[HIGH COURT OF AUSTRALIA.]

YOUNG . . . . . APPELLANT;
DEFENDANT,

AND

QUEENSLAND TRUSTEES LIMITED . . RESPONDENT.
PLAINTIFF,

ON APPEAL FROM THE SUPREME COURT OF QUEENSLAND.

H. C. OF A. 1956.

BRISBANE. *July* 26;

SYDNEY, *Aug.* 30.

Dixon C.J., McTiernan and Taylor JJ.

Money lent—Action to recover—Defence of payment—Onus of proof—Defendant to prove payment.

In an action for money lent where the defence of payment is raised, the onus of proving payment lies upon the defendant.

Nelson v. *Campbell* (1928) V.L.R. 364, disapproved.

Nature of the liability to pay a debt of a kind formerly recoverable in debt or *indebitatus assumpsit*, and pleading payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration, discussed.

Decision of the Supreme Court of Queensland (*Philp* J.), affirmed.

APPEAL from the Supreme Court of Queensland.

By writ of summons issued out of the Supreme Court of Queensland on 15th July 1953 Queensland Trustees Limited as executor of the will of Gertrude Kathleen Halley deceased sought to recover from the defendant Frank Stanley Young the sum of £11,661 10s. 0d. as and for money payable by the defendant to the plaintiff for money lent by the said Gertrude Kathleen Halley deceased in her lifetime to the defendant. By the particulars of claim the plaintiff alleged that the deceased had on 14th February 1950 lent eight separate sums to the defendant, being amounts of £392, £595, £1,000, £5,000, £875, £450, £550 and £730, that a further sum of £1,420 had been so lent on 21st September 1951 and that yet another sum of £699 10s. 0d. had been so lent on 18th February 1952. The

deceased died on 14th July 1952 and probate of her last will was granted to the plaintiff on 8th January 1953.

By his defence dated 4th September 1953 the defendant admitted that each of the loans alleged by the plaintiff had in fact been made to him by the deceased but claimed that he had repaid to her in her lifetime each and every of them.

The action was tried by *Philp* J. sitting without a jury and having heard the evidence his Honour entered judgment in favour of the plaintiff for the amount claimed, as he disbelieved the defendant's evidence as to the repayment of the several amounts lent.

From this decision the defendant appealed to the High Court upon the ground that his uncontradicted testimony as to the repayment of the loans ought to have been accepted and that in any event there was no evidence to disprove repayment, the burden of disproof lying upon the plaintiff.

Further material facts and the arguments of counsel appear sufficiently in the judgment of the Court hereunder.

J. G. Garland, for the appellant.

J. D. McGill and *J. D. Dunn*, for the respondent.

Cur. adv. vult.

Aug. 30.

THE COURT delivered the following written judgment :—

The question at issue upon this appeal is whether a finding that the defendant appellant did not repay a debt for money lent should be sustained.

The plaintiffs respondents are the executors of Gertrude Kathleen Halley who died on 14th July 1952. They discovered among the papers of the deceased certain receipts signed by the defendant and in consequence sued him as executors in the action out of which the appeal arises for the recovery of ten sums of money lent by the deceased to the defendant. Of these ten sums eight separate amounts were alleged to have been lent on 14th February 1950, viz. £392, £595, £1,000, £5,000, £875, £450, £500, £730. The sum of £1,420 was alleged to have been lent on 21st September 1951 and the sum of £699 10s. 0d. on 18th February 1952. There were eight receipts dated 14th February 1950 given for the respective sums the loan of which is attributed to that date, and there was a receipt dated 21st September 1951 and another dated 18th February 1951 with reference to the two other respective amounts. It was for this reason no doubt that the loans were alleged as ten

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separate causes of action. By his defence the defendant admitted each of the loans. But as to each of them he pleaded that he had repaid such loan. Evidence was given by the defendant in support of these pleas but *Philp* J., who tried the action without a jury, disbelieved his story.

His appeal is based upon the grounds that the learned judge should have accepted his uncontradicted testimony to the effect that he had repaid the money and that in any event there was no evidence to disprove repayment and that the burden of disproof lay upon the plaintiff.

The contention that the burden of disproving payment rests upon the plaintiffs is erroneous. Its source is to be found in the decision of the Supreme Court of Victoria in *Nelson* v. *Campbell* (1). That decision has already been disapproved in this Court by *Fullagar* J. in *Tozer, Kemsley & Millbourn (Australasia) Pty. Ltd.* v. *Collier's Interstate Transport Service Ltd.* (2) and by the Supreme Court of South Australia in *John* v. *Coles* (3).

It appears that when the plaintiffs' case was opened before *Philp* J. counsel accepted the position that the onus of disproof was upon the plaintiffs although *Philp* J. expressed something more than a doubt about the assumption, the adoption of which was due altogether to the decision in *Nelson* v. *Campbell* (1). But the law has always been that it lies upon a defendant to make out a defence of payment by way of discharge. The Supreme Court of Victoria was led to adopt the view that the onus was reversed by two considerations, each of which appears to have arisen from a misapprehension.

In the first place the court considered that since the cause of action lay in contract non-payment must be alleged and proved by the plaintiff as a breach. In the second place the court regarded the fact that at one time payment could be proved under the general issue as showing that the failure to pay must form part of the plaintiff's cause of action, which he must establish like every other ingredient in a cause of action. In the reasons of the court, which were delivered by *Lowe* J., there is some discussion of *indebitatus* counts and in particular of money lent. There follows this passage: "This short examination leaves no doubt in our minds that '*indebitatus assumpsit*' is, in the language of the modern lawyer, based on contract, and that a plaintiff suing in such form is subject to the burden which falls on every plaintiff who alleges

(1) (1928) V.L.R. 364.
(2) (1956) 94 C.L.R. 384, at pp. 407, 408.
(3) (1931) S.A.S.R. 254.

a breach of contract of alleging and proving (1) the contract on which he relies, and (2) the breach thereof of which he compla ns " (1). A little later in the reasons there occurs this passage :—" It is clear, we think, that prior to the *Common Law Procedure Act* a defendant might, under the general issue, prove payment : *Stephen* on *Pleading* 2nd ed. (1827) pp. 193, 194 ; *Tidd's Practice* 9th ed. (1828) pp. 2, 648 ; *Chitty* on *Pleading* 6th ed. (1836) pp. 476-478. This must have been, we think, because the general issue constituted a traverse of all the material allegations made by the plaintiff, and confirms the view that the plaintiff must allege non-payment of the money he was claiming, or, in other words, that it was still payable to him by the defendant " (1).

It is, of course, true that at the time when the once celebrated *Regulae Generales* of Hilary Term 4 Will. IV. were adopted pursuant to s. 1 of 3 & 4 Will. IV. c. 42 payment as well as other discharges could be given in evidence under the general issue in an action of *assumpsit*. But this was because by what was considered a relaxation of the ancient course of common law pleading the courts had extended the general issue to mean that at the time of suit the plaintiff's cause of action did not exist. It came to be much more than a denial of the essential ingredients of the cause of action upon which the plaintiff declared. It was taken to cover all or at all events most of the grounds upon which a cause of action once existing might be discharged. For example *Lee* C.J. and *Denison* J. say in *Barker* v. *Dixon* (2), " a defendant in an action on the case may give in evidence any matter that destroys the plaintiff's action " (3). *Blackstone* explains the course of development : " Formerly the general issue was seldom pleaded, except when the party meant wholly to deny the charge alleged against him. But when he meant to distinguish away or palliate the charge, it was always usual to set forth the particular facts in what is called a *special* plea ; which was originally intended to apprize the court and the adverse party of the nature and circumstances of the defence, and to keep the law and fact distinct. And it is an invariable rule, that every defence which cannot be thus specially pleaded, may be given in evidence upon the general issue at the trial. But, the science of special pleading having been frequently perverted to the purposes of chicane and delay, the courts have of late in some instances, and the legislature in many more, permitted the general issue to be pleaded, which leaves every thing open, the

(1) (1928) V.L.R., at p. 367.
(2) (1743) 1 Wils. K.B. 45 [95 E.R. 483].
(3) (1743) 1 Wils. K.B., at p. 451 [95 E.R., at p. 483.]

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fact, the law, and the equity of the case ; and have allowed special matter to be given in evidence at the trial."—*Blackstone Commentaries*, Bk. III, pp. 305, 306. In the second report of the commissioners appointed in 1828 to inquire into the procedure and practice of the courts of common law this latitude was condemned and as a result the *Regulae Generales* of 1834 already mentioned required that all matters by way of confession and avoidance should be pleaded specially. In opening this topic the commissioners said :— " One of the most important questions which has presented itself in the course of our inquiries is, whether it is expedient to continue to any, and to what extent, the use of that kind of plea denominated the general issue. Under this plea, which is in its shape a summary form of denial of the allegations in the declaration, or some principal part of them, a defendant is at present allowed in certain actions to put the plaintiff to the proof of every thing alleged in the declaration ; and in some not only to do this, but at the same time to prove in his own defence almost any kind of matter in confession and avoidance ; that is matter which, admitting the truth of the plaintiff's allegations, tends to repel or obviate their effect. . . That the present state of the practice on this subject requires alteration, seems to be universally felt."—cited by *Stephen* on *Pleading* 4th ed. (1838) notes, p. lviii.

In writing of the proper application of a plea of *non assumpsit*, *Chitty* on *Pleading* 7th ed. (1844) vol. III, p. 27 said : " Before the pleading Rules of Hil. Term, 4 W. 4, the plea of *non assumpsit* was admissible to a most absurd, illogical, and inconvenient extent, and plaintiffs were in many cases taken by surprise at the trial by an unexpected ground of defence being given in evidence. A defendant might plead *non assumpsit* and under it give in evidence *payment*, *accord* and *satisfaction*, *release*, and numerous other grounds of defence."

The rules of 1834 provided that in every species of *assumpsit*, all matters in confession and avoidance including not only those by way of discharge, but those that show the transaction to be either void or voidable in point of law on the ground of fraud or otherwise shall be specially pleaded. It is significant that in doing so the rules expressly include payment as an example. (See *Chitty* on *Pleading* 7th ed. (1844) vol. III, p. 27 and *Stephen* on *Pleading* 4th ed. (1838) p. lv.). But although under the development which theretofore had taken place in pleading a defence of payment might be established under the general issue, yet, because it was a matter of discharge, it might also have been specially pleaded. The special plea must give colour but, if it did so, it was valid and not demurrable on the ground

that it amounted to a traverse which formed part of the general issue. This is shown by the following extract from the report of *Hatton* v. *Morse* (1): " In *assumpsit*, &c. The defendant pleaded, that true it is he did promise, but that *ante diem impetrationis billae*, he paid the money ; and upon a demurrer to this plea it was objected, that it amounted to the *general issue*. But per *Holt* Ch. Just. This doth not amount to the general issue ; for though *payment may be given in evidence upon non assumpsit pleaded*, yet it was long before that obtained ; it is likewise *giving colour*, for he says, there was a promise, but that he performed it : now there are many things which may be *given in evidence* upon the general issue, and yet those things may be pleaded specially : as for instance, in an action of debt the defendant may plead a *release*, or he may give it *in evidence* upon *nil debet* pleaded, so in *debt for rent* upon a *demise*, the defendant may plead an *entry and eviction*, before any rent became due, or he may give it in evidence upon *nil debet*" (1). The report goes on to deal with the requirement that colour be shown. The reason why it was always a rule that payment might be pleaded specially even during the period when it might be established under the general issue is because generally payment operates as a discharge. It is possible to imagine cases of a special contract to pay a sum certain on a specified day and it may perhaps be true that in some cases of that kind a traverse of the allegation of breach was the only proper way of putting in issue non-payment on and perhaps before that day. But in such cases after 1834 a traverse would not enable the defendant to rely upon payment *post diem* as distinguished from punctual payment on the very day. For example in *Littlechild* v. *Banks* (2), in an action of debt for goods sold and delivered under a plea of never indebted the defendant's counsel sought to show that payment was made for the goods as delivered, a stack of hay bound on the premises by the buyer's servants. On the trial before *Coleridge* J. the jury found a verdict for the defendant, which the Court of Queen's Bench set aside. The court gave no formal reasons but, as plainly appears from the report of what was said during the argument, the grounds were first that there was no plea of payment and second that there was no evidence of payment. This case has a place in a difference of view that arose about that time as to the effect of a ready money sale. If money was paid over the counter in exchange for goods should the transaction be resolved notionally into indebtedness and contemporaneous payment or should it be treated as one where there was no debt

(1) (1702) 3 Salk. 273 [91 E.R. 820]. (2) (1845) 7 Q.B. 739 [115 E.R. 667].

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even notionally ? In *Dicken* v. *Neale* (1), the Court of Exchequer seemed to accept the latter position without question and in *Bussey* v. *Barnett* (2), the same court expressly asserted it. But in *Littlechild* v. *Banks* (3), *Patteson* J. says : " I cannot agree in that law " (4), and the Court of Queen's Bench appear to reject the proposition. In *Smith* v. *Winter* (5), in the Common Pleas, *Williams* J. says that *Bussey* v. *Barnett* (2) went to the very verge of the law. Lord *Campbell* C.J. in the same year expresses the view that a debt notionally arose and was discharged. In *Timmins* v. *Gibbins* (6), the Chief Justice said : " In fact it is difficult to say that there be any case in which the debt is not antecedent to the payment. Even where the money is paid over the counter at the time of the sale, there must be a moment of time during which the purchaser is indebted to the vendor " (7). However in *Wood* v. *Betcher* (8), the contrary seems to have been decided. There is a relevance in this controversy to the present question. For the basis upon which it proceeded is the tacit assumption that if a debt arose payment by way of discharge must be pleaded by way of confession and avoidance and that means that the burden of proof would rest on the defendant.

A loan of money payable on request creates an immediate debt. Speaking of a promissory note payable on demand *Parke* B. in *Norton* v. *Ellam* (9), said : " It is the same as the case of money lent payable upon request, with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all ; if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan. Where money is lent, simply, it is not denied that the statute begins to run from the time of lending " (10). This was settled at the end of the seventeenth century, as appears from the report of *Collins* v. *Benning* (11) : " In an *indebitatus assumpsit*, the plaintiff declared on a promise to pay on demand, and *non assumpsit infra sex annos* pleaded : To which the plaintiff demurred ; because declaring on a promise on demand, he thought nothing was due till demand ; and he should have pleaded *non assumpsit infra sex*

(1) (1836) 1 M. & W. 556 [150 E.R. 556].
(2) (1842) 9 M. & W. 312 [152 E.R. 132].
(3) (1845) 7 Q.B. 739 [115 E.R. 667].
(4) (1845) 7 Q.B., at p. 740 [115 E.R., at p. 667].
(5) (1852) 12 C.B. 487, at p. 489 [138 E.R. 997, at p. 998].
(6) (1852) 18 Q.B. 722 [118 E.R. 273].
(7) (1852) 18 Q.B., at p. 726 [118 at p. 274].
(8) (1856) 27 L.T. (O.S.) 126.
(9) (1837) 2 M. & W. 463 [150 E.R. 839].
(10) (1837) 2 M. & W., at p. 464 [150 E.R., at p. 840].
(11) (1700) 12 Mod. 444 [88 E.R. 1440].

annos after demand, or that no demand was within six years. *Per Curiam.* If the promise were for a collateral thing, which would create no debt till demand, it might be so ; but here it is an *indebitatus assumpsit*, which shews a debt at the time of the promise, therefore the plea is good " (1). In *Goodchild* v. *Pledge* (2), an action of debt, the question was put by *Parke* B : " Is the statement of the breach in debt anything more than a mere form ? The moment the goods are delivered, is there not a cause of action, throwing the proof of its discharge on the defendant ? If the breach is mere form, you cannot traverse it ; then your plea is in discharge, and ought to conclude with a verification. Suppose *nil debet* pleaded, under the old form ; would it not be sufficient to prove the debt contracted ? The new general issue, that the defendant never was indebted, that is, at no instant of time, was framed for the express purpose of making all these defences pleadable by way of discharge " (3). In delivering judgment the learned Baron said : " I think it will be found, on looking into the cases, that the statement of the breach is mere form ; if so, the plea admits the debt, and is a plea in confession and avoidance and it is so treated in the new rules. Under the general issue, as now framed, you deny the existence of a debt at any one time : if you admit a debt, you must plead every matter specially by which you seek to discharge it " (4). That this was the nature of a debt is further shown by the fact that in a common money count the allegation of request, the " *licet saepius requisitus* ", was mere form and was not traversable : see *The Case of an Hostler* (5) ; *Giles* v. *Hart* (6). " . . . where the declaration is upon a contract to pay a *precedent* debt as in the case of common counts for goods sold, work and labour, money lent &c. no request need be stated or proved. And in these instances, although the promise has been laid *on request*, the ' *licet saepius requisitus* ' need not be laid or proved." (*Chitty* on *Pleading* 7th ed. (1844) vol. 1, p. 339).

The common law does not and never did conceive of indebtedness in a sum certain for an executed consideration as a mere breach of contract : it is rather the detention of a sum of money and that was so whether the creditor enforced his demand by an action of debt or by *indebitatus assumpsit.* Were it otherwise it would not be necessary for a defendant who sets up a plea of tender to bring into court the amount of the debt with his plea. The reason he

(1) (1700) 12 Mod., at p. 445 [88 E.R., at p. 1440.]
(2) (1836) 1 M. & W. 363 [150 E.R. 474].
(3) (1836) 1 M. & W., at p. 364 [150 E.R., at p. 475].
(4) (1836) M. & W., at p. 365 [150 E.R., at p. 475.]
(5) (1606) Yelverton 67 [80 E.R. 46].
(6) (1698) Carthew 413 [90 E.R. 840].

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must do so is that the tender answers only the breach of obligation alleged and not the debt. This is explained by the following statement by *Wilde* C.J. in *Dixon* v. *Clarke* (1): "In actions of debt and *assumpsit*, the principle of the plea of tender, in our apprehension, is, that the defendant has been always ready (*toujours prist*) to perform entirely the contract on which the action is founded; and that he did perform it, as far as he was able, by tendering the requisite money; the plaintiff himself precluded a complete performance, by refusing to receive it. And, as, in ordinary cases, the debt is not discharged by such tender and refusal, the plea must not only go on to allege that the defendant is still ready (*uncore prist*), but must be accompanied by a *profert in curiam* of the money tendered. If the defendant can maintain this plea, although he will not thereby bar the debt (for that would be inconsistent with the *uncore prist* and *profert in curiam*), yet he will answer the action, in the sense that he will recover judgment for his costs of defence against the plaintiff" (2).

A further proof, if there be need for any, that payment is a plea of confession and avoidance is to be found in the fact that both before and after the rules of Hilary Term 4 Will. IV such a plea could not conclude to the country as a traverse should but must have concluded with a verification. For by way of discharge it offered new matter. "At common law, a plea, replication, or subsequent pleading, which contained new affirmative matter, concluded with a verification—an assertion of the ability of the pleader to prove the matter alleged, (though without actually producing his secta, as in declaring, which he might not be prepared to do)—and a prayer of judgment, by which the adverse party was invited to answer him. Secondly. Where the affirmative in the plea, &c. merely traversed a negative allegation of the adverse party, the conclusion was to the country":—Serjeant *Manning's* note to *Wilkes* v. *Hopkins* (3).

It is desirable to return to the possibility of there being a special contract to pay a sum of money on a day certain and to the question whether payment might then be proved under a traverse. It seems to have been true that if a special promise to pay at a specified time or on the occurrence of some given event was declared upon specially, then strict performance might be shown under a traverse. For that purpose the plaintiff should show failure to pay *ad diem*. If the plaintiff did so the defendant could not rely on payment *post*

(1) (1848) 5 C.B. 365 [136 E.R. 919].
(2) (1848) 5 C.B., at p. 377 [136 E.R., at pp. 923, 924].
(3) (1843) 6 Man. & G. 36, at p. 37 [134 E.R. 798, at p. 799].

diem unless he had pleaded payment specially. There was upon this matter a little uncertainty after the rules of 1834: see *Ensall* v. *Smith* (1). With reference to the subject, Serjeant *Manning*, in the note already quoted, in distinguishing the case of *Ensall* v. *Smith* (1) remarked: "In the ordinary plea of payment, the defendant alleges new matter occurring after a breach,—payment and acceptance in discharge of the breach. Here the payment negatives the breach itself" (2). In an action of debt on a bond assigning a breach of the condition a plea of *solvit ad diem* must conclude to the court as introducing new matter in discharge. See the precedents in *Chitty* on *Pleading*, 7th ed. (1844), vol. 3, pp. 183, 188. But in a note on p. 183 the learned author says that in *assumpsit* a plea of payment *ad diem* may conclude to the country. He points out the inadvisability of pleading on the basis of payment on the specified day because a special plea of payment would be necessary if it turned out that payment was made after that day. The difficulties of relying on a traverse are well brought out by the case of *Bishton* v. *Evans* (3). But it is unnecessary to do more than refer to the decision and add that whether because of that case or because of the perils involved it is a distinction which, so far as can be discovered, was not maintained in debt or *indebitatus assumpsit* for an executed consideration.

The purpose of the foregoing discussion is to show that the two reasons are mistaken which substantially led the Supreme Court of Victoria in *Nelson* v. *Campbell* (4), to decide that the burden rests on a plaintiff to disprove a defence of payment. A debt recoverable under an *indebitatus* count was not and is not now conceived of simply as a cause of action for breach of duty or obligation. In other words it is a mistake to regard the liability to pay a debt of a kind formerly recoverable in debt or *indebitatus assumpsit* as no more than the result of a breach of contract, a breach which the creditor must affirmatively allege and prove. It is, too, a mistake to suppose that the general issue was always a plea doing no more than negativing the essential ingredients in the plaintiff's prima facie cause of action. For a long period before 1834 it had come to be a plea denying that at the commencement of the suit a cause of action subsisted in the plaintiff, whether because having existed it had ceased to exist or because it had not come into existence or was incomplete. The law was and is that, speaking generally, the

(1) (1834) 1 C. M. & R. 522 [149 E.R. 1187].
(2) (1843) 6 Man. & G., at p. 37 [134 E.R., at p. 799].
(3) (1835) 2 C. M. & R. 12 [150 E.R. 6].
(4) (1928) V.L.R. 364.

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defendant must allege and prove payment by way of discharge as a defence to an action for indebtedness in respect of an executed consideration. It is interesting to notice that it was soon settled that upon a plea of payment the defendant had the right to begin at the trial: see *"An Exposition of the Practice in relation to the Right to Begin and to Reply"*, by *W. M. Best* (1837) pp. 60, 61. The same author in his well known work on *Evidence* treats the rule placing upon the defendant the burden of proving payment as a special application of the presumption of continuance. Writing of this presumption he includes as a case requiring special consideration, "the presumption of the continuance of debts, obligations etc. until discharged or otherwise extinguished". And he says "a debt once proved to have existed, is presumed to continue unless payment, or some other discharge, be either proved, or established by circumstances."—*Best* on *Evidence*, 12th ed. (1922) p. 346, s. 406. Though this no doubt supplies a rationale that is not unsatisfactory, the truth is that the rule arises from the nature of debt itself.

Once it is seen that the burden of proving payment falls upon a defendant setting it up as a defence the present appellant's case assumes a different aspect. It means that it is impossible for the appellant to support his appeal on the ground that, on the footing that his testimony is rejected as untrustworthy, there nevertheless remains no sufficient affirmative evidence to support a satisfactory positive conclusion that the loans had in fact never been paid. The appeal can only succeed on the ground that *Philp* J. ought to have accepted enough of the appellant's story to authorise a finding that he had not repaid the loans.

The facts, so far as they appear from the evidence, are unusual. The deceased, a spinster who died at the age of 65, left an estate of over £24,000, an amount which does not include the moneys in question in this appeal. Her income was from property and of this proper accounts were kept. She does not appear to have been interested in racing. The defendant, a bookmaker, says that he first became acquainted with her about the year 1937, at a time when he was employed by an insurance company. He met her over some endowment policies which she was persuaded to take out. He says that she invested in a single premium endowment policy of £18,000. Two or three years later he ceased to be employed by the insurance company and in the end took up his present vocation. His betting includes the taking of doubles on an extensive scale. In 1939 he and Miss Halley joined in acquiring some flats, which they resold later at a profit. He says that he saw her after that

occasionally. She would seek information and advice from him, but it does not appear that they were on close terms.

He gave the following account of the borrowings represented by the eight receipts of 14th February 1950, which amount to £9,542. About the end of April 1950 he found that he might be short of money for a settling day. He fixes the settling day as Tuesday, 2nd May. He said that he telephoned to Miss Halley a week before and asked whether, if he needed any money, he could obtain it from her. She asked how much he might want. He replied: "It might be £10,000". She said that that would be all right if he wanted it. After the races he rang her up and asked her if he could get the money which she had said he could have. She said: "Yes, I will fix it up for you". She said that she would meet him on Tuesday morning at the G.P.O. in Brisbane, the place where he had met her before. He met her there on Tuesday, 2nd May, about a quarter to ten or ten o'clock in the morning. His evidence goes on that she said to him: "You want £10,000?" He said: "Yes". She said: "Oh, well, I will be back here in half an hour or so", and she went away. He waited about until she came back. They then went to a cubicle in the Post Office where telegrams are written. She had several slips of paper and said: "I have got the money here for you. Will you sign these receipts just according to this list?" She had slips of paper one of which was dated 14th February 1950. She asked him to make receipts out in the same way for that date and to make the respective receipts for the amounts of money she had enumerated on the slip. In accordance with her request he made out the receipts on separate slips and signed them. She had certain letters written down on a slip of paper and she requested him to put the letters on the back of the receipts, a "W" on that one and a "B" on that one, and something else on another one. He followed her instructions without enquiry. She produced duty stamps and he affixed them. She paid him over the money. He said that he would come back in a fortnight or at all events within a month and she said that that would be all right so long as it was within a month. He said in his evidence that he did not know why the receipts were dated 14th February or what was the significance of the letters and characters he wrote on the back of the receipts. His evidence in support of the plea of payment is that he kept accumulating money as it came in and when he found that he had enough to pay her he telephoned to her. He said: "You can come and get the money". They met at the G.P.O. again and he paid her.

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After that he says that he saw her very occasionally until in September 1951 he obtained a further loan. On that occasion again his story is that he telephoned to her and asked her if he could get some money from her for settling and she said: "Yes". He told her he required about £1,400. Again they met at the G.P.O. and again she said: "I will fix that up for you. I will be back in about half an hour", and again she came back with the money. She brought a piece of paper and asked him to make out a receipt for £1,420, which he did. On the back of this receipt is written "Laund" but he says that it is not in his hand-writing. He told her the loan would be repaid within a month but he felt sure he would pay it sooner. He said that in fact he repaid it within a fortnight. As to the receipt of 18th February 1952 for £699 10s. 0d., he says that much the same thing occurred. He telephoned to her and asked for £700 for settling. She said it would be all right; she would come into Brisbane and give it to him. Once more they met at the G.P.O. Once more she went away and returned with the money, this time, he says, in about three-quarters of an hour. The receipt bears the words in his hand-writing, "To be repaid on 19th March 1952". He says that these words were written at her suggestion. He said that when that date arrived he telephoned to her and said that he could not pay the amount. She came into town and brought the receipt. They met again at the G.P.O. and she said she would extend the loan and asked him to write on it to that effect. He wrote "Extended to 19th April" and signed it. The receipt in fact bears these words. He says that this loan he also repaid at the G.P.O.

The source from which the deceased obtained the particular sum of £699 10s. 0d. to lend is known. She drew this money from her savings bank. But there is no trace in any of her papers or accounts of the source whence she obtained the remaining moneys which she advanced. She made all the payments to him in cash and he says that he made all the repayments to her in cash. There is no trace in her books or accounts or papers of the money which he says he had repaid. But as there is no trace of the source whence the money came the failure to find any trace of it afterwards is perhaps of little importance. The receipts were found in one of two black japanned boxes which she kept. The defendant could give no explanation of his failure to obtain them from her when he repaid the money, nor could he give any explanation of his failure to obtain a receipt from her except to say that bookmakers do not bother about receipts. The writings on the back of the receipts seem clearly enough to be his and they contain incomprehensible

words or letters such as "Silk", "S", "Bang", "Lin", "W", "B. & S.". Perhaps a not unimportant point is that when he was interviewed by the officers of the executors the defendant had assigned different dates and periods for the loans and repayments.

Philp J. made a careful examination of the facts of which the above is merely a brief outline. The following passage from his Honour's judgment brings to a point the reasons why he found against the defendant: "According to the defendant he did not ask for, nor was he offered any explanation of the following matters:—(1) Why the receipts were dated of a date other than that of the transaction; (2) Why the total sum advanced was the odd sum of £9,542 0s. 0d.; (3) Why eight receipts, some for odd amounts, were required; (4) Why he was asked to make the writings on the backs of the receipts; and (5) What was the significance of those writings. These documents are documents made by the defendant and I am unable to believe that a man like him would make them without enquiry and without full knowledge of their significance. I do not believe this story of the defendant as to the purpose of, and the manner of making of this loan. His demeanour was unsatisfactory but I place little reliance on that fact. I disbelieve him because of the obvious inherent improbabilities of his story."

In support of the defendant's appeal against this conclusion it was said that although his Honour found the demeanour of the defendant as a witness unsatisfactory that was not the reason why he was disbelieved. The reason why the learned judge disbelieved him depended, it was said, upon the nature of the story which he told and the circumstances to which he deposed and upon these matters this Court was in as good a position to judge as was his Honour. But even if we were to disagree with his Honour's views that the story was so inherently improbable that it was unsafe to give effect to it, there would still remain the fact that the witness's demeanour struck his Honour as unsatisfactory. In spite of that fact we would then be asked to give effect to the witness's testimony. But we see no reason to think that his Honour overstated the position when he described the story as containing obvious inherent improbabilities. An examination of the evidence cannot fail to leave the impression that the real explanation of the dealings between the defendant and the deceased has not been told. Presumably the defendant's account of his meetings and of the deceased's going away from the Post Office to obtain the money must mean that she possessed some place of deposit or other safe receptacle reasonably close at hand. Yet no trace of this reserve

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of money has been discovered. Many slight circumstances were relied upon in argument for the appellant but the fact is that there is really nothing but the defendant's own word to support the plea of payment. He admits on the pleadings that the loans were made to him. Having regard to the nature of his story he can scarcely complain if he has failed to satisfy the Court on the balance of probabilities that his bare word should be accepted.

We see no reason to disagree in any particular with the judgment of *Philp* J. For these reasons the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors for the appellant, *Feather, Walker and Delaney.*

Solicitors for the respondent, *Cardew, Simpson & Smith*, Ipswich, Queensland, by *Macrossan & Co.*

R. A. H.