LEGAL NOTES

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AND
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John Shields and Co. (Perth) Ltd. *v.* Commissioners of Inland Revenue

Company—Governing director with practical control and unrestricted power to acquire shares—Ordinary shareholder holding shares giving under articles voting majority—Whether director had 'controlling interest'—Finance (No. 2) Act, 1939, s. 13 (9)

COURT OF SESSION
THE LORD PRESIDENT, LORD CARMONT and LORD KEITH
1950. May 30.
[1950] S.C. 441.

John Shields and Co. (Perth) Ltd. was incorporated in 1936 with a share capital of 50,000 shares of £1 each. Under the articles of association the governing director had practically the complete control of the company. It was provided that he could exercise all the powers expressed to be vested in the other directors who were bound to conform to his instructions. He was entitled to restrict their powers and to remove them. Among the powers expressly conferred upon the directors, and accordingly exercisable by the governing director, was a power to require any member to retire from membership and to transfer his shares at a valuation to such other member or person as the directors might admit to membership.

Mr A. K. Bell was the founder of the company and its original governing director, and under the articles his executors had a power to appoint a governing director in his place. He died in April 1942 and his executors appointed one of their number, Mr W. G. Farquharson, to be governing director.

Of Mr A. K. Bell's shareholding of 34,000 shares, the executors retained 32,000 shares as a trust holding registered in the names of the four executors of whom Mrs Camilla Bell, the widow, was the first and so, in accordance with the articles, entitled to vote at general meetings in the absence of arrangements to the contrary.

The question before the Court was whether during the period material for certain assessments to Excess Profits Tax the company was a company 'the directors whereof' had 'a controlling interest therein' within the meaning of the Finance (No. 2) Act, 1939, section 13 (9).

The Lord President said:

When reference is made in this section (as in a number of other sections in other Finance Acts) to directors having a 'controlling interest' in a company, it seems to me plain that the reference is to the possession by these directors of such a shareholding as would carry a majority by voting power at a general meeting of the company. That view is, I think, reinforced by the opinions of the House of Lords in the cases of *The British American Tobacco Co.* v. *Commissioners of Inland Revenue* [1943] A.C. 335, and *Commissioners of Inland Revenue* v. *J. Bibby & Sons* [1945] 1 All E.R. 667 to which we

were referred. Out of many passages, I might quote the following sentence from Lord Macmillan in the case of J. Bibby & Sons: 'The control of a company resides in the voting power of its shareholders,' and this further passage quoted by Lord Chancellor Simon from the opinion of Mr Justice Rowlatt in *B. W. Noble Limited* v. *Commissioners of Inland Revenue* 12 T.C. 911 when Mr Justice Rowlatt said that the reference to a person having a 'controlling interest' in a company was a reference to the situation of a man 'whose shareholding in the company is such that he is the shareholder who is more powerful than all the other shareholders put together in general meeting.' Now, whatever may have been the potentialities of the position of governing director held by Mr Farquharson, the actuality will not satisfy these tests. He might conceivably have exercised his powers to require other members of the company to transfer their shares to him. He might equally have arranged for the register entry in respect of the trust shareholding to be so altered that his name appeared first amongst the trustees. Those expedients or either of them might have rendered this case of no interest. But they were never adopted. We are bound, I think, to take the situation as it was during the material period, and throughout that material period I can discover no warrant for the view that Mr Farquharson had then in fact or in law a controlling interest in this company.

Lord Carmont and Lord Keith concurred.

Sharp's Trustees *v.* Commissioners of Inland Revenue

Estate Duty—Policies under the Married Women's Policies of Assurance (Scotland) Act, 1880—In favour of named wife 'whom failing the executor or assignees whomsoever' of the husband—Wife taking policy monies—Whether aggregable to determine rate of estate duty—Finance Act, 1894, s. 4

COURT OF SESSION

THE LORD JUSTICE CLERK, LORDS MACKAY, JAMIESON and PATRICK

1951. March 28.
[1951] S.L.T. 284.

On 27 January 1919 Harold Sidney Sharp, of Balruddery by Dundee, effected with the Royal Exchange Assurance Corporation two policies on his own life for £18,000 and £2000 respectively. Each policy contained the following wording:

This policy is effected under the provisions of the Married Women's Policies of Assurance (Scotland) Act, 1880, in favour of Mrs Alison Rua Wenley or Sharp, wife of the said Harold Sidney Sharp, whom failing the executor or assignees whomsoever of the said Harold Sidney Sharp.

The husband died on 27 January 1949, leaving the wife surviving.

The Commissioners of Inland Revenue assessed estate duty at 45%, being the rate determined by aggregation of the policies with other property attracting estate duty on the death, but the trustees claimed that each of the policies should be treated as an estate by itself, being property in which the deceased never had an interest within the terms of the proviso to Finance Act, 1894, s. 4. On the latter basis the assessment would be, as to the policy for £18,000, at 10% and, as to the policy for £2000, nil.

It was argued for the appellants that the destination-over in favour of the 'executor or assignees whomsoever' fell to be regarded *pro non scripto*: or, alternatively, that the words were confined to executors or assignees *ex lege*, not from choice: and if so, the destination-over had been fixed as at the date when the policies were taken out and the deceased had had no interest whatsoever, not even a contingent interest, nor could there be a resulting trust if there were a complete divestiture.

The Lord Justice Clerk (Thomson) said that the prospect of the wife's death was always present. Its occurrence would have given the husband a negotiable asset, and indeed the very possibility of its occurrence would have had the same effect. It was this difficulty which drove counsel for the appellants to the argument that the destination-over must be construed as limited to the heirs *in mobilibus* in intestacy. It might well be that a destination could be framed in policies of this sort which would have the effect of putting the policy monies beyond the control of the person who effected the policy so depriving him of any possible interest, but while there had been cases where the Courts had given the words 'executor or assignees' a limited construction, they were cases where the terms of the documents in question compelled such a construction and that was not so in the terms of the policies before him.

In a lengthy dissenting judgment Lord Mackay said that the question of non-aggregation for estate duty had not been before the Courts in connexion with policies under the Married Women's Property Acts, and he distinguished the cases of *Tennant's Trustees* v. *Lord Advocate* and *Attorney-General* v. *Pearson*, where the policies were not under the Act and so did not create trusts from the moment of issue. So long as the wife was living she had an indefeasible interest, and he could not imagine that the husband as a statutory trustee of newly existent property from its very birth could be held personally to have a coincidental interest. With regard to the question of a resulting trust, he took the view that such a conception only sufficed to bring into existence a further trust when and where all the original intentions of the truster had wholly failed.

Lord Jamieson said that the husband had created the trust and he had reserved in favour of his executor or assignees the right to the proceeds in the event of his wife failing. Apart from the fact that he had no antecedent right he was in the same position as a truster reserving to himself or his estate, in the event of the trust purposes failing, his radical right to funds put in trust by him. There seemed to his Lordship no reason why the husband should not have dealt by testamentary deed or by assignation with the interest which he had in the policies contingent on the trust purposes, in favour of his wife, failing. He had an interest, albeit a contingent one: but that was enough. The net was spread wide in favour of aggregation.

Lord Patrick concurred in the judgment of the majority of the Court.

Lort-Williams *v.* Lort-Williams

Divorce—Variation of settlements—Post-nuptial settlement—Life assurance policy—Effected during marriage for the benefit of the 'widow or children' of the assured—Matrimonial Causes Act, 1950, *s.* 25

COURT OF APPEAL

SOMERVELL, DENNING and HODSON, L.JJ.

1951. June 12.
[1951] 2 P. 395.
[1951] 2 All E.R. 241.
[1951] 2 T.L.R. 200.

The sole question on this appeal from Wallington J. was whether a life assurance policy purporting to be effected under s. 11 of the Married Women's Property Act, 1882, for the benefit of the widow or children of the assured was a post-nuptial settlement within the meaning of s. 25 of the Matrimonial Causes Act, 1950, which under that section the Court had power to vary on the dissolution of the marriage between the assured and the woman who was his wife at the date

when the policy was effected. Wallington J., confirming the decision of the registrar to that effect, held that the document was a post-nuptial settlement which on a decree of divorce granted to the wife of the assured the Court had power to vary. The Court of Appeal affirmed that decision and dismissed the husband's appeal from the order of Wallington J. The principal judgment was delivered by Somervell L.J. He said that it was clear that the parties thought (and he had no reason to think that they were wrong) that the policy fell within the provisions of s. 11 of the Married Women's Property Act, 1882. Counsel for the husband contended that it was not a nuptial settlement within the meaning of s. 25 of the Matrimonial Causes Act, 1950, because it did not contemplate the particular marriage then subsisting but was for the benefit of 'the widow' of the assured who might be his wife by a subsequent marriage. The learned Lord Justice said that he did not take that view. He agreed that the wife's interest under the policy was contingent and uncertain because it was dependent on circumstances, but it seemed to him that having been taken out during the married life—undoubtedly with the object of creating a fund from which the wife might benefit—it was *prima facie* a nuptial settlement in respect of the marriage then existing. It did not cease to be that because it also did something else. By using the word 'widow' it provided for certain other contingencies, among them the possibility of a later marriage and the husband leaving someone other than his then wife as his widow. Having regard to the words of the section, however, and applying ordinary common sense, he, the learned Lord Justice, did not think that a settlement ceased to be a nuptial settlement—in this case a post-nuptial settlement—because in certain contingencies the wife of a subsequent marriage, if there were one, might be the person to take. The other members of the Court concurred.

In re Kleinwort's Settlement Trusts

Westminster Bank Ltd. and Others *v.* Bennett and Others

Settlement—Shares in company—Sale by company of interests in its undertaking—Allotment of stock as consideration for—Distribution of stock among shareholders—Special capital profits dividend—Tenants for life and remaindermen—Capital or income of trust

CHANCERY DIVISION

VAISEY J.

1951. June 15.
[1951] 1 Ch. 860.
[1951] 2 All E.R. 328.
[1951] 2 T.L.R. 91.

Adjourned summons for directions to the trustees of the above-named settlement whether they should distribute £10,000 British Transport 3% stock received by them, as holders of £2000 stock of Thomas Tilling Ltd., to the persons entitled to the income of the trust fund, or whether they should retain any, and if so what part, of the said stock as capital.

The plaintiffs were the trustees of the settlement. There was a large number of defendants some of whom were interested in income as tenants for life under the trusts of the settlement and others in capital under those trusts in remainder. On 3 November 1944 the trustees invested £6000 of the trust funds in the purchase of £2000 ordinary stock of Thomas Tilling Ltd. at the price of £3 for each £1 of such stock. That was an authorized trust investment.

Thomas Tilling Ltd. had considerable interests in passenger road transport and road haulage undertakings. As a result of the Transport Act, 1947, those interests were sold by the company to the British Transport Commission for the sum of £24,800,000 which was satisfied by the allotment to the company of British Transport 3% Guaranteed Stock at 101%. At an extraordinary general meeting of the company its memorandum was altered so that the company became entirely an investment and holding company, and at the same meeting the company resolved to pay a special capital profits dividend which resulted in the receipt by the trustees of the £10,000 British Transport stock above mentioned.

The learned judge, following the decision of Romer J. in the case of *In re Sechiari* [1950] 1 All E.R. 417 (*J.I.A.* LXXVI [30]), held that the stock must be treated as dividend or income belonging to the life tenants. It was not disputed by the life tenants that in proper circumstances the Court had jurisdiction to apportion such a dividend between the life tenants and the remaindermen. He (the learned judge) was not entirely satisfied that the jurisdiction in such cases did not depend on and arise out of the power and duty of the Court to remedy a breach of trust; but, however that might be, it was no doubt a question of degree. The disparity between the amount of the original capital of the Tilling stock and the amount of the Transport stock was certainly very striking, but that was not, in his judgment, such as by itself to justify the Court's interference in the circumstances.

It was pointed out in argument that the trustees might have sold the Tilling stock 'cum rights', or might have sold the rights, in either of which cases the proceeds would have been capital, and it was suggested that they ought to have sought the directions of the Court whether it was their duty to adopt one or other of those courses for the benefit of capital, or, on the other hand, to remain as they did passive and to accept the Transport stock for the benefit of income. It was further suggested that, if the directions of the Court had been so sought, the trustees would have been ordered to arrange for half the Transport stock to go to capital and the other half to income, on the principle that equality is the best equity in the absence of any other measure. Finally, it was suggested that the Court ought to do now, what it could have done then—divide the Transport stock in equal shares between capital and income.

The learned judge said that he was unable to accede to those suggestions in the present case. While it might be that the suggested jurisdiction exists, and while he did not doubt the power of the Court to exercise it in suitable special circumstances, here in the opinion of the learned judge there were no special circumstances and he could not think that there was anything in the nature of a general rule that profits distributed in whatever shape as dividends and belonging under well-settled principles to the tenant for life must be subject to an apportionment for the benefit of capital.

The learned judge directed the trustees to deal with the Transport stock as part of the income of the trust funds of which the Tilling stock formed part.

In re Winder's Will Trusts
Westminster Bank Ltd. *v.* Fausset and Another

Will—Settlement—Stockholder in company—Sale by company during testator's lifetime of interests in its undertakings—Allotment of stock as consideration—Distribution of stock among company's stockholders—Special capital profits dividend—Payable to stockholders on register at a date in lifetime of testator—Not paid until after his death—Tenant for life and remaindermen—Capital or income

CHANCERY DIVISION

ROMER J.

1951. June 19.
[1951] 1 Ch. 916.
[1951] 2 All E.R. 362.
[1951] 2 T.L.R. 93.

Adjourned summons to determine whether on the true construction of the will of Arthur Wellesley Winder, and in the events which had happened, a sum of £1000 British Transport stock, received by the trustees of the will as a capital profits dividend on £200 ordinary stock of Thomas Tilling Ltd., which formed part of the testator's residuary estate, was to be treated as capital or income for the purposes of the trusts of the will.

Reference may be made to the cases of *In re Sechiari* [1950] 1 All E.R. 417 (*J.I.A.* LXXVI [30]) and *In re Kleinwort's Settlement Trusts* [1951] 2 All E.R. 328 (*ante* p. [4]) for the circumstances which resulted in the distribution as a special capital profits dividend among the stockholders of Thomas Tilling Ltd. of part of the British Transport stock which was allotted to the company as consideration for the transfer to the British Transport Commission of the company's interests in passenger road transport and road haulage undertakings. In both those cases the stock distributed as a special capital profits dividend was held to be income to which the tenant for life under the settlement was entitled. The circumstances of the present case were substantially different. The Court had to decide whether on the true construction of the testator's will and in the events which had happened the tenant for life was entitled to the dividend as income of the testator's residuary estate.

By his will the testator gave 'all my estate' to the trustees of his will in trust to raise a sum thereout to pay his funeral and testamentary expenses, debts and legacies bequeathed by him and then:

'(ii) To retain the residue of my property (hereinafter called "my residuary estate") in its existing state of investment at my death,

'(iii) To pay the income of my residuary estate to my niece Naomi Mary Fausset during her life,

'(iv) From and after the death of my said niece to stand possessed of my residuary estate (both capital and income) for....'

During the testator's lifetime a statement was issued by the chairman of Thomas Tilling Ltd. addressed to the stockholders informing them of the agreement with the British Transport Commission for the transfer to the Commission of the company's interests in passenger road transport and road haulage undertakings for the sum of £24,800,000 to be satisfied by the allotment to the company of British Transport 3% Guaranteed Stock at 101%, and that it was proposed to recommend to a meeting of the company to be held later a resolution to the effect that a capital distribution be made to the company's stockholders of part of the stock received. The testator died six

days after the notices calling a meeting of the company to consider the proposed resolution had been sent out to the stockholders and before the meeting was held and the resolution passed. The resolution declared that the capital distribution which was described as a special capital profits dividend would be paid to all stockholders who were on the company's register at a date before the testator's death, and in anticipation of the passing of the resolution the company's stock was quoted 'ex dividend' on the Stock Exchange during the lifetime of the testator.

Counsel for the tenant for life contended that there was no right vested in a member to anything until the resolution declaring the dividend was passed and that the mere fact that the dividend was payable by reference to the state of the register at a date when the testator was alive did not prevent it from being income payable to the tenant for life in accordance with the decision in *In re Sechiari.*

Counsel for an infant remainderman contended that although the dividend was not declared until after the death of the testator it was made payable in respect of a date or period during the testator's lifetime, and that what was ultimately received must be regarded as income which had accrued due before the testator's death and was therefore capital.

The learned judge accepted the argument presented on behalf of the remainderman. He said that the position immediately before the testator's death was that if he sold his stock he would sell it ex dividend in the absence of a special bargain. Later on he would receive a separate asset which at that time existed in the form of a contingent or future right to an asset. That formed part of his property at the date of his death just as much as other items of the estate formed part of his property and it seemed to him, the learned judge, that in those circumstances and taking all the dates and other relevant considerations into account it was quite impossible to say that this guaranteed stock was income of the residuary estate. It formed an asset of the testator's estate before his death. Romer J. made a declaration accordingly that the sum of British Transport stock received by the trustees was to be regarded as capital of the testator's residuary estate for the purposes of his will.

In re **Maclaren's Settlement Trusts**
Royal Exchange Assurance *v.* **Maclaren and Others**

Settlement—Purchase by trustees of ordinary stock of company with a view to participating in proposed special capital profits dividend—Capital or income—Intention to treat dividend as capital—Consent of tenant for life—Subsequent sale of stock and purchase of residence for tenant for life—Claim by tenant for life to an equitable charge on the house for the amount of the dividend

CHANCERY DIVISION

HARMAN J.

1951. June 28.
[1951] 2 All E.R. 414.
[1951] 2 T.L.R. 209

Adjourned summons to determine whether on the true construction of the trusts of a settlement, and in the events which had happened, the tenant for life was entitled to an equitable charge on a dwelling house, or the proceeds of sale thereof, of an amount equivalent to the proceeds of sale of a holding of British Transport stock received by the trustees as a capital profits dividend as the holders of

ordinary stock of Thomas Tilling Ltd. which proceeds of sale had been used by the trustees (together with capital moneys) in the purchase of the said dwelling house.

The transaction, as the result of which the stockholders in Thomas Tilling Ltd. received a special capital profits dividend in the form of a distribution of part of the British Transport stock allotted to the company as the consideration for the transfer to the British Transport Commission of the company's interests in passenger road transport and road haulage undertakings, has already been referred to in the cases of *In re Sechiari* [1950] 1 All E.R. 417 (*J.I.A.* LXXVI [30]), *In re Kleinwort's Settlement Trusts* [1951] 2 All E.R. 328 (*ante* p. [4]) and *In re Winder's Will Trusts* [1951] 2 All E.R. 362 (*ante* p. [6]). In the two cases first mentioned it was held that the British Transport stock so distributed was income and not capital in the hands of the trustees of a settlement and that *prima facie* the tenant for life under the trusts of the settlement was entitled to it. In the last-mentioned case it was held that on the true construction of a will and having regard to the relevant dates the capital profits dividend accrued as an asset of the testator's estate before his death and that the tenant for life was not entitled to it as income of the testator's residuary estate.

In the present case the dividend of British Transport stock had been treated as capital moneys both by the trustees of the settlement in question and the tenant for life under the settlement, and it was held that the tenant for life was not afterwards entitled to withdraw from the position which he had accepted and claim the dividend as income. The settlement was made by William Frederick de Bois Maclaren by an indenture of 18 November 1919 which recited that he had transferred or was about to transfer to trustees certain securities and provided that the trustees should stand possessed of the trust fund on trust to pay the income to his nephew during his life and in remainder for his children or issue as therein provided. As the result of the sale of a house purchased as a residence for the tenant for life under the powers of the settlement the trustees had in their hands for investment in November 1948 a sum of approximately £4000 of capital moneys. In these circumstances they became aware of the proposal announced by the chairman of Thomas Tilling Ltd. to call a meeting of the company to sanction the distribution among the stockholders as a special capital profits dividend of part of the British Transport Guaranteed Stock received by the company in respect of the transfer to the British Transport Commission of its passenger road transport and road haulage undertakings, and with a view to obtaining the benefit of that distribution they bought with the consent of the tenant for life 350 Thomas Tilling Ltd. ordinary stock units of £1 each at £6. 2*s*. 3*d*. at a total cost of £2,193 16*s*. 9*d*. In respect of that holding they received £1,750 British Transport stock as the capital profits dividend and later with the consent of the tenant for life they sold both holdings for the sums of £391. 9*s*. 3*d*. and £1,642. 8*s*. 3*d*. respectively. The aggregate proceeds together with other capital moneys were at the request of the tenant for life applied to the purchase of a freehold property for his residence at a cost of £5,750.

After seeing a report of the decision in the case of *In re Sechiari* the tenant for life sought to apply it to himself by claiming an equitable charge on the house or the proceeds of its sale for the sum which he would have received as tenant for life if he had claimed it when the British Transport stock was

received by the trustees as a special capital profits dividend. The remaindermen protested that in the circumstances that would work a monstrous injustice on them.

The learned judge decided that for two reasons the tenant for life had no claim to any part of the British Transport stock: first, that he assented to its purchase as a capital investment and, secondly, that he assented to its sale and re-investment as capital in the real estate for his benefit. In these circumstances he held that the stock in this trust and the proceeds of its sale had assumed the guise of capital and must be retained as such and that no question of apportionment arose.

Barclays Bank Ltd. *v.* Lyons and others

Annuity under will given free of income tax—Repayment of income tax by Revenue to annuitant—Liability of annuitant to account to trustees—Whether extended to repayment on business loss—Income Tax Act, 1918, *s.* 34.

CHANCERY DIVISION

ROMER J.

1951. July 11.
[1951] 2 All E.R. 507.
[1951] 2 T.L.R. 1256.

By his will dated 8 October 1942 Henry Lyons, who died on 25 March 1946, directed his trustees to stand possessed of his residuary estate and the income thereof upon trust to pay to his son Michael each week during his life £10 free of income tax, with other trusts over. The trustees paid the annuity out of income which had suffered deduction of income tax at the source.

In 1946–47 and in 1947–48 Michael Lyons sustained business losses and under the Income Tax Act, 1918, s.34 he claimed and recovered from the Revenue the whole of the income tax deducted at the source from the gross equivalent of his net annuity.

If there had been no business losses, the annuitant would have been entitled to relief in respect of personal allowance, reduced rate allowance, child allowance and life assurance premiums (hereinafter called the Statutory Allowances). Under the rule *In re Pettit* [1922] 2 Ch. 765, however, he would have been required year by year to refund to the trustees that part of the income tax repaid to him which was attributable to the annuity and it was held in *In re Kingcombe* [1936] Ch. 566 that in such a case the annuitant is a trustee of the right to repayment of income tax and must make a claim for the benefit of the trustees.

Romer J. considered three views on the position of Michael Lyons in relation to the trustees of the will as follows:

(1) that he was under no obligation to account to the trustees for any income tax repaid pursuant to Income Tax Act, 1918, s. 34.

(2) that under the rule *In re Pettit* he was accountable to the trustees for so much of the income tax so recovered as would equal the amount for which under that rule he would have been accountable if he had made no claim under s. 34 but had limited his claim to the Statutory Allowances.

(3) that he was accountable to the trustees for so much of the income tax recovered as represented income tax suffered in respect of the annuity.

The learned judge then referred to *Inland Revenue Commissioners* v. *Cook* [1946] A.C.1 where the House of Lords confirmed that, if a testator gives an

annuity free of income tax he confers on the annuitant two benefits namely (i) the amount of the annuity and (ii) the amount of the income tax in the event found to be payable on the annuity in the hands of the annuitant.

Romer J. said that he was unable to regard the 'additional gift' as a bequest in the full sense the word 'gift' ordinarily bears, for, in his judgment, it was a gift for a particular purpose and no other, and if not required for that purpose, it failed and could not be applied to some other purpose instead. He therefore adopted the third view, for otherwise the repayment of income tax would go, not in relief of the income tax liability of the annuitant (which was nil), but in relief of his business losses.

If Michael Lyons had carried forward his business losses under Finance Act, 1926, s. 33, instead of claiming repayment of income tax under Income Tax Act, 1918, s. 34, different considerations might well have arisen: but with that question the learned judge was not concerned as the losses had not been carried forward.

In 1948–49 Michael Lyons had not suffered business losses and Romer J. said that counsel for the annuitant had rightly conceded that there was no logical ground for excluding reliefs for child allowance and life assurance premiums from computations under the rule *In re Pettit.*

On 3 December 1951 the Court of Appeal (Evershed M.R., Jenkins and Morris L.JJ.) upheld the decision of Romer J. ([1951] 1 Ch. 1093; [1952] 1 All E.R. 34).

Hangkam Kwingtong Woo *v.* Liu Lan Fong

Trading with the enemy—British resident in enemy occupied territory—Contractual relationship with British subject who has escaped to territory of allied power—Power of attorney—Validity of acts done in exercise of

PRIVY COUNCIL

LORDS SIMONDS, NORMAND, OAKSEY and RADCLIFFE and RINFRET, CHIEF JUSTICE OF CANADA

1951. July 23.
[1951] A.C. 707.
[1951] 2 All E.R. 567.
[1951] 2 T.L.R. 442.

Appeal from an order of the Supreme Court of Hong Kong dismissing the appellant's appeal from an order of Sir Leslie Gibson C.J. decreeing specific performance of an agreement for the sale of property in Hong Kong.

Hong Kong was from 25 December 1941 until 1 September 1945 in the effective occupation and control of the Japanese between whom and His Majesty a state of war existed. The appellant who resided in Hong Kong and there carried on the business of a solicitor was in September 1942 minded to leave Hong Kong and go to Free China. With a view to the management of his affairs during his absence he gave to one Chan two powers of attorney, one in English dated 15 September 1942 and the other in Chinese. The English power of attorney gave to Chan wide general powers and specifically authorized him to sell the appellant's real and personal property as he should think fit. On or about 6 October 1942 the appellant left Hong Kong and thereafter resided in Free China until February 1946 when he returned to Hong Kong. At the date of his departure he was the owner of certain real property in Hong Kong known as 48 Kennedy Road. In these circumstances the appellant by his attorney Chan on 21 August 1943 entered into an agreement with one Koo Wan Sing for the sale to him of the said property. The purchase money was paid but the sale was not completed and on 25 May 1946 the purchaser died. On 28 May 1948 the respondent as his

executrix commenced these proceedings for specific performance of the agreement. The appellant defended the claim *inter alia* on the ground that at all material times the appellant and Chan were divided by the line of war, the appellant being in Free China then in alliance with His Majesty, and Chan being in enemy occupied territory, and that therefore the power of attorney was cancelled and abrogated and the appellant was not bound by documents which Chan purported to have executed on his behalf. In support of this contention the appellant relied on the principles of the common law of England which prohibited intercourse between British subjects and persons resident in territory in the occupation of an enemy state. To this contention the respondent replied, first, relying on the authority of *Tingley* v. *Müller* [1917] 2 Ch. 144, that by the common law of England a general power of attorney given by a British subject residing within His Majesty's allegiance to one who is or becomes an enemy of His Majesty is not abrogated or avoided by the outbreak of war, and secondly that there is no principle of the common law of Hong Kong which the Courts of Hong Kong administer which constrains them to treat the residents of Hong Kong, when that territory is in enemy occupation, as for all purposes divided by the line of war from former residents who have escaped to some part of His Majesty's dominions or to the territory of an ally free from enemy occupation.

Their Lordships examined first the latter plea. It was, they said, to be observed that the common feature of every statement of the principle which prohibited intercourse between British subjects and persons divided from them by the line of war was that the person with whom intercourse was illegal was regarded as an enemy by the Court which had to determine the illegality. At once the question arose: how this doctrine could be applied in the Courts of an enemy-occupied country. To take the present case, whom were the Courts of occupied Hong Kong to regard as an enemy? To whom deny *persona standi in judicio*? Presumably not to the appellant who had escaped from the occupied territory and sought refuge among the King's allies. To him no taint of enemy character could attach. To Chan, then, the attorney who remained in Hong Kong? But to whom, if not to Chan, were the Courts of Hong Kong open? The result seemed plainly to ensue that, whatever consequences might follow outside the occupied territory if one of its inhabitants who has left it sought to maintain or initiate relations with another who has stayed within it, yet the Courts of that country cannot regard either him who has left or him who has stayed behind as enemies of the King or enemies of each other. Their Lordships did not think it necessary to assess the general advantage or disadvantage of endeavouring to apply in the Courts of Hong Kong the rigid rules of the common law which might have to be applied outside the colony in regard to a transaction taking place within it. The purpose of their observations was to show that the contentions of the appellant involved a grave extension of the common law, and that that extension meant not merely the application of old principles to new circumstances or their adjustment to fresh needs, but the re-writing of them in conditions in which their foundations were shaken. In these circumstances their Lordships were of opinion that the judgment of the Court of Hong Kong in decreeing specific performance of the agreement should be upheld.

Their Lordships having reached the above conclusion it became unnecessary to determine whether a general power of attorney was an instrument of

a kind which must in ordinary cases be regarded as abrogated when donor and donee are divided by the line of war, for even if it was such an instrument, it was not, as their Lordships held, to be regarded as abrogated in the extraordinary case then under appeal. It was sufficient to say that *Tingley* v. *Müller*, on which the respondent strongly relied as authority for the proposition that such an instrument remained of full force and effect notwithstanding the division of war, was difficult to reconcile with later cases and had itself been the subject of criticism in the highest tribunal.

Friends Provident and Century Life Office and Another *v.* Investment Trust Corporation Ltd. and Others

Company—Computation of dividend—Payment of dividend tax free up to 6s. in the pound

HOUSE OF LORDS

LORDS SIMONDS, GODDARD, MORTON OF HENRYTON, RADCLIFFE and TUCKER

1951. July 26.
[1951] 2 All E.R. 632.

Appeal by the Friends Provident and Century Life Office from an order of the Court of Appeal dated 25 October 1950 reversing an order of Vaisey J. dated 23 February 1949.

Vaisey J. held that in computing the net amount of the dividend payable by Godfrey Phillips Ltd. pursuant to their articles of association to holders of 'B' cumulative preference shares of that company, it was proper to assess the amount of income tax deductible in excess of 6*s.* in the pound on the amount of the dividend (calculated at 6%) grossed up at 6*s.* in the pound. The Court of Appeal held that the amount of excess income tax ought to be calculated on the net amount of the dividend at 6% and not on the grossed-up amount.

The article which defines the rights in regard to dividend of the 'B' cumulative preference shares is art. 5 (A) (ii) and reads as follows:

> The "B" cumulative preference shares confer the right to a fixed cumulative preferential dividend at such rate that after deduction of income tax thereon at the current rate for the time being... the amount remaining shall be the clear sum of six per cent per annum on the capital paid up thereon less the amount of any income tax for the time being payable in excess of 6*s.* in the pound computed on the gross sum of six per cent per annum on such capital.

From 1939 to 1945 the company without any objection being raised calculated the dividend on these shares by deducting from the clear sum of 6% the tax at the excess rate calculated on the actual gross amount of the dividend required to produce a net dividend of 6% after deduction of tax at 6*s.* in the pound.

In 1948 the correctness of this method was challenged by the Investment Trust Corporation Ltd. and other holders of "B" cumulative preference shares in Godfrey Phillips Ltd. and Vaisey J. made the order referred to affirming the practice of the company.

In the case of *Austin Motor Co. Ltd.* v. *British Steamship Investment Trust Ltd.* (*J.I.A.* LXXVI [33]), the provision in the articles of the Austin Company relating to the payment of dividend on its "B" cumulative preference shares closely resembled that of Godfrey Phillips Ltd. quoted above and on a similar question as to the proper deduction to be made from the net dividend of 6% coming before

Wynn-Parry J. on 9 November 1949 that learned judge felt himself constrained to adopt the same construction of the article as that given to it by Vaisey J. in the present case; but on 15 February 1950 the Court of Appeal reversed his decision and held that the tax to be deducted from the clear sum of 6% in respect of the excess tax over six shillings in the pound fell to be calculated on the net dividend of 6% and not on the grossed-up dividend. In these circumstances the time for appealing from the order of Vaisey J. was extended and the order of that learned judge was reversed by the Court of Appeal as stated above.

The House of Lords affirmed the decision of the Court of Appeal. Lord Morton of Henryton in the course of his speech said:

> The respondents' contention is a simple one, which can best be stated by taking as an example a year in which the standard rate of income tax is 9*s.* in the pound. In such a year it is said that the first part of the article would entitle a holder of one hundred "B" cumulative preference shares of £1 each to receive the sum of £6 that being 'the clear sum of six per cent per annum on the capital paid up thereon'. The latter part of the clause would then come into operation to reduce the sum receivable by 3*s.* in the pound, being the amount of income tax for the time being payable in excess of 6*s.* in the pound, computed on the sum of 6% per annum of such capital. The shareholder would therefore receive a sum of £6 less 18*s.*, or £5 2*s.*, in that year.
>
> My Lords, if the word 'gross' had not occurred in the passage under discussion there can be no doubt that the contention just set out would be correct. It would correspond exactly with the language of the article. It is said however by counsel for the appellants that the word 'gross' is of very great importance and they rely especially on the contrast between the words 'the *clear* sum of six per cent per annum on the capital paid up thereon' in the first part of the article and the words 'computed on the *gross* sum of six per cent per annum on such capital'. They point out that if the first respondent's argument is correct these two sums are arithmetically the same and they contend that the draftsman of the article cannot possibly have used two different words to denote the same sum. On this foundation they have built up a somewhat complicated argument which really amounts to this, that the words 'the gross sum of six per cent per annum on such capital' must be read as meaning what they describe as a 'grossed-up sum' that is 'such sum as after deduction of tax at the rate of 6*s.* in the pound will produce a net sum of six per cent per annum on such capital'.
>
> My Lords, in my view, there are three reasons why this contention cannot succeed. In the first place I do not think that the simple words used in the article are capable of the construction sought to be placed on them by the appellants. In the second place even if the article could be read as referring to a 'grossed-up' sum I cannot find in the article any indication of the rate of tax which is to be taken for the purpose of the 'grossing-up'. In the third place I think that the contrast between the words 'clear sum' in the first part of the clause and the words 'gross sum' in the latter part is capable of a simple explanation. In the first part of the clause what is contemplated is a sum which will remain after deduction of income tax at the current rate from a larger sum. Such a sum would naturally be described as a 'clear sum'. In the latter part of the clause what is contemplated is a sum from which income tax at a certain rate is to be deducted and it is not inappropriate to describe such sum as a 'gross' sum.

APPEALS

In re Brassey's Deed Trusts, Coutts and Co. v. *Inland Revenue Commissioners.* *J.I.A.* LXXVII [17]; [1951] 1 Ch. 979; [1951] 2 All E.R. 353; [1951] 2 T.L.R. 461.

On 20 June 1951 the Court of Appeal (Evershed M.R., Jenkins and Birkett L.JJ.) affirmed the decision of Romer J. in the Court below.

In re Power's Settlement Trusts, Power v. *Power*. *J.I.A.* LXXVII [31]; [1951] 1 Ch. 1074; [1951] 2 All E.R. 513; [1951] 2 T.L.R. 355.

On 9 July 1951 the Court of Appeal (Evershed M.R., Jenkins and Birkett L.JJ.) upheld the decision of Wynn-Parry J. in the Court below.

In re Duff's Settlement Trusts. *J.I.A.* LXXVII [27]; [1951] 1 Ch. 923; [1951] 2 All E.R. 534; [1951] 2 T.L.R. 474.

On 16 July 1951 the Court of Appeal (Evershed M.R., Jenkins and Birkett L.JJ.) upheld the decision of Harman J. in the Court below.

In re D'Avigdor-Goldsmid's Life Policy, D'Avigdor-Goldsmid v. *Inland Revenue Commissioners*. *J.I.A.* LXXVII [19]; [1951] 1 Ch. 1038; [1951] 2 All E.R. 543; [1951] 2 T.L.R. 381.

On 16 July 1951 the Court of Appeal (Evershed M.R., Jenkins and Birkett L.JJ.) upheld, though on different grounds, the decision of Vaisey J. in the Court below that estate duty was not payable under Finance Act, 1894, s. 2 (1) (*c*), but reversed his judgment so far as it related to liability under s. 2 (1) (*d*).

Dealing first with the claim under s. 2 (1) (*c*) the Court held that the word 'donee' in s. 11 (1) of the Customs and Inland Revenue Act, 1889, as applied by s. 2 (1) (*c*), was not apt to include the child of a marriage taking under his parents' marriage settlement, since he was within the marriage consideration and not a volunteer.

The Court was inclined to agree that the word 'donee' in s. 2 (1) (*c*) ought not to be restricted to one or more specified person or persons designated as the donee or donees from the date of the donation. In the case, for example, of a voluntary settlement in favour of such one of a class as the donor or some other might appoint and in default of appointment over, the individual ultimately entitled to take would none the less be a 'donee' for whose benefit the policy had been kept up from the date of the settlement, although the appointment in his favour was only made shortly before the policy matured. If it were otherwise, surprising and capricious results would follow. It was not however necessary for the Court to express a concluded opinion on that question. Counsel for the plaintiff had taken the point, not argued before Vaisey J., that as the settlement was made on the marriage of the deceased, the plaintiff as a child of the marriage was within the marriage consideration. Marriage settlements have always been treated as made for good consideration so that not only the spouses but also the issue of the marriage (as being 'within the marriage consideration') can enforce them; and the Court held that the plaintiff could not aptly be described as a donee within s. 2 (1) (*c*).

Turning to the claim under s. 2 (1) (*d*) Evershed M.R. reviewed the authorities and then said:

> In this state of the authorities, and, particularly in view of the express and unqualified approval accorded to *Attorney General* v. *Robinson* by this Court in *A.-G.* v. *Murray*, it seems to us that, notwithstanding *Lord Advocate* v. *Hamilton's Trustees*, our duty is to apply to the present case the law as laid down in *A.-G.* v. *Dobree* and *A.-G.* v. *Robinson*. Those cases appear to us clearly to proceed on the principle that the terms of the ordinary policy of life assurance are in themselves such as to produce for the owner of the policy on the death of the person whose life is insured a beneficial interest then accruing or arising in the shape of an immediate right to receive the policy moneys in the sense in which the expression 'beneficial interest accruing or arising...on the

death of the deceased' is used in s. 2 (1) (*d*). Once this principle is accepted, it seems to us to dispose of the plaintiff's argument and to lead necessarily to the conclusion that if a policy has been provided by the deceased and has been so disposed of that on his death the moneys which then became payable under it are payable to or for the benefit of some other person or persons, whether that result is achieved through the medium of a trust created in the lifetime of the deceased or by means of an assignment in his lifetime of the legal as well as the beneficial interest in the policy to such other person or persons, all the conditions of liability under s. 2 (1) (*d*) are satisfied. Thus, if A effects a policy of assurance on his life, assigns the whole legal and beneficial interest in it to B, and pays or provides for the payment of all premiums down to the date of his death, while B retains the policy down to the date of A's death and receives the moneys then becoming payable under it, the result on the principle above stated must, as it seems to us, be that a beneficial interest in the shape of the policy moneys—or the right to immediate payment of the policy moneys—will have accrued or arisen to B on the death of A within the meaning of s. 2 (1) (*d*), and that it can avail B nothing that the contract (i.e. the policy) under which this beneficial interest so accrued or arose to him became his absolute property at the date of the assignment, or that he might, had he chosen, have sold or surrendered the policy at any time after that date.

In the present case, the effect of Finance Act, 1939, s. 30 (1), appears to be that, subject to the question of insufficiency, the plaintiff can be in no better position for the purposes of the claim under s. 2 (1) (*d*) than he would have been in if the deceased had himself in fact provided for the payment of all the premiums on the policy from the date of the appointment of 10 November 1934, down to the date of his death, and, if the deceased had in fact done this, the claim would, so far as we can see, have been unanswerable on the footing that *A.-G.* v. *Dobree* and *A.-G.* v. *Robinson* are to be taken as correctly stating the effect of s. 2 (1) (*d*) in relation to policies of life insurance.

We have not overlooked the fact that in all the cases to which we have referred the policies were the subject of settlements or trusts. In our view, as appears above, the principle on which *A.-G.* v. *Dobree* and *A.-G.* v. *Robinson* are based in no way depended on this circumstance. On that principle the beneficial interest is to be regarded as accruing or arising under and by virtue of the contract of insurance irrespective of any settlement or trust affecting the policy moneys. The only relevance of a settlement or trust appears to be that where the policy moneys pass under it to a person taking a life interest only, the beneficial interest accruing or arising on the death of the deceased and so attracting duty under s. 2 (1) (*d*) is limited to the value of that life interest (*Westminster Bank Ltd.* v. *Attorney General* [1939] Ch. 610).

In the course of the argument, counsel for the plaintiff called attention to a statement in Green's Death Duties, 2nd ed. p. 100, that:

> 'It is not the official practice to claim duty in the case of a fully-paid policy given by the deceased more than five years before his death to a donee absolutely.'

Counsel for the Crown admitted that his argument involved the conclusion that duty would as a matter of law be exigible even in those circumstances. That may well be so, but for the present purpose we need only say that this is not such a case. In the result, we would allow this appeal so far as the claim under s. 2 (1) (*d*) is concerned.

The following comment is made in the First Supplement to the Eleventh Edition of Dymond's *Death Duties*.

In the light of the above decision it seems that, where A settles a policy on his or her life by an ordinary ante-nuptial settlement, on trust to receive the policy moneys on his or her death and invest and pay the income to his or her spouse for life with remainders for the issue, the death of A will not give rise to a claim under s. 2 (1) (*c*) (the spouse and issue being within the marriage consideration), but only under s. 2 (1) (*d*); and, if the spouse survives, the claim will be only on the value of the life interest, not on the capital, as hitherto claimed by the Revenue. On the death of the spouse, duty will be chargeable on the capital of the investments representing the policy moneys, subject to exemption *pro tanto* under s. 5 (2) of Finance Act, 1894.

LEGAL NOTES

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

One of Her Majesty's Counsel

AND

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

Trust and Claims Secretary, The London Life Association Ltd.

In re Cunliffe-Owen (deceased)—Mountain *v.* Comber and Others

Will—Incidence of Dominion death duties—Incidence of United Kingdom estate duty on assets in Canada and Australia—Apportionment of reliefs from double taxation—Double Taxation Relief (Estate Duty) (Canada) Order, 1946 (S.R. & O. 1946, No. 1884)

CHANCERY DIVISION
WYNN-PARRY J.

1951. June 6.
[1951] 1 Ch. 964.
[1951] 2 All E.R. 220.
[1951] 1 T.L.R. 1073.
[1951] 2 T.L.R. 231.

This was a summons to determine a number of questions on the incidence of various death duties in respect of property passing on the death of Sir Hugo Cunliffe-Owen who died on 14 December 1947.

By his will dated 22 November 1947 the testator gave certain pecuniary legacies and

By Clause 6 he gave to his trustees £15,000 upon trust to pay thereout to J. W. S. Comber on each distribution of capital of his residuary estate such a sum as should bear the same proportion to £12,500 as the distributed capital of the residuary estate should bear to the total residuary estate, and to raise and pay out of the £15,000 legacy the duties on payments made out of it.

By Clause 7 he directed that 'subject to Clause 6 so much of the death duties payable... in respect of all legacies... as shall be equal to the death duties at the rates in force at the date of this my will shall be paid and discharged out of my residuary estate'.

By Clause 9 he further directed that, subject to the payment of his funeral and testamentary expenses and debts and the legacies and annuities by his will given free of duty and all estate duty and succession duty or legacy duty payable on his real estate and the duties on any legacies or annuities given free of duty, his trustees should hold his residuary estate upon trust as to one moiety for Miss Marjorie Cunliffe-Owen absolutely and as to the other moiety upon trust for her for life and after her death for the children of the testator.

The testator died possessed of substantial holdings in Canada (including Quebec) and in South Africa; and the summons raised the question whether, and if so to what extent, the legacies and the Clause 6 legacy should bear (*inter alia*) the United Kingdom estate duty on the Dominion assets and the succession duties imposed in Canada and South Africa on those assets.

Referring first to Clause 6 Wynn-Parry J. pointed out that £2500 represented the United Kingdom legacy duty at 20% on £12,500, so that the testator envisaged that the beneficiary would receive £12,500, the remaining £2500 being used to pay the United Kingdom legacy duty. Turning next to Clause 7

he said that *prima facie* a direction by which duties are thrown on residue in exoneration of legacies is to be construed as referring only to United Kingdom death duties, but if the attendant circumstances were sufficiently compelling it might be given a wider scope. Evidence had been submitted that the testator had sought advice as to how to minimize the duties on Dominion assets, but that was not such a compelling circumstance; and if the testator had intended to throw the burden of Dominion duties on to residue, nothing would have been simpler than to insert express words to that effect. His lordship added that the opening passage in Clause 9 led to the same conclusion, for the estate duty, succession and legacy duty there mentioned could, in his view, mean only United Kingdom duties. He held accordingly that the legacies must bear their proper proportions of the Dominion duties.

On the construction of Clause 6 his lordship added that in the clause itself the testator decided to exhaust his bounty as regards the exoneration of the legatee from liability for duties; so that if there were a deficiency through the sum of £2500 not being sufficient (as, indeed, must be the case), the legatee could not have recourse as against residue to the provisions of Clause 7.

Canadian succession duty is a duty based on the value of the assets in Canada after setting off debts there, and where such assets form part of the estate of a person who dies domiciled outside the Dominion it is necessary to ascertain the proper proportion attributable to Canadian assets of the value of the benefit given to each beneficiary (including residuary legatees), because the rate of Canadian duty depends in part on relationship and is payable by the individual successor.

The Double Taxation Relief (Estate Duty) (Canada) Order, 1946, provides by Article 5 (1) as follows:

> Where one contracting government imposes duty by reason of a deceased person being domiciled in some part of its territory at the time of his death that contracting government shall allow against so much of its duty (as otherwise computed) as is attributable to property situated in the territory of the other contracting government a credit (not exceeding the amount of the duty so attributable) equal to so much of the duty imposed in the territory of the other contracting government as is attributable to such property.

The learned judge had already held that the direction in Clause 6 extends to all United Kingdom duties, including United Kingdom estate duty on moveable property abroad, which but for that direction would be payable by the legatee; and that in so far as the provision made was insufficient, such duties must be borne by the legatee personally. It accordingly became necessary to determine whether the Clause 6 legatee was entitled to any part of the double taxation relief.

His lordship said that it could not be doubted that, apart from any direction in the will to the contrary, the United Kingdom estate duty payable on foreign personalty is not a testamentary expense, because the foreign personalty does not come to the hands of the executor *virtute officii*; it is a charge on that personalty. He accordingly felt bound to approach Clause 9 with the general rule in mind to see to what extent, if at all, the testator had displaced it. The testator had expressly thrown on to residue the United Kingdom estate duty on real estate, which is not a testamentary expense, but he had not mentioned

United Kingdom estate duty on Dominion assets, so that the learned judge said he must hold that Clause 9 did not cover United Kingdom estate duty on Canadian assets.

Wynn-Parry J. said that the credit must enure for the benefit of the persons who had to bear the United Kingdom estate duty on the Canadian personalty. He would direct therefore that any sums paid to the Clause 6 legatee or applied in payment of duties under that clause should be treated as paid out of assets in Canada and other assets of the estate in the proportion which those classes of assets, as valued for United Kingdom estate duty respectively, bear to one another; and that as between the Clause 6 legatee and the residuary legatees, the Clause 6 legatee would be entitled to a part of the relief proportionate to the United Kingdom estate duty on Canadian assets charged against the benefits under Clause 6.

It remained to apportion the balance of the credit among the residuary legatees. They must, said his lordship, bear the duty according to their interests in the residuary estate, and the relief must be applied in the same way as the burden is borne, and not by reference to the amount of Canadian succession duty borne by the respective residuary legatees, notwithstanding that such duties were not assessed at a uniform rate owing to differences in relationship of the legatee to the testator.

The incidence of South African succession duty is similar to that of the Canadian duty, but there is no corresponding double taxation relief. The Inland Revenue, however, concessionally allow the Dominion duty to be treated as if it were a debt of the testator here. Wynn-Parry J. said that the same principles should be applied as those which governed the incidence of Canadian succession duty.

In the Estate of Botting

Will—Destruction—Conditional revocation—No direct evidence of destruction

PROBATE DIVORCE AND ADMIRALTY DIVISION
HAVERS J.
1951. Oct. 19.
[1951] 2 All E.R. 997.
[1951] T.L.R. 1089.

Action by the plaintiff, William George Botting, as executor to prove a will dated 14 February 1947 as the last will of the testator, Harrie Ewart Botting. The defendant, Hugh Botting, and the parties cited pleaded that the will had been destroyed by the testator *animo revocandi*. In reply the plaintiff invoked the doctrine of conditional revocation, and said on the evidence which had been adduced that when the will was destroyed by the testator he had not an absolute intention to destroy it, but that the intention was only contingent upon the validity of another testamentary document executed by the testator on 11 June 1949 which was not a valid will because it was not duly executed and attested in accordance with the formalities prescribed by the Wills Act. The plaintiff produced the completed draft of the will of 1947, and the learned judge was satisfied that it was an accurate draft showing the contents of the will as executed. It was common ground that that will was in the custody of the testator after its execution, and that as the will was not forthcoming on his death there was a presumption that it had been destroyed by him *animo revocandi*. There was no direct evidence of the physical destruction of the will, and the defendant contended that the doctrine of conditional or dependent

relative revocation had no application and that there was nothing to rebut the presumption that the will was destroyed *animo revocandi*. For that proposition he relied on a decision of Lord Penzance in the case of *Homerton* v. *Hewett* (1872) 25 L.T.R. 854.

The learned judge said that he had to decide the question: 'With what intent was the will of 1947 destroyed by the testator?' and he had come to the conclusion on the evidence that the document of 11 June 1949 was executed by the testator in the belief that it was a will and intending that it should be a will, and that when he destroyed the will of 1947 he had no intention of destroying it unconditionally; but that its destruction was conditional on another will being made and taking its place. The decision of Lord Penzance did, however, create a difficulty. The headnote to the case of *Homerton* v. *Hewett* read:

> A testator executed his will at his solicitor's office, and took it away with him. It was never seen afterwards, and could not be found after his death in his repositories. He had made declarations inconsistent with his testamentary depositions shortly before his death, but the Court held that, he being the last custodian of the will, and it not being forthcoming, the presumption of revocation arose and was not rebutted. The Court will not apply the principle of dependent relative revocation except there is proof of the actual destruction of the instrument.

On that principle the learned judge was asked to pronounce against the will of 1947. It was argued that in considering the question whether the doctrine of dependent relative revocation applied he was not entitled to presume the fact of destruction or to draw the inference from the evidence that the testator did destroy the will. The learned judge said that it seemed to him that in the circumstances of this case he was bound to make that *prima facie* presumption, and then it was open to the plaintiff to bring before him, if he could, evidence to rebut it and show what the intention of the testator was in destroying the will. The learned judge said that if he was satisfied on the whole of the evidence that the destruction was conditional on another will being made, then the doctrine of dependent relative revocation applied, and if it turned out that that later instrument was invalid because it had not been properly attested, the result was that the will of 1947 was not revoked because the testator did not have any *animus revocandi*. The judgment of Lord Penzance created great difficulty, but he, the learned judge, did not think that Lord Penzance meant that it was necessary to call some witness who could say 'I saw the testator burn or otherwise destroy the document'. There are various ways in which the fact of destruction or time of destruction can be proved, and the evidence before him was such that he felt that the proper inference to draw from it was that the will was destroyed by the testator conditionally and that he was able to put an approximate time and date when the destruction took place. If so, that would be consistent with the decision of Lord Penzance. He thought that there was sufficient evidence to satisfy him that the will was destroyed by the testator shortly before 11 June 1949, when he made the new document which he thought and intended to be a will.

In those circumstances there was nothing to preclude him from applying the doctrine of dependent relative revocation, and he held that it did apply and pronounced for the will of 14 February 1947 in terms of the completed draft which was produced.

Legal Notes

In re Pomfret's Settlement—Guest and Another *v.* Pomfret and Another

Settlement—Tenant for Life—Compensation for damage to house—Capital or income—Compensation (Defence) Act, 1939, s. 2 (1) (*b*)

CHANCERY DIVISION

ROXBURGH J.

1951. Nov. 1.
[1952] 1 Ch. 48.
[1951] 2 All E.R. 951.
[1951] 2 T.L.R. 990.

Adjourned summons to determine whether, on the true construction of the documents constituting a compound settlement, a sum of £7007. 0*s*. 8*d*. paid under s. 2 (1) (*b*) of the Compensation (Defence) Act, 1939, in respect of freehold property which was subject to the trusts of the settlement belonged in equity to the tenant for life or constituted capital moneys.

By a settlement dated 13 May 1935 an estate known as the Mystole estate was settled by way of strict settlement. The tenant for life was at all material times Virgil Pomfret. Under the property legislation in 1925 he could not have a legal life estate. His life estate was equitable; but he was by a clause in the settlement made unimpeachable of waste. On the settled estate was a house which in October 1939 was requisitioned by or on behalf of the military authorities and rent was paid. In the summer of 1946 the military authorities gave up occupation. Very considerable damage was then found to have been done during the occupation, and in respect of it a sum of £7007. 0*s*. 8*d*. was obtained by the tenant for life by way of compensation. In 1948 the house was sold for £5500. It was plain that the damage done during the occupation seriously depreciated the value of the house, with the result that it realized much less than it would otherwise have done.

The question for the Court was whether under those circumstances the tenant for life was under any equitable obligation to treat any part of the compensation money as capital held on the trusts of the settlement.

The learned judge said that, apart from authority, he would be at a loss to understand why no part of the compensation money should be attributed to capital. It is true, he said, that the tenant for life is without impeachment of waste, but it did not seem to him that this was a question of waste by the tenant for life. The waste was by the military authorities, and if, as he assumed, the compensation was exactly equivalent to the damage done and treating the inheritance and the compensation money as an entity, there was no waste. There had been neither profit nor loss. If, again, it were not for authority he would find difficulty in understanding how this sum could be called a casual profit. It might be casual, but why was it a profit?

The learned judge considered, however, that he was bound by the decision of Sargant J. in the case of *In re Williams' Settlement* [1922] 2 Ch. 750 which arose under the Indemnity Act, 1920. Sargant J. held that the compensation money received in respect of damage to settled property was a casual profit and that the tenant for life, being unimpeachable of waste, was entitled to retain the amount recovered by him as compensation for the damage done. He, the learned judge, was unable to see any difference between that case and the present which would enable him to reach a contrary conclusion. He accordingly decided with great reluctance that the compensation money in question belonged in equity to the tenant for life and he made a declaration to that effect.

In re Rose (deceased)—Rose and Others *v.* Inland Revenue Commissioners

Estate duty—Gift by deceased—Transfer of shares—Date of transfer before relevant date—Registration of transfer after that date

CHANCERY DIVISION

ROXBURGH J.

1951. Nov. 2.
[1951] 2 All E.R. 959.
[1951] 2 T.L.R. 1066.

Adjourned summonses to determine the liability to estate duty of two blocks of shares in a private company gratuitously transferred by the deceased to or for the benefit of his wife and child before 10 April 1943, the relevant date having regard to the Finance Act, 1946, sched. XI, prior to which the gifts must have been made if duty were not to be levied thereon under the Finance Act, 1894, s. 2 (1) (*c*). The transfers were not registered until after 10 April 1943, and the Inland Revenue Commissioners claimed estate duty on the footing that the gifts were not complete until the transfers were registered.

By a transfer dated 30 March 1943, Eric Hamilton Rose, of Leweston Manor, Sherborne, Dorset (who died on 16 February 1947), in consideration of the love and affection he had for his wife, Rosamund Mary Rose, transferred to her 10,000 shares of £1 each in Leweston Estates Co. to hold subject to the several conditions on which he held the same at the date of the execution thereof, and she did thereby agree to take the said shares subject to the conditions aforesaid. By another transfer of the same date, the deceased in consideration of the sum of 10*s.* expressed to be paid by his wife and Edward Thomas Read transferred to them another 10,000 shares of £1 each in the same company to be held subject to the same conditions, and they did thereby agree to accept them subject to such conditions. By a settlement of the same date and made between the deceased of the first part, his wife of the second part and his wife and Mr Read as trustees of the third part, trusts were declared of the second block of shares under which the wife and the son of the deceased, Hugh Lancelot St Vincent Rose, were beneficially interested. Art. 33 of the company's articles of association empowered the directors in their absolute and uncontrolled discretion, and without assigning any reason, to decline to register any proposed transfer of shares.

The transfers of the shares were not registered by the company until 30 June 1943, and it was common ground that there would be a charge for estate duty unless before 10 April 1943 there was a *bona fide* disposition of the said shares purporting to operate as an immediate gift *inter vivos* (whether by way of transfer, delivery, declaration of trust or otherwise) under which *bona fide* possession and enjoyment was assumed by the donees immediately on the gift and thenceforth retained to the entire exclusion of the donor or of any benefit to him by contract or otherwise.

Counsel for the Crown contended that the transfers transferred no interest in the shares, legal or equitable, but that both the legal title and the whole beneficial interest passed together on the registration of the transfers by the company after the critical date. Counsel for the transferees contended that by executing the transfers and putting them and the share certificates into the possession and power of the transferees the deceased had transferred the whole of his beneficial interest in the shares and that a Court of equity would at any time thereafter enforce the equitable rights of the transferees against the

deceased as registered holder, and that if the company had refused registration of the transfers he would have been treated as trustee of the shares for them.

After reviewing the relevant authorities the learned judge held that, on the true construction of the transfers, they operated to transfer the whole beneficial interest in the shares and that the transferees could compel the donor to give effect to the equitable interests which he had created. To hold the contrary would necessarily involve holding that there could be no gift by a registered holder by transfer of the shares before registration of the transfer but only an inchoate or imperfect gift, because an unenforceable transaction which transfers no beneficial interest is not a gift at all. It was not open to him so to hold having regard to the later authorities and in particular *In re Rose* [1949] Ch. 78, in spite of many passages in the earlier authorities which seemed to point in that direction.

The contention of the taxpayers was correct and there would be a declaration that no duty was payable.

On 4 April 1952 the Court of Appeal (Evershed M.R. and Jenkins and Morris L.JJ.) upheld the decision of the Court below [1952] 1 All E.R. 1217.

Gospel *v.* Purchase (Inspector of Taxes)

Income Tax—Professional earnings—Payments falling due after death—Whether assessable to tax under Case III or Case VI of schedule D—Income Tax Act, 1918

HOUSE OF LORDS

LORD CHANCELLOR (SIMONDS), LORDS NORMAND, MORTON OF HENRYTON, TUCKER AND ASQUITH OF BISHOPSTONE

1951. Nov. 29.
[1951] 2 All E.R. 1071.
[1951] 2 T.L.R. 1112.

The question in this appeal from the judgment of the Court of Appeal was whether the appellants who are the executors of the late Leslie Howard Stainer were assessable to income tax on certain sums which had been earned by him in the course of his profession but in the events that happened fell due for payment after his death.

Leslie Howard Stainer, who was professionally known as Leslie Howard, was killed by enemy action on or about 1 June 1943. He had in the exercise of his profession entered into certain contracts current at his death under which the sums in question were paid to the appellants.

The relevant contracts were three in number, made respectively with (*a*) British National Films Ltd. on 31 October 1940, (*b*) Ortus Films Ltd. on 13 December 1940 and (*c*) Misbourne Pictures Ltd. on 18 September 1940. Under each of these contracts Mr Howard agreed to perform in a cinematograph film which was to be made by the company, and under contracts (*a*) and (*c*) to give his services as producer-director. His remuneration was to be the payment to him of certain lump sums, £5000, £2000 and £5000 respectively, payable in each case during production of the film, under contracts (*a*) and (*c*) payment of a specified proportion of the gross sums received by the company in respect of its exploitation of the film, and under contract (*b*) a sum equal to 14/49ths of the company's share in the net profits from the distribution of the film. Under contract (*c*) Mr Howard was to receive, in addition to the lump sum of £5000 payable during production, a further sum of £10,000 to be paid within two years and six months after the trade show of the film. As regards this last-mentioned contract it was agreed after Mr Howard's death between the company and the appellants that its

terms should be varied by substituting for the £10,000 the sum of £11,000 payable by four instalments of £2000 each not later than 31 December 1943, 1944, 1945 and 1946, and a final instalment of £3000 payable not later than 31 December 1947, and by providing that in lieu of the two-thirds of the sum received in respect of the exploitation of the film the company would pay a sum equal to two-thirds of the sum so received in excess of £11,000.

Mr Howard fully performed the services required of him under the contracts, and during his lifetime he received the stated lump-sum payments payable to him during production. Those receipts were brought into account by him in computing the profits of his profession as a film actor and producer and returned by him for assessment to tax under Case II of schedule D.

After his death sums were received by the appellants during the years ending 5 April 1945, 1946 and 1947 in respect of Mr Howard's share of the gross receipts payable under contracts (*a*) and (*c*), the 14/49ths of the company's ultimate share of profits payable under contract (*b*) and the instalments of the £11,000 payable under contract (*c*). Those payments were assessed to income tax. The appellants appealed against the assessments to the Special Commissioners who discharged the assessments, but at the request of the respondent stated a case for the opinion of the High Court. Croom Johnson J. confirmed the determination of the Special Commissioners. On appeal by the respondent the Court of Appeal allowed the appeal except so far as it related to the instalments of £11,000 under contract (*c*) and the 14/49ths of the company's share of the ultimate net profits under contract (*b*). The Court, consisting of Evershed M.R. and Somervell and Jenkins L.JJ., were unanimous in holding that the instalments of £11,000 and the said 14/49ths not being receipts of a recurrent or income character were not assessable to tax; but by a majority, Jenkins L.J. dissenting, they held that the other payments received by the executors, that is to say, Mr Howard's share of gross receipts under contracts (*a*) and (*c*), were so assessable to tax as income under Case III or alternatively Case VI of schedule D. The appellants now appealed to the House of Lords against that decision. A cross-appeal by the Crown was withdrawn so that the only question for the House was whether the sums received by the appellants in respect of Mr Howard's share of gross receipts from the exploitation of the films under contracts (*a*) and (*c*) were assessable to tax.

It was common ground that all sums received by Mr Howard under the said contracts during his lifetime, whether by way of lump-sum payments or share of receipts or profits, were assessable to tax under Case II of schedule D, in that they had to be brought into account in computing the amount of the balance of the profits of his profession as a film actor and producer after deduction of permissible expenses. It was not, moreover, disputed that when he ceased to exercise his profession, either by reason of retirement or death, sums which only became payable after that date were no longer taxable under Case II, because that brought to an end the liability of his profits to tax under that Case subject to the appropriate assessment down to the date of discontinuance and the liability of his executors as regards any profits or gains which arose or accrued to him before his death but had not been returned by him for assessment in his lifetime. It was not disputed that the liability to tax of Mr Howard's professional earnings as such was exhausted. It was, however, contended on behalf of the Crown that although the sums received by the executors in respect of Mr Howard's share of receipts or profits which became

payable after his death were professionally earned by him in his lifetime, and although they could no longer be assessed under Case II as profits of his profession, that did not conclude the matter because the sums so received possessed in themselves an income character irrespective of the continuance or discontinuance of the profession in the course of which they were earned and were therefore assessable to tax as such under Case III or alternatively Case VI of schedule D. It was pointed out that as these shares of receipts or profits were not and could not have been prospectively brought into account in Mr Howard's lifetime for the purposes of assessment to tax under Case II, they had never in fact borne tax, and unless they were now taxable in the hands of the executors they would escape tax altogether.

Case III is:

'Tax in respect of profits of an uncertain value and of other income described in the rules applicable to this Case.'

Rule 1 of the rules applicable to that Case is:

'The tax shall extend to any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, whether such payment is payable... either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise...or as a personal debt or obligation by virtue of any contract, or whether the same is received and payable half-yearly or at any shorter or more distant periods.'

Case VI is:

'Tax in respect of any annual profits or gains not falling under any of the foregoing Cases and not charged by virtue of any other schedule.'

The House of Lords were unanimously of opinion that Jenkins L.J. was right in holding that none of the sums received by the executors was assessable to income tax and they allowed the appeal.

The Lord Chancellor in the course of his speech said that he agreed with every word of the dissenting judgment and respectfully adopted it. He said that the principle which was applicable was stated with his usual clarity by Rowlatt J. in *Bennett* v. *Ogston* (1930) 15 Tax Cases 374 in these words:

> When a trader or a follower of a profession or vocation dies or goes out of business... and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business there is no question of assessing those receipts to income tax: they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are to be taken to be covered by the assessment made during the life of the business whether that assessment was made on the basis of bookings or the basis of receipts.

The Lord Chancellor said that he was satisfied that that is a correct statement of the relevant principle of income-tax law, and if so it seemed to him to be an end of the case. How else could these sums come to the hands of Mr Howard or his executors than as the remuneration for his professional activities, the reward for services rendered by him during his life and unpaid for at his death. It was wholly irrelevant that they were not payable until after his death, and equally so that they were not and could not be quantified until after that event. They retained the essential quality of being the fruit of his professional activities. If in all the circumstances it was not possible to bring the sums into account in the years in which they were earned, as he would assume to be the case, the result was not to change the character of the

payments but to exhibit that some professional earnings may escape the income-tax net. Their Lordships were pressed by counsel for the Crown with the argument that the remuneration of Mr Howard took the form of an 'income-bearing asset' which became assessable after his death in the hands of his executors. He, the Lord Chancellor, was not sure that he correctly appreciated the argument, though he could well understand that if a professional man received as remuneration for his services £1000 2½% Consolidated Stock and retained it he would suffer deduction of tax from the interest, but he did not understand in what sense the sums of money received by Mr Howard could be described as an income-bearing asset. At one time it appeared to be urged that the several contracts which at once imposed obligations on Mr Howard and created rights in him were income-bearing assets, the income being the remuneration paid under them. Jenkins L.J. described this argument as 'placing a strained and artificial construction on these contracts', and he, the Lord Chancellor, was content to dismiss, without using more vigorous language, a contention that wholly disregarded both the form and substance of the transaction. If he was right in thinking that the sums in question were not assessable under Case III because they were nothing else than remuneration professionally earned by Mr Howard in his lifetime, that disposed also of the alternative claim under Case VI. In the result the appeal should be allowed and the cross-appeal dismissed with costs.

Wilkie *v.* Inland Revenue Commissioners

Income Tax—Residence in the United Kingdom—Six months—Method of computation—Calendar not lunar months—Fractions of a day—Hours of actual presence—Income Tax Act, 1918, *schedule D, Miscellaneous Rules, r.* 2

CHANCERY DIVISION

DONOVAN J.

1951. Dec. 12.
[1952] 1 Ch. 153.
[1951] 1 All E.R. 92.
[1952] 1 T.L.R. 22.

The question for determination in this case stated by the Special Commissioners of Income Tax was whether the taxpayer had resided in the United Kingdom for six months in the year of assessment 1947–48 so as to make him chargeable to income tax under schedule D on income from possessions out of the United Kingdom under the Miscellaneous Rules applicable to schedule D, *r.* 2.

The taxpayer arrived in England from India at about 2 p.m. on 2 June 1947. Of the next twenty-six weeks he spent eight or nine in Scotland and the remainder in England and Wales, and he left to return to India at about 10 a.m. on 2 December 1947.

The Crown contended that fractions of a day should count as a day, and that 'six months' in *r.* 2 of the Miscellaneous Rules applicable to schedule D means six lunar months of twenty-eight days, i.e. 168 days. So computed the taxpayer was resident in the United Kingdom for more than six months and therefore, it was said, was taxable. The taxpayer contended that fractions of a day should be computed in hours, that 'six months' means calendar months, and that on that basis he had been resident in the United Kingdom for less than six months.

The learned judge said that he had come to the conclusion that the taxpayer's construction should be upheld. The Interpretation Act, 1889, by s. 3 provided

that in all Acts passed since 1850 'month' meant calendar month unless the contrary intention appeared. The Crown contended that a contrary intention did appear in the Income Tax Act passed in 1918, because the rule in question was a reproduction of s. 39 of the Income Tax Act, 1842, and in 1842 'month' when used in a statute meant, in the absence of a special definition to the contrary, a lunar month, and the legislature could not have intended to alter *r.* 2 so as to change the meaning of 'six months' in that rule from lunar into calendar months, for that would have made the rule unworkable. The learned judge did not accept the contention that if 'month' meant calendar month it made the rule unworkable, and he could see no rational purpose behind a provision that the months should be lunar months. If it meant calendar months the rule might be applied by adding up the number of days a person had been actually resident in order to see whether those days, whether continuous or discontinuous, equalled the number of days in six calendar months which, in the year of assessment, would be half of 366 days, i.e. 183 days. As regards what was to be done when there were fractions of a day, in his, the learned judge's, opinion they should be taken into account in hours of actual presence, and on that basis the taxpayer having been resident for 182 days 20 hours had not been resident for a period equal in the whole to six months in the year of assessment and was not liable to tax.

In re Rudd's Will Trusts
Wort and Another *v.* Rudd and Others

Settlement—Trust for sale and conversion—Power to postpone and retain investments—Shares in company—Declaration of capital profits dividend—Retention of shares by trustees—Whether continued retention a breach of trust—Jurisdiction of court to apportion between capital and income

CHANCERY DIVISION

UPJOHN J.

1951. Dec. 17.
[1952] 1 All E.R. 254.
[1952] 1 T.L.R. 44.

This summons raised the question whether a substantial sum of British Transport 3% guaranteed stock 1968/73 received by the trustees of the will of the late Edward Whitton Rudd as a capital profits dividend in respect of their holding of ordinary stock of Thomas Tilling Ltd. ought to be apportioned between capital and income.

The testator devised and bequeathed his real and personal estate to the trustees of his will upon trust to sell, call in and convert the same into money (with full power to the trustees to postpone such sale, calling in and conversion of any part thereof and to retain any of the investments in the same state of investment as at his decease for so long as they might in their absolute discretion think fit); and he directed that the income of the retained investments should be applied as if the same were income arising from investments thereinafter directed to be made of the proceeds of sale. He further directed the trustees out of his ready money and the proceeds of sale, calling in and conversion to pay his debts, funeral and testamentary expenses and death duties and to invest the remainder in authorized trust investments, and to hold the same in trust for the purposes set forth in the will.

The testator died on 21 August 1939, and the will was proved by the plaintiffs, who were the executors and trustees. During his lifetime the

testator held considerable interests in the transport industry, and at his death he was the owner of, among other investments, £18,225 ordinary stock of Thomas Tilling Ltd. Of this stock £7405 was sold by the plaintiffs for estate purposes and a further £870 appropriated by them to satisfy legacies, leaving £9950 stock which was retained by them as part of the residuary estate.

After the coming into force of the Transport Act, 1947, the company reached an agreement with the British Transport Commission for the transfer to the Commission of its road transport undertakings, and the consideration for the transfer was the sum of £24,800,000 which was satisfied by the allotment to the company of British Transport 3% guaranteed stock 1968/73. In consequence of these matters the chairman of the board of directors of the company issued to the shareholders a circular dated 8 November 1948 by which it was announced that it was proposed to recommend at a meeting to be convened later that on 1 April 1949 a capital distribution be made to holders of ordinary stock at the rate of £5 of British Transport 3% guaranteed stock 1968/73 in respect of each £1 stock held. On 21 February 1949 notice was given of an extraordinary meeting of the company for 17 March 1949, and that a resolution would be proposed to give effect to the said proposal. A resolution to that effect was duly passed on 17 March 1949, and in due course the capital distribution was made. The effect of the announcement of 8 November 1948 was to enhance the price of the company's stock on the Stock Exchange with the result that on 15 February 1949 the price was £6. 4*s.* per £1 stock. On 16 February 1949 the stock went *ex* the capital profits dividend and the price fell to £1. 8*s.* per £1 stock.

The beneficiaries who under the will of the testator were mainly interested in the capital of the trust funds conceded that, so far as this Court was concerned, the result of the decision in the case of *In re Sechiari* [1950] 1 All E.R. 417 (*J.I.A.* LXXVI [30]) was that the capital profits dividend must be treated as income of the residuary trust fund; but they contended (1) that in the exceptional circumstances of this case there was a general equity which, apart from any question of breach of trust by the trustees, enabled the Court to direct an apportionment between capital and income, which argument, however, would be reserved for another Court, as counsel for the beneficiaries interested in capital had conceded that in this Court, having regard to the decisions of Vaisey J. in *In re Kleinwort's Settlement Trusts* [1951] 2 All E.R. 328 (*J.I.A.* LXXVII [4]) and of Harman J. in *In re Maclaren's Settlement Trusts* [1951] 2 All E. R. 414 (*J.I.A.* LXXVII [7]), any right to apportionment must be based on a breach of trust and not on any general principle of equity; (2) that in the case before the Court the trustees committed a breach of trust by not selling the whole or some part of their holding of the Company's stock before it went *ex* dividend, and that if such a breach of trust be proved the Court has jurisdiction to make an apportionment of the capital dividend as between capital and income.

Counsel for the beneficiaries interested in capital submitted that it was the duty of the trustees to consider from time to time whether trust assets, the sale of which had been postponed, ought to be sold, and that, when an event happened such as the issue of the circular of 8 November 1948 which might affect the trust estate, it was the duty of the trustees to meet and decide whether to continue to exercise the power to postpone. They had failed to do so

and thereby committed a breach of trust. Counsel for the beneficiaries interested in income, on the other hand, said that as the trustees had power not merely to postpone a sale of the investments but to retain them, the inference was that they must long ago have decided to retain the company's stock permanently as authorized investments and were under no duty to consider a sale on receipt of the circular.

The learned judge said that in his judgment on the true construction of the clause in question both the power to postpone and the power to retain were ancillary to the trust for conversion. The trustees were not entitled to treat the company's stock as permanent authorized investments. That, however, did not mean that the trustees ought necessarily to have taken the opportunity of realizing the stock in order to make a large profit for capital at the expense of income, as they must always act impartially between the two. It was not enough to show that the trustees ought to have met and considered a sale. It was further necessary to show that, being properly advised on the law, they ought to have sold the whole or some part of the company's stock *cum* dividend. Except for the large sums involved, no reason was advanced to him why the trustees should have sold the stock *cum* dividend nor why, accepting the view that the distribution was a windfall, it was wrong to allow the law to take its course, with the result that the windfall belonged to income.

For those reasons he declared that no part of the capital distribution ought to be apportioned to capital.

In re Lambton's Marriage Settlement
May and Another *v.* Inland Revenue Commissioners

Estate duty—Marriage settlement—Wife entitled during joint life of husband and wife to annuity out of income of settled funds—Husband entitled to balance of income—Cesser of wife's annuity on death of husband—Wife thereafter entitled to whole income from settled funds—Property passing on death of husband—Allowance for annuity—Finance Act, 1894, s. 5 (3)—*Amended by Finance Act*, 1938, s. 48

CHANCERY DIVISION

HARMAN J.

1951. Dec. 19.
[1952] 1 All E.R. 162.
[1952] 1 T.L.R. 127.

Adjourned summons to determine whether, on the true construction of a marriage settlement dated 20 July 1912 and the Finance Act, 1894, as amended by the Finance Act, 1938, estate duty became payable on the death of the Hon. Charles Lambton on 5 December 1949 on the principal value of the property comprised in the said settlement at the date of his death or on that value less the value of so much of the capital of the said property as was attributable at that date to the production of the yearly sum of £400 payable under the said settlement to his wife, Marion Lavinia Lambton, during their joint lives.

By the said settlement the Hon. Charles Lambton transferred certain funds to the trustees of the settlement on trust during the joint lives of himself and his wife to pay out of the income thereof an annuity of £400 to his wife and the rest of the income to him. Subject to these limitations the income was made payable to the survivor of the husband and wife during his or her life with remainder after the death of the survivor, in the events which happened, to the children of the marriage absolutely.

The husband died in 1949 leaving him surviving his widow and two children of full age. At his death the trust funds were of a value of approximately £17,000, and the amount of capital necessary by the income thereof to satisfy the annuity was approximately £11,000.

On the husband's death the Crown claimed estate duty on the entirety of the trust funds as passing on his death without any allowance in respect of the slice of capital necessary to provide the annuity. The trustees claimed to be entitled to the benefit of the appropriate reduction in respect of the annuity.

It appeared that for a number of years it had been the practice of the Crown in similar circumstances to allow a deduction on the principle contended for by the appellants in deference or supposed deference to the decision of the Court of Appeal in *A.-G.* v. *Glossop* [1907] 1 K.B. 163; but the Commissioners had recently been advised that the true view was that the whole property passed without any deduction and that *A.-G.* v. *Glossop* so far as inconsistent with this was wrong, as being in conflict with the decision of the House of Lords in *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 198 as followed in *De Trafford* v. *A.-G.* [1935] A.C. 280.

In the case of *Earl Cowley* v. *Inland Revenue Commissioners* a son was entitled to an annuity during his father's life out of the estate in which on his father's death he took a life interest, but the House of Lords nevertheless decided that no deduction in respect of the annuity was allowable. Lord Watson said:

> The annuity the capitalized value of which forms the subject of the claim was regularly paid to the appellant during his father's lifetime and ceased to be payable on his death. No part of it formed a charge on the equitable estate to which the appellant has succeeded under the deed of resettlement not in fee but in life-rent. In these circumstances I do not think that it can, with any degree of plausibility, be maintained that the estate which passed to the appellant upon his father's death has been thereby diminished or affected.

In the same case Lord Macnaghten said:

> I think the claim to deduct the value of the annuity must fail. There is no foundation for it. The property passed free from the annuity and the Act makes no provision for any such allowance.

In the case of *De Trafford* v. *A.-G.* Lord Russell of Killowen said:

> The first disputed point is concerned with the annual sum of £8000 of which the present baronet was in receipt and had been in receipt since he attained the age of 35 years. That annual sum, since it was only payable out of the annual income arising during his father's life, came to an end on his father's death; but on the happening of that event he became tenant for life in possession of the estates, and, as such, entitled during his life to the whole income arising therefrom subsequently to his father's death. In these circumstances it is argued by the appellants (who are the trustees and have accepted liability for the duty payable) that a notional portion of the estates (namely so much as was required to produce £8000 per annum) neither passed on the death of the late baronet within the meaning of s. 1 of the Finance Act, 1894, nor should be deemed to be included in property passing by reason of s. 2 of that Act. Alternatively it is contended that no benefit accrued to the present baronet by reason of the cesser of his right to receive the £8000 a year. My Lords these are contentions which in my opinion we are precluded by authority from adopting. I am unable to distinguish this case from *Earl Cowley* v. *I.R. Commissioners*.... I see no distinction of substance on the facts.... The present baronet's right to the annual sum of £8000 gave him no right to the receipt of any particular items of the annual income or to the income

of any particular portion of the estates. His right to receive the annual sum of £8000 ceased on the death of the late baronet; his right which then arose to receive all the rents was a new and a different right.

In the case of *A.-G.* v. *Glossop* the facts were that a joint fund consisting partly of a husband's property and partly of his wife's property was settled on trust to pay during their joint lives an annuity of £400 to the wife and to pay the rest of the income to the husband. Subject thereto the whole income was limited after the death of the wife to the husband for life and after his death to her for life with remainder to the children of the marriage, whom failing each fund reverted to the settlor of the fund. The wife survived the husband. It was held by the Court of Appeal affirming the judgment of Walton J. that estate duty became payable on the part of the fund representing her fortune except the slice of it which produced the annuity of £400. The decision in that case turned on s. 5 (3) of the Finance Act, 1894, which provided that:

> In the case of settled property, where the interest of any person under the settlement fails or determines by reason of his death before it becomes an interest in possession and subsequent limitations under the settlement continue to subsist, the property shall not be deemed to pass on his death.

Walton J. in giving judgment said:

> It is quite clear that this section was not referred to in *Earl Cowley's* case, and I think it had no application to the facts in that case. *Earl Cowley's* case shows that if s. 5 (3) did not apply to the facts of this case no deduction could be made in considering what property passed on the death of the husband in respect of the annuity of £400 a year payable to the wife during the lifetime of the husband. *Earl Cowley's* case is not an authority upon the construction of s. 5(3).

In the Court of Appeal Farwell L.J. said:

> It seems to me clear that the husband failed to take any interest in possession in such part of the wife's fortune as is properly attributable to the production of the £400 annuity. To my mind it is a perversion of language to say that, in the events that happened, the husband ever had an interest in possession in the whole income, subject only to a charge of £400. He never had anything but a right to receive the residue remaining after payment of the annuity of £400 to the wife.

In 1938, s. 5 (3) of the Act of 1894 was amended by the Finance Act, 1938, s. 48 by the addition of the words 'by reason only of the failure or determination of that interest'.

The learned judge said that the point in the present case was whether even if *A.-G.* v. *Glossop* applied up to 1938 it had ceased to apply since then. The amending words confined the exemption to cases where the passing was brought about only by the failure of the interest by reason of the death. It seemed to him that in the present case the failure of the husband's interest in the slice did not bring about the passing of the property. It passed in fact under s. 1 of the Act of 1894 and not under s. 2, and what caused it to pass was the death of the husband which caused the determination of the wife's annuity and created in her a new interest in the entirety of the income. In his judgment, therefore, the Crown's claim succeeded, not on the ground on which it was originally put, viz. that the *A.-G.* v. *Glossop* was wrong, but that the amendment in 1938 of s. 5 (3) of the Act of 1894 had rendered it inapplicable.

LEGAL NOTES

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

AND

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Trust and Claims Secretary, The London Life Association Ltd.

In re Batty deceased

The Public Trustee *v.* Bell and others

Statutory power of advancement—Death of testator before 1 *January* 1926—*Trusts arising on exercise of special power of appointment after* 1 *January* 1926—*Trustee Act*, 1925, *s.* 32(3)

CHANCERY DIVISION

VAISEY J.

1952. Feb. 5.
[1952] 1 Ch. 280.
[1952] 1 All E.R. 425.
[1952] 1 T.L.R. 412.

The Trustee Act, 1925, s. 32(1), provides that trustees may pay or apply up to one moiety of capital money subject to a trust for the advancement or benefit of any person entitled to the capital of the trust property, whether absolutely or contingently, but so that the money so paid or applied shall be brought into account as part of the share of that person, and that no such payment or application shall be made so as to prejudice any person entitled to any prior life or other interest without the consent in writing of the person so entitled.

S. 32(3) reads as follows:

> This section does not apply to trusts constituted or created before the commencement of this Act.

The Act came into force on 1 January 1926, and this summons raised the question whether the statutory power of advancement could be exercised by the trustees of R. H. Batty who died on 1 September 1925, having made his will on 25 July 1912 and a codicil thereto dated 2 August 1925, whereby he gave to Mrs K. F. Bell, the life tenant of a fund under the will, a special power of appointment. By deed dated 27 September 1951 Mrs Bell exercised the power and appointed a part of the fund equally between her two children.

The learned judge said that in In re *Dickinson's Settlements* [1939] Ch. 27, a similar question had arisen as to the scope of the Trustee Act, 1925, s. 31, which gives to trustees powers to apply for maintenance, education and benefit of infants and others the income of property in which they may have various interests but provides by subsection (5)

> This section does not apply where the instrument, if any, under which the interest arises came into operation before the commencement of this Act.

and Crossman J. had there held that the document exercising the power of appointment, and not the document creating the power, was for the purpose of that subsection the instrument under which the appointed interest arose, as a new interest was created by the appointment.

Vaisey J., however, drew a distinction between the expressions 'trusts constituted' and 'trusts created' in s. 32(3). The trusts were constituted by the testator's will, i.e. they originated by reason of the constitution of the original trusts as contained in the codicil, but while no doubt they were in one sense created when the power of appointment was exercised, it must be noted that the language of s. 32(3) differs materially from that of s. 31(5).

The learned judge pointed out that it is well settled that, except where there are special circumstances, a will is ambulatory and inchoate during the lifetime of the testator and comes into operation only at his death. He added that it must be noticed that s. 32(1) is a revolutionary provision in that it has a confiscatory effect. It seemed to him that, if the legislature had intended s. 32(1) to apply to interests which arise under the constitution of a testamentary instrument which came into operation before 1 January 1926, words of a much stronger character would have been employed. He declared, accordingly, that the statutory power of advancement did not apply to the trusts under the deed of appointment dated 27 September 1951.

Union Corporation Ltd. *v.* Inland Revenue Commissioners

Johannesburg Consolidated Investment Co. Ltd. *v.* The Same

Trinidad Leaseholds Ltd. *v.* The Same

Profits Tax—Non-distribution relief—Companies ordinarily resident outside the United Kingdom—Dual residence within and outside the United Kingdom—Substantial business operations and the presence of some part of the superior and directing authority

COURT OF APPEAL
EVERSHED M.R., JENKINS AND HODSON L.JJ.

1952. Feb. 22.
[1952] 1 All E.R. 646.
[1952] 1 T.L.R. 651.

These appeals from orders made by Harman J. raised the question whether the three tax-paying companies which were admittedly ordinarily resident in the United Kingdom were entitled to have the profits tax ascertained on the basis that they were also ordinarily resident outside the United Kingdom and thereby entitled to the relief granted by s. 39(1) of the Finance Act, 1947, which provides that the profits tax payable by a person ordinarily resident outside the United Kingdom throughout the chargeable accounting period shall be ascertained as if there had been no distribution of the profits chargeable to tax.

The tax in question was first imposed by the Finance Act, 1937, under the name of national defence contribution, as a tax at a uniform rate on profits whether distributed or not. The tax, originally introduced for five years, was continued indefinitely by s. 36(1) of the Finance Act, 1942, and its name was changed to profits tax by s. 44 of the Finance Act, 1946. A radical alteration in the character of the tax was made by the Finance Act, 1947, which introduced an entirely new feature in the shape of discrimination between distributed and undistributed profits. The broad effect of the provisions of that Act as amended was to charge profits tax at the rate of 25% on distributed and 10% on undistributed profits.

Each of the three appeals raised the same two questions: (i) whether on the assumption that a company is shown to have been ordinarily resident in a place outside the United Kingdom throughout a given chargeable accounting period it is on the true construction of s. 39(1) of the Finance Act, 1947, entitled to the benefit of that provision in the computation of its liability to profits tax as having been 'ordinarily resident outside the United Kingdom' throughout the relevant chargeable accounting period within the meaning of s. 39(1) notwithstanding that it was admittedly also ordinarily resident in the United Kingdom throughout the same period; and (ii) if the answer to the first question is in the affirmative whether, having regard to the circumstances in which according to the authorities dual residence can as a matter of law properly be inferred, the company is on the facts of the case shown to have been throughout the relevant period ordinarily resident in the place claimed as its second or concurrent place of residence.

On the first question the Court, affirming the decision of the learned judge (Harman J.) in the Court below, held that the words of s. 39(1) of the Act of 1947 construed in their natural sense against the background of the taxing Acts generally could only properly be construed in the sense contended for by the Crown so that the companies being resident inside could not claim the benefit conferred by the section on persons resident outside the United Kingdom; in other words, that the condition of residence outside the United Kingdom postulated absence of residence inside the United Kingdom and accordingly was not satisfied in a case of dual residence by proof of residence in a place outside the United Kingdom concurrently with residence inside the United Kingdom.

Having regard to the conclusion at which the Court arrived on the first question it became in strictness unnecessary for them to express their view on the second; but as it had been fully argued and they had been informed by learned counsel that those who are engaged in the practice and administration of income tax law had for more than twenty years been vexed by the problem and had awaited an opportunity for its determination by the Court, they thought it right to state their opinions on it.

The judgment of the Court was delivered by the Master of the Rolls, and after citing a large number of authorities he said

> We have, on this difficult question, derived great assistance from the judgment of Sir Owen Dixon J. in the Australian case of *Koitaki Para Rubber Estates Ltd.* v. *Federal Commissioner of Taxation* (1940) 64 Commonwealth L.R. 15, 241, when the same problem was fully considered by that learned judge and by the full High Court of Australia. We cite one paragraph from Dixon J.'s judgment:
>
> > 'The better opinion however appears to be that a finding that a company is a resident of more than one country ought not to be made unless the control of the general affairs of the company is not centred in one country but is divided or distributed among two or more countries. The matter must always be one of degree and residence may be constituted by a combination of various factors, but one factor to be looked for is the existence in the place claimed as a residence of some part of the superior or directing authority by means of which the affairs of the company are controlled.'
>
> We accept and respectfully adopt that passage as accurately stating the solution of the problem. The question in any particular case, whether or no the test is satisfied, whether such part of the 'superior or directing authority' of a limited liability com-

pany is found in any country as will justify the conclusion that the company is really doing business there and is accordingly there resident is one of degree and therefore one of fact, on which, if there be evidence to support it, the conclusion of the Special Commissioners will be final.

The learned Master of the Rolls said that in the circumstances it seemed proper that the Court should express its own conclusions rather than refer the case back to the Special Commissioners. As regards the Union Corporation Ltd. and the Johannesburg Consolidated Investment Company Ltd. the facts seemed to justify the conclusion, if the test was correctly formulated, that these companies had residence in South Africa as well as in England. The case of Trinidad Leaseholds Ltd. presented greater difficulty. The company was incorporated in England and all its eight directors were resident in England where all formal board meetings took place as well as the general meetings of the company and where the secretary resided. The main business of the company was that of winning, refining and dealing in petroleum and other mineral oils in Trinidad. Its operations there were in charge of a manager who had the widest powers and responsibility. If the matter rested there the case would seem to be that of an 'absolute owner' of a business, the conduct of which was in the hands of a manager whose responsibility, however full, was confined to management and did not extend to the control of the general or corporate affairs of the company or to matters of policy or finance, and that there was therefore no residence of the company in Trinidad. But although the supreme control was undoubtedly exercised at the meetings of the company's directors in England it was clear that in practice the chairman, managing director and other directors paid frequent visits to Trinidad for the purpose of exercising their supervision and a large measure of control over the policy and general affairs of the company, and important decisions were taken in the course of these visits. On those facts it seemed to the Court that there was sufficient evidence to justify the conclusion that the company was resident in Trinidad as well as in London. On this part of the case therefore the Court was of opinion that each of the three tax-payer companies had made good its claim to residence outside the United Kingdom as well as within the United Kingdom. But their success in that matter availed them nothing having regard to the view of the Court on the first question raised in the appeals which must be dismissed accordingly.

In re Stevens deceased
Pateman *v.* James and Another

Will—No appointment of executor—No reference to property of testatrix—'I give devise and bequeath unto' three named persons—Whether operative to pass any and if so what property to the persons named

CHANCERY DIVISION
WYNN-PARRY J.
1952. Feb. 28.
[1952] 1 Ch. 323.
[1952] 1 All E.R. 674.
[1952] 1 T.L.R. 590.

The will of the testatrix which was admitted to probate was made on a printed form and read as follows: 'This is the last will and testament of me, Mrs Ellen Stevens of 43 Caversham Rd. in the county of St Pancras — made this — day of Mar. 4 in the year of our Lord 1934. I hereby revoke all wills heretofore made by me. I appoint — of — in the county of — and — of — in the county of — to be

executors of this my will. I give devise and bequeath unto to my brother Mr Harry Pateman of Collingdale, Larkstone Terrace, Ilfracombe, Devon, Also sister) Mrs June Slade of 1, Elm Rd., Kentish Town, N.W. Also sister) Mrs Ethel James of 67 Dagenham Avenue, Dagenham.'

Then there is a blank followed by the signature of the testatrix and an attestation in proper form.

The question for the Court was whether the will operated to pass any and if so what part of the property of the testatrix to the brother and sister who survived her (one of the sisters having predeceased the testatrix) or whether it was completely ineffective to pass any of her property.

The learned judge prefaced his judgment by referring to a dictum of Lord Esher M.R. in the case of In re *Harrison* [1885] 30 Ch. D. 393, where he said

> There is one rule of construction which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce—that he did not intend to die intestate when he has gone through the form of making a will. You ought if possible to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.

Treating that rule as one of general application, the learned judge said that, notwithstanding the omission of any appointment of an executor, he had come to the conclusion that it sufficiently appeared from the form of the will that the testatrix not merely did not intend to die intestate but intended to deal with the whole of her property by leaving it to her brother and her two sisters and that as the elder of the two sisters had predeceased her the result was that the will was effective to pass the whole of her estate to the brother and second sister who would be entitled to the property as joint tenants.

Arab Bank Ltd. *v.* Ross

Bill of Exchange—Promissory notes—Endorsement by payees to plaintiff bank—Deviation in name of payees on the endorsement—Dishonour of notes on presentation for payment—Action by bank against defendant as maker of notes—Notes not 'complete and regular on the face' of them—Bank not 'holder in due course'—Bank entitled to recover as 'holder'

COURT OF APPEAL
SOMERVELL, DENNING AND ROMER L.JJ.
1952. Feb. 29.
[1952] 2 Q.B.D. 216.
[1952] 1 All E.R. 709.
[1952] 1 T.L.R. 811.

The plaintiff bank sued the defendant as the maker of two promissory notes, each for £10,000, payable on demand. Each of the notes was made payable to 'Fathi and Faysal Nabulsy Co. or order'. That was the name of a firm registered in Palestine of which Fathi Nabulsy and Faysal Nabulsy were the two partners. The notes were given in part payment for certain shares purchased by the defendant from the said firm. The plaintiff having made inquiries as to the defendant's financial standing agreed to discount the notes. Faysal Nabulsy who had authority to sign for the firm thereupon endorsed the notes to the plaintiff but signed the endorsement 'Fathi and Faysal Nabulsy', thereby omitting the word 'Company' or its abbreviation from the firm's name.

The notes were dishonoured on presentation for payment and the bank thereupon brought this action alleging that it was a holder in due course. By his defence the defendant admitted that the notes were dishonoured but pleaded *inter alia* that they were obtained from him by the fraud of the payees to which as he alleged the plaintiff was privy. The trial judge (McNair J.) found as a fact that there was no fraud and the only issues dealt with in the Court of Appeal which call for a report were (1) whether having regard to the omission of the word 'Company' from the signature on the endorsement the plaintiff was holder of the notes in due course and (2) whether it could in the alternative sue as holder.

Section 29(1) of the Bills of Exchange Act, 1882, provides:

> A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions: namely, (*a*) that he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact; (*b*) that he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

The Court held that owing to the omission of the word 'Company' from the signature on the endorsement the notes were not 'complete and regular on the face' of them and therefore the plaintiff was not a holder in due course and could not claim the special privileges which the Act confers on holders in due course, whatever right it might have as holder.

It was not disputed that on the true construction of s. 29(1) the 'face' of a bill includes the back of it and that the literal interpretation must be ignored because the meaning is obvious that, looking at the bill, front and back, without the aid of outside evidence, it must be complete and regular in itself. The question was whether the endorsement was regular. An endorsement is not regular if it is such as to give rise to doubt whether it is the endorsement of the named payee, and whether an endorsement gives rise to any such doubt is a practical question better answered by a banker than by a lawyer. Bankers had given evidence that they would not accept the endorsement in the present case as a regular endorsement. The word 'Company' clearly is or may be one of considerable importance as part of a business name. In Palestine the word might be of vital significance. It might signify a difference of legal entity just as the word 'Limited' does in this country. The omission of the word 'Company' from the signature did therefore give rise to doubt whether it was the endorsement of the named payee. It was therefore irregular and the plaintiff failed to make good the claim to be a holder in due course; nevertheless it was open to the plaintiff to claim as holder because the greater allegation of 'holder in due course' includes the lesser allegation of 'holder'. The difference between the rights of a 'holder in due course' and those of a 'holder' is that a holder in due course may get a better title than the person from whom he took, whereas a holder gets no better title. The defendant pleaded that the payees of the notes obtained them by fraud. He failed to prove that plea. The result was that no defect had been shown to exist in the title of the Nabulsy brothers. It was proved that the endorsement was their endorsement and accordingly there was no answer to the claim of the plaintiff bank as holder and the bank was entitled to judgment.

In re Hodgson deceased

Hodgson and Another *v.* Gillett and Others

Will—Meaning of 'survive'—Gift to such of the children of the son of the testator as shall survive the testator—Son unmarried at date of will and at date of death of testator

CHANCERY DIVISION

ROXBURGH J.

1952. March 11.
[1952] 1 All E.R. 769.

This summons raised a difficult question on the construction of the will dated 7 April 1920 of C. D. Hodgson who died on 25 April 1920. At the date of the will Captain Hodgson, a son of the testator, was a bachelor with, at that time, no intention of marriage. He was married in 1923 and had two children by that marriage.

By the will the testator gave (*inter alia*) certain life interests in his residuary estate to his widow and to his son and declared that, after the death of Captain Hodgson,

> My trustees shall hold the residuary trust funds and the income thereof in trust for such of the child or children of Captain Hodgson who shall survive me and being a son or sons shall attain the age of 21 years or being a daughter or daughters shall attain that age or marry under that age...but if my said son...shall die in my lifetime without leaving issue as aforesaid...to hold the residuary trust funds in trust for such sons of my daughter Noel Charteris as shall attain the age of 21 years and if more than one in equal shares absolutely....

with other trusts over.

In *Elliot* v. *Joicey* [1935] A.C. 209, the House of Lords held that the word 'survive', when used in relation to an event or point of time, predicates *prima facie* that the propositus is alive at and after that event or point of time; in the present case argument was directed to the question whether, in the case of a will, there could be found, in the will itself or in the surrounding circumstances, sufficient authority to displace that *prima facie* meaning.

The learned judge referred to In re *Clark's Estate* (1864) 3 De G.J. and Sm. 111, where the gift was to M.C. for life and after her death to 'all and every the children of the said M.C. who shall survive me'. M.C. was only 12 years old at the date of the will and the only surrounding circumstance was that a disposition which differentiates between the children of a named person born before the death of the testator and the children of the same person born after the death of the testator would appear to be wholly capricious. In the Court of Appeal Knight Bruce L.J. said

> I am of opinion that we may without impropriety hold the words 'who shall survive me' to mean 'who shall be living after me'; and I am not sure that this is not their strictly correct meaning.

and Turner L.J. concurred; but that short judgment had stirred up a long history of controversy, for few, if any, of the judges who had subsequently considered the question were prepared to agree with the lords justices. Chitty J., for example, in In re *Delany* (1895) 39 Sol. Jo. 468, said

> The common meaning of 'survivor' implied two lives running together. It would be a very forced use of the expression to say that Queen Victoria survived William the Conqueror.

Roxburgh J. was of the opinion that, as the *prima facie* meaning of the words had now been so authoritatively determined in *Elliot* v. *Joicey* (*supra*), more care is required in drawing inferences from the surrounding circumstances than would have been necessary if the words had not been held to have a *prima facie* meaning.

The learned judge then considered the surrounding circumstances and concluded that he did not think himself entitled to give an unnatural meaning to the words 'who shall survive me' because if he did not do so the will would operate in a most capricious manner. He had not found anything in the context and had not found enough in the surrounding circumstances to enable him to depart from the natural meaning of the words and he declared that the phrase 'such of the child or children of the said Captain Hodgson who shall survive me' did not include any child or children born after the date of death of the testator.

Inland Revenue Commissioners *v.* Gordon

Income tax—Income arising from possessions out of the United Kingdom—Debts incurred in London and discharged in Ceylon—Income Tax Act, 1918, *Schedule D, Case V, r.* 2

HOUSE OF LORDS
LORDS NORMAND, MORTON OF HENRYTON, TUCKER AND COHEN
1952. March 26.
[1952] 1 All E.R. 866.
[1952] 1 T.L.R. 913.

This was an appeal by the Crown against an order of the First Division of the Court of Session on a case stated by the Special Commissioners of Income Tax.

The respondent was at all material times senior partner of a firm carrying on business in Ceylon, and he had an account with the Colombo branch of the National Bank of India Ltd., whose head office is in London. In 1940 he was in England on a visit and owing to the war he had to remain in England and could not return to Ceylon until the end of the war. Some time before 2 January 1942 he opened an account with the head office of the bank and on or about 4 March 1942 he made an oral arrangement with the bank which allowed him to overdraw that account without security, and by which it was agreed that the bank would transfer parts of the overdraft to his account at Colombo. Later it was agreed that whenever the overdraft reached the figure of £500 it should be so transferred.

In these circumstances additional assessments to income tax were made on the respondent under the Income Tax Act, 1918, Schedule D, Case V, to cover income alleged to be chargeable under r. 2 applicable to that case which provides:

> The tax in respect of income arising from possessions out of the United Kingdom, other than income to which r. 1 applies, shall be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, or from property imported, or from money or value arising from property not imported, or from money or value so received on credit or on account in respect of any such remittances, property, money, or value brought or to be brought into the United Kingdom....

The Special Commissioners discharged the additional assessments. They stated the questions for the opinion of the court as follows: (1) Were the

commissioners entitled to hold that no sums of income from possessions outside the United Kingdom were remitted to the respondent in the United Kingdom? (2) Whether on the facts stated the respondent was assessable under Case V, r. 2, of Schedule D to the extent that the sums in the Colombo account used to repay the bank consisted of income and, if so, (3) whether there was a remittance within the said r. 2 (*a*) each time the respondent drew money in London, or (*b*) when the London drawings were repaid to the bank in Colombo. When the case came before the First Division of the Court of Session they reached the conclusion that question (1) should be answered in the affirmative and question (2) in the negative with the result that they affirmed the decision of the Special Commissioners and question (3) did not arise. The Crown appealed to the House of Lords where the dispute was finally concentrated on the question whether the appellants could bring their claim within the first or the fourth of the sources specified in r. 2. Lord Cohen who delivered the leading opinion said

...it is attractive to suggest that as the respondent obtained and spent these loans in London and was, so far as the evidence goes, able to discharge them only from moneys in Ceylon, part at any rate of which was income, and as the loan was in fact discharged, the money he received in England must have been received at least in part from remittances of income from Ceylon. Attractive though this may be it seems to me quite impossible to bring what happened within the compass of the rule. It is plain that the income receipts of the respondent were all received in Ceylon. It is plain that the moneys he received in London were advances of capital. There is no finding that these advances were made on credit or on account in respect of income in Ceylon which it was intended should be brought to London. On the contrary the parties expressly agreed that the debt should be discharged in Ceylon, it was so discharged, and there is no evidence that the rupees which the bank received in Ceylon were ever remitted to London. For these reasons, which are in substance the same as those given by the Court of Session, I would dismiss the appeal.

The other members of the Court concurred and the appeal was dismissed.

In re **Wyatt deceased**

Will—Revocation—Absence of proof—Presumption

PROBATE DIVORCE AND ADMIRALTY DIVISION

COLLINGWOOD J.

1952. April 2.
[1952] 1 All E.R. 1030.

Motion for an order that a will dated 2 January 1935 and a codicil thereto dated 12 April 1937 be admitted to probate on the application of the National Provincial Bank Ltd. as the executor thereof.

The said will and codicil were duly executed and were deposited by the testatrix at the Wallington branch of the plaintiff bank where they remained until after her death.

In October 1937 the deceased instructed a solicitor to prepare another will. This will was executed by the deceased on 1 November 1937. On the same day it was deposited with the Wallington branch of the plaintiff bank. It was withdrawn by the deceased on 30 December 1937, but was returned to the bank on 23 May 1938. It was finally withdrawn by the deceased on 4 May 1939 after which the bank had no further trace of it and it was not found among the deceased's effects after her death. The solicitor who prepared the

will had no recollection of the instructions which he received or of the contents of the will. All the papers in his office were destroyed by fire as a result of enemy action in May 1941. All he could say was that it was his practice to include a revocation clause in the draft of any will prepared by him for a client.

The learned judge said that the result of the evidence was that the contents of the will of 1937 were wholly unknown. The mere fact of making a subsequent testamentary paper did not effect a revocation of a prior one unless the later document expressly or implicitly revoked the former one. He could not assume that the will of 1937 contained a revocation clause or implicitly revoked the former will. No information with regard to it had been forthcoming despite advertisements inserted in local and other newspapers. In these circumstances the presumption was that the will was destroyed by the testatrix with the intention of revoking it, and, in the absence of any evidence to repel it, that presumption must prevail. The result was that there would be a grant of probate of the will dated 2 January 1935 and the codicil thereto dated 12 April 1937.

In re **Batley deceased**

Income tax—Bequest of annuity—Payable free of income tax—Annuitant's husband assessed in respect of his and her joint incomes—Reliefs and allowances—Liability to account to trustees of the will

CHANCERY DIVISION

VAISEY J.

1952. Apr. 4.
[1952] 1 All E.R. 1036.
[1952] 1 T.L.R. 1062.

By his will made on 27 January 1937 shortly after his divorce from his first wife, Charles Curson Batley bequeathed '...free of duty, to my former wife...an annuity of £416 for her life...'.

The annuitant married John Albert Hart on 27 June 1939. The testator during his life paid the annuitant £416 per annum free of income tax. He was content to allow her and her husband to retain the benefit of any allowances or relief from tax to which they might be entitled making no claim in that respect for himself. The testator died on 4 May 1947. The trustees of his will took out a summons to have it determined whether the annuity was subject to or free of income tax. The Court of Appeal (varying the decision of Vaisey J.) held and declared that the annuity was payable free of income tax but such declaration was expressed to be without prejudice to the question whether or not the annuitant was liable to account to the trustees for income tax relief in accordance with the rule in the case of In re *Pettit* [1922] 2 Ch. 765. That question was accordingly raised by the present summons which asked whether on the true construction of the testator's will and in the events which had happened the annuitant was entitled to retain for her own benefit any relief or allowances by way of repayment of income tax to which she was entitled or whether she must account for the same or any part thereof to the trustees.

The annuitant deposed that her husband was assessed to income tax in respect of their joint incomes, that he alone was entitled to claim income tax reliefs in respect of their personal allowances as husband and wife, and that she herself did not make and was not entitled to make any claim for such relief. The husband was accordingly joined as a defendant to the summons

and a further paragraph was added raising the further question of his liability to account to the trustees for any relief or allowances received by him in respect of the annuity.

The learned judge said that to his mind the only difficulty arose from the circumstance that it was the annuitant's husband and not she herself who was liable to pay the income tax on her income and entitled to claim any appropriate reliefs. It was contended that her husband being the accountable party could not be compelled to account to the trustees of the will. The learned judge said that he was inclined to the view that the husband, if he obtained the appropriate relief in respect of the annuity, would hold it impressed with a trust in favour of the testator's estate and if necessary he would be prepared to decide that the husband was in the circumstances under an obligation to claim the relief for the benefit *pro tanto* of the estate. He preferred however to base his judgment on the proposition that the annuitant was a trustee of her statutory right to recover the overpaid tax and was bound at the request of the trustees of the will to exercise that right and if necessary to apply to be, for that purpose, assessed under the Income Tax Act, 1918, All Schedules Rules, r. 17(1), separately from her husband. Of course a separate assessment might not have to be made in actual fact if the annuitant and her husband were willing to pay over and account for the amount which she could and would have obtained if such an assessment had been made. He would declare that on the true construction of the testator's will, and in the events which had happened, any relief or allowances by way of repayment of income tax recovered or recoverable by the annuitant and her husband or either of them in respect of and so far as attributable to the annuity belonged to the trustees of the will and unless other arrangements were made to give effect to that declaration he would order the annuitant to apply and her husband to support her application to be separately assessed.

On 24 July 1952 the Court of Appeal (Evershed M.R., Jenkins and Hodson L.JJ.) varied the decision of Vaisey J. The case will be noted later.

East India Trading Co. Inc. *v.* Carmel Exporters and Importers Ltd.

Foreign currency—Rate of exchange—Foreign judgment—Damages for breach of contract—Action on judgment in United Kingdom—Date of conversion into sterling

QUEEN'S BENCH DIVISION

SELLERS J.

1952. Apr. 8.
[1952] 2 Q.B.D. 439.
[1952] 1 All E.R. 1053.
[1952] 1 T.L.R. 1085.

On 11 May 1950 the plaintiffs obtained final judgment in the Supreme Court of the State of New York against the defendants for a sum of American dollars as damages for a breach of contract on 13 June 1949. On 20 September 1949 the rate of exchange between the United States of America and the United Kingdom was altered from $4.03 to $2.80 to the pound sterling.

In an action on the judgment the plaintiffs claimed £11,703 3*s.* 5*d.*, being the sterling equivalent of the sum for which they obtained judgment calculated at $2.80 to the pound, being the rate of exchange at the date of the judgment. A master gave the plaintiffs leave to sign judgment for £8131 4*s.* 9*d.*, the sterling equivalent of the judgment debt at $4.03 to the pound, being the

rate of exchange at the date of the breach of contract, and gave the defendants leave to defend the action as to the balance of £3571 18*s.* 8*d.*, the issue being whether $4.03 or $2.80 to the pound sterling was the correct rate of exchange at which the amount of the judgment debt should be converted into sterling.

The defendants contended that as the plaintiffs elected to sue on the foreign judgment when they could have proceeded in this country on the original cause of action, namely the breach of contract, in which case the damages would have been assessed at the date of the breach, the Court should hold that the rate of exchange applicable to the conversion was that prevailing at the date of the breach, as otherwise the rate of exchange applicable in any particular case might vary according to whether the plaintiff elected to enforce the judgment obtained in the foreign court or start a fresh action here.

The learned judge said that he saw less objection to a plaintiff who has obtained judgment than to a defendant who is in default being in a position to select the more advantageous course. It was correct to say that a foreign judgment does not in the view of an English Court merge the original cause of action and if the party likes to proceed on his original cause of action he may do so, notwithstanding the foreign judgment. It might be a question for a higher court whether a debt expressed in foreign currency must, in litigation in this country, be converted into sterling with reference to the rate of exchange prevailing on the date when the debt became payable or with reference to the rate on the date of the judgment in the English Court. In the present case the result would be the same. In the case of the enforcement of a foreign judgment he would follow the most recent decision of *Madeleine Vionnet et Cie* v. *Wills* [1940] 1 K.B. 72, which decided that the correct date on which to convert a debt in a foreign currency sued for in this country was the date on which the debt became due. In his judgment, authority and good reason were against the defendants' contention that the date of the breach should be taken as the material date. The American judgment was the immediate source from which the defendants' liability flowed, and no earlier date could be called into consideration. He would give judgment for £3571 18*s.* 8*d.* together with interest from 11 May 1950, on that amount only, at 4%, which was the rate current in our courts, although he understood that a higher rate of interest ruled in the American tribunal where the judgment was originally obtained.

APPEALS

In re Lambton's Marriage Settlement, May and Another v. Inland Revenue Commissioners. *J.I.A.* LXXVIII [29]; [1952] 1 All E.R. 162.

On 28 May 1952 the Court of Appeal (Evershed M.R., Birkett and Romer L.JJ.) affirmed the decision of Harmon J. in the Court below [1952] 2 All E.R. 201.

INDEX TO LEGAL NOTES

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TABLE OF CASES NOTED

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