25/11

IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CP 10/94

1760

UNDER	The Trustee Act 1956
IN THE MATTER	of the Estate of EDA FRANCISKA McKENZIE, late of Dunedin, Married Woman, Deceased
AND	
IN THE MATTER	of the Estate of ROBERT CRAIG McKENZIE, late of Dunedin, Retired, Deceased
BETWEEN	WAYNE VORRATH of Dunedin, Branch Manager
	Plaintiff
AND	the said WAYNE VORRATH
	Defendant

Hearing: 15 November 1994

Counsel: D J More for Wayne Vorrath (Trustee of both estates and representing the Residuary Beneficiaries of the Estate of E F McKenzie)
P S Rollo for Residuary Beneficiaries of the Estate of R C McKenzie

Judgment: 16 NOV 1994

JUDGMENT OF FRASER, J.

This is an application pursuant to s66 of the Trustee Act 1956 for directions as to certain trust property.

Eda Franciska McKenzie died on 12 October 1990, leaving a will under which she appointed her husband, Robert Craig McKenzie, and her nephew, Wayne Vorrath, executors and trustees. By her will the residue is to be

used to pay specified sums to named persons with the balance to be divided equally between three persons, one of whom is Mr Vorrath.

Robert Craig McKenzie died on 21 February 1991. Mr Vorrath is his sole executor and trustee. The residuary beneficiaries under his will are two sisters, Mrs M E F Corkin and Mrs I M McLay, and two brothers, Messrs Hugh and George McKenzie.

During their lifetimes both Mr and Mrs McKenzie loaned money to Mr Vorrath. Between 1975 and 1989 Mrs McKenzie loaned him sums totalling $6,000 and in 1975 Mr McKenzie loaned him $1,000. In 1986 and 1987 Mr and Mrs McKenzie together loaned Mr Vorrath $14,000. There are three separate written acknowledgments of debt in respect of sums making up the $14,000 referred to, each of the acknowledgments being addressed "To Robert Craig McKenzie and Eda Franciska McKenzie".

The amounts of $6,000 and $1,000 loaned to Mr Vorrath separately by Mr and Mrs McKenzie have been repaid to their respective estates. Mr Vorrath has also repaid the $14,000 which he borrowed from both of them. This money is currently being held by the solicitors who act for both estates but an issue has arisen as to whether the advances were made by Mr and Mrs McKenzie as joint tenants or whether they were tenants in common in equal shares. If they were joint tenants the $14,000 goes to the estate of Mr McKenzie; if they were tenants in common in equal shares $7,000 is payable to each estate.

Mr Vorrath was appointed to represent the interests of the beneficiaries of the estate of Eda Franciska McKenzie and Mr More on his behalf has submitted argument in support of the proposition that the monies repaid in respect of the advances are to be paid to the separate estates on the basis

that Mr and Mrs McKenzie were tenants in common in equal shares. Mr Rollo, as counsel for the residuary beneficiaries of Robert Craig McKenzie, argued in support of the contrary proposition, that the parties were joint tenants and that accordingly the whole fund should go to the estate of Robert Craig McKenzie.

Affidavits have been filed by Mr Vorrath and by two of the residuary beneficiaries in Robert Craig McKenzie's estate. The only possible indication of intention on the part of either of the two deceased is that on a sheet of paper which carries the acknowledgments of debt relating to the $14,000, Mrs McKenzie has written in her own handwriting "9,000 owing Eda, 8,000 Bob 19/8/88". Mr Vorrath says that at this date he had been loaned $2,000 by Mrs McKenzie, $1,000 by Mr McKenzie and the $14,000 which is the subject of the present application. This endorsement is possibly an indication by Mrs McKenzie that at that date she saw the monies as being separate but it is tenuous at best. The other material in the affidavits is relevant background but does not, in my opinion, assist in the resolution of the question requiring determination.

In *Steeds v Steeds* [1889] 22 QBD 537 the Court was required to consider a defence to an action on a bond by two obligees who pleaded that accord and satisfaction had been made to one of the plaintiffs. It was held that the defence was good in equity as to the claim of the plaintiff to whom satisfaction was made but not as to that of the other since, in equity, joint creditors are prima facie regarded as tenants in common in equal shares both of the debt and any security for it. Wills J, in delivering the judgment of the Court, stated the rule in those terms and made it clear that it is equally applicable whether the debt is secured by a mortgage or merely the subject of a personal contract and added that it was obvious that the

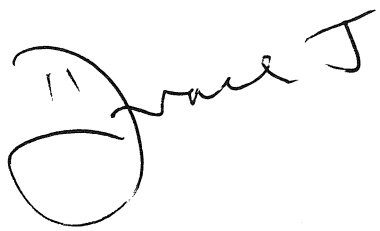
proposition could not be put higher than a presumption capable of being rebutted.

Counsel said that they had been unable to find any New Zealand case in which the matter had been considered.

The learned authors of *Meagher Gummow and Lehane, Equity Doctrines and Remedies*, 3rd ed, p 91 refer to *Steeds v Steeds* and comment that it was the origin of the "joint account" clause in a mortgage, stating that the borrower owed the secured money to the lenders of a joint account "in equity as well as at law". The effect of an advance on joint account in a mortgage or obligation expressed to be advanced by or owing to more persons than one out of money belonging to them on a joint account is now provided for in New Zealand by s80 of the Property Law Act 1952, one result being that a discharge by the last survivor is a complete discharge for all money for the time being due. This provision (and its predecessor in earlier legislation) pre-supposes that the position was previously as held in *Steeds v Steeds*.

It is my view that the presumption referred to in that case is applicable to the present case, that there is nothing sufficient in the evidence to rebut it and that accordingly the fund is to be held by the trustee for the respective estates in equal shares.

No order is required in respect of the trustee's costs but the residuary beneficiaries for whom Mr Rollo appeared are to have their costs out of the fund. Mr Rollo is invited to submit a memorandum as to amount.



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