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In re An Application by the Tasmanian Aboriginal Centre Inc [2007] TASSC 5 (9 February 2007)

Last Updated: 16 February 2007

[\[2007\] TASSC 5](#)

CITATION: *In re An Application by the Tasmanian Aboriginal Centre Inc* [\[2007\] TASSC 5](#)

PARTIES: IN RE AN APPLICATION BY THE

TASMANIAN ABORIGINAL CENTRE INC

and

IN RE THE ESTATES OF

17 DECEASED TASMANIAN ABORIGINALS

TITLE OF COURT: SUPREME COURT OF TASMANIA

JURISDICTION: ORIGINAL

FILE NO/S: M19/2007

DELIVERED ON: 9 February 2007

DELIVERED AT: Hobart

HEARING DATE: 9 February 2007

JUDGMENT OF: Underwood CJ

CATCHWORDS:

[Edited reasons for judgment delivered *ex tempore*]

Succession - Wills, probate and administration - Probate and letters of administration - Grants of probate and letters of administration - Limited special and conditional grants of probate and administration - Other cases - Where no estate except remains of deceased - Whether limited grant to recover and bury remains should be granted.

[Administration and Probate Act 1935](#) (Tas), [s66\(3\)](#).

In the Goods of Tucker (1864) 3 Sw & Tr [585: ER 164](#) 1402; *In the Estate of Wayland* [\[1951\] 2 All ER 1041](#); *Doodeward v Spence* [\[1908\] HCA 45](#); [\(1908\) 6 CLR 406](#); *Smith v Tamworth City Council* [\[1996\] NSWSC 86](#); [\(1997\) 41 NSWLR 680](#), referred to.

Aust Dig Succession [95]

REPRESENTATION:

Counsel:

Applicant: P W Tree SC and R A Browne

Solicitors:

Applicant: FitzGerald & Browne

Judgment Number: [\[2007\] TASSC 5](#)

Number of paragraphs: 12

Serial No 5/2007

File No M19/2007

IN RE AN APPLICATION BY THE TASMANIAN ABORIGINAL CENTRE INC and IN RE THE ESTATES OF 17 DECEASED TASMANIAN ABORIGINALS

REASONS FOR JUDGMENT UNDERWOOD CJ

(Delivered Ex Tempore) 9 February 2007

1 This is an application for letters of administration. It is a most unusual application because it relates to 17 Tasmanian Aboriginals who died more than 150 years ago and whose remains are now held in the Natural History Museum in the United Kingdom. It is also unusual because there is no evidence that any of the 17 deceased persons held any property, or certainly no evidence that there is any estate left today.

2 The application is brought because the Natural History Museum has made it clear that it proposes to conduct investigations on the remains by way of DNA examination, taking samples and otherwise investigating the remains before they are returned to Tasmania for burial. The personal representatives of the 17 deceased persons are of course, unknown, but for some considerable time the Tasmanian Aboriginal Centre Inc has been corresponding with the museum and also with the Australian Government, protesting about the proposed investigations and seeking the return of the remains for burial in accordance with Aboriginal customary rights.

3 This application has come on as a matter of urgency because the museum will not delay the start of testing and, further, I am told that in two days' an application will be made in the High Court in England for an injunction restraining the museum from carrying out the proposed tests and examinations. As it is now late Friday afternoon and the application is listed for Monday morning, these reasons are given *ex tempore* and in some haste. Although I have had the considerable assistance of counsel, it must be understood by those who might read these reasons that they are not given with the benefit of timely consideration and research.

4 The [Administration and Probate Act 1935](#) ("the Act"), [s66\(3\)](#), provides that the provisions of PtIII, Div1, apply to persons who died prior to its enactment in 1935. Accordingly, the statute confers jurisdiction on the Court to grant letters of administration with respect to the estates of deceased

persons who died both before and after the enactment of the Act in 1935. If the Court makes an order pursuant to [s13](#), the effect of the order is to vest the estate of the deceased person in the administrator identified by the letters of administration. Such an estate is presently vested in the Chief Justice in accordance with [s12](#). An order granting administration will give the administrator the authority to dispose of the deceased's estate in accordance with legislation. As I mentioned at the outset of these reasons, the principal stumbling block about granting such an order to anybody is that there is no evidence that any of the deceased had any estate. Now the common law was quite clear about this. An order should only be granted if it was necessary in order to deal with real or personal property of a deceased intestate. Before I started hearing this application, I had a chance to look at some of the old cases and I refer to a case called *In the Goods of Charles Turner* (1864) 3 Sw & Tr [476: ER 164](#) 1360 in which the only property that could be said to be vested in the deceased was an entitlement to a fund in Chancery if he survived another person. The court was of the opinion that the fund had never vested in him but it *did* grant letters of administration *limited* to enabling the administrator to appear and take proceedings in Chancery with respect to that fund.

5 That case was referred to in *In the Goods of Tucker* (which was the quaint nomenclature of these kinds of cases in those days) (1864) 3 Sw & Tr [585: ER 164](#) 1402. The words of Sir J P Wilde at 1403 are instructive when he said with respect to the earlier case:

"That case only decides, that, where it is doubtful whether a deceased was or was not entitled to personal property in this country, the Court would make a grant ad litem, in order that it might be ascertained whether he was or was not so entitled. In that case there was a possibility that the deceased had property in England, here she has none. The foundation of the jurisdiction of this Court is that there is personal property of the deceased to be distributed within its jurisdiction. In this case, the deceased had no property within this country, and the Court has therefore no jurisdiction."

6 Those two cases were referred to in *In the Estate of Wayland* [\[1951\] 2 All ER 1041](#). In that case it was argued that the passage of the English *Administration and Probate Act* 1932 meant that the cases of *Tucker* and *Turner* no longer applied and the court had jurisdiction to order a grant of letters of administration even if there was no estate in the country. So in that case, letters of administration were granted, but limited to the purpose of challenging wills made in another country and a will and a codicil made in England. As I mentioned in argument, that decision was criticised by Ormrod J in *Aldrich v Attorney-General* [\[1968\] P 281](#) at 295 when he said that it was decided without authority.

7 Mr Tree SC, who appeared for the applicant, was good enough to refer me to a transcript of the reasons for decisions given in a New Zealand case, *In re the Estate of Tupuna Maori*, heard on 19 May 1988, in which Greig J refers to the power to grant administration for a number of purposes, in addition to dealing with the real and personal estate of a deceased. His Honour referred to *Tristram and Cootes Probate Practice* (26 edn) 1983 at 183 where it is stated that "a grant may be made where the deceased left no estate". Well his Honour was correct with the reference to *Tristram and Cootes*, but when you refer to the case cited by the editors, it is to the contrary. However, it seems clear that a grant will be made limited to ascertaining whether there is any estate.

8 I seems to me, despite the criticism of Ormrod J in *Aldrich*, that the power to order letters of administration is unfettered, so it is not a question of jurisdiction, but a question of discretion in the sense that if there is no estate, what is the point in making the order?

9 Mr Tree has referred me to a High Court decision of some antiquity, *Doodeward v Spence* [\[1908\] HCA 45](#); [\(1908\) 6 CLR 406](#) which concerned the issue, in part, as to whether possession of a corpse could be defended because the common law is, of course, that there cannot be possession in a body. Relevant to this application Griffith CJ said at 412, "it does not follow from the mere fact that a human body at death is not the subject of ownership that it is forever incapable of having an owner". The High Court held that the possession of remains for purposes other than burial was not itself unlawful and that "a human body, or a portion of a human body, is capable by law of becoming the subject of property" (414). In *Smith v Tamworth City Council* [\[1996\] NSWSC 86](#); [\(1997\) 41 NSWLR](#)

680, Young J makes a detailed examination of the duty and right to bury a corpse. At 691 he cites with approval *Walworth v Holt* (1841) 4 My & C 619 at 635: 41 ER 238 at 244 in which Lord Cottenham spoke of a body not being property in the ordinary sense of the word but, "we may consider it as a sort of quasi-property, to which certain persons may have rights, as they have duties to perform toward it, arising out of our common humanity". Young J concluded that the law of New South Wales was that a body may be regarded as property "so far as to entitle the next of kin to legal protection from unnecessary disturbance and violation or invasion of its place of burial". He said that although the common law did not recognise property in a body, equity would intervene to protect the licence to bury the body.

10 So the end of these rather long-winded reasons is that I think that there is sufficient doubt here about the nature of an interest in the remains of the 17 Tasmanian Aboriginals and their burial to justify the grant of letters of administration to enable the administrator to test, if necessary, the proprietary right to the remains for the purpose of burial.

11 As to the recipient of the grant, I am quite easily satisfied that the applicant is the proper recipient. The Tasmanian Aboriginal Centre Inc has a real interest in seeing that the remains get a proper burial in accordance with customary law. It has championed that cause for a long time and obviously, of course, because of a lack of identification, there is no other better grantee.

12 For those reasons there will be an order that the Tasmanian Aboriginal Centre Inc be appointed administrator of the estates of the 17 deceased Tasmanian Aboriginal persons whose remains are identified in a letter from the Natural History Museum dated 30 November 2006 but identified by numbers PA HR 332, 334, 335, 337, 338, 340, 341, 342, 343, 344, 345, 412, 590, 593, 594, 597 and 604, set out in Annexure E to the affidavit of Mr Mansell, but limited:

- (a) to commencing legal proceedings seeking the return of the remains and/or preventing disturbance of them; and/or
- (b) taking possession of the remains; and/or
- (c) affording the deceased proper burial according to Aboriginal law and custom.

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