Privy Council Appeal No. 18 of 1975

The Commissioner of Stamp Duties – – – – *Appellant*

v.

Trevor Donald Bone and others – – – – – *Respondents*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH APRIL 1976

Present at the Hearing:

LORD WILBERFORCE
VISCOUNT DILHORNE
LORD CROSS OF CHELSEA
LORD FRASER OF TULLYBELTON
LORD RUSSELL OF KILLOWEN

[*Delivered by* LORD RUSSELL OF KILLOWEN]

This appeal by the Commissioner of Stamp Duties by special leave granted by Her Majesty in Council from a decision of the High Court of Australia (reversing a decision of the Supreme Court of New South Wales) concerns liability to death duty in respect of the death of Mrs. Alice Bone under the (New South Wales) Stamp Duties Act No. 47 of 1920. More specifically, but still in general terms, it concerns the effectiveness of an ingenious device—a term not applied in a pejorative sense—for transferring the greater part of a parent's fortune to her children *inter vivos* without risk of liability for death duty in respect of that greater part, even should the parent die next day. Their Lordships are informed that, once thought of, the device became popular: so that, though counteracting legislation has now been introduced, the liability for death duty in respect of a number of estates depends upon the decision in this case.

Mrs. Bone the testatrix, on 16th May 1969, as witnessed by three agreements of that date, lent to the Respondents, her two sons and her daughter, sums of $25,000, $25,000 and $44,600 respectively. These loans were each repayable by annual instalments of $375 payable on differing dates so that the testatrix would receive from one or other child that sum every four months. Provision was made for the whole of each loan to become immediately repayable in certain circumstances. Further details of these loan agreements fall to be considered later in connection with the quantum upon which death duty is chargeable should the scheme not have wholly succeeded in its aim, the point on quantum being shortly whether it is the amount outstanding of the loans at the death of the testatrix ($93,475) or the actuarial value at the death of the remaining annual instalments of $375 ($13,651).

On the same day as the loan agreements the testatrix made her will. By it she appointed the three children her executors. She bequeathed certain chattels to the daughter. Clause 4 was in these terms:

> "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."

Clauses 5 and 6 were in identical terms but referring to the two sons respectively. Residue was given upon trust to pay thereout debts, funeral and testamentary expenses and death duties, and subject thereto on trust for such of the three children as should survive the testatrix in equal shares. The testatrix died on 1st May 1970: the three children survived her and proved the will: the estate after payment of debts but excluding the loans was some $9,000. The Appellant assessed the death duty payable on the basis that it was chargeable on the principal sum outstanding of the loans ($93,475). On request the Appellant stated a case to the Court of Appeal of the Supreme Court of New South Wales. The questions for decision were whether death duty was chargeable as the Appellant contended: or whether it was chargeable on the basis of the actuarial value of the instalment obligations: or whether in assessing death duty the amount of the loans was to be ignored. The duty chargeable in the three cases would be $16,732, $1,516 and $477 respectively.

The Supreme Court (Jacobs P., Hope J. A. and Reynolds J. A.) unanimously upheld the appellant's contention. The High Court (Barwick C. J., McTiernan J., Menzies J., Stephen J. and Mason J.) unanimously reversed the decision of the Supreme Court on the ground that the amount of the loans was to be ignored in assessing the duty chargeable in respect of the death of the testatrix, which was accordingly only $477. The question of the value of the debts under the loan agreements consequently did not arise for decision in the High Court.

The immediately relevant provisions of the Stamp Duties Act are contained in section 102 (1) *(a)* and (2) *(a)*. These are as follows:

> "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
>
> . . . .
>
> 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:
>
> . . . ."

Their Lordships first summarize the contentions.

For the Appellant it is contended that upon the true construction of subsec. (1) *(a)* the outstanding loans were either (i) property to which the

three children in their capacity as executors became persons legally entitled under the will or (ii) property to which the three children became persons beneficially entitled under clauses 4, 5 and 6 of the will. Alternatively under subsec. (2) (*a*) they were property which the testatrix disposed of by her will. For the Respondents it is contended (i) that subsec. (1) (*a*) refers to beneficial entitlement and not to such legal entitlement as is conferred upon an executor as such: (ii) that the release of the debts extinguished them, and while it is correct to say that the children took a benefit under the will by the releases, it is not correct to say that they became entitled to any property thereunder, since the very benefit conferred annihilated at the same instant (the death) the choses in action (the debts) which had previously belonged to the testatrix: and (iii) alternatively that since the appointment of a debtor as executor transmutes his obligation in law as a debtor to an obligation in equity to account for an equivalent sum to the estate, the benefit of the latter obligation could not in any event be property of the deceased *at her death*. As to subsec. (2) (*a*) the Respondents contend that "disposed of" is not to be taken as embracing an act of extinction of a property (the chose in action) but relates rather to a displacement or transfer of property which remains in existence after the act: further they contend that subsec. (2) as a whole does not extend to free estate of the deceased which is exhaustively dealt with by subsec. (1).

Their Lordships consider it convenient at this stage to deal with some of these points separately, the answers to which can admit of little doubt.

The appointment of a debtor as executor has undoubtedly the effect at law that the cause of action in debt is extinguished: the liability of the debtor as such is extinguished, granted that the executor proves the will, with effect from the death. The reason is that at law the executor cannot sue himself: and their Lordships as at present advised see no sufficient reason for holding that the interim vesting of the estate in the Public Trustee under the law of New South Wales pending the grant of probate affects that general position. But it is fully established, and their Lordships consider that there is no need to expound the theory behind the outcome, that equity will at once fasten upon the executor an exactly equivalent obligation to account to those interested in the estate (whether creditors, legatees, residuary legatees, or next of kin) for the amount of the debt. The obligation of the debtor to the testator which existed at the moment of death is converted by the combined operation of law and equity into exactly the same obligation with a different technical character or label or method of enforcement. Their Lordships in those circumstances can find no substance in the contention of the Respondents that the result of the appointment of the debtors as executors is to deny to any claim against them the quality of property of the testatrix *at her death*. The change of label or method of enforcement has no more that effect than has a conversion after the death of loan stock into shares. Their Lordships observe that this point is advanced by the Respondents on the (denied) assumption that clauses 4, 5 and 6 would otherwise not assist them: and it clarifies the matter to remark that the particular argument—that the appointment of a debtor as executor would exclude the amount of the debt from the charge to death duty—would be equally valid or invalid if the executor was not a beneficiary and the residuary legatee was entitled in an administration action to an order declaring that the executor was accountable to him for the amount of the debt; a declaration that would be followed by appropriate consequential order and execution, theoretically based on a *devastavit*.

Accordingly their Lordships reject the contention of the Respondents that in any event subsec. (1) (*a*) is excluded by the appointment of the children debtors as executors.

The next point to be dealt with is the contention of the Appellant that subsec. (1)(*a*) is satisfied by the vesting in law of the estate in the executors so as to make them "persons entitled under the will" to property of the deceased. It was contended that "entitled" *includes* entitlement whether legally or beneficially, and much reliance was placed upon the exception to subsec. (1)(*a*). This point was withdrawn in the High Court, but their Lordships allowed it to be taken in a Supplementary Case for the Appellant. Their Lordships share the inability of the Board in *Commissioner of Stamp Duties v. Perpetual Trustee Co., Ltd.* ([1943] A.C. 425) to attribute any statutory significance, or indeed meaning, to this exception, and must reject it as a contribution to construction. A further argument on these lines was mounted upon consideration of Schedule 7A to the Stamp Act. Their Lordships are however wholly unpersuaded that the Stamp Act departs in this regard from the general philosophy behind all legislation imposing tax on a death on the free estate of a deceased, that it looks to beneficial mutation as the taxable occasion. It would in their Lordships' opinion be a very strange system of legislation that refers chargeability to death duty to the *legal* entitlement of a proving executor as such, and to the *legal* entitlement on an intestacy of an administrator as such, but in the case of an administrator with will annexed refers only to beneficial entitlement. Accordingly their Lordships reject the supplementary contention of the Appellant.

Their Lordships turn now to the basic question in this appeal, upon which the High Court and the Supreme Court have differed: whether in view of clauses 4, 5 and 6 it can be rightly said that the forgiveness and release by those clauses operated to confer upon the three children an entitlement to property of the deceased.

At the moment of her death the testatrix owned the property consisting of the debts owed to her. She was in a position to confer on whom she pleased by her will the benefit of that property, the value of that property, as an act of testamentary benevolence. In their Lordships' opinion the essence of the property is its value—the benefit derivable therefrom: the construction of subsec. (1)(*a*) which found favour with the High Court, which distinguishes between the property and its essence, appears to their Lordships to depend upon too narrow a view of the language of the subsection. The debt of (for example) the daughter was undoubtedly property of the testatrix at her death, and in the context of the imposition of duty on the death their Lordships would construe "to which any person becomes entitled under the will" as pointing to the devolution under the terms of the will of the benefit or value of such property.

The point can be considered in another way. There was not truly a release of the debt. A debt can only be truly released and extinguished by agreement for valuable consideration or under seal. By "giving" or "forgiving" or "releasing" by will a debt to the debtor a testator, in their Lordships' opinion, is but leaving a legacy of the amount of the debt: for it is clear that by such purported release the testator cannot remove this asset from the claims of creditors of the estate and the requirements of funeral and administration expenses: the testator can give to his benefaction no other status than that of a specific legacy of the value of the debt. The debt remains outstanding as an asset of the estate: but, on analysis, the debtor is in a position to deny an obligation to pay it to the extent that the specific legacy is effective as such. The equation of such a testamentary provision with a legacy has a long history in authority, with particular reference to matters such as ademption and lapse: hereunder reference may be made to *Izon v. Butler* ((1815) 2 Price 34): *Sidney v. Sidney* ((1873) 17 Eq. 65): *Re Wedmore* ([1907] 2 Ch. 277): *A. G. v. Holbrook* ((1823) 12 Price 407): and *A. G. v. Hollingworth* ((1857) 2 H. & N. 416). See also *Wentworth on Executors* 14th edition

p. 71 ff.—reputedly of the authorship of Dodderidge J: *Toller on Executors* 5th edition p. 307: *Roper on Legacies* 4th edition p. 843.

In the opinion of their Lordships a " release " such as is to be found in clauses 4, 5 and 6 is accordingly not a provision which truly extinguishes the asset of the estate: it is in truth and reality a legacy of property forming part of the estate of the testatrix at her death to which the debtor can only become entitled under the will, within s. 102 (1) (*a*). Moreover it is immaterial if the same debtor is appointed executor and proves: for, as earlier indicated, that event *per se* does no more than transmute the liability in debt into exactly equivalent liability to account which remains property of the estate.

In the Supreme Court Jacobs P. reached the conclusion that the case was covered by s. 102 (1) (*a*) by a different route (at p. 17 of the Record), a route which their Lordships with respect do not find easy to follow. No mention is there made of clauses 4, 5 and 6: reference is made only to the appointment of the debtors as executors. If it were merely a case of appointment of executors, without clauses 4, 5 and 6, the substituted obligation to account to the estate for the amount of the debts would remain, though on the facts of the case, having regard to the division of residue in equal shares, the final distribution of the estate would be achieved or short circuited by the daughter paying to each son one-third of the difference between her indebtness and that of a son. It is clauses 4, 5 and 6 that require an analysis of their effect for the present question, and to those the learned President on this question did not advert.

Hope J. A. deals first (at p. 23 of the record) with a submission that appears to have been made for the present Respondents based solely upon the appointment of the debtors as executors: which their Lordships understand to have been a wider submission than that already dealt with in this opinion—viz. that accountability in equity of a debtor executor was not property of the testatrix *at her death*. Hope J. A. rightly rejected such submission and proceeded in terms (p. 28 of the Record) to find that the provisions of clauses 4, 5 and 6 were to be considered as legacies and therefore within s. 102 (1) (*a*), relying particularly upon, and quoting appositely from, *Re Wedmore* (*supra*) and *A. G. v. Holbrook* (*supra*). Reynolds J. A. did not add any reasons of his own.

In the High Court the principal judgments were those of Stephen J. and Mason J., the other members of the Court agreeing.

Stephen J. (page 47 of the Record) concluded that the appointment of the debtors as executors had no relevant effect upon the operation of s. 102 (1) (*a*): and with that their Lordships agree. He then concluded that the accountability in equity of the executor debtors, which would not be denied by the gift of residue in equal shares, is excluded by clauses 4, 5 and 6: but finds an answer to that in the special feature of the law of New South Wales that the estate does not vest in the executor on the death but in the Public Trustee until grant. However he then (p. 51 of the Record) considers the argument for the present Respondents based solely upon clauses 4, 5 and 6. At page 51 of the Record he said this:

> " 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."

Stephen J. then discusses and analyses a number of the cases already cited in this opinion on whether such a provision is a legacy. He placed some reliance upon the decision of Lord Hardwicke L.C. in *Sibthorp v. Moxton* ((1747) 1 Ves.Sen. 49 and 3 Atk. 579) in concluding that such a provision is truly an extinction of the liability rather than a legacy: that decision has not been universally applauded, and their Lordships regard it rather as a decision that in the particular circumstances of the case there was a legacy with sufficient indication that it was to take effect in favour of the estate of the debtor rather than lapse by his predecease of the testator. Stephen J. concluded that the cases showed that for many purposes a provision such as this was analogous to a legacy, but, not being in reality a legacy but a release, did not come within the particular language of s. 102 (1) (*a*). For the reasons that their Lordships have set out they are unable, with respect, to agree with that conclusion: however expressed (and there are many modes of expression designed to confer the same benefaction, some of which were admitted to constitute purely a legacy) the benefaction can only be a legacy, and lacks the full indicia of a true release in the sense of extinction or annihilation of the obligation so as to result in no entitlement being conferred to property of the deceased.

Mason J. (at p. 61 of the Record) initially said:

" 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 ".

Mason J. also considered the authorities and text books on the nature of such a provision to which reference has been made, with especial reference to *A. G. v. Holbrook* (*supra*) and *Re Wedmore* (*supra*). He criticizes the judgment of Graham B. in the former case in its equation of the debt to a sum of money in the hands of the debtor—an approach which appears to be reflected in the judgment of Jacobs P. in the Supreme Court—with, in their Lordships' view, some justification. Nevertheless their Lordships are unable to agree with the conclusion, based as it is upon the view that a clause in this form is other than a disposition of an asset of the estate in favour of the debtor.

In the event their Lordships find it unnecessary to decide whether in the alternative there is here a case of " property disposed of by will " within s. 102 (2) (*a*), a contention that was not considered to be worthy of discussion in the judgments of either the Supreme Court or in the High Court.

There remains for determination the question whether the quantum upon which duty is chargeable in respect of these debts is the amount outstanding at the date of death, or the actuarial value at the death of the obligation to repay those amounts by instalments of $375 annually. This depends upon consideration of the true construction and effect of the Loan Agreements, and in particular whether the executors of the testatrix were able thereunder to call in the principal of the debts or not. Another possibility was ventilated before their Lordships, that perhaps the executors had no such power, but had the ability to assign on sale the benefit of the debts to another who could call for the principal outstanding: if that were the correct conclusion it was accepted by counsel for the Appellant that the matter should be remitted for ascertainment of the value of such right of disposal.

The Supreme Court decided that the value of the property that was chargeable in respect of these debts was the full amount outstanding: they declined to follow a decision in the contrary sense of Owen J. in *Bray v. Commissioner of Taxation* ((1968) 117 C.L.R. 349) on a loan agreement in relevantly identical terms. In the High Court it was not necessary to decide this point: but Stephen J. (Record p. 47) indicated that he would have been prepared to follow Owen J: and Mason J. (Record p. 63) expressed a "firm preference" for the views of Owen J.

It is necessary in order to examine this point to set out an example of the Loan Agreements in full. That of one son was as follows.

> "THIS AGREEMENT made this sixteenth day of May one thousand nine hundred and sixty-nine BETWEEN ALICE BONE . . . (hereinafter called the 'Lender') of the one part and TREVOR DONALD BONE . . . (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
>
> 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 thereof.
>
> 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.

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.

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 is contended for the Respondents that the only persons who can call up for payment the whole amount of the debt are (*a*) the Lender himself *in vivo* and (*b*) an assignee *inter vivos* of the Lender: and that neither the Lender's personal representative, nor that assignee's personal representative, nor an assign of that assignee or of any such personal representative has the right to do so. (The point was not debated whether an involuntary assignee in bankruptcy would have the ability.) The Respondents, and Owen J. in the *Bray* case, founded upon the words " under her own hand " in clause 2, and their incorporation by the words " in the same manner " in clause 3 in the case of an assignee. Jacobs P. considered that those words were satisfied by a requirement that, contrary to the ordinary situation in law, the notice be not given by an agent: that it was in the ordinary nature of a debt that all aspects of it were enforceable by assignees in due form, and by persons such as personal representatives standing in the shoes of the original creditor or of anyone taking his place as owner of the debt by due assignment or further assignment: and he remarks correctly that in many places the word Lender manifestly included the personal representatives of the original lender. Hope J. A. arrived at the same conclusion for similar reasons.

Their Lordships are of opinion that in this respect the Supreme Court was right, and that the decision of Owen J. in the *Bray* case should not be followed.

The recital of an agreement to repay to " the Lender ": the agreement in clause 2 to repay to " the Lender ": the reference in clause 3 to repayment to " the assignee ": the agreement in clause 4 to pay instalments to " the Lender or her assignee ": the second reference in clause 6 to " the Lender or her assignee ": in all these instances it is clear in their Lordships' opinion that personal representatives are included. It is not to be expected that the calling in of the full debt should be restricted to the original lender *inter vivos*, nor (supposedly) to the first assignee from the original lender in that assignee's lifetime, whether that assignee be an individual or a corporation. Such a scheme would not appear to have any rational basis, granted that the testatrix intended to preserve *some* ability to make the debt worth its principal value: for a purchaser of the debt by assignment from the testatrix might be unwilling to pay a full price if his personal representatives (should the purchaser die before giving notice) could not give it: and still more so if, as seems implicit in the argument for the respondents, he could not in turn on further sale confer upon his assignee a right to call in the whole debt. Their Lordships do not say that it would be impossible so to draft such an agreement as to make the principal sum immediately repayable only if called for by the original lender in her lifetime: though it might be that under some other provision for a charge to death duty a chargeable benefit might arise on the death in those circumstances. But their Lordships are of opinion that the particular language relied upon by the

respondents to exclude the normal ability of personal representatives to exercise all rights to enforce a debt belonging to a testatrix is insufficient for that purpose.

In summary therefore their Lordships are of opinion that the appeal should be allowed, and the order of the Supreme Court restored and that accordingly the questions posed by the case stated by the Commissioner of Stamp Duties should be answered

(1) Yes

(2) $93,475

(3) $16,732·96.

They will humbly advise Her Majesty accordingly. In accordance with the undertaking which he lodged the Appellant must pay the Respondents' costs of this appeal and the order for costs made by the High Court will be left undisturbed.

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In the Privy Council

THE COMMISSIONER OF STAMP DUTIES

v.

TREVOR DONALD BONE AND OTHERS

DELIVERED BY

LORD RUSSELL OF KILLOWEN

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