JIA 77 (1951) [0001]-[0038]

LEGAL NOTES

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AND
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In re Selby-Bigge, deceased

Will—Attestation Clause—Sufficiency of—Probate Non-Contentious Rules, r. 4

PROBATE DIVORCE AND ADMIRALTY DIVISION

HODSON J.

1950. April 20.
[1950] 1 All E.R. 1009.

The attestation clause in a codicil to the will of the testatrix was in these terms:

> Signed by the testatrix in our presence and attested by us in the presence of her and of each other.

The codicil was lodged in the probate registry in common form but was held back under r. 4 of the Probate Non-Contentious Rules (on the ground that the attestation clause was insufficient) for the production of an affidavit from at least one of the subscribing witnesses.

This summons was for a declaration that the form of the attestation clause was sufficient for the purposes of the Wills Act, 1837, s. 9 and the Probate Non-Contentious Rules, r. 4.

Section 9 of the Wills Act, 1837, provides:

> No will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned; (that is to say), it shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction; and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary.

By the Probate Non-Contentious Rules, r. 4:

> If there be no attestation clause to a will or codicil presented for probate, or if the attestation clause thereto be insufficient, the registrars must require an affidavit from at least one of the subscribing witnesses if they or either of them be living, to prove that the provisions of 7 Will. 4 & 1 Vict. c. 26, s. 9 and 15 Vict. c. 24 in reference to the execution were in fact complied with.

The official who dealt with the matter in the probate registry took the objection that there was no reference to subscription by the witnesses in the attestation clause, and that the word 'attested' was different from the word 'subscribed' and did not imply subscription. The learned judge said that the word attest in its ordinary meaning was sufficiently wide in connexion with a document such as a will to include the word subscribe, and that the attestation clause in question was therefore sufficient. No affidavit from a subscribing witness was required.

Priestman Collieries Ltd. *v.* Northern District Valuation Board

Coal Industry Nationalization Act, 1946—Valuation of compensation unit—Quantity of mining timber—Notional willing seller and willing buyer—Meaning of phrase 'open market'—Relevance of price control order—All relevant circumstances

KING'S BENCH DIVISION

LORD GODDARD C.J. MORRIS AND FINNEMORE JJ.

1950. May 12.
[1950] 2 All E.R. 129.

This was a special case stated by a referee under the Coal Industry Nationalization (Valuation of Compensation Units) Regulations, 1947, for the opinion of the Court. The claimants were a colliery company whose interests were transferred to the National Coal Board under the Coal Industry Nationalization Act, 1946. The transferred interests, which included a quantity of mining timber, were the subject of a valuation made by the Northern District Valuation Board. A draft valuation by the Board fixed the value of the timber at £4862. 10*s*. 10*d*., and after hearing the claimants the Board confirmed that valuation.

By notice given under reg. 27 of the said Regulations the claimants required the valuation made by the Board to be reviewed by a referee.

S. 13(4) of the Coal Industry Nationalization Act, 1946, provides as follows:

> For the purposes aforesaid the value of a compensation unit shall be taken to be the amount which it might have been expected to realize if this Act had not been passed and it had been sold on the primary vesting date in the open market by a willing seller to a willing buyer, no allowance being made on account of the vesting of the transferred interests comprised in the unit being compulsory.

S. 13(5) provides that

> For the purposes of the preceding sub-section... regard shall be had to all relevant circumstances and amongst those circumstances (*a*) to the state of the things in which the transferred interests subsisted at the date of their vesting in the Board; (*b*) to all relevant facts known at the time of the determination or review which were in existence on the primary vesting date, notwithstanding that any of them would not have been known at that date.

The primary vesting date was 1 January 1947. On that date there was in force the Control of Timber (No. 35) (Mining Timber Prices) Order, 1944. By that Order fixed prices were imposed for imported mining timber and maximum prices for home-grown mining timber. It was agreed before the learned referee that, if that Order applied to the mining timber which was the subject of the review, then the valuation of £4862. 10*s*. 10*d*. arrived at by the Northern District Valuation Board was correct on the basis of a sale to the owner of a coal-mine situate in Great Britain, and that if the Order did not apply then the proper figure was £8125. 16*s*. 3*d*., representing the economic value in the open market free from controls at the material date.

The claimants submitted that because of the existence of price regulation for mining timber and the limitations imposed on the class of those who could buy or sell timber no open market could be said to exist. The phrase 'open market' presupposed and contemplated a market in which a seller could expect to receive the highest unlimited price which resulted from the free competition of all potential buyers. It was on the basis of a hypothetical market free from the restrictions imposed by the Order that the valuation must be fixed.

The Court did not accept that view. The section did not postulate conditions wholly divorced from reality. The seller must be deemed to have done as well as a willing seller would reasonably have been expected to do on 1 January 1947; but that did not mean that he should be regarded as a person not bound by the law. It must be assumed that he would deal in a market subject to the law of the land. It was enjoined by the section that regard should be had to all relevant circumstances. What was contemplated was a sale which might have taken place in the actual market on the prescribed date.

A second question for the opinion of the Court was stated by the learned referee on the assumption that the terms of the Order were applicable. That was whether the scale on which the amount of the valuation was to be determined should be that of prices to the owner of a coal-mine situate in Great Britain when buying for use in that mine or that of prices to any other buyer or what combination of the two. The practical significance of that question resulted from the fact that the Control of Timber (Mining Timber Prices) Order, 1944, fixed the range of prices for imported timber in the case of a sale to the owner of a coal-mine situate in Great Britain when buying for use in such mine, whereas a higher range of prices was fixed in the case of a sale to any other buyer. In the opinion of the Court this second question was concluded by the common agreement of the parties, on the basis of which the matter proceeded before the Northern District Valuation Board, to the effect that the sale of this unit would be at the site where the various items lay and that the purchaser who would offer the best price would be the purchaser who was going to use the articles comprised in the unit on the site. That very reasonable agreement seemed to postulate that the purchaser who would give the best price would be a purchaser of the coal-mine. Counsel for the claimants contended that even on a concurrent sale of the timber and the coal-mine to the same purchaser the lower range of prices would not operate because the sale of the timber would not be a sale to someone who was at the time of the sale already 'the owner of a coal-mine'. In the opinion of the Court that last contention proceeded on too narrow a basis to make it reasonable or acceptable, and in any event a purchaser of the coal-mine and of the stores and stock could in practice so arrange the dates and sequences of his purchases that he would qualify to purchase the imported mining timber at the lower range of prices.

The Court was in agreement with the decision of the Northern District Valuation Board when they valued the timber at £4862. 10*s*. 10*d*.

Buttle *v.* Saunders

Sale of property—Duty of trustee—Overriding duty to obtain best price—Negotiations in advanced stage—Higher price offered by third party

CHANCERY DIVISION

WYNN-PARRY J.

1950. April 28.
[1950] 2 All E.R. 193.

This was an action brought by certain beneficiaries claiming an injunction to restrain trustees, who held No. 15 Montpelier Square, London, upon the statutory trusts for sale, from selling the property for a lower price than £6500.

A certain Mrs Simpson had already acquired a short-term lease in the property, and negotiations for the sale to her of the freehold reversion at

£6000 had already reached an advanced stage when Canon Buttle, who was one of the beneficiaries, called on the solicitors to the trustees and said that on behalf of a charity he was interested in the purchase of the premises. The Canon was informed of the state of the negotiations with Mrs Simpson, but when pressed, the solicitors said that if within 48 hours they received from him an offer of £6142 they would advise their clients to accept it.

On the following day Mrs Simpson raised her offer to £6142 and the solicitors to the trustees informed the Canon that their clients could not very well withdraw from the negotiations with Mrs Simpson as the amounts offered were equal and she had been the first in the field. The Canon made no higher offer, but again pressed that the property should be sold to him. The trustees nevertheless decided to sell to Mrs Simpson and the Canon was so informed, whereupon he offered £6500. The solicitors to the trustees replied that, although contracts with Mrs Simpson had not been exchanged, the trustees felt that they were in honour bound and that considerations of commercial morality required that they should proceed with the sale to her. The Canon was not satisfied and the writ in the action was issued.

Wynn-Parry J. said that persons who are not in the position of trustees are entitled, on sale of property, to accept such a price as they think fit, and not infrequently a vendor, who has gone some lengths in negotiating with a prospective purchaser, decides to close the deal with that purchaser, notwithstanding that he is presented with a higher offer. Trustees, however, are not vested with such complete freedom. They have an overriding duty to obtain the best price which they can for their beneficiaries. It would, however, be an unfortunate simplification of the problem if the view were to be taken that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and to withdraw from the existing offer. He thought that trustees have such a discretion in the matter as would allow them to act with proper prudence. He could see no reason why trustees should not pray in aid the common-sense rule underlying the old proverb 'a bird in the hand is worth two in the bush'. He could imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer. Each case must of necessity depend on its own facts.

In the present case the trustees and their solicitors acted on an incorrect principle. The only consideration present to their minds was that they had gone so far in the negotiations with Mrs Simpson that, from the point of view of commercial morality, they could not withdraw. Mrs Simpson had however bought the leasehold term and was an anxious purchaser. The Canon had equally shown himself an anxious buyer. The learned judge added that in his view the Canon was entitled to start proceedings to arrest the further progress of the transaction with Mrs Simpson. He then heard Mrs Simpson and gave the trustees liberty to sell to her for £6600, the highest price offered.

In re Jones (deceased), Midland Bank Executor and Trustee Co. Ltd. *v.* League of Welldoers and Others

Rule against perpetuities—Gift of capital sum on happening of uncertain event—Perpetual annuity—Gift of to unincorporated body—Capital value of—Beneficiary entitled to demand capital sum

CHANCERY DIVISION

DANCKWERTS J.

1950. June 8.
[1950] 2 All E.R. 239.
66 T.L.R. 2. 51

Adjourned summons to determine *inter alia* the validity of gifts under the testator's will having regard to the rule against perpetuities.

By his will made on 1 March 1926, the testator, who died on 4 October 1936, gave to a number of societies, some of which were plainly charitable and others plainly not charitable, some incorporated and others not incorporated, annual sums of £25 per annum and other amounts which were apparently in the nature of perpetual annuities. Thereafter he directed that on the realization of his foreign estate situate in Uruguay certain named capital sums should be paid to the beneficiaries to whom he had given annuities and that such sums were to be in substitution for and not in addition to the said annuities. It appeared from the terms of the will that the testator clearly anticipated that his estate in Uruguay would be realized at the latest within a period of three years from his death; but the realization might on the other hand take a very long time. The gift of the capital sums was therefore made on an uncertain event of which it could not be said that it was necessarily bound to happen within the period allowed by the rule against perpetuities and consequently was invalid, with the result that the substituted gifts failed completely. That left unaffected the original gifts of the annual sums. They were obviously perpetual in the case of corporations which might go on for ever, and the same might apply to the unincorporated bodies. It was argued that they were therefore invalid as infringing the rule against perpetuities. The learned judge rejected that argument. He said that there seemed to be no rule of law which prevents a perpetual annuity, any more than any other species of property, being given to an ascertained unincorporated body the members of which could dispose of it as they could dispose of any other property. It appeared that any of the beneficiaries to whom such an annuity was given could, if they wished, demand payment of a capital sum in cash instead of a sum paid over a period of years. It seemed therefore that the gifts of perpetual annuities were valid whether the bodies concerned were corporate or unincorporated. The method by which the capital value of such perpetual annuities was to be ascertained was laid down by Kekewich J. in *Hicks* v. *Ross* [1891] 3 Ch. 499, that is to say, that the price to be paid for such an annuity was such a sum as at the price of the day would purchase 2½% government stock sufficient to produce the annuity.

In re Banbury (deceased), Westminster Bank Ltd. *v.* Banbury

Annuity free of income tax—Payment of stated amount—Finance Act, 1941, s. 25(1)—Finance (No. 2) Act, 1945, s. 20—Substitution of proportionate amount—Direction to trustees to set aside and accumulate a stated sum per annum free of income tax—Application of statutory reduction

CHANCERY DIVISION

DANCKWERTS J.

1950. June 9.
[1950] 2 All E.R. 250.
[1951] 1 Ch. 1.

Adjourned summons to determine whether the Finance Act, 1941, s. 25(1), applies to a direction by a testator to the trustees of his will to accumulate an annual sum of a stated amount free of income tax so as to reduce that sum to the statutory fraction of the stated amount.

By his will dated 12 June 1934, Lord Banbury, who died on 13 August 1936, devised and bequeathed all his freehold lands and hereditaments and his personal estate to the trustee of his will on the trusts therein declared. The material clause of the will for the purposes of the question raised by the summons was in these terms:

> Subject as aforesaid my trustee shall for a period of twenty-one years from my death set aside annually the sum of £1500 (free of tax) from the income of the residuary trust fund and accumulate the same in the way of compound interest and the resulting income thereof from time to time in any investments in which the residuary trust fund is authorized to be invested and shall add the accumulations to the capital of that fund so as to form one fund therewith.

The Finance Act, 1941, s. 25, provides:

> (1) Subject to the provisions of this section, any provision, however worded, for the payment, whether periodically or otherwise, of a stated amount free of income tax, or free of income tax other than surtax, being a provision which—(*a*) is contained in any deed or instrument, in any will or codicil, in any order of any court, in any local or personal Act, or in any contract, whether oral or in writing; and (*b*) was made before 3 September 1939; and (*c*) has not been varied on or after that date shall, as respects payments falling to be made during any year of assessment, the standard rate of income tax for which is 10*s.* in the pound, have effect as if for the stated amount there were substituted an amount equal to twenty twenty-ninths thereof.

In the present case both the date of the will and the date of the testator's death were before 3 September 1939, and therefore there was no doubt that if the provisions of the section are relevant they are applicable to the direction in the will to accumulate part of the income from the residuary trust fund.

The section was amended by the Finance (No. 2) Act, 1945, s. 20, which was passed to deal with an alteration of the standard rate of income tax below 10*s.* in the pound and has reference to the time during which the standard rate has been 9*s.* in the pound.

The question was whether s. 25(1) applies to the circumstances of the present case. There is no doubt that £1500 annually is a 'stated amount' and is a periodical payment and that the words 'free of tax' which are equivalent to 'free of income tax' appear in the will. But is there a 'payment' within the meaning of the section, because during the period of accumulation the trustee who is responsible for the payment of income tax on the income of the trust fund will set aside primarily the sum of £1500 and will then make the investments to carry out the trust? It is not until the period of twenty-one years has come to an end that the trustee will deal with the income of the

fund so accumulated along with the rest of the residuary trust fund by making payment of the income to the persons who are entitled to receive the income of the residuary trust fund. In the meantime the trustee is merely transferring from one hand to another a certain proportion of the income in its hands.

The learned judge said that the matter seemed to be one of considerable difficulty. He thought however that the mischief to which the Act is directed includes a case of this kind and said that he had come to the conclusion that a liberal interpretation ought to be given to the words of the section and that he ought to have regard to the substance of the transaction. He thought that there is a payment in the present case within the meaning of s. 25(1) even though the trustee is merely paying to himself in another account which is also in the trustee's name, and held, therefore, that the provisions with regard to the reduction of the amount of such payment are applicable.

In re Hone (a bankrupt), Ex parte The Trustee *v.* Kensington Borough Council

Bankruptcy—Payment by bankrupt to creditor before date of receiving order—Payment by cheque—Date of payment—Property acquired after adjudication—Transaction bona fide *and for value—Bank permitting bankrupt to overdraw account by cheque payable to creditor—Bankruptcy Act*, 1914, *ss.* 45, 47(1)

CHANCERY DIVISION

HARMAN J.

1950. July 24.
[1950] 2 All E.R. 716.
[1951] 1 Ch. 85.

The debtor was the rated occupier of certain property in London. On 3 November 1949, in payment of the rates then due, she sent to the Kensington Borough Council her cheque for £55. 5*s*. 0*d*. drawn on the Colchester branch of the National Provincial Bank Ltd. The cheque was received by the borough treasurer on the same day and he gave the debtor a receipt for £55. 5*s*. 0*d*. The cheque was paid into the Borough Council's bank at 11 a.m. on 4 November. At 3 p.m. on the same day the debtor filed her petition in bankruptcy. A receiving order was at once made against her and she was adjudged bankrupt on the same day. The cheque was not presented to the debtor's bank until 8 November when it was honoured and the proceeds credited to the Council. The debtor's account with her bank was then overdrawn under an arrangement which entitled her to overdraw against the securities deposited by her. The cheque in question was debited as a further overdraft on her account.

The trustee claimed the £55. 5*s*. 0*d*. received by the Council as money paid out of the debtor's estate after the date of the receiving order. The Council resisted the claim on the following grounds:

(1) the money was paid when the cheque was received by the Council on 3 November and the payment was therefore protected by s. 45 of the Bankruptcy Act, 1914, as a payment made by the debtor to a creditor before the date of the receiving order;

(2) the debtor's account being overdrawn the money with which the debt was paid was not the debtor's money but the bank's money;

(3) if the money was the debtor's money and was paid after the date of the receiving order it was property acquired by her from her bank after the

adjudication when on 8 November it honoured her cheque and the payment to the Council was a transaction by her with a person dealing with her *bona fide* and for value in respect of that after-acquired property and was protected by s. 47(1) of the Bankruptcy Act, 1914.

The learned judge held that on none of these grounds was there a valid answer to the claim of the trustee.

On the first argument, he held that as between the debtor and the trustee the receipt of the cheque did not constitute a payment of the money to the Council and that it was not until the Council got the money and was the richer by £55. 5*s*. 0*d*. that it was paid. There was therefore no payment before the date of the receiving order.

On the second argument, it was not right to say that the money with which the debt was paid was not the debtor's own money. A payment by a bank under an arrangement by which the customer has an overdraft is a lending by the bank to the customer of the money. The customer pays the money, not the bank. The bank has only paid the money as agent for the customer just as if her account was in funds. Therefore the money paid was the bankrupt's money.

On the third argument, it was said that the bank did not have £55. 5*s*. 0*d*. in the bankrupt's account until after the date of the adjudication, because the bank did not lend it to the bankrupt until 8 November. The answer to that was that there was an asset of the bankrupt's, namely the state of her credit in her account with the bank, which existed before the bankruptcy, and the security given to the bank before the bankruptcy, and, by appropriating this money to its arrangement with the bankrupt, the bank merely decreased another asset, namely the value of the security charged by the bankrupt which in other circumstances might have been used to pay her creditors.

The learned judge held that this was a payment by the bankrupt after the date of the receiving order and that the trustee was entitled to say that an asset of the bankrupt was paid away without his authority and that he was entitled to recover it. He therefore ordered the Borough Council to pay the trustee the sum of £55. 5*s*. 0*d*.

Pearl Assurance Co. Ltd. *v.* West-Midlands Gas Board

Gas Act, 1948—*Vesting of gas undertakings in gas area boards—Transfer to area board of property rights, liabilities and obligations of the gas undertaker—Exception of securities issued by undertaker—Extinction of securities—Holders to be compensated by an allotment of British Gas Stock—Meaning of 'securities'*

CHANCERY DIVISION

WYNN-PARRY J.

1950. Oct. 6.
[1950] 2 All E.R. 844.
66 T.L.R. 2. 857.

Adjourned summons to determine whether a document described on the face of it as a 'redeemable mortgage debenture' issued by the Cannock District Gas Co. Ltd. was a 'security' within the meaning of s. 74 of the Gas Act, 1948.

The scheme of the Gas Act, 1948, was that the area board in which the property of a gas company or other gas undertaker was vested would assume the liabilities and obligations of that undertaker with the exception that, as regards liabilities, whatever fell within the meaning of the word 'securities' as used in the Act was not to be kept alive but was to be

extinguished, and the person who was the holder of the security on the vesting date was to receive in place of the extinguished security an allotment of British Gas Stock.

The word 'securities' is defined in s. 74 of the Gas Act, 1948, which so far as relevant provides:

> (1) In this Act, except where the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them that is to say...'securities', in relation to a body corporate, means any shares, stock, debentures and debenture stock of the body corporate, and also includes any mortgages of the body which were quoted in the Stock Exchange Official Daily List on all six of [certain specified dates].

The plaintiffs were the holders of a redeemable mortgage debenture of the Cannock District Gas Co. Ltd. and they contended that it was not a 'security' within the meaning of the definition in s. 74 and therefore not excepted from the transfer of liabilities to the Gas Board and that the Gas Board was bound to implement the obligation of the gas company under the debenture.

The plaintiffs conceded that if the definition had concluded before the words 'and also' they could not have contended that the document in question was not a debenture and therefore a security within the meaning of the definition but they argued that the inference to be drawn from the words which followed was that there was excluded from the definition any mortgage which was not quoted in the Stock Exchange Daily List on the dates specified and that the word 'debenture' in the first part of the definition must therefore be limited to debentures which were not also mortgages in that they contained a charge on the company's property.

By the 'redeemable mortgage debentures' in question the gas company agreed to pay the plaintiffs £18,480 on redemption and in the meantime to pay interest thereon at 4% p.a. by half-yearly payments and the company charged with such payments the undertaking and all the property of the company present and future including any capital for the time being uncalled.

The learned judge said that he did not find the language of the second part of the definition so strong as to justify the inference for which the plaintiffs contended. It was *prima facie* an extension and not a curtailment of the earlier words. He did not find it necessary to make any pronouncement as to the exact scope of the word 'mortgages' in the second part of the definition, but it was clearly apt to include the document which he had to consider. It might well be that the document was not only capable of being described as a 'debenture' and therefore falling under the first part of the definition but could also be described as a mortgage within the meaning of the second part of the definition. It had on the face of it the word 'mortgage'. He could however see no reason in deciding this case to pronounce definitely on that. Nor did he feel constrained to speculate why the mortgages referred to in the second part of the definition were limited to those which were quoted in the Stock Exchange Lists on the six specified days thus excluding documents falling within the description of mortgages which were not so quoted. That was a matter of policy with which the court was not concerned.

It appeared to the learned judge therefore that there was no reason which compelled him to cut down the meaning of the words 'debentures and debenture stock' in the earlier part of the definition and that there was every reason why he should not do so having regard both to the policy of the Act and to the language by which the second part of the definition was introduced.

The document in question was therefore a security which was extinguished on the vesting date in place of which as holders the plaintiffs would be entitled to receive compensation in gas stock.

In re Oakes (deceased)—Public Trustee *v.* Inland Revenue Commissioners

Estate duty—Money received under policies of life assurance—Kept up by deceased for the benefit of a donee—Policies under Married Women's Property Act 1882 *for benefit of deceased's wife if she should survive him; otherwise for sole benefit of deceased—Customs and Inland Revenue Act,* 1889, *s.* 11(1)—*Finance Act,* 1894, *s.* 2(1) (*c*)

CHANCERY DIVISION

ROMER J.

1950. Oct. 12.
[1950] 2 All E.R. 851.
66 T.L.R. 2. 831.

Adjourned summons to determine the estate duty (if any) payable on the sums received on the death of Montague Oakes under three policies of life assurance issued by the Law Life Assurance Society.

The policies in question purported to be taken out by the deceased under s. 11 of the Married Women's Property Act, 1882, for the benefit of his wife if she should survive him and otherwise for the sole benefit of the deceased. The sums assured were conditional on the payment of twenty-five annual premiums. The first two annual premiums on each of the three policies were paid by the wife's father. Thereafter the deceased paid several annual premiums and after the policies had been in force for fifteen years he paid a lump sum on each policy to convert it into a paid-up assurance.

On the death of the deceased the sums assured became payable and the Crown claimed estate duty in respect of that proportion of the policy money which was equivalent to the proportion of the total premiums (including the lump sum payments) paid by the deceased in keeping up the policies. The claim was founded on section 11(1) of the Customs and Inland Revenue Act, 1889, which, among other things, amends section 38(2) of the Customs and Inland Revenue Act, 1881. The relevant words of the section are:

> The charge under the said section shall extend to money received under a policy of assurance effected by any person dying on or after 1 June 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him, where the policy is partially kept up by him for such benefit.

The Public Trustee representing the deceased's estate contended that that taxing provision did not apply to the present case.

In the first place it was said that, having regard to the fact that the wife's father paid the first two premiums, it could not be said of the deceased that he was the person who effected the policy. The learned judge was unable to accept that view of the matter. He said that the policy was undoubtedly effected by the deceased who applied for it and filled up the necessary form and the fact that his father-in-law was generous enough to pay the first two premiums was an irrelevant factor.

Then it was said that, inasmuch as the deceased had a contingent interest in the policy in the event of his surviving his wife, the policy was kept up not exclusively for the benefit of the wife but for the benefit of both of them.

The learned judge said that the wife was undoubtedly a donee for whose benefit the policy was kept up. He did not think that the mere fact that the husband himself had a contingent beneficial interest prevented or displaced the view that the wife was to be regarded as a donee for the purpose of the section and that the payments were made for her benefit, although not exclusively for her benefit. The section does not require that the policy shall be kept up wholly for the benefit of a donee. The word 'wholly' in the section is related solely to the payment of premiums and not to the beneficial interest of the donee.

Then it was said that, if the policy was effected by the deceased and partially kept up by him for the benefit of his wife, the only payments which could come within the purview and scope of the provision were annual or other periodical payments which were made to keep the policy alive and did not include the sum which was paid by the deceased to convert the policy into a paid-up policy. That payment was made not to keep the policy alive but to establish it once and for all. The learned judge said that he came to the conclusion without any great hesitation that the payment made to convert the policy into a paid-up policy, which was merely a pre-payment of further annual premiums, was to be regarded on the same lines as the payment of the annual premiums had they been paid.

All points on which the objection to payment of estate duty was founded failed and estate duty was payable as contended by the Crown.

Jaworski *v.* Institution of Polish Engineers in Great Britain Ltd.

Income Tax—Deduction of tax—Mandatory provision—P.A.Y.E.—Income Tax (Employments) Act, 1943—Service agreement—Construction—Whether agreement to pay a gross sum or agreement not to deduct tax

COURT OF APPEAL

SOMERVELL, COHEN AND DENNING L.JJ.

1950. Nov. 27.
[1950] 2 All E.R. 1191.

The plaintiff who was an employee of the defendant company claimed payment of sums which the defendants deducted from his salary for income tax during the tax year 1946–47. He alleged that the defendants had agreed to pay him as salary a named sum *per month* without any deductions or taxes which according to the agreement would be borne by the defendants and that in breach of that agreement the defendants had deducted income tax from the sums named. The defendants pleaded that under s. 1(1) of the Income Tax (Employments) Act, 1943, which with the regulations made thereunder established the system known as P.A.Y.E., they were bound by law to deduct the tax and that any agreement to pay a salary without deduction of tax was void. The plaintiff contended that on the true construction of the agreement it was in effect a covenant to pay the plaintiff such monthly sum as after deduction of tax left the fixed sum which the plaintiff was to receive as a net payment.

It has been clearly established that if appropriate words are used a payer can so provide that the payee gets year by year a fixed net payment. The payer covenants to pay a sum which after deduction of tax leaves the sum that it is desired should be available to the payee. That is now familiar law but the words used must point to a gross sum. The question was whether the agreement under consideration could be construed in that sense. The agreement was

expressed in a letter written by the plaintiff to the defendants confirming an oral agreement come to in the course of an earlier conversation. The words were 'My remuneration will amount to £20 net per month payable in advance, later increased to £25 net per month, without any deductions and taxes, which will be borne by the association.' The amount stated in the letter was later raised to £36.

The Court, reversing the decision of Finnemore J., held that on the true construction of the words used the agreement was to pay a gross sum which after deduction of the tax referable to the plaintiff would leave the net sum named. Somerville L.J. said 'the words which in our opinion point to a gross sum are the later words "which will be borne by the association". We think one is entitled to have regard to the fact that this is not an instrument drawn by lawyers. We think it means—taking the £20 in the original agreement—"My remuneration is to be £20 plus whatever sum is necessary to leave that available to me after you have borne the taxes". As under the law the tax is suffered by deduction, it means such a sum as will after deduction leave £20.'

The plaintiff was therefore entitled to recover from the defendants the sums which they had deducted from the net sum payments of £36 per month during the tax year in question.

Note

Appeal:

Dale (*Inspector of Taxes*) v. *de Soissons*, [1950] 2 All E.R. 460.

On 3 July 1950, The Court of Appeal (Evershed M.R., Bucknill and Jenkins L.JJ.) upheld the decision of Roxburgh J. [1950] 1 All E.R. 912 (*J.I.A.* LXXVI, [37]).

RECENT STATUTES

Adoption Act, 1950

14 Geo. 6., Ch. 26

The Adoption Act, 1950, which came into force on 1 October 1950, repeals the Adoption of Children Act, 1949, except section 13 of that Act.

The 1950 Act is entitled 'An Act to consolidate the enactments relating to the adoption of children with such corrections and improvements as may be authorised under the Consolidation of Enactments (Procedure) Act, 1949', and is set out as follows:

with Five Schedules.

Sections 8, 9 and 10 of the 1949 Act (see *J.I.A.* LXXVI, [25] are reproduced by sections 16, 13 and 14 respectively of the 1950 Act and are extended to cover, in the case of section 16, adoption orders under the Adoption of Children Act (Northern Ireland), 1949, or any enactment of the Parliament of Northern Ireland for the time being in force, and, in the case of sections 13 and 14, adoption orders made after 1 October 1950 under such Northern Ireland Statutes: but section 9(1) of the 1949 Act is not reproduced.

Provisions as to registration will be found in sections 17–21 of the 1950 Act.

Sections 11 (Industrial insurance, etc.) and 15 (Scottish intestacies, etc.) of the 1950 Act provide as follows:

11.—(1) For the purposes of the enactments for the time being in force relating to friendly societies, collecting societies and industrial insurance companies, which enable such societies and companies to insure money to be paid for funeral expenses and which restrict the persons to whom money may be paid on the death of a child under the age of ten, an adopter shall be deemed to be the parent of the infant whom he is authorised to adopt under an adoption order.

(2) Where, before the making of an adoption order in respect of an infant, any such insurance has been effected by the natural parent of the infant, the rights and liabilities under the policy shall by virtue of the adoption order be transferred to the adopter, and the adopter shall, for the purposes of the said enactments, be treated as the person who took out the policy.

15.—(1) Sections thirteen and fourteen of this Act shall not affect the law of Scotland relating to the distribution of the moveable estate of a person dying domiciled in Scotland, the devolution of heritable property situated in Scotland or the disposal of any property by instrument inter vivos.

(2) An adoption order shall not deprive the adopted person of any legal rights competent to him in the estate of his parents or of any right to or interest in property to which, but for the order, he would have been entitled under any intestacy or dis-

position, whether occurring or made before or after the making of the adoption order, or confer on him any right to or interest in property as a child of the adopter; and the expressions 'child', 'children' and 'issue', where used in relation to any person in any disposition, shall not, unless the contrary intention appears, include a person or persons adopted by that person, or the issue of a person so adopted.

(3) In this section the expression 'disposition' means a deed, instrument or writing whether inter vivos or mortis causa whereby property is conveyed or under which a succession arises.

(4) This section extends to Scotland only, and references therein to an adoption order and to an adopter and an adopted person shall be constructed as references to an adoption order made in Scotland and to an adopter and a person adopted in pursuance of such an order.

LEGAL NOTES

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

Payton *v.* Inland Revenue Commissioners

Estate duty—Group pension policy for employees—Option to employee to take reduced pension continuing to widow—Pension for widow—Whether aggregable to determine rate of estate duty—Finance Act, 1894, s. 1, s. 2(1)(*d*), s. 4

CHANCERY DIVISION

WYNN-PARRY J.

1950. Dec. 7.
A.T.C. [1950] T.R. 351.

In this case the question for the decision of the Court was whether the rate of estate duty, payable on the value of a pension for the widow of an employee under a group pension policy, should be determined by aggregation with other property attracting estate duty on the death of the employee or should be ascertained by treating the value of the pension as an estate by itself.

The Austin Motor Co. Ltd. (hereinafter called the company) effected with the Legal and General Assurance Society Ltd. (hereinafter called the society) two separate group pension policies to provide benefits for its employees. The policies had similar incidents, and it is sufficient to analyse one of them only.

Notwithstanding that the policy was granted to the company, the benefits were expressed to be payable to the persons to be ascertained from the schedule to the policy: and it was declared that the company should hold the policy as trustee. It contained a scheduled provision that in certain circumstances an employee might in lieu of a full pension elect to take a reduced pension which should be payable to him during his life and after his death to his wife (to be named at the time of election) if she survived him during her life.

The material wording from the policy was as follows:

Clause 2. It is hereby agreed and declared that the grantees shall hold this policy and all benefits payable hereunder upon trust for the respective persons to whom the said benefits are expressed to be payable under and in accordance with the schedule hereto and that the grantees shall have no beneficial interest hereunder except in respect of any surrender values expressed to be payable to them under the schedule.

Clause 4. The society will pay at the principal office of the society in London to the person or persons specified in the schedule hereto, on proof of existence and identity, the appropriate benefit or benefits as and when the same shall fall due in accordance with the terms and provisions of the schedule subject only to payment of the appropriate premiums as therein specified and to the general conditions set out below.

Clause 5. The receipt of any person or persons to whom any benefit or any part thereof is expressed to be payable under this policy shall be a good and sufficient discharge to the society.

Scheduled Provision. At any time prior to normal pension date a male member may give written notice to the society requiring that any pension benefit becoming payable to such member at normal pension date shall, after the member's death, be paid to a surviving wife (whose name and age must be stated in the notice) for the remainder of her life and for her own use and benefit....

E. L. Payton was an employee of the company who exercised, or on whose behalf there was exercised, the option to take a reduced pension to be continued after his death to his widow. He enjoyed the pension until his death on 17 February 1946.

The learned judge said that if regard were paid only to the language of the scheduled provision, it appeared plain that it contemplated one continuing pension which would continue during the life of the employee and during the life of his wife if she survived him. As a matter of construction there seemed no doubt that the wife was intended to take, in continuation, the pension benefit which the husband had been enjoying.

The object of the policy was, however, to provide benefits by way of pension for employees. The function of the company was to make contributions which, with contributions from the employees, would provide the premiums for the benefits. Its only other function was to declare itself a trustee, so avoiding the necessity for a separate policy for each employee.

If a clause on the lines of clause 2 did not find its place in the policy, a difficulty would arise as regards the right of the respective employees to recover instalments of their pensions upon any default by the society, because the covenant was between the company and the society. If the company had not declared itself a trustee, it would have been unable to take any effective step on behalf of any employee whose pension might be in arrear. As, however, the company had declared itself a trustee, it followed that, should the necessity ever arise, the company on behalf of any particular beneficiary could effectively sue the society for damages, the measure of which would be the amount by which the society was in default. The real obligation of the society was to pay direct to the respective employees.

The manifest intention of the proviso was that, in the case of an employee who exercised the option, the widow should be in a position to enjoy the pension. If, however, the proviso were construed as *prima facie* its language required, the widow would find herself in a difficulty upon any default by the society. She had no right under the policy to sue the society. Her only course would be to call upon the company to do so. Although, therefore, under clause 4 she was the person to whom the society had bound itself to pay, that which can truly be regarded as property (i.e. the right to receive the pension) was a right which could only arise in her after the death of her husband.

The company was trustee of the right to sue on behalf of the employee so long as he continued to be entitled to a pension, and on his death it became trustee of the right to sue on behalf of the widow in respect of the benefit to which she then became entitled.

The learned judge said that in his view such a right did not represent property within the Finance Act, 1894, s. 1, which accordingly had no application, that estate duty was payable under s. 2(1)(*d*), and that the widow was entitled to the benefit of the proviso to s. 4 under which the value of the pension would be treated as an estate by itself. He declared accordingly that, on the

true construction of the two policies, the values of the two pensions to the widow were chargeable to estate duty under s. 2(1)(*d*), and that, for the purpose of calculating the amount of duty, each of the pensions should be treated as an estate by itself.

The case has since been heard by the Court of Appeal, which has upheld the above decision.

In re Brassey's Deed Trusts, Coutts & Co. *v.* Inland Revenue Commissioners

Estate duty—Policy of assurance—Premiums paid by trustees of settlement—Cesser of payment of premiums—Claim on 'slice' of capital to produce premiums—Finance Act, 1894, s. 2(1)(*b*)

CHANCERY DIVISION

ROMER J.

1950. Dec. 13.
[1951] 1 Ch. 351.
[1951] 1 All E.R. 102.

By virtue of a deed of resettlement dated 8 August 1935 to which Captain Brassey, Hugo Brassey his son, and the trustees were parties, it was declared that the trustees should in the event which happened hold investments and cash upon trust (*inter alia*) as to capital to purchase thereout certain policies on the life of Captain Brassey and as to income to pay the premiums on the policies and the balance of income to Hugo Brassey for life. The trusts of the policy moneys were, so far as material to this note, to invest and pay the income of the investments to Hugo Brassey for life with other trusts over.

Captain Brassey died on 14 November 1946, whereupon the Crown claimed estate duty on that part of the settled fund required by the income thereof to pay the premiums on the policies. The claim was founded on the Finance Act, 1894, s. 2(1)(*b*), which provides, so far as material, that property passing on death shall be deemed to include property in which the deceased or any other person had an interest ceasing on the death, to the extent to which a benefit accrues or arises by the cesser of such interest.

It was argued for the plaintiffs that on the death of Captain Brassey there was no cesser of interest by reason merely of the fact that the premiums ceased. The interest of Hugo Brassey remained, as before, a life interest, and the interest of the remaindermen continued to be a right in reversion to the corpus.

The learned judge said that while the remaindermen neither had before nor had now any right to call on the trustees to transfer capital, it was not accurate to say that they had no further right, for they were at all times entitled as *cestuis que trust* to insist that the trustees should, during the life of Captain Brassey, apply a sufficient part of the income to pay the premiums. They could in other words compel the trustees to divert income from the life tenant and pay premiums which would ultimately enure for their benefit.

It followed in his judgment that the remaindermen had an interest within s. 2(1)(*b*) in the capital and income of the trust fund, and that estate duty was payable on that part of the trust fund formerly required by the income thereof to pay the premiums, the proportion being ascertained by comparing the gross income required to produce, after deduction of tax, the net amount of the premiums with the total gross income of the trust fund.

The case is under appeal.

In re Smith's Settlement Trusts, Executor Trustee and Agency Co. of South Australia Ltd. and Others *v.* Inland Revenue Commissioners

Estate duty—Exemption of certain British Government securities—Beneficial ownership of persons neither domiciled nor ordinarily resident in the United Kingdom—Life tenant so domiciled and resident—Remaindermen not so domiciled and resident—Finance (No. 2) Act, 1915, s. 47, Finance (No. 2) Act, 1931, s. 22(1)

CHANCERY DIVISION

DANCKWERTS J.

1950. Dec. 13.
[1951] 1 Ch. 360.
[1951] 1 All E.R. 146.

The Finance (No. 2) Act, 1915, s. 47, and the Finance (No. 2) Act, 1931, s. 22(1), provide that securities may be issued by the Treasury with a condition that neither the capital nor the income shall be liable to any taxation, present or future, so long as the securities are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom.

The benefit of the exemption was allowed on the issue of 5% War Loan 1929–47, subsequently converted to 3½% War Loan 1952 or later, and on the issue of 4% Funding Loan 1960–90.

Holdings of both issues formed part of trust funds in certain settlements made *inter vivos*, under which the life tenant was a woman domiciled and ordinarily resident in the United Kingdom. The life tenant died on 17 October 1946, whereupon the trust funds became divisible in part to persons domiciled and ordinarily resident in Australia.

On the death of the life tenant estate duty became payable on the settled funds except in so far as the benefit of exemption could be properly claimed.

The material wording in the two Acts is similar. The 1915 Act provides:

> The Treasury may, if they think fit, during the continuance of the present war and a period of twelve months thereafter, issue any securities which they have power to issue for the purpose of raising any money or any loan with a condition that neither the capital nor the interest thereof shall be liable to any taxation, present or future, so long as it is shown in manner directed by the Treasury that the securities are in the beneficial ownership of persons who are neither domiciled nor ordinarily resident in the United Kingdom, and securities issued with such a condition shall be exempt accordingly.

The provisions of the prospectus are much the same for each issue and for the 5% War Loan 1929–47 are as follows:

> Stocks and bonds of these loans and the dividends payable from time to time in respect thereof will be exempt from all British taxation, present or future, if it is shown in the manner directed by the Treasury that they are in the beneficial ownership of a person who is neither domiciled nor ordinarily resident in the United Kingdom of Great Britain and Ireland. Further, the dividends payable from time to time in respect of stock and bonds of these loans will be exempt from British income tax, present or future, if it is shown in the manner directed by the Treasury that the stock or bonds are in the beneficial ownership of a person who is not ordinarily resident in the United Kingdom of Great Britain and Ireland, without regard to the question of domicil. Where a bond belongs to a holder entitled to exemption under these provisions the relative coupons will be paid without deduction for income tax or other taxes, if accompanied by a declaration of ownership in such form as may be required by the Treasury.

In these circumstances it was claimed that the exemptions applied in so far as the securities in question passed on the death of the life tenant to persons

beneficially entitled who were neither domiciled nor ordinarily resident in the United Kingdom.

The view taken officially by the Inland Revenue Commissioners is stated in Green's *Death Duties*, 2nd ed. p. 632, as follows:

> Exemption, *so long as* the property is in a particular ownership, is more appropriate to income tax than to death duties, which relate to a change of ownership. The official view is that regard must be had, on the death of an absolute owner or a life tenant, only to *his* domicil, etc., and not to the domicil, etc., of the living beneficiaries.

The learned judge said that it is not until the life tenant is dead that there can be any passing or any charge to estate duty. So long as the life tenant was still alive, even though she were *in extremis*, no claim for estate duty could be made. It was only when she died that the property passed and the liability to estate duty arose. The beneficial ownership of the life tenant could not be the test because when the event occurred the life tenant had already died. It seemed to him that the death was the cause which gave rise to the passing and to the liability for estate duty, so that there was some slight, even if almost imperceptible, period of time after the death before the liability to estate duty arose.

It was argued for the Crown that estate duty is a tax in respect of which the nature of the person succeeding is irrelevant, but the learned judge pointed out that he was dealing with two sections which in their terms are concerned with beneficial ownership, so that, whatever might be the general nature of estate duty, the Court and the Inland Revenue were compelled in the present case to consider the beneficial interests.

It was pointed out by counsel for the Crown that where such securities were not specifically bequeathed by will but formed part of the estate of a deceased person, there would be no person who at the death could claim a beneficial ownership because, while the estate was under administration, the persons who would eventually take the residuary estate could not assert a title to any particular asset. In the case, moreover, of a specific legacy, it was suggested that the legatee had no absolute right to the legacy at the date of death of the testator. The learned judge said, however, that the fact that there might be difficulties in other cases did not dispose of the matter if the case before him fitted the words in the sections of the Acts. It seemed to him that in the present case the passing of the securities to beneficiaries domiciled and ordinarily resident outside the United Kingdom brought the securities within the terms of the exemption and that the claim for exemption must succeed.

Reference should be made to the Finance Bill, 1951, s. 30.

In re d'Avigdor-Goldsmid's Life Policy, d'Avigdor-Goldsmid *v.* Inland Revenue Commissioners

Estate duty—Money received under policy kept up for donee—Ultimate donee—Interest accruing or arising by survivorship—Purchased or provided by person who has received resources from deceased—Finance Act, 1894, s. 2(1)(*c*), s. 2(1)(*d*)—*Finance Act*, 1939, s. 30

CHANCERY DIVISION

VAISEY J.

1950. Dec. 20.
[1951] 1 Ch. 321.
[1951] 1 All E.R. 240.

In this case the question for the decision of the Court was whether, at the death on 14 April 1940 of Sir Osmond d'Avigdor-Goldsmid, estate duty became payable in respect of the whole or part of £48,765, the policy money under a policy effected on 3 May 1904 by Sir Osmond on his own life with the Royal Insurance Company Ltd.

By his marriage settlement dated 23 October 1907 Sir Osmond settled freehold property, investments and the policy on trusts under which he took a protected life interest in part of the freehold property and, after his death, subject to a jointure rent charge for the wife, certain of the freehold property was settled in tail male. Sir Osmond covenanted to pay the premiums on the policy, and the settlement provided that at his death the policy money should be invested in the purchase of freehold property to be held upon the same trusts as those declared in respect of that part of the settled freehold property in which Sir Osmond had a protected life interest.

By a private Act of Parliament entitled the Goldsmid Estate Act, 1928, Sir Osmond was empowered, notwithstanding his protected life interest, to join in a disentailing deed, and, by virtue of various deeds dated 10 June 1930, the trust funds and the policy were resettled. Under the resettlement Sir Osmond again covenanted to pay the premiums on the policy.

By a deed of appointment dated 10 November 1934 Sir Osmond and his eldest son, Sir Henry, jointly exercised a power of appointment reserved to them under the resettlement, and declared that the policy and certain freehold property known as 27 Wood Street should be held upon trust for Sir Henry absolutely, and by the same deed Sir Henry released Sir Osmond from his covenant to pay the premiums on the policy. The effect of the appointment was that Sir Henry became the absolute beneficial owner of the policy and of the Wood Street property.

During the currency of the policy 37 premiums in all were paid as follows:

4 by Sir Osmond for his own benefit before the marriage settlement.

23 by Sir Osmond for the benefit of persons interested under the marriage settlement.

4 by Sir Osmond for the benefit of persons interested under the resettlement.

6 by Sir Henry for his own benefit after he became the absolute owner of the policy.

On the death of Sir Osmond the Crown claimed estate duty either under the Finance Act, 1894, s. 2(1)(*c*) or under the Finance Act, 1894, s. 2(1)(*d*) as extended by the Finance Act, 1939, s. 30.

The Finance Act, 1894, s. 2(1)(*c*), by reference brings into charge to estate duty:

> Money received under a policy of assurance effected by any person dying on or after 1 June 1889, on his life, where the policy is wholly kept up by him for the benefit of a donee, whether nominee or assignee, or a part of such money in proportion to the premiums paid by him where the policy is partially kept up by him for such benefit.

The claim of the Crown in so far as it was based on s. 2(1)(*c*) was accordingly limited to estate duty on a proportion of the policy money.

On this part of the case Vaisey J. said that in his view the donee referred to in the Act is the ultimate donee, and that the reference to a donee is not properly applicable to a series of donees and signifies the final beneficiary and owner of the policy. He took the view that the fact that Sir Henry was one of a number of beneficiaries under the earlier settlements had no bearing on the question, and that the policy had not been kept up by Sir Osmond for the benefit of Sir Henry. Following therefore *Lord Advocate* v. *Fleming* (1897)

A.C. 145 he held that the claim of the Crown under the Finance Act, 1894, s. 2(1)(*c*), failed.

The learned judge then turned to the claim under the Finance Act, 1894, s. 2(1)(*d*), which charges to estate duty:

> 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.

The charge under the subsection has been extended by the Finance Act, 1939, s. 30, as follows:

> The Finance Act 1894 s. 2(1)(*d*)...shall have effect in relation to an annuity or other interest that was purchased or provided wholly or in part by any person who was at any time entitled to, or amongst whose resources there was at any time included, any property derived from the deceased, as if that annuity or other interest had been provided by the deceased, or, if it is proved to the satisfaction of the Commissioners that the application of all the property derived from the deceased would have been insufficient to provide the whole of that annuity or other interest, as if a similar annuity or interest of an amount reduced to an extent proportionate to the insufficiency proved had been provided by the deceased:
>
> Provided that for the purpose of determining whether there would have been any such insufficiency as aforesaid, and the extent thereof, there shall be excluded from the property derived from the deceased any part thereof as to which it is proved to the satisfaction of the Commissioners that the disposition of which it, or the property which it represented, was the subject matter was not made with reference to, or with a view to enabling or facilitating, the purchase or provision of the annuity or other interest, or the recoupment in any manner of the cost thereof.

On this part of the case the learned judge regarded himself as bound by *Lord Advocate* v. *Hamilton's Trustees* (1942) S.C. 426, where Lord Wark observed, first, that the claim in that case was made under head (*d*) and not under head (*c*), secondly, that it was not disputed that head (*d*) might render subject to duty insurance policies and policy moneys which escape under head (*c*), and thirdly, that the words 'other interest' in head (*d*) are sufficiently wide to include the right to a policy or policy moneys. Lord Wark then said that he found it difficult to understand how head (*d*) could catch the very case with which head (*c*) deals, i.e. the case of an out-and-out transfer of a policy by way of gift, and make the interest in such policy liable to duty whether the policy be kept up by a donor for the benefit of the donee or not. He added that if that were a sound view it seemed to him that head (*c*) was otiose. He said that the claim of the Crown failed because it was not shown that any beneficial interest accrued or arose on the death of the deceased, and he pointed out that the whole interest in the policies and the policy moneys had in that case passed to the beneficiaries twenty-four years before the death of the deceased. Their interest then was fully vested and was neither altered nor increased by the death of the deceased. The nature of the interest was the same, although the value of it was increasing during the lifetime of the assured and reached its maximum at his death.

Vaisey J. then quoted the following passage from the judgment of Lord Wark:

> Coming to consider the language of s. 2(1)(*d*), it is apparent that, in order to succeed, the Crown must establish two things: first, that the property sought to be charged has been provided or purchased by the deceased, either by himself alone or in concert or by arrangement with any other person; and, second, that to some extent there has been a beneficial interest arising or accruing by survivorship or otherwise on the death of the deceased. If either of these is not established, the claim fails. And it is well to keep

in view the elementary principle of construction of taxing statutes that it is for the Crown to show that the subject is within the ambit of the statute and not for the subject to show that he is outside it. Having regard to what I have said as to s. 2(1)(*c*), I think there is soundness in the argument for the respondents that, where you are dealing with policy moneys, it is not sufficient to bring them within the expression 'purchased or provided by the deceased' that the policy was originally taken out by him, or even that certain premiums were paid by him upon it, if it has been assigned to a donee and the assured has thereafter paid no further premiums. And, in my opinion, this is true, even when the gift is made through the medium of a trust, so long as it is not one of the purposes of the trust to make payment of the premiums out of funds provided by the truster. The argument for the Crown amounted to this, that the deceased had in effect provided the premiums after the date of the declaration of trust by creating a trust and empowering the trustees to borrow upon the trust property, which was of sufficient value to afford security for the further premiums required. Alternatively, it was said that the trustees were his mandataries to pay the premiums. I do not think this argument is sound in either alternative. The trustees were trustees, not for the deceased, but for the beneficiaries. They were answerable to them alone, and, when they borrowed, it was in their interest and on their behalf. They were not directed to borrow, but only empowered to do so. They might have surrendered the policies, or some of them, at any time. Accordingly, the further premiums required were paid truly by the beneficiaries entirely, and not by the deceased.

The learned judge said that the latter part of the passage quoted seemed to him to dispose of any claim that might have been based on the Finance Act, 1939, s. 30, in reference to the Wood Street property as affecting the policy. The policy in his view was essentially the same in character as any other property which is capable of absolute and unfettered ownership. Sir Henry could have sold it, mortgaged it, given it away, destroyed it, settled it, or (it being a policy on his father's life) he could have surrendered it at the moment when his father was *in extremis* at the point of death. In the case of none of these possible dealings could the present claims have been established.

Vaisey J. said that the authorities are difficult to reconcile, and it might well be that *Lord Advocate* v. *Hamilton's Trustees* (*supra*) is inconsistent with *Attorney General* v. *Dobree* (1900) 1 Q.B. 442, *Attorney General* v. *Robinson* (1901) 2 I.R. 67 and *Inland Revenue Commissioners* v. *Scott's Trustees* (1918) S.C. 720, but he thought himself bound to follow it and to declare that no estate duty became payable at the death of Sir Osmond on the policy money.

The case has been heard by the Court of Appeal. Judgment was reserved.

Cole *v.* Milsome

Cheque payable to 'cash or order'—Not equivalent to a direction to pay to bearer—Not negotiable as a bill of exchange—Bills of Exchange Act, 1882, s. 3(1)—Cheque dishonoured—Drawer not liable to holder—Cheque payable to a specified person—Cheque dishonoured—Consideration necessary to support action by payee against drawer

KING'S BENCH DIVISION

LLOYD-JACOB J.

1950. Dec. 18.
[1951] 1 All E.R. 311.

This was an action brought by the plaintiff, Mrs Cole, against the defendant, Miss Milsome, in respect of two cheques drawn by the latter and dishonoured on presentation.

The plaintiff was in the employ of one Hignett, and part of her employment was dealing on his behalf with matters involving money. The cheques in question were brought to the

plaintiff by Hignett with a request that she pay them into her bank account and draw against it a number of cheques to meet various commitments of his.

The first cheque was for the sum of £137. 10*s*. It was drawn by the defendant on an ordinary cheque form with the printed words 'pay' and 'or order', and between them the word 'cash' was inserted in ink. The plaintiff endorsed it and paid it into her bank. She had drawn cheques on her account as directed by Hignett, to a total amounting substantially to the amount of the cheque paid in, before she received notice of its dishonour. As a third-party holder of the cheque she could only recover against the defendant if it was negotiable as a bill of exchange, and the question was whether it fell within the definition of a bill of exchange in subsection 3(1) of the Bills of Exchange Act, 1882, which reads as follows:

> A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer.

The document could qualify as a bill of exchange only if the words 'pay cash or order' could be read as indicating payment to bearer. The learned judge said that there was no precise authority on that point, and in the absence of such authority he had with some reluctance come to the conclusion that the words could not fairly be so constructed. In these circumstances the plaintiff's claim on the first cheque failed.

The second cheque was for the sum of £165. It was made payable to the plaintiff. When it was brought to her by Hignett she was ignorant of the fact that the first cheque had been dishonoured, and she paid it into her bank account and drew cheques on her account as directed by Hignett to a total amounting substantially to the amount of the cheque paid in. It was conceded by the defendant with regard to this document that it was a bill of exchange received in good faith by the plaintiff, but it was contended that the plaintiff was not in a position to recover against the defendant in respect of it because there had been no consideration as between the plaintiff and the defendant for its transmission. The learned judge said that in the circumstances which happened this cheque was delivered to the plaintiff by Hignett as agent for the defendant with an admitted request that the plaintiff should draw cheques on her account in respect substantially of the total. The receipt of the cheque, its endorsement by the plaintiff, its payment into her bank and the drawing by her of cheques against the amount were made by her pursuant (as she believed) to an implied request by the defendant that the cheque should be utilized for the purpose which Hignett was representing to her was the purpose of its transmission to her. The plaintiff was moved and actuated by the representations of Hignett which she believed he was making as agent for the person who had drawn the cheque. In these circumstances the learned judge could not hold that the completion of the cheque by the defendant amounted to nothing more than a voluntary promise on her part. He must read into the transaction the necessary business implications which followed from the transmission of a document drawn in that form to the expressed payee in the circumstances stated, and that there was sufficient consideration moving from the plaintiff to the defendant to support the action on the cheque.

In the result the plaintiff was entitled to recover the sum of £165 from the defendant.

Legal Notes

In re **Smallwood (deceased)**

Inheritance (Family Provision) Act, 1938, s. 1(7)—*Testator's reasons for his testamentary provisions—What evidence is admissible*

CHANCERY DIVISION

ROXBURGH J.

1951. Jan. 22.
[1951] 1 Ch. 369.
[1951] 1 All E.R. 372.

This was an application made by the widow of the testator for provision to be made for her out of the testator's estate under the Inheritance (Family Provision) Act, 1938. The Act provides that where a person dies domiciled in England leaving a wife or husband or a child or children dependent on him or her for support and has made a will which in the opinion of the Court does not make a reasonable provision for his, her or their maintenance, the Court may order a reasonable provision to be made out of the testator's estate. By subsection 1(7) of the Act the Court is directed to have regard to the testator's reasons so far as ascertainable for making the provisions made by his will or for not making any provision for a dependent, and may accept such evidence of those reasons as it considers sufficient, including any statement in writing signed by the testator and dated.

The question for the Court was whether a statement in writing made by one of the testator's sons was admissible in evidence. The statement included *inter alia* what the testator had told his son on various occasions with regard to the conduct of the applicant and the unhappy relationship which existed between the testator and his wife, and the complaints which the testator made to his son about his wife's conduct and how he was in the habit of spending week-ends with his son or his daughter in order to escape from her and how much he dreaded going back to her.

Counsel for the widow objected to the admissibility of the statement because (1) it was not a statement of the testator's reasons for making the provision in his will and (2) it was not a statement in writing made by the testator.

On the first point the learned judge said that at first sight he would have thought that the point was a good one and that subsection 1(7) was directed to statements by the testator of his reasons and did not extend to statements by the testator of facts which the Court might hold to have constituted his reasons. He thought, however, that in what is in any view a difficult point he ought to follow the decision of Bennett J. in *In re Vrint* (1940) Ch. 920, and hold that the subsection is not confined to evidence of the reasons given by the testator for making the dispositions made by the will or for not making any provision or any further provision (as the case might be) but extends to evidence of facts from which the Court could infer the reasons of the testator.

On the second point the learned judge said that it was covered by the decision in *In re Vrint*, but even if the point were open he considered that the words of the section 'such evidence...as it considers sufficient' are as wide as they could be, and although it was rather surprising that there should in these circumstances have been added the words 'including any statement in writing signed by the testator and dated,' he could not think that by reason of those words the generality of the words 'such evidence of those reasons as it considers sufficient' had to be curtailed.

The statement was therefore admissible as evidence of the testator's reasons.

Legal Notes

Candler *v.* Crane Christmas and Co.

Accountant—Negligent preparation of company's accounts and balance sheet—False statement of financial position—Purchase of shares on faith of statement—Liquidation of company—Accountant's liability to shareholder—No contractual or confidential relationship

COURT OF APPEAL

COHEN, ASQUITH AND DENNING L. JJ.

1951. Jan. 26.
[1951] 1 All E.R. 426.

In this action the plaintiff claimed damages from the defendants, a firm of accountants and auditors, on the ground of their negligence in the preparation of the accounts and balance sheet of a company called Trevanance Hydraulic Tin Mines Ltd. He alleged that the accounts and balance sheet contained a false statement of the company's financial position which induced him to invest £2000 in the purchase of shares. On the subsequent liquidation of the company the shares became valueless.

The plaintiff's case was (1) that since to the knowledge of the defendant's employee, who prepared the accounts and balance sheet, the plaintiff was a prospective investor in the company, and was asking for information about the accounts of the company to assist him in reaching a decision whether to make the investment, the defendants owed a duty to the plaintiff when giving him that information to exercise care to see that it was accurate; (2) that since the information given to the plaintiff was inaccurate in material particulars owing to the negligence of the defendants' employee, the defendants were liable in damages. Alternatively, the plaintiff alleged that as he became a shareholder in the company and the defendants were the auditors of the company, they owed a duty to him as shareholder to give him the accurate information which they should have given him when he was a prospective investor. That duty he said was not discharged, and accordingly he was entitled to damages.

The Court of Appeal (Denning L.J. dissenting) held on the main argument that, in the absence of a contractual or confidential relationship between the plaintiff and the defendant firm, the latter owed no duty to the plaintiff to exercise care in the preparation of the accounts and balance sheet. Such nexus of proximity as existed was insufficient to establish any such duty. On the alternative argument no damage flowed from the breach of such duty as was owed by the defendants to the plaintiff as a shareholder. The £2000 had been irretrievably invested before the relationship had become operative. It was further doubtful whether the defendants' alleged duty as auditors covered information given to the plaintiff before he became a shareholder.

On these grounds Lloyd-Jacob J. in the Court below had dismissed the plaintiff's claim for damages, and the Court of Appeal now dismissed the plaintiff's appeal from that order.

Note

Diplock's Estate, In re

Decision of the Court of Appeal [1948] Ch. 465 reported in *J.I.A.* LXXIV [16] affirmed by the House of Lords, sub nom. *Ministry of Health* v. *Simpson* [1951] A.C. 251; [1950] 2 All E.R. 1137.

LEGAL NOTES

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

In re Duff's Settlements Trusts

Company—Payment to shareholders out of share premium account—Whether received by shareholders as capital or income—Companies Act, 1948, s. 56

CHANCERY DIVISION
HARMAN J.
1951. March 21.
[1951] 1 Ch. 721.
[1951] 1 All E.R. 869.
[1951] 1 T.L.R. 735.

There was included in the trust funds of the above-named settlements a holding of 33,947 £1 shares in Highfields (Ceylon) Ltd. which were registered in the name of the trustee of the settlements. The company had from time to time allotted certain of its shares at a premium and the aggregate amount of the premiums was, in accordance with the provisions of s. 56 of the Companies Act, 1948, transferred to its share premium account. In 1950, a special resolution of the company was passed whereby it was resolved to pay to the holders of the fully paid shares of the company 2*s.* 6*d.* per share out of the share premium account, and on a petition presented by the company the reduction of the share premium account by that amount was sanctioned by the Court. As a result the trustee of the settlements received a sum representing 2*s.* 6*d.* a share of the trust holding.

This was an adjourned summons to determine whether in the administration of the trust the money so received by the trustee should be treated as capital or income.

Section 56(1) of the Companies Act, 1948, provides that when a company issues shares at a premium a sum equal to the aggregate amount or balance of the premiums shall be transferred to an account to be called 'the share premium account', and that the provisions of the Act relating to the reduction of share capital of the company shall, except as provided in the section, apply as if the share premium account were paid-up share capital of the company. Subsection (2) provides that the share premium account may, notwithstanding anything in the foregoing subsection, be applied by the company for any of the purposes specified, including paying up unissued shares of the company to be issued to members as fully paid bonus shares. The provisions of the section are new, but the section is retrospective and applies to shares issued at a premium before the commencement of the Act as if the shares had been issued after the commencement of the Act.

Before the Act of 1948, sums received by companies as premiums in the allotment of their shares ranked as profits available for the payment of a dividend, and it was argued on behalf of those interested in the income of the trust funds that the only effect of s. 56 was to make the process of distribution subject to the sanction of the Court and not to convert the premium receipts

into capital. It was further argued that as the return of this money to the shareholders did not reduce the share capital of the company it could not be a reduction of capital and, if not that, must necessarily be the payment of a dividend out of profits.

The learned judge said that in his judgment the section had created a novel type of capital which though it was not share capital was distributable only by the same process as share capital, and that it had, both in the hands of the company and in the hands of those who received it as a result of a reduction petition, the quality of capital. He declared accordingly that the sums in question received by the trustee ought to be treated as capital to be added to the trust fund.

The judgment has been upheld by the Court of Appeal [1951] 2 All E.R. 534.

Westburn Sugar Refineries Ltd., Petitioners

Companies Act, 1948—*Proposed reduction of capital in excess of the company's requirements—Transfer of assets to a holding company—Shareholders to receive shares in holding company equivalent to amount of capital reduction—Petition to sanction reduction—Just and equitable treatment of shareholders—Rights of creditors—Interests of investing public*

HOUSE OF LORDS
LORDS PORTER, NORMAND, OAKSEY, REID and RADCLIFFE
1951. April 5.
[1951] 1 All E.R. 881.
[1951] 1 T.L.R. 728.

This was an appeal from an interlocutor of the First Division of the Court of Session dismissing the petition of the above-named company for confirmation of a reduction of capital in manner proposed by a special resolution of the company.

The appellant company was incorporated in 1897 under the Companies Acts, 1862–90, and its main object was to carry on the business of sugar refining. In 1927 it became a public company. Its share capital at the date of the petition was £609,000 in ordinary shares of £1 each fully paid. The directors considered that its capital was in excess of the company's requirements and that certain assets were not essential to its business. It was therefore proposed to pay off part of the company's share capital by reducing the nominal amount of each share by 2*s*. and transferring to the shareholders concerned a 2*s*. share in an investment holding company to which it was proposed to transfer some of its unrequired assets, consisting of shares in private limited companies, of an aggregate value as shown in the company's balance sheet corresponding exactly with the amount by which the capital would be reduced. At an extraordinary general meeting of the company a special resolution for the reduction of capital in manner proposed was passed unanimously.

The First Division of the Court of Session dismissed the petition on the grounds (*a*) that it was against public policy to aid a company threatened with nationalization to part with valuable assets, and (*b*) that the company had failed to show by how much its capital was surplus to its requirements.

The House of Lords held that the proposed reduction of capital was not open to objection and ought to be confirmed. The appeal was allowed and the petition sent back to the Court of Session to dispose of it in accordance with the judgment of the House.

As regards the first ground of objection stated by the First Division, that there was or might be an ulterior object behind the petition, viz. to avoid in

part the consequences of a possible future nationalization of the industry, that might be a good reason for making quite certain that the existing law was complied with in every respect, but it could not be by itself a ground for dismissing the petition. The petition must be judged by the existing law. If the reduction was objectionable on other grounds it would not become any more acceptable because it might have been proposed in view of a pending measure of nationalization. Conversely, the threat of nationalization could not render improper what was otherwise unobjectionable.

As regards the second ground of objection, viz. that the company had not demonstrated to the Court by how much its capital was in fact surplus, their lordships could not find any reason why the Court should be concerned to know the extent by which the company's capital was surplus to its requirements. How much of the paid-up share capital the company could dispense with for the future was a domestic matter which the shareholders and their managers must decide among themselves. If the amount which they had decided on worked no injustice to shareholders or creditors, no purpose could be served by the Court insisting on precise figures of the company's wants or the striking of an exact balance between those figures and the total available resources in hand.

In their lordships' opinion all that the Court in any such case had to consider was whether the proposed reduction was fair and equitable to the shareholders and was not prejudicial to the rights of the company's creditors or the interests of the investing public.

As regards shareholders, the resolution in favour of the proposed reduction was passed unanimously and no shareholder had given notice of any objection. There was evidence that the assets transferred to the holding company were worth considerably more than the balance-sheet valuation on which the transfer was based; but that consideration did not materially affect the interests of the shareholders. If assets to a greater value than the amount by which the capital was reduced were transferred, the 2*s*. shares in the holding company would be worth more than 2*s*. and each 18*s*. of the company's stock would be worth less by an equivalent amount.

As regards creditors, their security depended on what was left of the company's assets after the reduction. The reporter to whom the petition was remitted for inquiry and report found that if the proposed reduction of capital were confirmed the company's remaining assets would be amply sufficient to safeguard the rights of creditors.

As regards the public interest, it was right to scrutinize the proposal somewhat closely having in mind the position of those who might in the future form connexions with the company as shareholders or creditors. In the present case the assets to be distributed taken at their full value formed only a comparatively small part of the total assets of the company. The assets which would be retained exceeded £1,400,000 according to the balance-sheet valuations, and it seemed clear that their true value could not be substantially less than that amount. The total share capital of the company was £609,000, and liabilities to creditors and others did not exceed £500,000 at the date of the last balance sheet. Those figures were amply sufficient to remove any apprehension that the future of the company might be adversely affected by the proposed reduction, and there was no legitimate interest of the public which could be prejudiced thereby.

Lloyds Bank Ltd. *v.* Eagle Star Insurance Co. Ltd.

Accident insurance—Personal injury—Sole direct and immediate cause of death—Exception of personal injuries happening to insured if over 65 years of age—Death from personal injuries at the age of 65 years and 7 months

KING'S BENCH DIVISION

JONES J.

1951. March 19.
[1951] 1 All E.R. 914.
[1951] 1 T.L.R. 803.

By a policy of insurance dated 17 March 1939 the defendant company promised to pay to Harry Rush or his personal representatives compensation as defined in clause 4 of the policy which read as follows:

Clause 4. Personal Accidents: If the insured shall sustain any personal injury caused by violent accidental external and visible means whilst mounting into, whilst riding in or whilst alighting from any private motor car whilst such motor car is being used for private or business purposes (as defined in the schedule hereto) and if such injury shall be the sole direct and immediate cause within ninety days of the occurrence of such injury of:

death of the insured, the sum of £1000....

Provided always that under this clause (No. 4) the company shall not be liable to pay compensation in respect of personal injuries sustained by or happening to the insured if under the age of sixteen years or over the age of sixty-five years.

The plaintiff claimed payment of £1000 as executor of the insured who on 23 December 1949 died as a result of injuries received the day before whilst riding in a private motor car. The insured at the time of the accident was aged sixty-five years and seven months. The defendant denied liability under the proviso to clause 4. The plaintiff contended (i) that the proviso applied only to injuries which did not result in death and (ii) that the insured was not 'over the age of sixty-five years' within the meaning of the proviso in that he had not reached his sixty-sixth birthday.

The learned judge held that on the true construction of the proviso the words 'personal injuries' in it included death resulting from such injuries, and that the words 'over the age of sixty-five years' applied to anyone who had lived beyond the attainment of his sixty-fifth birthday, and he gave judgment for the defendant accordingly.

In the Estate of Davies—Russell *v.* Delaney

Will—Attestation—Acknowledgment by testatrix of her mark—Witnesses not present at the same time—Invalidity of execution—Destruction of earlier will—Conditional on validity of later will—Pronouncement for earlier will

GLOUCESTER ASSIZES

MORRIS J.

1951. March 14.
[1951] 1 All E.R. 920.

On or about 16 January 1949 the testatrix made a will which was undated but duly signed and attested and in every respect validly executed as a will. On 9 February 1949 she asked her nephew, Mr Davies, to prepare a new will which he did. It contained a clause of revocation of all wills theretofore made by her. The testatrix who was ill did not sign this will, but she made her mark on it in the presence of a Mrs Barnett who then signed it as an attesting witness. As Mrs Barnett was writing her name on the will Mr Jones, a neighbour of the testatrix, came into the room and Mr Davies asked him to be the second attesting witness. The testatrix signified her assent and acknowledged the document as her will and

Mr Jones then signed the will as witness. The testatrix then said that there was no longer any need for the first will and it was destroyed in her presence. The testatrix died on 17 February 1949. The plaintiff as executor propounded the will of 9 February 1949 and in the alternative claimed that the will of January 1949 should be pronounced for.

The learned judge held that the second will was not properly executed in accordance with the provisions of s. 9 of the Wills Act, 1837, which requires that a will:

> ...shall be signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction: and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time and such witnesses shall attest and shall subscribe the will in the presence of the testator but no form of attestation shall be necessary.

The learned judge said that the attestation of the will was not in the form required by the Wills Act as the testatrix should have acknowledged her signature in the presence of both the attesting witnesses before either of them signed. He was therefore unable to pronounce in favour of the second will.

With regard to the first will he was satisfied that it was destroyed only because the testatrix thought she had made a valid second will. The revocation of the first will was conditional on the second will being valid, and as the second will was not valid the destruction of the first will as a document did not have the effect of revoking it. The result was that he pronounced in favour of the earlier undated will, the terms of which were those recollected by Mr Davies and set out in a document recorded by him.

In re Power's Settlement Trusts—Power *v.* Power

Trust—Power to appoint an additional trustee—Appointment by appointor of himself—Trustee Act, 1925, s. 36(6)

CHANCERY DIVISION

WYNN-PARRY J.

1951. April 4.
[1951] 1 Ch. 689.
[1951] 1 All E.R. 932.
[1951] 1 T.L.R. 820.

Adjourned summons to determine whether a deed of appointment dated 15 August 1950 whereby the defendant purported by virtue of the Trustee Act, 1925, s. 36(6), to appoint himself an additional trustee of a settlement was valid.

The defendant, George Frederick Cecil Power, was the tenant for life under protective trusts of a settlement dated 22 February 1939 made between the late Sir John Cecil Power of the one part and Lady Power and Leonard Frederick Sutton of the other part. It was provided by clause 16 of the settlement that 'The power of appointing a new trustee or new trustees hereof shall be vested in the settlor [the late Sir John Cecil Power] during his life and after his death in George [the defendant] during his life....'

The defendant purported to exercise this power of appointment by appointing himself an additional trustee of the settlement.

The Trustee Act, 1925, s. 36(1), provides:

> When a trustee, either original or substituted and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred

on him, or refuses or is unfit to act therein, or is incapable of acting therein, or is an infant, then, subject to the restrictions imposed by this Act on the number of trustees,

(*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(*b*) if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee;

may, by writing, appoint one or more other persons (whether or not being the persons exercising the power) to be a trustee or trustees in the place of the trustee so deceased, remaining out of the United Kingdom, desiring to be discharged, refusing or being unfit or being incapable, or being an infant, as aforesaid.

and s. 36(6) of the said Act provides:

Where a sole trustee, other than a trust corporation, is or has been originally appointed to act in a trust, or where, in the case of any trust, there are not more than three trustees (none of them being a trust corporation) either original or substituted and whether appointed by the court or otherwise, then and in any such case

(*a*) the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust; or

(*b*) if there is no such person, or no such person able and willing to act, then the trustees for the time being;

may, by writing, appoint another person or other persons to be an additional trustee or additional trustees....

The learned judge said that, if subsection (6) were the only relevant statutory provision to be considered, and if the matter were *res integra*, he would have construed it as a provision which did not exclude the donee of the power of appointing new trustees from the class of persons who could be appointed trustees, for he would have treated the phrase 'appoint another person or other persons' as pointing a contrast between the person or persons to be appointed on the one hand and those who were the existing trustees on the other. The matter however was not free from authority. The same words were to be found in a special power of appointing new trustees contained in a settlement which was construed by Kay, J. in *In re Skeats's Settlement* [1889] 42 Ch.D. 522 and in the statutory power contained in s. 10(1) of the Trustee Act, 1893, which was construed by Kekewich, J. in *In re Newen* [1894] 2 Ch. 297 and *In re Sampson* [1906] 1 Ch. 435. Both those judges had taken a very definite view as to the effect which should be given to the phrase 'another person or other persons' and had decided that they excluded the donee of the power from appointing himself. There was also the important consideration that the power to appoint contained in subs. 36(1) of the present Act is couched in somewhat different language from that found in subs. 36(6). It is a power to 'appoint one or more other persons' and there is the express provision in the words in brackets 'whether or not being the persons exercising the power' which make it clear that the donee of the power is not to be treated as excluded from the class of persons capable of taking the appointment. In subs. 36(6) there is not only the slightly different phrase but the complete absence of any such provision as the words in brackets. The result was that he, the learned judge, with the utmost reluctance felt driven to the conclusion that at any rate in a Court of first instance he ought not to give the phrase 'appoint another person or other persons' a meaning different from that which was given to the same words as they appeared in s. 10(1) of the Act of 1893 by Kekewich, J.

It might be said to be a capricious result that whereas when there is a vacancy the donee of the power can appoint himself a trustee, yet when there is not a vacancy he cannot do so. It appeared, however, to the learned judge that that was the result of the language of the Act and that that result could only be avoided either by an amendment of the Trustee Act, 1925, or as a result of a review by a higher court of the reasoning underlying the cases to which he had referred. For those reasons he felt constrained to declare that the deed of appointment of 15 August 1950 was invalid and ineffective on the ground that on the true construction of the Trustee Act, 1925, s. 36(6), the defendant had no power to appoint himself to be an additional trustee of the settlement.

The judgment has been upheld by the Court of Appeal [1951] 2 All E.R. 513

In re Hall (deceased) Barclays Bank Ltd. *v.* Hall and Others

Will—Administration—Bequest of shares—Shares part of testator's estate—General legacy—Right of legatee to dividend declared before satisfaction of legacy

CHANCERY DIVISION

DANCKWERTS J.

1951. April 17.
[1951] 1 All E.R. 1073.
[1951] 1 T.L.R. 850.

Adjourned summons to determine *inter alia* whether a certain bequest of shares which formed part of the testator's estate carried, as from the expiration of a year from the death of the testator until the satisfaction thereof by delivery of the shares to the legatee, the dividends declared on the shares.

By clause 6 of his will the testator, who died on 21 May 1945, gave and bequeathed 'the following number of £1 five per cent redeemable preference shares in Hall and Hall Ltd. to the persons set out below'. Then followed a list of persons against the name of each of whom there was specified a number of 'such shares'. At the date of his will and at the date of his death the testator was the absolute owner of 10,000 redeemable preference shares, and the number bequeathed by the will and a codicil thereto amounted to 10,000. In view of the provisions of the articles of Hall and Hall Ltd. it would not have been possible for the executor to buy shares to satisfy the bequests of shares if the testator had not owned sufficient of the shares to satisfy the bequests he made. On 31 October 1948 the executor transferred to the legatees the specified numbers of the said preference shares.

The legatees claimed the benefit of the dividends which were paid in respect of the shares which they received as from the expiration of one year from the testator's death. The learned judge held that the legacies in question were general legacies and until they were satisfied by the allocation of specific shares, the legatees were not entitled to the produce of the shares, but only to payment of four per cent per annum from and after the expiration of one year from the testator's death until the date of satisfaction.

INDEX TO LEGAL NOTES

included in Vol. LXXVII of the Journal

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Index to Legal Notes

TABLE OF CASES NOTED

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Table of Cases Noted