

[HIGH COURT OF AUSTRALIA.]

HEYDON APPELLANT ;
DEFENDANT,

AND

THE PERPETUAL EXECUTORS, TRUS-
TEES AND AGENCY COMPANY (W.A.) } RESPONDENT.
LIMITED }
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF
WESTERN AUSTRALIA.

Onus of proof—Action by executor—Claims on behalf of deceased person's estate— H. C. OF A.
Money lent—Money had and received—Defence—Gift by deceased. 1930.

In an action by an executor for money lent by a testatrix and money had
and received to her use in which the defence was that the testatrix had given
the money to the defendant, PERTH,
Sept. 10.

Held, that the onus of proving that the transaction amounted to a loan or
that the money was received to the use of the testatrix lay upon the plaintiff,
and was not satisfied by proof merely of the payment by her to the defendant
of the amount claimed. Gavan Duffy
C.J., Rich,
Starke and
Dixon JJ.

Decision of the Supreme Court of Western Australia (Full Court) : *Perpetual
Executors, Trustees and Agency Co. (W.A.) Ltd. v. Heydon*, (1930) 32 W.A.L.R.
89, reversed.

APPEAL from the Supreme Court of Western Australia.

In an action brought by the Perpetual Executors, Trustees and
Agency Co. (W.A.) Ltd. against A. A. Heydon, the plaintiff in its
statement of claim sued as executor of Bessie Albo de Bernales
deceased for the recovery of £150 for money payable by the defendant
to the plaintiff as such executor for money lent by Bessie Albo de
Bernales deceased to the defendant at her request and, by an

H. C. OF A.
 1930.
 {
 HEYDON
 v.
 PERPETUAL
 EXECUTORS,
 TRUSTEES
 AND AGENCY
 CO. (W.A.)
 LTD.
 —

amendment, for money had and received by the defendant as trustee for the plaintiff. By her defence the defendant pleaded that the said Bessie Albo de Bernales did not lend to the defendant the money alleged or any part thereof and that she gave the said money to the defendant as a gift.

On these pleadings the trial Judge, *Macmillan C.J.*, held that the burden of establishing a gift was upon the defendant, who must begin. The defendant thereupon gave evidence to the effect that on 14th July 1926 the deceased, whom she had befriended, gave her a cheque for £150, insisting that it should be a gift and not a loan, and that before the death of the deceased, which occurred on 11th August 1927, no claim was made on the defendant for repayment. The plaintiff then went into evidence. His Honor considered that the defendant's case amounted to a claim on a deceased person's estate and required corroboration. He held that the defence failed, not because it had been disproved by any evidence, but because it failed of its own inherent weakness. He entered judgment for the plaintiff with costs.

On appeal to the Full Court of Western Australia this judgment was affirmed: *Perpetual Executors, Trustees and Agency Co. (W.A.) v. Heydon* (1).

From the decision of the Full Court the defendant now, by special leave, appealed to the High Court.

Goold, for the appellant, referred to *Cary v. Gerrish* (2); *Welch v. Seaborn* (3). [He was stopped by the Court.]

P. O'Dea, for the respondent. When it appeared that the defendant admitted receiving the money without consideration the burden lay upon her of showing that no debt arose in favour of the testatrix and that she was not a trustee of the sum for the testatrix. A voluntary payment to a stranger raises a presumption of a resulting trust. [He referred to *Scott v. Pauly* (4); *Pink v. Pink* (5); *Bouts v. Ellis* (6); *Roscoe's Nisi Prius*, 16th ed., p. 261.]

[DIXON J. *Godefroi*, 3rd ed., at p. 195, 4th ed., at p. 145, says chattels which pass by delivery are not within the rule, and the

(1) (1930) 32 W.A.L.R. 89.

(2) (1801) 4 Esp. 9; 170 E.R. 624.

(3) (1816) 1 Stark. 474; 171 E.R. 534.

(4) (1917) 24 C.L.R. 274, at p. 281.

(5) (1912) 2 Ch. 528, at p. 540.

(6) (1853) 17 Beav. 121; 51 E.R. 978.

presumption arising from a voluntary delivery of them is that a gift was intended, in the absence of circumstances; and in *George v. Howard* (1) *Richards* C.B. says: "If I deliver over money . . . to another, even although he should be a stranger, it would be prima facie a gift".]

Goold was not called upon in reply.

The following judgments were delivered:—

GAVAN DUFFY J. In this case the plaintiff sued for money lent and money received by the defendant as trustee for the deceased. The defendant denied these allegations and said the money was given to her as a gift. At the trial the learned Judge thought that the onus of proving there had been a gift lay on the defendant. We are respectfully of opinion that the burden of proving the facts in support of either one or other cause of action set out in the statement of claim, lies on the plaintiff. The plaintiff's evidence as well as the defendant's was, as a matter of fact, given. Counsel for the plaintiff tells us that he has no further evidence to offer now than he had then. The evidence thus given did not satisfy any of the Judges that in fact any case had been made out, or that the money had been lent, and it does not satisfy us either that any of the allegations made in the statement of claim are correct. In this case, as there is no new evidence available, there is no necessity to inquire whether justice would be done by ordering a new trial. We have, in the circumstances, come to the conclusion that the appeal should be allowed; the order made by the Supreme Court should be set aside; judgment should be entered for the defendant appellant with costs of the action and of the appeal to the Supreme Court of Western Australia and of the appeal to this Court.

RICH J. I concur.

STARKE J. I agree.

DIXON J. I concur. In addition to the cases cited during the argument, I desire to mention *Aubert v. Walsh* (2) as a further authority in support of the view that the burden of proof was upon the plaintiff.

(1) (1819) 7 Price 646, at p. 651; 146 E.R. 1089, at p. 1090. (2) (1812) 4 Taunt. 294; 128 E.R. 342.

H. C. OF A.

1930.

{

HEYDON

v.

PERPETUAL
EXECUTORS,
TRUSTEES
AND AGENCY
CO. (W.A.)
LTD.

Goold. I would ask for some order directing the return of moneys paid by way of security and moneys paid by way of judgment and costs of the Court below.

GAVAN DUFFY J. Of course you are entitled to the recovery of any moneys you have paid under this judgment without it being specially ordered.

Appeal allowed. Order made by the Supreme Court set aside. Judgment entered for the defendant appellant with costs of the action and of the appeal to the Supreme Court of Western Australia and of the appeal to the High Court.

Solicitor for the appellant, *L. B. Goold.*

Solicitors for the respondent, *O'Dea & O'Dea.*