JIA 76 (1950) [0001]-[0044]

LEGAL NOTES

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Smith and another *v.* River Douglas Catchment Board

Privity of Contract—Contract for benefit of third party—Title to sue—Sufficiency of interest—Covenant with landowner for benefit of land—Successors in title—Tenant of landowner—Right to enforce covenant—Law of Property Act, 1925, s. 78

COURT OF APPEAL
TUCKER, SOMERVELL AND DENNING L.JJ.

1949. June 3.
[1949] 2 K.B. 500.
[1949] 2 All E.R. 179.
65 T.L.R. 628.

By an agreement under seal dated 25 April 1938, made between Mrs Ellen Smith and ten other owners of certain lands situate between the Leeds and Liverpool Canal and the River Douglas and adjoining the Eller Brook in the parish of Lathom in the county of Lancaster of the one part and the defendant board of the other part, in consideration of the landowners undertaking to pay certain specified sums as a contribution towards the cost of widening, deepening, improving and maintaining the Eller Brook, the board covenanted to 'widen and deepen and make good the banks of the Eller Brook . . . take over the control of the brook and maintain for all time the work when completed'.

On 1 April 1940 the first plaintiff, Smith, took from Mrs Ellen Smith a conveyance of her land which was expressly stated to be conveyed with the benefit of the said agreement of 25 April 1938. The second plaintiff, Snipes Hall Farm Ltd., was at all material times in possession of the said land under an oral agreement as yearly tenant. A breach in the bank of the Eller Brook occurred on 9 December 1939. Further and more serious breaches occurred in January 1944 and February 1945, and on 1 and 2 September 1946.

It was in respect of the damage suffered on the last occasion when the plaintiffs' land was flooded to a depth of over five feet that this action was brought. They claimed damages for the breach of the board's covenant contained in the agreement of 25 April 1938.

The question for the Court was whether the plaintiffs had a title to sue in respect of that covenant. It was said for the board that the benefit of the covenant did not run with the land so as to bind a stranger who had not and never had had an interest in the land to be benefited, and there being no servient tenement to bear the burden.

The Court of Appeal, reversing the judgment of Morris J. to the contrary, held that both plaintiffs had a good title to sue in respect of the damage which they had suffered in consequence of the defendant's breach of the covenant to maintain for all time the banks of the Eller Brook. Lord Justice Denning in the course of his judgment summed up the authorities, and expounded the principles of English Law which permit one who is no party to a contract to

sue on a promise contained therein for his benefit, and in respect of which he has sufficient interest to entitle him to enforce it. He said:

Counsel for the board says that the plaintiffs cannot sue. He says that there is no privity of contract between them and the board and that it is a fundamental principle that no one can sue on a contract to which he is not a party. That argument can be met either by admitting the principle and saying that it does not apply to this case, or by disputing the principle itself. I make so bold as to dispute it. The principle is not nearly so fundamental as it is sometimes supposed to be. It did not become rooted in our law until the year 1861 (*Tweddle* v. *Atkinson* (1861) 1 B. & S. 393) and it reached its full growth in 1915 (*Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge and Co. Ltd.* [1915] A.C. 847). It has never been able entirely to supplant another principle whose roots go much deeper: I mean the principle that a man who makes a deliberate promise which is intended to be binding, that is to say under seal or for good consideration, must keep his promise; and the Court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided it was made for his benefit and that he has a sufficient interest to entitle him to enforce it.... It is on this principle, implicit if not expressed, (i) that the Courts ever since 1368 have held that a covenant made with the owner of land for its benefit can be enforced against the covenantor, not only by the original party, but also by his successors in title (*The Prior's Case* (1368), 1 Sm. L.C. (13th ed.) 55; Co. Litt. 385*a*; *Spencer's Case* (1583) 5 Co. Rep. 16*a*; 1 Sm. L.C. (13th ed.) 51); (ii) that the Courts of common law in the seventeenth and eighteenth centuries repeatedly enforced promises expressly made in favour of an interested person (*Dutton* v. *Poole* (1678) 1 Freem. K.B. 471, approved by Lord Mansfield in *Martyn* v. *Hind* (1779) 1 Doug. K.B. 142); (iii) that Lord Mansfield held that an undisclosed principal is entitled to sue on a contract made by his agent for his benefit, even though nothing was said about agency in the contract (*Rabone* v. *Williams* (1785) 7 Term Rep. 360 (*n*); *George* v. *Clagette* (1797) 7 Term Rep. 359); and (iv) that Lord Hardwicke, L.C., decided that a third person is entitled to sue if there can be spelt out of the contract an intention by one of the parties to contract as trustee for him, even though nothing was said about any trust in the contract, and there was no trust fund to be administered (*Tomlinson* v. *Gill* (1756) Amb. 330). Throughout the history of the principle the difficulty has been, of course, to say what is sufficient interest to entitle the third person to recover. It has sometimes been supposed that these must always be something in the nature of a trust for his benefit (*Vandepitte* v. *Preferred Accident Insurance Corp. of New York* [1933] A.C. 79); but this is an elusive test which does not explain all the cases and it involves the trustee being made a nominal party to the action as plaintiff or defendant, unless that formality is dispensed with as it was in *Les Affréteurs Réunis Société Anonyme* v. *Leopold Walford (London) Ltd.* [1919] A.C. 801. The truth is that the principle is not so limited. It may be difficult to define what is a sufficient interest. While it does not include the maintenance of prices to the public disadvantage (*Dunlop Pneumatic Tyre Co. Ltd.* v. *Selfridge and Co. Ltd.* [1915] A.C. 847) it does cover the protection of the legitimate property rights and interests of the third person, although no agency or trust for him can be inferred. It covers, therefore, rights such as the following which cannot justly be denied—the right of a seller to enforce a commercial credit issued in his favour by a bank under contract with the buyer; the right of a widow to sue for a pension which her husband's employers promised to pay her under contract with him (*Dutton* v. *Poole* (1678) 1 Freem. K.B. 471; In re *Schebsman* [1943] Ch. 366; [1944] Ch. 83*); or the right of a man's servants and guests to claim on an insurance policy taken out by him against loss by burglary, which is expressed to cover them (*Prudential Staff Union* v. *Hall* [1947] K.B. 689, 690†). In some cases the legislature itself has intervened, as, for instance, to give the driver of a motor car the right to sue on an insurance policy taken out by the owner which is expressed to cover the driver, but this does not mean that the common law would not have reached the same result by itself.

* *J.I.A.* Vol. LXXII, p. [31]. † *J.I.A.* Vol. LXXIV, p. [3].

The particular application of the principle with which we are concerned here is the case of covenants made with the owner of the land to which they relate.... Such covenants are clearly intended and usually expressed to be for the benefit of whomsoever should be the owner of the land for the time being; and at common law each successive owner has a sufficient interest to sue because he holds the same estate as the original owner.... It was always held at common law that in order that a successor in title should be entitled to sue he must be of the same estate as the original owner.... This limitation, however, was, as is pointed out in Smith's *Leading Cases*, p. 75, capable of being 'productive of very serious and disagreeable consequences', and it has been removed by s. 78 of the Law of Property Act, 1925, which provides that a covenant relating to any land of the covenantee shall be deemed to be made with the covenantee and his successors in title 'and the persons deriving title under him or them' and shall have effect as if such successors 'and other persons' were expressed. The covenant of the catchment board in the present case clearly relates to the land of the covenantees. It was a covenant to do work on the land for the benefit of the land. By the statute, therefore, it is deemed to be made, not only with the original owner, but also with the purchasers of the land and their tenants as if they were expressed. Now, if they were expressed, it would be clear that the covenant was made for their benefit and they clearly have sufficient interest to entitle them to enforce it because they have suffered the damage. The result is that the plaintiffs come within the principle whereby a person interested can sue on a contract expressly made for his benefit.

Oliver *v.* Davis and Another

Action on cheque—Whether given for valuable consideration—Antecedent debt or liability—Debt or liability of third party—Promise to forbear suing third party—No evidence of such promise or forbearance—Bills of Exchange Act, 1882, *s.* 27 (1) (*a*) *and* (*b*)

COURT OF APPEAL

EVERSHED M.R. SOMERVELL AND DENNING L.JJ.

1949. July 12.
[1949] 2 K.B. 727.
[1949] 2 All E.R. 353.

This was an appeal by the second defendant, Miss Marjorie Woodcock, against the judgment of Finnemore J. whereby she was ordered to pay the plaintiff the sum of £400, being the amount of a cheque drawn by her in his favour and payment of which she had stopped before it was presented to her bank. The question for the Court was whether there was any valuable consideration given for the cheque.

The Bills of Exchange Act, 1882, s. 27 (1), provides that:

Valuable consideration for a bill may be constituted by (*a*) any consideration sufficient to support a simple contract; (*b*) an antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

The relevant facts of the case were as follows:

The first defendant, William R. Davis, had become engaged to the second defendant's sister, he being then a married man, a fact which was unknown to her. On the pretence that he was buying a house and furniture for their matrimonial home he extracted from his fiancée her total savings of £650 and borrowed from the plaintiff, Mr Oliver, the sum of £350, giving him in return a post-dated cheque for £400. The sums so obtained by Davis went into his own pocket. When the post-dated cheque was due for payment Davis represented to the second defendant that unless the cheque was met the plaintiff would

seize the furniture, and thereupon she wrote her own cheque for £400 in favour of the plaintiff. Davis and his fiancée took this cheque by hand to the plaintiff's house, and finding that the plaintiff was away from home left the cheque there. The plaintiff was unaware of this act of benevolence until he returned home. By that time the true character of Davis had been discovered by the sisters and on the day of the plaintiff's return the second defendant stopped payment of her cheque. On the same day she saw the plaintiff and gave him her reasons for doing so. On the following day the plaintiff presented Davis's cheque which was dishonoured. At a much later date the plaintiff presented the second defendant's cheque and it was returned by the bank marked 'stopped by order of drawer'.

Though both Davis and the second defendant were parties to the action, Davis did not enter appearance to the writ and no further proceedings in the action were taken against him.

The Court held that no valuable consideration had been given for the second defendant's cheque. The antecedent debt or liability, which by s. 27 (1) (*b*) may constitute valuable consideration for a bill, must be a debt or liability due from the maker or negotiator of the instrument and not from a third party. The plaintiff had therefore, in terms of s. 27 (1) (*a*), to show a consideration sufficient to support a simple contract. As to what is sufficient consideration, an express or implied agreement by the promisee to forbear from suing a third person is good consideration. So also is the simple act of forbearance even if it only arises *ex post facto*, provided that the promise to pay was given with the intention of gaining forbearance and the promisee acted on it and did in fact forbear.

In the present case there was no evidence to show that any promise of forbearance to sue Davis, express or implied as a consequence of the cheque, could be imputed to the plaintiff, nor of any intention by the plaintiff at any stage to forbear against Davis. The plaintiff in no way changed his position with regard to Davis in consequence of the second defendant's cheque. There was therefore no consideration to support it. The appeal was allowed and the action as against the second defendant dismissed.

Elcock and Another *v.* Thomson

Fire insurance—Valued policy—Partial loss—Assessment of amount recoverable—Proportion of agreed value equivalent to actual depreciation—Marine Insurance Act, 1906, *ss.* 27 (3) *and* 69 (3)

KING'S BENCH DIVISION

MORRIS J.

1949. July 1.
[1949] 2 K.B. 755.
[1949] 2 All E.R. 381.
65 T.L.R. 566.

This was an action on a Lloyd's policy of fire insurance which was issued to the Marquis of Devonshire whereby the underwriters agreed to pay or make good to the insured all loss or damage caused by perils insured against that might happen to the subject-matter of the insurance. The perils insured against were loss or damage by fire or lightning. The property covered by the policy was described by items in a schedule. These included the mansion house at Easthampstead Park in Berkshire, and many other houses and cottages and farm and other buildings in the vicinity, and opposite each item was set out the sum insured. Items 1–5

included the mansion house and adjacent buildings, and the total sum insured on these items was £106,850. At the end of the schedule were the words:

> The sum set opposite each item in this specification has been accepted by the underwriters and the insured as being the true value of the property insured and in the event of loss the said property will be assumed to be of such value and will be assessed accordingly.

The plaintiff Elcock, as agent for the plaintiff company, Farming Supplies (Berkshire) Ltd., was the purchaser from the Marquis of the freehold of the mansion house (together with other property belonging to the Marquis) under an agreement dated 5 March 1946, and in July 1946 the underwriters were informed of the plaintiffs' interest, and later in 1946 the underwriters agreed with the Marquis and the plaintiff Elcock that the policy should be extended to the date of the completion of the purchase.

The defendant was one of the underwriters who had subscribed the policy.

A week before the completion of the purchase the mansion house and adjacent buildings were partially destroyed by fire. The defendant admitted liability, and the only question for the Court was the quantification of the loss recoverable.

Evidence was given of the actual value of the property before and after the fire, and the cost of reinstatement and the present cost of constructing a mansion house similar to the one insured. On that evidence, the learned judge held that the fair value to the plaintiffs of the mansion house and adjacent buildings was £18,000 before and £12,600 after the fire, that the cost of reinstatement would be £40,252, and that the present cost of constructing a similar mansion would be £205,000.

The plaintiffs submitted the following as alternative methods of assessing the loss recoverable:

> (1) the difference between the agreed value of £106,850 and £12,600, the actual value after the fire, i.e. £94,250;
> (2) Such proportion of the agreed value as would be equivalent to the depreciation of £5400 in actual value, i.e. £32,055;
> (3) a sum representing the cost of reinstatement, i.e. £40,252.

The defendant submitted the following as alternative methods of assessing the loss recoverable:

> (1) the actual depreciation in value, i.e. £5400, the agreed valuation being ignored for the purpose of assessing a partial as distinguished from a total loss—the argument for this method of assessment is based on the analogy of the partial loss of a ship by marine perils and the application thereto of what he submitted to be the true interpretation of s. 69 (3) of the Marine Insurance Act, 1906, i.e. if the ship was damaged but not lost and if it was not repaired, recovery under the policy whether valued or unvalued would be limited to a sum representing the actual depreciation in value caused by the casualty;
> (2) such percentage of the agreed value as the cost of reinstatement would bear to the cost of constructing a similar mansion, i.e. approximately £21,000.

Dealing with the defendant's main argument based on an application of the principles embodied in the Marine Insurance Act, 1906, the learned judge said that it was first to be observed that the statutory provisions of that Act did not apply to the present case, but, if these provisions might be looked at in order to seek guidance on principle he was unable to accept the defendant's interpretation of the relevant provisions. He said that s. 69 (3) must be read in the light of

s. 27 (3) of the Act which provides that in the case of a valued policy the value fixed by the policy is, as between the insurer and the insured, conclusive of the insurable value of the subject to be insured, whether the loss be total or partial. S. 69 (3) provides that where the ship has not been repaired the insured is entitled to be indemnified for the reasonable depreciation arising from the unrepaired damage; but it does not fix the measure of such indemnity or lay it down that the parties' agreed valuation is to be ignored. In the judgment of the learned judge in the present case the insured was entitled to be indemnified in respect of the depreciation caused by the fire, but in quantifying such depreciation the agreed insurable value of the mansion house must be taken into account and the percentage of actual depreciation resulting from the fire should be applied to the agreed value as set out in the policy so as to arrive at the amount recoverable. On his findings the mansion house was worth £18,000 before the fire and £12,600 after the fire, and there was therefore a depreciation of £5400 in £18,000, i.e. a depreciation of three-tenths. The loss or damage recoverable by the plaintiff was therefore three-tenths of the agreed value of £106,850, namely, £32,055, and there would be judgment accordingly.

The learned judge said that there were two questions which he had posed during the argument, but which, on the facts as he found them, did not call for present determination and he expressed no final opinion with regard to them. It might be, he said, that if repairs had actually been done at a reasonable cost, the underwriters would be liable to pay such cost up to the extent of their liability under the policy. Further, it might be that if repairs were not done but could be done at a figure representing less than the underwriters' liability on the basis of depreciation, then underwriters could limit their liability to the lower figure.

The learned judge considered the plaintiffs' claim for interest under the provisions of the Law Reform (Miscellaneous Provisions) Act, 1934, and decided not to order the payment of interest on the amount recovered.

Hill *v.* William Hill (Park Lane) Ltd.

The Gaming Act, 1845, *s.* 18—*Suit to recover a sum of money alleged to be won upon a wager—Agreement to pay balance of a betting account in consideration of promise by bookmaker not to report to Tattersalls' Committee—Enforceability of agreement*

HOUSE OF LORDS

VISCOUNT JOWITT, L.C., VISCOUNT SIMON, LORD GREENE, LORD NORMAND, LORD OAKSEY, LORD MACDERMOTT AND LORD RADCLIFFE

1949. July 29.
[1949] A.C. 530.
[1949] 2 All E.R. 452.
65 T.L.R. 471.

By its decision in this case the House of Lords has made a notable alteration in the law as previously established relating to the right to recover by action money won upon a wager. In the case of *Hyams* v. *Stuart King* [1908] 2 K.B. 696, the Court of Appeal held that on the true construction of s. 18 of the Gaming Act, 1845, the prohibition imposed by the second limb of the section is limited to actions brought to enforce a contract of gaming or wagering, and that it does not apply so as to prohibit an action brought to enforce a non-wagering contract made for good consideration merely because it involves a promise to pay money which has been won upon a wager. Thus it was held that if

one who has lost money on a wager gives a fresh promise for a new and good consideration to pay the money so lost, such promise can be enforced by action. *Hyams* v. *Stuart King* is now overruled by a four-to-three majority in the House of Lords, which holds that if an action is one brought to recover money won upon a wager, it cannot be maintained, even though it is founded on a fresh promise to pay made for good consideration. The decision puts an end to the practice whereby a bookmaker has hitherto been able to enforce by action payment of his client's account by obtaining from him a promise to pay his betting losses by a post-dated cheque or by payment of agreed instalments in consideration of the bookmaker's promise not to report him to the Committee of Tattersalls if he duly implements the agreement. The decision will also deprive a principal of the right to recover from his agent money collected by the latter on contracts by way of gaming or wagering made on the principal's behalf, including not only betting transactions but money collected in respect of a claim on an insurance policy made without insurable interest and hitherto recoverable from the agent if the insurance, though not prohibited and therefore rendered illegal by the Life Assurance Act, was made null and void by the Gaming Act, 1845, as being in its essence a wager.

The Gaming Act, 1845, s. 18, enacts that:

> All contracts or agreements, whether by parole or in writing, by way of gaming or wagering, shall be null and void: and no suit shall be brought or maintained in any court of law and equity for recovering any sum of money or valuable thing alleged to be won upon any wager or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made.

The appellant Tom Hill sometime before July 1946 had had betting transactions with the respondents William Hill (Park Lane) Ltd., bookmakers, as a result of which he had lost in betting on horseraces the sum of £3635. 12*s*. 6*d*. He did not pay and following the common practice the case was reported by the respondents to the Committee of Tattersalls. The Committee heard evidence and adjudicated on the subject of the complaint on 22 July 1946. They decided that the said sum was due from the appellant and that he ought to pay the sum of £635. 12*s*. 6*d*. within fourteen days and the balance of £3000 by monthly instalments of £100. The result of that decision was that if the appellant failed to pay as directed, Tattersalls' Committee would at the request of the respondents report his failure to the stewards of the Jockey Club, and the appellant would be warned off Newmarket Heath and his name posted as a defaulter from whom no reputable bookmaker would be willing to accept bets. The appellant did not pay the sum of £635. 12*s*. 6*d*. within the fourteen days, but offered to give the respondents a cheque for that amount post-dated to 10 October 1946 and to pay the balance by monthly instalments of £100 commencing in November 1946. The respondents accepted that suggestion and said that if it was implemented they would 'refrain from enforcing the order' made by Tattersalls' Committee on 22 July 1946. The appellant thereupon sent the respondents his cheque for £635. 12*s*. 6*d*. post-dated to 10 October and promised to pay the balance by monthly instalments of £100 commencing in November.

It was common ground that as the result of these negotiations there was a concluded contract to the effect that if payment was made in accordance with its terms the respondents would not take any step which might result in the appellant being warned off Newmarket Heath or posted as a defaulter.

The post-dated cheque was dishonoured on presentation. On 19 October 1946 the appellant made a payment of £335. 12*s*. 6*d*. which the respondents accepted without prejudice to their rights under the contract. The appellant made no further payment, and on 21 February 1947 the respondents issued the writ in this action claiming payment of £700, being the balance of the £635. 12*s*. 6*d*. plus the four monthly instalments which had become due up to that date.

On the authority of *Hyams* v. *Stuart King* Hallett J. gave the respondents judgment for the amount claimed and his decision was affirmed by the Court of Appeal.

The House of Lords, by a majority (the Lord Chancellor, Lord Oaksey and Lord Radcliffe dissenting), held that though the contract sued on was not one by way of gaming and wagering and therefore not rendered null and void by the first limb of s. 18 of the Gaming Act, 1845, the action was nevertheless a suit brought for recovering a sum of money alleged to have been won upon a wager and therefore prohibited by the second limb of the section. As was pointed out by Lord Greene, it does not follow from the decision in this case that there can never be a case where a promise by a defaulting backer, given in consideration of a promise by the winner of the bet not to report the default to the Committee of Tattersalls, can be enforced by action. A promise in order to be obnoxious to the second branch of the section must be a promise to pay money alleged to be won on the bet. The question what the agreement really comes to is a question in each case for the tribunal of fact. In the present case the documents made it clear beyond controversy that the promise sued on was a promise to pay the unpaid balance of a betting account in accordance with the Committee's order, subject to certain modifications which were agreed between the parties.

The appeal was allowed and the respondents' claim dismissed.

Public Trustee *v.* Manchester Corporation and Others

Coal Act, 1938—*Distribution of compensation between owners of a holding—Freeholder and lessees and sub-lessees—Coal (Registration of Ownership) Act*, 1937—*Failure to register—Costs of application—National Coal Board to pay costs*

CHANCERY DIVISION

DANCKWERTS J.

1949. July 21.
[1949] 1 Ch. 737.
[1949] 2 All E.R. 498.
65 T.L.R. 514.

The questions raised by the originating summons in this case related to the proper distribution of the compensation awarded under the provisions of the Coal Act, 1938, in respect of a 'holding' as defined by the Coal (Registration of Ownership) Act, 1937, and the Coal Act, 1938. The coal in question lies under the surface of parts of the city of Manchester known as Collyhurst, Ancoats and Beswick, and the ascertained compensation in respect of the holding was approximately £14,000. This sum was held by the Public Trustee as trustee by virtue of an appointment made by the Coal Commission on 10 November 1942 in pursuance of powers conferred by para. 18 of Schedule III, Part IV of the Coal Act, 1938. The parties interested were Sir Oswald Mosley, as freeholder, the lord mayor, aldermen and citizens of the city of Manchester as lessees of some parts and

under-lessees of other parts of the holding and Mrs Septima Holcroft Shawe as a lessee or under-lessee of other parts of the holding. Mrs Shawe did not register particulars under the Coal (Registration of Ownership) Act, 1937, but the Manchester Corporation did register such particulars.

Reference may be made to the report of In re *Duke of Leeds' Will Trusts* (*J.I.A.* Vol. LXXIII, Legal Notes, p. [22]) for the relevant provisions of the Coal Act, 1938, which are set out in that report. The present case comes within sub-para. 21 (*b*) of Schedule III, Part IV of that Act which is in the following terms:

> Subject as aforesaid, the compensation for a holding and the income thereof shall be held and disposed of in such manner as to confer on the existing owners whose interests are comprised in the holding, their personal representatives or assigns, the like benefits, so far as may be, as they would have had from their respective interests in the premises in which the holding subsisted if those premises had not been acquired by the Commission.

The material leases were granted by the predecessors of Sir Oswald Mosley between 1811 and 1880 without any exception of minerals, and so the interest of Sir Oswald Mosley in the minerals in or under the surface of the property included in the leases passed to the lessees for the duration of the leasehold terms which were for 999 years or in some cases for 9999 years at comparatively small rents. When these leases were granted there was in existence a mining lease granted by Sir Oswald Mosley's predecessor on 21 October 1740 in respect of the Collyhurst, Ancoats and Beswick areas for a term of 200 years. This term of years was therefore due to expire in October 1940 so that on 1 January 1939 (the valuation date) the interest of the lessees in the minerals was a reversionary interest, but one which was very near the date of its falling into possession. Apart from the mining lease the legal position was that Sir Oswald Mosley could not work the minerals until the determination of the long term of years granted by the lease, because he or his predecessors had parted with the minerals for that period and the lessees or under-lessees could not work the minerals because to do so would amount to waste.

Counsel for Sir Oswald Mosley contended that the lessees had no interest in the minerals, and that all they had was a cause of action against Sir Oswald Mosley or his predecessors for damages which (as they could not work the minerals) must be trifling, or a right not to have the surface let down. Accordingly he contended that the value of the interests of the lessees and under-lessees was nothing, or so small a sum that the maxim *de minimis* should apply. This represented a practical view, which would have the advantage that the complications caused by the leases and under-leases could be wholly disregarded. The learned judge said that the argument seemed to him to ignore the legal realities of the case. An interest in land or minerals was, he said, none the less an interest because it was reversionary, and on 1 January 1939 the reversion was very near becoming an interest in possession. If the lessees or under-lessees could not work the minerals neither could Sir Oswald Mosley until the lessees' interest expired, unless the parties came to some arrangement. In his (the learned judge's) view it was plain that the lessees and under-lessees were 'existing owners whose interests are comprised in the holding' within the meaning of para. 21 (*b*) of Schedule III to the Act, and accordingly the compensation was to be held and disposed of so as to confer on them the like benefits in accordance with the provisions of that paragraph. It seemed to him

that the lessees and under-lessees were entitled to share in the parts of the compensation in the present case which were properly referable to the plots in which they had an interest. Giving the best consideration he could to the somewhat incalculable factors to be considered, the learned judge's view was that a fair division would be 50% to the freeholder and 50% to the lessee. It was admitted that on that footing the lessee's share must be reduced by further division when there was an under-lease of the property in question. As to that the learned judge said that on the information then before him he could not give a ruling as to the method of such division, inasmuch as the situation must depend on the facts of each particular case. The position therefore as between lessee and under-lessee must be reserved.

The learned judge then said that, having decided that question of principle, he had to decide whether lessees or under-lessees who had failed to register particulars in accordance with the Registration Act, 1937, or to make a claim, were debarred from sharing in the compensation paid. In his opinion it was sufficient if the particulars in respect of any holding were registered and a claim was made by some person who had a proprietary interest in the holding, and there was no obligation on other persons who might be interested to carry out these requirements. The object of the Acts was to secure that particulars should be sent in of every holding, and the Coal Commission were not to be troubled with the claims of various persons who might be interested in the sum of compensation awarded in respect of a holding when that sum had been duly ascertained. He was prepared therefore to make a declaration that lessees and under-lessees were entitled to share in the compensation whether or not they had made application in due time for registration of particulars of ownership.

On the question how the costs of the summons should be dealt with the learned judge referred to the relevant provisions of the Coal Act, 1938, and in particular to para. 22 (1) of Schedule III (as amended by the Coal Act, 1943, s. 13) and to s. 39 and said that although there were competing claims before the Court it was not a case of adverse litigation. The application was not caused by the adverse claims inasmuch as the position of the parties before the Act affected their interests was quite well known. The trouble was caused by the obscurity of certain provisions of the Coal Act and questions as to the proper construction of those provisions. It seemed to him therefore that this was a case in which the costs of the application ought to be paid by the National Coal Board.

In re Duke of Norfolk's Will Trusts

Public Trustee *v.* Inland Revenue Commissioners

Bequest of annuity for joint lives and life of survivor—Estate Duty on death of first beneficiary to die—Whether to be charged under s. 1 *or under s.* 2 (1) (*b*) *of the Finance Act*, 1894

CHANCERY DIVISION
WYNN-PARRY J.
1949. Oct. 19.
[1950] 1 Ch. 25.
[1949] 2 All E.R. 701.
65 T.L.R. 653.

By his will and codicils the Duke of Norfolk provided a fund out of the income of which certain annuities were to be paid and bequeathed to his trustees one such annuity for £2000 per annum during the joint lives of his brother Viscount Fitzalan and his nephew the present Viscount and the lifetime of the survivor of them, directing his trustees to hold

the annuity upon protective trusts for Viscount Fitzalan during his life and after his death upon protective trusts for the present Viscount.

Viscount Fitzalan died on 18 May 1947 leaving the present Viscount him surviving, and this summons raised the question whether estate duty became payable under s. 1 or under s. 2 (1) (*b*) of the Finance Act, 1894.

Under s. 1 estate duty is charged upon 'the principal value of all property real or personal settled or not settled which passes on the death' while s. 2 provides that property passing on the death shall be deemed to include various kinds of property which in fact do not pass on the death, among which under sub-s. 1 (*b*) is 'property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest'.

If s. 1 is the appropriate charging section, estate duty would be payable on the market value of the annuity for the remainder of the life of the present Viscount as property passing on the death; while if s. 2 (1) (*b*) applies the estate duty would be payable on the capital value of that proportion of the fund set aside which would be required to produce an income of £2000 per annum as property deemed to pass on the death.

For several years the Estate Duty Office had in practice claimed estate duty in such cases under s. 1, and this was a test case to determine whether the office was entitled to depart from that practice and claim estate duty under s. 2 if it should think fit to do so.

It was conceded on behalf of the Crown that on the true construction of the will and codicils there was created only one continuing annuity, that that annuity was property within the meaning of s. 1 of the Act, and that estate duty could be claimed under that section, but it was argued on behalf of the Commissioners that there was an alternative course open to them, that they need not levy duty under s. 1 but might levy duty under s. 2 (1) (*b*) as on the cesser of an interest.

Wynn-Parry J. said that so far as the Court of first instance was concerned the matter was concluded by the decision of Russell J., who in In re *Cassel* [1927] 2 Ch. 275 said he was driven by the decision of the House of Lords in *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 198 to the reluctant conclusion that, where a life interest in A ceases by A's death with the result that an interest in B which during A's life was reversionary becomes an interest in possession, the case is one which falls directly under s. 1. What passes is the right to enjoy the benefit of the annual sum. In Cowley's case it was made plain that ss. 1 and 2 are mutually exclusive, and that s. 2 is to be invoked only if s. 1 by itself cannot be invoked. In the present case there would be a declaration that on the death of the late Viscount Fitzalan estate duty became payable under s. 1 of the Act, and, therefore, only on the value of the continuing annuity for the life of his son the present Viscount.

Legal Notes

In re Simson *deceased*

Simson *v.* National Provincial Bank Ltd. and Others

Inheritance (Family Provision) Act, 1938—Order of court making provision—Division of burden between legacies and residue—Duty of executors where application is to be expected—Duty of executors to file evidence

CHANCERY DIVISION
VAISEY J.
1949. Nov. 1.
[1950] 1 Ch. 38.
[1949] 2 All E.R. 826.
65 T.L.R. 721.

This was an application by the widow asking that such reasonable provision as the Court might think fit should be made for her maintenance out of the net estate of her husband J. T. Simson who died on 24 April 1948. The value of the estate was about £14,000 and by his will the husband had made bequests valued after payment of legacy duty, approximately as follows:

To his housekeeper	£6100
To his wife	£2600
To his nephews	£1000
To his children	The residue (about £3000)

The husband and wife had been separated, and under the financial arrangements for the separation, the wife had received from the husband during his life an income of about £200 a year.

Taking into consideration various circumstances in the case and assuming a 4% yield on the bequest to the widow, Vaisey J. reached the conclusion that her income from the estate should be made up by £96 a year to £200 a year during her widowhood, and he ordered that £55 a year should be charged on the bequest to the housekeeper and £32 a year on the bequest to the children, but he did not make any order with regard to the remaining £9 a year which he would have charged on the legacies to the nephews because before the Master the widow had disclaimed any rights against their legacies.

The case is of some interest in view of various observations made by Vaisey J. on certain effects which the Act may have on the duties of executors, as shown by the following extracts from his judgment:

I have to decide out of what part of the estate the provision should be made, because it is an illusion all too prevalent that provisions ordered under the Act are normally, or primarily, made out of residue. That is clearly a mistake. There may be cases for instance, in which a testator has left a very large pecuniary legacy to a perfect stranger and a small residue to members of his family to whom he has some moral obligation.

I wish to make it clear that in these cases it is the paramount duty of the executor to avoid embarrassing the Court and to think carefully before allowing any part at all of the estate to be paid out to any beneficiary while any application under the Act is either pending or impending. If the legacies to the nephews have been paid, as I understand they have, the matter comes before me in a form which adds further embarrassment to an already embarrassing jurisdiction. I wish it to be distinctly understood that if an application under the Inheritance (Family Provision) Act is either pending or impending (that is, during the six months after the date on which representation is first taken out where there is a possibility of an application being made) the executor distributes the estate at his risk. Of course, duties and debts must be

paid—there is no question about that—but no distribution to beneficiaries should be made while there is any possibility or expectation that an application under the Act will be made.

In my judgment, it is the duty of the executors to file an informative affidavit telling the Court what is known to them and what it is necessary for the Court to know in order to deal properly with the matter. Although I do not want to lay down a definite rule that in every case the executor must always file an affidavit. I cannot help feeling that it should be the normal thing that the executor should file an affidavit and should put the Court in possession of the facts so far as known to him.

Capital & National Trust Ltd. *v.* Golder

Income Tax—Investment company—Repayment of tax in respect of expenses of management—Expenses incurred in changing investments

COURT OF APPEAL

TUCKER, SINGLETON AND JENKINS L.JJ.

1949. Nov. 16.
[1949] 2 All E.R. 956.

Where a company whose business consists mainly of making investments, and the principal part of whose income is derived therefrom, claims and proves to the satisfaction of the Special Commissioners that for any year of assessment it has suffered income tax by deduction, it has the right under s. 33 (1) of the Income Tax Act, 1918, to repayment of so much of the tax paid by it as is equal to the amount of the tax on any sums disbursed as expenses of management (including commissions) for that year.

The company in the present case is an investment company and has all its income taxed at the source. It claimed repayment of tax in respect of expenses incurred by the company in changing its investments in the course of conducting the familiar process of selling investments, the quotations of which had gone up in the market, and either re-purchasing them at lower prices, or buying other stocks with the view to capital appreciation in the future.

The question for the Court was whether as a matter of law the expression 'expenses of management' covers expenses of that nature, i.e. the cost of stamps on transfers and contract notes and brokers' remuneration. Croom-Johnson J. in the Court below held that giving the expression its ordinary meaning these were not expenses of management. The section referred to 'commissions' but in his opinion that reference was not apt to cover a stock-broker's remuneration.

The Court of Appeal affirmed the judgement of Croom-Johnson J. with which Tucker L.J. said he was in complete agreement. He added that counsel for the company had argued that the expenses in question were expenses of management because they were expenses incurred by the management in carrying out the business of the company. That seemed to him a totally different thing. The section related to expenses *of* management, not expenses incurred *by* the management.

Singleton L.J. and Jenkins L.J. concurred.

Attorney General *v.* London Stadiums Ltd.

Stamp duty—Amalgamation of Companies—Transfer of undertaking—Issue of shares in transferee company—Exemption from duty—Finance Act, 1927, s. 55

COURT OF APPEAL
TUCKER, SINGLETON AND JENKINS, L.JJ.
1949. Nov. 17.
[1949] 2 All E.R. 1007.
66 T.L.R. 13.

In this case the Crown claimed capital duty on the increase of the company's share capital and stamp duty on the transfer to the company of the undertakings of three existing companies in consideration of the issue to those companies of its own shares. The question for the Court was whether the company was entitled to exemption from duty under the provisions of s. 55 of the Finance Act, 1927, which provides that where a company (called 'the transferee company') has increased its capital with a view to the acquisition of the undertaking of an existing company, the transferee company is entitled to exemption from stamp duty on the increase and on the instrument of transfer of the undertaking, but it is provided by sub-s. (6) that

(*b*) If where the shares of the transferee company have been issued to the existing company in consideration of the acquisition, the existing company within a period of two years from the date, as the case may be, of the registration or incorporation, or of the authority for the increase of the capital, of the transferee company ceases, otherwise than in consequence of reconstruction, amalgamation or liquidation, to be the beneficial owner of the shares so issued to it . . . the exemption shall be deemed not to have been allowed and an amount equal to the duty remitted shall become payable forthwith and shall be recoverable from the transferee company.

On 5 June 1946 an agreement was entered into whereby the defendant company, London Stadiums Ltd., agreed to acquire the undertakings of Wandsworth Stadium Ltd., Park Royal Stadium Ltd., and Charlton Stadium (1936) Ltd. ('the vendor companies'), in return for shares in London Stadiums Ltd. which enlarged its capital from £100 to £750,000 so that it could issue enough shares to pay for the undertakings that it was acquiring and the vendor companies then became shareholders in it. The defendant company issued to the three vendor companies respectively 2,740,000 shares, 2,250,000 shares and 2,500,000 shares of two shillings each which on 4 November 1946 were subdivided into one-shilling shares. On 5 November 1946 the vendor companies sold a substantial portion of the shares which had been so issued to them to a firm of stockbrokers with a view to a market being created and the public coming in as shareholders. The question was whether the vendor companies had thereby ceased to be the beneficial owners of the shares within the meaning of s. 55 (6) (*b*).

Counsel for the company contended that as the vendor companies did not sell all the shares which they had acquired they had not ceased to be the beneficial owners of the shares so issued to them. The section did not therefore catch the transferee company and it still remained exempt from stamp duty. Lord Goddard L.C.J. in the Court below had rejected that argument. He said that he found it impossible to say that where a person parts with some of the shares that have been issued to him he remains the beneficial owner of the shares so issued. The shares so issued are (say) x. If he has sold, say, y of the shares, he is not the beneficial owner of x. He is the beneficial owner of x minus y. It seemed to him, the learned judge, that on the clear words of the statute the Crown was right and he accordingly gave judgment for them.

On appeal the Court of Appeal unanimously affirmed the judgment of Lord Goddard.

LEGAL NOTES

By EVAN JAMES MACGILLIVRAY, B.A., LL.B.

One of His Majesty's Counsel

AND

DAVID HOUSEMAN, A.I.A. (*Solicitor*)

Trust and Claims Secretary of the London Life Association Ltd.

Commonwealth of Australia and others *v.* Bank of New South Wales and others

Australian Commonwealth—Constitution—Australian Constitution Act, 1900—*Inter-state freedom of trade guaranteed—Banking Act*, 1947—*State Monopoly of banking declared invalid*

PRIVY COUNCIL
LORDS PORTER, SIMONDS, NORMAND, MORTON OF HENRYTON AND MACDERMOTT
1949. October 26.
[1949] 2 All E.R. 755.

In these consolidated actions the plaintiffs claimed a declaration that certain sections of the Commonwealth of Australia Banking Act, 1947, are invalid in that they contravene s. 92 of the Commonwealth of Australia Constitution Act, 1900. The plaintiffs were eight private banks incorporated in Australia and three private banks incorporated in England, all carrying on the business of banking in Australia, to which there were joined as co-plaintiffs the States of Victoria, South Australia and Western Australia. The defendants were the Commonwealth of Australia, the Treasurer of the Commonwealth and the Commonwealth Bank of Australia and its governor. By orders made by the High Court of Australia in each action it was declared that the provisions of 24 sections of the Banking Act, 1947, were invalid in that they contravened s. 92 of the Constitution Act.

The defendants obtained special leave to appeal to His Majesty in Council against the orders in so far as they relate to s. 46 of the Act, such leave being granted on the footing that at the hearing of the appeals the right should be reserved to the respondents to raise the preliminary plea that under s. 74 of the Constitution Act the appeals did not lie except upon a certificate from the High Court and that no such certificate had been sought or given.

When the appeals came on for hearing their Lordships sustained the preliminary plea and advised His Majesty that on that ground the appeals should be dismissed. The appeals had, however, been fully argued on their merits, and their Lordships thought it appropriate that they should express their opinion on the question whether s. 46 of the Act of 1947 offends against s. 92 of the Constitution Act and is for that reason invalid.

The objects of the Banking Act, 1947, are set out in s. 3 of the Act and are:

(*a*) the expansion of the banking business of the Commonwealth Bank as a publicly owned bank conducted in the interests of the people of Australia and not for private profit,

(*b*) the taking over by the Commonwealth Bank of the banking business in Australia of private banks, and the acquisition on just terms of the property used in that business, and

(*c*) the prohibition of the carrying on of banking business in Australia by private banks.

S. 46 of the Act is entitled 'Prohibition of the carrying on of banking business by private banks in Australia' and provides *inter alia* that the Treasurer may by notice published in the *Gazette* and given in writing to a private bank require that bank to cease, upon a date specified in the notice, carrying on banking business in Australia, and upon and after the date so specified the private bank shall not carry on banking business in Australia. A penalty of £10,000 is imposed for each day on which a bank carries on business in contravention of the order.

S. 92 of the Constitution Act provides that trade, commerce and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.

The questions for the Court were—to determine what is included, and in particular whether the business of banking is included, in the expression 'trade, commerce and intercourse', and if so what is the freedom guaranteed to the business of banking by the Constitution Act and whether that freedom is infringed by the Banking Act, 1947.

Their Lordships had no difficulty in answering the first question in the affirmative. The business of banking consisting of the creation and transfer of credit, the making of loans, the purchase and disposal of investments and other kindred activities, is part of the trade, commerce and intercourse of a modern society. If that be so then s. 92 of the Constitution Act guarantees the freedom of all inter-State banking transactions. S. 46 of the Banking Act, 1947, purports to authorize the Treasurer of the Commonwealth to prohibit the carrying on of banking business in Australia by any private bank. It does not differentiate between the intra-State and the inter-State transactions of a private bank, but if by a total prohibition it prohibits *inter alia* inter-State transactions it is irrelevant that it prohibits also intra-State transactions. It is also irrelevant that the Commonwealth Bank is directed to take over the business of the private banks and so provide the public with the same banking facilities. The direct and immediate result of the section is to restrict the freedom of inter-State banking business, and it is therefore unconstitutional and invalid.

Inland Revenue Commissioners *v.* Duncanson

Surtax—Total income—Gift by will of annuity of stated amount free of income tax—Grossing annuity by addition of tax at standard rate—Deduction of tax at standard rate on payment to annuitant—Repayment to annuitant of tax deducted in excess of liability to tax—Paid over to trustees—Exclusion from computation of total income

KING'S BENCH DIVISION

CROOM-JOHNSON J.

1949. October 27.
[1949] 2 All E.R. 846.

This was a case stated by the Special Commissioners of Income Tax for the determination by the Court of the question whether, in the computation of her total income for the purposes of surtax, a sum recovered by the taxpayer from the Revenue by way of repayment of income tax, on the ground that more tax had been deducted at source from her annuity than she was liable to pay, fell to be included in or excluded from the computation.

Under the will of her husband the taxpayer was entitled to an annuity of £2000 per annum expressed to be payable 'free of income tax and surtax'. The general income from the trust capital was received by the trustees after deduction at the source of income tax at the standard rate. The annuity was paid out of the income so taxed. The trustees grossed the annuity at such sum as after deduction of tax at the standard rate would leave the stated amount and under the Income Tax Act, 1918, All Schedules Rules, r. 19, they deducted and retained from the notional gross sum a sum representing the amount of tax at the standard rate, thus making a net payment to the annuitant of £2000. The annuitant, whose liability to tax was less than the amount so deducted, claimed under the Income Tax Act, 1918, s. 27 (1), a return from the Revenue of the tax over-paid, and her claim was allowed in the sum of £68. 17*s.* 6*d.* which she handed over to the trustees, pursuant to the rule in *In re Pettit* [1922] 2 Ch. 765.

The Commissioners held that the sum received by the annuitant and paid over by her to the trustees did not form part of the gift of the annuity and did not therefore fall to be included in her total income for surtax purposes. The Crown appealed and Croom-Johnson J. affirmed the decision of the Commissioners. The deduction of tax by the trustees under r. 19 at the standard rate was based on 'a provisional calculation', but when on her claim for repayment of tax it turned out that the annuitant was not ultimately liable to pay that amount of tax but something less the tax fell to be adjusted to the right amount. The annuitant had received the stated amount of her annuity without further liability to tax, and on the authorities she was bound to hand over to the trustees such proportion of the amount of the tax repaid as was attributable to the annuity. It was not money to which she was beneficially entitled. She had received it as a bare trustee for the trustees. In these circumstances it was not correct to say that it was her income at all.

It should be added that in the present appeal it had been agreed between the parties to consider only the net figure of £68. 17*s.* 6*d.* without prejudice to the question of the amount to be deducted in the computation of the surtax assessment which might no doubt well be thought to be £68. 17*s.* 6*d.* grossed at the standard rate.

Whiteside *v.* Whiteside and others

Application for rectification of deed—No relief required as between the parties—Rectification sought to reduce surtax liability

COURT OF APPEAL

EVERSHED M.R. AND COHEN AND ASQUITH L.JJ.

1949. November 8.
[1950] 1 Ch. 65.
[1949] 2 All E.R. 913.

After certain divorce proceedings the solicitor for the husband on the one hand and the solicitor for the wife on the other entered into negotiation on the subject of maintenance for the wife, and finally agreed (subject to confirmation by the wife who was abroad) that she should during her life receive £1000 a year free of income tax up to 7*s.* 6*d.* in the £.

The wife's solicitor prepared a draft deed of covenant by which the husband would agree to pay 'such a sum after deduction of income tax at the rate of not more than 7*s.* 6*d.* in the £ as shall represent £1000 per annum'. The husband's solicitor, however, altered the wording to read '£1000 per annum free of

British income tax up to but not exceeding 7*s.* 6*d.* in the £', and the deed was executed in that form.

It is beyond doubt that such a form of obligation in a deed contravenes the provisions of rule 23 (2) of the All Schedules Rules of the Income Tax Act, 1918, disentitles the covenantee from receiving the named sum free of obligation in respect of income tax, and imposes on the covenantor the duty to deduct income tax on payment.

For some time, however, the strict legal effect of the deed was not fully appreciated, and the husband paid to the wife the amount which it had been intended that she should have. He was, moreover, allowed by the Inland Revenue authorities to charge the appropriate gross equivalent amount against his income before assessment to surtax. In due course, however, the error was detected by the Inland Revenue authorities, and the husband thereupon issued the writ in this action against his wife and the trustees claiming rectification of the deed so that it would correspond with the language of the draft. After the writ, but before the matter came up for hearing, the parties executed a supplemental deed rectifying the error so that as between themselves the deed thereafter took effect as an obligation to pay such a sum as after deduction of income tax would leave £1000 per annum.

In the course of his judgment Evershed M.R. said that a case in which the equitable relief of rectification is sought must be a case in which one party is asserting a right against another and calling on a court of equity to say that it is inequitable and unconscionable for the other party to stand on the terms of the instrument as executed. Such a condition was here wholly absent, for there never had been an issue between the parties, and it had not been necessary for the husband to call on the wife to have the document reformed. The wife took virtually no part in the proceedings in the Court below, and on the appeal she had not thought it necessary to attend. No order which the Court could make in the action could affect her legal position in the smallest degree, and neither she nor the trustees were in any way interested in the point raised.

The learned judge added that, on the facts, the case inflicted some hardship on the husband, for if he had stood on his strict rights under the deed the wife could no doubt have successfully sued him for rectification, thus giving him an advantage which as things had turned out he did not obtain.

Evershed M.R. distinguished the present case from *Jervis* v. *Howle and Talke Colliery Company Limited* [1936] 3 All E.R. 193 where parties to a mining lease had bargained that one should pay to the other a royalty expressed as '3*d.* per ton on all coal...to be paid free of tax'. In that case Clauson J. found as a fact that the intention of the parties was that the 3*d.* should be a net sum. The matter came before the Court because the defendant company on deriving title under the original lessee claimed that it was entitled to deduct income tax. There was therefore a substantial issue between parties and the Court exercised its equitable jurisdiction to reform.

Concurring in dismissing the appeal Cohen L.J. observed that if the husband had refused to execute the supplementary deed and the wife had commenced proceedings for rectification against him supporting her claim by the evidence in the action, her claim would have succeeded.

Asquith L.J. agreed that the appeal should be dismissed.

In re Isle of Thanet Electric Supply Company, Ltd.

Company—Preference and Ordinary Stockholders—Liquidation—Surplus Assets —Distribution of among Stockholders

COURT OF APPEAL
EVERSHED M.R., ASQUITH L.J. AND WYNN-PARRY J.
1949. November 18.
[1949] 2 All E.R. 1060.

This was an appeal from the judgment of Roxburgh J. on an originating summons which raised the question how on the liquidation of a company its surplus assets should be distributed as between preference stockholders and ordinary stockholders.

At the date of the liquidation the issued capital of the company consisted of £282,000 of preference stock and £150,000 of ordinary stock. Article 3 of the articles of association defined the rights of the preference stockholders as the right to a fixed cumulative preferential dividend at the rate of 6% per annum in priority to the ordinary stockholders, the right to participate *pari passu* with the ordinary stockholders in the surplus of the distributed profits remaining after providing for the preferential dividend and a dividend at 6% on the ordinary stock, and the right in a winding-up of the company to repayment of capital and arrears (if any) of preferential dividend in priority to the ordinary stockholders.

In view of the imminent transfer of its electricity undertaking (then its only activity) under the Margate, Broadstairs and District Electricity Act, 1937, the company went into voluntary liquidation on 16 July 1946.

Prior to the liquidation all arrears of preference dividend had been paid off. The capital on the preference stock and the ordinary stock had been repaid to the respective holders, and there remained a substantial balance, the distribution of which was the subject matter of this summons.

Roxburgh J. considered himself bound by authority to hold that, in questions between preference shareholders and ordinary shareholders as to the right of the preference shareholders to share in surplus assets, the onus of showing that the preference shareholders are not entitled to share in these surplus assets lies on the ordinary shareholders. That was the effect of the decision of the Court of Appeal in *In re Metcalfe and Sons Ltd.* [1933] Ch. 142; but since the matter was before Roxburgh J. the position was materially altered by the decision of the House of Lords in *Scottish Insurance Corp. Ltd.* v. *Wilsons and Clyde Coal Co. Ltd.* [1949] A.C. 462, and the effect of the authorities now in force is to establish two principles: first, that in construing an article which deals with rights to share in profits, such as dividend rights, and rights to share in the company's property in a liquidation, the same principle is applicable to those rights; and secondly, that that principle is that when the article sets out the rights attached to a class of shares to participate in profits while the company is a going concern or to share in the property of the company in liquidation, *prima facie* the rights set out are exhaustive. Applying these principles to the present case the Court held that the preference stockholders were not entitled to any share in the surplus assets.

Wynn-Parry J., who delivered the leading judgment, summed up his conclusions in these words:

> With these considerations in mind I turn back to art. 3 of the articles of association in this case. As regards the rights to profits the whole of the distributable profits are expressly dealt with. They are to be applied, first, in paying to the holders of the preference stock 'a fixed cumulative preferential dividend at the rate of 6% per annum

on the amounts for the time being paid up or credited as paid up thereon respectively in priority to the ordinary shares'; secondly, in paying a non-cumulative dividend at the rate of 6 % per annum, calculated on the same basis, to the holders of the ordinary shares; and the balance is then distributable between the two classes of shares *pari passu*. Nothing could be more plainly exhaustive than that language. Then as regards the rights in a winding-up the holders of the preference shares are stated to be entitled to certain payments in priority to the ordinary shares. Those payments are, first, repayment of the capital paid up on the preference stock, and, second, any arrears of dividend whether earned or not. The question then is whether there is anything to suggest that the language regarding the rights of the holders of the preference stock is not exhaustive. I can find nothing. The onus now, as I have said, is, in my view, on the holders of the preference stock to show that the provision is not exhaustive, and, in my judgment, they have failed to discharge that onus.

In re Itter, deceased, Dedman and others *v.* Godfrey and another

Codicil—Alteration after execution—Alterations not attested—Question whether the words or effect of the codicil before such alterations were made were 'apparent'—Wills Act, 1837, s. 21—Discoverable only by infra-red photography—Question whether the testatrix intended to revoke the original bequests only if the new bequests made by the alterations were effectual

PROBATE, DIVORCE AND ADMIRALTY DIVISION

ORMEROD J.

1949. December 2.
[1950] 1 All E.R. 68.

In this case the plaintiffs claimed as legatees under a codicil of 22 February 1944 to the will dated 5 November 1942 of Ivy Eveline Itter, deceased, and asked that the letters of administration with the said will and codicil annexed which had been granted to the defendants should be revoked and a new grant made including the original writing in the codicil which had after the execution thereof been pasted over with slips of paper. The defendants, on the other hand, claimed that by pasting slips of paper over the amounts of certain legacies given by the codicil the testatrix had revoked those legacies and that they should be excluded from the grant.

It was agreed for both parties that both the will and the codicil in its original form were properly executed. At some time after she had executed the codicil the testatrix had pasted slips of paper over the amounts of six of the legacies given by the codicil, and in each case a sum of money had been written on the slip and each slip had been signed by the testatrix, but the signatures on the slips were not attested as required by the Wills Act, 1837, s. 9 and s. 21.

S. 21 is in these terms:

> And be it further enacted that no Obliteration, Interlineation or other Alteration made in any Will after the Execution thereof shall be valid or have any Effect, except so far as the Words or Effect of the Will before such Alteration shall not be apparent, unless such Alteration shall be executed in like Manner as hereinbefore is required for the Execution of the Will; but the Will with such Alteration as Part thereof shall be deemed to be duly executed if the Signature of the Testator and the Subscription of the Witnesses be made in the Margin or on some other Part of the Will opposite or near to such Alteration, or at the Foot or End of or opposite to a Memorandum referring to such Alteration, and written at the End or some other Part of the Will.

Evidence was given by a handwriting expert who said that he was only able to find out what was under the slips by taking photographs of the document by means of infra-red rays, and he produced to the court a photograph so

taken of the parts of the codicil which were under the slips of paper. He could not, he said, see what was on the codicil as originally executed by looking at the document itself without removing the slips.

No one was able to give the Court any information about the intention of the testatrix with regard to the alterations.

The plaintiffs contended

(*a*) that the figures written on the codicil as originally executed were 'apparent' within the meaning of the section and that the alterations were therefore of no effect,

(*b*) that even if they were not 'apparent' within the meaning of the section the proper inference was that the intention of the testatrix was to revoke the parts of the document covered by the slips only in the event of her having effectively substituted other figures to take their place.

The learned judge was unable to accept the first contention. He said that if the words of the document could be read by looking at the document itself they would be 'apparent' within the meaning of the section, however elaborate might be the devices used to assist the eye and however skilled the eye which was being used; but if they could only be read by creating a new document, e.g. by producing a photograph of the original writing on the codicil as in this case, then he could not find that the words were 'apparent'. They might be discoverable, as in this case they had proved to be, but that was not the word used in the section.

With regard to the alternative contention the learned judge was of opinion that the plaintiffs were right. From the fact that the amounts of the legacies only were obliterated by the slips and not the whole of the bequests, he thought that the inference should be drawn that it was the intention of the testatrix to revoke the part of the bequests covered by the slips only if new bequests were effectually substituted. If that were so it followed that the slips might be taken off the document if necessary or any other means used to ascertain the writing which was on the document before the slips were pasted on to it. There must therefore be judgment for the plaintiffs, and he would pronounce for the will and codicil in solemn form, in the form in which the words were originally in the codicil. The grant of letters of administration would be revoked and a fresh grant made in accordance with that pronouncement.

In re **Wallach, deceased, Weinschenk** *v.* **Treasury Solicitor**

Domicil—Married woman—Husband's domicil acquired on marriage—Death of husband domiciled in England—Subsequent death of wife intestate—Whether she had reverted to her foreign domicil before marriage—Claim to her estate by relative entitled to succession by foreign law—Claim by Treasury Solicitor entitled to succession by English law—Administration of Estates Act, 1925, *s.* 46 (1)

PROBATE, DIVORCE AND ADMIRALTY DIVISION

HODSON J.

1949. December 9.
[1950] 1 All E.R. 199.

In this action, which concerned the estate of Mrs Lucie Wallach who died intestate in England on 21 July 1943, the plaintiff claimed to be the lawful second cousin of the deceased and as such to be entitled to share in her estate in accordance with the law of France or alternatively of Germany, on the footing that the deceased was domiciled in one of those countries at the time of her death. For the Treasury Solicitor it was claimed that the deceased died

domiciled in England without leaving anyone entitled by virtue of the Administration of Estates Act, 1925, s. 46 (1) to share in her estate, so that he was the only person entitled to the succession.

In 1906 the deceased, who was born in France, married Eugene Wallach, whose domicil of origin was German and who at the time of the marriage was carrying on business in France. In 1939 the husband came to England where he lived with his wife until his death in 1943, which occurred shortly before the death of his wife. The learned judge held on the evidence that the husband acquired an English domicil and died domiciled in England, and on that finding it was not contested that up to the date of his death the deceased's domicil followed that of her husband. The contention of the plaintiff was that the domicil which a woman acquires by marriage persists only during coverture, and that on the death of her husband she reverts to her domicil of origin. That was a proposition which was not supported by any authority, but it was argued that because a wife's domicil *stanto matrimonio* is dependent on that of her husband there is no reason why she should not shed her domicil with her coverture, and there was, it was said, no binding authority to the contrary. The learned judge was unable to accept that view. He thought that the authorities, and in particular the speeches delivered in the House of Lords in *Udny* v. *Udny* (1869) L.R. 1 Sc. and D. 441, all pointed against the validity of the proposition propounded on behalf of the plaintiff. The domicil which a woman acquires on marriage is a domicil of choice, and like any other domicil of choice it is lost only by abandonment.

Having arrived at that conclusion the learned judge said that it was unnecessary to consider what the domicil of the deceased was before marriage. The Treasury Solicitor was entitled to succeed to the estate of the deceased and the plaintiff's claim failed.

In re Earl Fitzwilliam's Agreement, Peacock and others *v.* Commissioners of Inland Revenue

*Estate duty—Funds transferred by deceased to trustees of a settlement—Ultimate beneficiaries consisting of a class which included a son of the deceased—Transfer in consideration of an annuity payable to the deceased for his life—*Bona fide *sale for full value—Claim for estate duty on the funds transferred—Finance Act*, 1894, *s.* 2 (1) (*c*)—*Finance Act*, 1940, *s.* 44 (1)

CHANCERY DIVISION

DANCKWERTS J.

1949. December 21.
[1950] 1 All E.R. 191.
66 T.L.R. 174.

This was an originating summons taken out for the determination of the validity of a claim by the Commissioners of Inland Revenue for estate duty on the occasion of the death of the seventh Earl Fitzwilliam on 15 February 1943 in respect of funds which in 1934 he transferred to the trustees of a settlement dated 19 April 1933 made on the occasion of the marriage of his son, Lord Milton. The Earl was then about 62 years of age, and he wished to supplement his income by the purchase of an annuity. It was suggested that he might purchase an annuity from the trustees of the said settlement, and in pursuance of that suggestion the trustees sold to Earl Fitzwilliam an annuity of £50,000 per annum for his life for the sum of £375,000, the purchase price being satisfied by the Earl transferring to the trustees certain shares, debentures and insurance policies to which he was then absolutely entitled. It was not suggested that

the transaction was other than a *bona fide* sale for full value in money or money's worth. The rate of annuity had been recommended as appropriate by two actuaries. The trustees duly paid the annuity to the seventh Earl down to the date of his death.

At the date of the Earl's death the funds transferred by him to the trustees of the settlement were of the approximate value of £548,000. Estate duty was claimed under s. 2 (1) (*c*) of the Finance Act, 1894, incorporating s. 38 of the Customs and Inland Revenue Act, 1881, as amended by s. 11 (1) of the Customs and Inland Revenue Act, 1889, on the ground that the Finance Act, 1940, s. 44 (1) prevented the transaction from being treated as a sale within the Finance Act, 1894, s. 3 (1).

The transaction was a sale for full value and, having regard to s. 3, duty would not have been claimed but for the provisions of the Finance Act, 1940, s. 44 (1), which is as follows:

> Where a person dying after the commencement of this Act has made a disposition of property in favour of a relative of his, the creation or disposition in favour of the deceased of an annuity or other interest limited to cease on the death of the deceased or of any other person shall not be treated for the purposes of s. 3 or s. 7 (1) of the Finance Act, 1894 as consideration for the disposition made by the deceased.

The disposition in the present case was in favour of the trustees of the special settlement but, although it was admitted that, Lord Milton being one of the beneficiaries, the disposition was in favour of a relative of the seventh Earl, the trustees nevertheless contended that the transaction did not fall within the Finance Act, 1894, s. 2 (1) (*c*) and that neither s. 3 of that Act nor s. 44 of the Finance Act, 1940 were material.

The question for the Court was whether transactions for value are included under the Finance Act, 1894, s. 2 (1) (*c*). There is no reason to attribute to the provisions of the Customs and Inland Revenue Acts, 1881 and 1889, as originally enacted any intention to include transactions for value, but the contention of the Commissioners was that by reason of the removal by s. 2 (1) (*c*) of the Finance Act, 1894, of the words 'voluntary', 'voluntarily' and 'volunteer' from the original provisions, transactions for value including sales for full monetary consideration are now included.

The learned judge came to the conclusion that estate duty was not leviable on the funds in question. It must not be forgotten, he said, that the provisions he had to construe are contained in a taxing statute. The rules to be applied to such a Statute are well known and he quoted the words of Rowlatt J.:

> In a taxing Act one has to look merely at what is clearly said. There is no room for presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used—*Cape Brandy Syndicate* v. *Inland Revenue Commissioners* [1921] 1 K.B. 67 at p. 71.

In the present case the one thing which was clear was that the statutory provisions which are said to impose liability are obscure. He, the learned judge, was asked to give a construction to these provisions which was beyond anything decided by any of the courts which have had to deal with them. He did not think it would be right for him to attribute to the draftsman of the Finance Act, 1894, an intention to impose on the Customs and Inland Revenue Acts, 1881 and 1889, the far-reaching change for which the Commissioners contended and he certainly could not find in those statutory provisions words clearly imposing a tax in the circumstances of the present case.

Note

Appeal:

In re Duke of Norfolk's Will Trusts, Public Trustee v. *Inland Revenue Commissioners*, [1950] 1 All E.R. 664. On 6 March 1950 the Court of Appeal (Evershed M.R., Somervell and Jenkins L.JJ.) affirmed the decision of Wynn-Parry J. reported in *J.I.A.* Vol. LXXVI, p. [10].

RECENT STATUTES

ATTENTION IS CALLED TO CHANGES MADE BY THE FOLLOWING STATUTES, OF WHICH SOME EXTRACTS ARE GIVEN:

Married Women (Restraint upon Anticipation) Act, 1949

12, 13 & 14 Geo. 6, Ch. 78

(which came into force on 16 December 1949)

An Act to render inoperative any restriction upon anticipation or alienation attached to the enjoyment of property by a woman

Section 1.—(1) No restriction upon anticipation or alienation attached, or purported to be attached, to the enjoyment of any property by a woman which could not have been attached to the enjoyment of that property by a man shall be of any effect after the passing of this Act.

(2) The preceding subsection shall have effect whatever is the date of the passing, execution or coming into operation of the Act or instrument containing the provision by virtue of which the restriction was attached or purported to be attached, and accordingly in section two of the Law Reform (Married Women and Tortfeasors) Act, 1935, the proviso to subsection (1) and subsections (2) and (3) (which make provision differentiating as to the operation of such a restriction between an Act passed before the passing of that Act or an instrument executed before the date mentioned in the said proviso on the one hand and an instrument executed on or after that date on the other hand) are hereby repealed.

The Act does not extend to Scotland or to Northern Ireland.

Adoption of Children Act, 1949

12, 13 & 14 Geo. 6, Ch. 98

(which came into force on 1 January 1950)

An Act to amend the law relating to the adoption of children; and for related purposes

Section 8. Where an adoption order is made in respect of an infant who is not a citizen of the United Kingdom and Colonies, then, if the adopter or, in the case of a joint adoption, the male adopter, is a citizen of the United Kingdom and Colonies, the infant shall be a citizen of the United Kingdom and Colonies as from the date of the order.

Section 9.—(1) The provisions of this and the next following section shall have effect for securing that adopted persons are treated as children of the adopters for the purposes of the devolution or disposal of real and personal property.

(2) Where, at any time after the making of an adoption order the adopter or the adopted person or any other person dies intestate in respect of any real or personal property (other than property subject to an entailed interest under a disposition made

before the date of the adoption order) that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person.

(3) In any disposition of real or personal property made, whether by instrument inter vivos or by will (including codicil), after the date of an adoption order—

(*a*) any reference (whether express or implied) to the child or children of the adopter shall be construed as, or as including, a reference to the adopted person;

(*b*) any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall be construed as not being, or as not including, a reference to the adopted person; and

(*c*) any reference (whether express or implied) to a person related to the adopted person in any degree shall be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born in lawful wedlock and were not the child of any other person,

unless the contrary intention appears.

(4) Where under any disposition any real or personal property or any interest in such property is limited (whether subject to any preceding limitation or charge or not) in such a way that it would, apart from this section, devolve (as nearly as the law permits) along with a dignity or title of honour, then, whether or not the disposition contains an express reference to the dignity or title of honour, and whether or not the property or some interest in the property may in some event become severed therefrom, nothing in this section shall operate to sever the property or any interest therein from the dignity, but the property or interest shall devolve in all respects as if this section had not been enacted.

(5) References in this section to an adoption order shall be construed as including references to an adoption order made before the date of the commencement of this Act; but nothing in this section shall affect the devolution of any property on the intestacy of a person who died before that date, or any disposition made before that date.

Section 10.—(1) For the purposes of the application of the Administration of Estates Act, 1925, to the devolution of any property in accordance with the provisions of the last foregoing section, and for the purposes of the construction of any such disposition as is mentioned in that section, an adopted person shall be deemed to be related to any other person being the child or adopted child of the adopter or (in the case of a joint adoption) of either of the adopters—

(*a*) where he or she was adopted by two spouses jointly, and that other person is the child or adopted child of both of them, as brother or sister of the whole blood;

(*b*) in any other case, as brother or sister of the half-blood.

(2) Notwithstanding any rule of law, a disposition made by will or codicil executed before the date of an adoption order shall not be treated for the purposes of the last foregoing section as made after that date by reason only that the will or codicil is confirmed by a codicil executed after that date.

(3) Notwithstanding anything in the last foregoing section, trustees or personal representatives may convey or distribute any real or personal property to or among the persons entitled thereto, without having ascertained that no adoption order has been made by virtue of which any person is or may be entitled to any interest therein, and shall not be liable to any such person of whose claim they have not had notice at the time of the conveyance or distribution; but nothing in this subsection shall prejudice the right of any such person to follow the property, or any property representing it, into the hands of any person, other than a purchaser, who may have received it.

(4) Where an adoption order is made in respect of a person who has been previously adopted, the previous adoption shall be disregarded for the purposes of the last foregoing

section in relation to the devolution of any property on the death of a person dying intestate after the date of the subsequent adoption order and in relation to any disposition of property made after that date.

(5) Subsection (2) of section five of the principal Act (Adoption of Children Act, 1926) is hereby repealed.

Section 12.—(1) Every adoption order made after the commencement of this Act shall contain a direction to the Registrar General to make in the Adopted Children Register an entry in the form set out in the Schedule to this Act, and (subject to the provisions of the next following subsection) shall specify the particulars to be entered under the headings in columns 2 to 6 of that Schedule.

(2) For the purposes of compliance with the requirements of the foregoing subsection—

(*a*) where the precise date of the infant's birth is not proved to the satisfaction of the court, the court shall determine the probable date of his birth and the date so determined shall be specified in the order as the date of his birth;

(*b*) where the name or surname which the infant is to bear after the adoption differs from his original name or surname, the new name or surname shall be specified in the order instead of the original;

and where the country of the birth of the infant is not proved to the satisfaction of the court, the particulars of that country may, notwithstanding anything in that subsection, be omitted from the order and from the entry in the Adopted Children Register.

(3) Where upon any application for an adoption order in respect of an infant (not being an infant who has previously been the subject of an adoption order) there is proved to the satisfaction of the court the identity of the infant with a child to which an entry in the Registers of Births relates, any adoption order made in pursuance of the application shall contain a direction to the Registrar General to cause the entry in the Registers of Births to be marked with the word 'adopted'.

(4) Where an adoption order is made in respect of an infant who has previously been the subject of an adoption order, the order shall contain a direction to the Registrar General to cause the previous entry in the Adopted Children Register to be marked with the word 're-adopted'.

(5) Where an adoption order is quashed, or an appeal against an adoption order allowed, the court which made the order shall give directions to the Registrar General to cancel any marking of an entry in the Registers of Births and any entry in the Adopted Children Register which was effected in pursuance of the order.

(6) Where the Registrar General is notified by the Registrar General of Births, Deaths and Marriages in Scotland that an adoption order has been made under the Adoption of Children (Scotland) Act, 1930, in respect of an infant to whom an entry in the Registers of Births or the Adopted Children Register relates, the Registrar General shall cause the entry to be marked 'adopted (Scotland)', or, as the case may be, 're-adopted (Scotland)'; and where, after an entry has been marked in pursuance of this subsection, the Registrar General is notified as aforesaid that the adoption order has been quashed, or that an appeal against the adoption order has been allowed, he shall cause the marking to be cancelled.

(7) A copy of any entry in the Registers of Births or the Adopted Children Register the marking of which is cancelled under this section shall be deemed to be an accurate copy if and only if both the marking and the cancellation are omitted therefrom.

(8) The court by which an adoption order has been made (including, in the case of an order made by a court of summary jurisdiction, a court acting for the same petty sessional division or place) may, on the application of the adopter or of the adopted person, amend the order by the correction of any error in the particulars contained therein; and where an adoption order is so amended the prescribed officer of the court shall cause the amendment to be communicated in the prescribed manner to the Registrar General and any necessary correction of or addition to the Adopted Children Register shall be made accordingly.

(9) In the case of an adoption order made before the commencement of this Act, the

power of the court under the last foregoing subsection shall include power to amend the order—

(*a*) by the insertion of the country of the adopted person's birth;

(*b*) (where the order does not specify a precise date as the date of the adopted person's birth) by the insertion of the date which appears to the court to be the date or probable date of his birth;

and the provisions of that subsection shall have effect accordingly.

(10) Subsections (2) and (3) of section eleven of the principal Act, and the Schedule to that Act, shall cease to have effect; and subsection (5) of the said section eleven (which relates to certified copies of entries in the Adopted Children Register) shall have effect as if after the words 'the date of the birth' in both places where those words occur in paragraph (*b*) of the subsection, there were inserted the words 'or the country of the birth'.

SCHEDULE

FORM OF ENTRY TO BE MADE IN REGISTER

1	2	3	4	5	6	7	8
No. of entry	Date and country of birth of child	Name and surname of child	Sex of child	Name and surname, address and occupation of adopter or adopters	Date of adoption order and description of court by which made	Date of entry	Signature of officer deputed by Registrar General to attest the entry

Sections 9 and 10 do not affect the law of Scotland relating to the distribution of the moveable estate of a person dying domiciled in Scotland or the devolution of heritable property situated in Scotland and in other ways the Act applies to Scotland subject to certain modifications.

The Act, except Section 8, does not extend to Northern Ireland.

LEGAL NOTES

By EVAN JAMES MACGILLIVRAY, B.A., LL.B.
One of His Majesty's Counsel
AND
DAVID HOUSEMAN, A.I.A. (Solicitor)
Trust and Claims Secretary of the London Life Association Ltd.

In re A Debtor (No. 564 of 1949). *Ex parte* Commissioners of Customs and Excise *v.* The Debtor

Bankruptcy—Infant trading with adult—Jurisdiction to make receiving order against infant—Bankruptcy Act, 1914, *s.* 3

COURT OF APPEAL

EVERSHED M.R.
SOMERVELL L.J.
AND HODSON J.

1950. Jan. 23.
[1950] 1 All E.R. 308.
66 T.L.R. 313.

Miss Esther Posener, an infant, and her mother were registered as wholesale traders in cosmetics and under the Finance Act, 1940, s. 31 (2), they became liable on goods sold by them for purchase tax, which the Act provides shall be recoverable as a debt due to His Majesty from the person accountable therefor. They failed to account for the tax, and the Commissioners of Customs and Excise as creditors presented a bankruptcy petition against them. Mr Registrar Parton made a receiving order against the mother, but in the case of the daughter he declined to do so on the ground that she was an infant. The Commissioners now appealed.

It was not disputed that the purchase tax constituted a debt in the strict sense—that is a debt duly recoverable at law—but on behalf of the infant it was claimed that bankruptcy jurisdiction was inapplicable to her.

The Bankruptcy Act, 1914, s. 3, provides as follows:

> Subject to the conditions hereinafter specified, if a debtor commits an act of bankruptcy the court may, on a bankruptcy petition being presented either by a creditor or by the debtor, make an order, in this Act called a receiving order, for the protection of the estate.

Eversheld M.R. said that in his judgment all the conditions indicated in the section were satisfied in the present case. There was here a debtor, the infant, who became indebted to His Majesty for purchase tax. There had been committed an act of bankruptcy. *Prima facie* on the plain language of the section and of the Act generally, there seemed to him to be jurisdiction in the Court to make a receiving order.

It was however said that there was authority, consisting of statements in text-books and of some observations in cases, which indicated that where the debtor is an infant, bankruptcy jurisdiction is inapplicable. In Halsbury's *Laws of England*, Hailsham Edition, for example, it is stated:

> It appears that an infant cannot be made bankrupt, nor can he alter his legal status as an infant by himself presenting a bankruptcy petition. Though he can make a valid contract in respect of necessaries supplied to him, it has not been decided whether a debt incurred in respect of such a contract renders him liable to bankruptcy, but it is submitted that it does not, on the ground that this is a matter of status.

The Master of the Rolls examined certain cases where, before the Infants Relief Act, 1874, infants had in fact been made bankrupt. At that time contracts by infants were voidable and of two kinds, namely contracts which were valid and binding until disaffirmed as could be done either during infancy or within a reasonable time after majority, and contracts which were not binding until ratified within a reasonable time after majority. Such contracts were not wholly *void*, but *voidable*. The Infants Relief Act, 1874, made debts contracted in the course of trade and debts contracted otherwise than for necessaries not *voidable* but *void*. It therefore followed that, unless the obligations related to the supply of necessaries, there could be no debt of any kind arising out of contract, and there being no debt, on general principles it would follow that the bankruptcy jurisdiction could not be made to apply. It was on that ground that, in a case subsequent to the passing of the Act, the Court of Appeal held that a trading debt by an infant which was not an enforceable legal debt could not support an adjudication in bankruptcy.

In Halsbury's *Laws of England* the case of *Lovell and Christmas* v. *Beauchamp* [1894] A.C. 607 is cited as an authority for the proposition that the inapplicability to infants of bankruptcy jurisdiction is a matter of status. That was a case in which a receiving order was sought against a firm one of whose partners was an infant. The House of Lords ordered that the receiving order should be not against the *firm* but against the firm other than the infant partner. The case was not however, in the judgment of Evershed M.R., authority for the view that bankruptcy legislation is inapplicable to infants by reason of the status of infants as such. The bankruptcy legislation does not apply to an infant if, and only if, the debts which are invoked in support of it are not enforceable debts at all, but are 'debts' or obligations which are, in truth, wholly unenforceable and void.

The learned judge concluded:

> I am quite clear, having examined the authorities, and having looked at the Act, that there is nothing which makes the Act inapplicable to the case of an infant, provided always that the conditions stated in the Act are fulfilled. For these reasons, I have formed a different view from that entertained by the registrar. I think this is a case where, there being every reason why a receiving order should be made, one ought to be made against the daughter as it has been made already against the mother.

Somervell L.J. and Hodson J. concurred.

Sechiari, deceased, *In re*

Trust Settlement—Tenant for life and remaindermen—Shares in company—Special capital profits dividend—Capital or income—Apportionment on equitable principles

CHANCERY DIVISION

ROMER J.

1950. Feb. 7.
[1950] 1 All E.R. 417.
66 T.L.R. 531.

By her will the testatrix bequeathed her residuary estate to trustees on trust for all her children in equal shares and directed her trustees to settle each child's share on trust to pay the income to the child for life with remainder to that child's issue. She had six children all of whom survived her and there were three grandchildren who were interested in the capital of the trust fund. Among the assets constituting the residuary trust fund there was a sum of £4000 ordinary stock of Thomas Tilling Ltd. That company was the owner of substantial holdings of shares in passenger road transport and road haulage undertakings affected by

the Transport Act, 1947. Since the passing of that Act the company had been re-organized by the carrying out of a number of transactions which may be summarized as follows. The company sold all its interests in passenger road transport and road haulage undertakings affected by the Act to the British Transport Commission set up by the Act, under an agreement negotiated between the company and the Commission. The consideration for such sale was £24,800,000 which was satisfied by the allotment to the company of British Transport 3% guaranteed stock 1968/73 at a price of 101. The company distributed £20,600,000 of the said British Transport stock as a special capital profits dividend on its ordinary stock, each ordinary stockholder on the register on 21 February 1949 receiving £5 British Transport stock for every £1 ordinary stock of the company held by him. Under that distribution the trustees of the testatrix's will received £20,000 British Transport stock.

The trustees took out a summons to determine whether the said stock was to be treated as income or an accretion to the capital of the trust fund. Romer J. held that it was income. He said that the principle which decided the question was to be found in the judgment of the Judicial Committee of the Privy Council delivered by Lord Russell of Killowen in *Hill* v. *Permanent Trustee of New South Wales* [1930] A.C. 720 (*J.I.A.* Vol. LXII, p. 342). Lord Russell enunciated five principles which are directed to the position of beneficiaries of a settled trust fund which comprises shares in a company in regard to the distribution by the company of moneys to its shareholders. For the purposes of the present case the second and third of these principles are the most relevant and are in these terms:

(2) A limited company not in liquidation can make no payment by way of return of capital to its shareholders except as a step in an authorized reduction of capital. Any other payment made by it by means of which it parts with money to its shareholders must and can only be made by way of dividing profits. Whether the payment is called 'dividend' or 'bonus' or any other name, it still must remain a payment on division of profits.

(3) Moneys so paid to a shareholder will (if he be a trustee) *prima facie* belong to the person beneficially entitled to the income of the trust estate.

The learned judge said that applying these principles there would be a declaration that the stock in question ought to be treated as income of the trust fund but that declaration, which was limited to being a declaration on the construction of the will and in the events which had happened, would be without prejudice to any question whether, in the circumstances, in the administration of the trust, the court had, or would exercise, any jurisdiction to apportion the dividend on equitable principles between income and capital.

MacDarmaid *v.* Attorney-General

Legitimation by subsequent marriage of parents—Parent already married to third party—Onus of proof—Legitimacy Act, 1926, s. 1

PROBATE DIVORCE AND ADMIRALTY DIVISION

HODSON J.

1950. Feb. 10.
[1950] 1 All E.R. 497.
66 T.L.R. 543.

In connexion with a question of liability for succession duty the petitioner Ellen MacDarmaid claimed a declaration under the Legitimacy Act, 1926, s. 1, that she became the legitimate child of her parents on 1 January 1927 when the Act came into force, as her parents, though not married at her birth, had subsequently married on 10 March 1925. Her birth certificate showed her date of birth as

14 March 1894, her father being described as a widower and her mother as a spinster. Both parents had since died.

The Legitimacy Act, 1926, s. 1, provides as follows:

> (1) Subject to the provisions of this section, where the parents of an illegitimate person marry or have married one another, whether before or after the commencement of this Act, the marriage shall, if the father of the illegitimate person was or is at the date of the marriage domiciled in England or Wales, render that person, if living, legitimate as from the commencement of this Act, or from the date of the marriage, whichever last happens.
>
> (2) Nothing in this Act shall operate to legitimate a person whose father or mother was married to a third person when the illegitimate person was born.

The father of the petitioner had married Rosa Johnstone on 24 June 1886, some eight years before the birth of the petitioner. His younger brother proved that after the marriage the petitioner's father never lived with his wife, that she had a child which died shortly after birth, that he and the petitioner's father saw Rosa at the roller skating rink at Olympia in 1891 or 1893 when she would have been about 27 years old, that she then appeared to have aged somewhat and that within a year or two before he died the petitioner's father told him that he had not seen or heard of Rosa since the Olympia meeting though he did not say anything about her having died.

Hodson J. accepted the contention of the Attorney-General that the onus was on the petitioner to prove that the death of Rosa occurred on or before 14 March 1894 or to prove circumstances or facts which the Court should accept as *prima facie* evidence that such death had occurred.

The learned judge pointed out that where a person has not been heard of by persons who would naturally have heard of him, if alive, he will be presumed to be dead after a lapse of seven years. The present petitioner could not however rely on that presumption since the first wife was seen alive in 1891 or 1893—within seven years of the birth of the petitioner—and, in view of her age and the circumstances in which she was last seen, there were no facts proved from which the inference could properly be drawn that she died within the seven years.

There is on the other hand no presumption of law as to continuance of life but each case must be determined on its own facts.

The learned judge cited the following passage from the judgment of Sir G. M. Giffard L.J. in the case of *In re Phene's Trusts* (1870) 5 Ch. App. 139 where he said:

> The existence of the party at an antecedent period may or may not afford a reasonable inference that he was living at the subsequent date. If, for example, it were proved that he was in good health on the day preceding the second marriage, the inference would be strong, almost irresistible, that he was living on the latter day.

Accordingly, without reliance on any presumption, the learned judge found that as the first wife Rosa was seen alive in 1891 or 1893 at Olympia at the age of 27, when nothing abnormal about her health or circumstances was observed save that she had aged somewhat, the proper inference to draw on the probabilities of the case was that she was still alive in 1894 when the petitioner was born. In his judgment therefore the petition failed.

Austin Motor Co. Ltd. *v.* British Steamship Investment Trust Ltd. and Others

Company—Dividend—Tax-free up to 6s. in the £—Standard rate 9s.—Computation of amount payable

COURT OF APPEAL
EVERSHED M.R.
SOMERVELL AND
JENKINS L.JJ.
1950. Feb. 15.
[1950] 1 All E.R. 632.

This Originating Summons raised the question of the rights *inter se* of the 6% 'B' cumulative preference stockholders of the Austin Motor Co. Ltd. on the one hand and the preferred ordinary, ordinary, and 'A' ordinary stockholders on the other hand to share in the profits of the company available for distribution. The answer depended on the true construction of the company's articles. The relevant words are these:

> The profits of the company available from time to time for distribution in respect of each year... shall... be applicable... secondly to the payment of the cumulative preferential dividend on the £1,000,000 six per cent 'B' cumulative preference shares at such rate that after deduction of income tax thereon at the current rate for the time being... the amount remaining shall be the sum of six per cent per annum on the capital for the time being paid up, or credited as paid up, on the said six per cent 'B' cumulative preference shares, less the amount of any income tax for the time being payable in excess of six shillings in the pound computed on a gross sum of six pounds per cent per annum on such capital, together with any outstanding arrears.

The standard rate of income tax for the time being was 9*s.* in the £. The method of computation for which the 'B' cumulative preference stockholders contended was as follows. The earlier words of the section point to a gross sum which after deduction of tax at the standard rate would leave £6 per £100 of stock. Then from the £6 there falls to be deducted 3*s.* in the pound, that is to say 18*s.*, leaving the sum of £5. 2*s.* per cent payable to the stockholders. The preferred ordinary, ordinary, and 'A' ordinary stockholders did not accept that method of computation and contended that the correct method was that which in the case of a similarly worded article had been applied by Vaisey J. in *Godfrey Phillips Ltd.* v. *Investment Trust Corpn. Ltd.* (unreported, 23 Feb. 1949) or alternatively a third method which they now put forward.

The method of computation applied by Vaisey J. in the case cited was to deduct, from the nominal sum of £6 per £100 of stock, 3*s.* in the £ on the amount of £8. 11*s.* 5*d.* obtained by grossing up £6 at 6*s.* in the £, so that the deduction is £1. 5*s.* 8*d.* and the net dividend payable to the 'B' cumulative preference stockholders is £4. 14*s.* 4*d.* per £100 stock. In the Court below Wynn-Parry J. considered himself bound by the decision of Vaisey J. and followed it without expressing any opinion of his own on the construction of the article. The Court of Appeal held that this method of computation was not justified by the words of the article. Somervell L.J. who delivered the leading judgment said:

> That is quite a neat logical scheme which people might provide for in this class of case, but in my opinion it is impossible to get it out of these words. It involves grossing up the sum of £6 which is described as a gross sum on the basis that income tax was 6*s.* in the £. That seems to me an impossible construction to put on this phrase and although I appreciate what I might describe as the logic and the neatness of the result I find it impossible to obtain that result out of these words.

The third method of computation which was suggested by the preferred ordinary, ordinary and 'A' ordinary stockholders as an alternative to the method

applied by Vaisey J. was more elaborate in that, according to the construction contended for, the words after 'less' in the article are treated as leading not to a single item but to two items. It is, it was said, first of all 'less the amount of any income tax for the time being payable'. That phrase would refer back to the amount of income tax to be deducted from the yet unascertained gross figure, so that the £6 is to be less 9/20ths of *X* taking income tax at 9*s*. in the £. There is then a further deduction in that it is less the extent by which that amount is in excess of 6*s*. in the £ computed on a gross sum of £6 per cent. So the result is £6 minus 9/20ths of *X* minus 6/20ths of £6.

This third method of computation was also rejected by the Court of Appeal. Somervell L.J. said

> These things can be elaborated, but that is not, to my mind, the natural reading or construction of the words which follow 'less'. I think they do, as the scheme for the six per cent 'B' cumulative preference stockholders contends, point to a single figure. I think there is difficulty in the way of the formula of counsel for the preferred ordinary, ordinary and 'A' ordinary stockholders by reason of the word 'any'. Even apart from that, I think the natural construction is to treat the words as directed to a single sum.... For these reasons I think the appeal should be allowed and the declaration in the appropriate form asked for by the six per cent 'B' cumulative preference stockholders should be made.

Levin *v.* Roth

Sale of reversion by expectant heir—Unconscionable bargain—Equitable relief—Loss of right to apply for

COURT OF APPEAL
COHEN, ASQUITH AND SINGLETON L.JJ.
1950. Feb. 27.
[1950] 1 All E.R. 698.

The plaintiff and defendant were both dental surgeons. In 1937, when they first met, the plaintiff was 57 years old and the defendant was 37. The defendant was then entitled to a reversionary interest in a residuary estate of £30,000 expectant on the death of his step-grandmother. He had borrowed £4900 from a reversionary interest society on the security of his expectancy. On 24 August 1937 the defendant signed two bills of exchange, one for £1000 and one for £500, in favour of the plaintiff and the plaintiff signed an agreement to the effect that he would not present the bills for payment or negotiate them until the death of the defendant's step-grandmother. On 25 August 1937 the parties entered into a service agreement whereby the plaintiff employed the defendant as his assistant at a salary of £8 a week. At the end of July 1938 the defendant left the plaintiff's employment.

From time to time the defendant renewed the bills, the last renewal being on 1 August 1946. On 2 August 1938 the defendant assigned his reversionary interest to the said reversionary interest society absolutely. In August 1946 the defendant's step-grandmother died. On 25 January 1947 the bills became due and the plaintiff claimed payment of the amounts thereof with interest. The defendant claimed equitable relief on the ground that the bills were referable to an unconscionable bargain with him in relation to his expectancy and his appointment as the plaintiff's assistant.

Croom-Johnson J. held that in view of the relationship between the parties at the time when the defendant was an expectant heir the plaintiff had not discharged the onus which rested on him to show that the bills had not been obtained by an unconscientious use of power but were fair and reasonable and

he gave judgment for the defendant. The plaintiff appealed and the Court of Appeal allowed the appeal. Cohen L.J. said that on the whole he did not think that at the time when the bills were first given there was any such unconscionable bargain with regard to the expectancy as would entitle the defendant to equitable relief; but however that might be the defendant had renewed the bills since he had ceased to be an expectant heir and was no longer in a position to rely on the principles applicable to expectant heirs. Moreover there was no evidence of any unconscionable conduct on the part of the plaintiff at the time of the renewals.

Carey, deceased *In re*
Wardle and Another *v.* **Carey and Others**

Will—Income of residuary trust fund—Direction to pay to testator's daughter up to £1000 per annum for life—Deficiency of income in one year—Surplus in subsequent year—Provision held not cumulative

CHANCERY DIVISION

DANCKWERTS J.

1950. March 8.
[1950] 1 All E.R. 726.
66 T.L.R. 802.

By his will the testator who died on 29 December 1912 directed his trustees to pay the income of his residuary trust fund to his wife during her life and after her death to pay the income of the fund up to the sum of £1000 per annum to his daughter for her life so long as she remained single...and as to the remainder of the income to pay the same during the life of his said daughter to his brother and sisters or the child or children of them. After the death of the testator's widow in 1934 the gross income of the residuary estate was less than £1000 in the years 1935, 1936, 1937, 1939, 1940, 1941 and 1943 but exceeded £1000 in the years 1938, 1942 and in all the years since 1943.

This was a summons taken out by the trustees of the will to determine whether on the true construction of the will the provision in favour of the daughter was cumulative so that a deficiency in any one year might be made up by recourse to the surplus income of subsequent years.

The learned judge held that the provision could not be construed as cumulative and that the daughter was only entitled in each year to the income of the residuary estate up to a limit of £1000. He said:

> The will points to annual accounts and each year must be treated separately, so that, if there is an excess of income over £1000 in any year that excess must be distributed to the persons entitled, while if the income in any year is less than £1000 the daughter takes what is available.

Beaumont's Will Trusts *In re*
Walker and Another *v.* **Lawson and Others**

Executors—Payment of legacies and legacy duty—Whether payable primarily out of lapsed share of residue or out of testator's estate before division—Administration of Estates Act, 1925, s. 34 (3) and First Schedule, Part II

CHANCERY DIVISION

DANCKWERTS J.

1950. March 16.
[1950] 1 All E.R. 802.
66 T.L.R. 712.

This was an Adjourned Summons to determine whether on the true construction of the will of the testatrix and the Administration of Estates Act, 1925, s. 34 (3) and First Schedule, Part II, the share of the testatrix's residuary estate given by her will to Bertha Lawson (who predeceased the testatrix) was primarily applicable towards the discharge of the

pecuniary legacies bequeathed by the said will and the duty payable in respect of the pecuniary and specific legacies or whether those sums were payable out of the general estate of the testatrix before division.

The testatrix died on 26 August 1948. By her will she gave certain specific articles and a number of pecuniary legacies free of duty. With regard to the residue of her estate the will was in these terms:

> I give devise and bequeath all my real estate and all my personal estate not hereby otherwise disposed of (including property over which I shall have power to appoint) unto my trustees upon trust that my trustees shall sell call in and convert into money the same or such part thereof so far as shall be necessary and after payment of all my funeral and testamentary expenses and debts shall stand possessed of the residue thereof in trust to pay and transfer the same equally between the said Minnie Lawson, Isabel Lawson, Bertha Lawson and Joanna Millin absolutely.

The Administration of Estates Act, 1925, s. 34, provides:

> (3) Where the estate of a deceased person is solvent his real and personal estate shall, subject to rules of court and the provisions hereafter contained as to charges on property of the deceased, and to the provisions, if any, contained in his will, be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to this Act.

The schedule provides:

> ORDER OF APPLICATION OF ASSETS WHERE THE ESTATE IS SOLVENT
>
> 1. Property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies.
>
> ... ...
>
> 5. The fund, if any, retained to meet pecuniary legacies.

The learned judge held that the pecuniary legacies and the duty on these legacies and on the specific legacies were payable out of the general estate of the testatrix and that the lapsed share was a fourth share of the residuary estate after these burdens had been cleared. It seemed to him that in effect no provision is made in the Administration of Estates Act, 1925, s. 34 (3), with regard to such things as legacies and that the position of the legacies depends on the old law. Under the old law legacies would plainly come out of the general estate of the testator and there was nothing in the Act which eliminated or modified the old law as to the extent of such burdens.

Henley *v.* Murray (Inspector of Taxes)

Income tax—Profit from office or employment—Compensation paid to employee for discharge of service agreement—Income Tax Act, 1918 Schedule E. r. 1

COURT OF APPEAL
EVERSHED M.R., SOMERVELL AND JENKINS L.JJ.
1950. March 14.
[1950] 1 All E.R. 908.

This was an appeal by the taxpayer from an order of Croom-Johnson J. whereby he held that a sum of £2,202. 14*s.* 4*d.* paid to the taxpayer in consideration of the abandonment by him of his contractual rights under a contract of service as managing director of the G. Property Co. constituted a profit from his office or employment and was assessable to income tax under Schedule E. The service agreement in question was determinable at the earliest on 31 March 1944. A subsidiary of the company asked the trustees for its debenture holders to assist it in the disposal of certain property, and the trustees were unwilling to

give that assistance except on the condition that the taxpayer should leave the service of the company. This he did on 6 July 1943 and it was agreed that he should receive the said lump sum payment which was the amount to which he would have been entitled if the service agreement had continued in force until 31 March 1944.

The Court allowed the appeal and discharged the assessment. They said that the present case must be distinguished from those in which a service agreement was modified and the employee agreed to take a lump sum instead of the agreed periodic remuneration for the future and his obligations of service thereunder were modified or even cancelled. If that was the form of agreement it would be true to say that the lump sum which was paid was profit which became payable under the taxpayer's contract of service. In the present case there had ceased to be any contract of service and from that date onwards there was no office or employment and therefore no profit therefrom taxable under Schedule E. The sum agreed to be paid was compensation for the loss of the contract of service and comparable with the case of a servant recovering damages for wrongful dismissal. Although it would be true to say that the sum of damages awarded arose from the contract in the sense that if there had never been a contract the sum of damages could never have been awarded, counsel for the Crown admitted that in a case of that sort it would be impossible to suggest that the sum awarded to the servant as damages was taxable under Schedule E.

Dale (Inspector of Taxes) *v.* de Soissons

Income tax—Profit from office or employment—Clause in service agreement—Right of employer to terminate employment on payment of agreed compensation—Income Tax Act, 1918 *Schedule E. r.* 1

CHANCERY DIVISION

ROXBURGH J.

1950. April 3.
[1950] 1 All E.R. 912.
66 T.L.R. 1099.

This was an appeal by the Crown from a decision of the Special Commissioners that a sum of £10,000 paid to the taxpayer in accordance with the terms of his service agreement as compensation for loss of office on the termination of his employment was not assessable to tax as a profit arising from his office or employment. The taxpayer, Mr Pierre de Soissons, was employed by Gallaher Ltd. as assistant managing director in the administration of the company. The terms of employment were expressed in a service agreement whereby Mr de Soissons agreed to serve for a period of three years from 1 January 1945 at a salary of £3000 per annum. By a clause in the agreement the directors were entitled, if they thought fit in the interests of the company so to do, to terminate the employment on 31 December 1945 on payment to Mr de Soissons of the sum of £10,000 by way of compensation for loss of office. The company exercised its option to terminate the taxpayer's employment at that date and paid him the said sum of £10,000 accordingly.

The learned judge allowed the appeal and held that the amount so received by the taxpayer was assessable to income tax under Schedule E, r. 1, as a profit arising from his office or employment. He said that this was a very different case from that which was the subject of the decision in *Henley* v. *Murray*. The question in each case of this kind was whether on the facts of the case the lump sum paid was in the nature of remuneration or profits in respect of the office, or was in the nature of a sum paid in consideration of the surrender

by the recipient of his rights in respect of the office. In the present case the taxpayer surrendered no rights. He got exactly what he was entitled to under his contract of employment. Accordingly the payment fell within the taxable class.

On 3 July 1950 the decision of Roxburgh J. was upheld by the Court of Appeal consisting of Evershed M.R., Bucknill and Jenkins L.JJ.

Kneen (Inspector of Taxes) *v.* Ashton

Income tax—Superannuation contribution—Payment of back contributions by annual instalments—Whether 'ordinary annual contributions'—Finance Act, 1921, *s.* 32 (1)—*S.R. and O.* 1921 *No.* 1699

CHANCERY DIVISION

ROXBURGH J.

1950. April 3.
[1950] 1 All E.R. 982.
66 T.L.R. 1080.

On 15 April 1946 F. A. Ashton, then 48 years old, was promoted to be an inspector on the London Midland and Scottish Railway establishment at St Pancras Station. He had earlier served the railway on the wages staff and under Rule 7 of the Superannuation Fund Association of the railway he became entitled on his promotion to seek admission to the superannuation scheme as a contributory member.

In the exercise of its powers the committee which administered the scheme permitted the membership of the applicant to be deemed to have commenced at the date on which he attained age 40 subject to the payment of back contributions from that date. The total back contributions with interest amounted to £202. 16*s*., which the committee agreed (as was usual in such cases) should be spread forward equally in annual sums of £33. 16*s*. over the 6 years succeeding admission to the scheme.

Before the General Commissioners of Income Tax the taxpayer had successfully claimed that in arriving at the amount of his income for assessment to income tax for 1946–47 he should be allowed, pursuant to the Finance Act, 1921, s. 32 (1), to deduct four-fifths (being the approved proportion as explained in the case stated) of his total contribution paid in that year, or alternatively that for 1944–45 and 1945–46 he should be entitled to deduct four-fifths of the back contribution for each of those years.

The Finance Act, 1921, s. 32 (1), provides as follows:

> Subject to the provisions of this section and to any regulations made thereunder... any sum paid by...an employed person by way of contribution towards a superannuation fund shall, in computing profits or gains for the purpose of an assessment to income tax under...schedule E, be allowed to be deducted as an expense incurred in the year in which the sum is paid: Provided that—(*a*) no allowance shall be made under the foregoing provision in respect of any contribution by an employed person which is not an ordinary annual contribution.

The Commissioners of Inland Revenue made regulations (S.R. and O. 1921 No. 1699) of which regulation 5 provides:

> The expression 'ordinary annual contribution' shall mean an annual contribution of a fixed amount or an annual contribution calculated on some definite basis by reference to the earnings, contributions or numbers of the members of the fund.

Roxburgh J. said:

> The form of the regulation does introduce some doubt into a question which would otherwise have seemed to me to be free from all doubt. This payment called 'back

contributions' seems to me to be the purchase price of the right to be deemed to have been a member of the association for a longer number of years than was in fact the case—which is, undoubtedly, a valuable right. It seems to me, *prima facie*, to be a lump sum, once for all, payment. There is no express suggestion in the scheme that it should be paid otherwise than once and for all, but, for the convenience of persons faced with a liability to pay a comparatively large sum all at once, it has been the practice of the committee to allow it to be paid by annual instalments. I do not wish to suggest that the committee has exceeded its powers under the scheme in making such arrangements, but, nevertheless, such arrangements cannot change the essential nature of the payment. But for the superannuation funds regulation, I should have no doubt on the matter because s. 32 (1) of the Finance Act, 1921, used the phrase 'ordinary annual contribution'. While I can understand the argument that this back payment was an annual contribution, I cannot see how it can be regarded as an *ordinary* annual contribution. The Commissioners of Inland Revenue, however, have thought fit, as they were entitled to do, to define the expression 'ordinary annual contribution' in such a way as to cut out the word 'ordinary'. That raises the only difficulty in this case. On the whole, however, I think that, even with the word 'ordinary' omitted, it is impossible to say that these yearly instalments of the purchase price of these valuable rights were 'annual contributions' within the meaning of the phrase in regulation 5.

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