[HIGH COURT OF AUSTRALIA.]

HILL . . . . . APPELLANT;
DEFENDANT,

AND

HILL AND OTHERS . . . . . RESPONDENTS.
DEFENDANTS AND PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1933.

SYDNEY, *Aug.* 14, 15.

MELBOURNE, *Sept.* 21.

Rich, Starke, Dixon, Evatt and McTiernan JJ.

Death and Succession Duties—Death duty (N.S.W.)—Incidence and apportionment—Different disposition—Necessity for clear intention to negative statutory obligation—Residuary estate given to trustees upon trust to convert—Direction to pay thereout testamentary expenses including death duty and estate duty—Burden of duty on property notionally treated as testator's—Stamp Duties Act 1920-1931 *(N.S.W.) (No.* 47 *of* 1920—*No.* 13 *of* 1931), *secs.* 102, 114, 120 (1)*.

By an indenture of declaration of trust, made in 1914, certain property was conveyed to trustees upon trust, as to one-third thereof, for the benefit of the testator during his life with remainder upon trust for the benefit of his widow and children. The testator died in 1931, survived by his widow. By his will, after bequeathing certain legacies "free from all probate and Federal estate duties and debts," he gave the residue of his property to his trustees upon trust to convert and to stand possessed of the proceeds of conversion "upon trust to pay thereout my just debts funeral and testamentary expenses (which latter expression shall be deemed to mean and include probate duty payable to the Government of the State of New South Wales and estate duty payable to the Government of the Commonwealth of Australia) and to stand possessed of the rest residue and remainder thereof upon trust to divide the same equally between" four named persons.

* Sec. 120 (1) of the *Stamp Duties Act* 1920-1931 (N.S.W.) provides that "Where any property which is or the value of which is included in the dutiable estate of a deceased person is vested in any person other than the administrator, the duty payable in respect thereof shall be paid by the persons entitled thereto according to the value of their respective interests therein, to the administrator."

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Held, by *Rich*, *Starke*, *Dixon* and *McTiernan* JJ. (*Evatt* J. dissenting), that the provision as to payment of duties did not indicate an intention by the testator to negative the statutory obligation imposed by sec. 120 (1) of the *Stamp Duties Act* 1920-1931 (N.S.W.); therefore so much of the death duty as was payable in respect of the testator's share in the property subject to the trusts of the indenture should be borne by such share.

Decision of the Supreme Court of New South Wales (*Harvey* C.J. in Equity): *Permanent Trustee Co.* v. *Reeves*, (1933) 50 W.N. (N.S.W.) 111, reversed on this point.

APPEAL from the Supreme Court of New South Wales.

By an indenture of declaration of trust dated 9th January 1914, certain property, then forming part of a residuary estate, was conveyed to trustees upon trust, as to one-third thereof, for the benefit of Frank Hill during his life with remainder upon trust for the benefit of his widow and children. Frank Hill died on 1st June 1931, his wife, Marcella Hill, surviving him. There was no issue of the marriage. By his will, made 13th May 1931, Hill appointed Permanent Trustee Co. of New South Wales Ltd. and Francis Paul Couch Morris " (hereinafter called ' my trustees ' which expression shall include the trustees or trustee for the time being of this my will) " to be the " executors and trustees respectively " of his will, and he gave and bequeathed certain legacies " free from all probate and Federal estate duties and debts " to certain named persons and charitable organizations. The will proceeded " I give devise and bequeath the rest residue and remainder of my property of what kind soever and wheresoever situate of or to which I shall die possessed unto my trustees upon trust to sell call in and convert the same into money . . . and to stand possessed of the proceeds of such sale calling in and conversion together with all other moneys owned by me upon trust to pay thereout my just debts funeral and testamentary expenses (which latter expression shall be deemed to mean and include probate duty payable to the Government of the State of New South Wales and estate duty payable to the Government of the Commonwealth of Australia) and to stand possessed of the rest residue and remainder thereof upon trust to divide the same equally between " four named cousins of the testator. The testator's share in the property included in the declaration of trust referred

to above was, at the date of his death, valued at £7,554, and was included amongst his assets for the purpose of the assessment of death duties.

An originating summons was taken out by the executors for the determination of the question (*inter alia*), whether on the true construction of the will of the testator and in the events which had happened the amount of State death duty payable by reason of the inclusion in the testator's dutiable estate of his share in the property subject to the trusts in the above-mentioned indenture of declaration of trust, should be paid out of such property or out of the testator's residuary estate ? The defendants to the summons were Amy Florence Reeves, a beneficiary under the will ; Marcella Hill, the testator's widow, who took no benefit under the will ; and Eurolie Hill who, under the will, was beneficially interested in the testator's residuary estate.

The summons was heard by *Harvey* C.J. in Eq., who held that death duty and estate duty payable in respect of the property notionally included in the testator's estate for the purpose of such duties should be paid out of his residuary estate (*sub nom. Permanent Trustee Co.* v. *Reeves* (1)).

From that decision Eurolie Hill now appealed to the High Court, the respondents being the other defendants to the summons together with the plaintiffs thereto.

The Court was informed by counsel who appeared on behalf of the executors that an assessment for estate duty had not been made by the Federal Commissioner of Taxation in respect of the testator's share in the property subject to the trusts contained in the indenture, and, therefore, the Court need consider only the matter of the payment of death duty imposed by the State statute.

Teece K.C. (with him *Moverley*), for the appellant. The scheme of both the State and Federal legislation with respect to death duty and estate duty is that there becomes liable to duty not only property as to which a person dies possessed, but also property which he alienated in his lifetime. The executor is liable for the assessment and the whole of that duty, and, for so much of the duty as is

(1) (1933) 50 W.N. (N.S.W.) 111.

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referable to property alienated in the testator's lifetime, the executor has the right of recoupment from the person in whom that property is vested. It must be assumed that the testator knew the law. The provision in the will as to payment out of residue of his debts, funeral and testamentary expenses including the duties was merely a direction by the testator as to the fund out of which the executors were to pay, *inter alia*, the duties which they were by statute bound to pay, and he did not intend thereby to deny them, and the beneficiaries, of the benefit given by the respective statutes to recover. Where a testator directs that duty on settled property is to be paid out of the residuary estate he really gives a legacy of such duty to the respective legatees. The testator in the present case did not intend to make a legacy of the amount of the duty involved in respect of the beneficiaries under the settlement. The Court must find in the will a clear intention of placing the statutory liability. Similar words and provisions as used in other wills have been held not to exonerate the notional estate (*Permanent Trustee Co. of New South Wales* v. *Hill* (1); *Perpetual Trustee Co.* v. *Luker* (2)). The provision in the will now before the Court is merely a direction as to how the duties are to be borne as between the specific and residuary devisees under the will. The provision also serves to define the ultimate residue. It does not exonerate the devisees of the notional property from the obligation imposed upon them by the statute (*Permanent Trustee Co.* v. *Culpan* (3)). It is not enough to have words which are sufficient to include duty on notional estate, they must go further and show a clear intention to include the notional estate, for this reason *Permanent Trustee Co.* v. *Weekes* (4) was wrongly decided. As to what words are sufficient to exonerate the notional estate, see *Re Baxter*; *Baxter* v. *Baxter* (5); and *In re Briggs*; *Richadrson* v. *Bautoft* (6).

[DIXON J. referred to *O'Grady* v. *Wilmot* (7).]

The object of the words used by the testator was to define the ultimate residue, not to extend the area of persons outside the will.

(1) (1933) 33 S.R. (N.S.W.) 222; 50 W.N. (N.S.W.) 73.
(2) (1932) 33 S.R. (N.S.W.) 85; 50 W.N. (N.S.W.) 70.
(3) (1933) 50 W.N. (N.S.W.) 109, at p. 110.
(4) (1929) 47 W.N. (N.S.W.) 86.
(5) (1898) 42 Sol. Jo. 611.
(6) (1914) 2 Ch. 413.
(7) (1916) 2 A.C. 231.

The question for the Court is: Did the testator intend not only to distribute—to cast on certain beneficiaries the burden—but also to make a gift to persons outside the will? Unless the Court sees a clear intention to confer a bounty on persons outside the will it will not uphold the judgment appealed against.

[DIXON J. referred to *Perpetual Trustee Co.* v. *Adams* (1).]

The direction to pay the duties out of the residue is not equivalent to a direction to abstain from seeking recoupment from the settled property. It is merely a direction as to how such burdens as will ultimately fall on the estate are to be divided amongst the beneficiaries under the will (*Perpetual Trustee Co.* v. *Luker* (2); *Permanent Trustee Co. of New South Wales* v. *Hill* (3)).

Maughan K.C. (with him *Hooton*), for the respondent, Marcella Hill. The testator's intention should be ascertained from the words used by him without reference to decided cases or rules of construction. He created a fund, namely, the residue of the estate, and imposed upon it a specific trust to pay thereout his debts, funeral and testamentary expenses, which expressly included the duties—he dedicated the fund for that purpose. The words used by the testator, in the setting in which they are found, negative any idea of re-adjustment or refund. All that he gave to the residuary beneficiaries was the ultimate residue. It is worthy of note that those beneficiaries were not so closely related to the testator as were the persons under the settlement.

[MCTIERNAN J. referred to *Chadwick* v. *Chadwick* (4).]

The provision as to the payment of the testamentary expenses, including the duties, out of residue is dispositive and not administrative (*Permanent Trustee Co.* v. *Weekes* (5)). In any event the words used are clear enough to throw the burden of estate duty on the specific legacies. *Fraser* v. *White* (6); *In re Sir William Macleay's Will* (7); *Permanent Trustee Co. of New South Wales* v. *Hill* (8);

(1) (1923) 24 S.R. (N.S.W.) 87; 40 W.N. (N.S.W.) 158.
(2) (1932) 33 S.R. (N.S.W.), at p. 91.
(3) (1933) 33 S.R. (N.S.W.), at pp. 226, 227.
(4) (1920) 20 S.R. (N.S.W.) 447; 37 W.N. (N.S.W.) 139.
(5) (1929) 47 W.N. (N.S.W.) 86.
(6) (1893) 14 N.S.W.L.R. (Eq.) 216; 10 W.N. (N.S.W.) 3.
(7) (1892) 14 N.S.W.L.R. (Eq.) 217; 10 W.N. (N.S.W.) 3.
(8) (1933) 33 S.R. (N.S.W.) 222; 50 W.N. (N.S.W.) 73.

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and *Permanent Trustee Co.* v. *Culpan* (1) are distinguishable for the reason that in each case there is nothing to indicate that the testator concerned was altering the incidence because no fund was appointed, also the words used in the present case cannot be regarded as merely introductory. In the construing of wills the guiding principle is to ascertain from the words he has used what the testator meant; there is no rule that a " clear intention " must be found. So far as estate duty is concerned *Perpetual Trustee Co.* v. *Luker* (2) was governed by *Shelley* v. *New South Wales Institution for the Deaf, Dumb and the Blind* (3), and so far as probate or death duty is concerned it is distinguishable because there was no reference to such duty in the will there under consideration. In *Permanent Trustee Co. of New South Wales* v. *Hill* (4) a departure was made from the general rule of the Court that a trust or specific direction for payment out of a particular fund is dispositive and not administrative. The provision as to payment of testamentary expenses, debts and duties before the Court in *Permanent Trustee Co.* v. *Weekes* (5) was held to be dispositive because the effect was that residue had to bear the burden finally, though there was nothing in that case to negative the adjustment here; the words used by the testator in the present case are much stronger than the words there considered by the Court. In *Ashby* v. *Hayden* (6) the Court finally determined the burden between two classes of beneficiaries. The words used by the testator in this case are dispositive (*Robson* v. *Board* (7)). The system of taxation in England is different from the system which prevails in New South Wales; therefore the decisions in *O'Grady* v. *Wilmot* (8); *In re Briggs*: *Richardson* v. *Bautoft* (9); and *Re Baxter*; *Baxter* v. *Baxter* (10), do not afford any assistance to the Court. Items which are excluded from " testamentary expenses " in New South Wales, are included in England, and *vice versa* (*O'Grady* v. *Wilmot* (11)).

(1) (1933) 50 W.N. (N.S.W.) 109.
(2) (1932) 33 S.R. (N.S.W.) 85; 50 W.N. (N.S.W.) 70.
(3) (1917) 23 C.L.R. 351; (1919) 26 C.L.R. 200; (1919) A.C. 650.
(4) (1933) 33 S.R. (N.S.W.) 222; 50 W.N. (N.S.W.) 73.
(5) (1929) 47 W.N. (N.S.W.) 86.
(6) (1931) 31 S.R. (N.S.W.) 324; 48 W.N. (N.S.W.) 61.
(7) (1915) 15 S.R. (N.S.W.) 343; 32 W.N. (N.S.W.) 108.
(8) (1916) 2 A.C. 231.
(9) (1914) 2 Ch. 413.
(10) (1898) 42 Sol. Jo. 611.
(11) (1916) 2 A.C., at pp. 274, 275.

[DIXON J. referred to *Perpetual Trustee Co.* v. *Luker* (1).]

The direction by the testator to pay the testamentary expenses, including the duties, was a direction to his "trustees," not his "executors." A trustee has no right of recoupment under the Act.

David Wilson, for the respondent Amy Florence Reeves, submitted to any order the Court might make.

David Wilson (with him *H. Turner*), for the respondents Permanent Trustee Company of New South Wales Ltd. and Francis Paul Couch Morris.

Teece K.C., in reply.

Cur. adv. vult.

Sept. 21.

RICH AND MCTIERNAN JJ. Before his death testator had executed a settlement expressing trusts which made the property subject thereto his notional property for the purposes of the assessment and payment of death duty (*Stamp Duties Act* 1920 (N.S.W.), sec. 102). By his will testator devised and bequeathed the residue of his estate upon trust to convert and "upon trust to pay thereout my just debts funeral and testamentary expenses (which latter expression shall be deemed to mean and include probate duty payable to the Government of the State of New South Wales and estate duty payable to the Government of the Commonwealth of Australia . . .)." The question for our determination is whether by the particular terms of the will in question the stamp duty payable in respect of the property affected by the trusts of the settlement is payable out of residue. In the judgment under appeal *Harvey* C.J. in Eq. considered that the clause which has been referred to amounted to a direction that such duty was to be paid by the executors and trustees of the will in relief of the beneficiaries under the settlement out of the proceeds of conversion of the residue.

The *Stamp Duties Act* 1920, sec. 102, specifies the component parts of the dutiable estate, for the purposes of this case the relevant components are the notional estate and the estate proper of the

(1) (1932) 33 S.R. (N.S.W.) 85; 50 W.N. (N.S.W.) 70.

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testator. The primary liability to pay the whole amount of duty levied on the final balance of the estate of the deceased is cast upon the administrator (sec. 114), such liability being confined to the assets he has received or might but for his own neglect or default have received. But sec. 120 distributes or apportions the ultimate burden of payment as between certain components of the mass of property called the dutiable estate on which the whole duty is payable by requiring recoupment or repayment to the administrator of that part of the duty which is payable in respect of property vested in any other person than the administrator. The question then is whether the clause in the will is a provision to the contrary which prevents the operation of this section and removes from the trustees and *cestuis que trust* of the notional property the onus of repaying their proportional part of the duty. If the clause is interpreted in this way it virtually gives to the beneficiaries of the property passing under the settlement "a legacy equal in amount to the rateable proportion of the estate duty which is chargeable upon it" (*O'Grady* v. *Wilmot* (1)). The words of the clause are not clear enough for this purpose. The clause is in common form with certain explanatory words added. It is an attempt by the draftsman to express to the lay executor his powers and duty as to payment of debts &c. In this respect it is unnecessary. It does, however, "serve to define the content of the residuary bequest" (2), and relieve other gifts at the expense of the residue, a matter of much importance in estate duty but not in death duty. The scope of such a clause is usually confined to these purposes. It is not naturally the proper medium for conferring gifts or bounties on non-participants under the will. It is placed in a will on professional advice on which the testator relies when making his will with regard to such questions as the ultimate incidence of duties, the liability of assets and marshalling, he himself being concerned with the claims and merits of those he intends to benefit and with the relative amounts to be given. The clause in this will does not indicate any intention to make any gift or provision in favour of strangers to the estate proper, and does not "suffice to control or defeat the operation" (2) of sec. 120.

(1) (1916) 2 A.C., at p. 274.

(2) (1916) 2 A.C., at p. 275.

For these reasons the appeal should be allowed and question I. of the originating summons should be answered that the amount of the State death duty payable by reason of the inclusion in testator's dutiable estate of his share of the property subject to the trusts of the indenture of settlement should be borne by such share. Costs of this appeal out of the estate; those of the Trustee Company and F. P. C. Morris as between solicitor and client.

STARKE J. The originating summons in this case sought the determination amongst others of the following question: Whether on the true construction of the will of Frank Hill and in the events which have happened the amount of State death duty payable by reason of the inclusion in the dutiable estate of Frank Hill of his share of the property subject to the trusts of an indenture by way of declaration of trust dated 9th day of January 1914 should be paid out of such property or out of the residuary estate of the said Frank Hill? It appears that Frank Hill's share of the property included in such indenture is of the value (approximately) of £7,554.

Harvey, the present Acting Chief Justice of the Supreme Court of New South Wales, by a decretal order dated 28th April 1933, declared that State probate duty and Federal estate duty payable in respect of property notionally included in the estate of the testator Frank Hill for the purposes of such duties should be paid out of his residuary estate. The decretal order appears to follow the words of the testator's will rather than the precise question raised by the originating summons; but the notice of appeal takes no exception to the form of the decretal order and seeks a declaration that the State probate duty and the Federal estate duty payable in respect of property notionally included in the estate of the testator for the purposes of such duties should be paid out of such property and not out of the testator's residuary estate.

The State probate duty is the death duty imposed upon the final balance of the estate of the deceased, determined in accordance with the *Stamp Duties Act* 1920-1931 of New South Wales, secs. 100-123. The estate of the deceased, for the purposes of the Act, consists not only of the property of the deceased, but also of property which, because of the dispositions of the deceased or the nature of his

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interests, is not actually his property. The death duty constitutes "a debt payable to His Majesty out of the estate of the deceased in the same manner as the debts of the deceased, and such duty shall be paid by the administrator"—that is, the person to whom probate or letters of administration are granted—"accordingly out of all real or personal property vested in him and forming part of the dutiable estate of the deceased whether that property is available for the payment of the other debts of the deceased or not and whether the property in respect of which the duty or any part thereof has been assessed is vested in the administrator or not" (sec. 114). The administrator is not liable however for any duty in excess of the assets which he has received or might but for his own neglect or default have received (sec. 114).

But sec. 120 of the Act provides that "where any property which is or the value of which is included in the dutiable estate of a deceased person is vested in any person other than the administrator, the duty payable in respect thereof shall be paid by the persons entitled thereto according to the value of their respective interests therein, to the administrator." It is contended, however, that a provision in the will of the testator exonerates, in the present case, the persons of the class mentioned in the Act from this statutory obligation, and directs that the duty be borne by the testator's residuary estate. The relevant words of the will are: "I give devise and bequeath the rest residue and remainder of my property of what kind soever and wheresoever situate of or to which I shall die possessed unto my trustees upon trust to sell call in and convert the same into money . . . and to stand possessed of the proceeds of such sale calling in and conversion together with all other moneys owned by me upon trust to pay thereout my just debts funeral and testamentary expenses (which latter expression shall be deemed to mean and include Probate Duty payable to the Government of the State of New South Wales and Estate Duty payable to the Government of the Commonwealth of Australia) and to stand possessed of the rest residue and remainder thereof upon trust to divide the same equally between" certain named persons.

The clause provides clearly enough that death duties payable in respect of the estate of the deceased shall be paid out of residue.

But it does not follow that the clause negatives the statutory obligation cast by sec. 120 upon strangers to the estate and gives in effect a legacy of the amount of the duty to persons taking property outside the will and only notionally part of the testator's estate. Such a gift requires clear and explicit language. The primary obligation of payment is cast by the Act upon the administrator of the testator's estate. And a direction to an administrator or even a trust imposed upon an administrator to pay the duty out of a particular fund points to the performance of this obligation, and not at all to beneficial dispositions in favour of strangers to the will. The same principle would apply I should think to the Federal estate duty, but the summons does not actually raise the question and this Court had better confine itself to the question raised by the summons.

The appeal should be allowed, and the question of the originating summons answered as follows : So much of the State death duty as is payable in respect of the testator's share in the property subject to the trusts of the said indenture should be borne by the said share.

DIXON J. The question for decision is whether a provision in a will relieves the persons who take under a settlement which the testator made some years before his death from the liability otherwise imposed by sub-sec. 1 of sec. 120 of the *Stamp Duties Act* 1920-1931 (N.S.W.) to pay to his executor the amount of death duty payable in respect of the settled property. The settlement contained limitations which brought the settled property within one or more of the categories enumerated in the second paragraph of sec. 102 of the *Stamp Duties Act* which sets out what classes of property 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. Death duty is levied upon the final balance of the estate of a deceased person which is computed as being the total value of his dutiable estate after making such allowances as the statute authorizes in respect of the debts of the deceased (see sec. 105 (1)). The duty becomes a debt payable to the Crown out of the estate of the deceased in the same manner as the debts of the deceased and the legal personal representative, whom the Act calls the administrator, must pay it accordingly out of the assets vesting in him and forming

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part of the dutiable estate of the deceased (sec. 114 (1)). It constitutes a charge upon the whole of the dutiable estate in New South Wales, whether vested in the administrator or not, but the charge does not affect a title acquired bona fide and for value (sec. 115 (2)). The duty so payable and thus secured is a single indiscriminate amount calculated at a progressive rate on the net aggregate value, after deducting debts, of all the property constituting, for purposes of assessment, the dutiable estate of the deceased. By virtue of the provisions of sec. 102 the statutory conception of the dutiable estate includes much that at the testator's death is neither in his ownership nor in his disposal. Although for the purpose of the administrator's liability to the Crown, the duty is an entire sum, yet for the purpose of imposing liabilities upon those enjoying property of this description, it is considered divisible. The duty payable in respect of any property which is vested in any person other than the administrator but which is included in the dutiable estate of the deceased must be paid to the administrator by the persons entitled thereto according to the value of their respective interests therein (sec. 120 (1)). Every person who acquires possession or assumes the management of any such property is liable to pay to the Crown the duty payable in respect thereof (sec. 120 (2) and (3)). The expression " duty payable in respect of such property " must refer to so much of the whole amount as bears to the whole the same proportion as the value of the particular item of property bears to the value of all the property included in the dutiable estate.

When applied to the present case this legislation, apart from any provision of the will to the contrary, would produce the following result :—(1) Out of the assets coming to their hands the executors would be liable to pay the entire duty to the Crown as if it were a debt of the testator ; (2) The trustees of the settled property, and perhaps the beneficiaries, according to their interests therein, would be liable to pay to the Crown so much of the duty as is attributable to the settled property included in the dutiable estate ; (3) They would also be liable to pay this sum to the executors if the executors discharged the liability to the Crown for the entire duty ; and (4) as the duty is payable in the same manner as a debt of the deceased,

it is borne by the assets of the estate in the same order of abatement as other debts. (See *Perpetual Trustee Co.* v. *Adams* (1)).

By the decision appealed from, *Harvey*, C.J. in Eq., held that a testamentary provision to the contrary had been made by the testator and that the trustees of the settled property thereof had been relieved of the liability of the *cestuis que trust* to recoup the executors the proportion of the death duty attributable to the settled property. The will is short. After appointing the trustees and executors thereinafter to be called "trustees" and after bequeathing pecuniary legacies "free from all probate and Federal Estate Duties and debts" and making some specific bequests and a specific devise, the will proceeds to devise and bequeath the residue to the "trustees" upon trust for conversion. It then declares the trusts of the proceeds. The first is as follows:—"Upon trust to pay thereout my just debts funeral and testamentary expenses (which latter expression shall be deemed to mean and include Probate Duty payable to the Government of the State of New South Wales and Estate Duty payable to the Government of the Commonwealth of Australia)." There follow trusts for relatives and a declaration that no provision is made for the testator's wife because he has provided for her maintenance and support by the settlement and otherwise.

The question in the present case is not how the duty is to be borne as between residuary and specific or other gifts. Clearly the provision would suffice to throw upon residue the burden of Commonwealth estate duty which otherwise would fall upon the general pecuniary legacies and the specific bequests and devise. Nor, in my opinion, is the true question whether the reference to probate duty includes the entire sum of death duty for which the administrator is liable to the Crown. The words appear to me plainly to mean that the whole sum payable by the executors to the Crown for death duty shall be defrayed by "the trustees" out of the proceeds of conversion in execution of the primary trust declared, namely, to pay debts funeral and testamentary expenses. Whatever the executors are called upon to pay to Commonwealth or State for estate and death duty is regarded as a testamentary expense and

(1) (1923) 24 S.R. (N.S.W.) 87; 40 W.N. (N.S.W.) 158.

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"the trustees" are directed to pay all testamentary expenses out of the proceeds of conversion. In so far as such a payment is final in fact so that the residue is diminished and is not in the event recouped, then, whether in law strangers to the actual estate of the testator passing under the will are or are not under an obligation, unfulfilled, to make some corresponding repayment, the burden of the payment must, under the clause, remain upon residue. But the question is whether the words evince an intention that the entire payment shall be final and that strangers to the actual estate who are under a liability to recoup part of the payment shall be relieved at the expense of the residue. A provision depriving the estate vested in the executor of the operation of sec. 120 (1) amounts to a disposition in favour of the persons taking under the settlement. In *Permanent Trustee Co. of New South Wales* v. *Hill* (1) *Long Innes* J. says "in order to displace the liability imposed by statute on those taking the notional property of the testator, it is necessary for the Court to be satisfied that the testator has expressed a clear intention to displace that statutory liability, and, in effect, to bequeath to the donees of the notional property a legacy of the amount of the death duty payable in respect thereof" and this statement appears an accurate description of the position (cf. per Lord *Sumner* in *O'Grady* v. *Wilmot* (2)).

I do not find in the provision of this will any such clear intention. The clause primarily relates to disbursements for which the actual estate is unavoidably answerable, namely, debts funeral and testamentary expenses. Death duty is included among them. The primary trust to make these payments looks to the need of discharging the burdens and specifies the source whence they are to be paid. Doubtless, the result, if not the intention, is to exonerate other parts of the estate, that is, of the actual estate passing under the will. But, in my opinion, no intention appears of conferring any benefit upon strangers to the testamentary dispositions. The provision is expressed in terms consistent with the continuance and the fulfilment of the obligation imposed by sec. 120 (1), and the context and general tenor support the view that nothing to the contrary was intended.

(1) (1933) 33 S.R. (N.S.W.) 222, at p. 226; 50 W.N. (N.S.W.) 73, at p. 74.
(2) (1916) 2 A.C. 231, at p. 274.

For these reasons I think that the appeal should be allowed. In my opinion so much of the decree as contains the declaration answering question 1. of the originating summons should be discharged, and, in lieu thereof, it should be declared in answer to such question that so much of the State death duty as was payable in respect of the testator's share in the property subject to the trusts of the indenture therein referred to should be borne by such share.

Costs of the appeal should be paid out of the estate : the executors' as between solicitor and client.

EVATT J. This is an appeal from the decision of the Supreme Court of New South Wales (*Harvey*, C.J. in Equity), which held that, on the true construction of the will of the late Frank Hill, " State Probate Duty " payable in respect of property " notionally " included in his estate, should be borne by his residuary estate in relief of those otherwise liable to pay it.

The duty referred to in the will as " Probate Duty " is the death duty assessable under Part IV. of the New South Wales *Stamp Duties Act* 1920-1931. It is assessed and paid upon the " final balance of the estate of the deceased " (sec. 101). The rate per centum of duty is graduated so as to increase from 2 per cent. where the final balance exceeds £1,000 but does not exceed £5,000, until it reaches 20 per cent. where the final balance is £150,000. The phrase "notional " estate has no express statutory warrant, but it provides a convenient enough description of sec. 102 (2), by which certain classes of property not part of the actual estate of the deceased are deemed to be included therein. The duty is a stamp duty, and its payment is denoted by a stamp impressed on the probate or letters of administration (sec. 113). It constitutes a debt payable to His Majesty out of the estate of the deceased, in the same manner as the debts of the deceased. The administrator is liable to pay it out of all real or personal property vested in him, and forming part of the dutiable estate of the deceased (sec. 114). His liability exists whether or not the property in respect of which the duty or any part of it has been assessed, is vested in him as administrator (sec. 114).

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By sec. 114 (4) it is provided that death duty, so far as not paid by the administrator, is to be collected upon an account delivered in accordance with sec. 120. By sec. 120 (1) it is provided that:

> "Where any property which is or the value of which is included in the dutiable estate of a deceased person is vested in any person other than the administrator, the duty payable in respect thereof shall be paid by the persons entitled thereto according to the value of their respective interests therein, to the administrator."

The same section imposes the obligation to deliver an account and the liability to pay the Commissioner upon every person assuming possession or management of any property the value of which is included in the dutiable estate (sec. 120 (2), (3)).

The will contained a bequest of certain pecuniary legacies "free from all Probate and Federal Estate Duties and debts," followed by bequests of certain chattels and a specific devise of certain land. It then proceeded:

> "I give devise and bequeath the rest residue and remainder of my property of what kind soever and wheresoever situate of or to which I shall die possessed unto my Trustees upon trust to sell call in and convert the same into money or such part thereof as shall not consist of money and to stand possessed of the proceeds of such sale calling in and conversion together with all moneys owned by me upon trust to pay thereout my just debts funeral and testamentary expenses (which latter expression shall be deemed to mean and include Probate Duty payable to the Government of the State of New South Wales and Estate Duty payable to the Government of the Commonwealth of Australia) and to stand possessed of the rest residue and remainder thereof upon trust to divide the same equally between Kathleen Hill, Muriel Hill, Eurolie Hill daughters of my uncle Henry Hill and Mary Hill daughter of my uncle Robert Alan Hill share and share alike."

In the clause set out, the testator created a trust and indicated that the property subject to the trust was to consist of the primary residue of his property. He regarded both the State Probate or Death Duty, and the Commonwealth Estate Duty as imposing a liability, uncertain in amount until assessed and thereby quantified, but necessarily large, having regard to the extent and value of his property. "He was thinking," as Mr. Justice *Harvey* says (1), "of the duty as one indivisible sum, an amount of probate duty payable by his executors and an amount of estate duty payable by his executors or payable out of his estate."

(1) (1933) 50 W.N. (N.S.W.), at p. 113.

I entirely disagree with the view, or rather the assumption, of the appellant that the testator's intention was merely to throw the burden of payment of death and estate duty upon those who were to take the "residue." As the relevant clause of the will shows, no residue, properly so-called, could be ascertained until the execution of the trust to pay the duties, and it was only after such an ascertainment that the trust in respect of the ultimate residue became operative. The testator was not specially concerning himself either with determining or settling the incidence of death and estate duty as between the various parts of his estate which were to pass under his will. Like most persons in his position, he would know that his chosen beneficiaries would have to bear some, or perhaps all, of the heavy burden of the duties. As to how the duties would be calculated, he probably knew nothing. But it seems very unlikely that he would be ignorant of the fact that, e.g., gifts he might make within a certain period before his death would be taken into account in the reckoning of the duties, although it is doubtful whether he imagined that the recipients of such gifts might themselves be liable to recoup his estate any of the duties.

But speculation as to his knowledge and intent is of little use. It seems to me that, confining attention to the actual words of the will, the inference is that the testator impressed a trust upon the fund which was to constitute the primary residue of his estate, and that he did it so as to avoid any argument or dispute (1) as to whether "testamentary expenses" would include the amount of death and estate duty, and (2) as to the persons upon whom the burden of their payment should rest.

It is not suggested that sec. 120 of the *Stamp Duties Act* forbids a testator from exonerating the owners of the notional estate from their liability to pay to an administrator a proportionate part of death duty. But it is said that such an intention should be "clearly" expressed.

In my opinion, it is not necessary that, in order to relieve persons otherwise liable under sec. 120, there should be an express reference by the testator either to that section or to the persons who might be liable thereunder.

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I regard the relevant clause of the present will as a provision intended to ensure the relief of all who might be disadvantaged and prejudiced by being made liable, directly or indirectly, to pay a quota of the statutory duties. The class so relieved would certainly consist of all persons taking under the will, including, not least, the legatees of the ultimate residue of the estate. And I can see no justification for depriving those not otherwise benefiting under the will of precisely the same advantage. The trust is designed for the advantage and assistance of them all. Differentiation is difficult to sustain. The quantum of duty payable to the revenue authorities depends as much upon the amount of the "notional" estate as of the actual estate. If the actual estate is large in relation to the "notional" estate, those possessed of the latter are loaded with a disproportionate charge. It is as just and reasonable for a testator to prevent such a loading as it is to advantage all those who benefit directly by the will. By using the instrument of a trust and carefully excluding the idea that he is merely defining the residue of his estate before he gives it away, the present testator was, I think, successful in expressing his desire to relieve all whom it might concern.

I therefore agree that the testator made a "beneficial disposition in favour of the persons who otherwise would have to pay those duties"—Mr. Justice *Harvey's* expression. The appeal should fail.

Appeal allowed. Decretal order varied by answering Question I. of the originating summons that the amount of the State death duty payable by reason of the inclusion in the testator's dutiable estate of his share of the property subject to the trusts of the indenture of settlement should be borne by such share. Costs of this appeal out of the testator's estate, those of the executors (trustees) as between solicitor and client.

Solicitors for the appellant, *W. P. McElhone & Co.*

Solicitors for the respondents, *W. P. McElhone & Co.*; *Weaver & Allworth.*

J. B.