

IN THE PRIVY COUNCIL

No. 18 of 1975

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

B E T W E E N :

THE COMMISSIONER OF STAMP DUTIES

Appellant

- and -

TREVOR DONALD BONE
DARYL LEONARD BONE and
LILLIA KATHLEEN BONERespondents

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CASE FOR THE RESPONDENTS

RECORD

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1. This is an appeal, by special leave of Her Majesty in Council granted on 5th May 1975, from a judgment dated 12th August 1974 of the High Court of Australia (Barwick C.J. and McTiernan, Menzies, Stephen and Mason JJ.) unanimously allowing an appeal from a judgment dated 27th November 1972 of the Court of Appeal of the Supreme Court of New South Wales (Jacobs P. and Hope and Reynolds JJ.A.) unanimously answering in favour of the Appellant the questions raised in a case stated by the Appellant for the opinion of the Court of Appeal on 28th June 1972 pursuant to Section 124 of the Stamp Duties Act 1920, as amended, of the State of New South Wales (No.47 of 1920).

pp.65-66
pp.63-65

pp.38-39

pp.2-14

2. The questions for decision in this appeal are whether debts owed to the late Alice Bone (hereinafter called "the deceased") by each of the Respondents form part of her dutiable estate for death duty under

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the said Stamp Duties Act 1920 (which, as printed in accordance with the provisions of the Amendments Incorporation Act 1906 with amendments made up to 2nd June 1970, is hereinafter called "the Act"); and, if so, whether it is the total amount of the indebtedness or a lesser sum equal to the value at the deceased's death of the Respondents' promises to repay the debts by instalments spread over a term of years which is to be so included.

3. The section of the Act on which this appeal turns is as follows :- 10

"102. For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property :-

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

.....

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(b)

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.

(2) (a) All property which the deceased has disposed of, whether before or after the passing of this Act, by will or by a settlement containing any trust in respect of that property to take effect after his death, including a will or settlement made in the exercise of any general power of appointment, whether exercisable by the deceased alone or jointly with another person:

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Provided that the property deemed to be included in the estate of

the deceased shall be the property which at the time of his death is subject to such trust."

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4. On 16th May 1969 the deceased entered into an agreement for a loan with each of the Respondents, who are three of her children. The agreements are identical save for the identity of the borrower, the amount of the loan and the date on which the borrower was obliged to pay annual instalments in reduction of the debt. The agreement with the first-named Respondent provided first that in it the deceased should be called the Lender and the first-named Respondent the Borrower, and then recited that the receipt of the sum of A\$25,000.00 was acknowledged by the Borrower. The operative part of the agreement began by defining the principal sum lent or so much thereof as for the time being remained owing by the Borrower to the Lender as the "loan debt" and proceeded 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

p.8,1.26
p.14,1.27

p.8,11.
30-36

p.8,11.
37-42
p.9,11.2-4

p.9, 1.5

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be paid at the end of each succeeding year ending on the first day of December."

- p.9,11.27-46 Clauses 5 and 6 of the agreement made provision for the payment of interest by the Borrower on the loan debt in the event of his making default in the payments which were due to the Lender. Clause 7 gave the Borrower the right to repay the loan debt in full at any time and to anticipate the payment of any of the annual instalments. Clause 8 obliged the Borrower to execute a charge over his property for the amount of the loan debt if called upon to do so by the Lender or an assignee of the Lender. 10
- p.10,11.1-10
- p.10,11.11-16
- p.10,11.19-26
p.10,1.31-
p.12,1.28 The agreement was executed under hand by both parties. In the case of the agreement with the second-named Respondent the amount of the loan was A\$25,000.00 and the date for payment of the annual instalments was 1st April commencing on 1st April 1970. In the case of the agreement with the third-named Respondent the amount of the loan was A\$44,600.00 and the date for payment of the annual instalments was 1st August commencing on 1st August 1969. 20
- p.12, 1.33-
p.14, 1.27
- p.7, 1.1-
p.8, 1.25
p.7,11.10-14
p.7, 1.22 5. On the same date as that of the said agreements (hereinafter called "the agreements") namely 16th May 1969, the deceased executed her last will and testament. By Clause 2 she appointed the Respondents to be executors and trustees of the Will. Clause 4 provided as follows :
- "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." 30
- p.7,11.28-39 Clauses 5 and 6 contained a foregiveness and release in identical terms in favour of the second-named and first-named Respondents respectively. By Clause 7 the deceased gave the residue of her estate to the Respondents upon trust after payment thereof of all her debts, funeral and testamentary expenses and death, estate, probate, succession and other duties for such of them as should survive her 40
- p.7, 1.40-
p.8, 1. 9

and if more than one in equal shares as tenants in common.

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10 6. The deceased died on 1st May 1970, by which time each of the Respondents had paid one instalment of A\$375.00 in accordance with Clause 4 of the agreements. The deceased had not assigned any of the agreements. Probate of her said will was on 10th June 1970 granted by the Supreme Court of New South Wales in its Probate Jurisdiction to the Respondents.

p.3,11.2-3
p.4,11.
19-22

p.3,11.6-12

20 7. At the date of the deceased's death the total sum outstanding under the agreements was A\$93,475.00. The Appellant assessed the death duty payable in respect of the deceased's estate on the footing that that sum should be included in the dutiable estate of the deceased in respect of the debts due under the agreements. On this footing the amount of duty properly payable is A\$16,732.96. The Respondents claimed that no sum should be included in the dutiable estate in respect of the said debts and that the dutiable estate amounted to A\$9,205.16, being the value of all the other property of the deceased at her death less the amount of the debts due from her. On this footing the amount of duty properly payable is A\$477.23. Alternatively, the Respondents claimed that, if a sum ought to be included in the dutiable estate in respect of the said debts, that sum should be the value at the date of the deceased's death of the right of the estate to obtain payment of the loan debts by the instalments provided for in Clause 4 of the agreements, because on the true construction of the agreements notices under Clause 2 requiring repayment of the debts within 90 days could only be given by the deceased in person. Such value was agreed by the Appellant and the Respondents to be A\$13,651.00. On this footing the amount of duty properly payable is A\$1,516.00.

p.4,11.19-25
p.4,11.25-30

p.6,11.3-8

p.5,11.
42-47

40 8. The Respondents, being dissatisfied with the Appellant's assessment, gave notice pursuant to Section 124 of the Act requiring him to state a case for the opinion of the Court of Appeal, which he did on 28th June 1972. By paragraph 12 thereof

p.5,11.
32-41

p.6,11.9-32

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he raised the following questions for the decision of the Court :

- (1) Is any amount to be included in the dutiable estate of the above-named 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)? 10
- (3) Is the amount of duty properly assessable in respect of the dutiable estate of the above-named 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 20
 - (d) some other, and if so what, amount?
- (4) By whom are the costs of this case to be borne and paid?

pp. 1-2

9. On 7th July 1972 the Respondents filed a summons in the Supreme Court of New South Wales (No.31 of 1972) claiming the determination of the questions raised in the case stated.

pp.38-39

10. The case was heard by Jacobs P. and Hope and Reynolds JJ.A., who on 27th November 1972 ordered that the questions raised in the case stated be answered as follows : 30

- (1) Yes.
- (2) A\$93,475.00.
- (3) A\$16,732.96.

(4) The Respondents.

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11. In his judgment Jacobs P., after setting out the facts and the questions for decision, dealt first with the question whether any part of the A\$93,475.00 owing under the agreements at the death was property of the deceased to which any person became entitled under the will of the deceased within the meaning of Section 102(1) of the Act (hereinafter called "the first question"), and decided the question in favour of the Appellant. He considered that before her death the deceased had the right to be repaid \$93,475.00 and that that right could not be effectively distinguished from the money itself. Although by operation of law the appointment of the Respondents as executors of the Will might have extinguished the right of action to recover the money, the debt, regarded as the sum of money, passed under the will by virtue of the fact that the right of action was so extinguished. Jacobs P. then considered whether, in accordance with the decision of Owen J. sitting as a justice of the High Court of Australia in Bray v. Federal Commissioner of Taxation (1968) 117 C.L.R. 349 in relation to an agreement in terms which, so far as material, were identical to those of the agreements in the present case, the value of the debts owing to the deceased at her death on the basis of repayment by instalments rather than the full amount of the debts should be included in the dutiable estate (hereinafter called "the Bray question"). He regarded Owen J.'s decision as of persuasive value only and disagreed with it. He held that, notwithstanding the requirement in Clause 2 of the agreements that the 90-day notice be given "by the Lender under her own hand", the expression "the Lender" should there be construed to include the personal representatives of the Lender. Accordingly the full amount of the debts was to be included in the dutiable estate.

12. The judgment of Hope J.A. followed that of Jacobs P. in substance and reached the same conclusion. He rejected the Respondents' submissions on the first question for two reasons. First, he considered that the release of the debts was effected, not because the deceased nominated the Respondents as her executors, but because there

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p.17, 11.
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p.17, 11.
16-20

p.17, 11.
42-45

p.18, 1.1-
p.20, 1.48

p.20, 11.
17-21

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p.27, 1.8-
p.28, 1.40

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p.28, 1.41-
p.31,1.36

became vested in them the right to sue for the debts. The debts were released by virtue of the latter rather than the former fact, because at common law, if a debtor became the person or one of the persons who had the right to sue for his debt, the debts was extinguished. Secondly, he held that, if the Respondents had not been appointed the executors of the deceased and the debts had been released solely by the operation of clauses 4, 5 and 6 of the Will, the debts would have been property to which the Respondents became entitled under the Will, and that the debts were no less property to which the Respondents became entitled under the Will because the release was effected by their appointment as executors rather than by express releases. In relation to the Bray question, Hope J.A. pointed out that prima facie the benefit and, at least to the extent of a deceased person's assets, the burden of contracts other than "personal" contracts devolves upon his personal representative. Having considered the agreements as a whole, he held, consistently with the above proposition, that Clause 2 authorised the giving of 90-day notices by the personal representatives of the Lender as well as the Lender herself.

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p.34, 1.16-
p.35, 1.30

p.35, 1.31-
p.37, 1.21

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p.37, 11.
28-33

13. Reynolds J.A. agreed with the answers proposed by his brethren and did not wish to add to their judgments.

pp.39-41

14. By a notice dated 14th December 1972 the Respondents gave notice of appeal to the High Court of Australia (No.71 of 1973) from the order of the Court of Appeal.

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pp.63-65

15. The appeal was heard by Barwick C.J. and McTiernan, Menzies, Stephen and Mason JJ., who on 12th August 1974 allowed the appeal and ordered that the questions in the case stated be answered as follows :

- (1) No.
- (2) Does not arise.
- (3) A\$477.23.
- (4) The Appellant.

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16. Barwick C.J. agreed with the reasons given by Stephen and Mason JJ. for holding that by reason of the express release of the debts in the deceased's will the amount of the indebtedness under the agreements should not have been included in the dutiable estate as property to which the executors became entitled under the will of the deceased, and that the inclusion thereof by the Appellant in the dutiable estate of the deceased was erroneous and insupportable. The learned Chief Justice went on to say that even if the appointment by the deceased of her debtors as her executors operated to release the debts (a matter which he did not find it necessary to decide) there would have been no relevant property to which the executors became entitled under the will of the deceased. McTiernan J. agreed that the appeal should be allowed and had nothing to add to the reasons given by the other members of the Court. Menzies J. agreed with the reasons given in the judgment of Mason J.

p.44, ll.
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p.44, ll.
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17. Stephen J. held that on the view he had taken of the Respondents' contentions on the first question it was unnecessary for him to deal with the Bray question, but stated that, if it had been necessary to do so, he would have adopted the view of Owen J. in preference to that of the Court of Appeal. Turning to the first question, Stephen J. discussed first the effect of the appointment of the Respondents as the deceased's executors and secondly the effect of the express releases in the will. On the first of those points he came to the conclusion that the appointment of the Respondents as executors had no relevant effect for death duty purposes because of the provisions of Section 61 of the Wills, Probate and Administration Act 1898 (No.13 of 1898), whereby the real and personal estate of a deceased person, whether testate or intestate, is until the grant of probate or administration deemed to be vested in the Public Trustee. Therefore, in contrast with the position in England and other Australian States, a testator's choses in action did not vest in his executor at the moment of death. The extinguishment at law

pp.44-54
p.47, ll.
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p.49, l.49-
p.51, l.17

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of the indebtedness of a debtor-executor depended on the fact that the person to pay and the person to receive were the same, but by virtue of the above-mentioned statutory provision of New South Wales law the person to pay and the person to receive remained separate after the death of the deceased. Therefore, there was no extinguishment of the debts owed by the Respondents at the time of the deceased's death by virtue solely of their appointment as her executors. Stephen J. dealt with the effect of the express releases in the will by considering whether the releases were to be treated as legacies of the amounts released or as extinguishing the debts. He distinguished a number of authorities on the ground that they depended on the construction of the clause in question, and held that as a matter of construction the releases in the present cases were not to be treated as legacies but extinguished the debts. On that footing the debts were not property to which the Respondents became entitled under the will. 10

p.53, 1.32-
p.54, 1.14

pp.54-63
p.58, 11.
12-24

p.58, 1.48-
p.59, 1.32

p.60.11.
18-25

p.60, 11.
33-47

18. Mason J. held that the debts owed to the deceased by the Respondents were, notwithstanding their appointment as her executors and the releases in the will, property of the deceased at her death within the meaning of Section 102(1) of the Act. He then expressed doubts about the unqualified proposition 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. The principles applied at common law and in equity manifested a desire to protect the interests of creditors and reflected the presumed intention of testators; but, except as to the interests of creditors, the principles would accommodate themselves to the expressed intentions of the testator as declared by his will. In this case the will expressly released the debts, and the appointment of the debtors as executors would operate accordingly. Mason J. said that he assumed, without expressing a concluded opinion on the question, that the common law rule as to the extinguishment of a debt by the appointment of the debtor as executor was not affected by the provisions of Sections 44 and 61 of the Wills Probate and 20 30 40

Administration Act 1898. Turning then to the question whether the express provision for the release of the debts extinguished them or was a bequest of property operating as a legacy, Mason J. rejected the latter view because it involved disregarding the true character of the debt as a chose in action and not a sum of money. He said:

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p.62, ll.
32-40

10 "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 the debtor a right to sue himself."

20 Therefore the choses in action constituted by the debts were not property to which any person became entitled by the deceased's will. He said that his conclusion was reached as a consequence of the manner in which Section 102(1) was expressed, and that, had the Legislature been well advised, it would have had resort to a provision of the kind introduced in Section 45(2) of the Finance Act, 1940 (U.K.) to overcome the difficulty. Finally, Mason J. expressed his preference for the decision of Owen J. in Bray v. Federal Commissioner of Taxation, supra, to that of the Court of Appeal in the instant case on the Bray question.

p.63, ll.2-7

p.63, ll.
8-15

30 19. The Appellant issued a petition for special leave to appeal to Her Majesty in Council. The petition was heard on 5th May 1975, when special leave was granted on condition that the Appellant lodged in the Registry of the 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.

p.66, ll.7-22

SUBMISSIONS

40 20. In relation to the Appellant's claim under Section 102(1) of the Act the Respondents' submissions are as follows :-

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- (a) No person became entitled under the will of the deceased to the debts within the meaning of Section 102(1)(a). The provisions in the will forgiving and releasing the debts destroyed the choses in action. The choses in action were not property to which any person became entitled under the will. On the contrary, they constituted property which was destroyed by the will. The provisions in the will forgiving and releasing the debts cannot be treated as having the effect of vesting in the debtors rights to sue themselves, which would have to be the case if the debts were property to which the debtors became entitled under the will of the deceased. The Respondents adopt the reasoning of Stephen and Mason JJ. leading to that conclusion. The problems arise from the language of the Section. The Legislature could have introduced a provision such as Section 45(2) of the Finance Act, 1940 (U.K.). 10 20
- (b) Alternatively, the provisions in the will forgiving and releasing the debts, combined with the appointment of the debtors as executors, had the effect of extinguishing the debts, and the conclusion already mentioned follows.
- (c) The question whether by virtue of Section 61 of the Wills Probate and Administration Act the extinguishment at law was postponed until the grant of probate is irrelevant to the question whether the debts are property to which any person became entitled under the will; but, if it is material that the extinguishment should have taken place at the time of the deceased's death, the Respondents submit that, by virtue of the fact that under Section 44 of the Wills Probate and Administration Act vesting is retrospective to the death, the extinguishment must be treated as having occurred at that time. 30 40
21. In relation to the Appellant's claim under Section 102(2)(a) of the Act the Respondents' submissions are as follows :-

(a) The words in the Section "property.....disposed of" should be given their ordinary and natural meaning and thus refer to a dealing with property on the footing that the property remains in existence. For the reasons already stated in paragraph 20 the debts owed by the debtors to the deceased were extinguished by the provisions of the will, and therefore they do not answer the description of property disposed of by the will within the meaning of Section 102(2)(a).

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(b) There is no warrant for applying the definition of the phrase "disposition of property" where appearing in Section 100 to an expression in which the words are transposed, namely "property...disposed of" in Section 102(2)(a), particularly when the phrase "disposition of property" itself appears in other provisions of Section 102(2).

22. If it be held by virtue either of Section 102(1) or of 102(2)(a) of the Act that the debts due to the deceased under the agreements constitute property which ought to be included in her dutiable estate, the Respondents submit that the value of such property is the value at the date of the deceased's death of the right to be repaid the principal sums lent by instalments in accordance with Clause 2 of the agreements. In so submitting, the Respondents rely on the decision of Owen J. in Bray v. Federal Commissioner of Taxation, supra, and on the remarks of Walsh J. in Robbins v. Commissioner of Taxation (1973) 129 C.L.R. 332 and of the judgments of Barwick C.J., McTiernan, Menzies, Stephen and Mason JJ. in the instant case expressing approval of the views of Owen J.

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23. Accordingly the Respondents submit that this appeal should be dismissed for the following amongst other

R E A S O N S

1. BECAUSE the effect of the deceased's will was to extinguish the debts owed by the Respondents under the agreements.

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2. BECAUSE the debts were therefore not property of the deceased to which any person became entitled under her will within the meaning of Section 102(1) of the Act.

3. BECAUSE the debts were therefore not property of which the deceased disposed by will within the meaning of Section 102(2)(a) of the Act.

4. BECAUSE, even if the debts fall to be included in the dutiable estate of the deceased, the value thereof is the value at the date of the deceased's death of the right to be repaid the principal sum lent by instalments in accordance with Clause 2 of the agreements for loan. 10

5. BECAUSE the order of the High Court is right and ought to be affirmed.

J. S. LOCKHART

DIRIK JACKSON

Counsel for the Respondents

No. 18 of 1975

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE HIGH COURT OF AUSTRALIA

THE COMMISSIONER OF STAMP DUTIES

-v-

BONE and OTHERS

CASE FOR THE RESPONDENTS

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