[HIGH COURT OF AUSTRALIA].

DAWSON . . . . . APPELLANT;
DEFENDANT,

AND

PERPETUAL TRUSTEE COMPANY (LIMITED) AND OTHERS . . . . . RESPONDENTS.
PLAINTIFF AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 25, 26; *Dec.* 3.

Dixon C.J., Kitto and Taylor JJ.

Administration—Deceased estate—Real and personal property—Situate in Australia, New Zealand and other countries—Personal representatives—Australia—Appointment of three sons and trustee company as "Colonial Trustees"—New Zealand—Appointment of three sons as "Executor"—Great Britain—Appointment of three sons as "English Executor" re personal estate—New Zealand estate—Trustee company—Right to act as trustee—Getting in of testator's New Zealand estate—Inquiry therefor by New South Wales Court—Propriety.

A testator, who died in 1932, left personal property in Australia and England and some real and personal property in New Zealand and in the Principality of Monaco. By his will he appointed (a) his three sons, P., S. and N., and a trustee company, calling them his "Colonial Trustees", to be his "executor" (*sic*) to administer his real and personal estate in Australia; (b) P., S. and N., without the trustee company to be his "executor", but without particular designation, to administer his real and personal estate in New Zealand; and (c) P., S. and N., calling them his "English Trustees", to be his "English Executor" to administer all his personal estate in Great Britain. A personal representative was not appointed for the Principality of Monaco to deal with the property situated there. All property other than that in Australia and New Zealand was devised and bequeathed to the testator's English trustees and the property in Australia and New Zealand to his "Colonial Trustees in Australia and New Zealand". In a suit brought by the company in 1940, and to which P. and S. and later others were defendants, the Court ordered, *inter alia*, that it be referred to the Master in Equity to conduct certain inquiries and take certain accounts, including an inquiry "as to whether the executors should take any and if so what steps to get in the proceeds of the testator's estate in New Zealand, England and Monaco." Action proceeded on that order. By motion made by the company in 1951, the Court ordered that in lieu of the inquiry set out above, it should be referred to the Master in Equity to conduct an inquiry as to whether the company and S. (P. and N. having in the meantime died) as trustees of the testator's will and codicil should take any and if so what steps to get in the testator's estate in New

Zealand, England and Monaco. Whether or not the executorial duties in respect of the New Zealand estate had been completed was not shown. Upon appeal,

Held (1) that the company was one of the trustees of the New Zealand estate as well as of the Australian estate; and (2) that the company and S. being within the jurisdiction of the Court and as administration of the estate was proceeding, the Court could with propriety inquire into the question whether they should take any and, if so, what steps to get in the testator's estate in New Zealand.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.), affirmed.

APPEAL from the Supreme Court of New South Wales.

David Stewart Dawson died on 6th August 1932 leaving personal property in the States of New South Wales, Victoria, Queensland and Western Australia in the Commonwealth of Australia and in England, and real and personal property in the Dominion of New Zealand and in the Principality of Monaco. By his will he appointed his three sons, Percy, Stuart and Norman, and the Perpetual Trustee Co. (Ltd.) whom he expressed to be thereinafter called his colonial trustees, to be his "executor" to administer his real and personal estate in the Commonwealth of Australia and the said three sons to be "executor" to administer his real and personal estate in New Zealand and he appointed the said three sons whom he expressed to be thereinafter called his English trustees, to be his "English Executor" to administer all his personal estate in Great Britain. He devised and bequeathed all his real and personal property whatsoever and wheresoever expressly including his property in the Principality of Monaco "except property otherwise disposed of by this my will or any codicil thereto and except my real and personal estate in New South Wales, Victoria, Western Australia, Queensland and New Zealand and elsewhere in Australia and New Zealand devised hereinafter and bequeathed to my Colonial trustees in Australia or New Zealand" to his English trustees upon certain trusts which require that ultimately the net proceeds of the property devised and bequeathed to them shall be remitted by them "to my Colonial Trustees in Australia and New Zealand to be held and applied by them upon the trusts hereinafter declared concerning my Colonial estate". He then devised and bequeathed "to my Colonial Trustees in Australia and New Zealand all my real and personal estate and effects situate and being at the time of my death in New South Wales, Victoria, Western Australia and Queensland and elsewhere in the Commonwealth of Australia and in New Zealand" and directed that "my Colonial Trustees in Australia and New. Zealand" should stand

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possessed of the net proceeds of the estates devised and bequeathed to them and of any moneys remitted to them by his English trustees upon certain trusts which disposed of all the beneficial interests.

Probate of the will and codicil was granted in New South Wales on 25th May 1933 to the Perpetual Trustee Co. (Ltd.) and the testator's son Percy Stewart Dawson, leave being reserved to the two sons to come in and prove. That probate was resealed in the other States of the Commonwealth. Percy Stewart Dawson, who was also a beneficiary under the will, died after the decree for administration had been made in this suit and the suit was revived against his personal representatives. Stuart Stewart Dawson was originally a party to the suit as a beneficiary. Since Percy Stewart Dawson's death probate had been granted to Stuart Stewart Dawson in New South Wales pursuant to the leave reserved and at the time of the motion referred to hereunder he was the sole executor to whom probate had been granted in New Zealand. At that time the New Zealand estate consisted almost wholly of real estate in New Zealand and shares in companies incorporated in that Dominion. It did not then appear whether the executorial duties were complete notwithstanding that the testator died in 1932.

In a suit brought in 1940 in the equitable jurisdiction of the Supreme Court of New South Wales, by the Perpetual Trustee Co. (Ltd.) against, as first amended, Percy Stewart Dawson, Stuart Stewart Dawson and Alexander Ewan Campbell as official assignee of the bankrupt estate of the said Stuart Stewart Dawson, the Court, on 20th September 1940, ordered, *inter alia*, that it be referred to the Master in Equity to conduct certain inquiries and take certain accounts, including an inquiry "as to whether the executors should take any and, if so, what steps to get in the proceeds of the Testator's estate in New Zealand, England and Monaco." The inquiries and the taking of accounts proceeded up to a point.

By motion before *Roper* C.J. in Eq., on 19th October 1951, the Perpetual Trustee Co. (Ltd.) asked that in lieu of the inquiry set out above it should be referred to the Master in Equity to conduct an inquiry "as to whether the Plaintiff Company and Stuart Stewart Dawson as trustees of the Will and Codicil of the Testator should take any and, if so, what steps to get in the Testator's Estate in New Zealand, England and Monaco."

Notice of the motion was served upon the defendants to the suit, being, by amendment, Stuart Stewart Dawson, Alexander Ewan Campbell, as the official assignee of the bankrupt estate of the said Stuart Stewart Dawson, the Union Trustee Co. of Australia Ltd.

and Constantine Don Service as executors of the will of Percy Stewart Dawson deceased, Stewart Dawson Holdings Pty. Ltd., Stewart Dawson Pitt Street Pty. Ltd. (In liquidation), Stewart Dawson Strand Property Pty. Ltd. and Stewart Dawson Investments Pty. Ltd.

Roper C.J. in Eq. made the order as asked.

From that decision the defendant Stuart Stewart Dawson appealed to the High Court.

Sir *Garfield Barwick* Q.C. (with him *A. B. Kerrigan*), for the appellant. The will appoints three different groups of executors namely (i) for the Australian estate; (ii) for the New Zealand estate; and (iii) for the English estate. It would appear that at the date of the decree the executorial duties in Australia were not completed and in New Zealand they were and still are incomplete. The appellant claims that the plaintiff-respondent is not a trustee, or, alternatively, is not a trustee of the New Zealand estate. Upon the right construction of the gift of the non-English estates the property was given devised and bequeathed to those persons who were executors in New Zealand as well as in Australia. The testator did not expressly appoint any person to be both executor and trustee. He gave to the persons whom he appointed as executors a collective name in two instances, namely, in the case of his Australian executors and in the case of his English executors. The testator did not conceive any need to give his New Zealand executors a collective name as they were part of a group to which he had already given a collective name. There was not any need to do so because he had already described them as three of his colonial trustees and in going to divide his estate into two parts, English and colonial. He separated the functions of executor from those of trustee, hence it did not follow that functions were given to the same person. He did not necessarily give the function of trustee to the person in the group of persons to whom he gave the function of executor. He did not expressly name any persons as his colonial trustees in Australia, nor any persons as his colonial trustees in New Zealand. The words used are "in Australia and New Zealand", not "in Australia and in New Zealand", that is to say, the testator contemplated one group of persons who had functions in both countries. The suggestion that "colonial trustees" are the same as "colonial trustees in England and New Zealand" is not tenable. There is not any identity between them. The testator made a devise and bequest to those upon whom he lays trustee obligations upon the assumption that executorial

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duties were complete in all jurisdictions—to the persons who were English trustees and upon whom he placed limited duties: (i) convert and remit; (ii) remit accruing income; (iii) power to lease unconverted assets; (iv) directions to retain investments in form; (v) to make up his wife's income. He desired to make slightly more restricted duties as to the English estate than as to the colonial estate. By that time the New Zealand executorial duties would be completed and the persons who were the executors would have become trustees. Thus, by the time he made his gift he would have three persons who were his trustees in New Zealand. They would be part of a group of persons he has styled "my Colonial Trustees". Thus they are his colonial trustees in New Zealand. The testator regarded "my Colonial Trustees in Australia and New Zealand" as one group. This excludes the plaintiff company. It is consonant with other provisions of the will. The testator has divided his estate into English and colonial estates. He regards the English trustees and colonial trustees as identical in person though having different functions in their different capacities. It is not inconsistent with later references, after the gift has been construed, to colonial trustees; nor with the use by the testator of the words "or" and "and". The use of the disjunctive "or" assists the view of separate estates. Alternatively, New Zealand executors are New Zealand trustees. If the plaintiff company were not a trustee at all, or, at least, not a trustee of New Zealand assets an inquiry would be inappropriate. The plaintiff company either is not a trustee at all, or has no duty in relation to the New Zealand assets, and no right to call for any transfer of them to Australia. The decree is unappealable but it ought not to have been made. There is not any evidence of domicile, therefore there is not any jurisdiction to deal with external immovable or movable property unless there is some personal equity between the parties. The court cannot require something to be done in connection with an order which the court did not have any power to make. The suit was by an Australian executor claiming under an Australian grant, and a New Zealand executor claiming under a New Zealand grant. The plaintiff and defendant at the commencement of the suit only had executorial power in relation to Australian assets. The claim made in court was that a co-executor should be either removed or restrained. The decree was made in a suit to which the beneficiaries were not parties. No beneficiary asked the court to administer the New Zealand assets or the English assets, or the Australian assets. The suit was one for administration of Australian assets. There was not any jurisdiction in the court to make an order with

respect to assets outside New South Wales, that is, foreign assets. In the absence of power it is not competent to hold inquiries for the purpose of making an incompetent order. There was not any issue in the pleadings as to the trustee functions. The general principle is that a court may not deal with external assets : *Halsbury's Laws of England*, 2nd ed., vol. 6, pp. 223-224 ; *Dicey's Conflict of Laws*, 4th ed. (1927), p. 33 ; *British South Africa Co.* v. *Companhia de Mocambique* (1) ; *Ewing* v. *Orr Ewing* (2) ; *Ellerman Lines Ltd.* v. *Read* (3) ; *Deschamps* v. *Miller* (4) ; *Cheshire* on *Private International Law*, 3rd ed. (1947), p. 755. The court should not do indirectly what it cannot do directly. It is incompetent for the court now to make an order directing the defendant to hand over assets in New Zealand to the plaintiff. A court never begins a futility. It is not proper to do so (*Reiner* v. *Marquis of Salisbury* (5)). There is not any warrant for directing an inquiry which would be vain or futile. Although present in a personal capacity the defendant, *qua* trustee, in a representative capacity has never been a party. On the assumption that the construction is against the appellant it must be borne in mind that the executorial duties have not been completed. The affidavit shows that there are debts in New Zealand.

N. H. Bowen Q.C. (with him *R. Fox*), for the plaintiff-respondent, the Perpetual Trustee Co. (Ltd.). The original suit was properly constituted as regards parties, and the court could make a competent order : *Equity Act* 1901-1947 (N.S.W.), s. 23 (a) (d) (f). A decree for general administration may be made by a court of the country where trustees and some property are situated. It need not be the country of the testator's domicile (*Ewing* v. *Orr Ewing* (6)). The court of such country is a *forum competens*, but whether it is a *forum conveniens* is another matter and one in the decision of which domicile may be a material factor. There are not any competing applications. The court has full authority over persons who are trustees. The decree in this case was for general administration of the testator's real and personal property, that is, his property everywhere. It is suggested on behalf of the appellant that there was not any jurisdiction to make it because there was not any equity between the plaintiff and the defendant, and that the order sought would be futile. As to equity the main answer is that no such equity is necessary. The basis of the court's jurisdiction is

(1) (1893) A.C. 602.
(2) (1883) 9 App. Cas. 34, at p. 40.
(3) (1928) 2 K.B. 144, at p. 155.
(4) (1908) 1 Ch. 856, at pp. 863-864.
(5) (1876) 2 Ch. D. 378, at pp. 384-385.
(6) (1883) 9 App. Cas., at p. 39 ; (1885) 10 App. Cas. 453, at pp. 499, 505.

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its power to act on matters of conscience upon persons present within the jurisdiction. It binds men's consciences not to break contracts; not to commit breaches of trust and so on. If a person is in the jurisdiction and is subject to a fiduciary duty the courts can enforce that duty (even though it relate to land in another country). In a general way this will often require that it be shown there is such an equity between the plaintiff to the suit and the defendant otherwise the court will not entertain the suit. In this case the position is different. This estate is actually being administered by the court. The appellant is within the jurisdiction. As a colonial trustee he is subject to fiduciary duties which extend to the New Zealand estate, movable or immovable. The court can act to bind his conscience, whether or not there is an equity between him and the plaintiff company. The court is administering the estate and may think the appellant is committing breaches of trust. The court may act: *Dicey's Conflict of Laws*, 6th ed. (1949), pp. 142, 145. There is an equity between the plaintiff company and the appellant. As colonial trustees they are co-trustees of the vested interest in the New Zealand property. As co-trustees they have mutual obligations of loyalty and exchange of information. The appellant is in breach of his obligation to the plaintiff company.

As to futility, it should be remembered that general administration is not only for the benefit of beneficiaries but also for the protection of trustees. The trustees retain their duties, but their powers are sterilized. They cannot make decisions without reference to the court. There is a gift to the colonial trustees (who in the circumstances are the plaintiff company and the appellant) of the New Zealand estate, that is, a vested interest, though it may not come into possession until the executorial duties are performed in New Zealand. Nevertheless they are bound to ensure that its vesting in possession is not unduly or wrongly delayed. The order sought is for an inquiry as to what steps, if any, they should take. As a direct result of the order and inquiry the trustees will obtain or be able to obtain complete protection. The beneficiaries, also, will receive protection. The order and inquiry will not necessarily result in a direction to transfer. It may result in directions to proceed in New Zealand. But the court would have power to order the appellant to transfer the shares and, possibly, the land: see *Dicey's Conflict of Laws*, 6th ed. (1949), pp. 141, 145, 149; *Re Moses*; *Moses* v. *Valentine* (1); *Re Clinton*; *Clinton* v. *Clinton* (2). The court is responsible for administration. It can only obtain information from those subject to its jurisdiction and

(1) (1908) 2 Ch. 235.

(2) (1903) 88 L.T. 17, at p. 19.

can only act in the particular estate through the trustees. The court's general administration is not to be rendered futile. It would not be proper to join the appellant in the suit as a New Zealand executor. Joinder would not be in a capacity but as a person. It was not necessary to allege in the statement of claim that the appellant was a New Zealand or a New South Wales executor. An allegation in par. 3 of that statement of claim would, however, be sufficient: *Dicey's Conflict of Laws*, 6th ed. (1949), p. 450; *Logan* v. *Fairlie* (1).

R. Fox, for the defendants-respondents Union Trustee Co. of Australia (Ltd.) and C. Don Service, submitted to such order as the Court might make.

Sir *Garfield Barwick* Q.C., in reply. When the executorial duties are completed the property may be completely different in form and value. An inquiry at this stage would not serve any useful purpose: see *Daniell's Chancery Practice*, 7th ed. (1901), vol. 1, p. 391; *Harrison* v. *Gurney* (2); *Clarke* v. *Earl of Ormonde* (3); *Houlditch* v. *Marquis of Donegal* (4). Even now it would not be appropriate to make a decree for general administration of the trusts. It is not any part of the court's function to interrogate an executor under a foreign grant so as to determine what remains to be done under that foreign grant. There is not any equity between the parties to this suit which could warrant a new inquiry.

Cur. adv. vult.

Dec. 3.

THE COURT delivered the following written judgment:—

This is an appeal from an order made on 6th December 1951 by *Roper* C.J. in Eq. in an administration suit commenced on 27th March 1940. The estate concerned was that of David Stewart Dawson deceased. A decree for its administration was made on 20th September 1940. The order of 6th December 1951 from which the appeal is brought did no more than order an inquiry. The particular form of inquiry was substituted for a somewhat similar inquiry directed by the original decree. The order did not declare or otherwise bind rights and it is difficult to see why the order was not interlocutory and it is by no means clear how it affected prejudicially the appellant or anybody else to the pecuniary extent

(1) (1825) 2 Sim. & St. 284 [57 E.R. 355].
(2) (1821) 2 Jac. & W. 563 [37 E.R. 743].
(3) (1821) Jac. 108, at pp. 111, 121 [37 E.R. 791, at pp. 792, 795-796.]
(4) (1834) 8 Bli. N.S. 301, at p. 341 [5 E.R. 955, at p. 969].

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necessary to give an appeal except by special leave. However neither leave nor special leave to appeal was obtained but the appeal was instituted as of right.

The testator, who died on 6th August 1932, left personal property in England, Australia and New Zealand and some real property in New Zealand. He possessed also a villa at Monte Carlo together with some household furniture and effects. By his will he appointed his three sons and the Perpetual Trustee Co. (Ltd.) (which is the plaintiff-respondent), calling them his colonial trustees, to be his executor (*sic.*) to administer his real and personal estate in Australia. He appointed his three sons, without the plaintiff trustee company, to be his " executor " to administer his real and personal estate in New Zealand and his three sons (calling them his English trustees) to be his " English Executor " to administer all his personal estate in Great Britain. He attached no particular designation to his three sons in appointing them his executor(s) to administer his real and personal estate in New Zealand. No appointment was made of a personal representative for the Principality of Monaco to deal with his villa and effects at Monte Carlo. The will proceeded to devise and bequeath all his property, including that in the Principality of Monaco, but excepting that in Australia and New Zealand, to his English trustees and to devise and bequeath his property in Australia and New Zealand to his " Colonial Trustees in Australia and New Zealand ", a description which *Roper* C.J. in Eq. has held to mean the plaintiff Perpetual Trustee Co. (Ltd.) and the three sons. The names of the three sons are respectively Percy, Stuart and Norman. Norman died in England shortly after the making of the decree for administration, having before his death been declared bankrupt. Percy died on 5th January 1947. Stuart, who is the survivor, was declared bankrupt before the commencement of the suit. Probate of the will was granted by the Supreme Court of New South Wales to the plaintiff trustee company and to Percy, leave being reserved to Stuart and to Norman to come in. It seems that Stuart has done so since the suit. He is the now appellant. The Perpetual Trustee Co. (Ltd.) when they instituted the suit named Percy and Stuart as defendants. Other parties have since been added. The plaintiff company complained that Percy had dealt with assets of the estate without reference to the company and, for his own advantage, had in effect excluded the company from the proper exercise of its duties in the administration of the estate and had committed breaches of trust. There were no direct charges against Stuart but it was alleged in effect that Percy had availed himself of the control, obtained in consequence of his position, over a company to cause large advances to be made to

Stuart as well as to Norman and himself. The relief sought was a decree for the administration of the real and personal estate of the testator under the direction of the Court, accounts and inquiries, certain specific orders and the removal of Percy from his position as one of the colonial trustees.

The suit was heard by *Roper* C.J. in Eq., who did not remove Percy from his position as a colonial trustee but otherwise made a decree of the description sought by the plaintiff trustee company. The decree declared that the real and personal estate of the testator ought to be administered by and under the direction of the court and ordered accordingly. It ordered an inquiry as to assets in Australia, an account of the assets coming to the hands of the plaintiff trustee company and Percy or either of them, an account of the testator's debts in Australia, an account of the funeral, testamentary expenses and duties payable in connection with the estate in Australia, various accounts and inquiries with reference to annuitants and legatees, the payment of annuities, and of the amounts owing to two companies and finally the inquiry replaced by the order under appeal. It was expressed as an inquiry as to whether the executors should take any and if so what steps to get in the proceeds of the testator's estate in New Zealand, England and Monaco.

Difficulties arose in making this inquiry because of the use of the word "executors" and of the word "proceeds". Consequently the plaintiff trustee company moved before *Roper* C.J. in Eq. for an order somewhat differently expressed. Upon the motion his Honour ordered that in lieu of the inquiry directed by the decree it be referred to the Master in Equity to conduct the following inquiry, namely, an inquiry as to whether the plaintiff company and Stuart Stewart Dawson as trustees of the will and codicil of the testator should take any and if so what steps to get in the testator's estate in New Zealand, England and Monaco.

The appeal against this order is based on two grounds. The first is that under the will the plaintiff trustee company has, as the appellant asserts, nothing to do with the New Zealand assets of the estate nor for that matter with the English assets or those situated in Monaco. No order, therefore, could or should be made at the plaintiff's suit in reference to such assets. The second ground is that even supposing that the plaintiff trustee company is a trustee of the New Zealand assets, an administration by the Supreme Court of New South Wales does not extend to such assets, does not extend to movables and still less to immovables: no inquiry should be ordered where no substantive order could follow.

The first of these two grounds the appellant finds in a construction which he places upon the will. His contention is that the plaintiff

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trustee company does not take as one of the trustees under the devise and bequest to the testator's colonial trustees in Australia and New Zealand. True it is that " my Colonial Trustees " is a defined expression and that by the definition the persons called " my Colonial Trustees " are the three sons of the testator (Percy, Stuart and Norman) and the Perpetual Trustee Co. (Ltd.) of Australia. But the expression used by the devise and bequest in question is not " my Colonial Trustees " *simpliciter* but " my Colonial Trustees in Australia and New Zealand ". The addition of the words " in Australia and New Zealand " according to the appellant's contention rob the expression of the operation ascribed to it by the definition of comprising all four of the colonial trustees and lead to the exclusion of the trustee company or alternatively the exclusion of the trustee company in relation to the New Zealand assets. The provision is in the following form :—" I devise and bequeath to my Colonial Trustees in Australia and New Zealand all my real and personal estate and effects situate and being at the time of my death in New South Wales, Victoria, Western Australia and Queensland and elsewhere in the Commonwealth of Australia and in New Zealand ". It might be thought that there could be only one way of ascertaining who are the colonial trustees for the purpose of this clause and that is to turn to the place where they are named and the reader is instructed that they are " hereinafter called my Colonial Trustees ". But the appellant attempts to meet this simple view by pointing to the fact that the will separately appoints executors to administer the real and personal estate in Australia, in New Zealand and in Great Britain and to the further fact that the plaintiff trustee company is joined with the three sons in the first executorship and not in the second and third. In this an incompatibility is seen with a choice of the trustee company as one of the trustees of the New Zealand assets. The appellant deftly removes the incompatibility by applying the definition, not as denoting all the persons comprised therein collectively, but *sub modo* as referring only to so many of them as fit the case. Thus the words " I devise and bequeath to my Colonial Trustees in Australia and New Zealand " is read as meaning that he devises and bequeaths his property to such of the persons falling within the definition of colonial trustees as are concerned with both Australia and New Zealand, that is to say, the three sons. Thus the plaintiff trustee company is not included in the operation of the devise and bequest because it is not concerned with New Zealand. The testator intended, so the appellant says, to join the trustee company with his three sons in the executorial duties in relation to his Australian property but not otherwise and in particular not as trustees. If

in fact the testator were pursuing this strange policy it is curious that he should, as an examination of the trusts or directions which follow will show he did, commit expressly to the persons to whom he devises and bequeaths his Australian and New Zealand property under the description of "my Colonial Trustees in Australia and New Zealand", such characteristically executorial duties as the collection of debts and choses in action, the payment of debts owing by him in Australia and New Zealand at his death and the payment of his funeral expenses. An alternative reading of the bequest and devise calculated to support the appeal was submitted. It makes the expression "my Colonial Trustees in Australia and New Zealand" apply referentially or alternately to the plaintiff trustee company and the three sons as one group in the case of the Australian estate and to the three sons as another group in the case of the New Zealand estate. If this is right the testator certainly provided an example of weasel words.

The fact is that the will is drawn somewhat inartistically and perhaps even confusedly in relation to the duties of the three groups of executors and the two groups of trustees, English and colonial. But the purpose is plain enough. The greatest part of the testator's property was in Australia. But that in New Zealand was important and that in England and Monaco was by no means inconsiderable apart from the liabilities with which the English estate was saddled. The English estate was vested in the English trustees but they were to remit to the colonial trustees the net proceeds of realization after discharging liabilities. If the funds in the hands of the English trustees were insufficient for the purpose of carrying out the duties and trust imposed on them, the colonial trustees were to remit to them what was required. In the case of the colonial estate there was a trust for conversion as in the case of the English estate but there was full power conferred to retain the estate in the form of investments in which the testator left it. He expressed a wish that the shares in various companies in England, Australia and New Zealand, bearing his name, should not be sold except in the last resort. It is evident that he contemplated the trusts of his will continuing for some time. Throughout the will his estate is clearly divided into the English estate and the colonial estate. The distinction between his English trustees on the one side and his colonial trustees on the other is drawn with consistency and firmness. But while his English trustees are his English executors and his colonial trustees are his Australian executors, the latter are not his New Zealand executors. Why is a matter of speculation. It may have been because the English solicitors who drew his will doubted the qualification of an Australian trustee

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company to obtain probate in New Zealand. It may have been a fanciful or a substantial reason. But it would be absurd to suppose that every reference to his colonial trustees was made in a sense excluding the trustee company from the trusts so far as they covered the New Zealand estate. For example there is an express direction to the colonial trustees under that name *simpliciter* to hold upon certain trusts moities of a share that must comprise New Zealand as well as other assets. Another provision empowers " my English Trustees and my Colonial Trustees " to lease land in Great Britain *or* Australia *and* New Zealand. Repeatedly the English and the colonial estate is contrasted: repeatedly the colonial trustees and the English trustees differentiated.

The decision of *Roper* C.J. in Eq. that the plaintiff trustee company is one of the trustees of the New Zealand as well as the Australian estate is clearly right.

The second ground upon which the appeal is supported denies the propriety of an inquiry by the Supreme Court of New South Wales into the question whether the plaintiff trustee company and the appellant Stuart Stewart Dawson should take any and what steps to get in the testator's estate in New Zealand. Little if anything was said about the inclusion of the estate in England and Monaco. No doubt the duty of the English trustees to remit the net proceeds of realization was considered enough to support the direction for an inquiry as to what should be done about getting in those assets.

This ground of appeal assumes, of course, that the plaintiff company as well as the appellant is a trustee of the New Zealand estate. It would perhaps be enough to say that as the plaintiff and the appellant are within the jurisdiction of the Court and the administration of the estate under the direction of the Court is proceeding the assumption itself destroys the ground of appeal.

But the appellant invokes some other elements. First he points out that there is no information about the domicile of the testator. This cannot therefore be considered an administration of the *forum domicilii* to which other administrations would be ancillary. Moreover there are immovables in New Zealand. Then the grant of probate in New South Wales, although it is not in evidence, must be taken to follow the will and be a grant to the plaintiff company and (in the events that have happened) to the appellant limited to the Australian estate. It is to be assumed that the will is proved in New Zealand and that the appellant Stuart is executor, although there is nothing to show it. There is nothing, it is said, to show that the executorial duties in New Zealand have been completed. It may be remarked that there is nothing to show the contrary and

it is twenty-one years since the testator died. However, on the basis of these considerations the argument for the appellant disputes the application of such cases as *Stirling-Maxwell* v. *Cartwright* (1); *In re Orr-Ewing* (2) and in the House of Lords the same case as *Ewing* v. *Orr-Ewing* (3). It is true that there is no information about the testator's domicile, but one thing seems to be quite certain about it. He was not domiciled at the time of his death in New Zealand. What the state of facts is concerning the assets in New Zealand does not appear. It is a matter that will be elucidated during the inquiry. If an administration of the New Zealand estate under the direction of the Court is found desirable, it may be either necessary or expedient for the plaintiff trustee company to resort to the jurisdiction of the Supreme Court of New Zealand. That again is a matter that will be covered by the inquiry.

But the Supreme Court of New South Wales has before it a trustee, the defendant appellant Stuart Stewart Dawson, who under a single trust is a trustee of assets in New Zealand and in New South Wales and elsewhere in Australia. The defendant appellant is personally amenable to the jurisdiction of the New South Wales Court and is party to a suit in which a decree for administration has been made at the suit of his co-trustee. It is said that the decree is based on a suit framed as an executor's proceeding and not for the administration of the trusts. The distinction is untenable. The plaintiff in the suit made no such distinction and the decree is for general administration.

What will be the outcome of the inquiry perhaps the parties can foresee better than the Court. Indeed the vigour of the resistance to the inquiry suggests it. But at least the Court has jurisdiction by remedies *in personam* to protect the trust property if need be although it may be in New Zealand. If by any chance the facts which the Master reports show that the Supreme Court of New South Wales is *forum non conveniens*, doubtless that Court will then act accordingly: cf. *Jubert* v. *Church Commissioners for England* (4).

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant, *C. Don Service & Co.*

Solicitors for the respondents, *Sly & Russell.*

J. B.

(1) (1879) 11 Ch. D. 522.
(2) (1882) 22 Ch. D. 456.
(3) (1883) 9 App. Cas. 34.
(4) (1952) Sess. Cas. 160.