# LEGAL NOTES

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## *Re* **Cowlishaw**

CHANCERY DIVISION
BENNETT J.
1939 February 16.
L.R. [1939] Ch. 654.

*A bequest of an annuity of a specific sum clear of all deductions is not sufficient to discharge the annuitant to whom the annuity is payable of his liability to pay income tax in respect of it: but if on the true construction of the particular document it shows an intention on the part of the donor that the expression "deductions" is to include income tax it will be construed as a gift of the specific sum free of income tax.*

In this case the question was whether an annuity payable under his will to the testator's widow was payable to her free of income tax. By his will the testator directed his executor to pay "free of all duties to commence from the date of my death: to my wife an annuity of £900 during her life to be paid free of all deductions whatsoever by equal quarterly payments the first whereof shall be made three months after my death".

The executors sought the direction of the Court as to whether the annuity was payable to the widow free of income tax or whether it was payable to her subject to the deduction of such tax.

The learned judge said that the principles applicable to this class of case were stated by Warrington, L.J. in *Re Shrewsbury Estate Acts* [1924] 1 Ch. 313, 336. These were (1) that a mere gift of a clear annuity or an annuity clear of all deductions is not sufficient to discharge the annuitant to whom the annuity is paid of any liability to pay the tax on his own income, and (2) that if the document in question is so expressed as to show that it was the intention of the donor that the expression deductions should include income tax, the gift would be so interpreted. With that statement in mind, the learned judge approached the construction of the will, and asked himself whether there was anything in it which showed that the testator intended the expression "deductions" to include

income tax. In his judgment there was. The annuity was given free of all duties and unless the direction that it was "to be paid free of all deductions whatsoever", was meaningless and entirely ineffective, the expression "deductions" must include income tax. He could not hold the direction to be wholly meaningless and ineffective, and therefore he decided that in this will the expression "deductions" included income tax and that the annuity was payable to the widow free of income tax.

**Groom *v.* A Firm of Solicitors**

COURT OF APPEAL
1939. April 13.
L.R. [1939] 1 K.B. 194.

*A motor-car policy covering the insured* inter alia *against third party risks including liability to passengers contained a condition to the effect that the insurers should if and so long as they so desired have absolute conduct and control of all or any proceedings against the insured.*

Held *that the effect of such a condition is to give to the insurers the right to decide upon the proper tactics to pursue in the conduct of the action provided that they do so in what they* bona fide *consider to be the common interest of themselves and their insured but that insurers are not entitled to allow their judgment as to the best tactics to pursue to be influenced by the desire to obtain for themselves some advantage altogether outside the litigation in question with which the insured has no concern.*

*The condition entitles the insurers to nominate a solicitor to act for the insured in the conduct of any proceedings against him and to instruct the solicitor as to the conduct of all matters which the insurers are as between themselves and the insured entitled to do: but a solicitor so nominated who acting on instructions express or implied from the insurer does something to which the insurers are not entitled to require the insured to submit is acting beyond his competence and if what he does is something which in the ordinary way would be a breach of duty to his client he will be liable to the insured accordingly.*

*When a solicitor commits a breach of duty to his client the client's cause of action is for breach of contract and not for tort and the damages recoverable are limited to such pecuniary damage as the client has actually sustained.*

*When in breach of his duty to his client a solicitor writes to the solicitor acting for his opponent making an admission of negligence on the part of his client which is false and in the truth of which he the solicitor does not believe his client may recover damages against him in an action for libel and such damages are at large and may include punitive damages.* Semble *that a letter written in such circumstances is not written on a privileged occasion and that no proof of malice or indirect motive is necessary.*

The plaintiff in this action was the holder of a motor-car policy issued by the National Farmers' Union Mutual Insurance Society, Ltd., and covering him *inter alia* against third party risks, including liability to passengers. His brother, Aubrey Groom, was a passenger in his car when it came into collision with a lorry belonging to Tear Brothers, the driver of the lorry being solely to blame. The owners of the lorry were insured with the Motor Union Insurance Company Ltd. Aubrey Groom, who was injured, brought an action against the plaintiff and the owners of the lorry, alleging that they were both to blame. The plaintiff intimated the claim to his insurers and they appointed the defendants in this action to act as solicitors for the plaintiff. In pursuance of an agreement between the two insurance companies to the effect that the total liability of the two offices in this and in another case in which the plaintiff had no interest should be borne in equal shares the defendants were instructed by the plaintiff's insurers to admit that the accident, in this case, was caused by the plaintiff's negligence, and, in consequence of that admission, his brother recovered judgment against him for £924 and costs which were taxed at £208. 12*s.* 10*d.* Both these sums were paid by the plaintiff's insurers. The admission in question was contained in the defence delivered by the defendants on behalf of the plaintiff, and in sending a copy of the defence to the solicitors acting for the plaintiff's brother, the defendants wrote in a covering letter: "we enclose herewith our client's defence service of which kindly accept by post, and from which you will observe he admits that he was negligent on the occasion referred to in the Statement of Claim." The defendants did not believe that the plaintiff had been negligent and the admission was made because the plaintiff's insurers thought that having regard to the agreement with the other insurance company, it would result in their being in pocket to the extent of several hundred pounds.

The plaintiff claimed damages against the defendants for breach of their duty to him as his solicitors and for libel.

On the trial of the action, the jury found for the plaintiff and awarded £1000 damages for breach of duty and £1000 for libel, and the learned judge gave judgment for £3132. 12*s*. 10*d*. made up of the two sums of £1000 and £1132. 12*s*. 10*d*., the amount of the judgment recovered against him by the plaintiff's brother. The defendants appealed.

The Court of Appeal held that although the defendants were liable to the plaintiff for breach of duty to him as solicitors, the claim was for damages for breach of contract, and that unless he could prove an actual pecuniary loss he was not entitled to more than nominal damages. He suffered no loss from the judgment against him because that was paid by his insurers, and the jury were not entitled to award him £1000 damages on the ground that he was subjected to annoyance and public disapproval and that his reputation as a careful driver was destroyed. The Court accordingly reduced the damages for breach of duty to 40*s*. nominal damages.

On the other hand, the Court held that the jury was entitled to award £1000 damages for libel. In an action for defamation the damages were at large and although the only publication was to the opponent's solicitors it could not be said that the sum awarded was so unreasonable as to justify the Court in directing a new trial.

### *Re* **Warren**

CHANCERY DIVISION
SIMONDS J.
1939. April 26.
L.R. [1939] Ch. 684.

*The Trustee Act* 1925 *Sect.* 1 *provides that a trustee may invest the trust funds in his hands in any of the investments therein specified and by Sect.* 69 *subs.* 2 *it is provided that the powers conferred by the Act on trustees apply if and so far only as a contrary intention is not expressed in the instrument creating the trust.*

Held *that trustees may invest trust funds in any of the investments authorised by the Trustee Act unless expressly forbidden to do so by the trust instrument and that a direction to trustees to invest trust funds in certain specified classes of investments does not forbid them from investing the trust funds in any investments authorised by the Act.*

By his will a testator, who died in 1880, directed his trustees to

invest the proceeds of the conversion of his estate in certain government bonds and other named classes of securities in America, and that twelve months after his death they should set aside investments to the capital value of £35,500 and hold the same in trust for the benefit of his second daughter and her children. In 1938 the Public Trustee was appointed a trustee of the testator's will so far as the trust of £35,500 was concerned. The investments in which the fund then stood were all within the statutory range of investments, but did not include any of the investments authorized by the testator's will. The Public Trustee took out a summons for the direction of the Court as to the investment of the fund. The question was whether having regard to the direction in the testator's will, the trustees had power to invest in any securities authorized by law for the investment of trust funds.

The doubt arose from the alteration in the language of the Act as compared with the corresponding provisions of the Trustee Act 1893, Sect. 1, which provided as follows: "A trustee may unless expressly forbidden by the instrument (if any) creating the trust invest any trust funds in his hands whether at the time in a state of investment or not in manner following...". Under that section there was a power to invest in the investments authorized by the Act unless there was an express prohibition in the instrument creating the trust. The mere provision in the will for investment in a list of specified investments, with no negative provision, did not amount to an express prohibition. For some reason the Trustee Act 1925, Sect. 1, departs in its language from the Trustee Act 1893, Sect. 1, and provides as follows: "A trustee may invest any trust funds in his hands whether at the time in a state of investment or not in manner following...". The gap in this section is made good by Sect. 69, sub.s. 2 of the Act which provides as follows: "The powers conferred by this Act on trustees are in addition to the powers conferred by the instrument, if any, creating the trust, but those powers unless otherwise stated apply if and so far only as a contrary intention is not expressed in the instrument if any creating the trust."

The learned judge said that the 1925 Act was intended to be a consolidating Act, and though it contained some new provisions it would be strange if there were any serious departures from the 1893 Act. It was inconceivable that the Legislature intended to

depart as to investment from the position under the 1893 Act. He was, therefore, bound to give the words "contrary intention" in the 1925 Act the same force as that given to the words "unless expressly forbidden". Here there was a direction that the trustee shall invest in certain specified investments but no prohibition against other investments. It followed that there was power to invest the fund in any of the investments authorized by the Act.

A further point arose as to whether the direction in the will to appropriate certain investments to the fund altered the position. In a case of *Re Owthwaite* [1891], 3 Ch. 494, Kekewich, J. had expressed a doubt as to whether, when investments had been appropriated, to an annuity fund pursuant to a direction in a will, it was competent to the trustees to sell those investments and invest the proceeds in trustee investments. He, the learned judge, did not share that doubt, but in any case there was a distinction between the case of an annuity and that of a fund for a settled legacy and, if the doubt existed, it was only on the appropriation of a fund for an annuity which was not the case before him. Accordingly the trustees were at liberty to exercise the powers of investment and varying investments conferred on trustees by the Act.

### *Re* Wills

CHANCERY DIVISION
SIMONDS J.

1939. May 10.
L.R. [1939] Ch. 705.

*When a testator in the division of his residuary estate among his beneficiaries declares that for the purpose of that division any previous advance made by him to any beneficiary shall be brought into hotchpot against his or her share of the capital the position with regard to the allocation of income earned by the capital before distribution is equalized by adding to the actual income of the residuary estate interest at 4 per cent per annum less tax on the value of the capital sums to be brought into hotchpot and dividing the aggregate amount so arrived at into the shares directed by the will with regard to capital and crediting such shares to the respective beneficiaries subject in each case to the deduction of interest at the rate aforesaid on the sum to be brought into hotchpot.*

*The above is a general rule of administration which will give way only to a clear direction in the will to the contrary or when the testator's directions cannot be carried out consistently with its application.*

This was a summons taken out by the trustees of the will of

Frederick Noel Hamilton Wills, who died on 11th October 1927. The testator bequeathed his residuary estate to trustees upon trust as to two equal fifth parts thereof to pay the income to his wife during her life and after his death to hold the capital and future income of the said two fifth parts upon the trusts thereinafter declared concerning the remaining three-fifths; that is to say, upon trust for all or any of his children who should attain the age of twenty-five years or marry, in equal shares except that each son should take three times as much as each daughter. The sons took absolutely, but the daughters' shares were settled upon them respectively for the daughter's life and after her death upon trust for her children. The will contained a hotchpot clause to the effect that all sums which, prior to his death, the testator might have given or settled for the benefit of any child over the sum of £500, should be taken in or towards satisfaction of his or her share of the residuary estate and brought into hotchpot and accounted for accordingly.

The testator was survived by his wife and five children, two sons and three daughters, only one of whom, a daughter, had attained the age of twenty-five at the testator's death. The testator left a very large estate and during his life he made settlements of varying amounts upon his daughters and their future issue and for the benefit of his sons. The trustees of the will took out this summons to have it determined how the income and accumulations of income of the three-fifths of the testator's residuary estate in which the widow took no life interest, were to be allocated among the beneficiaries. The following alternative methods were suggested:

(*a*) Interest at the rate of 4% per annum less tax on the capital sums to be brought into hotchpot by each child (or in the alternative, the actual income received from such capital sum), ought to be added for computation to the actual income of three-fifths of the estate for the period, and the aggregate amount of income so arrived at ought to be divided into equal shares (except that the share of each son should be three times as much as the share of each daughter) and credited to the respective children, subject in each case to the deduction of interest at the rate aforesaid on the sum to be brought into hotchpot.

(*b*) The sums to be brought into hotchpot ought to be added for computation to three-fifths of the capital of the residuary estate and the sum to be brought into hotchpot by each child deducted

from such child's share (each son's share being three times as great as each daughter's share) in the aggregate amount of capital so arrived at, and the income and accumulations of income of the residuary estate allocated to the children in proportion to their respective shares of capital so arrived at.

The learned judge said that the second alternative under (*a*) was a method which had never been adopted by the Court in such a case, and he did not propose to introduce it for the first time. The choice lay between the first alternative under (*a*) and (*b*), and it was not an easy one in the present state of the authorities.

The Court in administering the estate of a deceased man endeavours to deal fairly between his beneficiaries and it would be manifestly unfair that an advanced beneficiary should at once enjoy the interest of the sum advanced and be placed in the same position as unadvanced beneficiaries with regard to the income earned by the capital of the estate before distribution. There might be many methods of meeting this difficulty and one method might, in a particular case, appear to be fairest and in another case another. But in this, as in other matters of administration, it has long been realized that the essential thing is to have a settled rule. It may work less well in some cases than in others, but that was probably true of every rule of equity or of law and was a consideration of little weight against the importance of certainty and regularity.

Turning to the decided cases, he found that the first alternative under (*a*) had been established and followed as a settled rule for more than 100 years. On the other hand, the Court of Appeal had, in one case, applied method (*b*), and the question he had to consider was whether the decision of the Court turned solely on the provisions of the will in that case or whether it was a decision of general application substituting a new rule for one which had been so long established. In his opinion, it was a decision resting solely on the particular language of the testator's will. In his view the old method was still the rule of general application and would only yield to a clear direction in the testator's will or to directions in the will which could not be carried out consistently with its application. In the present case there was no ground for excluding the rule of general application and the income and accumulation of income would therefore be appropriated in accordance with the first alternative under (*a*).

### *Re* **Maclennan**

COURT OF APPEAL
1939. May 23.
L.R. [1939] Ch. 750.

*A covenant to pay an annuity of such a sum as will after deduction of income tax but not surtax leave in the hands of the annuitant the sum of £X clear of all deductions for income tax but not sur tax is a covenant to pay such sum as will leave the annuitant the net sum of £X after the annuitant's liability for income tax has been finally adjusted and if the annuitant is entitled to certain reliefs any sums recovered by way of relief must be accounted for to the covenantor so that the annuitant shall not as the final result of the transaction receive a net sum in excess of £X.*

Under the will of Donald Maclennan his two children, a son and daughter, were entitled to an annuity of £250 each and his widow was entitled to an annuity of £3000 and to the residue of the income of his estate. By a deed of family arrangement the testator's widow charged the residue of the annual income of the estate with payment thereout to each of her children as a first charge thereon "such an annual sum as together with the amount of the annuity of £250 payable under the will of the testator would after deduction of income tax but not surtax leave in his or her hands the sum of £500 clear of all deduction for income tax but not surtax". A question arose as to whether the two annuitants were entitled to retain the reliefs which under the Income Tax Acts they might receive in respect of their annuities or whether they should return any such sums so recovered to the trustees of the estate. The trustees of the will and deed took out a summons asking for the determination of that question. The annuitants contended that "after deduction of income tax" must mean that the trustees had to pay such sum as after deduction of income at the standard rate would yield the sum of £500. The reference to surtax did not change deduction into something else. The widow contended that what was meant was that the annuitants should receive their full annuities after all adjustment had been made. The words used had the same meaning as free of income tax.

The Court of Appeal affirming the decision of Bennett, J. answered the question in favour of the widow. The Master of the Rolls said it was purely a question of construction. A covenantor

might covenant to pay such sum as after deduction of income tax at the standard rate would give the net sum of £*X* and in that case the annuitant would be entitled to claim and retain any of the reliefs to which he was entitled. But it was clear that a covenantor if so minded might go a step further and, by appropriate language, might provide that the sum of £*X* shall be arrived at by taking into account not merely the factor of the standard rate of income tax, but that factor adjusted by bringing into account also any recoveries which the annuitant, as a person entitled to relief, might be able to claim. The word "deduction", taken by itself, would appear to point to the act of deduction as the only relevant matter to be taken into account, but he, the Master of the Rolls, found it quite impossible to give to the word "deduction" that limited meaning. It was necessary to bear in mind that in the matter of surtax there was no question of any deduction being made by a person making an annual payment. The phrase "leave in his or her hands" coupled with the words "clear of all deduction for income tax but not surtax" seemed to contemplate the final result of the transaction, and to be speaking of the sum which is left in the hands of the annuitant and which he or she can use after all income tax but not surtax claims, which may arise in connexion with it, have been satisfied. The phrase "leave in his or her hands" seemed to him to point to a final result. If a payer of income tax has suffered tax by deduction and is entitled to relief it means that he has borne more tax than he is liable to pay. If by the machinery of the Income Tax Act the revenue gets a flat rate of tax by deduction, it does not alter the circumstance that when it does so it may be getting more than it is entitled to. But that is mere machinery and the adjustment is made and the tax brought back to its proper level by means of claims for relief and consequential repayment.

**Gibbons *v.* Westminster Bank Ltd**

KING'S BENCH DIVISION

LAWRENCE J.

1939. June 20.
L.R. [1939] 2 K.B. 882.

*If a bank dishonours a customer's cheque drawn in favour of a third party notwithstanding that it has in its possession funds of the customer available to meet the cheque there is a breach of contract in respect of which the customer is entitled to at least nominal damages.*

*If the customer is a trader he is entitled to recover damages at large*

*as a* solatium *for the imputation to his credit but if he is a non-trader he cannot recover more than nominal damages unless he pleads and proves that he has suffered actual damage as a consequence of the dishonour of his cheque.*

*A non-trader drew a cheque on her bank in favour of her landlords in payment of her rent. The bank although in possession of funds available to meet the cheque dishonoured it and the landlords thereupon asked her to pay her rent in cash instead of by cheque in future.*

*In an action against the bank for damages for breach of contract the plaintiff did not plead special damage but proved the above facts. The judge at the trial refused leave to amend.* Quaere *whether there was any evidence of special damage.*

The plaintiff was the tenant of a flat in Maida Vale and in payment of her rent she gave her landlords a cheque for £8. 16*s*. payable to their order and drawn on the defendant bank. The bank was in possession of funds available to meet the cheque but by mistake it had omitted to credit the plaintiff's account with a sum of money which she had paid in some few days previously and the manager, in the belief that her credit balance was insufficient, dishonoured the cheque. The landlords returned the dishonoured cheque to the plaintiff and asked her to pay her rent in cash and not by cheque in future. The plaintiff then interviewed the manager of the bank and he offered her, and she accepted, one guinea by way of compensation. Thereafter she brought this action claiming damages for breach of contract but did not allege special damage. The defendants by their defence, admitted the breach but pleaded that the plaintiff had accepted the guinea in satisfaction of her claim and they paid a further sum into Court with denial of liability. The action was tried before Mr Justice Lawrence and a common jury. The jury found that the plaintiff had not accepted the guinea in satisfaction of her claim and they awarded her £50 damages. The question was then argued whether the plaintiff was entitled to the sum awarded by the jury and the learned judge held that as she had not pleaded and proved special damage she was entitled to nominal damages only. The general rule was that damages at large were not recoverable for breach of contract and unless a plaintiff pleaded and proved that actual damage had accrued as the result of the breach he could not recover more than nominal damages. There were certain exceptions to the rule, such as breach of promise to

marry and the dishonour by a bank of a trader's cheque. There were a number of cases in which it was held that a trader whose cheque had been dishonoured could recover general damages because it was an imputation on the trader's credit and there was an irrefutable presumption that damage had in fact been sustained. The case of the trader had, however, always been stated as one of exception to the general rule and one which ought not to be extended. The corollary of the proposition laid down by those cases was that a person who was not a trader was not entitled to recover substantial damages for the wrongful dishonour of his cheque unless he pleaded and proved special damage. It had been argued that the plaintiff should have leave to amend her statement of claim so as to allege as special damage the fact that she had had to pay her rent in cash instead of by cheque. His Lordship thought that in the circumstances it would not be right to allow the amendment. The plaintiff was therefore entitled to recover no more than nominal damages which he would assess at 40*s.* and there would be a judgment for her for that sum. That was less than the sum paid into Court, but the defendants said they would not ask for costs if the plaintiff undertook not to appeal, and that undertaking being given, no order was made as to costs.

**Ottoman Bank** *v.* **Menni**

PRIVY COUNCIL
1939. July 21.
[1939] 4 All E.R. 9.

*Under a pension scheme the employees of the Imperial Ottoman Bank were entitled on retirement to a pension the amount of which was calculated on the basis of the salary being drawn by the employee on* 31 *December of the year preceding that in which he was put on pension. The annual salaries of the employees were expressed in Turkish pounds.* Held *that on the evidence and the true construction of the contract of employment the salary was not payable only in gold Turkish pounds but was payable in Turkish pounds as a unit of account and therefore in whatever might be legal tender according to Turkish law at the material time and that the pension fell to be calculated accordingly.*

Held *that when an employee had given an unconditional receipt for his salary calculated on the basis that it was payable in whatever*

*passed for legal tender for the Turkish pound at the date of payment he was estopped from claiming that his pension should be calculated on the basis of a salary payable in gold Turkish pounds.*

This was an appeal from two judgments of the Supreme Court of Palestine. By the judgments appealed from, it was decided in substance that the employees of the Imperial Ottoman Bank at Haifa were entitled to payment of their salaries in the equivalent of gold Turkish pounds, and that their pensions fell to be calculated on the same basis, and that an employee who had given unconditional receipts for his salary calculated on the basis that it was payable in whatever at the time was legal tender for the Turkish pound as a unit of account was not estopped from contending that his pension should be calculated on the basis that his salary was payable in the equivalent of gold Turkish pounds.

In the case of the employee Mansom, he entered the service of the Bank in June 1912 at Haifa, when he signed a declaration of adherence to the pension regulations. He remained in service of the Bank at Haifa until December 31, 1933 and was placed on pension as from January 1, 1934. The material provisions of the pension regulations were as follows:

Article 14. The amount of the pension is calculated on the basis of the salary which the employee was drawing on December 31 of the year which preceded that in which he was put on pension.

Article 15. The amount of the pension will be calculated on the following basis: (1) For 10 completed years of service 30 per cent of the fixed annual salary, (2) 2 per cent for each succeeding year.

Article 16. In no case must the pension exceed three-quarters of the fixed annual salary. In no case shall the pension be less than Ltq 45 per year in the case of the clerical staff, and Ltq 25 per year in the case of the subordinate staff.

At the commencement of the employment and until the autumn of 1918 the law of Turkey was the governing law of Palestine, and it was common ground that the proper law of the contract was Ottoman law as it existed at the time. Up to about the end of 1918, when Haifa was occupied by the British troops, the salaries of the Bank's employees there were expressed and paid in Turkish currency. From that time until 1927, Egyptian currency was mainly used, but in November 1927 a new Palestinian currency was introduced and the salaries were thereafter paid in that currency. The salaries expressed in Turkish pounds were converted at a fixed rate into the prevailing currency.

The evidence given in the Supreme Court established three points: (1) that although the Turkish gold pound was current at the date of the contract the proper construction of the contract according to Ottoman law was that the pound Turkish referred to in the contract was a unit of account and not the Turkish gold pound: in other words that the contract was to pay so many pounds Turkish in whatever might be legal tender in Turkey according to Turkish law at the material time; (2) that at all material times since the beginning of the war the paper pound Turkish has been legal tender, and that the Turkish gold pound has gradually disappeared from circulation and become a mere commodity with a price like any other merchandise; (3) that the practice of the Bank in converting the amount of pounds Turkish was at a fixed rate which was not the equivalent in value of the bullion content of the Turkish gold pound.

In their Lordships' opinion these three points were conclusive against the contention that the salary was payable in the equivalent of gold Turkish pounds, and that the pension ought to be calculated on that basis.

In the case of the employee Menni no evidence was given. There was no record of any agreement to treat the evidence in the Mansom case as evidence in this case, and if their Lordships agreed with the Supreme Court that Menni was not precluded by his admissions the case should be sent back to give the parties an opportunity of calling further evidence. Their Lordships, however, did not agree with the Supreme Court. On the paysheet for the respondent's salary for 1932 the calculation of his salary was fully stated and the respondent signed a receipt for the "net amount payable" as stated in the last column. The calculation was inconsistent with his present claim, and their Lordships were of opinion that that constituted a clear admission by the respondent that the net amount was correctly calculated. The respondent was bound by that admission as to the correct amount of his salary at the date material for the calculation of his pension. The respondent Menni's claim, therefore, also failed, and the appeal of the Bank in both cases would be allowed with costs.

### *Re* **Payne**

CHANCERY DIVISION

SIMONDS J.

1939. July 26.
[1939] 3 All E.R. 875.
L.R. [1939] Ch. 865.

*By virtue of the provisions of the Finance Act* 1894 *Sect.* 2 (1) (*c*) *and the provisions of the Customs and Inland Revenue Acts* 1881 *and* 1885 *referred to therein property passing on the death of a deceased person and liable to estate duty as such includes any property taken under a disposition made by the deceased purporting to operate as an immediate gift* inter vivos *whether by way of transfer, delivery, declaration of trust or otherwise which shall not have been* bona fide *made three years before the death of the deceased.*

Held *that in the case of property taken under a trust settlement made by the deceased within the three years before his death estate duty is chargeable on the value of the property at the date of the deceased's death and the property to be valued is the trust fund in the state of investment in which it then is.*

Quaere *in the case of an outright gift whether the same principle is applicable or whether what has to be valued is the actual subject matter of the gift regarded as in a hypothetical state of preservation in the condition in which it was given.*

Held *that when property is chargeable with estate duty as property taken under a voluntary disposition made by the deceased within three years of his death it is aggregable with the rest of his estate for the purpose of determining the rate of duty notwithstanding that the actual subject matter of the gift has not been preserved by the donee.*

In this case Matt Payne made a voluntary settlement of the sum of £10,000 the proceeds of the sale of certain patent rights together with his option as vendor to have allotted to him 6000 ordinary shares in the purchasing company at 35*s.* per share. The trustees of the settlement exercised the option. The company was exceedingly prosperous and the trustees took advantage of a high quotation on the Stock Exchange to sell some of the shares and invest the proceeds in sundry other investments. The settlor died within three years from the date of the settlement and after the realization and re-investment of the shares.

On a claim for estate duty under the provisions of the Finance Act 1894 Sect. 2 (1) (*c*) the question arose as to how the value of the settled property should be arrived at for that purpose. It was

common ground that the only relevant date for the purpose of valuing property which passes on the death of the deceased, is the date of his death. The question of difficulty as to which the parties were at issue was, what was the property of which the value had to be ascertained at the death of the deceased. The trustees said that it was the sum of £10,000 and an option that was taken under the disposition, and that it was the property so taken which must be valued at the death. The Crown contended that estate duty was exigible upon the value of the trust funds in the state of investment in which they were at the death of the settlor.

The learned judge said that a disposition might be made by way of gift outright or by way of settlement. It was the latter class of case with which he had to deal, and he thought it was the easier class of case. When there is a settlement which persists to the date of death it was not, he thought, difficult to regard the trust property in whatever state it might be at the death as the same property as that which was taken under the disposition. The subject matter of the gift was the settled fund, that is to say, the property originally made subject to the declaration of trust, subject to, and with, the benefit of the duties and powers vested in the trustees as such, including the power of investing money and varying investments, and the valuation at the date of the death should be a valuation of the investments and moneys representing the corpus of the trust fund at that date.

He was conscious that in isolating gifts by way of settlement from other forms of gifts, he was not solving all the difficulties which the section presented: but in view of the difficulties—well nigh insoluble as he humbly thought—that may arise in the case of outright gifts, it was permissible, he thought, to adopt in regard to gifts by way of settlement a construction which was consistent with the policy of the Act and did not appear to create any hardship to the subject or to cause any administrative inconvenience.

A further question had been raised as to whether the corpus of the settled fund was aggregable with the other property of the settlor for ascertaining the rate of duty or whether it should be assessed as an estate by itself. It was said that it was saved from aggregation by the proviso to Section 4 of the Finance Act, upon the ground that the settlor never had any interest in the actual property which was in existence at the date of his death. That was

in a sense true, but on the other hand, the settled fund was property in which the deceased as settlor had an interest, and it was the settled fund which was chargeable to duty. He held, therefore, that the settled fund was aggregable with the settlor's free estate.

### *Re* Prudential Assurance Company Limited and Others

CHANCERY DIVISION
SIMONDS J.
1939. July 28.
L.R. [1939] Ch. 878.

*Section 13 of the Assurance Companies Act 1909 provides that when it is intended to amalgamate two or more assurance companies or to transfer the business of one assurance company to another the directors of any one or more of the companies may apply to the Court to sanction the arrangement and that it shall not be lawful to effect any such amalgamation or transfer otherwise than with the sanction of the Court.*

Held (1) *that Section 13 applies only to an arrangement by way of amalgamation or transfer between companies all or both of whom are assurance companies to which the Act applies;* (2) *that the Act does not apply to a foreign assurance company carrying on no assurance business in the United Kingdom;* (3) *that accordingly the Court had no jurisdiction to sanction the proposed transfers of the industrial assurance businesses carried on in Eire by four companies incorporated under English law to an assurance company incorporated under the laws of Eire and carrying on no assurance business in the United Kingdom;* (4) *that having regard to the recent legislation in Eire relating to the carrying on of assurance business in that country and to the terms of the proposed transfer the Court would have had no hesitation in sanctioning the proposed scheme if it had had jurisdiction to do so.*

*The sanction of the Court given under the provision of Section 13 to an amalgamation or transfer of assurance business effects a statutory novation of the assurance contracts of the transferor company so as to substitute the obligation of the transferee company for that of the transferor company on the transferred policies and to relieve the transferor company of all further liability.*

Four assurance companies incorporated in England, Prudential, Pearl, Britannic and Refuge, sought the sanction of the Court under Section 13 of the Assurance Companies Act 1909 to the transfer of the industrial assurance business carried on by each of them respectively in Eire to a new company incorporated in Eire for the purpose

of taking over the businesses of a number of companies then carrying on life and industrial assurance business in Eire. The circumstances which led up to the decision of these companies to transfer their industrial assurance business in Eire may be stated shortly as follows.

When the Irish Free State came into being as the result of the Irish Treaty and the Irish Free State Constitution Act 1922, the Assurance Companies Act 1909 and the Industrial Assurance Act 1896 extended to and were in force in Ireland. Under the new Constitution these two last-mentioned Acts were re-enacted as Acts of the Irish Free State with such modifications as were necessary to adapt them to the new circumstances.

In 1936 an Act known as the Insurance Act 1936 was enacted by the legislation of the Irish Free State. That Act provides that the various Parts of it shall come into operation on such day or days as may be fixed by the Ministry of Industry and Commerce. When Part II of the Act comes into operation it will not be lawful for any assurance company to carry on in Eire any assurance business save under, and in accordance with, a licence granted by the said Minister. In consequence of this legislation the English companies doing business in Eire were faced with the problem as to whether they should apply for a licence in respect of their several classes of assurance business in Eire, or should cease to write further business in that country. The four companies in question decided that in due course they would cease to write further business in Eire and in view of that decision it became necessary to consider what steps should be taken in regard to the existing life and industrial business of the companies in that country. The existing business would necessarily dwindle with the efflux of time with a consequential increase in the overhead rate of expense.

The solution of the problem was materially assisted by the passing in Eire of the Insurance (Amendment) Act 1938. That Act was passed to give statutory effect to an Amalgamation Agreement entered into by four assurance companies incorporated in Eire and transacting life and industrial assurance business there, and led to the incorporation in Eire of the Industrial and Life Assurance Amalgamation Company Limited (hereinafter referred to as "the Terminating Company"), to take over the life assurance business, and/or the industrial assurance business of the said four Irish

companies and of such other companies as the Terminating Company might decide, and also led to the incorporation in Eire of The Irish Assurance Company Limited (hereinafter referred to as "the Permanent Company") to service the business of the Terminating Company and on its own account to transact new life assurance and industrial assurance business in Eire.

The four petitioning English companies accordingly entered into negotiations with the Terminating Company as the result of which each of them entered into a provisional agreement with that company for the transfer to it of the English company's industrial assurance business in Eire. The Insurance (Amendment) Act 1938 provides that if any such agreement is entered into before a date called the transfer date, to be fixed by the Minister of Industry and Commerce, it will have statutory effect in Eire, and that Section 13 of the Assurance Companies Act 1909 shall not apply thereto. As collateral to these agreements the Terminating Company undertook to service the existing life assurance contracts of the English companies in Eire on terms which were satisfactory to them. The provisional agreements between the petitioning companies and the Terminating Company were entered into on the express condition that in each case a petition would with all convenient speed be presented and proceeded with to the English Court, pursuant to the provisions of Section 13 of the Assurance Companies Act 1909, to sanction the proposed arrangement and that the agreement should not become absolute until any requisite sanction of the English Court should have been obtained.

When the petitions came before the Court on the preliminary application to dispense with the transmission to the policy-holders of the documents referred to in Section 13 (3) (*b*) of the Assurance Companies Act 1909 the Court granted the dispensation and ordered newspaper advertisement in lieu thereof, and at the same time directed that, on the hearing of the Prudential petition, a representative policy-holder should appear by leading counsel and argue the question of whether or not the Court had jurisdiction to sanction the transfer.

After hearing the arguments of counsel on behalf of the petitioning companies, the Terminating Company, the Industrial Assurance Commissioner, an objecting policy-holder in the Prudential and individual members of the Prudential staff who desired to

criticize the merits of the transfer, the learned judge held that under the Assurance Companies Act 1909 he had no jurisdiction to sanction a transfer of assurance business unless both the transferor and transferee companies were assurance companies to which the Act applied, and that as the Terminating Company was in the position of a foreign company transacting no business in the United Kingdom it was not a company to which the Act applied and he had no jurisdiction to sanction the provisional agreement.

In dealing with the question of jurisdiction, the learned judge said that he must consider the construction of the Assurance Companies Act 1909 on the basis of the decision given by Mr Justice Eve and Mr Justice Maugham in *In re United British Insurance Company Limited* [1929], 2 Ch. 430, who, following the decision of the Court of Session in *Empire Guarantee and Insurance Corporation* 1911 S.C. 1296 held that the sanction of the Court to a transfer of assurance business effected a statutory novation of the contracts with the policy-holders and relieved the transferor company of any further liability. Lord Parker had expressed an opinion to the contrary in the case of *United London and Scottish Insurance Company* v. *Dominion Insurance Corporation*, 84 L.J. Ch. 777, but his attention did not seem to have been called to the Scottish decision. He (Mr Justice Simonds) thought that these decisions went to the root of the whole matter. Section 13 (1) applied where it was intended to amalgamate two or more assurance companies or to transfer the business of one assurance company to another company. If "another company" meant "another assurance company", then as the transferee company was not an assurance company within the definition of the Act there was no jurisdiction to sanction the proposed transfer of business. As a matter of construction, he came to the conclusion that the proposed transferee must be an assurance company as defined by the Act. The petition, therefore, must be dismissed on the ground of absence of jurisdiction.

But the matter was one of great importance and as the case might be taken to a higher court he thought it his duty to examine the several schemes on their merits. Having regard to the abnormal circumstances created by the Irish legislation of 1936 and 1938, he was satisfied that the schemes were such that he ought to sanction them if he could do so. He was not satisfied that there had been any sufficient objection raised. On the contrary, he was satisfied

that the directors of the petitioning companies had in each case done their best in the difficult circumstances, both for the policy-holders in Eire and for their staff there.

It is understood that there will be no appeal from the decision of Mr Justice Simonds in any of these cases. The result of his decision that the English Court has no jurisdiction to sanction the proposed transfers is that the provisional agreements can be lawfully carried out without its sanction. The Irish Act of 1938 effects a statutory novation of the assurance contracts in so far as Irish law is applicable thereto, but where English law is the proper law of the transferred policies the English companies can only be relieved of their liability by actual novation effected by the consent of the policy-holders given either in express terms or by implication from the payment of future premiums to the Terminating Company.

**Hughes *v.* Bank of New Zealand**

HOUSE OF LORDS
1938. March 4.
L.R. [1938] A.C. 366.

*The exemption from United Kingdom income tax conferred in respect of certain interests and dividends when the person entitled thereto is not ordinarily resident in the United Kingdom applies not only to such interests or dividends as such but also as a component part of the profits of a trade carried on by such person in the United Kingdom.*

*In assessing a company not ordinarily resident in the United Kingdom to income tax in respect of the profits of its trade carried on in the United Kingdom the interest and expenses paid by it in borrowing money for the purchase of securities are properly included on the debit side of the profit and loss account although the interest on such securities is exempt from United Kingdom tax and therefore properly excluded from the credit side of the account.*

*The exemption contained in Schedule C, General Rules r. 2(d) of the Income Tax Act 1918 in respect of interest or dividends on the securities of a foreign state or British possession when the person entitled thereto is not resident in the United Kingdom is one of general application and is not limited to tax charged by that Schedule.*

*The exemption contained in r. 2(d) aforesaid is extended by Schedule D Misc. Rules r. 7 (2) to the dividends of foreign and colonial companies.*

The Income Tax Act 1918 contains the following exemptions from United Kingdom tax, viz.:

1. Interest on British Government securities issued on condition that the interest thereon shall not be liable to tax so long as they are in the beneficial ownership of persons who are not ordinarily resident in the United Kingdom. (Section 46.)
2. Interest or dividends on any securities of a foreign state or a British possession which are payable in the United Kingdom when the person entitled thereto is not resident in the United Kingdom. (Sched. C, General Rules, r. 2 (*d*).)

The Bank of New Zealand which resides in New Zealand and is not resident or ordinarily resident in the United Kingdom has a branch office in London. It is admittedly assessable to income tax under Case 1, Sched. D on the profits arising from the trade exercised at the London branch. In respect of such profits the Additional Commissioners of Income Tax for the City of London made an assessment on the basis of a statement which included the following items:

On the credit side—

1. Interest on 5% War Loan.
2. Interest on India 3% Stock.
3. Interest on Grand Trunk Pacific Railway Stock.
4. Interest on Auckland Electric Power Stock.

On the debit side—

Interest and expenses paid in New Zealand in respect of money borrowed in New Zealand and used in the purchase of the above-named securities.

The Bank appealed to the special commissioners against the assessment and contended that having regard to the exemptions above referred to the interest on these four securities ought to be omitted from the credit side of the profit and loss account. The Crown contended that although the Act exempted from tax certain interests paid to persons not resident or not ordinarily resident in the United Kingdom the exemption was merely *qua* interest, and did not operate to exclude such interest from taxation as part of the trading receipts of a trade carried on by such person in the United Kingdom, and that, alternatively, if the interest on these securities ought to be excluded from the credit side of the account, the interest and expenses paid in respect of the money borrowed for

the purpose of purchasing the securities ought to be excluded from the debit side of the account.

As regards the interest on India Government stock, it was further contended by the Crown that the exemption contained in Sched. C, General Rules, r. 2 (*d*) referred only to tax imposed under that schedule and was not of general application.

As regards the interest on the Grand Trunk Pacific and Auckland Electric Power stock, the Bank claimed exemption under the following provisions of Sched. D, Misc. Rules, r. 7:

> (1) Where (*a*) any interest...payable out of or in respect of the stocks, funds, shares or securities of any foreign or colonial company...are intrusted to any person in the United Kingdom for payment to any persons in the United Kingdom the same shall be assessed and charged to tax under this schedule by the special commissioners.
>
> (2) All the provisions of Sched. C relating to the tax to be assessed and charged in respect of dividends payable out of any public revenue other than that of the United Kingdom and intrusted to any person...for payment to any person in the United Kingdom shall extend to the tax to be assessed and charged under this rule.

The Bank contended that the language of r. 7 (2) was apt to include every provision of Sched. C which *mutatis mutandis* is applicable to dividends described in r. 7 (2) and that among such provisions Sched. C, General Rules, r. 2 (*d*), necessarily has a place. The Crown contended that r. 7 is not a charging rule, but merely provides machinery for collection of tax and that it would therefore be out of place to find an exemption from tax in such a rule.

The special commissioners upheld the Bank's contentions, and excluded the four credit items from the account and rejected the Crown's contention on that footing for exclusion of the debit items for interest and expenses, in respect of the money borrowed to purchase the securities in question. The determination of the special commissioners was affirmed successively by Lawrence J., the Court of Appeal and the House of Lords.

The leading judgment in the House of Lords was delivered by Lord Thankerton, who said that he had no difficulty in holding that whether as interest or as a component part of the profits of a trade, the exemptions must equally apply. As regards the India Government stock, he was of opinion that the exemption contained in Sched. C, General Rules, r. 2 (*d*), was of general application, and not limited in its operation to tax imposed under that schedule. The

most difficult question was that which arose as to the Grand Trunk Pacific and Auckland Electric Power stock. If this exemption applied, it was conferred for the first time by the Consolidation Act, and there was a presumption against such a construction. The Court of Appeal had held that the language of r. 7 (2) is sufficiently clear to overcome that presumption. He, Lord Thankerton, had felt some doubt as to the true construction of the sub-section, but he was not prepared to reverse on appeal the clear decision of the Court of Appeal. If the policy of the Crown was contrary to that decision, it was for them to rectify the ambiguities by amending legislation.

As to the claim by the Crown to exclude from the debit side of the account, the interest and expenses paid in respect of the money borrowed to purchase the securities in question, it was unable to point out any statutory provision in support of that claim, whereas the Bank had full justification in Sched. D, Cases I and II, r. 3, for including those items on the debit side as money wholly and exclusively laid out or expended for the purposes of the trade carried on by it in the United Kingdom.

*Notes*

Appeals:

*Barnes* v. *Hely-Hutchinson*, Vol. LXIX, p. 207. Affirmed by Court of Appeal, L.R. 1939. 1 K.B. 93.

*Welch* v. *Royal Exchange Assurance*, Vol. LXIX, p. 312. Affirmed by Court of Appeal. L.R. 1939. 1 K.B. 294.

Further references:

*Re London General Insurance Company Limited*, Vol. LXIX, p. 320. L.R. 1939. Ch. 505.

*Tennant's Trustees* v. *Lord Advocate*, Vol. LXX, p. 225. L.R. 1939. A.C. 207.
1939 S.C. (H.L.) 1.

*Westminster Bank* v. *Attorney General*, Vol. LXX, p. 228. L.R. 1939. Ch. 610: 160 L.T. 432.

*Knightsbridge Estates Trust Limited* v. *Byrne*, Vol. LXX, p. 231. L.R. 1939. Ch. 441.

*Inland Revenue Commissioners* v. *Tring Investments Limited*, Vol. LXX, p. 239. L.R. 1939. 2 K.B. 503.