# VOL. XI.—PART X.

No. 626.—High Court of Justice (King's Bench Division).—26th February and 1st March, 1926.

Court of Appeal.—19th and 20th May, 1926.

House of Lords.—14th, 15th and 17th February, and 26th July, 1927.

## Archer-Shee *v.* Baker (H.M. Inspector of Taxes).[1]

*Income Tax, Schedule D, Cases IV and V—Foreign trust—British beneficiary having sole life interest—Basis of assessment.*

*A resident in the United Kingdom was the sole life tenant under an American will trust, the trustees of which were resident in America. The trust fund consisted entirely of foreign property, including securities, and stocks and shares, the trustees having powers of sale and reinvestment. The income from the fund was paid by the trustees to the beneficiary's order at a New York bank.*

*It was contended on behalf of the beneficiary that her interest under the will was a foreign possession other than stocks, shares or rents, and that the income therefrom was, under Rule 2 of Case V, Schedule D, assessable only so far as actually remitted to the United Kingdom.*

Held, *that, having regard to the principle laid down by the House of Lords in* Williams *v.* Singer (7 T.C. 387), *the income receivable by the beneficiary under the will arose from the specific securities, stocks, shares, rents or other property which constituted the trust fund, and that the case must be remitted to the Special Commissioners to determine under which Case of Schedule D and under which Rule the income from the several securities, stocks, shares, rents, etc., was assessable.*

### Case

Stated under the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the King's Bench Division of the High Court of Justice.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at York House, Kingsway, London, on 30th January, 1925, for the purpose of hearing appeals, Sir

(1) Reported K.B.D. and C.A., [1927] 1 K.B. 109; and H.L., [1927] A.C. 844.

Martin Archer-Shee, formerly of 18, St. James Square, Westminster (hereinafter called the Appellant), appealed against two assessments made upon him under Schedule D by the Additional Commissioners of Income Tax for the Division of St. James, Westminster, in estimated amounts of £12,000 each for the two years ended 5th April, 1925, in respect of profits from Foreign and Colonial Securities under Case IV. The respective notices of the said two assessments are annexed hereto and may be referred to as part of this Case.(1) The notice for the year ended 5th April, 1924, was wrongly made out to shew the profits charged as derived from Foreign and Colonial Possessions.

1. Under the will of Alfred Pell, a citizen of the United States of America, who died in this country, it was directed, *inter alia*, as follows :—

" Section 6. I direct that all my real and personal estate, " except what is hereinabove disposed of, be held in trust by my " Executors and Trustees as follows :—(1) That during the life " of my said wife, Mary Huntington Pell, they shall apply two- " thirds of the income and profits thereof to her use and the " remaining one-third to the use of my said daughter or of " any issue she may leave her surviving, (2) That in the event " that my said wife shall die leaving issue by me her surviving, " the whole of the said income and profits shall thereafter during " the life of my said daughter Frances be applied to the use " of my said daughter Frances, and of such issue, equally share " and share alike. (3) That in the event that my said wife shall " die leaving no issue by me her surviving the whole of the said " income and profits shall thereafter be applied to the use of my " said daughter Frances during her life and (4) That in the event " that my said daughter Frances shall die leaving no issue her " surviving the whole of said income and profits shall thereafter " be applied to the use of my said wife. Such application to the " use of my said wife or my said daughter may be made by " paying over the said income and profits as the same shall " accrue to them personally or on their respective orders or " receipts and free from the debts or control of any husbands " they may have, but without power to anticipate, assign, pledge " or encumber the growing income or profits ".

" Section 9. I nominate, constitute and appoint my wife, " Mary Huntington Pell, and J. Pierpont Morgan, Junior, of " the City of New York, to be the Executors of this my Will, " and the Trustees of all trusts herein created or declared, and " I give to them full power and authority to sell and convey any " and all real estate whereof I may die seized or possessed at " public or private sale and for such prices and on such terms as " they may see fit, and also to lease, mortgage or otherwise dis- " pose of the same as they may find expedient, and also full " power and authority in their discretion to retain and hold any

(1) Omitted from the present print.

" investments which I may have at the time of my death, or to " change such investments and from time to time invest and " re-invest the moneys of my estate in any stocks, bonds, or " other securities, government, municipal, corporate or private, " as they may deem expedient, and it is my will that they be not " required to give security or bonds for the performance of their " duties as Executors or Trustees and I hereby request that they " be allowed to act as Executors and Trustees without giving bonds, " and I hereby direct that neither of them shall be liable for " any loss which may happen to my estate or the funds in their " hands, unless the same be caused by their own gross and " wilful negligence or misfeasance, and I further order and " direct that the powers and trusts herein given to or conferred " upon my Executors shall be held and exercised by such of " them only as shall qualify and take out Letters Testamentary " hereon. In case the said J. Pierpont Morgan, Junior, shall " decline to qualify or act as an Executor of or Trustee under " my Will, or should he die, resign or become incapacitated, I " hereby authorise my said Wife, or in case of her death or " incapacity then my said daughter, Frances Pell, to nominate " and appoint some Trust Company organised under the laws " of the State of New York, as Executor and Trustee in his place " or stead, such appointment to be made in writing and duly " acknowledged by her and to be filed in the office of the court " in which my Will shall be proved and upon the filing of such " appointment, such Trust Company so nominated shall become " one of the Executors and Trustees under this my Will, duly " authorised to perform all the duties of an Executor and " Trustee thereunder, with like power and authority and discre- " tion in all respects as if appointed by me in this Will ".

" Section 10. It is my will and I hereby order and direct " that in case of the appointment pursuant to Section Nine of " this my said Will of a Trust Company as one of the Executors " and Trustees thereof, that the said Trust Company so appointed " as aforesaid, shall have all the powers conferred by my said " Will upon the Executors and Trustees therein named, with " power to retain any investments of which I may die seized or " possessed, and with power to invest and re-invest my estate " in any securities which may be approved in writing by my said " wife or daughter, and by the said Trust Company."

A copy of the said will is annexed to and forms part of this Case.(1)

2. The widow of the said Alfred Pell died in the year 1904, leaving the said Frances Pell, but no issue by the said Alfred Pell, her surviving.

3. In the year 1914, the said J. Pierpont Morgan, Junior, resigned the trusteeship, and under the power conferred by section 9 of the said will the Trust Company of New York, being

(1) Omitted from the present print.

a company constituted under American law and resident in the State of New York was appointed to be executor and trustee of the will. The fund constituted under section 6 of the will consisted of foreign government securities, foreign stocks and shares and other foreign property.

4. During the three years ended 5th April, 1925, the Appellant was married to the said daughter (Frances) of Alfred Pell, who was entitled to have the whole of the income and profits from the said fund applied to her use. The Trust Company of New York have paid over such part of the sums which they received from the said fund as they considered to be income, as the same accrued, to her order at Messrs. J. P. Morgan and Company's bank in New York, while retaining in their own possession such sums as they thought might be required to comply with the income tax or other provisions of American law.

5. The Appellant through his Counsel contended (1) that the right which the Appellant's wife had under the said will was a right which belonged to her by virtue of and subject to the provisions of the laws of the State of New York to have the trusts of the said will duly administered, and was a foreign possession and not a foreign security, (2) that the mere fact that the trustees in exercise of the power conferred by the will on them applied the income and profits by paying over such portion as they regarded as income to the order of the Appellant's wife in America did not alter the character of the foreign possession for the purposes of the Income Tax Acts, (3) that so much only of the income receivable by his wife from the Trust Company of New York under the said will as was actually remitted to her in the United Kingdom was chargeable upon him with Income Tax under the Rules of Case V, Schedule D, and (4) that under General Rule 16 of the Income Tax Act, 1918, the Appellant was only assessable in respect of the profits of his wife, and the specific dividends and interest from the specific stocks, shares, securities and other property referred to were not profits of the wife within the meaning of the said Rule nor assessable as her profits if she had been sole and unmarried.

6. It was contended on behalf of the Respondent (*inter alia*) that the income receivable under the said will by the wife of the Appellant from the Trust Company of New York arose from the specific securities, stocks, shares, rents or other property which constituted the trust fund and must be charged upon the Appellant accordingly under the Rules of Cases IV and V of Schedule D in the full amount thereof, whether the said income was actually remitted to the United Kingdom or not.

7. We, the Commissioners who heard the appeal, decided that the contentions of the Respondent were right and the figure of the assessment for the year 1923–24 was amended in accordance with our decision. We determined the appeal accordingly.

The income for the year 1924–25 not yet having been ascertained it was agreed between the parties that the case should be remitted to us to fix the amount of the assessment for that year.

8. Immediately upon our so determining the appeal, the Appellant expressed to us his dissatisfaction with our determination as being erroneous in point of law and in due course required us to state a Case for the King's Bench Division of the High Court of Justice pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

W. J. BRAITHWAITE, } Commissioners for the Special
R. COKE, } Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
28th October, 1925.

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The case came before Rowlatt, *J.*, in the King's Bench Division on the 26th February and 1st March, 1926, when judgment was given in favour of the Crown, with costs.

Mr. Maugham, K.C., and Mr. Edwardes Jones, K.C., appeared as Counsel for the Appellant, and the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

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JUDGMENT.

**Rowlatt, J.**—A taxpayer is taxed under Case V of Schedule D of the Income Tax Act, 1918, on the income arising from foreign possessions. I do not lay any stress upon the words " arising from ", because " arising from " is obviously used as merely being the same thing as " from ". Under the legislation which was introduced in 1914 incomes from foreign possessions have been divided into two categories; that is to say, income from stocks, shares and rents, and income from foreign possessions other than stocks, shares and rents. Therefore it is quite obvious that when one speaks of income from stocks, shares or rents out of the United Kingdom, what is meant is income from possessions being stocks, shares or rents; and the question in this case is whether or not this lady's possessions were, within the meaning of the Income Tax Act, 1918, Schedule D, Case V, stocks, shares and rents.

The lady is not entitled specifically to the income from these stocks, shares and rents; she is merely entitled to the income from the trust fund; and of course she is not the shareholder or the stockholder or the landlord, and the trustees are not her

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nominees for that purpose; they exercise their discretion in the matter of investments, and so on, although it is for her benefit that it is exercised.

Mr. Maugham says that she has no interest specifically in the stocks, shares and rents at all, and that they are not her possessions. The question is whether that is an argument which carries him home in this case. Of the correctness of the proposition generally speaking there can be no doubt at all. What this lady enjoys is not stocks, shares and rents or other property subject to the will, but what she does enjoy and has got is the right to call upon the trustees, and to force the trustees if necessary, to administer this property during her life so as to give her the income arising therefrom, according to the trust. Her interest is that of equity and it is not an interest in the specific stocks and shares at all. There is no doubt about the correctness of that. But the question is whether that is so for the purpose of Income Tax.

The view put forward on behalf of the Crown is that in this case she receives the income from these stocks and shares because the possessions need not be her possessions in a legal or specific sense for the purpose of Schedule D, Case V; she has income from the stocks and shares *de facto*.

It seems to me that I must adopt that latter view. Without in the least impugning the correctness of Mr. Maugham's description of this state of affairs from a legal point of view, for the purposes of classifications and distinctions in this Act I must adopt the view that she has income from the stocks and shares. I do not think I can possibly hold otherwise having regard to the decision in the House of Lords in the case of *Williams* v. *Singer* (*No.* 2).[1] What was there held, it is true, was that the trustees could not be assessed. Why could they not be assessed? It was pointed out that trustees for people abroad can only be assessed wherever the *cestui que trust* is liable. Why was the Princess de Polignac in that case not liable? Because she was resident abroad and was not deriving income from property within the United Kingdom. What was she deriving income from? From these foreign investments. That is the way the position must have been looked at. It was not suggested there—and I do not think it could be suggested—that she could be treated as drawing an income from property in the United Kingdom represented by her interests under the trust so that the Crown could disregard the form of investment and charge her upon special property of that kind. She was held not chargeable, therefore, because, being abroad herself, her interest was from a foreign source, and, that being her position, her trustees could not be assessed. If the Princess de Polignac

[1] 7 T.C. 387.

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had been in England and not abroad she would clearly have been liable to be assessed. On what would she have been assessed? She would have been assessed on the stocks and shares or whatever they were, the foreign property, upon which it was held the trustees could not be assessed. That is what she would have been assessed upon; there was nothing else she could have been assessed upon. That is the position of this lady, except that her trustees are not in England, but in America. What difference does that make at all? Trustees, it seems to me, drop out for the purpose of discussing the liability. If the trustees had been here they would have been assessed, but as they are in America she is assessed; I do not think there is any difference between the two cases at all, and I think that must have been clearly the view of the House of Lords of the position of Princess de Polignac had she been in England.

Although there are inconveniences which may follow from the decision, as Mr. Maugham pointed out, and which will occur to anyone with imagination—where there are two persons, say two sisters, interested in a life estate consisting of foreign possessions and foreign stocks and shares, and receiving the income therefrom, one in this country and one not, the question may arise which is receiving the interest from the securities and which is receiving the interest from the possessions, because different considerations apply to the two cases—I must not be frightened by a trifle of that kind (because compared with other things it is quite a trifle) in a case like the present where the difficulty does not arise. I think I am bound by the authorities to give the decision which I have endeavoured to express. My opinion, therefore, is that this appeal must be dismissed with costs.

**The Attorney-General.**—My Lord, the actual figures have to be ascertained, so there will be an Order remitting for that purpose?

**Rowlatt, J.**—Yes.

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An appeal having been entered against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Warrington and Sargant, *L.JJ.*) on the 19th and 20th May, 1926.

Mr. Maugham, K.C., and Mr. Edwardes Jones, K.C., appeared as Counsel for the Appellant, and the Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills for the Crown.

Judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

JUDGMENT.

**Lord Hanworth, M.R.**—We need not trouble you, Mr. Maugham.

It is important to remember in these cases that we have no jurisdiction on matters of fact, that the duty of this Court is to see whether or not the law has been properly applied to the facts which it is for the Commissioners to find.

The facts in this case as found by the Commissioners are these. The Appellant married some few years ago a lady who was at the time an American national and by her father's will, he being an American national, she is entitled to receive an income from the property which passed under his will. The actual terms of it are these. "That in the event "that my said wife shall die leaving no issue by me her sur- "viving the whole of the said income and profits shall thereafter "be applied to the use of my said daughter Frances during "her life." In consequence of that provision of her father's will the wife of the present Appellant is in receipt of a sum which is remitted to her from America. By the terms of the will provision was made to enable that some Trust Company organised under the laws of the State of New York should be nominated and appointed as trustee in the place of those whom he had primarily nominated under his will, and in accordance with that power the Trust Company of New York have been appointed the trustees to carry out the terms of the will.

Now we have a paragraph in the Case which states the relevant and necessary facts for our consideration. Paragraph 4 says: "During the three years ended 5th April, 1925, the "Appellant was married to the said daughter (Frances) of "Alfred Pell, who was entitled to have the whole of the income "and profits from the said fund applied to her use. The Trust "Company of New York have paid over such part of the sums "which they received from the said fund as they considered to be "income, as the same accrued, to her order at Messrs. J. P. "Morgan and Company's bank in New York, while retaining "in their own possession such sums as they thought might be "required to comply with the income tax or other provisions of "American law."

It appears clear from that paragraph, slightly expanded, that the Trust Company of New York, acting properly in the execution of the trust imposed upon them, receive the income from whatever the property is which produces income and as trustees and in the execution of their duty as trustees they comply with the law in America and pay such sum as may be necessary as an income tax or other tax imposed by the laws to which the trust is subject, and they retain in their possession such sum, I suppose, as may be necessary to defray their costs charges and expenses, and having done so, they remit to this country the balance.

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It appears from that statement of fact that what they remit is not what I will call the dividends in specie in their actual form; what they remit is the balance in their hands after they have carried out their trust and defrayed the expenses which fall upon the trust. They do not remit the whole of the income from the profits but they remit a sum which has lost its origin or parentage; it has lost the shape of dividends, share warrants, or the like; it is merely a sum of money which represents the balance after payment of the sums which would properly fall upon the trust.

If the trustees did not fufil their duty in that way, proceedings could no doubt be initiated in the Courts of the State of New York in order to set the matter right, but we have upon the facts stated to us to take the case of a remission of a sum of money being the balance in the hands of the trustees arrived at after deduction of appropriate charges which fall upon the trust.

It appears to me clear, assuming as I do that the trustees do their duty, that this lady could not require the trustees to send over the dividends in the form in which they originally received them, that she is not entitled to more than such sum as is remitted to her which represents a balance in the hands of the trustees, and more than that, that if questions arise on the receipts which fall into the hands of the trustees as to whether those sums so received represent capital or income, it is for the trustees to determine whether they are to be appropriated to capital or to an income account.

It is perhaps not unimportant to observe what was said in the case of *Lord Sudeley* v. *The Attorney-General*, [1897] A.C. 11. There the testator gave to his wife one-fourth of his residuary real and personal estate. Part of the estate consisted of some mortgages in New Zealand and an attempt was made to say that she was directly interested in those mortgages. It was pointed out by Lord Halsbury that it was the fallacious use of language as applicable to the rights of these parties which led to the difficulty, and that what she was interested in was one-fourth of the residuary estate. He says on page 15: "It is uncertain until the residuary estate has been ascertained "of what it will consist. It may consist of many things—it may "consist of only a sum of money—and until that has been "ascertained the actual right capable of instant assertion does "not exist." There are other passages in the other speeches but Lord Davey puts it very shortly on page 21 thus: "I am of "opinion, on the facts of this case, that Mrs. Tollemache at the "time of her death had no right of property in or right to claim "any part of the mortgages in specie, and that the appellants, "her executors, acquired only a right to have the estate duly "administered and to enforce that right by an action for the

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" purpose, but had no right *virtute officii* to have any part of the " New Zealand mortgages appropriated to the estate of their " testatrix in specie."

Applying the analogy of that case here, it appears to me that from the facts which are found here, this lady could not require the dividends or other receipts to be sent over to her in specie and that until the trustees have ascertained what is the balance which they are able to appropriate to the income account, she is not entitled to that sum, and it is only to the sum when so ascertained that she has a right.

Now the question is, how is that sum so paid over to her to be taxed? Of course her husband has to make a return in respect of the income of his wife; no question is raised upon that. The tax under Schedule D shall be charged " in respect of the annual " profits or gains arising or accruing to any person residing in " the United Kingdom from any kind of property whatever, " whether situate in the United Kingdom or elsewhere ". Those words are wide enough to cover this sum so paid over to the wife of the Appellant.

Under the Cases there are certain categories under which this tax under Schedule D is to be ascertained and paid. Case IV is this: " Tax in respect of income arising from securities " out of the United Kingdom, except such income as is charged " under Schedule C ". Case V is: " Tax in respect of income " arising from possessions out of the United Kingdom ".

Under which of those Cases does this sum remitted and received over here fall? When one turns to the more specific Rules one finds that Case IV, Rule 1, says: " The tax " in respect of income arising from securities in any place out " of the United Kingdom shall be computed on the full amount " thereof arising in the year of assessment ". But is this sum income arising from securities? In *Singer* v. *Williams*(1), reported in [1921] 1 A.C. 41, it was decided that shares in a foreign trading company are foreign possessions and are not foreign securities within Case IV of Schedule D. In that case the present Lord Chancellor gave an indication or definition of what is the meaning of the word " securities ". This lump sum of money, this balance, does not appear rightly to fall within the words of Case IV, Rule 1, as income arising from securities. Exactly what those securities are it is unnecessary at present to define or to determine, but from what I have already said it is plain that this balance has lost its original character as being dividends from debentures or shares or the like, and it appears to me that it does not fall within Case IV, Rule 1, as income arising from securities.

(1) 7 T.C. 419.

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Then we have to consider Case V. Case V contains two Rules. The first Rule is: " The tax in respect of income " arising from stocks, shares or rents in any place out of the " United Kingdom shall be computed on the full amount thereof " on an average of the three preceding years ". From what I have already said it is plain that this is not income arising from stocks, shares or rents. Is it therefore immune from taxation? Not so. There is a second Rule to Case V which is as follows: " The tax in respect of income arising from possessions out of " the United Kingdom, other than stocks, shares or rents, shall " be computed on the full amount of the actual sums annually " received in the United Kingdom from remittances payable in " the United Kingdom ".

Now having eliminated the possibility of its being taxed as income arising from securities and also the possibility of its being taxed as income arising from stocks, shares or rents, there is the possibility of its being taxed as being income arising from possessions out of the United Kingdom. " Possessions " is one of the widest words that are to be found in the Income Tax Acts. In the old case of *Colquhoun* v. *Brooks*(1), 14 App. Cas. 493, Lord Macnaghten said that the word " possessions " is to be taken in the widest sense possible as denoting everything that a person has as a source of income.

It is not suggested by the Appellant that this balance remitted to and received in the United Kingdom is to escape taxation altogether, but it is said that it falls within the last Rule which I have read, the second Rule of Case V, and not within the others, and I agree with that contention.

I have already dealt with the difficulty of applying Case IV, Rule 1, to it because it is not income arising from securities, and also the difficulty of applying Case V, Rule 1, to it because it is not income arising from stocks, shares or rents; yet the very elimination of its chargeability under those Rules appears to bring it within, and appropriately bring it within, Case V, Rule 2, as being income arising from " possessions ", using that word in the wide sense attributed to it in the House of Lords, and the tax is to be computed on the full amount of the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom. Those words seem apt to catch this sum which has reached this country as the balance payable to the Appellant's wife.

Mr. Hills has presented us with an argument to controvert any mischievous theory arising on certain of these questions of income of beneficiaries in the possession of trustees. He is quite right in saying that when you are considering sums which are placed in the hands of trustees for the purpose of paying

(1) 2 T.C. 490.

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income to beneficiaries, for the purposes of the Income Tax Acts you may eliminate the trustees. The income is the income of the beneficiaries; the income does not belong to the trustees. All that is quite true; but one comes back to consider what are the facts upon which this case comes before this Court, and it is to my mind essential that this Court should adhere to its proper jurisdiction, treat the facts as found, and apply the law to those facts, and what has been found—I repeat it for the sake of emphasis—is that the balance, no longer clothed in the form in which it was originally received, having no trace of its ancestry, but in the form of a balance after other payments have been made, is remitted to this country by remittances payable in the United Kingdom and does arise from what is within the expression " possessions ".

That being so it appears to me that upon the facts in this case it rightly falls to be taxed under Case V, Rule 2, and not otherwise.

This case does not in any way vary or alter the many cases that have been cited to us. It applies the principles which are contained in a number of decisions to the particular facts of this case, it does not contravene the propositions which Mr. Hills has laid down, but it says that upon the facts this is a case of income arising from possessions and not falling within the other Cases or Rules.

It appears to me for these reasons that the appeal must be allowed, and that the case must go back to the Commissioners for the purpose of having the tax assessed in accordance with Case V, Rule 2.

**Warrington, L.J.**—I am of the same opinion. The Appellant's wife, under the will of her father, who died some time between the date of the will in 1899 and the death of his widow in 1904—it does not matter exactly which year it was—is entitled to have applied to her use—I am following the words of the will—the income and funds now constituting the residue of the real and personal estate of the testator.

By the Case stated by the Commissioners it appears that the fund now consists of foreign government securities, foreign stocks and shares, and other foreign property. No question is raised in reference to the liability of the Appellant to be taxed under Schedule D in respect of the profits or gains arising or accruing to his wife in respect of this income as being profits or gains arising or accruing to a person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere.

The question is under which of several Cases, and, if under Case V, under which Rule of Case V, the Appellant is to be assessed and the tax is to be computed. As is well known, the Income Tax Act provides that the tax under Schedule D shall

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be charged under certain Cases; there are enumerated six Cases, and Cases IV and V are relevant to the present case. Case IV is: "Tax in respect of income arising from securities out of the "United Kingdom, except such income as is charged under "Schedule C", and Case V is: "Tax in respect of income "arising from possessions out of the United Kingdom".

The question then is, on the facts as stated by the Commissioners, under which of these Cases does the income fall to be charged, and, if under Case V, then under which of two Rules of Case V, because it makes a material difference to the rights of the taxpayer under which of those Rules the assessment ought to be made.

Now I desire to say that the decision I am about to give depends on the facts as found by the Commissioners in this case, and that it is quite possible that the decision will be no authority in any other case, but we are bound by the facts as found by the Commissioners and it is on those facts that I propose to express my opinion.

I have already summarised the Commissioners' statements with regard to the interest of the Appellant's wife under the testator's will and the nature of the funds in respect of which she is entitled to that interest. The Commissioners then state this: "During the three years ended 5th April, 1925, the Appellant "was married to the said daughter (Frances) of Alfred Pell"—that is his present wife—"who was entitled to have the whole "of the income and profits from the said fund applied to her "use. The Trust Company of New York"—who were the trustees—"have paid over such part of the sums which they "received from the said fund as they considered to be income, "as the same accrued, to her order at Messrs. J. P. Morgan "& Company's bank in New York, while retaining in their "own possession such sums as they thought might be required "to comply with the income tax or other provisions of American "law."

They therefore found that the income arising or accruing to this lady in the present case is not the actual income derived from the various sources of investment but that it is such sum as the trustees from time to time considered to be the income, while retaining in their hands the sums which are referred to in the finding of the Commissioners.

It is contended for the Crown, and the assessment appealed from is based on the contention, that the income arising and accruing to this lady was income arising from securities out of the United Kingdom and therefore falls to be charged under Case IV.

I am of opinion that that contention is inconsistent with the findings of the Commissioners, that the income which has arisen or accrued to this lady is not the income of so much of the fund as was represented by securities. It has been suggested that

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the right of the lady to have the income of the entire fund applied to her use may be a security within the meaning of Case IV, but in my opinion that contention is at all events unsustainable, and, if it is to come under Case IV at all, it can only be by treating the income arising or accruing to her as the income derived from that part of the fund which constitutes securities in the ordinary sense, as, for example, debentures or securities of that kind in railway companies.

But then it is further said on behalf of the Crown that if that is wrong and the Appellant is not to be assessed under Case IV, he might be properly assessed under Rule 1 of Case V. Now Case V itself is expressed in these terms: "Tax in respect of "income arising from possessions out of the United Kingdom". Now that by the Rules is divided into two categories. The tax in respect of income arising from stocks, shares or rents in any place out of the United Kingdom falls to be assessed and computed under Rule 1, and it is contended again for the Crown, as in the case of the securities, that the income coming to this lady is to be treated as income arising from stocks, shares or rents out of the United Kingdom. But there again I think the same answer is to be made, that the Commissioners have stated that argument out of court, because they have found that the income which has been coming to her is not the income derived from or arising from the stocks, shares or other property which is the security which makes up the entire fund.

Then, lastly, Rule 2 provides that the tax in respect of income arising from possessions out of the United Kingdom other than stocks, shares or rents shall be computed in the manner thereby laid down, and is limited to the sums annually received in the United Kingdom from remittances payable in the United Kingdom; and, if it comes under that Rule, then the Appellant is in a more favourable position than if it comes under the others.

Now from what I have said upon the facts as found, I think the facts in the present case do not bring it within either Case IV or Rule 1 of Case V but do bring it under Case V as income arising from a foreign possession, and that it falls to be charged under Rule 2 which applies to income from such possessions other than stocks, shares and rents referred to in Rule 1.

The result is, in my opinion, that the appeal must be allowed, the assessment under Case IV set aside, and the case remitted to the Commissioners to be dealt with properly.

**Sargant, L.J.**—I am of the same opinion. I want to make it clear that no importance is to be attached to the fact that the trust fund in this case was originally formed or was derived from a residue, because having regard to the date at which the testator must have died, we must assume that the estate has been quite fully administered long ago, so that here we have a definite and specific trust fund.

**(Sargant, L.J.)**

It is to be noticed that the trust fund is one which is not held for the sole behoof of the wife of the Appellant, but that she is only one of the persons interested in the trust fund although her interest during her life is to receive the net income after certain deductions.

Now the facts that are stated in paragraph 4 of the Case stated by the Commissioners appear to make it quite clear that the lady was not entitled to the specific income of any item of the trust property at all. She was entitled only to such a sum as the trustees might think represented income after they had made certain deductions for income tax and other purposes, amongst which of course there must have been remuneration to the trustees themselves either under the general law of the State of New York or under the particular constitution of the Trust Company. The learned Judge has summed up the position, in my judgment, perfectly accurately in a passage of his judgment which I will now read. He says this: "What this lady enjoys "is not stocks, shares and rents or other property subject to "the will, but what she does enjoy and has got is the right to "call upon the trustees, and to force the trustees if necessary, to "administer this property during her life so as to give her the "income arising therefrom, according to the trust. Her interest "is that of equity and it is not an interest in the specific stocks "and shares at all."

It seems to me that in that state of things the general reasoning of the Judges and of the Members of the House of Lords in the case of *Lord Sudeley* v. *The Attorney-General*, [1897] A.C. 11, is precisely applicable. The question there was one of Probate Duty. Lord Herschell says: "It "seems to me impossible to say that at the time of the death of "the testatrix her executors were in a position to insist that a "certain proportion of these mortgages, or an interest in an "undivided fourth part of these mortgages, was a part of the "estate of the testatrix. In truth, the right she had was to "require the executors of her husband to administer his estate "completely, and she had an interest to the extent of one-fourth "in what should prove to be the residuary estate of the testator, "Algernon Tollemache. Well, where was that situate? It "seems to me that it can only be said to have been situate in this "country. Indeed, I do not think it was seriously disputed on "the part of the appellants that unless their contention could "be made out that there was a right to these particular assets in "Mrs. Tollemache or her executors, Probate Duty is payable "upon the whole sum, and the whole of it must be regarded as "an asset situate in this country." In my judgment, substituting for the specific right to the mortgages a claim to a specific right in this case to any particular item of income, that reasoning leads quite clearly to the conclusion that in this case the property

**(Sargant, L.J.)**

is situate in the State of New York, namely in the place to which the lady would have to resort for the purpose of asserting that equitable right to have handed over to her the net income of the estate, subject to all proper deductions, and of course after taking into account any claim that might arise, by persons interested in remainder subject to her life interest, that a sum paid apparently as income was in fact a sum part of which should be retained as capital.

In my judgment, therefore, the case falls to be taxed within Rule 2 of the Rules applicable to Case V as income from a foreign possession, and the appeal should be allowed.

**Mr. Edwardes Jones.**—I ask for costs, my Lord.

**Lord Hanworth, M.R.**—Yes.

**Mr. Edwardes Jones.**—The Order will be that the case be remitted to the Special Commissioners to assess on the basis that it falls under Case V, Rule 2?

**Lord Hanworth, M.R.**—The appeal allowed with costs; case remitted to the Commissioners for an assessment to be made under Case V, Rule 2.

**Mr. Edwardes Jones.**—If your Lordship pleases.

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The Crown having given notice of appeal against the decision of the Court of Appeal, the case came before the House of Lords (Viscount Sumner and Lords Atkinson, Wrenbury, Carson and Blanesburgh) on the 14th, 15th and 17th February, 1927, when judgment was reserved.

The Attorney-General (Sir Douglas Hogg, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown, and Mr. Maugham, K.C., and Mr. Edwardes Jones, K.C., for Sir Martin Archer-Shee.

On the 26th July, 1927, judgment was delivered in favour of the Crown, with costs (Viscount Sumner and Lord Blanesburgh dissenting) reversing the decision of the Court of Appeal.

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JUDGMENT.

**Viscount Sumner.**—My Lords, in this case the Respondent was assessed by Additional Commissioners in respect of the Income Tax years 1923–24 and 1924–25. His appeal to the Special Commissioners failed. Their decision was in turn affirmed by Mr. Justice Rowlatt, but was set aside by the Court of Appeal. Hence the present appeal.

**(Viscount Sumner.)**

The Respondent's wife was born in the United States. Under the will of her father, Mr. Alfred Pell, of New York, she is entitled, as tenant for life, to the income of a considerable estate now held in trust by the Trust Company of New York. So far as concerns the present appeal it is in respect of his wife's interest under this trust that the Respondent is charged with tax.

Paragraph 2 of the Case of the Appellant, the Inspector of Taxes, runs thus: "The question arising in this appeal is "whether for Income Tax purposes the income of foreign "securities, held by the trustee of a foreign will resident abroad "upon trusts which entitled the Respondent's wife to the income "during her life, belonged to the Respondent's wife so as to be "chargeable to Income Tax under Case IV of Schedule D of the "Income Tax Act, 1918, whether such income was remitted to "the United Kingdom or not." In different words the Respondent's Case states the question to the like effect and Counsel so argued it on both sides.

The Case Stated sets out the relevant sections of the will. In the events which happened, the whole income and profits of the trust estate were to be applied to the use of Lady Archer-Shee during her life. The trust fund consisted, in the years now in question, of foreign government securities, foreign stocks and shares, and other foreign property. The Case Stated says: "During the three years ended 5th April, 1925, the Appellant "was married to the said daughter (Frances) of Alfred Pell, who "was entitled to have the whole of the income and profits from "the said fund applied to her use." So far it merely follows the will. It proceeds: "The Trust Company of New York have "paid over such part of the sums which they received from the "said fund as they considered to be income, as the same accrued, "to her order at Messrs. J. P. Morgan & Company's Bank in "New York, while retaining in their own possession such sums "as they thought might be required to comply with the income "tax or other provisions of American law."

This is, in effect, a finding that no profits or gains accruing in specie from any particular trust investment have been paid to Lady Archer-Shee at all. The trustees have throughout retained the receipt and control of the income from all sources. Your Lordships were told by the Respondent's Counsel, without contradiction, that the sums actually paid to Messrs. J. P. Morgan & Co. for Lady Archer-Shee's account were not remitted to her in this country but were spent by her in the United States, and it has been the Appellant's contention throughout, as the Case Stated recites, that the income arising from the trust property was taxable here, whether actually remitted to the United Kingdom or not. In truth the issue, as raised, is independent of the proportions in which the trust fund is made up of securities, shares

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and other foreign possessions; and this is no doubt the reason why the Commissioners, with the concurrence of both parties, have thought it unnecessary to define those proportions.

There is no finding as to the law of the State of New York and, in accordance with the settled rule, we must presume that the general law of New York which is here relevant, namely, the law of trusts and wills, is the same as our own. How far any such presumption arises with regard to statutory law and particularly to Revenue Statutes is another matter. I am sure no well-wisher of the State of New York would willingly suppose that the income tax law there prevailing is expressed in the same terms as our own.

Though the Attorney-General conceded at your Lordships' Bar that tax should not be claimed on any sums rightly deducted by the trustee before making payment to Lady Archer-Shee's New York bank, I still think that the Inland Revenue is logically committed to its original contention that because she is the beneficiary for life under a trust vested in a New York trustee, she is now chargeable to English tax in a greater measure than if she had made these investments herself and had owned them absolutely at law instead of being merely beneficially entitled to their income for life in equity. This broad contention is variously expressed, viz: (*a*) that the Respondent was rightly assessed in respect of income arising from "securities out of the "United Kingdom belonging to his wife" (Reason 1); (*b*) that the income of the securities forming part of the trust fund "belongs to the Respondent's wife" (Reason 2); and (*c*) that it arose from the specific investments which constituted the trust fund and must be charged upon the husband accordingly "in "the full amount whether actually remitted to this country or "not." Accordingly we have to consider two kinds of question: (*a*) does the income of a trust fund "belong" to the beneficiary so that the beneficiary is chargeable as if it arose and accrued to him directly as his, and, if so, (*b*) is the amount so chargeable the gross amount paid by way of interest or dividend on the investments, or only the net amount received by the beneficiary after deduction of the tax and other charges which the trustees have necessarily to pay out of the gross income of the trust fund which comes to them?

My Lords, the position of the equitable tenant for life and of the investments which form the trust fund is so clear both in law and equity that, apart from any special prescriptions express or implied of the law relating to Income Tax, there can, I think, be no doubt about them.

The trustee has the full legal property in the whole of the trust fund and the beneficiary has not. Apart from special provisions—in particular settlements which do not affect the general

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principle—the trustee is not the agent of the beneficiary who can neither appoint nor dismiss him. She cannot require him to change or forbid him to change the particular investments of the fund. There is no liability on the beneficiary for the trustee's acts on the principle of *respondeat superior* and, unless the trust deed otherwise provides, the trustee must act without remuneration to himself and cannot in any case sue the beneficiary on any implied promise to pay. It is the trustee alone who can give a discharge for interest, rent or dividends to the parties who have to pay them, in respect of the invested trust estate, nor need they know the beneficiary in the matter. All that the latter can do is to claim the assistance of a Court of Equity to enforce the trust and to compel the trustee to discharge it. This right is quite as good and often is better than any legal right, but it is not in any case one which for all purposes makes the trust fund " belong " to the beneficiary or makes the income of it accrue to him *eo instanti* and directly as it leaves the hand of the party who pays it. I do not understand that so far there was any contest. The Appellant's argument is that whatever may be the legal position of the capital and the equitable position of the trustee and the *cestui que trust* as regards the right to the income, for Income Tax purposes the law is otherwise and that under the Income Tax Act and by virtue of some implication the " accrual " is to the beneficiary.

I put aside the contention that if the Respondent is not held liable, trustees will be liable to Super-tax on trust funds and beneficiaries will be outside the benefit of exemptions from tax. It is not in this indirect way that the general law can be set aside for the convenience of the Revenue. Super-tax and exemptions depend on the Sections which impose or confer them, not on some supposed incidence arising argumentatively from provisions as to the subject-matter which attracts tax or as to the extent of it. Super-tax is chargeable in respect of the income of an " individual " from all sources. Even in the easiest case of a trustee to accumulate income, no one would say that his trust was a " source of income " to him as an " individual ", for in the case of several trustees they are not " an individual " at all. The case of exemptions is similarly dependent on the construction of the relevant Section.

It is not a private instrument like a will that can determine the question whether a fund is taxable or whether Lady Archer-Shee is chargeable in respect of it. That turns on the legislation which deals with her rights, legal or equitable, for the purposes of taxation. It follows that it is in the terms of the Income Tax Act or in some decided construction which binds your Lordships, that the Inland Revenue can alone find authority for the present contention that the person " entitled to " the income is the beneficiary, and a rule of " Income Tax law "

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which so completely and uncompromisingly disregards the regular law of trusts and the ordinary law of property is one that must be enacted beyond doubt or question.

The scheme of the Act is that income is taxed—that is, income which somewhere has been received—and persons are assessed to the payment of that tax. The income taxed and the charge upon it are, or should be, expressly and uniformly described on definite principles, but assessment is a matter of convenience, now on this plan and now on that. There is a good deal of practical advantage in tax-gathering on this indefinite scheme, but all the same the advantage must be taken *cum onere*, and if the right to charge and to assess is not to be found in the Act either in express terms or by necessary intendment (including what is called " the scheme of the Act "), the Crown fails. I have looked without success for either express words or a necessary implication that would enable the Revenue to tax a subject who is only an equitable tenant for life, as if she were both the beneficiary and the trustee in one, or to claim that securities and shares belong to her as to which she has only a right to compel the administration of the trust. The Rules applicable to Case IV and Rule 1 of those applicable to Case V of Schedule D clearly apply to legal owners, and if words properly apt to charge them are also to charge equitable owners it can be done only by ignoring the difference in this matter between law and equity.

On the argument for the Appellant that the equitable tenant for life of the income of this trust estate may be directly chargeable, there are two separate questions: (*a*) whether she can in any case be chargeable in respect of the difference between the gross income of the trust and that net income which the trustees properly retain, and (*b*) where, as is here the fact, the whole fund and the income of it are abroad, can she be chargeable at all in respect of income arising from foreign possessions other than securities, stocks, shares or rents, which is not remitted to the United Kingdom? The first question would equally affect the case where fund, trustee and beneficiary are all here; the second arises only where there is property abroad. It does not seem to matter whether the income aimed at is said to arise from or to accrue to or to belong to this or that property or person. In the present case, where the person assessed can only be the beneficiary or her husband for her, authority has to be shown for taxing her in respect of something that is not here and that she does not get. In others, however, the position of the trustee would arise for consideration if the trustee were here.

I do not know of any provision which clearly or at all imposes either collection at the source or vicarious liability on a trustee as such as against the beneficiary; and in the case of foreign possessions, which is this case, there are express provisions to

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the contrary. The debatable question is generally one of the person to be assessed, without deciding anything about ownership or its rights. There is, however, no question here as to the person to be assessed; he must be Sir Martin Archer-Shee. Counsel for the Inland Revenue pointed to no authority that made his liability depend on anything but the nature and extent of his wife's right to the property which is charged.

In the present case it happens that the settlement is in the simplest form. There is only one tenant for life, and during her life there is no other object of the trust to be considered. We hear of no matters in which a conflict between income and capital and their respective interests has arisen, nor of any business carried on by the trustee as to which the more complex case of trading profits would replace the plain case of dividends paid. If there had been annuitants with a prior right to be paid or several beneficiaries entitled to share in the income; if there had been reversioners who could claim that part of the annual receipts were in the nature of accretions to capital; if there was a trust for accumulation or a power to vary the amounts payable from time to time as between minors, the impracticability of saying that any or all of the beneficiaries entitled to income owned the whole or any part of that income from the moment it became payable and was paid, and to the full extent of the amount paid, would be evident. The same rule of "Income "Tax law" must, however, be applicable to all these cases. No doubt it is true that an accountant could always more or less simply appropriate certain fractions of each incoming and each outgoing to each object of the trust in a uniform proportion. That, however, is done by making assumptions which may not correspond to the facts, and by computing accordingly. The trustee may in his discretion pay one beneficiary out of the money collected from a security, another out of a payment of rent, and a third out of the profits of a business. He may on the other hand, if he thinks fit, pay everything received into one account and then draw on that account generally in favour of each beneficiary. In either case it is plain that no specific dividend or interest payment "belongs" in any proper sense of the word to any particular beneficiary. The distribution rests with the trustee so long as he complies with his duties. A series of accounts could be made out between the trustee and each beneficiary, crediting the latter with a fraction of each item of income and debiting him with a fraction of each item of outlay in such a way that, on aggregating all the separate accounts, the debits and credits would exactly correspond to the trustee's general account of his trust. Similarly, by appropriation of payments in the trust bank account, the source out of which any given payment was made can be calculated. Neither process shows anything material to the nature of the beneficiary's right. They both go only to the measure and discharge of it in money.

**(Viscount Sumner.)**

The fact appears to be that it has all along been the policy of the Legislature in regard to Income Tax to keep aloof as far as possible from questions of title and to confine itself as far as possible to questions of administration. Money within the United Kingdom is taxed where it is most conveniently found, and though that is prima facie in the hands of its owners, in a vast number of cases it is otherwise. Collection at the source is effected by express provisions which enable specified persons to pay the tax thereon to the Revenue direct and in the first instance and authorise them to deduct it against another person, who is placed under a statutory obligation to allow it; *e.g.*, under Schedules A and C and No. 20 of the General Rules. As Lord Cave says in *Blott's* case(1), [1921] 2 A.C. 171, a company pays as taxpayer and then deducts; it does not pay as agent for the shareholder. Where the person to whom the money belongs is out of the country, his agent who is here and handles the money may be taxed for him. In some cases, mostly similar to this, the assessment and charge are made on the trustee here for the beneficiary abroad. Nothing in this scheme catches the taxpayer who is in the United Kingdom and whose trustee and trust fund are not.

On suitable occasions the Act deals expressly with the respective positions of trustee and beneficiary and distinguishes between legal and equitable ownership, *e.g.*, Section 37 (1) (*a*) " . . . . " hereditaments . . . . belonging to any hospital . . . . or " vested in trustees for charitable purposes "; Section 103 (1) and (3) in which the case of a trustee " who has authorised the " receipt of . . . . trust property by the person entitled " thereto " is distinguished from that of an agent or receiver, and also from that of a person who, in whatever capacity, is " in " receipt of . . . . profits or gains . . . . of or belonging to " any other person who is chargeable in respect thereof." Section 54 (4) and Schedule C, General Rule No. 2 (*d*) proviso, make express special provisions for substituting the acts of beneficiaries for the action of trustees, which would in general be alone material, and, in one single case, for the " elimination " of the trustee as owner of the trust securities and the substitution of a beneficiary, who, in that single case, is to be " deemed " to be the person owning the securities, which in general of course he is not.

I come now to the decisions which were supposed to be in point. The Appellant contended epigrammatically that " for " Income Tax purposes the trustee is eliminated ", a contention which goes far and unwarrantably beyond the words of the Act. The authority on which it was rested, *Williams* v. *Singer*(2), [1921] 1 A.C. 65, turned on the question whether or not the trustee, resident here, was chargeable. The fund was abroad

(1) 8 T.C. 101, at p. 136. (2) 7 T.C. 387.

**(Viscount Sumner.)**

and he had authorised the beneficiary, who was abroad also, to collect the income abroad where it arose. The difference between legal and equitable rights only came in question because it enabled the Inland Revenue to argue that the legal owner alone was chargeable and that the income must be deemed to have accrued or arisen to him, that is to say, here. There is no such contention in the present case, nor was the distinction between the gross amount collected by a trustee and the net amount duly distributed by him to the beneficiaries one which arose on the facts of *Williams* v. *Singer*(1). The decision of the House was that the trustee was not chargeable to tax here, and sundry expressions used to the effect that the beneficiary resident here is chargeable are only correlative to the *ratio decidendi* in its actual form and have no reference to the questions now in debate. Again, the case of *Lord Sudeley* v. *The Attorney-General*, [1897] A.C. 11, is said by Lord Justice Sargant to be in its general reasoning precisely applicable. The points referred to there were, first, the local situation for the purposes of English taxation of an equitable right to have an estate administered in which the testatrix was interested as a residuary legatee at the time of her death, and, second, the question whether for such taxation her interest was to be deemed to be confined to a specified fraction of the residuary estate corresponding to her share under her husband's will, or extended to the whole of that residuary estate. In applying this to the present case the learned Lord Justice says that Lady Archer-Shee has not any specific right to any particular item of income, but, following Lord Herschell's reasoning, only an equitable right to have handed over to her the net income of the estate subject to all proper deductions, which right of hers is a form of property situate in New York in whose Courts it would have to be asserted. I think the reasoning of this judgment is correct. It is immaterial that in *Lord Sudeley's* case the estate of the husband of the testatrix had not yet been administered, whereas here, no doubt, this has been long ago accomplished. Nobody at any rate has argued the contrary, and the point does not need discussion. Furthermore, the Rules of Case IV of Schedule D—which are applicable on this occasion—say expressly that where no money has been remitted to this country, the taxpayer here is not chargeable in respect of foreign possessions other than stocks and shares, securities and rents. Lady Archer-Shee, for the reasons already given, in my view, does not for Income Tax purposes own and is not entitled to any of the stocks, shares, securities or real property that form part of the New York trust estate. These belong to the trustee company, to whom also the annual payments made in respect of them by way of rent, interest or dividends " arise ", " accrue " and " belong ". All that she has is a right, in the *forum* of the

(1) 7 T.C. 387.

**(Viscount Sumner.)**

trustee and of the trust fund, to have the trust executed in her favour under an order to be made for her benefit by the appropriate Court of Equity, and this " possession " neither consists in the trust's investments or any of them, nor is situated here. It is " foreign ".

I am therefore of opinion that the appeal fails. I attach no importance to the obvious slip made in one of the judgments in the Court of Appeal as to money having been remitted to Lady Archer-Shee here, and I need say no more about it as I do not think that it affected the reasoning of the judgment appealed from.

**Lord Atkinson.**—My Lords, the testator in this case, Alfred Pell, the father of Lady Archer-Shee, in the sixth section of his will, dated the 4th May, 1899, directed that all his real and personal estate, except what was thereinbefore disposed of, should be held in trust by his executors and trustees; that they should, during the life of his wife, apply two-thirds of the income and profits thereof to her use, and the remaining one-third to the use of his daughter, or any issue she (i.e., his wife) might leave her surviving. He then provided for the event which has in fact occurred in these words: " In the event that my said wife " shall die leaving no issue by me her surviving the whole of the " said income and profits shall thereafter be applied to the use " of my said daughter Frances during her life ".

The testator then by the ninth section of his will appointed his wife and John Pierpont Morgan, Junior, to be executors of his will and trustees of all the trusts created or declared thereby. He gives his executors the very widest powers of dealing with, selling, investing, or disposing of his real and personal estate, and changing any of the investments upon which any portion of it might be invested. He further provided that in case the executor, John Pierpont Morgan, Junior, should decline to qualify, or act as an executor or trustee under his will, or should die, resign or become incapacitated, he authorised his wife, or in case of her death or incapacity his daughter Frances, to nominate and appoint some trust company organised under the law of New York State as executor and trustee in his, Pierpont Morgan's, place or stead, such appointment to be made in writing and duly acknowledged by her, and to be filed in the office of the Court in which his will had been proved. The trust company so appointed was to become one of the executors and trustees of his will, and was to perform all the duties, and have all the powers, authority and discretion as if it had been appointed by his will. This last provision is curtailed by that which follows in section 10. By this latter section he confers upon the trust company power to retain any investment of which he was seized or possessed, and also the power to invest and re-invest his estate in any securities which might be approved of in writing by his wife or daughter and by the said trust company.

**(Lord Atkinson.)**

It is found in the Case Stated that the testator died before the year 1904, and that his wife died in that year. Mr. Pierpont Morgan, Junior, on her death became the sole trustee and executor under the testator's will. This gentleman seems to have occupied that position for a period of about ten years; presumably he discharged the duties belonging to it till he retired in the year 1914. Lord Justice Sargant, at page 28 of the Appendix, in giving judgment said(1) : " No importance is to " be attached to the fact that the trust fund in this case was " originally formed or was derived from a residue, because " having regard to the date at which the testator must have died, " we must assume that the estate has been quite fully adminis- " tered long ago, so that here we have a definite and specific " trust fund."

I quite concur, but may one not justly assume that the words " long ago " extend to the year 1914, when Mr. John Pierpont Morgan terminated his ten years' administration of the estate? It would be strange indeed if a business man like him who, unless he belies his name, is skilled in financial affairs, should not have completed the work of this administration in that length of time. If he had done so it would have furnished a reason for his retirement. Then, when he did retire, one finds this young lady, Miss Pell, who, it is contended, has now no property in or rights to this fund beyond the right in equity—by suit presumably—to compel the trust company to pay to her the portion of the income to which she is entitled, dominating the situation, and by written instrument duly acknowledged and filed in the Court named, appointing not a named company but some company, i.e., some company which she may select to fill the office of executor and trustee instead of Mr. John Pierpont Morgan, Junior, retired. The choice is left with her. In addition, her powers and responsibility are not ended there. She has, under section 10 of the will, power over the investment and re-investment of her father's estate in any securities, in that her consent is necessary for any such operation. I think it is not an unreasonable inference from these matters that the life interest given to her by her father's will had become vested in her, and that the trust company which she had appointed were merely her agents to administer the fund for her and in her interest. If that be so, payments necessarily made properly in the administration of the fund are made in her interest and on her behalf, and, in my view, are made with her money.

The learned Master of the Rolls is in error in supposing that the trust company remit what they receive from the trust fund or any portion of it to the Respondent in this country. That is evident from the following paragraph in the Case Stated(2) :—" In

(1) Page 762 *ante*. (2) Pages 751 and 752 *ante*.

**(Lord Atkinson.)**

" the year 1914, the said J. Pierpont Morgan, Junior, resigned " the trusteeship, and under the power conferred by section 9 " of the said will the Trust Company of New York, being a " company constituted under American law and resident in " the State of New York, was appointed to be executor " and trustee of the will. The fund constituted under " section 6 of the will consisted of foreign government " securities, foreign stocks and shares and other foreign property. " During the three years ended 5th April, 1925, the Appellant " was married to the said daughter (Frances) of Alfred Pell, " who was entitled to have the whole of the income and profits " from the said fund applied to her use. The Trust Company " of New York have paid over such part of the sums which they " received from the said fund as they considered to be income, " as the same accrued, to her order at Messrs. J. P. Morgan and " Company's bank in New York, while retaining in their own " possession such sums as they thought might be required to " comply with the income tax or other provisions of American " law."

But even with that correction I am unable to understand what precisely is meant by the two following passages in the judgment of the Master of the Rolls printed at pages 22 and 24 of the Appendix. They run thus (page 22)(1) : " It appears from " that statement of fact that what they remit is not what I " will call the dividends in specie in their actual form ; what " they remit is the balance in their hands after they have carried " out their trust and defrayed the expenses which fall upon the " trust. They do not remit the whole of the income from the " profits but they remit a sum which has lost its origin or " parentage ; it has lost the shape of dividends, share warrants, " or the like ; it is merely a sum of money which represents " the balance after payment of the sums which would properly " fall upon the trust " ; and (page 24)(2) : " But is this sum " income arising from securities? In *Singer* v. *Williams*(3), " reported in [1921] 1 A.C. 41, it was decided that shares in a " foreign trading company are foreign possessions and are not " foreign securities within Case IV of Schedule D. In that case " the present Lord Chancellor gave an indication or definition " of what is the meaning of the word ' securities '. This lump " sum of money, this balance, does not appear rightly to fall " within the words of Case IV, Rule 1, as income arising from " securities. Exactly what those securities are it is unnecessary " at present to define or to determine, but from what I have " already said it is plain that this balance has lost its original " character as being dividends from debentures or shares or the " like, and it appears to me that it does not fall within Case IV, " Rule 1, as income arising from securities."

(1) Page 757 *ante*. (2) Page 758 *ante*. (3) 7 T.C. 419.

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The trustees undoubtedly do not remit to the beneficiaries the income of the fund in specie, if that means, as I suppose it must mean, forwarding to them the dividend warrants, cheques, and such like things received by them in payment of what are debts due to the fund. It would be unbusinesslike and ridiculous to do so. What the trustees properly and rightly do is to cash those dividend warrants and cheques, etc., and pay into the bank of the beneficiaries the money they thus receive. If the trustees paid into the bank of the beneficiaries all the income of the fund which they received, retaining nothing, I assume, on the reasoning in these paragraphs, there would be no loss of origin, no loss of " parentage ", of any portion of the sums paid in. If that be so, I am utterly unable to understand how the retention by the trustees in their own hands of a portion of the income which they receive in order to pay lawful claims upon the fund, and charges which probably the lady herself would have had to pay or get paid for her, if she were resident in New York, and which the trustees will have to account for fully, can change the " origin or parentage " of the residue of the income received, lodged with the bankers of the beneficiaries.

This residue has no doubt lost the shape of dividends, share warrants or the like, but so would the entire income of the fund if it had been lodged in the same way with the Respondent's bankers.

On the first of those two paragraphs it would appear to me as if nothing can preserve the true character and origin and parentage of the income paid to the beneficiaries through their bankers unless that be done by lodging with those bankers the dividends, share warrants and the like received by the trustees but not cashed. With all respect I am quite unable to concur in this reasoning. I think it is misleading.

An idea similar to that expressed in the two passages quoted from the judgment of the Master of the Rolls seems to me to underlie the following passage from the judgment of Lord Justice Warrington, as he then was. The passage runs thus (page 27)(1) : —" They therefore found that the income arising or accruing to " this lady in the present case is not the actual income derived " from the various sources of investment but that it is such sum " as the trustees from time to time considered to be the income, " while retaining in their hands the sums which are referred " to in the finding of the Commissioners."

This passage would appear to indicate that in order to satisfy the word " accruing " or " arising " to the lady the trustees should remit to her all the dividend warrants, cheques received by them, and such like, in payment of the income, with the consequence I have already mentioned. The lodgment of the entire

(1) Page 761 *ante*.

**(Lord Atkinson.)**

income with her bankers would not apparently satisfy these words, or if it would, how and why the lodgment of 95 per cent. of the income, 5 per cent. being retained to satisfy some lawful claim upon the fund, which the beneficiary, if she were resident in New York, would probably have had to pay, would not satisfy them I cannot understand. The trustees do not, I think, properly speaking, consider what is to be the income the beneficiary is entitled to receive. They lodge the whole income, less what they consider it is necessary to retain to discharge lawful claims upon the fund. I am unable to follow the reasoning that leads to the conclusion that, by the deduction of these sums, the character of the balance lodged changes, and acquires a character different from what the entire income would have borne if it had been lodged.

Lord Justice Sargant expressed his view of the case in the following passage (page 28)[1]:—" The learned Judge has summed up the position, in my judgment, perfectly accurately in a passage of his judgment which I will now read. He says this: " ' What this lady enjoys is not stocks, shares and rents or " ' other property subject to the will, but what she does enjoy " ' and has got is the right to call upon the trustees, and to force " ' the trustees if necessary, to administer this property during " ' her life so as to give her the income arising therefrom, accord- " ' ing to the trust. Her interest is that of equity and it is not " ' an interest in the specific stocks and shares at all.' "

He apparently considers that in that state of things the reasoning of the Judges and the members of the House of Lords who took part in the case of *Lord Sudeley* v. *The Attorney-General*[2] was applicable to this case. That case has been frequently referred to in the argument in this case, and consistently, almost, the important point decided is disregarded. That point was, that the claim upon or against the residue of a testator's property could not be enforced until the testator's estate has been fully administered, and the net residue—which might ultimately be nothing—ascertained. Lord Justice Sargant himself states that it must be presumed, owing to the lapse of time, that the testator's estate has been fully administered. The remarks of the Judges to whom the learned Lord Justice refers have reference to the fact that the testator's estate had not been fully administered, and do not, it appears to me, help to the conclusion at which the learned Lord Justice has in this case arrived.

The evidence stated in the Case Stated is extremely scanty. It does not indicate with any particularity the sources from which the trust fund is derived—whether it be from foreign government securities, foreign stocks and shares or other foreign property.

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(1) Page 763 *ante*. (2) [1897] A.C. 11.

**(Lord Atkinson.)**

I have had the pleasure and advantage of reading the judgment about to be delivered by my noble friend Lord Wrenbury. It is, I think, clear and convincing. I concur with him in his view of the case, and approve of the suggestion he makes as to a reference back to the Commissioners to re-state the Case by setting forth the particulars he has indicated.

**Lord Wrenbury.**—My Lords, Section 1 of the Income Tax Act, 1918, enacts that Income Tax for any year "shall be charged "for that year in respect of all property, profits, or gains "respectively described or comprised in the schedules marked "A, B, C, D, and E". I note here the words "all property".

Schedule D enacts that tax under that Schedule shall be charged in respect of (*a*) the annual profits or gains arising or accruing—(i) to any person residing in the United Kingdom "from any kind of property whatever, whether situate in the "United Kingdom or elsewhere". It further enacts that tax under the Schedule shall be charged under certain Cases and after specifying five Cases it adds:—Case VI.—"Tax in respect "of any annual profits or gains not falling under any of the "foregoing Cases, and not charged by virtue of any other "Schedule". No words could be more plain to include all annual profits of every kind.

In the case of a person residing in the United Kingdom therefore the tax is imposed upon *all property*, whether situate in the United Kingdom or elsewhere and whether described in any of the five Cases or not.

Case V, however, which relates to "possessions out of the "United Kingdom", consists of two parts. The former has to do with "stocks, shares or rents in any place out of the United Kingdom"—the latter with "possessions out of the United "Kingdom, other than stocks, shares or rents". In the latter case the tax is to be computed only "on the full amount of the actual sums annually received in the United Kingdom".

The result of the above may be shortly stated by saying that in the case of a person residing in the United Kingdom all his property whatever, situate in the United Kingdom or elsewhere, is charged to tax, but if he shows that a particular part of his property is within Case V, Rule 2, then the tax is computed only upon so much of the income as is actually received in the United Kingdom.

In this case the taxpayer is a British subject resident in England. The property from which the income is derived is in America. The income is not remitted to this country. The Case states that the income has been paid to Lady Archer-Shee's order at Messrs. J. P. Morgan & Company's bank in New York. It stops there, and does not go on to state that it has not been remitted by New York to this country; but it is admitted at the

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Bar that this is the case. Under these circumstances the question is whether the income is such that, in that state of facts, it is taxable to Income Tax.

The income in question is income of Lady Archer-Shee under a gift in the will of her father Mr. Arthur Pell of New York in the following terms :—" I direct that all my real and personal " estate, except what is hereinbefore disposed of, be held in trust " by my Executors and Trustees as follows . . . . .(3) That " (in an event which happened) " the whole of the said income and " profits shall thereafter be applied to the use of my said daughter " Frances during her life." Lady Archer-Shee is the said daughter Frances.

The date of Mr. Pell's death does not appear, but it was before 1904. It is not disputed that the estate has been fully administered. The Trust Company of New York have been appointed as, and now are, trustees of the fund, and it is not disputed that the funds are now in their hands as trustees upon the trust above stated.

The securities, stocks and shares are liable to American income tax and the Trust Company of New York are entitled to commission or other payment for their services. Subject to these Lady Archer-Shee is during her life entitled to the income arising from the securities, stocks and shares and foreign possessions.

In this state of facts Lady Archer-Shee's interest under her father's will is beyond all question " property ". The question for determination is what is the nature of that property, is it a " possession out of the United Kingdom other than stocks, shares " or rents " within Case V, Rule 2? To escape taxation the Respondent must establish that it is.

What, then, is the property to which Lady Archer-Shee is entitled? The will is an American will. The law of America is in an English Court question of fact. In the Case stated by the Commissioners there is no finding as to what is the American law in the light of which the construction of Mr. Pell's will is to be ascertained. We have not heard that there has been any agreement between the parties on the point, and I have not traced that there has been any reference to it in the course of the proceedings. The members of the Court of Appeal do not appear to have considered the matter. They, and in particular Lord Justice Warrington, seem to have treated the question for decision as purely a question of fact and without any finding as to the American law as question of fact they contented themselves with referring to paragraph 4 of the Case and founded themselves upon the statement that there is paid over to Lady Archer-Shee's account only such part of the sums which the trustees have received from the funds as they considered to be income. My Lords, the question is not what the trustees have thought proper to hand over and have handed over (which is a question of fact)

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but what under the will Lady Archer-Shee is entitled to (which is a question of law). The trustees, of course, have a first charge upon the trust funds for their costs, charges and expenses, and American income tax will be a tax which they would have to bear and which would fall upon the beneficiary. But this does not reduce the right of property of the beneficiary to a right only to a balance sum after deducting these. If an owner of shares deposits them with his banker by way of security for a loan he is not reduced to being the owner of a balance sum being the difference between the dividends on the shares and the interest on the loan. He is the owner of the equity of redemption of the whole fund. If a landowner employs an agent to collect his rents and authorises him to deduct a commission he does not cease to be the owner of the rents. Under Mr. Pell's will Lady Archer-Shee (if American law is the same as English law) is, in my opinion, as matter of construction of the will, entitled in equity specifically during her life to the dividends upon the stocks. If, say, in January, £100, after deduction of American income tax, was received for a dividend and there was nothing owing to the trustees which they were entitled to deduct, Lady Archer-Shee could, in my opinion, call upon them to pay her that £100. If such a property is not taxable it results that a person residing here (whether a British subject or not) can by creating a foreign trust of stocks and shares and accumulating or spending the income abroad escape taxation upon that income.

If the estate had not been fully administered I could well understand a contention that the right to whatever in administration might turn out to be the fund the subject of this gift was a " foreign possession," and fell under Case V, Rule 2. But that is not the case. I have to read the will and see what is Lady Archer-Shee's right of property in certain ascertained securities, stocks and shares now held by the Trust Company " to the use " of my said daughter ". It is, I think, if the law of America is the same as our law, an equitable right in possession to receive during her life the proceeds of the shares and stocks of which she is tenant for life. Her right is not to a balance sum, but to the dividends subject to deductions as above mentioned. Her right under the will is " property " from which income is derived.

The Statute itself provides for deduction of Income Tax (see Schedule D, Cases IV and V). The commission payable to the Trust Company is a debt due from the beneficiary to the trustee—neither the one nor the other is relevant to the title of the beneficiary as distinguished from the amount which the beneficiary is entitled to receive by virtue of her title.

The Case does not give particulars of the sources of the income beyond stating that the fund from which it arises consists of " foreign government securities, foreign stocks and shares and " other foreign property " (Case, paragraph 3). " Securities "

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are the subject of Schedule D, Case IV, Rule 1. "Stocks, "shares or rents" are the subject of Case V, Rule 1. Foreign possessions, other than stocks, shares and rents, are the subject of Case V, Rule 2. The first are taxable on the full amount arising in the year of assessment, whether the income has been or will be received in the United Kingdom or not, subject to deduction as there mentioned, including the deduction of any sum which has been paid in respect of income tax in the place where the income has arisen (in the present case American income tax). The second are taxable on an average of the three preceding years, whether the income has been or will be received in the United Kingdom or not, subject to deductions as before. The third are taxable only on the actual sums annually received in the United Kingdom from remittances payable in the United Kingdom, etc., on an average of three years.

To succeed on this appeal the Respondent must establish that the securities, stocks, shares and property of which she is tenant for life are within Case V, Rule 2. But in the absence of particulars as to the nature of the "foreign government "securities, foreign stocks and shares and other foreign "property," mentioned in paragraph 4 of the Case, and of information upon which of them (*a*) the assessment has been made under Case IV, Rule 1, on the amount arising in the year of assessment, and (*b*) under Case V, Rule 1, on an average of the three preceding years, and (*c*) under Case V, Rule 2, no assessment at all because there has not been receipt in the United Kingdom, it is impossible to say whether the assessment is right or wrong. Your Lordships are not concerned with the figures. They are for the Special Commissioners. It is for them to make the assessment. But you are concerned with the principles upon which the Commissioners arrive at the figures, and without knowledge with respect to these it is not possible either to confirm or to disallow the assessment. The only information before the House is that upon an income of £12,000 an assessment has been made of £2,700. This is simply 4*s.* 6*d.* in the £ upon £12,000 and must have been made upon the assumption that the income arises from securities within Case IV, Rule 1. The House has no means of saying whether this has been arrived at upon a right or a wrong principle.

The Master of the Rolls more than once in the course of his judgment says that the balance of the income is remitted to this country. This is not so. If the case were within Case V, Rule 2, (which he holds it to be) there would be nothing to assess, because the income is not remitted to the United Kingdom. And all the members of the Court of Appeal fell into error, I think, (1) in failing to treat the construction of the will as matter of American law, and (2) in deciding the case upon the footing that they were bound by a finding of fact in the Case stated by

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the Commissioners that the income paid to the lady was not the actual income but such balance sum as the trustees considered to be income after retaining such sums as they thought might be required to pay American income tax.

My Lords, in my judgment the appeal must be allowed and the matter referred back to the Commissioners to re-state the Case by—

(*a*) stating the particulars of the " foreign government " securities, foreign stocks and shares, and other foreign " property " sufficiently to show first, which of them are, in their opinion, " securities " within Case IV, Rule 1, and, secondly, which of them are, in their opinion, " stocks, shares " or rents " under Case V, Rule 1, and thirdly, which are, in their opinion, " possessions out of the United Kingdom other " than stocks, shares or rents " under Case V, Rule 2; and

(*b*) stating which of these they have assessed on the income of the year of assessment and which on the average of the three preceding years; and

(*c*) stating (as was admitted at the Bar) that the sums paid, as stated in paragraph 4 of the Case, into the New York bank have not been in whole or in part remitted to the United Kingdom.

The order of Mr. Justice Rowlatt must also, I think, be discharged, and the case referred back to the Commissioners with a direction as above stated. Any costs paid under the orders below must be repaid. The Appellant to have his costs here and below.

**Lord Carson.**—My Lords, I do not think it necessary, having regard to the full discussion which has taken place in the speeches which have been already made, to discuss the Sections of the Income Tax Act or the Schedules which have been already referred to. The question which emerges from these is whether the money paid by the trustees of the will of Alfred Pell to the order of Lady Archer-Shee at Messrs. J. P. Morgan & Company's bank in New York, or any part of it, though not remitted to this country, was chargeable to Income Tax under the Rules of Case IV of Schedule D, in so far as it was interest arising from securities, and under the first Rule of Case V, in so far as it arose from stocks or shares: the contention being on behalf of the Respondent that under the circumstances of the case the sum so transferred constituted in the hands of the Respondent's wife a foreign possession, and did not come within the Rules mentioned as being either interest arising from securities or from stocks and shares.

It is, I think, essential in the first place to remember that the property which it is sought to tax in this case was in the hands of the trustees, to use the words of Lord Justice Sargant,

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" a definite and specific trust fund ", to the whole of the income and profits of which the Respondent's wife was entitled under the will of her father Alfred Pell. Had the residue been still undetermined or had the share to which Lady Archer-Shee was entitled been a proportion only of the income or profits of the residue other questions would, no doubt, arise. The Commissioners in the Case Stated have found that the fund constituted under section 6 of the will (being the residue mentioned before) consisted of foreign government securities, foreign stocks and shares and other foreign property, that the Respondent's wife was entitled to have the whole of the income and profits from the said fund applied to her use, and that the Trust Company of New York (as trustee) had paid over such parts of the sum which they received from the said fund as they considered to be income, as the same accrued, to her order at a bank in New York, whilst retaining in their possession such sums as they thought might be required to comply with the income tax or other provisions of American law. The Commissioners also held that the income receivable by the wife of the Respondent from the Trust Company of New York arose from " the specific securities, stocks, " shares, rents, or other property which constituted the trust " fund ". My Lords, under these circumstances I cannot myself draw any distinction between such a trust fund and one where specific securities, stocks and shares were vested in trustees to pay the rent and dividends to a *cestui que trust* for life. In my opinion upon the construction of the will of Alfred Pell once the residue had become specifically ascertained, the Respondent's wife was sole beneficial owner of the interest and dividends of all the securities, stocks and shares forming part of the trust fund therein settled and was entitled to receive and did receive such interest and dividends. This, I think, follows from the decision of this House in *Williams* v. *Singer*(1), [1921] 1 A.C. 65, and in my opinion the Master of the Rolls correctly stated the law when he said(2) " that when you are considering sums which " are placed in the hands of trustees for the purpose of paying " income to beneficiaries, for the purposes of the Income Tax " Acts you may eliminate the trustees. The income is the " income of the beneficiaries; the income does not belong to the " trustees ".

The Master of the Rolls, however, yielding to the argument so put forward by the Respondent, held that, having regard to the facts found, " what they remit is not what I will call the " dividends in specie in their actual form; what they remit is the " balance in their hands after they have carried out their trust " and defrayed the expenses which fall upon the trust. . . . . " it has lost the shape of dividends, share warrants, or the " like ". In aid of this view he cites certain statements made

(1) 7 T.C. 387. (2) Pages 759 and 760 *ante*.

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by noble Lords in this House in the case of *The Attorney-General* v. *Lord Sudeley*, [1897] A.C. 11, and amongst others that of Lord Halsbury at p. 15: "It is uncertain until the "residuary estate has been ascertained of what it will consist. "It may consist of many things—it may consist of only a sum of "money—and until that has been ascertained the actual right "capable of instant assertion does not exist". My Lords, with great respect to the Master of the Rolls, I do not think either his own reasoning or the quotations he relies upon have any application to a case such as the present when, as I have already pointed out, we are dealing with "a definite and specific "trust fund". My Lords, I am unable to understand why or how the character of the sum paid to the Respondent's wife ever became changed or, as the Master of the Rolls graphically says, was "no longer clothed in the form in which it was "originally received, having no trace of its ancestry", simply because the deductions due by law have been made and because it has been mixed up with other trust moneys by the trustees. It is, in my view, in the same position as if the trustees had arranged to have the interest and dividends paid direct to the Respondent's wife and she had discharged the necessary outgoings in accordance with the law. Whether the necessary outgoings according to the law were discharged by the trustees or by the *cestui que trust* cannot, in my opinion, make any difference. I think the appeal should be allowed, but as it is evident that no distinction was made at the hearings before the Commissioners or Mr. Justice Rowlatt between what amount of the sum in question consisted of securities or stocks and shares or other foreign property, and as different considerations apply under the Income Tax law to these different classes of property, I agree that the matter must be referred back to the Commissioners, and as a consequence that the order of Mr. Justice Rowlatt must be modified or discharged.

**Lord Blanesburgh.**—My Lords, the ultimate question in this appeal turns upon the description which in Income Tax phraseology ought properly to be applied to the moneys paid during the two years in question by the Trust Company of New York to the order of Lady Archer-Shee, the Respondent's wife, at Messrs. J. P. Morgan and Company's bank there. None of these moneys have been received in the United Kingdom. It is that fact which, if his contention as to their true description be correct, enables the Respondent to say that he is not liable to pay Income Tax in respect of them, either in whole, in part, or at all.

Lady Archer-Shee's interests arise under the will of her father, an American citizen, domiciled at his death in or about the year 1904 in the State of New York. The Trust Company of New York are the present trustees of his will. In them the

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residuary settled estate is vested. The estate, now ascertained as a corpus, consists, it is found by the Case, of foreign government securities, foreign stocks and shares, and other foreign property. The entire interest, dividends and profits of these are received by the trustees. Upon them the trustees are chargeable with American income tax, as, if they were English trustees, they would be chargeable with United Kingdom Income Tax. Being, however, resident Americans, they are no more chargeable with that Income Tax upon these "foreign" receipts than would any other resident American citizen receiving them on his own account. But is any one else so chargeable when these receipts as such have come to no other hand? That is the serious question involved in this appeal.

In the events which have happened the trustees hold the settled residue upon trust to apply its income and profits to the use of Lady Archer-Shee during her life. She has no interest in the corpus. In default of issue surviving her the entire settled residue, subject to a payment thereout of $50,000 to a niece of the testator, is to be held on trust for Columbia College, in the City of New York. It follows that Lady Archer-Shee is in no sense in control of the fund. The trustees are as much trustees for those entitled in remainder as for herself.

It was in pursuance of the trust in her favour that the payments referred to were made. Their nature is stated in the Case. They were payments over by the trustees of "such part "of the sums which they received from the said fund as they "considered to be income, as the same accrued . . . while "retaining in their own possession such sums as they thought "might be required to comply with the income tax or other "provisions of American law."

There can, I think, be no doubt as to the meaning of that statement. It means that the payments made to Lady Archer-Shee were payments of all that remained of a fund of miscellaneous income receipts after there had been paid or retained thereout sums deemed by the trustees to be sufficient to discharge the trust and other outgoings that had first to be provided for. The payments represented, in other words, the actual net residuary income available for the tenant for life ascertained and only ascertained after payment or provision had been made of or for all prior claims against the gross residuary receipts. The income the lady received was the net income of a totality, not of particular items of property. Such seems to me to be the meaning of the statement.

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Its implications, however, are no less clear. No suggestion of irregularity on the part of the trustees being made, the statement implies that Lady Archer-Shee had no right, during these two years over which the payments extended, to demand more than she received or to demand any of it at any earlier date than she received it. More important still, the statement, I think, implies, for the same reason, that until the moneys paid to her were actually paid over, she had neither property in them nor right to receive them. The proper result of any account taken would have shown—so much the statement implies—that the liability of the trustees to pay, and in the precise amounts, accrued only at the respective times at which the payments were actually made. Accordingly, if the statement in the Case must be accepted by your Lordships, it is with reference and with reference only to a fund so circumstanced that the question of the liability of the Respondent for Income Tax in respect of it must be determined.

And, my Lords, although the statement with its implications appears, superficially, to be concerned as much with law as with fact, it is, in truth, a statement of fact only. As such, it is one by which your Lordships are, I think, bound. For the law which is referred to is, or should be, the appropriate American law by which the rights and duties of the trustees of this American testator's will are defined, and the nature of the interest thereunder of Lady Archer-Shee determined. The true effect of American, as of any other foreign law, is in England a question not of law but of fact. As such therefore this statement must, I think, be regarded, and, if so, it must be accepted by your Lordships. This was, I conclude, the view of the Court of Appeal. If it was, I agree with it.

But, my Lords, I am the more ready without further inquiry to accept the statement with all its implications as a correct finding of the American law ascertained by the Commissioners like any other fact, because I am myself satisfied that if this were the will either of a Scottish or of an English testator, the Commissioners' statement would be exactly paralleled. In other words, the case is not one in which the position is at all affected by any speciality of American law.

I take the case of a Scottish will first, because in relation to such a will your Lordships have the assistance of a decision of the First Division of the Court of Session in a case very close to the present. In *Murray* v. *Commissioners of Inland Revenue*(1), cited in argument and decided on the 18th June, 1926, the facts were that the Appellant's father by his will gave his residuary estate on trust for the Appellant and her sister equally during their respective lives and directed the trustees to pay the expenses of management of the trust. The position in other words is

(1) 11 T.C. 133.

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indistinguishable from the present. There the gross income of the estate, after deducting an annuity of £70 payable to the testator's widow under an ante-nuptial marriage contract, was £608 0*s*. 2*d*., and the whole of it suffered Income Tax in the hands of the trustees. The Appellant's only other income was £10 War Loan interest, and for the purposes of a claim for repayment of Income Tax in respect of personal allowance, etc., she contended that her taxed income under her father's will was one-half of the gross income of the estate, i.e., £304 0*s*. 1*d*., without any deduction in respect of the expenses of the management of the trust. The First Division, at the instance, in that case, of the Crown—there is a certain piquancy in that fact—repelled the claim : " It is plain " said Lord Clyde in delivering judgment(1), " that if a liferenter returns his or her income for " purposes of repayment of Income Tax, what he should return " is precisely what he gets and nothing more or less. It is " plain that the total revenue which arose from the residuary " estate was not the income of any of the liferent beneficiaries " in the residuary estate, but, on the contrary, was income of the " trustees who were administering the residuary estate. It was " for them to pay the full Income Tax which the receipt by " them of that income made incident upon them. It was for " them to pay the prior charges upon it (there was an annuity " of £70 charged upon it) and the expenses of administration, " and after meeting those expenses to divide the balance of the " income among the liferent residuary beneficiaries. . . . . " There was no justification either under the Statute, or, as far " as I can see, in any view consistent with common sense, for " the course taken here."

Lord Sands is equally express and refers to an aspect of the matter which is very relevant in the present case. The plaintiff's view, he says, was that one-half of the £608 0*s* .2*d*. belonged to her. And he continues(2), " That would be a sound view no " doubt if any expenses that were incurred before any payment " was made to her had been expenses incurred by somebody she " had employed to collect the money, because then these expenses " would have been her expenses if they had been incurred by " someone whom she was free to employ or not to employ. But " that is not the situation. The expenses which were deducted " before any payment was made to her were incurred not by " anyone she employed but by the trustees whom the truster had " appointed to manage his estate and whom he had directed to " pay all necessary charges of administration before any division " took place." Lord Blackburn gives as an illustration that which is the present case(2). " The lady in this case is seeking " to recover Income Tax upon an income taxed at source. If " the position had been just the other way about and if she was

(1) 11 T.C. at p. 137. (2) *Ibid.* at p. 138.

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" making a return of her income for the purpose of having the " Income Tax assessed upon the income, I entertain no doubt " whatever that she would have returned the sum which she " actually received from the trustees as her income under the " trust disposition and settlement of her father." " What the " Appellant was entitled to under the bequest," said Lord " Ashmore(1), " was only one-half of the free residue remaining " after deduction of the appropriate proportion of the expenses of " the trust management."

I have cited these judgments at length because the report of them may not be readily accessible. The decision shows, I think, clearly, that the statement made in the Case here by the Commissioners would be an exact representation of Lady Archer-Shee's position if a Scottish Court were in relation to her father's will the forum of construction and administration.

And, my Lords, speaking for myself, I cannot doubt that the same would be true if this were an English will with its residuary funds vested in English trustees. In that case, Lady Archer-Shee's only specific interest in the income of the residuary estate would be an interest in that income cleared of all proper administrative or other payments thereout ranking in priority to any beneficial interest of her own.

The right of the trustees to retain moneys to answer these payments *in praesenti* or even, in a proper case, *in futuro*, is undoubted (see e.g., *Stott* v. *Milne*, 25 Ch.D. 710, 715). Their duty, themselves to execute their trust, is equally undoubted. No receiver of the gross residuary income could be obtained against them except on proof of misconduct, actual or contemplated, and then only in a suit for the execution of the trusts of the will. In other words, in the eye of a Court of Equity the interest of Lady Archer-Shee in the gross income of the estate is not that of a mortgagor in the property charged but is exactly analogous to the interest of a residuary legatee of corpus before that residue has been actually ascertained. I agree with Lord Justice Sargant that to the case with which we are here concerned the reasoning of this House in *Lord Sudeley* v. *The Attorney-General*(2) in relation to an unascertained capital residue is precisely applicable.

It is, of course, merely an accident that Lady Archer-Shee is sole life tenant. During the life of the testator's widow each was entitled to a moiety of the residuary income. The position was in no way different then, and it would have been in no way different however numerous were the persons entitled to share the income between them. It would, however, be difficult to suggest, if the body of life beneficiaries were numerous, that there could be any normal right in any or all of them together other

(1) 11 T.C. at p. 139. (2) [1897] A.C. 11.

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than a right to require the trustees to account for their receipts and payments in a due course of administration. Such, in my judgment, was Lady Archer-Shee's right and, in the absence of misconduct, no other.

My Lords, her position from an English point of view could not, I think, be better put than it is by Mr. Justice Rowlatt in his judgment. " What this lady enjoys ", he says, " is not " stocks, shares and rents or other property subject to the will, " but what she does enjoy and has got is the right to call upon " the trustees, and to force the trustees if necessary, to administer " this property during her life so as to give her the interest of " it, and so on, according to the trust. Her interest is that of " equity and it is not an interest in the specific things at all. " There is no doubt about the correctness of that."

I agree in that statement, and it is clear that, basing himself upon it, the learned Judge would have decided the case in favour of the present Respondent had he not misapprehended the effect of *Williams* v. *Singer*(1), [1921] 1 A.C. 65, by failing to note, amongst other things, that the foreign dividends there in question had been *in forma specifica* actually received by the foreign beneficiary by the direction of the trustee—a statement which applies also to the case of *Pool* v. *Royal Exchange Assurance*(1), decided by this House at the same time.

Be that, however, as it may, it is now I think agreed on all hands that if the view of the will so expressed by the learned Judge be correct, the Respondent here must succeed. For, my Lords, what Lady Archer-Shee actually received at her bank in New York was, on that view, neither income from securities, stocks, shares or rents in any place out of the United Kingdom, but was, in the language of the Income Tax Act, " income " arising from possessions out of the United Kingdom other than " stocks, shares or rents ", income which while chargeable to Income Tax is only so chargeable to the extent to which it is received in the United Kingdom.

Such equally is the position if the result be reached by reference to the statement in the Case—the proper foundation as I conceive for your Lordships' judgment—or by reference to the Scots law as expounded in the judgments I have cited.

My Lords, I confess to a sense of relief in being able to reach this conclusion. If the alternative view prevails and the Respondent is charged with Income Tax according as the sums paid to his wife can, on dissection, be traced in their different parts to income received by the trustees from " foreign govern- " ment securities, foreign stocks and shares and other foreign " property " respectively, a burden is placed upon him which, as it seems to me, he cannot discharge, and an inquiry is set on foot which may never be capable of answer. For, having regard to the statements in the Case, it is, to my mind, more than

(1) 7 T.C. 387.

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doubtful whether the trustees themselves could trace the payments to their sources. They are, of course, in no way concerned with any question of United Kingdom Income Tax, and for the purposes of their own administration they have no intelligible purpose to serve by appropriating their retentions to any particular receipts, either rateably or in any other way, and I cannot suppose that they have ever done so. In any case, the Respondent, who is not a beneficiary under the testator's will, could not require the trustees to do anything so entirely superflous, and in the absence of any such declared appropriation he would himself be quite unable to furnish any of the statements X or XI (1) of the Fifth Schedule to the Act which on this footing would be required of him. These practical difficulties confirm me in the view that this is not the kind of case to which either of these statements has any reference at all.

It has been suggested that the view of this case which I have taken may encourage evasion of a tax which ought to be paid. With reference to that, I would only observe that before 1914 no foreign income of any kind was taxed unless it was received in this country. Since 1914, with what almost seems an arbitrary exception, such income, arrived at as is prescribed in the Statute, has been taxed whether received in this country or not. All that is involved in the view I have taken is that this particular interest of Lady Archer-Shee's is at present within that exception. It will rest with the Legislature to introduce the necessary amendment to the Act if, in its view, the time has come for limiting the exception by now excluding such a foreign possession as this of Lady Archer-Shee from its benefit.

My Lords, I do not doubt that the actual form of Mr. Justice Rowlatt's order was adopted in the circumstances stated by the noble and learned Viscount on the Woolsack. It was a form which effectively concealed the difficulties involved in the principle thereby adopted. But, like my noble and learned friend, I deprecate, in any event, any further inquiry in this case. With him, however, I am of opinion that this appeal should be dismissed altogether.

*Questions put:—*

That the Order appealed from be reversed.

*The Contents have it.*

That the Order of Mr. Justice Rowlatt be discharged and the Case be referred to the Commissioners with a direction.

*The Contents have it.*

That the Respondent do pay to the Appellant his costs here and below.

*The Contents have it.*

[Solicitors—Messrs. Boulton, Sons and Sandeman; The Solicitor of Inland Revenue.]