over-delivery. It may be doubted whether Lord Justice Romer, in the passage quoted, intended to enunciate a principle of general application. Assuming that he did so intend, it is, we think, plain that his dictum was not necessary to the decision of the case, and nothing to the same effect is to be found in the judgments of the other members of the court.

We were referred to a recent decision of Mr. Justice Goddard (as he then was) in which doubt was expressed as to the correctness of the dictum and the accuracy of the reports: (*Lauro* v. *L. Dreyfus and Co.*, 59 Ll. L. Rep. 110, at pp. 116, 117).

In the absence of any binding authority, it is necessary for this court to decide the question according to general principles. It was argued that, just as the buyer who accepts a quantity of goods larger than he contracted to buy must pay for them at the contract rate (see sect. 30, sub-sect. (2), of the Sale of Goods Act, 1893), so, by analogy, the consignee who takes delivery from the shipowner of a larger quantity of goods than the bill of lading specifies must pay their value to the shipowner.

In our view, the two cases are in no way analogous. As between seller and buyer, the delivery of a quantity larger than that specified in the contract was regarded at common law as a proposal for a new contract of sale which the buyer might accept by retaining the goods (see *Hart* v. *Mills*, 15 M. & W. 85, and *Cunliffe* v. *Harrison*, 1851, 6 Ex. 903, per Baron Parke, at p. 906). As between shipowner and consignee we can find no reason for holding that, whether (as was suggested) by implication of law, or by way of inference from the facts, the acceptance by the latter of the overplus of itself gives the shipowner a right to anything more than the payment of additional freight. *Primâ facie* the shipowner is entitled to be paid for carrying the surplus goods, but not to be paid their value or their price. Even the right to additional freight, where goods are not mentioned in the bill of lading, and are thus it would seem, not covered by sect. 1 of the Bills of Lading Act, 1855, would appear to depend not on an implication of law, but on an inference which may properly be drawn from the facts: (see *Sanders* v. *Vanzeller*, 1843, 4 Q. B. 260, at p. 295; *White and Co.* v. *Furness, Withy, and Co.*, 72 L. T. Rep. 157; (1895) A. C. 40, per Lord Herschell, at p. 43).

In the present case there were no facts before the learned county court judge to support a finding that the defendants were bound by contract to pay to the shipowners the value of goods the price of which, for all that appears from the admitted facts, either may have been paid long ago by the defendants to their vendors or may be a debt due from the defendants to their vendors which would not be satisfied by payment to the shipowners.

Counsel for the plaintiffs sought to rely upon a passage in the speech of Lord Moulton in *Sandeman and Sons* v. *Tyzack and Branfoot Steamship Company Limited* (109 L. T. Rep. 580; (1913) A. C. 680, at pp. 696 and 697), which deals with the position of a consignee whose goods have become "inseparably and indistinguishably mixed" with those of another consignee, "without loss and without deterioration." Lord Moulton there says that if the consignee chooses to exercise his right to claim as tenant in common the mixture of his goods with those of another, "the shipowners are entitled to the benefit of what he received in reduction of damages for their breach of contract." In the case supposed, the consignee elects to exercise a right which he has acquired solely by reason of the shipowners' breach of contract. He thus becomes co-owner of a mixture in which the goods which should have been delivered to him as a separate entity have been merged. It seems almost self-evident that any profit which this co-ownership brings him should be set off against the loss occasioned by the breach of contract.

In the present case, the consignee is not shown to have received any countervailing advantage whatever which may be set against his loss, nor is there anything to show any *commixtio* of his goods with those which are the property of another person. Here again the answer to the respondents' contention is that the appellants may well have had a right to receive not only the goods which the respondents failed to deliver, but also the 362 pieces which, according to the bill of lading, were over-delivered.

In the result, the appeal succeeds. The judgment of the county court must be varied (1) by omitting that part of it which adjudges that the plaintiffs are to be given credit for a sum to be assessed as the value of overage of delivery, and (2) by giving the costs of the issue raised by the reply to the defendants instead of to the plaintiffs. The defendants are to have the costs of this appeal.

Leave to appeal granted.

Solicitors for the appellants (defendants), *Pritchard, Sons, Partington*, and *Holland*, agents for *Andrew M. Jackson* and *Co.*, of Hull.

Solicitors for the respondents (plaintiffs), *Botterell* and *Roche*, agents for *Sanderson* and *Co.*, of Hull.

HIGH COURT OF JUSTICE.

CHANCERY DIVISION.

March 16 *and* 17.

(Before CROSSMAN, J.)

Re Cooper; Le Neve-Foster v. National Provincial Bank Limited and others. (*a*)

Will—Construction—Power for professional executors and trustees to charge—Trust corporation appointed executor—Right of corporation to charge fees—Legacy on secret trusts—Trusts communicated to trustees before will executed—Codicil increasing amount of legacy—Trustees not told of increase—Validity of increased legacy.

The testator duly executed three testamentary documents. The first contained a power in common form for any executor or trustee thereof, being a professional person, to charge for business done. By a subsequent testamentary document the testator appointed a trust corporation to be one of his executors, and the question was raised whether the trust corporation had power to charge its fees.

The testator by a will made in February, 1938, *bequeathed to F. and W. "the sum of* 5000*l. free of duty upon the trusts which I have already communicated to them with respect thereto." Immediately before signing this will the testator verbally communicated the trusts on which the* 5000*l. was to be held to his trustees. On the* 27*th March*, 1938, *the testator made a*

(*a*) Reported by Miss B. A. BICKNELL, Barrister-at-Law.

further testamentary document, which contained the following provision: "The sum of 5000l. bequeathed to my trustees in the will now cancelled, is to be increased to 10,000l., they knowing my wishes in regard to this sum." The testator died two days later without having communicated to the trustees the fact that the 5000l. legacy had been increased to 10,000l. This summons raised the further question whether the additional 5000l. given by the later will was a valid gift, having regard to the fact that the trustees were not informed of this additional bequest until after the testator's death.

Held, first, the professional trustees' charging clause did not empower the trust corporation to charge its fees. Secondly, that, for a legacy held on secret trusts to be valid, it is essential that the trusts on which the legacy is to be held be communicated to the legatee, and that in the lifetime of the testator he acquiesce or promise to carry them out. Here the trustees never accepted the trusts in regard to the second 5000l. The trusts in regard to this sum were therefore not effectually declared, and this sum fell into residue. The principle laid down in Blackwell *v.* Blackwell (140 *L. T. Rep.* 444; (1929) *A. C.* 318) *considered and applied.*

ORIGINATING SUMMONS.

Colin Cooper (hereinafter called "the testator") duly executed three testamentary documents, which were all admitted to probate. By the first, a will dated the 13th July, 1931, after appointing executors and trustees and making certain bequests, the testator gave his residuary real and personal estate to his trustees upon trusts in favour of his wife, Thelma Cooper, a defendant to this summons, and of his children. Clause 40 contained a professional trustees' charging clause in the following terms: "Any executor or trustee for the time being of this my will, being a person engaged in any profession or business, shall be entitled to charge and be paid all usual professional or other charges for all business done by him or his firm in relation to the premises whether in the ordinary course of his profession or business or not, and although not of a nature requiring the employment of a professional or business person."

By a second will dated the 10th February, 1938, the testator revoked all wills theretofore made by him. He appointed the plaintiff Fermian Le Neve-Foster, another individual, and the National and Provincial Bank Limited executors and trustees thereof. By clause 6 thereof the testator provided as follows: "I bequeath to the said Fermian Le Neve-Foster" [the plaintiff] "and Frank Wilson the sum of 5000l. free of duty upon the trusts which I have communicated to them with respect thereto."

Before the testator executed his will he verbally communicated to Frank Wilson, one of the legatees of the 5000l., the trusts on which he desired this sum to be held. When he made this communication T. Swan, a solicitor, was present, who immediately afterwards made a written memorandum of the trusts on which the 5000l. was to be held. This sum was to be held upon trust to invest the same and to hold the income upon protective trusts for a named beneficiary for life and, subject to that life interest, the trust legacy was directed to fall into the testator's residuary estate. Shortly afterwards these trusts were communicated to the plaintiff, the second legatee of the trust legacy. The testator subsequently left England. While away he suddenly became extremely ill, and executed a third testamentary document dated the 27th March, 1938, in the following terms:

"This is my last will, and cancels the will I made about the 8th or the 9th February, 1938, before leaving England, and puts back in its complete form the previous will, with the exception that my executors will be Fermian Foster and the National Provincial Bank, and my bequests to Stapleton and Man holds good.

"The sum of 5000l. bequeathed to my trustees in the will now cancelled is to be increased to 10,000l., they knowing my wishes regarding this sum."

The testator died on the 29th March, 1938. He left him surviving his widow, the defendant Thelma Cooper, and two infant children, the defendants Christopher Colin Cooper and Gillian Cooper. On the 23rd June, 1938, probate in solemn form of the third will of the 27th March, 1938, and of the two earlier wills was granted to the plaintiff.

This summons was taken out by the plaintiff as executor and trustee for the determination, *inter alia*, of the following questions: First, whether the National Provincial Bank Limited, a defendant to the summons, had power to charge remuneration if it accepted the executorship and trusteeship of the testator's wills; and secondly, whether the increased legacy of 10,000l. bequeathed by the will dated the 27th March, 1938, was effectually bequeathed as to the said sum of 10,000l. or some and what part thereof or whether the same failed in whole or in part.

Wilfrid Hunt for the plaintiff.

Charles Russell for the defendant bank.

B. F. Mendel for the defendants, Frank Wilson and Charles Vivian Troughton, who were named as trustees of the first will.

J. V. Nesbitt for the testator's widow and children.

Roger Turnbull for the fourth defendant, the beneficiary in whose favour trusts of the original legacy of 5000l. had been declared.

Crossman, J. [stated the relevant facts with regard to the claim of the defendant bank that it was entitled to charge its fees, and continued:] I find there is no power in the bank to charge remuneration; there is no power to charge in the first will. Notwithstanding Mr. Russell's very ingenious argument, I am quite unable to hold that the clause, commonly called the solicitors' charging clause or professional trustees' charging clause, is sufficient on its true construction to empower the corporate trustee to charge its fee. If that is going to be held I think it must be held by some other court than this. I hold that the bank here, if it proves the will, has no power to charge. [The learned judge then read the relevant provisions of the testator's testamentary documents dealing with the 5000l. legacy, and continued:] The question which has now arisen is this. It is admitted that the gift of 5000l. made by the will of the 10th February, 1938, has been excepted from the cancelling of that will and remains as if it was incorporated really in the will of 1931—there was no such provision in the will of 1931—and it is not disputed here by anybody, that, so far as regards that gift of 5000l., it is an effective gift, because the trusts on which it was to be held by the trustees to whom it was bequeathed were communicated to the legatees in the lifetime of the testator, in fact before the execution of the

will, and, therefore in accordance with the principles which were in fact laid down and followed in *Blackwell* v. *Blackwell* (140 L. T. Rep. 444; (1929) A. C. 318), those are good trusts which can be enforced and take effect.

The question is, whether the gift of the sum of 5000*l.* which was added to that by the testator by the document executed on the 27th March, 1938, is also valid. For the purpose of arriving at the decision of that question I have to consider the principle upon which the gift of 5000*l.* by the will of the 10th February, 1938, is now held to be good. Looking at the case of *Blackwell* v. *Blackwell* (*sup.*) in the House of Lords, I find that the main principle which is laid down is that communication of the purpose for which a legacy is given to a legatee and acquiescence by the legatee in that purpose or promise on his part to carry it out are the essential matters which render a legacy made in this way, on what is known as secret trusts, valid. On p. 339 of the report in the House of Lords, Lord Sumner says this: "It is communication of the purpose to the legatee, coupled with the acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the law of trusts, as applied in this instance to trustees, who happen also to be legatees." In fact the principle of *Blackwell* v. *Blackwell* is this; it is a matter of trusts and not a matter of testamentary disposition; it is whether there is a valid and effective trust binding the legacy which has been given to the trustees.

What was added to the law by *Blackwell* v. *Blackwell* and what had not been recognised or accepted entirely before, was that the principle applied in the same way if the legacy was given to the trustees in the will expressly upon trusts of some sort, as it applied in the case where the legacy was given without any disclosure of the trust in the will at all. It had always been, I think, accepted, that where a legacy was given to a person without any expression of a trust, and that person at the same time was informed that he held it upon a trust, and he either expressly undertook to perform that trust or allowed the legacy to remain without saying he would not carry it out, that was a trust which the court could enforce. Since *Blackwell* v. *Blackwell*, the same principle applies even if the legacy is given to a trustee expressly upon a trust, so that in fact he could not get out of it even if he wished to.

What I have to consider here is whether in this document of the 27th March, 1938, the further 5000*l.* which is bequeathed (because I regard the gift here as an additional 5000*l.* bequeathed to the same trustees) can be governed by the same principles as the original 5000*l.*, notwithstanding the fact that the bequest of the second 5000*l.* was not communicated to the trustees, that in fact they were not aware of it until after the death of the testator. It seems to me that I must treat this gift in that document of the 27th March, 1938, as an additional sum of 5000*l.*, and at present I cannot see how I can arrive at the conclusion that the trustees ever accepted a trust either impliedly or expressly with regard to the second 5000*l.* What they did, as the evidence clearly shows, is this: they accepted the trust as regards the first 5000*l.*, and it seems to me that the suggestion which Mr. Nesbitt has put before me, that, if the gift of the second 5000*l.* is held to be good, also a gift of the whole of the estate would be equally good, is a *reductio ad absurdum* which does show that this does not come within the principle which, as extended in *Blackwell* v. *Blackwell*, I must now regard as the law binding me. It may be that the testator wished and intended to give it in this way, but the question is, whether he can give it in this way. He has chosen to give it on what is known as a secret trust, and the limit of the extent to which a secret trust can be enforced is at present shown by *Blackwell* v. *Blackwell*. I do not find in that case anything which would enable me to say that the gift of the second 5000*l.* is subject to a trust which can be enforced. It seems to me that the result here is that, as is admitted by all parties, the first 5000*l.* remains good and is held upon the trusts expressed by the testator to the trustees previously to the will of the 10th February, 1938, but that the second 5000*l.* falls back into residue, because it is given to the trustees apparently, but it is given upon a trust which is not effectually declared and consequently falls back into residue and is in the same position as if it never had been given.

Solicitors: *Warren, Murton, Foster*, and *Swan; Elvy, Robb*, and *Co.*

Thursday, February 16.

(Before BENNETT, J.)

Re Cowlishaw; Cowlishaw v. Cowlishaw. (*a*)

Will—Annuity—Free of all duties—Free of all deductions whatsoever—Whether annuity bequeathed by testator was free of income tax.

By his will dated the 3rd February, 1937, a testator, who died on the 20th May, 1937, bequeathed an annuity of 900l. a year for life to his wife, and with reference thereto used the following words in his will: "free of all duties to commence from the date of my death: To my wife an annuity of nine hundred pounds during her life to be paid free of all deductions whatsoever by equal quarterly payments, the first shall be made three months after my death." A summons was taken out by the widow which asked whether the annuity was or was not payable free of income tax.

Held, that on the authority of Re Shrewsbury Estate Acts; Shrewsbury *v.* Shrewsbury (130 *L. T. Rep.* 238; (1924) 1 *Ch.* 315), *per Warrington, J.* (130 *L. T. Rep. at pp.* 246, 247; (1924) 1 *Ch. at p.* 336), *the cases on the particular question could be divided into two classes: one where there was merely the bare gift of an annuity clear of all deductions, in which case there was not a sufficiently clearly expressed intention to relieve the annuitant from the obligation to pay income tax; and the other case where, as a matter of construction, it clearly appeared that the testator had intended to include income tax as one of the things from which the annuitant was to be free. On the proper construction of the will that was the intention of the testator, and there would be a declaration that the annuity was given free of income tax.*

SUMMONS.

The facts sufficiently appear from the headnote.

Droop for the applicant, the testator's widow.

Irby for the defendants, the executors.

(*a*) Reported by J. H. G. BULLER, Esq., Barrister-at-Law.