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 Leigh's Marriage Settlement
Rollo *v.* Leigh and others

Perpetuities—Rule in Whitby v. Mitchell—Perpetuity in respect of any interest in land—Abolition of rule—Law of Property Act, 1925, *s.* 161(2)—*Application only to limitations or trusts created by instruments coming into operation after the commencement of the Act—Ante-nuptial marriage settlement dated before* 1 *January* 1926—*Special power of appointment—Power exercised by deed dated after* 1 *January* 1926—*Appointment infringing rule in Whitby v. Mitchell—Question whether limitations created by the settlement or by the deed of appointment*

CHANCERY DIVISION

VAISEY J.

1952. May 16.
[1952] 2 All E.R. 57.
[1952] 1 T.L.R. 1467.

In a marriage settlement dated 8 December 1913 the parties were the intended husband John Cecil Gerard Leigh (hereinafter referred to as 'the settlor') of the first part, the intended wife Helen Goudy of the second part and certain trustees of the third part. It was a settlement of real estate. The property was conveyed to the use of the settlor until the solemnization of the intended marriage and afterwards to the use of the settlor and his assigns during his life. There were certain provisions by way of rent-charge to take effect after his death in favour of his wife if surviving. It was declared that subject to those interests the settled property was to go to the use of all or such one or more exclusively of others of the children or remoter issue of the settlor, such remoter issue to be born and take vested interests within 21 years from the death of the settlor, for such estates or estate, interests or interest, and if more than one in such shares and subject to such charges, powers of charging, and other powers, provisions and limitations over for the benefit of all or any one or more of such children or issue and in such manner as the settlor might by any deed or deeds revocable or irrevocable or by will or codicil appoint, but so that no such appointment should infringe the rule against limiting an estate to an unborn person for life with remainder to the child of such person.

These last words stated the effect of what is known as the rule in *Whitby* v. *Mitchell* which prohibits any such perpetuity in limitations of real estate and, except as a reminder to the draftsman of any deed of appointment of the existence of the rule, did not affect the exercise of the power of appointment and were from that point of view otiose.

By a deed dated 21 March 1946 the settlor purported to exercise the power of appointment by directing that a considerable part of the settled property

was to be held on trust for a son of the marriage for life without impeachment of waste with remainder on trust for sale and as to the net proceeds of sale on trust for the son's children.

But for the intrusion into the law as it formerly stood of the Law of Property Act, 1925, the appointment would clearly have been invalid as an infringement of the rule in *Whitby* v. *Mitchell.*

The Law of Property Act, 1925, s. 161 (1) provides:

> The rule of law prohibiting the limitation, after a life interest to an unborn person, of an interest in land to the unborn child or other issue of an unborn person is hereby abolished, but without prejudice to any other rule relating to perpetuities.

Subsection (2) of the same section provides:

> This section only applies to limitations or trusts created by an instrument coming into operation after the commencement of this Act.

The date of commencement of the Act was 1 January 1926.

The question for the Court was whether the limitations directed by the deed of appointment were 'created' by that instrument or whether they must be deemed to have been created by the settlement or by the settlement and deed of appointment operating in conjunction.

The learned judge held that the limitations in question were created by the deed of appointment which came into operation after the commencement of the Act and were therefore free from the rule against perpetuities in *Whitby* v. *Mitchell* and if not prohibited by the terms of the power contained in the settlement were valid. He said:

> After all, the *proxima causa* of the limitation is undoubtedly the second of the two instruments and when one looks at the reason and sense of the matter I cannot help thinking that what the legislature was really contemplating in s. 161(2) of the Law of Property Act, 1925, was the protection of interests which had accrued and come into existence or had arisen or had been created prior to 1 January 1926, and that it was not intended to say that all limitations created in the sense of originating from or created under or in pursuance of an earlier instrument were to be protected. I do not think that the legislature was intending to limit the operation of s. 161(1) in that manner.... I think that the better view is that the instrument by which these limitations were created was the deed of 21 March 1946.

There was another question to be decided: What did the settlement mean when it said:

> so that no such appointment shall infringe the rule against limiting an estate to an unborn person for life with remainder to the child of such person?

On that question the learned judge said:

> In my view, if the settlement had merely prohibited an appointment to an unborn person for life with remainder to that person's child without any reference to infringing any rule, the appointment of 1946 would have been *ultra vires* the instrument of 1913. I think it would have been outside the power but, knowing the troublesome ways of conveyancers in this respect, I think the object was merely to give a warning to the draftsman not to fall into the well known pit labelled '*Whitby* v. *Mitchell*'. The operative words indicate to my mind a prohibition against infringing a rule and, if when the relevant time came (and, in my judgment, it came in 1946 and not 1913) the rule had gone, it seems to me that the prohibition had no operation because there was no rule left to be infringed. In my judgment the appointment purported to be effected by the deed of 21 March 1946 is valid and effectual and I so declare.

In re J. Bibby and Sons Ltd. Pensions Trust Deed
Davies *v.* Inland Revenue Commissioners

Estate duty—Finance Act, 1894, *s.* 2(1)(*d*)—*Pension Fund provided by company for its employees—Non-contributory—Vested in trustees—Grant of pension in absolute discretion of trustees—Pension granted to widow of employee—Succession duty—Succession Duty Act*, 1853, *s.* 2

CHANCERY DIVISION

HARMAN J.

1952. July 10.
[1952] 2 All E.R. 483.
[1952] 2 T.L.R. 297.

Adjourned summons to determine whether the plaintiff (the widow of a deceased employee of J. Bibby and Sons Ltd.) to whom a pension had been granted by trustees under a pension scheme constituted by the said company, was liable for estate duty and succession duty in respect of such pension under the Finance Act, 1894, s. 2 (1) (*d*) and the Succession Duty Act, 1853, s. 2, respectively.

James Davies who was the husband of the plaintiff entered the employment of the company in 1898 and remained in its employment until his death in 1942. In 1924 the company adopted a pension scheme for its employees. It was not a contributory scheme which called for any kind of assent by any employee or any kind of payment by any employee. The pensions fund consisted in the first place of £60,000 provided by the company and of such further money as the company might thereafter contribute. It was vested in trustees and its administration was regulated by an indenture made between the company and the trustees. The original class of beneficiaries were retired employees of the company and later the wives and children of employees became eligible for pensions. No beneficiary was entitled to a pension except at the absolute discretion of the trustees, and the trustees might at any time reduce or suspend a pension on the ground of misconduct of the recipient.

Shortly after the death of James Davies, his widow, the plaintiff, was granted a pension and the Crown claimed to be entitled to estate duty and succession duty in respect of it.

As regards estate duty the property which was alleged to pass to her on the death of her husband was an annuity, viz., the yearly pension

> ...purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest...arising... on the death of the deceased.

The Crown argued that the pension to which the plaintiff was entitled, subject to the discretion of the trustees to withdraw it in certain circumstances, was an item of property which accrued on the death of the deceased and in which the widow had a beneficial interest. It was said further that the annuity was provided by the deceased in the sense that, but for the fact that he was an employee of the company over his years of service, there would have been no pension for his widow.

The learned judge said that it was clear from the terms of the trust deed that it was purely discretionary in that the trustees had an absolute discretion either to give or withhold a pension according to their views of the desirability of paying it. They were not bound to give any reason nor bound to do anything but consider honestly the merits of the plaintiff's case. In that view of the matter it did not seem to him that this was property in the sense of the

Finance Act, 1894, s. 2, nor was it a beneficial interest arising on the death of the deceased. According to his judgment this was not a case which fell within the Finance Act, 1894, s. 2 (1) (*d*).

As regards the claim for succession duty the Succession Duty Act, 1853, s. 2, provides that in order to constitute a succession there must have been a 'disposition of property' and here there was a disposition of property. The company had disposed of £60,000 plus £15,000 a year in favour of the trustees. The section provides:

> Every... disposition of property by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person... shall be deemed... to confer a succession....

No doubt on the death of her husband the plaintiff started to receive this pension. Did she then become beneficially entitled to the income of some part of the property for that reason? The learned judge said that in his judgment she did not, for the same reason that it was not a beneficial interest which she took within the meaning of s. 2 (1) (*d*) of the Finance Act, 1894. He held accordingly that s. 2 of the Act of 1853 did not apply and succession duty was not payable.

In re **Stoneham's Settlement Trusts**
Popkiss and another *v.* **Stoneham and another**

Trust—Appointment of new trustees—Validity of appointment—Non-concurrence of former trustee who had remained out of the United Kingdom for a continuous period of more than twelve months—Refusing or retiring trustee—Trustee Act, 1925, s. 36 (1) and (8)

CHANCERY DIVISION

DANCKWERTS J.

1952. Oct. 2.
[1952] 2 All E.R. 694.
[1952] 2 T.L.R. 614.

Summons to determine the validity (*a*) of an appointment of new trustees, dated 11 December 1950, whereby the two plaintiffs were appointed the trustees of a settlement dated 15 February 1924 and made by Allen Henry Philip Stoneham, in place of the two defendants and (*b*) of an appointment of new trustees, dated 11 December 1950, whereby the plaintiffs were appointed the trustees of the will of the said Allen Henry Philip Stoneham, dated 4 March 1927, in place of the two defendants and the testator's widow who died on 18 December 1950.

Each of the appointments was made by the second defendant alone who after making the appointments retired from the trusts. The first defendant challenged the validity of both appointments on the ground that he had not concurred in them.

The original trustees of the settlement were a Mr Holyfield and the second defendant, Henry Tudor Crosthwaite. On 14 December 1938 Mr Holyfield died and the second defendant, who was then left sole trustee, by an appointment dated 27 March 1939 appointed Mr Stoneham the first defendant (who was a son of the testator) to be a trustee of the settlement with him. The executors and trustees of the will were the testator's widow, the first defendant and the second defendant.

The first defendant and the testator's widow had at the date of the challenged appointments remained out of the United Kingdom for a consecutive period of more than twelve months and could under s. 36 (1) of the Trustee Act, 1925,

be removed from their office as trustees whether they agreed or not. The second defendant, a retiring trustee within the meaning of s. 36 (8) of the said Act, was admittedly competent to appoint new trustees. The only question was whether the first defendant was entitled to have a hand in the appointments as a 'refusing or retiring trustee' within the meaning of that subsection. He was removed because he was out of the United Kingdom but it seemed clear on the evidence that he was prepared to act. He was not therefore refusing to act but neither was he a trustee who was retiring. He was taken from the trust compulsorily and did not retire of his own volition. The learned judge said that it seemed to him, in the absence of any authority which bound him to decide otherwise, that a person who is compulsorily removed from a trust is not a person who retires and is not a retiring trustee. In his opinion therefore the first defendant was not a person whose concurrence was required to the appointments which were made by the second defendant and the second defendant was the only person who answered the description contained in s. 36 (1) of the Act of 1925 as modified and extended by s. 36 (8); therefore the appointments which were made by him were perfectly valid and effective.

In re Wright deceased
Barclays Bank Ltd. *v.* Wright and others

Income Tax—Annuity—'Net income of £10 per week'—Whether payable free of income tax

CHANCERY DIVISION

DANCKWERTS J.

1952. Oct. 2.
[1952] 2 All E.R. 698.
[1952] 2 T.L.R. 649.

Summons to determine *inter alia* whether on the true construction of the will of the testator the sum directed to be set aside and appropriated pursuant to the direction contained in Cl. 8 (*b*) thereof ought to be such as to produce an income of £10 a week at the date of such setting apart and appropriation (*a*) before deduction of income tax at the standard rate current at the date of such setting aside and appropriation or (*b*) after deduction of income tax at such standard rate.

By his will the testator directed the trustees of his will in these terms:

> To set aside and appropriate a sum sufficient at the time of such appropriation to produce a net income of £10 per week and I direct the bank and my trustee to pay such income to the said Henrietta Charlotte Wear during her life... or until she shall marry and upon the happening of that event such income shall be reduced to £2 10*s.* per week.

The learned judge said that before he could arrive at the conclusion that the annuity was a sum of £10 which was to be enjoyed by the annuitant without liability to income tax he must find in the words of the bequest some clear indication to that effect because otherwise the burden of income tax is a normal and proper burden which should fall on the annuitant. In the present case the only word which could have that effect was 'net' and in view of the authorities which had been cited he was unable to see why the word 'net' was any more effective and compelling than the words 'clear' and 'free of deduction' which had been held ineffective to free the annuitant from the burden of income tax on his annuity. It seemed to him, the learned judge, that he would be introducing unnecessary refinements into what had become more or less a principle of construction if he were to give a different effect to the use of the word 'net' from that which had been applied to the use of the word 'clear'

which seemed to him as strong a word as the word 'net'. On the whole therefore he came to the conclusion that in the present case the annuity given to Henrietta Charlotte Wear must be subject to the liability to bear income tax in the ordinary way.

Attorney-General of Ceylon *v.* Mackie and another

Estate Duty—Valuation of shares in company—Based on tangible value of company's assets

PRIVY COUNCIL
VISCOUNT SIMON, LORDS NORMAND, MORTON OF HENRYTON AND REID AND SIR LIONEL LEACH
1952. Oct. 6.
[1952] 2 All E.R. 775.

This was an appeal by the Attorney-General of Ceylon from a decree of the Supreme Court of Ceylon. The question at issue was the valuation for the purpose of estate duty of 5000 management shares of C. W. Mackie & Co. Ltd. (hereinafter called 'the company') which belonged to the late C. W. Mackie (hereinafter called 'the deceased') at his death on 7 September 1940. The respondents were his executors. The District Court of Colombo held that the value of these shares at that date was Rs. 250 per share. On appeal the Supreme Court reduced that valuation to Rs. 40.6188 per share. The appellant maintained that the valuation of the District Court should be restored.

The company was incorporated in 1922 and acquired as a going concern the deceased's business in Ceylon which was that of a rubber merchant, a business which he had carried on since 1908. The capital of the company was Rs. 1,000,000, divided into 19,800 8% cumulative preference shares of Rs. 50 each and 5000 management shares of Rs. 2 each. The deceased was a life director of the company. At his death he held 9,201 preference shares and all the management shares. During its first five years very large profits were made amounting in all to over Rs. 3,000,000. During the next six years to 1932 losses were incurred to a total amount exceeding Rs. 1,800,000. During the next six years there were profits in four years and losses in two, the figures varying from a profit of Rs. 443,161 in 1933 to a loss of Rs. 281,907 in 1935. Finally, in 1939 and 1940 there were profits of Rs. 787,641 and Rs. 501,878. No dividend had been paid on the preference shares since 1930 and no dividend had been paid on the management shares since 1926 and the company had found it necessary to borrow large sums from time to time on overdraft.

The statute in force at the time of the deceased's death was the Estate Duty Ordinance, 1938. By s. 20 of that ordinance it was provided that the value of any property should be estimated to be the price which in the opinion of an assessor such property would fetch if sold in the open market at the time of the death of the deceased.

The value of the preference shares held by the deceased was agreed at Rs. 806,017. The appellant contended that the valuation of the management shares should be based on a capitalization of the average profits of the company (calculated after deducting an 8% dividend on the preference shares but before placing anything to reserve or making any deduction for taxation) over the four and two-thirds years immediately preceding the death of the deceased at 15% or alternatively a capitalization of a weighted average of the profits of the company for each of the five years immediately preceding the death (calculated after deducting from the average an 8% dividend on the preference

shares and an appropriation to reserve) at 16%. The respondents contended that the value of the shares should be based on the net value of the company's tangible assets at the date of death after providing for the value of the preference shares. The District Court accepted the method of valuation for which the appellant contended and held that the value of the shares was Rs. 250 each. The Supreme Court in allowing the appeal to that court held that neither of the methods relied on by the appellant was appropriate when applied to a speculative business such as that carried on by the company where there was no steady trend of profits and that the balance sheet method contended for by the respondents was the correct method to adopt. By an application of that method the Court assessed the value of the shares at Rs. 40.6188 per share.

In their Lordships' judgment the value of these shares at the date of the deceased's death was a question of fact which must be decided on the evidence given before the District Court. That evidence was very fully considered by the judges of the Supreme Court and their Lordships could not find that those judges in any way misdirected themselves. The principal witness for the respondents was a chartered accountant who had had experience of rubber companies. He valued the shares on a balance sheet basis because in his view no one would have paid more than that at that time. There was really no contradictory evidence given for the appellant. Neither of the appellant's witnesses professed to have been familar with the markets for rubber shares or to have any direct knowledge about the possibility in 1940 of finding a purchaser for this large block of shares, although they admitted that no one would pay anything like Rs. 250 for the management shares unless he could buy at the same time a large block of the preference shares and so have a majority vote. Their approach was more theoretical. They assumed that it was possible to estimate the future average maintainable profits by means of an arithmetical calculation from past profits and losses and that a purchaser could have been found who would have paid a price for the shares determined by a further arithmetical calculation from that average maintainable profit. When a past history of a business shows consistent results or a steady trend and where there has been no disruption of general business conditions it may well be possible to reach a fair valuation by a theoretical calculation. But in this case neither condition was satisfied. The profits and losses of the company had fluctuated so violently in the past that, as the second witness for the appellant admitted, it was impossible to choose any five consecutive years in the company's history the result of which would be reflected in the next year's profits. It was therefore in their Lordships' opinion not possible in this case to derive by a mathematical calculation anything which could have properly been regarded in 1940 as an average maintainable profit and in addition there were extremely uncertain conditions in 1940. It was argued by the appellant that the Supreme Court erred in law in accepting the balance sheet method of valuation because that can only give break-up value and in this case it was necessary to find the value of the business as a going concern. No doubt the value of an established business as a going concern generally exceeds and often greatly exceeds the total value of its tangible assets. But that cannot be assumed to be universally true. If it is proved in a particular case that at the relevant date the business could not have been sold for more than the value of its tangible assets that must be taken to be the value of it as a going concern. In their Lordships' judgment it had been proved in this case that the

deceased's holding could not have been sold in September 1940 at a price based on any higher figure than the value of the tangible assets of the company. Their Lordships would therefore humbly advise Her Majesty that the appeal should be dismissed.

Hawkins (Inspector of Taxes) *v.* Leahy

Income Tax—Medical practitioner—National Health Service Regulations—Payments made to practitioner by Minister of Health as contributions towards premiums on practitioner's insurance policy—Income Tax Act, 1918, *Sched. D, Cases II and III*

CHANCERY DIVISION

HARMAN J.

1952. Oct. 17.
[1952] 2 All E.R. 759.

The Special Commissioners found that the payments made to the taxpayer as contributions towards the premiums payable by him on his life insurance policy did not accrue to him as profits from his profession as a medical practitioner and accordingly were not assessable to tax under Case II of Sched. D to the Income Tax Act, 1918, but that they were assessable as annual payments within Case III of Sched. D. The Crown appealed against the finding that they were not assessable under Case II. The taxpayer cross-appealed against the finding that they were assessable under Case III.

The taxpayer, who is a medical practitioner, entered the Service under the National Health Service Act, 1946. Under the National Health Service (General Medical and Pharmaceutical Services) Regulations, 1948, every general practitioner who comes into the scheme gets a fixed annual payment, a capitation fee and sundry other payments described as 'remuneration of practitioners'. The National Health Service (Superannuation) Regulations, 1947, provide a contributory superannuation scheme for practitioners in the National Health Service. The practitioner's contribution is 6% of his remuneration for the time being. The Minister contributes 8% of the same remuneration. Reg. 38 (3) (*m*) provides that:

> Where any person holding a contract or policy of insurance with any of the life assurance companies becomes a practitioner on the appointed day, then, if he so requests the executive council in writing within three months after the appointed day, the Minister may agree that the practitioner shall not, so long as he continues to be a practitioner, become subject to any provisions of these regulations except this provision, and in that event the Minister shall, subject to such terms and conditions as the Minister may determine, pay to him as a contribution towards the maintenance of the contract or policy an amount equal to eight per cent of his remuneration as a practitioner.

The taxpayer having insurance policies of his own exercised the right to give notice that he did not wish to be bound by the pension scheme. The Minister agreed that he should not be so bound and thereupon became liable to pay him 8% of his remuneration as a contribution towards the maintenance of his policies. The question is whether that 8% is subject to tax.

For the case to come within Case II these words must be satisfied:

> Tax under this schedule shall be charged in respect of (*a*) The annual profits or gains arising or accruing . . . (ii) to any person residing in the United Kingdom from any . . . profession.

The learned judge said that in his opinion the Commissioners were right in holding that the payments are not a part of the taxpayer's professional remuneration. They are sums paid to him by the Minister as part of the bargain to keep him out of the benefits given by the National Health Service pension scheme. No doubt they are paid to him in order to make the coming into the service attractive to him but they are not professional remuneration.

For the case to come within Case III it must be because it falls under Sched. D (1) (*b*) being

annual profits or gains not charged under Sched. A, B, C, or E and not specially exempted from tax.

When one looks at the wording of Case III one sees that it is:

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

In the Rules Applicable to Case III r. 1 (*a*) brings in

...any annual payment...as a personal debt or obligation by virtue of any contract.

The learned judge held that broadly speaking this payment does come within Case III. It is an annual payment in the nature of income made by the Minister by agreement. It is income arising out of that agreement and Case III is the appropriate case under which it can be charged.

The appeal and cross-appeal were accordingly dismissed.

In re **Duncan Gilmour and Co. Ltd.**
The Company *v.* **Inman and others**

Company—Rights of preference shareholders in winding-up—Surplus assets—Rights conferred by memorandum of association and special resolution—Variation by articles

CHANCERY DIVISION

WYNN-PARRY J.

1952. Oct. 15.
[1952] 2 All E.R. 871.
[1952] 2 T.L.R. 951.

Summons to determine how on a true construction of the memorandum and articles of association of Duncan Gilmour and Co. Ltd. (hereinafter called 'the company') the surplus assets of the company would be distributable in the event of a winding-up.

There was no intention of putting the company into liquidation and the reason for bringing the question before the Court was that there was a reconstruction scheme in course of preparation and it was necessary that the rights of the various classes of stockholders *inter se* should be clearly defined before the scheme took its final form. There were three classes of stockholders concerned, the first preference, the second preference and the ordinary.

Clause 5 of the memorandum provides:

The capital of the company is £125,000 divided into seven thousand five hundred preference shares and five thousand ordinary shares of £10 each. The holders of the said preference shares shall be entitled to a fixed cumulative preferential dividend at the rate of £6 per centum per annum on the amount for the time being paid up thereon, and to a preferential right in the distribution of the assets of the company in the event of a winding-up or otherwise. The company also takes power to increase its capital and to issue the whole or any of the shares in such increased capital, as ordinary preference or deferred shares, or with such other rights privileges or conditions attached thereto as the special resolution authorising the increase of capital may determine, subject to

any special or fixed rights attaching to any of the existing shares issued prior to such increase of capital.

Both classes of shares were subsequently converted into stock.

The articles of association and in particular article 160 were relied on by counsel for the preference stockholders as enlarging their rights beyond those given to them by the memorandum. The learned judge after referring to a number of authorities and passages cited therefrom said:

> These passages show the limited area in which it is proper to refer to the articles of association, and in my judgment, it emerges from these passages that the first thing I have to do is to endeavour to construe clause 5 of the memorandum standing alone and to say whether on that construction there is any material matter as to which as regards the rights of the preference shareholders that clause is silent.

It was true, he said, that the memorandum in giving to the preference shareholders 'a preferential right in the distribution of the assets of the company in the event of a winding-up or otherwise' did not go on to say 'but no other right to share in profits or assets'. On the other hand the use of the words 'or otherwise' was in his opinion significant as they must refer to the return of capital on a redemption thereof and it seemed to him that the effect of those words was to indicate beyond any reasonable doubt that the rights purported to be conferred on the holders of the preference shares in the assets of the company were intended to be and were exhaustive. That, he said, would be sufficient to deal with the first preference stock but in case he should be wrong in that conclusion he would refer to article 160 assuming for the purpose that he was entitled to do so. In his opinion that article was designed as an administrative provision and did not purport to alter or vary the rights of the holders of preference shares and therefore even if he were entitled to look at that article the result would have been the same. The result was that he came to the conclusion that so far as the holders of the first preference stock were concerned they had no right through any distribution of assets to receive more than the capital paid up or which ought to have been paid up on their stock for the time being.

That left the question of the rights of the holders of the second preference stock. That preference stock was the result of the conversion of second preference shares, which were created by a special resolution of the company. By the resolution the capital of the company was increased by the creation of twelve thousand second preference shares of £10 each entitling the holders to a fixed cumulative preferential dividend at the rate of £6 per cent per annum (free of income tax) on the amount for the time being paid up thereon, ranking after the fixed cumulative preferential dividend on the first preference shares and carrying a preferential right in the distribution of the assets of the company in the event of a winding-up or otherwise over the remaining shares in the company other than and except the first preference shares, and carrying the right to one vote for every twenty second preference shares.

The learned judge said that in his view, having regard to the modern authorities, that resolution is exhaustive. Again on the assumption that that was not the correct construction and that he was entitled to look at article 160 of the articles of association he could not see that there was anything there to help the holders of the second preference stock because he should feel bound to place the same construction on that article in respect of them as in respect of the holders of the first preference stock.

It was, he said, purely a matter of construction and he had come to the conclusion that in answer to the question in the summons he should make a declaration that, in the event of a winding-up of the company, its surplus assets remaining after payment and discharge of all its debts and liabilities, the costs of the winding-up and the repayment of the capital of the first preference stock, the second preference stock and the ordinary stock, should be distributed among the holders of the ordinary stock in proportion to the capital paid up or which ought to have been paid up on the ordinary stock held by them respectively at the commencement of the winding-up.

Bridges (Inspector of Taxes) *v.* Watterson

Income Tax—Annual payments to taxpayer under pension scheme—Assessment under Case V of Sched. D—Income Tax Act, 1918

CHANCERY DIVISION

HARMAN J.

1952. Nov. 6.
[1952] 2 All E.R. 910.
[1952] 2 T.L.R. 850.

The taxpayer was assessed to income tax under Case V of Sched. D on the sum of £166 17*s.* paid to him under a pension scheme of the Canadian Pacific Railway Company. The taxpayer contended that the assessment ought to be discharged because the sum in question represented a partial repayment to him of his contributions to the pension fund and that until the aggregate of the sums paid to him by way of pension exceeded the aggregate of his contributions no income tax was or would become payable. He admitted that any payments made to him by the company in excess of his contributions to the fund must be treated as income and liable to tax accordingly.

Rule 20 of the pension scheme provided:

> When the pension payments under these rules cease by reason of the death of a contributor... before the amount of the pension payments (including the proportion voluntarily contributed by the company) has equalled the amount of contributions made by the said contributor, the difference shall be paid to the contributor's legal personal representatives.

The taxpayer retired in March 1948 having during his service made contributions amounting in the aggregate to £219 3*s.* During the next year he received by way of pension allowance the sum of £166 17*s.*, this being calculated by reference to his length of service and the rate of his wages. He had not therefore during the first year of his retirement received back a sum equal to the aggregate of his contributions so that if he had died at that moment the difference between the two sums would have been payable to his personal representatives. The £166 17*s.* so received by him was the sum on which tax was demanded. It was said on behalf of the taxpayer that he was entitled to two rights, namely a right to a refund of his contributions and a right to a pension over and above these contributions, if he lived long enough to obtain it, and that so long as he enjoyed the former right payments made to him in reference to it did not attract income tax.

The learned judge said that the matter turned on a proper construction of the rules governing the pension scheme. It was a truism to say that the court was not bound by the label which parties to a contract chose to give to a payment made under it. The fact that the payment in question was described as a pension would not be permitted to control the income tax liability if in truth the sum paid

was a repayment of capital. In the present case however the sums paid to the taxpayer were in truth, what they affected to be, payments of a pension allowance. That allowance would continue during the rest of his life, but, if he should die before the amount so paid to him reached the aggregate of his contributions, his personal representatives would acquire a new right, namely, to demand payment of the deficiency. As it seemed to the learned judge, that right did not belong to the taxpayer at all. If the matter were free from authority he would have no hesitation in holding that the assessment made on the taxpayer was correct.

The taxpayer, however, relied on the decision of the Court of Appeal in *Perrin* v. *Dickson* [1930] 1 K.B. 107 as an authority which was conclusive in his favour. That case decided that payments made by an assurance company to an assured on what is commonly known as an education policy did not attract tax because they were mere repayments of capital. Under that policy the taxpayer had subscribed yearly between 1912 and 1917 sums of money in consideration of which the company covenanted to pay him as guardian of his son annual sums for the seven years from 1920 to 1926 if the son should so long live. These sums were equal to the payments made by the assured with compound interest. The policy further provided that, if the son did not survive, repayment should be made to the assured of a sum which together with any sums already paid would equal the amount of his contributions, but without interest. The learned judge said that it was not surprising to find that in that case the Court of Appeal looked on these payments as repayments of capital to the assured, not attracting tax, and that it was at once apparent that there was a crucial distinction between that case and the present in that in the present case the liability of the company might in the upshot exceed by many times the pensioner's contributions to the fund. That is essentially a feature of the purchase of an annuity. It was true that the two cases had this in common, that the contributor could in no case receive less than his contributions. It was submitted on behalf of the taxpayer that in the case of any contract whereby A pays to B contributions in return for B's obligation to make payments to A in the future then if the amount paid by A is a measure of B's liability, payment made in pursuance of that liability is not taxable. The learned judge said that he was of course bound by *Perrin* v. *Dickson* and if the present case were one of a terminable annuity it would be on all fours with it; but, as he had already pointed out, that was not the case and the indefinite liability of the company made in his view the whole difference.

The case relied on by the Crown was also a decision of the Court of Appeal, that in *Southern-Smith* v. *Clancy* [1941] 1 K.B. 276. The court in that case was at pains to distinguish *Perrin* v. *Dickson*. The contract in question was one whereby in consideration of a single premium an insurance company agreed to pay a man an annuity during his life and guaranteed that if he died before the annuity paid equalled the amount of the single premium it would make up the deficiency. Thus the insurance company's liability could not be less than the amount of the single premium received but might be more and that was the fact which distinguished the case from *Perrin* v. *Dickson*.

The learned judge said that, if he had felt any difficulty about the decision in *Perrin* v. *Dickson*, *Clancy's* case would have resolved it by pointing out the true distinction. In his opinion on the true construction of these rules the pension allowances paid and payable to the taxpayer were what they were stated

to be and nothing else and could not be treated as repayments of capital simply because in a certain event the company's liability might be measured by the amount of the taxpayer's contributions. He allowed the appeal from the General Commissioners and restored the assessment.

In re Longbourne's Marriage Settlement

Estate Duty—Marriage Settlement—Death of tenant for life—Life interest of wife subject to payment of annuity to husband—Child of marriage entitled absolutely subject to said annuity—Allowance for annuity—Finance Act, 1894, ss. 1 and 2

CHANCERY DIVISION

WYNN-PARRY J.

1952. Nov. 5.
[1952] 2 All E.R. 933.
[1952] 2 T.L.R. 818.

Adjourned summons to determine the estate duty payable on the death of the tenant for life under a marriage settlement whose life interest was burdened by a continuing annuity.

By an antenuptial settlement dated 13 September 1907 the wife directed the trustees thereof to stand possessed of the investments therein mentioned in trust, after the intended marriage (which took place), (*a*) out of the annual income of the settled property to pay the yearly sum of £2,000 to the husband during his life, and (*b*) subject thereto, to pay the annual income of the settled property to the wife during her life, and (*c*) after the death of the wife and (if the husband survived her) subject to the trustees' setting apart such part of the settled property as would in their opinion be sufficient out of the income to discharge the said yearly sum of £2,000, and subject to the payment of the said yearly sum out of the income of the settled property until a fund was set aside to answer the same, as to both the capital and income of the settled property (in default of appointment) for the children or child of the marriage who attained age twenty-one. One child was born of the marriage and attained the age of twenty-one years. On 16 January 1946 the wife died leaving the husband and the child surviving.

The learned judge said that the first question which arose was whether or not on the death of the wife the property passed under the Finance Act, 1894, s. 1, or whether this was a case falling to be dealt with under s. 2. On that point he entertained no doubt that the property passed under s. 1.

The next question was: What property passed? Was it, as the Crown contended, the whole of the property subject to the settlement or, as was contended by the trustees, less than the whole, viz. the property remaining after there had been taken out of the whole a slice sufficient by its income to produce the amount of the annuity. The learned judge said that on this aspect of the case the really relevant authority was the recent decision of the Court of Appeal in In re *Lambton's Marriage Settlement* [1952] 2 All E.R. 201. He did not intend to travel through the facts of that case because he took the view that the passages from the judgments to which counsel for the Crown particularly referred him were passages in which Sir Raymond Evershed and Romer L.J. were speaking and intending to speak in general terms. For the purposes of this note it will be sufficient to cite the passage from the judgment of the Master of the Rolls where he says:

> The student of the law who reads *Earl Cowley* v. *Inland Revenue Commissioners* [1899] A.C. 198 in relation to this point might, I think, be excused for failing to discern

that it had (as in my judgment was the case) decided a most significant and far-reaching question of principle. When I come to *De Trafford* v. *A. G.* [1935] A.C. 280 I think it is impossible to resist the view that what I have said is correct, for, putting it for the moment very briefly, the *Cowley* case must now, in my view, be taken to have decided that when the income of a settled estate is held on trust not to pay it in aliquot shares to two or more persons, but to apply the income first in making an annual payment of a fixed sum or an annuity, whether that annuity is or is not charged on any part of the estate, and subject thereto to pay the income to another person, then the entire property passes on the death of the latter person under s. 1 of the Finance Act, 1894, and s. 2 (1) (*b*) has no application whatever to it. How far-reaching that is may be seen if examples are taken (and the present case indeed is not a bad one) in which the annuity or fixed annual payment takes up by far the largest part of the income of the whole estate. So far indeed does the principle go that it is irrelevant that the person who succeeds to the whole income is the same person who has in fact enjoyed the annuity or annual payment. The result seems indeed a hard one, but though the point appeared most casually taken and briefly dealt with in the House of Lords as a minor point of little significance, it is my view that *De Trafford* beyond any question lays it down that that is what as a matter of principle *Earl Cowley* v. *Inland Revenue Commissioners* in the House of Lords did decide.

The learned judge, after referring to other passages in *Lambton's* case to the same effect, said that in the result so far as this part of the matter was concerned he came to the conclusion that on the death of the wife the whole property passed. He continued as follows:

The Crown however concedes that as the annuity continues and must be treated as representing a burden on the property, there must be a deduction representing the value of that burden. Here again there has been a dispute between the parties as to how that burden should be calculated. An argument was developed that I should apply by analogy the Finance Act, 1894, s. 7 (7) (*b*), but I can see no warrant on a consideration of that Act for acceding to that suggestion. The language of that subsection is clearly confined to cases arising under s. 2 and has no application to cases arising under s. 1. The fact is that the legislation is silent on this point. As the Crown concedes that there should be a deduction, in my view, I can do nothing else but accept the effect of that concession and direct that the value of the deduction must be the value of the annuity at the date of death calculated on actuarial principles.

Order accordingly.

APPEAL

In re **Batley deceased** *J.I.A.* LXXVIII [42]: [1952] 1 All E.R. 1036

On 24 July 1952, [1952] 1 Ch. 781, [1952] 2 All E.R. 562, the Court of Appeal (Evershed M.R., Jenkins and Hodson L.JJ.) varied the decision of Vaisey J. in the Court below.

Vaisey J. held that the rule in In re *Pettit* [1922] 2 Ch. 765 applied and that on the true construction of the will of Charles Gurson Batley and in the events which had happened the testator's first wife and her present husband were accountable to the trustees of the will for any relief or allowances by way of repayment of income tax in respect of an annuity of £416 bequeathed to her by the deceased.

The bequest was in these terms:

...free of duty to my former wife [Mrs Hert] an annuity of £416 for her life... But if at any time during the lifetime of my wife the said Grace Lucy Batley such annuity of £416 should exceed the amount of one third of the total income of my estate after pay-

ment of income tax then and in such case the amount to be paid to the said [Mrs Hert] by way of such annuity shall be such one third of the total income of my estate after payment of income tax....

The first question which arose on that bequest was whether or not the annuity of £416 for her life to Mrs Hert was payable to her free of income tax. That question came before the Court of Appeal in In re *Batley* [1951] Ch. 558 and the Court held that the annuity was payable free of income tax, in other words that it was a gift of the net sum of £416 per annum, and in arriving at that conclusion the learned judges applied their minds if not exclusively, at least primarily, to what they called the first limb of the bequest. They left open the question whether Mrs Hert having received the net sum was liable in accordance with the rule in *Pettit*'s case to account to the trustees for any repayment of tax which she or her husband might secure from the Inland Revenue in respect of the annuity having regard to the allowances or relief from tax to which they might be entitled. In holding that they were so liable Vaisey J. considered primarily the first limb of the bequest and the second limb was referred to in the argument only incidentally. When the case came before the Court of Appeal on appeal from the decision of Vaisey J. it was not disputed that at all material times the condition had been fulfilled that brought into play the second limb of the bequest, in other words £416 was in excess of the amount of one third of the total net income of the estate after payment of income tax. The result was that instead of the fixed sum of £416 Mrs Hert was entitled to receive only one third of the total net income of the estate. The Court was of opinion that the principle of In re *Pettit* was inapplicable to a provision of that character. If it were applied there would have to be a different calculation each year to ascertain what was the fixed sum which was to be substituted for the £416. Enormous administrative difficulties would arise if that view were to prevail but unless that were the result it was difficult to see what would happen once any repayments had been recovered and were back in the hands of the trustees so that the distributable income in their hands was increased beyond the original figure. When there is a provision for distributing income in shares among beneficiaries a beneficiary is entitled to get from the trustees the due proportion of the net figure after tax has been paid and the trustees are treated as having paid tax on his behalf on the gross sum so that the beneficiary also gets as part of the benefaction such rights in respect of that tax as were so to speak attached to the amount received. The whole conception of a gift of a third (or any other fraction) of the net income is for this purpose fundamentally different from the ordinary case of a fixed amount of money.

The order of the learned judge was accordingly varied by adding a direction that in any year in which the annuitant received a one-third share of the net total income of the estate instead of the fixed sum of £416 neither she nor her husband was liable to account to the trustees for any repayment of tax attributable to her annuity.

Intestates' Estates Act, 1952

THIS Act, Part I of which amended the Administration of Estates Act, 1925, came into operation on 1 January 1953.

A new provision is that of section 2 which cancels s. 48 (1) of the 1925 Act (see *J.I.A.* LXIV, 203) and gives a surviving spouse, whatever the state of health, the right to demand that his or her life interest in the residuary estate shall be purchased by the personal representative of the intestate by payment of the capital value of the interest and the costs of the transaction. The section includes the following rules for the determination of the capital value of the life interest:

1. There shall be ascertained the annual value of the life interest to which the surviving husband or wife would be entitled if the said part of the residuary estate (whether or not yielding income) were on the date of redemption of the life interest re-invested in the two-and-a-half per cent consolidated stock referred to in section two of the National Debt (Conversion) Act, 1888.
2. There shall be ascertained the amount which, if invested on the said date in the purchase of an immediate life annuity from the National Debt Commissioners through the Post Office Savings Bank, would purchase an annuity for the tenant for life of the annual value ascertained under rule 1.
3. The said capital value shall, subject to rule 4, be the amount ascertained under rule 2 diminished by five per cent thereof.
4. If the age of the tenant for life on the said date exceeds eighty years, a further deduction shall be made equal to five per cent of the amount ascertained under rule 2 for each complete year by which the age exceeds eighty:
   Provided that, if the effect of this rule would otherwise be that the said capital value was less than one-and-a-half times the annual value ascertained under rule 1, the said capital value shall be one-and-a-half times that annual value.

Reference should be made to the Act for information as to the period during which the option is exercisable and for other details.

Part II of the Act amends the Inheritance (Family Provision) Act, 1938, and the Fourth Schedule reproduces the 1938 Act as amended.

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.

Godfrey Phillips Ltd. *v.* Investment Trust Corporation Ltd. and Others

Company—Rights of preference shareholders—Construction of articles—Method of calculating preference dividend—Decision of House of Lords—Method previously applied held erroneous—Declaration of insufficient dividends—No debt created in respect of shortages—Right of shareholders to recoupment out of future profits—No time limitation of claim—No waiver or estoppel—No participation by previous shareholders—Deduction of income tax

CHANCERY DIVISION

WYNN-PARRY J.

1952. December 10.
[1953] 1 All E.R. 7.
[1953] 1 W.L.R. 41.

In *Friends Provident and Century Life Office* v. *Investment Trust Corporation Ltd.* [1951] 2 All E.R. 632* the House of Lords determined the correct method of ascertaining the dividends payable in accordance with the articles of association on the 'B' cumulative preference shares of the plaintiff company. The effect of their Lordships' decision was that for several years the dividends previously declared were less than those to which, on a true construction of the articles, the shareholders were entitled. The plaintiff company now sought the opinion of the Court as to:

(1) Whether, in calculating the aggregate sum which ought to be paid to the holders of the 'B' cumulative preference shares as compensation for the amount by which the sums already paid on such shares fell short of the sums which ought to have been paid, the earliest half-yearly payment to be regarded for that purpose as having been deficient was that made on 31 October 1948, the date of the half-yearly payment made next after the date when the old method of calculating the dividend was first challenged, or that made on 31 October 1939, the date of the half-yearly payment made next after the standard rate of income tax first rose above 6*s.* in the pound.

(2) Whether the aggregate sum so ascertained would be divisible exclusively among holders of the 'B' cumulative preference shares appearing as such on the register of members at the time of the payment of the said aggregate sum or whether persons who were holders of the 'B' preference shares at any time during the material period but had parted with them were entitled to participate in the distribution.

(3) Whether on the distribution of the said aggregate sum the amount of income tax to be deducted from the payment made should be calculated at the several standard rates in force at the dates when the deficient dividends payable in respect of the said aggregate sum were declared.

* *J.I.A.* LXXVIII [12].

The answer to the first question was that the relevant first deficient payment of dividend was that made on 31 October 1939. The learned judge said that it was well established that in respect of a shareholder's right to a dividend no debt is created until a dividend is declared. Over the maximum period involved which went back to 31 October 1939, too small a dividend was declared on each occasion. In respect of each dividend in fact declared a debt was created in favour of each holder of 'B' preference shares at that time but, in respect of what the learned judge referred to as the 'short fall', on no such occasion was any debt created. Full effect was not given to the rights of the holders of those shares: but the continued existence of those rights was not affected by reason of such failure. It followed that apart from any question of waiver or estoppel the holders of the 'B' preference shares could insist as against the company and the holders of stock or shares of inferior classes that, before any further distribution of profits be made, the amount by which the declaration of dividend in respect of the 'B' preference shares over the period from 31 October 1939 was short should now be paid in respect of those shares. It was argued that either the holders of the 'B' preference shares must be taken, by reason of their acquiescence in the dividends in fact declared, to have waived their right to any larger dividend in respect of those past years, or that they were estopped by their conduct from now asserting their right to any larger dividend. The learned judge said that as regards waiver he could find nothing in the facts stated in the special case to indicate that there had been anything in the nature of waiver. As regards estoppel it was clear that the holders of the 'B' preference shares could not be precluded from now asserting the true construction of the articles of association, because that construction had been pronounced by the House of Lords and must apply for the future. As regards the past years he, the learned judge, could not find any representation of fact by the shareholders which could found an estoppel nor, assuming that difficulty to be overcome, was there any evidence that the company had altered its position to its detriment. It followed that the relevant date from which the additional dividends must now be declared was 31 October 1939.

On the question whether the aggregate sum now payable to the holders of the 'B' preference shares in respect of past insufficiency of dividends was divisible exclusively among the present holders of those shares, the learned judge said that the answer must be in the affirmative, for the simple reason that, when the aggregate sum was distributed, it must take the form of a declaration of dividend, and although that dividend would be calculated by reference to a period extending back to October 1939, it would necessarily be a dividend solely in respect of the year in which profits were declared for division. Such a dividend could only be paid to those persons who were registered as the holders of 'B' preference shares at the time of the declaration of the dividend.

On the question as to the rate at which income tax would fall to be deducted, the learned judge said that of necessity it followed from the nature of the payments as expounded above that the rate deductible would be that in force at the date when the additional dividend was declared.

In re Masters deceased
Coutts and Co. *v.* Masters and Others

Intestacy—Infant beneficiaries—Appointment of two administrators—Trust corporation and widow of intestate—Power of Court to authorize remuneration of corporation

CHANCERY DIVISION
DANCKWERTS J.
1952. December 18.
[1953] 1 All E.R. 19.
[1953] 1 W.L.R. 81.

On 9 March 1949 Leslie Ninian Masters died intestate leaving surviving him a widow, and three children who at that date were under the age of 21 years. The estate was sworn for estate duty at £95,600 gross with net personalty £80,056. On 22 November 1949 a grant of administration was made to two administrators, Coutts and Co. and Mrs Masters the widow. In this adjourned summons the bank asked for an order (*inter alia*) that, notwithstanding the absence of any power in that behalf in the statutory trusts arising under the Administration of Estates Act, 1925, ss. 46 and 47, Coutts and Co. might be authorized by virtue of the Trustee Act, 1925, s. 42 to charge remuneration for its services as administrator and trustee of the estate of the intestate in accordance with its usual scale of charges.

The learned judge, after referring to ss. 42, 68 (17) and 69 (1) of the Trustee Act, 1925, held that the duties of an administrator are included in the duties of a trustee for the purposes of that Act and therefore s. 42 applied as regards the power to award remuneration to the case of a trust corporation which is appointed by the Court to be administrator of the estate. Apart from that statutory jurisdiction the learned judge was of opinion that there is inherent jurisdiction in the Court to authorize the remuneration of a trustee whether appointed by the Court or not.

Danckwerts J. made an order accordingly.

White *v.* Bristol Aeroplane Company Limited

Company—Proposed resolution to increase capital by issue of additional preference and ordinary shares—Whether the rights of the holders of existing preference stock would be affected by such issue—Whether a separate meeting of existing preference shareholders should be summoned and an extraordinary resolution in favour of the proposal passed thereat—Whether existing preference shareholders should be summoned to attend and vote at the general meeting of the company called to pass the resolution to increase capital

COURT OF APPEAL
SIR RAYMOND EVERSHED M.R. DENNING AND ROMER L.JJ.
1952. December 11.
[1953] Ch. 65.
[1953] 1 All E.R. 40.
[1953] 2 W.L.R. 144.

The question raised in this appeal was whether, according to the proper construction of the memorandum and articles of association of the Bristol Aeroplane Company Ltd. (hereinafter referred to as 'the company'), the proposed distribution (by way of capitalization of undistributed profits) of fully paid-up preference and ordinary shares required (i) that a separate meeting of the existing preference stockholders should be summoned and an extraordinary resolution in favour of the proposals passed thereat and (ii) that the existing preference stockholders should be summoned to attend and vote at the general meeting of the company.

Danckwerts J. answered the question in the affirmative and made an order accordingly restraining the company until after judgment in the action or

until further order from (*a*) convening a general meeting to consider the proposals without giving notice of such general meeting to the holders of the preference stock and (*b*) passing or acting on a resolution in favour of the proposal without the sanction of an extraordinary resolution passed at a separate meeting of the holders of the preference stock.

The company appealed against the said order.

The existing capital of the company was £3,900,000 consisting of £600,000 preference stock and £3,300,000 ordinary stock, all of which was issued and fully paid-up. The company proposed to create (by way of capitalization of undistributed profits) (*a*) 660,000 new cumulative preference shares of £1 each ranking *pari passu* with the existing preference stock and (*b*) 2,640,000 ordinary shares of 10*s*. each ranking *pari passu* with the existing ordinary stock. Under the company's regulations both new issues would be distributed to existing ordinary stockholders.

After quoting the relevant articles of association, which are substantially in common form, the Master of the Rolls continued as follows:

> From what I have read it will be observed that the rights of the preference stockholders consist, first of the right to priority of the dividend of five per cent on the paid-up capital; secondly of the right to payment on a winding up of capital and unpaid dividends on their shares before anything is distributed to the ordinary stockholders; thirdly of a qualified right to attend meetings and to vote. Their voting rights by reference to the amount of capital paid-up are half those of the ordinary stockholders and they are only entitled to influence the transactions of the company at meetings at which it is proposed to deal with subject matters of the kind mentioned in article 83 (i.e. if the dividend on the preference shares or stock is in arrear or the meeting is convened to consider a resolution for winding up or to reduce capital or to consider a resolution directly affecting their rights or privileges as a separate class). They have also certain special rights to be separately summoned in case there is anything to be done affecting, modifying, varying, dealing with or abrogating in any way their other rights or privileges.

Counsel for the preference stockholders did not seek to make any distinction between 'rights' and 'privileges' and conceded that the proposal would not operate to 'modify' or 'vary', still less to abrogate, the preference stockholders' existing rights. The argument for the preference stockholders was that the word 'affect' is a word of the widest import and must be taken to cover a transaction which, though not in any way modifying or varying the rights, would in some way or other affect them. The learned Master of the Rolls said that in his opinion the rights of the preference stockholders would not in any way be affected by what was proposed. They would remain exactly as before. It was, he said, no doubt true that the enjoyment of and capacity to make effective those rights would be in a measure affected, for the existing preference stockholders would be in a less advantageous position on such occasions as would entitle them to register their votes, whether at general meetings of the company or at separate meetings of their own class: but there was to his mind a sensible distinction between an affecting of the rights and affecting of the enjoyment of the rights or the stockholders' capacity to turn them to account. The result was that he came to the conclusion that the claims of the preference stockholders were not well founded. The appeal of the company must be allowed and the order of Danckwerts J. discharged.

The other Lords Justices concurred and Romer L.J. said:

> The rights of the preference stockholders in the present case are those conferred by

article 61 and article 83 and the only relevant article for present purposes is article 83. Under that article it is provided that on a poll every member present in person or by proxy shall have one vote for every share held by him, or in the case of the preference stock one vote for every £1 of preference stock held by him. It is suggested that, as a result of the proposed increase of capital, that right of the preference stockholders will be in some way 'affected' but I cannot see that it will be affected in any way whatever. The position then will be precisely the same as the position now, viz. that the holder of every £1 of preference stock will have on a poll one vote for every £1 of preference stock held by him. It is quite true that the block vote, if one may so describe the total voting power of the class, will or may have less force behind it because it will *pro tanto* be watered down by reason of the increased total voting power of the members of the company, but by the constitution of the company no particular weight is attached to the vote as distinct from the right to exercise the vote, and certainly no right is conferred on the preference stockholders to preserve anything in the nature of an equilibrium between their class and the ordinary stockholders or any other class.

I cannot help thinking that a certain amount of confusion has crept into this case between rights, on the one hand, and the result of exercising those rights on the other hand. The rights, as such, are conferred by resolution or by the articles, and they cannot be affected except with the sanction of the members on whom those rights are conferred, but the results of exercising those rights are not the subject of any assurance or guarantee under the constitution of the company and are not protected in any way. It is the rights, and those alone, which are protected and for the reasons which my Lord has given, and in view of what I have myself said, the rights of the stockholders will not in my judgment be affected by the proposed resolutions. Accordingly I agree that this appeal should be allowed.

In re Goetze deceased
National Provincial Bank Limited and Another *v.* Mond and Another

Estate duty—Canadian succession duty—Testatrix domiciled in the United Kingdom—More than one half of her estate situated in Canada—Bequest of pecuniary legacies and annuities free of duty—Double Taxation Relief (Estate Duty) (Canada) Order, 1946—Benefit of allowance of Canadian succession duty in relief of United Kingdom estate duty—Relief of legatees and annuitants from all death duties

COURT OF APPEAL
SOMERVELL, JENKINS AND ROMER L.JJ.
1952. December 15.
[1953] Ch. 96.
[1953] 1 All E.R. 76.
[1953] 2 W.L.R. 26.

This appeal from an order made by Upjohn J. concerned the incidence as between the pecuniary legatees and annuitants under the will of the testatrix, Constance Goetze, and the residuary estate of the testatrix, of the United Kingdom estate duty and Canadian succession duty attributable to the personal estate of the testatrix situated in the Dominion of Canada. The learned judge declared that the United Kingdom estate duty so attributable and the interest thereon ought to be borne by the residuary estate of the testatrix and that declaration was not appealed from by the respondent residuary legatee; but the learned judge also declared that the Canadian succession duty so attributable ought to be borne by the legatees or annuitants concerned, and that the credit of the amount of such Canadian succession duty allowed against the United Kingdom estate duty under the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, enured for the benefit of the residuary estate of the testatrix, and from that part of the learned judge's order the appellant as representative of all the pecuniary legatees and annuitants appealed.

The testatrix died domiciled in England on 12 February 1951. By her will dated 2 March 1949 she made the following dispositions:

By clause 2 she declared that:

All legacies and annuities bequeathed by this my will or any codicil thereto are to be paid free of legacy duty and all other death duties.

By clause 3 she declared that:

In case any death duties shall become payable on my death in respect of the money or property comprised in any gifts made or covenants entered into by me in my lifetime such death duties (and any duty thereon payable by reason of the provisions of this clause) shall be paid by my trustees out of my estate in exoneration of any other person accountable for such duty (and, further, that) all payments made hereunder shall be deemed to be testamentary expenses of my estate.

By clause 8 to clause 47 inclusive the testatrix bequeathed forty-three pecuniary legacies and annuities to persons who with two exceptions all survived the testatrix including (by clause 9) a legacy of £1000 to the appellant. By clause 50 the testatrix devised and bequeathed to her trustees her residuary real and personal estate on usual trusts for sale or conversion and directed as follows:

And my trustees shall out of the moneys to arise from the sale calling in and conversion of or forming part of my residuary estate and out of my ready money pay my funeral and testamentary expenses (including all payments to be deemed testamentary expenses made under the provisions of this my will) and debts and shall pay or provide for all legacies and annuities bequeathed by this my will or any codicil hereto and the duty on all such legacies and annuities: and subject as aforesaid my trustees shall hold the residue of my estate in trust for... Countess Cippico.

The net value of the testatrix's estate for the purposes of United Kingdom estate duty was £431,501 4*s.* 3*d.* and in addition to other assets all of which were situated in England it comprised 26,150 preferred and 10,976 common shares in the International Nickel Co. of Canada Ltd., valued for duty purposes at £230,243 15*s.* 1*d.*, which were situated in Canada.

As the testatrix was domiciled in England, these shares notwithstanding their Canadian situation attracted United Kingdom estate duty on her death and accordingly fell to be included in the above-mentioned total of £431,501 4*s.* 3*d.* on which United Kingdom estate duty at the appropriate rate (viz. 65%) amounting to £280,475 13*s.* 2*d.* was assessed; but notwithstanding the testatrix's English domicile the last mentioned shares situated in Canada also attracted the succession duty exigible under the law of Canada on the beneficial interests in the Canadian estate created by her will. In these circumstances the provisions of the Double Taxation Relief (Estate Duty) (Canada) Order, 1946, applied to the case.

Apart from the effect of that Order it was now conceded by the appellant as representative of the pecuniary legatees and annuitants that the directions as to duty contained in the will did not on their true construction extend to Canadian succession duty. In the case of In re *Cunliffe-Owen* [1951] Ch. 964 *J.I.A.* LXXVIII [17], Wynn-Parry J. reviewed the authorities and held them to establish a rule of construction that *prima facie* directions such as those in the present will by which duties are thrown on the residuary estate in exoneration of legacies are to be construed as referring only to United Kingdom death duties unless the surrounding circumstances are sufficiently compelling to imply a reference to duties imposed by the law of foreign countries. In the Court below it was argued that that might be implied from the fact that the

greater part of the personal property was situated in Canada; but Upjohn J. held that that was not a circumstance which compelled departure from the *prima facie* rule and the appellant now accepted that decision.

The effect of article v of the Double Taxation Order was that United Kingdom estate duty was to be assessed in full on the Canadian estate without regard to Canadian succession duty, that the Canadian succession duty was to be similarly assessed thereon without regard to the United Kingdom estate duty, and that the Canadian succession duty was then to be allowed as a credit of like amount against the United Kingdom estate duty, or, in other words, as a payment operating to discharge a like amount of United Kingdom estate duty. Jenkins L.J. said that it seemed to him that if the Canadian succession duty attributable to the Canadian proportion of the pecuniary legacies and annuities were thrown on those benefits, they would not have been paid free of United Kingdom estate duty. They would have been paid free of United Kingdom estate duty save in so far as that duty was satisfied by the payment of Canadian succession duty out of the pecuniary legacies and annuities. The amount paid in respect of Canadian succession duty was, to the learned judge's mind, none the less for the present purpose a payment of United Kingdom estate duty because under the terms of the Order it served the double purpose of discharging both the Canadian succession duty and a like amount of United Kingdom estate duty. Perhaps the simplest way of putting the point was to describe the effect of the Double Taxation Order as being in substance to preserve the liability of the Canadian estate to assessment to United Kingdom estate duty at the full appropriate rate of 65% but to make the Canadian succession duty payable out of the amount of the United Kingdom estate duty as so assessed.

The conclusion was, therefore, that the whole of the United Kingdom estate duty at the appropriate rate of 65% on the Canadian estate should be borne by the residuary legatee and that she was not entitled to throw on the pecuniary legatees and annuitants the proportion of it which was satisfied by the payment of, or, in other words, was applied in payment of, the Canadian succession duty on the pecuniary legacies and annuities.

The other Lords Justices concurred and the appeal was allowed in that sense.

In re Downshire's Settled Estates
Downshire (Marquis) *v.* Royal Bank of Scotland and Others
In re Chapman's Settlement Trusts
Chapman and Another *v.* Chapman and Others
In re Blackwell's Settlement Trusts
Blackwell *v.* Blackwell and Others

Settlement—Jurisdiction of Court to authorize variation of trusts—Inherent jurisdiction—Statutory powers

COURT OF APPEAL
SIR RAYMOND EVERSHED M.R., DENNING AND ROMER L.JJ.
1952. December 17.
[1953] Ch. 218.
[1953] 1 All E.R. 103.
[1953] 2 W.L.R. 94.

These three appeals were concerned with the exercise by Her Majesty's judges, sitting in chambers in the Chancery Division, of their jurisdiction in relation to the variation or modification of the trusts of a settlement. The jurisdiction invoked in such cases is either the inherent jurisdiction of the Court of Chancery or the statutory jurisdiction conferred by the provisions of the Trustee Act,

1925, s. 57, or the Settled Land Act, 1925, s. 64. In each of the present cases the sole question before the Court of Appeal was the existence of the jurisdiction and not whether, if the jurisdiction existed, the Court should in the exercise of its discretion exercise its jurisdiction by approving the scheme presented to it. In each of the present cases a principal object of the scheme was to achieve (so far as foresight could achieve it) a limitation of the future liability of the corpus of the trust property to serious diminution from estate duty. It is notorious that many persons, having families and free estates, so dispose of their estates as to reduce, within the law, liability for income tax during their lives and for death duties on their deaths, and in the judgment of the Court of Appeal it was not an objection to sanction by the Court of any proposed scheme in regard to trust property that its object or effect is or may be to reduce liability for tax.

The inherent jurisdiction of the Court of Chancery in these matters has been evolved over many centuries and exists in a power to confer on trustees *quoad* items of trust property vested in them administrative powers to be exercised by them as the persons in whom the property is vested (notwithstanding that such powers are not conferred by the trust instrument) where a situation has arisen in regard to the property (particularly a situation not originally foreseen) creating what may be fairly called an 'emergency', that is, a state of affairs that has to be presently dealt with, and such that it is for the benefit of everyone interested under the trusts that the situation should be dealt with by the exercise of the administrative powers proposed to be conferred for the purpose. The jurisdiction does not extend to changes or rearrangements of the beneficial interests *inter se* under the trust as distinct from rearrangements or reconstructions of the trust property itself.

There are, however, two exceptions to the principle that the inherent jurisdiction of the Court does not extend to sanctioning, generally, modification or remoulding of the beneficial trusts, viz.,

(i) Where a testator or settlor has so provided, particularly by way of a trust for accumulation, that the immediate beneficiaries have no fund for their present maintenance, the Court, which has shown dislike of trusts for accumulation, will assume that the intention to provide, sensibly, for the family is so paramount that it will order maintenance in disregard of the trusts for accumulation.

(ii) It must also now be taken that the Court has a further power and jurisdiction to approve, on behalf of persons interested under the trust who are under a disability (particularly infants) and persons who may hereafter become interested, compromises proposed by or between persons beneficially interested under the trust who are *sui juris* and to direct and protect trustees accordingly, and the word 'compromise' should not be narrowly construed so as to be confined to 'compromises' of disputed rights.

Turning now to s. 57 of the Trustee Act, 1925, it was presumably the intention of Parliament in enacting this section to confer new powers on the Court, rather than to codify or define existing powers, though it may well be that the new extended jurisdiction does in some degree overlap the old.

It was argued, by those presenting a scheme for the approval of the Court, that whatever may have been the position before the passing of the Trustee Act, 1925, the Court now has jurisdiction by virtue of s. 57 to sanction the alteration or rearrangement of the dispositions declared by a trust instrument

if it is satisfied that it is to the substantial advantage of infants and unborn issue who are beneficially entitled thereunder so to do. If this proposition were well founded it would be clear that a jurisdiction had been created of a quality which had never before been assumed or recognized by the Court, viz. a jurisdiction to eliminate, vary or remould dispositions and trusts which the settlor himself had thought proper to establish, provided only that the beneficiaries who are *sui juris* desire it and that the Court is satisfied that the order which it is being asked to make is materially advantageous to the infants and unborn issue concerned. That argument was rejected by the Court of Appeal. The Master of the Rolls in the judgment delivered by him on behalf of himself and Romer L.J. said:

> In our judgment the object of s. 57 was to secure that trust property should be managed as advantageously as possible in the interests of the beneficiaries, and, with that object in view to authorize specific dealings with the property which the Court might have felt itself unable to sanction under the inherent jurisdiction, either because no actual 'emergency' had arisen or because of inability to show that the position which called for intervention was one which the creator of the trust could not reasonably have foreseen, but it was no part of the legislative aim to disturb the rule that the court will not re-write a trust or add to such exceptions to that rule as have already found their way into the inherent jurisdiction.... It follows that in our judgment unless any proposed transaction is one which is specifically related to the management or administration by trustees of trust property, *quoad* property, it does not fall within s. 57.

There remained for consideration the Settled Land Act, 1925, s. 64, which is relevant to and was invoked in the first of these appeals. The section is in these terms:

> (1) Any transaction affecting or concerning the settled land or any part thereof or any other land (not being a transaction otherwise authorized by this Act or by the settlement) which in the opinion of the court would be for the benefit of the settled land or any part thereof or the persons interested under the settlement may, under an order of the court, be effected by a tenant for life if it is one which could have been validly effected by an absolute owner.
>
> (2) In this section 'transaction' includes any sale, extinguishment of manorial incidents, exchange, assurance, grant, lease, surrender, re-conveyance, release, reservation, or other disposition, and any purchase or other acquisition, and any covenant, contract or option, and any application of capital money...and any compromise or other dealing, or arrangement.

Roxburgh J. construed this section as limited to transactions of an administrative character and held that it did not empower the Court to do anything beyond authorizing the tenant for life to effect the transaction in that sense. The Lords Justices in the Court of Appeal were unable to agree that the word 'transaction' in this section should be given a restricted meaning such as the learned judge suggested. The learned judge thought that the two sections, s. 57 of the Trustee Act, 1925, and s. 64 of the Settled Land Act, 1925, were closely analogous, conferring parallel jurisdictions, the one in regard to settlements not comprising land, the other in regard to settled land. The Court of Appeal did not share that view. In their judgment s. 64 of the Settled Land Act, 1925, is in some respects more ample in regard to the subject-matter to which it relates than is s. 57 of the Trustee Act, 1925. The transaction contemplated by s. 64 of the Settled Land Act, 1925, is one that must be effected by the tenant for life, who under the general scheme of the Act is vested with wide powers of ownership. It is necessary that the transaction proposed should in the opinion of the Court be for the benefit

of the settled land or some part thereof or of the persons interested under the settlement but not necessarily of both. The transaction must affect or concern the settled land 'or any other land', and in the judgment of the Lord Justices the test imported by that last qualification is satisfied by transactions indirectly as well as directly operating on the settled land (or other land) provided that in the former case the effect is real and substantial by ordinary common sense standards as distinct from that which is oblique or remote and merely incidental. This view is supported by the circumstance that the transaction is within the jurisdiction of the Court to approve though it is in the opinion of the Court for the benefit of the persons interested under the settlement and not of the settled land.

The Court of Appeal proceeded to apply the principles above stated to the three cases before them. For the particulars of the several schemes submitted to the Court, readers of these notes are referred to the report of the cases in the All England or other accredited series of law reports.

In the case of In re *Downshire's Settled Estates* the Court of Appeal, reversing the decision of Roxburgh J., held that the scheme constituted a compromise which it was within the power of the Court to sanction under its inherent jurisdiction and that the scheme should be approved; and further that the Court was competent to approve it under s. 64 (1) of the Settled Land Act, 1925.

In the case of In re *Chapman's Settlement Trusts* the Court of Appeal affirming the decision of Harman J. held that the Court had no jurisdiction under s. 57 of the Trustee Act, 1925, to sanction the scheme because it involved the alteration or remoulding of the trusts and that the scheme did not constitute a provision for maintenance or (Denning L.J. *dissentiente*) a compromise; and therefore was not within the two exceptions to the rule limiting the Court's inherent jurisdiction to emergencies.

In the case of In re *Blackwell's Settlement Trusts* the Court of Appeal, reversing the decision of Roxburgh J., held that the Court had no jurisdiction to sanction the scheme under s. 57 of the Trustee Act, 1925, because it could not fairly be described as a disposition or transaction in the 'management or administration of the property vested in the trustees'; but nevertheless the scheme constituted a compromise which under its inherent jurisdiction the Court was competent to approve.

In re Bates deceased
Bates *v.* Rodway and Others

Family provision—Application by widow—Estate under £2000—Power of Court to award capital payment—Inheritance (Family Provision) Act, 1938, s. 1 (3) (b), s. 1 (4)

CHANCERY DIVISION

ROXBURGH J.

1953. January 21.
[1953] 1 All E.R. 318.
[1953] 1 W.L.R. 276.

Application by widow of the testator for provision to be made for her out of the testator's estate. By his will dated 27 July 1951 the testator, after making a specific bequest to his son by a former marriage and giving a legacy of £100 to his sister, gave his residuary estate equally to two charities. He died on 2 August 1951. The net value of the estate was under £2000. The widow was the only dependant.

Counsel for the widow contended that the Court should make an order for the payment to her of (*a*) one-half of the capital, in a lump sum, without

conditions or (*b*) an annual income amounting to one-half of the net income of the estate plus supplementary payments out of capital or (*c*) the capitalized value of her widowhood interest.

The learned judge came to the conclusion that in the circumstances of the case he ought to award the maximum permissible amount of income payment under s. 1 (3) of the Inheritance (Family Provision) Act, 1938, namely one-half of the annual income of the estate, which might be treated as £28 per annum, during her widowhood. Under s. 1 (4) of the Act, where the net value of a testator's estate does not exceed £2000, the Court has power to make an order providing for maintenance, in whole or in part, by way of payment of capital 'so however that the Court, in determining the amount of the provision, shall give effect to the principle of the last preceding sub-section'. S. 1 (3) is in these terms:

> The amount of the annual income which may be made applicable for the maintenance of a testator's dependants by an order or orders to be in force at any one time shall in no case be such as to render them entitled under the testator's will as varied by the order or orders to more than the following fraction of the annual income of his net estate, that is to say . . . (*b*) if the testator . . . leave a wife . . . and no other dependant: one half.

In the case of In re *Catmull* [1943] Ch. 262 counsel for the widow contended that the Court had a discretion under s. 1 (4) to make a larger provision than it could under s. 1 (3), while counsel for the testator's daughter contended that, in making an order for a capital payment under s. 1 (4), the Court could not award more than the capitalized value of the maximum amount of income which it would order under s. 1 (3). In that case Uthwatt J. came to the considered conclusion that the provision which could be made under s. 1 (4) was limited to the capitalized value of the provision which would otherwise be made under s. 1 (3).

In the present case the learned judge said that he was probably bound to follow In re *Catmull* if it were necessary for him to come to a conclusion on that point; but in the view he took of the circumstances of the present case he need not pursue that question any further. He said that assuming he had jurisdiction to order an immediate payment to the widow of one-half of the capital as a lump sum payment, without conditions, he would not do so. He had no jurisdiction to make an order for her to receive one-half of the net income plus supplementary payments out of capital, as that would be violating the principle of s. 1 (3) (*b*) because it would be giving her more than half the annual income. He had jurisdiction to give her the capitalized value of her widowhood interest, but he did not think that in this case it was expedient to do so.

In re John Smith's Tadcaster Brewery Co. Ltd. The Company *v.* Gresham Life Assurance Society Ltd. and Another

Company—Rights of preference shareholders—Capitalization of profits—Increase of ordinary share capital—Distribution among ordinary shareholders

COURT OF APPEAL

SIR RAYMOND EVERSHED M.R., JENKINS AND MORRIS L.JJ.

1953. February 5.
[1953] Ch. 308.
[1953] 1 All E.R. 518.
[1953] 2 W.L.R. 516.

The question raised in this appeal from an order of Danckwerts J. was whether a proposed distribution of surplus profits among the ordinary shareholders by way of capitalization in accordance with the articles of the company would affect the rights or privileges of the preference shareholders and therefore could only be carried out with their sanction.

The existing paid-up capital of the company consisted of £1,740,000 5% cumulative preference stock and 1,920,000 ordinary shares of £1 each. The proposal was to distribute £280,000 undistributed profits in paying up in full 280,000 new ordinary shares of £1 each, such shares to be issued to the existing ordinary shareholders. The transaction was to take effect pursuant to article 115 of the articles which deals with the capitalization of profits. The result would be to swell the amount of issued ordinary shares and to give the holders of those shares added strength in any matter which the holders of the two classes of stock or shares are together considering. Article 47, which contains a statement of certain special privileges attached to the preference stockholders, provides:

The following provisions shall have effect: (*a*) The holders of the preference stock in the capital of the company shall have the right to receive a fixed cumulative preferential dividend at the rate of five per cent per annum on the amount of stock held by them respectively in priority to the holders of any other class of stock or shares of the company (*b*) The preference stock shall in a winding up of the company rank for repayment of capital, together with all arrears of the fixed preferential dividend thereon, whether declared or earned or not, up to the commencement of the winding up in priority to all other stock or shares in the capital of the company (*c*) The holders of the ordinary shares in the capital of the company shall be entitled between them to the surplus profits of the company which it shall from time to time be determined to distribute by way of dividend and in a winding up shall rank for repayment of capital after payment off of the capital and arrears of dividend represented by the said preference stock (*d*) The right of the holders of the preference stock to receive notice of or attend or vote at general meetings of the company shall be restricted in manner hereinafter mentioned.

One matter which came before Danckwerts J. arose under article 47 (*c*), being the question whether the rights there given to the holders of the ordinary shares in the capital of the company on a winding up were such as to exclude any participation of the preference stockholders in those surplus assets after the preference stockholders had received in priority repayment of capital and any unpaid dividend. The learned judge decided that the preference stockholders had no right of further participation in a winding up. Against that decision there was no appeal.

Article 48, which is headed 'Increase of Capital', provides:

The Company may from time to time in general meeting, whether all the shares for the time being authorized shall have been issued, or all the shares for the time being issued shall have been fully called up or not, increase its capital by the creation of new shares, such aggregate increase to be of such amount and to be divided into shares of such respective amounts as the general meeting resolving upon the creation thereof shall direct. Subject and without prejudice to any rights for the time being attached to the shares of any special class, any shares in such increased capital may have attached thereto such special rights or privileges as the general meeting resolving upon the creation thereof shall direct, or, failing such direction, as the directors shall by resolution determine, and in particular any such shares may be issued with a preferential, deferred or qualified right to dividends or in the distribution of assets and with a special or without any right of voting. With the sanction of a special resolution, any preference share may be issued on the terms that it is or at the option of the company is liable to be redeemed.

Article 50 provides:

Subject to any directions that may be given in accordance with the powers contained in the memorandum of association or these articles, any capital raised by the creation

of new shares shall be considered as part of the original capital, and shall be subject to the same provisions with reference to the payment of calls, transfer, transmission, forfeiture, lien and otherwise as if it had been part of the original capital.

Article 54, which is headed 'Modification of Rights', provides:

Subject to the provisions of s. 72 of the Companies Act, 1948, all or any of the rights or privileges attached to any class of shares forming part of the capital for the time being of the company may be affected, modified, dealt with or abrogated in any manner with the sanction of an extraordinary resolution passed at a separate meeting of the members of that class.

Article 69, which is headed 'Votes of Members', provides:

Subject to any special rights, restrictions or prohibitions as regards voting for the time being attached to any special class of shares in the capital of the company, on a show of hands every member personally present shall have one vote only, and in case of a poll every member shall (subject as hereinafter provided) have one vote for every share held by him. The holders of the preference stock shall not as such be entitled to receive notice of or attend or vote at any general meeting of the company unless (*a*) the fixed cumulative preferential dividend on the preference stock is in arrears or unpaid for six months prior to the date of the meeting: or (*b*) a resolution is proposed to be passed at such meeting for the sale of the company's undertaking, or for the winding up or reduction of the capital of the company, or for altering the regulations of the company so as directly to interfere with or affect the rights and privileges of the said holders.

Article 115 provides:

The Company in general meeting may at any time and from time to time pass a resolution that any sum not required for the payment or provision of any fixed preferential dividend... and standing to the credit... (of certain accounts) be capitalized and that such sum be appropriated as capital to and amongst the ordinary shareholders in the shares and proportions in which they would have been entitled thereto if the same had been distributed by way of dividend on the ordinary shares, and in such manner as the resolution may direct.

The Court of Appeal were of opinion that, although the articles in the present case differed in some respects from those of the Bristol Aeroplane Co. Ltd., and it might be thought were in some respects less favourable from the point of view of the ordinary shareholders, they were nevertheless bound by the decision of the Court in *White* v. *Bristol Aeroplane Co. Ltd.* (*supra*) and must hold, contrary to the argument of counsel for the preference stockholders, that there was in the proposed transaction no such 'affecting' of the rights or privileges of the preference stockholders as entitled them to be summoned to a separate meeting. The Master of the Rolls said that it seemed to him that if the argument for the preference stockholders was carried to its logical conclusion absurd results would follow. Carried to its fullest extent the argument must, he thought, mean that any activity on the part of the directors in pursuance of their powers which might in any way affect or touch the value of any of the privileges attached to the preference stock would be rendered ineffective save with the prior sanction of a special meeting of the preference stockholders. Such a conclusion obviously was counter to the ordinary conception of the relationship between preference and ordinary stockholders in a company of this character.

In re **Basioli deceased**

Will—Shares of estate devised and bequeathed to daughter of testator—Death of daughter intestate before death of testator—Wills Act, 1837, *s.* 33—*Preservation from lapse—Ascertainment of persons entitled on intestacy under Administration of Estates Act*, 1925—*Ascertainment at actual death of intestate*

CHANCERY DIVISION

UPJOHN J.

1953. January 15.
[1953] Ch. 367.
[1953] 1 All E.R. 301.
[1953] 2 W.L.R. 251.

Adjourned summons to determine whether, on the true construction of the will of the testatrix Maria Dominica Depaoli and of the Wills Act, 1837, s. 33, the bequests and devises given by the will to her daughter Adelina Emilia Basioli, who died in the lifetime of the testatrix leaving a son who survived the testatrix but died before attaining the age of 21 years, devolved on the daughter's intestacy in the same way as her original estate, viz. on the persons entitled under the Administration of Estates Act, 1925, ascertained at her actual death, or whether the persons entitled to such bequests and devises on the daughter's intestacy were to be ascertained on the footing that she survived the testatrix and died immediately after her.

Section 33 of the Wills Act, 1837, is in these terms:

> Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Two views on the construction of that section have been expressed. One view which has been called the narrow view is that the sole object of the section is to give effect to the gift in the testator's will and to prevent lapse and that the section was not intended to affect or alter the administration of the estate of the person receiving the gift by imputing to that person an artificial date of his or her death. The alternative view on the construction of the section has been referred to as the wide view and it is that the child who has predeceased the testator must be treated for all purposes in relation to the testator's gift as surviving the testator.

The learned judge said that authorities are to be found in support of both those views and he proceeded to review them. He said that he respectfully agreed with the views expressed by Farwell J. in In re *Hurd* [1941] 1 Ch. 196. In his judgment the section is aimed solely at preserving the gift in the parent's will and is not in any way concerned to alter the administration of the estate of the child who has predeceased the testator. Therefore in his opinion the persons interested on the intestacy of Mrs Basioli, in the shares devised and bequeathed to her by the will of the testatrix, were to be ascertained as at the actual date of her death.

Legal Notes

APPEALS

D'Avigdor-Goldsmid v. *Inland Revenue Commissioners*. *J.I.A.* LXXVIII [14]; [1953] A.C. 347; [1953] 1 All E.R. 403; [1953] 2 W.L.R. 372.

On 5 February 1953 the House of Lords (Viscount Simon and Lords Porter, Morton of Henryton, Reid and Asquith of Bishopstone) allowed the appeal of the taxpayer from the order of the Court of Appeal discharging an order of Vaisey J. dated 20 December 1950 [1951] 1 Ch. 321 (*J.I.A.* LXXVII [19]) dismissing the claims by the Crown for estate duty under the Finance Act, 1894, s. 2 (i) (*c*) or alternatively under s. 2 (i) (*d*) of that Act as extended by the Finance Act, 1939, s. 30 (1), in respect of moneys payable under a policy on the life of Sir Osmond d'Avigdor-Goldsmid which in 1934 had become absolutely vested in his eldest son Sir Henry d'Avigdor-Goldsmid. A statement of the material facts will be found in *J.I.A.* LXXVII [19].

The Court of Appeal held that Sir Henry was not a donee within the meaning of the Finance Act, 1894, s. 2 (i) (*c*), as he was within the marriage consideration, and the Crown did not contest that issue; but Sir Henry appealed to the House of Lords against the decision of the Court of Appeal that a beneficial interest arose on the death of Sir Osmond within the meaning of s. 2 (i) (*d*) which brings into charge to estate duty:

> Any annuity or other interest purchased or provided by the deceased, either by himself alone or in concert or by arrangement with any other person, to the extent of the beneficial interest accruing or arising by survivorship or otherwise on the death of the deceased.

Lord Morton said that three conditions must be satisfied in order to give rise to a claim for duty under the subsection, namely:

(1) there must be an annuity 'or other interest',
(2) it must have been purchased or provided by the deceased,
(3) a beneficial interest *therein* must accrue or arise by survivorship or otherwise on the death of the deceased,

and he observed that he inserted the word 'therein' because it is manifest that the duty is payable only if a beneficial interest in the annuity or other interest accrues or arises on the death, and that view is supported by the Finance Act, 1934, s. 28.

Their Lordships assumed for the purpose of the appeal that a policy is within the term 'other interest' in condition (1), though Lord Morton said he had long felt grave doubt whether the legislature ever intended that curious phrase to apply to the absolute beneficial ownership of a life policy.

Condition (2) was admittedly satisfied in view of the provisions of the Finance Act, 1939, s. 30.

Their Lordships held, however, that condition (3) was not satisfied, because in their view no beneficial interest in the policy accrued or arose on Sir Osmond's death. The whole beneficial interest in the policy passed to Sir Henry in 1934. His beneficial interest immediately after the death of Sir Osmond was exactly the same as his beneficial interest before the death of Sir Osmond, though it had become more valuable on the death. Confusion had arisen in certain earlier cases because the Court had regarded the moneys ultimately paid under the policy, instead of the policy itself, as the 'other interest purchased or provided'.

The House reviewed a number of the earlier cases including *A.G.* v. *Dobree* [1900] 1 Q.B. 442 and *A.G.* v. *Robinson* [1901] 2 I.R. 67 in the latter of which Chief Baron Palles had said:

> The thing subjected to taxation is 'the beneficial interest accruing or arising, by survivorship or otherwise, on the death of the deceased, in any annuity or in any other interest in property purchased or provided by the deceased', as mentioned in the section. The words 'accruing or arising' are used in contradistinction to 'passing'. They indicate, not the transfer upon death to another of something which the deceased or some other person had before or at the death, but the springing up, upon the death, and the then vesting in another, of property which previously had not been existing in any one. This is an exact description of money secured by a policy of insurance.

Viscount Simon said he did not appreciate the meaning of the learned Chief Baron as to 'an exact description of money secured by a policy of insurance'. Lord Morton shared his difficulty as to that passage, and found the reasons of the learned Chief Baron for his decision to be open to criticism.

It was argued for the Crown that if the 'other interest' was the policy and not the money paid under it at the death, then there was an increase in the value on the death which fell to be taxed and, under the Finance Act, 1934, s. 28, the value of that increase must be ascertained without regard to the value of the policy before the death, so that the whole policy money would be dutiable. Dealing with the point, Lord Porter said that the present case differed from *Adamson* v. *A.G.* [1933] A.C. 257, which led to the passing of the Finance Act, 1934, s. 28, for in Adamson's case there was on the death a change in the interests of the beneficiaries. They had before the death contingent interests which might have been divested, while after the death they had vested interests. In the present case, however, the rights of Sir Henry had not changed on the death.

It was further argued for the Crown that if the benefit had been an annuity for 10 years instead of a lump sum, s. 2 (i) (*d*) would certainly have applied, and that it would be difficult to hold that a different rule should apply merely because the policy moneys were payable in ten instalments instead of in a lump sum. Discussing the matter Lord Reid said:

> I am not at all convinced that this argument with regard to annuities is right. In that case also no duty is payable unless a beneficial interest accrued or arose on the death. The Attorney-General laid stress on the terms of s. 15 of the Act of 1894. That section exempts certain small annuities from duty. It does not say, and I do not think that it means, that, no matter what the circumstances may be, every annuity of the kind which it mentions would necessarily fall within the scope of s. 2 but for its provisions. It is an exempting section, and it appears to me to be more natural to read it as meaning that an annuity which would otherwise fall within the scope of s. 2 is exempted if it complies with the requirements of s. 15. That would leave it open to say, in a particular case, that an annuity does not need to be exempted because the circumstances are such that it never came within the scope of s. 2.

Lord Asquith concurred and the appeal by Sir Henry d'Avigdor-Goldsmid was allowed.

In re *Brassey's Deed Trusts: Coutts and Company* v. *Inland Revenue Commissoners*. *J.I.A.* LXXVIII [13]; [1953] A.C. 267; [1953] 1 All E.R. 418; [1953] 2 W.L.R. 364.

On 5 February 1953 the House of Lords (Earl Jowitt and Lords Porter, Reid and Asquith of Bishopstone) allowed the appeal of the trustees from

a decision of the Court of Appeal dated 20 June 1951 [1951] 1 Ch. 979 (*J.I.A.* LXXVIII [13]) affirming an order of Romer J. dated 13 December 1950 [1951] 1 Ch. 351 (*J.I.A.* LXXVII [17]), whereby it was declared that estate duty became payable on the death of Captain Brassey under the Finance Act, 1894, s. 2 (i) (*b*) by the cesser of the right of reversioners to have the premiums on settled policies paid out of the income of the trust fund. A statement of the material facts will be found in *J.I.A.* LXXVII [17].

Part of the trust funds under a settlement consisted of policies of assurance on the life of Captain Brassey for the aggregate amount of £40,000 the premiums on which were in accordance with directions in the trust deed paid by the trustees out of the annual income of the trust estate. Subject to the payment of those premiums Hugo Brassey as tenant for life was entitled to the whole income. When the policies matured on the death of Captain Brassey the liability to pay the premiums ceased and Hugo Brassey became entitled to the whole income free from the burden of the premiums. At the time of Captain Brassey's death his three daughters had a vested beneficial interest in the trust estate as tenants in remainder. The question was whether in these circumstances the daughters had an interest in any property which ceased on the death of Captain Brassey and if so whether the benefit which then accrued to Hugo Brassey accrued by reason of the cesser of that interest so as to attract estate duty under s. 2 (i) (*b*) of the Finance Act, 1894, on that slice of the trust funds the income of which was required to meet the premiums on the policies. The Crown contended that the property in which the daughters had an interest was the whole property included in the trust and that the interest which ceased on the death of Captain Brassey was their right to have the premiums paid out of the income thereof and that a benefit accrued to Hugo Brassey from the cesser of that interest and therefore the Crown was entitled to claim estate duty.

That contention was accepted by Romer J. and the Court of Appeal. The House of Lords allowed the appeal of the trustees.

Lord Porter said:

I cannot think that in any ordinary sense the interest was the right to have the premiums paid. What the ladies were interested in was the receipt of the policy money. The death did not affect that interest so as to make it cease, it removed a prerequisite to the insurance company's liability. It was merely an event on which the insurance money became payable. The ladies' interest was unchanged. If the question were whether Hugo Brassey had obtained an advantage by reason of the death, undoubtedly he did, but the benefit accruing or arising is but one element towards the establishment of the Crown's claim. An interest in property and a cesser of that interest are further requisites for the respondent's success. . . . The ladies have not ceased to enjoy anything. On the contrary the property in which they are interested has become more valuable.

Lord Reid said:

When estate duty was introduced by the Finance Act, 1894, the rates of duty were low. For an estate of between £100,000 and £150,000 the rate of duty was six per cent. and even for the largest estates it was only eight per cent. The Act provided a method of valuation of benefits accruing on the cesser of an interest which generally inflated the real value of such benefits and often resulted in the statutory valuation very greatly exceeding any possible real value. No doubt this was administratively a convenient course, and, as the rates of duty were such that the additional burden thrown on the taxpayer was in any case relatively small, it may have been thought that practical convenience outweighed any small injustice which might result. As, however, the

rates of duty were increased from time to time, the effect of the disparity became more serious. This was, of course, well known to those who advised Parliament in these matters, but, nevertheless, Parliament has not chosen to make any alteration. In my view, the glaring disparity which appears in the present case cannot properly be attributed to the Act of 1894, but must be attributed to the fact that Parliament has not chosen to make any change to meet vastly different circumstances, and it is, therefore, not a matter which can properly be regarded as material in construing the Act of 1894. That Act is a taxing statute and must be construed as such, but it ought not to be more strictly construed because of the effect of subsequent enactments.

The Finance Act, 1894, is an Act which applies to the United Kingdom, and the word 'interest' is an ordinary word of the English language, so one ought not to give to the word a technical meaning peculiar to English or Scots law unless there is some indication that such a technical meaning is intended. I can find no such indication in this Act. The Act gives some assistance in determining what is meant by an 'interest'. Section 2 comes into operation if the property does not 'pass' under s. 1 so an 'interest' is some right with regard to the property, e.g. an annuity payable out of the income from it, which can cease without the property passing.

The tenants in remainder lost nothing when the premiums ceased to be paid: on the contrary they gained by the addition of £40,000 to the capital. I find it very difficult to see how a person's 'interest' in any real sense can cease unless by the cesser he loses something of actual or at least potential value which he might have had if the deceased had lived longer.

Union Corporation Ltd. v. *Inland Revenue Commissioners;*
Johannesburg Consolidated Investment Co. Ltd. v. *The Same;*
Trinidad Leaseholds Ltd. v. *The Same.* *J.I.A.* LXXVIII [34]

On 9 March 1953 the House of Lords (Lord Normand, Lord Oaksey, Lord Morton of Henryton, Lord Reid and Lord Cohen) affirmed the decision of the Court of Appeal.

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.

Nestlé Company Limited *v.* Inland Revenue Commissioners

Stamp duty—Company—Statement of nominal share capital—Increase of registered capital—In connexion with scheme of reconstruction or amalgamation—Acquisition of undertaking of any particular existing company—Exemption from duty—Finance Act, 1927, *s.* 55(1)

COURT OF APPEAL

EVERSHED M.R., JENKINS AND HODSON L. JJ.

1953. March 10.
[1953] Ch. 395.
[1953] 1 All E.R. 877.
[1953] 2 W.L.R. 786.

Stamp duty on the nominal share capital of a company registered with limited liability is chargeable *ad valorem* at the rate of 2*s.* for every £100 and any fraction of £100 over any multiple of £100 of the amount of such capital or any increase of such capital as the case may be. Capital duty was first imposed by s. 11 of the Customs and Inland Revenue Act, 1888, and is now levied under the provisions of ss. 112 and 113 of the Stamp Act, 1891.

Under the provisions of s. 55(1) of the Finance Act, 1927, if, in connexion with a scheme of reconstruction of any company or companies, a company with limited liability is to be registered, or has been incorporated, or has increased its capital, with a view to the acquisition either of the undertaking or of not less than 90% of the issued share capital of any particular existing company, and the consideration for the acquisition consists in the issue of shares in the transferee company to the holders of shares in the existing company in exchange for the shares held by them in the existing company, then the nominal share capital of the transferee company or the amount by which the capital of the transferee company has been increased, as the case may be, shall for the purpose of computing the stamp duty chargeable in respect of that capital be treated as being reduced by an amount equal to the amount of the share capital of the existing company.

The appellant company was a company incorporated in England under the Companies Act, 1948. Its share capital was held substantially by another corporation registered in the republic of Panama. In March 1951 it took steps to acquire the whole of the share capital of four other companies. Two of those companies, Nesmilk Ltd. and Nesfood Ltd., were English companies, having been incorporated in England under the relevant English Companies Act. The other two, Nestlé's Food Products (Northern Ireland) Ltd. and Ulster Farm Products Ltd., were companies formed pursuant to the Northern Ireland Companies Act, 1932. As a consequence of the Government of Ireland Act, 1920, and steps taken pursuant thereto, the Parliament of Northern Ireland

has exclusive jurisdiction as regards the regulation of joint-stock companies within the confines of Northern Ireland, so that the English Companies Act, 1948, under which the appellant company was incorporated, does not apply to Northern Ireland. The increase of share capital which was requisite for the acquisition of the shares in the four companies amounted to £3,410,000, of which the greater part was attributable to the two English companies.

The appellant company presented to the Commissioners a statement of increase of nominal capital for their opinion as to the stamp duty chargeable in respect thereof. The Commissioners admitted that so much of the increase as was referable to the acquisition of the issued share capital of the two companies incorporated under the Companies Act, 1948, was entitled to exemption by virtue of s. 55(1) of the Finance Act, 1927, but refused exemption in respect of the balance which was referable to the acquisition of the issued share capital of the two companies incorporated under the Northern Ireland Companies Act, 1932.

Danckwerts J. held that the exemption conferred by the Act of 1927 applied only to the acquisition of the capital of companies regulated by the laws of Great Britain. The company appealed.

The appellant company's main argument was that there is no definition of 'company' in the Act of 1927, and therefore there is no reason why the word should not include any corporation in the world which can be said to answer the description of a company in the sense in which it is used in the Companies Acts. It was said that if it had been intended to limit the relief to English and Scottish companies, the statute could and would have so stated in clear terms. The answer to that argument is contained in the Finance Act, 1927, itself and in the Stamp Act, 1891, which imposed the duty or rather re-imposed it, since the duty was first imposed by the Customs and Inland Revenue Act, 1888. One expects to find in legislation of a fiscal character that the word 'company' is intended to include companies subject to the laws of this country and not foreign companies. Sections 112 and 113 of the Stamp Act which impose the duty clearly do not apply to companies outside the United Kingdom. In s. 55(1) of the Act of 1927 where the word 'company' is applied to a transferee company, that is to say, a company which is entitled to relief from duty, it clearly refers only to companies within the United Kingdom, and the context would at least suggest, therefore, that the 'particular existing company' in the section would be the same kind of company. The Court of Appeal was in agreement with the learned judge that the language of the section supports a limited construction of the words 'particular existing company'. It shows that what is contemplated is an existing company which has paid stamp duty and is accordingly a United Kingdom company. The Court therefore rejected the wide construction of the words 'particular existing company' contended for by the appellant company and adopted the narrower construction, which would exclude the two companies incorporated in Northern Ireland, since at the time the Finance Act, 1927, was passed the Government of Ireland Act, 1920, had come into operation and Northern Ireland had for this purpose been constituted as a separate country.

A second argument put forward by the appellant company was that if it was wrong in its first contention then 'particular existing company' means a 'particular existing company liable to stamp duty'. The two companies are

liable to stamp duty, since the Stamp Act, 1891, is still in operation in Northern Ireland and accordingly it was said they are within the section. The short answer to that argument was that the words 'particular existing company' are not to be construed as equivalent to a 'particular existing company which is liable to stamp duty'. The Stamp Act, 1891, continues in force in Northern Ireland but it continues as part of its own legislation, and the word 'company' in the Act of 1927 is confined therefore to United Kingdom companies, excluding Northern Ireland.

The Commissioners were therefore right in refusing exemption from duty in respect of the increase of capital in so far as it was attributable to the acquisition of the issued share capital of the two companies incorporated under the Northern Ireland Companies Act, 1932.

In re Robb's Will Trusts

Marshall *v.* Marshall and others

Accumulation of income—Statutory restrictions—Annuities charged on income of residuary estate—Implied trust for accumulation—Title to income unlawfully accumulated—Law of Property Act, 1925, *s.* 164(1) (*b*)

CHANCERY DIVISION

DANCKWERTS J.

1953. March 19.
[1953] Ch. 459.
[1953] 1 All E.R. 920.
[1953] 2 W.L.R. 819.

Adjourned summons to determine *inter alia* whether on the true construction of the will of John Robb and in the events which had happened the income of the residuary estate from time to time arising after the expiration of twenty-one years from the death of the testator and pending the death of the surviving annuitant, the defendant Alice Margaret Anne Marshall, ought, subject to the payment of the annuity given by the said will to the said defendant, to have been and to be held by the trustee or trustees for the time being of the said will (i) on trust for the next of kin of the testator as under a partial intestacy, or (ii) on trust to divide the same equally between such of the grandchildren of the testator as for the time being, being male had attained the age of twenty-five years, or being female had attained that age or had married (or their personal representatives), or (iii) on some other and what trusts.

By his will dated 7 September 1916 the testator, who died on 25 November 1916, devised and bequeathed all his real and personal estate not otherwise disposed of unto his trustees on trust to sell call in and convert into money the same or such part thereof as should not consist of money and with and out of the proceeds of such sale calling in and conversion and with and out of his ready money to pay all his just debts, funeral and testamentary expenses and he directed his trustees to invest the residue thereof in or on such stocks, funds, shares or securities as should be authorized by law. The will proceeds:

> ...and out of the annual income thereof I direct my trustees to pay to my wife during her life an annuity of £120...and to my said daughter during her life an annuity of £52...and after the deaths of my said wife and daughter I direct my trustees to stand possessed of my residuary estate...in trust for all my grandchildren who shall be living at my death or any of them born at any time afterwards and who being male attain the age of twenty-five years before the expiration of twenty-one years from the

death of the survivor of my said wife and daughter or being female attain the age of twenty-five years or marry before the expiration of such twenty-one years if more than one in equal shares.

The testator then gave a series of powers:

I empower my trustees to accumulate the surplus income (if any) of my residuary estate at compound interest by investing the same and the resulting income thereof in any investments hereby authorised. . . .

I declare that my trustees may pay or apply the whole or any part at their discretion of the income or the capital of the share to which my grandson James shall for the time being be entitled in expectancy and would if of the age of twenty-five years be entitled in possession under the trusts hereinbefore declared for or towards his maintenance, education, advancement or benefit and shall invest the surplus income (if any) in any such investments as are hereby authorised in augmentation of the capital of such share.

On 9 December 1921 the testator's widow died and her annuity of £120 a year came to an end. Only the annuity of £52 a year to his daughter remained at the date of this summons. The testator had three children, his said daughter who was the first defendant and two sons, one of whom died on 7 October 1923 and the other on 7 June 1944. He had fifteen grandchildren, of whom twelve were still living and had attained the age of twenty-five and two had died under that age. The last defendant, James Morrison Robb, is the grandchild who is referred to by name in the will as James and he was born on 15 December 1893, so that at the date of the testator's will he was already nearly twenty-three years old.

The income so far as not required by the annuities was accumulated for a considerable period. It was submitted by counsel for the next-of-kin and by counsel for the grandson James that having regard to the provisions of the Law of Property Act, 1925, s. 164, or the provisions of the Thellusson Act (39 and 40 Geo. 3. c. 98) which were in similar terms, no accumulation could lawfully be made after the expiration of twenty-one years from the death of the testator, *i.e. 25 November 1937. The lawfulness of such accumulation* was defended by counsel for the grandchildren (other than James), who argued that there was no express trust for accumulation in the will but only a power of accumulation which was in no way contrary to the statutory restriction.

Section 164(1) of the Law of Property Act, 1925, provides:

No person may by any instrument or otherwise settle or dispose of any property in such manner that the income thereof shall. . . be wholly or partially accumulated for any longer period than one of the following, namely

and then four periods are named of which only the second is material in the present case: a term of twenty-one years from the death of the testator. The section then proceeds:

. . . In every case where any accumulation is directed otherwise than as aforesaid, the direction shall (save as hereinafter mentioned) be void; and the income of the property directed to be accumulated shall, so long as the same is directed to be accumulated contrary to this section, go to and be received by the person or persons who would have been entitled thereto if such accumulation had not been directed.

The learned judge held that when there was no direction to accumulate but only a power to accumulate unlimited in form such a power was not

necessarily bad in itself, but it could not be exercised lawfully by the persons to whom such power was given so as to authorize an accumulation for a longer period than twenty-one years from the death of the testator. Any other result would be contrary to the prohibition which is contained in the opening portion of s. 164(1).

There was, he said, a further difficulty in the present case. The annuitants were given the benefit of a continuing charge on the income of the testator's residuary estate and were entitled to have the annuities in any year in which the income was insufficient made up out of the income of subsequent or past years. That, according to the principles laid down by the Court of Appeal in In re *Coller's Deed Trusts* [1937] 3 All E.R. 293, would necessarily involve an accumulation of the income of the residuary estate until finally the fund was released by the death of the last of the annuitants.

The contention that any accumulation could lawfully be made after the expiration of twenty-one years from the death of the testator failed, and therefore the question which he, the learned judge, had to consider was what was to be done with the income from the time when the accumulation ceased to be lawful. Was it to be divided among the grandchildren who had obtained an interest by attaining the age of twenty-five years? The alternative to the grandchildren taking was an intestacy, so that the income until the death of the last tenant for life would have to be divided between the next-of-kin of the testator according to the law of intestacy. In this case subject to the annuities there was no gift whatever until the death of the survivor of the widow and daughter. Then and then only the testator's trustees are directed to stand possessed of the residuary estate in trust for the relevant grandchildren. It followed that any income which might not lawfully be accumulated was not given to the grandchildren but was undisposed of and must go to the next-of-kin.

In re **Langston (deceased)**

Will—Revocation—Will made in contemplation of marriage—'I bequeath unto my fiancée'—Law of Property Act, 1925, s. 177(1)

PROBATE DIVORCE AND ADMIRALTY DIVISION

DAVIES J.

1953. March 25.
[1953] P. 100.
[1953] 1 All E.R. 928.
[1953] 1 W.L.R. 581.

This was a motion by the applicant, the widow of the testator, for a grant of probate of a will of the testator made on 4 November 1935. By the said will he devised and bequeathed 'unto my fiancée Maida Edith Beck' all his property and appointed her sole executrix. The testator was then a widower and he was married to the applicant two months later, namely, on 7 January 1936. He died on 28 December 1952.

By s. 18 of the Wills Act, 1837, it is provided:

> ...Every will made by a man or woman shall be revoked by his or her marriage.

but by s. 177(1) of the Law of Property Act, 1925, which applies to any will made on or after 1 January 1926, it is provided:

> A will expressed to be made in contemplation of a marriage shall, notwithstanding anything in s. 18 of the Wills Act, 1837, or any other statutory provision or rule of law to the contrary, not be revoked by the solemnisation of the marriage contemplated.

The question for the Court was whether or not the will, by reason of the expression 'unto my fiancée Maida Edith Beck', was a will 'expressed to be made in contemplation of a marriage', so as to remain valid after the marriage which was solemnized between the applicant and the testator. If it is not, there would be an intestacy. The only persons other than the applicant who were interested in this estate on an intestacy were three nieces of the deceased, and they had all signed consents to this application.

Among the authorities cited by counsel for the applicant was *In re Knight*, an unreported case in 1944, which is referred to in Tristram and Coote's *Probate Practice*, 19th ed., p. 25, where, according to the text-book:

> By his will the testator gave all his estate 'to E.L.B. my future wife'. On his death she (as widow) applied for a grant. It was held that the will was not revoked.

The learned judge in making a grant of probate in the present case said:

> Those authorities all seem to me to make it quite clear that when, in the present case, the testator used the words 'unto my fiancée Maida Edith Beck' he was expressing a contemplation of marriage to that named lady. *In re Knight* is, in my opinion, a direct authority in favour of the present motion. There is obviously no effective difference between 'my future wife' and 'my fiancée'. Accordingly, I hold that this will was expressed to be made in contemplation of a marriage to the applicant and was not revoked by his subsequent marriage to her.

In re Nesbitt's Will Trusts

Estate Duty—Legacy payable in part out of Australian assets—Incidence of liability for estate duty paid in respect of Australian assets

CHANCERY DIVISION
ROXBURGH J.

1953. March 20.
[1953] 1 All E.R. 936.

By her will dated 16 February 1946, the testatrix, who died on 10 January 1949, directed the sale and conversion of her real and personal estate and continued:

> My trustee shall out of the moneys to arise from such sale or conversion of my said real and personal estate and out of my ready money pay my funeral and testamentary expenses death duties and legacy duties (if any) and my debts and shall stand possessed of the residue... upon trust to pay thereout (*a*) the following legacies....

The estate of the testatrix consisted in part of assets in Australia. The question for the Court was whether or not the English estate duty on those assets had to be borne in proper proportions by the legatees. It was conceded that it must be so borne unless there was a direction in the will to the contrary. The learned judge held that the will did contain a direction to the contrary. It seemed to him that it was impossible so to construe the words 'death duties' that they included estate duty on English assets and did not include estate duty on Australian assets. He saw no reason for construing them as meaning only those death duties which are testamentary expenses. Indeed, so to construe them would make them entirely otiose because testamentary expenses had already been mentioned. He felt no doubt that the direction was to pay estate duty, including this particular estate duty, before any legacies were payable and before the fund was constituted out of which the legacies were payable.

In re Lewis's Declaration of Trust
Lewis *v.* Ryder

Slander of title—Right asserted by defendant on behalf of an intestate's estate—No letters of administration—Action disputing right—Competency—No malice or special damage—Declaration of title

CHANCERY DIVISION

HARMAN J.

1953. March 25.
[1953] 1 All E.R. 1005.

The plaintiff, Diana Myrna Spencer Lewis, alleged that she was the owner of certain shares in and a deposit with the Woolwich Equitable Building Society, and she claimed an injunction restraining the defendant, Napoleon Ryder, from representing that he had any interest in or claim to the said shares or deposit. She alleged in her statement of claim that the defendant had fraudulently asserted a claim to the said shares and deposit knowing that his claim was untrue or not caring whether it was true or false and had refused to withdraw his claim, and that by reason of the said claim the plaintiff was unable to deal with the said investments.

The defendant Ryder was a Polish Jew. In his defence he denied that his claim was fraudulent and said it was asserted on behalf of his sister Rozia Liebeskind, who was believed to have died intestate in Poland, as a victim of persecution, sometime between 1939 and 1947. He made no claim to the investments other than through the estate of his said sister. He alleged that the investments represented part of a sum of £12,000 entrusted to the plaintiff's mother by the defendant's said sister and invested in the name of the plaintiff by her mother. This allegation was founded on what he was told by Mrs Lewis in September 1938, and in the opinion of the learned judge he had no reason to doubt her word, and from then onwards he regarded her as in effect his debtor if his sister should fail, as she did, to emerge from the ghetto in Krakau. The story was in fact untrue, and the defendant was mistaken in supposing that his sister's money was invested in these securities and his assertions were unjustified. The question was whether they were made honestly or as part of a conspiracy between himself and the plaintiff's mother to deprive the plaintiff of her property. His Lordship held that although the claims made were unjustified he had no reason to suppose that the defendant did not accept Mrs Lewis's story. It might be that his acceptance was careless and that he acted in an ill-considered and foolish way but that did not make his act fraudulent. Recklessness, as used when applied to fraud, is never the same as carelessness.

The defendant pleaded that at the date when the writ was issued there was no personal representative of Mrs Rozia Liebeskind in existence, and that the action was therefore premature. During the course of the action Mr Ryder did obtain a grant of letters of administration to his sister's estate. The learned judge said that although a plaintiff cannot maintain an action as personal representative when it appears that no letters of administration had issued before the writ, it did not follow that a defendant who asserts a right as next-of-kin of a deceased person and as being entitled to a grant cannot be sued if he sets up a wrongful claim. To admit that would be to allow a defendant to take advantage of his own procrastination which he might continue indefinitely.

There remained a point of some difficulty, namely, that an action such as this is in effect a claim of slander of title and that the gist of that action is that the defendant should have made his claim maliciously and have thereby caused special damage to the plaintiff. Here the learned judge had negatived malice which was tantamount to the fraud alleged in the statement of claim, and it was urged on him that the action did not lie. That, he said, was right in so far as it was an action for damages for slander; but in the present case the defendant never withdrew his wrongful claim. He still maintained it, and if the action were dismissed he would presumably continue to do so, with the result that the plaintiff would not be able, at any rate without giving an indemnity, to make herself mistress of what he, the learned judge, had held to be her own property. The solution appeared to lie in the provisions of R.S.C. Ord. 25 r. 5 which enables a declaratory judgment to be pronounced whether any consequential relief was or could be claimed or not.

The learned judge accordingly pronounced judgment against the defendant Ryder, limited in form to a declaration that as personal representative of his sister he had no right, title or interest in the building society shares and deposit which stood in the plaintiff's name.

Bray (Inspector of Taxes) *v.* Colenbrander
Harvey (Inspector of Taxes) *v.* Breyfogle

Income Tax—Remuneration from employment outside the United Kingdom—Duties performed in the United Kingdom—Employee resident in the United Kingdom—Income Tax Act, 1918, *Schedule D, Case II, Schedule D, Case V—Finance Act*, 1922, *s.* 18(1)

HOUSE OF LORDS

LORDS NORMAND, OAKSEY, MORTON OF HENRYTON, REID AND COHEN.

1953. April 20.
[1953] A.C. 593.
[1953] 1 All E.R. 1090.
[1953] 2 W.L.R. 927.

In each of these appeals the taxpayer entered into a contract of employment with an employer resident abroad. The contract was in each case made in the country of the employer's residence, and it provided for payment of the employee's remuneration in that country. Substantially the whole duties of the employee under the contract in each case were performed in the United Kingdom and he was resident in the United Kingdom at all material times.

The Crown assessed each of the taxpayers under Schedule E of the Income Tax Act, 1918, in respect of all sums paid to him as the remuneration of his employment on the ground that, under Case II of Schedule D, such sums by the provisions of the Finance Act, 1922, s. 18(1), became chargeable under Schedule E, so that he was assessable as a person residing in the United Kingdom, in respect of the whole annual profits and gains accruing to him from an employment carried on in the United Kingdom. Each taxpayer maintained that he was assessable, under Case V of Schedule D, only on the actual sums received by him in the United Kingdom in respect of the profits and gains arising from a source of income wholly situated abroad. He claimed the benefit of the express exception in s. 18(1) of the Act of 1922 whereby profits and gains chargeable under Case V of Schedule D remain chargeable under that schedule.

It was held by the House of Lords in *Colquhoun* v. *Brooks* (1889) 14 App. Cas. 493 that whenever one finds a source of taxable income of which source it can properly be said that it is wholly situated abroad, the income from that source where taxable falls to be taxed under Case V of Schedule D. The real point of controversy between the Crown and the taxpayer in the present cases was whether or not the employment which was the taxpayer's source of income was wholly situated outside the United Kingdom. In *Bennett* v. *Marshall* [1938] 1 K.B. 591 the Court of Appeal held that the employee who was the taxpayer in that case was assessable in respect of his remuneration under Case V because the place of payment was outside the United Kingdom and that the fact that some of his duties were performed in the United Kingdom was irrelevant. In the present cases the Special Commissioners, Danckwerts J. and the Court of Appeal followed *Bennett* v. *Marshall* as an authority binding on them. The present appeals were brought for the purpose of bringing under review the ruling of the Court of Appeal in that case. It was there held both by Lawrence J. and the Court of Appeal that the case was concluded by the decision and reasoning of the House of Lords in *Foulsham* v. *Pickles* [1925] A.C. 458. The facts in *Foulsham* v. *Pickles* were the converse of those in *Bennett* v. *Marshall*, and in the present cases, in that the taxpayer was employed abroad by an English company under a contract of employment which provided for payment of his remuneration in England. The House of Lords held that the employment was not situated wholly out of the United Kingdom and that the taxpayer was therefore assessable under Case II and not under Case V. The question debated in *Bennett* v. *Marshall* was whether the *ratio decidendi* of the House of Lords in *Foulsham* v. *Pickles* was (*a*) that the place or places where the employee performed his duties were irrelevant to the question whether the employment was wholly situated outside the United Kingdom and that the only relevant matter was the place of payment of his remuneration, or (*b*) that the place of payment was a relevant fact without excluding as irrelevant the place or places where the duties were performed. Both Lawrence J. in the Court below and all the judges in the Court of Appeal came to the conclusion after a close examination of the speeches of the noble Lords who took part in the decision of *Foulsham* v. *Pickles* that the House of Lords in that case had definitely decided that in a case where the source of income is an employment the locality of the employment is not the place where the activities of the employee are exercised, but either the place where the contract for payment is deemed to have a locality or the place where the remuneration for the employment is paid.

In the present cases the House of Lords came to the same conclusion. Lord Normand in delivering the leading opinion said:

> I have studied the judgments of Lawrence J. and of the Court of Appeal in *Bennett* v. *Marshall* in so far as they bear on the question of the *ratio decidendi* of *Foulsham* v. *Pickles* and I am unable to find any ground for rejecting them or indeed any ground for criticism. It is my humble opinion that Sir Wilfred Greene M.R., who dealt most fully with the point, expounded the opinions of the House of Lords with extraordinary precision and insight. It would be a mere waste of time to go over again the ground that he has so completely and satisfactorily covered in that part of his judgment. There is no doubt in my mind that this case is governed by the *ratio* of *Foulsham* v. *Pickles*. The appeals must therefore I think be dismissed with costs.

Order accordingly.

In re Thomson Settlement Trusts

Robertson *v.* Makepiece and others

Settlement—Appointment—Unappointed part of trust fund—Hotchpot—Valuation of life interest—Interest on ascertained value

CHANCERY DIVISION

ROXBURGH J.

1953. April 21.
[1953] Ch. 414.
[1953] 1 All E.R. 1139.
[1953] 2 W.L.R. 978.

The question for the Court in this adjourned summons was whether, for the purpose of the hotchpot clause in a marriage settlement, a life interest appointed to one of the daughters of the marriage ought, after her death, to be valued in accordance with its then ascertained duration or in accordance with her expectation of life when her interest fell into possession on the death of the survivor of the spouses, and whether the value of the life interest so ascertained ought to be brought into hotchpot at 4% per annum interest (or some other and what rate) as from the death of the said survivor.

By his will the husband exercised his testamentary power of appointment by directing the division of the trust fund into four equal shares, one such share to be held in trust for each of his three daughters and the remaining share for three granddaughters equally for their respective lives with cross remainders. Roxburgh J. held that the appointment except in regard to the life interests so appointed was invalid. The husband died on 22 March 1933. Edith, one of the daughters, died on 29 March 1941, and in order to apply the provisions of the hotchpot clause it became necessary to value her life interest.

The question as to whether in such circumstances the life interest ought to be valued in accordance with its then ascertained duration or in accordance with the expectation of life when it fell into possession has been the subject of some conflict of authority.

The learned judge after considering the relevant authorities said:

In the present case the valuation is required to carry out the dispositions of the settlement. The date at which it ought to be carried out is the date when the life interest fell into possession. In my judgment it would be a strange thing if a different value was put on the life interest because of the accident that nobody came to the Court to have a valuation made until the life tenant had died. Accordingly in my judgment the life interest must be actuarially valued as on 22 March 1933.

The next question is whether the value of the life interest ascertained in the manner I have directed ought to be brought into hotchpot with interest at the rate of four per cent per annum. I do not think that interest comes into this matter. Let me take the simplest illustration which, I think, represents the essential features of the present case. Two persons are entitled in default of an appointment. An appointment of a life interest in the whole is made to one of them. The effect of that transaction is this. Apart from the appointment, the second of the two would be entitled to half the income and capital straight away. The effect of the appointment is to deprive him of his half of the income during the life of the appointee; but that is precisely the thing for which he received compensation by getting a larger share of the capital. He gets no income during the life of the appointee. On the other hand, on the death of the appointee he gets more than one half of the fund. It is true that it is only a rough and ready compensation, because the life tenant may have a short life, in which case the other gains, or the life tenant may have a long life, in which case the other loses, but that is inherent in a prospective actuarial calculation. It seems to me that there can be no question of

waiting until the death of the life tenant and then considering whether some interest ought to be debited to the deceased life tenant on the footing of the actual duration of the life tenancy.

In re Holder's Will Trusts

National Provincial Bank Limited *v.* Holder and others

Will—Administration—Capital or income—Monthly increment on National Savings Certificates

CHANCERY DIVISION

ROXBURGH J.

1953. April 16.
[1953] Ch. 468.
[1953] 2 All E.R. 1.
[1953] 2 W.L.R. 1079.

At the date of his death on 21 September 1951 the testator held five hundred units of National Savings Certificates, seventh issue, of 15*s.* each, purchased by him on 12 June 1940 at a cost of £375. His executor called in the certificates and received £534 7*s.* 6*d.* The question for the Court was whether for the purpose of the directions contained in the will the increment of £159 7*s.* 6*d.* on the initial cost was to be treated as capital or income.

The prospectus of the seventh issue of National Savings Certificates in so far as material contained the following statements:

Put your savings into National Savings Certificates. See how they grow in value.

A National Savings Certificate costs 15*s.* and becomes worth 20*s.* 6*d.* in ten years at the following rate of growth:

At the end of the first year 3*d.* interest is added. Thereafter ½*d.* is added at the end of each completed period of one month up to the end of the tenth year. A bonus of 3*d.* is added at the end of the fifth year and a further bonus of 6*d.* at the end of the tenth year.

This represents a rate of interest of £3 3*s.* 5*d.* per cent per annum over the whole period of ten years.

No income tax is payable on the interest on certificates, and the interest they earn need not be included in any income tax return.

After short notice Certificates may be cashed at any time...the owner receiving whatever interest is due.

By a clause in his will the testator provided as follows:

I expressly declare that no part of any dividends rents interest or moneys of the nature of income which shall actually be paid after my death shall be apportioned or treated as capital of my estate and I declare that the whole thereof (whether the same be paid in respect of a period wholly or only partly prior to my death) shall belong to the person entitled to the investment or property from which the same respectively arose and if there shall be a tenant for life of such investment or property such dividend rent or interest shall be income payable to such tenant for life.

Counsel for those interested in capital conceded that any interest earned by the National Savings Certificates after the death of the testator must be income.

As between the beneficiaries interested in the income of the deceased's estate and those interested in capital the question to be determined was whether, having regard to the aforesaid direction in the will, the interest earned during the lifetime of the testator on the National Savings Certificates was to be treated as income or whether it had been capitalized during the lifetime of the testator so as to lose the character of moneys of the nature of income.

The learned judge said that, although the sum received by the executor included an amount which in its inception was interest, the tenor of the prospectus as a whole was to effect an agreement between the purchaser of National Savings Certificates and the government that, so long as he held them, a sum would be added to the principal month by month with the result that at the end of each completed month the addition was capitalized unless the holder, before the end of the month, called for repayment.

Stokes *v.* Bennett (Inspector of Taxes)

Annuity free of income tax—Payments made by divorced husband resident abroad—No evidence of deduction of income tax—No evidence of husband's receipt of taxed income—Income Tax Act, 1918, *All Schedules Rules*, *r.* 21

CHANCERY DIVISION

UPJOHN J.

1953. May 21.
[1953] 2 All E.R. 313.
[1953] 3 W.L.R. 170.

This was an appeal by Mrs A. G. Stokes from a decision of the Special Commissioners of Income Tax, confirming assessments upon her for 1946/47 to 1950/51 under Case III of Schedule D in respect of maintenance of £22 per month, free of tax, which was payable to her by her divorced husband under an order of the Divorce Court.

For the purposes of argument the case proceeded on the footing that the husband had regularly made payments of £22 a month, though in fact the amount payable had been reduced by virtue of the Finance Act, 1941, s. 25 and by the Finance (No. 2) Act, 1945, s. 20, and up to 1947 the husband had paid rather less than the amounts due and later had paid rather more. It was also agreed that the order ought to be construed as an order to pay a gross sum of such amount as, after deduction of income tax, would leave the net sum of £22 per month.

The husband was a British subject, and in 1946 he went to reside in Brazil and had remained so resident. There was no evidence to show either that since 1946 he had been in receipt of income which had suffered British income tax or that under *r.* 21 of the Income Tax Act, 1918, All Schedules Rules, he had accounted to the Commissioners of Inland Revenue for any British income tax deducted from the annuity payments.

The case was argued in two stages, first, by considering the position on the footing that the husband had remained resident at all material times in the United Kingdom, and secondly, by considering how his residence abroad affected the matter.

At the first stage Upjohn J. said that it was clear that, in making the payments, the husband was either entitled or compelled to deduct income tax. The learned judge quoted the well-known passage from *Allchin* v. *Coulthard* [1943] A.C. 607 where Viscount Simon L.C. said:

> The three heads under which the existing scheme of collection of income tax embodied in *rr.* 19 and 21 may be stated are as follows:
>
> (*a*) A person liable to pay any yearly interest of money annuity or any other annual payment to a recipient is not entitled to deduct this payment in arriving at his profits or gains to be assessed and charged with income tax. If the amount is payable and paid

out of his profits or gains, he is assessed on a sum which includes such payments, while the recipient is not directly assessed in respect of the amount at all. Consequently, the Crown gets from the payer both the tax at the standard rate which would otherwise be due from the recipient of the annual payment and the tax due from himself in respect of what is left of his profits and gains after the payment is made.

(*b*) If the annual payment is payable and paid out of his profits and gains, the payer is *entitled* to deduct from the payment he makes to the recipient income tax at the current rate, and the recipient is bound to allow the deduction upon receipt of the residue and to treat the payer as acquitted of liability to him in respect of the amount thus deducted. By this means, the payer recoups himself for the tax which he has paid or will pay on the annual payment.

(*c*) If and in so far as the annual payment is not payable and paid out of profits or gains brought into charge, the person making the payment is *bound* to deduct from it income tax at the current rate and to account to the Crown for the amount deducted. In effect, the payer in such a case acts as collector for the Crown of the tax due from the recipient. The requirement that the recipient must allow the deduction and treat the payer as acquitted of liability in respect of this amount is not repeated in *r.* 21, but must be implied.

It was contended for the Crown that the monthly sums of £22 must be taken to be gross sums, but the learned judge said that as the husband had made, more or less exactly, payments of the net sums prescribed by the order, the only permissible inference was that he intended to deduct and did deduct tax from the gross amounts due on the proper construction of the order. There was no magic in the word 'deduct'. It meant merely that less was paid, the balance being retained if *r.* 19 was applicable or paid to the Crown if *r.* 21 was applicable. The wife could not sue for the balance on the footing that she had been paid a gross sum, for she would be met at once with a defence under *r.* 21 and there was nothing in the Income Tax Act, 1918, which entitled a payee to say that the payer had deducted tax if, and only if, he could produce a receipt from the Commissioners. The wife was the recipient of a sum from which tax had been deducted by the payer and no further assessment could be raised on her.

Turning then to the second stage, the learned judge said that as a matter of construction of the Act it seemed to be clear, and, indeed, the contrary was not seriously pressed, that *r.* 21 was as applicable to a person resident abroad as to one resident in the United Kingdom, and it was conceded that *r.* 19 was so applicable. The Crown had, however, submitted that where the payer is resident abroad *r.* 21 has no application because, as Lord Wrenbury said in *Whitney* v. *I.R.C.* [1926] A.C. 37, the Income Tax Act, 1918, has nothing to do with the foreign income of one who is not a British subject and is not resident here. In the view of Upjohn J. there was a short answer to that submission. The income in question was the income of the wife, a person resident in this country, and there was no foreign element about it. The husband held tax in his hands as collector for the Crown of tax due from the recipient, for which he as agent was bound to account, although the Crown might not be able to recover it in a foreign Court, as such an action would be an action to enforce our revenue law.

The claim of the Crown accordingly failed and the assessments must be discharged.

INDEX TO LEGAL NOTES

included in Vol. LXXIX of the Journal

* The pages containing Legal Notes are numbered separately from the remainder of this volume of the *Journal*. The page number is printed in square brackets at the foot of each page.

TABLE OF CASES NOTED

in the Legal Notes included in Vol. LXXIX of the Journal

* The pages containing Legal Notes are numbered separately from the remainder of this volume of the *Journal*. The page number is printed in square brackets at the foot of each page.