LEGAL NOTES

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Sothern-Smith *v.* Clancy

COURT OF APPEAL
1940. December 13.
[1941] 1 All E.R. 111.
57 T.L.R. 247.

In consideration of a single premium payment an insurance company covenanted to pay to A an annuity during his lifetime and in the event of his death before he should have received by way of annuity payments an aggregate amount equal to the premium paid to continue the annuity payments to his nominee until that sum had been returned. HELD *that the annuity payable to A's nominee after A's death was taxable as income under r.* 1 (*a*) *of Sched. D, Case III.*

The decision of the Court of Appeal in the case of PERRIN *v.* DICKSON [1930] 1 *K.B.* 107 *commented on and distinguished*

PER The Master of the Rolls (Sir Wilfrid Greene) and Clauson L.J. *Whether the view of the nature of the contract taken by the Court in* PERRIN*'s case was consistent with the facts of that case.*

PER Goddard L.J. *Whether having regard to the principle applied in* PERRIN*'s case it may not yet have to be decided that in the case of all deferred terminable annuities only so much of the payments as represents interest on the capital sum invested is taxable as income.*

In this case the Court of Appeal reversed the decision of Lawrence J. (*J.I.A.* Vol. LXXI, p. 163) and restored the decision of the Special Commissioners. The contract in question was made in New York between Edward H. S. Sothern and the Equitable Life Assurance Society of the United States. It is in a form unfamiliar in this country but may be summarized as follows. In consideration of a payment of $65,243 by Sothern to the company the latter became bound to pay $6510 to Sothern on the first and each subsequent anniversary of the date of the contract during his life, and if the total annuity payment made during his lifetime should fall short of $65,243 to pay the same annual amount to a

beneficiary named by him until the total payments reached that aggregate. Sothern died after four annual payments had been made, and thereafter the company made annual payments of £6510 to the respondent, Mrs Sothern-Smith, the beneficiary named by Sothern. Lawrence J. thought that the capital sum paid by Sothern never ceased to exist, and that the contract in express terms stipulated that in the event which happened that capital sum should be refunded and that the annual payments made to the respondent were therefore capital and not income payments and were not assessable to income tax. The Court of Appeal took a different view of the nature of the contract. The Court held that the capital sum paid by Sothern had gone and ceased to exist having been converted into an annuity, the only continuing relation between which and the vanished capital was that the amount of the latter was taken as the measure of the minimum period for which the annuity was to run.

The Master of the Rolls (Sir Wilfrid Greene) said that under Sched. D, Case III, r. 1 (*a*) an annuity or other annual payment was chargeable to income tax as being an annual profit or gain and for that reason it was necessary to examine the nature of the annual payment in order to see whether it was in truth an income or a capital payment. In order to answer that question it was no doubt true to say that the real nature of the transaction had to be ascertained. The expression "the real nature of the transaction" was, however, ambiguous. It might mean the real nature of the legal relationship resulting from the transaction or it might include as well the real nature of the transaction from a financial point of view. The real nature of the transaction from the legal point of view might stamp it as a capital transaction as in the case of an agreement by a debtor to pay his debt or by a purchaser of property to pay the purchase price by yearly instalments. If to the instalments there was added an element of interest that element alone would attract tax as an annual profit or gain. There were cases, however, where the real nature of the transaction from the legal point of view did not necessarily stamp it as a capital transaction, as in the case of a purchase of an annuity for a term of years when no relationship of debtor and creditor as regards the capital sum invested was ever constituted and the only obligation of the obligor was to pay the annuity as it accrued due. The purchase price as a

sum ceased to exist once it was paid. If, however, it was permissible to look behind the legal nature of the transaction and inquire into its financial nature it was at once apparent that the annual payments were calculated on the basis that at the expiration of the period of annuity the annuitant would have received an amount equal to his capital plus a certain addition for interest and if each annual payment was charged with tax he would in one sense be paying tax on capital. Nevertheless it had been throughout assumed by the Courts that such payments were liable to tax. On the other hand in *Perrin* v. *Dickson* [1930] 1 K.B. 107 the Court of Appeal felt itself at liberty to hear extrinsic evidence as to the method of calculating the payments and upon the facts so ascertained coupled with a particular term in the contract to hold that they were of a capital nature. He, the Master of the Rolls, found the reasoning of the judgments in that case difficult to follow. It was found that the sum to be paid to a parent for the education of his child was if the child survived the whole period the amount of the premium plus 3 % compound interest. If the child died before the payments were completed the parent was to be paid the total amount of the premiums paid by him without interest less any sum which might already have been received. That seemed to have led the Court to regard the whole transaction as being similar to that of a loan repayable by instalments. His difficulty was that it certainly was not a loan transaction. On the authority of the earlier cases he felt bound to regard the purchase of an annuity for a fixed term of years as the purchase of an income and the whole of the income so purchased as a profit or gain notwithstanding the way in which the amount of the payment was calculated. The sum paid for the annuity had ceased to have any existence and the fact that at the end of the annuity period the recipient would have received an amount equal at least to what he paid he felt bound to treat as irrelevant. Nor could it make any difference if this result was stated on the face of the transaction. In the present case the contract was to pay an annual sum for an ascertainable period of years or for the period of Sothern's life whichever might prove to be the longer. There was no debt nor was there anything which could properly be described as analogous to a debt. The sum paid by Sothern had gone once and for all. The reference to it in the contract was inserted for the purpose of putting a term to a

liability which was throughout the same, namely a liability to pay an annual sum. During Sothern's life the sums paid to him were payments of a life annuity. In the events which had happened further payments fell to be made for a definite period and the fact that the period was ascertained by reference to the capital sum paid by Sothern and the amounts paid to him during his life could not make these payments anything different from the ordinary payments of an annuity for a fixed term.

Lord Justice Clauson said that applying to the case the principles stated by P. O. Lawrence L.J. in *Perrin* v. *Dickson* it seemed clear that if the contract had merely been to pay $6510 for the number of years and the fraction of a year which were requisite to make up the total payments to $65,243 that would create a taxable annuity. The addition to such a contract of a further liability to pay the same annual sum to the contracting party for the rest of his life if he should survive that period could not alter the character of the payment especially when it was borne in mind that no one had ever doubted that a contract to pay an annuity for a period measured by life must be taken to be an annuity chargeable to tax. There was nothing in the decision in Perrin's case which compelled a different conclusion. The decision there was based on the fact that each member of the Court was satisfied that in that case the sums paid by Bishop Perrin were mere investments of capital received and in due course repaid by the company and that the transaction was merely one of a deposit of a fund with the company on the terms that the deposit should be repaid in one event without interest but in the event of the whole scheme working out as anticipated with compound interest calculated at 3 %. Whether the view of the nature of the contract taken by the Court in Perrin's case was consistent with the circumstance that if Bishop Perrin failed to keep up the periodical advances or premiums which he was bound by the contract to make he had no contractual right to recover them is a question which might if the case had to be considered in a Court which had power to overrule that case be a matter for serious consideration. Be that as it might there remained the crucial distinction between Perrin's case and the present that in that case the company's liability could never exceed the amount of the premiums with the compound interest at 3 %, whereas in the present case the contract involved

the company in a possible liability which if Sothern lived for an unexpected number of years might exceed the original payment and any reasonable rate of interest thereon by a very large figure. The existence of such a liability to the payee of the original capital sum appeared to him, the learned Lord Justice, to make the transaction differ crucially from a mere deposit or investment of a capital sum to be returned in due course as a capital sum.

Lord Justice Goddard said that in his opinion the case as between the company and Sothern was one of the purchase of an ordinary life annuity with an additional benefit attached the company agreeing that in no event would they pay less than the amount of the capital which they had received from the annuitant and he found it difficult to see why the payments to be made after his death should change in character or quality becoming capital and not income merely because the measure of the payment or payments was limited to an amount which added to what had already been paid to the grantee would be equivalent to the amount originally paid by him to secure the income. In Perrin's case the Court held that the true nature of the transaction was no more than the accumulation or saving by the parent of a fund at compound interest to be applied when the time came for the education of the child or to be returned to him without interest in the event of the earlier death of the child. On that view of the facts the transaction was in no sense the purchase of an annuity and was quite different in quality from that which they were considering. It was unnecessary to consider what effect if any the decision in Perrin's case might have on terminable annuities. Obviously the transaction was closely akin to the grant of such an annuity and the Court held that only so much of the payments as represented interest was taxable. In his opinion it might yet have to be decided whether that principle must not be applied to all cases of deferred terminable annuities.

Re National Provincial Bank, Ltd.

CHANCERY DIVISION

FARWELL J.

1940. December 10.
[1941] 1 All E.R. 97.

The Courts (Emergency Powers) Act 1939 *S.* 1 *subs.* (2) *which prohibits any person except with the leave of the appropriate Court: (a) to proceed to exercise any remedy which is available to him by way of...(ii) the taking possession of any property or the appointment of a receiver of any property...(b) to institute any proceedings for foreclosure or for sale in lieu of foreclosure...does not apply to proceedings taken to enforce a charge on property granted by the owner thereof to secure money owing to the mortgagee by a third party and in respect of which the owner of the property granting the charge is under no personal obligation whatsoever to the mortgagee to pay the secured debt.*

Thomas Edmund Liddiard executed a charge over certain property in Tunbridge Wells belonging to him in favour of the National Provincial Bank to secure the payment of money owing to the bank by his daughter Mrs Milburn. It was in the usual form of and contained the provisions usually contained in a collateral security of this character. The mortgagor as beneficial owner charged by way of legal mortgage the property

> ...with payment to the bank on demand of all such sums of money as are now or shall from time to time become due and owing to the bank anywhere upon banking account or upon any discount or other account or for any other matter or thing whatsoever including interest, discount, commission and all other banking charges from or by Mildred Bessie Milburn of Tunbridge Wells in the County of Kent married woman.

Mrs Milburn found herself unable to pay the bank the money which she owed and the bank demanded from Mr Liddiard payment of the amount due by her. The money was not forthcoming and the bank were desirous of exercising their right under the mortgage granted by Mr Liddiard and to realize the mortgaged property or appoint a receiver or take possession thereof. They accordingly took out a summons against Mr Liddiard for leave under the Courts (Emergency Powers) Act 1939 to take the requisite proceedings against his property, and Mr Liddiard filed evidence with a view to satisfying the Court that he was entitled to relief under the Act. The provisions with regard to the granting

of relief against proceedings are contained in S. 1 subs. (4) of the Act and are as follows:

> If, on any application for such leave as is required under this section for the exercise of the rights and remedies mentioned in subss. (1) (2) and (3) of this section the appropriate Court is of opinion that the person liable to satisfy the judgment or order or to pay the rent or other debt, or to perform the obligation in question is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged the Court may refuse leave for the exercise of that right or remedy or give leave therefor subject to such conditions and restrictions as the Court thinks proper.

On the hearing of the application it was contended on behalf of the bank that the section did not apply to their rights under the mortgage and that they were entitled to take proceedings to enforce the charge without any leave of the Court.

Mr Justice Farwell so held. He said that having regard to the wording of subs. (4) the only person entitled to relief from proceedings taken to exercise any remedy available to a mortgagee of any property was the person 'liable to satisfy the judgment or order or to pay the rent or other debt, or to perform the obligation', and such person had to satisfy the Court that he was 'unable immediately to do so by reason of circumstances directly or indirectly attributable to' the war. In his view Mr Liddiard was not a person liable to perform the obligation against which he was seeking relief. The mortgagees' only right under the mortgage was against the mortgaged property. Mr Liddiard was under no obligation whatsoever to the bank. The bank had demanded payment of the money owing by Mrs Milburn: but that did not create an obligation upon the mortgagor to pay anything. Either he must find the money which was demanded or the mortgagees would be entitled to realize their security: but the fact that he was put in that dilemma did not create an obligation of any sort or kind upon him. The position was therefore that it was not a case which came within the Act at all. It might be that it was a *casus omissus,* but in the language of the Act no provision had been made for this particular case and it was not for the Court to provide a remedy by giving to the words 'perform the obligation' a meaning which on their true interpretation they could not bear. He, the learned judge, was unable to give Mr Liddiard any relief under the Courts (Emergency Powers) Act 1939, not because he had not

shown sufficient cause—because he, the learned judge, had not considered that at all—but because in his judgment the Act did not provide for this particular case. The summons therefore would be dismissed on the ground that no leave was necessary and there would be no order as to costs.

Re Twiss

CHANCERY DIVISION
SIMONDS J.
1940. November 21.
[1941] 1 All E.R. 93.
57 T.L.R. 146.

When a testator by his will bequeaths annuities to a number of beneficiaries with power to resort to capital if the income of his estate should prove to be insufficient the Court may order the capital value of the annuities to be calculated and paid out of capital and when such an order is made it is the general rule that the valuation should be made as at the date of the order and not as at the date of the testator's death.

When the annuities include deferred annuities payable to infants the Court may direct that the amount which would be payable to them if they were capable of giving a discharge should be invested by the trustees in the purchase of deferred annuities on the terms of the will and based on Government tables and that such annuities should be retained by the trustees on behalf of the infants.

By his will George Twiss after making certain specific bequests gave the following annuities: £416 per annum each to Amelia Annie Pratt and to Jane Ann Barker free of duties deductions income tax and allowances, on the death of the survivor of himself and Jane Ann Barker to Dorothy Lord and Norman Barker £260 and £156 per annum respectively and on the death of the survivor of himself Jane Ann Barker and Dorothy Lord £78 per annum each to each of the three children of Dorothy Lord then living. There were certain pecuniary legacies and a bequest of the residue of the estate to certain named charities. Clause 13 of the will contained a power to appropriate out of the income of the estate in satisfaction of the annuities and a power to resort to capital if the income should prove to be insufficient. The income of the estate was insufficient to pay the annuities, but the capital was sufficient to pay the annuitants the capital value of their annuities.

This was an originating summons taken out by the trustees to determine *inter alia* what method should be adopted to satisfy the

pecuniary legacies and annuities, and if the annuities had to be valued as at what date the valuation should be made and for the purposes of the annuities free of tax what rates of income tax and allowances should be made.

It was argued on behalf of the infant annuitants and the residuary legatees that when the insufficiency of income to meet the annuities is immediately apparent the correct date of valuation is the date of death which is the one fixed point about which there can be no dispute.

Mr Justice Simonds said that it was a general rule that when the valuation of annuities is necessary it should be made as at the date of the order. That was a rule which was clearly laid down in earlier cases and which he must follow. Accordingly the annuities must be valued as at the date of the order, and for that purpose the rate of income tax then prevailing and the reliefs in respect of income tax then prevailing were to be taken into account. When the annuities had been so valued the legacies and the amount of such valuations must be paid in full if the estate be sufficient, and if it be not they must be abated *pari passu*. In the case of the deferred annuities payable to infants the learned judge directed that the amount which would be payable to them if they were capable of giving a discharge should be invested by the trustees in the purchase of deferred annuities upon the terms of the will, and that such annuities should be retained by the trustees on behalf of the infant annuitants.

McNicol *v.* Pearl Assurance Company

COURT OF SESSION
LORD PATRICK
1941. January 10.

A life endowment policy secured a double benefit in the event of the life assured dying within the endowment period and before attaining the age of 65 years as a direct result of bodily injury caused by accidental means such death not having been caused by self-injury.

HELD *that on the true construction of the provision for double benefit the exception was directed to the case of the assured intentionally causing his own death while insane and that although such death was the direct result of bodily injury caused by accidental means it was also caused by self injury and therefore excluded from the double benefit.*

The claimants in this case, which was tried by the Lord Ordinary under the summary trial procedure, were the executors of the late William Dickson McNicol, farmer of Castleton, North Berwick, who died on 24 June 1939 when he was 58 years of age. The deceased was the holder of two policies of assurance issued to him by Pearl Assurance Company in the year 1933. The two policies were in identical terms. In each the first obligation of the insurers was on the expiration of 20 years from the date of the policy or on the earlier death of the assured to transfer to the assured or his executors, administrators or assigns £5000 4% Victory Bonds. No question arose as to this obligation, the company having agreed to implement it. The second obligation contained in each policy was to transfer an additional £5000 in the event of the assured dying within the endowment period before attaining the age of 65 years as the direct result of bodily injury caused by accidental means, such death not having been caused by self-injury. The issue between the parties was whether having regard to all the circumstances in which death occurred the claimants were entitled to the additional benefit.

McNicol died as the direct result of having fallen or thrown himself from an upper window of a nursing home in Edinburgh on to a roof below. Evidence was given by the doctors who attended him and by doctors called by the company, by a nurse who attended him at the home, and by relatives. It appeared that when the assured was admitted to this particular home he was suffering from insane delusions as to the state of his farm and his financial position, that he exhibited marked signs of depression and had made statements which indicated that he was prone to commit suicide. On the day after he was admitted to the home dinner was served to him in his bedroom by a nurse. He had had his soup and the next course was about to be served. He was alone in the room. The lower sash of the window was closed, the upper sash being open. The height from the floor to the top of the lower sash was 6 feet 6 inches. There was a luggage rack standing beneath the window. The height from the top of the rack to the top of the lower sash was 5 feet 2 inches. When the nurse returned to the room McNicol had disappeared. The window was in the same position as when she left the room. She lifted the lower sash and looked out and saw McNicol lying on the roof below.

The learned judge said that the conclusion from the evidence was irresistible that McNicol threw himself from the window and that when he did so he knew that he would kill himself and that he being insane deliberately chose to kill himself in order to escape from the misery engendered by his insane delusions.

The question was whether in that state of the facts McNicol died as a direct result of bodily injury caused by accidental means, such death not having been occasioned by self-injury. Many people, he said, might find difficulty in the view that such a death could pass the initial test of being a death resulting from bodily injury by accidental means, but apparently the parties to this contract thought that that was a proper description. The words of the policies indicated that in the view of the contracting parties there was a state of facts which might properly be described as death from bodily injury caused by accidental means which death was occasioned by self-injury. It was clear that the parties were here dealing with deliberate self-injury, not accidental injury to self. What then was the state of facts which could properly be described as a death resulting from bodily injury caused by accidental means, such death having been occasioned by deliberate self-injury. The death of a person who commits suicide while sane could never properly be described as death resulting from bodily injury caused by accidental means. Such a death was clearly the result of sane intention and not of accident. Accordingly the proviso 'such death not having been occasioned by self-injury' was not introduced to free the insurance company from liability in the case of suicide of a sane person. That purpose was already effected by the substantive provision whereby liability of the company only arose if death resulted from bodily injury caused by accidental means. It was clear therefore that the proviso was designed to effect that the company would not be liable if death resulted from bodily injury caused by accidental means, such death having been occasioned by the act of an insane person in deliberately injuring himself.

The learned judge said that he did not decide what would have been the result under those policies if McNicol's last act had not been a conscious act at all but the act of an automaton responding without any act of consciousness to an external stimulus. Holding as he did that McNicol deliberately chose to kill himself in order

to escape from the misery engendered by his insane delusions he was of opinion that on the true construction of the policies he died as the result of bodily injury caused by accidental means, such death having been occasioned by self-injury and that the claimants were not entitled to the additional benefit.

R. & A. Kohnstamm Ltd. *v.* **Ludwig Krumm (London) Ltd.**

KING'S BENCH DIVISION

MACNAGHTEN J.

1940. May 21.
[1940] 3 All E.R. 84.

The Trading with the Enemy Act 1939 *S.* 1 (2) (*a*) (*iii*) *enacts that for the purposes of that Act a person shall be deemed to have traded with the enemy if he has discharged any obligation of an enemy whether the obligation was undertaken before or after the commencement of the Act.*

HELD *that 'discharged any obligation' in that section means a complete discharge and not a mere transfer of an enemy's obligation from one English creditor to another and that it does not constitute a trading with the enemy for an English company which has guaranteed the payment of a debt due to another English company from an alien who has since become an enemy to make payment of the debt to that other English company in pursuance of its guarantee.*

The plaintiffs are an English company dealing in leather. The defendants are also an English company formed in England under the Companies Acts but nearly all of their shares are held by a German company named L. Krumm Akt. of Offenbach for whom they act as agents in the United Kingdom. The plaintiffs had over a period of years sold leather to the German company but in 1936 the difficulties of trading with Germany had increased owing to German legislation and the plaintiffs were unwilling to continue the business unless payment was guaranteed by the defendant company. The defendants accordingly guaranteed the payment by the German company for all goods supplied to them by the plaintiffs and this action was brought on that guarantee to recover the price of goods sold and delivered to the German company in July 1939.

The defendants contended that if they were to pay the money sued for they would be committing an offence under the Trading

with the Enemy Act 1939. The section upon which that argument was based provides as follows:

S. 1 (2) For the purposes of this Act a person shall be deemed to have traded with the enemy...(*a*)...if he has...(iii)...discharged any obligation of an enemy whether the obligation was undertaken before or after the commencement of this Act.

The defendants said that by paying the debt due by the German company they would be discharging that company's obligation to pay the plaintiffs.

The learned judge said that in one sense the German company would be discharged from its obligation to pay the plaintiffs but there would be created at the same time an obligation on the part of the German company to pay the defendants the same sum. In reality the obligation was not discharged but merely altered from an obligation to pay a sum of money to *A* to an obligation to pay it to *B*. In his opinion the words 'discharged any obligation' meant a complete discharge. The obligation in the present case still had to be met. The plaintiffs were therefore entitled to recover the sum sued for.

General Accident Fire and Life Assurance Corporation Ltd. *v.* Midland Bank Ltd.

COURT OF APPEAL

1940. June 13.
[1940] 3 All E.R. 252.
56 T.L.R. 905.

In a policy of fire insurance the insurers in consideration of the insured named in the schedule thereto paying the premium mentioned in the said schedule agreed that in the event of the property mentioned in the said schedule being lost or damaged by fire they would pay to the assured the value of the property or the amount of the damage. In the schedule there was written opposite the words 'The insured' the names of three persons followed by the words 'for their respective rights and interests'. HELD *on the true construction of the policy that there was no joint insurance and that each of the persons named was insured severally in respect of his own insurable interest in the insured property and that the insurers were liable to indemnify each one separately in respect of the loss of or damage to his interest.*

Three persons having effected an insurance against fire on certain property 'for their respective rights and interests' the insured property was damaged by fire and the loss fell upon one only of the three insured

persons. A claim was made by that person and the insurers paid the amount of the loss by a cheque drawn in favour of the three persons named as the insured. It was subsequently discovered that there was a fraudulent overstatement of the claim which by the conditions of the contract exempted the insurers from liability. The insurers claimed a return of the money from all three persons as money paid by mistake of fact. HELD *that no claim for a return of the money lay against the two insured other than the person who had suffered the loss.*

When the interest of the insured in the insured property is that of a debenture holder with a floating charge on a mass of property including the insured property and the property is lost or damaged by fire the claim which the owner of the property has against his insurers comes under the floating charge and replaces pro tanto *the insured property and the debenture holder suffers no loss as a consequence of the fire.*

A shareholder of a company has as such no insurable interest in the property of the company.

A guarantor of another's obligation has as such no insurable interest in the property of the person whose obligation he has guaranteed.

In a policy of insurance which consists of a printed form completed with typewritten or handwritten matter the prima facie *meaning of the words in the printed form may yield to the added matter if it be necessary that it should do so for the purpose of arriving at a reasonable and consistent construction of the document as a whole.*

This was a claim by the General Accident Fire and Life Assurance Corporation Limited for a return of money paid by mistake of fact, the payment having been under the terms of a policy of fire insurance in settlement of a claim which was afterwards discovered to have been fraudulently overstated, a circumstance which exempted the corporation from liability. The payment was made by cheque drawn in favour of the three persons named in the policy as the insured and the question at issue was whether the money could be recovered from two of the insured who had not suffered any loss in respect of which they were entitled to indemnity and who were not parties to the fraudulent overstatement.

The policy was to the effect that in consideration of the insured named in the schedule thereto paying to the corporation the premium mentioned in the said schedule the corporation agreed to pay to the insured the amount of any loss or damage by fire

happening to the property named in the said schedule. In the schedule the insured were stated to be 'Messrs Plant Bros. Ltd., Messrs Scoffin & Willmott Ltd. and the Midland Bank for their respective rights and interests'. The property insured consisted of a building and stock-in-trade including raw materials, goods manufactured or in the course of manufacture the property of the insured or held by them in trust or on commission for which they were responsible whilst in the said building. Plant Bros. Ltd. were carrying on their business upon the insured premises of which they were tenants at will and were the owners of the stock-in-trade. Scoffin & Willmott Ltd. were the freeholders and the Midland Bank held a debenture by way of a floating charge over the stock-in-trade as security for an overdraft up to £20,000 on the current account of Plant Bros. Ltd. In addition to their interest as freeholders Scoffin & Willmott Ltd. were holders of a controlling interest in the share capital of Plant Bros. Ltd. and were guarantors of the debt of Plant Bros. Ltd. to the bank.

A fire having damaged the insured building and destroyed or damaged part of the stock-in-trade or other contents a claim was made by Plant Bros. Ltd. The loss and damage was assessed and the corporation which undertook only 20% of the risk paid its share. Payment was made by cheque drawn in favour of Plant Bros. Ltd., Scoffin and Willmott Ltd. and the Midland Bank. It was subsequently discovered that there was a fraudulent overstatement of the claim in respect of the stock-in-trade and the corporation now claimed from the three payees of the cheque a return of the money on the ground that it was paid on a mistake of fact.

Plant Bros. Ltd. who were in liquidation did not appear to defend the action. Scoffin & Willmott Ltd. and the Midland Bank contested the claim on the ground that they were neither parties to the fraudulent overstatement of the claim nor recipients of the money. The Court of Appeal affirming the decision of Tucker J. held that they were right in their contention and dismissed the action as against them.

In the case of the stock-in-trade Plant Bros. Ltd. alone had an insurable interest or had suffered any loss. Scoffin & Willmott Ltd. had no insurable interest either as guarantors of the debt to the bank or as the principal shareholders of Plant Bros. Ltd. The bank

had no insurable interest as creditors and as debenture holders with a floating charge they suffered no loss because when the property was destroyed by fire the claim of Plant Bros. Ltd. against the corporation took the place *pro tanto* of the property as the subject of the floating charge. The policy on its true construction was not a joint insurance of the three insured but a composite insurance covering each separately in respect of its own insurable interest in the property. As a matter of law it was impossible to effect a joint insurance unless there was a joint interest. Plant Bros. Ltd. alone had any claim to be indemnified in respect of the loss and although the money was paid to the three insured jointly that could not affect the right of Plant Bros. Ltd. to receive the totality of the money. Either the insertion of the other two names in the cheque was a mistake which was rectified by their indorsement of the cheque so as to enable Plant Bros. Ltd. to negotiate it and receive the money which they did or if, contrary to the view taken by the Court, the payment clause called for payment to the three jointly they received it merely as agents under an obligation to pay it over to that one or more of the three who was entitled to be indemnified. Their obligation being to pass it on, which they did, no claim for repayment could be made against them. In the case of an agent it was settled law that once he has paid over the money to his principal no action for money had and received based on the allegation that the money was paid by mistake of fact would lie against him.

In the case of the building the claim made by Plant Bros. Ltd. and paid by the office in respect of that claim was in fact excessive for the reason that they were only tenants at will and the claim was in part appropriate only to the freeholders. Everybody concerned however treated the claim as one in respect of the full interest in the property and the money was expended on the restoration of the building. If the money was paid partly in respect of the interest of Scoffin and Willmott Ltd. and they were to be treated as recipients of that part of it they had only received that to which they were entitled and there was no ground on which it could be recovered from them. If on the other hand the whole was paid in satisfaction of an excessive claim by Plant Bros. Ltd. then Scoffin and Willmott could not be treated as recipients of any part of it otherwise than as agents and it was not paid in respect

of any fraudulent claim of theirs. The claim in substance was a perfectly good one which ought to have been honoured by the office in any event and there was no injustice about it whatsoever.

The result was that the claim for a return of the money as against Scoffin & Willmott Ltd. and the Midland Bank wholly failed and the action as against them was dismissed with costs. Leave to appeal to the House of Lords was given.

Stockholm Bank *v.* Schering Ltd.

COURT OF APPEAL

1941. January 29.
[1941] 1 All E.R. 257.
57 T.L.R. 289.

The Trading with the Enemy Act 1939 *makes it an offence to pay or transmit money to or for the benefit of an enemy or to discharge any obligation of an enemy.*

The words 'for the benefit of' being words of the widest possible character are wide enough to include any transaction of which it can truly be said (and that is a question of fact in each case) that it is for the benefit of an enemy.

A transaction which substitutes a British for a neutral creditor is for the benefit of an enemy debtor in that the claim of a neutral can be enforced against the enemy during the war whereas the claim of a British creditor is suspended.

The payment of a sum in sterling by a British national to a neutral in consideration of the assignment by the neutral of a debt due to him by an enemy operates as a discharge of the enemy's obligation to the neutral within the meaning of the Act notwithstanding that it substitutes a like obligation by the enemy to a British creditor. On this point the decision of Macnaghten J. in R. & A. Kohnstamm Ltd. v. *Ludwig Krumm (London) Ltd.* (supra at p. 303) *was considered and distinguished.*

The claim in this action was by a Swedish banking company known as Stockholm Enskilda Bank Aktiebolag (hereinafter referred to as the Swedish company) against Schering Ltd. a company incorporated in England (hereinafter referred to as the English company) for payment of a sum of £3360 sterling. The English company and a company incorporated in India (hereinafter referred to as the Indian company) are subsidiaries of a German company known as Schering-Kahlbaum Aktiengesellschaft of Berlin (hereinafter referred to as the German company). The

existence of the obligation was not disputed but payment was refused on the ground that such payment would constitute an offence under the Trading with the Enemy Act 1939 and would be illegal. The claim arose out of transactions between the above-named companies which may be summarized as follows.

By the first of two agreements made in 1936 the German company agreed to purchase from the Swedish company for £50,400 in sterling, that is to say at a discount of 8*s*. in the pound, a sum of German reichsmarks, which at the current official rate of exchange were worth £84,000 in sterling. The English and Indian companies constituted themselves jointly and severally surety for payment of the said sum of £50,400 to the Swedish company and undertook to purchase from the Swedish company by instalments the sterling debt incurred by the German company to the Swedish company. It was provided that if the two companies made default in purchasing any instalment of the debt on the due date the obligation of the German company to the Swedish company would be raised to the nominal sum of £84,000 less any instalments already paid, that is to say the German company would lose the benefit of a proportionate part of the discount which they enjoyed in purchasing the reichsmarks. By the second agreement made between the English and Indian companies on the one part and the Swedish company on the other part the former agreed to make the instalment payments to the Swedish company in consideration of the assignment by the Swedish company to them of a like amount of the Swedish company's claim against the German company each such payment to be in satisfaction *pro tanto* of their guarantee of the German company's obligation to the Swedish company.

The English and Indian companies made default in the payment of an instalment on the due date and the Swedish company now sued the English company for the amount thereof.

Mr Justice Hawke held that the payment of the money to the Swedish company would be an offence under the Trading with the Enemy Act 1939 and he dismissed the action. The Swedish company appealed to the Court of Appeal. The appellants contended that in construing the words 'for the benefit of an enemy' a narrow meaning should be attributed to them in the sense that they should be limited to cases where by some device or some

circuitous means an attempt was being made to get some benefit into the hands of an enemy and were not to be construed in such a way as to cover a perfectly *bona fide* pre-war financial transaction merely because one of the indirect results would be to benefit an enemy.

The Court dismissed the appeal. In giving judgment the Master of the Rolls (Sir Wilfrid Greene) said that he was quite unable to accept the appellants' argument and that on no principle of construction known to him was it possible to limit the perfectly simple and general words 'for the benefit of' in such a way. On the contrary in his opinion those words were of the widest possible character and even wide enough to take in any transaction of which it could be truly said (and that was a question of fact in each case) that it was for the benefit of an enemy. At what particular point the line would have to be drawn, what particular degree of benefit and what question of remoteness might arise would depend on the facts of each individual case and it would be improper to attempt to suggest any limitation for these words. It seemed clear to him that the payment would be for the benefit of the German company. The effect of the payment would be in the first place to preserve for the German company the substantial benefit of the discount, a benefit which would be lost if no payment were made. Secondly, the German company would be relieved of its obligation to the appellants *pro tanto*. That relief was unquestionable. It was true that on such payment being made the German company would come under a liability to pay a corresponding amount to the English company, but a liability to a neutral company would have been discharged and there would have been substituted a liability to a British company which that company could not enforce during war. He was also of opinion that payment by the English company would discharge an obligation of the German company within the meaning of the Act. It was nothing to the point that contemporaneously with that discharge the German company came under a liability to the English company. That did not in any way alter the fact that the obligation of the enemy to the appellants had been discharged. Reliance had been placed on the recent decision of Macnaghten J. in *R. & A. Kohnstamm Ltd.* v. *Ludwig Krumm (London) Ltd.* (*supra* at p. 303). That was a simple case of principal and surety and Macnaghten J. took the

view that when the surety discharges the debt of the principal debtor it is not correct to say that the obligation of the principal debtor has been discharged within the meaning of the relevant words in the Act. The facts in that case were quite different from those in the present case and it would not be proper for the Court of Appeal not having heard it argued in full to express any opinion about it.

Re S. Brown & Son (General Warehousemen) Ltd.

CHANCERY DIVISION
BENNETT J.
1940. July 30.
[1940] 3 All E.R. 638.

The Courts (Emergency Powers) Act 1939 *S.* 1 (2) *provides that a person shall not be entitled except with leave of the appropriate Court: (a) to proceed to exercise any remedy which is available to him by way of...(iv) the realization of any security.*

A debenture issued by a company gave the debenture holder power to appoint a receiver and provided that a receiver so appointed should be the agent of the company.

HELD *that a debenture holder having with leave of the Court appointed a receiver and the company having subsequently gone into voluntary liquidation the agency of the receiver as agent for the company was terminated and if thereafter the receiver were to sell the property comprised in the debenture he would do so as agent for the debenture holder and that it was necessary for the debenture holder to obtain leave of the Court before such sale could be effected.*

On 1 November 1937 S. Brown & Son (General Warehousemen) Ltd. issued two debentures to Solomon Brown and Sarah Brown. On 27 February 1940 the debenture holders obtained leave of the Court to appoint receivers and managers under the power contained in Cl. 11 of the debentures, and C. Sherrott and W. H. Cork were duly appointed as such. On 12 June 1940 the receivers and managers issued a summons asking for leave to sell the property comprised in the debentures. Subsequently the company went into voluntary liquidation and the debenture holders were added as applicants under the summons.

Mr Justice Bennett said that if the company had not gone into liquidation it might have been difficult to say that the receivers and managers acting as the company's agents required leave of

the Court to sell the property, but as the result of the liquidation the receivers and managers had ceased to be the agents of the company and were acting in co-operation with the debenture holders by whom they were appointed. Their act in realizing would be not their act but that of the debenture holders and in such circumstances it would be necessary for leave of the Court to be obtained at the instance of the debenture holders whose agents the receivers and managers must be presumed to be. There was no difficulty in making the order in this case and he gave the applicants authority to sell the property comprised in the debentures.

Re **Wood**

CHANCERY DIVISION
MORTON J.
1940. November 12.
[1940] 4 All E.R. 306.
L.R. [1941] 1 Ch. 112.

The Courts (Emergency Powers) Act 1939 *S.* 1 (2) *provides that a person shall not be entitled except with leave of the appropriate Court: (a) to proceed to exercise any remedy which is available to him by way of...(iv) the realization of any security.*

A debenture issued by a company gave the debenture holder power to appoint a receiver and provided that a receiver so appointed should be the agent of the company: HELD *that a debenture holder having with the unqualified leave of the Court appointed a receiver no further leave was required to enable the receiver to sell the property comprised in the debenture.*

In giving leave to a debenture holder to appoint a receiver the Court may qualify the leave so given by making it a condition of the order that the receiver shall not sell the property without coming back to the Court.

On 18 November 1938 the Globe Clothing Company issued a debenture in favour of one Robert Dobson to secure a sum of £1200 and interest at 6 per cent per annum. The principal sum was repayable on 1 January 1939 and was not repaid on that date. The debenture provided that the holder might at any time after the principal moneys had become payable appoint a receiver of the property comprised in the debenture with power to the receiver *inter alia* to sell, convert into money and realize the same and that any receiver so appointed should so far as the law allowed be the agent of the company for all purposes. On 9 December 1939 the debenture holder applied to the Court and on 21 December 1939

the Master before whom the matter came made an order that the applicant be at liberty to exercise any remedy which might be available to him by way of the appointment of a receiver of the property comprised in the debenture. The debenture holder appointed one Benjamin Wood to be receiver of the property comprised in the debenture and on 10 October 1940 Wood made the present application by summons for leave to sell the property.

Morton J. held that no further leave of the Court was necessary and dismissed the application. In selling the property comprised in the debenture the receiver was not personally proceeding to exercise any remedy which was available to him by way of the realization of a security. The receiver was deemed to be the agent of the company and if he desired to sell the property he would do so in his capacity as such agent. Neither was the debenture holder proceeding to exercise any remedy which was available to him by way of the realization of a security. Once the receiver was appointed he was the agent of the company and so long as he was in that position and desired to sell he was not the agent of the debenture holder and therefore the debenture holder was not proceeding to exercise any remedy which was available to him. The Court however had power under Sect. 1 (4) of the Act to insert in the order giving a debenture holder leave to appoint a receiver a restriction to the effect that the receiver should not be at liberty to sell the property without leave of the judge in person. He, the learned judge, had inserted that restriction in any case where he felt doubt as to whether the receiver ought to be allowed to realize the property without further application to the Court.

With reference to the decision of Bennett J. in *Re* S. Brown & Son (General Warehousemen) Ltd. to the effect that where after the appointment of a receiver the company had gone into liquidation the receiver ceased to be the agent of the company and became the agent of the debenture holders and could not sell without leave of the Court he, Morton J., said that in that case it might be that there were some special facts which led Bennett J. to that conclusion but he, Morton J., was not, without considering the matter very carefully, prepared to assent to the view that the mere fact of the liquidation not only terminated the agency of the receiver *quoad* the company but also constituted the receiver the agent of the debenture holder.

Re Sylvester

CHANCERY DIVISION
FARWELL J.
1940. October 31.
[1940] 4 All E.R. 269.
L.R. [1941] 1 Ch. 87.
57 T.L.R. 136.

The Inheritance (Family Provision) Act 1938 *S.* 1 (2) *provides that when a deceased person has left a will but has not by such will made proper provision for any dependant as defined by the Act the Court may make an order for payment of a reasonable provision for the maintenance of such dependant by way of periodical payments from the income of the estate.*

HELD *that although the husband of a deceased woman is a dependant as defined by the Act the Court presumes that* prima facie *a husband is capable of maintaining himself and it is only in exceptional circumstances that the Court will make an order under the Act in his favour.*

This was a summons taken out by Milbourne Sylvester the husband of Caroline Elizabeth Sylvester asking that the Court under the Inheritance (Family Provision) Act 1938 should make some proper provision for him for his maintenance during his widowerhood on the ground that no such proper provision had been provided by the will of his wife.

The spouses were married on 5 November 1913. At that time the plaintiff who was 42 years of age was the manager of licensed premises. Apart from his salary he had no means. His wife had some means and after the marriage he gave up his business as manager and the whole of the spouses' living expenses were defrayed until her death on 24 February 1940 out of the wife's income. There were no children of the marriage. By her will the wife after the bequest of certain legacies gave the whole residue of her estate upon the usual trust to sell and convert and the whole of the proceeds upon trust to pay an annuity of £104 to her sister, during her life, an annuity of £104 to her brother during his life and if he should die leaving his wife surviving him to her during her life, and an annuity of £52 to the plaintiff during his life and she left the residue to be divided among three charities absolutely.

The estate was amply sufficient to provide an increased annuity to the plaintiff without abating the other annuities. The learned judge said that he did not think that in the ordinary way applications by husbands for the sort of assistance which the Act enabled the Court to give were applications which ought readily to be entertained. *Prima facie* the husband should be able to maintain himself

and ought not to ask the Court to give him out of his wife's estate more than she had thought fit to provide for him. There were however exceptional cases in which such an application might be justified and he thought that this was one of these.

The evidence showed that the plaintiff up to the time of his marriage was earning an income upon which he was able to maintain himself. He then gave up his occupation and his earnings in order to devote himself to his wife. The wife seemed to have kept no servants and the husband did all the work of the house and when his wife was ill which happened on more than one occasion he had to nurse her and look after her as she was not willing to engage the services of a nurse. In that way he was prevented from earning his own living or from making such provision for his old age as he might otherwise have done. Now at the age of 69 his chances of earning a living were very much prejudiced if not almost destroyed by the circumstances of his married life. In these circumstances he, the learned judge, thought that the provision of £1 a week was inadequate and that his wife had not made a proper provision for him. On the whole he came to the conclusion that a reasonable provision would be £4 a week and he would make an order directing that out of the income of the estate there should be paid to him during his widowerhood an additional £3 per week.

Re **Pointer**

CHANCERY DIVISION

MORTON J.

1940. October 22.
[1940] 4 All E.R. 372.
L.R. [1941] 1 Ch. 60.
57 T.L.R. 83.

The Inheritance (Family Provision) Act 1938 *provides that when a deceased person has left a will but has not by such will made proper provision for any dependant as defined by the Act the Court may make an order for payment of a reasonable provision for the maintenance of such dependant.*

Dependants as defined by the Act include the husband of a deceased woman [*S.* 1 (1) (*a*)] *and a daughter of the deceased who has not been married or who is by reason of some mental or physical disability incapable of maintaining herself* [*S.* 1 (1) (*b*)].

S. 1 (2) *of the Act provides that an order for payment of maintenance shall be by way of periodical payments of income and shall provide for their termination not later than, in the case of a daughter*

who has not been married or is under disability, her marriage or the cesser of her disability whichever is the later.

A married daughter who was separated from her husband (who contributed nothing to her maintenance) was, owing to a physical disability, unable to exercise her profession of a pianist but gave her services as housekeeper to a friend of her father in exchange for board and lodging without wages. HELD *that she was a dependant as defined by the Act and that although the words 'whichever is the later' were extremely difficult to construe the order ought to provide for the termination of payments on cesser of her disability. If she was left a widow and remarried that situation would have to be dealt with by a variation of the order under the provisions of S.* 4.

This was a summons under the Inheritance (Family Provision) Act 1938 by Charles Benjamin Pointer and Ada Ellen Schonfield, the husband and daughter respectively of Alice Julia Pointer deceased asking for an order that such reasonable provision as the Court thought fit should be made out of her estate for their maintenance.

The testatrix died on 7 December 1939. She had left her husband about 1893 and under a deed of separation dated 2 October 1895 the husband had the custody and maintenance of the children and allowed the testatrix £2 per week. The husband was a schoolmaster who at the time of his wife's death had retired and was aged 83. His income was then about £330 per annum. There were two children of the marriage, a daughter Ada Ellen Schonfield and a son George Pointer. The daughter was married but was separated from her husband owing to the latter's drunkenness and neither he nor any of their three children all of whom were married contributed anything to her maintenance. She was 55 years of age and owing to physical disability could not exercise her profession of a pianist and acted as a housekeeper to a friend of her father in return for her board and lodging.

The son was dead leaving a widow and a daughter Joan Nancy Pointer who had attained the age of 21 years; but had not attained the age of 25 years. The widow had an income of about £180 per annum and there was medical evidence that Joan Nancy Pointer was not in good health.

By her will the testatrix left £1000 to her daughter and directed that the trustees should hold the residue of the proceeds of the

conversion of her estate in trust for her granddaughter absolutely if she should attain the age of 25 years and if she should not live to attain a vested interest upon trust for her children living at her death who should attain the age of 21 years or marry under that age and in default of such children in trust for the daughter of the testatrix and her children. The estimated total net estate was £15,849. Mr Justice Morton said that he did not think in all the circumstances that the legacy of £1000 was a reasonable provision for the daughter and that he would make an order that the income of one-fifth of the residuary estate or 30*s.* per week whichever was the smaller sum should be paid to her during her life subject to the proviso that such payments should terminate on the cesser of her disability and as regards the husband he had felt considerable hesitation but having regard to his age and physical infirmities he, the learned judge, proposed to direct that the income of one-fifteenth of the residuary estate or 5*s.* per week whichever was the smaller should be paid to him during his lifetime or until his remarriage. With regard to the termination of the payments to the daughter the Act said that the order should provide for its termination on her marriage or the cesser of her disability whichever was the later. The words 'whichever was the later' were extremely difficult to construe but he thought in the case of a daughter who was married but was under disability the provision should be for termination on the cesser of her disability. If she were left a widow and remarried that situation could be dealt with by a variation of the order under the provisions of S. 4 of the Act.

Re **Webb**

CHANCERY DIVISION

FARWELL J.

1941. February 18.
[1941] 1 All E.R. 321.

A policy on the life of an infant securing payment of the sum assured in the event of his death on or after the date of his 21st birthday may be effected by the child's parent in trust for the child as beneficial owner.

In order to create such a trust it is not sufficient to state that the policy is effected for or on behalf of the child but if upon the true construction of the whole provisions of the policy it is reasonably clear that the parent intended to constitute himself a trustee for his child the Court will give effect to that intention notwithstanding the absence of plain words constituting a trust.

This was a summons taken out by the executors of Henry Bertram Law Webb to determine whether two policies taken out by him belonged to his estate or were held in trust respectively for his two infant children. The policies which were issued by the Friends' Provident and Century Life Office are dated 4 May 1934 and 17 August 1936 respectively. They are in similar terms. In each the father is described as 'the grantee' and is stated to be desirous of effecting an insurance 'on the life on behalf and for the benefit of' the person named in the schedule as 'the life assured' namely the child. The policy then provides that in consideration of the payment of the first and subsequent premiums (if any) (namely £47. 11*s.* 8*d.* annually) the office will pay £6042 to the personal representatives or assigns of the life assured on the death of the life assured provided he shall die on or after the day on which he attains the age of 21 years. Then follows a provision to the effect that during the 30 days immediately preceding the life assured's 21st birthday and on his behalf the grantee or his personal representatives or assigns may at his or their option exercised by notice to the office (1) Terminate the assurance as on the day prior to such birthday and receive a payment in cash of £996. 19*s.*; (2) Determine that the assurance shall continue as from such birthday in the form of either an ordinary whole life or an endowment assurance subject to payment of annual premiums as follows. Then follows a statement of the premiums payable. Then it is provided that, notwithstanding anything thereinbefore contained, until (but not including) the life assured's 21st birthday and on his behalf the grantee, his personal representatives or assigns shall have full power to (i) surrender the policy, (ii) agree to any modification or variation thereof, (iii) assign or charge the same by way of mortgage or security for any sum not exceeding the surrender value. Then follows a provision that on the 21st birthday of the life assured (if the policy is still subsisting) all rights and powers of the grantee, his personal representatives or assigns will cease and the life assured will become solely interested therein and entitled to deal therewith subject nevertheless to any such assignment or charge by way of mortgage or security as aforesaid then affecting the same. Then there is a provision that if the grantee shall die before the life assured's 21st birthday the policy shall remain in force without payment of any further premium, until (but not including) the life assured's 21st birthday for the period up to but

not including that day. If the life assured shall die before his 21st birthday there shall be paid to the grantee, his personal representatives or assigns the sum of £40. 5*s*. 8*d*. on account of each year's premium paid in respect of the policy with compound interest thereon at the rate of 2 per cent per annum.

Henry Bertram Law Webb died on 19 August 1939 having made a will dated 8 February 1938, and his two children whose lives are assured by the policies in question were then aged 6 and 4 years respectively.

The learned judge after citing *Cleaver* v. *Mutual Reserve Fund Life Association* C. A. [1892] 1 Q. B. 147; *Re Policy No.* 6402 *of the Scottish Equitable Life Assurance Society* Joyce J. [1902] 1 Ch. 282; *Re Burgess's Policy* Eve J. [1915] 85 L. J. Ch. 273; *Re Engelbach's Estate* Romer J. [1924] 2 Ch. 348 and *Re Sinclair's Life Policy* Farwell J. [1938] Ch. 799 said that the policy he had to consider was one in terms quite different from those of any other policy which he had seen before and there were provisions in it which differentiated it very much from the policy which he had to consider in *Sinclair's* case or which Romer J. had to consider in *Engelbach's* case. It must be taken on the authority of these cases that unless there is in the policy something which does establish reasonably clearly that the assured was in fact constituting and intending to constitute himself a trustee for the infant of the assurance money, the infant was not entitled and the personal representatives of the deceased were entitled to the moneys payable and that the mere fact that a policy was taken out for or on behalf of an infant was not alone sufficient to constitute trusteeship. He thought however there was enough in the policy before him to establish a trust in favour of the infant as against the father's estate. The provisions which he had cited giving the grantee certain powers to exercise options, surrender, agree to modifications and so on were to be exercised only on behalf of the infant and it seemed to him that any money so acquired would be money which belonged to the infant and not to the grantee. The most striking of all the provisions was that if the life assured attained the age of 21 years then any interest which the grantee had in the policy or the moneys secured under it completely disappeared. It was then a matter wholly between the insurance company and the life assured as to the future terms. He thought that the life assured was the person entitled, in that event, to the money payable under

the policy, and the life assured if there were any further payments to be made was the person to make these payments. In those circumstances the proper course was to make a declaration that the moneys payable under the two policies in question belonged to the two infants respectively and not to the estate of the testator.

Young *v.* Hamill's Executrix

COURT OF SESSION
FIRST DIVISION
1940. May 17.
1940. S.C. 421.

The Courts (Emergency Powers) (Scotland) Act 1939 *enacts that a person shall not be entitled except with the leave of the appropriate Court to enforce any decree of Court...for the payment of a sum of money and that if on any application for leave to enforce any decree...the appropriate Court is of opinion that the person liable to implement such decree...is unable immediately to do so by reason of circumstances directly or indirectly attributable to any war in which His Majesty may be engaged the appropriate Court may refuse leave to enforce the decree.*

HELD *that if on an application for leave to enforce a decree for payment the debtor fails to persuade the Court of his inability to meet his obligation owing to circumstances occasioned by war the Court has no discretion and must grant leave notwithstanding that the debtor can only pay by realizing his stock or other business assets at a figure much below its true worth in normal circumstances. A debtor is not entitled to relief unless the war has induced a position of insolvency.*

The defender was the executrix of her late husband who carried on a pawnbroking and saleroom business to purchase which he had borrowed a sum of money from the pursuer. At his death part of this sum was still outstanding and the pursuer was granted decree against the defender as executrix for payment of the sum of £2550. On an application for leave to enforce the decree the defender averred that the business was the only asset of the executry; that it was reasonably profitable and if carried on would provide the defender with a livelihood and at the same time permit substantial payments being made in reduction of the loan; that owing to the war it was impossible to obtain a loan to pay off the pursuer and that if the business were sold the sum realized would be far less than its true worth and would result in approximately £1000 and no more being received in excess of the amount due under the decree. The defender pleaded that having regard to these facts leave to enforce the decree should be refused.

The Court was of opinion that the defender's averments were irrelevant and that it had no discretion to refuse leave to enforce the decree. The defender had not averred that she was unable immediately to make payment of the debt for which decree had been granted; nor did she seek to show that there were other debts outstanding which she would be unable to pay if called upon to discharge this debt. In these circumstances she had entirely failed to show that the war had induced in her case such a position of insolvency as is required before the statutory relief could be given. It was no doubt unfortunate that assets had to be realized at a time when the owner thought that the best price could not be obtained; but she could hardly be allowed to frustrate the present rights of her creditors on the statement of an expectancy that a better price than that now obtainable might be got in the future. It might well be that the opposite view as to future values might turn out to be correct.

Notes

Appeal:

Sothern-Smith v. *Clancy*, Vol. LXXI, p. 163. Reversed by Court of Appeal. [1941] 1 All E.R. 111: 57 T.L.R. 247: supra, p. 292.

Corrigenda:

Odhams Press Ltd. v. *Cook*, Vol. LXXI, p. 158. Correct reference is 56 T.L.R. 704.

English v. *Western*, Vol. LXXI, p. 152. Correct reference is L.R. [1940] 2 K.B. 156.

Further references:

Hollis v. *Wingfield*, Vol. LXXI, p. 147. 56 T.L.R. 421.

Attorney General v. *Oldham*, Vol. LXXI, p. 149. 56 T.L.R. 926.

Harling v. *Celynen Collieries Workmen's Institute*, Vol. LXXI, p. 150. 56 T.L.R. 935.

Weld Blundell v. *Synott*, Vol. LXXI, p. 154. L.R. [1940] 2 K.B. 107.

Lowry v. *Consolidated African Selection Trust Ltd.*, Vol. LXXI, p. 156. L.R. [1940] A.C. 648.

Soho Square Syndicate Ltd. v. *Pollard & Co. Ltd.*, Vol. LXXI, p. 160. L.R. [1940] Ch. 638.

Forsyth v. *Thompson*, Vol. LXXI, p. 164. L.R. [1940] 2 K.B. 366: 56 T.L.R. 879.

Re Smith-Bosanquet, Vol. LXXI, p. 166. 56 T.L.R. 960.