1976, 11

IN THE PRIVY COUNCIL No. 18 of 1975.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

PRINCIPAL REGISTRY

B E T W E E N :-

THE COMMISSIONER OF STAMP DUTIES

Appellant

- and -

TREVOR DONALD BONE
DARYL LEONARD BONE and
LILLA KATHLEEN BONE

Respondents

CASE FOR THE APPELLANT

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IN THE PRIVY COUNCIL No. 18 of 1975.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA PRINCIPAL REGISTRY

IN THE MATTER of the Estate of ALICE BONE deceased

AND IN THE MATTER of the Stamp Duties Act, 1920 as amended

BETWEEN:

THE COMMISSIONER OF STAMP DUTIES — Appellant

-AND-

TREVOR DONALD BONE
DARYL LEONARD BONE and
LILLA KATHLEEN BONE — Respondents

CASE FOR THE APPELLANT

		Record
	INTRODUCTION	
1.	This is an appeal brought pursuant to special leave granted by Her Majesty in Council by Order in Council dated 14th May, 1975 upon a report from the Judicial Committee dated 5th May, 1975, from a judgment dated 12th August, 1974, of the High Court of Australia.	pp.65-66 pp.63-65
2.	The respondents (at all material times resident in New South Wales) are children of and the executors of the will of Alice Bone (hereinafter called "the deceased") who died on 1st May, 1970 and of whose last will probate was granted on 10th June, 1970 to such executors.	pp.7-8
	HISTORY	
3.	On or about 16th May, 1969 the deceased pursuant to three agreements for loan made on 16th May, 1969 advanced to the three respondents respective sums of $25,000.00, $25,000.00 and $44,600.00.	pp.8-14

Record

pp.8-14 4. The agreements for loan last referred to were identical in all respects except for the identity of the borrower, the amount agreed to be advanced, the time for commencement of repayments and the duration thereof. It was a term and condition of each of the said agreements for loan that the loan debt should be repaid by instalments of $375.00 per annum, but with repayment in full by the borrower upon the expiration of 90 days written notice given by the "lender" under her own hand to the borrower requiring the borrower to pay in full the amount of the said loan debt. Except in specified circumstances the loans were free of interest.

p.8 lines 14-21
p.11 lines 19-22
p.13 lines 21-24
p.9 lines 5-9
p.11 lines 6-10
p.13 lines 8-12

p.7 lines 22-39 5. By Clauses 4, 5 and 6 of her last will dated 16th May, 1969 the deceased forgave and released each of the respondents the debts owing under the agreements for loan referred to above. The release clause as to each respondent was in the following terms:-

> "I FORGIVE AND RELEASE unto the said " (name) "free from any contribution whatsoever towards payment of my debts funeral and testamentary expenses death estate probate succession and other duties all sums whether for principal or interest which" (he or she) "owes me."

p.8 lines 4-9 The residuary estate was given to the said three children in equal shares.

p.4 lines 19-25 6. At the death of the deceased each of the respondents had paid the sum of $375.00 off the loan to which he or she was a party, leaving a total sum outstanding under the three agreements for loan of $93,475.00. In assessing the death duty payable in respect of the estate by virtue of the Stamp Duties Act, 1920 (as amended) of New South Wales (hereinafter called "the said Act"), the appellant included the total sum outstanding under the three agreements for loan as part of the dutiable estate of the deceased. Accordingly, the appellant assessed the death duty payable at $16,732.96, of which sum an amount of $16,255.73 was duty attributable to the inclusion in the estate of the total sum outstanding under the said agreements for loan.

p.4 lines 25-34

p.4 lines 25-34 and p.5 lines 42-47

Record

7. The respondents claim that nothing in respect of the outstanding amounts due under the said loans should be included in the dutiable estate of the deceased, or alternatively that the amount to be included was the actuarial value as at death of the stipulated annual repayments, such actuarial value being agreed between the parties at $13,651.00. The respondents required the appellant to state a case on these points to the Court of Appeal of the Supreme Court of New South Wales. p.5 lines 24-31 p.5 lines 32-41

8. On 28th June, 1972 pursuant to Section 124 of the said Act, the appellant stated and signed a case for the opinion of the Court of Appeal on the following questions:- p.2 line 14 to p.6

"(1) Is any amount to be included in the dutiable estate of the abovenamed deceased in respect of the debts mentioned in paragraph 6 of this stated case?

(2) If the answer to (1) is "yes", is that amount ninety-three thousand four hundred and seventy-five dollars ($93,475.00) or thirteen thousand six hundred and fifty-one dollars ($13,651.00)?

(3) Is the amount of duty properly assessable in respect of the dutiable estate of the abovenamed deceased:-

(a) four hundred and seventy-seven dollars and twenty-three cents ($477.23); or

(b) one thousand five hundred and sixteen dollars ($1,516.00); or

(c) sixteen thousand seven hundred and thirty-two dollars and ninety-six cents ($16,732.96); or

(d) some other, and if so what, amount?

(4) By whom are the costs of this case to be borne and paid?"

Record

DECISION OF COURT OF APPEAL

p.14 line 30 to p.15 line 24 and p.38 line 1 to p.39 line 7

9. The matter was argued before the Court of Appeal on 3rd October, 1972. The members of the Court were Jacobs P., Hope and Reynolds JJ.A.. The Court delivered its judgment on 27th November, 1972 (reported at (1972) 2 N.S.W.L.R. 651) and was unanimous in answering the questions in the following manner:-

"(1) Yes;

(2) Ninety-three thousand four hundred and seventy-five dollars ($93,475.00);

(3) Sixteen thousand seven hundred and thirty-two dollars ninety-six cents ($16,732.96);

(4) The appellants" (i.e. the respondents herein).

HIGH COURT OF AUSTRALIA

p.39 line 11 to p.41 line 23 and p.43 lines 10-23 and p.63 line 22 to p.65 line 13

10. The respondents appealed to the High Court of Australia on 14th December, 1972. The appeal was heard on 29th April, 1974. On 12th August, 1974 the Court unanimously allowed the Appeal. The High Court answered the questions asked in the case stated as follows:-

"(1) No.

(2) Does not arise.

(3) Four hundred and seventy-seven dollars twenty-three cents ($477.23).

(4) By the respondent" (i.e. the appellant herein).

11. On the argument of the appeal in the High Court of Australia your appellant contended that the debts arising from the agreements for loan referred to above should be included in the dutiable estate

Record

of the deceased by reason of the provisions of sub-sections 102 (1) or alternatively 102 (2) (a) of the said Act. Section 102 reads, so far as is relevant:-

> "For the purposes of the assessment and payment of death duty...the estate of a deceased person shall be deemed to include and consist of the following classes of property:-
>
> (1) (a) All property of the deceased which is situate in New South Wales at his death..... to which any person becomes entitled under the will.....of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased.
>
> (2) (a) All property which the deceased has disposed of....by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person..."

12. On the hearing in the High Court of Australia of the appeal, your respondents relied upon the following propositions:-

(1) That because the deceased had appointed the respondents her executors, the debts owing by them to the deceased were extinguished upon the death of the deceased by reason of the rule of law set out in Sir John Nedham's case 8 Co. Rep. 135a; 77 E.R. 678, so that upon the death of the deceased the debts ceased immediately to form part of the estate of the deceased and so were not dutiable.

Record

(2) That no person became "entitled under the will" to any property by reason of the express releases, since no property passed; rather was the only existing property (i.e. the choses in action constituted by the debts) extinguished and destroyed so that Section 102 (1) did not apply.

(3) That no property was disposed of by the will by reason of the inclusion in the will of the releases, since no identifiable property had passed from the deceased to the respondents, so that Section 102 (2) (a) of the said Act did not apply; moreover that sub-section did not relate to any property actually owned by the deceased.

(4) Alternatively, that even if the debts formed part of the estate so as to attract duty, the right conferred by the loan agreements upon "the lender" to call in the loans upon 90 days notice was personal to the deceased and could not be exercised by her legal personal representatives; and that accordingly the amount brought to duty was not the full amount of the debts outstanding, i.e. $93,475.00, but was merely the value as at the date of death of the right to receive yearly instalments of $375.00 from each respondent, the total agreed value of which was $13,651.00.

13. On the hearing of the appeal the High Court was composed of Barwick C.J., McTiernan, Menzies, Stephen and Mason JJ.. McTiernan J. agreed with the reasons for judgment published by the other members of the Court, and Menzies J. with the reasons for judgment of Mason J. On the above points, the reasons for judgment of the other members of the Court, in summary, were as follows:-

p.44 lines 20-29

p.44 lines 30-32

THE APPOINTMENT AS EXECUTORS

p.44 lines 6-13

14. Barwick C.J. said that if the appointment by the deceased of her debtors as her executors operated to release the debts (a

Record

matter which His Honour did not find it necessary to decide in this case), there yet would have been no relevant property to which the executors became entitled under the will of the deceased.

15. Stephen J. said that it was well established by the English authorities that appointment as executor would effectively extinguish a debt owed by the executor, subject, however, to the qualification that an executor would be treated as holding assets of the estate of a value equal to his indebtedness if due administration of the estate required that the amount of the indebtedness should be available to the estate to meet the claims of creditors or legatees. His Honour noted that there was no question of insolvency in the instant estate, even if the indebtedness be excluded from the assets; accordingly, no interest of creditors required the executors to hold in trust the amount of their indebtedness to the deceased. Further, though the debts were owed unequally but residue given equally, the release clauses in the will made it clear that the executors were to be forgiven their indebtedness, and no occasion thus arose for equity to treat them as trustees for the amounts of their indebtedness. His Honour said that if the appeal were concerned with a deceased to whom English succession law applied the causes of action for recovery of the debts would be extinguished once death of the deceased made the appointment of executors effective. The executors would thereupon become "both the person to receive and the person to pay" - in Re Bourne (1906) 1 Ch. 697 at page 708 per Romer L.J. However, under the succession law of New South Wales the estate of the deceased is deemed until grant of probate or administration to be vested not in the executor, but in the Public Trustee; Wills Probate and Administration Act, 1898 (as amended), Section 61. His Honour said that the result was that since the estate did not vest in the executor at the moment of death,

p.47 lines 28-39

p.48 line 49 to p.49 line 33

p.49 lines 34-44

p.49 line 49 to p.51 line 17

Record

there was absent that coincidence between he who must pay and he who was to receive which alone brought about extinguishment of indebtedness. His Honour recognised that the deemed vesting of the estate in the Public Trustee might confer upon him only limited powers, perhaps excluding the power to sue for debts to the deceased, but said the relevant aspect of the section was that the executor did not become the competent plaintiff in place of the deceased on death. It followed in His Honour's view that the appointment of the children of the testatrix as her executors had no significance in relation to the inclusion in her estate for duty purposes of the debts owed to her at her death by her children.

p.59 lines 26-32

16. Mason J. said that the true basis of the rule relied upon by the respondents lay in the significance attributed to a voluntary act on the part of the testator, the person entitled to bring the action. Once this was recognised, the true character of the rule was perceived. It reflected the presumed intention of the party having the right to bring the action and was not absolute in its operation. His Honour then considered some of the cases relating to the rule at common law and in equity, and continued:-

p.59 line 33 to p.60 line 25

p.60 lines 26-32

> "In this case the will contains an express provision releasing the debts. In the circumstances the appointment of the debtors as executors must be read in the light of the intended operation of that provision and as conforming to the operation which it would have according to its terms."

p.60 lines 33-47

His Honour then considered the combined effect of sections 44 and 61 of the Wills Probate and Administration Act, which he said had the effect of placing the title of the executor on a similar footing to that of the administrator at common law. His Honour concluded his consideration of this point by saying that without expressing any concluded opinion on the question, he had assumed that this circumstance would not of itself operate to defeat the old common law rule as to extinguishment of the debt.

Record

SUBMISSION OF APPELLANT ON APPOINTMENT OF EXECUTORS

17. It is submitted that the view expressed by Stephen J. as to the effect of Section 61 of the Wills Probate and Administration Act is preferable to the tentative view expressed by Mason J., and that the effect of sections 61 and 44 is to prevent the operation of the rule at the relevant date, namely, the death of the testatrix. It is further submitted that the rule being that a debt is an asset in the executor's hands to pay creditors, the appointment, or even the grant of probate, leaves the debt as an asset in the executor's hands until, by the process of administration, it becomes disclosed that such asset is not required to pay creditors. So far as Stephen J. relied on the solvency of the estate that, it is submitted, is not presently relevant, since that fact can only emerge after the date of death. In relation to the appointment entitling the respondents to assets, the appellant respectfully adopts the following passage from the judgment in the Court of Appeal of Jacobs P. (as he then was):-

p.49 line 49 to p.50 line 32
p.60 lines 33-47
p.48 line 49 to p.49 line 5
p.17 lines 16-50

> "The deceased, before her death, owned a valuable asset, namely, the right to be repaid a sum of $93,475.00. That right cannot be effectively distinguished from the money itself. Upon the death both the right and the property which the right represents go by virtue of the will to the executors and the executrix. If by operation of law the right to recover the money is thereby extinguished, the real property, the money, remains with the executors and the executrix freed of the obligation of repayment. In my view it can then be said that those persons become entitled to the money under the will because they get that entitlement by virtue of their appointment in the will. The submission of the appellant in my view places an insupportable reliance on the distinction between the right of action for the money and the money itself. It is submitted that no person becomes entitled to the right of action for the money under the will of

Record

p.17 lines 16-50

Mrs. Bone because all that happens is that the right of action is extinguished. I cannot agree that this is a true analysis of the legal effect of the rule that the appointment of a debtor as executor extinguishes the debt at law. The debt, regarded as a right to recover money, is extinguished to the extent that the money is irrecoverable. However, the debt, regarded as the sum of money, passes by virtue of the extinguishment of the right of action for its recovery, to the debtor or debtors. In my view this is what occurred in the present case and therefore those debtors became entitled under the will to the money in question once the right of action for its recovery was extinguished by the appointment of the debtors as executors and executrix."

THE EFFECT OF THE EXPRESS RELEASES AND S.102(1)

p.43 line 31 to p.44

18. Barwick C.J. agreed with Stephen and Mason JJ. in the conclusion that, by reason of the provision in the will of the deceased expressly forgiving the indebtedness to her of her executors, the inclusion by the respondent of the amount of that indebtedness in the dutiable estate of the deceased as property to which the executors became entitled under the will of the deceased, was erroneous and insupportable. The Chief Justice agreed with the reasons for that conclusion given by his brethren.

p.51 lines 18-31

19. Stephen J. said that the second submission of the respondents (i.e., that relating to the effect of the express releases and Section 102 (1)) had the merit of giving to the release clauses of the will an effect which accorded precisely with their ordinary meaning; each expressly forgave and released unto the particular child all sums whether for principal or interest which he or she owed to the deceased. There was no question of any gift of the debt itself being made but only of its forgiveness; claims were relinquished, not transferred. His Honour said:-

Record

"Only if faced with compelling authority would I be disposed to regard these clauses in the light for which the respondent" (i.e. the present appellant) "contends, as conferring legacies of the debts upon the three children." p.51 lines 31-35

His Honour then considered the early cases in which, where the debtor had predeceased the testator, the question had been whether the testator's benefaction was confined to the debtor in person, or whether the testator had intended to extinguish the debt in any event. He contrasted Izon -v- Butler (1815) 2 Price 34, 146, E.R. 13, in which the forgiveness had been treated as a lapsed personal legacy, with Sibthorp -v- Moxom (1747) 3 Atk. 580, 26 E.R. 1134 (reported as Sibthorp -v- Moxton 1 Ves. Sen. 49, 27 E.R. 883) where Lord Hardwicke L.C. held that the devise was intended to extinguish the debt in any event. His Honour then considered Attorney General -v- Holbrook (1823) 12 Price 407, 147 E.R. 761; 3 Y and J 114, 148 E.R. 1115, in which the Court of Exchequer treated a forgiveness of a debt as a legacy subject to legacy duty. His Honour expressed the view that the reasons of the Judges in that case depended very much upon the view that the real result of forgiving the debt was to give the debtor money to the value of the debt. His Honour expressed the opinion that the Judges in that case had tended to look at the ultimate practical effect of the provisions of the will and accordingly treated the forgiveness as a bequest of so much money. He went on:- p.51 line 41 to p.53 line 12

"then, because of the very wide statutory meaning given to 'legacy' by the revenue legislation in question - see 147 E.R. 761 at page 763, they were able to conclude that there was here a dutiable legacy." p.53 lines 3-7

His Honour considered two other cases and then said that none of the cases he had cited appeared to him to require that clauses 4, 5 and 6 of the will should be treated otherwise than as effecting at the date of death of the deceased a release in equity of the debts p.53 lines 13-31 p.53 lines 32-36

Record

owed to her. His Honour then remarked again on
.54 lines 6-14 the reliance which had been placed in Attorney General -v- Holbrook on the statutory definition of "legacy", and went on to say:-

.54 lines 21-32

> "the question is not what is the practical effect of the benefaction but, rather, how is it bestowed, does it involve the acquisition of an entitlement to property of the deceased under his will? The issue is as to the precise means by which the benefit is conferred. In the present case I consider that it arises by the release of the indebtedness in equity once the will takes effect on the death of the testatrix and that, accordingly, there is no property to which any entitlement is conferred under the will."

p.61 lines 2-4 20. Mason J. stated the problem in this way:-

> "the point at issue is whether" the release "exonerated or extinguished the debts or was a bequest of property operating as a legacy."

His Honour pointed out that Wentworth in his
p.61 lines 14-27 The Office of an Executor, 14th edn. pages 71 to 73, and Toller in The Law of Executors and Administrators 7th Edn. page 307, expressed the view that a release of a debt is in the nature of a legacy, the debt not being discharged until there is an assent by the executor. His Honour said that a similar view had been taken in Attorney General -v- Holbrook (supra) where it had been held that the forgiveness of a debt owing to a testator under a bond was a legacy subject to legacy
p.61 lines 42-47 duty. His Honour then said the decision in the Attorney General -v- Holbrook might be supported as a matter of construction of the statute but the observations he had cited from the judgments disregarded the true character of the debt as a chose in action and assimilated it to a sum of money. His Honour said:-

p.61 line 47 to p.62 line 4

> "In my view this reasoning cannot be sustained unless it be correct to say that the provision in the will does not itself extinguish the debt, that

Record

> it requires for its implementation the assent of the executor and that it is a disposition of the testator's property in favour of the debtor."

His Honour then referred to the cases of Elliott -v- Davenport (1705) 1 P.Wms. 83, Toplis -v- Baker (1787) 2 Cox 118, 30 E.R. 55; Maitland -v- Adair (1796) 3 Ves. Jun. 231, 30 E.R. 984; Izon -v- Butler (1815) 2 Price 34, 146 E.R. 13. His Honour said that the approach taken in those cases had been that it was a question of construction as to whether the forgiveness of a debt was to operate as an equitable release or as a legacy, and that he was of opinion that the approach in those cases had been correct. He said:- p.62 lines 20-28

> "Excepting the case when other assets are insufficient to satisfy creditors, the forgiveness or release of a debt by will may operate in equity to release or extinguish the debt. An assent by the executor, although apt as to a legacy, is inappropriate to a release. What is material is that the release in equity, when it takes effect on death, destroys or annihilates the chose in action or, if you like, the debt." p.62 lines 28-35

His Honour concluded:-

> "This conclusion disposes of the matter. If the provision in the will destroyed the chose in action in the sense explained above, the chose in action was not property to which any person became entitled by the deceased's will. On the contrary, it was property which was destroyed by her will." p.62 line 41 to p.63 line 1

SUBMISSIONS OF APPELLANT ON EFFECT OF EXPRESS RELEASES

21. It is submitted that Stephen J. fell into error in that:-

Record

p.53 lines 3-7 and p.54 lines 6-10

(1) His Honour regarded Attorney General -v- Holbrook as having depended upon the statutory meaning of "legacy", and accordingly to have treated that case as purely a decision of construction; whereas it is submitted the case establishes that a forgiveness by will is a legacy, and the question of construction was confined to whether or not such a legacy was within the statutory definition of the word.

p.52 lines 1-27

(2) His Honour, it is submitted, treated the decisions in Izon -v- Butler and Sibthorp -v- Moxom as being in contrast to one another and seems to have preferred the decision of Lord Hardwicke L.C. in the latter case, whereas the correct approach to those cases is that each of them turned upon a construction not of whether or not the release was a legacy, but of whether or not the release, which was a legacy, was personal to the debtor or of such a nature as to enure for the benefit of his estate upon his death. It is submitted that there is no conflict between the decisions, and that both are in favour of the arguments advanced to the High Court by your appellant.

22. It is submitted that Mason J. fell into error in that:-

p.61 lines 42-44

(1) Again, His Honour treated Attorney General -v- Holbrook as a decision of construction; for the reasons advanced above it is submitted that this approach was incorrect.

p.62 lines 30-32

(2) His Honour's conclusion that "an assent....although apt as to a legacy, is inappropriate to a release" not only contradicts

Record

Wentworth and Toller, both authors of great authority, but is directly contrary to the opinion of Lord Hardwicke L.C. in Sibthorp -v- Moxton (1747) 1 Ves. Sen. 49,27 E.R.883 at 884.

(3) His Honour relied upon Elliott -v- Davenport, Toplis -v- Baker, Maitland -v- Adair, Izon -v- Butler, and Sibthorp -v- Moxom (all supra) as having demonstrated an approach (which he regarded as correct) of distinguishing between a legacy and an equitable release; whereas, as has been submitted earlier, the question in those cases was always: "What type of legacy is here?". p.62 lines 20-28

(4) His Honour's conclusion that "what is material is that the release in equity, when it takes effect on death, destroys or annihilates the chose in action or, if you like, the debt" cannot be correct if the assent of the executor is necessary. Further, it ignores the rule that a debt is not discharged when the assets are insufficient, and that there must be a temporal lapse between death and proved sufficiency of assets. p.62 lines 32-35

(5) It is not material to say, as his Honour did, that the release "does not vest the chose in action in the executor or the debtor", even if that statement be correct. Unless and until the release operates the chose in action is vested, first, in the Public Trustee by virtue of Section 61 of the Wills Probate and Administration Act, and then, on grant, in the executor. Upon the release operating the debt, regarded as a sum of money, passes to the debtor by virtue of the release of the right of action for its recovery. p.62 lines 36-37

Record

THE LIABILITY TO DUTY OF THE DEBTS UNDER

S.102 (1)

23. Your appellant for reasons previously outlined submits that neither by reason of the appointment of the debtors as executors, nor by reason of the express releases were the debts extinguished as at the date of death. They continued as assets until it emerged that they were not required for payment of creditors. They were assets therefore to which the respondents became entitled under the will.

THE LIABILITY TO DUTY OF THE DEBTS UNDER

S.102 (2) (a)

p.46 lines 17-19

24. This aspect, though argued before the High Court, is not dealt with at all in the judgments of that Court. It is submitted:-

(a) As was held by your Lordships' Board in Thompson -v- Commissioner of Stamp Duties (1969) 1 A.C. 320, the reference in the paragraph to "trusts to take effect after death" qualifies only the word "settlement" and not the word "will".

(b) Though often this and the succeeding paragraphs are loosely referred to as covering "notional" property, rather than actual property, of the deceased at death, that cannot control the plain meaning of the words of the paragraph, "any property which the deceased has disposed of by will".

(c) The ordinary meanings of the words "dispose of" include "to put or get (anything) off one's hands; to put away, stow away, put into a settled state or position; to deal with (a thing) definitely; to get rid of; to get done with, settle, finish;" O.E.D. The release of a debt by will comes within these ordinary meanings.

(d) In S.102 (2) (a), the relevant words are "property...disposed of". The definition in S.100 of the Act

of "disposition of property" includes "the release .... at law or in equity of any debt, contract, chose in action...". This reinforces the applicability of the ordinary meanings of the words "dispose of". The proper construction of the Act requires that if a person has made a disposition of property, he has disposed of that property.

Record

THE VALUATION OF THE LOANS FOR DUTY PURPOSES

25. The submission by the respondents that even if the debts formed part of the estate so as to attract duty the dutiable amount was not the outstanding balance of the debts, but merely the value as at the date of death of the right to receive yearly instalments, was not the subject of any decision by the High Court. However, Stephen J. said:- p.46 line 45 to p.47 line 7

> "On the view I have taken of the earlier contentions advanced on the appellants'" i.e., your respondents' "behalf, it becomes unnecessary finally to determine this question, which involves a consideration of the decision of Owen J. in Bray -v- Commissioner of Taxation (1968) 117 C.L.R. 349, a decision upon which the" respondents "rely but which the Court of Appeal Division considered that it should not follow. What is involved is no more than a point of construction and were it necessary to decide it I would adopt the view of Owen J. and conclude that in cl. 2 of each of the present agreements the power to give notice requiring payment in full of the loan debt is confined to the deceased during her lifetime and is not exercisable by her personal representatives after her death."

Mason J. said:-

> "I have no occasion to examine the other questions which arise on the stated case, although I should express my firm preference for the view of Owen J. in Bray -v- Commissioner of Taxation (supra) to that expressed by the majority in

p.63 lines 8-15

Record

the Court of Appeal as to the construction of the right conferred by cl. 2 of the agreement to call up the loan."

In Bray's case, Owen J. considered an agreement which, so far as relevant, was in precisely the same terms as the agreements under consideration here. His Honour said (at p.352):-

"This claim is based upon the submission that the obligation imposed on the company by cl. 2 of the agreement was conditional upon a written notice 'under his own hand' being first given by the deceased; that the right to give such a notice was personal to the deceased; and that, having died without exercising that right, it cannot be exercised by his executors (sic). In these circumstances, it was submitted, the value of the asset as at the date of the deceased's death was much less than the total of the instalments remaining to be paid. If the executors' contention is accepted the parties are in agreement that that value is the dollar equivalent of £24,938.

Counsel for the appellants naturally placed great reliance upon the words 'made' (sic. given) 'under his own hand' in cl. 2. The use of that phrase made it plain, he submitted, that it was the intention of the parties to the agreement that the right to call upon the company to pay the debt in full was to be exercisable only by the deceased in his lifetime unless he should assign the debt under cl. 3, in which case a notice might be given by the assignee 'under his own hand'.

The question is one as to the proper construction of the agreement and I think the appellants' submission should prevail. The obligation which the agreement imposes upon the company is to repay the debt by annual instalments over a period of

Record

years 'subject to' cll. 2 and 3. Clause 2 gave the deceased the right to elect, if he thought fit to do so, to require the borrower to repay the whole debt in full by giving it a notice in writing 'under his own hand', that is to say 'under the lender's own hand'. This right of the lender was, in my opinion, a personal right and it came to an end with his death. Thereafter the only obligation owed by the company was to pay the debt by instalments. The executors can, of course, enforce the payment of those instalments as and when the times for payment arrive but have no right to take the course for which cl. 2 provides.

I would therefore allow the appeal and remit the matter to the Commissioner so that he may amend the assessment accordingly."

26. In the Court of Appeal, Jacobs P. (as he then was) set out the passage from the judgment of Owen J. which appears above, and continued:- p.19 lines 21-50

"With great respect, I have come to a different conclusion upon the construction of the agreement. The question is whether the right to require payment of the debt in full was a personal right of the lender which came to an end upon the death. There could be no question if it were not for the use in cl. 2 of the words 'under her own hand' when describing the notice to be given by the lender requiring the borrower to pay in full the amount of the debt. For the Commissioner it has been submitted that all that is done by the requirement that the notice be given by the lender under her own hand is to make clear that the notice cannot be given by an agent. It is submitted that the words say nothing upon the question whether the right to repayment upon notice passes to the executors. I am of the opinion that the words 'under her own hand' did no more

Record

p.19 lines 21-50

than specify the form of notice required during the lifetime of the lender. I cannot with respect extract from them an expression of intention that the character of the loan debt, namely, that it was repayable upon the expiration of 90 days notice, was to change at the death of the lender because the fact of death made the particular form of notice prescribed by the agreement no longer able to be given. The debt was owing to the lender and after her death to her executors or administrators. This was not expressed in the agreement but it was to be implied from the general law which makes such a debt transmissible."

p.20 lines 3-37

His Honour pointed out that in many clauses of the agreement the term "lender" was used so as to comprehend the personal representatives of the lender, e.g. in Clauses 4 and 8. His Honour said that accordingly, he could see no reason for reading the word "lender" in Clause 2 so as to exclude the personal representatives; and said that to do so would be to give the word two different meanings in Clause 2 itself, "or at least to comprehend within the term two different classes". His Honour pointed out that the first time the word is used in Clause 2 is where there is expressed the requirement that the loan debt shall be paid in full by the borrower to the lender. He said:

p.20 lines 38-48

"Let it be assumed that the lender had under her own hand given a 90 days written notice. Surely then the loan debt would have been repayable in full by the borrower to the personal representatives of the lender as well as to the lender herself. Thus, where the word lender is first used in cl. 2 the personal representatives would be comprehended but upon the appellants' submission where it is secondly used the personal representatives would not be comprehended. I regard this as an unlikely construction and I do not accept it."

Record

27. Hope J. said:-

"Prima facie, the benefit and, at any rate to the extent of the deceased's assets, the burden of contracts other than 'personal' contracts devolve upon the executor or administrator or a contracting party who has died. This has been long established. Thus in Hyde -v- Skinner (1723) 2 P.Wms. 196; 24 E.R. 697, the defendant possessed a house for a long term of years, and leased it to Hyde for five years. The lease contained a covenant by the defendant for himself and his executors that he would renew the lease on the request of Hyde within the term. Hyde died within the term, and after his death his executors, within the term, requested the defendant to grant the new lease. The defendant objected that the request might only be made by Hyde and not by his executors, but this objection was rejected by Lord Macclesfield L.C., who said:- p.34 lines 16-38

> 'The executors of every person are implied in himself, and bound without naming;... it is immaterial whether the testator or the executors required the renewal of the lease, it need not be personal.'"

His Honour pointed out that the same conclusion had been reached in Hyde -v- The Dean and Canons of Windsor, Cro. Eliz. 553; 78 E.R. 798, and in other cases including one in the High Court, Carter -v- Hyde (1923) 33 C.L.R. 115. p.34 line 44

His Honour said that if one went to the subject agreements it was seen that the word "lender" was used in the various clauses where it must be taken to include the personal representatives of the lender, and he refers specifically to Clauses 4, 1, 8 and 6. p.35 lines 31-35

His Honour said that without the words "under her own hand", and indeed the word "own", it could not be said that Clause 2 created a right personal to the lender, and that that phrase and particularly that word p.35 line 36 to p.36 line 3

p.36 lines 3-14

Record

must be relied on to support the view that only Mrs. Bone could give the notice. His
p.36 lines 14-19 Honour expressed the opinion that the phrase "under her own hand" meant no more than "signed by the lender him or herself", and thus precluded signature by an agent, but did not throw any light on the identity of the lender who must sign the notice.
p.36 lines 33-37 His Honour also pointed out that this view accorded with the provisions of Clause 3 that an assignee should be entitled to obtain payment in full in the same manner as the lender could have obtained payment under Clause 2.

SUBMISSIONS OF THE APPELLANT ON THE "BRAY" POINT

28. It is submitted that the full amount of the debts owing at death should be brought to duty because:-

(1) It is not open to say that the words "under her own hand" refer only to the lender personally, having regard to the context and to the fact that the words "the lender" where they appear elsewhere in the loan agreements are not confined in meaning to the deceased personally.

(2) The effect of the words "under her own hand" is only to require that notice under Clause 2, by whomever given, must be signed by the person then entitled to receive the money owing, and to preclude signature by an agent of such person.

29. The appellant humbly submits that this appeal should be allowed and that subject to the conditions on which your Lordships' Board granted leave to appeal, the answers of the Court of Appeal to the questions stated should be restored for the following, amongst other

REASONS

1. BECAUSE the debts owing to the deceased by the respondents are brought to charge in the estate both by reason of section 102 (1) and also by section 102 (2) (a) of the said Act; and

Record

2. BECAUSE the debts were recoverable by the executors of the deceased by written notice under their own hands and accordingly should be so brought to charge in the sums unpaid as at the date of death.

FORBES OFFICER Q.C.

B. M. J. TOOMEY

Counsel for the Appellant

IN THE PRIVY COUNCIL No. 18 of 1975.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

PRINCIPAL REGISTRY

B E T W E E N :-

THE COMMISSIONER OF STAMP DUTIES

Appellant

- and -

TREVOR DONALD BONE
DARYL LEONARD BONE and
LILLA KATHLEEN BONE

Respondents

CASE FOR THE APPELLANT

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