Billposting, Ltd. (1)—the case is outside the definition of property, and the respondent succeeds.

The appeal should be dismissed.

Appeal dismissed with costs.

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Macnamara & Smith.*

J. B.

(1) (1916) 2 A.C. 54.

Foll *Mc & Angus Pty Ltd, Re* (1992) 7 ACSR 748

[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (NEW SOUTH WALES). . . . APPELLANT;

AND

PERPETUAL TRUSTEE COMPANY LIMITED RESPONDENT.

(SAXTON'S CASE.)

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Stamp Duties (N.S.W.)—Dutiable estate—Gift made within three years before death —Shares in company issued to members of deceased's family—Payment therefor by company's cheque debited to deceased's account in company's books—Subsequent transfer of such debits to accounts of said members of deceased's family in said books—Retransfer thereof to deceased's said account within three years of his death—Pro rata extinguishment of debts by pre-existing credit balance—Stamp Duties Act 1920-1924 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 32 *of* 1924), *sec.* 102 (2) (*b*)*.

S., who died on 30th September 1926, was a large shareholder in, and also life managing director of, a limited company which by its articles conferred

*Sec. 102 of the *Stamp Duties Act* 1920-1924 (N.S.W.) 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 the following classes of property:— . . . (2) . . . (*b*) Any property comprised in any gift made by the deceased within three years before his death . . . including any money paid or other property conveyed or transferred by the deceased within such period in pursuance of a covenant or agreement made at any time by him without full consideration in money or money's-worth" &c.

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upon him unfettered authority over its affairs. The company had power to lend and borrow money, and S., his wife, his daughter and each of his five sons had personal accounts in its books. S. operated upon his personal account as upon a banking account. The capital of the company was increased in June 1920 by the issue of 50,000 £1 shares—40,000, on which 6d. each had been paid, being allotted to the wife and children of S., who expressed his intention of making a gift of such shares, the remaining 10,000, on which nothing had been paid, being allotted to H. On 29th and 30th November 1920 cheques for various amounts were drawn on the company's banking account for the £49,000 due in respect of the shares, and the total amount was on 30th November 1920 debited to S.'s personal account with the company, which immediately prior to this transaction was in credit to the extent of £19,091 17s. 3d. Three of these cheques of the company, amounting to £36,262, and six cheques of three of S.'s children, amounting to £12,738, were handed to the company either by or on behalf of the allottees of the shares. Cheques of the company totalling £12,738 were paid into the banking accounts of the three children in order to meet their cheques for that sum. Scrip was duly issued to each of such applicants, who were also entered in the register of members in respect thereof. All this was done on both sides on the instruction of S. On 1st July 1921 S. changed his intention and caused the sum of £30,000 to be credited to his own account and debited to the respective accounts of his wife and of his five sons in proportion to the number of shares issued to them, which transactions were effected without the knowledge of his wife and/or children. On 30th September 1922 S. caused the sum of £9,450, being the difference between par and interest earned on 10,000 shares, to be debited to the account of one of his children and credited to his personal account. The debits then appearing in the accounts of the wife and children with the company at that time totalled £39,450, which amount was reduced by credits of dividends and by the transfer of 3,500 shares from one of the children to S., and on 31st May 1925 stood at the sum of £27,098 2s. 7d. On 7th September 1925 S. caused his account in the company's books to be debited with this sum, for which he took the company's cheque. He paid this cheque into his bank account, upon which he drew his own cheques for a corresponding total amount. These were paid to the company either directly by him or through his children to meet the debits appearing in the accounts of the wife and children. His personal account was then in credit to an amount greater than £27,098 2s. 7d., and at the date of his death was still in credit.

Held, by *Knox* C.J., *Isaacs* and *Dixon* JJ. (*Starke* J. dissenting as to quantum only), that the amount of £13,232 3s. 7d., mentioned below, formed part of the dutiable estate of S. as being property comprised in a gift made by him within three years before his death within the meaning of sec. 102 (2) (*b*) of the *Stamp Duties Act* 1920-1924 (N.S.W.). The debit of £49,000 made in S.'s account on 30th November 1920 operated as an extinguishment of the then existing credit of £19,091 3s. 7d. and as an attempt to create an indebtedness as to the balance of £29,908 2s. 9d. This extinguishment lawfully operated to pay the calls upon the shares *pro tanto*.

The amount outstanding in respect of shares issued to the wife and children must be deemed paid up ratably out of the credit of £19,091 3s. 7d. in the proportion that £39,000 bears to £49,000, that is, to the extent of £15,195 11s. 3d. No subsequent change of intention on the part of S., or the company, could undo this payment, for paid up capital could not be returned. From the sum of £15,195 11s. 3d. should be deducted the sum of £1,329 12s. 3d., being the amount which it included as paid up on the 3,500 shares taken over by S. The balance of £13,865 19s. was the additional amount which had in law been paid up on the shares allotted to the wife and five children and the difference of £13,232 3s. 7d. between that amount and £27,098 2s. 7d. represented the amount which by the credit of that figure and its extinguishment was actually paid up on those shares.

Clayton's Case, (1816) 1 Mer. 572; 35 E.R. 781, distinguished.

Per Knox C.J. and *Dixon* J.: Whether with or without a filed agreement, a company may not extinguish the shareholder's liability, with all its peculiar incidents, by merely accepting in its place a liability for a simple contract debt.

Per Isaacs J.: It is *ultra vires* of a company to accept as payment of share liability the substitution of another promise to pay that liability.

Decision of the Supreme Court of New South Wales (Full Court): *Perpetual Trustee Co.* v. *Commissioner of Stamp Duties*, (1929) 29 S.R. (N.S.W.) 153, reversed.

APPEAL from the Supreme Court of New South Wales.

A special case, which was substantially as follows, was stated by the Commissioner of Stamp Duties for the opinion of the Full Court of the Supreme Court under sec. 124 of the *Stamp Duties Act* 1920-1924 (N.S.W.):—

1. Alexander Charles Saxton, late of Sydney in the State of New South Wales, died on 30th September 1926, having made his will, probate whereof was granted by the Supreme Court in its Probate Jurisdiction on 1st April 1927 to Perpetual Trustee Co. (Ltd.), the executor therein named. The said deceased was at the date of his death fifty-eight years of age and was accidentally drowned.

2. The said Trustee Company included in the affidavit of value filed by it in pursuance of sec. 117 of the *Stamp Duties Act* 1920-1924 the following item: "Gifts of any kind whatever, made within three years preceding date of death, as per schedule No. 10, £29,055 12s. 10d."

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3. In the said schedule No. 10 the following item appeared: "To amount given by deceased to his wife and four of his sons as at 7th September 1925 as detailed in memorandum herewith . . . £27,098 2s. 7d."

4. The memorandum annexed to the said schedule No. 10 was in the words and figures following:—The history of these particular shares and the transactions surrounding them is as under:—(*a*) In the early part of 1920 A. C. Saxton & Sons Ltd. had an opportunity of purchasing the freehold property at Pyrmont from the Harris Estate, on which its mill premises are located, and for other business reasons deemed it desirable to make a further issue of capital; Mr. Alexander Charles Saxton at that time was absent abroad. (*b*) Mr. Heath consulted Mr. Russell (of Sly & Russell, solicitors) freely at the time, and it was decided to cable Mr. Saxton and secure his permission to carry this into effect. The permission was duly received, and in June 1920 the Company passed a resolution authorizing the issue of 50,000 shares of £1 each that were then held in reserve. This issue of 50,000 shares then made the total issue of the Company equal to its nominal capital of £250,000. Applications were invited for the shares, and were received as follows:—Mrs. Janet Saxton, 10,000 shares; Miss Janet Cuthbertson Saxton, 10,000 shares; Harold Saxton, 4,800 shares; Alexander Wilson Saxton, 4,400 shares; Charles Donald Saxton, 4,000 shares; Malcolm Nevitt Saxton, 3,500 shares; Geoffrey Saxton, 3,300 shares; A. E. Heath, 10,000 shares. (*c*) The shares were duly allotted at a meeting of directors held on 21st June 1920, and were payable: on allotment, 6d.; on first call, 9s. 6d., due 21st August 1920; on 2nd call, 10s., due 21st October 1920. (*d*) The whole of the purchase-money of £50,000 was paid by Mr. Saxton by a cheque drawn on the Company and debited to his personal account in the Company's books on 30th November 1920, he having then returned from abroad. (*e*) With the exception of the shares allotted to A. E. Heath, Mr. Saxton at that time stated that they were to be a gift to the various parties set out above, while those allotted to A. E. Heath were those mentioned in what is referred to, for convenience, as agreement No. 1, and have been dealt with in accordance with the provisions of that agreement, subject to the variations concerning which a separate

statement has been prepared. (*f*) At a subsequent date, namely, on 1st July 1921, Mr. Saxton changed his ideas and arranged with the Company to advance the parties set out hereunder the moneys set opposite their respective names, such to be secured on the shares that were allotted to them on the date first above mentioned. These were as follows:—Mrs. Janet Saxton, £10,000; Harold Saxton, £4,800; A. W. Saxton, £4,400; C. D. Saxton, £4,000; Geoffrey Saxton, £3,300; M. N. Saxton, £3,500: £30,000. (*g*) Mr. Saxton then had an entry passed in the Company's books debiting the above individuals with the amount set opposite their respective names and crediting his personal account with £30,000. In the Company's books each individual account was headed with the name of the party with the addition of the words "Advance Account." (*h*) At a subsequent date the above shares of Malcolm Nevitt Saxton, together with others, amounting in all to 20,000 shares, which he held, were repurchased by Mr. Saxton during his trip to America, and Malcolm Nevitt Saxton from that point disappeared from the transaction, the shares so transferred still being registered in Mr. Saxton's name at the date of his death. (*j*) Dividends from time to time as received were credited by the Company against the Advance Accounts of the individuals named above. (*k*) Before proceeding further, however, it is necessary to state that while Mr. Saxton made a gift to Miss Janet Cuthbertson Saxton of the 10,000 shares allotted on 21st June 1920, he subsequently altered this, and on 30th November 1922 the Company advanced to Miss Janet Cuthbertson Saxton the sum of £9,450 against the security of those shares. This sum of £9,450 was arrived at by taking the original sum of £10,000 which Mr. Saxton had paid on her behalf and which he always referred to as a gift, and taking therefrom such dividends as he had received between the date of the gift and the date of the taking over of the liability by the Company, and which said dividends amounted to £550, so that on 30th November 1922 in the Company's books an entry was passed debiting Miss Janet Cuthbertson Saxton's Advance Account with £9,450 and crediting Alexander Charles Saxton's personal account with £9,450. (*l*) From this point onwards various dividends and other amounts were duly received by the Company, and the Advance Accounts were reduced to the following

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figures :—Statement of balances of Advance Account as at 31st May 1925 :—Mrs. Janet Saxton, £7,246 2s. 3d. ; Harold Saxton, £3,535 10s. 9d. ; Alexander Wilson Saxton, £3,144 ; Charles Donald Saxton, £2,767 12s. 3d. ; Geoffrey Saxton, £2,434 10s. 1d. ; Miss Janet Cuthbertson Saxton, £7,970 7s. 3d. : £27,098 2s. 7d. (*m*) Mr. Saxton informed Mr. Heath that he wished to clear these debts from the Company's books, and stated that he would like to make a gift to the various parties concerned of the outstanding amounts. He therefore paid to the Company his cheque for the amounts due on Advance Account and drew from the Company, in order to place himself in funds to meet these cheques, a similar sum, the transaction being a cheque drawn on the Company's bank and banked by Mr. Saxton to his private banking account and the debt being to his personal account in the Company's books. These cheques were duly passed on 7th September 1925. (*n*) At the same time he desired that Miss Janet Cuthbertson Saxton should cease to be a shareholder in the Company, as he stated to Mr. Heath that, in view of the trust already existing covering 10,000 shares in the Company and the fact that he was making other provision for her, he thought his five sons should have the shares. He desired, however, that the sons (in regard to this particular 10,000 shares) should be treated as taking over the liability which he had discharged to the Company on account of Miss Janet Cuthbertson Saxton and amounting to £7,970 7s. 3d. (*o*) Mr. Russell was consulted ; and this amount, divided into five equal parts, was made the consideration for the transfer of 1,594 shares to each of the five sons, transfers being signed by Miss Janet Cuthbertson Saxton as transferor and the sons as transferees, the remaining 406 shares to each son being transferred by Miss Janet Cuthbertson Saxton to the sons for a nominal consideration of 10s. The first set of transfers went through on 16th November 1925, and the second set on 11th December 1925, although the cash paid by Mr. Saxton to discharge Miss Janet's debt in the Company's books was actually paid to the Company on 7th September 1925. (*p*) In the Company's books when the cheques were received from Mr. Saxton they were entered and credited in accordance with the figures set out above, but the cheques drawn by Mr. Saxton were only drawn in favour of Mrs. Janet Saxton, Messrs.

Harold, Alexander Wilson, Charles Donald, Malcolm Nevitt and Geoffrey, for the amount of their advance due to the Company plus one-fifth of the amount due by Miss Janet, thus bringing the respective cheques handed over up to the following figures:— Harold Saxton, £5,129 12s. 2d.; A. W. Saxton, £4,738 1s. 5d.; C. D. Saxton, £4,361 13s. 8d.; Geoffrey Saxton, £4,028 11s. 7d.; M. N. Saxton, £1,594 1s. 6d.; Mrs. Janet Saxton, £7,246 2s. 3d.: £27,098 2s. 7d. In other words, the dissection of the amount of the cheque is more clearly seen from the following statement:—

Name.	Amount advanced paid Company own debt.	Amount advanced paid Company Account J. C. Saxton.	Total Cheque.
	£ s. d.	£ s. d.	£ s. d.
Harold Saxton	3,535 10 9	1,594 1 5	5,129 12 2
Alexander W. Saxton ..	3,144 0 0	1,594 1 5	4,738 1 5
Charles D. Saxton ..	2,767 12 3	1,594 1 5	4,361 13 8
Geoffrey Saxton	2,434 10 1	1,594 1 6	4,028 11 7
Miss J. C. Saxton	7,970 7 3		
Mrs. Janet Saxton ..	7,246 2 3		7,246 2 3
	27,098 2 7		
Malcolm Nevitt Saxton ..	nil	1,594 1 6	1,594 1 6
	£27,098 2 7	£7,970 7 3	£27,098 2 7

(*q*) As far as Mr. Heath has been able to ascertain to date no receipt or document of any kind was taken by Mr. Saxton at the time he made the payments to clear the Advance Accounts to the Company, and he expressed himself quite clearly to Mr. Heath that he wished the debts to be wiped out.

5. Subsequently the Trustee Company forwarded to the Commissioner a case for opinion which it had submitted to counsel, which contained the following statement:—" In order to clear the amount of advances debited against his said wife and children Mr. Saxton paid to each of the members of his family who were indebted to the Company, his cheque for the amounts due by each of them on Advance Account, and these cheques were indorsed to the Company and paid to its credit. He then drew from the Company, in order to place himself in funds to meet these cheques, a cheque for a sum equal to the total amount of those cheques, the transaction being a cheque drawn on the Company's bank and banked by Mr. Saxton

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to his private account, and the debit being to his personal account in the Company's books. These cheques were duly passed on 7th September 1925."

6. The Trustee Company, having taken counsel's opinion, subsequently contended that the gifts made by the deceased were complete on 30th November 1920, and that no moneys were thereafter owing by the said members of his family in respect of the said transactions either to the said Mr. Alexander Charles Saxton or to the said Company.

7. The Trustee Company has supplied the following additional facts as supplementing and modifying the statements contained in the said memorandum and in the said case for opinion :—(i.) The applications mentioned in par. (*b*) of the memorandum were duly signed by the persons whose names appeared therein, and immediately after the allotment of the said shares as mentioned in par. (*c*) scrip for the said respective shares was duly issued to and in the names of the respective applicants and the applicants were duly entered in the share register of the Company as holders of the shares they had respectively applied for. (ii.) The shares were issued as fully paid-up and were in fact paid for, not as set out in par. (*d*), but by a series of cheques, particulars whereof are as follows :—On 30th June 1920 the sum of £1,000 was deposited to the Company's current account as shown in its Cash Book and credited to Sundry Shareholders' Account, thus reducing the debit to £49,000. This £1,000 was made up by cheques as follows :—Cheque on A. C. Saxton & Sons Ltd. (which said cheque was debited to A. C. Saxton's private account), £357 10s. ; cheque on Harold Saxton's own bank account, £267 10s. ; cheque on Alexander Wilson Saxton's own bank account, £245 ; cheque on Charles Donald Saxton's own bank account, £130 : £1,000. In the case of Harold Saxton, Alexander Wilson Saxton and Charles Donald Saxton, cheques of the Company for similar amounts were handed to them respectively and debited to their respective personal accounts with the Company, and were then banked in their own respective personal bank accounts. The balance of the £49,000 was received by the Company on 30th November 1920 and was made up of four items, namely, £4,267 10s., £34,732 10s., £5,440 and £4,560 : £49,000. The respective items set

out above were paid into the Company's banking account, the cheques comprising each deposit being made up as follows:—Item £4,267 10s. was represented by cheque from Alexander Wilson Saxton, £2,040; cheque from Harold Saxton, £2,227 10s.: £4,267 10s. Item £34,732 10s. was composed of cheque from Charles Donald Saxton, £1,890; cheque from A. C. Saxton & Sons Ltd., £3,200; cheque from A. C. Saxton & Sons Ltd., £29,642 10s.: £34,732 10s. Item £5,440 was made up by a cheque drawn on A. C. Saxton & Sons Ltd. in favour of Alexander Charles Saxton for £3,420 and a cheque from Charles Donald Saxton, £2,020: £5,440. Item £4,560 was made up by cheques from Harold Saxton, £2,380, and Alexander Wilson Saxton, £2,180: £4,560. Cheques on the Company's account for the whole of the amounts set out above were drawn on 29th and 30th November 1920, and the total sum of £49,000 was debited to Alexander Charles Saxton's personal account with the Company on that date. The cheques of the said Harold Saxton, Alexander Wilson Saxton and Charles Donald Saxton for the individual amounts in the lists set out above paid by the said Harold Saxton, Alexander Wilson Saxton and Charles Donald Saxton respectively to the Company were exchange cheques for cheques of similar amounts drawn on the Company in their favour and debited to Alexander Charles Saxton's personal account with the Company. At a meeting of the directors of the Company held on 1st December 1920 the secretary reported that the whole of the moneys due on the issue of 50,000 shares had been paid and banked to the credit of the Company's account. (iii.) From the time that the said respective applicants were registered as holders of the said respective shares, the dividends payable in respect thereof have been paid to the said respective shareholders by being credited to their personal cash accounts with the said Company save in the case of Miss Janet Cuthbertson Saxton as set out in par. (*k*), who was a minor, and the said respective shareholders have paid income tax in respect thereof. . . . (v.) The matters mentioned in sub-pars. (i.) and (ii.) hereof were carried out with the knowledge and consent of Mr. Alexander Charles Saxton. (vi.) With regard to the transaction mentioned in pars. (*f*) and (*g*) of the memorandum the same in so far as it was carried out consisted of the making of entries in the books of the

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Company by which entries the aggregate sum of £30,000 was debited in different proportions to the following members of his family, namely, Harold Saxton, A. W. Saxton, C. D. Saxton, Geoffrey Saxton, M. N. Saxton and Mrs. Janet Saxton; and at the same time Mr. Alexander Charles Saxton's personal account was credited with the sum of £30,000. After this credit, the amount of the latter's debit with the Company was £1,003 5s. No money nor property of any kind passed, nor were any cheques drawn nor documents executed in connection with this transaction, the only record thereof being the entries in the Ledger and the Journal of the Company. This transaction was carried out and the entries made without the knowledge or consent of the said Harold Saxton, A. W. Saxton, C. D. Saxton, Geoffrey Saxton, M. N. Saxton or Mrs. Janet Saxton. (vii.) Subsequently, some time between the months of May and November 1922, the personal account of Alexander Charles Saxton with the Company became in credit. (viii.) Miss Janet Cuthbertson Saxton attained the age of twenty-one years on 3rd April 1928.

8. Annexed to and forming part of the case is a copy of the memorandum and articles of association of the said A. C. Saxton & Sons Ltd. as they stood at all times material to this case.

9. Upon the deceased's acquiring the shares held by Malcolm Nevitt Saxton as mentioned in par. (*h*) of the said memorandum, the amount of £3,500 debited against the said Malcolm Nevitt Saxton in his account as mentioned in par. (*f*) of the said memorandum was transferred to the account of the deceased.

10. Save as in this case mentioned, the shares allotted on 21st June 1920, as mentioned in pars. (*b*) and (*c*) of the said memorandum, remained vested in the respective persons therein named at the death of the deceased.

11. The deceased's personal account with the Company was in credit at the date of his death.

12. The Commissioner claims that the said sum of £27,098 2s. 7d. forms part of the dutiable estate of the deceased.

13. The Trustee Company now claims that the said sum does not form part of such dutiable estate, and that no duty is payable by it in respect of the said transactions or any of them.

14. The final balance of the estate of the deceased in accordance with the above stated claim of the Commissioner is £188,808, upon which the Commissioner assessed the death duty at £37,761 12s., being at the rate of 20 per cent.

15. The Trustee Company duly paid the said £37,761 12s., and, being dissatisfied with the said assessment, paid the sum of £20 as security for costs and called upon the Commissioner to state this case.

The questions for the decision of the Court were as follows:—

(1) Does the said sum of £27,098 2s. 7d., or any part thereof, form part of the dutiable estate of the deceased?

(2) What is the death duty payable in respect of the estate?

(3) How are the costs of this case to be borne and paid?

By clause 3 (12) of the memorandum of association one of the objects for which the Company was established was "to negotiate loans and to advance and lend moneys upon such terms or security as may be arranged."

The Full Court answered question 1 in the negative: *Perpetual Trustee Co.* v. *Commissioner of Stamp Duties* (1).

From that decision the Commissioner now appealed to the High Court.

Other material facts are stated in the judgments hereunder.

Flannery K.C. (with him *Kitto*), for the appellant. A company cannot purchase its own shares, and it is doubtful whether a company can advance loans on the security of such shares (*Palmer's Company Law*, 12th ed., pp. 68, 69). The advance by the Company to the deceased was *ultra vires*, therefore the shares were not paid for on 30th November 1920 (*In re Birkbeck Permanent Benefit Building Society* (2); *Murray* v. *Scott* (3); *Sinclair* v. *Brougham* (4)). They remained unpaid for until September 1925, when the deceased paid to the Company by cheque the sum of £27,098 2s. 7d. The money so paid to the Company was money provided by the Company through the deceased. A company cannot, under a general power in its memorandum of association to lend money, advance money

(1) (1929) 29 S.R. (N.S.W.) 153.
(2) (1912) 2 Ch. 183.
(3) (1884) 9 App. Cas. 519.
(4) (1914) A.C. 398.

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for the purpose of permitting the borrower to purchase its own shares. The Court should look at the transaction as a whole and should not deal with it in sections.

Maughan K.C. (with him *Hooton*), for the respondent. The events of 30th November 1920 created a complete gift by the deceased in favour of his wife and children, who thereupon became absolute owners both at law and in equity of fully paid-up shares in the Company which they had applied for in June 1920. So far as the deceased was concerned the gift was irrevocable. The amount of £31,000 which remained owing in respect of shares allotted to the wife and children of the deceased was under the rule in *Clayton's Case* (1) paid by cheques from the Company and others by February 1923. The fact that payment was made partly by cheques of the Company does not alter the position. The matter therefore does not come within the provisions of sec. 102 (2) (*b*) of the *Stamp Duties Act*. With regard to the sum of £27,098 2s. 7d. which the Commissioner contends was owing to the Company in September 1925 by the wife and children of the deceased, they could not without their wish and knowledge be debited with any moneys, and therefore were not indebted to the Company in the amount stated. Even assuming that the transactions in September 1925 created gifts, they are not liable to stamp duty because the subject matter thereof is no longer in existence (*Commissioner of Stamp Duties (N.S.W.)* v. *Perpetual Trustee Co. (Watt's Case)* (2)). Here, so far as there was a substitution of liability it was not a substitution of a liability sounding in damages only (*In re Richmond Hill Hotel Co.*; *Ex parte Pellatt* (3); *Gardner* v. *Iredale* (4)). The Company did not give up its right to receive payment in cash, nor did it release the shareholder from his obligation to pay money or money's-worth (*In re Wragg Ltd.* (5)). Under its memorandum of association the Company had ample power, prima facie, to lend money to the deceased. The question is whether it had power to lend money to be applied in payment for its own shares. The question in *In re Birkbeck Permanent Benefit Building Society* (6) was only whether a company

(1) (1816) 1 Mer. 572; 35 E.R. 781.
(2) (1926) 38 C.L.R. 12.
(3) (1867) 36 L.J. Ex. 613.
(4) (1912) 1 Ch. 700.
(5) (1897) 1 Ch. 796.
(6) (1912) 2 Ch. 183.

formed under special statutes had power to engage in the business of banking (*Sinclair* v. *Brougham* (1)). If there was a debt as between the Company and the wife and children of the deceased, it was by the book entries transferred to the deceased (*Bodenham* v. *Purchas* (2)).

Flannery K.C., in reply. Calls made in respect of shares cannot be satisfied by paying to the Company its own cheques. The ordinary business of the Company is not the providing of money for the purchase of its own shares. The general power to lend money referred to the other powers of the Company. The intention of the testator was that his wife and children should become shareholders of the Company and that the shares should be paid for in cash. The transactions in November 1920 were merely book entries, and were the first step in a scheme which was not complete until the cash was paid in September 1925. The rule in *Clayton's Case* (3) does not apply in the circumstances of the present case.

Cur. adv. vult.

Oct. 17.

The following written judgments were delivered :—

KNOX C.J. AND DIXON J. Alexander Charles Saxton, who died on 30th September 1926, was managing director for life of a company called A. C. Saxton & Sons Ltd. Under the Company's articles of association he had an unfettered authority over its affairs. The books of the Company contained "Advance Accounts" in the name of his wife, his daughter and each of his five sons. According to these accounts, as balanced to 31st May 1925, his wife, his daughter and four of these sons were indebted to the Company in sums which together amounted to £27,098 2s. 7d. The deceased himself also had an account in the Company's books. On 7th September 1925 he caused this account to be debited with the sum of £27,098 2s. 7d., for which he took the Company's cheque. He paid this cheque into his bank account, upon which he drew his own cheques for a corresponding total amount. These were paid to the Company either directly by him or through his children.

(1) (1914) A.C., at p. 411. (2) (1818) 2 B. & Ald. 39; 106 E.R. 281.
(3) (1816) 1 Mer. 572; 35 E.R. 781.

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His personal account was then in credit to an amount greater than £27,098 2s. 7d., and at the date of his death the account was still in credit. The Commissioner of Stamp Duties claimed that the sum of £27,098 2s. 7d. was "property comprised in a gift made by the deceased within three years before his death" within sec. 102 (2) (*b*) of the *Stamp Duties Act* 1920-1924, and liable accordingly to be included in the estate for the purposes of the assessment of death duty. If no further facts appeared, there would be no doubt as to the correctness of this contention. Sec. 100 defines the word "gift" by reference to the expression "disposition of property," which it also defines. These definitions combine to give sec. 102 (2) (*b*) a meaning wide enough to include such a transaction as the entries purport to effect or to narrate. But further facts do appear, and the deceased's executor (who is the respondent upon this appeal) relies upon them as affording an answer. It says that, in spite of these entries in the Company's accounts, the sum of £27,098 2s. 7d. was an amount which the wife and these children did not owe to the Company, but which the deceased himself did owe to the Company. The executor therefore maintains that the debit of £27,098 2s. 7d. to the deceased's personal account did not result in the discharge of any indebtedness to the Company but his own. And the fact was that this amount represented a residue or balance of sums which in 1921 and 1922, without the authority of his wife and children, the deceased had caused to be credited to his account with the Company and to be debited in various amounts to their respective accounts. On 30th September 1922 the deceased had caused his daughter's account to be debited and his own to be credited with £9,450. On 1st July 1921 he had caused his own account to be credited with £30,000, and his wife's to be debited with £10,000, his son Harold's with £4,800, his son Alexander Wilson's with £4,000, his son Charles Donald's with £4,000, his son Geoffrey's with £3,300, and a fifth son's, Malcolm Nevitt's, with £3,500. These debits together amounted to £30,000 and, with the debit of £9,450 to the daughter's account, make up £39,450. This total has been reduced by credits of dividends and by the transfer of the debit against the fifth son, Malcolm Nevitt, and on 31st May 1925 stood at the sum of £27,098 2s. 7d. When,

on 1st July 1921 and 30th November 1922, he caused these entries to be made, the deceased intended to reverse, *pro tanto*, a debit to his account of £49,000 which had been made at his instance on 30th November 1920. This debit was made in order to pay up in full 50,000 shares of £1 in the Company. Upon 40,000 of these shares 6d. had been paid up, and 19s. 6d. was due and owing for calls. Upon 10,000 of them nothing had been paid, and the whole amount was due and owing. The 50,000 shares had been allotted by the Company as follows: 10,000 shares had been allotted to the deceased's wife, 10,000 to his daughter, 4,800 to his son Harold, 4,400 to his son Alexander Wilson, 4,000 to his son Charles Donald, 3,300 to his son Geoffrey, 3,500 to his son Malcolm Nevett and 10,000 to an accountant and business associate named Heath. If on 1st July 1921 and 30th November 1922 it were open to the deceased and the Company to revoke and reverse so much of these credits and of the debit to himself as related to his wife, daughter and sons and the shares allotted to them, then doubtless the calls would be unpaid, and, unless by some other means the shares were paid up in the meantime, the liability of the allottees would not be wholly extinguished before 30th September 1925, when the balance of £27,098 2s. 7d. was credited to the holders and debited to the deceased.

The respondent, the deceased's executor, says that, as a result of the transaction of which the debit of £49,000 and the credits to the allottees form a part, the shares were fully paid-up and that the deceased's repentance in 1921 and 1922 of the benefit which had thus been conferred upon his family was ineffectual. This view was adopted by the Supreme Court of New South Wales. *Ferguson* A.C.J., who delivered the judgment of himself, *Campbell* J. and *Halse Rogers* J., summed up the position by saying "in effect the testator borrowed money from the Company and gave it to the applicants to pay for the shares" (1). This view assumes that the deceased intended to make a final and not a provisional appropriation for the advantage of his family when he caused his account to be debited with £49,000, and cheques to be issued and received by the Company. No doubt his subsequent conduct may suggest the contrary. But the question whether he did so intend

(1) (1929) 29 S.R. (N.S.W.), at p. 161.

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is one of fact. The proceedings are by way of case stated under sec. 124 of the *Stamp Duties Act*, and the Commissioner has taken the fullest advantage of the fact that sub-sec. 2 requires him to do no more than state the facts "before him on making the assessment." He has contented himself with setting out what allegations the taxpayer made to him from time to time, without stating what he considers the real facts to be. No steps were taken under sub-sec. 6, but the Supreme Court decided the case upon its own view of the effect of the taxpayer's statements. Although it is very unsatisfactory to determine the matter upon such materials, the character of the case stated ought not to be allowed to operate against the taxpayer, who is not, in law, responsible for the statement of the case. Accordingly, unless it were now considered necessary to exercise the powers given by sub-sec. 6, any doubt as to what the facts are should be resolved in the taxpayer's favour. Adopting this method of dealing with the facts, it seems to follow that the deceased should be treated as having intended the transaction of 30th November 1920 to be final and irrevocable. Upon this view the precise steps which it involved must be considered.

After the allotment of 40,000 shares to the deceased's wife and children and payment thereon of 6d. a share (by means which need not be discussed) and the allotment of 10,000 shares to Heath, two calls were made as a result of which 19s. 6d. per share was by 21st October 1920 due and owing by the holders of these 40,000 shares, and apparently £1 per share on his 10,000 shares by Heath. On 29th and 30th November 1920 cheques on the Company's banking account were drawn for the whole £49,000 thus due, but in various amounts, and the total sum was debited to the deceased's personal account with the Company. Three of these cheques of the Company, amounting to £36,262, and six cheques of three of the deceased's sons, totalling £12,738 (the balance of £49,000), were handed to the Company either by or on behalf of the allottees of the shares. Cheques of the Company totalling £12,738 were paid into the banking accounts of these three sons in order to meet their cheques for that sum. All this was done on both sides upon the instructions of the deceased.

The Company's objects include a power "to negotiate loans and to advance and lend moneys upon such terms or security as may be arranged." On the assumption that when the £49,000 was debited to the deceased's personal account it was not in credit to that or any amount, the Supreme Court considered that the debiting and the issue of cheques constituted a loan made in exercise of this power. In *Spargo's Case* (1) *Mellish* L.J. says:—"Nothing is clearer than that if parties account with each other, and sums are stated to be due on one side, and sums to an equal amount due on the other side of that account, and those accounts are settled by both parties, it is exactly the same thing as if the sums due on both sides had been paid. Indeed, it is a general rule of law, that in every case where a transaction resolves itself into paying money by A to B, and then handing it back again by B to A, if the parties meet together and agree to set one demand against the other, they need not go through the form and ceremony of handing the money backwards and forwards." The decision under appeal held that in this way the shares were paid up in cash out of the proceeds of a loan made by the deceased.

The provision contained in sec. 25 of the English *Companies Act* 1867 is in force in New South Wales: it is sec. 55 of the New South Wales *Companies Act* 1899. Therefore, in the absence of a filed agreement providing for some other form of payment, shares must be paid up in cash. It is, of course, well settled that when the liability upon shares and the liability upon a cross-demand against the Company of a sum certain immediately payable are mutually extinguished by an agreed set-off, this amounts to payment within the section. (See *Larocque* v. *Beauchemin* (2); *North Sydney Investment and Tramway Co.* v. *Higgins* (3).) The circuity involved in actual cross-payments is dispensed with. *Spargo's Case* (4), *Fothergill's Case* (5), *Larocque's Case* (6) and *Higgins's Case* (3) were directed to the application to the requirements of this section of the principles of the common law which enabled payment to be effected without circuity. But these principles are called into play

(1) (1873) 8 Ch. App. 407, at p. 414.
(2) (1897) A.C. 358, at p. 365.
(3) (1899) A.C. 263.
(4) (1873) 8 Ch. App. 407.
(5) (1873) 8 Ch. App. 270.
(6) (1897) A.C. 358.

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only for the purposes of sec. 25, and only where there is a sum lawfully payable by the Company which when paid might lawfully be repaid to the Company in discharge of the liability upon the shares. The liability upon shares cannot be discharged unless the Company obtains in funds or assets that which is, or is supposed to be, a real equivalent to the capital represented by the shares. Thus, although an agreed extinguishment by set-off of the liability of the shareholder to the Company and of the Company's liability to him is undoubtedly payment, yet probably it is not competent to a Company to incur a voluntary liability for the purpose of enabling such a set-off to be had. (See the rhetorical question of Lord *Macnaghten* in *Famatina Development Corporation Ltd.* v. *Bury* (1).)

Further, it seems clear that, with or without a filed agreement, a company may not extinguish the shareholders' liability with all its peculiar incidents, by merely accepting in its place a liability for a simple contract debt. There appears to be no express decision exactly to this effect but it seems a necessary consequence of settled principles. In *Pellatt's Case* (2) *Turner* L.J. was of opinion that apart from the special circumstances under which the directors might possibly legally contract with a tradesman for him to take shares, and for goods furnished by him to be set off against calls made on his shares, such a contract would be generally *ultra vires* of the directors, since under such a contract the company's sole remedy for breach of the agreement would be an action for breach of contract, on which they could recover merely as for a simple contract debt, whereas, under the usual contract to take shares, calls on the shares were given by the Act the rank of specialty debts. Yet this is the practical result of the transaction of 30th November 1920. For, after the exchange of the cheques, the Company had merely the personal liability of the deceased, and for that it sought to relinquish the shareholders' specialty debt for calls with its peculiar statutory incidents. Is it possible to justify this result by disintegrating the transaction? Can it be treated as if the Company, in the bona fide exercise of its powers to lend, had lent money to the shareholders so that it became part of their general

(1) (1910) A.C. 439, at p. 442.

(2) (1867) 2 Ch. App. 527.

resources and the shareholders had out of their resources so replenished, paid, independently, their debts for calls ? The answer is found in the facts of the transaction. It never was intended that the Company should put any funds under the control of the supposed borrowers, nor even incur an obligation to do so. The Company after issuing its cheques remained entitled to recover back the very cheques or their proceeds. It was one inseverable transaction which could not, and was not intended to, increase the total assets of the Company. The Company was to obtain nothing. The purpose of the operation was to substitute the simple contract indebtedness of the deceased for the shareholders' liability for calls. Whatever may be the position when a company receives back from a shareholder in payment for calls money which it advances to him generally and not specifically for the purpose of paying them, such a transaction as that attempted by the entries made on 30th November 1920 and by the exchange of cheques is ineffectual and void ; always upon the assumption that the debit of £49,000 was not made against an existing credit. On this supposition, therefore, the liability for calls would have remained unsatisfied, and the deceased would have been at liberty to reverse the credit and debit for £49,000. It would follow upon this supposition that at that time the shares of Heath would be wholly unpaid, and those of the deceased's wife and children would be paid up to sixpence only. But this supposition is not wholly true. In fact, on 29th November 1920 the deceased's account was in credit £19,091 17s. 3d. On the following day the £49,000 was debited to this account. Two other items were also debited on this date but, in the absence of proof to the contrary, it must be presumed that the £49,000 was the first debit against the credit of £19,091 17s. 3d. When this debit was made to the account so in credit, the transaction did not operate simply as an attempt to create an indebtedness in this sum. It operated as an extinguishment of the amount of £19,091 17s. 3d. and as an attempt to create an indebtedness as to the balance, namely, £29,908 2s. 9d. This extinguishment might and did lawfully operate to pay the calls upon the shares *pro tanto*.

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The question, however, at once arises how the amount of this payment should be appropriated among the various shareholders, namely, Heath, the deceased's wife, his daughter and his five sons. The solution of this question must, on the facts, be independent of the intention of the deceased and the Company. They contemplated a total sum of £49,000 and did not advert to any smaller sum. When a single payment is made on account of a total sum composed of several liabilities and there is no appropriation, it must be taken to reduce them ratably (see *Ellis* v. *Emmanuel* (1) and *Blackstone Bank* v. *Hill* (2)). It follows that Heath's shares must be treated as paid up proportionately out of the £19,091 17s. 3d. These shares together numbered 10,000. Upon the facts to be collected from the special case it must be taken that £1,000 had already been paid up in respect of the shares of the deceased's wife and children leaving a liability thereon of £39,000, and that £10,000 of the £49,000 credit was attributable to Heath's shares. The shares of the wife, the daughter and the five sons concerned with the alleged gift in 1925 therefore numbered 40,000, and the amount unpaid on them was £39,000. This amount of £39,000 must be considered as paid up ratably out of the £19,091 17s. 3d. The amount so paid up would be that proportion of £19,091 17s. 3d. which £39,000 bears to £49,000. This is £15,195 11s. 3d. No subsequent change of intention on the part of the deceased or the Company could undo this payment; for paid-up capital could not be returned. It follows that on 30th November 1920 only £39,000 less this sum of £15,195 11s. 3d., or £23,804 8s. 9d., remained unpaid upon the shares of the wife and these children.

It was argued for the executor that, under the rule in *Clayton's Case* (3), credits made to the deceased's account after this date, and before 1st July 1921, when £30,000 was debited, must be taken as discharging *pro tanto* the further liability upon the shares. The answer is that the deceased and the Company intended to reverse the debit of £49,000 by the credit of £30,000 so far as the £49,000 related to the shares of the deceased's wife and sons. This is clearly so, because the corresponding debit was made to their accounts.

(1) (1876) 1 Ex. D. 157, at p. 163, per *Blackburn* J.

(2) (1830) 10 Pickering 129, at p. 133.

(3) (1816) 1 Mer. 572; 35 E.R. 781.

Inasmuch as no actual liability of the deceased was represented by the residue of the £49,000 and the shareholders had no right to have any different appropriation made, there is no room for the application of the rule in *Clayton's Case* (1). (See per Lord *Atkinson* in *Deeley* v. *Lloyds Bank Ltd.* (2).) It was likewise argued that the rule in *Clayton's Case* operated upon the account in respect of the residue of the £49,000 after the credit of £30,000. Again the answer is that the item of £49,000 was reversed *pro tanto* and taken out of the account. Similarly the credit of £9,450 on 30th November 1922 must be referred to the credit of £49,000.

The result is that, when the deceased in 1921-1922 attempted to revoke the transaction by which he had intended the shares of his wife and family should be paid up, he was not in a position to do so as to £15,195 11s. 3d. If on 30th November 1925 the amount of £27,098 2s. 7d. with which he debited his account had related to all the shares originally allotted to his wife and children, and had represented the amounts remaining unpaid upon those shares, then to ascertain the extent to which that debit and its subsequent extinguishment operated in law to satisfy the liability upon those shares, it would be necessary only to deduct the sum of £15,195 11s. 3d. which had been paid up in 1920 from the sum of £27,098 2s. 7d. But in fact the sum of £27,098 2s. 7d. represented only the amount then unpaid upon the shares originally allotted to his wife, his daughter and to four sons; for the deceased had already himself taken over the 3,500 shares of his son Malcolm Nevitt.

It is therefore necessary to reduce the amount of £15,195 11s. 3d. by the sum which it includes representing an amount paid up on these shares. This is £1,329 12s. 3d. The balance, namely, £13,865 19s. is the additional amount which had in law been paid up on the shares allotted to the wife, daughter and four sons. If this be deducted from the £27,098 2s. 7d., the balance represents the amount which, by the credit of that figure and its extinguishment, was actually paid up on those shares. This is £13,232 3s. 7d.

The answer to question 1 in the case stated should, therefore, be: "The sum of £13,232 3s. 7d. forms part of the dutiable estate

(1) (1816) 1 Mer. 572; 35 E.R. 781. (2) (1912) A.C. 756, at pp. 771-772.

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of the deceased." The appeal should be allowed. The order below should be discharged and question 1 answered accordingly.

Question 2 presumably involves a mere calculation, but upon the argument of the appeal the parties did not refer to it. The case should be remitted to the Supreme Court to carry out this judgment.

It was necessary for the executor to appeal to the Supreme Court in order to obtain relief from the payment of the death duty in respect of the full sum of £27,098 2s. 7d., and by so appealing it has gained a substantial reduction of this amount. It should, therefore, have the costs in the Supreme Court. On the other hand, it was necessary for the Commissioner to appeal to this Court in order to secure his right to include the balance of that sum in the estate, and he should, therefore, have his costs of this appeal. Costs to be set off.

ISAACS J. The two competing contentions are these: The Commissioner maintains that the sum of £27,098 2s. 7d. did not become a gift until 7th September 1925; the respondent's view being that the gift was complete in November 1920, and alternatively in 1921 and 1922.

The material facts are as follow:—In June 1920 the wife and several children of the deceased, shortly referred to hereafter as the family, agreed to become members of an incorporated company limited by shares, and were duly entered as such on the register of the Company in respect of 40,000 shares of £1 each. On 30th June the shares were partly paid up in cash. On 30th November 1920, the family being already the holders of the shares, and liable individually to the Company in respect of the unpaid capital, certain transactions took place to which the Company, the deceased, and the family were all parties. These transactions constitute the first general ground relied on by the respondent as constituting the gift in question. Before stating them, it is necessary to observe that, besides the primary object of the Company, which was the acquisition as a going concern of a specific general timber business, the memorandum of association included objects of the most varied, and practically unlimited, character. It is sufficient to say that

par. 12 of clause 3 sets out an object which, when read in connection with the rest of the document, it is impossible to limit in the way suggested for the Commissioner (see *Cotman* v. *Brougham* (1)). It is plain that, unless expressly restricted, a power to advance or lend moneys to strangers connotes that the borrower may—unless he chooses to contract otherwise—use the money for his own purposes. He may use it to pay for shares, and none the less that the Company lending the money to him rather than to another, profits by the payment. To deny this would be to rob the power of lending of all business sense. An ordinary bank, formed under the *Companies Act*, lending money to a customer and perhaps on excellent security, surely does not act *ultra vires* if it knows the loan is for the purpose of paying up uncalled capital on its own shares. And for the present purpose no distinction can be drawn between that case and the case in hand. If, for instance, in November 1920 the Company under its power to lend had genuinely lent in bank-notes £49,000 on personal account, though for the very purpose of paying share capital, and then out of that sum £40,000 had been at once paid over to the Company to discharge their share liability, the sole indebtedness for the personal account being assumed by the deceased, I should have no doubt the gift was then complete. So far from this being an intended breach of the *Companies Act*, it would in that case have been a resolute compliance with it. If the loan, as a loan, is *intra vires* the Company, the intended application of the money is prima facie the business of the borrower. If he has bound himself to apply it to the benefit of the Company, so much the better for the Company. The borrower may be a shareholder; he may be a stranger. The loan may be secured by unquestionable assets, or it may rest on personal credit. So long as it is genuine, it is *intra vires* in presence of a power to lend such as exists here.

It is established law that a payment in cash does not require that the formality of handing over actual cash shall take place, so long as what is done is virtually payment in cash. If A owes B £1,000 for cattle, and B owes A £1,000 for a house, mutual receipts for indebtedness would in law be payment in cash on both sides. In *Larocque* v. *Beauchemin* (2) Lord *Macnaghten* for the Judicial

(1) (1918) A.C. 514.

(2) (1897) A.C., at p. 364.

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Committee, applying the doctrine of *Spargo's Case* (1), pointed to the necessity of independent agreement, each requiring an immediate payment of money down, in order that the setting off of the two demands should amount to a payment in cash.

The question, therefore, is whether what took place on 30th November 1920 was the setting off of two cross independent rights to instant payment of money. If it was not, the shares were not, by reason of the exchange of cheques, paid for in cash, and therefore in law not at all. The consequence, in my opinion, when I come to apply to the circumstances the judgment of Lord *Macnaghten* in *Larocque's Case* (2), is that the respondent's first contention cannot be supported.

Now, the transactions of 30th November 1920 were these: There was a tripartite agreement between the Company, the deceased and the family, that the Company would give its own cheques for £32,842 10s. to the deceased to be applied as part payment for the shares, and would accept those cheques and certain other cheques drawn by various members of the family in full payment of the share liabilities of the family and of Heath, and that the whole amount, namely, £49,000, should be debited to the personal account of the deceased. This was done. There is no doubt that the cheques accepted for the share liability were so given and accepted that in transactions between individuals such an arrangement could be regarded as a discharge of liability. But in my opinion it is a fatal circumstance that, to begin with, it was not payment "in cash." Two opposite possibilities may be contrasted. Suppose the Company had really arranged to lend the deceased £49,000 and had given him its cheque for that amount genuinely payable *instanter* if demanded, and suppose, instead of going through the ceremony of presenting it, this cheque had been handed in as payment for the shares, I should have no doubt that would, on the authority of *Larocque* v. *Beauchemin* (2), have been in law equivalent to a payment in sovereigns. I need hardly add that, in the absence of the independent object of lending, such an arrangement would be *ultra vires* of the Company, because in patent violation of the Acts. It would not have been payment, but a mere substitution of another

(1) (1873) 8 Ch. App. 407. (2) (1897) A.C. 358.

promise to pay the same liability. It would not have been what *Sargant* J. in *Hong Kong and China Gas Co.* v. *Glen* (1) calls a discharge "either by the meal of cash or by the malt of property, services, or the like." It would not have been a discharge giving something which, to borrow the expression of *Malins* V.-C. in *Schroder's Case* (2) with reference to bonds, "they could have turned into money any day they thought fit." On the other hand, notwithstanding the existence of the lending power, if one cheque of a member of the family had been accepted as payment of the share account, the cheque not being payable at once, but chargeable to the personal account of the deceased, then, unless and until that cheque was actually paid, the shares would not be paid for. No one could reasonably regard the transaction as an independent loan and an independent payment. To that state of circumstances *Larocque* v. *Beauchemin* (3) would have no application, except to deny the efficacy of the transaction as payment in cash.

The arrangement actually made in this case was plainly entire; though, of course, the allocation was separate. It is impossible to place the Company's cheques on any different footing from that of the family cheques. There was no separate exercise in reality of the lending power of the Company. There was no undertaking to lend, nor any loan in fact, and there was no independent debt of the Company which could be set off against the debts to the Company of the family in respect of their share accounts. The attempt, in fact, to pay for the shares, by exchange of cheques, fails, because, as *Lindley* L.J. says in *In re Wragg Ltd.* (4), it was *ultra vires* the Company. Therefore the shares were not so paid for. But when the cheques for £49,000 were debited to the deceased's personal account, the fact was that he had therein about £19,000 to his credit. The legal result of the cross-entries, in the absence of contrary intention, was to absorb the amount of £19,000 so *pro tanto* to pay off the £49,000 debit (see per *Parke* J. in *Smith* v. *Ure* (5)). To that extent, the Company then obtained payment for the shares.

(1) (1914) 1 Ch. 527, at p. 540.
(2) (1870) 11 Eq. 131, at p. 141.
(3) (1897) A.C. 358.
(4) (1897) 1 Ch.. at p. 829.
(5) (1833) 2 Knapp 188, at p. 195; 12 E.R. 451.

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In July 1921, it is said in the case stated, Mr. Saxton changed his ideas and arranged with the Company to advance the family sufficient to pay for their shares, debiting them with £30,000 and at the same time increasing the credit side of his personal account by £30,000. This was all done without the knowledge or consent of the family, and was ineffectual as between them and the Company or as between them and the deceased. But it was effectual, as between Saxton and the Company, in negativing any intention of paying off this indebtedness by credits in his personal account. As at 31st May 1925, there appeared in the Company's books, as against the family, on "Advance Accounts"—not Share Accounts—a total indebtedness of £27,098 2s. 7d. This was assumed by the deceased by giving his cheque for that sum on 7th September 1925 as for "cash paid" to him. He then had over £30,000 to his credit, and therefore there was instant payment, and the ledger account shows this. The Company was then fully paid its claims against the family, which in truth were in respect of share liability. But it still remains to be ascertained what at that moment was the true amount of its claims against the family. I have had the advantage of reading the analysis by the Chief Justice and my brother *Dixon* of the relevant figures appearing in the accounts, and I agree in the conclusion to which they come.

The gift, therefore, so far as it was made within the taxable period, was made on 7th September 1925, and was a gift of £13,232 3s. 7d. To that extent, the Commissioner succeeds.

STARKE J. The *Stamp Duties Act* 1920-1924 of New South Wales imposes a death duty upon the estates of deceased persons. It provides that the estate of a deceased person shall be deemed to include and consist of any property comprised in any gift made by the deceased three years before his death, and whether made before or after the passing of the Act, including any money paid or other property conveyed or transferred by the deceased within such period in pursuance of a covenant or agreement made at any time, without full consideration in money or money's-worth. "Gift" means any disposition of property made otherwise than by will, whether with or without an instrument in writing, without

full consideration or money's-worth. And a "disposition of property," means, *inter alia*, any transaction entered into by any person with intent thereby to diminish directly or indirectly the value of his own estate and to increase the value of the estate of any other person. As to this latter provision, "what is hit at by the statute is a transaction which the person entering into it intends to have the effect stated in the sub-section. It is not enough merely to prove that the result which is stated in the sub-section accrued" (*Finch* v. *Commissioner of Stamp Duties* (1)).

Alexander Charles Saxton died on 30th September 1926, and the matter before the Court arises in connection with the issue of shares in A. C. Saxton & Sons Ltd. in the names of his wife and family, and one Heath (who held under an agreement, creating, apparently, some trust for the family of the deceased), and payments or credits in respect of those shares. A case has been stated under sec. 124 of the Act, but it is most unsatisfactorily stated. Questions have been propounded for decision upon memoranda presented to the Commissioner by the respondent, the executor of the deceased, and a ledger account of the deceased with A. C. Saxton & Sons Ltd. The Court is at liberty, under the Act, to draw from facts and documents stated in the case any inference, whether of fact or law, which might have been drawn therefrom if proved at a trial (see sec. 124 (7)). But the Commissioner has not stated which of the statements in the memoranda he finds as facts, or what inferences (if any) he draws from the statements and the ledger account submitted to him. The Supreme Court thought it right, and my brethren think it right, to treat the case as "setting forth the facts before the Commissioner on making the assessment" of the estate of the deceased for the purpose of death duty. I propose to follow the same course, though with much misgiving. But I think it necessary to state the facts of the case as they present themselves to me :—(1) In 1920, A. C. Saxton & Sons Ltd. resolved to obtain further capital by the issue of 50,000 shares of £1 each. (2) Applications were invited for shares, and shares were allotted as follows: Mrs. Janet Saxton 10,000 shares, Miss Janet Saxton

(1) (1929) A.C. 427, at pp. 429-430.

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10,000 shares, Harold Saxton 4,800 shares, Alexander W. Saxton 4,800 shares, Charles D. Saxton 4,000 shares, Malcolm Nevitt Saxton 3,500 shares, Geoffrey Saxton 3,300 shares, A. E. Heath 10,000 shares. Mrs. Saxton was the wife of the deceased, and Heath took up his shares under the agreement already mentioned. The other allottees were children of the deceased. (3) According to the books of the Company the sum of £1 has been entered as paid in respect of each of these shares. The *Companies Act* 1899 of New South Wales, sec. 55, provides that every share shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash unless the mode of such payment has been otherwise determined by a contract duly made in writing and filed with the Registrar at or before the issue of such share. No such contract was ever made or filed. (4) Neither the family of the deceased nor Heath paid anything in respect of the shares. The sons exchanged cheques with the Company, which resulted in their share accounts being credited and their personal account debited with certain amounts, but no cash was paid by them to the Company. (5) The deceased stated that the shares taken up by his family were to be a gift from him to them, and Heath's shares were dealt with in accordance with the agreement mentioned. So the deceased arranged that sums at the debit of his family's accounts (and apparently sums at the debit of Heath's account also), in respect of the shares, should be transferred to him. In any event, it is clear that on 25th June 1920 a sum of £357 10s. was debited to his personal account: "To cash *re* sons A. C. Saxton and Sons Ltd."; and on 30th November 1920 a sum of £49,000 was debited to him: "To cash paid you." Cheques were drawn on the Company to represent these sums, and the total amount was debited to the personal account of the deceased. But no moneys passed: book entries were made, crediting the accounts affected and debiting the deceased. (6) On 30th November 1920 the account of the deceased with the Company, excluding these amounts of £357 10s. and £49,000, stood in credit to an amount of £18,269, in round figures. (Dr.—£53,793 1s. – £49,357 10s. (£357 10s. and £49,000): £4,435 11s. Cr.—£22,704

11s. 3d.) (7) Various entries in the books establish that this sum of £18,269 was applied—if not directly, still indirectly—in liquidating the amount due in respect of the 50,000 shares. (8) There was left, however, a sum of £31,731 on the shares in respect of which the Company had not been paid cash and which, despite the entries in the Company's books, was still due and payable to the Company. (9) On 21st July 1921 the following debits and credits were made in the Company's books:—Dr.—Mrs. Janet Saxton £10,000, Harold Saxton £4,800, Alex. W. Saxton £4,400, Chas. D. Saxton £4,000, Geoffrey Saxton £3,300, Malcolm N. Saxton £3,500: £30,000. Cr.—A. C. Saxton (the deceased)—By sundry persons £30,000. These entries were made because the deceased changed his mind, and arranged with the Company to debit the parties with £30,000 as an advance on the shares allotted to them, and credit him with the amount. The entries were made without the knowledge or consent of the persons debited with the amounts, totalling £30,000. (10) But in my opinion these entries establish the intention of the deceased of throwing upon these persons the obligation—an existing obligation and one that the *Companies Act* imposed upon them—of providing for the shares taken up by them respectively, and of not discharging that obligation for them. They also establish, in my opinion, the appropriation by the Company and the deceased of the £18,269 in and towards the discharge of the obligation arising out of the allotment of 10,000 shares to the daughter and to Heath respectively. (11) The deceased took over M. N. Saxton's shares, and the debit to the latter's advance account was transferred, about November 1922, to the deceased. (12) About November 1920 the deceased altered the arrangement as to his daughter's shares. A sum of £9,450 was debited to the daughter's Advance Account in the Company's books, and a credit of £9,450 passed to the deceased's personal account. This sum of £9,450 represented the amount paid or payable in respect of the 10,000 shares allotted to the daughter, less a sum of £550 paid in dividends. The daughter thus assumed a responsibility to the Company for an advance of £9,450 which was credited to her father, the deceased. The daughter does not appear to have dissented

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from this arrangement. (13) In May 1925 the balances at debit of the Advance Accounts of the deceased's wife and children, after crediting various dividends and other amounts, stood as follows:— Mrs. Janet Saxton £7,246 2s. 3d., Harold Saxton £3,535 10s. 9d., Alex. W. Saxton £3,144, Chas. D. Saxton £2,767 12s. 3d., Geoffrey Saxton £2,434 10s. 1d., Miss Janet Saxton £7,970 7s. 3d.: £27,098 2s. 7d. (14) About this time the deceased made a further arrangement as to his daughter's shares: he arranged to transfer her shares to his sons, in view of other provisions made for her benefit, and that the sons should take over her liability in respect of advances on her shares by the Company. (15) This arrangement was carried out, and the sons took over the daughter's shares, and with them her liability. (16) About the same time (May 1925) the deceased resolved to clear these debits, amounting to £27,098, and to make a gift, to the various parties concerned, of the outstanding amounts. (17) Accordingly, the Advance Accounts were credited with the amounts outstanding, and the deceased was debited, on 30th September 1925: "Cash paid you £27,098 2s. 7d."; and this amount was ultimately liquidated in account with the Company. (18) All parties concerned appear to have acquiesced in this arrangement.

Now, this long narration leads me to the conclusion that the £30,000 debited to the accounts of Mrs. Janet Saxton and the sons of the deceased was a legitimate debit by the Company in respect of an obligation due by them in respect of the shares allotted to them, whether it be called the amount due upon the shares allotted to them or an advance. And if this is so, the debits, amounting to £27,098 2s. 7d., made to the accounts of the wife and sons in 1925, were all legitimate debits to their respective accounts. And when the testator discharged those debits by payment of £27,098 2s. 7d. in May 1925, he made a gift of this amount to his wife and sons within the meaning of the *Stamps Duties Act*.

In my opinion, therefore, the judgment of the Supreme Court cannot be supported, and the first question stated should be answered: Yes, the whole. The respondent should pay the costs here and below.

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Appeal allowed. Order of Supreme Court discharged. Question 1 *answered as follows: The sum of* £13,232 3*s.* 7*d. forms part of the dutiable estate of the deceased. Case remitted to Supreme Court to carry out this judgment.*

Solicitor for the appellant, *J. V. Tillett*, Crown Solicitor for New South Wales.

Solicitors for the respondent, *Sly & Russell.*

J. B.

Appl *Commonwealth* v *Oldfield* (1976) 133 CLR 612

Cons *ACT, Chief Minister for the* v *MacRae* (1992) 110 FLR 106

[HIGH COURT OF AUSTRALIA.]

McGEOCH . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF LAND TAX RESPONDENT.

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SYDNEY, *Aug.* 6.

MELBOURNE, *Oct.* 28.

Knox C.J., Isaacs and Dixon JJ.

Land Tax—Assessment—Improvements—Clearing land and keeping free from prickly pear—"Improvements thereon"—Unimproved value—Method of ascertaining—Land Tax Assessment Act 1910-1924 (*No.* 22 *of* 1910—*No.* 32 *of* 1924), *secs.* 3, 10—*Land Tax Assessment Act* 1910-1926 (*No.* 22 *of* 1910—*No.* 50 *of* 1926), *secs.* 3, 10.

Held, by *Knox* C.J. and *Dixon* J. (*Isaacs* J. dissenting), that the eradication, destruction and removal of prickly pear plants which would otherwise spread and deprive the land of its utility and value are "improvements on" the land within the meaning of the *Land Tax Assessment Acts* 1910-1924, 1910-1926.

Morrison v. *Federal Commissioner of Land Tax*, (1914) 17 C.L.R. 498, and *Jowett* v. *Federal Commissioner of Taxation*, (1926) 38 C.L.R. 325, followed.

Toohey's Ltd. v. *Valuer-General*, (1925) A.C. 439, considered.

Held, also, by *Knox* C.J. and *Dixon* J. (*Isaacs* J. dissenting), that the unimproved value of land should be ascertained by considering what the land