointment is also found in the definitions of "disposition of property" and "successor". The definition of disposition of property enters into the definition of gift. This in turn takes the definition of general power of appointment into the scope of section 5(1)(b) (gifts within 5 years before death), section 5(1)(c) (gifts without possession and enjoyment passing to the donee to the exclusion of the deceased), see 5(1)(i) (dispositions of property subject to reservation of interest etc. in favour of the deceased).

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61. Furthermore the Court of Appeal appear to have overlooked the fact that the Ordinance also imposes gift duty on gifts inter vivos. The exercise inter vivos of a general power of appointment otherwise than in favour of the donee is a disposition of property and if the property is of sufficient value and fully adequate consideration in money or moneys worth does not pass to the donee the transaction will constitute a gift which is dutiable under the Ordinance.

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62. Accordingly the construction of paragraph (h) contended for by the Company would not deprive part of the definition of general power of appointment of all operative effect.

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63. In these circumstances the Company submits that paragraph (h) does not bring to duty property the subject of powers of appointment which were only exercisable inter vivos, and that for this reason also the wife's half interest was not dutiable under section 5(1)(h).

CLAIM TO DUTY UNDER PARA.(i) NO DISPOSITION BY DECEASED

64. Section 5(1)(i) brings to duty :-

"any property situate in Fiji at the death of the deceased comprised in any settlement, trust or other disposition of property.... made by the deceased...

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(i) by which an interest in that property...is reserved, ..... to the deceased for his life....., or

(ii) which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life...; or

(iii) .... "

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65. The principal question which arises in relation to the claim for duty under this paragraph is whether there existed "any settlement, trust or other disposition of property ...made by the deceased".

66. In our submission, as held by the Court of Appeal, there was in this case no "disposition of property...made by the deceased" which is capable of attracting the operation of this paragraph.

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(a) The community property system attached by operation of law upon the deceased and his wife acquiring a domicile of choice in California (Civil Code section 5110). The expert evidence and the terms of the Code itself do not suggest that the applicability of the community property system depended upon any notional, implied, or tacit contract.

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pp.38,41,53

(b) While the parties might contract out of the community property system, the existence of this freedom does not require or justify the conclusion that acquiescence in the system, conscious or otherwise, imports an implied or tacit contract for the adoption of the system.

pp.35-36

p. 35

pp.85-86

67. The deceased and his wife entered into a marital property agreement in October 1961. Clause 3 of the agreement provided that after acquired property of the spouses shall become and remain their community property. The Court of Appeal held, correctly in our submission, that this agreement did not operate as a disposition of property by the deceased.

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p. 23

pp.85-86

68. There are concurrent findings that the deceased had no separate property during the

marriage. The 1961 agreement therefore did not operate as to settlement by the deceased of any of his separate property.

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69. The wife on the other hand did have separate property but to the extent to which the 1961 agreement converted her separate property into community property the transaction was a settlement or disposition of property by her and not by the deceased.

p.18

p.84

10 70. It is clear therefore that except to the extent to which the agreement operated as a settlement or disposition of property by the wife, it did no more than declare the existing rights of the spouses. The instrument therefore did not operate as a settlement or disposition of property by the deceased.

pp.85-86

20 71. In any event even if the 1961 agreement effected in some way a resettlement of the existing community property of the spouses it could only operate as a settlement or disposition by the deceased in respect of his own half of the community property. The deceased had no right to settle or dispose of his wife's half interest as such in the community property. His powers of disposition were confined to the assets which made up the community property.

pp.38,41,53

p. 44

72. Any agreement or settlement varying the statutory system of community property required the consent of both spouses.

pp.38,41,53

30 73. Accordingly any resettlement of the spouses' community property interests effected by the 1961 agreement involved a disposition by the deceased of no more than his half share.

74. Any settlement or disposition by the deceased of his own half share can not result in the wife's half share being brought to duty under this paragraph.

40 75. Accordingly we submit that substantially for the reasons given by the Court of Appeal the wife's half interest was not dutiable under section 5(1)(i).

COMPANY'S CROSS APPEAL

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pp. 1-16

76. In the first stage of the proceedings the Supreme Court and the Court of Appeal held that the Company had brought itself within the provisions of section 31(1) of the Ordinance by registering transfers of the shares executed by

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the Bank, or by the Bank and the widow as the case may be, when no local grant of probate was produced or even existed.

p.6 L1.16-33

77. The registration of the transfers under these circumstances was held to involve a taking of possession of or dealing with part of the estate of the deceased within the section.

78. Both Fiji Courts relied upon the decision of the House of Lords in New York Breweries -v- Attorney General (1899) A.C.62 in reaching the conclusion that in registering the transfers the Company had taken possession of or dealt with the shares. 10

79. The Company submits that the decision in the New York Breweries case is distinguishable for the following reasons :

p.3 L1.4-6

(a) In this case probate was granted to the Bank in Fiji on 29 November 1976 after the proceedings had been commenced but prior to the hearing. 20

(b) Under the statute law of Fiji an executor's title derives from the probate, not from the will as such, but upon grant his title relates back to the date of death.

(c) The Statutory relation back of the executor's title validated the acts of the executor between death and grant, including the transfer of the shares, thereby also validating the acts of the Company in registering the share transfers upon the instructions of the Bank. 30

(d) In the New York Breweries case, the Company knew that the foreign executor had not taken out probate in the U.K. and that it did not intend to do so. In the present case the Company had no such knowledge and the Bank always intended to take out local probate and was attempting to obtain such a grant when the share transfers were registered. 40

80. The general law doctrine that executors derive title from the will and not from the probate was altered in Fiji by the Succession Probate and Administration Ordinance No.20 of 1970, Sections 8 and 9 of which provide as follows :-

"Sec.8 Pending the grant of probate of a will or administration of the estate of an intestate, the real and personal estate of the deceased person shall.... vest in the Public Trustee for the purpose of accepting service of notices and proceedings and acting as Nominal Defendant.

10 Sec.9 Upon the grant of probate or administration all property of which a deceased person dies possessed, or entitled to, in Fiji shall, as from the death of such person, pass to and become vested in the executor to whom probate has been granted, or administrator for all the estate and interest of the deceased therein....."

20 81. The Company submits that Section 9 assimilates the position of executors to that of administrators under the general law. An administrator's title relates back from the date of grant to the date of death as stated by Williams & Mortimer "Executors Administrators and Probate" 1970 at page 85,

30 "Case may however be found where the letters of administration have been held to relate back to the death of the intestate, so as to give a validity to acts done before the letters were obtained. Thus if a man takes the goods of the intestate as executor de son tort and sells them and afterwards obtains letters of administration, it seems that the sale is good by relation and the wrong is purged ....such relation back exists only in those cases where the act done is for the benefit of the estate."

40 82. Halsbury 4th Edition Volume 17 "Executors and Administrators" page 390, para.376, states the law in similar terms:

"The doctrine of relation back is also applied to render valid dispositions of the deceased's property made before the grant when it is shown that those dispositions are for the benefit of the estate, or have been made in due course of administration."

83. Thus in Hill v. Curtis (1965) L.R.1 Eq.90 at 100 Page-Wood V.C. said :-

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"If one enters as executor of his own wrong and sells goods, and then obtains administration the sale is good by relation - the wrong is purged; so that when a person sells a lease and afterwards obtains administration the title goes back by relation."

84. The New York Breweries case does not decide that a subsequent local grant to the foreign executor would not protect the stranger who had dealt with estate assets in the meantime on the instructions of the executor. On the contrary the Crown conceded that the Company would not be liable in such a case because the subsequent probate would make the previous act lawful. See the argument of the Solicitor General before the Court of Appeal (1898) 1 Q.B. at 210-211. This concession seems to have been treated as correct. See the judgments of A.L. Smith L.J. and Collins L.J. at 216-217, 218-219 and 224-225. 10 20

85. It is submitted that the statutory relation back of the executor's title from the date of grant to the date of death under the terms of the Succession etc. Ordinance 1970 validated the Company's actions in registering transfers of the shares on the instructions of the Bank, and put an end to the Company's liability under section 31(1).

86. The Company did not contravene any other provision of the Estate and Gift Duties Ordinance in registering the share transfers in question, and if it is protected by the statutory relation back of the Bank's title to the date of death from liability under section 31(1) its acts were not otherwise unlawful under that Ordinance or otherwise. 30

87. The Company submits that the first decision of the Court of Appeal was erroneous, and that the proceedings against it under section 31(1) should have been dismissed. 40

88. The Company therefore submits that the Commissioner's appeal should be dismissed and the Company's cross appeal allowed for the following (amongst other)

R E A S O N S

1. BECAUSE the wife's half share in the community property was not dutiable under section 5(1)(e), (h) or (i) of the Ordinance.



2. BECAUSE the Court of Appeal was correct in holding that the wife's half share was not dutiable under any of those paragraphs.
3. BECAUSE the Court of Appeal should have held that the reasoning of the High Court of Australia in Silk's case 135 CLR 268 was properly applicable to the construction of section 5(1)(h).
- 10 4. BECAUSE the Company by registering the share transfers had not taken possession of or in any manner dealt with the shares within the meaning of section 31(1).
5. BECAUSE the acts of the Company in registering the transfers was validated by the statutory relation back of the executor's title upon the grant of probate to it in Fiji.

K.R. HANDLEY Q.C.

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P.I. KNIGHT

No.4 of 1982  
IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE FIJI COURT OF APPEAL

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B E T W E E N :

THE COMMISSIONER OF  
ESTATE AND GIFT DUTIES  
Appellant  
(Original Plaintiff)

- and -

FIJI RESORTS LIMITED Respondent  
(Original Defendant)

No.29 of 1982

AND B E T W E E N :

FIJI RESORTS LIMITED  
Cross Appellant  
(Original Defendant)

- and -

THE COMMISSIONER OF  
ESTATE AND GIFT DUTIES  
Cross Respondent  
(Original Plaintiff)

(CONSOLIDATED)

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CASE FOR THE RESPONDENT  
AND CROSS APPELLANT

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COWARD CHANCE,  
Royex House,  
Aldermanbury Square,  
London, EC2Y 7LD

Solicitors for the Respondent  
and Cross Appellant

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