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LEGAL NOTES

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AND

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Diplock's Estate, *In re*, Diplock and others *v.* Wintle and others (and associated actions)

Will—Charitable bequest of residue held void for uncertainty—Previous distribution of residue by executors in terms of bequest—Mistake in construction of will—Mistake in law—Claims by next of kin to recover payments made to charitable institutions—Common law doctrine of following assets—Equitable doctrine of tracing assets

CHANCERY DIVISION

WYNN-PARRY J.

1947. March 11.
[1947] Ch. 716.
[1947] 1 All E.R. 522.

These were 19 out of a series of 120 associated actions brought by the next of kin of Caleb Diplock, who died in 1936, to recover from some one or more charitable institutions money paid to them by the executors of his will in terms of a charitable bequest of residue which was subsequently held by the House of Lords to be void for uncertainty. The bequest was in the form of a direction by the testator to his executors to divide his residuary estate between such charitable institution or institutions or other charitable or benevolent object or objects as his executors might in their absolute discretion determine. During the years 1936, 1937 and 1938 the executors distributed a sum of over £200,000 among 139 charitable institutions.

On the failure of the charitable bequest there was an intestacy as to residue, and the next of kin of the testator claimed from the institutions the return of the shares of residue to which they were respectively entitled under the Administration of Estates Act, 1925.

In the course of adjudicating on these claims the learned judge reviewed the principles of common law and equity applicable to the recovery of money by the true owner from some other person or persons to whom it had been paid by the holder of it.

At common law an action for money had and received lies by the true owner of it against one to whom it has been paid under a mistake of fact; but the action is not maintainable where the money has been paid under a mistake of law which does not involve any mistake of fact. In the present case the mistake of the executors was as to the construction of the will which was a question of law, and in the opinion of the learned judge no mistake of fact was involved and in no case could an action for money had and received lie for the recovery of the money paid to an institution by the executors.

Another common law remedy is the right of the owner of money or other asset to follow and recover it from any person into whose hands it may have come. This remedy is not dependent on whether the money has been paid or

other asset parted with under any mistake either of fact or law. It is a right *in rem* and depends on the preservation of the identity of the *res*, even though it may have been converted into some other form. Where money has been paid by the wrongful recipient of it into his bank account and has there been mixed with money of his own, the identity of the money so paid in has been lost and the common law right of the owner to follow it is gone. Where, however, a defendant institution had paid the money received from the executors into a separate account and the money was never mixed with any of the institution's own money it could be followed and recovered by the executors on behalf of the next of kin who were beneficially entitled to it. It could be followed also into any other property in the hands of the institution which could be identified as property into which the money had been converted.

In some cases the defendant institution had paid the money into its general bank account where it was mixed with its own money, the institution's accounts treating an aliquot part of its assets as representing the money received from the executors, and it was argued that its identity was thereby preserved for the purpose of recovery; but the learned judge held that once the money had been mixed with the institution's own money in its bank account its identity was lost and could not thereafter be preserved by an ear-marking of assets for the purposes of the institution's own internal administration.

The learned judge rejected a further contention put forward on behalf of the plaintiffs that wherever it could be shown that the money had been applied in discharge of a debt owing by the institution the plaintiffs were entitled to be recouped the amount so applied. To order recoupment in such a case would involve the imposition of a personal liability whereas the common law right to follow assets is a right *in rem* to recover the plaintiffs' own property or the property into which it has been converted.

Where a fiduciary relationship exists between the recipient of money and the true owner of it, equitable principles may be involved to enable the latter to recover it in many cases where the common law provides no remedy. In equity the true owner of the money may trace it into the recipient's general banking account and out of it; and when, on such tracing, assets can be discovered in the hands of the recipient which represent wholly or in part the money received, equity gives the true owner an equitable charge on such assets for the money to which he is entitled. There is, however, no right in equity to trace where there is no fiduciary relationship between the recipient and the true owner. Where such relationship does exist there is no distinction between an express trustee and an agent or a bailee or collector of rents or anybody else in a fiduciary position, and the moment a fiduciary relationship is established the rules of equity as regards tracing the trust money apply. When the bank account of the recipient trustee has been entered the application of the rule in *Clayton's* case is displaced. Under that rule where applicable every payment out of a bank account has to be applied to the earliest item on the credit side, but in the case of trust money the rule is displaced because the trustee cannot be allowed to say that he had taken out trust money when his own money was available and the creditors of the trustee cannot stand in a better position in relation to the bank account than he could.

Having regard to the possible application of the above-mentioned equitable rule, of tracing trust money, to the claims of the next of kin in the present case, it was necessary for the learned judge to decide when, if at all, a fiduciary

relationship was established between an institution which had received the money and the next of kin who were entitled to it. It was submitted on behalf of the plaintiffs that, having regard to the terms of the letter covering the cheque by which payment was made to an institution, the latter took with notice of the trust in favour of the next of kin: but counsel for the plaintiffs admitted that on the authorities that contention was not open to them in a Court of first instance though they desired to keep the point open in case the matter should go further. On the assumption that the institution took without notice of the trust and paid the money into a banking account where it was mixed with its own money, there could not be imputed to it at the time of the reception of the money that fiduciary character by means of which only the identification of it could be notionally preserved in equity. Where, however, the money was paid into a separate account and was not mixed with the institution's own money then, in addition to the plaintiffs' common law right to follow it so long as identification was possible, the institution became a trustee of the money as from the time when in October 1939 it received a letter from the solicitors to the executors informing it that the validity of the payment to it had been challenged and calling upon it not to deal until further notice with the sum paid to it, and if identity had been preserved up to that time the plaintiffs could as from that time trace the money in equity into any assets representing wholly or in part the money received from the executors which could be discovered in the hands of the institution.

In some cases the executors in paying the money to an institution imposed a condition that it should be applied to some specified purpose such as building or providing equipment. In these cases it was argued on behalf of the institution that it was a purchaser for value without notice and therefore entitled to retain the money whatever the right of the next of kin might have been to recover from a donee who had given no valuable consideration. The learned judge said that he did not think that the application of the money in compliance with such a condition constituted the giving of valuable consideration and he rejected the argument.

The case is under appeal.

Prudential Staff Union *v.* Hall

Collectors on staff of Prudential Assurance Company, Ltd.—Responsible to Office for money collected—Collectors' Trade Union—Burglary policy effected by Union—Risk of loss by members of money collected—Action on policy in name of Union—Trustee for members—Insurable interest—Life Assurance Act, 1774—Names of persons interested—Insurance on ships, goods and merchandise—Whether 'goods' includes money in specie

KING'S BENCH DIVISION

MORRIS J.

1947. April 1.
L.R. [1947] K.B. 685.
63 T.L.R. 392.

This action was brought by the Prudential Staff Union on a policy subscribed by Lloyd's underwriters. In the policy the Union was described as 'the assured'. The policy covered losses by burglary and housebreaking from any office or private dwelling-house normally occupied in the British Isles. It purported to insure all those who should be members of the Union during the currency of the policy in respect of losses of moneys collected by or held by them which resulted from the occurrence of any of the perils insured against. The action was

brought in the name of the Union as sole plaintiff and the statement of claim alleged that on 16 May 1945 two collectors, husband and wife, who were members of the Union, had in their possession on behalf of the Company £72. 0*s*. 6*d*. and £93. 2*s*. 1*d*. respectively and that on the night of 16 May those sums were stolen from their dwelling-house by burglary and had not been recovered. The Union claimed to be indemnified by the underwriters in respect of the loss and brought this action against the defendant in respect of his share.

The learned judge said that the plaintiff Union had not proved to his satisfaction that the alleged burglary had taken place and that on that ground the action failed and must be dismissed.

Arguments had, however, been addressed to him on the assumption that a loss had occurred and in deference to those arguments the learned judge proceeded to express his opinion on the legal points which had been raised.

The defendant contended that the plaintiff Union had no insurable interest in the money alleged to be stolen and had therefore suffered no loss and had no title to sue in respect of the loss suffered by two of its members.

The Union, however, claimed an insurable interest in itself on two grounds: (1) that it was under an obligation to each member to effect the policy sued on out of the money received by it from the member as his contribution to the Union funds, (2) that the Union was concerned generally with the welfare of its members and had an interest in protecting them from the loss of their property. The learned judge was of opinion that the Union's claim to an insurable interest was unfounded.

On an alternative plea that the defendant was estopped from denying that the Union had a title to sue in respect of the alleged loss by reason of the past conduct of the underwriters in requiring claims to be presented by the Union and in settling claims by cheque made payable to the Union, the learned judge said that the course followed in cases where liability was admitted could not be decisive of who should properly be plaintiff in a contested action at law.

Although the learned judge repelled the Union's pleas of insurable interest and estoppel he was however of opinion that the action was maintainable by the Union on the ground that the Union was named as the assured in the policy and the underwriters undertook to pay and make good to it the losses suffered by its members. The Union was therefore entitled to sue in its own name for the indemnity contracted for and would hold it when received as trustee for the members who had suffered the losses.

The defendant had contended that the Union could not succeed on the last-mentioned ground because of the provision of s. 2 of the Life Assurance Act, 1774, that it shall not be lawful to make any policy without inserting in such policy the name or names of the person or persons interested therein or for whose use benefit or on whose account such policy is so made. The answer to that was that s. 4 of the Act provides that nothing therein contained shall extend to insurances *bona fide* made by any person or persons on ships, goods or merchandise. In the opinion of the learned judge this was a policy on 'goods' within the meaning of that section. It was on moneys in a form in which such moneys could be physically burned or physically transported. It might be that for some purposes moneys were not to be regarded as goods but in his judgment moneys as defined for the purposes of this policy were 'goods' as that word in its context and having regard to the scope and purview of the enactment is used in the Life Assurance Act, 1774.

Bate (deceased), *In re*, Chillingworth *v.* Bate

Presumption of survivorship—Law of Property Act, 1925, *s.* 184—*Uncertainty as to who survived—Evidence required—Balance of probability—Defined and warranted conclusion*

CHANCERY DIVISION
JENKINS J.
1947. July 17.
[1947] 2 All E.R. 418.

After considerable difference of judicial opinion the House of Lords in *Hickman* v. *Peacey* [1945] A.C. 304 held by a majority that the statutory presumption of survivorship enacted by s. 184 of the Law of Property Act, 1925, applies in every case where the circumstances are such that it is uncertain whether any one of two or more persons who were the victims of a common catastrophe survived the other or others. The section, they said, proceeds upon the footing that if survivorship is not proved the only alternative is uncertainty and that the presumption arises even though the proper inference from the evidence may be that death was simultaneous or as nearly simultaneous as it is possible for the deaths of any two persons to be. Different opinions were expressed as to what weight of evidence is necessary to prove the fact of survivorship so as to rebut the presumption and take the case out of the section, but that point was left open. On the one hand it was suggested that it might be sufficient if on the evidence there was such a balance of probability as to warrant a definite conclusion on the matter and on the other hand it was maintained that survivorship must be proved to the exclusion of all reasonable doubt.

In the case now noted a husband and wife aged 83 and 75 years respectively were found lying dead together in their kitchen, the cause of death being carbon-monoxide poisoning from an escape of gas. The man left a will and the wife died intestate, and the succession to their respective estates depended on which survived the other.

Evidence was given by three distinguished pathologists, one of whom said that a definite conclusion as to priority of death could be drawn from the relative degrees of saturation of carbon monoxide found in the blood after death and that inasmuch as the degree of saturation was less in the woman than it was in the man the inference was that the woman died first. The other two pathologists were of opinion that in the circumstances no reliable conclusion could be drawn from an examination of the blood. The body of the man was found lying across that of the woman and it was contended that that was an additional reason for holding that the woman died before her husband.

The learned judge said that although there was something less than unanimity among the judges of the House of Lords as to the degree of proof of survivorship which would exclude the presumption enacted by s. 184 he thought that all of them would have agreed that Lord Simon did not put it too high when he spoke of 'evidence leading to a defined and warranted conclusion'. Applying that as the test he thought he must go further than a conclusion that a reasonable explanation of the circumstances was that the husband survived his wife or *vice versa*. He thought he must be able to come to a conclusion of fact on grounds which so outweighed any ground for a contrary conclusion that he could ignore the latter. It seemed to him that on the evidence before him he could not do anything of the kind. Having

given the best consideration he could to the evidence he found that there was no reliable ground on which he could hold that the husband survived his wife. He accordingly made a declaration to the effect that it be presumed that the husband predeceased his wife.

Fraenkel *v.* Whitty

Covenant—Payment of monthly sum to beneficiary—Until some act or event whereby the sums covenanted or any part thereof if belonging absolutely to the beneficiary would become vested in some other person—Trading with the Enemy (Custodian) Order, 1939—Beneficiary becoming an 'enemy'—Whether next monthly payment would have become 'vested' in Custodian of Enemy Property

CHANCERY DIVISION
ROXBURGH J.
1947. Oct. 30.
[1947] 2 All E.R. 646.

The question raised by this summons was whether a settlor, having covenanted to make a monthly payment to a beneficiary subject to a forfeiture clause, was absolved from making further payments when his beneficiary became an 'enemy'. The answer depended on whether on the happening of that event the next monthly instalment if it had belonged absolutely to the beneficiary would have become 'vested' in the Custodian of Enemy Property.

By a deed dated 31 August 1939 the settlor covenanted with the beneficiary (Hilde Raaber) that until the death of the beneficiary, or until some act or event should sooner be done or happen whereby the monthly sums thereby covenanted to be paid or some part thereof if belonging absolutely to the beneficiary would become vested in some other person or persons, he or his executors or administrators would pay to the beneficiary on the first day of each month such sum as after deduction of income tax at the standard rate for the time being in force would amount to £41. 13*s.* 4*d.*

The beneficiary was an Austrian national and was resident in Switzerland at the date of the deed. During May 1940 she went to reside in Austria and thereby became an 'enemy' within the meaning of the Trading with the Enemy Act, 1939.

The Trading with the Enemy (Custodian) Order, 1939, provides *inter alia* that there shall be paid to the Custodian any money which would but for the existence of a state of war be payable to or for the benefit of a person who is an enemy and 'that such payment shall be made...within fourteen days after...the money has become payable or would but for the existence of a state of war have become payable...' and that the Custodian shall have power to sue for and recover any moneys payable to him under the Order and that the receipt of the Custodian or any person duly authorized by him to sign receipts on his behalf for any money paid to him under the Order shall be a good discharge to the person paying the same.

It was argued on behalf of the Custodian of Enemy Property that any monthly sum (e.g. the June instalment) which would have become payable to the beneficiary under the deed after she had become an 'enemy' would not have 'vested' in the Custodian within the meaning of the deed, because if before actual payment the beneficiary ceased to be an 'enemy' the Custodian would be divested of the right to receive payment, and that a right to receive

payment which may be diverted in certain events cannot be a 'vesting' within the meaning of the deed. The learned judge held that, upon the true interpretation of the Trading with the Enemy Act and the Order, once money has become payable to the Custodian its character is fixed and must be paid to him whatever may be the subsequent history of the person to whom but for the state of war it would have been payable. The event which happened would have caused the June instalment to be payable to the Custodian within 14 days of its due date. It would have vested in the Custodian the right to sue for it and give a good discharge for it. It would have put him in a position as strong as, or indeed stronger than, that of a legal assignee. It was difficult to see what more could have been done to 'vest' that instalment in him, short of actual payment and the context showed that in the deed 'vest' cannot refer to actual payment. In his judgment there would have been a 'vesting' in the Custodian and the forfeiture clause applied so that nothing ever became payable to the Custodian and when Hilde Raaber became an 'enemy' the settlor was absolved from any further payment under the deed.

Reference was made to the very different case of In re *Wightman* (17 April 1945, unreported), where a widow who was entitled during her widowhood to the income from her deceased husband's testamentary trust fund subject to a forfeiture clause was resident in France and in July 1940 became technically an 'enemy', and it was held that so long as she remained an 'enemy' the income payable to her became payable to the Custodian. In that case the will directed a forfeiture if any event should happen whereby the widow's interest during widowhood would if belonging absolutely to her become vested in some other person. It could not be said that when the widow became an 'enemy' her whole interest during widowhood would have become vested in the Custodian since all that he was entitled to was the income arising until she ceased to be an enemy. There was therefore no forfeiture.

If in the present case the words 'or some part thereof' had been omitted from the forfeiture clause it would have been equally impossible to argue that all the monthly sums would have become 'vested' in the Custodian or that a forfeiture had been incurred: but the introduction of these words made all the difference because a forfeiture was incurred if some part of the monthly sums (i.e. the June instalment) if belonging absolutely to the beneficiary would have 'vested' in the Custodian.

Commercial Structures, Ltd. *v.* Briggs

Income tax—Additional assessments—'If the surveyor discovers...'—No additional information—Mistake in law—Income Tax Act, 1918, *s.* 125(1)

KING'S BENCH DIVISION

ATKINSON J.

1947. Oct. 30.
[1947] 2 All E.R. 659.

In this case the learned judge had to consider the important question whether, if a surveyor of taxes makes an assessment to income tax and afterwards he or another surveyor finds that owing to a mistake in law on the part of the surveyor the taxpayer has been undercharged, an additional assessment may be made notwithstanding that full information was before the surveyor in the first instance and that no fresh information has been received by the surveyor.

The answer to that question depends on the meaning to be given to the word 'discovers' in subsection 125(1) of the Income Tax Act, 1918. The subsection provides that 'If the surveyor discovers that any properties... chargeable to tax have been omitted from the first assessments; or that a person chargeable... has been undercharged in the first assessments; or that a person chargeable has been allowed... any allowance, deduction, exemption, abatement or relief not authorized by this Act then and in every such case' further assessments may be made.

There has been considerable conflict of judicial opinion on this question and the authorities as they stand do not afford a clear answer to it. Bray J. in *Rex* v. *Kensington Income Tax Commissioners* [1913] 3 K.B. 870 and Lush J. in *Rex* v. *Inspector of Taxes for Parish of Kingsland* [1922] 8 Tax Cas. 327 both took the view that the word covered an honest change of opinion by the surveyor on the same information. In *Anderton and Halstead, Ltd.* v. *Birrell* [1932] 1 K.B. 271 Rowlatt J. took the opposite view. He said 'The word "discover" does not, in my view, include a mere change of opinion on the same facts and figures upon the same question of accountancy'. It was, however, unnecessary in that case for the learned judge to decide the point as he had already held that the surveyor's amended view was wrong and that the surveyor's original assessment was the right one. The same point came before Finlay J. in *Williams* v. *Grundy Trustees* [1934] 1 K.B. 524. The assessment to income tax was on the trustees of a trust fund. The trustees' liability to tax on the income of certain stock held by them depended on whether the interest of an infant beneficiary was vested or contingent. The interest was contingent on the infant's attaining the age of 21 and the Inspector of Taxes was clearly in error in accepting the trustees' contention that they were not assessable to tax on the interest received and accumulated by them. Four years later another Inspector realizing that a mistake had been made caused an additional assessment to be made on the trustees and on an appeal by them the only question dealt with was whether the surveyor could be said to have 'discovered' anything within the meaning of subsection 125(1). Finlay J. held that the Inspector had 'discovered' the omission from the original assessment although the only discovery was that his predecessor had made a mistake in law. So far the point had not come up for decision before the Court of Appeal but in *British Sugar Manufacturers, Ltd.* v. *Harris* [1938] 2 K.B. 220 there was an appeal from another decision of Finlay J. in which he adhered to the view he expressed in *Williams* v. *Grundy Trustees* and allowed an additional assessment which was made by a surveyor who had changed his mind on the question of whether or not a certain payment made by a manufacturing company should be allowed as an expense in ascertaining the company's net profits. The Court allowed the appeal on the ground that the payment was properly allowed as an expense and that the original assessment was therefore right. It was clear during the argument that the Court was also prepared to allow the appeal on the alternative ground that a mere change of opinion did not amount to a discovery, but at the request of the Attorney General the Court refrained from delivering judgment on that point. Shortly afterwards the same question came before the Court of Session in *Inland Revenue Commissioners* v. *MacKinlay's Trustees* [1938] S.C. 765 where the Court allowed an additional assessment made by a surveyor who had changed his opinion on the view which he had taken in the first instance. The point about 'discovers' was taken by the

taxpayer but the Court rejected his argument and the Lord President (Normand) said that he did not think it was stretching the word 'discovers' too far to hold that it covered the finding out that an error in law had been committed in the first assessment.

In the present case the taxpayer was a manufacturing company and was assessable to tax on the rental value of a factory which had been requisitioned. In the original assessments for the years 1940/41 to 1944/45 the company was assessed on the rent paid by the requisitioning authority (which was assumed to be the full annual value) less one-sixth allowance for repairs. In 1945 the income tax authorities changed their minds and formed the view that it was not right that the company should get an allowance for repairs when it was entitled to have the repairs paid for by the Crown under the Compensation (Defence) Act, 1939. Additional assessments in respect of each of the five years were made accordingly. The company appealed but did not dispute that the later view was the right one and that there had been an undercharge on the original assessments. The only point argued was that of the power of the surveyor to make an additional assessment when he had all the relevant facts before him in the first instance. The learned judge after reviewing the authorities said that although he saw the greatest force in Rowlatt J.'s view that a mere change of opinion is not a 'discovery' he did not think it necessary to express his own view with regard to that as he thought it was his duty to follow the decisions of Finlay J. and of the Court of Session. He could not take an undelivered judgment of the Court of Appeal as being as effective as if it had been delivered. The Company's appeal against the additional assessment must be dismissed.

Bischoffsheim, *In re*, Cassel *v.* Grant and others

Marriage of widow to late husband's brother—Foreign domicile—Succession to English personalty—Legitimacy of issue

CHANCERY DIVISION
ROMER J.
1947. Nov. 26.
[1947] 2 All E.R. 830.
64 T.L.R. 36.

In 1908 Nesta Lady Wellesley married Lord Richard Wellesley. The husband was killed in action in 1914 and in 1917 the widow married his brother Lord George Wellesley in New York. The marriage was valid by the law of New York but invalid in England.

This summons was brought to determine whether Mr Richard Wellesley, a son of the marriage, was legitimate so that he could succeed as a child of Lady Wellesley to a share of English personalty held by the trustees of the will of her father.

The argument on behalf of Richard Wellesley was that legitimacy is a question of status which is conferred or withheld by the law of the domicile of origin, i.e. of the domicile of the parents at the time the person whose legitimacy is in question was born: and that the status once conferred remains with the person concerned for life and will be recognized by the English Court except in respect of claims to succeed to real estate in England. Richard Wellesley received at birth the status of legitimacy by the law of New York.

It was argued for other beneficiaries that the English Court will not accord universal recognition to a status of legitimacy conferred by a foreign domicile

of origin and that recognition will not be given to the children of a marriage which in England is regarded as incestuous or contrary to religion or sound morality.

The learned judge referred to In re *Goodman's Trusts* [1881] 17 Ch.D. 266 where the Court held that a share in the personal estate of an intestate who died domiciled in England could be taken by a child born before wedlock of parents at her birth domiciled in Holland who was legitimated under the law of Holland by the subsequent marriage of her parents. In that case Cotton L.J. said: 'I am of opinion that if a child is legitimate by the law of the country where at the time of its birth its parents were domiciled, the law of England, except in the case of succession to real estate in England, recognizes and acts on the status thus declared by the law of the domicile'.

Romer J. then reviewed further authorities and explained that *Doe* v. *Vardill* [1840] 7 Cl. and Fin. 895 decided that the eldest son born in Scotland before the marriage of his parents domiciled there and by Scottish law legitimated by their subsequent marriage could not take land in England as heir of his father; but the decision depended on a special rule of the feudal law as adopted in England and the judges did not intend to express their opinion as to legitimacy.

The learned judge accordingly followed In re *Goodman's Trusts*, so that it was not necessary to enquire into the domicile of the parents at the time of the marriage: and he declared that Richard Wellesley was entitled to share in the estate of his grandfather.

In the Goods of Schulhof
In the Goods of Wolf

Presumption of death—Declaration by foreign Court—Vesting order by that Court—Evidence

PROBATE DIVISION

WILLMER J.

1947. Dec. 3.
64 T.L.R. 46.

These two motions heard together were for presumption of death which was in each case alleged to have taken place in the concentration camp at Auschwitz. In both cases a competent Court in Czechoslovakia, the country of domicile, had made a declaration of death in accordance with the law of that country. In the case of Schulhof the foreign Court had also made an order vesting in the applicant the estate in Czechoslovakia of the presumed deceased.

Willmer J. said that the case of Schulhof was the same as that considered by the Court in *In the Goods of Spenceley* [1892] P. 255 and held that the English Court must follow the foreign declaration without requiring further evidence.

In the case of Wolf, however, it was stated that there were no assets in Czechoslovakia so that the declaration of death had not been followed by any vesting order. The manner in which death may be proved is a matter of procedure: but because a certain procedure is permissible in Czechoslovakia it did not follow that the English Court was bound to accept the declaration of the foreign Court as conclusive.

Counsel then submitted further evidence in the case of Wolf, whereupon the learned judge made the order as prayed in the motion.

LEGAL NOTES

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

AND

DAVID HOUSEMAN, A.I.A. (Solicitor)
Trust and Claims Secretary of the London Life Association Ltd.

Nelson and others *v.* Larholt

Cheques on Executorship account—Cash handed by payee to drawer—Payee put on enquiry—Right of true owner to follow—Until received in good faith for value and without notice of want of authority

KING'S BENCH DIVISION
DENNING J.

1947. Nov. 20.
[1948] 1 K.B. 339.
64 T.L.R. 1.

William Burns died in June 1942 and probate of his will was granted to G. A. Potts, one of his executors, with power reserved to Simon Burns another executor who at the time was in Australia.

G. A. Potts opened an account with Midland Bank Ltd. as 'Executor of William Burns decd.' and at various times in 1942, 1943 and 1944 drew cheques for £135 in all in favour of David Larholt the defendant. Each cheque was signed 'G. A. Potts Executor of Wm. Burns decd.' The defendant gave cash for the cheques which he later paid into his own bank for collection.

In November 1946 Simon Burns returned from Australia and himself obtained a grant of probate. He found that G. A. Potts had misappropriated the estate and with other beneficiaries under the will he brought this action against David Larholt who defended the claim on the ground that he had received the cheques for value and in good faith.

The cheques had been handed to the defendant out of banking hours, and when asked what was the purpose of the cheques the defaulting executor had replied that he wanted the money in connexion with the estate while on one occasion he said that he was going to Scotland on estate business.

The learned judge said that the law would compel the defendant to restore the money received by him in the form of the cheques unless he had received it in good faith and for value and without notice of the want of authority. He was the original payee and as such was not protected by the fact that the cheques were negotiable instruments. He must be taken to have known of the want of authority if the circumstances were such as to put a reasonable man on enquiry and he made none, or in other words if he were negligent in not perceiving the want of authority. If the defendant had negotiated the cheques to a third person, the test of notice to that new holder would have been different, for he would have been able to claim that he was a holder in due course, and notice to such a holder would depend on his own state of mind and not that of a reasonable man.

Each of the cheques on its face showed that it was drawn on the executor's account and in the view of the learned judge any reasonable person would have been put on enquiry. He accordingly gave judgment for the plaintiffs for £135 with costs.

Brockbank, deceased *In re*, Ward *v.* Bates

Trust—Appointment of new trustee by continuing trustees—Discretionary power —Interference by beneficiaries—Claim to direct trustee to retire and nominate a new trustee

CHANCERY DIVISION

VAISEY J.

1948. Jan. 27.
[1948] 1 All E.R. 287.

By his will made on 7 September 1923 and a codicil thereto dated 26 January 1926 the testator Joseph Robert Brockbank appointed the defendant Alfred Bates who is a solicitor and his (the testator's) son-in-law Robert Clifton Knight as his executors. The testator died on 4 February 1926 and the executors proved the will.

Neither the will nor the codicil contained any express power of appointing new trustees. In the absence of express power in the instrument creating the trust the power is exercisable under the Trustee Act, 1925, s. 36, by the surviving or continuing trustee. By deed dated 20 December 1940 Knight retired from the trusteeship and one Edgar Ernest Ward was appointed a new trustee in his place to act with the defendant. In 1947 Ward desired to retire and he and all the beneficiaries of the trust (the testator's widow and five children) wished to appoint Lloyds Bank Ltd. as sole trustee of the will. Bates refused to concur in the proposed appointment. This summons was accordingly taken out by Ward and the beneficiaries as plaintiffs for an order that the defendant Bates be directed to concur in the proposed appointment and retire from the trust or alternatively that Lloyds Bank Ltd. be appointed by the Court to be sole trustee in place of Bates and Ward.

The plaintiffs contended that where all the beneficiaries of a trust concurred they might force a trustee to retire or compel his removal and could direct trustees who had power to nominate their successors to appoint as their successors such person or persons or corporation as might be indicated by the beneficiaries and that the trustees had no option but to comply. It was argued that, inasmuch as the beneficiaries being all *sui juris* could terminate the trust and direct the trustees to transfer the trust property either to themselves or to other trustees on trusts identical with the trusts of the will, they could achieve the same result by directing the appointment of new trustees of the will.

The learned judge refused to make any order. He said that the statutory power of appointing a new trustee was a discretionary power and it could no longer exist as such if it had become one the exercise of which could be dictated by others. He agreed that the beneficiaries could terminate the trust and direct the transfer of the trust property to other trustees provided the existing trustees were adequately protected against any possible claim for future death duties and were indemnified as regards their costs charges and expenses: but the result of such a transaction would be to establish a new settlement which would attract *ad valorem* stamp duty and forfeit the benefit of the exemption from estate duty given by the Finance Act, 1894, s. 5 (2), and retained under the Finance Act, 1914, s. 14, on the death of the widow as a surviving spouse. Either they must keep the trusts of the will on foot in which case those trusts must continue to be executed by trustees duly appointed either pursuant to the original instrument or pursuant to the powers under the Trustee Act, 1925, and not by trustees arbitrarily selected by themselves, or they must by mutual agreement extinguish and put an end to the trusts with the consequences which he had indicated.

In the Estate of Arthur Dowds, Presumed Deceased

Presumption of death—Declaration and grant by foreign court—Power of English registrar to make order

PROBATE DIVISION

PILCHER J.

1948. March 17.
64 T.L.R. 244.

Arthur Dowds, domiciled in Eire, was lost at sea in November 1946 and the High Court of Eire made an order giving to his wife leave to swear that he had died on or since 20 November 1946. The High Court of Eire granted probate on 24 December 1947.

An English grant was required to deal with English estate and an application for probate was made to the registrar of the Probate Division in England without proceeding by way of motion to the judge. The registrar refused to make the grant.

Pilcher J. made the grant without asking for further evidence and said that *In the goods of Schulhof J.I.A.* Vol. LXXIV, p. [10]; [1948] P. 66; 64 T.L.R. 46 was sufficient authority for the registrar to make a grant where there had been a declaration of death by a competent court of the domicile followed by an order of that Court vesting the estate of the presumed deceased. Cases might however arise which might cause the English Court to consider that the evidence tendered required careful investigation and the registrar must have a discretion to refer such cases to the judge.

Morant Settlement Trustees *v.* Inland Revenue Commissioners

Inland Revenue Commissioners *v.* Morant Settlement Trustees

Income Tax on Annual Payment—Deficiency made up out of Capital—Capital or Income—Treatment of sums paid as gross or net

COURT OF APPEAL

TUCKER, SOMERVELL AND COHEN L.JJ.

1948. March 22.
1948] 1 All E.R. 732.

By deed dated 31 May 1939 Captain Morant settled a sum of £100,000, to which he was absolutely entitled. He paid the money to trustees upon trust to invest it and to hold the income on protective trusts as mentioned in s. 33 of the Trustee Act 1925 for his benefit during his life.

By Clause 5 of the deed it was provided that, if in any year ending on 24 June the income received by the trustees should be less than such a sum as after deduction of income tax at the current rate would leave the net sum of £6500 and if at the end of the year the settlor should be living and the protective trusts in his favour should not have determined, the trustees should, unless directed in writing by the settlor to the contrary, raise the deficiency out of capital and pay it to the settlor.

In none of the years under consideration did the income amount to £6500 net and in each year the trustees, purporting to act under Clause 5, raised money out of capital and paid it to the settlor.

The trustees contended that, on the correct interpretation of the settlement, the settlor did not alienate the entire interest in the capital of the trust fund and that the sums paid to him out of capital were payments to him of his own capital. On behalf of the Crown it was contended that the settlor had irrevocably parted with the £100,000 and that the sums in question were annual payments assessable under Rule 21.

If the Crown were right there remained the question of the correct basis of assessment. The trustees contended that the amounts paid by them were paid as gross sums and that the only tax assessable was the appropriate tax on those gross sums. The Crown contended that it must be presumed that the trustees had complied with the law and had made net payments after deduction of tax and that they were liable accordingly for tax on the gross equivalent of the sums paid.

The Special Commissioners held: first that the sums paid were paid as income and that the settlor had not received his own capital or capital to which he was beneficially entitled: and secondly that the sums paid were net sums and none the less so because they were paid without any such understanding and on the footing that they were payable as capital.

Macnaghten J. upheld the decision of the Commissioners on the first point but reversed their decision on the second point, taking the view that the contention of the Crown was based on a fiction which could not be sustained. He held that the trustees were liable for the amount of tax which they ought to have deducted from the sums paid and no more.

The trustees appealed and the Crown cross-appealed.

On the appeal the Court unanimously upheld the decision of Macnaghten J. Cohen L.J. said that the Crown was right in its argument that the point must be determined by reference to the settlement and that it was immaterial who provided the funds from which the payments were made. The settlement could have been so framed as to reserve to the settlor an interest in the capital. The settlor had however directed the trustees to pay him an annuity primarily out of income, but if and so far as income were insufficient for the purpose, then out of capital unless he should otherwise direct. He had chosen to attach an income quality to the payments under consideration and must abide the consequences. The appeal must be dismissed.

On the cross-appeal Somervell L.J. said that if the settlor had not had the power under Clause 5 to direct the raising of smaller sums he would have allowed the cross-appeal: but both the trustees and the settlor had thought the sums were paid as capital and if the settlor had realized the position in law he might have given directions limiting the sums. Cohen L.J. concurred but Tucker L.J. thought that the trustees had no authority under Clause 5 or under Rule 21 to make any payment other than a net payment and that neither their mistaken view as to the position in law nor the settlor's power of direction could affect the *quantum* of tax.

By a majority therefore the Court also dismissed the cross-appeal.

Dorgan, deceased, *In re*, Dorgan *v.* Polley and others

Inheritance (Family Provision) Act, 1938—Application by widower for provision —Delay in making—Six months limitation—Extension of time

CHANCERY DIVISION

HARMAN J.

1948. March 23.
[1948] 1 All E.R. 723.
64 T.L.R. 229.

The testatrix died on 7 October 1942 leaving estate sworn at £7268 with net personalty of £5725. She was twice married. She was survived by her second husband and by six daughters of her first marriage. There was no issue of the second marriage. By her will she excluded her husband from any interest in her estate the major part of which was bequeathed to her trustees in trust to maintain her crippled daughter Hilda and after the death of Hilda to divide the corpus between

certain others of her daughters. Probate of the will was granted to her executors on 7 December 1942. In October 1943 the widower issued a summons under the Inheritance (Family Provision) Act, 1938, asking the Court to make a provision in his favour out of the deceased's estate, but the summons was not brought before the Court until some four years later.

The applicant was an old man and was in receipt of an old-age pension and according to his affidavit he had no other means of support.

The Inheritance (Family Provision) Act, 1938, s. 2 (1), provides:

> Except as provided by s. 4 of this Act an order under this Act shall not be made save on an application made within six months from the date on which representation . . . is first taken out.

S. 4 (1) provides:

> On an application made at a date after the expiration of the period specified in s. 2 of this Act, the Court may make such an order as is hereinafter mentioned: (*a*) an order for varying a previous order . . . or (*b*) an order for making provision for the maintenance of another dependant of the testator.

The learned judge said that if the application had been made in due time and prosecuted with due diligence he would have felt disposed to make some provision for the applicant, but the delay made him doubt whether the applicant's need was as great as was stated by him in his affidavit. However that might be he had no jurisdiction to make any order on an application made out of time except in the cases provided for by s. 4.

S. 4 (1) (*a*) did not apply because there was no previous order. It was contended on behalf of the applicant that, so long as there was a dependant of the testator receiving a bounty under the will, an order could at any time be made under s. 4 (1) (*b*) to provide for another dependant. In the opinion of the learned judge that was a wrong interpretation of the provision. He thought that s. 4 (1) (*b*) merely enabled the Court to make an order in favour of another dependant when there was already a dependant in receipt of a provision under the Act and in the present case there was no such dependant.

The application was dismissed.

Bidie deceased, *In re*, Bidie *v.* General Accident Fire and Life Assurance Corporation Ltd. and others

Inheritance (Family Provision) Act 1938—*Letters of Administration on Intestacy—Revocation of grant on discovery of will—Grant of Probate—Time for application for provision under the Act*

COURT OF APPEAL

LORD GREENE, M.R. SOMERVELL AND EVERSHED, L.JJ.

1948. Nov. 11.
[1948] 2 All E.R. 995.

The testator died on 16 January 1945 and in the belief that he had died intestate a full grant of letters of administration was on 13 April 1945 made to his widow and one of her sons. On the later discovery of a will, the grant of letters of administration was revoked and on 7 September 1946 probate of the will was granted to the executor named in the will.

The Inheritance (Family Provision) Act, 1938, s. 2 (1) provides:

> Except as provided by s. 4 of this Act, an order under this Act shall not be made save on an application made within six months from the date on which representation in regard to the testator's estate for general purposes is first taken out.

The widow issued a summons for maintenance on 8 January 1947 which was within six months of the date of the probate but more than six months from the date of the revoked letters of administration. It was agreed that for the present purpose s. 4 was not material and the question before the Court was whether the date on which representation in regard to the testator's estate for general purposes was first taken out was the date of the grant of letters of administration or the date of the grant of probate.

Jenkins J. held that the revoked grant of letters of administration was a 'representation' to a testator's estate within s. 2(1) and that the application of the widow was out of date: but the Court of Appeal reversed his decision.

Lord Greene M.R. said that the Act was entitled 'An Act to amend the law relating to testamentary dispositions'. It set itself to deal only with the case where, by his testamentary disposition, a testator had displaced the succession which would have taken place if he had died intestate. By construing the word 'representation' as including a grant of letters of administration *simpliciter* it would be impossible for a widow, in the case of an after-discovered will, ever to get any relief at all if the letters of administration *simpliciter* remained on foot for a period of six months.

The relevant 'representation' under the general scheme of the Act must be a representation the granting of which gives the court jurisdiction to apply the provisions of the Act and must therefore be limited to probate of the will or letters of administration with the will annexed because it is only when there is a will that the court has power to do anything.

The appeal was allowed and the matter remitted to the Chancery Division to deal with the application on its merits.

Diplock's Estate, *In re*, **Diplock and others** *v.* **Wintle and others** (and associated actions)

Will—Charitable bequest of residue held void for uncertainty—Previous distribution of residue by executors in terms of bequest—Mistake in construction of will—Mistake in law—Claims by next-of-kin to recover payments made to charitable institutions—Claim against executors—Claim against recipient charities—Application of equitable principles—Claims in personam*—Wrongful payment of trust money—Retention against conscience—Claims* in rem*—Doctrine of tracing money into a mixed fund—Bank account—Rule in Clayton's case*

COURT OF APPEAL
LORD GREENE M.R.
WROTTESLEY AND
EVERSHED L.JJ.

1948. July 9, 27.
[1948] 2 All E.R. 318, 429.

These appeals (ten in number) were from the judgment of Wynn-Parry J. delivered on 11 March 1947 in these and nine other actions (all of which were tried together) and from the orders made on 1 April 1947 pursuant to the judgment, *J.I.A.* Vol. LXXIV, p. [1]; [1947] 1 All E.R. 522.

The actions tried by Wynn-Parry J. were brought by the next-of-kin of Caleb Diplock, who died in 1936, to recover money paid to certain charitable institutions by the executors of his will in terms of a bequest of residue which bequest was subsequently held by the House of Lords to be void for uncertainty. The bequest was in the form of a direction by the testator to his executors to divide his residuary estate between such charitable institution or institutions or other charitable or benevolent object or objects as his executors

might in their absolute discretion determine. The invalidity of the bequest lay in the use of the disjunctive 'charitable *or* benevolent object or objects'.

During the years 1936 to 1938 the executors distributed a sum of over £200,000 among 139 charitable institutions. There was no doubt that when the executors made these distributions they *bona fide* believed that the testator's directions in regard to his residuary estate were valid and effectual and it was also clear that the defendants in these appeals accepted their respective cheques in the full faith and belief that the executors were properly entitled so to distribute the residuary estate.

In the Court of Appeal the plaintiffs in support of their claims relied entirely on equitable principles and, as in the Court below, their claims in equity were formulated as claims *in personam* founded on an alleged personal obligation of the recipients to reimburse the estate in respect of the money wrongly paid to them, and alternatively as claims *in rem* founded on the alleged right of the true owners of trust money to follow or trace it into the various assets held by the defendants which were attributable to and represented the money wrongly paid to them.

The claims *in personam* were submitted under two alternative heads (*a*) a constructive trust imposed on the recipients by reason of their knowledge of the terms of the will so far as the bequest of the residuary estate was concerned (*b*) the right in equity of a beneficiary in a trust to recover from one to whom it has been wrongly paid the share of the trust money to which he is entitled.

Wynn-Parry J. in the Court below rejected *in toto* the claims *in personam*. He held that there could be no claim *in personam* at common law inasmuch as the common law action for money had and received lies only when money has been paid under a mistake of fact. He held further that in equity there could be no claim *in personam* to recover trust money wrongly paid away unless it could be established that there was a confidential relationship which in effect made the recipient of the money a trustee for the true owner and he held that no such relationship was established until October 1939, when the defendants were first informed that the validity of the bequest had been challenged by the next-of-kin of the deceased.

In so far as the learned judge held that the plaintiffs were entitled to recover anything from the defendants his judgment was based on the plaintiffs' claims *in rem* to follow or trace the money into specific assets held by the defendants.

The Court of Appeal held that Wynn-Parry J. had taken too narrow a view of the rights of unpaid beneficiaries to equitable relief in such cases and that he was wrong in rejecting *in toto* the plaintiffs' claims *in personam* and in limiting the claims *in rem* to cases where the Diplock money could be traced into a separate banking account or into some specific asset which represented the Diplock money unmixed with any other.

The judgment of the Court which was delivered by the Master of the Rolls expounds at length the equitable principles involved in the plaintiffs' claims and applies these principles to the circumstances of each case arising from the different uses to which the recipients of the Diplock money had respectively put it. With regard to the claims *in personam* the Court rejected them in so far as they were founded on the theory of a constructive trust. The Master of the Rolls said that, though to the eye of a lawyer it might seem plain enough that the executors had embarked on an entirely irregular execution of their duties, the defendants were unversed in the law, and the Court thought that they were

entitled in the circumstances to assume that the executors were properly administering the estate, and if, as was admitted, the defendants took the money *bona fide* believing themselves to be entitled to it they should not have imposed on them the onerous obligations of trustees.

On the second branch of the plaintiffs' claim *in personam* the Court came to the conclusion that they were entitled in equity to recover the trust money by direct action against those to whom it had been wrongly paid. As regards the conscience of the defendants on which in this as in other jurisdictions equity was said to act, it was a sufficient circumstance that the defendants had received some share of the estate to which they were not entitled and it was immaterial that it had been paid to them owing to a mistake of law on the part of the executors. A party has no great reason to complain when he is called upon to reimburse what he has received against his right.

On the other hand, there was in the opinion of the Court one important qualification. Since the wrong payment was due to the blunder of the personal representatives the right of the unpaid beneficiary was in the first instance against them, and recourse should not be had against those who were wrongly paid until the claim against the personal representatives had been exhausted. In the present case that claim had been the subject of a compromise order and it must be assumed that the compromise sanctioned by the Court represented a fair estimation of what might have been recovered from the executors or their estates. The Court had not been informed of the exact sum recovered but it ought to be credited rateably to all the 139 charities.

In such cases as the present where trust money has been erroneously paid away the rule of the Court is to allow no interest on a claim *in personam* for re-imbursement of the money and therefore the defendants were liable under this head of the claim for the principal sums only and not for any interest.

In some of the cases the defendants pleaded that the claim was statute-barred. They contended that the appropriate period of limitation under the Limitation Act, 1939, is six years. The plaintiffs contended that the period applicable to the present claims is twelve years. The arguments turned on the true construction of s. 20 of the Act which provides that no action in respect of any claim to the personal estate of a deceased person or to any share or interest therein shall be brought after the expiration of twelve years from the date when the right to receive the share or interest accrued. The plaintiffs contended that the section applies only to claims against personal representatives and that, as there is no section of the Act which expressly applies to claims to recover from a recipient the trust money wrongly paid to him, the six-year limitation for actions founded on simple contract is applicable by analogy. The Court held that such an action could quite fairly and properly be described as an action 'in respect of' a claim to the personal estate of a deceased person and that twelve years was therefore the appropriate period and that the defence of limitation necessarily failed.

The Court then considered the plaintiffs' claims *in rem* to follow or trace the Diplock money. Though the plaintiffs had succeeded in their claim *in personam* and would recover the full amount of the moneys wrongly paid away the alternative claims *in rem* had been fully argued and on these the Court differed in some important respects from the judgment of Wynn-Parry J. In so far as the plaintiffs were entitled to succeed on their claims *in rem* they would be entitled to interest which they would not recover on their claims *in personam*.

The Master of the Rolls said that the equitable doctrine of tracing was developed from the equitable right *in rem* and was not limited to cases where the money remained capable of identification in a physical sense. Equity adopted a more metaphysical approach. It found no difficulty in regarding a composite fund as an amalgam constituted by the mixture of two or more funds each of which could be regarded as having for certain purposes a continued existence. The equitable relief, whether it takes the form of an order to restore an unmixed sum of money (or property acquired by means of such a sum) or a declaration of charge on a mixed fund (or in property acquired by means of such a fund), is personal in the sense that its efficacy is founded on the jurisdiction of equity to enforce its rules by acting on the individual: but it is not personal in the sense that a person against whom an order of this kind is made becomes personally liable to repay the amount claimed. The equitable remedies *in rem* presuppose the continued existence of the money either as a separate fund or as part of a mixed fund or as latent in property acquired by means of such a fund. It is necessary therefore in each case where it is sought to trace money in equity to consider whether it has such a continued existence, actual or notional, as will enable equity to grant specific relief.

On these principles the Court proceeded to examine the circumstances of each case and consider whether they were such as would enable the Court to give equitable relief by an order to restore a specific asset or by a declaration of charge upon it.

The claims which were most important from the point of view of amount were those in which the charity had expended the Diplock money in executing work on land or buildings already belonging to the charity. The plaintiffs sought a declaration of charge on such land or buildings. The Court held that in those cases no relief *in rem* was practicable or equitable. In no true sense could the Diplock money be located in the improved land or building; the improvements may have rendered the property more fitting for the charity's own purposes, but they did not necessarily add one penny to its market value. But even if they did so a charge on the land would not enable each contributor to the amalgam to take out of it that which he put in. The charge could only be enforced by a sale of the land or building and it would be inequitable to require the charity to take the value of the land or building when what it contributed to the amalgam was the land or building itself.

In two claims of a different class part of the Diplock money had been applied by the recipient charity to pay off a debt owing by the charity. The plaintiffs claimed to be subrogated to the rights of the respective creditors in respect of these debts. In both cases the claim was rejected. In the one the charity had borrowed money for the purpose of erecting buildings on its own land and the application of the Diplock money to paying off that debt enabled the charity to apply the borrowed money to the purpose for which it was borrowed without being under any obligation to repay it. In substance the Diplock money was used for carrying out the works on the land of the charity and the plaintiffs were in no better position than they were in the class of case already discussed. The other claim was one in which the grant was used by the charity to pay off a loan which was secured by a charge on property belonging to the charity. The Court held that the result of such payment was to extinguish the debt and disburden the property so that there was nothing to which the plaintiffs could be subrogated. If equity were to create a charge on the

property in favour of the plaintiffs it would be placing them in a position to insist on a sale of the charity's own property. The case was analogous to the cases where Diplock money was expended on improvements. The money was in this case used to remove a blot on the title to the land.

In cases where the money received from the executors was paid into the charity's current banking account and thereby mixed with the charity's own money in a mixed fund which was subjected to periodical withdrawals and additions, the Court having decided that in equity the Diplock money could be traced into a mixed fund notwithstanding the absence of any confidential relationship between the charity and the next-of-kin, there remained for consideration the question how it should be disentangled from the mass and whether withdrawals from the fund should be regarded as having been made rateably from Diplock money and the charity's own money or whether the rule in *Clayton's* case should be applied, in accordance with which each withdrawal would *prima facie* be debited against the earliest payment which remained unexhausted by earlier withdrawals. In the opinion of the Court it would not in the case of an active banking account be practicable to attribute each withdrawal rateably to charity money and trust money and the rule in *Clayton's* case should therefore be applied.

The rule in *Clayton's* case is however one of *prima facie* presumed intention which may be rebutted by the expressed intention of the customer. If therefore the charity, notwithstanding earlier withdrawals for general purposes which if the rule in *Clayton's* case were applied would have exhausted the Diplock money leaving no specific asset representing it, subsequently withdrew money from the account and invested it in securities which it specifically earmarked in its own accounts as representing the Diplock money, it would be unconscionable for it afterwards to assert that it was not Diplock money and claim it as its own by reason of the rule in *Clayton's* case.

The Court also refused to extend the rule in *Clayton's* case beyond its application to a current banking account. In one case the Diplock money was traced into a mass holding of $3\frac{1}{2}\%$ War Stock, the first purchase of which had been made with the charity's own money and then added to by a purchase made with the Diplock money. The charity had also from time to time sold blocks of this stock and applied the proceeds to the general purposes of the charity. If the rule in *Clayton's* case were applied to these sales they would have been attributed solely to stock purchased with the Charity's own money thus leaving intact the stock purchased with the Diplock money. The Court held that the only equitable way of treating the situation was to regard each amount of stock withdrawn from the mass as having been withdrawn rateably from the two interests. The proceeds of the sales of stock having been applied to the general purposes of the charity that proportion of it which represented the Diplock money had disappeared as a traceable asset: but in respect of so much of the Diplock money as was not thus accounted for the plaintiffs were entitled to claim a rateable proportion of the stock still held by the charity.

In those cases where in the opinion of the Court of Appeal the plaintiffs would have been entitled to succeed wholly or partially on their claim *in rem*, they would have been entitled also to a further sum representing the whole or the appropriate part of the interest in fact earned by the investments into which the Diplock money was traced. At the hearing the Court understood the

plaintiffs to say that if they were entitled to succeed in their claim *in personam* they would not seek or need to rely on their claims *in rem*. On that view the proper order in each case was to set aside the order made by Wynn-Parry J. —including in the appropriate cases that part of his order directing payment to the plaintiffs—and to substitute an order for payment to the judicial trustee of an amount equivalent to the full principal sum received by the defendant charity (reduced as above mentioned by the appropriate proportion of the money recovered from the executors). There remained the plaintiffs' right to interest on the amounts which might have been recovered on a judgment *in rem* and therefore in those cases the proper order would be for a transfer to the judicial trustee of the appropriate securities or portions of securities in respect of which the plaintiffs had established a right of tracing (or payment of a sum equivalent to the proceeds of sale thereof) together with payment of the appropriate sums for interest.

Haldane *v.* Eckford

Estate Duty—Property 'passing' on death—Direction by testator to accumulate income and make periodical investments of land in Scotland to be entailed—Scots law—Heir of entail in possession entitled to payment of accumulations in cash—No beneficial interest or title passes on his death—No right to enjoy current income—Right to compel trustees to accumulate—Right already enjoyed by successor—Contingent right to accumulations

COURT OF APPEAL
LORD GREENE M.R. AND EVERSHED L.J.
1948. July 30.
[1948] 2 All E.R. 622.

A testator by certain codicils to his will directed his trustees to accumulate the income of certain parts of his estate until the value of the accumulations amounted to £8000 or upwards and then to invest the accumulations in the purchase of land in Scotland to be settled under the fetters of a strict entail. Further accumulations were to be made until a figure of £8000 was again reached when a similar investment in and settlement of land in Scotland was to be made and the process was to be repeated until 31 December 1956 when the fund itself was to be invested in land in Scotland and settled under the fetters of a strict entail.

In the course of an administration action it was held that the testator died domiciled in Jersey and that the trusts of the will were valid according to the law of Jersey. The relevant provisions of the law of Scotland were proved by an affidavit made by a member of the Scottish bar.

By the Entail (Scotland) Act, 1848, where any money or other property has been invested in trust for the purpose of purchasing land to be entailed, but the direction has not been carried into effect, it is competent to the person who if the land had been entailed in terms of the trust would be the heir of entail in possession, provided he is *capax* and of full age, to make a summary application to the Court of Session for warrant and authority for payment to him of such money, and the Court will grant such warrant and authority without the consent of any person if the direction to entail was contained in the will of a testator who died subsequent to 1 August 1848 and the applicant was born after the death of the testator.

Until there was an heir of entail in possession competent to make the necessary application to the Court of Session, the accumulations of the income of the trust fund were carried to the credit of an account in the administration

action entitled 'income and accumulations of income' and whenever that account exceeded £8000 that amount was carried to an account entitled 'moneys subject to be invested in land' and the income of the last-mentioned account was paid to the heir of entail in possession for the time being. The first heir of entail in possession born after the death of the testator was Douglas Eckford and he on attaining the age of 21 years applied to the Court of Session and by order of that Court the money standing to the credit of the 'moneys subject to be invested in land' account was paid out to him. Two further accumulated sums of £8000 were subsequently paid to Douglas Eckford on similar applications. On his death in 1912 his daughter Helen Eckford who was born in 1905 became heir of entail in possession and during her minority two further accumulated sums of £8000 were carried to the 'moneys subject to be invested in land' account and pursuant to an order of the Court of Session were paid out to her when she attained the age of 21 years. Subsequently during her lifetime, three further sums of £8000 were paid out to her as the accumulations of income reached that sum and the appropriate application was made by her to the Court of Session.

Helen Eckford died unmarried in 1935 and John Eckford Hacket became heir of entail in possession. Since Helen Eckford's death the accumulations of income again reached £8000 and pursuant to an Order of the Court of Session the accumulated fund was paid out to John Eckford Hacket.

The Crown claimed estate duty under the Finance Act, 1894, s. 1, on the corpus of the trust estate the income of which was directed to be accumulated and applied as aforesaid, on the ground that it was property which had passed on the death of Helen Eckford.

The question for the Court was whether on the facts of the case some actual change as regards the beneficial interest in the corpus of the property as a whole had taken place on the death of Helen Eckford.

Romer J. held that there was no such change and that the Crown's claim for estate duty was not well founded. He said that the only right which Helen had in relation to the trust property was to compel the performance by the trustees of their duty to accumulate the income and that right did not pass on her death for the reason that her successor as a contingent beneficiary of the trust already had that right. Helen had no right to any current income but only the expectation, if she lived for some uncertain period of time, of receiving one or more sums of £8000. Her successor had during her lifetime a similar expectation and all that happened on Helen's death was that her expectancy ceased and one contingency was eliminated from the expectancy of her successor.

The Court of Appeal formed a different opinion and held that on the death of Helen there was a *de facto* change in the beneficial interest and that accordingly the corpus of the estate did pass within the meaning of s. 1 of the Finance Act, 1894, as interpreted by the relevant authorities. Lord Greene M.R. in delivering the judgment of the Court said:

> It seems to us that the effect of the death of Helen was to bring about an actual change in the title to the corpus as a whole. Before that death it was producing income to which, by the combined operation of the codicils and of Scottish law, Helen became entitled at recurrent stages and subject to the contingency of her being alive and *capax* at the end of a stage. On her death this interest of hers came to an end and an exactly similar interest arose in her successor.... It is clear that Helen's right in respect of the income of the corpus determined on her death. It is also clear that subject to the requirements of Scottish law her successor stepped into her shoes and succeeded to

precisely similar rights in respect of that income. It is true that if he had died before the accumulations current at Helen's death had amounted to £8000 he never would have enjoyed any income and in that case the Finance Act, 1894, s. 5 (3), would, we think, have operated to prevent duty becoming payable on his death, but this did not happen and he succeeded *de facto* and *de jure* to the right to obtain the whole income produced by the corpus during his lifetime whenever that income plus accumulated accretions should amount to £8000. The fact that he could not obtain any income for himself until, during his lifetime, the necessary period subsequent to the death of Helen had elapsed for the accumulations to reach the figure of £8000 does not, in our opinion, prevent a passing on the death of Helen: see Finance Act, 1894, s. 22.

Notes

Appeal:

Inland Revenue Commissioners v. *Wesleyan and General Assurance Society*, Vol. LXXIII, p. [13]; [1948] 1 All E. R. 555; 64 T.L.R. 173. The House of Lords (Viscount Simon and Lords Porter, Uthwatt, du Parcq and Oaksey) unanimously upheld the decision of the Court of Appeal. Viscount Simon emphasized two propositions well established in the application of the law relating to income tax as follows:

(i) The name given to a transaction by the parties concerned does not necessarily decide the nature of the transaction. To call a payment a loan if it is really an annuity does not assist the taxpayer any more than to call an item a capital payment would prevent it from being regarded as an income payment if that is its true nature.

(ii) A transaction which, on its true construction, is of a kind that would escape tax is not taxable on the ground that the same result could be brought about by a transaction in another form which would attract tax.

He quoted with approval the following passage from the judgment of Lord Greene M.R.:

'In dealing with income tax questions it frequently happens that there are two methods at least of achieving a particular financial result. If one of those methods is adopted, tax will be payable. If the other method is adopted, tax will not be payable....The net result, from the financial point of view, is precisely the same in each case, but one method of achieving it attracts tax and the other method does not. There have been cases in the past where what has been called "the substance of the transaction" has been thought to enable the court to construe a document in such a way as to attract tax. That particular doctrine of substance, as distinct from form, was, I hope, finally exploded by the decision of the House of Lords in *The Duke of Westminster* v. *Inland Revenue Commissioners* [1936] *A.C.* 1.

In re Waring (deceased), *Westminster Bank Ltd.* v. *Burton-Butler and others*, [1948] 1 All E. R. 257. As a result of the decision by the House of Lords in *Berkeley* v. *Berkeley* Vol. LXXIII; p. [12], a further summons was brought in respect of the will of J. A. Waring who died on 3 August 1940. The first summons is reported at [1942] Ch. 309 and mentioned in Vol. LXXI at p. 447.

The Finance Act, 1941, s. 25, reduced the *quantum* where provision is made for an annuity free of income tax if (*inter alia*) such provision was made before 3 September 1939: and in *Berkeley* v. *Berkeley* the House of Lords, reversing the decision of the Court of Appeal in *In re Waring*, held that, in the case of a will, such provision is made at the date of death and not at the date of the will.

In *In re Waring* there were two such annuities given to H. B. Burton-Butler and Mrs L. Burton-Butler respectively: but in the previous application to the Court Mrs Burton-Butler was not a party. She was abroad and not available but, although the Court was asked to make a representation order to bind her, it refused to do so.

If the position of the annuity to H. B. Burton-Butler had now been brought before the Court *de novo* the Court would have had to follow *Berkeley* v. *Berkeley*: but it was clear that on the well recognized principle of *res judicata* it was bound by the previous decision and that the *quantum* of his annuity must be treated as irretrievably fixed. Mrs Burton-Butler was, however, in a different position and (anomalous as the result might appear to be) her annuity must be paid in full.

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