

LEGAL NOTES

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AND

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*Secretary, The London Life Association Ltd.***Hutton v. Inland Revenue Commissioners**

Income Tax—Tax reserve certificates purchased by company—Interest thereon—Applicable only to discharge of tax liability—Not available as source of dividend to shareholders—Distribution to shareholders of sums equal to amount of such interest—Income tax payable on such sums—Finance Act, 1942, s. 29(1)

CHANCERY DIVISION Case Stated by the Special Commissioners of Income Tax.

UPJOHN J.

1953. May 1.
[1953] 2 All E.R. 93.
[1953] 1 W.L.R. 729.

The taxpayer owned half of the issued share capital of Hutton Shoe Co. Ltd. In the course of its trading years from that ended on 30 June 1942 to that ended on 30 June 1946, the company purchased tax reserve certificates and surrendered them at various dates in payment of tax, being credited with interest which was also applied in payment of tax.

From 1943 to 1948 the company annually paid sums equal to the total of such interest to the shareholders in proportion to their holdings of shares. Such payments were made without deduction of tax, interest on tax reserve certificates being exempt from income tax under the Finance Act, 1942, s. 29(1).

The terms of the issue of the certificates provided

- (i) that they would earn interest in so far as they were applied to the payment of certain taxes (the principal and interest being so applied on surrender) but not to the extent to which they were not so applied,
- (ii) that the interest would not be returnable by the holder of the certificates as part of his income or profit and thus would not be liable to income tax, surtax, national defence contribution or excess profits tax.

The directors were advised that the payments should not have been made in that way, and on 10 February 1950 they resolved that the payments to the two shareholders, totalling £708 1s. 8d. to each of them, should be treated as reducing their respective loan accounts. Additional assessments to surtax were made on the taxpayer for the years 1943/44 to 1948/49 in the gross amounts of the payments of interest he had received, on the basis that such payments represented in his hands net income after deduction of income tax. The taxpayer appealed.

The taxpayer contended that the interest was a profit of the company available for distribution to shareholders, notwithstanding that it was required to be, and had been, applied towards payment of tax due from the company and that the distributions were dividends from a fund which was exempt from

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income tax, with the result that the sums received by him were non-taxable receipts in his hands and that the assessments were bad.

The Crown contended that the payments made to the taxpayer were not distributions of interest on tax reserve certificates, since such interest came into existence only for the purpose of discharging liability to tax, but were distributions out of general profits taxed in the hands of the company; that the payments were accordingly taxed income in the taxpayer's hands and were properly the subject of additional assessments.

The Commissioners held that the interest came into being only for the purpose of meeting a corresponding tax liability and that the shareholders had no concern in it as a prospective or possible source of dividend to themselves, and that it was not available for dividend.

Dismissing the appeal the learned judge said:

In my judgment the true solution of this short but difficult point is to be found in the following considerations. The company in the course of carrying on its business has made profits. On those profits it has to pay tax and it can pay tax in two ways, either by waiting for the due date and then paying cash out of its general fund standing to the credit of profit and loss, or by making an estimate of its tax liabilities and making provision by the purchase of tax reserve certificates well in advance of the due date, and in due course surrendering those certificates and claiming interest thereon. If the company follows the latter course the result is that its general fund standing to the credit of profit and loss is larger than it otherwise would be, or what comes to the same thing, that it has had to deplete that fund by less than would be necessary if it paid its tax in cash. All that has happened is that the general fund standing to the credit of profit and loss has been swollen. The case is analogous to receiving a discount on a trade debt. The company is left with a larger fund to the credit of profit and loss and not with a separate item in its profit fund representing a tax-free item. In my judgment, accordingly, the Special Commissioners reached a correct decision.

Inland Revenue Commissioners v. Nicholson and Another

Income Tax—Settlement—Covenant by settlor to make periodic payments to trustees of charitable trust—Power of revocation—Exercisable within six years from due date of first payment—Payments treated for income tax as income of settlor—Claim by trustees for repayment of tax refused—Finance Act, 1938, s. 38(1)

CHANCERY DIVISION Case Stated by the Special Commissioners of Income Tax.

UPJOHN J.

1953. May 1.
[1953] 2 All E.R. 123.
[1953] 1 W.L.R. 809.

Appeal by the Inland Revenue Commissioners against the decision of the Special Commissioners allowing a claim by the trustees of a charitable trust for repayment of income tax deducted by a settlor from payments made to the trustees under a revocable covenant.

The claim was made by the trustees of a charitable trust known as the Frank Butler Memorial Fund. By a deed dated 27 March 1943 the settlor covenanted that, so long as she lived, she would pay to the trustees the monthly sum of £350 without any deduction except for income tax, such sums to accrue as from 5 April 1942 and to be paid (1) as to the amount accrued to the date of the deed, on the execution thereof and (2) as to the sums thereafter to accrue, on the last day of every month. The settlor reserved a power,

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exercisable by deed at any time or times after the expiration of seven years from 27 March 1943, to revoke the covenant wholly or partially.

During the period before the power of revocation became exercisable, i.e. up to 28 February 1950, the settlor made the payments under deduction of income tax and the trustees obtained repayment under the Income Tax Act, 1918, s. 37.

Shortly before the date on or after which the power of revocation became exercisable, the settlor executed a supplemental deed which postponed for a further 3 years the date on or after which the power of revocation might be exercised.

The question for the Court was whether, having regard to s. 38(1) of the Finance Act, 1938, the payments falling due on and after 31 March 1950 were for income tax purposes to be deemed to be the income of the settlor or of the trustees.

S. 38(1) provides as follows:

If and so long as the terms of any settlement are such that (a) any person has or may have power, whether immediately or in the future, and whether with or without the consent of any other person, to revoke or otherwise determine the settlement or any provision thereof and, in the event of the exercise of the power, the settlor or the wife or husband of the settlor will or may cease to be liable to make any annual payments payable by virtue or in consequence of any provision of the settlement... any sums payable by the settlor or the wife or husband of the settlor by virtue or in consequence of that provision of the settlement in any year of assessment shall be treated as the income of the settlor for that year and not as the income of any other person. Provided that, where any such power as is referred to in para. (a) of this sub-section cannot be exercised within the period of six years from the time when the first of the annual payments so referred to becomes payable, and the like annual payments are payable in each year throughout that period, the said para. (a) shall not apply so long as the said power cannot be exercised.

S. 41(4)(b) of the same Act defines the word 'settlement' as follows:

The expression 'settlement' includes any disposition, trust, covenant, agreement or arrangement, and the expression 'settlor' in relation to a settlement means any person by whom the settlement was made.

In allowing the appeal the learned judge referred to *Taylor v. Inland Revenue Commissioners* [1946] 1 All E.R. 488 and the dictum of Cohen L.J. which, he said, afforded him a very valuable guide and was binding on him.

In that case Cohen L.J. said of s. 38(1):

Having regard to the references in the proviso back to the earlier part of the sub-section, and to the use of the present tense, the proviso must, in my opinion, be construed to read as follows: 'Provided that, where any power to revoke or otherwise determine the settlement contained in such settlement cannot under any provision of such settlement be exercised within the period of six years from the time when the first of the annual payments due under such settlement becomes payable, the said para. (a) shall not apply so long as the said power cannot be exercised.' It is plain that the power to revoke and the obligation to pay must be contained in the same settlement, and the use of the present tense, in my opinion, involves that the restriction on the exercise of the power to revoke should also be present in the same settlement. Having regard to the definition of 'settlement' in s. 41, the settlement may be a single document or may be comprised in two or more documents, but it must be the same settlement throughout.

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Upjohn J. said that the Special Commissioners had misapprehended the effect of the judgment in *Taylor's* case. He continued as follows:

In my judgment what was said by Cohen L.J. is quite plain. There must be found in the settlement, whether it be constituted in one document or in two or more documents so as to form a compound settlement, three things. There must be, first, an obligation to pay, secondly, a power to revoke, and, thirdly, a suspension of that power to revoke for six years from the first payment. It seems to me clear that the learned lord justice, when he used the words 'so long as the said power cannot be exercised', intended to refer to a minimum period of six years, and it is not sufficient merely to be able to point to a restriction during the relevant year of assessment. If that be true, then it must be clear that the claim of the Crown here succeeds.

If the only settlement is the settlement of 1943, then for the relevant period the power to revoke is no longer suspended. If the relevant settlement be the settlement of 1943, coupled with the deed of 1950, then the first payment thereunder fell due on 31 March 1950, and again the proviso was not satisfied, because the power of revocation comes into operation in 1953, within six years of the first payment due under the compound settlement.

Morgan v. Tate and Lyle Ltd.

Income Tax—Profits from trade or business—Deductions—Propaganda campaign against nationalization of sugar industry—Cost of advertising—Income Tax Act, 1918, Schedule D. Cases I and II r. 3(a)

COURT OF APPEAL
SINGLETON, JENKINS
AND HODSON L.JJ.

1953. May 5.
[1953] 1 Ch. 601.
[1953] 2 All E.R. 162.
[1953] 1 W.L.R. 145.

Appeal from an order of Harman J. dated 18 December 1952 dismissing the Crown's appeal by Case Stated from a decision of the General Commissioners of Income Tax for the City of London.

The company appealed against an assessment to income tax for the year ending 5 April 1951, under Case I of Schedule D to the Income Tax Act, 1918, on the ground that certain expenditure incurred in carrying out a propaganda campaign was deductible in computing its profits.

The expenditure was incurred through an agent, Aims of Industry Ltd., whose activities included advertising, film making, film showing, the issue of pamphlets and ration book holders (suitably inscribed), photography and recordings. The campaign was directed against the nationalization of the sugar refining industry, which was being advocated by the Labour Party and was included in the policy statement submitted to the annual conference of the Party in 1949, and the directors believed that nationalization would result if the Party were returned to power at the General Election, 1950.

The company contended that the expenditure incurred in carrying out the propaganda campaign was for the sole purpose of preserving its business and assets and thereby enabling it to carry on its business, and that it was therefore money wholly and exclusively laid out for the purposes of the trade and was a permissible deduction from profits. It said further that the position was not affected by the fact that the expenditure might have benefited the sugar-refining industry as a whole or the stockholders of the company, and that the ultimate form of nationalization was immaterial.

The Crown contended, on the other hand, that the expenditure was not made for the purpose of earning profits in the trade but for the extraneous purpose of conducting a propaganda campaign against nationalization of the sugar industry as a whole; that the campaign was for the dual purpose of

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preventing the acquisition of (i) the assets and business of the company, and (ii) the capital stock of the company by a national body, depending on the particular form of nationalization which might be adopted by the government; that, in so far as the propaganda campaign was to prevent the form of nationalization by which the assets and business would be compulsorily acquired by a national body, the expenditure was not incurred directly for the earning of profits in the trade but was the cost of conducting a campaign to decide who should earn the profits—the company or the State; that expenditure to protect the ownership of the capital stock of the company was not expenditure connected with the trade of the company; and, therefore, that the expenditure was not money wholly and exclusively laid out for the purposes of the trade of the company and was not deductible.

The Commissioners and Harman J. held that the expenditure was an admissible deduction and the Crown appealed.

The Court of Appeal by a majority (Singleton L.J. dissenting) dismissed the appeal. The *ratio decidendi* is expressed by Hodson L.J. in these words:

In my opinion the expenditure is a proper debit item to be charged against the incomings of the trade when computing the balance of the profits of it, and is none the less a proper revenue charge because it is laid out for the purpose of preserving the assets of the company. It is not, I think, a good answer to say that the asset is not in danger and that the only question is a change of ownership. If the trader has his business taken from him by the State, whatever form nationalization may take, he cannot continue to carry on his trade. Expenditure laid out in protecting himself against nationalization is accordingly directed towards enabling him to retain the trade which he is carrying on.

In re Howell (deceased) **Howell and Another v. Lloyds Bank Ltd.**

Inheritance (Family Provision) Act, 1938—Application by the infant children of testator for a reasonable provision for their maintenance—Whether provisions of the testator's will were unreasonable—Test of reasonableness—Alteration of circumstances after death of testator

COURT OF APPEAL
EVERSHED M.R.
BIRKETT AND ROMER
L.JJ.

1953, July 1.
[1953] 2 All E.R. 604.
[1953] 1 W.L.R. 1034.

Appeal by the plaintiffs, the infant children of Frederick George Howell deceased, from an order of Roxburgh J. dismissing their application for reasonable provision to be made for their maintenance under the Inheritance (Family Provision) Act, 1938, on the ground that the testator had not acted unreasonably in giving by his will all his property to his second wife.

The applicants were the children of the testator by his first wife whom he divorced in April 1947 on the ground of her cruelty to him. They were aged eight and ten respectively. In 1949 Barnard J. had made an order withdrawing from the children's mother her right of access to the children, then living with the testator and his second wife whom he married in March 1949. Those conditions remained until the testator's death in August 1950. By his will made in that year the testator left the whole of his property to his second wife whom he appointed to be guardian of the infant children, the effect of that appointment being, by virtue of the Guardianship of Infants Act, 1925, that she was joint guardian with their mother.

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The total value of the testator's estate was stated to be £2500. After the death of the testator the widow became seriously ill and the state of her health was such as to render her incapable of earning a living. In consequence of her illness the children returned to their mother with whom they were living at the date of the application. Her health and financial circumstances were not good but she was able to provide the children with a home, and, on an application to make the children wards of Court, Danckwerts J. took the view that there was no good ground for disturbing that state of affairs; so they remained with their mother.

Evershed M.R. said that the premise on which any exercise of the jurisdiction given to the Court must depend was whether it could rightly say that the testator here, in the circumstances as they were when he died as well as when he made his will, acted unreasonably in giving the whole of his property to his wife. Roxburgh J. took the view that the testator had not acted unreasonably and the Master of the Rolls had on the whole come to the same conclusion. The Court should not interfere with a testator's dispositions merely because the judge might think that, if he had been in the position of the testator, he would have been inclined to make some provision for a particular person. The Court had to consider whether it was unreasonable on the part of the testator to make no provision for the person in question or whether it was unreasonable not to make a larger provision. It must *prima facie* be right to judge the matter in the light of the circumstances which presented or should have presented themselves to him up to the moment of his death. The circumstances must, no doubt, include eventualities reasonably to be foreseen but the action of the testator ought not to be judged exclusively in the light of circumstances happening after his death which might have altered the situation.

The learned Master of the Rolls said that he had referred to the state of affairs at the date of the testator's death and he thought that it was not possible to say that, having regard to the very limited range within which the testator could make dispositions, the bequest to the wife was unreasonable or unwarranted.

Generally speaking applications under the Act were of such a kind that the Appellate Court should not readily entertain appeals interfering with decisions of judges below. For the reasons which he had indicated he would dismiss the appeal and the other members of the Court were of the same opinion. The appeal was dismissed.

Dean v. Prince and Others

Private company—Articles of Association—Directors required to purchase shares of deceased member at a price certified by auditor—Finality of auditor's certificate—Basis of valuation explained by auditor—Wrong basis—Objection by deceased member's personal representative sustained—Injunction restraining company from acting on certificate

CHANCERY DIVISION

HARMAN J.

1953. June 26.
[1953] 1 Ch. 590.
[1953] 2 All E.R. 636.
[1953] 3 W.L.R. 271.

Action by the personal representative of a deceased director of the third defendant, Dean and Mulhall Ltd., for (i) a declaration that the valuation of the shares in the company, as at the date of death, given by the certificate of the auditor in accordance with article 9(g) of the articles, was arrived at on a wrong basis and was not binding, and (ii) an injunction restraining the first and second defendants, the

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remaining directors of the company, from transferring the shares at the valuation figure.

The company carried on a light engineering business with a nominal capital of £200 divided into 200 shares of £1 each. The deceased held 140 shares and the other two directors each held 30 shares. Article 9(g) provided that if a member died 'his shares shall be purchased and taken by the directors at such price as is certified in writing by the auditor to be in his opinion the fair value thereof at the date of death and in so certifying the auditor shall be considered to act as an expert and not as an arbitrator'.

The deceased died on 6 November 1951 and on 6 December 1951 the auditor certified to the defendant directors that in his opinion a fair value was £7 a share. The plaintiff was dissatisfied with that valuation. Her solicitors pressed the auditor to explain how he had arrived at the value of £7 a share and on 12 February 1952 he wrote: 'We enclose a few notes which we have prepared to show you how the points you raised at our discussion last week have been allowed for in our valuation in so far as we considered them appropriate.' From the notes it appeared that a certain basis of valuation had been taken which the plaintiff said was a fundamentally wrong basis.

The defendants took the preliminary point that the certificate was final and binding, that on the face of it there was nothing wrong with the valuation, and that it was not legitimate to go beyond the certificate and to look at explanations subsequently offered by the auditor.

The learned judge held that there was nothing in the preliminary point. It was well settled that those who have a discretion, e.g. trustees who have powers to apply income for maintenance, and directors who have powers to admit members to a company, can maintain a silence in regard to the reason for decisions which the Court will not oblige them to break, and that if they do maintain silence no action will lie against them. If however they choose, for whatever reason, to disclose the motives which impelled them, those motives may be impeached, and that seemed to Harman J. analogous to what had happened in the present case.

It was true that the auditor was dealing as an expert and that he had to arrive at what in his opinion was the fair value, but if he had founded his opinion on an entirely wrong basis and had chosen to explain that basis, there was nothing in article 9(g) which precluded the plaintiff from attacking the valuation.

Argument on the plaintiff's claim was then heard. The auditor's note disclosed that he had proceeded on the basis that, owing to the difficult position in which the company would be placed if certain large sums due by the company to the deceased and his wife (the present plaintiff) had to be paid, no value could be put on the shares on a normal going concern basis other than something purely nominal and that it became necessary therefore to take the only other basis which could apply, i.e. the break-up value, and that was the basis on which the auditor proceeded. In the opinion of the learned judge it was a wrong basis. If a person were buying a small parcel of shares in a private company which was making a loss (as this company was doing, owing to the high remuneration paid to its directors), the buyer would, no doubt, be in an unhappy position, for he would receive no dividend and have no prospect of a dividend; but in taking that point of view the auditor overlooked the substance of the matter. The property for sale was not some small parcel of

shares but 140 shares which carried with them the right to control the company. The auditor left that aspect of the matter altogether out of his calculations. Being of opinion that the company ought to be wound up, he valued the machinery on the basis that the company had ceased business on the date of death and that the physical assets were sold at the earliest auction sale to which they could be taken. On that basis he valued the plant and machinery at £1400 instead of £4000 which was the value at which they appeared in the accounts of the company.

In taking the break-up value the auditor left out of account altogether the question of control. The company had made a trading profit for a number of years. There was no necessity to put an end to its life; it had no creditors who were threatening to destroy it, and it had a factory and machinery which were well maintained. No inquiry was made however whether the factory and machinery could be sold as an entirety.

Evidence was given before the learned judge that at the time of death factory space in Sheffield was short, trade in the light engineering world was good, and it was likely that someone could have been found to make a bid for the whole concern. The purchaser of the deceased's shares would be in a position to turn out the defendants, to re-organize the factory and put in his own business, or to sell everything. None of these possibilities was considered. The auditor left out of account the control factor and that, in the view of the learned judge, showed that his valuation was altogether wrong.

The valuation could not stand and Harman J. made a declaration that it was not binding on the plaintiff. He said that if necessary, he would restrain the defendant company from acting on it. The Court had no jurisdiction to put itself in the place of the valuer whom the parties had chosen and he did not at that stage propose to do more than to relieve the plaintiff of any obligation to accede to the valuation (*vide p.*[167]).

Lomax (Inspector of Taxes) v. Newton

Income Tax—Deduction of expenses—Territorial Army Officer—Mess subscription—Camp expenses—Whether incurred 'wholly exclusively and necessarily in the performance of duties'—Income Tax Act, 1918—Rules applicable to Sched. E, r. 9

CHANCERY DIVISION

VAISEY J.

1953. July 21.
[1953] 2 All E.R. 801.
[1953] 1 W.L.R. 1123.

The taxpayer was Major Newton, second-in-command of the Territorial battalion of the York and Lancaster Regiment stationed at Sheffield. He claimed that certain items of expenditure had been incurred by him wholly, exclusively and necessarily in the performance of his duties within the meaning of r. 9 of the rules applicable to Schedule E to the Income Tax Act, 1918, and should therefore be deducted from his emoluments as an officer for income tax purposes. The items of expenditure in respect of which the claim was made were originally eleven in number, but of these, one was withdrawn and four were disallowed by the Commissioners. The remaining six were found by the Commissioners to have been incurred by the taxpayer wholly, exclusively and necessarily in the performance of his duties as an officer in the battalion. From that finding the Crown appealed and the question was whether there was evidence before the

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Commissioners on which they could properly so find. The contention of the Crown was that there was no such evidence and that all the items should have been disallowed.

The six items allowed by the Commissioners were:

- (1) Annual mess subscription.
- (2) Share of cost of entertaining official regimental guests.
- (3) Payments to batman.
- (4) Hire of camp furniture.
- (5) Amounts paid for hotel accommodation in excess of detention and ration allowances.
- (6) Cost of tickets at sergeants' and other ranks' dances and sergeants' annual dinner club.

The learned judge said:

Before coming to the particular items I would observe that the provisions of r. 9 of the rules applicable to Schedule E to the Income Tax Act, 1918, are notoriously rigid, narrow and restricted in their operation. In order to satisfy the terms of the rule it must be shown that the expenditure incurred was not only necessarily, but wholly and exclusively, incurred in the performance of the relevant official duties. It is certainly not enough merely to assert that a particular payment satisfies the requirements of the rule, without specifying the detailed facts on which the finding is based. An expenditure may be 'necessary' for the holder of an office without being necessary to him in the performance of the duties of that office. It may be necessary in the performance of those duties without being exclusively referable to those duties. It may, perhaps, be both necessarily and exclusively, but still not wholly, so referable. The words are indeed stringent and exacting. Compliance with each and every one of them is obligatory if the benefit of the rule is to be claimed successfully. They are, to my mind, deceptive words in the sense that, when examined, they are found to come to nearly nothing at all.

Dealing with the items severally, the learned judge said that

as regards the first and second items, the expenditure, although obligatory on all officers, was referable to personal and social obligations rather than to the performance of official duties and for that reason did not comply with the requirements of the rule.

As regards the third and fourth items, he thought that evidence to justify these allowances might have been forthcoming: but the difficulty in the taxpayer's way was the insufficiency of the evidence adduced. It was not enough to say that the expenditure was essential to the performance of his duties. The test was whether it was made in the performance of his duties and the onus of proof was on the taxpayer. The taxpayer had not discharged that onus. There was no evidence on such points as (a) what the duties of a batman are, (b) for what services he receives pay from the officer who employs him, (c) what is the appropriate amount of such payments, (d) whether the payments are really in the nature of a gratuity, (e) what camp furniture has to be hired, and (f) what is the proper cost of hiring it. In the absence of evidence, he could not see that the Commissioners could properly have allowed the items.

As regards the fifth item, no doubt the taxpayer's attendance at conferences and exercises was compulsory and he had no choice of hotels. The chief difficulty was the paucity of the evidence, but the Commissioners had found as a fact that the expenditure was wholly exclusively and necessarily incurred in the performance of the duties and he could not say that they were wrong.

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As regards the sixth item, he agreed that participation in the social life of the battalion was part of the social duties of the officer but it was no part of his official duties. It was quite impossible to see how the item could be brought within the rule.

The result was that the learned judge allowed the appeal except as to £6 under item No. 5: but in doing so he called attention, not for the first time, to the extreme and possibly unintentional narrowness of the rule and to the question whether allowances to Territorial officers in such matters require to be somewhat increased.

In re Gilpin (deceased) **Hutchinson v. Gilpin and Others**

Will—Disposition in favour of children—Adopted child—Adoption Act, 1950, s. 13(2), Sched. V. para. 4—Will made before 1 January 1950—Death of testator after that date—Date of 'disposition'—Intention of testator to include his adopted grandchild in residuary bequest

CHANCERY DIVISION

UPJOHN J.

1953. Oct. 19.
[1953] 2 All E.R. 1218.
[1953] 3 W.L.R. 746.

Adjourned summons to determine whether, on the true construction of clause 8 of the will of the testator, George Gilpin, and of s. 13 of and para. 4 of Schedule V to the Adoption Act, 1950, the plaintiff as the adopted child of Margery Annie Hutchinson, one of the daughters of the testator, was a 'child' of the daughter within the meaning of the clause and as such entitled to share in the residuary estate.

By clause 8 of his will dated 3 September 1947 the testator directed his trustees to stand possessed of his residuary estate upon trust in equal shares for his son and his four daughters but to retain the share of each of them upon trust to pay the income to the son or daughter for life and, subject thereto, upon trust for the children of his son or daughter or any of them or any of their issue in such shares and in such manner as they and each of them should by deed or will appoint, and in default of appointment upon trust for such children in equal shares.

The testator died on 11 October 1950. The plaintiff was the adopted child of his daughter Margery Annie Hutchinson. The adoption order was made on 12 February 1941 under the power conferred by the Adoption of Children Act, 1926. It appeared from the evidence that Mrs Hutchinson, born in 1899, underwent at the age of eighteen an operation which prevented her from bearing children and that the effect of the operation was known to her father. The adoption was made with his full approval and he recognized the plaintiff as his grandson.

The Adoption of Children Act, 1926, provided that an adoption order should not confer on the adopted child any right or interest as a child of the adopter and that the expressions 'child', 'children' or 'issue' when used in any disposition should not, unless the contrary intention appeared, include an adopted child or children or issue of an adopted child.

The Act of 1926 was replaced by the Adoption of Children Act, 1949, which in turn was replaced by the Adoption Act, 1950. The Acts of 1949 and 1950 radically altered the policy of the law in relation to the benefits which adopted

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children might receive. Section 13 of the Adoption Act, 1950, is in these terms:

(1) Where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any real or personal property . . . that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person.

(2) In any disposition of real or personal property made, whether by instrument *inter vivos* or by will (including codicil), after the date of an adoption order—

(a) any reference (whether express or implied) to the child or children of the adopter shall, unless the contrary intention appears, be construed as, or as including, a reference to the adopted person;

(b) any reference (whether express or implied) to the child or children of the adopted person's natural parents or either of them shall, unless the contrary intention appears, be construed as not being, or as not including, a reference to the adopted person; and

(c) any reference (whether express or implied) to a person related to the adopted person in any degree shall, unless the contrary intention appears, be construed as a reference to the person who would be related to him in that degree if he were the child of the adopter born in lawful wedlock and were not the child of any other person.

Schedule V para. 4 of the Act of 1950 contains the following transitional provision:

Sections 13 to 15 of this Act shall apply in relation to an adoption order made under the Adoption of Children Act, 1926, . . . as if it were an adoption order within the meaning of those sections respectively: Provided that nothing in s. 13 of this Act shall affect the devolution of any property on the intestacy of a person who died before 1 January 1950, or any disposition made before that date.

The first point which the Court had to determine was whether in this case the 'disposition' was made before 1 January 1950, so as to bring it within the proviso. It was argued for the plaintiff that the disposition was not made until the will ceased to be ambulatory and became irrevocable on the death of the testator, as until the date of death there was no effective disposition. It was argued for the defendants on the other hand that the 'disposition' was the document which created the benefit and that the relevant date was the date of its execution. The learned judge held that, on the true construction of the words of the statute, the latter was the correct view, and that, as the disposition was made on 3 September 1947, the Adoption Act, 1950, did not affect the devolution of the property which accordingly remained subject to the provisions of the Act of 1926.

The second point argued for the plaintiff was that, by the operation of the general law or of the Act of 1926, a contrary intention appeared, and that, on the true construction of the will, the words 'children' or 'children of the testator' must necessarily include the adopted child. On that point the learned judge decided in favour of the plaintiff. He said that in the circumstances which appeared in the evidence, the testator must necessarily have intended to benefit the plaintiff, because, when he made his will, he well knew that his daughter could not bear children. He knew and approved of the fact that his daughter had an adopted child. Upjohn J. thought that the case was a clear one and made a declaration accordingly.

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In re Watkins (deceased) Watkins v. Watkins and Others

Family provision—Claim by widow of second husband—Validity of marriage—Proof of death of first husband—Presumption of death—Not heard of for twenty-six years—Absence of any inquiry

CHANCERY DIVISION The plaintiff applied under the Inheritance (Family Provision) Act, 1938, for reasonable provision to be made for her out of the estate of William Elias Watkins deceased whose widow she claimed to be.

HARMAN J.

1953, Oct. 13,
[1953] 2 All E.R. 1113.
[1953] 1 W.L.R. 1323.

The brother and sisters of the deceased took the preliminary objection that the plaintiff was not the widow of their brother as she could not prove that her first husband was dead at the date of her second marriage.

On 21 November 1913 the plaintiff was married to one William Edwards, a bachelor then twenty-five years of age. He was a coalminer and both were inhabitants of Pontypool. They had two children born in 1913 and 1919 respectively. In 1921 the husband deserted the plaintiff for another woman but one day in 1922 he returned and asked the plaintiff to take him back saying that, if she would not do so, she would never see him again. She refused him and she had neither seen nor heard of him again, except that in 1942 a rumour, which was no more than a rumour, reached her that he was dead.

On 30 January 1948 the plaintiff was married to the testator and in the marriage certificate she was described as a widow and he as a bachelor. The certificate was *prima facie* evidence that the plaintiff was then a widow. The question for the Court was whether there was sufficient evidence to the contrary.

The plaintiff relied on the presumption that, when a man had not been heard of for seven years, he was not alive after that time.

Reviewing the evidence the learned judge said that it had been submitted that, on the facts of this case, there was no occasion to suppose that the man was dead because, if living, he would be only sixty-five years old and as a miner he had a trade which takes men all over the world. There was, moreover, good reason for his silence, because he had not maintained the plaintiff since he left her. On the other hand the period from 1922 was a very long period of time. The plaintiff had kept in touch with her husband's father until his death in 1927 and he apparently had no communication from his son. She also had from time to time some communication with her husband's sister who died in 1937, and no mention of the husband was ever made between them. The plaintiff had, nevertheless, made no inquiries or adequate searches.

The learned judge said that, in his judgment, the plaintiff was entitled to assume in 1948 that she was free to marry and describe herself as a widow. The presumption was that she was right. He held accordingly that she was a dependant of the testator and entitled to raise the action.

Harman J. then considered further facts and ordered that the annuity of £2 per week bequeathed to the plaintiff out of an estate of about £15,000 should be doubled.

**Trustees of Sir William Haldane (deceased)
v. Inland Revenue Commissioners**

**Trustees of H. G. Walker (deceased)
v. Inland Revenue Commissioners**

Estate duty—Policies effected under the Married Women's Policies of Assurance (Scotland) Act, 1880—Whether aggregable with other property to determine rate of estate duty—Finance Act, 1894, s. 4

COURT OF SESSION
SECOND DIVISION

THE LORD JUSTICE
CLERK, LORDS MACLACHLAN,

PATRICK AND
MACKINTOSH

1953, Oct. 23.
[1953] S.L.T. 80.

The short point for decision in these cases was whether the policy moneys payable on death under certain policies effected under the Married Women's Policies of Assurance (Scotland) Act, 1880, should be aggregated with other property to determine the rate of estate duty payable. The policies were effected with various life offices, some by Sir William Haldane, who had three children and the remainder by H. G. Walker, who also had three children.

The Married Women's Policies of Assurance (Scotland) Act, 1880, s. 2 provides:

A policy of assurance effected by any married man on his own life, and expressed on the face of it to be for the benefit of his wife or of his children . . . shall, together with all benefit thereof, be deemed to be a trust for the benefit of his wife for her separate use or for the benefit of his children . . . and such policy immediately on its being so effected shall vest in him and his legal representatives in trust for the purpose or purposes so expressed or in any trustee nominated in the policy . . . but in trust always as aforesaid, and shall not otherwise be subject to his control or form part of his estate, or be liable to the diligence of his creditors, or be revocable as a donation, or reducible on any ground of excess or insolvency.

The Finance Act, 1894, s. 4 provides that in determining the *rate* of estate duty on property passing on death, all property so passing in respect of which duty is leviable shall be aggregated so as to form one estate except that any property so passing in which the deceased never had an interest shall not be aggregated with any other property but shall be treated as an estate by itself.

The parties were agreed that the policies under consideration could be divided into two categories and that one of those effected by Sir William Haldane (hereinafter called the Haldane policies) could be taken as typical of the policies in the first category. It contained the following wording:

This policy is effected under the Married Women's Policies of Assurance (Scotland) Act, 1880, and is hereby expressed to be for the benefit of Thomas Graeme Nelson Haldane, son of the grantee, should he be living at the date on which the sum assured hereunder becomes payable, but if he be not living on such date then for the benefit in equal shares of such of the grantee's other two children, Mary Elizabeth Campbell Fraser and Archibald Richard Burden Haldane as shall be living on such date, provided always that if on the said date neither the said Thomas Graeme Nelson Haldane nor either of the said Mary Elizabeth Campbell Fraser and Archibald Richard Burden Haldane be living, the whole benefit of the policy shall vest absolutely in the last of such children to die.

The policies effected by H. G. Walker (hereinafter called the Walker policies) were taken as typical of the policies in the second category and contained similar words up to the point of contemplating the event of all three children predeceasing the grantee and then proceeded:

and if the grantee's said three children shall all predecease the happening of the event assured against then for the benefit of the estate of the last to die of the said three

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children: provided that if any of the said three children predecease the grantee leaving issue such issue shall not take any part of the share which the parent or parents of such issue would have taken on surviving the grantee except such share as may accrue through the estate of the last survivor of the grantee's said three children.

It was contended for the Crown that in the case of each of the policies the assured had an interest in the policy money within the meaning of the Finance Act, 1894, s. 4.

Lord Patrick said:

The trusts which were set up for the benefit of the children were revocable under the common law. There was no delivery to the trustees of the trust property. Such delivery is essential to constitute an irrevocable trust under the common law. A faculty in a trustor to revoke the trust would suffice to give him an interest in the trust property and to lead to aggregation of the trust property with the rest of the property passing on his death but the trusts created in these cases were expressly created under the Married Women's Policies of Assurance (Scotland) Act, 1880. Such trusts are an exception to the general law, for the policy vests in the trustees immediately on its being effected, and the trust is irrevocable. There is no need to deliver either the deed of trust or the trust property to the trustees. This exceptional privilege attaches only to policies of assurance effected by a married man on his own life and expressed upon the face of them to be for the benefit of his wife, or of his children, or of his wife and children. The statute provides that such a policy is deemed to be a trust for the benefit of his wife, or for the benefit of his children, or for the benefit of his wife and children. If, however, a situation could arise in which under the destination in such a policy the property ceased to be held for the benefit of the wife, or of the children, or of the wife and children of the assured, the statutory trust would fail for want of statutory objects, and the trust would then become a trust under the common law. As such, it would be revocable by the assured, unless there had been delivery of the trust property to the trustees, which is not so in the cases with which we are concerned. The Crown maintains that under each of these policies the above situation might have arisen. If that is right the deceased had an interest in the policy and its value must be aggregated with the rest of the property passing on the death of the assured.

In the case of the Haldane policies the Court held unanimously that the policy moneys were not aggregable with other property. Lord Mackintosh said:

I think that even if all three of Sir William's children had predeceased him the statutory trust in their favour would not have come to an end on the death of the last survivor of the children, but would have persisted and remained to be performed in favour of the last survivor's personal representatives seeing that under the destination an absolute vested right in the policy had been conferred on that last survivor before his death. I hold therefore that under the destination in the Haldane policies the interest of Sir William was from the date of the policies entirely excluded and that accordingly the property represented by these policies was property in which the deceased (Sir William) never had an interest. The property in each of these policies thus falls to be treated as an estate by itself and not to be aggregated with the rest of Sir William's estate for the purpose of determining the rate of duty to be levied upon it.

In the case of the Walker policies, the Court held by a majority (Lord Mackay dissenting) that the policy moneys were aggregable. In the course of his judgment Lord Patrick said:

Under both types of policy if the last child to survive died intestate in the lifetime of the assured, the property in the policy would pass to his heirs *in mobilibus*, but in the first type of policy it would do so by inheritance, and not by virtue of the destination in the policy, as in the case of the second type of policy. The distinction is a matter of substance and not merely of form. This may be tested by supposing that the assured

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became bankrupt after the last survivor of the children died intestate. Then, in the case where the last survivor of the children took a vested right in the policy immediately on such survivorship, that vested right, being a proper object of a statutory trust and being protected by a statutory trust, would not pass to the assured's trustee in bankruptcy. But, in the case where the last survivor of the children took no vested right in the policy, there being no irrevocable trust in existence to protect the interests of his heirs *in mobilibus* but only one revocable at the will of the assured, the property in the policy would pass to the assured's trustee in bankruptcy. The destinations in the two types of policy are different in effect as well as in form. This contingent interest of the assured in the property put under trust in the case of the second type of policy is sufficient to negate the appellants' contention that the deceased never had an interest in the policy, in the sense of the proviso to section 4 of the Finance Act, 1894, and to lead to aggregation of the value of the policy with the rest of the estate passing on the death of the assured.

In re Merton's Settlement: Public Trustee v. Wilson and Others

Settlement—Power of appointment—Exercise of power in favour of children of appointor—Subsequent purchase by appointor of appointed interests—Validity of transaction—Fraud on the power

CHANCERY DIVISION

WYNN-PARRY J.

1953, June 4.
[1953] 2 All E.R. 707.
[1953] 1 W.L.R. 1096.

This adjourned summons raised the question of the validity of the exercise of a power of appointment and the subsequent purchase by the appointor of the appointed interests.

By the terms of a settlement dated 5 May 1908 the trustees were directed to pay the income of the trust fund to the defendant Gladys Wilson for life and after her death to hold the fund in trust for such of her issue as she might at any time by any deed or deeds with or without power of revocation appoint and in default of appointment in trust for all her children in equal shares. She had three children, two daughters and a son who was under a disability.

By an irrevocable appointment dated 16 June 1952 Gladys Wilson appointed that (subject to her life interest) the trust fund should be held in trust for her two daughters in equal shares. She made no appointment in favour of her son who (in default of appointment) was interested in one-third of the trust fund; but it appeared from the evidence that she had otherwise made generous provision for him. On or before 1 July 1952 she purchased the reversionary interests appointed to her daughters.

The learned judge said:

This summons raises the short and, to my mind, simple question whether or not there is ground for saying that the appointment, followed by the purchase, constitutes an invalid transaction. It can be held to be an invalid transaction (and then only partially invalid) only if it can be shown that there is some inflexible rule established by the authorities that, where the appointor and appointee stand in the relationship of parent and child, the appointor who appoints in favour of the child and then purchases the interest of the child cannot benefit thereby beyond the interest which the child would have in the fund if the appointment had never been made.

He then referred to various authorities including *Vatcher v. Paull* [1915] A.C. 372 where Lord Parker of Waddington said:

The term fraud in connexion with frauds on a power does not necessarily connote any conduct on the part of the appointor amounting to fraud in the common law meaning

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of the term or any conduct which could properly be termed dishonest or immoral. It merely means that the power has been exercised for a purpose or with an intention beyond the scope of or not justified by the instrument creating the power. Perhaps the most common instance of this is where the exercise is due to some bargain between the appointor and appointee whereby the appointor or some other person not an object of the power is to derive a benefit: but such a bargain is not essential. It is enough that the appointor's purpose and intention is to secure a benefit for himself or some other person not an object of the power.

Commenting on that dictum Wynn-Parry J. said:

It appears to me that that is a clear direction to the Court in each case to inquire what is the purpose and intention of the appointor and if, and only if, it appears from the evidence that the object was to secure a benefit for himself or for some other person not an object of the power is the transaction to be held invalid. These words of Lord Parker direct that the Court shall embark on that inquiry, and they are therefore the reverse of words which are apt to establish or recognize the existence of any inflexible rule.

After quoting from the judgment of Evershed M.R. in *In re Dick* [1953] Ch. 343 Wynn-Parry J. said:

Those words appear to me again to recognize the duty of the Court to embark on the inquiry to which I have referred and are inconsistent with any inflexible rule that the mere circumstance that an appointor stands in the relation of parent to the appointee and purchases the appointee's share vitiates the transaction.

The learned judge then referred to two older authorities viz. *Smith v. Lord Camelford* (1795) 2 Ves. 698 and *Noel v. Lord Walsingham* (1824) 2 Sim. & St. 99 and said:

It appears to me that the two older authorities are not inconsistent with the modern authorities. In each case there must be the inquiry by the Court and the Court is free as the result of that inquiry to come to such conclusion as appears to be right, being guided only by the principle stated by Lord Parker. The Court has to ask itself what was the appointor's purpose and intention. Was it to secure a benefit for himself or for some person not an object of the trust?

In this case I come without hesitation to the conclusion that on the evidence and in the light of the instruction to be derived from these cases the transaction was entirely valid.

APPEAL

Dean v. Prince and Others

Vide supra p. [6]

In this case the Court of Appeal (The Master of the Rolls, Denning L. J. and Wynn-Parry J.) allowed an appeal from the decision of Harman, J. The Court came to the conclusion that, though the auditor erred in principle in treating himself as bound to regard only the break-up value of the shares, the plaintiff had nevertheless failed to establish sufficiently that a consideration of the value of the plant *in situ* or otherwise would produce in all the circumstances a figure of value materially different from that at which the auditor had arrived. There was, therefore, no reason why the Court should reject the auditor's valuation certificate.

There was no appeal from the decision of the learned judge on the preliminary point that, as the reasons on which the valuation was based had been stated by the auditor, the valuation could be challenged in the Courts (5 March 1954: *The Times* 6 March 1954).

LEGAL NOTES

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

One of Her Majesty's Counsel

AND

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

Secretary, The London Life Association Ltd.

In re The Delhi Electric Supply and Traction Co. Ltd.

Company winding up—Proof of debts—Liability of company in respect of assessment to Indian capital profits tax—Rejection by liquidator of claim by Government of India to be admitted to proof in the liquidation—Tax imposed by foreign state—Rule against collection of tax by English Court—Companies Act, 1948, ss. 302, 307, 316

COURT OF APPEAL

EVERSHED M.R.,

JENKINS AND

MORRIS L.JJ.

1953. Nov. 11.

[1954] 1 Ch. 131.

[1953] 2 All E.R. 1452.

The Government of India claimed to be admitted as a creditor in the voluntary winding-up of The Delhi Electric Supply and Traction Co. Ltd. in respect of assessments to Indian capital profits tax. The liquidator rejected the claim. The Indian Government applied by summons in the Chancery Division under the Companies Act, 1948, s. 307, for an order that the decision of the liquidator be reversed. Vaisey J. refused the application. The Government of India appealed.

The question was whether the liability, which the company would have been bound to discharge in India (i.e. so long as the company operated in India or remained subject to the effective jurisdiction of the Indian Courts), was a liability for which the liquidator must make provision under the terms of the Companies Act, 1948, and in particular s. 302 which provides:

Subject to the provisions of this Act as to preferential payments, the property of a company shall, on its winding up, be applied in satisfaction of its liabilities *pari passu* and, subject to such application, shall, unless the articles otherwise provide, be distributed among the members according to their rights and interests in the company.

Section 316 provides:

In every winding up . . . all debts payable on a contingency, and all claims against the company, present or future, certain or contingent, ascertained or sounding only in damages, shall be admissible to proof against the company . . .

After an exhaustive examination of the relevant authorities, the Court held that there is a well recognized rule which has been enforced for at least two hundred years under which an English Court will not collect the taxes of foreign states.

The Court then considered what, having regard to the rule, is the effect of the Companies Act, 1948, under which the property of the company is to be applied in paying all liabilities. On behalf of the Government of India, it was submitted (i) that by section 302 every liability has to be provided for, including liability for tax due in a foreign country, and particularly in a

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foreign country where the company has been trading and has earned the money in respect of which the tax is assessed and (ii) that, according to the ordinary language and interpretation of the section, such a claim as the present was a 'liability' notwithstanding that it might be that the Government of India could not under the rule come to this country and directly sue for the sum.

The Court did not accept those submissions. Although 'liability' might be a word of the widest import, the present claim was in substance and effect, though not perhaps in form, a proceeding to enforce payment of the tax which the Government of India alleged to be due. The result was that, even if the word 'liability' be given its widest meaning, it must still be so construed as to exclude claims which under the law of England are not enforceable in the Courts of this country. The appeal failed and was dismissed.

Holt and Others v. Inland Revenue Commissioners

Estate Duty—Valuation of shares in private company—Minority holding—Restriction on alienation—Open market value—Hypothetical prudent buyer—Consideration of company's trading prospects—Possibility of increased dividend—Finance Act, 1894, ss. 7(5), 10(1)

CHANCERY DIVISION

DANCKWERTS J.

1953. Nov. 25.
[1953] 2 All E.R. 1499.

This was an appeal under s. 10(1) of the Finance Act, 1894, against the decision of the Inland Revenue Commissioners as to the value for the purposes of estate duty of ordinary shares in the capital of a private company known as John Holt and Co. (Liverpool) Ltd. The shares had been settled by a voluntary settlement dated 7 January 1947 made by Robert Longstaff Holt, who died on 11 March 1948, with the result that estate duty became payable under s. 2(1)(c) of the Finance Act, 1894, on his death on the principal value of the shares. The appellants were the trustees of the settlement.

The shares were 43,698 ordinary shares of £1 each. At the date of the settlement and at the date of the death of Mr Holt the capital of the company was £1,150,000 divided into 150,000 preference shares and 1,000,000 ordinary shares of £1 each, of which 139,140 preference shares and 697,680 ordinary shares had been issued.

The articles of the company contained restrictions on the transfer of shares on more or less familiar lines, the essential features being that unfettered transfer to non-members was prohibited as long as a member or person approved by the directors was willing to purchase the shares at the fair value to be certified (in the case of difference) by the company's auditor, and that the directors were given a general power to refuse to register a transfer.

Under s. 7(5) of the Finance Act, 1894, the principal value of any property is to be estimated for the purposes of duty as 'the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased'; but by s. 10(1) of the Act a right of appeal is given to any person who is aggrieved by the amount of the duty claimed by the Commissioners, whether on the ground of the value of any property or otherwise. There was no quotation for any of the company's shares on the Stock Exchange and they were all held by members of the Holt family or by family trusts.

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The Commissioners had determined that the value of the shares was 34s. per share, but on the hearing of the appeal the Crown reduced the figure to 25s. per share. The appellants contended that the fair value was 17s. 2d. per share.

The company owned a number of trading stores in West Africa and the business consisted of purchasing and carrying to West Africa goods for sale there and purchasing and re-selling the products of West Africa, the goods being carried in both directions in the ships owned by the company. The results of the company's trading had fluctuated considerably in the past and the West African trade had been described as a particularly hazardous trade. Witnesses with a knowledge of the trade were called by the appellants and the Crown respectively and gave their reasons for their respective estimates of the value of the shares.

Before dealing with evidence the learned judge stated the principles which in his opinion are applicable in cases of this kind to the valuation of shares for estate duty purposes. He said:

The principles on which shares in a private company are to be valued for the purpose of estate duty have been settled by the House of Lords in *Inland Revenue Commissioners v. Crossman, Inland Revenue Commissioners v. Mann* [1937] A.C.26. The House of Lords decided in that case (by a majority of three to two) that the facts that a shareholder by the articles of a company may be compelled to sell his shares at the 'fair value' ascertained in accordance with the articles and that by the articles the directors may have power to refuse to register a transfer must be ignored, but none the less it must be assumed that a purchaser will be bound by the company's articles once he is on the register of members. The result is that I must enter into a dim world peopled by the indeterminate spirits of fictitious or unborn sales. It is necessary to assume the prophetic vision of a prospective purchaser at the moment of the death of the deceased, and firmly to reject the wisdom which might be provided by the knowledge of subsequent events. In my task I have had the assistance of a number of experts on each side who differ in their opinions in the manner in which experts normally do, and the frankest of them admitted that certain of his calculations were simply guesswork. It seems to me that their opinions are, indeed, properly described as guesswork though, of course, it is intelligent guesswork, aided by the experience which they have gained by their work as stockbrokers or accountants. No possible suggestion can be made against the honesty of these witnesses, but their methods of calculation appear to me to be inevitably uncertain and controversial, and, in my view, statements by several of them, that they would have been ready to buy the shares at the price reached by them, if they had had the opportunity some five years ago, must be discounted accordingly. None the less I could not have approached my task without their valuable assistance, and my remarks must not be taken to belittle the efforts which have been made by them to provide an answer to a question to which no certain answer is possible.

By the terms of the section I have to imagine the price which the property would fetch if sold in the open market. That does not mean that a sale by auction (which would be improbable in the case of shares in a company) is to be assumed, but simply that a market is to be assumed from which no buyer is excluded: *Inland Revenue Commissioners v. Clay, Inland Revenue Commissioners v. Buchanan* [1914] 3 K.B.466. At the same time the Court must assume a prudent buyer who would make full enquiries and have access to accounts and other information which would be likely to be available to him. *Findlay's Trustees v. Inland Revenue* [1938] 22 A.T.C.437.

The learned judge then referred to the history of the company and the evidence of the witnesses and concluded his judgment in these terms:

Having carefully considered the evidence which has been given, including such assistance as may be gained from the various tables which have been put in and the various

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comparisons with the prices of shares of other companies quoted on the Stock Exchange (so far as any useful deductions can be made from them) and making the most intelligent guess that I can, I have come to the conclusion that these shares of John Holt and Co. (Liverpool) Ltd., if sold in the hypothetical open market which the authorities and the section in the Act require me to assume, would fetch a price of 19s. per share.

In re Whichelow (deceased)

Bradshaw and Others v. Orpen and Others

Trust—Family settlement—Holding of shares in company—Exercise of voting rights—Discretion of trustees—Direction by all existing beneficiaries—Possibility of further issue not extinct

CHANCERY DIVISION By her will dated 31 July 1922 Annie Matilda Whichelow left three blocks of shares in George Whichelow Ltd. on trust for her three daughters respectively for life with remainder to those of their children who attained the age of 21 years. At the date of the present motion the daughters were aged 61, 58 and 52 respectively.

UPJOHN J.

1953. Nov. 24.
[1953] 2 All E.R. 1558.

The youngest daughter was divorced from her husband. All the children of the daughters had attained the age of 21 years.

The shares held in trust were part of the ordinary shares of the company and commanded a total voting power of 26,782 votes which was a substantial but not a controlling voting power.

Disputes and difficulties had arisen between the directors and the beneficiaries under the trust. The beneficiaries and the trustees could not agree on the manner in which the voting power should be exercised at a forthcoming general meeting of the company.

By the present motion all the existing beneficiaries asked for a mandatory injunction that the trustees should appoint one of the beneficiaries a proxy in respect of the shareholding or that one of the trustees should vote as directed by the beneficiaries.

The trustees desired to exercise the voting power in a manner which would conflict with the expressed desire of all the beneficiaries. The trustees were acting *bona fide* in what, after having given their attention to the difficult questions involved, they believed to be in the best interests of the shareholders. The beneficiaries on the other hand said that, as they were the only persons entitled to the beneficial interest in the shares, they were entitled to give directions to the trustees as to how the voting power should be exercised. In support of that proposition they relied on a passage in the judgment of Romer L.J. in the Court of Appeal in *In re Butt* [1952] Ch. 197.

The learned judge said that it was difficult to reconcile *In re Butt* with other cases that had been cited and he was not prepared to grant the relief asked for on an interlocutory motion. In his judgment the right way of looking at the matter was that there were before the Court trustees against whom nothing could be said who were anxious to exercise their own discretion. They had not had a direction from all persons beneficially entitled, because it could not be said in law that the daughters of the testatrix were past the age of childbearing. The matter before him must be dealt with as one of strict law, and in law it could not be said that all possible beneficiaries were before the Court. He accordingly refused the injunction.

In re Maldonado (deceased)
State of Spain v. Treasury Solicitor

Intestate Succession—Intestate domiciled in Spain—Movable property situate in England—No heirs entitled to succession—Conflict of law—Spanish Civil Code—State entitled—English law—Property as bona vacantia

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

1953, Nov. 30.
[1953] 2 All E.R. 1579.
[1954] 2 W.L.R. 64.

£31,515 5s. 4d.

Eloisa Hernandez Maldonado, a Spanish national, domiciled in Spain, died there on 11 October 1924, a widow and intestate, with no ascendant, descendant or collateral relative entitled under the law of Spain to succeed to her estate on her death. She left movable property in England valued at the time of her death at

By Article 956 of the Spanish Civil Code the State was entitled to the succession, the assets being devoted to charitable purposes. By the English law of succession the property would pass to the Crown as *bona vacantia*. On 4 June 1930 the State of Spain obtained from a Spanish Court a declaration of heirship. The State of Spain then brought proceedings in England, claiming that letters of administration should issue to the duly constituted attorney of the State of Spain as the sole and universal heir to the estate of the intestate. The Treasury Solicitor opposed the application on the ground that the property of the intestate in this country passed to the Crown as *bona vacantia* and that the grant should issue for the benefit of the Crown. Barnard J. held that the State of Spain was entitled to the grant and the Treasury Solicitor now appealed.

The Crown's argument may be stated in the form of the four propositions expressed by Sir Raymond Evershed in the course of his judgment.

(i) *Prima facie*, movable property situate within the limits and jurisdiction of any State is subject to the laws of that State, and if such property be found to be ownerless it will pass to and become the property of that State. This at least is the law of England, and in the case supposed the property in England is assumed by the Crown as *bona vacantia*.

(ii) To the above general rule there is an exception, being a rule of private international law generally accepted by and forming part of the law of civilized States, including England. The exception is expressed by the formula *mobilia sequuntur personam*. Thus in the case of movables belonging, for example, to a deceased national of another country who died domiciled in that other country (as in the present case), the Courts of this country will treat as entitled to the movables the person or persons who are by the law of that other country entitled to succeed thereto either under a testamentary disposition valid by the law of that other country or on an intestacy, as the case may be; but

(iii) the extent and scope of the exception expressed by the formula *mobilia sequuntur personam* is a matter in the case of each State for its own municipal law; and

(iv) in the case of a national of another State dying domiciled in the other State, and dying, according to its laws, intestate (as in the present case) the English Courts will not recognize as having a title in this country to the movables of the intestate any persons who are not 'successors' in accordance with some generally recognized nexus of personal relationship with the intestate or, at least, will not recognize as a successor the foreign State itself which has made itself such by its own laws, for, notwithstanding the language used in those laws, the truth is that the State is exercising the equivalent of our *jus regale* as regards ownerless property.

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In further support of his fourth proposition counsel for the Crown argued that since the rules of private international law apply to the relations *inter se* of individuals or, at least, of subjects of States and not to the relations *inter se* of States themselves, the scope of the exception necessarily and logically stops short of recognition of a State as a successor.

Counsel for the State of Spain did not contest the first three of the propositions. His challenge was directed to the fourth and last. No line, he said, could be drawn to exclude a *persona ficta* whether a corporation, a municipality or the State itself, so long as, by the Spanish law, such *personae* are in truth made successors and do not claim their title otherwise, for example, by a right of appropriation of the property as *bona vacantia*.

The Court of Appeal, affirming the judgment of Barnard J. in the Court below, held that the State of Spain was entitled to the succession. Jenkins L.J. in his judgment said:

There might be a case where a so-called right of succession claimed by a foreign State could be shown to be in truth no more than a claim to *bona vacantia*. If so, then, no doubt, it would be right to apply the recognized exception to the general rule, but this has not been shown to be such a case. On the contrary, it has been found (and the Crown has accepted the finding) that the State of Spain is, in the eye of Spanish law, the true heir, and I would add that to my mind. . . the conclusion that this is a case of genuine succession is reinforced by the circumstance that the State of Spain is by Article 956 of the Spanish Civil Code enjoined to apply the property of the intestate to the charitable purposes therein mentioned.

Morris L.J. in concurring with the other members of the Court said:

I can see no reason why either this or another country should not by law provide that on intestacy the Crown or the State should in certain circumstances inherit. The line in such a case between becoming owner as heir or inheritor by a law dealing with inheritance on intestacy and acquiring movables because there is no one who is made their owner as heir or inheritor may be a fine one, but I think it is a real one. . . As it is established and not in this Court challenged that the State of Spain is under Spanish law the heir of the deceased and is as truly the heir as any individual heir would be, I can see no reason why the English Courts should decline to recognize this particular heir. The substance of the matter, as it seems to me, is that, by the law to which reference is made, the property in England is not left ownerless but is to pass to an heir, that heir being the State of Spain.

Inland Revenue Commissioners v. Universal Grinding Wheel Co. Ltd.

Profits tax—Distribution of profits—Sums applied in reducing share capital—Redemption of preference shares—Price of redemption fixed by articles—Nominal amount of shares plus premium—Premium to be provided out of profits

COURT OF APPEAL
SINGLETON, BIRKETT
AND HODSON L.JJ.

1953. Nov. 27.
[1954] 1 Ch. 117.
[1953] 2 All E.R. 1592.
[1954] 2 W.L.R. 37.

Appeal by the Crown against an order of Upjohn J. dismissing the appeal of the Crown against the decision of the Special Commissioners, which allowed the Company's appeal against an assessment to profits tax.

The Universal Grinding Wheel Co. Ltd. was incorporated with a nominal capital of £600,000 divided into 400,000 five per cent cumulative participating preference shares of £1 each and 400,000 ordinary shares of 10s. each. The capital at the material time was fully paid.

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In December 1947 the company redeemed all the preference shares at a redemption price of 27s. per share under a power contained in its articles which required the redemption price to be the nominal amount of the shares plus a premium of 7s. per share. Of that price 20s. per share was provided by an issue of new preference shares and 7s. out of profits as required by s. 46(1)(d) of the Companies Act, 1929.

The company was assessed to profits tax for the twelve months to 30 September 1948 on the basis that only 20s. of the 27s. was applied in reducing the share capital of the company within the proviso to s. 36(1) of the Finance Act, 1947, and that therefore the 7s. represented a distribution of profits for profits tax purposes under s. 30(1) and (2) of that Act as amended by the Finance (No. 2) Act, 1947, s. 7. The Special Commissioners allowed the company's appeal against the assessment and Upjohn J. dismissed the Crown's appeal against that decision. The Crown appealed to the Court of Appeal.

The appeal depended on the true construction of s. 36(1) of the Finance Act, 1947, which reads:

Subject to the provisions of the next succeeding subsection, wherever

(a) any amount is distributed directly or indirectly by way of dividend or cash bonus to any person; or

(b) assets are distributed in kind to any person. . .

there shall be deemed for the purposes of the last preceding section to be a distribution to that person of that amount or, as the case may be, of an amount equal to the value of those assets:

Provided that no sum applied in repaying a loan or in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution.

In the course of his judgment Singleton L.J. said:

The contention put forward by counsel for the Crown is that the amount applied to reduce the capital of the company was only £1 a share and that the 7s. was in the nature of an additional payment which came out of profits and was not a sum or part of a sum applied in reducing the share capital. In the course of the argument I suggested that the proviso might have had words added to make it read: 'Provided that no sum applied in reducing the share capital of the person carrying on the trade or business shall be treated as a distribution, except in so far as the sum so applied exceeds the nominal amount of the share capital repaid.' In the absence of any such words I find difficulty in agreeing with the submission made on behalf of the Crown, especially in view of the reference to the nominal amount of the capital in s. 35(1). We are concerned solely with a question of construction. It seems to me that the word 'applied' in the proviso to s. 36(1) has the same meaning as 'paid'. The company could not redeem the preference shares unless it paid 27s. a share to the holders of those shares. In paying that amount it was applying it to redeem the preference shares and in reducing the share capital of the company. Thus the sum which it paid was applied in reducing the capital of the company and does not fall to be treated as a distribution. I am in favour of dismissing the appeal.

Birkett L.J. concurred with the opinion of Singleton L.J.

Hodson L.J. dissented and would have allowed the appeal. He said:

The company was constrained to argue that in construing the words 'no sum applied in reducing the capital' the question to be posed was 'What is the cost of redemption?' The answer being 27s. per share it was said that this was the sum applied. I cannot read the word 'sum' as equivalent to 'the cost of redemption'.

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The sum which is under consideration is the sum to be applied in reduction of the capital. This sum cannot exceed the amount of the capital, whereas the cost of redemption would include sums which are not applied in reduction of capital, *e.g.* not only the premium in question, but the costs of stockbrokers and solicitors incurred in connexion with the redemption. . . . This in my judgment is the plain meaning of the proviso as it stands and this result is reached without the aid of any proviso to the proviso which it has been suggested must be implied in order to reach this end. I, for my part, therefore, would have allowed the appeal.

In re Rees's Will Trusts

Lloyds Bank Limited v. Rees and Others

Will Trusts—Income to grandchildren during their respective lives—Corpus to their respective surviving children—Forfeiture clause—Consent by life tenant to exercise of statutory power of advancement—Trustee Act, 1925, ss. 32, 69

CHANCERY DIVISION

UPJOHN J.

1953. Dec. 4.
[1954] 1 Ch. 202.
[1954] 1 All E.R. 7.
[1954] 2 W.L.R. 59

Adjourned summons to determine (i) whether on the true construction of the will of Robert Price Rees and by virtue of s. 32 of the Trustee Act, 1925, the trustees of the will were entitled, subject to the consent of the tenant for life, to exercise, in relation to the contingent share of any great-grandchild of the testator in his residuary estate, the power of advancement given by s. 32 and (ii) whether on the true construction of the will any of the testator's grandchildren giving his or her consent to an advancement under the power would thereby forfeit his or her life interest in the residuary estate.

By cl. 16 of his will the testator gave the residue of his estate on trust to pay his debts and so forth and to divide and pay the income of the trust fund to his three grandchildren during their respective lives and after their respective deaths he bequeathed the corpus of the trust fund to their respective children who should survive them. The testator provided that each life interest should be held on protective trusts, that is to say, subject to the usual provision for forfeiture in the event of alienation, followed in that event by a discretionary trust for maintenance during the remainder of the life of the life tenant.

By s. 32 of the Trustee Act, 1925, trustees are given a statutory power under which, subject to the consent of any person entitled to a prior life or other interest, they may pay or apply capital money for the advancement or benefit of a person contingently entitled to the capital under the trusts: but by s. 69 such a power applies if and so far only as a contrary intention is not expressed in the instrument creating the trust.

On behalf of any unborn child of a tenant for life, it was submitted that the statutory power was inapplicable to the present will on the ground that the protected life interests and discretionary trusts expressed a contrary intention within the meaning of s. 69, and in particular that the discretion given to the trustees in the event of a forfeiture to apply the annual income for the maintenance or otherwise of the tenant for life or his or her dependants indicated an intention that the income should continue without diminution during the residue of the life of the tenant for life, and that the exercise of the statutory

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power would reduce the amount of the life interest. In dealing with that submission the learned judge said that the question was one of construction of the will and that he did not find sufficient in the discretionary trusts to amount to a contrary intention. He thought that the proper view to take was that, as the will was silent as to any power of advancement, he must assume that the draftsman had in mind the statutory power which, accordingly, ought to be read into the will, so that if the power were exercised, the provisions of the will would operate on the capital remaining under the trusts of the will from time to time.

The second question was whether a tenant for life who gave his or her consent to the exercise of the power would thereby forfeit his or her life interest and so bring into operation the discretionary trusts. It might be conceded that by reading the words of the forfeiture clause quite literally it could be said that the giving of consent was doing or suffering something whereby the life interest or a part thereof would become payable to or vested in some other person. In the opinion of the learned judge, however, that view was not conclusive and he found in the judgments of Neville J. in *In re Hodgson* [1913] 1 Ch. 34 and Harman J. in *In re Shaw's Settlement* [1951] Ch. 833 authority for holding that when a settlement contained a power of advancement, whether in express terms or by reason of the incorporation of s. 32, such a forfeiture clause ought to be read as though there were inserted at the end of it a proviso that it should not apply to any steps taken to enable an advancement by the trustees to take effect.

The learned judge held therefore (i) that the trustees might with the consent of the tenant for life exercise the statutory power of advancement and (ii) that such consent would not operate as a forfeiture of the life interest.

Fouad Bishara Jabbour and Another v. Custodian of Absentee's Property of the State of Israel

Fire insurance—Policy issued by foreign agency—Insured property situate in and insured party resident in foreign country—Claim on policy—Nature of—Unliquidated damages—Chose in action—Recoverable in foreign state—Constitutes property situate there—Right subject to law of foreign state

QUEEN'S BENCH
DIVISION
PEARSON J.

1953. Nov. 27.
[1954] 1 All E.R. 145.
[1954] 1 W.L.R. 139.

Before the termination of the United Nations mandate in Palestine, the Yorkshire Insurance Company Ltd., whose head office is in London, had an agency in Haifa which was authorized to issue the company's policies without reference to the head office. On 31 December 1949 the company ceased to accept new business in Israel. On those facts the learned judge held that the company was resident both in London and in Haifa up to 31 December 1949 but that it was not proved either to have had or not to have had a residence in Haifa after that date.

On 21 November 1947 the agency issued a policy to the owners of a garage in Haifa insuring the garage and its contents against loss or damage by fire or riot up to a limit of £P6000. On 18 January 1948 the insured premises were mined and blown up. On 26 March 1948 the insured left Haifa for

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Egypt and thereafter resided and carried on business in Cairo. After some correspondence with the insured's solicitors the company eventually admitted liability under the policy for £5039 4s. *od.*, but contended that it was unable to pay otherwise than in Israeli currency and that it was bound to pay to the Custodian of Absentee's Property of the State of Israel under Israeli emergency regulations of December 1948 and the Absentee's Property Law of Israel which came into force on 31 March 1950.

On 17 November 1950 the insured issued a writ against the company and by an interpleader order made on 11 January 1952 the insured was constituted as plaintiff in the issue and the Custodian as defendant. The Company paid into Court £4962 19s. *9d.* being its admitted liability after deduction of its costs.

The learned judge referred to a number of cases in which it has been established that a claim on an indemnity policy is a claim for unliquidated damages, inasmuch as the plaintiff has to prove the amount of his loss. The word 'damages' is so used in a rather unusual sense, because the right to an indemnity arises not by reason of any wrongful act on the part of the insurer but only because of his failure to pay the claim.

In the present case the amount of the indemnity was agreed between the company and the insured by letters dated 29 March, 18 October and 11 November 1949 and the right of the insured to be indemnified by a money payment, as distinguished from re-instatement, had accrued not later than the last mentioned date. The agreed sum constituted a chose in action capable of being assigned, and it was situate in Israel inasmuch as the company was resident in Haifa and the money was properly recoverable there.

In support of his claim the Custodian relied on the Israeli emergency regulations of December 1948 and the Law of March 1950, and it was admitted that the enactments were valid and effective in respect of property situate in the State of Israel and that the translations of the enactments supplied to the Court were true and accurate. No expert evidence was called as to the true construction of the enactments and it was agreed by the parties that they should be construed by the learned judge without the aid of such evidence.

The learned judge held that on the true construction of the enactments the amount claimed was movable property within the terms of the regulations and was thereby expressly vested in the Custodian. The Law of 1950 replaced the emergency regulations but the two enactments fell to be read together. The chose in action constituted 'property' within the meaning of the Law of 1950 and the earlier vesting in the Custodian was not disturbed by that Law.

In general the Law of 1950 did not apply to property situate outside Israel but it was not proved that the chose in action ceased to be situate in Israel by 31 March 1950 or at any time. The removal of personal property to another country after vesting did not cause it to cease to be so vested. The learned judge held, accordingly, that the Custodian succeeded in the issue because the chose in action became vested in him under the regulations of 1948 and remained vested in him under the Law of 1950.

Legal Notes

Westminster Bank Ltd. and Another v. Inland Revenue Commissioners

Estate Duty—Deduction of incumbrance—Annuity payable by deceased—Method of valuation

CHANCERY DIVISION

HARMAN J.

1954. Jan. 15.
[1954] 1 All E.R. 240.
[1954] 1 W.L.R. 242.

The question to be determined concerned the value of a debt or incumbrance which for the purposes of estate duty fell to be deducted from the value of the estate of George Wolsey, deceased. The debt or incumbrance in question was an annuity of £850 a year payable by the deceased to his wife Grace Wolsey during her life under a deed of separation dated 26 February 1926.

The deceased died on 10 May 1947 having by his will dated 3 August 1940 appointed Westminster Bank Ltd. and another to be executors. He was survived by his wife who at the date of the proceedings was still living and aged about 69.

The net principal value of the estate, subject to the deduction of the correct amount in respect of the liability represented by the annuity, was £71,286 10s. 10d. Disagreement arose between the executors and the Inland Revenue as to the sum to be deducted, and the executors sought the determination of the Court as to the correct method of ascertaining that sum.

The matter had been referred to two actuaries who were unable to agree and neither was prepared entirely to accept the basis of valuation proposed by the other. One actuary wished to base his calculations on the rate of interest yielded by Consols and the other on the average rate of interest earned by trustee securities. One actuary wished to use the Registrar General's tables of mortality for the whole country and the other the table of Mortality of Annuitants 1900–1920 published by the Institute of Actuaries.

In the course of the argument it was pointed out that the annuitant had nothing to do with the administration of the deceased's estate. She was entitled to claim from the estate payment of each future instalment of her annuity as it fell due, and she was not bound either to take a lump sum in satisfaction of the annuity or to accept the appropriation of a sum to answer her claims. She was entitled to the security of the whole estate.

The learned judge said that in view of the circumstances the valuation of the annuity was a highly artificial matter. He thought a good practical method of making a valuation for estate duty purposes was to consider what might occur if all the beneficiaries under the will, being *sui juris* and wishing to wind up the estate and take at once the capital to which they were ultimately entitled, called on the executors to satisfy the annuitant in order to free the rest of the estate. If the annuitant were recalcitrant and refused to accept anything but the security of the whole estate, the executors might prudently apply to the Court which might direct that the annuitant should have the best security so that she could have no cause of complaint. That seemed to him a convenient way of measuring the liability and would obviate the technical argument between actuaries which, in this case, had been carried on without result for several years.

The best security the annuitant could have would be an annuity purchased from the National Debt Commissioners and the cost at the relevant date afforded a measuring rod of a not unsatisfactory kind. A declaration was made accordingly.

Sneddon and Others v. Lord Advocate

Estate Duty—Gift inter vivos by way of settlement—Payment to trustees of £5000—Immediate investment by trustees in shares of company—Death of truster within five years—Property deemed to pass on death—Property taken—Whether £5000 or trust fund in which invested—Finance Act, 1894, s. 2(1)(c)

HOUSE OF LORDS

VISCOUNT SIMON,*
LORD MORTON OF
HENRYTON, LORD
MACDERMOTT, LORD
REID AND LORD
KEITH OF AVONHOLM

Appeal by the surviving trustees of a deed of trust dated 19 December 1946 made by William Galbraith Hetherington, who died on 5 February 1948, against an order dated 10 October 1952 of the Second Division of the Court of Session which, by a majority (Lord Mackay dissenting), sustained an estate duty assessment made by the Inland Revenue Commissioners in respect of property held by the trustees. The House of Lords by a majority (Lord Keith dissenting) allowed the appeal.

1954. Jan. 25.
[1954] 1 All E.R. 255.
[1954] 2 W.L.R. 211.

The Finance Act, 1894, s. 2(1)(c), as amended by the Finance Act, 1946, s. 47, provides (by reference to the Customs and Inland Revenue Act, 1881, s. 38) that for the purposes of estate duty property passing on death shall be deemed to include (*inter alia*):

any property...taken under a disposition made by any person...purporting to operate as an immediate gift inter vivos whether by way of transfer, delivery, declaration of trust or otherwise, which shall not have been bona fide made five years before the death of the deceased.

Section 7(5) of the Act provides:

The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased.

On 19 December 1946 the truster executed a deed of trust whereby he nominated himself and three others as trustees 'for the ends, uses and purposes after mentioned' and declared that

the trust fund consists of the sum of £5000 sterling which is vested in the trustees and which, or investments representing the same, shall be held and applied for the trust purposes after written.

Then followed a declaration of trusts in favour of the truster's daughter Elizabeth for her life, with remainders over. The trust deed gave the trustees wide powers of investment, including power to purchase, subscribe for, pay for and take up any shares or stock in a number of companies including Creamola (England) Ltd. On 21 December 1946, on the instructions of the trustees, their solicitors applied for an allotment of 5000 new £1 ordinary shares in Creamola (England) Ltd. at par. On 24 December 1946 the truster paid to the trustees the sum of £5000 by a cheque drawn in favour of their solicitors. On the same date the solicitors sent their own cheque for £5000 to Creamola (England) Ltd. in payment for the allotment to them of 5000 new £1 ordinary shares in that company. The trustees still held those shares when the truster died on 5 February 1948.

* The appeal was heard on 11, 12 and 16 November 1953. Viscount Simon died on 11 January 1954 before judgment was delivered.

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The questions to be determined by the Court were (1) what was the disposition purporting to operate as an immediate gift *inter vivos* and (2) what was the property taken thereunder.

The answer given by the majority in the House of Lords was that the disposition was the drawing of the cheque for £5000 by the truster, coupled with the sending of the cheque to the solicitors for the trustees, but whether the disposition was the drawing of the cheque or the execution of the deed of trust was immaterial. In either case the only property which was taken was the sum of £5000, and the disposition operated as an immediate gift thereof *inter vivos* to the trustees. Estate duty was therefore payable on the sum of £5000 without reference to the value at the date of the truster's death of the shares in which the money had been invested.

The contentions on behalf of the Crown, which were accepted by the majority of the Court of Session and by Lord Keith in the House of Lords, were (1) that the disposition was the trust deed which operated as an immediate gift *inter vivos* of the trust fund created thereby and (2) that the property taken by them was the trust fund in its state of investment from time to time and represented at the date of death by the Creamola shares and (3) that estate duty was therefore payable on £9250 which was the market value of the shares at that date.

The majority of the House of Lords rejected the view (which was the basis of those contentions) that a trust fund could rightly be regarded as 'property' as that expression is used in s. 2 of the Act of 1894. In the first place such an abstraction was not 'property' according to the ordinary meaning of the word. Secondly the Act of 1894 did not appear to recognize any relevant distinction, as respects property which was subject to duty, between a trust fund and the items which constituted it at any particular moment. Thus in s. 1 of the Act of 1894 the duty was made payable on 'property . . . settled or not settled' which passed on death, a provision which suggested that the creation of a trust fund was not regarded as producing a new species of property.

The conclusion reached by the majority of the law lords was accordingly that the submissions on behalf of the Crown failed, that the 'property taken' was the sum of £5000 and nothing else, and that there was nothing to justify looking beyond that sum to the state of its investment at the time of the truster's death.

In re Bransbury's Will Trusts Grece and Others *v.* Bransbury and Others

Trust—Trustees—Statutory power of advancement—Trustee Act, 1925, s. 32(1)—Whether trust constituted before commencement of Act—Testamentary power of appointment—Exercise of power

CHANCERY DIVISION

VAISEY J.

1954. Feb. 18.
[1954] 1 All E.R. 695.
[1954] 1 W.L.R. 496.

Adjourned summons to determine whether, in the events which had happened, the power of advancement conferred by the Trustee Act, 1925, s. 32(1), was exercisable by the plaintiffs as the trustees of the will and codicil of Henry Bransbury deceased, in respect of the capital of the trust funds representing the residuary estate, in favour of the infant beneficiaries contingently interested in the capital.

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By his will dated 22 September 1915, Henry Bransbury devised and bequeathed all his real and personal estate to trustees on the usual trusts for sale and conversion and directed them to hold the trust premises on trust for his wife during her life, and by a codicil dated 6 June 1919 the testator directed that after the death of his wife his trustees should stand possessed of the trust premises 'in trust for such person or persons and in such manner as my said wife shall from time to time by will or codicil appoint'. The husband died on 6 March 1921.

By her will dated 26 August 1926, the wife, in exercise of the power of appointment conferred on her, directed her trustees to hold the residuary estate of the husband on the same trusts as were declared by her in respect of her own residuary estate, that is to say, as to one equal part to pay the income to her grandson Stuart Bransbury during his life and after his death as to both capital and income for all his children living at his death, with substitutional trusts in favour of the children then living of any child then dead, and as to a second equal part on similar trusts in favour of her grandson John Bransbury and his issue. The wife died on 14 September 1934. Both grandsons had infant children.

There was no doubt that, as regards the private estate of the wife, s. 32(1) of the Trustee Act, 1925, was applicable, and that her trustees could exercise the statutory power of advancement in favour of the infant beneficiaries; but a doubt had arisen whether the statutory power was also exercisable in respect of the funds which were handed to the trustees of the will of the wife by virtue of the appointment made by her under the will of her husband.

The doubt was in some measure due to the decision of Vaisey J. in *In re Batty (J.I.A. 78 [33])* and to the headnote of the report in the Law Report [1952] Ch. 280 which reads:

When a will, which confers a power of appointment, takes effect before 1 January 1926, and that power is exercised by an instrument executed after that date, the trusts set up by the later instrument are, for the purposes of s. 32(3) of the Trustee Act, 1925, 'constituted' before the commencement of that Act; and the trustees have no statutory power to make advancements under the provisions of that section.

The learned judge said that the headnote was perfectly correct as regards the exercise of a special power, which is a fiduciary power, for the document exercising the power is read back into the original document. The decision applied however exclusively to powers which are called either special powers or limited powers. The question now before the Court was whether the same principle applied in any way to a general power, but there was clear authority that it does not. In the case of *In re Gordon and Adams' Contract* [1914] 1 Ch. 113, Cozens-Hardy M.R. said:

The law has made a clear distinction between general and special powers. A special power must be read into the instrument creating it, but that cannot be treated as applicable to general powers.

and he quoted a passage from *Farwell on Powers*, 2nd edition, p. 286, in these words:

The donee of a general power is virtually absolute owner of the property over which his power extends: and he is to be regarded as absolute owner for the purpose of considering the application of the rule against perpetuities to him.

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Swinfen Eady L.J. in the same case said:

This is a case in which there is a general power of appointment which has been fully exercised. The whole estate has been re-settled... The original settlement is entirely at an end.

In the present case Vaisey J. after citing these passages said:

I think the exercise of a general power, and in this case particularly, is such as to destroy altogether the limitations, qualifications and provisions of the document creating the power, and to bring into operation the new trusts which derive their force and originate in the later of the two documents exclusively. In *re Batty* has no application at all to a general power of appointment, and I so hold on the authority of the cases to which I have referred.

In answer to the question before the Court, the learned judge declared that the power of advancement conferred by the section was exercisable by the plaintiffs as trustees of the will of the wife both in respect of the capital of the trust funds which originally represented the residuary estate of the husband and in respect of the other property which formed the residuary estate of the wife.

In re Iveagh Trusts

Iveagh (Earl) and Others v. Inland Revenue Commissioners

Estate Duty—Voluntary settlement—Release of life interest in favour of remainderman—Death of tenant for life within five years—Property deemed to pass on death—Finance Act, 1940, s. 43(1)

CHANCERY DIVISION

UPJOHN J.

1954. Feb. 9.
[1954] 1 Ch. 364.
[1954] 1 All E.R. 609.
[1954] 2 W.L.R. 494.

Adjourned summons to determine *inter alia* what property was liable to estate duty under the Finance Act, 1940, s. 43(1) in connexion with the death on 20 March 1949 of Arthur Ernest Guinness.

By a settlement dated 1 July 1907 made between Viscount Iveagh (hereinafter referred to as the settlor) of the first part, Arthur Ernest Guinness (hereinafter referred to as Ernest Guinness), the second son of the settlor, of the second part and the trustees of the third part the settlor made a voluntary settlement of the investments specified in the schedule thereto on Ernest Guinness during his life on protective trusts, but with power to surrender his life interest in favour of his wife or issue without creating a forfeiture, and after the death of Ernest Guinness on the usual trusts for such of his issue as he might appoint, and subject thereto on trust for his children in equal shares. In default of children or persons taking under the power of appointment the settlor directed his trustees to hold the trust property on the trusts of certain settlements executed on the same day in favour of two brothers of Ernest Guinness.

In 1946 and 1948 Ernest Guinness executed releases of his life interest in part of the trust property and as to part of that property he made appointments to his three daughters under his power of appointment with the result that on the release of his life interest they took a part of the trust property absolutely.

Ernest Guinness died within five years of the releases and under the Finance Act, 1940, s. 43 estate duty became payable. It was common ground that, whatever the property was that fell to be taxed, it had to be ascertained and valued as at the death of Ernest Guinness.

Legal Notes

The Finance Act, 1940, s. 43(1) is as follows:

Subject to the provisions of this section, where an interest limited to cease on a death has been disposed of or has determined, whether by surrender, assurance, divesting, forfeiture or in any other manner (except by the expiration of a fixed period at the expiration of which the interest was limited to cease), whether wholly or partly, and whether for value or not, after becoming an interest in possession,—if apart from the disposition or determination the property in which the interest subsisted would have passed on the death under s. 1 of the Finance Act, 1894, that property shall be deemed by virtue of this section to be included as to the whole thereof in the property passing on the death...

By the Finance Act, 1940, s. 65(5), Part IV of the Act (in which s. 43 appears) is to be construed as one with Part I of the Finance Act, 1894, which brings into play s. 22(1) of that Act, as follows:

In this Part of this Act, unless the context otherwise requires... the expression 'property' includes real property and personal property and the proceeds of sale thereof respectively and any money or investment for the time being representing the proceeds of sale.

For the Crown it was argued that the property to be taxed was the actual constituent investments taken by the remainderman at the moment of the release of the life interest and that it was immaterial whether she had sold or disposed of such investments between the date of release and the date of death. For the remainderman on the other hand it was submitted that the Finance Act, 1894, s. 22(1) must be read into the word property in the Finance Act, 1940, s. 43, so that the property in which the interest subsisted must be the original property taken under the release by the remainderman and the proceeds of sale thereof or investments in the hands of the remainderman representing the property so taken.

The learned judge said that s. 43 posed a hypothetical state of affairs because the 'property' mentioned in the section is property which would have passed on the death. The section appeared to contemplate the continuance of a hypothetical state of affairs, i.e., a continuance of the trusts until the death. No one could tell what property would in fact have passed on the death, for the trustees might have made changes of investment. He proceeded:

It seems to me that the 'property' in s. 43 must satisfy the test that it would have passed hypothetically on the death of the tenant for life. What property is that? It might be the property in the actual state of investment that was in fact transferred to the remainderman, for the trustees might never have made any changes of investment. It might have consisted of property which was the result of sale, transposition and reinvestment by the trustees of the settlement. I do not see how any other property would have passed on the death. The contention of the remainderman involves that the property which is deemed to pass on the death includes the property which is or may be the result of a sale and re-investment and other possible dispositions by, not the trustees, but the remainderman who is solely entitled... That consideration leads me to the view that it is not possible to read into s. 43 the wider inclusion of property to be found in s. 22 of the Act of 1894.

Upjohn J. said that in his judgment the word 'property' in s. 43 must mean either the actual property at the date of release or property which had been transposed by the trustees and by no one else, and to make any sense of the

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section, the latter construction must necessarily be rejected. He found some support for that view in the words of Lord Reid in *Sneddon v. Lord Advocate* [1954] 1 All E.R. 255 (p. [28] *supra*) as follows:

A gift is taxed on the footing that if the property given away had not been given the donor would still have had it at his death. Of course, he might have sold the property and spent the proceeds; but no one suggests that that can be considered: or he might have sold the property and re-invested the proceeds, but where the gift is to an individual donee no one has suggested that that can be considered. The re-investment cannot be deemed to have been in the donor's possession and to have passed on his death.

In the result, the learned judge held accordingly that the property liable to estate duty was the actual constituents of the funds at the respective dates on which the life interests had been released.

In re Allan (deceased)

Allan v. Midland Bank Executor and Trustee Co. Ltd. and others

Power of appointment—Appointment in favour of surviving wife of appointor—Divorce on wife's petition—Death of appointor—Whether surviving ex-wife an object of the power

COURT OF APPEAL

SIR RAYMOND EVERSHED J.
M.R., DENNING AND
JENKINS L.JJ.

1954. Feb. 17.
[1954] 1 Ch. 295.
[1954] 1 All E.R. 646.
[1954] 2 W.L.R. 512.

Appeal by the plaintiff from a decision of Danckwerts on an originating summons to determine whether, in the events which had happened, the plaintiff Alida Virginie Allan was an object of the power of appointment given by the will of the testator Arthur Campbell Allan.

By his will the testator gave to each of his son and daughters a life interest in the residue of his estate and provided that each such child might by any deed executed prior to and in contemplation of marriage or by will or codicil appoint to or for the benefit of any wife or husband who might survive him or her an interest for her or his life in the whole or any part of his or her share. The testator died in 1934.

In 1937 the testator's son, Francis Anthony Selby Allan, shortly before and in contemplation of his marriage with the plaintiff, exercised the power of appointment by deed whereby he appointed that, if the plaintiff should survive him, then, after the death of the survivor of himself and his mother, the trustees of his father's will should, out of the income of his settled share in his father's residuary estate, pay to the plaintiff the yearly sum of £3000.

The marriage was solemnized in 1937, but in 1951 it was dissolved on the plaintiff's petition. The appointor died without issue in December 1951.

The question for the Court was whether the plaintiff was within the power given by the testator's will, i.e. whether, in the events which had happened, she having survived her husband but having ceased to be his wife before his death, was an object of the power. The Court, affirming the judgment of Danckwerts J., held that the plaintiff was outside the power and that the appointment in her favour had become ineffective. A power given by deed or will to appoint for the benefit of any wife who might survive the appointor was a power having the quality that nobody could be an object of it unless she both survived the appointor and was also his wife at the time of the death of the appointor.

Denning L.J., in agreeing with the other members of the Court, said that if the wife had not divorced her husband she would on the death of her

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mother-in-law be entitled to £3000 a year; but because she divorced her husband, as she was entitled by law to do, she did not take anything. It seemed a very hard result, but it was the result of the language which the testator used and the Court had no alternative but to dismiss the appeal.

In re Dark's Will Trusts **Glover and Another v. Dark and Others**

Trustees—Settlement created by will—Settled land—Executors by representation becoming trustees—Retirement and appointment of new trustees—Settled Land Act, 1925, s. 30(3)—Trustee Act, 1925, ss. 36(1), 64(1), 68(5)

CHANCERY DIVISION

ROXBURGH J.

1954. March 3.
[1954] 1 Ch. 291.
[1954] 1 All E.R. 681.
[1954] 2 W.L.R. 509.

Adjourned summons to determine whether, under the powers conferred by the Settled Land Act, 1925, or otherwise, the plaintiffs, Kenneth Frank Glover and Roy Glover, who were the executors by representation of the will of John Dark deceased, had power to retire from the trusts of the settlement of the testator's settled estate and to appoint other trustees in their place.

By his will dated 10 September 1908 the testator, who died on 16 February 1910, appointed Frank Glover and two other persons to be executors and trustees and devised all his real estate, including the Limebury estate, to his trustees to hold on the trusts declared by his will. On 1 January 1926 the Limebury estate became settled land under the provisions of the Settled Land Act, 1925. One of the executors died in 1932 and another in 1948, leaving Frank Glover the sole surviving trustee. Frank Glover died in 1952 and the plaintiffs, who were the executors of his will, became executors by representation of the will of the testator and, under the Settled Land Act, 1925, s. 30(3), the trustees of the settlement of the Limebury estate for the purposes of that Act. They now desired to retire and appoint in their place the first and second defendants who were willing to accept the trusts.

The learned judge said:

This point is interesting if only as an example of how dangerous it is to think that words in an Act of Parliament necessarily mean what they say. Sec. 30(3) of the Settled Land Act, 1925, reads:

Where a settlement is created by will . . . and apart from this subsection there would be no trustees for the purposes of this Act of such settlement, then the personal representatives of the deceased shall, until other trustees are appointed, be by virtue of this Act the trustees of the settlement, but where there is a sole personal representative, not being a trust corporation, it shall be obligatory on him to appoint an additional trustee to act with him for the purposes of this Act, and the provisions of the Trustee Act, 1925, relating to the appointment of new trustees and the vesting of trust property shall apply accordingly.

The question is: can the plaintiffs, who are the personal representatives by representation of the deceased, do what they want to do, namely, retire from being trustees for the purposes of the Settled Land Act, 1925, and appoint other such trustees in their place? I do not think that they can do so under the concluding words of s. 30(3) . . . Those words are confined to the case of a sole personal representative . . . but a perusal of the Trustee Act, 1925, solves the problem.

'Instrument' in the Trustee Act, 1925, includes an Act of Parliament and, that being so, s. 64(1) plainly applies to the present case. It reads:

All the powers and provisions contained in this Act with reference to the appoint-

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ment of new trustees, and the discharge and retirement of trustees, apply to and include trustees for the purposes of the Settled Land Act, 1925... whether such trustees are appointed by the Court or by the settlement or under the provisions contained in any instrument.

In the present case the trustees had been appointed under the provisions of an instrument as defined in the Trustee Act, 1925, namely the Settled Land Act, 1925, so that s. 64(1) of the Trustee Act, 1925, introduced the Trustee Act, 1925, s. 36(1) dealing with the appointment of trustees and there would be no difficulty. The learned judge accordingly answered the question in the affirmative.

Lloyds Bank Limited v. Margolis and Others

Bank—Overdraft on current account—Secured by legal charge on land—Action for foreclosure or sale—Limitation of action—Accrual of cause of action—Limitation Act, 1939, ss. 4(3), 18(4)

CHANCERY DIVISION

UPJOHN J.

1954. Feb. 26.
[1954] 1 All E.R. 734.
[1954] 1 W.L.R. 644.

Adjourned summons dated 29 November 1950 to enforce by foreclosure or sale a legal charge on a farm known as Winterslow Farm, which was charged with repayment of an overdraft by George John Lyster (the third defendant) on his account with Lloyds Bank Ltd. (the plaintiffs).

At the date of the summons the amount due on the overdraft was £2684 for principal and £1954 for interest. The defendants said that the legal charge was no longer enforceable because the remedy was barred by the Limitation Act, 1939.

By the legal charge the mortgagor covenanted with the bank to pay to the bank on demand all money and liabilities due to the bank, for which he was then or might become liable on any current or other account, together with interest to date of repayment, commission, banking charges, law and other costs, charges and expenses; and by clause 2 (i) the mortgagor as beneficial owner charged by way of legal mortgage all and singular the said property with repayment to the bank of the principal money, liabilities, interest and other money thereby covenanted to be paid by the mortgagor, and it was provided by clause 2 (ii) that in favour of a purchaser the principal money thereby secured should be deemed to have become due on the day on which demand for payment was made by the bank.

The facts of the case are a little complicated and for the purposes of this note it is unnecessary to state them in detail. It is sufficient to say that (i) the mortgage was a second mortgage subject to a first mortgage to the Agricultural Mortgage Corporation to secure £7200 and interest, (ii) the first defendant Morris Margolis was a party who on 24 June 1938 had contracted with the mortgagor (the third defendant) to purchase the mortgaged premises for £10,000 free from encumbrances, a purchase which was not completed as the purchase money was insufficient to discharge the two mortgages, (iii) the second defendant Reginald George King was a party to whom on 27 September 1950 the property was ultimately conveyed discharged from the first mortgage but expressly subject to the bank's legal charge.

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By the Limitation Act, 1939, s. 18(4), it is provided:

Nothing in this section shall apply to a foreclosure action in respect of mortgaged land, but the provisions of this Act relating to actions to recover land shall apply to such an action.

And by s. 4(3)

No action shall be brought by any . . . person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

The question for determination was what was the date on which the right of action in respect of the overdraft first accrued to the bank. The rival contentions were these. The bank said that the time ran for twelve years from the demand for repayment which was on 19 December 1938 and therefore the bank was just in time. The defendants, however, said that the time ran, in the case of advances made before the date of the deed, from the date of the deed, and, in the case of subsequent advances, from the date of the subsequent advances, and that, as no advance was made after 14 October 1938, the date on which the bank received notice of the contract between the first and third defendants, all the sums claimed had become irrecoverable and there was no debt in respect of which an action could be brought.

The learned judge said that the construction of clause 1 of the legal charge seemed to him too plain to admit of argument. It expressly provided that the covenant by the mortgagor was to pay the bank 'on demand' all moneys and liabilities which were then or at any time thereafter might become due. *Prima facie* the plaintiffs were right. It was, however, said by counsel for the defendants that the authorities show that, when there is a covenant to pay on demand, it is not necessary, and it is not a condition precedent to the issue of a writ, that there should be a demand, and that time under the Limitation Act runs from the date of each advance.

Upjohn J. said that in his judgment it was a question of construction in each case, and that, where there is the relationship of banker and customer and the banker permits his customer to overdraw on entering into a legal charge which provides that the money then due or thereafter to become due shall be paid on demand, that means what it says. As between customer and banker dealing on a running account, it seemed to him impossible to assume that the bank was to be entitled to sue on the deed on the very day after which it was executed without making a demand and giving the customer a reasonable time to pay.

There would, accordingly, be an order to enforce the security.

In re Greaves's Will Trusts **Public Trustee v. Ash and Others**

Trust—Power of appointment—Exercise of power—Revocation of appointment—Release of power—Fraud on a power

COURT OF APPEAL
EVERSHED M.R., DEN-
NING AND JENKINS L.JJ.

1954. March 5.
[1954] 1 Ch. 434.
[1954] 1 All E.R. 771.
[1954] 2 W.L.R. 557.

This was an appeal from the decision of Vaisey J. in an originating summons issued by the trustee of the will of Henry Greaves deceased to determine whether, in the circumstances in which a deed of revocation dated 15 February 1952 was executed, an appointment dated 30 May 1938 had been effectively revoked.

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By his will dated 19 November 1931, Henry Greaves, who died on 6 December 1934, gave to his daughter Mrs Margaret Frances Ash a life interest in his residuary trust fund and a special power of appointment over the capital among her children and remoter issue. In default of and subject to any such appointment, the testator gave his residuary trust fund to the children or child of his daughter who should attain age 21 or (being female) should attain that age or marry, and if more than one in equal shares.

Mrs Ash had five children, all daughters, of whom at the date of the summons one was married and one was an infant, and the married daughter had one child then aged 2½.

On 30 May 1938 Mrs Ash executed a revocable deed of appointment the effect of which was that the residuary trust fund was settled so that each of the daughters who attained age 21 or married under that age would be entitled to a life interest in a proportionate share of the fund with remainder to her children, with appropriate cross remainders in default of such children.

On 15 February 1952 Mrs Ash wholly revoked the appointment of 1938 to the intent that the residuary trust fund should be held on the trusts applicable thereto as if the appointment of 1938 had not been executed, and by a further deed dated 16 February 1952 she released the residuary trust fund from the power of appointment. On 18 February 1952 she made four conditional agreements for exchange with the four adult daughters as part of a scheme under which it was proposed to make a partial distribution of the capital of the residuary fund among the mother and daughters.

In these circumstances the question arose whether the proposed transaction could be impeached as involving a 'fraud on a power' and in particular a fraud on the power of revocation expressly conferred by the testator and expressly reserved by Mrs Ash in the deed of 1938. Two separate points were involved: (i) whether the principles enshrined in the formula 'a fraud on a power' applied at all to the power of revocation conferred reserved and exercised in the present case, and (ii) if so whether on the facts of the present case there had been such a fraud.

Vaisey J. answered both inquiries affirmatively. The Court of Appeal reversing his judgment answered the first question in the negative so that the second question did not arise.

The judgment of the Court was delivered by the Master of the Rolls. He said that the essential characteristic of the vice which constitutes a fraud on a power is that the appointor, having assumed the burden of making the appointment (i.e. of deciding whether, in preference to allowing the trust in default of appointment to take effect, a selection or discrimination should be made by him among the whole class designated by the creator of the power, and if so what kind of selection or discrimination) then proceeds to decide the matter, not with the single view of conferring benefits among the designated class, but with the purpose of procuring the receipt of a material benefit by some person not among the designated class, and to that extent defeating or departing from the intention of the donor of the power. It is for that reason that a distinction is drawn between the exercise of the power on the one hand and the revocation of an appointment or the release of the power on the other. The donee of the power, being free to exercise or not to exercise the special power as he chooses, is embarrassed by no duty if he prefers the latter alternative. In that event he leaves things as the donor of

the power left them: the persons beneficially entitled have been selected by the donor and it is *nihil ad rem* that the donee of the special power has decided not to exercise the power in the expectation that, or because, he will as a consequence receive himself some benefit from one or other of the persons who take in default of appointment.

It follows that the appointor, having made a revocable appointment, owes no duty to anyone if he revokes the appointment; if he revokes and does not reappoint, no one can complain of what he has done, for no one can assert the misuse of a power.

The Master of the Rolls said that in the judgment of the Court a power to revoke an appointment means what it says—that is that the appointor can wholly recall what he has done and place himself in all respects in the same position as if he had never made any appointment. In other words, since the power of revocation is free from obligation, there can be no ‘fraud on the power’ by its exercise. It is in truth not so much a power as a right.

In the result the appointor was entitled to succeed on her first point. The deed of appointment had been effectively revoked and the trusts of the will in default of appointment had been restored as if the appointment had never been made.

Inland Revenue Commissioners v. Broadway Cottages Trust
Inland Revenue Commissioners v. Sunnylands Trust

Income Tax—Settlement—Specified classes of beneficiaries—Two charitable foundations included—Unascertainable classes—Trusts void for uncertainty—Payments of income to charities—Not income of charities exempt from taxation—Income Tax Act, 1918, s. 37(b)

CHANCERY DIVISION The charities claimed repayment of income tax in respect of sums received from the trustees of a settlement made by Alan Geoffrey Timpson as settlor. The claim was made on the ground that the sums were income of the charities and so exempt from taxation under the Income Tax Act, 1918, s. 37 (b).

WYNN-PARRY J.

1954, March 11.
[1954] 1 All E.R. 878.
[1954] 1 W.L.R. 659.

It was common ground that the exemption claimed depended on the validity of the trusts of the settlement under which the payments had been made. Clause 1 of the settlement contained by reference to the schedule to the deed a definition of those who were to be regarded as objects of the powers and trusts. The schedule specified the classes of beneficiaries, and among them were the two charities. The interests of the beneficiaries in the capital were by the settlement declared to be absolute interests and were to take effect at the expiration of an appointed period. It was common ground that, of the classes of beneficiaries specified in the schedule, some were such that the members were unascertainable at any given moment, so that the trusts of the capital were void for uncertainty.

Clause 8 contained an imperative direction to the trustees to distribute during the appointed period the whole of the income among such of the members of the specified classes as they might in their absolute discretion from time to time think fit and the trustees had made payments to the two charities in the exercise of that discretion.

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The learned judge gave judgment in favour of the Crown. He cited among other authorities a dictum of Lord Tomlin in *In re Ogden* [1933] Ch. 678 to the effect that, if there is an imperative direction to trustees to distribute a fund (whether of capital or income) among a class or such of the members thereof as they may select and the whole class is not capable of ascertainment at any particular moment, the trust is void for uncertainty.

Wynn-Parry J. said that he had come to the conclusion that the case before him was covered by *In re Ogden*, by which he was bound and with which he agreed. It followed that he must treat the trusts of income as void, so that the sums received by the charities in question were not the income of the charities and were not exempt from income tax.

On 26 July 1954 the Court of Appeal (Singleton, Jenkins and Hodson, L.JJ.) affirmed the decision of Wynn-Parry J.

Innes (Inspector of Taxes) v. Harrison

Income Tax—Trust offending against rule against perpetuities—Payment made under the trust—Not income of infant recipient but a gift to him—Failure of claim for repayment of income tax

CHANCERY DIVISION

WYNN-PARRY J.

1954. March 11.
[1954] 1 All E.R. 884.
[1954] 1 W.L.R. 668.

Under a deed of settlement dated 1 May 1949 the trustees paid £385 (being £700 after deduction of income tax at 9s. in the £) for G. J. C. Harrison, an infant grandchild of the settlor, and on behalf of the infant a claim for repayment of income tax was made by his father. The Crown contended, however, that the trusts of the settlement were void for uncertainty, so that there must be a resulting trust of income in favour of the settlor.

Wynn-Parry J. said that the point was covered by his judgment in *Inland Revenue Commissioners v. Broadway Cottages Trust* and *Inland Revenue Commissioners v. Sunnylands Trust* (supra p. [38]) and that the Crown must succeed. In the present case the Crown had taken the further point that the trusts in clause 3 of the settlement offended against the rule against perpetuities because the clause provided that the application of the fund might be made 'at such time or times' as the trustees might think fit.

It was argued for the Crown that the trustees could not be compelled as to when they should distribute, that the objects of the power were not necessarily lives in being and that there was nothing in the trusts to confine the period of distribution to the lives of those objects. If the point were well taken, it was clear that the limits offended against the rule against perpetuities.

Counsel for the taxpayer submitted that the clause should be read as carrying an implication that the trustees must distribute within a reasonable time and that such a reasonable time could not extend to twenty-one years. The learned judge said that he could not accept that view. Apart from the consequences of the application of the rule, there could be no ground for implying any such qualification, and the fact that, unless the implication were made, the rule would apply was no ground for making the implication. The Crown was, accordingly, entitled to judgment.

Legal Notes

In re Wilson (deceased) **Grace v. Lucas and Others**

Adoption of child in Canada—Adopter domiciled in England—Intestate estate of adopter—Rights of adopted child—Adoption Act, 1950, s. 13(1)

CHANCERY DIVISION

VAISEY, J.

1954, March 26.
[1954] 1 All E.R. 997.
[1954] 2 W.L.R. 1097.

This was an adjourned summons to determine whether the estate of Guthlac Wilson, as to which he died intestate, should be held (a) upon trust for his surviving sisters in equal shares or (b) upon the statutory trusts under the Administration of Estates Act, 1925, s. 47, for Philip Wilson, his adopted son, and subject thereto for the surviving sisters of the deceased.

Guthlac Wilson was a consulting engineer and had travelled widely. In 1933 he was married in Shanghai and in 1937 he was living with his wife in the United States. The marriage had been childless and the husband and wife decided to adopt a child in Canada. For that purpose they went to Montreal and obtained from the Superior Court of the Province of Quebec an order dated 3 November 1939 effecting the adoption of Philip under the law of the Province.

The husband and wife were British subjects domiciled in England during the whole period of their marriage, but on return home they did not seek an adoption order in England because they had been advised by the solicitor who arranged the Canadian adoption that there was no necessity for such a step.

The marriage of the husband and wife was dissolved on 7 January 1946 on the petition of the wife. No orders for custody or maintenance were made. The adopted child remained with the wife but the husband voluntarily made an allowance of £200 per annum for the boy and for some time continued to visit him and to treat him as his own son.

Both husband and wife made second marriages and on 3 July 1947 the husband made a will by which he gave his residuary estate to his second wife absolutely. On 29 March 1953 the husband and his second wife were both killed in an aircraft accident in circumstances in which it was uncertain which survived the other, so that, the wife being the elder, the husband was deemed to have survived the wife and accordingly died intestate in respect of the property, valued at upwards of £20,000, which he had bequeathed to her.

The Adoption Act, 1950, s. 13 reads as follows:

(1) Where, at any time after the making of an adoption order, the adopter or the adopted person or any other person dies intestate in respect of any real or personal property... that property shall devolve in all respects as if the adopted person were the child of the adopter born in lawful wedlock and were not the child of any other person.

(4) The references in this section to an adoption order include references to an order authorizing an adoption made after the commencement of this Act under the Adoption of Children Act (Northern Ireland), 1929, or any enactment of Northern Ireland for the time being in force.

Vaisey J. said:

It is clear that, under s. 13(1) of the Adoption Act, 1950, where, at any time after the making of an adoption order under that Act, an adopter dies intestate, his property is to devolve in all respects as if the adopted person were a child of the adopter born

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in lawful wedlock. It is noticeable that under s. 13(4) the references in that section to an adoption order are to include references to an adoption order made in Northern Ireland, but with that exception the adoption orders referred to in the Act are orders made by the courts in this country. In the present case we have an order made under an alien jurisdiction at the suit of persons domiciled, not in the country to which that jurisdiction belonged, but in England, and it is difficult to see on what basis an adoption order made under a foreign jurisdiction could be brought either expressly or by implication within either the provisions or the principles of s. 13.

The learned judge referred to *Theobald on Wills*, 11th edition, p. 282, where it is pointed out that adoption is governed by the law of the domicile of the adopter and of the child but that it does not follow that the question whether an adopted child can succeed to property as a child of the adopter will be determined by that law. The author says that there is no English authority on the question and that Dominion authorities conflict, and adds that the analogy of the cases on legitimation suggested that the law governing the adoption would be applied.

Vaisey J. said that in his view such an analogy is inapplicable and that the matter is one to be determined by the law governing the succession. He did not see how the Adoption Act, 1950, could contain any provision for recognising an adoption under a foreign law, having regard to the extreme divergence which exists between the various kinds of adoption under various systems of foreign law.

Dicey's *Conflict of Laws*, 6th edition, at p. 512, puts the matter thus:

The question whether an adopted child can succeed as a child... under an intestacy... is (semble) determined by the law governing the succession, that is, the law of the domicile of the... intestate at the date of his death in the case of movables...

and the learned judge said that there followed some discussion whether English courts would give effect to an adoption effected in a foreign country, and that the question was left, as far as he could understand, indeterminate. He concluded his judgment in these words:

It is clear that the adoption order of the Superior Court of the Province of Quebec was perfectly valid according to the law of Quebec, which permitted adoptions to be made at the suit of persons outside its jurisdiction, but I decide, on the whole, that the infant defendant is not entitled.

In re Joynson's Will Trusts **Gaddum and Another v. Inland Revenue Commissioners and Others**

*Estate Duty—Release of life interest under a settlement—Death of tenant for life
within five years of release—Liability for duty—Persons accountable*

CHANCERY DIVISION

DANCKWERTS J.

1954. April 29.
[1954] 2 All E.R. 294.
[1954] 2 W.L.R. 1061.

On the death of Lady Brentford on 17 January 1952 the Inland Revenue Commissioners claimed estate duty on £25,000 (in which she had earlier had a life interest), part of a sum of £100,000 settled on the trusts of the will of Richard Hampson Joynson. The question for the Court was who was accountable for the duty.

By his will, the testator gave his residuary estate to his trustees on trust for conversion, and directed them to set apart the sum of £100,000 and to

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pay the income thereof to his daughter Grace Lynn Joynson Hicks (afterwards Lady Brentford) for her life and after her death to hold the settled fund and the income thereof on trust for all or any of her children or remoter issue as she should by deed or will or codicil appoint. On 1 December 1947 a transaction was effected under which Lady Brentford released her life interest in £25,000 of the settled fund and appointed £20,000 thereof to trustees to be held by them on the trusts of a settlement called the A settlement and £5000 to the same trustees on the trusts of a settlement called the B settlement. Inasmuch as Lady Brentford died within five years from the date on which she released her life interest in the £25,000, estate duty became payable at her death.

The securities in which the funds of the A and B settlements had been invested were such as not to be readily available for the payment of the estate duty and the Crown contended that under s. 44 of the Finance Act, 1950, the trustees of the will of the testator were accountable for the duty.

That section provides as follows:

(1). Where an interest limited to cease on a death (within the meaning of s. 43 of the Finance Act, 1940) after becoming an interest in possession is disposed of or determines wholly or partly, then, whatever the nature of the property in which the interest subsisted, the following persons shall be accountable for any estate duty payable on the death by virtue of that section (in addition to any persons accountable therefor apart from this section) that is to say (a) if the settlement under which the interest subsisted is in existence at the death, the trustees for the time being of that settlement. . . .

(4). It is hereby declared that a person who may become accountable as trustee of a settlement for estate duty payable by virtue of the said s. 43 on property which is or has been comprised in the settlement has a lien for the prospective amount of the duty and the costs in respect thereof on any property in his hands which is so comprised.

It was argued by counsel for Miss Joynson Hicks, as the person interested in the balance of the £100,000 settled fund, that 'settlement' in s. 44 means the settlement dealing with the proportion of the fund coming originally from the testator, but the learned judge said that he must come to the conclusion that for the purposes of sub-s. (4) 'settlement' in the present case meant the settlement of the fund of £100,000 made by the will of the testator. Any part of the £100,000 which remained in the hands of the trustees was therefore property which is comprised in the settlement and the subsection conferred on the trustees a lien upon it to meet the liability for duty.

APPEALS

Chapman and Others v. Chapman and Others

J.I.A. 79 [23]; [1954] 1 All E.R. 798; [1954] 2 W.L.R. 723.

This was an appeal to the House of Lords (Lord Simonds L.C. and Lords Oaksey, Morton of Henryton, Asquith of Bishopstone and Cohen) from an order dated 17 December 1952 made by the Court of Appeal dismissing an application for leave to execute a scheme of family arrangement affecting the property held by the trustees of certain settlements.

On behalf of the appellants it was submitted that a judge of the Chancery

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Division had an inherent jurisdiction in the execution of the trusts of a settlement to sanction on behalf of infant beneficiaries and unborn persons a re-arrangement of the trusts of the settlement for no other purpose than to secure an adventitious benefit, which might be and, in the present case, was, that estate duty would in consequence of the re-arrangement no longer be payable in certain events.

It was argued that, on the one hand, the Chancellor, the Court of Chancery and the Chancery Division, exercising in turn on behalf of the Sovereign as *parens patriae* a peculiar jurisdiction over infants, had power to dispose of an infant's property in any manner beneficial to him in which he, if of full age, could have disposed of it; and on the other hand that the same court whose duty it had been for some centuries to execute and administer trusts had jurisdiction to remodel those trusts by agreeing on behalf of infants and unborn persons to any re-arrangement which it deemed to be advantageous to them.

The Lord Chancellor said that he could find no support for such broad propositions and that the court had no such inherent jurisdiction. There were, however, certain exceptions which were reasonably clearly defined as follows:

(1) the jurisdiction to change the nature of an infant's property from real to personal estate and *vice versa*;

(2) the power (sometimes ignoring the direction of a settlor) to provide maintenance for an infant and, even, for an adult;

(3) the power in the administration of trust property to direct that by way of salvage some transaction unauthorized by the trust instrument should be carried out, but mere expediency was not sufficient to found the jurisdiction; and lastly

(4) the power to sanction a compromise by an infant in a suit to which that infant was a party by next friend or guardian *ad litem*.

He added that it was the function of the court to execute a trust. It was not the function of the court to alter a trust because alteration might be thought to be advantageous to an infant beneficiary. He could not agree with the majority of the Court of Appeal that the fourth exception of compromise could be extended to cover cases in which (as in the present case) there was no real dispute as to rights and therefore no compromise, but it was sought by way of bargain between the beneficiaries to re-arrange the beneficial interests under the trust instrument and to bind infants and unborn persons to the bargain by order of the Court.

Lords Oaksey, Morton of Henryton and Asquith of Bishopstone took the same view as the Lord Chancellor. Lord Cohen agreed that the present appeal should be dismissed, but on the same grounds as those on which the judgment of the majority of the Court of Appeal had been based. His view was that the jurisdiction of the court extends to the sanction of compromises in the wider sense between tenants for life on the one hand and remaindermen on the other, but not to varying rights *inter se* of parties whom the settlor had put on an equality such as was the case in the scheme submitted.

Dean v. Prince (see page [16]) is further reported at [1954] 1 All E.R. 749.

Morgan (Inspector of Taxes) v. Tate and Lyle Ltd. (see page [4]). On 1 June 1954 the House of Lords (Lords Morton of Henryton, Reid, Tucker, Asquith of Bishopstone and Keith of Avonholm) affirmed the decision of the Court of Appeal.

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