

MASTEN, J., reading the judgment of the Court, said that it was contended for the appellant that evidence received at the trial subject to objection was admissible and shewed that the two instruments in question were not to become operative as promissory notes unless a condition, the death of the defendant in the lifetime of the testatrix, was fulfilled. The notes were given for money advanced to the defendant by his mother; and the plaintiff was the executor of the mother.

The learned Judge agreed with the trial Judge that the bargain was not that the commencement of the obligation represented by the notes should be suspended, but rather that the notes imported a definite present obligation, liable to be defeated if the event mentioned in the oral agreement happened. That finding of fact negated the argument advanced on behalf of the appellant.

Another point was, whether the circumstances here shewn brought the case within the principle established by *Strong v. Bird* (1874), L.R. 18 Eq. 315, and followed in a number of cases cited in *Halsbury's Laws of England*, vol. 14, p. 270; see also *Re Goff* (1914), 11 L.T.R. 34; *Re Barnes* (1918), 42 O.L.R. 352; the principle being that, where there is an uncompleted gift, and the donor appoints the debtor to be the executor of his will, the debt is extinguished in law, though in equity the executor is answerable for the amount of the debt as assets of the testator in favour of creditors and all persons taking beneficially under the testator; and the further principle that the claim in equity may be rebutted by evidence of an intention on the part of the testator to forgive the defendant, the same principle applying where the testator, during his lifetime, attempted to make a gift, which, being uncompleted, failed on technical considerations.

Here the trial Judge found in favour of the defendant's account of what took place when the money was advanced, namely, that the mother had then said that she would not lend the money to him, but would give him the money provided that he paid her interest on it as long as she lived; and there was a further finding that the notes were given to secure the payment of the interest and the payment of the principal in case the son predeceased the mother. On this issue the evidence received subject to objection was admissible; but it established that the intention to give did not continue throughout the life of the testatrix. It is essential that the intention to give shall be plain and absolute, and shall be communicated to the donee. These things were proved; but it must further be established that the intention to give continued until the death, and there the defendant failed.

*Appeal dismissed with costs.*