CASE LAW

DUTIES ON "NOTIONAL ESTATE"

EASTGATE v. *EQUITY TRUSTEES EXECUTORS AND AGENCY CO. LTD.*

The legislature is generally most ingenious in combating the skill of that reprehensible brand of conveyancers who try to earn the gratitude of their clients' nearest and dearest by preparing schemes to avoid death and estate duties. Amendments made over the years to the statutory provisions which define a deceased person's "estate" for duty purposes demonstrate constant vigilance by Parliamentary legal experts and a considerable amount of care and skill directed to the activity of stopping up any loophole in the overall legislative scheme. In their zeal and enthusiasm, the Parliamentary draftsmen often manage to catch transactions in which nothing could be further from the parties' minds than the avoidance of duties.

Unfortunately, once it has been ensured that the Government will not lose its rightful share of the deceased's property, the draftsmen's enthusiasm appears to wane, and their handling of the question as to how ultimate liability for the duty is to be shared out is a good deal less successful. This is most apparent in regard to duty on notional estate. By way of example, the New South Wales legislature has still not seen fit to remedy the defect in the Stamp Duties Act exposed in 1941 by *Union Trustee Co.* v. *Maslin*,[1] where it was held by the Supreme Court of New South Wales that if the recipient of a gift of property made less than three years before the donor's death managed to dissipate the property by the time the death occurred, he could not be compelled to contribute to New South Wales death duty. The unsatisfactory nature of the statute law in this field is further illustrated in the case under discussion, *Eastgate* v. *Equity Trustees Executors and Agency Co. Ltd.*[2]

The facts in *Eastgate's Case* are commonplace enough and it seems unfortunate that so many problems should have arisen out of them. The deceased, Grace Eastgate, was domiciled in Victoria at the time of her death. Her will contained the following direction as to payment of duties:

> I direct my Trustee after payment of my just debts funeral and testamentary expenses and all death estate and succession duties—State or Federal—upon the whole of my dutiable estate to hold the residue . . . upon trust to divide the same . . .

Included in her estate for the purposes of Victorian probate duty and Federal estate duty were items of property which did not vest in her executor on her death (that is "notional estate"), being the amount of various gifts of money made by her within three years before her death, her interest in a joint tenancy of certain real property situated in Victoria and her interest in a joint tenancy of certain personal property. The gifts attracted probate duty by virtue of s.104(1)(d)(i) of the Victorian Administration and Probate Act,

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[1] (1941) 41 S.R. (N.S.W.) 26.
[2] (1964) 37 A.L.J.R. 479. The case is also reported at (1964) A.L.R. 1063.

1958, and estate duty by virtue of s.8(4)(a) of the Federal Estate Duty Assessment Act, 1914-62. The interest in the joint tenancies attracted the same duties by virtue of s.104(e) and s.8(4)(d) respectively of the same Acts.

The question before the Court was whether the probate duty assessed on these items of notional estate and the estate duty on the deceased's interest in the joint tenancies were ultimately to be met[3] by the executor or by the person in whom this property was vested, who was in each case the husband of the deceased.

As regards the probate duty, the relevant sections of the Administration and Probate Act were s.121(1), whereby the executor is required to pay all duty out of "the residue of the estate" (meaning here, it seems, the residue of the testamentary estate) and s.122, which provides that unless a contrary intention appears in the will (subs.(2)), an executor who is liable to pay duty in respect of notional estate may recover the amount of such duty from "the person to whom it passed" or may retain or deduct the amount out of or from any moneys in his hands belonging to that person (subs.(3)), whereupon he must apply the net amount so recovered to make good any deduction that he has made for the payment of duty from devises, requests or legacies or out of residue (subs.(6)).

In deciding whether the executor or the deceased's husband should pay the probate duty on the notional estate, the Court had to determine two matters: first, whether an interest under a joint tenancy "passes" on the death of one of the joint tenants to the survivor or survivors within the meaning of s.122(3); and secondly (if the answer to this first question was "yes"), whether the deceased's will disclosed a sufficient "contrary intention" to deprive the executor of any right under s.122(3) to recover the relevant amount of duty from the husband. Adam, J., in the Supreme Court of Victoria,[4] and Kitto and Owen, JJ., comprising the majority in the High Court, held that an interest under a joint tenancy does "pass" within the meaning of the section, and that there was no such "contrary intention" in the will. Accordingly, the result of the case was that the husband had to pay the duty. Menzies, J., the dissentient judge in the High Court, agreed with the majority on the first point but considered that there was a "contrary intention" to be found in the clause of the will quoted above, whereby the husband was relieved of his liability to contribute to duty.

The ultimate liability for estate duty on the deceased's interest in the joint tenancies was governed in the first place by s.29 of the Estate Duty Assessment Act, which provides that where there is an "administrator" of the estate (defined in s.3 to include an executor), liability to pay duty is imposed upon him except where the Commissioner chooses to make an apportionment under s.35A(a) as to duty on property which passed from the deceased by gift *inter vivos* or by settlement. The other important section was s.35, which is in the following terms:

> Subject to any different disposition made by a testator in his will, the duty payable in respect of an estate, exclusive of so much of the estate as is exempt from estate duty, shall be apportioned by the administrator among the persons beneficially entitled to the estate in the following manner:—

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[3] The reports of the case in the High Court do not expressly state whether the duties in question had been paid by the executor before the case was instituted, but it may be assumed that they had been paid, as a necessary step before probate could be obtained.

[4] The writer has been unable to locate a report of the Victorian Supreme Court proceedings.

(a) The duty shall in the first instance be apportioned among all the beneficiaries in proportion to the value of their interests; and

(b) When there are any beneficiaries under the will each of whom takes only specific bequests or devises of a value not exceeding two hundred pounds the duty which under paragraph (a) of this section would be payable in respect of the interests of those beneficiaries shall be apportioned among all the beneficiaries in proportion to the value of their interests:

Provided that for the purposes of the foregoing provisions of this section, the value of the interests of the widow or widower, children or grandchildren shall be reduced by an amount ascertained in accordance with the provisions of sub-paragraph (i) of paragraph (c) of sub-section (1) of section eighteen A of this Act.

Adam, J. held that the will made no "different disposition" for the purposes of s.35 and that the deceased's husband had therefore to pay an appropriate proportion of estate duty. In the High Court, Kitto and Owen, JJ. said that this question of a different disposition did not even arise because, in his capacity as surviving joint tenant, the deceased's husband was not a "beneficiary" within s.35 and so could not be affected by apportionment under the section. His position, they said, was not caused by s.35A(b) because this section applies only to property passing from the deceased by gift *inter vivos* or settlement. He was therefore held not to be liable for the estate duty. Menzies, J. reached the same result by a contrary route; he said that a surviving joint tenant, or indeed any recipient of notional estate, was included in the expression "beneficiary" in s.35, but there was in this case a "different disposition" in the will preventing the executor from including him in the apportionment.

In discussing the case in detail, it is convenient for obvious reasons to treat the probate duty and estate duty questions separately.

Probate Duty

It is not proposed to discuss at length the first point arising under this heading, namely, whether an interest in a joint tenancy may be said to "pass" to one or more surviving joint tenants. In their separate judgments, Kitto, J. and Menzies, J. (particularly the former) explored in some detail the theoretical basis of joint tenancy, each quoting the familiar catch-phrase that joint tenants hold "*per my et per tout*". In the writer's view, there is generally little to be gained out of delving too far into this branch of legal theory because the outcome is usually only a series of partially successful attempts to reconcile two contradictory notions, viz., that a joint tenant owns all the property in question and that each of the other joint tenants also owns all of the same property.[5] It is, therefore, fortunate, it is submitted, that in the present case the judges did not allow these theoretical issues to prevent them reaching what was obviously the practical conclusion; namely, that the deceased joint tenant does have an interest that "passes", on the simple grounds that the result of his death is an increase in the estate held by the survivor or survivors and the obliteration of his own rights in respect of the property. Menzies, J. still felt constrained to say that the use of such terminology with regard to joint tenancies was a "fiction" set up by the Administration and Probate Act. It is suggested that this fiction is

[5] The irreligious might make a similar comment on the doctrine of the Holy Trinity.

only necessary because the whole concept of joint tenancy is pretty fictitious anyway.

The second point is a point of construction, yet it deserves close attention, on practical as well as theoretical grounds. Strictly speaking, earlier authorities should not be considered important on a pure matter of construction, yet the main issue between the majority judges and Menzies, J. was that of the relevance of the case of *Hill* v. *Hill*[6] to the will which had come up for consideration. In *Hill* v. *Hill*, the High Court discussed the effect of s.120(1) of the New South Wales Stamp Duties Act, 1920-1962, which is as follows:

> Where any property which is or the value of which is included in the dutiable estate of a deceased person is vested in any person other than the administrator the duty payable in respect thereof . . . shall be paid by the person entitled thereto according to the value of their respective interests therein, to the administrator.

It is important to bear in mind that the Stamp Duties Act has no provision that a "contrary intention" or "different disposition" may affect the operation of this section. The Court in *Hill* v. *Hill* was asked to decide whether the executor's right to recover duty under this section was impaired in the case of a will which gave the residuary estate to trustees upon trust to convert the same and "to pay thereout my just debts funeral and testamentary expenses (which latter expression shall be deemed to mean and include probate duty payable to the Government of the State of New South Wales and estate duty payable to the Government of the Commonwealth of Australia) and to stand possessed of the rest residue and remainder thereof" on certain named trusts. It was held by Rich, McTiernan, Starke and Dixon, JJ. (Evatt, J. dissenting) that duty assessed on certain "notional estate" of the deceased was recoverable under s.120(1) from the person in whom it was vested.

In making this conclusion the majority judges took into account the fact that death duty on both the actual and notional estate must always be paid initially by the executor: it will be a condition precedent to the obtaining of probate.[7] Furthermore, they seemed to concede (or, in the case of Dixon, J., to regard as not relevant) that in administering the will in question, the executor could not "define the content of the residuary bequest"[8] without first deducting from the available assets the duty on notional estate as well as the other duties, debts and expenses, legacies, devises, etc. However, if the holder of notional estate was to be relieved of his liability under s.120(1), it was not sufficient, they said, that the will should contain this kind of direction to the executor; the will must also exercise an intention by the testator that the executor's payment of the duty should be "final" in the sense that recoupment from the holder of the notional estate is to be ruled out. In view of the fact that the executor's right of recovery under s.120(1) is mandatory (the section says that the duty "shall" be paid) and is not qualified by other provisions of the Act, the majority judges, following *O'Grady* v. *Wilmot*[9] said that the executor's payment will be treated as "final" only if the terms of the will virtually bestow upon the holder of the notional estate a legacy equal to the amount of duty chargeable thereon. A disposition of this nature could not, they said, be construed from the terms of the will before them.

In *Eastgate's Case*, Adam, J., in the Supreme Court, and Kitto and Owen, JJ. applied *Hill* v. *Hill*; and they relied heavily on the distinction drawn

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[6] (1933) 49 C.L.R. 411; *sub. nom. Hill* v. *Permanent Trustee Co. of N.S.W. Ltd.* (1933) A.L.R. 543.

[7] (1916) 2 A.C. 231 at 274.

[8] *Id.* quoted in *Hill* v. *Hill* (1933) 49 C.L.R. 411 at 418 (*per* Rich and McTiernan, JJ.).

[9] (1916) 2 A.C. 231.

in that case between a provision in a will which requires duty on notional estate to be taken into account in defining the content of the residuary gift and a provision showing an intention that the executor should be deprived of his right to recover such duty from the person in whom the notional estate is vested. Menzies, J. said that *Hill* v. *Hill* should not, however, be followed because of the differences between the New South Wales and the Victorian Acts and between the terms of the two wills. Moreover, he appeared to reject outright the distinction relied upon by the majority judges, when he said:

> I am unable to find any real difference between a direction that duty, including duty upon notional estate, should be borne by residuary estate and a direction that, in ascertaining residuary estate, duty, including duty upon notional estate, shall first be deducted.[10]

There was thus a cleavage in the High Court on a matter of principle as well as on matters of construction.

The differences between the two Acts to which Menzies, J. referred were the use of the word "shall" instead of "may" in the New South Wales section, and, more important, the fact that the Victorian Act, but not the New South Wales one, contains a "contrary intention" provision. The chief difference between the two wills was that only the will being construed in *Eastgate's Case* employed the phrase "dutiable estate".

It is submitted that the existence of these differences should have led to *Eastgate's Case* being decided along the lines favoured by Menzies, J., whatever the correct view may be on the point of principle over which he disagreed with the majority. The main reason for this opinion is that only the judgment of Menzies, J. appears to take adequate account of the provision in s.122(2) of the Victorian Act that the recovery measures laid down in s.122 may only be adopted if the will does not indicate a contrary intention. The result of s.122(2) is that one is required first of all to examine the terms of the will to see if it prescribes any scheme for the payment of duty on notional estate, and it is only where no such scheme emerges that the rest of the section is called into play. A similar situation exists in the law relating to the application of the assets of a solvent estate to the payment of debts and other liabilities; if the will indicates in what order the assets are to be applied, the order laid down by statute becomes irrelevant.[11] The cases on this branch of the law have stressed that the terms of the will must always be followed through *in toto* before the statutory order is resorted to. (See, for example, *Re Williams*,[12] *Re Atkinson*,[13] *Permanent Trustee Co. of N.S.W. Ltd.* v. *Temple*.[14]) Moreover, it is now well recognized that merely the creation of a so-called "net residue" in the will (that is, a residuary estate whose extent is ascertained only after all debts, etc. are paid) is sufficient, if one of the shares of residue lapses, to displace the statutory provision that intestate estate ("Class I") is applied before residue ("Class II") in the payment of debts. (See *Re Kempthorne*,[15] *Perpetual Trustee Co. Ltd.* v. *Walker*.[16]) There seems no reason why these divisions should not be applied to the situation of a residuary estate defined, after payment of probate duty on notional estate, where by statute the recovery of such duty by the executor is expressly made subject to a contrary intention

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[10] (1964) 37 A.L.J.R. 479 at 485.

[11] See the Wills Probate and Administration Act, 1898 (as amended), s.462(2) and the Second Part of the Third Schedule.

[12] (1949) 57 A.L.R. 751 at 757.

[13] (1930) 1 Ch. 47.

[14] (1957) 57 S.R. (N.S.W.) 301 at 305.

[15] (1930) 1 Ch. 268 (Chancery Division); (1930) 1 Ch. 279 (Court of Appeal).

[16] (1941) 42 S.R. (N.S.W.) 174 at 177.

in the will. In both cases, the intention displaces the statutory rule.

By contrast, s.120(1) of the New South Wales Stamp Duties Act can never strictly be displaced. At best, its effect may be nullified in the manner outlined in *O'Grady* v. *Wilmot* and *Hill* v. *Hill*. But to do so, it is necessary virtually to make a gift to the holder of the notional estate, to give back to him the money which the statute requires him to pay. The fact that an actual disposition is required is emphasized in the judgment of Rich and McTiernan, JJ. in *Hill* v. *Hill*.[17]

Accordingly, it is submitted that in *Eastgate's Case* it was Menzies, J., rather than the majority judges, who used the correct criteria in applying s.122 of the Victorian Administration and Probate Act. To him, the important factor was that he found in a will "a clear expression of intention"[18] that duty upon notional estate should be borne by actual estate. By contrast, Kitto, J.'s reference to "the prima facie rights which in general s.122 gives residuary beneficiaries"[19] is not wholly appropriate.

On more pragmatic grounds, it may be argued that it is advantageous to interpret these corresponding provisions among the various death duty statutes of the Australian States as uniformly as possible, in order to avoid confusion in the administration of estates whose assets are situated in more than one State. This sort of consideration may have influenced some of the cases where both State and Federal duties have been involved. (See, for example, *Re Joseph*,[20] *Re Hoppe*.[21]) Yet each of the statutory provisions in question must also be regarded as an element in the overall scheme for collection of duty set up by the statute of which it forms part, and as these schemes vary from State to State, differences in the language of corresponding sections must necessarily be given due recognition. Alternatively, if uniformity among the various States is to be aimed at, surely the flexibility of the Victorian approach, which does have the advantage of giving priority to the intention of the testator, is preferable to the rigidity of s.120(1) of the New South Wales Stamp Duties Act. If the trend of *Hill* v. *Hill* is to be followed in all decisions on these matters, notwithstanding the different wording of the various statutes, the end result is yet another trap for the draftsman. He will find that what he thought to be a sufficiently clear expression of his client's wishes is in fact insufficient to displace the statutory rule, even though the statute may expressly provide that the testator's intention is to be paramount.

Federal Estate Duty

It will be marked that the majority decision on this aspect of *Eastgate's Case* is comprised of the single significant holding that "beneficiaries" as used in s.35 of the Estate Duty Assessment Act, 1914-1962, means persons taking the actual estate only, and does not include those to whom notional estate has passed. The result of such a holding is that the process of apportionment described in s.35 cannot affect holders of notional estate, who can only be compelled to pay duty where the notional estate passed to them by gift *inter vivos* or settlement (s.35A) or where there is no "administrator" (s.34).

It is submitted that the opposite view, taken by Menzies, J., by Adam, J. in the Victorian Supreme Court, and by the judges in the earlier Victorian decisions of *Re the Will of Harper*[22] and *Re Joseph*, is the preferable view,

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[17] *Cf.* some remarks of Lord Sumner in *O'Grady* v. *Wilmot* (1933) 49 C.L.R. 411 at 418. The High Court relied strongly on this case.

[18] (1964) 37 A.L.J.R. 479 at 485.

[19] *Id.* at 482.

[20] (1960) V.R. 550.

[21] (1961) V.R. 381.

[22] (1922) V.L.R. 512.

on grounds arising from a study of the terms of the Estate Duty Assessment Act and on practical considerations as well.

As to the wording of the Act, the following points may be made:

(1) There are many places within the Act where the single term "estate" must be taken to include "notional estate", and, as was stressed in *Re the Will of Harper*, a consistent reading of the Act would therefore require a similar interpretation in s.35. Thus, in s.8, "the estate" is defined, for the purposes of the Act, and it includes notional estate as described in s.8(4). The exemption from duty in s.8(5) for property passing to certain defined institutions is extended to "so much of the estate as is devised or bequeathed or passed by gift *inter vivos* or settlement . . .", it being necessarily implied that "estate" in this phrase includes notional estate. The same argument may be applied to the opening words of s.35A: "Where an estate includes property which passed by gift *inter vivos* or settlement. . . ." Section 34 provides that where there is no administrator, duty on "the estate" may be recovered from the persons beneficially entitled thereto in proportion to their interests; here, notional estate must be included because otherwise there would be no means of recovering the duty assessed on it. In the same section, payment of duty is made a first charge on so much of "the estate" as is situated in Australia; it is generally accepted that once again notional estate is included. (See, for example, *Re the Will of Harper*.) In the light of these examples, it is difficult to see why "estate" in s.35 should be limited to "actual estate", in the absence of some express indication.

(2) In 1942, s.35 was amended by the substitution of the words "exempt from estate duty by subsection five of section eight of this Act" for the phrase "devised or bequeathed or passes by gift *inter vivos* or settlement for religious, scientific, charitable or public purposes".[23] It follows that prior to this amendment the word "estate", at least where used for the first and second times in the section, must have included notional estate, and "persons beneficially entitled to the estate" must have included recipients of notional estate. It is difficult to conceive that this amendment to a minor exception within the section was intended to alter the whole scope of the section by relieving recipients of notional estate from the process of apportionment.

The different wording of the section prior to 1942 also appears to dispose of any argument that the introduction of s.35A into the Act impliedly limited s.35 by taking over wholly the matter of recovery of duty from strangers to the actual estate. This is because s.35A was enacted in 1928. Had the two amendments been simultaneous, this argument might have had some force.

(3) The difficulty of applying the term "beneficiaries" to persons not named in the will may be largely overcome if the term is regarded as a shorthand form of the phrase "persons beneficially entitled to the estate". This phrase appears in the section before the words "beneficiaries" or "beneficiaries under the will". Clearly "beneficiaries under the will" in paragraph (b) does not include holders of notional estate, but this is no reason so to limit "beneficiaries" in paragraph (a) or "persons beneficially entitled to the estate". Such an argument seems to involve reading the section from the bottom upwards and, furthermore, takes no account of what may be a deliberate contrast between "beneficiaries" and "beneficiaries under the will" in paragraph (b).

(4) If it is artificial to apply "beneficiaries" to holders of notional estate, it is likewise artificial to apply it to persons taking under an intestacy. Yet

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[23] The relevant phrase is now simply "exempt from estate duty", following an amendment made in 1963. See Estate Duty Assessment Act, 1963 (Cth.) s.7.

it is hardly conceivable that s.35 should be limited only to situations where the deceased has left a will.

(5) As Menzies, J. points out,[24] this use of "beneficiaries" is explicable on the basis that the Act throughout seeks to assimilate beneficiaries under the will and holders of notional estate, and to treat them together for estate duty purposes.

In addition to the above arguments, there are various practical reasons why the view of Menzies, J. seems preferable. The result of *Eastgate's Case* is that, although property held by a deceased person under a joint tenancy is assessable for estate duty, the amount of duty assessed on it cannot be recovered by an executor from the surviving joint tenant. But in addition it is arguable that, as a further result of the case, if the Commissioner chooses to exercise his rights against the surviving joint tenant under any charge imposed in his favour by s.34 of the Act,[25] the joint tenant may recover from the executor the full amount of duty which was extracted out of the charged property, notwithstanding that a proportion of that duty was assessed on the property itself.

This anomalous conclusion arises in the following way. By s.29 where the estate has an "administrator", the only persons liable to the Commissioner for duty are the administrator himself and anyone else whom the Commissioner chooses to render liable under s. 35A(a). By s.34, the Commissioner has a charge over all the actual and notional estate (unless *Re the Will of Harper* is wrong on this point). It follows that the deceased's interest in the joint tenancy is subject to a charge, but the surviving joint tenant is under no personal liability to pay duty, not even the duty assessed on the deceased's interest. It is submitted that on general principles such a situation will in itself be sufficient to confer rights of subrogation on the surviving joint tenant if and when the Commissioner elects to enforce the charge against him; he will be subrogated to the Commissioner's rights under s.29 to obtain payment of duty from the administrator. But for the holding in *Eastgate's Case*, the administrator's situation would be relieved on account of his right to "apportion" the duty under s.35. This right has been described as a right to secure "practical indemnification" through subrogation to the Commissioner's charge; the administrator cannot claim a direct charge or personal liability in his favour. (*Perpetual Trustee Coy. Ltd.* v. *Adams*,[26] *Re the Will of Harper, Re Cummings*.[27]) But the point of *Eastgate's Case* is that apportionment cannot be availed of by an administrator against a surviving joint tenant. Hence, the right of subrogation to the Commissioner's charge will end up operating in favour of the joint tenant, not the administrator.

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[24] (1964) 37 A.L.J.R. 479 at 486-87.

[25] While dealing with the question whether a deceased's interest in a joint tenancy "passes" to the survivor within the meaning of the Victorian Administration and Probate Act, Kitto, J. suggested that an executor's right under s.122(4) of that Act to apply to court for an order charging notional estate with the payment of duty assessed on it would not be available to him in the case of a joint tenancy, because the deceased's interest in the joint tenancy no longer exists, having wholly merged in the estate of the survivor (see (1964) 37 A.L.J.R. 479 at 482). Now any charge imposed under s.122(4) does not come into existence until such an order is made, whereas the Commissioner for Estate Duties' charge under s. 34 of the Estate Duty Assessment Act arises at the moment of death. For this reason, it is suggested that Kitto, J.'s remarks would not, and should not, apply to the charge for Federal estate duty. The deceased's interest exists at the moment of death and is capable of being charged. If it did not, an estate consisting solely of property held under joint tenancy would be wholly free from estate duty, because there is no personal liability upon the surviving joint tenant, and there would be no charge to enforce against him either.

[26] (1924) 24 S.R. (N.S.W.) 87.

[27] (1939) 34 Tas. L.R. 77.

If this argument is valid, there is the further anomaly that where the estate has no "administrator" the surviving joint tenant will have to pay the duty assessed on the deceased's interest; this follows from s.34 and *Re Busby*.[28] Thus the joint tenant's liability to or freedom from duty will depend on the incidental question as to whether or not there is an "administrator".

Kitto, J. seemed to regard as conclusive the consideration that a surviving joint tenant *cannot* be affected by a process of apportionment which the administrator carries out.[29] It is respectfully submitted that "apportionment" as described in *Perpetual Trustee Co. Ltd.* v. *Adams* and the other cases mentioned above could be effectively utilized by an administrator against a stranger to the actual estate, clumsy though the process may be. "Apportionment" is a difficult word in this section, as has often been pointed out, yet it must be interpreted so as to involve the creation of some sort of rights and liabilities between the administrator and the other persons referred to in s.35; otherwise it will be meaningless. As has been pointed out, apportionment among holders of notional estate was clearly contemplated by the legislature prior to the amendment to the section in 1942. There is no reason why it should not still be practically possible.

Conclusion

Eastgate's Case has not made the law as to death and estate duties any easier. Notably, the anomalies in ss.29, 34, 35 and 35A of the Estate Duty Assessment Act have, it is submitted, been increased by the majority's decision. A rewording of parts of these sections so as to take more clearly into account the fact that "estate" under the Act includes two distinct types of property, notional and actual estate, would be the most appropriate solution. But in the meantime, the most manageable line of approach is that of Menzies, J., that is, to consider the Act as assimilating notional and actual estate and to disregard the artificialities that may arise when words strictly appropriate to actual estate only are used in reference to both.

The executor seems to have won on the swings but lost on the roundabouts. He may now call on another High Court authority to the effect that a very clear expression of intention is required in the will to prevent him recovering from recipients of notional estate the duty assessed on it. However, a surviving joint tenant has been granted an immunity against him as regards Federal estate duty. Both these points are, of course, important ones for practitioners to bear in mind, both in the drafting of wills and in advising on the administration of deceased estates.

M. R. CHESTERMAN, B.A., Case Editor—Fourth Year Student.

PROTECTION TO A PURCHASER BEFORE REGISTRATION UNDER THE REAL PROPERTY ACT

I.A.C. (FINANCE) PTY. LIMITED v. *COURTENAY AND OTHERS*

In 1930 a section was added to the Real Property Act (N.S.W.) which was a model of obscurity and unintelligibility. Perhaps for this reason there has been little written on its meaning and effect, and it was thirty years before it arose for judicial determination. It has now been considered by the New

[28] (1930) 30 S.R. (N.S.W.) 399.
[29] (1964) 37 A.L.J.R. 479 at 483.