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MR E. J. MACGILLIVRAY, K.C.

Readers of the Journal will be interested to hear that Mr E. J. MacGillivray, who for the last eight years has been one of the Editors of Legal Notes, has taken silk.

Ever since 1912 when the first edition of his treatise on "Insurance Law" was published, Mr MacGillivray has been an acknowledged authority on that subject and there can be few on whom a professional distinction has been more appropriately conferred.

LEGAL NOTES

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AND

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Tennant's Trustees *v.* Lord Advocate

House of Lords
1939. February 27.
55 T.L.R. 472.

By S. 4 of the Finance Act 1894 all property passing on the death of a deceased person is aggregated for the purpose of determining the appropriate rate of estate duty payable thereon subject however to the proviso that property so passing in which the deceased never had an interest is not so aggregated but is treated as an estate by itself and duty levied thereon at the rate appropriate to the amount thereof.

Property does not fall within the said proviso so as to be exempt from aggregation if the deceased had at any time any interest therein, including any future or contingent interest. Where the deceased effected a policy on his own life and after paying the premiums thereon for a number of years assigned it to trustees in trust to apply the proceeds thereof in payment of the death duties which would be payable on his estate and as to the balance to divide the same equally among his children who should survive him it was held that the property which passed or was deemed to pass on his death was the right to the policy *moneys payable in that event and that before the assignment he had the sole interest therein and that after the assignment there still remained vested in him the radical right thereto contingent on the event of his having no children surviving him and the death duties not exhausting the amount of the policy moneys. The policy moneys accordingly fell to be aggregated with the rest of the deceased's estate for the purpose of determining the rate at which estate duty was payable thereon.*

The Right Honourable Harold John Tennant was the grantee of a policy dated 26 July 1911 effected by him on his own life with the Star Life Assurance Society for £100,000 payable to his executors administrators or assigns on his death if happening after 21 July 1936. The premium was £2250 per annum payable until 21 July 1935, and in the event of the death of the assured before 21 July 1936 all premiums paid were returnable with compound interest at the rate of $3\frac{1}{2}\%$ per annum. By assignation and deed of trust in Scottish form dated 1 June 1931 the assured assigned the said policy to trustees on trust to pay to his executors out of the proceeds thereof the amount of the British death duties payable in respect of all property passing on his death and to pay and make over the residue of the proceeds to and among his children who should survive him in equal shares. The assured died on 8 November 1935 and the net proceeds of the policy amounted to the sum of £75,328. 13*s*. 7*d*. The death duties payable on the deceased's estate exceeded that sum and the trustees accordingly paid the whole of the net proceeds of the policy to the deceased's executors.

The Inland Revenue Commissioners assessed the said sum of £75,328. 13*s*. 7*d*. to estate duty on the basis that it fell to be aggregated with the other estate of the deceased. On that basis the rate of duty payable was 32%. The executors appealed against the assessment on the ground that as they contended the policy money was property in which the deceased never had an interest and that under the proviso to S. 4 of the Finance Act 1894 it was assessable to duty as an estate by itself. On the latter basis the rate of duty payable would have been 18%.

The appellants argued that the only property assessable to duty was the amount of the beneficial interest accruing or arising on the death of the deceased in a policy which was purchased or provided by him within the meaning of S. 2 (1) (*d*) of the Finance

Act 1894 and that as this was property which had no previous existence the deceased never had any interest in it.

The following are the relevant provisions of the Finance Act 1894:

2 (1) Property passing on the death of the deceased shall be deemed to include the property following that is to say:

(*a*) Property of which the deceased was at his death competent to dispose.

. . . .

(*d*) Any annuity or other interest purchased or provided by the deceased either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

4 For determining the rate of Estate duty to be paid on any property passing on the death of the deceased, all property so passing in respect of which Estate duty is leviable shall be aggregated so as to form one estate and the duty shall be levied at the proper graduated rate on the principal value thereof.

Provided that any property so passing in which the deceased never had an interest shall not be aggregated with any other property but shall be an estate by itself and the Estate duty shall be levied at the proper graduated rate on the principal value thereof.

The House of Lords affirming the decision of the Court of Session were of opinion that the assessment on the basis of aggregation was to be upheld. Lord Russell of Killowen, who delivered the leading speech, said that as the whole proceeds of the policy went in payment of death duties and so enured to the benefit of the deceased's estate the case might have been treated as one in which no effectual assignation of the sums recoverable under the policy had been made and that it was therefore property which passed on the death of the deceased under S. 1 of the Finance Act 1894 or which was deemed to pass under S. 2 (1) (*a*). But on the assumption that the provisions applicable were those of S. 2 (1) (*d*) the property which fell to be taxed was to be deemed to include an interest provided by the deceased, which admittedly includes a policy of insurance, to the extent of the beneficial interest accruing or arising on the deceased's death. These last words were inserted for the purpose of measuring the amount of the sum which was liable to duty. In this case there was no real distinction between the sum recovered under the policy and the extent of the beneficial interest in it accruing on Mr Tennant's death. But the real question was whether the deceased had at any time a beneficial interest in the property deemed to pass at his death. It was plain that he had an interest in that property whether it is to be taken to be the sum of £75,000 or the beneficial interest in it arising on his death. The word interest as used in the proviso of S. 4 of the Finance Act 1894 was of wide and comprehensive meaning and covered a future and contingent interest which the deceased may have had at any time in the property which passes or is deemed to pass on death. It was obvious that the whole interests which arise from a policy of life assurance are built up or created by premiums. In this case the whole benefits under the policy were created by the premiums paid before the assignation, for after the assignation the fund of credit provided by the payment of these premiums was used to keep up the policy. Before Mr Tennant granted the assignation he had the sole interest in the whole beneficial rights under the policy including those rights which would emerge on his death. There was vested in him the right to recover when the policy matured, and after he had granted the assignation he still retained the radical right in whatever sum might ultimately be paid under the policy. For example if he had survived all his children and if there had been a balance after paying the death duties that balance would have fallen to be distributed either in accordance with his testamentary provisions or as part of his estate. It was impossible therefore to say that this was a case of the deceased never having had any interest in the property passing on his death and accordingly the policy moneys fell to be aggregated with the rest of the deceased's estate for the purpose of determining the rate of estate duty payable thereon.

Westminster Bank Ltd. *v.* Attorney General

COURT OF APPEAL
1939. March 6.
[1939] 2 All E.R. 72.

A policy of life insurance on the life of a settlor and belonging to him at the date of the settlement was settled upon trust to invest the policy moneys payable at his death and to hold the investments in trust to pay the income arising therefrom to certain named persons during their respective lifetimes and as to the capital thereof to hold it subject to a power of appointment in such persons for the benefit of their respective children.

HELD (1) *that the policy moneys constituted an interest purchased or provided by the settlor which was assessable to estate duty under S.* 2 (1) (*d*) *of the Finance Act* 1894 *to the extent of the principal value of the life interests arising on his death;*

(2) *that before the settlement the settlor had an interest in the whole of the policy moneys and that it could not be predicated of that part of such moneys which were liable to duty as aforesaid that he never had any interest therein;*

(3) *that accordingly such moneys fell to be aggregatea with the rest of the estate for the purpose of ascertaining the rate of duty.*

By a settlement dated 27 January 1926 Sir Frederick MacMillan who died on 1 June 1936 settled certain policies on his life and certain investments upon trusts under which the income from the investments was to be accumulated for a period of 21 years from the date of the settlement or during Sir Frederick's life whichever period should be the shorter. In the event which happened of Sir Frederick dying within the period of 21 years the proceeds of the policies and the investments and the accumulations fund were to be held in trust to pay the income to such of the children of Mrs Van der Goes born in the lifetime of Sir Frederick as should obtain 21 years of age or marry under that age for their respective lives and each child was given a general testamentary power of appointment over the capital of his or her share and in default of such appointment the capital was to belong to the children of such child. On Sir Frederick's death there were five children of Mrs Van der Goes in existence, some of whom had and some of whom had not acquired a vested interest. The policy moneys became payable on Sir Frederick's death.

The Crown claimed that the investments and accumulations fund were liable to death duty as property passing on Sir Frederick's death and that duty was payable in respect of the policy moneys under S. 2 (1) (*d*) of the Finance Act 1894 on the life interests of the children of Mrs Van der Goes whether vested or contingent on attaining the age of 21 years or marriage. The Crown claimed also that for the purpose of assessment to death duty the investments and accumulations fund and the children's interests in the policy all fell to be aggregated with the rest of the estate and that none of these was entitled to be treated as an estate by itself under the proviso to S. 4 of the Act.

As regards the investments and accumulations fund the case was governed by decision of the Court of Appeal in *Re Hodson's Settlement*. Previous to Sir Frederick's death the children of Mrs Van der Goes had an interest in the income of these funds since they had a right to have that income accumulated so as to provide an accumulated fund the fruit of which would come to them and the children of those children had a corresponding right to have it accumulated so as to provide an accumulated fund the capital of which would in default of appointment to the contrary come to them. On Sir Frederick's death there was a change in the beneficial possession of the property as a whole. The life interests of the children of Mrs Van der Goes became interests in possession and the interests of their children were changed in that the accruing income was no longer to be rolled up for their benefit but the right to this income passed to their respective parents for their respective lives. Both the investments and the accumulations fund were therefore property which passed on Sir Frederick's death and was assessable to estate duty as such.

As regards the policy moneys it was conceded that they were assessable to estate duty under S. 2 (1) (*d*) as being an interest purchased or provided by the deceased to the extent of the beneficial interest accruing or arising on his death. The extent of the beneficial interest so arising was commensurate with the life interests which sprang into being on the death of Sir Frederick that is to say the life interest whether vested or contingent of the five children of Mrs Van der Goes living at the testator's death. It followed that that which was deemed to pass in respect of the policy moneys was so much thereof as was equivalent to the capital value of these life interests.

The only question which arose for decision on this appeal was whether or not the interest in the policy moneys assessable to duty under S. 2 (1) (*d*) fell to be aggregated with the rest of the estate for the purpose of determining the rate of duty or whether it was property in which the deceased never had interest and therefore to be assessed as an estate by itself at the proper graduated rate on the principal value thereof. It had now been decided by the House of Lords in Tennant's Trustees *v.* Lord Advocate (supra p. 225) that it is not possible to predicate of policy moneys paid in respect of a policy at one time belonging to A.B. that A.B. never had an interest in such moneys. It followed that it could not be predicated of this sum forming as it did a part of the policy moneys paid upon the policies belonging to and settled by Sir Frederick that he never had any interest in it. Farwell J. appeared to have reached a contrary conclusion by holding that the beneficial interests were that which is to be deemed to pass. In the judgment of their Lordships however the correct construction of the paragraph was that the "annuity or other interest purchased or provided" is that which is deemed to pass, though only to the limited extent indicated; and that when the "interest provided" is provided in the shape of policy moneys arising from a policy formerly belonging to and settled by the settlor it is not possible to predicate that that interest or any part of it is property in which the deceased never had an interest.

Knightsbridge Estates Trust Ltd. *v.* Byrne

COURT OF APPEAL
SIR WILFRID GREENE M.R. SCOTT L.J. AND FARWELL J.
1938. December 1.
55 T.L.R. 196.
160 L.T. 68.

A mortgage deed which provides for repayment of the principal and interest by instalments over a period of years is to be construed as precluding the mortgagor from redeeming until the expiration of the period.

The postponement of the contractual right to redeem is not a clog on the equity of redemption. Therefore, unless the length of the postponement is so oppressive as to be unconscionable or is such as to make the right to redeem illusory, the Court will not consider whether it is reasonable or not.

Mortgages do not come within the provisions of the rule against perpetuities, so that a mortgage is not invalidated by a clause in it postponing the right to redeem for more than 21 *years.*

In 1931 Knightsbridge Estates Trust Ltd. borrowed a sum of £310,000 from the trustees of the Royal Liver Friendly Society. The loan was secured by a mortgage which contained a covenant by the borrowers to repay the principal sum with interest at $5\frac{1}{4}\%$ per annum by eighty equal half-yearly instalments of principal and interest combined. There was a proviso that on default in payment of any instalment the whole of the principal outstanding was to become immediately payable. The mortgage also contained a clause restricting the borrowers' statutory power of leasing and a clause providing that on any breach by the borrowers of any of the provisions of the mortgage the powers and remedies conferred on mortgagees by the Law of Property Act 1925 should immediately become exercisable.

In 1937 the borrowers were minded to redeem the mortgage but the Society said that they would refuse to accept a tender of the outstanding principal and interest, contending that repayment could only be made by payments spread over a period of 40 years. Accordingly the borrowers brought this action against the trustees for a declaration that they were entitled to redeem the mortgaged property on the usual notice on payment of all moneys due.

The action came before Luxmoore J. as he then was. He held (1) that upon the true construction of the mortgage the plaintiffs, the borrowers, were only entitled to redeem by repaying the principal and interest by the stipulated instalments; (2) that the postponement of the right to redeem for 40 years was not of itself unreasonable, but when the postponement for so long a period was considered in conjunction with the restrictions in the deed against granting leases and with the rights reserved to the mortgagees thereunder it became unreasonable; (3) that the rule against perpetuities did not apply to mortgages so that the mere fact that the postponement was for more than 21 years did not by itself avoid the deed; (4) that a mortgage granted by a limited company as security for repayment of a loan is not a debenture within the meaning of the Companies Act 1929. Accordingly Section 74 of the Act, which provides that debentures are not to be invalid by reason of their being irredeemable or redeemable only after a long period of time, had no application to the deed before him. It followed from the second finding that in the opinion of the learned judge the plaintiffs were entitled to the declaration which they sought.

From this decision the trustees appealed. The view of the learned judge upon the first point was not challenged and his conclusion that the rule against perpetuities had no application was affirmed. But the Court of Appeal differed from him on the second point. Sir Wilfrid Greene M.R. who delivered the judgment of the Court observed that equity does not reform mortgage transactions because they are unreasonable. Equity is concerned to see that the essential element of a mortgage transaction is present and that oppressive or unconscionable terms are not enforced; but subject to that it does not interfere. One such essential element is the right to redeem. Therefore a contract in which that right to redeem is non-existent or illusory (as where in a mortgage of a lease it is postponed until the expiration of the lease) will not be enforced. But inasmuch as the postponement of the contractual right to redeem is not a clog on the equity of redemption, no question as to its reasonableness arises. So long as the right to redeem is real and not colourable, the Court will not interfere with the bargain which the parties have made. As regards the collateral advantages secured to the mortgagee by the deed the Court will not enforce any which it holds to be oppressive or unconscionable. But a consideration of those collateral advantages is of no assistance for determining whether the contractual terms as to redemption are enforceable or not.

It was further the opinion of the Court that the postponement of the right to redeem for 40 years was in fact reasonable. The agreement was one made between two competent parties acting under expert advice. It was not an oppressive bargain made by an unscrupulous lender with a helpless borrower, but a commercial transaction entered into between two important corporations. In such a case the parties should be the best judges of what is reasonable and the Courts will be very slow to interfere with the freedom of private contract.

On the view which the Court took it became unnecessary to consider whether the mortgage was or was not a debenture within the meaning of Section 74 of the Companies Act and the Court refrained from expressing any opinion on this point.

The appeal of the trustees accordingly succeeded, it being held that the borrowers could redeem the mortgage only by paying the instalments covenanted to be paid in the deed.

In re **Foster : Hudson** *v.* **Foster**

CHANCERY DIVISION
CROSSMAN J.
1938. June 24 and July 15.
54 T.L.R. 993, 1059.
159 L.T. 279.

A policy of assurance taken out by a father on the life of his son provided that in the event of the son dying after he reached the age of 21 years the policy moneys were to be paid to the son's representatives. Held that the policy moneys belonged to the father's estate.

After the father's death the premiums were paid by the son with the acquiescence of the father's representatives, all parties believing *that the policy was the son's property.* HELD *that the son's estate had a lien on the policy moneys for the amount of the premiums. Secus, if the son had paid the premiums with knowledge that he had no title to the policy.*

This was a summons taken out by the legal personal representative of W. E. Foster to have determined the extent of W. E. Foster's interest in the moneys secured by a policy on his life granted by the North British and Mercantile Insurance Company. The policy was taken out in 1908 by his father R. J. Foster and it provided that should W. E. Foster die after 26 September 1916 (the date of his twenty-first birthday) the sum of £5000 and bonuses was to be payable on his death to his representatives or assigns but that should he die before that date 90% of the premiums with interest should be returned to R. J. Foster or his representatives or assigns.

W. E. Foster attained the age of 21 years and survived his father who died in 1925. From then until 1932 W. E. Foster paid the premiums on the policy as they fell due in the belief that the policy was his absolute property. In the same belief he charged the policy with repayment of a loan and covenanted with the mortgagees that he would pay the premiums on it. In 1932 W. E. Foster became of unsound mind and from then until his death the premiums were paid by his receiver acting under the order of the Master in Lunacy. The Master's order was made on the faith of an affidavit sworn by the legal personal representative of R. J. Foster in which the policy was stated to be the property of W. E. Foster. On the latter's death in 1936 the Company paid over the proceeds of the policy to the legal personal representatives of R. J. Foster and W. E. Foster on their joint receipt.

The questions before the Court were first whether the policy moneys belonged to the father's estate or to the son's estate and secondly if they were held to belong to the father's estate whether the son's estate had any lien on them for the premiums paid after the father's death by the son or his receiver.

It was contended on behalf of the son's representative that *Re Engelbach's Estate* 1924, 2 Ch. 348 was distinguishable on the grounds that on the true construction of the policy a trust was declared in the son's favour in the event (which happened) of his reaching the age of 21 in his father's lifetime. But the learned judge rejected this contention. It was further urged that Section 56 of the Law of Property Act 1925, which provides that "a person may take an immediate or other interest in land or other property... although he may not be named as a party to the conveyance or other instrument", operated to give the son an interest in the policy moneys. In the opinion of the learned judge the word "property" in that Section was not to be read as applying only to real property and to that extent he acceded to the argument. But he held following *In re Sinclair's Life Policy* 1938, Ch. 799, *J.I.A.* Vol. LXIX, p. 220, that the Section could not be interpreted as giving to a person not a party to a contract any right to sue on the contract. He accordingly declared that the policy moneys formed part of the father's estate.

But on the second question the learned judge held that the son's estate was entitled to a lien on the proceeds of the policy for the moneys expended in keeping it on foot. The general rule of law is that where a person voluntarily expends money on the property of another, that other is not liable to reimburse him even although he has stood by and allowed the expenditure to be made. But a payment can be recovered where all parties have acted under the mistaken belief that the property on which the expenditure was made belonged to the person making it. The case of *In re Leslie* 23 Ch. D. 552 laid down four cases in which a person not the sole beneficial owner of a policy of life assurance is entitled to a lien on the policy or its proceeds for the amount of the premiums paid by him to keep it on foot. The learned judge held that the matter before him exemplified a fifth case namely the case where the payment has been made under the erroneous belief shared by all parties that the person making the payment was the owner of the policy.

Pyrmont Ltd. *v.* Schott

PRIVY COUNCIL
LORDS ATKIN AND PORTER AND SIR LANCELOT SANDERSON.
1938. December 1.
L.R. 1939. A.C. 145.
160 L.T. 118.

A contract for the loan of foreign currency is a contract for the supply and return of a commodity and not of money. The commodity contracted for may be coin or notes in circulation in the foreign country or it may be units of foreign currency. An obligation to pay in units of foreign currency is an obligation to pay in whatever at the date of payment *is legal tender in the foreign country whose money is the subject matter of the contract.*

This was an appeal from the judgment of the Supreme Court of Gibraltar whereby the appellants were ordered to pay the sum of £13,969 being the sterling equivalent of 500,000 Spanish pesetas at the rate of exchange ruling at the date of the judgment. The claim arose out of a loan transaction entered into between the appellants and the respondent in May 1935. The appellants are an Investment Company incorporated in Gibraltar and the respondent is a lady who at the date of the transaction had a credit of over 500,000 pesetas standing in the name of her late husband's testamentary trustees at the Gibraltar branch of Barclays Bank. The appellants were anxious for the purpose of their business to borrow Spanish pesetas and they did not wish to convert English pounds sterling into that currency. It was agreed that the appellants should borrow and that the respondent should lend 500,000 pesetas at $3\frac{1}{2}\%$ interest. Accordingly the appellants executed a bond in favour of the respondent whereby they bound themselves to pay the respondent on 22 May 1936 the sum of 500,000 pesetas with interest at $3\frac{1}{2}\%$, and upon the execution of the bond a cheque for 500,000 pesetas drawn on Barclays Bank and signed by the above mentioned trustees was handed to a director of the appellants and was paid in to the appellants' account at Barclays Bank.

The peseta is the unit of Spanish currency. At all material times gold coins without limit and silver coins of 5 pesetas were legal tender in Spain. Peseta notes of varying denomination were issued by the Bank of Spain but were not legal tender in ordinary transactions between individuals. In practice the notes were accepted in Spain as a good discharge of monetary obligations. In Gibraltar pesetas whether in the form of gold or silver or notes were not currency at all but a commodity which could be bought or sold like any other commodity. Up to 16 March 1936 peseta notes were commonly given and accepted both in Spain and in Gibraltar as the equivalent in value of the coinage they represented but on that date a decree of the Spanish Government prohibited the importation of any notes of the Bank of Spain unless accompanied by an authorisation called a *guía*. Guias were issued to travellers and others by the Customs authorities who made a daily return of the guias issued by them and the names of the travellers. After the date of the decree it became illegal for notes to be reintroduced into Spain unless accompanied by guias corresponding in amount to the amount of the notes proposed to be brought in. There were a large number of peseta notes already in Gibraltar at the date of the decree and unless these could be wedded to the appropriate amount of guias they could not be reintroduced into Spain and therefore could not be presented to the Bank for payment. In Gibraltar notes accompanied by guias had the full exchange value of the peseta but notes unaccompanied by guias had a much lower value. Both however continued to be used.

In these circumstances when the date for repaying the loan of 500,000 pesetas was approaching the respondent told the appellants that if payment were to be made it must be in notes accompanied by guias. The appellants did not accept that view and tendered a bundle of 500,000 peseta notes without guias. The respondent refused to accept the notes as a repayment of the loan.

For the appellants it was argued that in Gibraltar pesetas meant peseta notes, that these notes were in regular use in Gibraltar at the time of the making of the contract and that though they were not legal tender they were treated as equivalent thereto and that peseta notes were therefore all that the appellants were under an obligation to return. For the respondents it was contended that the contract was for the supply of pesetas, that a credit in Barclays Bank was accepted in performance of that contract and that the appellants were under an obligation to return pesetas.

Their Lordships affirming the judgment of Sir Kenneth James Beatty C.J. held that the contract was for the supply and return of pesetas as units of foreign currency. The question therefore was what performance was required to fulfil an obligation to pay a foreign unit of account. That was a question which was not devoid of authority. The Court of Appeal had held that the obligation was to pay whatever at the date of repayment was legal tender in the foreign country where the money was lent. The decision was not binding on their Lordships but they thought that it correctly enunciated the law applicable to the case. The appellants borrowed 500,000 units of account of the republic of Spain not 500,000 peseta notes. Their obligation was to return 500,000 units of account and judgment was properly entered for the amount in sterling which would be required to purchase these units of account on the date when judgment was determined.

Anderson *v.* Inland Revenue Commissioners

KING'S BENCH DIVISION
MACNAGHTEN J.
1938. November 11.
L.B. 1939 1 K.B. 341.
55 T.L.R. 133.
160 L.T. 127.

A voluntary transfer of a mortgage by way of gift is chargeable to ad valorem *stamp duty as a conveyance or transfer on sale at the rate of £1 % on the amount of the principal and arrears of interest transferred and not only to* ad valorem *stamp duty as a transfer of mortgage at the rate of* 6*d.* % *on the amount of such principal and interest.*

When an instrument is chargeable to duty under more than one taxing section the Crown is entitled to exact the higher duty.

This was an appeal by way of special case stated under the Stamp Act 1891 against the decision of the Inland Revenue Commissioners as to the stamp duty payable upon a voluntary transfer of a mortgage. The contention of the transferor was that it was chargeable under the Stamp Act 1891 as a transfer of mortgage with an *ad valorem* duty of 6*d.* % on the amount of principal and interest transferred. The contention of the Crown was that it was chargeable under the Finance (1909–10) Act 1910 as a voluntary disposition *inter vivos* with the like stamp duty as if it were a conveyance or transfer on sale that is to say with an *ad valorem* duty of £1 % on the value of the property conveyed or transferred. The learned judge (Macnaghten J.) held that the contention of the Crown was right. He said that the deed was a transfer and that it operated as a voluntary disposition *inter vivos*. Therefore it plainly came within the words of S. 74 (1) of the Finance (1909–10) Act 1910. It was said that it seemed very odd that the transfer of a mortgage for consideration should pay no more than 6*d.* % and that a transfer by way of gift should pay £1 % and it was argued that Parliament could not have intended such a whimsical result. But it might be that the legislation with regard to death duties had given so much encouragement to voluntary dispositions of property that Parliament considered it advisable to impose *ad valorem* stamp duty on voluntary conveyances *inter vivos*. However that might be the words of the Section were plain and it was only necessary to turn to the Stamp Act 1891 to see what the duty was on a conveyance or transfer on sale. It was true that the deed was also chargeable under the Stamp Act with 6*d. ad valorem* duty as a transfer of a mortgage but when an instrument was chargeable under two distinct heads of charge the Crown was entitled to charge the higher duty.

Inland Revenue Commissioners *v.* Tring Investments Ltd.

COURT OF APPEAL
SCOTT, SLESSER AND DU PARCQ L.JJ.
1939. March 16.
55 T.L.R. 559.
160 L.T. 343.

A covenanted to pay annually to an investment company such a sum as after deduction of income tax at the standard rate would yield £11,000. *In satisfaction of that covenant A paid to the Company during the financial year* 1935–36 *the sum of* £14,426. 4*s*. 7*d*. *The only shares issued by the Company were two preference shares of* 1*s*. *each to each of the two subscribers of the memorandum of association and ten deferred shares of* 1*s*. *each. By a resolution of the directors A had an option to have issued to him on demand the whole or any part of the Company's ordinary share capital but at the end of the financial year in question he had not exercised the option. It was provided by the articles of association that in the event of the Company being wound up the preference and deferred shareholders should be paid the nominal amount of their shares and that the balance of the Company's assets should be distributed among the holders of the ordinary shares.*

For the purpose of surtax for the financial year 1935–36 *the Income Tax Commissioners in exercise of the powers conferred on them by S.* 21 *of the Finance Act* 1921 *and by S.* 14 (3) *of the Finance Act* 1937 *made an apportionment on A of the whole income of the Company for that year.*

HELD *that subject to the deduction of* 12*s*. *in respect of the preference and deferred shares the apportionment was correct.*

An apportionment of the income of an investment company was made by the Income Tax Commissioners on the Marquess of Queensberry in the following circumstances. On 10 December 1936 the Tring Investments Ltd. was registered under the Companies Act 1929 as a private company limited by shares with a capital of £155 divided into 3,100 shares of 1*s*. each. By the articles of association these shares were divided into 600 cumulative preference shares, 500 ordinary shares and 2000 deferred shares. The preference shares were entitled to a dividend at the rate of 5 %, the ordinary shares were entitled to a dividend at the rate of 10 % and the deferred shares were entitled to the remainder of the profits distributed by way of dividend. In the event of a winding up the surplus assets of the Company were to be applied in repaying to the holders of the preference shares the amount paid up on the shares held by them and the arrears of dividend, to the holders of the ordinary shares the amounts paid up by them on the ordinary shares and to the holders of the deferred shares the sum of 1*s.* for every deferred share held by them respectively. The balance remaining after these payments had been made belonged to the holders of the ordinary shares.

The subscribers to the memorandum were a Mr Hannaford and a Mr Fisher each of whom subscribed for one preference share. A Mr Hunter and a Mr Todd were appointed by the articles to be the first directors with power to appoint a permanent director for life on whom the most ample powers were conferred including a power to remove any other director.

Five days after the incorporation of the Company the directors appointed the Marquis of Queensberry to be permanent director. At the same time they resolved that in consideration of the sum of £5 then paid to the Company the Marquis of Queensberry should have an option to take up at par any of the ordinary shares of the Company. Subsequently upon the application of Peverell Trust Ltd. 10 deferred shares at a premium of 19*s.* per share were allotted to that Company.

On 4 January 1937 the Marquis of Queensberry executed a deed of covenant whereby he covenanted to pay to the Company annually for a term of 7 years to be reckoned from 1 April 1936 or throughout the remainder of the life of the grantor whichever should be the shorter period such an annual sum as after deduction of income tax at the appropriate rate or rates from the full amount thereof would leave a clear annual sum of £11,000 per annum. The said annuity was expressed to be payable as to the amount due in respect of the year ending 1 April 1937 upon 1 March 1937 and thereafter by the 1 April in each succeeding year.

On 31 March 1937 the Marquis of Queensberry pursuant to his covenant paid to the Company £11,000 free of tax. The gross sum required to produce £11,000 free of tax was £14,426. 4*s.* 7*d.* The Company went into liquidation in November 1937 and shortly before the winding up 10 ordinary shares were allotted to the Marquis of Queensberry. The annuity paid to the Company by the Marquis was the only asset which the Company ever possessed.

By the Finance Act 1922 S. 21 it is provided as follows:

With a view to preventing the avoidance of the payment of super tax through the withholding from distribution of income of a company which would otherwise be distributed, it is hereby enacted as follows: (1) Where it appears to the Special Commissioners that any company to which this section applies has not, within a reasonable time after the end of any year or other period ending on any date subsequent to 5 April 1922 for which accounts have been made up, distributed to its members in such manner as to render the amount distributed liable to be included in the statements to be made by the members of the company of their total income for the purposes of super tax, a reasonable part of its actual income from all sources for the said year or other period, the Commissioners may, by notice in writing to the company, direct that for purposes of assessment to super tax, the said income of the company shall, for the year or other period specified in the notice, be deemed to be the income of the members and the amount thereof shall be apportioned among the members and super tax shall be assessed and charged under the provisions of this section in respect of the sum so apportioned after deducting in the case of each member any amount which has been distributed to him by the company in respect of the said year or period in such manner that the amount distributed falls to be included in the statement of total income to be made by that member for the purposes of super tax.

. . . .

In this Section the expression member shall include any person having a share or interest in the capital or profits or income of a company.

The Finance Act 1937, S. 14 (3) provides as follows:

When a direction is given under the Finance Act 1922 S. 21 (1) with respect to an investment Company the Special Commissioners in determining the respective interests of the members for the purpose of apportioning income in accordance therewith...may if it seems proper to them so to do attribute to each member an interest corresponding to his interest in the assets of the Company available for distribution among the members in the event of a winding up.

The Income Tax Commissioners made an apportionment on the Marquis of Queensberry in respect of the income of the Company amounting to £14,426. 4*s.* 7*d.* for the year of assessment 1936/37. The whole of that income was apportioned to him and he was assessed to surtax accordingly as if that income had been received by him during the year of assessment. The Special Commissioners held that the Marquis of Queensberry had no rights to the assets of the Company unless and until he had exercised his option and since the option had not been exercised within the year of assessment the apportionment could not be sustained.

Mr Justice Macnaghten allowed an appeal by the Crown from the Special Commissioners and sent the case back to them to confirm the apportionment made by the Income Tax Commissioners. From that judgment this appeal was brought to the Court of Appeal which affirmed the decision of the learned judge. The Court said that there were two questions to be considered. First whether Lord Queensberry was a "member" of the Company within the definition of that expression in S. 21 of the Finance Act 1922. Was he a person who at any time during the year of assessment that is to say before 5 April 1937 had a share or interest in the capital or profits or income of the Company. In their opinion the word capital covered not only share capital but also the pecuniary capital of a company, its capital assets. The Company had given the Marquis an option over all the ordinary shares of the Company. He had a right to call upon the Company to allot him the whole or any part of the ordinary share capital and if the Company had proposed to issue any of the ordinary share capital to any one else it could have been restrained from doing so. It was clear therefore that the Marquis had an interest in the capital and was therefore a member of the Company for the purpose of the provisions of the Section. The word "interest" was capable of wide meaning and there was nothing in the words of the Act to require its meaning to be restricted.

The second question was as to the question of the interest which Lord Queensberry had in the assets of the Company available for distribution among the members in the event of a winding up—that is to say what interest would he have had in the event of a winding up on 5 April 1937. He was not a shareholder but he had the right to become the holder of all or any of the ordinary shares by giving notice to himself as the permanent director before the liquidation or by notice to the liquidator after the resolution for winding up had been passed. He would have then been entitled to be put on the register of members and would get the whole of the assets of the Company after paying the subscribers of the memorandum the 1*s*. due to each of them for their preference shares and to Peverell Trust Ltd. the 10*s*. due to that

Company in respect of its deferred shares. He would thus be able to put into his own pocket substantially the whole of the money which he had provided under his covenant. The apportionment was therefore correct except that from the sum of £14,426. 4*s*. 7*d*. there ought to have been deducted the 12*s*. payable to the preference and deferred shareholders and something for secretarial expenses.

Re Horlick's Trusts

COURT OF APPEAL
SIR WILFRID GREENE M.R. AND SCOTT AND CLAUSON L.JJ.
1938. November 25.
[1938] 4 All E.R. 602.

By a settlement made by a husband to make provision for his wife who had on her petition obtained a decree nisi for the dissolution of the marriage the settlor covenanted to pay to the trustees of the settlement in trust for her an annuity of such a sum as after deduction of income tax at the standard rate and of every other tax on income for the time being in force would leave a clear sum of £4000. HELD *that surtax was included in the tax to be deducted and that on the wife marrying again the surtax to be deducted was surtax at the rate to which her income would in fact be assessed having regard to the total of the combined incomes of her husband and herself.*

This was a summons taken out by the trustees of a settlement to determine whether an annuity payable thereunder should have added thereto a sum equal to the surtax payable by the annuitant in respect of the annuity. The settlor was Sir Ernest Horlick and the settlement dated 19 August 1930 was made by him for the benefit of Lady Horlick (now Lady Oppenheimer) and the children of their marriage. It was made after a decree nisi for the dissolution of the marriage had been pronounced on the petition of Lady Horlick but before the decree had been made absolute. Lady Horlick married again in 1931 and became Lady Oppenheimer and Sir Ernest Horlick died in 1934 and the question now raised affects his executors. The covenant on the interpretation of which the question arose was in every year during the remainder of the life of Lady Horlick to pay to the trustees in trust for Lady Horlick such a sum as after deduction of income tax at the standard rate for the time being in force and of every other tax on income for the time being in force shall leave a clear sum of £4000 and on the death of the survivor of the settlor and Lady Horlick to pay the said yearly sum to Peter Horlick and Elizabeth Horlick during their lives in equal shares.

The Court had to consider whether having regard to all the other provisions in the settlement the words "and of every other tax on income for the time being in force" included surtax. It was submitted on behalf of the executors that although the words apart from the context were wide enough to include surtax yet the purport of the document as a whole was that the settlor had income tax in his mind and not surtax. It was said that the use of the word after deduction was inapt to describe surtax which was not chargeable by way of deduction. Then it was said the settlor could not reasonably be supposed to have contemplated that the amount of the annuity should be dependent on the actual income of the annuitant or upon the income of a future husband. It was said further that the introduction of surtax would introduce in the case of the covenant in favour of the two children certain problems and difficulties which could not have been intended. The Court was of opinion that these considerations were not of a kind which would compel them to give a restricted meaning to the words "other tax on income". There were other provisions in the deed which tended to confirm the view that they were intended to include surtax which was the only other then existing tax on income. For instance the settlor covenanted to pay Lady Oppenheimer in trust for one of her daughters until she attains the age of 21 years "such sum as after deduction of income tax at the standard rate for the time being shall leave a clear sum of £500". That indicated that a distinction was intended between the daughter's annuity and Lady Oppenheimer's annuity and the only possible distinction was that in the one case surtax was not and in the other case it was to be taken into an account in calculating the gross amount of the annuity payable. Taking the whole matter and regarding the deed as a whole the Court came to the conclusion that the covenant did provide for the case of surtax.

The other question that arose was as to the way in which the amount of the surtax element in the covenanted sum was to be arrived at. The importance of that lay in the circumstance that Lady Oppenheimer having remarried and her husband being a man of substantial means the rate of surtax which she had to pay was arrived at by taking her present husband's income into account. That of course imposed a serious burden on the personal representatives of Sir Ernest Horlick and it was argued that upon the true construction of the settlement the only surtax which was to be introduced into the covenant was to be surtax on the footing that the sum of £4000 plus income tax upon it was to be treated as being the sole income of Lady Oppenheimer. The Court rejected that argument as not only inconsistent with the language used but highly artificial and in respect of this as well as the main question they affirmed the order of Farwell J. The surtax to be provided in arriving at the gross amount of the annuity would be such proportion of the total surtax payable by Sir Francis and Lady Oppenheimer as the sum upon which Lady Oppenheimer was from time to time assessed to surtax in respect of the said annuity bore to the total amount of the assessment of the joint income of Sir Francis Oppenheimer and Lady Oppenheimer for the purpose of surtax.

Smith *v.* Pearl Assurance Company, Ltd.

COURT OF APPEAL
SLESSER, CLAUSON AND DU PARCQ L.JJ.
1939. January 11.
55 T.L.R. 355.
63 LL.L.R. 1.

Where a policy of insurance contains an arbitration clause which makes the award of an arbitrator a condition precedent to the bringing of an action it is an open question whether or not S. 3 (4) *of the Arbitration Act* 1934 *gives the Court a discretionary power to refuse a stay and to eliminate the provision making an award a condition precedent.*

Where under the provisions of S. 1 (1) *of the Third Parties (Rights against Insurers) Act* 1930 *an action was brought by a third party against the insurers on a motor car policy which contained an arbitration clause making the award of an arbitrator a condition precedent to the bringing of an action the Court held that the fact that the third party was a poor person who could have prosecuted an action under the Poor Person Rules but could not pay the costs of an arbitration was not in itself a sufficient reason why the matter should not be referred to arbitration and accordingly the Court made an order under S.* 4 *of the Arbitration Act* 1889 *staying the proceedings.*

In this Case the plaintiff who was a passenger in a motor car suffered serious injury as the result of the negligence of the driver. In an action against the driver he obtained judgment for £2160 and costs. The driver became insolvent and in accordance with the provisions of the Third Parties (Rights against Insurers) Act 1930, S. 1 (1) the rights of the driver to be indemnified against third party risk under a motor car policy issued by the defendants became vested in the plaintiff. The plaintiff accordingly commenced this action against the defendants to recover the amount of the judgment in his favour. The defendants applied to the Court under S. 4 of the Arbitration Act 1889 for an order staying the proceedings on the ground that the policy contained an arbitration clause which provided that the award of an arbitrator should be a condition precedent to the bringing of any action. The plaintiff opposed the application on the ground that he was a poor person who could prosecute the action under the Poor Persons Rules but could not afford the cost of arbitration proceedings. He argued that S. 3 (4) of the Arbitration Act 1934 gave the Court power to refuse a stay and to eliminate from the arbitration clause the provision making the award of an arbitrator a condition precedent to the bringing of an action. The Judge and the Master took the view that the Court had no power under S. 3 (4) of the Arbitration Act 1934 to order that the provision that the making of an award should be a condition precedent to the bringing of any action should cease to have effect. The Court of Appeal said that on that very difficult question they expressed no opinion and desired to leave it entirely open. Assuming however that they had a discretion to refuse a stay and eliminate the provision in question they were satisfied that there was no sufficient reason why the matter should not be referred in accordance with the arbitration clause. The only reason suggested was that the plaintiff found himself to be in such a financial position that if his suit were continued in the High Court he would as he conceived have the benefit of the Poor Persons Rules and would accordingly be in a favourable position for bringing the matter before the Court. He pointed out that if the matter were to go to arbitration he would not get any corresponding benefit and would be greatly hampered in establishing his case. That it was to be observed was a disability personal to the plaintiff and in no way connected with the contractual rights or obligations arising out of the contract in respect of which he had or conceived he had a cause of action. It could only be in some very exceptional case indeed that the Court would be justified in holding that one party's mere personal disability of this character would be a sufficient reason for the Court to exercise the power given by S. 4 of the Arbitration Act 1889 of overriding the contractual right of arbitration. On that ground the order staying the proceedings was properly made and the appeal was accordingly dismissed.

In re **Barnes**

LAWRENCE J. AND COURT OF APPEAL

1938. December 15.
L.R. 1938. 2 K.B. 684.
L.R. 1939. 1 K.B. 316.

In determining the value of an estate for the purpose of estate duty allowance is to be made for debts only to the extent to which assets are available for meeting them. Consequently where a deceased left debts exceeding the assets available to meet them but had made gifts inter vivos *which were aggregable with the rest of his property for the purpose of estate duty, it was held that estate duty was leviable on the whole amount of the gifts without any allowance for the debts.*

Section 2 (*c*) of the Finance Act 1894 as amended by Section 59 (1) of the Finance (1909–10) Act 1910 provides that the property deemed to pass on the death of a deceased shall include gifts made by him within the three years preceding his death. The other material provisions of the Finance Act 1894 were as follows:

Sect. 4. "For determining the rate of Estate duty to be paid on any property passing on the death of the deceased all property so passing in respect of which Estate duty is leviable shall be aggregated so as to form one estate and the duty shall be levied at the proper graduated rate on the principal value thereof."

Sect. 7. "In determining the value of an estate for the purpose of Estate duty allowance shall be made for reasonable funeral expenses and for debts and incumbrances; but an allowance shall not be made: (*a*) for debts incurred by the deceased, or incumbrances created by a disposition made by the deceased, unless such debts or incumbrances were incurred or created *bona fide* for full consideration in money or money's worth wholly for the deceased's own use and benefit and take effect out of his interest... and any debt or incumbrance for which an allowance is made shall be deducted from the value of the land or other subjects of property liable thereto."

This was an appeal by the executrix of the will of William Henry Barnes deceased from a decision of the Inland Revenue Commissioners that estate duty was leviable on the principal value of the deceased's estate without any deduction for funeral expenses or debts.

In 1930 the deceased made gifts to the members of his family to the value of £185,101. 15*s*. He died in 1931 leaving debts which amounted, together with his funeral expenses, to £90,390. 4*s*. 1*d*. He died without assets. It was conceded by the executrix that the gifts attracted estate duty. But it was contended on her behalf that in as much as all property passing on death, which was deemed to include gifts *inter vivos*, was to be aggregated so as to form one estate, the case fell within the words of Section 7 enacting that in determining the value of an estate allowance should be made for funeral expenses and debts. Accordingly estate duty was leviable only on the balance and on that basis the appropriate rate of duty would be 19% and the duty £17,995.

But the learned judge held—and his decision was affirmed by the Court of Appeal—that no allowance could be made for debts beyond the value of the assets out of which they could be met. He was not concerned with the question whether creditors could avail themselves of the Statute of Elizabeth to make available any of the moneys given away. There were no assets of the estate out of which debts could be paid and therefore no allowance was to be made. The Commissioners' claim, which was for £44,424 being at the rate of 24% on the whole value of the gifts, was correct.

Notes

The decision of the Court of Appeal in *British & French Trust Corporation* v. *New Brunswick Railway Company* (reported in *J.I.A.* Vol. LXIX, p. 209) has been affirmed by the House of Lords. (L.R. 1939 A.C. 1.)

The following are further references to cases reported in Vol. LXIX, Part II:

Beresford *v*. Royal Insurance Company Ltd.

L.R. 1938 A.C. 586: 158 L.T. 459.

Paget *v*. Inland Revenue Commissioners.

L.R 1938 2 K.B. 25.

Re Sinclair's Life Policy.

L.R. 1938 Ch. 799: 159 L.T. 189.