

(1957) 10 CAL CK 0001
In the Calcutta High Court

IN RE MCNEILL, DECD. ROYAL BANK OF SCOTLAND

Date of Decision : 29-10-1957

Acts Referred:

Finance Act, 1849 — Section 27
Finance Act, 1894 — Section 14(1), 9(1)

Citation : (1959) 37 ITR 16

Hon'ble Judges : Romer, J

Bench : Division Bench

Judgement

ROMER L. J., reading the judgment of the court, stated the facts set out above and continued : The question which now call for determination concern the incidence of the estate duty which became leviable upon the passing of the first moiety of the trust estate on the death of Alexander and of both moieties on the death of Eila. It has been contended on behalf of the residuary legatees and was conceded before Upjohn J. that unless they were exempted by the direction "free of duty" which we have quoted, the legatees would be bound to pay, or suffer by ways of deduction, a part of both sums of estate duty calculated in accordance with the proportion which the legacies bore and bear to the moieties of the trust estate. The extent to which this contention, according to the general law, is well founded is dealt with later in this judgment. We deal first with the effect of the formula "free of duty" and with the contention of Mr. Cozens-Hardy Horne on behalf of the first defendant, Anna Elizabeth MacPherson (who had been appointed by the order of the judge to represent all the pecuniary legatees), that such formula upon the true construction of this will operates to discharge the legatees from all liability to contribute in any way in those sums of estate duty. It will be appreciated that by virtue of the Finance Act, 1949, section 27, legacy duty had ceased to be chargeable in respect of the legacies with which we are concerned before the date when they became payable, namely, on the death of Eila. At that date the only death duty exigible in respect of any part of the testators estate was the estate duty already mentioned; and the same was true also at that date of the death of Alexander, since the legacies were not then payable.

It was the aim premise of Mr. Hornes argument that the formula "free of duty," in the absence of some special or limiting context, means "without any deduction (therefrom) by reason or in respect of death duty"; that is to say, it imports freedom from all kinds of death duties which might otherwise have the effect of diminishing the gift. This proposition was founded on such cases as *In re Turnbull*, before Farewell, J., and *In re Snape*, before Eve J.

In the former case the question particularly arose in regard to settlement estate duty which was chargeable in respect of certain legacies in addition to legacy duty. Farewell J. said : "I do not see how I can spell out of that anything other than what it says, namely, that the legacy is to be paid free from duty. The settlement estate duty is charged upon the legacy, no doubt, in a sense, but the executors have to pay it before they pay over the legacy, and they do so as a matter of practice. Not only are they required to retain, but for their own protection they do retain, the duty before they pay over the legacy. I cannot myself see any reason for saying that free from duty means free from one kind of duty payable by the executors more than from another kind of duty so payable."

The exact scope of formulae of this kind has been considered in relation to particular wills in many cases which have come before the courts, but it appears that the present is the first occasion on which it has been necessary to consider the effect of such exemptions (and also, indeed, strictly, the effect of the general law) in the case of deferred pecuniary legacies. To the general principle which Mr. Horne invokes from the case of *in re Turnbull*, and *In re Snape*, two collaries may here be mentioned. In the first place, it has been decided (see *In re Wedgwood*) that in the case of a legacy given to trustees in trust for persons in succession the exemption conferred by the formula "free of duty" will *prima facie* be satisfied (and its effect exhausted) by freeing the gift from diminution for death duties when it is first severed from the estate and handed over to the trustees. No question of this kind, however, arises in the present appeal - though the testator did in fact give a settled pecuniary legacy by clause 9 of his will.

The second corollary is to the effect that since the will speaks *prima facie* from the death the exemption will ordinarily cover new death duties which may be imposed between the dates of the will and of the death; but may, on the other hand, not cover new death duties imposed after the date of the death : see *In re DOyly*. This principle, again, is not directly relevant in the present case. On the other hand, as already observed, legacy duty which was operative in respect of the legacies given by the testator and payable on his death had ceased to be operative at the time when Eila died. It seems to us, as a matter of principle, plain enough that if upon the true construction of this will the exempting formula "free of duty" was apt and intended only to relieve the legatees from liability in respect of legacy duty (which was an existing tax at the date of the testators will and death) then it would be wrong, simply because legacy duty had been abolished, to give to the formula an extended meaning in order that it might

have some practical effect in favour of Mr. Hornes clients when their legacies became payable on Eilas death.

We are prepare to accept, at least for the purposes of this judgment, the correctness of Mr. Hornes general proposition founded on the cases of *In re Turnbull* and *In re Snape*. But it is trite law that in any given instrument the meaning of any form of words used therein must depend upon the context of that instrument an the guidance to interpretation which the instrument itself provides. It becomes necessary, therefore, to look somewhat closely at the testators will as a whole. It will be observed at once from its form an language that the will was the product of a skilled professional draftsman. We think, therefore, that the interpretation of the phrase "free of duty" where used in the will must be judged against that background : and against the background of knowledge, which we think must be attributed to the draftsman, that at its date legacy duty and succession duty were operative as well as estate duty, is payable as regards personality by the executors as part of their administration expenses.

By the first clause of the will the testator appointed the Royal Bank of Scotland his general executor and trustee and declared that the bank should be entitled to remuneration "free of duties" (plural) out of his estate in accordance with its relevant scale. Clause 2 contained an appointment of executors for the testators East Indian property with a bequest to them of the proceeds of sale of that property "free of all duties (including estate duty) leviabale in England by reason of my death," which duties he directed to be paid as testamentary expenses. By clause 3 the testator devised his Norfolk freehold property, with an exception in favour of his gamekeeper, to his brother in fee simple, and the directed the bank to pay as testamentary expenses "all the duties (including estate duty)" leviabale at his death in regard to his Norfolk property and in exoneration thereof. The clause also contained a devise to the gamekeeper of the excepted cottage, expressed to be "free of all duties (including estate duty)," which were to be paid as part of his testamentary expenses. There followed in clauses 4, 5 and 6 a bequest of leasehold property to his sister and specific legacies to his sister and brother, all expressed to be "free of duty." Clause 7 contained a forgiveness of all debts due to the testator with a direction to the bank to pay as part of his testamentary expenses "all duties (including estate duty)" leviabale at his death in respect of any such indebtedness. Clause 8 to 12 inclusive comprised pecuniary legacies, charitable and otherwise, one settled pecuniary legacy, and certain annuities. In each case the bequest was expressed simply to be "free of duty." Clause 13 contained a declaration to the effect that if he had made any gift during his life in respect of which estate duty should be payable at his death, such duty was to be paid out of his personal estate as a testamentary expense. There followed then the residuary gift of clause 14 which we have already sufficiently cited.

The direction in clause 1 that the banks remuneration should be "free of duties" may not perhaps for present purposes be of significance one way or the other - it

may have been taken from some form provided by the bank. We are not presently concerned with the scope of the exemption intended, but observe none the less that the plural "duties" is used. Of much greater significance, in our judgment, is the language of clauses 2 and 3. Not only is the plural used in both cases - free of all "duties" -but express reference is made to the inclusion of estate duty. The same observation is applicable in regard to clause 7, even though, as pointed out in argument, the precise effect intended may be more doubtful. It will be noted also that by clause 13 express reference is made to estate duty in circumstances in which provision for such duty was plain and desirable. Finally, in the first paragraph of clause 14 there is again found the use of the plural "all death duties" in a context containing express reference to estate duty. In contrast to these provisions, the simple formula and the use of the singular "free of duties" in a context containing express reference to estate duty. In contrast to these provisions, the simple formula and the use of the singular "free of duty" is used in every case in regard to bequests (clauses 4, 5, 6, 8, 9, 10, 11, 12 and the sub-clauses of clause 14).

Where in a will of this elaborate character, to be judged against the background already mentioned, two distinct formulae are found, it seems to us that *prima facie* distinct meanings should be attributed to each : and where one formula, namely, the singular "free of duty," is on the fact of it less comprehensive than the other, it would seem to follow that by the formula a more limited exemption was intended. It is true that in the first paragraph of clause 14 the reference to all death duties (in the plural) is followed by the language : "and other moneys which under... any direction or devise or bequest free of duty contained in this my will... are payable out of my general personal estate." But we are not satisfied that the use of the phrase "free of duty" in that passage can have the effect of equating in significance the two formulae. The words "free of duty" in the passage just cited are part of a reference to a direction, to be found in several places in the will, for payment of the duty out of the general personal estate - a direction not, however, in fact found in any of the cases in which bequests are given free of duty.

But, in addition, it is important to observe, as did the judge, that the only duty to which any sensible reference could have been intended or made in any one of the cases of gifts "free of duty" before you get to clause 14 must have been legacy duty : and in clause 14 itself the same is beyond doubt true of the two gifts of life interests to Alexander and Eila respectively. If the phrase "free of duty" in reference to the pecuniary legatees in this clause has the wider intention of which Mr. Cozens-Hardy Horne argues, then it would appear to be used in this one instance in a different sense from that in which it is used elsewhere throughout the will, including clause 14 itself.

Finally, we draw attention, as also did the judges, to the words in subclause 1(b) of clause 14 : "subject to the said legacies... and the duty thereon." Though it would be sensible and correct to speak of legacy duty being leviable upon

legacies, the same would not really be true or sensible of the estate duty which it is contended the legatees would have to bear in the absence of exemption : for that estate duty is not a duty upon the legacies. It is a duty leviable upon or in respect of the whole estate and the obligation of the legatees to suffer some part of the levy arises not by reason of any separate charge upon the legacies as cash, but because the legatees (like those entitled to the residue) are entitled to receive their benefits out of a trust estate which itself must be diminished by the charge for estate duty.

In the context therefore, of this will, and having regard to its elaborate form and the selection of two distinct formulate, one wider in scope on the fact of it than the other, we are with the judge in thinking that the phrase "free of duty" in subclauses (1) and (2) of clause 14 was intended to apply only to exemption from legacy duty, and is not apt to exempt the legatees from liability to bear such proportion of the estate duty charges as the general law will otherwise impose upon them.

On that view of the matter, the question next to be considered is as to the liability of the legatees in respect of the estate duty which became leviable on the death of Alexander in 1947 and the further estate duty which fell to be paid on Eilas death in 1956. The provisions of the Finance Act, 1894, which are relevant to the determination of this question are section 8(4), section 9(1), and section 14(1). They are as follows : [His Lordship read the sections and continued :] Inasmuch as Eilas legal personal representatives were not accountable for the estate duty which became payable on her death (for she only had a life interest in her own and in her brothers fund) it is clear that, by virtue of section 8(4) of the Act, each legatee is accountable for a rateable part of that duty, ascertainable by reference to the value of his or her legacy, as being a person to whom property passed for a beneficial interest in possession; nor, indeed, was the contrary contended either before the judge or before this court. It was, however, assumed in the court below that unless the legatees were exempted from liability to estate duty by reason of their legacies having been given "free of duty," they should be charges not only with a rateable part of the duty which became payable on Eilas death but with a similar part of the duty which had become exigible, and had been paid, on the brothers fund, on the death of Alexander. Accordingly, an in default of argument upon the point the judge declared "that the pecuniary legacies payable out of the brothers fund ought to be paid subject to deduction of a rateable proportion of the two sets of estate duty which became payable in respect of the said brothers fund on the death of Alexander McNeill (the brother of the testator) and of the said Eila McNeill." The appellant did not in her original notice of appeal raise the point that if the judge were right in the limited effect which he had attributed to the words "free of duty," the legatees were at all events not liable for any part of the estate duty which had become payable on the death of Alexander (hereinafter referred to as "the relevant duty"). During the discussion before us it was, however, suggested that an argument to that effect might well be advanced on behalf of

the legatees, as alternative to their main contention. We accordingly gave leave to Mr. Cozens-Hardy Horne to amend his notice of appeal in order to raise the point, and this he did by introducing as an additional ground of appeal "that the judge was wrong in law in holding that any duty payable in respect of the said brothers fund on the death of the said Alexander McNeill was chargeable against the pecuniary legacies payable thereout on the death of the said Eila McNeill." This point was accordingly argued before us and it is, in our opinion, one of some little difficulty.

It is, we think, clear that if the pecuniary legatees are liable to be charged with any part of the relevant duty, it can only be (i) because there is some statutory provision to that effect, or (ii) because the testator expressed an intention by his will that the legatee should be so charged, or (iii) because of some principle of equity which imposes the liability.

As to the first of these grounds, it was not suggested that any statutory provision is relevant to the matter other than the sections of the Finance Act, 1894, to which we have already referred, viz., section 8(4), section 9(1) and section 14(1). By reason of section 9(1), the brothers fund clearly became charged upon his death with the estate duty which became payable in respect thereof, as being property which did not pass to Alexanders executor as such. That sub-section, however, does no more than impose the charge; it does not indicate how the charge is to be borne as between the persons who are beneficially interested. Section 8(4) of the Act specifies the persons who shall be accountable for the estate duty on property which passes on the death of a deceased person whose executor is not accountable for the duty, and there is included in the category "every person to whom any property so passes for any beneficial interest in possession." It is, we think, clear that the pecuniary legatees did not become accountable on Alexanders death under this sub-section, for, in view of Eilas prior life interest in the brothers fund, it cannot be said that their legacies passed to them for a beneficial interest "in possession." It is true that on Alexanders death the legacies became indefeasible, whereas they have previously been contingent, but a vested legacy payable in future is not a beneficial interest in possession. Nor, in our judgment, did the legatees become chargeable in respect of estate duty on Alexanders death by virtue of section 14(1) of the Act. That sub-section only applies where a person is entitled to any sum "charged on" property which does not pass to the executor as such. In our opinion, the legacies given to the first defendant and her fellow legatees were not charged on the brothers fund for the purpose of section 14(1) of the Act or at all. The legacies were ordinary pecuniary legacies and would become payable in a due course of administration, but the legatees had no rights comparable, for example, to those attaching to a rent charge.

It accordingly cannot be said, in our judgment, that if the legatees are liable at all to be charged with a rateable part of the relevant duty, they are so liable because of any of the provisions of the Finance Act, 1894. Is there, then, any

indication of intention to be found in the testators will that he intended them to be subject to this liability ? Inasmuch as we have expressed the view that the words "free of duty" in the will were confined in their operation to freedom from legacy duty, it may be said that the testator impliedly evinced an intention that the legatees should not also enjoy exemption from any statutory or other liability to estate duty; and that he accordingly intended that they should bear a rateable proportion of the estate duty payable in respect of both on Eilas death in accordance with section 8(4) of the Act of 1894. Subject, however, to that implication of intention, no guidance appears from the testators will either one way or the other on the question which we are now considering; and certainly there is no indication that the testator intended to impose any duty on the legatees other than such as might be imposed by law.

It was contended before us, however, that even though no liability to contribute to the relevant duty is imposed either by statute or by virtue of any intention, express or implied, in the will, it should nevertheless be imposed on equitable grounds. Apart from authority, it is difficult to see why the legatee should be subjected to a rateable proportion of estate duty which became payable on a death which brought them no beneficial interest in possession. It was suggested, however, on behalf of the respondents, that every time charge for duty arises on the cesser of a limited interest in a fund, that charge must be rateably borne, according to their respective beneficial interests, by all those amongst whom the fund ultimately falls to be distributed. Accordingly, so it is contended, if legacies are payable out of a fund on the falling in of the last of several successive life interests in the fund the legatees, when finally paid, must suffer a cumulative deduction in respect of the estate duty levied on the death of each life tenant. If this view of the matter be right, it would lead of curious results. In the first place, the argument involves a pecuniary legacy being relegated in those circumstances to the status of an aliquot fraction of the whole estate, which is not. It is of the essence of the pecuniary legacy that it is paid; so here the testator directed that legacies of stated amounts should be paid out of the trust fund as it stood when Eila died, which is quite a different thing to bequeathing an aliquot part of that fund to each legatee on Eilas death. Again, it is difficult to understand why the suggested equity should be applied in the present case for the advantage only of the residuary legatees. During the period of Eilas survivorship of her brother she suffered a diminution of income by reason of the duty which the trustees paid out of the brothers fund on Alexanders death. If the alleged equity exists at all, it would surely have been fair to have applied it in such a way as to have benefited Eila as well as the residuary legatees; this could have been done by valuing the legacies as at Alexanders death and charging the legatees with an appropriate rate of interest on the amounts so ascertained as part compensation to Eila or her estate. Such a course would, however, involve considerable difficulties - which would, of course, have been enhanced had the legacies continued to be contingent after Alexanders death. Another curious position would have arisen, on the respondents argument, if the testator had

directed the trustees to raise and pay, during Eilas lifetime, the sum of Pound X for some specific purpose and had charged the sum on the funds; it would surely not be right to subject the legacies to a deduction in respect of this charge when then became payable on Eilas death.

Such consideration as we have mentioned suffice to show the difficulties - and indeed hardships - to which the suggested equity would give rise. Nor is it easy to define the equity, if it in truth exists. It is perfectly true that, generally speaking, if a fund is subject to a charge, the burden of that charge must be borne rateably by the persons among whom the fund is divisible in proportion to their respective beneficial interests : and, as was pointed out by Cozens-Hardy L. J. in *Berry v. Gaukroger* : "It is an old and well-established principle of equity that, when several persons are liable in respect of one and the same obligation, the rights of the parties interest are not affected by the circumstance that one of those persons has been called upon to discharge an has discharged the obligation." But at the time when the legacies in the present case became payable there was no charge on the brothers fund at all in respect of the relevant duty; that duty had long since been paid and the charge which has been imposed by section 9(1) of the Finance Act, 1894, in respect of it had ceased to exist. Accordingly, the general principle to which we have referred has no application to the present question. No other principle was invoked to support the respondents contention an were the matter free of authority, we should have little hesitation in rejecting it; for it does not appear to be founded in reason, would occasion complication in the administration of trusts and would, in some cases at least, produce unfair results.

Mr. Bradburn, however, placed considerable reliance upon a decision of Joyce in *In re Charlesworths Trusts*. In that case a trust fund was settled on trust to pay the income thereof to the settlor for his life with remainder to his widow for her life, and on the death of the survivor then as to Pounds 10,000 as the wife should by will appoint, and the remainder of the fund was to fall into the testators residuary estate disposed of by his will. Estate duty was paid on the fund on the death of the settlor in 1908. The widow survived him and die in 1911, having appointed the Pounds 10,000 by her will. Joyce J. held that the estate duty which had been paid in 1908 should be borne rateably by the appointees and by the settlors residuary legatees. It is by no means easy to discover from the short judgment which he delivered what was the true ground of his decision. He stated that the decision of this court *Berry v. Gaukroger* applied, and that there was indeed no difference between that case and the case before him; but further he seems to have applied the principle of section 14(I) of the Finance Act, 1894, notwithstanding that he was unable to hold that the Pounds 10,000 was a charge on the trust fund. In so far as we apprehend the reasons for the decision (and they were carefully considered by Romer in *In re Viscount Portman (No. 2)*, to which we refer hereafter), we think that it is true to say that if those reasons were adopted and applied to the present case the first defendant would fail; for the judge does seem to have treated the Pounds 10,000

as though it had been an ordinary pecuniary legacy payable at a future time, namely, upon the widows death. In truth, however, the judge was in error in thinking that the decision in *Berry v. Gaukroger* was conclusive of the case; for it had little, if any, bearing upon the question which was realty and personalty to trustees on trust to pay his funeral and testamentary expense and debts, and to invest the residue and out of the income to pay his widow an annuity of Pounds 500; and he directed that after her death the trust fund should be held upon trust to pay thereout certain legacies amounting to Pounds 9,000 and, to divide the residue among certain persons named in the will. The widow died in 1900, that is to say, after the Finance Act, 1894, came into operation. u/s I of that Act, estate duty was payable on the widows death on so much of a fund which had been set aside to answer her annuity as represented real estate; but u/s 21(I) the duty was not payable on the portion representing personal estate. The proportion representing real estate was taken at 12/17ths of the whole fund the estate duty on 12/17ths of the Pounds 9,000 legacies was Pounds 223. The question before the court was whether the pecuniary legatees ought to bear that sum by deduction from their legacies or whether it should be borne by residue.

Buckley exonerated the legatees from this burden, but the court of Appeal held that the Pounds 223 ought to be borne by them. This summary of the facts demonstrates the essential difference between that case and *In re Charlesworths trusts*; for in the latter case the legacies were not payable upon the death on which the liability to estate duty arose, whereas in *Berry v. Gaukroger* they were. This distinction was emphasized by Romer in *In re viscount Portman (No. 2)*. The facts of that case were that upon the death of the second Viscount Portman in 1919 certain estate sin London forming part of the Portman settled estates stood limited to the use of the third viscount for life with remainder (which subsequently failed) to his first and other sons successively in tail male with remainder; if the defendant, the fourth viscount, should (as happened) succeed to the title, to the use (so far as material) that the fourth viscount and his assigns during his life should receive a yearly rentcharge of Pounds 50,000 to commence from his succession to the title and to be paid without any deduction except for death duties by equal quarterly payments. Subject as aforesaid, and as to the estates charged with the Pounds 50,000 rent charge, subject thereto all the Portman settled estates were limited to the use of the plaintiff for life with remainders over. Upon the death of the second viscount, estate duty became payable in respect of the London estates by 16 half-yearly instalments, only seven of which had been paid before the death of the third discount, who died in 1923 without ever having had male issued and was thereupon succeeded by his brother, the fourth viscount. The balance under the nine instalments then due amounted to about Pound 1,300,000. Further estate duty became payable to the death of the third viscount. The question before the court was as to what proportion of the aforesaid nine instalments and of the estate duty which became assessable upon the death of the third viscount in respect of the London estate should be borne by the yearly rent charge of Pound 50,000. At the original

hearing of the originating summons (*In re viscount Portman*) it was admitted that there was made upon the footing of the liability of the fourth viscount, in respect of his rentcharge, to contribute, in the manner therein mentioned, to both sets of estate duty. Before the order was drawn up, however, leave was given to withdraw the admission made at the hearing, and it was directed that the question with regard to the liability of the rentcharge in respect of the unpaid instalments should be argued. Inasmuch as (i) the rentcharge was plainly a charge upon the London estates which passed upon the death of the second viscount, and (ii) the estates did not pass to the second discounts executor as such, the argument of the plaintiff was mainly founded upon section 14(I) of the Finance Act, 1894, though reliance was also placed upon section 8(4). It was argued, however, on behalf of the fourth viscount that section 14(I) is really a procedure section, dealing with the recovery rather than with the incidence of estate duty; and that it is merely complementary to section 8(4). Romer rejected this latter argument and held that section 14(I) is not mere machinery but imposes liability under its own provision. He then proceeded to inquire whether there was anything in *Berry v. Gaukroger* which was inconsistent with that view and came to the conclusion that there was not. He summarized the judgments which were delivered in this court and said that that of Vaughan Williams was founded upon section 8(4) of the Act; that Romer held that the legacies there in question were property which passed upon the death of the annuitant for a beneficial interest in possession and that, as u/s 9(I) the duty assessable as against the legatees became a first charge on the legacies as a gains the legatees, there was nothing to justify the court in holding that as between the residue and the pecuniary legatees the former ought to indemnify the latter against such duties; and that Cozens-Hardy based his judgment on section 8(4) and though that the legacies must be regarded as property which passed to the legatees for a beneficial interest in possession of the death of the annuitant and that the legatees were accountable to the Crown accordingly. The judge added that Romer had said that it was unnecessary for him to consider the effect of section 14(I), and that Cozens-Hardy had doubted whether the contention based upon that sub-section to the effect that the legacies were charged upon the fund belonging to the residuary legatees was well-founded, but had found it unnecessary to decide the point. Romer then considered the meaning to be attributed to the word "entitled" in section 14(I) and, after indicating five possible meanings, which he specified, he said that the only authority hearing upon this question seemed to be *In re Charlesworths Trusts*. The judge recited the facts of that case and said that the question to be decided was whether the Pound 10,000 which the widow had appointed ought to bear any part of the estate duty in question. He then proceeded as follows : "Joyce held that the duty must be borne rateably by the wives appointees, and the settlors residuary legatees. In the course of his judgment he expressed himself as follows : Why this duty should be borne by one part of the fund and not by the other part, I cannot see. In my opinion *Berry v. Gaukroger* applies to this case. When the two cases are compared there is no substantial difference between them I think this

the judgment of Cozens-Hardy is conclusive. But the judgment of Cozens-Hardy is conclusive. But the judgment of Cozens-Hardy in *Berry v. Gaukroger* was based upon the fact that the pecuniary legatees in that case became entitled to a beneficial interest in possession immediately upon the death of the person on whose death the estate duty became leviable, and so became personally liable to a proportionate part of the duty u/s 8(4). In the case before Joyce the Pound 10,000 did not become an interest in possession, or at all, until the death of the wife. With all deference, therefore, to the learned judge, I am unable to see how the judgment of Cozens-Hardy was conclusive upon the point. For there was nothing in the sections of the Act preceding section 14 to impose any liability to the duty upon the persons who ultimately became entitled to the Pound 10,000. Joyce however continued as follows : If it is said that there is a charge and that the Pound 10,000 is to be paid first, then section 14(I) is an answer to that. If Mrs. Charlesworth had died before her husband and there had been no intervening life estate, I do not see how the duty could have failed to have been apportioned between the two parts of the fund. To have done so would have been to disregard the doubts expressed both by Vaughan William and Cozens-Hardy in *Berry v. Gaukroger*. But he must undoubtedly have been of the opinion that if the Pound 10,000 did constitute a charge upon the fund it ought to bear a rateable part of the estate duty, although it did not become a charge until after the duty had been paid. He therefore treated the word entitled in section 14(I), as meaning entitled at any time." In the result Romer held that the fourth viscount was liable by virtue of section 14(I) to contribute towards payment of the outstanding instalments of the estate duty which were in question. His actual decision is not, of course, material to the present appeal because the legacies now in question were not charged upon the residuary estate and section 14(I), therefore has no application. The decision has, however an important relevance to the present case. The judge made it plain that in so far as Joyce founded himself in *In re Charlesworths Trusts* on either the decision or the judgments in *Berry v. Gaukroger*, he was mistaken. We agree with Romer's criticism of *In re Charlesworths Trusts*. True it is that Romer said that he thought he ought to follow the decisions it had been given over 13 years previously and, for aught he knew to the contrary, had been acted upon in practice ever since. It is clear, however, that he only followed it in adopting the view which Joyce had apparently expressed as to the meaning of the word "entitled" in section 14(I), viz., that it meant (or included) entitled at some future time to any sum charged upon settled property. This sufficiently appears from what Romer said in favour of that view. "Directly you find," he said, that a person is entitled to a charge upon property in respect of which estate duty has been paid, the charge being created by a disposition not containing any express provision to the contrary, that person is liable to pay a proper rateable part of the duty"; and he said that that view gives effect to the prima facie meaning of the words in the sub-section. Romer in no way indicated his approval of the apparent application by Joyce of section 14(I), by way of analogy, to a case where a legatee is entitled at a future time to payment of a sum which is not charged upon a settled fund; and to the

extent that Joyces decision imposed liability on such a legatee it cannot, in our judgment, be supported.

No textbook, so far as we are aware, has treat In re Charlesworths trusts as a decision covering such a case as the present. In our judgment Joyces judgment could only be supported (if at all) on the ground that the intention of the settler in that case was that the Pound 10,000 over which his widow was given a power of appointment was to constitute a fractional part of the entire settled fund so that the recipients of that part should stand in all respect on the same footing as those to whom the rest of the fund was given. Such an approach could not, however, be sustained, in our judgment, in a case, such as the present, where ordinary pecuniary legatees are concerned; for as we have previously stated, a pecuniary legacy takes precedence over residue, and residue can only be ascertained after the legacies have been paid. Apart from In re Charlesworths Trusts no case was brought to our attention which affords much assistance in the solution of the person problem. Reference was made to the decision of Astbury J. in In re Hicklin. That decision, however, went no further than to apply the general principle (which the judge thought, and perhaps rightly, was supported by the judgments of Romer and Cozens-Hardy in Berry v. Gaukroger that where a fund is, at the time of distribution, subject to a charge for estate duty u/s 9(I) of the Act of 1894, that charge must be borne rateably by the several beneficial interests in the fund. The decision has no application to the present case, for the charge which arose on Alexander McNeills death had ceased to exist before the time for the payment of the legacies had arrived.

In our judgment, there is no equitable principle which justifies or requires that the pecuniary legatees under clause 14(I) of the testators will should be charged with any proportion of the relevant duty; and as there is, in our opinion, no statutory provision and no expression of testamentary intention which imposes the liability on the legatees, they are, in our judgment, immune from it. On this point, accordingly, we allow the appeal.

Appeal on first point dismissed. Appeal on second point allowed.

Leaver to appeal to the House of Lords.