

DEATH AND TAXES

IMPROVING THE PROSPECTS FOR WRITERS AND THEIR ESTATES

I ought to begin by first explaining the title of this talk. It was Benjamin Franklin who penned the immortal truth that “*nothing can be said to be certain except death and taxes*” – hence the first part. The writers here today might be somewhat alarmed at the full title of my talk this morning. To reassure you, I do not see the first part as being the means of achieving the second. I will not be proposing a draconian system for culling authors nor suggesting an additional tax which will go directly to a new British Library Acquisition Fund for literary papers and archives. Rather, I want to look at how, over the last century or so, the UK has developed a system of protection for its cultural heritage, to what extent this has been successful and, by comparison with measures in other countries, how it might be improved and made more responsive to the requirements of the 21st century.

For a country with such a rich literary tradition it is perhaps surprising that the UK’s heritage protection has never been framed specifically with a view to keeping literary archives within these shores. That said, manuscripts have always been one of the elements of the cultural heritage which have been implicitly included with the broad definitions of what is worth preserving.

The beginnings of Government initiatives in heritage protection go back to the end of the 19th century and followed soon after the introduction of Death Duties in 1894 by the Liberal Government of Lord Rosebury. His party was, however, defeated in the General Election the following year and the new Tory premier, Lord Salisbury, appointed Sir Michael Hicks Beach as his Chancellor. Although he had opposed the introduction of Death Duties the year before, the tax was bringing in rather more than had been predicted and the rhetoric of opposition did not become the policy of Government.

Although the Chancellor decided he could not afford to repeal Death Duties, he was prepared to offer a concession. The Finance Act of 1896 introduced the system of conditional exemption whereby, “*objects of such national or historic interest that they would be purchased or accepted as a bequest by one of the national collections*” could be excluded from the taxable element of an estate.

Conditional Exemption lifted the financial burden and penalty on maintaining ownership of such material and passing it down through the generations. But the exempted items remained in private ownership and access to it was at the discretion of the owner. Indeed, it was only in 1998, over a century after the introduction of conditional exemption, that open public access became an absolute requirement of the granting of conditional exemption.

The next development in heritage protection came in 1910 when in that year's Finance Act an embryonic Acceptance in Lieu scheme was introduced. Those liable to pay death duties could discharge their liability by transferring property of cultural importance to the ownership of the nation and it would then be transferred to a suitable public body.

That at least was the theory. The Inland Revenue, however, was rather attached to the idea of tax being paid in pounds, shillings and pence. Neither a painting, nor a literary manuscript fitted neatly into the accounting ledgers of Somerset House. The powers had been given to the Commissioners of Inland Revenue to accept cultural property in lieu of death duties but they resolutely refused to exercise them unless somebody came forward to make good the loss of hard currency that such an acceptance would represent. So, for the next 37 years the scheme remained virtually unused.

It was in 1946 that the Acceptance in Lieu (AIL) scheme became a feasible mechanism for bringing cultural property into public ownership. Hugh Dalton, the then Chancellor of the Exchequer announced that £50m was to be set aside from the sale of war surplus as a memorial for those who had died in the War. This was used to establish the National Land Fund. The interest from this sum would be used to recompense the Inland Revenue for the loss of tax that the acceptance of offers in lieu gave rise to.

Progress, yes, but there was a catch. The role of the Land Fund was precisely what its name suggests – a fund to acquire land and any buildings that happened to be on that land. Chattels, that is, moveable property, (which, of course, includes literary manuscripts) were not within the scope of the Fund. So in the years immediately following the 1946 announcement, AIL was responsible for acquiring amenity land and various country houses which were then passed primarily to the National Trust.

Improvements came in a 1953 amendment which, for the first time, allowed chattels to be accepted in lieu, but only where they were associated with buildings already in public ownership. In practice this meant buildings which had themselves already been accepted in lieu. The chattels were then allocated to the National Trust for display in the properties to which they belonged.

Further changes came in 1956. These allowed chattels to be accepted on account of their aesthetic or historic importance and then to be allocated to **national** public collections. One of the first such acceptances came from Chatsworth and included the Benedictional of Saint Ethelwold, a masterpiece of 10th century Anglo-Saxon illumination, which is now here in the British Library.

(It would be stretching definitions too far to say we had reached the "Collecting of Modern Literary Manuscripts", the theme of this conference but, at last, we have a manuscript, albeit one a thousand years old.)

Further extensions to the AIL scheme came in the mid 1960s allowing items to be accepted and then allocated to **regional** museums. In 1973 an

amendment permitted the acceptance not just of individually pre-eminent items but also of pre-eminent collections. At the same time the definition of what could be accepted was expanded from “works of art” to “any picture, print, book, manuscript, scientific object or other thing”. This paved the way for whole archives to come into public ownership and the first such acceptance was of the Blenheim papers, principally those of John and Sarah Churchill, 1st Duke and Duchess of Marlborough, which were allocated to The British Library.

The last major amendment to the scheme was in 1998. 88 years after AIL’s introduction, the need to repay the Inland Revenue for the tax ‘lost’ was abandoned. It is now simply written off. It was the Department for Culture, Media and Sport with Chris Smith as Secretary of State which brought this about. Since then the scheme has flourished. In the eight years before this change, AIL involved objects valued at just under £63m. By comparison, in the eight years since, £213m of cultural property has entered public collections through AIL. This makes it the largest single means of acquisition for the UK’s museums, libraries and archival repositories.

In the last decade or so, the proportion of offers which involve manuscript material, whether they be historic or modern, has increased considerably and they now make up about a third of all cases, although most of these are of historic archives.

The first AIL acquisition which has a direct relevance to the theme of this conference was in 2002 when the typescripts of Anthony Powell, including those for his twelve novel sequence *A Dance to the Music of Time* were accepted in lieu and allocated to the British Library. Since then literary papers by Kathleen Raine and the Scottish 20th century poet, George Bruce as well as the photographic archive of the travel writer Wilfred Thesiger, have been accepted.

The scheme is beneficial for offerors, because a greater proportion of the value of the material being offered can be applied to paying the tax bill than if the same archive was sold and the proceeds applied to discharging the tax liability. If an archive valued at £100,000 is sold to raise cash to pay a tax bill, the Revenue takes 40% of the proceeds, leaving only £60,000. The same material offered in lieu settles £70,000 of tax. In addition, in negotiating the AIL value, the costs are normally less than those incurred in auction fees and, in agreeing what is a fair market price, buyer’s premium is taken into account with the value of this benefiting the offeror and not the auctioneers.

So far, the number of modern literary archives may be small, but the AIL system is working and is a proven and effective way of bringing modern literary material into British repositories.

The one drawback is of course that an offer can only be made against inheritance tax.

Before looking at how the tax system could be developed, I ought to mention the controls relating to the export of cultural goods which date to 1952. A

licence is required for the export of most cultural objects which have been in the UK for more than 50 years. The main exception is for personal papers and goods being exported by the maker (and if the export is to another EU country this exemption extends to export by the creator's spouse, widow or widower.) This means that most of what this conference is concerned with is outside the export control procedures. There is, accordingly, no mechanism to provide an opportunity for a UK purchaser, public or private, to acquire the material before it goes abroad.

The exemption exists because the export controls have been devised to strike a balance between the legitimate rights of the nation to protect its heritage and the equally legitimate rights of the individual to earn a living. The current view is that it would be a disproportionate restriction on the maker to subject his output to export control procedures, even where they are 50 or more years of age.

Apart from the AIL scheme the main source of funding for acquisitions has been the Heritage Lottery and the National Heritage Memorial Funds. The former has decided that, given its 'heritage' remit, it cannot fund items which were created less than ten years ago. I know this causes concern to some but from my experience of handling the modern archives that have come through the AIL route, I know that a ten year rule would not have excluded much, if any, material. But I do appreciate the AIL does deal with estates and not living authors.

It is of course when authors sell their literary papers while very much alive, that the real difficulties arise. Earnings derived from the sale of literary papers are regarded as part of the normal income from the trade or profession and are subject to income tax. The most recent legal ruling on this issue comes from a case involving the papers of the author, John Wain. These had been sold in batches, during the 1980s, to Edinburgh University. He, and following his death in 1994, his executors, appealed against the Revenue's assessment to income tax of the proceeds of these various sales. The decision in the High Court, in favour of the Revenue, could not be clearer. It stated that the exploitation by the taxpayer of anything produced in the course of his profession is taxable as a profit of the profession under Case II of Schedule D. The fact that the manuscript was not originally produced with the intention of being sold was not relevant. The principle that the fruits of professional activity are taxable to income tax is such a fundamental cornerstone of our tax system that to advocate any tax concession that ignored this, would, I believe, be mistaken.

The current system of Private Treaty Sales where a 'douceur' of 25% of the capital taxes potentially leviable on a sale are given back to the vendor is, therefore, not going to assist UK libraries to acquire the papers of living authors.

The present system of Gift Aid, has limited application. Currently, it applies to gifts of money, shares, securities and land. It cannot be used to gift cultural items such as literary papers or, for that matter, works of art. It allows the charity (and the gift has to be made to a registered charity) to reclaim the

basic rate of income tax and the donor to claim the difference between the basic and higher rates. So if you make a cash donation of £1,000 to a charity, it can claim back from the Revenue a further £282 which represents the basic rate of income tax that will have been paid on the £1,000 donation and, if the donor is a higher rate tax-payer, he can claim back £231 which is the difference between the higher and basic rates of tax on the £1,000. The net effect is that from the higher-rate tax-payer who gives £769 the charity gets £1,282. This is not going to help institutions acquire directly from the author, but it is a strong selling point when trying to encourage donors to provide the money that will supplement a library's meager acquisition budget. (I do sometimes wonder if the benefits of Gift Aid are fully understood and exploited sufficiently both by donor or donee.)

If Gift Aid was to be extended to allow gifts of cultural property, in addition to cash, it could certainly help but it would not solve all the difficulties for literary manuscripts. With the financial value of archives increasing and reaching 5, 6 and sometimes 7 figure sums, the donor is unlikely to have paid sufficient income tax in any one year to make use of the full amount of relief available. The relief can only be given up to the amount of income tax paid in the year of the donation. Secondly, Gift Aid requires a significant proportion of philanthropy on the part of the donor – at least 60%. You will have seen the accounts in the papers 10 days ago concerning the sale of Salman Rushdie's papers. He is quoted as saying that although his priority had been to, "*find a good home*" for his papers, money was also a consideration. "*I don't see why I should give them away. It seemed quite reasonable that one should be paid.*" I see little reason to think this is an untypical view.

How then do other countries address the issue?

Ireland has a form of Acceptance in Lieu Scheme which unlike the UK system allows the value of the donation to be applied against a range of taxes including Income Tax, Corporation Tax, Capital Gains Tax, Gift Tax and Inheritance Tax. However, just in case you think that Ireland is a paragon of enlightened tax treatment for the heritage, it should be noted that the total value of the relief given in any one year is capped at €6,000,000 (£4,000,000) Given, however, that the population of Ireland is 4 million and the UK's is 60 million you might conclude that capping at this ratio (£1 per head of population) might be an acceptable price to pay.

Canada also has a system of tax incentives for the donation of cultural goods. Items have to be of outstanding importance and the intended recipient, which must be a designated public institution, makes the application along with the donor. Although the scheme also applies to sales and not just to donations. In these cases the tax concession is in respect of capital gains tax and artists cannot gain any concessions on what the Canadian authorities describes as "sales from inventory".

Australia has had a cultural Gifts programme since 1977/78. The relief is given in the form of a credit which is off-set against taxable income and it can be spread (apportioned) over five years from the year in which the cultural

item is gifted. Gifts under the program have been free from any capital gains tax since 1999.

The **USA** has a very wide array of tax incentives to encourage gifts and donations. It would take too long to summarise these and I am already taking too much of your time. Suffice to say that even with recent changes and the proposal by the Bush administration to abolish Inheritance Tax for one year in 2010 they still are of far wider scope than those available in the UK.

France introduced an Acceptance in Lieu scheme (*dation en paiement*) in 1968 and it has been running since 1972. It is broadly analogous to the UK system being a method of payment of Inheritance tax. However, what makes France particularly interesting are the changes it introduced 3 years ago. In 2003 France reformed its tax incentives for charitable giving, especially for the cultural sector. Where a cultural object has been declared a “national treasure” donations from companies to acquire such items attract 90% relief from French corporation tax. (If the company buys the item but retains title, relief is given at 40%, provide the item is put on display and the company retains ownership for 10 years.) Although the majority of these national treasures are objects from the fine and decorative arts, manuscripts that have been so designated include autographs by Antoine de Saint Exupery and Jean Genet and Jean Cocteau. Also on the list of French national treasures is the autograph score of Stravinsky’s opera *Les Noces* which is now in the *Bibliothèque nationale de France*. This seems an appropriate moment to voice concerns over the future retention of manuscripts of living British composers. These manuscripts should be as much part of the cultural heritage that we try to retain in this country as are those of our authors and writers.

This brief review of foreign tax incentives brings us to what can be done in the UK. Last year, the UK Literary Heritage Working Group put forward two proposals to the Treasury. First, an extension to Income Tax of the Private Treaty Sale provisions which currently relate only to capital taxes. As was noted earlier, the sale by authors of their manuscripts gives rise to a charge to Income Tax. The Working Group proposed that the income tax should not be collected by the Revenue but divided equally between vendor and purchaser. An archive sold for £100,000 by a writer paying higher-rate tax, generates an income tax bill of £40,000. Under the proposal, the public body acquiring the archive would pay the writer £80,000 and the seller would not have to pay any tax on that amount. As the public purchaser still faces the challenge of raising the funding, it is fairly safe to assume that this would not cost the Treasury any great amount as it would be a self-limiting concession.

The second suggestion was that an Acceptance in Lieu arrangement could be made before death. The archive would be deposited in a public collection, where it could be conserved and catalogued. I have to say that I think this poses several technical problems. The valuation of the archive would have to be at the time of the ‘pre-death’ offer while the remainder of the possessions would only be valued at death. If there was a long period of time between the two, the effects of inflation could be significant and costly to the offeror’s

estate. A solution could be an inflationary increase to the inheritance-tax credit, based on RPI.

The adoption of a Cultural Gifts programme, however, with the best features of the schemes widely used in the countries described previously, would, in my view, present fewer difficulties. The value of the gift is established and used to give immediate tax relief against income tax or any other taxes which are deemed to be within the scope of the scheme. As we have seen, such Cultural Gifts schemes are up and running in various parts of the world and it would be a relatively easy matter to provide the data which the Treasury will demand in order to assess how any comparable UK scheme would operate, how much it would cost and what it might achieve. Such a scheme could permit a group of donors to buy an archive from the author and then donate it to a suitable body.

This is no new proposal. Sir Nicholas Goodison, in his 2004 report to Treasury **recommend that donors, acting singly or together, should be able to offset the gross value of the gift against income and should be able to allocate the value in installments against gross income over successive tax years.** The Art Fund campaigned for fundamentally the same scheme in its 2005 campaign, *Living and Giving*.

None of these proposals, however, has yet to receive support from Government. The view from the Treasury, I understand, is that there are sufficient tax incentives already available and that they should be more fully used. Of course this is disappointing but it is neither surprising nor a reason to stop advocating new incentives which will be more effective. As the history of the AIL scheme demonstrated, change and improvements in this area take time and when they do occur it is generally in response to particular crisis. But while the campaigning goes on, AIL can in some circumstances be an effective means of acquisitions and is financially beneficial to all sides. Please consider and encourage its use.

Meanwhile, this conference can draw attention to the problems associated with collecting modern literary archives. By doing so, again and again and drawing attention at every opportunity, to what we lose by the sale abroad of our contemporary literary heritage, by making clear what we would gain through its retention, the current apparent indifference will, I believe, change.

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