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Unclaimed Personal Property and the State's Liability for Accrued Interest: A Comparative Lesson from the United States

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UNCLAIMED PERSONAL PROPERTY AND THE STATE'S LIABILITY FOR ACCRUED INTEREST: A COMPARATIVE LESSON FROM THE UNITED STATES

I Introduction

The law of property concerns itself with a group of related questions: what property is and when it can be said to exist, and how it is deployed by a legal system to allocate goods and resources. A vast system of rules surrounds those matters in every jurisdiction the world over. Those that have their origins in the common law typically have a modern legal structure made up of both common law and legislative principles.[1] Part of those rules concern what happens when the holder of property dies without making provision for who it should be left to. In most jurisdictions, the law relating to the distribution of an estate on intestacy is a complicated hybrid of the common law principles of inheritance and — in the absence of heirs — escheat for real property and *bona vacantia* for personal property, with statutory reforms and interventions in varying degrees encroaching upon the common law doctrines. In the United States, for instance, property — both real and personal — that becomes unowned through the death of the owner without a valid will or qualified heirs is generally said to escheat to the state. In Australia, various legislative reforms operate in respect of different sorts of property. Thus, in all Australian jurisdictions, legislation replaces or supplements the common law with a hierarchy of rules for the distribution of an estate on intestacy. In most cases of failure of heirs, such property is treated as a statutory form of *bona vacantia*.[2]

A distinct, though related, issue arises in the case of property which the holder has forgotten about or has left unused for a substantial period of time. In the case of real

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1 While this article does not attempt to cover all such regimes that might exist in respect of any form of property, there are some areas where the law is now entirely legislative, such as in respect of security interests in personal property. Many jurisdictions, Australia included, now have legislative regimes to deal with such interests: see *Personal Property Securities Act 2009* (Cth). See also Anthony Duggan and David Brown, *Australian Personal Property Securities Law* (LexisNexis, 2nd ed, 2015).

2 See Victorian Law Reform Commission, 'Bona Vacantia' (Web Page, 23 January 2013) <https://www.lawreform.vic.gov.au/content/bona-vacantia>. For a statement of the common law concerning *bona vacantia*, see Sir William Blackstone, *Commentaries on the Laws of England, Book I, Of the Rights of Persons* (Oxford University Press, 2016) 288.

property, a system of rules relating to adverse possession operates in most common law jurisdictions.[3] In the case of tangible personal property with no apparent owner, some jurisdictions continue to use the concept of *bona vacantia*. Other jurisdictions use a legislative hybrid of that doctrine, as in Australia. And still others treat it as lost or mislaid property, as in the United States, with the present right to possession assigned to the finder or owner of the locus in quo respectively, to hold on behalf of the 'true owner'. Abandoned personalty is generally open to the claim of the first possessor.[4]

Within the category of lost, mislaid, or abandoned property, intangible personal property that is presently unclaimed typically poses special problems. In a modern capitalist society, vast amounts of wealth are held in the form of *choses in action*; that is, proprietary rights created by contract, such as deposit accounts in banks, ownership interests in corporations, and debts represented by uncashed cheques. Left unclaimed by their owners, these rights are removed from the stream of commerce and are at risk of being appropriated by the depositaries, corporations, and obligors. To make the property productive and to protect it from misappropriation, unclaimed property legislation in both the United States and Australia operate to allow the state to administer it.[5]

Although these acts in the United States often refer to the property as 'presumed abandoned', they also make clear that the state does not claim title, either as *bona vacantia* or by adverse possession, but rather takes custody for the benefit of the owner. In Australia, Commonwealth, state and territory legislation make similar provision.[6] All provide for delivery of the property to the owner on demand and appropriate proof of ownership. Divergence between jurisdictions arises, however,

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3 See Paul Babie, 'The Crown and Possessory Title of Torrens Land in South Australia' (2016) 6(1) *Property Law Review* 46; Paul Babie and John Orth, 'The Troubled Borderlands of Torrens Indefeasibility: Lessons from Australia and the United States' (2017) 7(1) *Property Law Review* 33.

4 See John V Orth, 'What's Wrong With the Law of Finders and How to Fix It' (2001) 4(7) *Green Bag 2d* 391 (describing and criticising the distinction between lost, mislaid, and abandoned property).

5 In the United States, many statutes are derived from one iteration or another of the *Uniform Unclaimed Property Act*: see National Conference of Commissioners on Uniform State Laws, *Estate, Probate and Related Laws* (Thomson Reuters, 2016) vol 8C. In Australia, this is achieved through the *Banking Act 1959* (Cth) and the *Life Insurance Act 1995* (Cth). Specifically, s 69(7AA) of the *Banking Act 1959* (Cth) provides: 'If unclaimed moneys are paid to an ADI ['Authorised Deposit Taking Institution'] under subsection (7) on or after 1 July 2013: (a) the Commonwealth must also pay to the ADI the amount of interest (if any) worked out in accordance with the regulations; and (b) the ADI must pay that amount to the person.'

6 See 'Unclaimed Money', *Australian Securities and Investments Commission* (Web Page, 16 April 2019) <https://asic.gov.au/for-consumers/unclaimed-money/>; 'Money Held by State Governments', *Australian Securities and Investments Commission* (Web Page, 6 March 2019) <https://www.moneysmart.gov.au/tools-and-resources/find-unclaimed-money/money-held-by-state-governments>.

in relation to the payment of interest on such property while in the state's custody. A recent lawsuit challenged the refusal by the State of Minnesota to account for interest on unclaimed personal property in the State's custody.[7] The decision of the Supreme Court of Minnesota provides an overview of the reasons for considering the justice of interest payments on unclaimed property.[8]

II Factual Background

Plaintiff Timothy Hall alleged that the State of Minnesota had taken custody of an uncashed cheque for less than $100 payable to him. A second plaintiff, Beverly Herron, alleged that the State was holding insurance proceeds of $236.67 belonging to her.[9] Finally, plaintiff Mary Wingfield alleged that the State had custody of over $100,000 taken from her interest-bearing bank account.[10] The State did not deny the plaintiffs' ownership, but offered to deliver to them only the value of the property at the time the State took possession.[11] The plaintiffs claimed that failure to account

7 *Hall v Minnesota*, 908 NW 2d 345 (Minn, 2018) ('*Hall*'). The plaintiffs also claimed individually and on behalf of a class of all owners of property that had been remitted to the State that the notice of the transfer of possession to the State was inadequate and violated the requirements of due process, but the Court rejected this claim.

8 This is of concern in Australia too, in respect of the *Australian Constitution's* provision for just terms compensation for Commonwealth acquisition of property in s 51(xxxi). While s 51(xxxi) does not provide the wide scope of protection found in the Fifth Amendment to the *United States Constitution*, the two protections are not dissimilar. Still, the question as to whether interest is required in order to meet the just terms requirement remains open: see, *Commonwealth v Tasmania* (1983) 158 CLR 1, 291 (Deane J); *Commonwealth v Western Australia* (1999) 196 CLR 392, 462 (Kirby J), 490 (Callinan J). Cf *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 282 (Latham CJ), 286 (Starke J), 293 (Dixon J), 296 (McTiernan J). See also Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws (*Report No 129, December 2015) 19 ('*Traditional Rights and Freedoms*'). On the comparative operation of the Fifth Amendment and s 51(xxxi): see Krithika Ashok, Paul T Babie and John V Orth, 'Balancing Justice Needs and Private Property in Constitutional Takings Provisions: A Comparative Assessment of India, Australia, and the United States' (2019) 42(4) *Fordham International Law Journal* 999.

9 A third plaintiff, Michael Undlin, alleged that the State was holding 'property payable to him worth over $100', apparently insurance proceeds: *Hall* (n 7) 349, 354.

10 There is no indication in the Court's opinion of the rate of interest on the account.

11 Under the *Minnesota Unclaimed Property Act*, Minn Stat §§ 345.31–60, the State is not obligated to pay to the owner any 'income or other increments accruing' on the property after the holder transfers the property to the Commissioner of Commerce: Minn Stat § 345.45, as repealed by Act of 2019 First Special Session, ch 7, art 10 § 15(a) Minn Laws 1.

for interest during the time in possession was an unconstitutional acquisition of their property.[12]

Although the Court described the issue as being whether the plaintiffs had 'a protected property right in the interest accrued on their property during the time that the State held it',[13] there was no allegation that the property actually 'earned interest after it was transferred to the State'.[14] In defence of its refusal to account for interest, either actual or constructive, the State principally relied on a decision of the United States Supreme Court, *Texaco Inc v Short*,[15] which upheld the constitutionality of Indiana's *Mineral Lapse Act*. That statute provided that a severed mineral interest that remains unused for 20 years 'automatically lapses and reverts to the current surface owner', unless the mineral owner filed a timely statement of claim in the registry of deeds. The Supreme Court held in that case that there is no constitutional right to compensation 'for the consequences of [an owner's] own neglect'.[16] Eight state courts and two federal circuit courts have subsequently held that the rationale of *Texaco* justifies the state's refusal to account for interest on unclaimed property in its custody.[17]

III Decision of the Minnesota Supreme Court

The Supreme Court of Minnesota agreed with the approach in *Texaco* — as to the plaintiffs' property that was not earning interest at the time it passed into the State's custody — but disagreed as to the plaintiffs' property that was interest-bearing when taken by the State. The Court held that the third plaintiff had suffered 'an actual loss of interest that she reasonably expected her principal to earn'.[18]

A similar result was reached in a case decided by the US Court of Appeals for the Seventh Circuit.[19] In an opinion authored by Judge Richard Posner, long a leader in

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12 *United States Constitution* amend V ('No person shall be … deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.'), applied to the states through amend XIV. The *Minnesota Constitution* has a similar provision: *Minnesota Constitution* art I § 13.

13 *Hall* (n 7) 352.

14 Ibid 354.

15 454 US 516 (1982) ('*Texaco*').

16 Ibid 530. Under Indiana's *Mineral Lapse Act* Ind Code § 32-23-10 (2015), unlike the *Unclaimed Property Acts*, the property interest is 'deemed as a matter of law to be abandoned': ibid 529.

17 *Hall* (n 7) 353 (listing citations). See John V Orth, 'Interest Follows Principal: Why North Carolina Should Pay Interest on Unclaimed Personal Property' (2015) 37 *Campbell Law Review* 321 (criticising one of these decisions).

18 *Hall* (n 7) 356.

19 *Cerajeski v Zoeller*, 735 F 3d 577 (7th Cir, 2013) ('*Cerajeski*').

the field of Law and Economics,[20] the Court held that Indiana's 'confiscation of the interest' earned on a depositor's inactive account which was taken by the State is 'a taking of a part of his property';[21] '[I]f you own a deposit account that pays interest, you own the interest.'[22] Not discussed in Judge Posner's decision was whether the State would be liable for interest on personal property that was not interest-bearing at the time it was taken into the State's custody.[23]

The Supreme Court of Minnesota in *Hall* began its reasoning by analysing 'the nature of the property at issue'.[24] The depositor who owned an interest-bearing account had a 'constitutionally protected property right'[25] to continue to receive interest, while the payees of the uncashed cheques had no property right beyond the face value of the cheques. The distinction drawn seems to be between a benefit that was already in the process of being realised (property) and the opportunity to gain a benefit (not property). Those who lost the latter had to suffer 'the consequences of [their] own neglect'.[26]

The Court treated it as immaterial whether the State had earned interest on the property or not. The measure of damages was what the owners of the property had lost, not what the State gained.[27] No inquiry was made into the nature of the neglect that led to the loss of the payees' opportunity to earn interest, whether they had negligently left the cheques uncashed or had never received them and then negligently failed to enforce their right to payment.[28]

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20 See Stephen B Presser, *Law Professors: Three Centuries of Shaping American Law* (West Academic Publishing, 2017) 297–313 (describing Judge Posner as the exemplar of the 'economic approach to law').

21 *Cerajeski* (n 19) 580.

22 Ibid. Judge Posner admitted that '[t]he state can charge a fee for custodianship and for searching for the owner, but the interest on the principal in a bank account is not a fee for those services': at 583.

23 Within days of the decision in *Hall* (n 7), the United States District Court for the Northern District of Illinois construed the holding in *Cerajeski* (n 19) as limited to unclaimed property taken from an interest-bearing account: *Kolton v Frerichs* (ND I11, Civ No 16-3792, 28 March 2018).

24 *Hall* (n 7) 354.

25 Ibid 349.

26 Ibid 353, quoting *Texaco* (n 15) 530.

27 *Hall* (n 7) 355 citing *Brown v Legal Foundation of Washington*, 538 US 216, 235–6 (2003). There is no discussion in *Hall* (n 7) of the rate of interest for which the state is liable.

28 In *Cerajeski* (n 19), Judge Posner noted that the depositor in that case was sufficiently incapacitated to require the appointment of a guardian and that the guardian was 'unaware of the account until years after it was transferred to the state': at 581.

IV Conclusion

While the reasoning of the Minnesota Supreme Court to some extent turned on the protection of property pursuant to the Due Process Clause of the *United States Constitution*,[29] that is not altogether unhelpful in the Australian context. Indeed, the question as to whether interest should be taken into account in order to meet the requirement of 'just terms' compensation in s 51(xxxi) of the *Australian Constitution* remains unsettled, although previous judgments considering the issue seem to suggest that it should.[30] As such, the Minnesota Supreme Court's reasoning proves helpful for two reasons: what it might tell us about the future application of s 51(xxxi) to interest payments, and the not unrelated question of why it is that a jurisdiction ought to consider whether justice might require the payment of interest in such cases. This latter point remains important, too, for in Australia, while interest is payable on the unclaimed balance in bank accounts without regard to whether it had previously been earning interest, in some states the same is not true in respect of property in intestate estates.[31] The reasoning of the Supreme Court of Minnesota will therefore be of value in those jurisdictions considering reforms to the legislative schemes implemented for dealing with unclaimed property.[32]

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29 *United States Constitution* amend XIV.

30 *Commonwealth v Tasmania* (1983) 158 CLR 1, 291 (Deane J); *Commonwealth v Western Australia* (1999) 196 CLR 392, 462 (Kirby J), 490 (Callinan J). Cf *Grace Brothers Pty Ltd v Commonwealth* (1946) 72 CLR 269, 282 (Latham CJ), 286 (Starke J), 293 (Dixon J), 296 (McTiernan J).

31 See, eg, South Australian Law Reform Institute, *Report 7: South Australian Rules of Intestacy* (Report, 2017). See also *Traditional Rights and Freedoms* (n 8) 19.

32 See, *Report 7: South Australian Rules of Intestacy* (n 31); *Traditional Rights and Freedoms* (n 8) 19.