

THE HIGH COURT

1983 No. 2955P

BETWEEN:-

GLADYS FLACK AND HENRY FLACK

Plaintiffs

- and -

THE PRESIDENT OF THE HIGH COURT
AND ELIZABETH FLACK, NOEL FLACK
AND THOMAS FLACK

Defendants

Judgment of Mr. Justice Costello delivered the 29th day of
November, 1983.

Death, intestate, of last surviving partner. President of the High Court joined as defendant in partnership action. Deceased's partner's estate vesting in President pursuant to s. 13 of the Succession Act, 1965. Whether President a proper party.

When instituting these proceedings the plaintiffs' advisers met certain difficulties as to how to constitute the present suit. They arose in this way. Nearly 50 years ago five brothers went into business together as partners and at different times traded as timber merchants, haulage contractors and garage proprietors in County Monaghan. They registered the business name "Black Bros." for their enterprises but beyond that they seem to have taken little action to formalise their relationship. In the course of time each died; firstly, William Flack in 1972 (intestate); then John Balfour Flack (testate) in 1973; then Henry Holmes Flack (testate) in 1979. The last two brothers died in 1982; Samuel Flack (testate) on the 1st July and Robert Thomas Flack (intestate) on the 16th October. After the death of the last brother disputes as to the distribution of the partnership assets broke out between the members of the families of the deceased partners (including the plaintiffs) and there are now two sets of High Court proceedings in being. That with which I am concerned is an action taken by the executors of Henry Holmes Flack and they

are seeking an order that an account be taken of all the partnership dealings, an order for a sale of the partnership assets and the appointment of a Receiver. But when they started the action no representation had been taken out to the estate of Robert Thomas Flack (the last of the brothers to die) and so they joined the President of the High Court as the first named defendant. Counsel on behalf of the President has now applied that he be struck out of the action on the grounds that he was improperly joined. No formal motion for this purpose has been brought but counsel for the plaintiffs has agreed that I can determine the point on the plaintiffs' own motion for the appointment of a Receiver.

The plaintiffs of course seek no order against the President but say that it was necessary to join him because no administration had been raised to the estate of two of the partners who died intestate. They refer to section 13 of the Succession Act 1965 which provides that where a person dies intestate his real and personal estate until administration is granted in respect thereof shall vest in the President of the High Court and it is urged that because of the special

difficulties in this matter (including apparently the urgency of these proceedings) that it was appropriate to join the President as the person in whom the estate of two of the deceased partners vests.

I do not think that it was proper so to join the President. To explain this conclusion I think I can best begin by referring to the pre-1965 position. The Probate Act (Ireland) 1857 abolished the jurisdiction in testamentary and intestate business of the diocesan courts in Ireland and established a new court, "the Court of Probate". By section 15 of the Court of Probate (Ireland) Act 1859 it was provided that:-

"From and after the decease of any person dying intestate, and until letters of administration shall be granted in respect of his estate and effects, the personal estate and effects of such deceased person shall vest in the judge of the court of probate for the time being, in the same manner and to the same extent as heretofore they vested in the Ordinary."

By virtue of the provisions of the Judicature Acts and later the Courts of Justice Acts the personal estate of persons dying intestate until letters of administration were granted vested firstly in the Judge of the probate and matrimonial division and later in the President of the High Court.

Section 15 of the 1859 Act was repealed by the Administration

of Estates Act 1959 but the vesting of the personal estates of persons dying intestate in the President remained the same for section 13 of that Act provided:

"Where a person dies intestate, his real and personal estate, until administration is granted in respect thereof shall vest in the President of the High Court in the same manner and to the same extent as formerly in the case of personal estate it vested in the Ordinary."

Section 13 of the 1959 Act was repealed by the Succession Act 1965 but was re-enacted with only slight modification by section 13 to which I have already referred.

I think it is worthy of note that neither under the 1859 Act nor under the 1959 Act was the President of the High Court ever joined as a defendant in proceedings arising from the vesting provision to which I have referred. The reason was perfectly clear. In vesting personalty and later both realty and personalty in the President the legislature did not make him a trustee of the estate which vested in him and he had no duty to perform and no obligation in respect of the estate. As was pointed out in relation to the vesting provisions of section 9 of the Administration of Estates Act 1925 in England (which are similar to those I am considering) these vesting provisions

are "a mere matter of necessary convenience and protection" (see re Deans 1954 1 A.E.R. 496 at 498). The President's position under the 1965 Act is exactly the same.

Under the old law a plaintiff faced with the difficulties with which the plaintiffs in these proceedings were confronted was not without remedy; he could apply for and obtain the appointment of an administrator ad litem and join him as a defendant in the suit. The Court has a similar power under section 27 of the Succession Act, 1965 to make a grant limited to the defence of these proceedings.

I think therefore that the President should not have been joined in this action and I will strike him out as a defendant.

approved
DL
6.12.83