LEGAL NOTES

By EVAN JAMES MACGILLIVRAY, B.A., LL.B.
One of His Majesty's Counsel

Ideal Life Assurance Co., Ltd. *v.* Hirschfield

War Damage Act 1941—*Contributor—Recovery from mortgagee—Mortgage of more than one contributory property in one transaction*

COURT OF APPEAL

1943. April 9.
[1943] K.B. 442.
[1943] 1 All E.R. 563.
59 T.L.R. 274.

By the provisions of the War Damage Act 1941, s. 25, sub-ss. 4, 5, a contributor whose proprietory interest in the property in question is mortgaged may, in certain cases, recover from the mortgagee a proportion of his net liability for an instalment, that is to say in cases where:

(i) the contributory property consists of or comprises premises used or suitable for residential purposes or consists solely or mainly of agricultural properties,

(ii) the contributory value of the property does not exceed £150 in the case of residential premises or £500 in the case of agricultural properties, and

(iii) the mortgage was created for the purpose of purchasing the proprietory interest in, or erecting buildings on, or making improvements to the property;

provided that no contribution is recoverable if the mortgage was created on the occasion of and in connexion with the acquisition of an interest in, or the execution of any such works for the benefit of, more than one contributory property.

Held that the proviso is not limited to cases in which more than one contributory property is included in the same mortgage but extends to and excludes recovery in a case where a number of separate mortgages of separate contributory properties form part of a single transaction.

Tilley *v.* Wales (Inspector of Taxes)

Income tax—Director of company—Sum paid to him in consideration of release of pension rights—Sum paid in consideration of reduction of salary—One undivided sum—Assessment to tax—Apportionment—Income Tax Act 1918, *Sch. E, r.* 1

HOUSE OF LORDS

1943. Feb. 11.
[1943] 1 All E.R. 280.
[1943] A.C. 386.
59 T.L.R. 178.

A pension payable to the managing director of a company on his retirement is chargeable to income tax under Sch. E, r. 1 of the Income Tax Act 1918; but if an individual in receipt of such a pension agrees to exchange his future right to it for a lump sum, that sum is not taxable as income under Schedule E or at all.

Where the holder of an 'office or employment of profit' within the meaning of Sch. E, r. 1 of the Income Tax Act 1918, such as the employee of a company, agrees in consideration of the payment of a lump sum, to serve the company in future at a reduced salary, the lump sum so paid to him as compensation for the reduction in salary is assessable to income tax as a profit from his employment.

Where a managing director of a company, who was in receipt of a salary and who was entitled to a pension on his retirement from that office, agreed

in consideration of a lump sum payment (1) to release the company from the prospective obligation to pay the pension and (2) to serve the company in future at a reduced salary, it was held that, in so far as such payment represented the capitalization of the pension, it was not taxable as income, but that, in so far as it was paid as compensation for the reduction of salary, it was taxable under Sch. E. The Commissioners having assessed the individual in question upon the whole lump sum payment, the House, with the assent of the Attorney General on behalf of the Crown, referred the assessment back to the Commissioners to determine what would, to the best of their judgment, be a reasonable apportionment of the lump sum, with a direction that so much only as represented a payment made as compensation for reduction of salary should be assessed to tax under Sch. E.

Scottish Life Assurance Company Limited, *In re*

Assurance Companies Act 1909—*Statutory deposit—Application to vary investments—Evidence in support of*

CHANCERY DIVISION

SIMONDS J.

1943. June 2.
[1943] Ch. 245.
59 T.L.R. 327

Under the Rules relating to Deposits by Assurance Companies (S.R. & O. 1910, No. 566, rr. 2, 4 (*a*)) made under the Assurance Companies Act 1909 (9 Edw. VII, c. 49), s. 2, sub-ss. 1, 2, 3, 4 and 6 and s. 3, the Court may authorize a variation of the investments constituting for the time being the statutory deposit, but in the exercise of its discretion in that behalf it must ascertain why it is sought to change the investments and, before authorizing any change, should be satisfied that it is in the interests of the class of persons concerned and that the investments will not suffer thereby.

When it is proposed to vary the investments constituting for the time being the statutory deposit, the application for the sanction of the Court should be accompanied by proper evidence of the value of the respective investments.

When the investments constituting the statutory deposit of a life assurance company consisted of British railway stock of the then market value of £10,725, the Court refused to authorize the substitution of £11,000 3% Savings Bonds 1960–70 in the absence of any evidence to show that it was in the interests of the policyholders that the variation should be made. The Court was not bound to accede to the application because, according to present market values, the investment which it was proposed to substitute was equivalent in value to that of the existing investment.

Sun Life Assurance Co. of Canada *v.* Jervis

Contract of life assurance—Completion—Incorporation of terms of 'Illustration'—Rectification of policy

COURT OF APPEAL

SCOTT AND GODDARD L.JJ. (LUXMOORE J. DISSENTING)

1943. July 29.

In October 1929 an agent of the defendant Company (appellants) sent to the plaintiff (respondent) two documents (1) a document headed 'Illustration' setting out the alternative benefits which a life policy issued by the Company would secure to the assured, and (2) a form of application for assurance. Each document consisted of a printed form issued by the Company and in each there were blanks left to be filled in in writing or type. The blanks in the

illustration were for figures to be inserted, and when received by the plaintiff all the figures had been completely filled in by the agent. The application form, except in the spaces left for the applicant's signature and his own as witness, had also been completely filled in by the agent from information obtained from the plaintiff's son. On receipt of those documents the plaintiff on 2 November signed the application form and sent it by post to the Company with a cheque for the premium quoted in the illustration as covering the selected benefits. On 5 November 1929 the Company sent a letter of acceptance to the plaintiff accepting him as a first-class life and saying that a policy would in due course be issued, and either that day or shortly afterwards it forwarded a separate receipt for the premium. Neither in the application form nor in the letter of acceptance was there any express reference to the illustration. Subsequently the policy issued at Montreal on 2 December 1929 was sent to the plaintiff. The benefits assured by the policy were different from those set out in the illustration. The respondent said that when he received it he did not realize that it gave him less benefits than he understood from the illustration he was to get.

The contract was for a £500 endowment policy (with profits) payable at latest on the expiration of 12 years from 2 November 1929. The plaintiff survived the 12-year period for which the policy was issued, and on 30 July 1942 he issued a writ claiming £250 in addition to the £500, the nominal amount of the contract. The £250 so claimed was composed of two items, viz. £150 in respect of annual dividends and £100 in respect of a special maturity dividend. These two items were claimed in respect of the following statement in the illustration:

Investment. Should you live until the end of 12 years the Company will pay you in cash the sum assured of £500

The dividends shown above which if not previously drawn will amount to

Annual Dividends	£150
Special Maturity Dividend	£100

The plaintiff also claimed rectification of the policy.

The Company contended that the illustration formed no part of the contract of assurance the terms of which were contained only in the policy, or alternatively that on a true construction of the illustration it contained no promise to pay those two sums which were calculated on the assumption that the 1929 dividend scale would be maintained throughout the life of the policy as to which there was no guarantee. The Company admitted liability for £579. 10*s*., being the sum assured plus the annual dividends in fact declared and allotted to the policy during its currency. They denied any obligation to pay a special maturity dividend. It was common ground that if the contract was contained only in the policy that was all that the plaintiff was entitled to.

A majority of the Court of Appeal held that the contract of insurance between the parties which was completed by the Company's letter of acceptance and the receipt for the first premium was expressed in the terms contained in the application signed by the plaintiff and in the illustration without reference to which the terms of the application were unintelligible. On the true construction of the contract so expressed the Company contracted to pay £100 Special Maturity Dividend. Whether it contracted also to pay

annual dividends amounting to £150 was not argued in that Court, inasmuch as the plaintiff did not appeal on that point from the judgment of Atkinson J. who held that he was only entitled to £79. 10*s*., the amount of the dividends actually declared. It must not be assumed that the Court agreed with the trial Judge's conclusion. The Court ordered rectification of the policy and gave judgment for £679. 10*s*.

Luxmoore J. in a dissenting judgment was of opinion that the illustration was not incorporated as part of the contract of insurance. He thought that in order to incorporate it there would have had to be an express reference thereto in the application or acceptance letter and an appropriate clause providing for its inclusion. If, however, he was wrong in that view and it was so incorporated then construing the illustration and the application together he was of opinion that there was no guarantee of the amount of the annual dividend or of the Special Maturity Dividend. In his opinion the plaintiff was only entitled to £579. 10*s*. for which liability was admitted.

On an application by the Company for leave to appeal to the House of Lords the Court of Appeal granted leave subject to the Company's undertaking to pay the costs as between solicitor and client in the House of Lords in any event and not to ask for the return of any money ordered to be paid by the order. On the appeal coming before the House of Lords the House declined to hear it on the ground that having regard to the terms on which leave was granted the respondent had no interest in the result and the House would not be deciding any existing issue between the parties but would be merely expressing its view on a legal conundrum which the Company hoped to have decided in its favour; see 60 T.L.R. 315: [1944] 1 All E.R. 469.

Chessler *v.* Hebrew United Lodge No. 22 of the Grand Order of Israel and Shield of David Registered F.S. 1 (c), 8

Friendly society—Policy of assurance on human life—Separate premium—Non-payment of premium—Relief from forfeiture—Circumstances arising out of war—Industrial Assurance and Friendly Societies (Emergency Protection from Forfeiture) Act 1940, *s.* 1, *par.* (*c*), *and s.* 8, *sub-s.* 1

KING'S BENCH DIVISION

DIVISIONAL COURT

1942. July 24.
[1942] W.N. 168.

The Industrial Assurance and Friendly Societies Act 1940 applies *inter alia* to policies of assurance upon human life, in respect of which there are separate premiums, effected with registered friendly societies, other than collecting societies, for an amount not exceeding fifty pounds and provides by s. 8 that the owner of any such policy may apply to the society (or by way of appeal to the Chief Registrar of Friendly Societies) for relief against the forfeiture of the policy for non-payment of premium on the ground that the default was due to circumstances arising directly or indirectly out of the war.

The claimant in this case was the widow of Lewis Chessler who had been a member of the respondent Society but whose name had on 17 June 1941 been erased from membership owing to non-payment of premiums.

The claimant now claimed the benefit to which a member was entitled on death and contended that the erasure of Chessler's name as a member was invalid inasmuch as the Society had not given him the notice required by s. 8, sub-s. 1 of the Act before the policy could be forfeited.

The Society contended that the policy was not one to which the Act applied in that: (1) there was no 'assurance' because by the rules of the Society a rule could have been passed depriving the deceased of the benefits claimed and (2) there was no separate premium applicable to the assurance on human life because the premium paid covered a sickness benefit in addition to the life benefit.

Held (1) that assuming, without deciding, that a member could be deprived of the death benefit by making an alteration in the rules there was a subsisting assurance until such alteration was made; (2) that no separate premium was payable in respect of the death benefit and that therefore the Act did not apply.

The claim therefore failed.

Fisher, deceased, *In re*

Administration—Intestacy—Proceeds of life policy—Postponed payments—Capital or income—Whether reversionary interests—Administration of Estates Act 1925, *s.* 33, *sub-s.* 1, *par.* (*b*) *and s.* 46

CHANCERY DIVISION

BENNETT J.

1943. July 26.
59 T.L.R. 446.
[1943] 2 All E.R. 615.

The estate of a person who died intestate on 14 December 1941 included the proceeds of a policy of assurance effected by him on his own life dated 12 April 1938. The policy provided that in the event of death occurring within 20 years from that date the Society would pay 'an income of £52 per annum for the remainder of the 20 years, £50 immediately at death and £450 when the income ceases'.

The intestate left a widow and two brothers and two sisters of the half blood.

By the Administration of Estates Act 1925, s. 46, the widow was entitled to receive out of the deceased's estate a capital sum of £1000 net, free of death duties and costs, with interest at the rate of 5% per annum from the date of death until payment and the income of the residue of the estate during her life, and subject thereto the residuary estate would be held by the personal representatives on the statutory trusts for the deceased's brothers and sisters of the half blood. By s. 33, sub-s. 1, par. (*b*) of the Act the personal estate of an intestate shall be held by his personal representatives on trust to call in and convert into money such part thereof as may not consist of money...but so that any reversionary interest be not sold until it falls into possession unless the personal representatives see special reasons for the sale.

Held that the payments of £52 per annum to be made under the policy were capital moneys and not income of the estate, but that neither those sums nor the sum of £450 payable in 1958 were 'reversionary interests' within the meaning of s. 33, sub-s. 1, par. (*b*), and that it was therefore the duty of the personal representatives to realize at once all such future payments and to invest the proceeds of such realization and hold the investments on the trusts applicable to the capital of the residuary estate.

Pyke *v.* Peters

Stated amount free of income tax—Statutory reduction of—Provision for payment of premiums on policies of assurance assigned as security for advance—Redemption of mortgage by person not entitled to immediate equity—Transfer of benefit of covenants with mortgagee—Finance Act 1941, *s.* 25, *sub-ss.* 1, 4 *—Law of Property Act* 1925, *s.* 114, *sub-s.* 1, *and s.* 115, *sub-s.* 2

KING'S BENCH DIVISION

ASQUITH J.

1942. Dec. 11.
[1943] K.B. 242.

The plaintiff was possessed of a right of £1574 a year from the life interest of one William Lloyd in the estate of Lord Overton and three policies of assurance on the life of William Lloyd for £12,000. This yearly payment and the policies had been mortgaged by the plaintiff to the Legal and General Assurance Society by a mortgage and two charges and the mortgage contained a covenant by the plaintiff to pay the premiums. On the defendants' advancing to the plaintiff the sum of £12,000 for the redemption of the said mortgage the plaintiff on 1 July 1934 executed a deed whereby he assigned to the defendants (1) out of the said annual sum of £1574 (*a*) the net annual sum of £480 (4% interest on £12,000), (*b*) such further annual sum as after deduction of tax therefrom would amount to the annual sum payable in respect of the premiums on the said policies and (2) the said policies of assurance.

At the date of the assignment the defendants paid to the Legal and General Assurance Society the amount due on the said mortgage, viz. £9615. 3*s.* 7*d.*, and handed the balance of the £12,000 to the plaintiff and on the redemption of the mortgage a receipt was endorsed thereon for the moneys paid by the defendants to the Society.

Thereafter the defendants received each year the said sum of £1574 less tax and after deduction therefrom of £480 less tax and £420, the sum required to pay the premiums on the policies, they handed the balance to the plaintiff.

The defendants having deducted the said sum of £420 for premiums in 1941 the plaintiff claimed repayment of £130. 7*s.* on the ground that the charge of such annual sum as after deduction of income tax would amount to the annual sum payable in respect of the premiums was a 'provision...for the payment of a stated amount free of income tax' within the meaning of s. 25, sub-s. 1 of the Finance Act 1941, and when the standard rate of income tax was 10*s.* in the £, as it then was, the stated amount should be reduced to twenty twenty-ninths thereof, viz. to £289. 13*s.*

The defendants contended that the deed contained no provision for payment of the stated amount within the meaning of the section inasmuch as the defendants collected the whole annual sum of £1574 and retained what was due to them out of it. 'Payment' connoted an identifiable 'payer' of the stated amount (s. 25, sub-s. 4) and inasmuch as there was no such payer there was no payment. They further argued that as the deed contained an absolute assignment of the £1574, the words of the deed were words of grant and not of covenant to pay. The learned judge rejected both contentions on the ground that the common-sense view was that by assigning the £1574 the plaintiff thereby made provision for the payment of the annual amount necessary to pay the premiums.

The defendants counterclaimed (1) for rectification of the deed so that it might express the true intention of the parties, viz. that the policies should

be kept up at the sole expense of the plaintiff, (2) for payment of the full sum of £420 under the covenant contained in the mortgage to the Legal and General Assurance Society the benefit of which was assigned to the defendants by virtue of the receipt for the money which was endorsed on the mortgage when it was redeemed (Law of Property Act 1925, s. 115, sub-s. 2).

The learned judge dismissed both heads of the counterclaim. As to (1) he said that the intention of the parties that the defendants should be under no liability in respect of the premiums was given effect to by the deed but was frustrated by s. 25 of the Finance Act 1941 and the raising of the standard rate of tax to 10*s*. There was no ground therefore for rectification. As to (2) he said that by s. 115, sub-s. 2 of the Law of Property Act 1925 the benefit of the covenant was transferred to the person who paid off the mortgage unless 'it is otherwise expressly provided'. In his view the assignment was so intended to deal with the rights of the parties as to supersede and cancel anything in the mortgage, and therefore it 'provided otherwise' and the benefit of the covenant did not pass to the defendants.

The plaintiff therefore succeeded in his claim for repayment of the £130. 7*s*., being the excess over twenty twenty-ninths of the stated amount of £420.

Bradberry, *In re*
Fry, *In re*

Annuities—When valuation necessary—Actuarial valuation—Date of death or date of order—Death of annuitant before valuation

CHANCERY DIVISION

UTHWATT J.

1942. Nov. 3.
[1943] Ch. 35.
59 T.L.R 131.

If in the course of the administration of the estate of a deceased person it becomes necessary for the purpose of division of the estate to place a valuation on annuities, the valuation should in the case of any annuitant still living be an actuarial valuation, and facts such as the health of the annuitant or the risks attendant to his vocation should be disregarded. The valuation should be made wherever possible by reference to the sum which is required to purchase a government annuity of the amount specified by the testator.

Whether there is or is not to be a valuation of annuities can be finally determined only in due course of administration. At the testator's death the estate may be sufficient to provide for the payment of the annuities and afterwards be insufficient or *vice versa*, or the insufficiency at the testator's death may not be apparent until after there has been a partial administration. The duty of the court is to do the best it can in the circumstances as they exist when the valuation is ordered.

If at the date of the order one of the annuitants is dead that fact must be taken into account and his annuity valued at the total amount of the arrears due at the date of his death. The value of the annuities of the other annuitants still living will be the sum of the arrears to the date of the order plus the actuarial value of the annuity as at that date.

If all the annuitants are still living at the date of the order their annuities may be valued as at the date of the testator's death provided there has been no real change in the position between the date of death and the date of the order. If, however, there has been such a change, as where a prolonged administration justifies a review, at the later date, of the expectancy of life of the

annuitants, or where the estate has become insolvent, after it has been administered for a time on the footing of its sufficiency, and payments to the annuitants have been made on that basis, valuation as at the date of the order is not only the logical but the only fair course.

I.R. Commissioners *v.* Castlemaine

Income tax—Annuities—Actuarial deficiency of estate—Annuitants entitled to division of capital—Previous annuity payments

KING'S BENCH DIVISION
MACNAGHTEN J.
1943. July 27.
[1943] 2 All E.R. 471.
60 T.L.R. 2.

If a testator directs that his residuary estate shall be held in trust to pay certain annuities and subject thereto shall be held in trust for other trust purposes, and it is ascertained that the actuarial value of the annuities amount together to more than the value of the testator's residuary estate, the annuitants are entitled to have the capital of the residuary estate divided between them in proportion to the value of their annuities.

If before the deficiency of the estate has become apparent the trustees have made payments to the annuitants on account of their annuities, such payments must be regarded as instalments of their respective shares of the capital of the residuary estate and are not therefore assessable to income tax or surtax.

Lord Westbury's Settlement, *In re*

Annuities—Deficiency of income—Payment out of capital—Arrears—Rate of tax

CHANCERY DIVISION
COHEN J.
1943. June 29.
[1944] Ch. 4.
[1943] 2 All E.R. 463.

Where the income of a trust fund is insufficient to pay the annuities charged on the fund the deficiency in each year as it arises ought to be made good out of capital.

If payment of the annuities has been permitted to fall into arrear the arrears should be paid out of capital and not as and when possible out of future income. The fact that if paid out of capital they are chargeable to tax at the rate in force when the payment is made (All Sch. Rules, r. 21), and that if paid out of income they would be chargeable to tax at the rate in force when the arrears accrued (All Sch. Rules, r. 19) does not justify the trustees in acceding to the request of the annuitant that the latter course should be adopted.

Payments made to annuitants on account should be treated in the first instance as made in satisfaction of the annuities falling due in the current year and then in satisfaction of arrears, the first falling due being paid off first.

Attorney General *v.* Barclays Bank Ltd.

Estate duty—Customs and Inland Revenue Act 1889, *s.* 11—*Money received under life policy—Kept up by deceased for benefit of donee—Premiums provided by deceased*

COURT OF APPEAL
SCOTT AND MACKINNON L.JJ. (LUXMOORE L.J. DISSENTING)
1943. June 10.
[1943] 2 All E.R. 123.
59 T.L.R. 358.

By Finance Act 1894, s. 2, sub-s. 1, par. (*c*) incorporating by reference Customs and Inland Revenue Act 1881, s. 38, as amended by Customs and Inland Revenue Act 1889, s. 11, property passing on the death of the deceased shall for the purpose of levying estate duty be deemed to include money received under a policy of assurance effected by the deceased on his own life where the policy is wholly kept up by him for the benefit of a donee,

whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

The above provision is not limited to cases where the premiums on the policy are paid direct out of the deceased's own pocket as and when they fall due, but includes cases where the deceased has caused the policy to be kept up by providing the funds necessary for that purpose.

The dominant words of s. 11 are 'kept up by him' and they control the meaning of the narrower words 'premiums paid by him' which appear only in the ancillary provision about apportionment between donor and donee and 'paid' must be construed as including 'provided'.

Where the deceased transferred a policy effected on his own life to the trustees of a settlement together with a sum of money to be applied by the trustees in the payment of the premiums thereon, it was held that estate duty was payable on the money received under the policy.

Lord Advocate *v.* Hamilton's Trustees

Estate duty—Policies of life assurance—Assigned to trustees for behoof of children of deceased—Whether provided or purchased by him—Whether any beneficial ownership accrued on his death—Finance Act 1894, *ss.* 1, 2, *sub-s.* 1, *par.* (*d*)

COURT OF SESSION

1942. March 13.
1942. S.C. 426.

The deceased insured his own life by six policies of life assurance, viz. one dated 26 January 1906 for £5000 granted by the Scottish Widows Fund and Life Assurance Society and five all dated 9 November 1906, for £2000 each, granted by the Scottish Amicable Life Assurance Society. On 27 February 1912 he assigned the policies to trustees on the terms of a declaration of trust of even date to the effect that the whole sums of money to be derived therefrom should be held by the trustees for behoof of his three sons and daughter equally. The policy of the first-named Society became fully paid on 15 August 1914 and the policies of the second-named Society became fully paid on 15 August 1915. To enable the trustees to pay the premiums due at the date of the assignation the trustees borrowed the necessary money from the deceased and granted bills in his favour which at the date of his death amounted to £5213. 5*s.* 4*d.* In order to meet the premiums falling due after the date of the assignation the trustees in the exercise of a power given to them by the declaration of trust borrowed money on the security of the surrender values of the policies. The deceased died on 12 March 1936 and the trustees received payment from the two Societies of the total amount of £25,204. 8*s.* 6*d.*, which after deduction of the amount due on the bills granted in favour of the deceased left a balance of £19,991. 3*s.* 2*d.*

The Crown claimed estate duty and succession duty on the sum last mentioned. The claim for estate duty was made under ss. 1 and 2, sub-s. 1, par. (*d*) of the Finance Act 1894. As the deceased neither paid nor provided any of the premiums falling due after the assignation it was conceded that there was no claim for duty under s. 2, sub-s. 1, par. (*c*). Under s. 2, sub-s. 1, par. (*d*) the Crown would be entitled to duty if (1) the policy was provided or purchased by the deceased either by himself or in concert or by arrange-

ment with some other person, or (2) a beneficial ownership in the policy arose or accrued by survivorship or otherwise on the death of the deceased.

On the first point it was conceded by the Crown that it was not sufficient that the policies were originally taken out by the deceased and that he had paid or provided the premiums thereon falling due before the date of the assignation. It was contended, however, that the deceased had in effect provided the premiums falling due after that date in that he gave the trustees power under the declaration of trust to borrow the money to pay those premiums on the security of the surrender values of the policies, which they had done. That contention was rejected by the Court on the ground that as the whole beneficial interest in the policies was vested in the beneficiaries the premiums were in substance and reality entirely provided by them. The Crown also contended that the policies were an interest purchased or provided by the deceased in concert or by arrangement with the trustees. That contention also was rejected on the ground that although the money to pay the premiums falling due after the assignation was borrowed by the trustees by arrangement with the deceased, the interest in the policies was not thereby purchased or provided by the deceased in concert or by arrangement with the trustees but was purchased or provided by the trustees in concert or by arrangement with the deceased. The deceased purchased or provided nothing.

On the second point the claim of the Crown failed because it was not shown that any beneficial interest accrued or arose on the death of the deceased to the beneficiaries under the declaration of trust. The whole interest in the policies and in the policy moneys passed to the beneficiaries twenty-four years before the death of the deceased. Their interest was then fully vested and was neither altered nor increased by the death of the deceased. The nature of the interest was the same although the value of it increased during the lifetime of the assured.

It was conceded by the Crown that if the claim for estate duty failed the claim for succession duty could not succeed.

Fraser-Taylor's Application, *In re*

Mortgage—Emergency legislation—Application for leave to appoint a receiver—Evidence required on—Courts (Emergency Powers) Act 1939, *s.* 1, *sub-ss.* 2, *par.* (*a*) (*ii*) *and* 4

CHANCERY DIVISION

MORTON J.

1941. July 30.
[1942] Ch. 40.
[1941] 3 All E.R. 941.
58 T.L.R. 23.

In an application made to the Court by a mortgagee for leave to appoint a receiver of the property comprised in the mortgage it is not necessary to produce any evidence that the statutory power to appoint a receiver has arisen. The mortgage deed having been produced and the power to appoint a receiver not being excluded thereby, the only matter which the Court has to consider is whether the mortgagor has put forward any evidence to show that he is unable immediately to pay the amount due under the mortgage deed by reason of circumstances directly or indirectly attributable to the war.

If there is any dispute as to whether or not the power to appoint a receiver has arisen that must be determined in other proceedings.

Tritonia, Ltd. *v.* Equity and Law Life Assurance Society

Emergency legislation—Scotland—Relief against diligence of creditor—Heritable security granted by party under no personal obligation—Courts (Emergency Powers) (Scotland) Act 1939

HOUSE OF LORDS

1943. Aug. 5.
[1943] 2 All E.R. 40.
60 T.L.R. 3.

Where a party claiming relief against the diligence of his creditor was in default for a prolonged period before the commencement of the present war, the burden of showing that his continued default is attributable to the war is not easily discharged. It is not enough for the applicant to say that he believes that but for the war the potentialities of his business would have been realized.

At the date of this decision a party who had pledged his heritable property in Scotland as security for a debt owed by another but who was under no personal obligation to the disponee was not entitled to relief from the exercise by the latter of his power of sale.

By the Courts (Emergency Powers) (Scotland) Act 1944 the Scottish Act has now been amended so as to bring it into line with the English Act as amended by the Courts (Emergency Powers) Amendment Act 1942, now consolidated with that and the other amending Acts in the Courts (Emergency Powers) Act 1943. As in England, the Court in Scotland may now on an application for leave to exercise a right or remedy available in consequence of a default by any person in the payment of a debt or the performance of an obligation treat any person appearing to the Court to have any interest in property affected by the right or remedy as if he were the person liable to pay the debt or to perform the obligation and may grant him relief accordingly.

Gregory and Co. (Bruton Street) Ltd., *In re*

Emergency powers—Application for leave to exercise remedy—Demand by creditors of company—Evidence that applicant not a creditor—Companies Act 1929, *s.* 169, *sub-s.* 1—*Court (Emergency Powers) Act* 1939, *s.* 1, *sub-s.* 2, *par.* (*a*) (*v*)

CHANCERY DIVISION

BENNETT J.

1943. Feb. 8.
[1943]. Ch. 130.
[1943] 1 All E.R. 293.
59 T.L.R. 169.

Although on an application under the Courts (Emergency Powers) Act 1939 for leave to exercise a remedy which the applicant claims to be entitled to enforce the applicant is not bound to support his claim by any evidence, yet if the respondent files uncontradicted evidence which proves conclusively that the applicant is not entitled to the remedy which he seeks leave to enforce leave will be refused.

Where an applicant sought leave of the Court to serve a demand on the respondent Company as a creditor under s. 169, sub-s. 1 of the Companies Act 1929 as a preliminary to presenting a petition to wind up the Company, the respondent Company filed uncontradicted evidence which proved conclusively that the applicant was not a creditor of the Company.

Leave to serve the demand was refused.

Rothermere deceased, *In re*

Covenant to pay money—Provision in deed charging covenantor's assets on death—Effect of—Covenant that creditors shall have priority—Void against other creditors

CHANCERY DIVISION

UTHWATT J.

1943. Jan. 22.
[1943] 1 All E.R. 307.
59 T.L.R. 145.

Where there is a covenant in a deed to pay a named sum of money to the covenantee it is competent to the covenantor to provide that in the event of his death without having paid the said sum it shall attach by way of equitable charge to the whole assets comprised in the covenantor's estate at the date of his death.

Such a charge would render it improper for the covenantor's executors to alienate or dispose of any asset of the estate unless they had first paid off the creditor in question and would seriously embarrass the executors in the administration of the estate and if any more reasonable interpretation can be placed on the deed it is to be preferred.

Where a deed provided that on the covenantor's death the amount due should 'constitute a first charge' on his estate it was held that the phrase was ambiguous and was capable of meaning either that there should be an equitable charge on the whole assets of the covenantor's estate or that in the administration of the estate the debt in question should be paid before any other debt. As it was more reasonable to suppose that the latter was what the covenantor intended the Court so construed the deed: but such a direction was inoperative in that the law provides for the order in which a deceased person's debts are to be paid and no agreement by the debtor with his creditor can vary that order.

The covenantee was therefore an unsecured creditor of the estate without any priority over other creditors.

Notes

Legislation:

Robb's Contract, In re, Vol. LXXI, p. 445. Finance Act 1942, s. 44 has given statutory effect to the Inland Revenue circular referred to in this case and voluntary dispositions which are exempt from the ad valorem stamp duty imposed by sub-s. 6 of s. 74 of the Finance (1909–10) Act 1910 (that is to say, by sub-s. 6 thereof, certain conveyances or transfers made for securing repayments of advances and loans or connected with trusts or not passing any beneficial interest and certain disentailing assurances) need no longer be submitted for adjudication or bear the Inland Revenue adjudication stamp. This enactment is retrospective and validates all past conveyances and transfers in the above category which in the absence of an adjudication stamp were formerly deemed to be insufficiently stamped.

Woolwich Equitable Building Society's Application: Leicester Temperance and General Permanent Building Society's Application, Vol. LXXI, p. 432. The *casus omissus* in the Courts (Emergency Powers) Act 1939, s. 1, sub-s. 4 which resulted in these decisions has now been remedied by an amendment of that sub-section by the Courts (Emergency Powers) Amendment Act 1942, s. 1, sub-s. 1 which provides that the court may grant relief

to any person who appears to be affected by the exercise of a mortgagee's rights against the mortgaged property. This gives relief among others to a mortgagor who has executed the mortgage to secure another's debt and to the assignee of the equity of redemption although neither is under any personal liability to pay the mortgage debt and on that account was not previously entitled to relief. By the rules made under the amending section both of these must now be made respondents to the mortgagee's application for leave to exercise the remedies available to him against the mortgaged property (S.R. & O. 1942, No. 2163).

Wood v. *Smallpiece*, Vol. LXXI, p. 425. The common law right of a mortgagee to obtain possession of the mortgaged property which was restricted by the enactments referred to in the first paragraph of the note on this case has been further restricted by s. 2 of the Courts (Emergency Powers) Amendment Act 1942. A mortgagee must now obtain the leave of the court before instituting proceedings for the recovery of possession of the mortgaged property instead of as formerly proceeding to judgment without leave and then obtaining the leave of the court to proceed to the execution of the judgment. The amending legislation does not however affect the decision in this case as set out in the head note. The Courts (Emergency Powers) Act 1939 and the several amending Acts are now repealed and consolidated in the Courts (Emergency Powers) Act 1943, 6 & 7 Geo. 6, c. 19.

Departmental Statement:

Bryan (*Inspector of Taxes*) v. *Cassin*, Vol. LXXI, p. 439. Following on representations made on behalf of the Life Offices' Association to the Principal Inspector of Taxes the Department has reconsidered the position and has intimated that in order to simplify procedure no objection will be raised if an insurance company treats the final payment of an apportionable annuity for the purposes of deduction of tax in the same way as previous payments have been treated. If the annuity was paid in full when the annuitant was alive the final payment may be made in full and if the annuity was paid under deduction of tax at a reduced rate the final payment may be made under deduction of tax at the reduced rate. If there is additional income tax due in respect of the final payment over and above the tax (if any) deducted the additional tax will be collected from the recipient of the final payment.

Appeal:

Barnes v. *Hely-Hutchinson*, Vol. LXIX, p. 207. In this important tax case the House of Lords reversed the decision of the Court of Appeal [1940] A.C. 81. The question at issue was whether a preference shareholder in a company registered in Calcutta who was assessable to income tax under Sch. D, Case V, r. 1 on the full amount of his income arising from stock, shares or rents in any place out of the United Kingdom, whether the income has been or will be received in the United Kingdom or not, was entitled to an abatement at the rate of 44·12 % from the standard rate of tax on the ground that 44·12 % of the company's profits for the year was derived from dividends paid to the company by two British companies in which it was a shareholder and the profits of which had borne British income tax. The analogy was invoked of the share-

holder in a British company who is not taxed separately to standard income tax on his dividends because they are treated as franked by the tax which has been paid by the company on its profits as a whole. The House of Lords held that the rule had no application to the tax assessable on the dividends of the Indian Company inasmuch as the Indian Company had not paid United Kingdom tax on its profits or any part of its profits in such a way as to frank the preference dividends in whole or in part in the hands of the English recipient.

Further references:

Vandyke v. *Adams*, Vol. LXXI, p. 427. 58 T.L.R. 129.
Allchin v. *Coulthard*, Vol. LXXI, p. 441. [1942] 2 K.B. 228: 58 T.L.R. 285.
Butler's Settlement Trust, In re. [1942] Ch. 403.

LEGAL NOTES

By EVAN JAMES MACGILLIVRAY, B.A., LL.B.
One of His Majesty's Counsel

Bird, deceased, *In re*

Annuity—Whether free of income tax—Whether a stated amount—Finance Act 1941, *s.* 25

CHANCERY DIVISION
UTHWATT J.
1943. Nov. 24.
[1944] Ch. 111.
[1944] 1 All E.R. 132.
60 T.L.R. 90.

A testator directed his trustees to pay the income from a capital trust fund to his wife during her widowhood and, if after deduction of income tax at the current rate the income received by her should be less than £500, to make good the deficiency out of capital.

It was held that the amount of the deficiency was an income given to the widow free of income tax and that it was 'a provision however worded for the payment of a stated amount free of income tax' within the meaning of the Finance Act 1941, s. 25. 'Stated amount' is not confined to an amount stated in terms of currency. An amount can be stated with reference to the income from time to time of an identified trust fund. The amount in currency cannot, save perhaps in exceptional cases, be set out or predicted: but the source of the income referred to—the aggregate of the property for the time being comprised in the trust fund—does not change, and the income referred to, though subject to fluctuation in amount, remains the same thing, namely, the income produced by that aggregate. It is the amount of that income, whatever it may be from time to time, that is stated. The statement is the statement of an amount and is complete in itself, and no future happening can vary the amount so stated. It follows that the deficiency from a fixed sum of the income of a trust fund is also a stated amount.

Priest, deceased, *In re*

Holograph will made in Scotland by British subject domiciled in England—Attested by husband of beneficiary—Gift void

CHANCERY DIVISION
BENNETT J.
1943. Nov. 25.
[1944] 1 All E.R. 51.
[1944] Ch. 58.
60 T.L.R. 145.

By the Wills Act 1837, s. 15, if an attesting witness, or the wife or husband of an attesting witness, takes any benefit under the will, the attestation is valid but the gift is void. The Wills Act 1837 does not apply to Scotland, and according to Scots law a holograph will signed by the testator is valid without attestation of his signature.

By the Wills Act 1861, a will made within the United Kingdom by a British subject is valid if made according to the law in force in that part of the United Kingdom where it was made.

A British subject domiciled in England made when in Scotland a holograph will by which he bequeathed half of his residuary estate to E. D. The will if unattested would have been valid according to Scots law, but the testator's signature was in fact attested by two witnesses, one of whom was the husband of E. D.

Held that E. D. was excluded from taking any benefit under the will. It was impossible from the evidence to conclude that the testator intended to make a holograph will according to Scots law or that he was minded to make a will otherwise than in conformity with the Wills Act 1837, the provisions of which excluded from any benefit the wife of an attesting witness.

Grosvenor, *In re*

Presumption of death—Two or more persons—Uncertainty as to which survived the other—Statutory presumption—Law of Property Act 1925, *s.* 184

COURT OF APPEAL

1943. Dec. 15.
[1944] 1 All E.R. 81.
[1944] Ch. 138.
60 T.L.R. 124.

The Law of Property Act 1925, s. 184, enacts that, when two or more persons die in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the Court) for all purposes affecting the title to property be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder.

The words 'for all purposes affecting the title to property' are very wide and the section applies not only to questions of title strictly so called but to claims by or through a legatee or devisee under a will where the succession depends on survivorship or on the fact that some other legatee or devisee predeceased the testator.

The words 'subject to any order of the Court' do not give the Court any discretion to depart from the presumption in cases where the section says it is to arise. It is difficult to find a sensible meaning for these words, but they may refer to subsequent orders of the Court in the event of fresh evidence becoming available.

When the proper inference from the evidence is that the death of two or more persons was simultaneous, as in the event of their being killed by a high-explosive bomb, the presumption of survivorship does not arise. The presumption arises only when the proper inference from the evidence is that the deaths were consecutive, but it is uncertain which died first, as for instance when two persons are washed overboard at sea by the same wave.

Hooper, *In re*

Annuity—Gift of by will—Meaning of 'free of income tax' or 'without deduction of income tax'—Intention that annuitant shall actually receive specified amount—Annuity being an amount consisting of cash payment plus tax paid—Meaning of 'free of all deductions whatever'—Income tax not a deduction

CHANCERY DIVISION

UTHWATT J.

1943. Dec. 21.
[1944] 1 All E.R. 227.
[1944] Ch. 171.
60 T.L.R. 161.

In law it is beyond the competency of a testator to free an annuitant from the burden of income tax; that intention can only be carried out by an appropriate increase in the specified money amount of the annuity, the increase being such as to enable the annuitant to receive the specified amount after the tax incident to the increased annuity in the hands of the annuitant has been satisfied in manner required by the Act.

In such cases a question which gives rise to difficulty is whether on the true construction of the particular will the testator has declared his intention

that the annuitant shall receive the specified annual sum as a net sum after income tax has been accounted for. The words 'free of income tax' or 'without deduction of income tax', although technically inaccurate, do sufficiently express the testator's intention to that effect, but it is not necessary that income tax should be in terms referred to. The only thing necessary is an adequate expression of the testator's intention.

Income tax withheld on payment of an instalment of an annuity is not, technically speaking, a deduction from the annuity. The annuity is paid in full, in part by cash payment to the annuitant and in part by satisfaction, in accordance with the provisions of the Income Tax Acts, of the income tax exigible in respect thereof. It follows that where there is a direction to pay an annuity of a specified amount 'free of all deductions whatsoever' these words will not be construed as including income tax unless there is shown by the will an intention that income tax is to be treated as a deduction.

In the particular will which was the subject-matter of the case now noted, the learned judge said that there were three matters to be observed. First, the will throughout was expressed in technical terms; colloquial language was absent. Secondly, the phrase 'free of all deductions whatsoever' had no application to anything else unless income tax were treated as a deduction; freedom from death duty was expressly provided for. Thirdly, the rest of the will contained nothing to suggest that income tax was to be treated as a deduction. The sole question, therefore, was whether, in the absence of any explanatory matter, the bare fact that unless so treated the phrase had no application at all justified the inference that the testator intended for the purpose of the gift to treat income tax as a deduction. It was no doubt a sound rule of construction that, when words are susceptible of several interpretations, that interpretation should be adopted which would give some effect to every expression, rather than one which would render any of the expressions inoperative. But the rule ought not to be pressed so far as to wrest words from their proper legal meaning only because those words are superfluous. In his, the learned judge's, view it would not be right to construe the will as giving a tax-free annuity. Income tax was not a deduction and the will was expressed in technical terms. He preferred to treat the phrase as meaningless rather than, in an instrument drawn in technical terms, to attribute to it a meaning which it did not bear in law and which had consistently been denied it by authority for nearly a century.

In the case of *In re Cowlishaw* [1939] Ch. 654, Bennett J., in construing a will which he, Uthwatt J., could not distinguish from the will now under consideration, had come to the opposite conclusion to that at which he had arrived. He found himself, however, constrained to differ from Bennett J. and would declare that the annuity was not given free from the income tax to which it was subject.

Wittke, *In re*

Protective trust—Trustee Act 1925, *s.* 33*—Destination over 'subject thereto'—Trading with the Enemy (Custodian) Order* 1939*—Beneficiaries resident in enemy-occupied territory*

CHANCERY DIVISION

VAISEY J.

1944. Jan. 13.
[1944] 1 All E.R. 383.
[1944] Ch. 166.

The testatrix by her will directed that the residue of her estate should be held by the trustees 'as to the income thereof upon protective trusts for the benefit of my sister Louise Berrin provided always that my trustees shall have power from time to time to pay to my said sister the whole or any part of the capital of my residuary estate in their absolute discretion and subject thereto upon trust to pay the capital and income of my residuary estate to King Edward's Hospital Fund for London'.

The learned judge held that upon the true construction of that bequest the gift to the sister of the testatrix was for payment of the income of the trust estate to her for the period of her life and was not an indefinite gift of income. It followed that s. 33 of the Trustee Act 1925 applied and that the income was held on the trusts therein defined, that is to say, for the payment of the income to the named beneficiary for the period of her life or until forfeiture had arisen by reason of the vesting of the interest in some person other than the beneficiary and upon that event happening then on trust for the application thereof for the maintenance or support or otherwise for the benefit of all, or any one or more exclusively, of certain specified persons who in the events which had happened might be said to be the principal beneficiary and her husband.

On the death of the testatrix Louise Berrin and her husband were both resident in France and were therefore affected with enemy status.

By the Trading with the Enemy (Custodian) Order 1939, made under the authority of the Trading with the Enemy Act 1939, any money which but for the existence of a state of war would be payable to or for the benefit of any enemy is directed to be paid to the Custodian of Enemy Property.

It was admitted that a forfeiture of the interest of Louise Berrin had occurred and that the trust for the application of the income for maintenance and so forth had arisen within the meaning of the section if it applied. The question was whether the interest which the principal beneficiary and her husband acquired in that form was caught by the provision of the Trading with the Enemy (Custodian) Order. The learned judge was of opinion that no distinction could be drawn between money which was payable for the benefit of an enemy and money which was applicable for the benefit of an enemy and therefore, having regard to the construction of the will, the proper interpretation of the Trustee Act 1925 and the true scope of the Trading with the Enemy Act 1939 and the Trading with the Enemy (Custodian) Order 1939, it followed that as from the admitted forfeiture of the determinable interest given to Madame Berrin and until further order the income should be paid to the Custodian of Enemy Property.

The learned judge was unable to accept the argument that, because it was impossible for there to be an application of the income for the personal benefit of either of those persons, the King Edward's Hospital Fund for London came in by virtue of the words 'subject thereto'.

Fuchs, *In re*

Estate duty—Property passing on death of tenant for life of settled funds—Executor not accountable—Person to whom property passes for a beneficial interest in possession—Persons claiming under the will of the settlor who was entitled absolutely to reversion

CHANCERY DIVISION

SIMONDS J.

1944. Feb. 3.
[1944] Ch. 200.
60 T.L.R. 243.

By the Finance Act 1894, s. 8 (1), where property passes on the death of the deceased and his executor is not accountable for the estate duty payable in respect of such property, every person to whom any property so passing for any beneficial interest in possession and also to the extent of the property actually received or disposed of by him, every trustee, guardian, committee or other person in whom any interest in the property so passing or the management thereof is at any time vested, and any person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property.

By a post-nuptial settlement dated 23 April 1881 the testator settled certain funds in trust to pay the income to his wife during her lifetime and subject thereto, in the events which happened, on trust for himself absolutely. By his will he directed that after the death of his wife the trustees of the settlement should transfer the settlement funds to the trustees of his will and on that event happening he directed the trustees of his will to pay certain legacies and to hold the residue on certain trusts for the benefit of his residuary legatees. The testator died on 19 December 1894, having had no issue. The testator's wife survived him and died on 22 March 1940. On her death the trustees of the testator's will received the settlement funds and took out this summons, which asked whether the estate duty payable on the death of the widow ought to be borne by the legacies and the residuary trust estate rateably or wholly by the residuary trust estate.

Held that, as the testator was the absolute beneficiary of the residuary interest in the settlement funds, he and after his death his executors were the persons to whom on the death of his widow the property passed for a beneficial interest in possession within the meaning of the subsection and that as such beneficiaries his executors were liable to pay the duty. At that stage the effect of the subsection was exhausted and there was no justification for carrying the matter further and apportioning the duty as between those who claimed under and through the absolute beneficiary. The whole duty therefore would be borne by the residuary estate and no part of it by the legatees. The right of the legatees was not a right to the property which passed on the death of the widow but solely a right to have the estate of the reversioner administered in due course.

Howard, deceased, *In re*

Will—Revocation—By two subsequent inconsistent wills neither of which admitted to probate—Intestacy—Presumption of survivorship—Law of Property Act 1925, *s.* 184

PROBATE DIVORCE AND ADMIRALTY DIVISION
HENN COLLINS J.
1944. Feb. 9.
[1944] P. 39.
60 T.L.R. 248.

A testator executed a will by which he left his whole estate to his son. On a later date he executed two wills, both of which revoked all former wills and by one of which he left everything to his son and by the other left everything to his wife. There was no evidence as to the order in which the two later wills were executed. It was held that both were void for inconsistency and that neither could be admitted to probate, but that inasmuch as each was executed so as to comply in form with s. 20 of the Wills Act 1837 they were effective in so far as they expressed a common purpose to revoke the earlier will and that there was therefore an intestacy.

A man and his wife and their son all died as the result of the explosion of an enemy land-mine or parachute-bomb which demolished the house in which they were living. Only fragments were found of the bodies of the man and of his wife who presumably occupied the same room, whereas the body of the son who slept in another part of the house was found apart and not mutilated. *Held* that there was no evidence to show that the son died simultaneously with his parents and that s. 184 of the Law of Property Act 1925 raised the presumption that he survived both his parents. The inference from the evidence was that the parents died simultaneously and there was therefore no presumption that either survived the other.

Hillas-Drake, *In re*

Residuary estate—Divisible among children of testator in equal shares—Advancements to be brought into hotchpot—Date at which estate to be valued for that purpose—Adjustment of income

CHANCERY DIVISION
SIMONDS J.
1944. Feb. 17.
[1944] 1 All E.R. 375.
60 T.L.R. 261.

This was an adjourned summons to determine at what date the residuary estate of the testator, Thomas Standish Hillas-Drake, should be valued for the purpose of adjusting the rights of the beneficiaries *inter se* on the final distribution of the capital after the death of the testator's widow. By his will the testator directed the trustees to hold the residuary trust fund in trust to pay the income thereof to his wife during her life and subject thereto to hold the fund in trust as to one equal third part for his son Robert, as to one equal third part for his daughter Beatrice and the remaining third part for his daughter Ella. The testator also directed that any securities settled by him on the marriage of any of his children should be brought into hotchpot by such child in ascertaining his or her share of the trust fund and that certain other moneys should be similarly brought into hotchpot by his son. The testator's widow survived him but died within a month after his death. The amounts to be brought into hotchpot were agreed to be £7368 by the son, £3846 by Beatrice and £4257 by Ella.

In a similar case (*In re Gunther's Will Trusts* [1939] Ch. 985) Farwell J. held that for the purpose of adjusting the rights of the beneficiaries on a final distribution of the estate the valuation should be made as at the date of the testator's death and that decision was followed by Bennett J. in *In re Oram* ([1940] Ch. 1001). Simonds J. refused to follow those decisions and held that the valuation should be made at the date of distribution. He pointed out that in that way alone was it certain that equality in the distribution would be secured. Valuation at the date of death would almost certainly result in inequality in greater or less degree. If the value of the assets had appreciated since the death, the beneficiary who had received the advance might lose in the distribution more than he had gained by his advancement. On the other hand, if the value of the assets had depreciated, the advanced beneficiary would retain a substantial advantage. Moreover, it had long been the practice of the Court to value the assets for the purpose in question as at the date of distribution. With regard to the income account, each beneficiary who had received an advance would be debited with interest at 4% on the amount of his advancement against his share of the residuary income.

Inland Revenue *v.* Oswald

Mortgage—To secure repayment of capital and interest—Option to mortgagee to capitalize unpaid interest—Exercise of option—Whether capitalized income assessable to income tax

COURT OF APPEAL

1944. March 16.
[1944] 1 All E.R. 426.

B being entitled to the funds comprised in a settlement, subject to a life interest, mortgaged her reversionary interest to L to secure the repayment of money advanced to her and the interest thereon. The mortgage deed provided that if the interest were not paid within 21 days after it became due it might at the option of the mortgagee be capitalized as from the date when it became due. No interest was paid after 18 August 1906. L died on 7 May 1920. By an instrument dated 9 August 1935 the trustees of her will exercised the option contained in the mortgage deed and capitalized 'so much of the interest fallen due on the principal sums as is now capable of being capitalized'. On 29 June 1938 the reversionary interest fell into possession. By another instrument dated 13 September 1938 the trustees of L's will capitalized the interest which had fallen due since 9 August 1935 and claimed payment from the respondent, as the sole surviving trustee of the settlement, of the principal sums due under the mortgage deed and the capitalized interest. The claim in respect of interest was made up by capitalization of the net interest after deduction of income tax payable on the dates when the interest fell due. They did not claim any right to capitalize the gross interest.

The Commissioners of Inland Revenue assessed the respondent to income tax on the capitalized interest on the footing that it was payable to L's trustees in respect of arrears of interest and therefore assessable to tax under All Schedules Rules, r. 21.

The Special Commissioners discharged the assessment on the ground that it was not interest under r. 21 but the capitalized balance of past interest after tax had been deducted. On appeal from the Special Commissioners Lawrence

J. dismissed the appeal. The case was, he said, indistinguishable from the decision of the Court of Appeal in *I. R.* v. *Lawrence Graham and Co.* [1937] 2 K.B. 179.

On appeal by the Crown to the Court of Appeal the appeal was dismissed and the decision of Lawrence J. affirmed.

Associated Insulation Products Ltd. *v.*
H. Golder (H.M. Inspector of Taxes)

Income tax—Dividends of foreign corporation—Paid in scrip instead of cash—Certificates of indebtedness payable four years after date

KING'S BENCH DIVISION
MACNAGHTEN J.
1944. March 29.
[1944] 1 All E.R. 533.

Under Schedule D, Case V of the Income Tax Act 1918 a company incorporated in this country is taxable on income from foreign possessions, and in order to be taxable the company must receive not a promise to pay but payment. Where such a company held shares in a company incorporated under the laws of the United States of America and that company declared a dividend on its shares which was payable not in cash but in certificates of indebtedness payable four years after date, the British company was not assessable to tax on such dividends in the years in which they were declared but in the year in which the payment was made under the certificates.

Sebright, *In re*

Annual payments—Payable out of profits and gains brought into charge—Deduction of tax—Income Tax Act 1918, *All Schedules Rules, r.* 19—*Finance Act* 1927, *s.* 39 (1)—*Payment of arrears—Rate of deduction—Year in which the amount became due—Arrears of jointure paid out of rentals of subsequent year—Power to create jointure not exceeding specified amount—Jointure declared to be free of succession and estate duty—Whether limit exceeded*

CHANCERY DIVISION
VAISEY J.
1944. March 30.
[1944] 2 All E.R. 547.

By the provisions of the Income Tax Act 1918 All Schedules Rules, r. 19, as amended by the Finance Act 1927, s. 39 (1), where any annual payment is payable wholly out of profits and gains brought into charge to tax, no assessment shall be made upon the person entitled to such annual payment, but the whole of those profits and gains shall be assessed and charged with tax on the person liable to the annual payment without distinguishing the same, and the person liable to make such payment shall be entitled in making such payment to deduct and retain thereout a sum representing the amount of the tax thereon at the standard rate for the year in which the amount payable becomes due.

The phrase 'becomes due' does not mean the same as 'becomes payable', and either 'became due' or 'became or becomes due' would have been a more accurate expression, and in effect it means that the person entitled to the annual payment should in regard to payment of tax be placed in the same position as though the payment had been made on the very day on which it became due. The person liable to make the payment may therefore be in the position of having himself suffered a deduction at one rate while his own right of deduction and retention is at a different rate.

Where a settled estate was subject to a yearly rent charge of £600 by way of jointure created by a deed of appointment executed, in pursuance of the will of the settlor, by a former tenant for life of the settled estate in favour of his widow and the payment of the jointure had for several years fallen into arrear, a sum representing rents or other income of the settled estate became available for discharging those arrears. Income tax upon such rents and other income at the appropriate rate of 10*s.* per pound had been paid or accounted for to the Revenue. The tenant for life contended that tax at the same rate was deductible from the payments to be made in discharging the arrears of the jointure. *Held* that the tax deductible from such payments was the standard rate of tax for the financial year in which each half-yearly payment of the jointure became due.

The deed of appointment directed the payment of a jointure of £600 per annum 'without any deduction'. As a matter of construction it was agreed that that would exonerate the jointure from payment of succession and estate duties, but it was contended by the tenant for life that by reason of that direction the appointment was *ultra vires* of the power which permitted the creation of a jointure not exceeding £600 per annum, in that the jointure exceeded that sum by the amount of the duties from payment of which the person entitled to the jointure was relieved. *Held* that although the matter was not free from doubt the Court ought to follow the decision of Bennett J. in *Re Smith-Bosanquet* (*J.I.A.* Vol. LXXI, p. 166) L.R. [1940] Ch. 954, and hold that a jointure of the full permitted amount free from succession and estate duties was within the power.

Hill, *In re*

Will—Annuity—Charged on capital as well as income—Insufficiency of estate—Valuation

COURT OF APPEAL

1944. March 31.
[1944] 1 All E.R. 502.
[1944] Ch. 270.
60 T.L.R. 358.

In certain cases where a testator directs payment of annuities out of an estate which is insufficient to provide for them out of income such annuities may be valued and the amount so ascertained treated as pecuniary legacies and paid over to the annuitants. But the valuation of annuities in any such case is not a rule of law which has universal application but a rule of convenience in administration.

If there are no pecuniary legacies and the question is simply as between annuitant and residuary legatees the annuitant is entitled to have the deficiency made up out of capital, but he must take the estate as it stands and is not entitled, except by consent of the persons entitled to the residuary estate, to have the value of the annuity paid over to him. If, however, pecuniary legacies are also concerned and the estate is insufficient for the payment of both in full then where there is a direction in the will to set apart and invest a sum sufficient to answer the annuity the Court as a matter of convenience of administration will direct the annuity to be valued, treat the amount of the valuation as a legacy, make it abate in due proportion and direct payment of the abated value to the annuitant.

There is an intermediate case where, although the estate is insufficient to pay pecuniary legacies in full and to set aside a fund sufficient by its income to answer the annuity or annuities, the estate is sufficient to pay the full value of the annuity or annuities and even to leave a surplus for residue, and in such a

case it is usual to apply the rule; but it would seem unnecessary to do so if there is no competition between the legatees and the annuitants or between the annuitants *inter se*: for example, in a case like the present where the pecuniary legacies can be paid in full at once and it is plain on the evidence that the residue will be more than sufficient to pay all the annuities in full as and when they fall due in accordance with the testator's directions.

It would be contrary to common sense to apply the so-called rule to a case where there is no proper ground for its application and where by so doing the testator's directions are interfered with unnecessarily and an inequitable result is achieved. No confusion can be caused if the Court refuses to apply the rule where it is clear on the evidence that all the annuities can be properly satisfied in full out of the estate and there is no commercial risk of any insufficiency.

In the Estate of Bean

Will—Validity—Signature—Testator's name on back of paper and on envelope containing the paper

PROBATE DIVORCE AND ADMIRALTY DIVISION

HOBSON J.

1944. May 25.
[1944] P. 83.
60 T.L.R. 418.

By s. 9 of the Wills Act 1837 no will shall be valid unless it be in writing and executed in manner therein mentioned, that is to say, it shall be signed at the foot or end thereof by the testator or by some other person in his presence and by his direction and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary.

The signature of the testator may be written on an envelope which contains the document upon which the dispositive part of the will is written but only if the proper inference is that the deceased's intention was to give effect to the will by the writing on the envelope. If on the other hand the proper inference is that the writing on the envelope was only for the purpose of identifying the contents of the envelope and not as a signature at all it will not suffice.

In this case the document which it was sought to prove was written on a printed form which contained a space for the testator's signature, and the Court came to the conclusion that the omission on the part of the deceased to sign it there was purely accidental and that when he wrote his name on the back of it and on the envelope he was under the impression that he had already signed the will in the place provided in the form for his signature. It was impossible therefore to regard the endorsement on the envelope as intended to be a signature of the will or otherwise than a description of the contents of the envelope. The unsigned will and the containing envelope could not be admitted to probate and the motion was refused.

Mercer, *In re*

Presumption of death—Death of husband and wife by enemy action—Uncertainty as to which survived the other—Law of Property Act 1925, *s.* 184

CHANCERY DIVISION

MORTON J.

1944. June 6.
[1944] 1 All E.R. 759.
60 T.L.R. 487.

Where the deaths of two or more persons occur as a consequence of the same violent occasion or closely connected series of such occasions and there is no evidence from which it may properly be inferred that the deaths were simultaneous or that either or any of such persons survived the other or any of the others the statutory presumption applies and the younger is deemed to have survived the elder.

A man and his wife resided in the city of York in a block of flats which was destroyed by enemy action in the early hours of the morning. Two high-explosive bombs of a weight estimated at 500 kilograms each fell one in front and the other in the rear of the flats, and a number of incendiary bombs fell on the city that night. Both the man and his wife were killed and their bodies were found among the debris without any sign of injury other than those caused by burning. There was no evidence to show in what room or rooms the two were when they met their deaths.

Morton J. held that the statutory presumption applied and that as the wife was the younger there would be a declaration that the administrators of the estate of the husband should distribute that estate on the footing that he predeceased his wife. He said that the cases in which the Court could find that two or more persons died simultaneously must be extremely rare. *In re Grosvenor* (ante, p. [16]) was a case of a direct hit on an air-raid shelter where those killed were all close together. It would not be right to draw any similar inference in the present case. The Act must apply to the great majority of cases where two or more persons are killed by bombs.

A quantity of furniture estimated to be of the value of £200 which was the property of the husband was destroyed as a result of the bomb damage to the flat, and a right to recover the value thereof arose under the War Damage Act 1943. The husband died intestate, and if it had been proved that the furniture was still in existence at the time of his death the wife would have become entitled to it under his intestacy and the right to claim the war damage compensation would have vested in her and would be an asset of her estate. On the other hand, in the absence of such proof the right to claim the war damage compensation would form part of the husband's general residuary estate. The learned judge held that there was no evidence on which he could find that the furniture survived the husband's death and therefore the claim of the wife's executors to the right to recover the war damage compensation failed.

Barclays Bank Ltd. *v.* **Attorney-General**

Estate duty—Customs and Inland Revenue Act 1889, *s.* 11—*Money received under life policy—Policy comprised in settlement—Premium paid out of settled funds provided by settlor—Whether kept up by settlor for benefit of donee*

HOUSE OF LORDS

1944. July 27.
[1944] A.C. 372.
[1944] 2 All E.R. 208.

In this case the House of Lords reversed a majority decision of the Court of Appeal in favour of the Crown (*J.I.A.* Vol. LXXII, p. [8]) and held that, where a settlement comprised policies of life assurance on the settlor's own life and the settlor retained no interest under the settlement, the fact that the premiums on the policies were paid by the trustees

of the settlement out of settled funds provided by the settlor for that purpose did not render the proceeds of the policies payable on the death of the settlor liable to estate duty on the ground that the policies were kept up by him for the benefit of the donees within the meaning of the Customs and Inland Revenue Act 1889, s. 11.

The grounds upon which the House of Lords reversed the decision of the Court of Appeal and held that no estate duty or succession duty was payable on the death of Viscount Devonport in respect of the money received under policies of life assurance effected by him on his own life and comprised in a settlement made by him are tersely expressed by Lord Thankerton in the following words:

'With all respect to the learned judges who have held otherwise I am clearly of opinion that these policies were not kept up by the deceased after the date of the settlement and I agree with the opinion of Luxmoore L.J. The premiums were annual ones and the crucial date in each year could not arrive until it became necessary to renew the currency of the policies for another year because of the survival of the assured. Payment of the premium necessary for renewal was made by the trustees, over whom the deceased retained no control, out of the settled funds in which the deceased had no interest and over which he retained no control. It cannot be maintained that the trustees made such payments as agents of the deceased, and the fact that the funds out of which the payments were met were originally settled by the deceased is not relevant in my opinion. I agree with the statement of Luxmoore L.J. when he said: "The funds were no longer the property of the first Viscount. They belonged in equity to the beneficiaries who alone could compel the trustees to carry out the trusts. The payment by the trustees of the premiums was not made by them in any sense as agents for the first Viscount and cannot properly be described as being payments made on the first Viscount's behalf."'

In the Estate of Mardon

Will—Revocation by subsequent will—Revival of earlier will in part by codicil thereto—Wills Act 1837, *s.* 22

PROBATE DIVORCE AND ADMIRALTY DIVISION

BARNARD J.

1944. July 28.
[1944] 2 All E.R. 397.
[1944] P. 109.

In this case the testatrix had executed three wills in 1934, 1935 and 1939 respectively. Each of these three wills was prepared by a solicitor and disposed of the whole estate of the testatrix, and each contained the usual revocation clause revoking all former wills. In 1941 the testatrix executed a codicil to the will of 1934. This had been drafted by a relative without legal advice. The codicil altered the main portions of the will but did not contain the usual clause confirming the will in all other respects. The questions for the Court were whether this codicil revived the first will in whole or in part and if so whether the third will was thereby revoked. The answer to these questions depended on the true interpretation of the Wills Act 1837, s. 22, the material part of which reads as follows:

No will or codicil, or any part thereof which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof or by a codicil executed in manner hereinbefore required and showing an intention to revive the same.

It was obvious from the facts of the case that when the testatrix asked her relative to draft a codicil to the first will she had completely forgotten the existence of her two later wills and that the codicil was drafted with reference only to the will of 1934. The learned judge said that it was clear from the authorities that it was not necessary that a codicil should show on the face of it that the deceased knew that the will to which the codicil purported to be a codicil had been revoked and that she was in fact reviving such will. This particular codicil showed an intention to revive a part of the revoked will by reference to certain provisions of that will as of an existing and valid will. The evidence in the case was clear and undisputed that the draftsman of the codicil applied his mind to certain provisions of the first and revoked will and therefore at any rate in part revived that will: it seemed clear, however, that the draftsman of the codicil did not apply his mind to either the residuary bequest in the will which was contained in clause 4 or to the revocation which was contained in clause 7 nor were there on the face of the codicil any words showing an intention to revive either of those clauses. Those clauses could not therefore be admitted to probate, but otherwise the codicil had revived the first will, and reading the codicil and the provisions of the first will which were revived together there was no revocation clause and no bequest of residue and therefore there could be no question but that the last will, which was never in fact revoked, ought also to be admitted to probate.

Billings *v.* **Reed**

War injuries—Personal Injuries (Emergency Provisions) Act 1939*—Personal Injuries (Civilians) Scheme* 1944*—Exclusion of other claims to compensation or damages in respect of a war injury*

COURT OF APPEAL

1944. Oct. 11.
[1944] 2 All E.R. 415.

The Personal Injuries (Emergency Provisions) Act 1939 passed on the outbreak of the present war makes provision for pecuniary grants by way of pension or lump sum as the case may be in respect of 'war injuries sustained by gainfully occupied persons' and 'war service injuries sustained by civil defence volunteers'. 'War injuries' are defined by s. 8 (1) of the Act as meaning 'physical injuries' caused by any of the occurrences specified in the subsection including '(*b*) caused by the impact on any person or property of . . . any aircraft belonging to, or held by any person on behalf of or for the benefit of His Majesty . . .'. Section 3 (1) of the Act provides in effect that in respect of a war injury sustained during the period of the present emergency by any person no compensation or damages shall be payable whether to the person injured or to any other person as apart from the provisions of the subsection would be payable under the Workmen's Compensation Acts 1925 to 1938 or the Employers' Liability Act 1880 or on the ground that the injury in question was attributable to some negligence, nuisance or breach of duty for which the person by whom the compensation or damages would be payable is responsible. In respect of war injuries to civilians the rights to a pecuniary grant under the Act are defined by the Personal Injuries (Civilians) Scheme 1944. The Scheme, which is a most elaborate document, sets out the cases in which and the conditions under which a pecuniary grant under the Scheme may be made to the person injured or those dependent on such person, and *inter alia* it gives a widower no right

to claim in respect of the death of his wife unless he was 'the dependent husband of his wife at the date of her death... incapable of self-support or in need'.

This was an action for damages for negligence and/or trespass brought under the provisions of the Fatal Accidents Act 1846 and the Law Reform (Miscellaneous Provisions) Act 1934 by a widower as personal representative of the estate of his deceased wife in respect of her death under the following circumstances. The deceased woman was killed owing to the negligence of the defendant, a pilot in the Royal Air Force, who flew an aeroplane at a height of less than 6 feet over a field in which she was engaged in farm work. The defendant admitted negligence but pleaded that he was relieved from liability for damages under the provisions of the Personal Injuries (Emergency Provisions) Act 1939, section 1 (3), since death was due to a war injury. The plaintiff contended that his right of action was not barred under the subsection in that (1) the injury sustained by the deceased woman was not a war injury as defined by the Act, (2) his rights of action were not barred inasmuch as he was not entitled to any grant under the Personal Injuries (Civilians) Scheme 1944.

It was argued on behalf of the plaintiff that this was not a war injury within the meaning of the Act because it resulted in death, and death could not be called a 'physical injury'. The Court of Appeal affirming on this point the judgment of Charles J. held that it was clear beyond the possibility of doubt that the circumstance that death ensues from injury does not in any way make that injury any less a war injury than it would have been if the person injured had survived. It was therefore a war injury and *prima facie* the plaintiff's claim was barred if it was based on any negligence, nuisance or breach of duty on the part of the defendant.

The plaintiff's next argument was that although his claim based on negligence might be barred his claim was laid in trespass as well as negligence and trespass was not covered by the words 'negligence, nuisance or breach of duty'. The Court held that the phrase 'breach of duty' was comprehensive enough to cover the case of trespass to the person which was certainly a breach of duty as used in a wide sense.

The next point made by the plaintiff was that assuming this was a war injury and that his claim was based on negligence or breach of duty the abrogation of rights did not extend to cases where under the Scheme contemplated by the Act no alternative right was conferred and that the Court should avoid putting a construction on the Act which would deprive injured persons of their common law or statutory rights when the Scheme as in this case did nothing for them. On this point Charles J. accepted the plaintiff's argument and gave judgment in his favour. The Court of Appeal was of a different opinion. The Master of the Rolls (Lord Greene) said that, although broadly speaking it might be said that the Court does not construe an Act of Parliament as depriving a person of his normal rights as a subject unless clear language be used to that effect, it seemed to him that the Scheme of this legislation in dealing with a situation in which injuries arising out of war conditions might affect the civil population in a very extraordinary and unusual degree was to lift that class of injury right out of the common law and existing legislation such as the Workmen's Compensation Acts and to give to it a special treatment. That seemed to him to be both reasonable and just. Therefore looking at the general context

of the Act, that is to say its apparent scope and purpose, on the face of it he did not find any context which would justify him in writing a gloss or a qualification into the clear language of section 3 (1) which in terms takes away the right of action. The plaintiff's right of action was therefore barred and he could not recover notwithstanding that under the Scheme he was given no alternative relief.

In the Estate of Viscount Rothermere

Executors—Administration—Insolvent estate of deceased person—Valuation of tax-free annuity for purposes of proof—Method of actuarial calculation

CHANCERY DIVISION
VAISEY J.
1944. Nov. 13.
[1944] 2 All E.R. 593.

When for the purpose of proof against the insolvent estate of a deceased person it is necessary to value a tax-free annuity payable to an annuitant under a covenant made by the deceased, the sum provable must be arrived at by an actuarial calculation, and the Court rejected as a possible basis of valuation both (1) an inquiry as to what it would cost to purchase an annuity of a corresponding amount either from the Government or from some well-established insurance company and (2) the price which such an annuity would probably realise if sold on the open market.

The proper method of actuarial calculation is to ascertain what sum of money would have been required at the date of the covenantor's death to purchase an amount of Consols which by means of the dividends and by recourse from time to time to capital would provide from the date of death during the residue of the annuitant's life, on the dates when the instalments of the annuity were payable, such sums as were necessary to discharge the specified amount of tax-free annuity and the income tax payable thereon.

In the calculation of instalments falling due before the date on which the calculation is made the rate of tax to be provided for is that which was exigible when each such instalment became due, and as regards future instalments the rate of tax to be provided for is that which is exigible at the date of the calculation. No account is to be taken of the possibility of future reduction or increase in the rate of tax. Thus a valuation of future instalments made at the present time should be based on an income tax of 10*s.* in the pound and the provisions of s. 25 of the Finance Act 1941 which for this purpose reduces it to an effective tax of 5*s.* 6*d.* in the pound.

In the absence of any evidence to the contrary the annuitant's expectation of life should be assumed to be a normal expectation having regard to the annuitant's age and no regard should be had to exceptional war risks or to variations in the price of Consols since the date of the covenantor's death or to brokerage or other expenses incident to the realization of capital.

LEGAL NOTES

By EVAN JAMES MACGILLIVRAY, B.A., LL.B.
One of His Majesty's Counsel

Schebsman, *In re, Ex parte* The Official Receiver

Covenant—Payment to third party—Whether revocable mandate or essential term of covenant—Advancement—Settlement

COURT OF APPEAL

1943. Dec. 6.
[1943] 2 All E.R. 768.
1944] Ch. 83.

This was a motion by the trustee in bankruptcy of one John William Schebsman, deceased, claiming a declaration that all sums payable to the debtor's widow and daughter pursuant to a covenant by the debtor's late employers formed part of the estate of the debtor.

The debtor had for many years been employed by a Swiss Company which had lent his services to an English Company associated with it in business. On the termination of that employment a tripartite agreement dated 20 September 1940 was made between the Swiss Company of the first part, the English Company of the second part and the debtor of the third part, by which the parties released one another from all previously subsisting obligations, the debtor undertook not to carry on, be engaged or interested in, the business of cargo superintendent for a period of ten years, and the English Company undertook *inter alia* to make certain annual payments to him over a term of years, and in the event of his decease before the expiration of the annuity period to make like payments to his widow or daughter. In opposition to the motion the debtor's widow and daughter contended that they were entitled to receive and retain the annuities for their own benefit because either (1) there was an implied trust in their favour or (2) the debtor contracted as their agent to secure the benefits on their behalf. The English Company claimed the right to perform the precise terms of the contract by paying the annuities to the widow or daughter and no other.

It was common ground that unless there was a declaration of trust or the debtor contracted as agent for his wife and daughter they not being parties to the contract could not enforce it either at law or in equity.

In the Court of Appeal it was conceded on behalf of the trustee in bankruptcy that at common law the English Company was entitled and bound to make payment to the widow or daughter in accordance with the precise terms of the contract, that the debtor could not intercept such payments, and that if payment were made it would as between the Company and the payee be a gratuitous payment made with the intention of passing the property in the money to the payee which would be sufficient to give her a title to it as against the world. It was contended, however, that in equity the position was different, and that inasmuch as the debtor had provided the whole consideration the annuities were voluntary gifts which would be incomplete until payment was made. Until payment the widow or daughter acquired no title to the annuity, and the debtor or his representative could at any time intervene and exert his or their right to it as against the widow or daughter, and if notwithstanding such intervention payment was afterwards made to the payee there would be a resulting trust for the debtor's estate. In the alternative it was contended that

if there was a completed gift it constituted a voluntary settlement which, being made within two years of the settlor's bankruptcy, was voidable by the trustee under s. 42 of the Bankruptcy Act, 1914.

The Court of Appeal, affirming the decision of Uthwatt J., held that as there was nothing in the agreement from which a trust or agency in favour of the widow and daughter could be inferred they acquired no right or title to the money on either of those grounds. The case therefore must be decided on other considerations. In dealing with the argument for the trustee an important element in the case was that this was a tripartite agreement that payments should be made by the English Company to the debtor's widow and daughter and clearly for their benefit. If the debtor in his lifetime had directed the English Company to make the payment to his executors the Company could have ignored that direction. What then was the position as between the debtor and his wife and daughter? When the debtor entered into the contract he intended that his widow and daughter should receive these benefits for themselves. That was part of his bargain with the two Companies. If the English Company performed its obligation under the agreement, as they were entitled to assume it would, the money would inevitably reach the hands of the widow or daughter. That would result from the contract into which the debtor had entered. In law the money would belong to the payee when she received it. Was there then any equitable principle which would entitle the trustee in bankruptcy to recover it from her? If it were regarded as an advancement by the debtor it must be regarded as having been complete when the contract was made, since it was not in the power of the debtor to change his mind and prevent its becoming effective. An advancement may be complete although the subject-matter has not reached the hands of the person to whom it is to be advanced. When a person has done everything that the nature of the subject-matter permits to ensure that it will reach the object of his bounty and the nature of the transaction precludes the possibility of any subsequent intervention or change of mind on his part, the advancement must be regarded as complete. There was therefore no resulting trust for the trustee in bankruptcy. On the alternative argument that if the advancement was complete it was a voluntary settlement which was voidable by the trustee under the bankruptcy law, the answer was that the money was never the property of the debtor either at law or in equity. The section clearly deals with property which but for the settlement would have been available to pay the debts of the settlor. These sums would never have been available for that purpose. Another ground for rejecting the argument based on the theory of an incompleted advancement or a voidable voluntary settlement was that the benefits for the widow and daughter were not purchased or provided solely by the debtor. The consideration for the agreement was mutual and each party contributed to it.

No reliance could be placed by the trustee on the Engelbach case. The basis of that decision was that on the true construction of the policy the insurance company was nothing more than the mandatary of the father in making the payment to the daughter, and on that footing the decision had no application to the present case.

Watson and others, Petitioners

Settlement policy—Married Women's Policies of Assurance (Scotland) Act, 1880—Policy effected by married man for the benefit of his wife in the event of her surviving him and failing her for the benefit of his children—Whether wife by subsequent marriage entitled to benefit

COURT OF SESSION

LORD PATRICK

1944. July 18.
Unreported.

It is enacted by s. 2 of the Married Women's Policies of Assurance (Scotland) Act, 1880, that a policy of assurance effected by any married man on his own life and expressed upon the face of it to be for the benefit of his wife or of his children or of his wife and children shall together with all benefit thereof be deemed a trust for the benefit of his wife for her separate use or for the benefit of his children or for the benefit of his wife and children; and such policy immediately on its being effected shall vest in him and his legal representatives in trust for the purpose or purposes so expressed...and shall not otherwise be subject to his control or form part of his estate or be liable to the diligence of his creditors.

On 6 September 1894 one George Macdonald effected an assurance on his own life with the Scottish Union and National Insurance Company. The policy was expressed to be issued under the provisions of the above-mentioned Act 'for the benefit of his wife, in the event of her surviving him, and failing her, for the benefit of his children, born or to be born or any of them'. George Macdonald was married when the policy was effected, and in 1902 a son was born of the marriage. The wife died in 1927, and George Macdonald married a second wife in 1942. There was no issue of the second marriage. George Macdonald died in 1943 and was survived by his son and his second wife. The widow and son each claimed to be entitled to the policy moneys as the sole beneficiary of the trust in the events which had happened.

Lord Patrick treated the matter solely as one of construction of the destination expressed in the policy. He said that there was a presumption that a married man speaking of his wife intended to refer to his wife at that time and that the presumption was even stronger if he provided that if his wife did not survive him his children should take the benefit of the gift. It was extremely difficult to think that when the words used were 'his wife in the event of her surviving him and failing her for the benefit of his children' he intended these words to have the enlarged content of 'his wife in the event of her surviving him, whom failing such subsequent wife as he may hereafter marry, if she survives him, whom all failing, then for the benefit of his children'. The learned judge said that he read the words 'for the benefit of his wife' as meaning 'for the benefit of his then wife' and not as meaning 'for the benefit of his widow'. The latter words were never used and they might so easily and naturally have been used if it had occurred to him that his then wife might predecease him and that he might marry again. He thought that George Macdonald never thought of such an event and never intended to provide for it. He held accordingly that the son and not the widow was entitled to the policy money.

It will be observed that in this case the learned judge treated the matter solely as one of construction of the policy and that he did not rely on the wording of the Act which differs slightly from the wording of s. 11 of the

Married Women's Property Act, 1882, in England. It is arguable, although it does not appear to have been argued in this case, that, inasmuch as the Scottish Act applies only to a policy of assurance 'effected by any *married* man on his own life... for the benefit of his wife', a wife by a subsequent marriage is not within the trust purposes contemplated by the Act. In the English Act of 1882 the word 'married' is omitted, and in that respect it was an amendment of s. 10 of the Act of 1870. Under the English Act of 1882 a second wife may be a beneficiary of the statutory trust, but it is submitted nevertheless that if this policy had been effected under the English Act the construction of the words of destination would have been the same as that preferred by Lord Patrick.

Tatham, *In re*

Will—Gift of annuity—Payment of specified net sum after deduction of income tax—Whether annuitant accountable to trustees in respect of the annuity for a due proportion of any reliefs, allowances or post-war credits to which the annuitant may be entitled

CHANCERY DIVISION

EVERSHED J.

1944. Nov. 9.
[1945] 1 All E.R. 29.
[1945] Ch. 34.
61 T.L.R. 76.

A grant of an annuity by will in the simple form 'To A.B. an annuity of £*x* a year free of income tax' is construed as an expression of an intention on the part of the testator to provide an addition to the annuitant's income, after discharging the annuitant's liability for income tax in respect thereof, of £*x* and no more. The Income Tax Act, 1918, All Schedules Rules, r. 23 prohibits the making of a grant by deed in that simple form, but the same result is achieved by a direction to the trustees of the deed to pay an annuity of such an amount as after deduction of the income tax chargeable thereon will provide a clear sum of £*x*.

In both cases the aim of the grantor is to relieve the annuitant of liability for income tax in respect of the annuity granted. The calculation which the trustees ought to make is to ascertain a sum which after taking into account not merely the initial deduction but also the relief and allowances to which the annuitant may be entitled will produce the specified net sum. The annuitant having received the specified net sum must therefore account to the trustees for a due proportion of any repayment of tax made to him in consequence of the reliefs and allowances to which he may be entitled, for until such repayment has been received by the trustees there will in effect have been by virtue of the deduction of income tax at the standard rate under r. 19 an overpayment by the trustees of the tax chargeable to the annuitant in respect of the annuity. The annuitant in such cases is also accountable to the trustees for any post-war credit to which the annuitant may become entitled under the Finance Act, 1941, s. 7.

If the grantor of an annuity desires to give the annuitant the benefit of the reliefs and allowances to which he is entitled in addition to the specified amount of annuity clear of deduction for income tax he must use words which will make it clear that the gift is of such an annuity as after deducting therefrom income tax at the standard rate will amount to the clear yearly sum of £*x*, as, for instance, where the grant is of such an annuity as after deducting therefrom income tax at the current rate for the time being will amount to the clear yearly sum of £*x*.

Picken and others *v.* Bruce and others

Employees' superannuation scheme—Pensions and rate of contributions based on amount of salary or wages—Actuarial calculation—Quinquennial valuation—Meaning of 'wages'—Whether pay for overtime and Sunday work included—Occasional employment in higher grade at higher rate of pay—Whether wages thereby increased

COURT OF APPEAL

1944. Dec. 11.
[1945] 1 All E.R. 73.
[1945] Ch. 90.
61 T.L.R. 130.

This case raised a number of questions in relation to the working out of the Great Northern Railway Company's superannuation scheme which was established in 1875 on the basis of equal contributions by the Company and its employees to a superannuation fund. The scheme applies to the salaried officers and the wages staff of the Company, and the fund is divided into two classes. An employee whose salary or wages amounts to £80 per annum or more at the date of his joining the fund is placed in Class I, an employee whose salary or wages amounts to less than that sum is placed in Class II. When the salary or wages of an employee in Class II is increased to or beyond £80 per annum he is transferred to Class I. Each member contributes according to the class to which he belongs. By the rules of the fund a member's contribution is deducted from his salary or wages and there is no provision requiring payment of the contribution otherwise than by deduction. The amount of pension to which a member of the fund is entitled depends on the total number of years during which he has been a member and is based on his 'average salary' during his term of membership. The word 'salary' is defined by the rules as 'including wages and any bonus, house or house allowance'.

The first question for the Court was whether for the purposes of determining whether a member on entry belonged to Class I or Class II and of calculating the amount of the pension to which he was entitled, the war bonus paid to all employees of the Company to meet the increased cost of living during the period of the present emergency should be taken into consideration and treated as an increase of the member's salary or wages. The Court held that whether or not the war bonus was a bonus within the meaning of the definition it was in every true sense a part of the member's salary or wages. It was a flat rate and was applicable to all grades for the simple reason that the rise in the cost of living affected all grades alike. It was put into a separate category of nomenclature for a very good reason in that it was regarded as something not necessarily permanent, something which if the war came to an end within a reasonable time might be expected to disappear when the circumstances which gave rise to its creation disappeared. But these considerations of nomenclature were quite irrelevant when they looked at the true nature of the payment, which was an increase in salary or wages to meet special circumstances which might not be permanent.

Following from the answer to the first question there was the further question whether an employee could claim a pension on the basis of the bonus being part of the salary or wages without bringing into account the deficit in his past contributions due to the fact that the bonus was not taken into account when the deductions were made. It might be that no proceedings would lie against a member for recovery of any contribution which had not

been deducted from his salary or wages on payment; but in equity a member ought not to be allowed to take money from the fund without himself contributing to it what he ought to have contributed in the past. That was a well-known principle of equity which had previously been applied to other superannuation cases of the same character. However the matter was looked at, the member had not contributed enough. In so far as his contributions were deficient in amount he had underpaid, under-contributed, and it would be grossly inequitable that a man in that position could be heard to say: 'Although I have not made the contributions by way of deduction which I ought to have made I am now going to say that the application of the equitable rule is not permissible because that would involve making me contribute otherwise than by deduction, which is a thing I never contracted to do'. That would be quite a wrong view of the way in which the equitable principle worked. It did not compel a member to make an actual contribution otherwise than by way of deduction, but if he came to make a claim then he had to do what was right and must bring the fund up to its right level before he could claim to participate in it.

The next question was whether for the purposes of determining the Class to which a member belonged, and of calculating the amount of the pension to which he was entitled, money paid to him for working overtime or on a Sunday or extra pay received for occasional work outside the work appropriate to his own grade should be reckoned as an addition to his salary or wages. The answer to that question again depended on the meaning of salary or wages. It was said, on the one hand, that that phrase covered everything that the man received in the way of payment, alternatively that it certainly included the extra pay which a man received when he was engaged occasionally to do work which commanded a higher rate of pay than that applicable to work in his own grade. On the other hand, it was said that the wage that had to be regarded was the wage applicable to the man's grade, and that what might be called casual cash receipts of the character described did not fall within that expression. Grouping together overtime and Sunday pay those were not naturally described as wages in a context which called for an answer to the question 'What is the man's wage?' The context did call for an answer to that question, first, for the reason that the superannuation scheme was subject to quinquennial valuations by an actuary, and some firm basis for actuarial calculation might be expected rather than one which would fluctuate according to the quite accidental circumstances of whether a man or a number of men was or were employed overtime or on Sundays. That consideration by itself might not carry them very far, but there was a very clear indication of what was intended as a basis of ascertaining wages when they looked at the provisions relating to the two classes into which the fund was divided, and in particular at the rule which provided that when the salary or wages of a member in Class II was increased to or beyond £80 per annum such member was to be transferred to Class I. If wages included casual earnings, on what principle was a wage-earning member to be transferred from Class II to Class I? The answer given by counsel for the employee was that whenever in the twelve months preceding any given date it was ascertained that his receipts had in fact amounted to £80, then he would automatically be transferred. But that involved a sliding and ever-advancing period, the results of which would have to be looked at day by day. It meant that from day to day in the case of every

employee about whom there was any doubt it was necessary to ascertain what in the preceding twelve months was in fact the amount of his earnings. It was quite impossible to suppose that any intelligent person formulating a scheme of that kind would make such a provision. So far, therefore, as overtime and Sunday pay were concerned they did not fall naturally under the description of wages in such a context as that under consideration, because they were not what would be described in answer to the question 'What is your wage?' nor would a man who happened one week to have received overtime pay which he had never received before say, 'I have had a rise in wages', nor would he say, to use the exact language of the rules, 'My wages have been increased'. He might say that he had received an increased amount of wages, but the phrase was 'be increased', which involved a different idea altogether. The same considerations applied to the extra money a man might earn if he were called upon to do work outside his own special grade and received pay appropriate to the higher grade work. With regard to all these questions it was an important consideration that the scheme was actuarially calculated with periodical reviews, and no certain ground for actuarial calculation would be afforded save that of some static rate of wage without regard to those occasional and accidental earnings.

Bonham *v.* Zürich Insurance Company

Motor insurance—Truth of answers in proposal form—Conditions precedent to liability—Whether passengers were carried for hire or reward—Whether car was let on hire—Construction of words contra proferentes

COURT OF APPEAL

1945. Feb. 22.
[1945] 1 All E.R. 427.
[1945] 1 K.B. 292.
61 T.L.R. 271.

In a motor-car policy issued by the respondents to the claimant in this arbitration it was a term of the policy that the truth of the statements and answers in the proposal form should be a condition precedent to any liability of the insurers to make any payment under the policy. To the question on the proposal form 'Will passengers be carried for hire or reward or will the motor-car be let on hire?' the claimant answered 'No', and the question was whether on the facts as found by the arbitrator passengers were 'carried for hire or reward'.

The claimant, who resided in Northampton, used the car covered by the policy for the purpose of driving himself to his place of work in Market Harboro' daily. On these journeys he regularly and habitually carried three passengers whose place of work was also in Market Harboro'. In return for such carriage these passengers regularly and habitually paid the claimant at the rate of 1*s.* 2*d.* per return journey, which payments amounted approximately to 7*s.* 6*d.* each per week. The rate was based on and calculated upon the cost of the railway fare between the two places. The claimant never asked his passengers for payment but they voluntarily offered him the money and he accepted it. The claimant would have carried the passengers without payment and would have used the car to travel to and from his place of business apart from and independently of any question of carrying the said passengers.

On 28 January 1941, the claimant was driving his car from Northampton to Market Harboro' with the three passengers aforesaid in it when there was an accident, as a result of which one of the passengers was killed. The executor

of the dead man brought an action against the claimant and obtained judgment against him for £2015. 15*s.* 6*d.* and costs. In respect of that judgment the claimant now claimed an indemnity from the respondents as a loss covered by his policy.

The arbitrator came to the conclusion in law that the answer to the question quoted above was untrue, and that having regard to the condition in the policy the claimant was not entitled to be indemnified by the respondents, and in a case stated for the opinion of the Court he asked whether he was correct in so holding. Atkinson J. held that the answer was not untrue, and that the claimant was entitled to the indemnity which he claimed.

In the Court of Appeal there was a difference of opinion. Mackinnon L.J. agreed with Atkinson J. In his view the expression 'carried for hire or reward' imported carriage for some monetary or other remuneration pursuant to some form of contract by which the owner of the car would be legally entitled to claim the payment of that remuneration from the passengers, but in his opinion there was no such legally enforceable contract. If there was any ambiguity about the meaning of the words 'hire or reward' they ought to be construed against the insurance company who put them forward. In his opinion the claimant was entitled to recover and the appeal ought to be dismissed. Du Parcq L.J. and Uthwatt J. took the opposite view. They thought that there was a distinction to be drawn between the word 'hire' and the word 'reward'. The first word necessarily imported an obligation, and in their opinion the addition of the word 'reward' was for the purpose of bringing in a subject-matter which was different from hire and which did not include any obligation to pay. If the question of contract were left out of consideration the man was in ordinary language carrying for reward in every sense of the word. The appeal was therefore allowed and the judgment of Atkinson J. set aside. The answer to the question raised by the special case would be that the arbitrator was right in holding that the car was used in violation of the terms and conditions of the policy and that the claimant was not entitled to be indemnified by the respondents.

Williams, *In re*

Annuity—Free from income tax at current rate deductible at source—Liability of annuitant to account to trustees for a due proportion of reliefs and allowances

CHANCERY DIVISION

UTHWATT J.

1945. Feb. 28.
[1945] 2 All E.R. 102.
[1945] Ch. 320.

This originating summons was taken out by the trustees of the testator's will for the determination of the question whether the recipients of certain annuities bequeathed to them free from income tax and in respect of which the trustees had paid the tax to the Revenue at the standard rate were liable to account to the trustees for a due proportion of the reliefs and allowances to which they (the annuitants) were entitled. The testator, by his will, directed that the annuities of specified amounts bequeathed by him should be paid 'free of all deductions whatsoever and free from income tax at the current rate for the time being deductible at source', and he empowered his trustees to set aside a fund sufficient, in the opinion of the trustees, to meet by its produce the annuities given by his will and to purchase annuities from an insurance company and to commute the

annuities for a fair capital sum. The learned judge said that according to the authorities the question was in substance whether the reference to income tax was a reference to the standard rate of tax merely as an arithmetical factor in the calculation of the gross amount of the annuity given by the will, or whether the provision as to income tax merely indemnified the annuitant against such part of the tax ultimately payable by him as was properly referable to the annuity. If construed in the former sense the income tax actually suffered by the annuitant did not enter into the picture. If construed in the latter sense complete effect could not be given to the bequest by payment to the annuitant. The provisions of the Income Tax Acts compelled the paying hand, in order that £*x* tax paid might reach the hand of the annuitant in the first instance, to make an overpayment, for the tax attributable to the gross amount resulting in the payment of £*x* was still a payment for the account of the annuitant, and on that footing it had been held that the annuitant was bound to claim reliefs and allowances in respect of his total income and to account to the paying hand for a rateable proportion of the sum received by him, with the result that he received only his indemnity. The learned judge went on to say that, if he were free to accede to the argument that the proper test was 'Does the will to be construed show positively an intention directed to placing on the annuitant an obligation to account for any part of his reliefs and allowance?', he would in the case of this will answer the question in the negative: but he was bound by the authorities, and by the case of *In re Eves* [1939] Ch. 969 in particular, to hold that on the true construction of the will in question the annuitants were only entitled to an indemnity against the tax ultimately payable by them and were therefore liable to account to the trustees for a due proportion of their reliefs and allowances on the lines laid down in *In re Pettit* [1922] 2 Ch. 765.

Warden & Hotchkiss, Ltd., *In re*

Companies Acts—Alteration of memorandum of association—Validity of special resolution—Notice not served on members resident abroad

COURT OF APPEAL

1945. March 5.
[1945] 1 All E.R. 507.

The three articles of a company registered under the Companies Acts in 1898, relating to the service on members of notice of a meeting called for the purpose of passing a special resolution, were expressed in exactly the same terms as the three corresponding articles of Table A of the Companies Act, 1862, and were as follows:

'Art. 42: Seven days' notice at least, specifying the place and day and the hour of meeting, and in the case of special business the general nature of such business shall be given to the members in manner hereinafter mentioned.

'Art. 109: A notice may be served by the Company on any member, either personally or by sending it through the post in a prepaid letter addressed to such member at his registered place of abode.

'Art. 111: Any notice if served by post shall be deemed to have been served at the time when the letter containing the same would be delivered in the ordinary course of the post, and in proving such service it shall be sufficient to prove that the letter containing the notice was properly addressed and put into the post-office.'

Under the exactly identical articles of Table A of the Companies Act, 1862, it was held by Vice-Chancellor Malins in 1870 that the articles in question had reference only to shareholders who could be reached by the ordinary English post, and that it was not necessary to serve a notice of a meeting called for the purpose of passing a special resolution for the voluntary winding-up of the Company on members whose registered place of abode was outside the United Kingdom.

HELD that a notice of a meeting of the Company called for the purpose of passing a special resolution to alter its memorandum of association need not be served on shareholders resident outside the United Kingdom, and that a special resolution was valid notwithstanding that no notice of the meeting had been sent to three shareholders whose registered addresses were situated in South Africa.

Whatever construction of the articles in question the Court might adopt if the matter were *res integra*, it would be contrary to principle to upset what must have been the accepted interpretation of these three articles over a long period of time. When the Company framed its articles in 1898 it must be taken to have framed them on the basis of that accepted view, and it would be wrong to hold now that that view was not the right one.

Where a decision of the Court is one upon a question of general importance, namely, the interpretation of a statute or a set of statutory rules or of any document or instrument in common use, and a decision upon the interpretation thereof has stood unchallenged and been acted upon in commercial and business transactions over a long period of time, that interpretation ought not to be disturbed.

Uthwatt J. had dismissed under s. 5 of the Companies Act, 1929, the petition of the Company praying for confirmation of the validity of the special resolution. The Court of Appeal allowed the appeal from his order and confirmed the resolution.

Cunard's Trustees *v.* Inland Revenue

Income tax—Trust estate—Sums paid to beneficiary out of capital as addition to income of residuary estate—Sums paid out of capital as addition to income during administration before residue ascertained—Whether so paid in respect of beneficiary's life interest—Finance Act, 1938, s. 30

KING'S BENCH DIVISION

MACNAGHTEN J.

1945. April 16.
[1945] 2 All E.R. 23.

The testatrix by her will devised her freehold property to her trustees on trust to permit her sister to reside there free of rent during the remainder of her life, and provided that out of the income of her residuary estate her trustees should pay all rates, taxes and other outgoings in connexion with the said property and pay the remainder of such income to her sister during her life, and if in any year the income of her residuary estate should be insufficient to enable her sister to live in the same degree of comfort as formerly her trustees were empowered in their absolute discretion to apply such portion of the capital of her residuary estate as they might think fit by way of addition to such income without replacement out of the income of a subsequent year. The testatrix died on 24 January 1935. The

administration of the estate took a considerable time and the residue was not ascertained until 7 February 1940. During the years ended 5 April 1939 and 5 April 1940 the balance of income of the estate in their hands after paying all outgoings properly chargeable to income was no more than £1058 and £1046 respectively, which income in the opinion of the trustees was insufficient to enable the sister of the testatrix to live in the same degree of comfort as before, and in the year ended 5 April 1939 they raised out of capital and paid to her £2049, and in the year ended 5 April 1940, £1900. Assessments to income tax in respect of these payments out of capital were made under r. 21 of the All Schedules Rules, as amended by the Finance Act, 1927, s. 26, upon the trustees in the sums of £2826 and £2923 respectively (being the gross equivalents of the net amounts paid to the beneficiary). The Special Commissioners confirmed the assessments.

On appeal to the Court the trustees admitted that they were correctly assessed as to so much of the sum of £1900 as was paid out of capital between 7 February and 5 April 1940, but they denied that any part of the capital paid to her during the year ended 5 April 1939 and between 6 April 1939 and 7 February 1940 was assessable to income tax. The learned judge held that the contention of the trustees in that respect was right, and he allowed the appeal and discharged the assessment in respect of the year ended 5 April 1939 and directed that the appropriate reduction should be made in respect of the year ended 5 April 1940.

With regard to the sums paid out of capital after the administration was completed and the residue ascertained, the learned judge held that he was bound by the decision of Finlay J. in *Brodie's Trustees* v. *I.R. Commissioners* [1933] 17 Tax Cas. 432 and *Lindus & Hortin* v. *I.R. Commissioners* [1933] 17 Tax Cas. 442 to the effect that sums raised out of capital in addition to the income bequeathed by the will were the taxable income of the recipient, and that the trustees who paid a net sum were assessable for the tax which they ought to have deducted and paid over to the Exchequer.

With regard to the sums paid out of capital before the administration was completed and the residue ascertained the learned judge held, on the authority of the decision of the Court of Appeal in *Corbett* v. *I.R. Commissioners* [1938] 1 K.B. 567, that a sum paid to a beneficiary out of capital before the residuary account had been made up on account of the life interest in a share of the residuary estate to which she was entitled was not income of the beneficiary and was not assessable to income tax. The Finance Act, 1938, was passed after the decision in Corbett's case, and it was provided by s. 30 (1) and (2) of that Act that when any sum had been paid to any person during the administration period in respect of a limited interest in the residue of the trust estate the amount thereof should be deemed for the purposes of the Income Tax Acts to have been paid to that person as income for the year of assessment in which that sum was paid. It was contended that the capital sums paid to the beneficiary in the present case during the period of administration were sums paid during that period in respect of her life interest in the residuary estate, but the learned judge held that the payments were not caught by the section in question, as it would be a very forced and unnatural construction of the words 'in respect of' to hold that it covered payments made not on account of but by way of addition to the income bequeathed by the will.

Harris, deceased, *In re*

Annuity—Forfeiture clause—Annuitant resident in enemy-occupied territory—Annuity payable to Custodian of Enemy Property—No forfeiture

CHANCERY DIVISION

VAISEY J.

1945. April 19.
61 T.L.R. 364.

By her will the testatrix Elizabeth Anne Harris bequeathed to Gertrude Frances Evans an annuity of £52 a year free of tax during the life of the annuitant, provided that if the annuitant should commit, permit, or suffer any act default or process whereby but for the proviso the annuity or some part thereof would or might become vested in or payable to any other person or persons then the annuity should thereupon absolutely cease and determine as if the annuitant were dead. The annuitant was resident and continued to reside in that part of France which was occupied by Germany in 1940, and inasmuch as by reason of such residence the annuitant acquired the status of an alien enemy the annuity became payable to the Custodian of Enemy Property under the provisions of the War Emergency legislation. The question for the Court was whether in the circumstances there was a forfeiture of the annuity under the terms of the proviso. The learned judge said that the annuitant could not be said to have committed, permitted or suffered any act or default, and that his (the learned judge's) only hesitation was whether it could be said that she had 'suffered a process' by the passing of the Trading with the Enemy Act, 1939, the making of the Trading with the Enemy (Custodian) Order, 1939 and the subsequent directions given under the Order. He had come to the conclusion that having regard to its context the word 'process' in the proviso ought to be given a judicial meaning and that it meant something done in a proceeding in a civil or criminal Court, and that anything done without the aid of the Court was not a 'process'. In the present case there was no process as a result of which the annuity became payable to the Custodian, and therefore the question whether the annuitant suffered a process did not arise. He thought that although the words were not the same as those in *In re Hall* [1944] Ch. 46, they were so very near them that he was reluctant to distinguish the present case from that case, and that it would be necessary to draw a very fine distinction if he were not to follow that decision. There would therefore be a declaration that on the true construction of the will and in the events which had happened the annuity in question had not ceased or determined.

Smith Barry *v.* Cordy (Inspector of Taxes)

Income tax—Income Tax Act, 1918, Schedule D, Case I—Annual profits or gains arising or accruing from any trade—Profit realized from purchase and sale of policies of assurance

KING'S BENCH DIVISION

MACNAGHTEN J.

1945. April 20.
61 T.L.R. 376.

The word 'trade' in Case I of Schedule D of the Income Tax Act, 1918, is used in contradistinction to the words 'profession, employment or vocation' in Case II and must be construed in its ordinary and accepted sense of purchasing goods or other property with the intention of resale and of making a profit on the transactions. It is not appropriate to the case of property bought by the subject with the intention

of holding it and afterwards sold at a profit because of an alteration in the circumstances of the seller. In this case the subject who was assessed to income tax had bought between July 1937 and February 1939 one whole-life and sixty-three endowment assurance policies on the lives of other persons at a cost of about £100,000 with a view to spending the proceeds thereof as and when they became payable on maturity, which proceeds would amount to approximately £7000 in each year of his life until he attained the age of 74. To cover the possibility of a longer life he had bought a deferred annuity. In 1942 he decided to leave the United Kingdom and make his future home in India, and in view of that decision he instructed his solicitor to sell all the policies which had not then matured. The subject was assessed to income tax on the profits realized by the sale of these policies, and the Crown argued that they were chargeable to tax as profits 'from an adventure or concern in the nature of trade'. The Court discharged the assessment on the ground that it would be an unwarrantable extension of the word 'trade' to hold that it applied to a transaction of this kind when the subject had bought something with the intention of keeping it and had afterwards sold it because of an alteration in his circumstances.

Canadian Eagle Oil Co. Ltd. *v.* Rex
Selection Trust Ltd. *v.* Devitt (Inspector of Taxes)

Income tax—Double taxation—Dividends paid by foreign company to British shareholders—Paid partly out of profits assessed to British income tax—Claims for proportionate repayment of tax

HOUSE OF LORDS

1945. June 14.
[1945] 2 All E.R. 499.

A person resident in the United Kingdom who receives dividends on the shares held by him in a foreign or Colonial company not resident in the United Kingdom is assessable to tax in respect thereof under s. 1(*a*) (i) of Schedule D of the Income Tax Act, 1918, either by direct assessment under r. 7(i) of the Miscellaneous Rules of Schedule D or if such dividends are received by him through a paying agent in the United Kingdom by assessment on such paying agent, who by r. 3 of the paying agents' Rules is directed out of the money in his hands for that purpose to pay the tax on behalf of the persons entitled thereto.

If part of a foreign or Colonial company's income out of which its dividends have been paid consists of dividends on its shares in British companies or of interest on loans or on moneys deposited with banks or of other profits which have paid United Kingdom income tax, a shareholder resident in the United Kingdom who is in receipt of such dividends is not on that account entitled to any rebate or return of the tax payable by him in respect of that proportion of his dividends which is attributable to that part of the income of the foreign or Colonial company which has paid United Kingdom tax.

There is in such a case no double taxation inasmuch as the income of the foreign or Colonial company and the income received from it in dividends by its shareholders in the United Kingdom are not to any extent or effect one and the same income but are two distinct incomes of two different persons and the fact that the foreign or Colonial company's total income is in part composed

of income which has borne United Kingdom tax is entirely irrelevant to the question of the tax to be paid by a shareholder resident in the United Kingdom on the dividends received by him from the foreign or Colonial company. The rule against double taxation applies only against taxing twice the income of the same person.

There is no analogy between the case of a British shareholder in a foreign or Colonial company and that of a British shareholder in a British company. In the latter case, although there are also two separate incomes and the company is chargeable to tax on its own total profits and pays tax in discharge of its own liability and not as agent for its shareholders, the Income Tax Act, 1918, by a fictional treatment of a joint stock company as a quasi-partnership between the company and its shareholders, has enacted the special provisions contained in rr. 1 and 20 of the General Rules under which the company having been charged on the full amount of its profits and gains is entitled to deduct tax from the dividends which it pays and the shareholder's income from those dividends is protected from being treated for revenue purposes as a new taxable income in his hands. Such income, however, bears its proportionate burden of what the company has paid (and perhaps more) by reason of the deduction made under r. 20 and it has thereby paid tax by deduction within the meaning of the Income Tax Act, 1918, s. 29. These provisions are, however, wholly inapplicable to dividends paid by a foreign or Colonial company to its British shareholders.

The first of these appeals was on a Petition of Right presented by the Canadian Eagle Oil Company Ltd., a company incorporated in Canada and not resident in the United Kingdom, claiming repayment of tax in the following circumstances. Many of the Company's shareholders were resident in this country and held preference shares entitling the holders to dividends at a fixed rate, participating preference shares entitling the holders to dividends at a fixed rate and to a further participation in profits in certain circumstances, and ordinary shares. The dividends on these were paid under deduction of tax by the Midland Bank Ltd. as agents in this country of the Company. Part of the Company's income was from sources chargeable to tax in this country, viz. dividends on shares in British companies, interest on loans and interest on moneys deposited with banks. In respect of the two former classes income tax was levied by deduction at the source, in respect of the last by direct assessment. For a number of years the Crown following the rule adopted by the Court of Appeal in *Gilbert* v. *Fergusson* [1881] 7 Q.B.D. 562 repaid to the Company in respect of all three classes of shares such proportion of the tax deducted by the Midland Bank as was found to be attributable to that part of the Company's income which had borne United Kingdom tax. Later, however, the Crown confined the repayment to the tax deducted against the holders of ordinary shares, a course which was not disapproved by the House of Lords in *Barnes* v. *Hely-Hutchinson* [1940] A.C. 81, and in 1940 in deference to certain observations made in that case the proportion for repayment was calculated only in relation to the Company's directly assessed income from deposits. That small sum was refused by the Company and it now claimed repayment in respect of all classes of shares and contended that the amount should be calculated in relation to all three categories of the Company's income charged to tax in the United Kingdom. The Crown demurred to the petition and argued that the principle embodied in the decision in *Gilbert* v. *Fergusson* was wrong and should

now be overruled. The House of Lords acceded to that argument with the result that the claim for repayment of tax was wholly disallowed.

The second of these appeals was on a claim for repayment of tax by the Selection Trust Ltd., which is a British company resident in the United Kingdom carrying on the business of dealing in and holding investments. It held *inter alia* shares in the common stock of a company incorporated in the United States under the name of the American Metal Co. Ltd. The American company in its turn held shares in four British companies trading in the United Kingdom and received dividends on those shares after deduction of United Kingdom tax. The appellant company relying on the rule adopted in *Gilbert* v. *Fergusson* claimed that in the computation of its profits chargeable to tax there should be omitted a part of the dividends received from the American company proportionate to so much of the American company's profits as was derived from the dividends in the four British companies paid under deduction of United Kingdom tax. As in accordance with the decision in the first appeal the rule in *Gilbert* v. *Fergusson* could no longer be supported the appeal failed.

Both appeals were therefore dismissed with costs.

Westminster Bank, Ltd. *v.* Riches

Income tax—Interest awarded by Court under s. 3 of Law Reform (Miscellaneous Provisions) Act, 1934—Judgment for debt and interest thereon for period between date when cause of action arose and judgment—Whether in satisfying the judgment the judgment debtor was bound to deduct income tax at the current rate from the amount awarded as interest

COURT OF APPEAL

1945. June 22
61 T.L.R. 470.

S. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, provides that in any proceedings tried in any Court of Record for the recovery of any debt or damages the Court may if it thinks fit order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

Paragraph (1) of r. 21 of the All Schedules Rules of the Income Tax Act, 1918, provides that 'Upon payment of any interest of money...charged with tax under Schedule D...the person by or through whom any such payment is made shall deduct thereout a sum representing the amount of the tax thereon at the rate in force at the date of payment'. By paragraph (2) provision is made for assessment to tax of the person who is bound to deduct the tax under paragraph (1). By Schedule D s. 1(*b*) of the Act tax is charged in respect of 'all interest of money...not specially exempted from tax'.

The defendant Riches had in a previous action against the Bank in its capacity as judicial trustee of the estate of one Ridsdel deceased recovered judgment for the sum of £36,255 being the unpaid balance of one-half of the profit on the purchase and resale of certain shares due to Riches from Ridsdel pursuant to an agreement entered into between them and for an additional sum of £10,028 being the equivalent of interest on the first mentioned sum at the rate of 4% per annum from 14 June 1936, the date when the same became

due, until 14 May 1943, the date of the judgment, which additional sum was awarded by the trial judge in the exercise of his discretion under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934.

In satisfaction of the judgment the Bank paid Riches £36,255 and £5014, having deducted from the £10,028 representing interest income tax at the current rate of 10*s.* in the pound. Riches having threatened to levy execution unless the £10,028 was paid in full without deduction the Bank brought this action for a declaration that it was bound to deduct income tax from that part of the judgment debt which represented the award of interest.

It was argued on behalf of Riches that the sum of £10,028 awarded under s. 3 of the Law Reform (Miscellaneous Provisions) Act, 1934, was not interest of money within Schedule D of the Income Tax Act, 1918, because it was in the nature of an award of damages and not interest although it was arrived at by a calculation of interest at a particular rate for a particular period and alternatively because the sum in question was non-recurrent and not capable of recurring. It was further argued that whatever the rights of the Crown might be against Riches to charge the sum of £10,028 to tax as interest on money his right to payment of interest had merged in the judgment and the Bank were not paying interest but satisfying the judgment.

The Court held that the sum in question was awarded as interest and not damages and was chargeable to income tax which the Bank as payer of the interest was bound to deduct and that the judgment was satisfied as Riches was bound to acquit the Bank of the sum deducted.

Roberts, deceased, *In re*

Policy of life assurance—Effected by father on life of son—Policy moneys payable to father or his personal representatives in trust for son—All premiums paid by father until his death—Presumption of advancement—Subsequent premiums paid by trustees out of income of father's residuary estate—Lien on policy

CHANCERY DIVISION

EVERSHED J.

1945. July 13.
61 T.L.R. 572.

By a policy of life assurance dated 12 September 1907 taken out by James Roberts the elder (hereinafter called 'the father') with the Life Association of Scotland it was agreed that if the annual premiums were paid as therein provided the insurers would on the death of his son John Roberts the younger (hereinafter called 'the son') pay to the father, his executors administrators or assigns but always as trustee or trustees for his son the sum of £500 with profits. The father paid the first and all subsequent premiums which fell due during his lifetime amounting in all to £368.

The father died on 5 May 1940 and by his will dated 16 October 1939 he purported to bequeath the said policy of assurance and all sums payable thereunder equally to the son's wife and two daughters (Marcia and Margaret) or such of them as should be living at the date of the son's death and he directed his trustees to keep the said policy on foot by paying the premiums thereon out of the income of his residuary estate. The assured left his whole residuary estate in trust for his widow (Anna Roberts, his second wife) as tenant for life with remainder to his two infant sons by his second marriage.

After the death of the father his trustees with the consent and approval of the widow paid out of the income of his residuary estate the three annual premiums on the policy amounting in all to £33. 10*s*. which fell due before the son's death.

The son's wife died on 14 December 1940. The son died on 28 September 1942 survived by his two daughters. By his will he appointed his daughter Margaret his executrix and bequeathed to her his whole estate.

On the son's death the Association paid the policy moneys amounting with profits to £736. 15*s*. to the father's executors who took out this summons for the determination of the several claims which were made in respect of alleged beneficial interests in the policy moneys.

It was not disputed that the terms of the policy created an effective trust by virtue of which the father and his personal representatives held the policy and would receive the policy moneys in trust for the benefit of the son and his estate. Subject therefore to any valid claim to enforce a lien for the premiums which had been paid to keep the policy on foot the son's daughter Margaret as executrix and sole beneficiary under her father's will was entitled to receive the whole of the policy moneys.

The father's personal representatives claimed a lien in respect of the whole premiums paid on the policy whether before or after the father's death as having been paid by a trustee or trustees of the policy in order to preserve it as the trust property.

As regards the premiums paid by the father during his lifetime it was held that although he was a trustee of the policy yet having paid the premiums on behalf of his son as the sole beneficiary of the trust there was a presumption of a gift to the son by way of advancement and as that presumption was not rebutted by any evidence to the contrary the father's estate was not entitled to have the moneys so expended repaid out of the policy moneys and the claim to that extent failed.

As regards the premiums paid by the father's trustees out of the income of his residuary estate as directed by his will there was no presumption of advancement in favour of the son and the trustees had a good claim to be recouped out of the policy moneys the sums which as trustees of the policy they had expended in preserving it. The moneys when recovered would go back to the income of the residuary estate.

It was contended on behalf of the son's daughters Marcia and Margaret that insofar as there was any lien on the policy moneys for the benefit of the father's estate they were entitled to any sums which might be so recovered as being part of the policy moneys the whole of which were bequeathed to them and their mother under the father's will. It was held that the right of the trustees to enforce a lien on the policy moneys for the premiums paid by them out of the income of the residuary estate was not a subject-matter properly referred to and given by the clause in the will relating to the policy moneys and that the daughters' claim to the sum of £33. 10*s*. recoverable under this lien failed.

Thomas, *In re*

Bequest of annuity—Power to set aside annuity fund—Bequest of corpus of fund after death of annuitant—Estate insufficient to satisfy provisions of will in full—Annuity fund essential part of bequest—Abatement calculation on basis of annuity fund—Ascertainment of amount—Administration of sum allocated on abatement to annuity fund—Annuitant not entitled to payment of actuarial value of annuity—Instalments of annuity to be paid as they accrue due

CHANCERY DIVISION

UTHWATT J.

1945. July 27.
[1945] 2 All E.R. 586.

In this case the testatrix who died on 31 January 1940 bequeathed to her niece Mrs Ruby Falconer an annuity of £104 per annum free of income tax and authorized her trustees to provide for the payment of the annuity by setting apart a capital sum sufficient by the income thereof to pay the annuity and directed that the capital of the annuity fund might be resorted to if at any time the income was insufficient to pay such annuity in full and on the death of the annuitant the testatrix bequeathed the capital of the annuity fund to her niece Mrs Irene Walker absolutely if she should survive the annuitant. The testatrix then bequeathed various specific legacies and a legacy of £700 to Mrs Walker, two legacies of £3 each to friends and the residue of her estate to Mrs Walker.

The estate proved to be insufficient in amount to give full effect to the provisions of the will and the questions raised by the summons were as to the basis on which the annuity should be valued for the purpose of abatement and the administration of the annuity fund if it were set up.

The first question was whether the sum required to set up an annuity fund should enter into the abatement computation or whether the computation should be on the basis of the actuarial value of the annuity. On this question the learned judge held that although the authority to set apart a capital sum to form an annuity fund was in terms only a power yet having regard to the bequest of the capital of the annuity fund to Mrs Walker on the death of the annuitant the provision was not merely ancillary to the gift of the annuity but was an essential term of the bequest. The amount of the annuity fund must therefore enter into the computation.

The second question was whether for the purpose of ascertaining the amount of the annuity fund the capital sum should be ascertained on the basis of an investment in Consols or on the basis that the fund be composed of investments yielding interest at 3½% per annum and the learned judge held that the former was the correct basis of computation.

The third question was as to the disposition of the sum allocated on the abatement calculation to the annuity fund. On this point the question was whether after payment of the arrears of the annuity the balance of the fund (which would be less than the actuarial value of the annuity) should be paid to the annuitant or whether that balance should be applied in paying the instalments of the annuity in full as they accrued due. The learned judge held that the latter was the correct view. The valuation of an annuity and payment of the ascertained amount to the annuitant was not a rule of law but a rule of administration in which effect should be given to the dictates of common sense. Without payment on the basis of a valuation the rights of the annuitant

could be fully met so far as funds admitted. To make a valuation imposed on those interested in the corpus of the annuity fund the burden of paying an annuity for an average life—and an average life was as rare a thing as an average man—whereas the testatrix contemplated the burden of paying an annuity during the lifetime of this particular annuitant. Valuation was therefore not only unnecessary for the purposes of administration but imposed a charge on the annuity fund for an amount different from that intended by the testatrix.

Inland Revenue *v.* Cook

Annuity—Will—Free of all deductions including income tax and government duty—Paid by trustees out of trust income brought in to charge to tax—Payment of sum stated—Gross income—Annuitant's total income exempt from taxation—Claim by annuitant to recover from Crown income tax deducted by trustees from notional gross income—Liability to account to trustees for sums recovered

HOUSE OF LORDS

1945. July 30.
[1945] 2 All E.R. 377.

This was a claim by an annuitant who was entitled under a will to an annuity of a stated amount free of income tax to recover from the Crown part of the tax deducted by the trustees from the notional gross amount of annuity required after deduction of tax at the standard rate to provide a net payment to the annuitant of the stated amount.

By her will the testatrix who died domiciled in Scotland directed her trustees out of the free annual income derived from her heritable property to pay to her niece, the respondent in this appeal, an annuity or yearly sum at the rate of £100 per annum for the remainder of her life payable at two terms in the year, Whitsunday and Martinmas, and declared that the annuity was to be payable 'free of all deductions including income tax and government duty'.

It was common ground that upon the true construction of the will the respondent was entitled to receive an annuity of such a sum as after deduction of the income tax if any which but for the tax-free provision she would have to pay in respect of it would leave her with a net sum of £100, no more and no less. The question was how, having regard to the provisions of the Income Tax Acts imposing on the trustees the duty on payment of the annuity to deduct income tax at the standard rate, effect was to be given to that intention. The contention of the Crown was that the trustees should have given effect to it by deducting tax at the standard rate from the stated amount so that the payment in the first instance should have been £65 accompanied by a certificate of deduction of tax which would have entitled the respondent to claim repayment from the Crown of the £35 deducted for income tax. That, it was argued, would give effect to the intention of the testatrix so far as the substance of the gift was concerned inasmuch as the respondent would ultimately receive £100 per annum, no more and no less. Against that it was said on behalf of the respondent that the form of the gift was in that way disregarded for the testatrix had prescribed payment of the annuity of £100 at two terms of the year and presumably in equal parts. To that the Crown replied that as the testatrix had made a bequest which was in form irreconcil-

able with the statutory machinery for the collection of tax at the standard rate the form must be disregarded in order to give effect to the substance of the gift. On that basis the Crown while denying liability to make any payment was prepared to make an *ex gratia* payment of £35 inasmuch as the whole of the trust income having been subjected to tax in the hands of the trustees the total available for distribution among the beneficiaries was diminished by that amount and it was therefore prepared to treat the case as one in which what it considered to be the correct procedure had been followed and to repay the respondent the £35 on the assumption that she would hand it over to the trustees to replace the excess of £35 formerly paid by them to her.

The contention of the respondent was that in order to give effect to the direction of the will to pay a tax-free annuity of £100 by two equal instalments of £50 and at the same time comply with the requirements of the Income Tax Acts and deduct tax at the standard rate from the amount payable to the respondent there must be added to the gift of £100 a sum such that when the tax was levied on the total amount the net amount paid would be £100. It was not disputed that on that basis the gross amount of the annuity upon which tax at the standard rate of seven shillings in the pound would be levied would be £153. 16*s*. 11*d*. and that the tax to be deducted would be £53. 16*s*. 11*d*. As the respondent had no other income she was entitled to the allowances which she claimed and for which she would be accountable to the trustees so that in the net result she would receive no more from the trust than a tax-free annuity of £100.

Their Lordships differed in opinion as to which contention was correct. The majority of the House consisting of Viscount Maugham and Lords Thankerton and Porter were of opinion that the respondent's contention represented substantially the correct view of the matter and they accordingly dismissed the appeal and so confirmed the judgment of the Court of Session to the effect that the respondent was entitled to the relief which she claimed and they added that in their opinion she would have been entitled to recover the whole of the £53. 16*s*. 11*d*. deducted as tax inasmuch as that was the amount overpaid in respect of the respondent's personal liability to income tax. Her income was £100 and no more and on that amount no tax was payable. So far as she was concerned the Crown had no possible ground for claiming any tax out of the £53. 16*s*. 11*d*. inasmuch as the trustees had paid tax at the standard rate on the whole income of the trust. Whether the respondent accounted to the trustees or not for the sum recovered was a matter between her and them to be determined on the true interpretation of the gift. That in no way concerned the Crown.

Lord Russell was of opinion that the respondent was not entitled to recover anything. He said he was unable to see how any overpayment of tax had taken place or how any claim by the annuitant for repayment could arise. She had received exactly what the will gave her and had paid no tax. The residue had suffered the reduction of the estate's taxed income contemplated by the will and caused by the direction to pay the £100. He preferred that solution to one which caused the trustees to depart from the direction given them by the testatrix and to a solution which was based on a twofold fiction, namely, that the income of the annuitant during the year in question was £153. 16*s*. 11*d*. and that the trustees had disbursed a sum of £153. 16*s*. 11*d*. out of which they had paid to the Revenue income tax at the standard rate.

Lord Simonds, who also dissented from the majority and would have allowed the appeal, adopted in effect the contention of the Crown to the effect that tax at the standard rate should have been deducted from the £100 and afterwards recovered by the annuitant from the Crown but that the annuitant was entitled to no relief on the fictional basis that the gross amount of the annuity was £153. 16*s.* 11*d.* and that the trustees had deducted tax from that amount.

Associated Portland Cement Manufacturers Ltd. *v.* Kerr (Inspector of Taxes)

Income tax—Company—Computation of profits—Trading expenses—Payment made to retiring managing director as consideration for covenant restraining him from activities injurious to company's business—A capital and not a revenue expenditure

COURT OF APPEAL

1945. Nov. 26.
62 T.L.R. 115.

This was the Company's appeal from the judgment of Macnaghten J. who had affirmed a decision of the Commissioners for the Special Purposes of the Income Tax Acts to the effect that a payment made to a retiring managing director of the Company in consideration of his entering into a covenant not to carry on or be engaged in any competitive business was a capital expenditure in that it brought into existence an asset or an advantage of enduring benefit to the Company and was therefore not a proper charge to revenue in the calculation of the Company's profits for the purposes of income tax. The appeal was in respect of two payments of £20,000 and £10,000 respectively made to two managing directors whose service agreements were shortly to expire and who having intimated their intention to retire would apart from the covenants entered into by them in consideration of such payments have been free to engage in business in competition with the Company's business. The covenant in each case was that after the date of his retirement the retiring managing director would not without the previous consent of the Company 'carry on or be engaged or concerned in the manufacture of any kind of Portland cement, coloured and other cements for building, constructional or decorative purposes, lime, whiting or bricks' in any part of the world. The question was whether in computing the profits of the Company the sums in question were proper debit items to be charged against the incomings of the trade. The appeal was dismissed.

In his judgment the Master of the Rolls (Lord Greene) quoted from the judgment of Viscount Cave L.C. in *British Insulated and Helsby Cables* v. *Atherton* [1926] A.C. 205 where he said: 'When an expenditure is made not only once and for all but with a view to bringing into existence an asset or an advantage for the enduring benefit of a trade I think that there is very good reason (in the absence of special circumstances leading to an opposite conclusion) for treating such expenditure as properly attributable not to revenue but to capital'.

Notes

Appeals:

Grosvenor, In re, Vol. LXXII, p. [16]. The House of Lords by a majority (Lord Simon L.C. and Lord Wright dissenting) reversed the decision of the Court of Appeal (sub nom. *Hickman* v. *Pearson* 61 T.L.R. 489) and held that the uncertainty which was postulated by s. 184 of the Law of Property Act, 1925, existed when the circumstances were such that it could not be ascertained that any one of two or more deceased persons survived the other or others and that as in the present case it had not been established that there was no element of uncertainty the presumption applied and the several deaths caused by the explosion of one high explosive bomb must be presumed to have occurred in order of seniority so that the younger would be presumed to have survived the elder.

Howard, deceased, In re, Vol. LXXII, p. [20]. Insofar as Henn Collins J. decided that there was no presumption as regards the man and his wife that either survived the other his decision must be treated as having been overruled by the decision of the House of Lords in *Hickman* v. *Pearson* (see above).

Inland Revenue v. *Oswald*, Vol. LXXII, p. [21]. On appeal by the Crown to the House of Lords the decisions of the Court of Appeal, Lawrence J. and the Special Commissioners were all reversed and the original assessment made by the Commissioners was restored: 61 T.L.R. 370: [1945] 1 All E. R. 641. In the opinion of their lordships the decisions of the Court of Appeal in this case and in the case of *I.R.* v. *Lawrence Graham & Co.* [1937] 2 K.B. 179 were based on a misconception. Those decisions proceeded on the view that the contract between the parties provided for the capitalization not of the stipulated interest but of that interest less tax. That was a manifest confusion between what the lender must accept on payment and what was due. The lender must discharge the borrower's indebtedness to pay interest at the stipulated rate on being paid that interest less tax but it was quite a different thing to say that what was due under the contract was the stipulated interest less tax. The contract fixed the rate of interest. The Income Tax Act created a supervening right and duty to deduct tax. The option to capitalize the interest merely meant that if exercised the interest at the stipulated rate which was in arrear would be added to the borrower's principal indebtedness and would itself yield interest at the stipulated rate. The option to capitalize was in effect an option to exact compound interest from the borrower. Looking at it in that light there was no justification for treating the capitalization as the equivalent of a notional payment of the interest less tax and a capitalization of the net income after a notional deduction of tax. The interest was not in fact paid when the option to capitalize was exercised and there was no right or duty to deduct tax from it until it was paid. The interest was not capitalized because it was treated as paid but because it was in fact not paid and the interest to be capitalized was the interest which was payable and not the interest less tax which the lender would have been bound to accept if it had been paid. The capitalized interest did not cease to be interest in arrear and therefore when it was paid along with the principal sum it was a payment of arrears of interest and liable to be assessed to tax as such.

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