# CASE AND COMMENT

RECOVERING MONEY PAID UNDER A MISTAKE OF LAW — A NOTE ON *Re Diplock's Estate.*— Some time in 1919 one Caleb Diplock, a resident of Eastbourne in Sussex and the possessor of a considerable fortune, decided to leave the bulk of his worldly wealth to charity and, being unable or unwilling to nominate any particular institution as the recipient of his favours, requested his lawyer to draft a will imposing the task of distribution upon his executors. Unhappily the lawyer chose to clothe his client's wishes in the form of a direction to his executors to apply the residuary estate "for such charitable institution or institutions or other charitable *or* benevolent object or objects" as they in their absolute discretion should select. It must be rare indeed in the legal annals of any country that one tiny word — in this instance the use of "or" instead of "and"— should have provoked litigation of so protracted and complex a character as that which followed. When Caleb died in 1936 his estate was valued at some £520,000. The events that ensued are not lacking in human as well as legal interest. Both the size of the sum involved and the reputation apparently enjoyed by Caleb in his lifetime of being far from open-handed with his money afforded the Press an opportunity of gratifying its readers with a story enlivened with picturesque details as to Caleb's monetary habits. The tale spread as far as Australia where an enterprising news-editor in Newcastle, New South Wales, recounted it under the headline "Meanest man. Surprise Will". It so happened that an Australian cousin of Caleb's was living in a neighbouring state. He saw the item, but being an aged and infirm miner, living on £1 a week pension, took little interest in it. His grand-daughter however — a young lady of resolute character — decided that this was not to be the end of the matter. After trying unsuccessfully for some three years to induce Australian lawyers to move on her behalf to upset the will on the ground of mental incompetence, a lawyer in Melbourne, seemingly gifted with deeper legal acumen than his colleagues, spotted the use of the fatal word "or" and advised her that the will was void for uncertainty. In the meantime the two executors, one of them the draftsman of the will and the other Caleb's former doctor, were going ahead merrily distributing the deceased's estate among a large number of highly deserving charitable institutions. There was a stage when the doctor, feeling some misgivings, suggested to his colleague that perhaps it would be advisable before doling out these considerable sums to obtain counsel's opinion, but the

solicitor-draftsman, confident of his own handiwork, rejected the proposal. So the payments continued and by 1939 some £200,000 had already been paid over to 139 charitable institutions. It was at this moment that the thunderbolt, being relentlessly prepared in a remote State of Australia, was suddenly discharged upon the unsuspecting heads of the two executors, innocently busying themselves in fulfilling the intentions of the deceased Caleb. The next-of-kin gave notice that they were challenging the validity of the direction in the will relating to the residuary estate. That challenge in due course developed into 123 actions of which 20 were actually brought to trial. The whole basis of those actions derived exclusively from the unhappy slip whereby a country solicitor used the word "or" instead of "and". Had the word "and" been employed there could have been no possible ground for disputing the will.[1] As it was, the litigation proceeded through the whole gamut of first instance, Court of Appeal and House of Lords. In 1944 the first stage of the combat was concluded when the House of Lords finally decided that the bequest was void for uncertainty.[2] This however was only the preliminary round. The death of the two executors, who were themselves being pursued by separate actions for misapplication of the deceased's estate, had meanwhile supervened, and in April 1944 a compromise was approved of all claims against their respective estates. It was still, however, necessary for the next-of-kin to establish that they were entitled to recover the £200,000 already paid over under the will, after deducting whatever had been obtained from the executor's personal estates under the compromise. Nineteen actions, selected as typical specimens of the totality of claims, were therefore instituted against certain of the charitable recipients of Caleb's fortune. These actions were consolidated and the hearing of them began in the Chancery Division on November 26th, 1947. After a trial lasting fifteen days Wynn Parry J. held that the charities were entitled to retain practically the whole of the money received under the void bequest.[3] His judgment, extending to some 65 pages of print, was mainly devoted to an elaborate review of the authorities dating from 1800 onwards. The next-of-kin appealed. Their appeal began on February 9th, 1948, and 22 days were occupied in argument before the Court of Appeal. In the result the court held that Wynn Parry J.'s decision was wrong on most

[1] See *per* Lord Macmillan in *Chichester Diocesan Fund* v. *Simpson*, [1944] A.C. 341, at p. 350.

[2] *Chichester Diocesan Fund* v. *Simpson*, [1944] A.C. 341.

[3] [1947] Ch. 716. See a note by J. B. Milner in (1947), 25 Can. Bar Rev. 640.

material points and that his major error was in starting his review of the cases from 1800, instead of carrying his researches farther into the recesses of the past to certain 16th and 17th century decisions which were fundamental in this branch of the law. In a judgment some 94 pages long the court found that the plaintiffs were entitled to recover the whole of the money wrongly paid out under the void direction, subject only to the amounts already received under the compromise of the actions against the executors personally.[4] Whether even this is the final round of this titanic contest still remains to be seen. There is yet the possibility of a further appeal to the House of Lords.

At first sight it may seem a matter of no little surprise that the circumstances under which next-of-kin can recover property paid out to a legatee under a void bequest should have not long been settled, or that so much learning should have to be expended to arrive at a solution. It will be borne in mind, however, that there were two circumstances that presented the next-of-kin with legal difficulties. Firstly, their interest in the deceased's residuary estates was purely equitable[5] and the charities, when they received payment under the will, had no notice of their rights or possible claims.[6] Secondly, the payments made were in money and, for the purpose of having recourse to the actual sums paid over, there are the limitations sometimes expressed in the phrase that "money has no earmark".[7] Wynn Parry J. held that the plaintiffs' claim could only rest upon an action for money had and received under a mistake, or, alternatively, upon any right of tracing the money as a specific fund. So far as money paid under a mistake was concerned, the learned judge took the view that, whether the claim was pursued at law or in equity, it was fundamental that the mistake should be one of fact and not of law. Because in the present case the executors had distributed the money under a mistake as to the general law governing the validity of charitable bequests, no action under this head would lie against the recipients of the money. As for tracing the money as a specific fund into their hands, the common law would only allow this to be done if it was earmarked in such a way as to preserve its identity. In most instances, however,

[4] [1948] Ch. 465. The judgment of the court was delivered by Lord Greene M.R.

[5] See Administration of Estates Act (1925), ss. 33 and 46; Law of Property Act (1925), s. 1(3).

[6] The C. A. rejected the argument that the terms of the letters accompanying payment to the various charities put them upon inquiry as to the validity of the disposition (see [1948] Ch. at p. 477).

[7] But on the inroads of this doctrine made both by the common law and in equity, see *infra*, p. 1361.

the charities concerned had paid it into their general banking accounts where it had become merged in their other moneys. Moreover, although the equitable doctrine of tracing went farther than the common law, it was inapplicable in the present case since the charities were not in a fiduciary relationship to the next-of-kin. Only when such relationship existed could the equitable doctrine come into play.

The Court of Appeal held that this view of the matter was wrong in two material respects. Firstly, the equitable right to claim the return of money paid under a mistake rested on an independent foundation and was not identical with or analogous to the common law action for money had and received. In the second place, the equitable doctrine of tracing did not require the ultimate recipient to be in a fiduciary relation to the equitable owner of the money. By rejecting these two basic fallacies the court was therefore able to reach an opposite result to that arrived at by the judge of first instance. It was quite clear that if the plaintiffs' claim were to be founded on an action for money had and received, or an equitable action based on analogous principles, then it would be a complete answer to show that the mistake relied upon was one of law. In fact the court approached the case from rather a different angle, *viz.* (1) a right *in personam* in equity against the recipients themselves, and (2) a right *in rem* to the money, recognized by equity. These two possible ways of formulating the claims were considered independently and it is proposed in this note to follow the same course.

(1) *The right in personam:*—This right, which is not dependent on the existence of any particular fund, must be based upon the power of equity to compel the recipient of money to which he has no title to restore an equivalent sum to the person entitled thereto. The claim is not against any fund as such in the hands of the recipient but is a judgment against him personally. The common law would only allow such a personal judgment where the money had originally been paid under a mistake of *fact*, in which case *indebitatus assumpsit* would lie, based on an implied or fictitious promise to repay.[8] Equity, however, (thus the Court of Appeal held) went a good deal farther. The right in equity of an equitable owner to proceed against one who has received money to which that equitable owner was entitled had a different lineage from the common law action and was based upon different principles. As Maitland once observed, Equity came in not "to destroy the common law

[8] See Winfield, Province of the Law of Tort, p. 157.

but to fulfil it".[9] This it did by refusing to circumscribe its remedies within the narrow limits postulated by the common law. There were fundamental differences in this matter between the equitable and common law approach. In the case of executors distributing a deceased's estate to the wrong person the mistake was that of the executors and not of the creditors, or next-of-kin, or whoever might in fact be entitled in equity to the property. Those entitled were not themselves guilty of any mistake, nor could it possibly be argued that the executors were acting as agents on their behalf.[10]

In arriving at this distinction between the practice of the old Court of Chancery and the common law courts, the Court of Appeal relied upon a number of decisions, prior to those cited by Wynn Parry J. The earliest of these was in 1669,[11] but the foundation of the jurisdiction is contained in the decision of Nottingham L.C. in *Noel* v. *Robinson* (1682),[12] where it was held that a creditor of a deceased person might compel a legatee to refund, when he has received payment of his legacy despite a deficiency in the assets to meet the claims of creditors. Later decisions limited this right to cases where there was an original deficiency in the assets when the distribution occurred,[13] and also laid down that the remedy in the first instance was against the executor, but that, if he were insolvent, the claimant could proceed direct against the legatee.[14] On these early decisions the Court of Appeal took the view that they contained no warrant for the suggestion, as argued for the defendants before them, that equity could only proceed against a person whose conscience was affected with knowledge, actual or constructive. Rather, the only test applied was, did the legatee receive more than he was entitled to receive at the time? Moreover, no distinction was made in those cases between mistakes of fact or of law, though the court agreed that all the mistakes actually involved in the cases cited appeared to have been factual, whether as to the identity of the legatees or the amount of the assets available for distribution.[15] The cases showed too that it made no difference

[9] Equity (1936 ed.) p. 17.
[10] [1948] Ch. at p. 481.
[11] *Nelthrop* v. *Hill* (1669), 1 Cas. in Ch. 135.
[12] 1 Vern. 90.
[13] See *Anon.* (1718), 1 P. Wms. 495; *Fenwick* v. *Clarke* (1862), 4 De G. F. and J. 240.
[14] *Orr* v. *Kaines* (1750), 2 Ves. Sen. 194.
[15] The court distinguished some later cases, such as *Hilliard* v. *Fulford* (1876), 4 Ch. D. 389; *Re Hatch*, [1919] 1 Ch. 351; *Re Mason*, [1929] 1 Ch. 1; and *Re Blake*, [1932] 1 Ch. 54, all of which contained *dicta* indicating a possible distinction even in equity between mistakes of fact and law, on the ground that those cases were all in fact dealing with other points, and the

whether the claimant was a creditor, a beneficiary or the next-of-kin entitled on an intestacy.[16] On this basis therefore the plaintiffs had a personal claim enforceable in equity against those who had received money to which they were not entitled and in respect of which the plaintiffs had an equitable title, provided they first exhausted their remedy against the executors who had wrongfully distributed the assets. It mattered not at all whether the executor's mistake was one of law or of fact.

(2) *Right in rem:*— A few words may now be said on this aspect of the case. It will be realised that the decision under the previous head was sufficient to dispose of the matter, but for various reasons[17] the court decided to examine the alternative claim under this head. While therefore the views expressed on this subject were plainly *obiter* they are none the less worthy of close attention. Formulated as a right *in rem*, the claim amounted to an assertion that the money could be followed as a specific fund into the hands of the recipients and could be traced and ordered to be restored even if it had become indistinguishably merged in other moneys not belonging to the claimants. Such a right, if established, would of course be limited to such portion as the court held itself able to trace, and would not result in a personal judgment for the whole sum against the recipient as such. Both common law and equity recognized a doctrine of tracing money, but here again the former adopted a very much narrower approach. The attitude of the common law was distinctly materialistic and proceeded on the basis of physical identity. If A comes into possession of money belonging to B, B can in law trace it and recover it so long as it retains its specific identity as a separate fund or even if it has been converted into other property, *e.g.* by purchase, so long as that property can be shown to have been *wholly* purchased by the money in question.[18] But if once the money has been mixed with other moneys then the common law declined to pursue the matter

*Noel* v. *Robinson* (*supra*) line of cases was not cited. (See [1948] Ch. at pp. 498-502).

[16] See *David* v. *Frowd* (1833), 1 My. and K. 200; *Gillespie* v. *Alexander* (1827), 3 Russ. 130.

[17] *E.g.*, the C.A. held that the plaintiffs might be entitled to interest on the amount of their claims in so far as they were enforceable *in rem*, but that no interest would be awarded on a mere claim *in personam* (see [1948] Ch. at pp. 517, 558).

[18] This right at common law was based not so much on a theory of tracing as on the idea that the unauthorized purchase was capable of ratification. Lord Haldane (see *Sinclair* v. *Brougham*, [1914] A.C. at p. 419) suggested that the common law would not regard money as indentifiable once it had been paid into a banking account even if it had not been mixed with other moneys, *sed quaere?* (See [1948] Ch. 518-9; *Banque Belge* v. *Hambrouk*, [1921] 1 K.B. at p. 335).

further: the original money had lost its identity and the claimant must be left to any personal remedy he might have against the recipient.[19] Furthermore the common law did not recognize equitable rights and would only permit a person who retained the ownership in the money to trace it. Thus if A gave B, his agent, money to apply to a particular purpose, the money remained A's property and could be traced, subject to the limitations stated already, but if A merely lent money to B for a particular purpose, this divested A of his ownership and constituted a debtor-creditor relationship which rendered the doctrine of tracing inapplicable. Equity on the other hand adopted a more metaphysical approach. If a trustee was in possession of trust moneys, and then mixed those moneys with his own, "equity regarded the amalgam as capable, in proper circumstances, of being resolved into its component parts".[20] And the beneficiary might thus be able to trace his trust moneys into the hands of third parties, even where those third parties had intermingled the trust funds with their own or other moneys not belonging to the beneficiary. Wynn Parry J. held that equity would only confer such a right where a fiduciary relationship existed between the claimant and the person who thus mixed the money with his own. The Court of Appeal, after an elaborate consideration of the leading case of *Sinclair* v. *Brougham*,[21] took the view that this proposition went too far and omitted a material distinction laid down by the House of Lords in that case. *Re Hallett* [22] had previously settled the principle that money can be traced through the hands of a trustee even where he has mixed that money with other moneys not belonging to the *cestui que trust; Sinclair* v. *Brougham* carried the process one stage farther where the mixing was done not by a trustee or fiduciary agent in breach of his obligations, but by an innocent volunteer. In that case there was a contest between the shareholders and depositors on the winding-up of a building society in relation to certain mixed assets of the society which, acting *ultra vires*, had engaged in banking. It was held that the depositors were not entitled to claim on the footing of an action for money had and received, as that action could apply only where the law could consistently

[19] *E.g.*, an action for money had and received on the basis of a mistake of fact; an equitable claim *in personam*, as in *Re Diplock;* or, in some circumstances, even an action for conversion (see *Orton* v. *Butler* (1822), 5 B. and Ald. 652.

[20] [1948] Ch. at p. 520. Equity was thus able to extend its operation beyond the limits of the common law rule by means of its flexible remedy of a declaration of charge upon the mixed fund.

[21] [1914] A.C. 398.

[22] (1880), 13 Ch. D. 696.

import "at least the fiction of a promise",[23] and here the money had been paid under an *ultra vires* contract. However, the House went on to hold that the depositors were entitled under the rule in *Hallett's* case to trace their moneys to the common fund in the hands of the society itself. The difference between this case and *Re Hallett* was that here it was an innocent volunteer, the society, that had come into possession of the moneys of third parties, the depositors, and merged them in a common fund to which the society's shareholders would be entitled on the winding-up of the society. The conscience of the society itself could not be affected by the payment by its directors of the depositors' money into its account at its bankers, for it could not have been a party in law to any such transaction, since it had no power to accept the depositors' money. On what basis then could the depositors claim to trace their money into the hands of the society now that it had been mixed with other moneys belonging to the shareholders? For this purpose the House treated the shareholders as in effect asserting the rights of the society itself, since, but for the liquidation, they would have had no *locus standi*, and therefore no question of any fiduciary relationship between them and the society came into question. The case was really treated on the footing that X (the depositors) having handed over moneys to Y (the directors of the society) as a fiduciary agent, Y then pays them over to Z (the society) as a volunteer, whereupon those moneys become mixed with other money belonging to Z. X's title in equity to trace his moneys into the hands of Z rests not on Z's conscience being affected, but on the fact that Z is a mere volunteer. In the case of a volunteer, knowledge or means of knowledge is irrelevant: an equitable title that starts off as a mere personal claim against a trustee or other fiduciary agent developed, under the practice of the old Court of Chancery, into one practically equivalent to a right *in rem* comparable to a legal title, but subject always to the qualification that it would not avail against the purchaser of the legal title for value in good faith and without notice actual or constructive of the breach of trust.[24] But although in the case of a volunteer it is unnecessary in the first instance to show that the volunteer's conscience was in any way affected, this matter becomes material when determining the question of priorities. For, suppose the mixed fund be insufficient to meet the claims of both parties in full. *Re Hallett* laid down that as regards a trustee who had mixed his own money with that of the *cestui que trust* and has

[23] [1914] A.C. at p. 417.
[24] See Maitland, Equity, Lecture IX.

subsequently drawn upon the common fund, the trustee will be presumed to have drawn out his own rather than the *cestui que trust's* money, for the court will avoid if possible attributing to him a breach of trust. In this manner the *cestui que trust* is afforded priority over the claim of his trustee or those claiming under him. Where however it is an innocent volunteer who thus comes into possession of money belonging to another and mixes it in a common fund with his own moneys, the equities as between the parties are equal. Both have an equal claim *pro rata* to their share in the common fund, and if it be insufficient to meet their respective claims in full then they are to rank *pari passu*.[25] Equity will not choose between them. So matters stood as between the depositors and the building society (or the shareholders standing in the shoes of the society) in *Sinclair* v. *Brougham*: and so they stood as between the next-of-kin and the charities in *Re Diplock*. In each case the equities were equal and the respective claimants ranked *pari passu* in relation to the mixed fund. One important qualfication however requires to be emphasised. Although the court held that it made no difference whether the mixing was done by the original recipient or by an innocent third party, what is vital in order that equity may operate is that at some stage a fiduciary relationship (though not necessarily a positive duty of trusteeship) should have arisen, so as to create an equitable right of property.[26] The essence of the doctrine of tracing is some proprietary title acknowledged by equity as conferring a continuing interest in the fund as it passes from hand to hand; an equitable interest good against the whole world other than the purchaser for value without notice. And the principles of equity have broadened out sufficiently in modern times to enable such an interest to arise not only from a strictly trustee-beneficiary relationship, but from any situation where A is in possession of property which he has received from B in a fiduciary capacity. The authorities show that this conception of fiduciary relationship is one of considerable flexibility which is capable of a broad application to many cases where the more rigid categories of the common law would be helpless to afford a remedy.[27]

We have so far only considered the simple case where there is nothing but a monetary fund representing in equity the

[25] See especially *per* Lord Parker, [1914] A.C. at pp. 447-9.

[26] Lord Dunedin, [1914] A.C. at p. 437, seems to have treated the equitable remedy as applicable in any case where a "superfluity" was found to exist, but this view, reasonable though it may seem on general principles, is difficult to justify on the footing on which equity has enforced its remedies. The C.A. in *re Diplock* preferred the view of Lord Parker.

[27] See *per* Jessel M.R. in *re Hallett* (1880), 30 Ch. D. at p. 708.

amalgam of moneys belonging to A and B. Further intricacies fell to be considered in *Re Diplock*. Suppose, for instance, that some of the fund had been used to acquire other property, *e.g.* land or stock. In this case, so long as the property thus acquired is identifiable, the trading will extend to it, equity will recognize a charge upon it enforceable by sale, and the claims of A and B will again be met *pro rata*. But more complex problems arise where the holder of the fund has used it not to acquire new assets, but to alter and improve assets he already owns. For example, he might use it to make an alteration in his house to suit his own convenience but which might not in any way increase, or may even diminish, its value in the eyes of a purchaser. In these circumstances the court took the view that tracing in any real sense had become impossible; the money had disappeared, and as the equities were equal the loss would have to this extent to fall upon the other party.[28] The court further held that where the moneys were mixed in a current banking account from which withdrawals were made from time to time to meet current expenditure, the ordinary rule in *Clayton's* case[29] should be applied, *i.e.* moneys should be deemed to be paid out in the order in which they were paid in. If therefore A has an account at his bank containing £100 and pays into it subsequently £50 representing B's money, and later withdraws £75, that latter sum will be deemed to be derived entirely from A's £100.[30] And if A then proceeds to withdraw the remaining £75 and invest it in stock, B would then be able to claim to trace his £50 in the shape of two-thirds of that stock, leaving the remaining third to A.[31] On the other hand it must be borne in mind that if A specifically earmarks B's money in an independent account, *e.g.* by depositing it in a special account at the Post Office Savings Bank, B will be entitled to assert his right to the whole of the fund thus earmarked.[32]

It must be admitted that despite the admirable analysis of the law on this complex topic by the Court of Appeal, it is still

[28] It is by no means clear whether the same rule would apply if the equities were not equal, *i.e.* if the recipient of the money was in a fiduciary relation to the person entitled to it. And if in this case the court would permit the property to be traced physically there seems no reason why the same process should not be applied where the equities are equal.

[29] (1816), 1 Mer. 529.

[30] [1948] 2 All E.R. 429.

[31] See the instance in relation to the payment to Dr. Barnardo's Homes, [1948] Ch. at p. 552.

[32] As *e.g.* in the instance of the grant to the National Institute for the Deaf, [1948] Ch. at p. 551.

far from clear within what limits the so-called right *in personam*[33] will be held to be enforceable in equity. The court rejected the two tests put forward on behalf of the charities, *viz.* that it should be limited to payment under a mistake of fact, and not of law, on the analogy of the common law action for money had and received, or that it should prevail only against a person whose conscience is in some way affected by notice, actual or constructive, of the prior equitable claims of other persons. On the contrary, the court expressed the view that in equity the conscience of anyone would be affected merely on account of his having received more, at the time, than he was entitled to.[34] If, however, this is so — and certainly the authorities relied upon appear in this instance to ignore the necessity for notice in any form to be imputed to the defendant[35] — it seems to constitute an exception to the normal basis upon which equity seeks to enforce its personal remedies. For if equitable interests are to prevail and be enforceable personally against anyone merely on the ground that he has received more than he is entitled to, it is difficult to see what scope would be left either, on the one hand, for the common law action of money had and received, and, on the other, for the equitable doctrine of tracing *via* a specific fund or other property, which is admittedly based on much narrower grounds. In any event it seems clearly settled that even the personal claim will not avail against a purchaser for value without notice, actual or constructive.[36] But what of a volunteer[37] who takes without notice? The Court of Appeal has conceded that the right *in rem* to trace moneys that have been mis-applied is limited in the case of an innocent volunteer to a claim to rank *pari passu* with the volunteer in relation to the mixed fund. Would equity nevertheless enforce the full rigour of its personal

[33] It should be noted that the C.A. used this phrase, and also "right *in rem*", not in the normal juristic sense of rights available against limited classes or good against all the world (see Salmond, Jurisprudence, s. 81), but in the special sense of a right either enforceable against a defendant personally, or merely as limited to a particular fund or piece of property. The right *in personam* in this usage is thus more comprehensive than the right *in rem*.

[34] [1948] Ch. at p. 488.

[35] The cases dealing with refunds ordered to be made by legatees, although occasionally putting the claim as if it were to trace assets into the hands of a person not entitled to them (see *Noble* v. *Brett* (1858), 24 Beav. at p. 505; *Dilkes* v. *Broadmead* (1860), 2 De G.F. & J. at p. 574) do in fact appear to recognize that the claimant is ultimately entitled to enforce a personal liability against the wrongly paid legatee (*cf.*, *March* v. *Russell* (1837), 3 My. & Cr. at pp. 41-2; *Fordham* v. *Wallis* (1853), 10 Hare. at p. 226; *Re Rivers*, (1920) 1 Ch. 320).

[36] *Noble* v. *Brett* (1858), 24 Beav. 499.

[37] It will be recalled that in *re Diplock* the charities were volunteers. The court rejected an argument that they took as purchasers for value (see [1948] Ch. at p. 544).

remedies against such a person? Would the claimant not rather be left to his remedy of following the actual fund into any form into which it had been converted so long as it was traceable? [38] This would reserve the right *in personam* against any person, whether purchaser or volunteer, who was a party to the breach of trust or analogous fiduciary duty, or who took with notice that it had occurred. On this view of the matter the right of a creditor, an unpaid legatee, or the next-of-kin to secure a personal order against another legatee for a refund of a deceased testator's money, wrongly paid out to that legatee, is an exceptional right enforced on broader grounds than those normally applied in a court of equity; and indeed the Court of Appeal made no attempt to extend their ruling beyond this limited situation. If an explanation be sought for this practice it seems to lie in the rivalry between the old Court of Chancery and the ecclesiastical courts seised of testamentary matters, and the desire of the former to provide a remedy which would excel in efficacy that afforded by the latter in requiring a first paid legatee to give security.[39]

To those who would turn from admiring the subtlety of legal analysis to the social consequences of that process, the thought must inevitably arise that such a case as *Re Diplock* is a sad commentary on any legal system which adopts a strictly technical approach to the construction of documents. Technicalities cannot of course be wholly divorced from law, but a system that allows the use of one wrong word in a document to result in the whole intention of the person executing it being utterly frustrated, even though that intention is clearly ascertained and beyond dispute, is hardly calculated to inspire either the confidence or respect of those to whom it is applied. A broader approach aimed at ascertaining the real object and meaning of a document, by any available evidence, rather than narrowly construing particular forms of words, would perhaps give less handle to the popular notion that a client should explain matters frankly to his lawyer, and that "it is for him to embroil them afterwards".[40]

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[38] As in *Sinclair* v. *Brougham* (*supra*), where it was never suggested that the depositors had any right in equity beyond that of tracing their money into the hands of the building society (*cf. per* Lord Haldane L.C. in [1914] A.C. at p. 418).

[39] See Holdsworth, History of English Law, VI, pp. 652-3; *Noel* v. *Robinson* (1682), 1 Vern. 90; *Re Diplock*, [1948] Ch. at pp. 485, 489.

[40] Hine, Confessions of an Uncommon Attorney, p. 89.

CONFLICT OF LAWS — JURISDICTION — CUSTODY — RECOGNITION OF FOREIGN JUDGMENTS — TWO VIEWS.

I

The recent Ontario case of *Re McKee: McKee* v. *McKee*[1] raises certain problems of private international law relative to the enforcement and recognition of foreign judgments. Although the decision was quite properly based upon what was desirable from the standpoint of the welfare and interests of the child, the remarks of the learned trial judge, Wells J., with respect to the validity of the California judgment may be open to some criticism.

The appellant, Mrs. McKee, had originally commenced proceedings in Ontario by way of *habeas corpus*. Her object was to regain custody of her infant son previously awarded her by a judgment of the Supreme Court of California. In 1942 Mrs. McKee had petitioned the California courts for a dissolution of her marriage. A cross-petition was filed by her husband, the present respondent. The court subsequently granted the cross-petition, and awarded the husband custody of the infant son, but provided that the child was to spend three months in each summer with Mrs. McKee and was not to be removed from the state of California during that time without leave of the court.

Shortly afterwards, Mr. McKee moved to Wisconsin, and later to Michigan where, in the view of Wells J., he had been domiciled both prior and subsequent to the California judgment of 1942. In any event, the learned judge held that he was domiciled there in 1945. Between 1942 and 1945 Mrs. McKee made several unsuccessful applications both in California and in Wisconsin for custody of the infant. In 1945 her former husband, while domiciled in Michigan and while the infant son Terry was physically present in that state, began proceedings in California for an order to modify the original order as to custody. Mrs. McKee brought a counter-proceeding, and the net result was an order giving her custody of the child. Mr. McKee unsuccessfully took all proceedings by way of appeal that were available to him. Before the judgment of the Supreme Court of California upon his final appeal became binding, and while the infant Terry McKee was still in his lawful custody, he removed the child to the province of Ontario. It was then that Mrs. McKee began *habeas corpus* proceedings, relying upon the California judgment.

[1] [1948] O.R. 658; affirming [1947] O.R. 819.

Upon the return of the writ Smily J. held that a formal motion for custody of the infant ought to have been made, but waived the irregularity and treated the proceedings as though such a motion had been made and gave Mrs. McKee leave to file an application. He then directed the trial of an issue to determine who was entitled to custody of the infant Terry McKee. This issue was tried by Wells J. and judgment was given for the defendant, Mr. McKee. The judgment was affirmed by the Court of Appeal.[2]

Although it was strenuously argued by counsel for the appelant that the judgment of the California court awarding the appellant custody was entitled to recognition in Ontario, the Court of Appeal did not regard this submission as an element to be considered in deciding who was entitled to custody of the infant. Even the learned Chief Justice put his grounds of dissent rather upon principles of justice and convenience than upon the validity of the California judgment. Hogg J.A., with whom Aylesworth J.A. agreed, based his decision upon the answer to two questions: (1) did the Supreme Court of Ontario have jurisdiction to entertain the action?[3] and (2) if it did have jurisdiction, should it be exercised, "and what, under the circumstances and in the light of the evidence was best conducive to the welfare and interests of the child Terry?"[4]

Both upon reason and upon authority it appears that the overriding consideration in actions for custody is the welfare of the child and, while it is not clear what recognition is to be afforded foreign-appointed guardians,[5] it would seem that their claims ought not to be wholly ignored, at least where the welfare of the child will not be prejudiced. In this case, the majority of the Court of Appeal seems to have found that the welfare of the child would not best be served by giving effect to the California judgment.

At the trial of the issue Wells J., in addition to giving effect to the overriding consideration of the welfare of the child, held that, in any event, the California judgment was not entitled to recognition in Ontario. The reasons given were: firstly, that the California court acted without jurisdiction since the infant was

[2] Hogg and Aylesworth JJ.A.; Robertson C.J.O. dissenting.

[3] Answered in the affirmative since the infant was physically present in Ontario, if his father had not already become domiciled there.

[4] [1948] O.R. at p. 680.

[5] Cheshire, in his Private International Law (3rd ed.), has suggested that considerable weight ought to be given to the appointment of a guardian by a foreign tribunal, and from this viewpoint criticizes, at pp. 537-8, a recent English decision, *In re B. . . .* 's Settlement, [1940] Ch. 54, cited by Hogg J.A. in support of his decision.

neither resident nor domiciled within the state; secondly, that even though the respondent, Mark T. McKee, had sought the forum as plaintiff and subsequently had prosecuted several appeals, he was not estopped from denying the validity of the California judgment since the court had acted without jurisdiction; and thirdly, since the order for custody made by the California court was variable it could not be regarded as binding upon the Ontario court. The third reason appears to be unassailable. It is a well-known principle of private international law that a foreign judgment may not be relied upon in a subsequent action elsewhere unless it is final, binding and not subject to variation in the forum pronouncing it. But the first and second reasons, it is submitted, display some misapprehension as to the nature of jurisdiction within the meaning of private international law.

We are not disposed to question the proposition that, since the infant was neither resident nor domiciled in California, the court was not a court of competent international jurisdiction, but it is by no means clear why the respondent was not estopped by his conduct from denying the jurisdiction of the California court. In actions *in personam* (and it was submitted by counsel both for appellant and respondent that this was an action *in personam*) a person who, as plaintiff, has resorted to the forum,[6] or who has entered an appearance as defendant and has contested the action on the merits[7] is bound by the decision of the court to which he has resorted or submitted, even though the court otherwise has no jurisdiction. The respondent in this case had done both.

Wells J. based his decision with respect to this point upon the following passage from Halsbury, for which *Toronto Railway Company* v. *The City of Toronto*[8] was apparently regarded as an authority:

> In order that estoppel by record may arise out of a judgment, the court which pronounced the judgment must have had jurisdiction to do so. The lack of jurisdiction deprives the judgment of any effect, whether by estoppel or otherwise; and this rule applies even where the party alleged to be estopped himself sought the assistance of the court whose jurisdiction is impugned.[9]

It is submitted that this statement should not be too literally interpreted. Obviously, it can have no application where, as has been shown, a party has been estopped from denying the jurisdic-

[6] *Schibsby* v. *Westenholz* (1870), L.R. 6 Q.B. 155.
[7] *Tallack* v. *Tallack and Broekema*, [1937] P. 211; *The Gemma*, [1899] P. 285; *The Dupleix*, [1912] P. 8.
[8] [1904] A.C. 809.
[9] 13 Halsbury (2nd ed., 1934), p. 438, para. 493.

tion of the court by reason of his submission, even though apart from such submission the judgment would be a nullity because of a lack of jurisdiction in the court. The submission acts as a substitute for the court's lack of jurisdiction. Ordinarily, in an action *in personam*, jurisdiction is based upon the physical presence of the defendant within the territorial authority of the court when he is served and, where he is not so present, upon his submission to it. Admittedly, in cases of custody, jurisdiction depends upon the residence or domicile of the infant. But if submission will prevent a person from denying jurisdiction where the jurisdiction is based upon the physical presence of the defendant, it might be argued that submission of the defendant in another action *in personam*, where jurisdiction is based upon some other element, should have the same effect. In our opinion this argument cannot be upheld. Although there is sufficient connection between the presence of a defendant and his submission to the jurisdiction to allow the one factor to act as a substitute for the other, no such connection exists between the submission of the defendant and the residence or domicile of some other person. However, if the respondent is not to be estopped from denying the jurisdiction of the California court it should be for the reason that this is not a case where jurisdiction may be assumed as a result of submission, rather than because, apart from submission, the California court acted without jurisdiction.

*Toronto Railway Co.* v. *The City of Toronto* dealt with an entirely different situation. That case was not concerned with the recognition or enforcement of a foreign judgment. It simply held that a decision of a court of revision and judgments delivered upon statutory appeals therefrom did not render *res judicata* a matter over which the court of revision had no jurisdiction. It appeared that the court of revision had jurisdiction over the question of whether assessments were too high or too low, but not over the question of whether particular property was subject to assessment at all. Nevertheless, the court of revision had adjudicated upon the latter question. Accordingly, its decision was not binding even as against a party who had submitted to its jurisdiction.

It is submitted that this case would be authority for saying that the respondent was not estopped from denying the validity of the California judgment only if the California court lacked jurisdiction to make orders for custody at all. It would appear that where recognition or enforcement of a foreign judgment is sought its jurisdiction may be questioned only insofar as principles

of English private international law are concerned, and whether the foreign court had or had not jurisdiction according to its own internal law is immaterial.[10] However, this proposition is subject to the qualification that the foreign court must have had jurisdiction over the subject-matter of the action involved.[11]

It is submitted that the passage from Halsbury cited earlier in this note refers to jurisdiction in this last sense. In *Toronto Railway Company* v. *The City of Toronto* the court of revision did not have jurisdiction over the subject-matter of the action, namely, whether the particular property was subject to assessment. Accordingly, that case and the quotation from Halsbury are not authority for saying that in the present instance the respondent is estopped from denying the jurisdiction of the California court. There is nothing to show that the California court lacked jurisdiction to make orders for custody or that, by the law of California, the court lacked jurisdiction in any sense.

It should be emphasized, however, that since the judgment of the California court was variable it was not entitled to international recognition. Even had it not been variable, it seems proper both upon reason and upon authority to give paramount consideration to the welfare of the child. But the reasons and authority given by the learned trial judge for holding that the respondent was not estopped from denying the jurisdiction of the California court appear, with all respect, somewhat inadequate. It is suggested that the proper *rationale* for such a decision ought to have been that in an action for custody submission of the parties should not be made a basis for recognizing jurisdiction.

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## II

The principles on which the court should act in awarding the custody of a foreign infant resident in the jurisdiction were discussed fully in *Re McKee; McKee* v. *McKee*.[1] The question was also discussed whether the court should refuse to exercise its jurisdiction further than to assure the return of the infant to its own country, on the ground that by the comity of nations

[10] *Pemberton* v. *Hughes*, [1899] 1 Ch. 781.
[11] *Vanquelin* v. *Bouard* (1863), 15 C.B. (N.S.) 341; *Papadopoulos* v. *Papadopoulos*, [1930] P. 55.
[1] [1947] O.R. 819; [1948] O.R. 658.

the decisions of the courts of the country to which the infant belonged should be respected.

Mark McKee, anticipating that the proceedings between him and his wife for the custody of their son would conclude unfavourably to him, left the United States and went to Kitchener, Ontario, where he purchased a farm and established his son. His wife, having been successful in the custody proceedings in the California court, applied for a writ of *habeas corpus* for the production of the infant and, on the return of the writ before Smily J. at Osgoode Hall, an issue was directed in which the question was whether the father or mother should have custody of the infant. The issue was tried by Wells J., who found in favour of the father, and an appeal to the Court of Appeal was dismissed, Robertson C.J.O. dissenting.

The first question was whether the courts of Ontario had jurisdiction at all. All the judges agreed that the mere physical presence of the infant in Ontario gave the court jurisdiction and it did not matter how he was brought into the Province or with what motives he was kept there. A much more difficult question was whether that jurisdiction should be exercised and, if so, what weight should be given to the order of the foreign court. On the one hand it was argued that the California court had no jurisdiction to award custody, that the order was not irrevocable on its face in that it permitted further applications to be made, that circumstances had changed since the making of the order and that The Infants Act[2] required the court to decide the issue solely with a view to determining what would be most conducive to the welfare of the infant. All these arguments found favour in varying degrees with the trial judge and the majority of the Court of Appeal. But Robertson C.J.O., who dissented, pointed out that the father had never questioned the jurisdiction of the California court until an unfavourable decision had been made by that court. All the parties were American and had been born and always resided in the United States. The infant had been brought into Canada in breach of an agreement between the parents that he would not be removed from the United States without the written permission of the other party. The obvious purpose of bringing him out of the United States into Ontario was to evade obedience to the order of the California court. Neither the infant nor his parents had become residents of Ontario in the ordinary sense nor had they ceased to be subjects of the United States. "In the circumstances," said Robertson C.J.O.,

[2] R.S.O., 1937, c. 215.

> it is my opinion that the Courts of this Province should leave the dispute regarding the custody of the infant to the Courts of the country to which these people belong. It is not a question of jurisdiction, but rather one of comity between friendly nations. The United States has jurisdiction over its own subjects, whether at home or abroad. The Courts of this Province have jurisdiction over persons while they are within the Province, although they may be the subjects of a foreign power, but in the special circumstances of this case, a proper observance of the comity of nations, in my humble opinion, requires that the Courts of this Province should not exercise their jurisdiction over this infant further than to assure his return to the country to which he belongs.[3]

And later he said:

> I cannot too strongly state my opinion that there is grave impropriety in upholding in the Courts of Ontario a claim made to the custody of an infant who is a subject of a neighbouring and friendly country, by one who has brought the infant into this Province in breach of his agreement not to remove the infant from the country to which th infant belongs, and in defiance of, and solely for the purpose of evading the order of, the Courts of that country to which Courts respondent had himself submitted the question of custody. Any jurisdiction to deal with the infant that an Ontario Court may have acquired as the result of such conduct, it should exercise only for the purpose of returning the child, in proper custody, to the country whose subject he is.[4]

Most of the early cases dealing with this question of "welfare of the infant" versus "comity of nations" involve the right of a foreign guardian to exercise control over his ward in England, where the same principles apply. In *Johnstone et al.* v. *Beattie*[5] it was decided that a foreign guardian had no status as such in England, though duly appointed by the *lex domicilii*, and that guardians who were subject to the jurisdiction of the court should be appointed. Lord Brougham, who dissented, admitted the jurisdiction of the English court, but said that it did not follow that in every case the jurisdiction must be exercised. "The first question that arises", he said, "is the degree in which the protection is wanted and the infant left unprotected, because this may be said to be the ground of the jurisdiction; but most emphatically it is the thing that calls for, and thus justifies, the exercise of it."[6] If the appointment of the guardian by the foreign court was made by virtue of some peculiar local policy there might be some reason why that appointment should not be recognized. "But where the choice is made either

[3] [1948] O.R. at p. 672.
[4] *Idem.* at p. 675.
[5] (1834), 10 Cl. & Fin. 42; 8 E.R. 675.
[6] (1834), 10 Cl. & Fin. at p. 94.

by the natural parent in exercise of his parental power — a power common to all nations — or by the substitution of the next-of-kin in default of such appointment, or by the authority of the Supreme Court to which the parent and infant alike owe allegiance, and which has the sole disposal of the infant's property, then surely nothing can be alleged to show that this choice should not be respected everywhere and in every country in which the infant may accidentally be found for a temporary residence."

Lord Brougham was the only one of the five law lords in this case who gave any consideration to the respect due to the courts of a foreign country. But in *Hope* v. *Hope*,[7] the Lord Chancellor (Lord Cranworth), when making an order for the custody of two infants then in France, was careful so to word the order that those who obeyed it might not be led into conflict with the laws of France. If the French courts had for any reason said that it would be a violation of their law to give up the children, no attempt would have been made by the Lord Chancellor to exercise any jurisdiction over what was done by those tribunals, "for whose decisions he had always entertained the most profound respect".

In *Nugent* v. *Vetzera*[8] complete recognition was given of the status of a guardian duly constituted by foreign law. The headnote of that case reads in part as follows:

> The Court will not from any supposed benefit to infant subjects of a foreign country, who have been sent to this country, for the purposes of education, interfere with the discretion of the guardian who has been appointed by a foreign Court of competent jurisdiction, when he wishes to remove them from England in order to complete their education in their own country.
>
> But the Court refused to discharge an order by which guardians had been appointed over the children in this country: and merely reserved to the foreign guardian the exclusive custody of the children, to which he was entitled by the order of the Court of his own country.

In *Re B—s Settlement*[9] where the facts were somewhat similar to *Re McKee*, Morton J. held that The Guardianship of Infants Act, 1925, modified the principle of complete recognition of a foreign guardian's status, and he accordingly exercised a measure of discretion.

The Canadian cases all say that great weight will be given to the judgment of a foreign court but that the paramount consideration is the welfare of the infant. Robertson C.J.O. would seem to have given greater weight to the principle of the

[7] (1854), 4 De. G. M. & G. 328; 43 E.R. 534.
[8] (1866), L.R. 2 Eq. 704.
[9] [1940] 1 Ch. 54.

comity of nations than has been given in most of the decided cases since *Nugent* v. *Vetzera* (*supra*).

It is submitted that the true test is enunciated by Lord Brougham in *Johnstone* v. *Beattie* (*supra*). The court has jurisdiction over any infant within the jurisdiction as representing the King in his capacity of *parens patriae*. It should not exercise that jurisdiction unless the protection of the court is wanted by the infant. Protection is not wanted if a guardian has been regularly appointed in the infant's own country, unless the appointment is made in pursuance of a local policy that is offensive to the court. If jurisdiction is exercised, the paramount factor will be the welfare of the infant, especially if that is provided in a statutory enactment.

If custody has been provided for by the courts of a civilized and friendly country, to which the infant belongs, either by nationality, or domicile, or long residence, and the order awarding such custody is not patently wrong, then, surely, it is presumptuous for the courts of a country in which the infant is temporarily resident to say that their protection is wanted by the infant. Surely the proper course is to say, as Robertson C.J.O. said, "You come from a civilized country whose courts we respect. They have made provision for your custody and we can see no reason why we should interfere."

If the welfare of the infant were the deciding factor in every country, and no more regard were paid to the principle of the comity of nations than was paid by Wells J. and the majority of the Court of Appeal, then a man could with impunity move his child from country to country, flaunting the courts of each in turn, until he found a court that gave him an agreeable decision.

The question of procedure obtained some attention in the Court of Appeal. The order directing the trial of the issue contained no reference to the *habeas corpus* proceeding itself and, notwithstanding this omission, Wells J. assumed full jurisdiction to dispose of the whole proceeding. A formal application for delivery of custody of the child was made at the opening of the trial, pursuant to the Infants Act. Robertson C.J.O. considered that the omission was fatal and that Wells J. had no power to make the order awarding custody to the father. The majority of the court, however, held that, even if it were assumed that there was a defect in procedure, it should "make the order which would have been made if the form had been strictly correct".

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TAXATION — THE DOMINION SUCCESSION DUTY ACT — SURVIVORSHIP INTERESTS. — In the May 1947 issue of the Canadian Bar Review there appears an interesting and instructive article by Mr. R. M. Sedgewick, Jr., on the question whether survivorship interests are taxable under the Dominion Succession Duty Act.[1]

The writer of that article takes issue withn the findings of the Exchequer Court of Canada (O'Connor J.), in *National Trust Co. Ltd.* v. *Minister of National Revenue*,[2] on the taxability of a "succession" alleged by the Crown to have been created by the terms of a settlement executed by the late E. R. Wood in favour of his daughter. The executor of the deceased's last will and testament, The National Trust Company, Ltd., appealed from the assessment on two grounds:

> (a) that the settlement in question did not create a "succession" within the meaning of the Act; and
>
> (b) in the alternative, if a "succession" was in fact created, it was exempt from taxation within the meaning of section 7(1)(g) of the Act.

O'Connor J. held that the settlement did not come within the taxing provisions of the Act at all, so that it was not essential to consider whether the exemption provided for by section 7(1)(g) applied, there being nothing in the way of a taxable gift to which it could apply.

The article in the Canadian Bar Review questions the validity of these findings and says, in effect, that in the opinion of the writer neither ground of appeal can be maintained.

An appeal was taken by the Crown to the Supreme Court of Canada, and the decision of that court was handed down on October 5th,[3] to the effect that the exemption provision in section 7(1)(g) is over-riding in character and prevents the court from collecting any duties in respect of the benefits taken by the settlor's daughter.

Although the result of the proceedings so far is in favour of the taxpayer, the position of the Crown has been materially advanced by the fact that the judgments handed down by the Supreme Court do not specifically mention the subject of the application of the taxing provisions to the settlement in question. The failure to make specific mention of this subject would seem to be an approach entirely different from the usual method of

[1] (1947), 25 Can. Bar Rev. 425.
[2] [1946] Ex. C.R. 650.
[3] As yet unreported.

interpreting a taxing enactment, which regards taxation as being the rule and exemption as an exception.

In any event the only subject to be considered so far as the present judgment is concerned is whether or not the exemption provision in section 7(1)(g) of the Act is over-riding in character. With deference to the opinion expressed by the Supreme Court, it is suggested that the court erred in holding as it did.

At the outset, it is important to bear in mind the important rule that, while the onus is upon the Crown to establish that a taxing enactment applies so far as the taxing provisions are concerned, once this onus is satisfied, the onus then shifts to the taxpayer to establish beyond question that an exemption provision applies to him. If there is any doubt whatever on this subject, the case for the Crown is complete and the tax is leviable. This rule is now so well established as to need little or no comment. The decision in *Re Carr*[4] furnishes a recent illustration of its application.

Section 7(1)(g) of the Act does not exempt gifts in the wide and general sense of that expression. It might have been possible so to contend had the statute remained in the form in which it was originally enacted on June 14th, 1941, the exemption provision then referring simply to "any gift made by the deceased prior to the 29th day of April, 1941". But this general provision was repealed by Chapter 25, Statutes of 1942, and the present section substituted for it. The substituted provision was given a retroactive effect in relation to benefits derived from persons dying on or after June 14th, 1941, so that it undoubtedly applies to the settlement executed by the late Mr. Wood. The gifts referred to in this exemption provision must accordingly be construed as limited to the particular type of gifts mentioned. Do the benefits provided by the settlor for his daughter in this case come within this category? If the Supreme Court is right in deciding that they do, the result is to make the reference in section 3(1)(g) to beneficial interests "accruing or arising by survivorship" absolutely meaningless. On the well-known principle of interpretation of statute law, that there is a presumption against intending an absurdity, it is not possible to interpret section 7(1)(g) so as to prevent the Crown from claiming duty under section 3(1)(g) in respect of survivorship interests.[5]

The very point as to a survivorship interest not being a gift of the type mentioned in section 7(1)(g) is dealt with by Lord

[4] [1948] C.T.C. 15, confirmed on appeal, [1948] C.T.C. 68.
[5] Maxwell on Interpretation of Statutes (9th ed.), p. 207.

Blanesburgh in his judgment in *Adamson* v. *Attorney-General*[6] as follows:

> Mr. Greene in his reply suggested that this was *an attempt on the part of the Crown to subject to duty subject-matter of a gift made more than three years before the donor's death.* I do not agree with him. *This was not such a gift.* It could not be said of this deed that the property comprised in it had been assumed by the donee immediately upon the gift or that it had thenceforward been retained to the entire exclusion of the donor. *There was no ascertainable donee to assume it, and it was of the essence that the settlor's reserved powers over it should not be excluded so long as he lived.* The very fact that it was, as I think, impossible consistently with the settlor's reservations to make of this deed 'a gift' *weakens the cogency of the appellent's present contention that the property had in fact passed at the date of the deed, so that there was nothing left to pass at the settler's death.*

While the other judges in the *Adamson* case make no specific mention of this subject, it is clear that the majority of the court were of opinion that survivorship interests are taxable whether or not a gift could be said to have been made of such an interest in the lifetime of the deceased. Lord Russell of Killowen is the only dissentient voice in this finding, so that his views on the subject can only be regarded as dicta not judicially confirmed.

It may be contended that there is a difference between survivorship interests, as between beneficiaries *inter se* and those depending upon the question whether the beneficiary shall survive the deceased or vice-versa. If any difference exists, it rather strengthens the case for the Crown than the reverse. Adapting the language of Lord Blanesburgh, it can, in such circumstances, be said that:

> There was no ascertainable donee to assume immediate possession of the benefits provided for to arise after death (the reason being that it could not be foretold as to whether or not the settlor or his daughter would survive) and it was of the essence that the settlor's interest in his own property and accumulations of interest therefrom should not be excluded as long as he lived.

Moreover, the facts in relation to the settlement executed by the late Mr. Wood are more clearly within the tax net than was the case under the Adamson settlement. The settlement in the *Adamson* case was held to concern property that did not pass on the death within the meaning of section 1 of the English Finance Act, 1894, but that duty was nevertheless payable under a provision in that Act corresponding to section 3(1)(g) of our Act. On the other hand, the settlement executed by the late Mr. Wood does concern property passing on his death and constitutes as well a survivorship interest accru-

[6] [1933] A.C. 257.

ing or arising to his daughter at that precise period. He clearly indicated his wish that the property should not pass to her in the full and absolute sense until that time. How then could it possibly be said that he had made a gift to her within the meaning of section 7(1)(g) prior to the 29th day of April, 1941? Futurity was of the very substance of the transaction, and, so long as the deceased lived, it was impossible for the daughter to claim either the title or possession of the corpus. Her right was restricted to the interest payments as they became due and payable on the quarterly payment dates, and this was the only gift to which the New South Wales case, to which the Supreme Court referred in the instant case,[7] could be said to apply. To say otherwise would be to allege that the daughter could force the trustees prior to Mr. Wood's death to account and pay over to her the capital and accumulations of interest without reference to whether the deceased was alive or not. Such a claim, if it had been asserted prior to Mr. Wood's death, would obviously have been untenable. Consequently, the interest that the daughter had prior to the death of the settlor was quite separate and distinct from that which she got afterwards. The latter interest is clearly taxable under section 3(1)(g) of the Act and, as Harrison on Death Duties says at pages 43 and 44:

> It is no answer to a claim for duty under this head to represent the provision as a gift without reservation more than three years before the death.

In view of the foregoing considerations, it is, to say the least, doubtful whether the taxpayers can satisfy the onus resting upon them to show that the benefits provided for by the settlement come within the exemption provision in section 7(1)(g).

It is submitted further, with deference, that the Supreme Court of Canada has placed an interpretation upon the meaning of the word "actual" in death-duty statutes which is not in harmony with existing case law on the subject. In this connection, Green on Death Duties, at page 77, says:

> *But actual possession and enjoyment* are required: it is not sufficient that the donee had the right to possession and enjoyment. (*Lord Advocate* v. *Stewart* (1906), 8 F. Ct. of Sess. 579).

The *Stewart* case concerned accumulations of interest which through an oversight had not reached the beneficiary until after the death of the settlor. It was held nevertheless that these accumulations were subject to succession duty for the reason

[7] *Commissioner of Stamp Duties of the State of New South Wales* v. *Perpetual Trustee Co. Ltd.*, [1943] A.C. 425.

that the beneficiary had not acquired *actual* possession of them during the settlor's lifetime.

Under the settlement executed by the late Mr. Wood, the daughter had neither the title nor possession of the capital and accumulations, and could make no claim to them until the settlor died. How is it possible then to say that as and from the date of the settlement she had *actual* possession and enjoyment?

The views expressed by the Supreme Court with respect to the settlement executed by the late Mr. Wood appear to be irreconcilable with those expressed by that court in the recent case of *Berwick* v. *Canada Trust Company*,[8] more particularly in relation to,

(a) what constitutes a gift of an accumulated fund; and

(b) when such a gift can be said to have been made.

It is true that the accumulated fund in that case was one dealt with by the will of the deceased, and that the question at issue was whether or not the deceased's son could be said to have a vested interest in the fund where his interest depended on surviving the testatrix, there being a gift over in the event of his failing to do so. Nevertheless, the reasoning seems to be equally applicable to a case where, as under the settlement executed by Mr. Wood, the persons interested in the settled fund are not beneficiaries *inter se* but rather the deceased himself and the beneficiary concerned. Indeed, common sense would seem to suggest that the reasoning is more applicable in such circumstances, since it is not a case of a "gift over" but rather one in which the settlor cannot be said to have parted with the accumulated fund at all while he lived. This conclusion leads to the question whether the settlement is really a valid trust instrument, or is a testamentary instrument dependent for its validity upon compliance with the Wills Act. To say the least, the circumstances are most unusual, and it is perhaps safe to say that the case records of our courts, if submitted to an exhaustive search, would fail to reveal an exact parallel. The nearest approach seems to be the case of *Doe et Cross* v. *Cross*[9] in which it was held that there was no objection to one part of an instrument operating *in praesenti* as a deed, and another *in futuro* as a will. In Jarman on Wills, Seventh Edition, at pages 1330 and 1331, the author says that

> If words of futurity are introduced into the gift, the question arises whether the expressions are inserted for the purpose of protracting the

[8] [1948] S.C.R. 151.
[9] 8 Q.B. 714.

> vesting, or point merely to deferred possession or enjoyment. A simple illustration of this question occurs in those cases where property is given to a person, followed by a direction that it shall be paid or transferred to him on his attaining a certain age, or on some other event.

Jarman proceeds to give examples of cases where a gift to a person upon attaining a certain age has been held to be vested, and then draws the following distinction between such cases and those where the gift is purely contingent:

> But the gift and the direction must be independent, for if the only gift is in the form of a direction to pay or transfer on the happening of a future event, the principle does not apply.

It would seem reasonable to suggest that the settlement executed by the late Mr. Wood comes within this exception and is accordingly distinguishable from the settlement considered in the New South Wales case[10] so much relied on by the Supreme Court in in its recent judgment.

In any event, it can confidently be asserted that the late Mr. Wood's daughter was not the only person interested in the trust for accumulation set up by the settlement as long as the settlor lived. This being so, the court would not assist her during his lifetime to obtain absolute possession and enjoyment of the fund.[11] How then can it be asserted that the settlement constituted a gift to her exempt from taxation under and by virtue of section 7(1)(g) of the Dominion Succession Duty Act?

In *Lethbridge* v. *Attorney-General*[12] the Lord Chancellor refers to a provision in the English Finance Act, 1894, exactly corresponding to section 3(1)(g) of the Dominion Act, and observes that its general purpose "appears to be to prevent a man escaping duty by subtracting from his means, during his life, moneys or money's worth, which, when he dies, are to reappear in the form of a beneficial interest accruing or arising on his death". This is what the late Mr. Wood did or attempted to do during his lifetime. If the Supreme Court by its judgment meant to imply that section 3(1)(g) is not applicable to the settlement executed by the late Mr. Wood, it may be said that the judgment is directly contrary to the finding in the *Lethbridge* case. Moreover, it appears to be in conflict with the decision in *Attorney-General* v. *Robertson*[13] which lays particular emphasis on the principle that for purposes of taxation the "substance of the transaction"

[10] *Supra*, footnote 7.
[11] *Wharton* v. *Masterman*, [1895] A.C. 186, at p. 198.
[12] [1907] A.C. 19.
[13] [1893] 1 Q.B. 293.

must be clearly borne in mind. The beneficial interest that passed to Mr. Wood's daughter on his death was distinctly a separate and completely new interest from that which she enjoyed during his lifetime, and can perhaps be described in language similar to that employed by Lindley L.J. in the *Robertson* case, at pages 301-302, as follows:

> She then lost her life interest, and she got what she had not before [that is, while the settlor lived], namely, the whole property in the fund and power to dispose of it as she liked then and there. This appears to me to be a succession under the Act.

The late Mr. Wood's daughter did not have a life interest while the deceased lived, but merely a right to the quarterly instalments of interest as they became due and payable. Accordingly, there can be no doubt that the interest she acquired on her father's death was a completely new interest.

The Supreme Court suggests that the exemption provision in section 7(1)(g) is over-riding in character, and thus strikes out all the taxing provisions of the Act in relation to this particular settlement, including section 3(1)(g). If this is really so, it would appear to have the result of destroying the central purpose of the enactment, which is to tax successors in respect of benefits that undoubtedly accrue from and after death.

Apart from this phase of the matter, it should be remembered that the Dominion Act includes not only all the classes of property mentioned in the English Finance Act, 1894, but also renders dutiable "property transferred in contemplation of death", a provision borrowed from the United States Inheritance statute.

It is quite possible for a transfer to be made "in contemplation of death" more than three years prior to the death and in such a way as to vest the title and complete possession and enjoyment so as to make the exemption provision in section 7(1)(g) applicable. It is suggested that it is this type of transfer to which the exemption is applicable, and not to transfers of property, irrespective of whether the title conferred is vested or contingent. In other words, the exemption provision has a limited application and not, it would appear, the wide and all exclusive application as suggested by the Supreme Court.

In any event, the onus of establishing that it has this wide and extended meaning lies upon the taxpayer, an onus that would seem difficult to discharge in the circumstances. In this connection, it is essential to remember that a gift is not "made" until the property of the beneficial interest has been effectually

vested in the donee.[14] It cannot be said that any gift to Mr. Wood's daughter was made prior to April 29th, 1941, in this sense.

As already stated, the Supreme Court has taken a novel line in making no reference whatever to the application of the taxing provisions of the Act and relying instead upon an exemption provision in support of its judgment. This being so, it would seem to be reasonable to suggest that the court, in effect, or impliedly, held that the settlement is within the taxing provisions of the Act. To say otherwise would of necessity mean that the court was concerning itself with the question whether an exemption could be deducted from "property included in the succession", which in fact had no existence. It has repeatedly been held that it is the duty of the court to ascertain in the first instance whether a tax is expressly imposed, particularly since the onus is upon the Crown to show that this is so. As long ago as 1903 Wetmore J. made the following observation:

> The duty of the court is to ascertain from the language of the ordinance what the legislature intended, and having clearly arrived at that intention to give effect to it. If it produces hardships, the legislature must remedy it, not the court.[15]

Lord Thankerton brings out the same point in his judgment in *Provincial Treasurer of Alberta* v. *Kerr*,[16] where he says:

> The identification of the subject-matter of the tax is naturally to be found in the charging section of the Act, and it will only be in the case of some ambiguity in the terms of the charging section that recourse to other sections is proper or necessry.

It is scarcely necessary to multiply references to illustrate this point further. Suffice it to say that it receives most frequent illustration in the cases where exemption is claimed, the rule being laid down that "taxation is the rule; exemption is the exception". In *Rex* v. *Madawaska S. D.*; *Ex parte Fraser*[17] Hazen C.J. said:

> It is laid down clearly in the text-books and in cases that have been decided on the question that as taxation is the rule and exemption the exception the intention to make an exemption ought to be expressed in clear and unambiguous terms.

To interpret the judgments in this case in the manner suggested would seem to imply that the court was completely ignoring the existence or non-existence of the rule, and applying

[14] Green on Death Duties (2nd ed.), p. 81.
[15] *Re Donelly Tax Sale* (1903), 6 Terr. L.R. 1 (C. A.).
[16] [1933] A.C. 710.
[17] 49 D.L.R. 371, affirmed 60 S.C.R. 351, 56 D.L.R. 95.

an exception. It would seem to be unreasonable to say that this can be done.

If the "substance of the transaction" is to be regarded in the interpretation of the Dominion Succession Duty Act, as in the case of other taxation statutes, it would seem reasonable to conclude that all benefits that accrue or arise upon death are dutiable, irrespective of whether such benefits have their origin in the terms of an instrument *inter vivos* or by reason of the will of the deceased or his intestacy. The Judicial Committee of the Privy Council gave expression to this view in relation to the terms of the statute considered in *Thomson* v. *Commissioner of Stamp Duties*[18] and it is difficult to understand why the same principle should not be applied to the Dominion legislation.

It would seem unreasonable to suggest that the Dominion Act does tax all successions in this sense and that, at the same time, Parliament destroys the tax by an exemption provision in certain cases simply because the particular benefit arises under an instrument *inter vivos* instead of by the terms of a testamentary instrument. Such a conclusion seems all the more extraordinary in a case where there is reason to consider that the instrument *inter vivos* is or may be regarded as testamentary.

The views expressed in this note are merely the personal expression of the writer's opinion.

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## GOING BEHIND THE STATUTE

I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses serious practical problems for a large part of the legal profession. The British courts, with their long accumulation of experience, consider parliamentary proceedings too treacherous a ground for interpretation of statutes and refuse to go back of an act itself to search for unenacted meanings. They thus follow Mr. Justice Holmes' statement, made, however, before he joined the Supreme Court, that "We do not inquire what the *legislature* meant, we ask only what the *statute* means". (Justice Robert H. Jackson: The Meaning of Statutes (1948), 34 A.B.A.J. 535)

[18] [1929] A.C. 450.