1976, 11

IN THE PRIVY COUNCIL

No. 18 of 1975

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

PRINCIPAL REGISTRY
NEW SOUTH WALES

BETWEEN :-

THE COMMISSIONERS OF STAMP DUTIES

Appellant

- and -

TREVOR DONALD BONE
DARYL LEONARD BONE and
LILLA KATHLEEN BONE

Respondents

RECORD OF PROCEEDINGS

LIGHT & FULTON
24 John Street,
Bedford Row,
London WC1N 2DA.

Solicitors for the Appellant

LINKLATER & PAINES
Barrington House,
59-67 Gresham Street,
London EC2V 7JA.

Solicitors for the Respondents

IN THE PRIVY COUNCIL — No. 18 of 1975

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA PRINCIPAL REGISTRY

BETWEEN:

THE COMMISSIONER OF STAMP DUTIES — Appellant

- and -

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

RECORD OF PROCEEDINGS

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No. 1

SUMMONS FOR CASE STATED

IN THE SUPREME COURT OF NEW SOUTH WALES COMMON LAW DIVISION) No. 31 of 1972

BETWEEN:

TREVOR DONALD BONE, DARYL LEONARD BONE and LILLA KATHLEEN BONE

Plaintiff

10 AND:

THE COMMISSIONER OF STAMP DUTIES

Defendant

The Plaintiff claims -

(1) A decision or determination of the questions and matters stated for decision or determination in the stated case annexed hereto.

To the Defendant:

If there is no attendance before the court by you or by your counsel or solicitor at the 20 time and place specified below the proceedings may be heard and you will be liable to suffer judgment or an order against you in your absences.

Before any attendance at that time you must enter an appearance in the Registry.

Time: 25 July 1972 at 10 a.m.

Place: Supreme Court King Street Sydney.

Plaintiff:

Trevor Donald Bone of "Arrana" Muttama New 30 South Wales farmer and grazier.

Daryl Leonard Bone of "Glenwood" Wambidgee New South Wales farmer and grazier.

Lilla Kathleen Bone of "Sunny Brae" Wambidgee New South Wales spinster.

In the Supreme Court of New South Wales Court of Appeal

No. 1

Summons for Case Stated

7th July 1972

(continued)

Solicitor:

C.A. Vaughan & Hains of 248 Parker Street Cootamundra telephone numbers Cootamundra 35 and 325.

Solicitor's Agent:

Peter S. Utz & Company of 250 Pitt Street Sydney telephone number 619146

Plaintiff's address for service:

At the office of Peter S. Utz & Company solicitors 250 Pitt Street Sydney. 10

Address of Registry:

Filed 7 July 1972 ....

Plaintiff's Solicitor

No. 2

Case Stated by Commissioner of Stamp Duties

28th June 1972

No. 2

Case Stated

IN THE SUPREME COURT OF NEW SOUTH WALES COMMON LAW DIVISION } No. 31 of 1972

IN THE MATTER of the Estate of ALICE BONE late of Wambidgee in the State of New South Wales, Married Woman, deceased. 20

AND IN THE MATTER of the Stamp Duties Act, 1920-1968.

BETWEEN:

TREVOR DONALD BONE, DARYL LEONARD BONE and LILLA KATHLEEN BONE

Appellants

AND:

THE COMMISSIONER OF STAMP DUTIES

Respondent 30

In the Supreme Court of New South Wales Court of Appeal

No. 2

Case Stated by Commissioner of Stamp Dities

28th June 1972

(continued)

STATED CASE

1. ALICE BONE (hereinafter called "the deceased") died on 1st May, 1970.

2. At the time of her death and at all material times theretofore the deceased was domiciled and resident in the State of New South Wales.

3. Probate of the last Will of the deceased dated 16th May, 1969, was on 10th June, 1970, granted by the Supreme Court of New South Wales in its Probate Jurisdiction to Trevor Donald Bone, Daryl Leonard
10 Bone and Lilla Kathleen Bone, the Executors and Executrix therein named (hereinafter called "the Appellants"). A copy of the said Will is set forth in the First Schedule hereto which is to be taken as part of this case.

4. On or about 16th May, 1969, the deceased pursuant to an Agreement for Loan made on 16th May, 1969, advanced to the firstnamed Appellant by way of loan an amount of twenty-five thousand dollars ($25,000.00); on or about the same day pursuant to
20 an Agreement for Loan made the same day the deceased advanced to the secondnamed Appellant by way of loan an amount of twenty-five thousand dollars ($25,000.00) on or about the same day the deceased pursuant to an Agreement for Loan made the same day advanced to the thirdnamed Appellant by way of loan an amount of forty-four thousand six hundred dollars ($44,600.00). The three Agreements for Loan referred to were identical in all respects except for the identity of the borrower, the amount agreed to be advanced
30 and the provisions for repayment referred to in paragraph 5 hereto. It was a term and condition of each of the said Agreements for Loan that the loan debt should be paid in full by the borrower upon the expiration of ninety (90) days written notice given by the deceased under her own hand to the borrower requiring the borrower to pay in full the amount of the said loan debt.

5. It was a term and condition of each of the said Agreements for Loan that the borrower should pay to
40 the deceased in reduction of the loan debt annual instalments of not less than three hundred and seventy-five dollars ($375.00). In the case of the Agreement for Loan made between the deceased and the firstnamed Appellant the first such annual instalment was to be paid on the 1st day of December, 1969, and each subsequent annual instalment

In the Supreme Court of New South Wales Court of Appeal

No. 2

Case Stated by Commissioner of Stamp Duties

28th June 1972

(continued)

was to be paid at the end of each succeeding year ending on the 1st day of December. In the case of the Agreement for Loan made between the deceased and the secondnamed Appellant the first such annual instalment was to be paid on the 1st day of April, 1970, and each subsequent annual instalment was to be paid at the end of each succeeding year ending on the 1st day of April. In the case of the Agreement for Loan made between the deceased and the thirdnamed Appellant the first such annual instalment was to be paid on the 1st day of August, 1969, and each subsequent annual instalment was to be paid at the end of each succeeding year ending on the 1st day of August. The terms of the said Agreements for Loan are set forth in the Second, Third and Fourth Schedules hereto which are to be taken as part of this case.

6. At the date of death of the deceased each of the Appellants had paid the sum of three hundred and seventy-five dollars ($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 ninety-three thousand four hundred and seventy-five dollars ($93,475.00). The Commissioner of Stamp Duties in assessing the death duty payable in respect of the estate of the deceased claimed that the said total sum outstanding under the three Agreements for Loan was included in the dutiable estate of the deceased, and the Commissioner accordingly assessed the death duty payable in respect of the said estate at sixteen thousand seven hundred and thirty-two dollars and ninety-six cents ($16,732.96).

7. Apart from the debts mentioned in paragraph 6 above, the deceased had, at the time of her death, the sum of nine thousand four hundred and fifty-nine dollars and seventy-six cents ($9,459,76) to the credit of her current account with the Bank of New South Wales, Cootamundra Branch. At the time of her death the debts due and owing by the deceased amounted to two hundred and fifty-four dollars and sixty cents ($254.60) and no more.

8. The value at the date of the death of the deceased of a promise to pay the sum of twenty-four thousand six hundred and twenty-five dollars ($24,625.00) by annual instalments of three hundred and seventy-five dollars ($375.00), the

first of such instalments being payable on the 1st December, 1970, was four thousand five hundred and forty-two dollars ($4,542.00). The value at the date of the death of the deceased of a promise to pay the sum of twenty-four thousand six hundred and twenty-five dollars ($24,625.00) by annual instalments of three hundred and seventy-five dollars ($375.00), the first of such instalments being payable on the 1st April, 1971 was four thousand four hundred and twenty dollars ($4,420.00). The value at the date of the death of the deceased of a promise to pay the sum of forty-four thousand two hundred and twenty-five dollars ($44,225.00) by annual instalments of three hundred and seventy-five dollars ($375.00), the first of such instalments being payable on the 1st August, 1970, was four thousand six hundred and eighty-nine dollars ($4,689.00).

9. The Commissioner claims that the amount which should be included in the dutiable estate of the deceased in respect of the debts mentioned in paragraph 6 hereof is the total sum of ninety-three thousand four hundred and seventy-five dollars ($93,475.00). The Appellants claim that no amount is to be included in the dutiable estate of the deceased in respect of the debts mentioned in paragraph 6 hereof, or, alternatively, that the amount so to be included is the total of the sums mentioned in paragraph 8 hereof, namely, thirteen thousand six hundred and fifty-one dollars ($13,651.00).

10. The Appellants being dissatisfied with the said assessment of death duty in respect of the estate of the deceased have pursuant to Section 124 of the said Act and within the time therein limited delivered to the Commissioner a notice in writing requiring him to state a case for the opinion of this Honourable Court and have paid the said duty in conformity with the said assessment and the sum of forty dollars ($40.00) as security for costs in accordance with the said Section of the said Act.

11. If there is no amount to be included in the dutiable estate in respect of the debts mentioned in paragraph 6 hereof, then the duty properly payable in respect of the estate of the deceased is four hundred and seventy-seven dollars and twenty-three cents ($477.23). If the proper amount to be included in respect of the said debts is thirteen thousand six hundred and fifty-one dollars ($13,651.00)

In the Supreme Court of New South Wales Court of Appeal Appeal
No. 2
Case Stated by Commissioner of Stamp Duties
28th June 1972
(continued)

then the amount of duty properly payable is one thousand five hundred and sixteen dollars ($1,516.00). If the proper amount to be included in respect of the said debts is ninety-three thousand four hundred and seventy-five dollars ($93,475.00), then the amount of duty properly payable is sixteen thousand seven hundred and thirty-two dollars and ninety-six cents ($16,732.96).

12. The questions for the decision of this Honourable Court are:- 10

(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 above-named deceased:- 20

(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? 30

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

DATED this Twenty Eighth day of June 1972.

K.T. Wyburn
Commissioner of Stamp Duties.

In the Supreme Court of New South Wales Court of Appeal

No. 2

First Schedule to Case Stated by Commissioner of Stamp Duties

Will of Alice Bone dated 16th May 1969

First Schedule to Case Stated by Commissioner of Stamp Duties - Will of Alice Bone

THIS IS THE LAST WILL AND TESTAMENT of me ALICE BONE of Wambidgee in the State of New South Wales wife of James Thomas Bone.

1. I HEREBY REVOKE all other wills and testamentary dispositions and declare this to be my last will and testament.

10 2. I APPOINT to be executors and trustees of this my will my son TREVOR DONALD BONE of "Arrana" Muttama and my son DARYL LEONARD BONE of "Glenwood" Wambidgee and my daughter LILLA KATHLEEN BONE of "Sunny Brae" Wambidgee.

3. I GIVE AND BEQUEATH to my said daughter LILLA KATHLEEN BONE free from any contributions whatsoever towards payment of my debts funeral and testamentary expenses death estate probate succession and other duties all my furniture linen crockery cutlery
20 consumable stores and provisions and other articles of household use and articles of personal adornment.

4. I FORGIVE AND RELEASE unto the said LILLA KATHLEEN BONE 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 she owes me.

5. I FORGIVE AND RELEASE unto the said DARYL LEONARD BONE free from any contribution whatsoever
30 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 owes me.

6. I FORGIVE AND RELEASE unto the said TREVOR DONALD BONE 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 owes me.

40 7. I GIVE DEVISE AND BEQUEATH all the rest and residue of my estate whatever and wherever to my trustees UPON TRUST:

In the Supreme Court of New South Wales Court of Appeal

No. 2

First Schedule to Case Stated by Commissioner of Stamp Duties

Will of Alice Bone dated 16th May 1969

(continued)

A. To pay thereout all my debts funeral and testamentary expenses death estate probate succession and other duties.

B. To hold the balance then remaining for such of my said daughter LILLA KATHLEEN BONE my said sons TREVOR DONALD BONE and DARYL LEONARD BONE ~~and my other son LYLE JAMES McLEOD BONE~~ as survive me and if more than one in equal shares as tenants in common.

8. I have not made any specific gift under this my will to my said son LYLE JAMES McLEOD BONE for the reason that I made provision for him during my lifetime.

IN WITNESS WHEREOF I have hereunto set my hand to this my will this sixteenth day of May in the year one thousand nine hundred and sixty-nine.

SIGNED by the said testatrix as and for her last will and testament in the presence of us both present at the same time who at her request in her presence and in the presence of each other have hereunto subscribed our names as witnesses: } Alice Bone

J. Mulally
Solicitor Cootamundra

L. Blair
Clerk Cootamundra

Second Schedule to Case Stated by Commissioner of Stamp Duties

Agreement between Alice Bone and Trevor Donald Bone dated 16th May 1969

Second Schedule to Case Stated by Commissioner of Stamp Duties - Agreement between Alice Bone and Trevor Donald Bone

THIS AGREEMENT made this sixteenth day of May one thousand nine hundred and sixty-nine BETWEEN ALICE BONE of "Sunny Brae" Wambidgee in the State of New South Wales (hereinafter called the "Lender") of the one part and TREVOR DONALD BONE of "Arrana" Muttama in the said State (hereinafter called the "Borrower") of the other part WHEREAS the Lender at the request of the Borrower has agreed to lend to the Borrower on the terms and conditions hereinafter set out the principal sum of Twenty-five thousand dollars ($25,000) the receipt whereof is hereby acknowledged AND WHEREAS the Borrower has agreed to repay the said principal sum to the Lender on the terms and conditions hereinafter set out

In the Supreme Court of New South Wales Court of Appeal

No. 2

Second Schedule to Case Stated by Commissioner of Stamp Duties

Agreement between Alice Bone and Trevor Donald Bone dated 16th May 1969

(continued)

NOW IT IS HEREBY AGREED as follows:

1. The said principal sum or so much thereof as for the time being remains owing by the Borrower to the Lender is hereinafter called "the loan debt."

2. The loan debt shall be paid in full by the Borrower to the Lender upon the expiration of ninety (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.

10 3. If the Lender by assignment made in accordance with Section 12 of the Conveyancing Act 1919-1954 of the State of New South Wales should assign the said loan debt to any person then the assignee shall be entitled to obtain payment in full of the said loan debt in the same manner as the Lender could have obtained payment thereof in pursuance of Clause 2 hereof.

4. Subject to Clauses 2 and 3 hereof the Borrower shall pay to the Lender or her assignee in reduction 20 of the said debt annual instalments of not less than three hundred and seventy-five dollars ($375) the first of such annual payments to be paid on the first day of December 1969 and subject to Clauses 2 and 3 hereof each subsequent annual payment is to be paid at the end of each succeeding year ending on the first day of December.

5. If default be made in payment of the first or any subsequent payment payable in pursuance of Clause 4 hereof for a period of more than sixty (60) 30 days after the date hereinbefore fixed for the payment of any such annual payment then simple interest at the rate of five per centum (5%) per annum shall be payable on the loan debt in respect of the period during which such default continues.

6. Should the Borrower having been required to pay the loan debt pursuant to either Clause 2 or Clause 3 hereof fail so to do then simple interest at the rate of five per centum (5%) per annum shall be payable on the amount of the loan debt outstanding 40 at the date when the Lender or her assignee shall have given written notice to the Borrower in pursuance of Clauses 2 or 3 hereof and shall be payable in respect of the period commencing at the date of the expiration of the aforesaid written notice and ending on the date when the loan debt is paid in full to the Lender or her assignee.

In the Supreme Court of New South Wales Court of Appeal

No. 2

Second Schedule to Case Stated by Commissioner of Stamp Duties

Agreement between Alice Bone and Trevor Donald Bone dated 16th May 1969

(continued)

7. Subject to the foregoing provisions of this agreement the Borrower shall have the right to re-pay the loan debt in full at any time or to anticipate the payment of any one or more of the aforesaid annual payments and for the purposes of the foregoing provisions of this agreement the payment in anticipation of any such annual instalment shall be treated as the payment of that instalment on the date fixed for the payment thereof by Clause 4 hereof. 10

8. If requested in writing by the Lender or by an assignee to whom or to which the loan debt has been assigned in accordance with the foregoing provisions hereof the Borrower shall execute a charge over his property for the amount of the loan debt.

IN WITNESS WHEREOF THIS agreement has been executed on the date first abovementioned.

SIGNED by the said ALICE BONE in the presence of:-) Alice Bone 20

J. Mulally
Solicitor Cootamundra.

SIGNED by the said TREVOR BONE in the presence of:) T. D. Bone

J. Mulally
Solicitor Cootamundra.

Third Schedule to Case Stated by Commissioner of Stamp Duties

Agreement between Alice Bone and Daryl Leonard Bone dated 16th May 1969

Third Schedule to Case Stated by Commissioner of Stamp Duties - Agreement between Alice Bone and Daryl Leonard Bone 30

THIS AGREEMENT made this sixteenth day of May one thousand nine hundred and sixty-nine BETWEEN ALICE BONE of "Sunny Brae" Wambidgee in the State of New South Wales (hereinafter called the "Lender") of the one part and DARYL LEONARD BONE of "Glenwood" Wambidgee aforesaid (hereinafter called the "Borrower") of the other part WHEREAS the Lender at the request of the Borrower has agreed to lend to the Borrower on the terms and conditions hereinafter set out the principal sum of Twenty-five thousand dollars ($25,000) the receipt whereof is hereby acknowledged AND WHEREAS the Borrower has agreed to repay the said principal sum to the 40

In the Supreme Court of New South Wales Court of Appeal

No. 2

Third Schedule to Case Stated by Commissioner of Stamp Duties

Agreement between Alice Bone and Daryl Leonard Bone dated 16th May 1969

(continued)

Lender on the terms and conditions hereinafter set out NOW IT IS HEREBY AGREED as follows:

1. The said principal sum or so much thereof as for the time being remains owing by the Borrower to the Lender is hereinafter called "the loan debt".

2. The loan debt shall be paid in full by the Borrower to the Lender upon the expiration of ninety (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. 10

3. If the Lender by assignment made in accordance with Section 12 of the Conveyancing Act 1919-1954 of the State of New South Wales should assign the said loan debt to any person then the assignee shall be entitled to obtain payment in full of the said loan debt in the same manner as the Lender could have obtained payment thereof in pursuance of Clause 2 hereof.

4. Subject to Clauses 2 and 3 hereof the Borrower shall pay to the Lender or her assignee in reduction of the said debt annual instalments of not less than three hundred and seventy-five dollars ($375) the first of such annual payment to be paid on the first day of April 1970 and subject to Clauses 2 and 3 hereof each subsequent annual payment is to be paid at the end of each succeeding year ending on the first day of April. 20

5. If default be made in payment of the first or any subsequent annual payment payable in pursuance of Clause 4 hereof for a period of more than sixty (60) days after the date hereinbefore fixed for the payment of any such annual payment then simple interest at the rate of five per centum (5%) per annum shall be payable on the loan debt in respect of the period during which such default continues. 30

6. Should the Borrower having been required to pay the loan debt pursuant to either Clause 2 or Clause 3 hereof fail so to do then simple interest at the rate of five per centum (5%) per annum shall be payable on the amount of the loan debt outstanding at the date when the Lender or her assignee shall have given written notice to the Borrower in pursuance of Clauses 2 or 3 hereof and shall be payable in respect of the period commencing at the date of the expiration of the aforesaid written notice and ending on the date when the loan debt is 40

In the
Supreme Court
of New South
Wales
Court of
Appeal

No. 2

Third
Schedule to
Case Stated by
Commissioner
of Stamp
Duties

Agreement
between Alice
Bone and Daryl
Leonard Bone
dated 16th
May 1969

(continued)

paid in full to the Lender or her assignee.

7. Subject to the foregoing provisions of this agreement the Borrower shall have the right to repay the loan debt in full at any time or to anticipate the payment of any one or more of the aforesaid annual payments and for the purposes of the foregoing provisions of this agreement the payment in anticipation of any such annual instalment shall be treated as the payment of that instalment on the date fixed for the payment thereof by Clause 4 hereof. 10

8. If requested in writing by the Lender or by an assignee to whom or to which the loan debt has been assigned in accordance with the foregoing provisions hereof the Borrower shall execute a charge over his property for the amount of the loan debt.

IN WITNESS WHEREOF this agreement has been executed on the date first abovementioned.

SIGNED by the said ALICE BONE in the presence of:-) Alice Bone 20

J. Mulally
Solicitor Cootamundra.

SIGNED by the said DARYL LEONARD BONE in the presence of:) D. L. Bone

J. Mulally
Solicitor Cootamundra.

Fourth
Schedule to
Case Stated by
Commissioner
of Stamp
Duties

Agreement
between Alice
Bone and Lilla
Kathleen Bone
dated 16th
May 1969

The Fourth Schedule to Case Stated by Commissioner of Stamp Duties - Agreement between Alice Bone and Lilla Kathleen Bone 30

THIS AGREEMENT made this sixteenth day of May one thousand nine hundred and sixty-nine BETWEEN ALICE BONE of "Sunny Brae" Wambidgee in the State of New South Wales (hereinafter called the "Lender") of the one part and LILLA KATHLEEN BONE of "Sunny Brae" Wambidgee aforesaid (hereinafter called the "Borrower") of the other part WHEREAS the Lender at the request of the Borrower has agreed to lend 40
to the Borrower on the terms and conditions hereinafter set out the principal sum of forty-four thousand six hundred dollars ($44,600) the receipt

In the Supreme Court of New South Wales Court of Appeal

No. 2

Fourth Schedule to Case Stated by Commissioner of Stamp Duties

Agreement between Alice Bone and Lilla Kathleen Bone dated 16th May 1969

(continued)

whereof is hereby acknowledged AND WHEREAS the Borrower has agreed to repay the said principal sum to the Lender on the terms and conditions hereinafter set out NOW IT IS HEREBY AGREED as follows:

1. The said principal sum or so much thereof as for the time being remains owing by the Borrower to the Lender is hereinafter called "the loan debt".

2. The loan debt shall be paid in full by the Borrower to the Lender upon the expiration of ninety (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.

3. If the Lender by assignment made in accordance with Section 12 of the Conveyancing Act 1919-1954 of the State of New South Wales should assign the said loan debt to any person then the assignee shall be entitled to obtain payment in full of the said loan debt in the same manner as the Lender could have obtained payment thereof in pursuance of Clause 2 hereof.

4. Subject to Clauses 2 and 3 hereof the Borrower shall pay to the Lender or her assignee in reduction of the said debt annual instalments of not less than three hundred and seventy-five dollars ($375) the first of such annual payments to be paid on the first day of August 1969 and subject to clauses 2 and 3 hereof each subsequent annual payment is to be paid at the end of each succeeding year ending on the first day of August.

5. If default be made in payment of the first or any subsequent annual payment payable in pursuance of Clause 4 hereof for a period of more than sixty (60) days after the date hereinbefore fixed for the payment of any such annual payment then simple interest at the rate of five per centum (5%) per annum shall be payable on the loan debt in respect of the period during which such default continues.

6. Should the Borrower having been required to pay the loan debt pursuant to either Clause 2 or Clause 3 hereof fail so to do then simple interest at the rate of five per centum (5%) per annum shall be payable on the amount of the loan debt outstanding at the date when the Lender or her assignee shall have given written notice to the Borrower in pursuance of Clauses 2 or 3 hereof and shall be payable in respect of the period commencing on the date of the expiration of the aforesaid written notice and ending on the date when the loan is paid in full to the Lender or her assignee.

In the Supreme Court of New South Wales Court of Appeal

No. 2

Fourth Schedule to Case Stated by Commissioner of Stamp Duties

Agreement between Alice Bone and Lilla Kathleen Bone dated 16th May 1969

(continued)

7. Subject to the foregoing provisions of this agreement the Borrower shall have the right to repay the loan debt in full at any time or to anticipate the payment of any one or more of the aforesaid annual payments and for the purposes of the foregoing provisions of this agreement the payment in anticipation of any such annual instalment shall be treated as the payment of that instalment on the date fixed for the payment thereof by Clause 4 hereof. 10

8. If requested in writing by the Lender or by an assignee to whom or to which the loan debt has been assigned in accordance with the foregoing provisions hereof the Borrower shall execute a charge over her property for the amount of the Loan debt.

IN WITNESS WHEREOF this agreement has been executed on the date first abovementioned.

SIGNED by the said ALICE BONE in the presence of:) Alice Bone 20

J. Mulally
Solicitor Cootamundra.

SIGNED by the said LILLA KATHLEEN BONE in the presence of:) Lilla K. Bone

J. Mulally
Solicitor Cootamundra.

No. 3

Judgment of theCourt of Appeal

27th November 1972

No. 3

Judgment of the Court of Appeal

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL) No. 23 of 1972 30

CORAM: JACOBS, P.
HOPE, J.A.
REYNOLDS, J.A.

Monday, 27th November, 1972.

BONE & ORS. v. THE COMMISSIONER OF STAMP DUTIES

In the Supreme Court of New South Wales Court of Appeal

No. 3

Judgment of the Court of Appeal

27th November 1972

(continued)

JUDGMENT

HARDIE, J.A.: The President, Hope and Reynolds, J.J.A. sat in this matter and Hope, J.A. will deliver his judgment first.

HOPE, J.A.: In the opinion of the President, the questions asked in the stated case should be answered as follows:-

(1) Yes;
(2) $93,475;
10 (3)(c) Yes;
(4) By the appellants.

I publish his reasons.

In my opinion the questions asked in the stated case should be answered as follows:

(1) Yes;
(2) $93,475;
(3) $16,732-96;
(4) the appellants.

I publish my reasons.

20 REYNOLDS, J.A.: In my opinion the questions should be answered as proposed by the President. I will publish a short statement to that effect.

HARDIE, J.A: Then the order of the Court will be as indicated by Hope, J.A.

Jacobs, P.

JACOBS, P.: The three appellants are the children and the executors and executrix of the will of Alice Bone who died on 1st May, 1970 domiciled and resident in the State of New South Wales. A year before her death Mrs. Bone entered into an agreement for loan
30 with her three children whereby she advanced to each of the two sons a sum of $25,000 and to the daughter a sum of $44,600. The three agreements for loan were identical in all respects except for the identity of the borrower and the amount agreed to be advanced. It was a term and condition of each of the agreements that the loan debt should be paid in full by the borrower upon the expiration of ninety days' written notice given by the deceased under her own hand to the borrower requiring the borrower
40 to pay in full the amount of the loan debt. It was a further term of each agreement that the borrower should pay to the lender, Mrs. Bone, in reduction

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of the loan debt annual instalments of not less than $375. The dates of these annual instalments varied between the three children but that is of no importance in the present case. At the date of Mrs. Bone's death each of the children had paid the sum of $375 off his or her loan. Therefore, there was a total of $93,475 still owing on the three loans. The Commissioner claims that this amount should be included in the dutiable estate of Mrs. Bone. The appellants, the three 10 children who were appointed executors and executrix, claim that no portion of this indebtedness should be included in her estate. Alternatively they claim that a smaller sum should be included, namely, the value at the date of the death of the deceased of the promises to pay the various sums by annual instalments of $375. In respect of the three loans the value of this sum at the date of death of the deceased was $13,651.

In these circumstances the following questions 20 are asked of the Court:

(1) Is any amount to be included in the 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)? 30

(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 40

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

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

The appellants put their case in two ways. First, it is submitted that in the events which happened no part of the $93,475.00 was property of the deceased to which any person became entitled under the will of the deceased. See s.102(1) of the Stamp Duties Act, 1920. Secondly, it was submitted that upon the decision of Owen J. in
10 Bray v. Commissioner of Taxation (1968) 117 C.L.R. 349, a decision upon an indistinguishable set of facts, none of the property in question was liable to duty. I shall deal with these submissions in turn.

Upon the first point I am of the opinion that the appellants do not succeed. 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
20 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
30 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 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.
40 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.

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The question which secondarily arises is whether we should follow the decision of Owen J. in Bray v. Federal Commissioner of Taxation (supra). That decision is naturally entitled to the greatest respect. It is of its nature a most persuasive precedent but it is not a precedent which is binding upon this Court. It was not a decision given by Owen J. when sitting as a member of a Court in the framework of the appellate structure of which this Court is part. 10

Upon the agreement from which the agreements in question in the present case are clearly copied, Owen J. determined that the full amount of the unpaid debt at the date of death of the deceased should not be included in the estate of the deceased lender for the purposes of the Estate Duty Assessment Act, 1914-1963. He determined that the full amount of the unpaid debt should not be included. He accepted submissions of the appellants which he expressed as follows: 20

> "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. In these circumstances, it was submitted, the value 30 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."

Owen J. continued as follows:-

> "Counsel for the appellants naturally placed great reliance upon the words 'made under his own hand' in cl. 2. The use of that 40 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'.

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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 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."

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 not more 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.

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The agreement primarily directs itself to a situation where the borrower and the lender are still alive but in many clauses of the agreement it is necessary to comprehend within the term "lender" the personal representatives of the lender. Thus, in clause 4 the requirement that the borrower should pay instalments to the lender created more than a personal right in the lender to receive the money. It was clearly intended to be a right which passed to the personal representatives of the lender. By clause 8 of the agreement it is provided that if requested in writing by the lender or by an assignee to whom or to which the loan debt has been assigned in accordance with the foregoing provisions the borrower should execute a charge over his or her property for the amount of the loan debt. It appears to me that in this clause the word "lender" includes also the personal representatives of the lender so that the request in writing could after the death of the lender be given by the personal representatives.

There are thus a number of instances within the agreement itself where the word "lender" is used to refer to the personal representatives of the lender as well as to herself. That being so there does not seem to me to be any reason for reading the word "lender" in cl.2 as not including the personal representatives. To do so would be to give to the word "lender" in cl.2 itself two different meanings or at least to comprehend within the term two different classes. The first time that the word is used in cl.2 is where there is expressed the requirement that the loan debt shall be paid in full by the borrower to the lender 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. 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.

I am therefore of the opinion that the

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questions should be answered as follows:-

(1) Yes.

(2) $93,475.00

(3)(c) Yes.

(4) By the appellant.

Hope, J.A.

HOPE, J.A.: This is a case stated by the respondent Commissioner for the determination of questions which arise under the provisions of the Stamp Duties Act, 1920-1968, in relation to the estate of the
10 late Mrs. Alice Bone. Mrs. Bone, who was at all material times domiciled and resident in New South Wales, died on 1st May, 1970, and probate of her will was granted to the three appellants as executors and executrix. On 16th May, 1969, almost a year before her death, Mrs. Bone entered into a written agreement for loan with each of the appellants, and on the same day paid to the appellants the amounts referred to in the agreements. The amount lent to Mr. T.D. Bone was $25,000, the
20 amount lent to Mr. D.L. Bone was $25,000, and the amount lent to Miss L.K. Bone was $44,600. Each of the agreements was in a practically identical form, and since their construction is raised by the case, it will be convenient to set out the whole of one of them. The agreement which Mrs. Bone made with Mr. T.D. Bone was as follows:-

"THIS AGREEMENT made this sixteenth day of May one thousand nine hundred and sixty-nine BETWEEN ALICE BONE of 'Sunny Brae' Wambidgee
30 in the State of New South Wales (hereinafter called the 'Lender') of the one part and TREVOR DONALD BONE of 'Arrana' Muttama in the said State (hereinafter called the 'Borrower') of the other part WHEREAS the Lender at the request of the Borrower has agreed to lend to the Borrower on the terms and conditions hereinafter set out the principal sum of Twenty-five thousand dollars ($25,000) the receipt whereof is hereby acknowledged AND
40 WHEREAS the Borrower has agreed to repay the

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said principal sum to the Lender on the terms and conditions hereinafter set out NOW IT IS HEREBY AGREED as follows:

1. The said principal sum or so much thereof as for the time being remains owing by the Borrower to the Lender is hereinafter called 'the loan debt'.

2. The loan debt shall be paid in full by the Borrower to the Lender upon the expiration of ninety (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.

3. If the Lender by assignment made in accordance with Section 12 of the Conveyancing Act 1919-1954 of the State of New South Wales should assign the said loan debt to any person then the assignee shall be entitled to obtain payment in full of the said loan debt in the same manner as the Lender could have obtained payment thereof in pursuance of Clause 2 hereof.

4. Subject to Clauses 2 and 3 hereof the Borrower shall pay to the Lender or her assignee in reduction of the said debt annual instalments of not less than three hundred and seventy-five dollars ($375) the first of such annual payments to be paid on the first day of December 1969 and subject to Clauses 2 and 3 hereof each subsequent annual payment is to be paid at the end of each succeeding year ending on the first day of December.

5. If default be made in payment of the first or any subsequent payment payable in pursuance of Clause 4 hereof for a period of more than sixty (60) days after the date hereinbefore fixed for the payment of any such annual payment then simple interest at the rate of five per centum (5%) per annum shall be payable on the loan debt in respect of the period during which such default continues.

6. Should the Borrower having been required to pay the loan debt pursuant to either Clause 2 or Clause 3 hereof fail so to do then simple interest at the rate of five per centum (5%) per annum shall be payable on the

amount of the loan debt outstanding at the date when the Lender or her assignee shall have given written notice to the Borrower in pursuance of Clauses 2 or 3 hereof and shall be payable in respect of the period commencing at the date of the expiration of the aforesaid written notice and ending on the date when the loan debt is paid in full to the Lender or her assignee.

10 7. Subject to the foregoing provisions of this agreement the Borrower shall have the right to repay the loan debt in full at any time or to anticipate the payment of any one or more of the aforesaid annual payments and for the purposes of the foregoing provisions of this agreement the payment in anticipation of any such annual instalment shall be treated as the payment of that instalment on the date fixed for the payment thereof by Clause 4
20 hereof.

8. If requested in writing by the Lender or by an assignee to whom or to which the loan debt has been assigned in accordance with the foregoing provisions hereof the Borrower shall execute a charge over his property for the amount of the loan debt."

It will be seen that par. 4 of this agreement provided for the payment of an annual instalment of not less than $375 in reduction of the debt, the
30 first of the annual payments to be made on 1st December, 1969, and subject to cls. 2 and 3 of the agreement, each subsequent annual payment to be made at the end of each succeeding year ending on the first day of December. In the case of the agreement made by Mrs. Bone with Mr. D.L. Bone, the first annual instalment of $375 was to be paid on 1st April, 1970, and subject to cls. 2 and 3 each subsequent annual payment was to be made at the end of each succeding year ending on 1st April.
40 In the case of the agreement between Mrs. Bone and Miss L.K. Bone, the first annual instalment of $375 was to be paid on 1st August, 1969, and subject to cls. 2 and 3 each subsequent annual payment was to be made at the end of each succeding year ending on 1st August. Subject to these variations and the difference of the amount of the advance in the case of Miss L.K. Bone, each of the agreements was in identical form.

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Each of the appellants paid the first annual instalment of $375 which fell due between 16th May, 1969, and the death of Mrs. Bone on 1st May, 1970. Mrs. Bone did not during her lifetime assign any of the "loan debts" whether in accordance with s.12 of the Conveyancing Act, 1919, as amended, or otherwise, and did not give any written notice in accordance with cl. 2 of the agreements requiring the payment in full of the amount of any of the loans. By her will, which was also made on 16th May, 1969, Mrs. Bone appointed the appellants to be executors and trustees of her will, and having made a bequest of certain household and personal effects, provided as follows:- 10

> "4. I FORGIVE AND RELEASE unto the said LILLA KATHLEEN BONE 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 she owes me. 20
>
> 5. I FORGIVE AND RELEASE unto the said DARYL LEONARD BONE 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 owes me.
>
> 6. I FORGIVE AND RELEASE unto the said TREVOR DONALD BONE 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 owes me." 30

Thereafter she gave, devised and bequeathed all the rest and residue of her estate to her trustees upon trust to pay thereout all her debts, funeral and testamentary expenses, death, estate, probate; succession and other duties, and to hold the balance for such of the appellants as should survive her and if more than one in equal shares as tenants in common. Apart from the loans, Mrs. Bone's assets at the time of her death comprised a sum of $9,459.76 standing to her credit with a bank in New South Wales, and the debts owing by her at the time of her death amounted to $254.60. The amount of death duty payable in respect of such an estate is $477.23. It is common ground that if the value of the loans at Mrs. Bone's death is not to be included in her estate for duty purposes, there 40

were ample assets in her estate to ensure the payment of her debts, funeral and testamentary expenses and all death and estate duties.

The questions asked in the stated case raise two quite distinct issues. The first of these issues is whether the debts which each of the appellants owed to Mrs. Bone in her lifetime formed any part of her estate for duty purposes. The only provision of the Stamp Duties Act which the respondent
10 Commissioner can rely on for this purpose is s.102(1), which provides that 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, inter alia, 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. It is submitted for the appellants that their appointment as executors of Mrs. Bone's will, whether with or without the grant of probate
20 to them, operated at law to release the debts, that having regard to the other assets owned by Mrs.Bone at the time of her death, the debts due by her, the duties payable in respect of those other assets, and the terms of her will, there is no occasion for the application of the principles which, in appropriate circumstances, would entitle creditors and beneficiaries of the estate to have the debts treated as assets of the estate, and that accordingly no person became entitled to the debts under
30 Mrs. Bone's will.

This is a rather startling proposition, because on any view of the matter the debts were vested in Mrs. Bone at the time of her death, and if they ceased to exist after her death, it was because of the provisions of her will. The basis of the appellants' submission is that the effect of their appointment as executors was not to vest in them the rights which the loan agreements gave to Mrs. Bone, and to extinguish the debts because the
40 persons entitled to recover them included in each case, by virtue of that vesting, the person who was liable to be sued, but was to destroy the obligation of each of them to repay the loans without any such vesting of rights. Hence, so it is submitted, no-one became entitled under Mrs. Bone's will to the benefit of the contractual rights which were previously vested in her. This submission requires a consideration of the principle that the appointment by a testator of a debtor as his

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executor operated, at common law, as a release of the debt.

The principle is long established, and is based on the general common law principle that a person cannot sue himself. In equity, despite the release at common law, the debt is, in the appropriate circumstances, regarded as an asset of the estate, and can be treated as part of the general assets of the estate for the payment of the testator's debts, and also for the payment of legacies. In In re Bourne, (1906) 1 Ch. 697 at p. 708, Romer, L.J., described the position of an executor debtor who was sought to be made liable as follows:-

> "He was indebted to the testator in his lifetime, and by the will he was appointed executor, and he proved the will. The effect of that was that at law the debt was extinguished because there was no one to sue or be sued, but in equity he as debtor is held to have paid himself as executor, and therefore as executor to have in his possession the full amount of the debt as having been paid to him as executor. That is the view of equity, and it is on that view that he can be made liable in an action to administer the estate of the testator."

Indeed, even at common law, the debt seems to have been regarded as part of the assets of the estate to pay creditors if they were otherwise to be defeated. In Wankford v. Wankford, (1704) 1 Salk. 299 at p. 306; 91 E.R. 265 at p. 270, Holt, C.J., said:-

> "........ when the obligee makes the obligor his executor, though it is a discharge of the action, yet the debt is assets, and the making him executor does not amount to a legacy, but to payment and a release. If H. be bound to J.S. in a bond of 100l., and then J.S. makes H. his executor, H. has actually received so much money, and is answerable for it, and if he does not administer so much, it is a devastavit."

The appellants contend that their respective debts were released at common law and that it is irrelevant to consider the position that would have existed if Mrs. Bone's debts or legacies

required the amounts of the loans to be treated as asets of her estate. This is correct, for Mrs.Bone did not leave any legacies in her will, and there are adequate assets in her estate to pay debts and duties without recourse to the loans. However, as it seems to me, the appellants' contention is to be rejected for two reasons.

The first reason is that the release of the debts was effected, not because Mrs. Bone nominated the appellants as her executors, but because there became vested in them the several rights to sue for the debts. At common law, a person could not sue himself, nor could two or more persons sue one of their number; and if a debtor became the person, or one of the persons, who had the right to sue for his debt, even though temporarily, the debt was extinguished. In another context, this rule was considered by the High Court in English Scottish and Australian Bank Limited v. Phillips, (1936-37) 57 C.L.R. 302, where the owner of land under Torrens title gave a registered mortgage containing the usual covenants to pay principal and interest, and later took a transfer of the mortgage to himself, thus becoming both mortgagor and mortgagee. He then transferred the mortgage to the Bank, and when sued on the covenants to pay principal and interest, claimed that his liability was extinguished when he was both mortgagor and mortgagee. The majority of the Court conceded that this would have been the position under the general law, but held that the provisions of the relevant Torrens statute preserved his liability: see particularly 57 C.L.R. at pp. 320-321.

The reason why a debtor executor fell within this rule was because the right to sue to recover the testator's debts was, at common law, vested in him upon the death of the testator. That this was so was confirmed by Holt, C.J. in Wankford v. Wankford (supra), when he was considering a case where a debtor was bound to a testator who made the debtor his executor, and the debtor executor, having inter-meddled, died before the grant of probate. Holt, C.J., said (1 Salk. at p. 305; 91 E.R. at p. 269):-

> "But .... I hold that the obligee's making the obligor his executor is a release in that case and that for these reasons:

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> 1st Because by being made executor he is the person that is entitled to receive the money due upon the bond before probate; and as he is the person that is entitled to receive it, he is also the person that is to pay it; and the same hand being to receive and pay, that amounts to an extinguishment."

The same position applied where an executor did not take out probate, for at common law, the testator's personal estate vested in the executor by virtue of the will, and the grant of probate was merely proof of his title. However if he were cited to take out probate and not having intermeddled declined to do so, there was no release:

> "..... for you shall no more force a man to accept of a release against his will, than of a deed of grant; and the subsequent refusal makes the deed void ab initio; as if a deed of release were delivered to B. to the use of the obligor, if the obligor refuses to accept it, it is not the deed of the obligee, and he may plead non est factum to it. 5 Co. 119 b. And besides, if the obligor were never executor, then was he never the person entitled to receive the money, and consequently not within the reason of the rule of extinguishment."

It follows that it is not the mere nomination of a debtor as an executor that releases the debt, but it is the vesting in him of the property of the testator which has this effect. In New South Wales, the common law rules may well be affected by the provisions of ss. 44, 61 and 69 of the Wills Probate and Administration Act, 1898, as amended, but it is irrelevant to consider the effect of these provisions for the purposes of the present case, except that there would probably be no release until probate was granted to the appellants, the release then operating retrospectively from the death of Mrs. Bone.

The second reason for the rejection of the appellants' claim that the loan debts did not form part of Mrs. Bone's estate for the purposes of the assessment of death duty does not depend upon the vesting of Mrs. Bone's rights under the loan agreements in the appellants as executors of her will, but upon the beneficial rights acquired by

the appellants as a result of the provisions of that will. Mrs. Bone appointed the appellants to be her executors and they accepted this office and obtained a grant of probate. In the circumstances it was this grant that effected the extinguishment of the loan debts. However, if the appellants had not been appointed as executors, the debts would, subject to the executors' assent, have been released in equity pursuant to the provisions of cls. 4, 5 and 6 of her will. If this had been the position, I do not think that there would be any doubt that the loan debts would have been caught by the provisions of s.102(1) of the Stamp Duties Act. "The forgiveness of a debt due to the testator from a particular person is a form of, and has characteristics of, a specific legacy": Williams and Mortimer, Executors, Administrators and Probate, p. 852. This does not mean of course that such a forgiveness involves the actual payment of money to the beneficiary, but it is treated as if it had the same effect, and is subjected to the same rules as other legacies. As Kekewich, J., said in In re Wedmore; Wedmore v. Wedmore, (1907) 2 Ch. 277 at p. 283; in relation to a provision in a will:- "I forgive my child all debts and sums of money due from him on my death, and not secured by bond, bill, note or other security":

> "I cannot see myself any substantial difference between what I have just read and 'giving' the debt due from another, merely because the former is in the nature of a surrender or release. It really is a gift to the child of what he owes, so that he would not be bound to pay the debt to the executors of the testator."

This approach was adopted in relation to the application of the provisions of the English Legacy Duty Act, 1796, to testamentary releases of debts. This Act, together with the Stamp Act, 1815, taxed, inter alia, any legacy payable or satisfied out of either the personal or real estate of a testator. In Attorney-General v. Holbrook, (1829) 3 Y. & J. 114; 148 E.R. 1115, the Court of Exchequer had to consider whether the forgiveness of a debt owing to a testator under a bond was subject to legacy duty. Holding that it was, Graham, B., said (3 Y. & J. at p.120; 148 E.R. at p.1118):-

> "It is said that this is not within the purview of this act of Parliament, because it is not a legacy. What was this debt? It was so much

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money in the hands of the testator which they were bound to pay him; it is as much as to say, I give you the amount of that debt, my money, in the hands of you the persons who have entered into that obligation to me; and therefore I can form no doubt at all that the remission of a debt that is due to the testator, is to all intents and purposes a bequest of so much money to the party, and must be so considered: the words of the different acts of Parliament are large enough to comprehend the case of the forgiveness of a debt."

Garrow, B., said (3 Y. & J. at p.122; 148 E.R. at p. 1119):-

".... I consider the case upon the question, whether this is a legacy or not, just as if the testator had done this sort of thing, as if he had said I give to my brother 4000l. in exchequer bills, which are sealed up at my bankers, they shall be given up to him at my death; then he says, this is in effect in order to show my affection and regard to my brother, and to benefit him to the extent of 4000l.; I do not direct it shall be paid to him, I do not desire it to be paid to him, because I have a security from him to that amount, and I desire that it may be done in this way that the bond be cancelled, and he will be 4000l. better in the world than he would if that bond remained uncancelled and unrevoked. I am of opinion that this is a legacy to the brother of the testator, and therefore liable to the payment of duty ...".

Mullock, B., said (3 Y. & J. at p. 124; 148 E.R. at p. 1119):-

"Now, the first point will be to ascertain, whether it falls within the words of that clause, which enacts 'That every gift,' there is no question this is a gift, 'by any will or testamentary instrument ..... which, by virtue of any such will, or testamentary instrument, shall have the effect or be satisfied out of the personal estate of such person so dying,' about which there can be no question - this debt is to have effect, or be satisfied out of the personal estate

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(continued)

of such person so dying, - this debt was part of the personal estate, and would have been assets, ... 'shall be deemed and taken to be a legacy within the true intent and meaning of this act.' Now, it appears to me, this must be construed, as the Court are disposed to construe it, to be a legacy, and that it is a legacy which acquires its force and effect under this will. If it be so, then it falls within the former part of the clause, and becomes a legacy, and subject to the duty. The question is, whether it be or be not a legacy within this act; it appears to me, that it is; and that, therefore, it is liable to the duty ....".

This principle here established continued to be applied until the abolition of legacy duty in 1949: Green's Death Duties, 4th Ed., P.668; Halsbury's Laws of England, 3rd Ed., Vol. 15, p. 86.

It seems to me that the same approach should be adopted in relation to the provisions of s.102(1) of the Stamp Duties Act, and to an extinguishment effected by the appointment of a debtor as executor as well as to an express release of a debt. In the present case, the loan debts belonged to Mrs. Bone, and the appellants became entitled, in a real sense, to those debts by virtue of the provisions of Mrs. Bone's will. It is irrelevant for this purpose that they became so entitled because of the provisions of her will by which she appointed them as her executors rather than pursuant to the releases to be found in cls. 4, 5 and 6 of the will; in either case, it could properly be said that the appellants became entitled to property of Mrs. Bone under the terms of her will.

The second of the issues which are raised by the stated case involves the construction of the loan agreements which were made on 16th May, 1969. On the assumption that the loans did form part of Mrs. Bone's estate, their value at the time of her death depends upon whether the amount of each of the loans then outstanding could be called up by the giving of a 90-days' written notice, or whether, since Mrs. Bone had given no such notice during her lifetime, the loans were repayable over a long period of time in accordance with the provisions of cl. 4 of each of the agreements.

In the Supreme Court of New South Wales Court of Appeal

No. 3

Judgment 27th November 1972

Hope, J.A.

(continued)

The respondent Commissioner took the view that the loans did form part of Mrs. Bone's estate and that the value to be attributed to them was the whole of the amount outstanding at the time of Mrs. Bone's death, namely, $93,475. On this basis he assessed death duty on the estate in the sum of $16,732.96. If the loans did form part of Mrs. Bone's estate but the balance outstanding was repayable only in accordance with the provisions of cl. 4 of the loan agreements, then the total value of the outstanding balance of the loans as at the time of Mrs. Bone's death was $13,651, and the amount of duty payable on her estate was only $1,516.

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The appellants submit that on the proper construction of the loan agreements, in the absence of any assignment coming within the terms of cl. 3 of the agreements, the only person who could give a notice under cl. 2 of the agreements was Mrs. Bone, that this right did not devolve upon her executors, and that accordingly upon her death without the service of any such notice, each loan was repayable in accordance with the provisions of cl. 4 of each of the agreements. For this submission, the appellants rely upon the decision of Owen, J., in Bray v. Commissioner of Taxation, (1968) 117 C.L.R. 349. This decision, which was given on 6th September, 1968, undoubtedly supports the appellants' contention, for each of the agreements for loan which were signed on 16th May, 1969, was a replica of the agreement before Owen, J., and which he held had the construction contended for by the appellants. In that case a testator had executed an agreement for loan on 3rd May, 1960, and thereafter died on 20th September, 1964, without having assigned the loan debt or given any notice in accordance with cl. 2 of the agreement. Owen, J., held that the value of the loan instalments unpaid at the date of death which should be included in the estate of the lender for the purposes of the Estate Duty Assessment Act, 1914, as amended, was one arrived at on the basis that the loan was repayable in accordance with cl. 4 of the agreement, and not on the basis that the executor could call up the loan by the giving of a notice pursuant to s. 2 of the agreement. In coming to this conclusion Owen, J., said, at p. 352:-

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" Counsel for the appellants naturally

In the Supreme Court of New South Wales Court of Appeal

No. 3

Judgment 27th November 1972

Hope, J.A. (continued)

placed great reliance upon the words 'made 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'.

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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 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."

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It is submitted by the respondent Commissioner that this decision was wrong, and that on a proper construction of the loan agreements Mrs. Bray's executors would have been entitled to give a notice under cl. 2 of each of the agreements calling up the whole outstanding amounts of the loan debts. A decision of a Justice of the High Court sitting at first instance is of course of the greatest persuasive authority for this Court, but this Court is not bound to follow it, and since the decision is challenged, it becomes necessary to decide whether the construction placed upon the agreement by Owen, J., was the correct one. With the greatest respect to the learned Judge, I do not agree with that construction.

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The critical words upon which the appellants rely are the words "written notice given by the Lender under her own hand" appearing in cl. 2.

In the Supreme Court of New South Wales Court of Appeal

No. 3

Judgment 27th November 1972

Hope, J.A.

(continued)

It is contended by the appellants, as was held by Owen, J., that the words "under her own hand", in their context, show that it was only the person who made the loan, in the present case Mrs. Bone, who could give the notice which the clause authorises and that neither the executor nor the administrator of the lender, nor indeed any other person except an assignee exercising his right under cl. 3, could give such a notice. The contrary view is that the words "under her own hand" are merely intended to indicate that a "lender" giving a notice pursuant to cl. 2 must sign the notice himself and not by an agent and that an executor or administrator of the original lender, but not his agent, may sign and give such a notice. 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 of a contracting party who has died. This has long been 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:-

> "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."

More than one hundred years earlier it was treated as well established that "a covenant lies against an executor in every case, although he be not named; unless it be such a covenant as is to be performed by the person of the testator, which they cannot perform": Hyde v. The Dean and Canons of Windsor, Cro. Eliz. 553; 78 E.R. 798. Hyde v. Skinner, (supra), is particularly relevant for the purposes of the present case, for the fact that the lease was expressed to be renewable "upon the request of Hyde within the term" did not preclude the executors from being

entitled to make the request. A similar conclusion has been reached in a number of other reported decisions relating to options to purchase and options to take a lease. Thus, in Buckland v. Papillon, (1866) L.R. 1 Eq. 477, the defendant agreed in writing to let and G.F. Bloxam agreed to take a certain property for a term of three years from 29th September, 1856. The memorandum then proceeded: "And it is further agreed that the said John Papillon shall, whenever called upon so to do by the said George Frederick Bloxam, grant a lease to him at his, the said George Frederick Bloxam's expense, of the" property on the terms set out. It was held that a purchaser from the assignee in bankruptcy of Bloxam was entitled to the benefit of this provision. In Carter v. Hyde, (1923) 33 C.L.R. 115, a similar approach was adopted by the High Court, which held that an option to purchase the lease, licence, furniture and goodwill of a hotel might be exercised by the executrices of the person to whom the option was granted and who had died without having exercised it. In this case the document, so far as relevant, stated "In consideration of £1 paid to me by Mr. George Hyde I hereby place under offer to him the lease" etc. It was pointed out in this case by Higgins, J., at p. 129 that no-one denied that an option could be so framed as to limit its exercise to the optionee personally but he said that in that case there was no indication of such limitation.

If, in the light of these principles and decisions, one goes to the subject agreements, it is seen that the word "lender" is used in various clauses where undoubtedly it must be taken to include the executor or administrator of the lender. Cl. 4 provides that subject to cls. 2 and 3, the borrower shall pay to the lender or her assignee the annual instalments which are there set out. The "lender" here undoubtedly includes the executor or administrator of the lender, as Owen, J., himself pointed out at the conclusion of the passage from his judgment which I have quoted. The identification of Mrs. Bone as the lender at the commencement of the agreement does not prevent this extended meaning being given to the word any more than does the identification of the "borrower", this expression including executors and administrators in every case where it is used in the substantive provisions of the agreement. It is also apparent that the word "lender" where used

In the Supreme Court of New South Wales Court of Appeal

No. 3

Judgment 27th November 1972

Hope, J.A.

(continued)

in cls. 1 and 8, and where secondly used in cl. 6, must include the executor or administrator of the lender. If cl. 2 had provided that the loan debt should be paid in full by the borrower to the lender upon the expiration of 90 days after a written notice signed by the lender had been given by the lender to the borrower requiring the borrower to pay in full the amount of the loan debt, I do not think that it could be argued that the executor of the lender could not give such a notice; it is the words "under her own hand", and indeed the word "own", which must be relied on to support the view that it was only Mrs. Bone who could give the notice. However, the expression "under her own hand" means no more than "signed by the lender him or herself" and thus precludes signature by an agent, but does not throw any light on the identity of the lender who must sign the notice. In other words, the expression does no more than exclude the application of the rule that a person may generally do through an agent anything which he may do himself: cf. The Queen v. The Justices of Kent, (1873) L.R. 8 Q.B. 305; Fricker v. Van Grutten, (1896) 2 Ch. 649. It is true that the word "her" is used, but this must have been because the original lender was a woman, and does not in my opinion limit the meaning of the word "lender" any more than if the original lender had been a man, and the word "his" was used. I do not think that the expression, or anything in the agreement, limits the word "lender" in cl. 2 to Mrs. Bone alone.

This view accords with the provisions of cl. 3 that an assignee should be entitled to obtain payment in full of the loan debt in the same manner as the lender could have obtained payment thereof in pursuance of cl. 2. This does not mean of course that the assignee had to serve a notice signed by Mrs. Bone; it simply meant that the "Assignee" had to serve a notice signed by him or herself, and a notice signed by an agent would not suffice. In cls. 4, 6 and 8 the word "assignee" is used in a context which necessitates that it should include the executor or administrator of the assignee, and I see nothing in cl. 3 which would suggest that a different meaning should be given to the word for the purpose of that clause.

Accordingly, in my opinion, the loan agreements signed on 16th May, 1969, on their proper

construction, authorised the giving of notices by Mrs. Bone's executors calling up the loan debts, and did not limit the executors' rights in respect of the repayment of the loans to an annual instalment of $375 from each borrower. The fact that the agreements were executed after the decision in Bray v. Commissioner of Taxation, (supra), was given does not affect this conclusion, for the intention of the parties is to be ascertained by reference to the words that they used, and not by reference to their subjective intentions. It follows that the loan debts should be valued for death duty purposes on the basis that the right to give a notice under cl. 2 of each of the agreements of 16th May, 1969, was not exercisable only by Mrs. Bone, but might also be exercised by her executors. I would also add that I think that the word "lender" where firstly used in cl. 3 includes Mrs. Bone's executors, and that this construction provides an additional reason for valuing the loan debts at the sum of $93,475.

The questions asked in the case should therefore be answered as follows:-

(1) Yes;
(2) $93,475;
(3) $16,732.96
(4) The appellants.

REYNOLDS, J.A.: I have read the judgments of Jacobs P. and Hope J.A. in draft form.

The considerations involved which lead to the answers proposed are fully covered and I do not wish to add anything.

I agree with the answers proposed.

In the Supreme Court of New South Wales Court of Appeal

No. 4

Order of the Court of Appeal

27th November 1972

No. 4

Order of the Court of Appeal

IN THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL) CA 23 of 1972

No.31 of 1972

BETWEEN:

TREVOR DONALD BONE, DARYL LEONARD BONE LILLA KATHLEEN BONE

Plaintiffs

AND: 10

THE COMMISSIONER OF STAMP DUTIES

Defendant

THE COURT ORDERS

1. THAT question (1) in the stated case herein namely "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?" be answered in the affirmative.

2. THAT the answer to question (2) in the stated case herein namely "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)?" is ninety three thousand four hundred and seventy-five dollars ($93,475.) 20

3. THAT the answer to question (3) in the stated case herein namely "Is the amount of duty properly assessable in respect of the dutiable estate of the abovenamed deceased:- 30

(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?"

is sixteen thousand seven hundred and thirty-two dollars and ninety-six cents ($16,732.96).

4. THAT the costs of this case are to be borne and paid by the plaintiffs.

ORDERED 27 November 1972 AND ENTERED

Registrar.

In the Supreme Court of New South Wales Court of Appeal

No. 4

Order of the Court of Appeal

27th November 1972

(continued)

No. 5

Notice of Appeal

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In the High Court of Australia

No. 5

Notice of Appeal

14th December 1972

IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY) No.111 of 1972.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

BETWEEN:

TREVOR DONALD BONE DARYL LEONARD BONE and LILLA KATHLEEN BONE as executors of the will of Alice Bone deceased.

20

Appellants

AND:

THE COMMISSIONER OF STAMP DUTIES

Respondent

NOTICE OF APPEAL

TAKE NOTICE

That TREVOR DONALD BONE DARYL LEONARD BONE and LILLA KATHLEEN BONE as executors of the will of Alice Bone Deceased appeal to the High Court of Australia against the whole of the judgment decrees

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and orders of the Supreme Court of New South Wales Court of Appeal given pronounced and made on 27 November 1972 upon the following amongst other grounds:-

In the High Court of Australia

No. 5

Notice of Appeal

14th December 1972

1. That the Court was in error in holding that by reason of the death of the late Alice Bone her executors and executrix became entitled under the will of the deceased to the debts totalling $93,475.

2. That the Court was in error in failing to hold that no person became entitled under the will of the late Alice Bone to the debts totalling $93,475 by reason of her death.

3. That the Court was in error in holding that in the agreements for loan between the late Alice Bone and each of the appellants the word "lender" in the clauses numbered 2 thereof included the personal representatives of the deceased. 10

4. That the Court was in error in holding that the personal representatives of the late Alice Bone are entitled to give the notice referred to in the clauses numbered 2 of the said agreements whereby the debtors may be called upon to repay the loans in full.

5. That the Court should have held that upon the proper construction of the said agreements for loan the loans the subject thereof could not be called up by the giving of a notice of the kind referred to in the clauses numbered 2 of the said agreements by the legal personal representatives of the late Alice Bone. 20

6. That the Court was in error in answering the first question in the stated case in the affirmative.

7. That the Court was in error in answering the second question in the stated case in the amount of $93,475. 30

8. That the Court was in error in answering the third question in the stated case in the amount of $16,723.96.

The orders sought by the appellants in lieu of those made by the Court are that the questions asked in the stated case should be answered as follows:-

1. No. 40
2. Does not arise.
3. $477.23.
4. By the respondent.

In the High Court of Australia

No. 4

Notice of Appeal

14th December 1972

(continued)

In the alternative the orders sought by the appellants in lieu of those made by the Court are that the questions asked in the stated case should be answered as follows:-

1. Yes.
2. $13,651.
3. $1,511.
4. By the respondent.

DATED this fourteenth day of December 1972.

10

J. Mulally
....
Solicitor for the Appellants.

This notice of appeal is filed by Peter S. Utz & Company of 250 Pitt Street Sydney city agents for C.A. Vaughan & Hains of 248 Parker Street Cootamundra the solicitors for the appellants.

TO: District Registrar,
High Court of Australia,
SYDNEY. N.S.W.

AND TO: The abovenamed Respondent and his Solicitor,
C/- R.J. McKay, Crown Solicitor,
Goodsell Building,
8-12 Chifley Square,
SYDNEY. N.S.W.

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No. 6

Affidavit of John Mulally

14th December 1972

No. 6

Affidavit of John Mulally

IN THE HIGH COURT OF AUSTRALIA)
NEW SOUTH WALES REGISTRY) No. 111 of 1972

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES

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BETWEEN:

TREVOR DONALD BONE DARYL LEONARD BONE and LILLA KATHLEEN BONE as executors of the will of Alice Bone Deceased.
Appellants

AND:

THE COMMISSIONER OF STAMP DUTIES
Respondent

In the High Court of Australia

No. 6

Affidavit of John Mulally

14th December 1972

(continued)

AFFIDAVIT

On the fourteenth day of December 1972 JOHN MULALLY of 248 Parker Street, Cootamundra in the State of New South Wales solicitor being duly sworn makes oath and says:-

1. I am the solicitor for the appellants herein.

2. The appellants are the executors and executrix of the late Alice Bone who died on 1 May 1970.

3. Prior to her death the deceased entered into agreements for loan with each of the appellants whereby she advanced to them certain sums of money. 10

4. It was a term of each of the agreements that the debt should be repaid in full by the borrower upon the expiration of 90 days notice given by the deceased under her own hand to the borrower. It was a further term of each of the agreements that the borrowers should repay the debts by annual instalments of not less than $375.

5. The total amount outstanding in the agreements for loan on the death of the deceased was $93,475. The value as at the date of death of the deceased of the agreements to repay the debts by annual instalments of $375 was $13,651. 20

6. The respondent claims that the total amount of $93,475 should be included in the dutiable estate of the deceased by reason of the agreements for loan. The appellants claim that no amount, or alternatively the amount of $13,651 only, should be included in the dutiable estate of the deceased by reason of the agreements for loan. 30

7. In the event that the total amount of $93,475 should be included in the dutiable estate of the deceased by reason of the agreements for loan the duty assessable in respect of that dutiable estate is $16,732.96. In the event that the amount of $13,651 only should be included in the dutiable estate of the deceased by reason of the agreements for loan the duty assessable in respect of that dutiable estate is 40 $1,516. In the event that no amount should be included in the dutiable estate of the deceased by reason of the agreements for loan the duty assessable in respect of that dutiable estate is $477.23.

SWORN by the deponent on the day and year first hereinbefore mentioned at Cootamundra before me:-) J. Mulally

E.F. Byrne JP

Justice of the Peace
Cootamundra.

This Affidavit is filed on behalf of the Appellants.

In the High Court of Australia

No. 6

Affidavit of John Mulally

14th December 1972

(continued)

No. 7

10 Order of the High Court of Australia

No. 7

Order of the High Court of Australia

(undated)

BONE AND OTHERS

V.

THE COMMISSIONER OF STAMP DUTIES

ORDER

Appeal allowed with costs.

Order of the Court of Appeal Division of the Supreme Court of New South Wales set aside and in lieu thereof the questions in the stated case answered as follows:-

20
(1) No
(2) Does not arise
(3) $477.23
(4) By the respondent

No. 8

Judgment of the High Court of Australia

No. 8

Judgment

Sir Garfield Barwick C.J.

12th August 1974

In this appeal I have had the advantage of reading the reasons for judgment to be delivered by my brothers Mason and Stephen. The relevant facts and statutory provisions are there to be found and
30 I have no need to repeat them.

I agree with my brothers in the conclusion that, by reason of the provision in the will of the

In the High Court of Australia

No. 8

Judgment

Sir Garfield Barwick C.J.

12th August 1974

(continued)

deceased expressly forgiving the indebtedness to her of her executors, the inclusion by the respondent Commissioner 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. I agree with the reasons which my brothers give for that conclusion. I would add for myself that even if, contrary to the opinions expressed by them, the appointment by the deceased of her debtors as her executors operated to release the debts (a matter which I do not find it necessary to decide in this case), there would yet have been no relevant property to which the executors became entitled under the will of the deceased. 10

I would allow the appeal and answer the questions asked in the stated case:

(1) No.
(2) Does not arise.
(3) $477.23
(4) By the respondent.

McTiernan J.

<u>McTIERNAN J</u>: I agree that the appeal should be allowed and that the questions asked in the stated case should be answered as follows:- 20

1. No.
2. Does not arise.
3. $477.23.
4. By the respondent.

I have nothing to add to the reasons of the other members of the Court which are being published.

Menzies J.

<u>MENZIES J.</u>: I have read the reasons for judgment of Mason J. I agree with them and have nothing to add. 30

Stephen J.

<u>STEPHEN J.</u>: This is an appeal from the unanimous decision of Court of Appeal Division upon a case stated by the Commissioner of Stamp Duties at the instance of the plaintiffs, the executors of the will of Alice Bone, deceased.

The questions raised are whether three debts owed to the deceased by three of her children form part of the deceased's dutiable estate and, if they do, whether it is the total amount of 40

indebtedness or a lesser sum, being the value of the debtors' promises to pay by instalments spread over a long term of years, which is to be so included.

The origin of these debts lies in three agreements in substantially identical form, one with each child. Each is dated 16th May 1969, which was also the date of the deceased's will, and recites an agreement to lend, a lending and an agreement to repay. The deceased lent $25,000 to two of her sons and $44,600 to her daughter and the agreements provide, by clauses 2, 3 and 4, as follows:

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> "2. The loan debt shall be paid in full by the Borrower to the Lender upon the expiration of ninety (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.
>
> 3. If the Lender by assignment made in accordance with Section 12 of the Conveyancing Act 1919-1954 of the State of New South Wales should assign the said loan debt to any person then the assignee shall be entitled to obtain payment in full of the said loan debt in the same manner as the Lender could have obtained payment thereof in pursuance of Clause 2 hereof.
>
> 4. Subject to Clauses 2 and 3 hereof the Borrower shall pay to the Lender or her assignee in reduction of the said debt annual instalments of not less than three hundred and seventy-five dollars ($375) the first of such annual payments to be paid on the first day of December 1969 and subject to Clauses 2 and 3 hereof each subsequent annual payment is to be paid at the end of each succeeding year ending on the first day of December.".

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The agreements elsewhere define Mrs. Bone as "the Lender", the child in question as "the Borrower" and the principal sum, or that part of it for the time being owing, as "the loan debt". The remaining terms of the agreement are described in more detail in the judgments in the Court of Appeal Division, reported in (1972) 2 N.S.W. L.R. 651.

In the High Court of Australia

No. 8

Judgment

12th August 1974

Stephen J.

(continued)

By her will Mrs. Bone appointed her two sons and her daughter her executors and trustees and by clauses 4, 5 and 6 forgave and released unto each of those three children "all sums whether for principal or interest" which they owed her.

Mrs. Bone died on 1st May 1970, almost a year later, without having given any written notice in accordance with clause 2 of the agreements but having received from each of her three children one instalment of $375, paid pursuant to clause 4 of the agreements. 10

The Commissioner claims to include in her dutiable estate the sum of $93,475, being the total indebtedness outstanding at her death, as property of the deceased "to which any person becomes entitled under the will" of the deceased - s.102(1), Stamp Duties Act 1920 (N.S.W.) as amended, or alternatively as property "which the deceased has disposed of" by will - s.102(2) of that Act.

The appellants contended, unsuccessfully before 20 the Court of Appeal Division and now before us, that the loan transactions gave rise to no property of the deceased for duty purposes since their appointment as executors operated as from the moment of death to extinguish their indebtedness. In any event, even if for a moment of time the existence of the debts did give rise to some property of the deceased, it was not property to which there arose any entitlement "under the will" of the deceased within the meaning of s.102(1). The benefit to the 30 executors arising from the extinguishment of their indebtedness arose by operation of law when the children became her executors and not under the will of the deceased. Alternatively, the effect of clauses 4, 5 and 6 of the will was to destroy what had formerly been the deceased's choses in action against the executors and once again their existed neither any relevant property of the deceased nor, of course, any entitlement to it under her will.

The appellants also contended that if there 40 was property to which s.102(1) applied, its value was no more than $13,651, being the agreed present value of the children's promises to repay their respective loans by future instalments of $375. On the view I have taken of the earlier contentions advanced on the appellants' 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 50 which the appellants rely but which the Court of Appeal Division considered that it should not follow. What is involved is no more than a point

In the High Court of Australia

No. 8

Judgment

12th August 1974

Stephen J. (continued)

of construction and were it necessary to decide it I would adopt the view of Owen J. and conclude that in clause 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.

The appellants' other submissions can best be dealt with in two parts, that relating to what is said to be the effect of the appointment of the deceased's children as her executors and, secondly, that relating to the effect of clauses 4, 5 and 6 of the will of the deceased.

I have concluded that their appointment as executors has no relevant effect upon the operation of s. 102 of the Stamp Duties Act but that the effect of clauses 4, 5 and 6 of the will is such as to entitle the appellants to succeed in this appeal. Notwithstanding these conclusions I should, I think, deal at some length with the quiet detailed submissions of the appellant concerning the alleged effect of the children's appointment as executors, which does also incidentally involve one aspect of the effect of these three clauses of the will, and only then turn to the point upon which I consider that the appellants should succeed, which relies exclusively upon the effect of these three clauses.

It is well established by the English authorities that the fact of appointment as executor will effectively extinguish a chose in action for recovery of a debt owed to the deceased by the executor. This is, however, subject to the qualification that an executor will be treated as holding assets of the estate of a value equal to his indebtedness if due administration of the estate requires that the amount of the indebtedness should be available as an asset of the estate to meet the claims of creditors or of persons entitled under the will or upon a partial intestacy.

At common law the discharge of, or release from, indebtedness which was regarded as flowing from a creditor's appointment of his debtor as executor - Y.B. 21 Ed. 4, 81b (reported in 126 E.R. 1103 at note (a)[2]); Sir John Needham's case 8 Co. Rep. 135a: 77 E.R. 678 at p. 680 - nevertheless still left the amount of the debt as assets in the executor's hands and he "is answerable for it, and if he does not administer so much, it is a

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devastatit" - Wankford v. Wankford (1704) 1 Salk 299: 91 E.R. 265 per Holt C.J. at p.270; and see per Lord Tenterden C.J. in Freakley v. Fox (1829) 9 B & C 130: 109 E.R. 49 at p.50.

As Sir William Holdsworth points out (History of English Law, Vol. 3, p.585), the concern of the common law with the administration of estates was a very narrow one and it was the Court of Chancery, as successor to the ecclesiastical courts, which came to have the principle concern with the administration of estates. By what was perhaps no more than an adoption of the principle of common law - per Cozens-Hardy L.J. in In re Bourne (1906) 1 Ch 697 at p.711 - it early held an executor's indebtedness to his testator to be assets in the executor's hands to pay debts and perhaps also to pay legacies in general, Brown v. Selwin (1734) Cases to Talbot 240: 25 E.R. 756 - per Lord Talbot L.C., affirmed an appeal to the House of Lords. Lord Hardwicke L.C. in Fox v. Fox (1737) 1 Atk 463: 26 E.R. 294 treated such a debt as assets in the executor's hands to be "applied, after payment of funeral expenses and legacies, to the exoneration of the real estate in favour of the heir" and in Carey v. Goodinge (1790) 3 Bro. C.C. 110: 29 E.R. 439, the testator having failed to dispose of residue, Lord Thurlow L.C. declared the executor to hold the amount of his indebtedness to the deceased in trust for the next of kin, it being "a settled point in this Court that the appointment of the debtor executor was no more than parting with the action.". In Berry v. Usher (1805) 11 Ves. Jun.87: 32 E.R.1021, Sir William Grant M.R. declared the position to be so "perfectly settled by the decisions" that defendant's counsel, who had pleaded that defendant's appointment as executor had released his indebtedness except against creditors of the estate, was constrained to give up the point without argument. Thus by 1847 Roper, in his Law of Legacies at p.1070, could state the law to be that in equity the appointment of a debtor as executor resulted in his being a trustee of the debt for the residuary legatee or next of kin. Of modern cases to the same effect it suffices to refer to In re Bourne at pp. 703, 708 and 710-711, Jenkins v. Jenkins (1928) 2 K.B. 501 and Re Cahill, ex parte Fielding (1931) St. R. Qd. 329.

In the case of the present estate no question

of insolvency arises even if the indebtedness be excluded from the estate assets; accordingly no interest of creditors requires the executors to hold in trust the amount of their indebtedness to the deceased; neither do the interests of those entitled under any provision of the will other than clause 7, but by clause 7 residue is given, in the events which occurred, to the executors in equal shares as tenants in common. If the operation of clauses 4, 5 and 6 of the will be for the moment left out of account this disposition can only take proper effect if each of executors accounts to the estate for his or her respective indebtedness, the indebtedness of the executrix being almost twice that of each of the two executors. Accordingly the equitable doctrine would require to be invoked so that the executors might hold the total amount of indebtedness, $93,475, in trust to satisfy the equal division of residue contemplated by the residuary bequest.

However, when regard is had to clauses 4, 5 and 6 of the will, it becomes apparent that no room exists for the application of the equitable doctrine. Its function is only to ensure that the application of the assets of the deceased's estate in satisfaction of the testamentary dispositions of the deceased should not be prejudiced by any extinguishment of assets resulting from the appointment as executor of one who is also a debtor. In the present case the will makes it clear that the executors were to be forgiven their indebtedness and no occasion thus arises for Equity to treat them as trustees of the amounts of their indebtedness.

Were this appeal concerned with a deceased to whom English succession law or that of other States of Australia, such as Victoria, applied this would, in my view, be an end of the matter; the causes of action for recovery of the executors' indebtedness would be extinguished once death of the deceased made their appointment effective. The executors would thereupon become "both the person to receive and the person to pay", there would be "no one to sue or be sued" - In re Bourne per Collins M.R. at p. 707 and per Romer L.J. at p. 708; as Salter J. puts it in Jenkins v. Jenkins, at p. 506, "a debt is a right to sue and the executor cannot sue himself"; moreover there would, at the same time, be no occasion to invoke the equitable doctrine discussed above. However under the succession law

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of New South Wales the testator's choses in action do not vest in his executor upon death; the executor does not, at the moment of death, become the person entitled to sue for debts due to the deceased; instead, by s. 61 of the Wills, Probates and Administration Act (N.S.W.), the real and personal estate of a deceased, whether testate or intestate, is, until grant of probate or administration, deemed to be vested not in the executor named in the will but in the Public Trustee. 10

It is because a debtor-executor "cannot sue himself" that his indebtedness is extinguished upon the death of his testator, the concept that he has paid himself the debt being unrelated to extinguishment and being invoked only so that the amount of the extinguished debt may, in proper cases, be treated as assets of the estate in his hands. Accordingly when, as in New South Wales, no vesting in the executor of a testator's choses in action occurs at the moment of death there is 20 absent that coincidence between he who must pay and he who is to receive which alone brings about extinguishment of indebtedness. The relevant date for the purpose of death duties is the date of death and postponement of vesting until grant of probate must produce the result that debts are not extinguished at the date of death. The fact that upon grant vesting is retrospective to the date of death - s. 44 - does not, I think, affect, for the purposes of death duties, the continued existence 30 of these choses in action after date of death and until grant of probate.

The deemed vesting of a deceased's estate in the Public Trustee may confer upon him only limited powers and these may not include any power to sue for debts owed to the deceased - Ex parte Public Trustee: re Birch (1951) 51 S.R. (N.S.W.) 345 at pp. 350 and 357, Ex parte Newlands Bros: re Kenniff & anor.(1955) 56 S.R. (N.S.W.) 35, Ex parte Callan; re Smith & ors. (1968) 87 W.N. 40 (Pt. 1) (N.S.W.) 595. However for present purposes it is unnecessary to determine the extent of the power of the Public Trustee; it is the negative aspect of s.61 that is of relevance, the fact that upon death the executor does not become the competent plaintiff to sue for the debts of the deceased, it being irrelevant that, if such be the case, there is for the time being no competent plaintiff at all. It is also irrelevant that in

English cases it has been held that extinguishment of indebtedness occurs despite the executor's death before grant or his failure ever to take a grant of probate - In re Applebee (1891) 3 Ch. 422 at p.429. This can only be so in jurisdictions where the title of the executor is independent of the grant of probate and it may, in any event, now no longer be applicable in England in the particular circumstances dealt with in s.5 of the Administration of Estates Act 1925, with which compare s.69 of the New South Wales Act and, for example, s.16 of the Administration & Probate Act 1958 (Victoria).

It follows that in my view the appointment of the three children of the testatrix as her executors has 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.

The appellants' alternative submission is that by clauses 4, 5 and 6 of the will the executors' debts were extinguished at the moment of death; thereafter they were incapable of constituting property of the deceased and no person could become entitled to them under the will. This submission has the merit of giving to these clauses an effect which accords precisely with their ordinary meaning; each expressly forgives and releases unto the particular child all sums, whether for principal or interest, which he or she owes to the testatrix. There is no question of any gift of the debt itself being made but only of its forgiveness; claims are relinquished, not transferred. Only if faced with compelling authority would I be disposed to regard these clauses in the light for which the respondent contends, as conferring legacies of the debts upon the three children. This would be a conceivable, although curious, mode of discharging indebtedness but the words of the testatrix do not suggest that this was the course which recommended itself to her; she adopted, instead, the straightforward course of forgiveness and release.

There are reported cases which treat a testamentary provision for forgiveness of indebtedness as a legacy of the debt rather than as its release in equity. The early cases are ones in which the debtor had predeceased the testator and the question was whether the testamentary extinguishment of the debt was nevertheless effective. The result depended upon the intent of the testator as discerned by the Court and if the testator's benefaction was regarded as confined to the debtor in person the provision was treated as a lapsed legacy.

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Thus in one of the last of these early cases, Izon v. Butler (1815) 2 Price 34: 146 E.R. 13, the Court of Exchequer treated a forgiveness of indebtedness as a lapsed personal legacy rather than as a provision operating by way of equitable release or extinguishment of the debt, and did so as a matter of construction, holding that the benefit conferred by the will was intended only to advantage the debtor himself. In contrast to this is Sibthorp v. Moxom (1747) 3 Atk. 580: 26 E.R. 1134, 1 Ves. Sen.49: 27 E.R. 883. There counsel for the defendant expressed the point succinctly when he said that the true question was whether "this devise be of a legatory nature, or to operate by way of extinguishment". Lord Hardwicke L.C. adopted the second of these alternatives. He held that the provisions of the will, which forgave a debt due on a bond, operated as a release in equity which might be enforceable by injunction or original application in Chancery and this despite the death of the debtor; as reported in Vesey Senior his Lordship cited Lord King L.C. in Rider v. Wager (1725) 2 P.Wms. 328 at p.332; 24 E.R. 751 at p.753 for this proposition and, looking to the expressed intent of the testator, discerned "a clear intention to release the debt" which was not expressed as personal to the debtor.

Izon v. Butler provided the basis upon which the first revenue case on the point was decided. In this case, The Attorney-General v. Holbrook (1823) 12 Price 407: 147 E.R. 761, 3 Y & J 114: 148 E.R. 1115, the Court of Exchequer treated a forgiveness of a debt as a legacy subject to legacy duty and the Court of Appeal Division has given effect to that decision in the present appeal. The reasons of the members of the Court of Exchequer, varying as they do in mode of expression, and sometimes in substance, from one report to the other, depend very much upon the view that in reality the result of forgiving the debt was to give the debtor money to the value of the debt. Thus Graham B. described the debt as so much money in the hands of the testator which the debtors were bound to pay him and described the testator as saying, by his will "I give you the amount of that debt, my money, in the hands of you the persons who have entered into that obligation to me" - 148 E.R. 1118. Garrow B. adopted a very similar approach, saying, at 147 E.R. 770 and 148 E.R. 1119, that the case was as if the debtor had been given exchequer bills for the amount of the debt: each tended to look at the ultimate

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practical effect of the provisions of the will and accordingly treated the forgiveness as a bequest of so much money: then, because of the very wide statutory meaning given to "legacy" by the revenue legislation in question - see 147 E.R. 761 at p.763, they were able to conclude that there was here a dutiable legacy. Hullock B. took a similar view, going so far as to describe the decision of the three members of the Court of Exchequer in Izon v. 10 Butler as having "overruled" Lord Hardwicke's earlier decision in Sibthorp v. Moxom - see 147 E.R. 761 at p.770.

Only two later cases need be noted. In In re Wedmore (1907) 2 Ch. 277 Kekewich J., in determining whether or not the forgiveness of all unsecured indebtedness owed to a testator by his children was liable to abatement, held such a provision to be a specific legacy not subject to abatement and, like the members of the Court in 20 Holbrook's case, was assisted to his conclusion by considering the substance or ultimate effect of the provision; he said that "in substance" there was no difference between giving a debt to the debtor or to a third party and forgiving the debtor his debt. In the last case, Colgan v. MacDonnell (1927) I.R. 213, Kennedy C.J. had to determine whether a testator's bequest to his debtor of a charge over the debtor's property amounted to a simple bequest which lapsed on the prior death of the debtor. 30 This case appears to turn exclusively upon a point of construction.

None of these cases appear to me 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 owed to her. In these cases in which the debtor was found to have predeceased the testator the Courts had to determine what should then be the fate of the provisions for forgiveness of indebted- 40 ness; they looked to the intention of the testator and if it appeared that it was the debtor personally who was to be advantaged they applied, by analogy, the doctrine of lapse, familiar in the case of legacies, just as in In re Wedmore Kekewich J. proceeded by way of analogy and treated a provision for forgiveness of debts as a specific legacy in determining whether the doctrine of abatement was applicable. These cases appear to me to have little relevance to the present question save to the 50 extent to which the decision of Lord Hardwicke in

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Sibthorp v. Moxom makes it clear that, although not operating as a release at common law, a testamentary forgiveness of indebtedness will be effective as a release in equity, subject only to the claims of creditors.

In Attorney-General v. Holbrook it may perhaps have been appropriate, because of the statutory definition of "legacy", to assimilate the release of indebtedness there in question to a testamentary gift of money, just as in some of the other cases discussed above Courts have declared their inability to distinguish between "giving" and "forgiving" (e.g. Kekewich J. in In re Wedmore). But where the critical question is whether there exists any property of the deceased to which any person becomes entitled under the will it is irrelevant to observe that the ultimate effect of a testamentary forgiveness is the same as would be a gift to the debtor of an amount equal to the debt or a gift to him of the creditor's chose in action itself; 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.

I would therefore allow this appeal and answer the questions asked

(1) No.
(2) Does not arise
(3) $477.23
(4) By the respondent.

Mason, J.

MASON, J.: Alice Bone ("the deceased") died on 1st May 1970. By her will dated 16th May 1969 she appointed the appellants, who are her children, as executors. They are the sole beneficiaries and residuary legatees under the will. Probate was granted to them on 10th June 1970.

Shortly before her death the deceased on

16th May 1969 made a loan to each of the appellants. She lent $25,000 to Trevor Donald Bone, a similar amount to Daryl Leonard Bone and $44,600 to Lilla Kathleen Bone. On the same day three agreements for loan, one with each borrower, were executed. These agreements were identical in all respects save as to the identity of the borrower, the amount agreed to be advanced and the provisions for repayment.

10 The principal provisions of the agreement with Trevor Donald Bone may be taken as a sufficient example. Clauses 2, 3 and 5 of this agreement provide as follows:

> "2. The loan debt shall be paid in full by the Borrower to the Lender upon the expiration of ninety (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.
>
> 20 3. If the Lender by assignment made in accordance with Section 12 of the Conveyancing Act 1919-1954 of the State of New South Wales should assign the said loan debt to any person then the assignee shall be entitled to obtain payment in full of the said loan debt in the same manner as the Lender could have obtained payment thereof in pursuance of Clause 2 hereof.
>
> 5. If default be made in payment of the first or any subsequent payment payable in pursuance of Clause 4 hereof for a period of more than 30 sixty (60) days after the date hereinbefore fixed for the payment of any such annual payment then simple interest at the rate of five per centum (5%) per annum shall be payable on the loan debt in respect of the period during which such default continues."

The remaining provisions of the agreement give the Borrower a right to repay the loan debt in full at any time or to anticipate the payment of any instalment and they oblige the borrower to execute a 40 charge over his property for the amount of the loan debt if requested in writing so to do by the lender or by an assignee.

By her will the deceased, in addition to appointing the borrowers her executors, forgave and released the debts owing by each of the appellants. Clause 4 of the will was in the following terms:

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"I FORGIVE AND RELEASE unto the said LILLA KATHLEEN BONE 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 she owes me."

Clauses 5 and 6 were in similar terms and related to the sums owing by Daryl Leonard Bone and Trevor Donald Bone respectively.

At the date of death of the deceased each appellant had paid the sum of $375 off the loan to which he or she was a party, leaving a total sum outstanding under the three agreements of $93,475. The Commissioner of Stamp Duties in assessing the death debt payable in respect of the deceased's estate claimed that the total sum outstanding under the three agreements was included in her dutiable estate and assessed death duty payable in respect of it at $16,732.96. The appellants claim that no amount is to be included in the dutiable estate of the deceased in respect of the debts or, alternatively, that the amount to be included is not the total sum outstanding under the agreements at the date of death but rather an amount of $13,651 which represents the then present value at the date of the death of the deceased of the promises to pay the amounts outstanding under the three agreements.

The Commissioner of Stamp Duties stated a case under the provisions of s. 124 of the Stamp Duties Act, 1920 (N.S.W.), as amended. The questions asked in the stated case are:

"(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 above-named deceased:-

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(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?

10

These questions were answered by the Court of Appeal as follows:-

(1) Yes.

(2) $93,475.

(3) $16,732.96.

(4) By the plaintiffs.

From this decision the appellants have appealed to this Court.

The Commissioner's claim that the debts form part of the deceased's dutiable estate is based on s.102(1) of the Stamp Duties Act, 1920, as amended. It includes in the dutiable estate of a deceased person:

20

"(a) All property of the deceased which is situate in New South Wales at his death.

And in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death; and

30

(b) all property of the deceased mentioned in section one hundred and three of this Act

to which any person becomes entitled under the will or upon the intestacy of the deceased, except property held by the deceased as trustee for another person under a disposition not made by the deceased."

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The appellants seek to answer this claim with the submission that their appointment as executors or, alternatively, the express releases of the debts, operated to release the debts as at the death of the deceased. Then they submit that the effect of the release of the debts was to destroy the choses in action to recover the debts, so that it cannot be said that the choses in action were property "to which any person becomes entitled under the will" within the meaning of those words as they appear in s.102(1). 10

A debt owing to a deceased person is "property of the deceased ...... at his death" within s.102(1)(a). In my view the debt does not lose this character by reason of the deceased's appointment of the debtor as his executor or because the will contains an express release. Even if it be assumed that an appointment of the debtor as executor or an express release by will has the effect of exonerating the debt as from the date of death, a question to which I shall return later, the debt is one which was owing to the deceased person at the time of his death and therefore constituted his property at that time. 20

It has been said that at common law the appointment by a testator of his debtor as his executor or as one of his executors operated to extinguish the debt. Equity applied a different rule, as Salter J. explained in Jenkins v. Jenkins, (1928) 2 K.B. 501, at p. 507: 30

> " In equity the executor is held liable to pay the debt if the interests of the creditors require it and unless he can show a continuing intention on the part of the testator to make him a gift of the debt: Strong v. Bird, L.R. 18 eq. 315; In re Applebee, (1891) 3 Ch. 422. When the executor is thus held liable, equity enforces payment by treating the debt as assets in his hands. He can be declared accountable in an administration action and ordered to pay, and on default he may be liable to attachment. In equity, therefore, it is plain that his debt to the estate has been paid: see In re Bourne, (1906) 1 Ch. 697, at p. 708." 40

Whether the approach of the common law was accurately and comprehensively expressed in the

rule to which I have referred is open to serious question. The basis of the rule that the appointment of the debtor as executor operated to extinguish the debt rested on the proposition that a debt was no more than the right to sue for the money owing by the debtor and that a personal action was discharged when it was suspended by the voluntary act of the person entitled to bring it. An executor could not maintain an action against 10 himself; the action to recover the debt was suspended by his appointment which came about by the voluntary act of the testator.

It was otherwise when a debtor was appointed the administrator of the credifor's estate; he could not be sued for recovery of the debt, yet it was agreed that his appointment did not bring about an extinguishment of the debt. In Hudson v. Hudson (1737), 1 Atk. 460, at p. 461; 26 E.R. 292, at p.293, Lord Hardwicke L.C. said, "if a debtor be appointed 20 administrator, that is no extinguishment of the debt, but a suspension of the action". See also Wankford v. Wankford (1704), 1 Salk. 299; 91 E.R. 265.

Although the common law principle was stated in terms which gave it the apparent character of a rule of law, its true basis lay in the significance attributed to a voluntary act on the part of the testator, the person entitled to bring the action. Once this is recognised, the true character of the 30 rule is perceived. It reflected the presumed intention of the party having the right to bring the action and was not absolute in its operation.

Indeed, there is powerful authority for the proposition that at common law, as well as in equity, the executor's debt was treated as an asset in his hands, so long as he was able to pay it. In Wankford v. Wankford (1704), 1 Salk. 299, at p.306; 91 E.R. 265, at p.270, Holt C.J. said:

> "..... when the obligee makes the obligor 40 his executor, though it is a discharge of the action, yet the debt is assets, and the making him executor does not amount to a legacy, but to payment and a release. If H. be bound to J.S. in a bond of £100, and then J.S. makes H. his executor, H. has actually received so much money, and is answerable for it, and if he does not administer so much, it is a devastatit."

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See also the report of the judgment of Holt C.J. in the same case in 3 Salk. 162; 91 E.R. 753.

And in Freakley v. Fox (1829), 9 B. & C. 130; 109 E.R. 49, Lord Tenterden C.J. referred to the debt owing by the executor as being "discharged" by his appointment as executor and said of it, "it is considered to have been paid by the executor to himself, and becomes assets in his hands".

In equity the debt was regarded as an asset in the hands of the executor in favour of creditors, residuary legatees and even next-of-kin (Brown v. Selwin (1734), Cases t. Talbot 240; 25 E.R. 756; Berry v. Usher (1805), 11 Ves. Jun. 87 at p.88; 32 E.R. 1021 at p. 1022; Carey v. Goodinge (1790), 3 Bro. C.C. 110; 29 E.R. 439; Simmons v. Gutteridge (1806), 13 Ves. Jun. 262; 33 E.R. 292). Whether the common law went as far as equity in this respect it is not now necessary to decide. What is important is that the principles applied at common law and in equity manifested a desire to protect the interests of creditors and reflected the presumed intention of the testator. Except as to the interests of creditors, the principles would accommodate themselves to the expressed intention of the testator as declared by his will.

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.

In passing I would mention that in New South Wales the title of the executor is governed by the provisions of ss. 44 and 61 of the Wills, Probate and Administration Act, 1898, as amended. The effect of the two sections has been to place the title of the executor on a similar footing to that of the administrator at common law; the executor's title now flows from the grant of probate, in the meantime the estate is in the Public Trustee, although upon the making of the grant the doctrine of relation back will apply. I have assumed that this circumstance would not of itself operate to defeat the old common law rule as to extinguishment of the debt, without expressing any concluded opinion on the question.

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In relation to the express provision for release of the debts, the point at issue is whether it exonerated or extinguished the debts or was a bequest of property operating as a legacy. The mode of operation of such a provision was the subject of speculation by the text-writers. It was acknowledged that at common law the forgiveness of a debt by will could not operate as a release which, for its efficacy, required a release under seal executed by the testator in his lifetime (Sibthorp v. Moxom (1747), 3 Atk. 580, at p.581; 26 E.R. 1134, at p.1135, per Lord Hardwicke, L.C.; Elliott v. Davenport (1705), 1 P. Wms. 83, at p.85; 24 E.R.304, at p.305; Wankford v. Wankford (supra). Wentworth in his The Office of an Executor, 14th ed., pp.71-73, and Toller in The Law of Executors and Administrators, 7th ed., p. 307, relying strongly on the fact that a debt is not discharged when the assets are insufficient to meet creditors, express 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. A similar view was taken in The Attorney-General v. Holbrook (1829) 3 Y. & J. 114; 148 E.R. 1115, where the Court of Exchequer held that the forgiveness of a debt owing to a testator under a bond was a legacy subject to legacy duty. Graham B. said (3 Y. & J., at p.120; 148 E.R., at p. 1118):

> "What was this debt? It was so much money in the hands of the testator which they were bound to pay him; it is as much as to say, I give you the amount of that debt, my money, in the hands of you the persons who have entered into that obligation to me; and therefore I can form no doubt at all that the remission of a debt that is due to the testator, is to all intents and purposes a bequest of so much money to the party."

To the same effect are the observations of Garrow B. and Hullock B. See also In re Wedmore, (1907) 2 Ch. 277, at p.283.

The decision in The Attorney-General v. Holbrook may be supported as a matter of construction of the statute but the observations to which I have referred disregard the true character of the debt as a chose in action and assimilate it to a sum of money. In my view this reasoning cannot be sustained unless it be correct to say that the provision in the will does not itself extinguish

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the debt, that 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.

To my mind this conclusion is supported neither by the observations of Lord Hardwicke L.C. in Sibthorp v. Moxom (supra) nor by the decided cases. Lord Hardwicke said (3 Atk., at p.581; 26 E.R., at p.1135):

> " To be sure where a testator gives a debt, or forgives a debt, it is a testamentary act, and will not be good against creditors, but against an executor it may. 10
>
> And though this cannot operate as a release at law, yet equity will carry it that length, and if an action had been brought on the bond, this court would have granted an injunction, or an original application might be made to this court."

In that case and in others the question whether 20 the forgiveness of a debt was to operate as an equitable release or as a legacy was held to be one of construction - see Elliott v. Davenport (supra); 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.

In my opinion the approach taken in these cases was correct. 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 30 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. It does not vest the chose in action in the executor or the debtor. It would be incongruous to regard a provision for the release of a debt as having the effect of vesting in the debtor a right to sue himself. 40

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,

In the High Court of Australia

No. 8

Judgment

12th August 1974

Mason J.

(continued)

it was property which was destroyed by her will.

This conclusion I reach with reluctance. It is a consequence of the manner in which s.102(1) is expressed. Had the Legislature been well advised it would have had resort to a provision of the kind introduced in s.45(2) of the Finance Act, 1940 (U.K.) to overcome the difficulty.

I have no occasion to examine the other questions which arise on the stated case, although
10 I should express my firm preference for the view of Owen J. in Bray v. The Commissioner of Taxation (1968), 117 C.L.R. 349 to that expressed by the majority in the Court of Appeal as to the construction of the right conferred by cl. 2 of the agreement to call up the loan.

I answer the questions asked -

(1) No.

(2) Does not arise.

(3) $477.23.

20 (4) By the respondent.

No. 9

Order of the High Court of Australia

12th August 1974

No. 9

Order of the High Court of Australia

IN THE HIGH COURT OF AUSTRALIA
PRINCIPAL REGISTRY

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES COURT OF APPEAL

BETWEEN TREVOR DONALD BONE DARYL LEONARD BONE LILLA KATHLEEN BONE as executors of the will of Alice
30 Bone deceased

Appellants/Plaintiffs

AND THE COMMISSIONER OF STAMP DUTIES

Respondent/Defendant

In the High Court of Australia

No. 9

Order of the High Court of Australia

12th August 1974

(continued)

BEFORE THEIR HONOURS THE CHIEF JUSTICE SIR GARFIELD BARWICK MR JUSTICE McTIERNAN MR JUSTICE MENZIES MR JUSTICE STEPHEN AND MR JUSTICE MASON

MONDAY THE 12TH DAY OF AUGUST, 1974

THIS APPEAL against the whole of the judgment and order of the Court of Appeal of the Supreme Court of New South Wales given and made on the 27th day of November 1972 coming on for hearing before this Court at Sydney on the 29th day of April 1974 UPON READING the transcript record of proceedings herein AND UPON HEARING Mr. J. S. Lockhart of Queen's Counsel with whom was Mr. R.D. Giles of Counsel for the appellants and Mr. G.D. Needham of Queen's Counsel with whom was Mr. B.M.J.Toomey of Counsel for the respondent THIS COURT DID ORDER that this appeal should stand for judgment and the same standing for judgment this day accordingly at Sydney THIS COURT DOTH ORDER that this appeal be and the same is hereby allowed AND THIS COURT DOTH FURTHER ORDER that the order of the Court of Appeal of the Supreme Court of New South Wales be set aside and in lieu thereof the questions in the stated case be answered as follows:

QUESTION (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 the stated case?
ANSWER "No".

QUESTION (2) If the answer to (1) is "Yes" is that amount $93,475.00 or $13,651.00?
ANSWER "Does not arise".

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

(a) $477.23 or
(b) $1,516 or
(c) $16,732.96 or
(d) Some other; and if so what amount?

ANSWER "477.23"

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

AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the appellants in this appeal and that such costs when so taxed and certified be paid by the respondent to the appellants or their solicitors Messrs C.A.Vaughan Hains & Mulally AND THIS COURT DOTH BY CONSENT FURTHER ORDER that the sum of one hundred dollars ($100.00) paid into Court as security for the due prosecution and costs of this appeal be paid out to the appellants or to their said solicitors.

BY THE COURT

REGISTRAR

No. 10

Order granting Special Leave to Appeal to Her Majesty in Council

AT THE COURT AT BUCKINGHAM PALACE

The 14th day of May 1975

PRESENT

THE QUEEN'S MOST EXCELLENT MAJESTY IN COUNCIL

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 5th day of May 1975 in the words following viz.:-

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of the Commissioner of Stamp Duties in the matter of an Appeal from the High Court of Australia between the Petitioner and (1) Trevor Donald Bone (2) Daryl Leonard Bone and (3) Lilla Kathleen Bone Respondents setting forth that the Petitioner prays for special leave to appeal from a Judgment and Order of the High Court of Australia dated the 12th August 1974 allowing an Appeal by the Respondents from a Judgment of the Court of Appeal of the Supreme Court of New South Wales dated the 27th November 1972 on a case stated by the Petitioner for the opinion of the

In the Judicial Committee of the Privy Council

No.10

Order granting Special Leave to Appeal to Her Majesty in Council

14th May 1975

(continued)

Court of Appeal: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal against the Judgment and Order of the High Court of Australia dated the 12th August 1974 and for further or other relief:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that special leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment and Order of the High Court of Australia dated the 12th August 1974 on condition of the Petitioner lodging in the Registry of the Privy Council an undertaking to pay the costs of the Appeal in any event and to leave undisturbed the Orders for costs made in the Courts below:

"And Their Lordships do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the saidReport into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

N. E. LEIGH

IN THE PRIVY COUNCIL

No. 18 of 1975

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA
PRINCIPAL REGISTRY
NEW SOUTH WALES

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

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