NO. 777.—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—25TH MARCH, 1929, AND 28TH AND 29TH NOVEMBER, 1929.

COURT OF APPEAL.—6TH, 7TH, 10TH AND 11TH FEBRUARY, 1930, AND 10TH MARCH, 1930.

HOUSE OF LORDS.—18TH AND 20TH NOVEMBER AND 15TH DECEMBER, 1930.

GARLAND (H.M. INSPECTOR OF TAXES) v. ARCHER-SHEE.[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 securities, stocks and shares. The income from the fund, after deduction of administration expenses and commission, was paid by the trustees to the beneficiary's order at a New York bank.

On an appeal against assessments to Income Tax in respect of this income, evidence was given as to the American law relating to trusts and trustees, having regard to which it was contended by the Respondent that the income arose from a foreign possession other than stocks, shares or rents and was assessable under Rule 2 *of Case* V *of Schedule* D *by reference only to the amounts actually remitted to the United Kingdom.*

Held, *that, in the light of the evidence given as to the American law, the income of the beneficiary was to be regarded as arising from a foreign possession other than stocks, shares or rents, and was assessable under Rule* 2 *of Case* V.

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.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at York House, Kingsway, London,

[1] Reported (C.A.) 142 L.T. 443, (H.L.) [1931] A.C. 212. This case raised with respect to later years the same question as was involved in the case of *Archer-Shee* v. *Baker*, 11 T.C. 749 and 15 T.C. 1. Evidence as to the relevant American law had not been taken on that occasion.

on the 27th July, 1928, for the purpose of hearing appeals, Sir Martin Archer-Shee of 5, Victoria Street, Westminster, hereinafter called the Appellant, appealed against assessments made upon him in the sum of £12,000 for each of the three years ended 5th April, 1928, under Schedule D of the Income Tax Acts by the Additional Commissioners of Income Tax for the Division of St. Margaret and St. John.

2. It is agreed that the said assessments were made to include the income of Lady Archer-Shee (formerly Miss Frances Pell) the wife of the Appellant from a certain trust fund established in the State of New York the full particulars relating to which are set forth hereinafter.

3. By his will (a copy whereof is hereto annexed marked "A" and forms part of this Case(1)) Alfred Pell, a citizen of the United States of America, directed that his residuary estate should be held in trust by his executors and trustees upon trust (*inter alia*) (1) during the life of his wife Mary Huntington Pell to apply two-thirds of the income and profits thereof to her use and the remaining one-third to the use of his daughter (Frances Pell) or of any issue she might leave (3) in the event that his said wife should die leaving no issue by the testator her surviving, the whole of the said income and profits should thereafter be applied to the use of his said daughter Frances during her life. It was further provided that " 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 person- " ally 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."

4. By section 9 of the said will the testator appointed the said Mary Huntington Pell and J. Pierpont Morgan, Junior, of the City of New York, to be the executors and trustees thereof and in case the said J. Pierpont Morgan, Junior, should (*inter alia*) die or resign, the testator thereby authorised his said wife or (in case of her death or incapacity) then his 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. The testator further provided that in the case of the appointment of such a trust company as aforesaid, the company so appointed should have all the powers conferred by his said will upon the executors and trustees therein named, with power to retain any investments of which he might die seized or possessed, and with power to invest and re-invest his estate in any securities which might be approved in writing by his said wife or daughter, and by the said trust company.

(1) Not included in the present print.

5. The testator, Alfred Pell, died on 13th March, 1901, and his said wife, Mary Huntington Pell, died on 30th November, 1904, leaving the said Frances Pell, but no issue by the said Alfred Pell, her surviving. Thereupon the said Frances Pell became entitled to have the said income and profits applied to her use during her life in accordance with the terms of the said will. Prior to the years relevant to this appeal the said Frances Pell married the Appellant.

6. In the year 1914 the said Pierpont Morgan, Junior, resigned the said trusteeship and under the power conferred by section 9 of the said will the Appellant's wife appointed the Trust Company of New York, being a company constituted under American law and resident in the State of New York, to be executor and trustee of the said will.

7. In all material years the trust fund constituted under the said will consisted solely of foreign securities and foreign stocks and shares, particulars of which are set out in accounts furnished by the said trust company to the Appellant's wife and put before us at the hearing, which accounts are hereto annexed marked " B " and form part of this Case.(1)

8. At the hearing of the present appeal, the Appellant tendered evidence, which was objected to (as hereinafter stated) on behalf of the Inspector, as to the effect of the law of New York State in relation to the said trust fund. We decided, subject to the objection raised, to hear such evidence.

9. Mr. Richard Powell, a member of the Bar of the State of New York and Professor of Law at Columbia University Law School in the City of New York and a person skilled in the law of the State, especially that part of that law which relates to trusts, gave the following evidence :—

(*a*) He stated that the law of New York State, after a survey lasting for five years by a committee of three, was subjected to a general statutory revision under what are known as the Revised Statutes of 1830. Under these statutes the number of trusts permitted was restricted to four, and the form of trust under which the trust fund in the present case is constituted is one which by decisions of the Court since 1849 has been held to be among those not prohibited although by the words allowing the trustees " to pay the money over " to the beneficiary it went beyond the words of the statute which by its terms dealt only with the application of money.

---

(1) Not included in the present print.

(*b*) He stated that the provision of the law which directs who shall hold and own the property of a trust was as follows :—

> " Every express trust valid as such in its creation, " except as herein otherwise provided, shall vest the " whole estate in the trustees in law, and in equity, " subject only to the execution of the trust period. " The persons for whose benefit the trust is created " shall take no estate or interest in the lands, but " may enforce the performance of the trust in " equity."

This provision although it relates in terms only to lands had been held to be equally applicable to personal property.

(*c*) He stated that the words of the trust directing that the " income and profits shall be applied to the use of my " daughter " (being the Appellant's wife Lady Archer-Shee) and providing that such application may be made " by paying over the said income and profits as the " same shall accrue " to Lady Archer-Shee gave to Lady Archer-Shee merely the right to resort to a Court of Equity to compel the trustees to discharge the task imposed upon them, which was to apply the money which they receive as a net income from the trust to her use; that they have within the limits of reasonable and conscientious behaviour an absolute discretion as to the application of the income for her benefit; that if they decided to apply the money for her benefit instead of paying it over they must exercise the power to do so reasonably; that she had no right to any specific dividends or interest at all; that the trustees were vested with a discretion and that Lady Archer-Shee had not the right to call for the immediate payment or expenditure of income which they might receive, that if the trustees, say in January, received £100 for a dividend, after deduction of American Income Tax, she could not there and then and as a matter of course call upon them to pay her that £100 notwithstanding that there was nothing owing to them—but that, if they did not do so, after a lapse of time it would become a question whether they were conscientiously performing their duties although as a beneficiary she had no right either immediately or after a year or any other defined period to call them to account.

(*d*) He explained that, whilst it was true that under the trust in question (there being no provision for accumulation)

the whole of the net income (including in the event of death any income accrued but not paid over) must ultimately be either paid over to or applied for the benefit of Lady Archer-Shee the manner and times of doing so were within the discretion of the trustees subject to judicial supervision; that if the trustees exercised their discretion unconscientiously Lady Archer-Shee had the right to ask the Court to supervise their behaviour in the matter both of the management of the income and of the capital of the trust; that whereas in a decision of the Appeal Court (*Sherman* v. *Skuse*, 166 N.Y. 346) where the trusts were similar to those in the present case, and where a doctor, employed by the beneficiary, successfully sued the trustees for payment (out of unexpended income in their hands) of his fees for professional services rendered to the beneficiary the trustees were referred to as " the mere custodians of " any income in their hands which should properly be " applied " (for the benefit of the beneficiary), this language was not in his opinion strictly accurate language but must be regarded as " obiter " and inconsistent with the language used in other cases; he agreed, however, that the actual decision of the Appeal Court (which was the highest tribunal) was authoritative, and that the language in question had never been expressly disapproved or questioned in any subsequent case; that prior to a statute passed in 1910 a trustee in bankruptcy would not have had the right to obtain any payment from trustees for the benefit of creditors in the case of the bankruptcy of a beneficiary under a trust similar to the one in the present case, but that since that date he would have the right, a right which creditors had always enjoyed, to obtain the surplus of the income of the trust, such surplus being arrived at after deduction of so much as was " necessary " for the beneficiary's education or support; that what was " necessary " was often calculated in a very exaggerated and anomalous manner; that arising out of these provisions of the law third parties had a direct cause of action against trustees for the supply of necessaries to a beneficiary but that such rights were rights of the creditors and were not rights of the beneficiary of the trust; and that, by a recent statute to remedy some of the evils which had arisen, it had been enacted that in a bankruptcy 10 per cent. at any rate of any income from a trust fund to which the debtor was entitled must be paid over for the benefit of creditors.

(*e*) He agreed that under the trust the trustees had the right of deciding how the trust funds should be invested, but that Lady Archer-Shee had in effect a veto upon their choice of investments; that she was entitled as was every beneficiary under any trust, to know what the investments were, and at reasonable intervals to ask for statements of the investments as well as accounts of the income of the trust fund and that the Court would enforce reasonable demands for them; and that whilst usually the trustees would be required, if they had not done so, to pay over the whole of the income it was always open to them, if there was some special occasion for expenditure likely to arise, to keep part back for the purpose of such expenditure.

(*f*) In confirmation of his statement that no equitable "estates" were created by trusts, he referred to the case of *Gilman* v. *Reddington*, 24 N.Y. 9, in which, although the creation of successive life estates for more than two persons and except for persons in being was prohibited by statute, the Court held that a trust to effect this object was not prohibited as it did not create "estates," and to *Maryx* v. *McGlynn*, 88 N.Y. Reports 358, in which, although aliens were prohibited by statute from holding land, it was held that a trust of land for an alien was not prohibited, as it did not give him the land.

10. Mr. Tompkins McIlvaine, a member of a legal firm of old standing in New York and himself for many years a practising lawyer, confirmed the above evidence.

He added that under statutory provisions trustees were entitled to take a commission upon an annual statement of account and that for this reason it was usual for trustees to prepare statements annually; and that as a matter of practice creditors did not prior to the statute of 1910 giving them ten per cent. get anything out of trust estates.

11. The two witnesses were cross-examined on behalf of the Inspector and we accept the evidence above summarised as giving a sufficiently accurate account of the law of New York State regarding trusts.

12. Evidence was also given by the Appellant that in point of fact the trustees did not themselves apply any part of the net income for the benefit of Lady Archer-Shee otherwise than by paying it over to her, but, in all material years they paid over the whole of the net income to Lady Archer-Shee by paying the same to her bankers Messrs. J. P. Morgan & Co. in New York.

Lady Archer-Shee remitted or caused to be remitted to the United Kingdom in each material year a portion, but not the whole, of the income so paid to her.

13. In making the said payments to Messrs. J. P. Morgan & Co. (which were made monthly) the trustees deducted (1) any administration expenses incurred by them which were properly chargeable to income (2) a commission of 1 per cent. on the amount of each payment. The trustees did not deduct American Income Tax, which was paid by Lady Archer-Shee herself or Messrs. J. P. Morgan & Co. on her behalf. Particulars of (*a*) the income received by the trustees, (*b*) the administration expenses and commission deducted by them, (*c*) the net payments by them to Messrs. J. P. Morgan & Co. are set out in the said accounts.

14. On behalf of the Appellant it was contended that having regard to the facts thus proved in relation to the law of New York State the Appellant was, in respect of his wife's income from the trust, only assessable under Rule 2, Case V of Schedule D on the remittances payable to the United Kingdom on an average of the three preceding years for each of the years under appeal respectively.

15. On behalf of the Inspector of Taxes it was contended (*inter alia*) :—

(1) That the issue raised on this appeal was the identical issue raised between the same parties and decided in the case of *Baker* v. *Archer-Shee*, [1927] A.C. 844(1) and the matter therefore " *res judicata* " and could not be litigated again on fresh evidence, which was available and might have been called on the first occasion. Consequently the evidence now called as to the law of the State of New York should not be admitted and the appeal should be dismissed.

(2) Alternatively that even accepting the evidence as to the law of New York State the decisions of the House of Lords in *Williams* v. *Singer*, [1921] 1 A.C. 65(2) and *Baker* v. *Archer-Shee*, [1927] A.C. 844(1) were equally applicable to the present Case and were conclusive that in the case of a trust of the kind in question the income was assessable under Case IV and Rule 1 of Case V of Schedule D.

(3) That in respect of the income of his wife from the said trust the Appellant was assessable to Income Tax under Rule 1 of Case IV and Rule 1 of Case V respectively of Schedule D of the Income Tax Act, 1918, (as

(1) 11 T.C. 749. (2) 7 T.C. 387.

modified, in respect of the year 1927-28, by Section 29 of the Finance Act, 1926) on the full amount of the income arising in America whether remitted to the United Kingdom or not.

16. The following cases were also referred to :—

In re May, 28 Ch. D. 516.

The Phosphate Sewage Co. v. *Molleson*, 4 A.C. 801.

Hoystead v. *Commissioner of Taxation*, [1926] A.C. 155.

Broken Hill Proprietary Co. Ltd. v. *Municipal Council of Broken Hill*, [1926] A.C. 94.

Aylmer v. *Mahaffy*, 10 T.C. 594 and [1925] N.I. 167.

Edwards v. *Old Bushmills Co.*, 10 T.C. 285.

Drummond v. *Collins*, [1915] A.C. 1011.(1)

17. We, the Commissioners who heard the appeal, gave our decision upon the points raised before us as follows on 10th August, 1928 :—

We are bound in our opinion upon any view of our duties first to ascertain the facts upon which the liability of the taxpayer is to be based. These facts have to be ascertained separately for each year. After they have been ascertained we have to consider whether any doctrine of "*res judicata*" or previous decision compels us to draw a fixed conclusion.

Now in the present case the questions of American (New York) law discussed before us must be treated as questions of fact and we have to decide and find them as facts. Happily there is no dispute about them. It is enough to say of them here that they shew that differences exist in several important respects between the English and American law of trusts, differences which, it seems very likely, would, if they had been before the Court, have been enough to turn Lord Wrenbury (who assumed that there were no differences) and with him Lord Atkinson, over to the side of the Appellant in the previous appeal. Are we then in these circumstances at liberty to decide the present appeal in the Appellant's favour? Not to do so might seem to amount to a denial of justice if justice has anything to do with a taxing matter. And we have moreover before us here different facts, a different year, a different Inspector, and an income which is in some respects different owing to changes in investments. Does the doctrine of "*res judicata*" in these circumstances apply? In spite of the differences in the facts before us is the "*res*" "*eadem res*"? Is the issue and are the parties the same?

---

(1) 6 T.C. 525.

As regards the change in the person of the Inspector that can make no difference, and we can only answer the main question by saying that the issue is the same. The very question before us in this appeal, as in the previous one, is whether the Appellant has an income from stocks, shares and securities because of his wife's right to the income of the trust fund. It is the same question in both appeals. And the rule of law, which to prevent "double vexation" forbids the repetition of litigation—seems to us to apply directly in this case, whatever its consequences in taxation, and to prevent the Appellant from seeking a new trial with different evidence upon the same issue. Our decision in principle is therefore in favour of the Inspector.

18. The liability of the Appellant under our decision was agreed subsequently between the parties as follows :—

	1925–26	1926–27	1927–28
Income from securities	£2,615	£2,794	£2,794
Income from stocks and shares ...	£8,118	£7,279	£5,664
Total ...	£10,733	£10,073	£8,458

The liability so calculated includes a small amount of income received by Lady Archer-Shee from investments of her own in her own name. As regards the income from the trust, such income has been calculated at the full amount received by the trustees from securities and from stocks and shares respectively in the respective years or average of years prescribed by Rule 1 of Case IV and Rule 1 of Case V respectively and (as regards the year 1927–28) Section 29 of the Finance Act, 1926, after deductions of a commission of 1 per cent., a few very small expenses and American Income Tax. We fixed the assessments in the above figures of £10,733, £10,073 and £8,458 respectively, and determined the appeal accordingly on 3rd November, 1928.

19. Immediately upon our so determining the appeal the Appellant declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

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

York House,
23, Kingsway,
London, W.C.2.

5th February, 1929.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 25th March, 1929, when the Crown with the consent of the Court, and by agreement with the Respondent, waived the contention that the matter was *res judicata*. The Case was remitted to the Commissioners to determine the appeal upon the basis that the matter was not *res judicata* and to amend paragraphs 8, 15, 16, 17 and (if necessary) 18 and 19 of the Case accordingly.

Mr. A. M. Latter, K.C., and Mr. G. M. Edwardes Jones, K.C., appeared as Counsel for the Appellant and the Attorney-General (Sir T. Inskip, K.C.) and Mr. R. P. Hills for the Crown.

The Attorney-General.—If your Lordship pleases, this is a case with a name which will recall certain troublesome questions to your Lordship's mind. The case originally went to the House of Lords.

Rowlatt, J.—Originally it went there, did it?

The Attorney-General.—The first part.

Rowlatt, J.—It travelled there at an early part of its career?

The Attorney-General.—Yes, my Lord. It went to the House of Lords, the House of Lords gave certain directions and then Sir Martin Archer-Shee appealed against certain decisions which the Commissioners gave as the result of the directions. Then he went to the Court of Appeal and he lost in the Court of Appeal. That was all with regard to one year's Income Tax.

Rowlatt, J.—Did he come to me on the way?

The Attorney-General.—Yes, my Lord. That is with regard to one year's Income Tax. There was a second year of Income Tax which was considered before the Commissioners. The point was taken before the Commissioners that it was *res judicata* by reason of the decision upon what was said to be the same point in the case for the previous year. The Commissioners gave their decision that it was *res judicata*.

Rowlatt, J.—Which means that it was governed by authority?

The Attorney-General.—No, my Lord, *res judicata*, as between the same parties.

Rowlatt, J.—And the same point?

The Attorney-General.—Yes, my Lord, the same point. A suggestion was made that it was not *res judicata*, because evidence had been given as to the state of American law in the second case with regard to the second year, which showed that the assumption made by the House of Lords as to the state of American law was wrong, and therefore, it was not *res judicata*. However, the Commissioners

(The Attorney-General.)

held that it was *res judicata*. Lord Justice Greer, in the appeal which has last been made upon the matter arising in respect of the first year(1), threw out the suggestion that it was open to the Crown to abandon the point of *res judicata* and not to rely upon it as an estoppel in regard to the second year. The Commissioners of Inland Revenue have carefully considered the matter, they have taken advice upon the matter, and if your Lordship thinks proper, the Board of Inland Revenue are prepared to consent to the Case being remitted to the Commissioners, in order that it may be reconsidered, apart from the point as to *res judicata*; and that the Case should be amended by omitting all reference to the point of *res judicata*; so that the matter may be treated as one of substance upon the evidence of the American lawyers and so decided.

Rowlatt, J.—Very well.

The Attorney-General.—My friend, Mr. Latter, I understand, assents to that course, and if your Lordship thinks that is a proper course I should respectfully ask that, at this stage, the matter may be remitted to the Commissioners for decision upon the Order which has been agreed provisionally. There will be no further hearing before the Commissioners—they will merely give their decision upon the point of substance, instead of confining themselves to the point of *res judicata*.

Rowlatt, J.—Yes, I shall be very pleased.

The Attorney-General.—Then the Order will be in the form which my friend agrees with me is the proper form, subject to your Lordship's decision.

Rowlatt, J.—Yes.

The Special Commissioners, having determined the appeal upon the basis that the matter was not *res judicata*, re-stated the Case, amending it in accordance with the Order of the Court.

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.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at York House, Kingsway, London, on the 27th July, 1928, for the purpose of hearing appeals, Sir Martin Archer-Shee of 5, Victoria Street, Westminster, hereinafter called the Respondent, appealed against assessments made upon him in

(1) 15 T.C. 1.

the sum of £12,000 for each of the three years ended 5th April, 1928, under Schedule D of the Income Tax Acts by the Additional Commissioners of Income Tax for the Division of St. Margaret and St. John.

2. It is agreed that the said assessments were made to include the income of Lady Archer-Shee (formerly Miss Frances Pell) the wife of the Respondent from a certain trust fund established in the State of New York the full particulars relating to which are set forth hereinafter.

3. By his will (a copy whereof is hereto annexed marked " A " and forms part of this Case(1)) Alfred Pell, a citizen of the United States of America, directed that his residuary estate should be held in trust by his executors and trustees upon trust (*inter alia*) (1) during the life of his wife Mary Huntington Pell to apply two-thirds of the income and profits thereof to her use and the remaining one-third to the use of his daughter (Frances Pell) or of any issue she might leave (3) in the event that his said wife should die leaving no issue by the testator her surviving, the whole of the said income and profits should thereafter be applied to the use of his said daughter Frances during her life. It was further provided that " 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."

4. By section 9 of the said will the testator appointed the said Mary Huntingdon Pell and J. Pierpont Morgan, Junior, of the City of New York, to be the executors and trustees thereof and in case the said J. Pierpont Morgan, Junior, should (*inter alia*) die or resign, the testator thereby authorised his said wife or (in case of her death or incapacity) then his 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. The testator further provided that in the case of the appointment of such a trust company as aforesaid, the company so appointed should have all the powers conferred by his said will upon the executors and trustees therein named, with power to retain any investments of which he might die seized or possessed, and with power to invest and re-invest his estate in any securities which might be approved in writing by his said wife or daughter, and by the said trust company.

5. The testator, Alfred Pell, died on 13th March, 1901, and his said wife, Mary Huntington Pell, died on 30th November, 1904, leaving the said Frances Pell, but no issue by the said Alfred Pell,

(1) Not included in the present print.

her surviving. Thereupon the said Frances Pell became entitled to have the said income and profits applied to her use during her life in accordance with the terms of the said will. Prior to the years relevant to this appeal the said Frances Pell married the Respondent.

6. In the year 1914 the said Pierpont Morgan, Junior, resigned the said trusteeship and under the powers conferred by section 9 of the said will the Respondent's wife appointed the Trust Company of New York, being a company constituted under American law and resident in the State of New York, to be executor and trustee of the said will.

7. In all material years the trust fund constituted under the said will consisted solely of foreign securities and foreign stocks and shares, particulars of which are set out in accounts furnished by the said trust company to the Respondent's wife and put before us at the hearing, which accounts are hereto annexed marked " B " and form part of this Case(1).

8. At the hearing of the present appeal, the Respondent tendered evidence as to the effect of the law of New York State in relation to the said trust fund.

9. Mr. Richard Powell, a member of the Bar of the State of New York and Professor of Law at Columbia University Law School in the City of New York and a person skilled in the law of the State, especially that part of that law which relates to trusts, gave the following evidence :—

(*a*) He stated that the law of New York State, after a survey lasting for five years by a committee of three, was subjected to a general statutory revision under what are known as the Revised Statutes of 1830. Under these statutes the number of trusts permitted was restricted to four, and the form of trust under which the trust fund in the present case is constituted is one which by decisions of the Court since 1849 has been held to be among those not prohibited although by the words allowing the trustees " to pay the money over " to the beneficiary it went beyond the words of the statute which by its terms dealt only with the application of money.

(*b*) He stated that the provision of the law which directs who shall hold and own the property of a trust was as follows :—

" Every express trust valid as such in its creation, " except as herein otherwise provided, shall vest the " whole estate in the trustees in law, and in equity, " subject only to the execution of the trust period.

(1) Not included in the present print.

" The persons for whose benefit the trust is created " shall take no estate or interest in the lands, but may " enforce the performance of the trust in equity."

This provision although it relates in terms only to lands had been held to be equally applicable to personal property.

(*c*) He stated that the words of the trust directing that the " income and profits shall be applied to the use of my " daughter " (being the Respondent's wife Lady Archer-Shee) and providing that such application may be made " by paying over the said income and profits as the " same shall accrue " to Lady Archer-Shee gave to Lady Archer-Shee merely the right to resort to a Court of Equity to compel the trustees to discharge the task imposed upon them, which was to apply the money which they receive as a net income from the trust to her use; that they have within the limits of reasonable and conscientious behaviour an absolute discretion as to the application of the income for her benefit; that if they decided to apply the money for her benefit instead of paying it over they must exercise the power to do so reasonably; that she had no right to any specific dividends or interest at all; that the trustees were vested with a discretion and that Lady Archer-Shee had not the right to call for the immediate payment or expenditure of income which they might receive, that if the trustees, say in January, received £100 for a dividend, after deduction of American Income Tax, she could not there and then and as a matter of course call upon them to pay her that £100 notwithstanding that there was nothing owing to them—but that, if they did not do so, after a lapse of time it would become a question whether they were conscientiously performing their duties although as a beneficiary she had no right either immediately or after a year or any other defined period to call them to account.

(*d*) He explained that, whilst it was true that under the trust in question (there being no provision for accumulation) the whole of the net income (including in the event of death any income accrued but not paid over) must ultimately be either paid over to or applied for the benefit of Lady Archer-Shee the manner and times of doing so were within the discretion of the trustees subject to judicial supervision; that if the trustees exercised their discretion unconscientiously Lady Archer-Shee had the right to ask the Court to supervise their behaviour in the matter both of the management of the

income and of the capital of the trust; that whereas in a decision of the Appeal Court (*Sherman* v. *Skuse*, 166 N.Y. 346) where the trusts were similar to those in the present case, and where a doctor, employed by the beneficiary, successfully sued the trustees for payment (out of unexpended income in their hands) of his fees for professional services rendered to the beneficiary the trustees were referred to as " the mere custodians of any " income in their hands which should properly be " applied " (for the benefit of the beneficiary), this language was not in his opinion strictly accurate language but must be regarded as " obiter " and inconsistent with the language used in other cases; he agreed, however, that the actual decision of the Appeal Court (which was the highest tribunal) was authoritative, and that the language in question had never been expressly disapproved or questioned in any subsequent case; that prior to a statute passed in 1910 a trustee in bankruptcy would not have had the right to obtain any payment from trustees for the benefit of creditors in the case of the bankruptcy of a beneficiary under a trust similar to the one in the present case, but that since that date he would have the right, a right which creditors had always enjoyed, to obtain the surplus of the income of the trust, such surplus being arrived at after deduction of so much as was " necessary " for the beneficiary's education or support; that what was " necessary " was often calculated in a very exaggerated and anomalous manner; that arising out of these provisions of the law third parties had a direct cause of action against trustees for the supply of necessaries to a beneficiary but that such rights were rights of the creditors and were not rights of the beneficiary of the trust; and that, by a recent statute to remedy some of the evils which had arisen, it had been enacted that in a bankruptcy 10 per cent. at any rate of any income from a trust fund to which the debtor was entitled must be paid over for the benefit of creditors.

(*e*) He agreed that under the trust the trustees had the right of deciding how the trust funds should be invested, but that Lady Archer-Shee had in effect a veto upon their choice of investments; that she was entitled as was every beneficiary under any trusts, to know what the investments were, and at reasonable intervals to ask for statements of the investments as well as accounts of the income of the trust fund and that the Court would enforce reasonable demands for them; and that whilst usually the trustees would be required, if they had not

done so, to pay over the whole of the income it was always open to them, if there was some special occasion for expenditure likely to arise, to keep part back for the purpose of such expenditure.

(*f*) In confirmation of his statement that no equitable "estates" were created by trusts, he referred to the case of *Gilman* v. *Reddington*, 24 N.Y. 9, in which, although the creation of successive life estates for more than two persons and except for persons in being was prohibited by statute, the Court held that a trust to effect this object was not prohibited as it did not create "estates," and to *Maryx* v. *McGlynn*, 88 N.Y. Reports 358, in which, although aliens were prohibited by statute from holding land, it was held that a trust of land for an alien was not prohibited, as it did not give him the land.

10. Mr. Tompkins McIlvaine, a member of a legal firm of old standing in New York and himself for many years a practising lawyer, confirmed the above evidence.

He added that under statutory provisions trustees were entitled to take a commission upon an annual statement of account and that for this reason it was usual for trustees to prepare statements annually; and that as a matter of practice creditors did not prior to the statute of 1910 giving them ten per cent. get anything out of trust estates.

11. The two witnesses were cross-examined on behalf of the Inspector and we accept the evidence above summarised as giving a sufficiently accurate account of the law of New-York State regarding trusts.

12. Evidence was also given by the Respondent that in point of fact the trustees did not themselves apply any part of the net income for the benefit of Lady Archer-Shee otherwise than by paying it over to her, but, in all material years they paid over the whole of the net income to Lady Archer-Shee by paying the same to her bankers Messrs. J. P. Morgan & Co. in New York. Lady Archer-Shee remitted or caused to be remitted to the United Kingdom in each material year a portion, but not the whole, of the income so paid to her.

13. In making the said payments to Messrs. J. P. Morgan & Co. (which were made monthly) the trustees deducted (1) any administration expenses incurred by them which were properly chargeable to income (2) a commission of 1 per cent. on the amount of each payment. The trustees did not deduct American Income Tax, which was paid by Lady Archer-Shee herself or Messrs. J. P. Morgan & Co. on her behalf. Particulars of (*a*) the income received

by the trustees, (*b*) the administration expenses and commission deducted by them, (*c*) the net payments by them to Messrs. J. P. Morgan & Co. are set out in the said accounts.

14. On behalf of the Respondent it was contended that having regard to the facts thus proved in relation to the law of New York State the Respondent was, in respect of his wife's income from the trust, only assessable under Rule 2, Case V of Schedule D on the remittances payable to the United Kingdom on an average of the three preceding years for each of the years under appeal respectively.

15. On behalf of the Inspector of Taxes it was contended (*inter alia*) :—

(1) That even accepting the evidence as to the law of New York State the decisions of the House of Lords in *Williams* v. *Singer*, [1921] 1 A.C. 65(1) and *Baker* v. *Archer-Shee*, [1927] A.C. 844(2) were equally applicable to the present case and were conclusive that in the case of a trust of the kind in question the income was assessable under Case IV and Rule 1 of Case V of Schedule D.

(2) That in respect of the income of his wife from the said trust the Respondent was assessable to Income Tax under Rule 1 of Case IV and Rule 1 of Case V respectively of Schedule D of the Income Tax Act, 1918, (as modified, in respect of the year 1927–28, by Section 29 of the Finance Act, 1926) on the full amount of the income arising in America whether remitted to the United Kingdom or not.

(It was originally also contended that the Respondent was estopped from denying liability by the decision in *Baker* v. *Archer-Shee* (*supra*), but this contention was subsequently withdrawn and the objection waived on behalf of the Appellant, and the appeal proceeded without reference to the point in accordance with an Order of the High Court dated 25th March, 1929.)

16. The following case was also referred to :—

Drummond v. *Collins*, [1915] A.C. 1011(3).

17. We held that the differences between American and English law proved before us were so great that the decision of the House of Lords on the previous appeal had no application, and we decided that the Respondent's wife's income under the trust in question must be treated as derived from the trustees and not from the stocks, shares and securities, and was assessable under Rule 2 of Case V of Schedule D.

---

(1) 7 T.C. 387. (2) 11 T.C. 749.
(3) 6 T.C. 525.

18. In accordance with this decision we fixed the liability of the Respondent as follows for the years in question, the figures being agreed by the two parties :—

For 1925–26 at £8,877
,, 1926–27 ,, £8,522
,, 1927–28 ,, £3,493

We determined the appeal accordingly.

19. Immediately upon our so determining the appeal the Appellant declared to us his dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

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

York House,
23, Kingsway,
London, W.C.2.

27th June, 1929.

The amended Case came before Rowlatt, *J.*, on the 28th and 29th November, 1929, and on the latter date judgment was given against the Crown, with costs.

The Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. G. M. Edwardes Jones, K.C., for the Respondent.

JUDGMENT.

Rowlatt, J.—In this case the first thing to appreciate is what was decided by the last case, when the parties went to the House of Lords. In that case I did not think that this lady had any right to the specific investments or the specific dividends. What I thought was that when you come to construe and apply this particular part of the Income Tax Acts which classifies and distinguishes between income according as it arises from securities, stocks, shares, and rents or other property, you have got—I do not fail to notice the difficulties—to go back until you find something from which the income arose, the investment which bore the income, and see what that was; and that the fact that a trust was interposed, a trust which holds the principal and administers the income after it has been earned did not give you a source of

(Rowlatt, J.)

income which came into this classification at all. That was my view. I do not think anybody agreed with it. I am not certain, as I said just now, that anybody tried to support it. What took place in the House of Lords, as I understood what the majority of the House of Lords decided, was: " Oh, but this lady was " specifically entitled to these dividends ". Lord Wrenbury said,(1) I think, several times, and I think Mr. Hills has referred to one of the passages, " Her right is not to a balance sum, but to the " dividends subject to the deductions as above mentioned ". That is to say, they held that she was entitled to the dividends, and that the deductions which the sums from the dividends produced suffered before they reached her hands were analogous really to the expense of collection which a landlord has to submit to when he gets somebody to go and collect his rents. On the other hand, the Law Lords who were in the minority took the view that she was only entitled to the balance sum, and that it was the balance sum which came to her from the trust which was her property. That is what I understand was decided; it was decided on the assumption expressed in the judgment that the American law was the same as the English law.

Now I have a statement of the American law found by the Commissioners. I agree with Mr. Hills that it is not a question of American law whether something is or is not within the Income Tax Acts. The question of the American law is, what are exactly the rights and duties of the parties under an American trust, and when you find what those rights and duties are, you see what category they come in, and the place they fill in the scheme of the English Income Tax Acts which the Courts here must construe. The position is stated by these American lawyers and found by the Commissioners, and I do not think I can say, after this evidence, that the American law is the same as the British law, or that it countenances the view at the base of the decision of the House of Lords that this lady was entitled specifically to these dividends. The American lawyers stated in terms that she is not. They state that she has no right to any specific dividend or interest at all; that the trustees were vested with discretion, and so on, " that if " the trustees . . . received £100 for a dividend . . . she could " not there and then and as a matter of course call upon them to " pay her that £100 notwithstanding that there was nothing owing " to them—but that, if they did not do so, after a lapse of time it " would become a question whether they were conscientiously per- " forming their duties although as a beneficiary she had no " right . . . " and so on. Now it seems to me what they are saying is that according to American law her right goes no farther

(1) Archer-Shee *v.* Baker, 11 T.C. 749 at p. 779.

back than to ask the trustees to do something. It may be that what she is entitled to ask them to do may be founded upon a different consideration of what funds they have in their hands to do it with, but they do not trace her right farther back than assigning a source to her income. They say, in other words, that she is entitled to the balance sum, and not entitled to the dividends as they arise. That is how I read the American lawyers' evidence as found by the Commissioners, and in those circumstances I agree with the Commissioners, and this appeal must be dismissed with costs.

Mr. Edwardes Jones.—I think I ought to say there was an agreement that there should be no costs as regards remission.

Rowlatt, J.—Whatever your agreement was.

Mr. Edwardes Jones.—There will be only costs of this appeal, but no costs as to remission.

Rowlatt, J.—Do not state material things inaccurately, because it may cause somebody to pounce on it and say that it is the only thing that matters, and send it back again.

Mr. Edwardes Jones.—I am told those costs were not agreed.

Rowlatt, J.—Very well. You are entitled to whatever costs are in dispute.

The Crown having appealed against this decision, the case came before the Court of Appeal (Lord Hanworth, M.R., and Lawrence and Greer, *L.JJ.*) on the 6th, 7th, 10th and 11th February, 1930, when judgment was reserved. On the 10th March, 1930, judgment was given in favour of the Crown, with costs (Greer, *L.J.* dissenting) reversing the decision of the Court below.

The Attorney-General (Sir W. A. Jowitt, K.C.) and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. G. M. Edwardes Jones, K.C., for the Respondent.

JUDGMENT.

Lord Hanworth, M.R.—In this case the Crown appeal from a decision of Mr. Justice Rowlatt who, on the 29th November, 1929, confirmed a decision of the Commissioners given in favour of Sir Martin Archer-Shee, the Respondent in this appeal.

Assessments had been made upon the Respondent in the years ending the 5th April, 1926, 1927, and 1928 in the token sums of £12,000, and those assessments were made to include the income of Lady Archer-Shee (formerly Miss Frances Pell) the wife of the Respondent, who in these several years received sums by way

(Lord Hanworth, M.R.)

of income from a certain trust fund established in the State of New York under her father's will, who was a citizen of the United States of America.

The Commissioners held that these sums so received by Lady Archer-Shee in each of the years in question were derived from the trustees of the trust fund in America, and not from the securities or stocks and shares held by the trustees as the investments into which the funds of the trust had been placed.

The consequence is that this income falls to be taxed, under Rule 2 of Case V, of Schedule D of the Income Tax Act, 1918, and not under Rule 1 of Case V, or if from securities, under Case IV. This latter Rule specifically refers to income arising from stocks, shares or rents in any place out of the United Kingdom, and directs the tax to be computed on an average of the three preceding years, whether the income has been, or will be, received in the United Kingdom or not; while Rule 2 refers to income arising from possessions out of the United Kingdom other than stocks and shares and rents, and directs that the tax shall be computed on the full amount of the actual sums annually received in the United Kingdom on the same average. We are told that some part of the income of Lady Archer-Shee was remitted to the United Kingdom and some part was not. The difference in result is shown by the figures to which the assessments upon the Respondent were reduced by the Commissioners—the actual figures being agreed between the Appellant and Respondent, namely :—

For 1925–6	...	...	...	£8,877.
For 1926–7	...	...	...	£8,522.
For 1927–8	...	...	...	£3,493.

The liability of the Respondent in respect of his wife's income from the same trust, and the funds held by it, has already been the subject of litigation in the Courts(1). He disputed the assessments made upon him in respect of income from that source in the years 1923–4–5, and claimed that the income ought to be subjected to tax only under Case V, Rule 2, that is to say, upon the amount actually received in the United Kingdom.

The Case in that matter stated in paragraph 4 that : " 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."

(1) Archer-Shee *v.* Baker, 11 T.C. 749.

(Lord Hanworth, M.R.)

Upon the facts thus stated, this Court held that the identity of the sums paid over by the trustees with the dividends received by the trustees, had been lost, and that the sums paid were no longer " income arising from stocks, shares or rents " within Case V, Rule 1, but fell within the description of income dealt with by Rule 2 of Case V.

The House of Lords held this decision to be wrong. They decided that the income was to be attributed to the sources from which it arose, and sent the case back to the Commissioners to determine the facts in accordance with directions which the House gave, and they directed that the computation of tax was to be made, as the facts might warrant, either upon the income of securities under Case IV, Rule 1, or of the stocks, shares or rents under Case V, Rule 1, or of possessions out of the United Kingdom other than stocks, shares or rents under Case V, Rule 2.

Lord Wrenbury in his speech indicated that American law might make some difference, and that if the American law applicable to the matter were ascertained, Lady Archer-Shee's rights might be different from what he explained them to be, with a consequent possibility of a variation in the computation of the liability to tax upon her income.

Accordingly, in the present case evidence was laid before the Commissioners as to the American law relevant to the facts.

The Commissioners, who had to deal with that foreign law as a question of fact, have embodied a summary of it in the Case, and have " held that the differences between American " and English law proved before us were so great that the decision " of the House of Lords on the previous appeal had no applica- " tion." They accordingly decided that the income of the Respondent's wife must be treated as derived from the trustees, and not from securities under Case IV, Rule 1, or from stocks, shares or rents under Case V, Rule 1. That is to say, they held the income to be derived from a foreign possession under Case V, Rule 2.

Mr. Justice Rowlatt, after consideration of the evidence as to the American law, felt unable to say that the American law is the same as the British law; or that " it countenances the view at " the base of the decision of the House of Lords that this lady was " entitled specifically to these dividends "; and accordingly, he upheld the decision of the Commissioners.

It appears to me that the true question before this Court is a little different. We ought to take the decision of the majority of the learned Lords and examine the propositions that they laid down as to the English law applicable to this same trust; and then consider whether those propositions are seriously contradicted or

(Lord Hanworth, M.R.)

displaced by the American law, and if not so contradicted or displaced, then we ought to follow the decision of the House of Lords.

I turn, therefore, to a consideration of the speeches of Lords Atkinson, Wrenbury and Carson, who formed the majority.

Lord Atkinson, 11 T.C. page 773, after consideration of the terms of the trust, says that " 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."; and later, page 775 : " 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."

Lord Wrenbury says(1) that the fact that the trustees have a first charge upon the trust funds for their costs, charges and expenses, and American income tax; " does not reduce the right " of property of the beneficiary to a right only to a balance sum " after deducting these . . . . I have to read the will and see " what is Lady Archer-Shee's right of property in certain ascer- " tained 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."

Lord Carson says(2) : " 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 "; and he quotes with approval the words " the income is the income of " the beneficiaries; the income does not belong to the trustees "; and finally(3) " 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."

These excerpts make it plain that the learned Lords held that Lady Archer-Shee had (1) an equitable right in possession to

(1) 11 T.C. at p. 779. (2) *Ibid.* at p. 782.
(3) *Ibid.* at p. 783.

(Lord Hanworth, M.R.)

receive the proceeds and dividends of the securities, shares and stocks of which she was tenant for life; (2) that the mere holding back of a portion from these proceeds and dividends, for the purpose of defraying outgoings, made no difference, and did not alter or shift the right to the receipts, or change the nature of the balance paid over to Lady Archer-Shee. It was the same in character, even though reduced in amount.

With this clear guidance, I turn to the American law which is now before us. I agree with Mr. Latter that foreign law is a question of fact, and thus that we must take it as stated by the Commissioners who are the masters of the facts; and that too because of the caution administered by Lord Blackburn in *Castrique* v. *Imrie*, Law Reports, 4 English and Irish Appeals, at page 430, that foreign law must be brought before a Court in this country, with the assistance of witnesses who are able to explain it, without which it would be easy to misunderstand it. It must, therefore, be summarised by those who hear the evidence expounding the foreign law.

Now how far does that law which is epitomised in the Case stated before us, contradict or displace the propositions which I have quoted from the speeches in the previous Archer-Shee case?

Paragraph 9 (*d*) of the Case appears to me to sum up the position:—" He "—the American lawyer—" explained that, whilst " it was true that under the trust in question (there being no " provision for accumulation) the whole of the net income (including " in the event of death any income accrued but not paid over) " must ultimately be either paid over to or applied for the benefit " of Lady Archer-Shee the manner and times of doing so were " within the discretion of the trustees subject to judicial " supervision; that if the trustees exercised their discretion uncon- " scientiously Lady Archer-Shee had the right to ask the Court to " supervise their behaviour in the matter both of the management " of the income and of the capital of the trust."

Now that statement in essentials appears to accord with the statements of the learned Law Lords, and particularly of Lord Wrenbury. It may be that there is some greater latitude allowed in America in point of time, but Lady Archer-Shee has a right, earlier or later, to the payment of the dividends which the trustees cannot withhold from her. If they do pay out sums for her account, that is not more than an exercise of their duty imposed by the will that in the events which have happened—" the whole of " the said income and profits should thereafter be applied to the " use of his said daughter Frances during her life." The power and duty to " apply the income " did not escape the attention of the House of Lords, and if and so far as any delay may occur, or there may be any retention of sums for the purpose of defraying

(Lord Hanworth, M.R.)

costs, charges or expenses, no significance can be attached to these matters as indicative of a divergence between the law in America and in this country.

In my judgment it is important to follow the principle of the law laid down by the House of Lords, and not to attempt to discover some divergence in detail between that and what is told to us is the American law. We must rather see whether there is any root divergence which places the trustees in an authoritative position as against the *cestui que trust*. I cannot find such a distinction. I, therefore, feel bound to say that this case is governed by the decision of the House of Lords(1), [1927] A.C. 844, and the appeal must be allowed with costs here and below.

Lawrence, L.J.—Since the assessments for the two years ended on April 5th, 1925, which formed the subject matter of the decision in the House of Lords in the previous case(1), three further assessments have been made on the Respondent for the three years ended on April 5th, 1928. The Respondent appealed to the Special Commissioners against these further assessments and adduced fresh evidence, mainly directed to the law of the State of New York (hereinafter for the sake of brevity called the American law) in support of his appeal. The Commissioners allowed the appeal, holding that in the light of the fresh evidence the decision in the previous case did not apply to the further assessments. Mr. Justice Rowlatt affirmed the decision of the Commissioners and the Crown now appeals to this Court.

The question, as in the previous case, is whether the income to be taxed falls to be assessed under Case IV, Rule 1, and Case V, Rule 1, of Schedule D of the Income Tax Act, 1918, (as modified in respect of the year ended 5th April, 1928, by Section 29 of the Finance Act, 1926) on the full amount of the income arising in America, whether remitted to the United Kingdom or not, or whether such income falls to be assessed under Case V, Rule 2, on the actual amount annually received in the United Kingdom from remittances payable in the United Kingdom.

The income in question is derived from a trust fund established in the State of New York under the will of Lady Archer-Shee's father. Particulars of this trust fund are annexed to the Case, from which it appears that it consists entirely of foreign securities, stocks and shares. No distinction is drawn in the Case between securities on the one hand and stocks and shares on the other, but I understand that no difficulty will arise on this account when once the principle upon which the income is to be assessed has been determined.

---

(1) Archer-Shee *v.* Baker, 11 T.C. 749.

(Lawrence, L.J.)

The trust fund is vested in a trust company in New York upon trust, in the events which have happened, to apply the whole of the income and profits to the use of Lady Archer-Shee during her life with a proviso that such application might be made by paying over the income and profits as the same should accrue to her personally for her separate use but without power of anticipation.

During the relevant years the trustee has received the whole of the income of the trust fund and, after deducting such small administration expenses as were properly chargeable against income and a commission of one per cent. for his remuneration, has in each month paid the net amount in hand to the order of Lady Archer-Shee at her bankers in New York. Out of the money so paid to her, Lady Archer-Shee has paid American income tax and has caused a substantial proportion of the remainder, but not the whole, to be remitted to her in England.

In these circumstances, the question is whether the income which Lady Archer-Shee derives under her father's will is income arising to her from the investments constituting the trust fund, or is income arising to her from her equitable right, enforceable in the American Courts, to have handed over to her or applied to her use the balance of the income of the trust fund after all lawful deductions have been made therefrom.

The similar question which arose in the previous case gave rise to a sharp divergence of judicial opinion. Mr. Justice Rowlatt (in the Court of first instance) and Lord Atkinson, Lord Wrenbury and Lord Carson (in the House of Lords) took the view that the income in question was income arising to Lady Archer-Shee from the trust's investments, whilst the Master of the Rolls, Lord Justice Warrington and Lord Justice Sargant (in the Court of Appeal) and Viscount Sumner and Lord Blanesburgh (in the House of Lords) took the view that it was income arising to her from her right to enforce the performance of the trust in the American Courts.

In the result the House of Lords (by a majority) decided that the income arising to Lady Archer-Shee under the trusts of her father's will fell to be assessed under Case IV, Rule 1, and Case V, Rule 1, and made an order remitting the case back to the Commissioners with a direction to restate it by distinguishing between securities and stocks, shares and rents and foreign possessions (other than stocks, shares or rents) and by stating certain further particulars.

In the absence of evidence as to American law the decision of the House of Lords was based on the assumption that the law governing the construction of the will of the testator was the same as the law of England. This decision is binding on this Court, and must govern the present case unless the fresh evidence shows that

(Lawrence, L.J.)

the relevant American law renders the principle upon which that decision was based inapplicable. In order to determine this question it is necessary in the first place to arrive at a clear understanding as to what was the principle underlying the decision in the previous case.

Unless I have misunderstood the judgments of the three learned Lords who constituted the majority in the House of Lords the principle underlying their decision is that, as the estate of the testator had been fully administered and had become a clear trust estate, Lady Archer-Shee as the sole beneficiary under the bequest in question (when construed according to English law) acquired a right of property in the income of the trust fund as and when received by the trustee subject only to a charge in his favour for his expenses and remuneration and that Lady Archer-Shee did not merely acquire a right enforceable against the trustee in the American Courts to have handed to her the balance of the income after the deduction of his expenses and remuneration.

All the reasons given in the judgments, though naturally expressed in different ways, are reasons for adopting that principle. Much reliance has been placed by the Respondent on the illustration given by Lord Wrenbury[1] of the hypothetical receipt by the trustee of a sum of £100 in the month of January and the right of Lady Archer-Shee to demand payment to her of that sum if nothing were then owing to the trustee which he was entitled to deduct. This illustration, however, must not be pressed too far. Lord Wrenbury is far too well acquainted with the practical administration of trusts in the Court of Chancery not to be fully aware that in a trust such as the one under consideration the trustee would not be compelled immediately on receipt of every sum of income, however small, to send off a cheque to the tenant for life. What the Court demands is that the trustee should at reasonable intervals (generally quarterly or half-yearly) account to the beneficiary for the income he has received and should not unreasonably delay or withhold payment. Nor did Lord Wrenbury intend to negative the right of the trustee, although nothing might be due to him at the moment, to retain sufficient money to meet expenses which were likely to arise in the near future (see *Stott* v. *Milne*, 25 Ch.D. 710, cited by Lord Blanesburgh in his judgment). The illustration given by Lord Wrenbury when read in its proper setting, was only intended to emphasise the fact that Lady Archer-Shee acquired a right of property in the whole of each specific item of the income as and when it was received by the trustee, and not merely a right to enforce payment of a balance.

---

[1] 11 T.C. at p. 779.

(Lawrence, L.J.)

The next question is whether there is any difference between the American law and our law which makes the principle so laid down inapplicable to the present assessments.

The Respondent contended that the American law differs from the English law in two material respects, viz. :—first, that under the American statute quoted in the Case (which although in terms only relating to land has been held to apply to personal estate) the whole estate in the trust fund is vested in the trustee in law and in equity and that Lady Archer-Shee takes no interest in that fund; and, secondly, that the trustee has a discretion as to the manner and times of paying over the income to or applying it for the benefit of Lady Archer-Shee, who has no right to call for the immediate payment or application of any specific part of the income.

As regards the first of these alleged differences, applying the American statute to personalty, it operates to vest in the trustee the absolute ownership of the trust fund, and Lady Archer-Shee has no legal or beneficial title to or interest in it. According to American law, however, she is entitled in equity to enforce the performance of the trust in her favour; she has a veto upon the choice of investments; and she has the right to call upon the trustee to furnish her with a statement of the investments. This is very much the same as the English law according to which a trustee of personalty has vested in him the absolute ownership of the trust fund and the person beneficially entitled for life to the income has no legal or beneficial title to the corpus of the investments constituting it. As incident to the right to the beneficial enjoyment of the income, however, the tenant for life under our law has the right to call upon the trustee for accurate information as to the state of the trust fund, and if the corpus of the trust fund is in jeopardy to apply to the Court of Chancery to compel the trustee to perform the trust, or to have him removed from the trusteeship and to have new trustees appointed in his place or to have the trust fund brought into Court. If there be any distinction between the American law and the English law on the question of the ownership of the corpus of the trust fund—and I have not been able to discover any—it clearly is not a distinction of any substance. Moreover, according to the Income Tax laws of this country, it is not necessary that the taxpayer should own the source from which his income arises. Lord Parker of Waddington, in *Drummond* v. *Collins*(1), [1915] A.C., at page 1018, says : " As I understand the " Appellant's argument, it depends on the proposition that Case V " applies only to profits or gains from foreign possessions when " these possessions belong to the person sought to be assessed, and " that this property did not in the present case belong either to the

(1) 6 T.C. 525 at p. 540.

(Lawrence, L.J.)

" infants or to their guardian. In my opinion it is enough for " Case V to apply that the person to be assessed has such an interest " in the property as to entitle him to the profits or gains in " question."

As to the second alleged point of difference a more difficult question arises. Under the terms of the bequest the trustee is given the option of applying the income to the use of Lady Archer-Shee instead of paying it to her personally. In the case of a person who is *sui juris*, the English law ignores this option on the principle (laid down in *Younghusband* v. *Gisborne*, 1 Collyer's Chancery Cases, 400, and now firmly established) that where there is what amounts in effect to an absolute gift, that gift cannot be fettered by prescribing a mode of enjoyment (see *per* Master of the Rolls Swinfen-Eady in In re *Nelson*, reported in a note to In re *Smith*, [1928] Ch.D., at page 921). In the previous case of *Baker* v. *Archer-Shee* the House of Lords evidently felt no hesitation in applying this principle, as regards any income already accrued, to the bequest in favour of Lady Archer-Shee although she was a married woman restrained from anticipation.

From the summary of the American law in the Case it would appear, however, that this principle is not adopted in the State of New York, and consequently that the trustee under the terms of the bequest is entitled to exercise his discretion as to whether he will pay over the income to Lady Archer-Shee or will himself apply it for her benefit in such manner and at such times as he should think fit. The exercise of this discretion is, however, subject to certain limitations. The whole of the net income must ultimately be either paid over to or applied for the benefit of Lady Archer-Shee and any income accrued but not so paid over or applied during her lifetime passes on her death to her legal personal representative as part of her estate, thus showing conclusively that she has a right of property in the income and not merely a personal right against the trustee. Further, the trustee cannot unreasonably or indefinitely withhold the payment or application of the income and Lady Archer-Shee has the right at reasonable intervals to demand an account of the income received by the trustee, and payment to her of any sum not already paid over or applied to her use, unless there should exist some special occasion for expenditure likely to arise, in which case the trustee is entitled to retain a sufficient amount to meet such expenditure.

In these circumstances, the question is whether the existence of this discretion (which, as a matter of fact, has not been exercised in any of the three years of assessment) is sufficient to cause the income to lose its " origin or parentage " and to change its character from income arising from the investments of the trust fund to income arising from the right to enforce in the American Courts her right to the balance of the income.

(Lawrence, L.J.)

If I have rightly understood the principle of the decision of the House of Lords in the previous case, the limited discretion which the trustee has under the American law as to the manner and the time of the payment or application of the income is not a difference which goes to the root of that principle.

The essential facts which emerge from the fresh evidence are that under American law the discretion vested in the trustee does not prevent Lady Archer-Shee's interest in the income under the bequest from being a right of property nor does it reduce that right to a right only to a balance sum after deducting the trustee's costs, charges and expenses and remuneration. Lady Archer-Shee's equitable title to every separate item of income received by the trustee attached at the time of such receipt; the trustee has to account to her for every penny so received; and (subject to the charge for expenses and remuneration) is bound to pay or apply the whole of it to her or for her benefit within a reasonable time. The fact that the income pending its payment over or application may remain in the trustee's hands for a longer or shorter period does not in my opinion obliterate its origin or operate to change its character or source, it remains the same income and it is that specific income which has ultimately to be paid and applied to or to the use of Lady Archer-Shee.

To hold in these circumstances that the decision of the House of Lords is inapplicable would in my opinion be to refine upon that decision, a process against which Viscount Sumner uttered a warning in *Whelan* v. *Henning*, [1926] A.C. at page 297(1).

If the discretion vested in the trustee had been a discretion to pay or apply the income either to or for the use of Lady Archer-Shee or to or for the use of some other person or persons, it would be an entirely different matter. In such a case it might well be that the decision in the previous case would be inapplicable and that the trustee or the trusts of the will and not the trust's investments would be held to be the source of the income, but that is not the case here, where the trustee has no power to divert the income from Lady Archer-Shee.

In the result, for the reasons stated, I agree with the Master of the Rolls that this appeal ought to be allowed.

Greer, L.J.—The Respondent in this case was assessed for Income Tax in the sum of £12,000 for each of the three years ending 5th April, 1926, 5th April, 1927, and 5th April, 1928, in respect of his wife's income arising from foreign securities, stocks and shares. The Respondent appealed to the Special Commissioners on the ground that his wife's income did not arise either from securities in any place out of the United Kingdom within the meaning of

(1) 10 T.C. 263 at p. 282.

(Greer, L.J.)

Case IV, Rule 1, or from stocks, shares or rents in any place out of the United Kingdom within the meaning of Case V, Rule 1, but arose from possessions out of the United Kingdom other than stocks, shares or rents, within the meaning of Rule 2 of the Rules applicable to Case V, and that therefore he was only liable to pay tax on the amount of such income received in each year in the United Kingdom from remittances payable in the United Kingdom. The Special Commissioners allowed the Respondent's appeal, and assessed him on the amount of such remittances only. The Crown appealed to Mr. Justice Rowlatt, who confirmed the decision of the Special Commissioners.

The Crown now appeals to this Court, and asks this Court to say on the facts found by the Special Commissioners that the Respondent was rightly assessed under Case IV, Rule 1, and Case V, Rule 1, upon the full amount of the dividends received by the trustees of the will of Lady Archer-Shee's father in the United States, and passed on to her, less certain deductions, by the trustees, whether the money was remitted to this country or not. In my judgment the decision of the Special Commissioners, confirmed by Mr. Justice Rowlatt, was right, and this appeal should be dismissed.

There had been appeals by the Respondent in respect of similar assessments for the two years ending on the 5th April, 1925, in respect of which an appeal was carried to the House of Lords. In those proceedings no evidence was called before the Commissioners as to American law, and the members of the House of Lords who finally determined the questions involved in the assessments for the two years ending 5th April, 1925, decided in favour of the Crown on the grounds that, by the law of England, the dividends and interest arising out of the securities, stocks and shares received by the trustees of the will of Lady Archer-Shee's father were her property when so received, and that, in the absence of proof to the contrary, the laws of the State of New York, by which the nature of her interest fell to be determined, must, in accordance with a well-established rule of English law, be held to be the same as English law. In the present proceedings, however, evidence of the relevant rules of law of the State of New York was given, and the Special Commissioners found as a fact that the law of the State of New York is in material respects different from the law of England. A contention was at one stage of the proceedings raised by the Crown that the Respondent was estopped by the decision in the House of Lords, but the Attorney-General in return for a concession by the Respondent gave up his rights to rely upon such estoppel.

The question for this Court to determine is whether there was evidence before the Special Commissioners on which they were entitled to find that in material respects the law of New York

(Greer, L.J.)

State was different from the law of England as laid down by the majority of the House of Lords. In legal proceedings in this country when foreign law becomes material it is regarded as raising questions of fact to be determined like all questions of fact by the tribunal of fact upon the evidence given before it. The Commissioners state as their finding that they accept the evidence given before them by two American lawyers as a sufficiently accurate account of the law of New York State regarding trusts. In order to see whether that law is different from the law applied by the House of Lords it is necessary to consider carefully what is the English law which, in the absence of evidence, the House of Lords held should have been treated by the Special Commissioners as the American law applicable to the case. Of course, any question as to the meaning of the Rules under the various Cases contained in the Income Tax Act, 1918, is a question of English law, but these Rules have to be applied to facts proved before the Commissioners, and it is question of fact dependent upon the law of New York State what is the nature of the rights of Lady Archer-Shee in or in relation to the trust property held by the trustees of her father's will to be used for her benefit during her life. In the events which happened, the trustees were by the terms of the will to hold the residuary estate in trust to apply the income and profits thereof to the use of Lady Archer-Shee during her life. It has been admitted throughout that the nature of her rights under the will is necessarily a question to be determined by the law of New York State. It is, therefore, important in the first place to ascertain what is the character of these rights in English law. It is no doubt historically correct to say that the rights of beneficiaries to the benefit of real and personal property vested at law in trustees for their use or benefit had their origin in the recognition by Courts of Equity of a right on the part of the beneficiary to call for the intervention of the Court of Chancery to enforce on the trustee the obligation of the trust by means of the special writs and remedies invented to meet the inequity which arose from the failure of the Common Law Courts to recognize any rights except those of the legal owner; but in the course of time this right of resort to a Court of Equity was expanded by the judicial decisions into an estate or interest in the subject matter of the trust. Thus, that which was in origin a mere right of action to enforce the administration of the trust became an equitable estate in the case of land, and an equitable interest in the trust property. Equitable estates in land were distinguished as equitable estates in fee, equitable estates in tail, and equitable estates for life. I do not think this recognition in equity of an estate or equitable right of property accruing to the beneficiary in the subject matter of a trust was confined to equitable interests in land. In *Donaldson* v. *Donaldson*, Kay, page 711, at page 717, Lord Hatherley, then

(Greer, L.J.)

Vice-Chancellor Page-Wood uses the words " property " and " equitable interests " as properly applicable to the rights of a beneficiary of stock held in trust. In *Dearle* v. *Hall*, and *Loveridge* v. *Cooper*, 3 Russell, page 1, a beneficiary for life of invested funds is spoken of as " tenant for life " and as having a property or interest in the fund. See also In re *Freshfield's Trust*, 11 Ch.D. 198; *Arden* v. *Arden*, 29 Ch.D. 703, and *Mutual Life Assurance Society* v. *Langley*, 32 Ch.D. 460. The steps whereby Courts of Equity transformed that which was originally a chose in action into an equitable estate in land or an equitable property in chattels, are conveniently traced in the introductory chapter in Lewin on Trusts (see the 13th Edition, page 7).

If the speeches of the majority of the House of Lords in the former Archer-Shee case, *Baker* v. *Archer-Shee*, 11 T.C. 749, [1927] A.C. 844, are closely examined, it will be found that the decision of the case turned on the recognition of the rights of Lady Archer-Shee as rights of property in the securities, stocks and shares subject to the trust, and in the dividends received therefrom, at the very moment when they were received by the trustees. Lord Atkinson (see 11 T.C., page 773 and, in the Law Reports, [1927] A.C., page 858) refers to the contention of the Respondent that she had no property in or rights to the fund beyond the right in equity by suit to compel the trust company to pay her the portion of the trust income to which she is entitled, in terms which make it clear that he disagreed with the contention. Further on he says: " 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 ", and, in concluding his speech, he expressed his concurrence in the speech of Lord Wrenbury. In the course of Lord Wrenbury's speech we find the following words used(1): " In this state of " facts Lady Archer-Shee's interest under her father's will is " beyond all question ' Property '. The question for determina- " tion 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? " On page 779 of the Report in the Tax Cases, and page 865 of the Law Reports, he points out the question is not what the trustees have thought proper to hand over, and have handed over, but what under the will Lady Archer-Shee is entitled to, and then adds: " The trustees, of " course, have a first charge upon the trust funds for their costs,

(1) 11 T.C. at p. 778.

(Greer, L.J.)

" 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." And later the learned Lord says :—" 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." Later he says : " 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." Lord Carson says at page 782 of the Report in the Tax Cases, and page 870 of the Law Reports : " 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."

The statement of the American law which was accepted by the Commissioners is contained in paragraphs 9 and 10 of the Case. The law of trusts in the State of New York is statutory, and if the evidence of the witnesses stated in those paragraphs is accepted as the law of the State of New York, it seems to me impossible to come to any other conclusion than that the law of New York State does not recognize any property in trust funds as vesting in the *cestui que trust*. The persons for whose benefit the trust is created take no legal or equitable estate or interest in the lands or other subject matter of the trust. They are not regarded by the law of the State of New York as having any right, title or interest either in the securities, stocks or shares, or in the interest or dividends received therefrom, nor had Lady Archer-Shee any such rights by the law of the State of New York to call for the immediate application to her use, by payment to her or otherwise, of sums received by way of dividends which Lord Wrenbury,

(Greer, L.J.)

in the words already quoted from page 779, says she would have under English law. The essential difference between the rights of the beneficiary under English law as decided by the House of Lords in *Baker* v. *Archer-Shee*, and the law of New York State as proved by the evidence accepted by the Commissioners may be made plain by considering how the Courts of New York State would deal with a state of facts assumed for the purpose of illustration. It might well be that a beneficiary in the position of Lady Archer-Shee would be in course of having a mansion or yacht built for her under contract, when the trust income was received by the trustees. The trustees might well think that the money should be kept in hand to meet the instalments that would become payable from time to time, and that it would be unwise in the interests of the beneficiary to pay over to her the dividends when received, as she might be an extravagant woman likely to dissipate immediately the money she would receive and so leave her unable to meet the instalments. In this country according to the decisions of the Supreme Tribunal, the beneficiary could say to the trustees : " The money you have in " hand is my money, pay it over to me at once; I am the sole " judge as to how I shall spend my income." The trustees would have no lawful answer to such a demand, and the beneficiary could enforce her rights by action. In New York State she could certainly bring an action against her trustees, but the nature of her complaint in the action would not be that her property was being withheld from her, but that her trustees were not conscientiously carrying out their duties as trustees, and if the Court thought they were the action would fail.

One other observation occurs to me to make before concluding what I have to say about the case of *Baker* v. *Archer-Shee*, and it is this. At page 850(1), in the speech of Viscount Sumner, these words will be found. Referring to the rights of Lady Archer-Shee, he says this : " This right " (the right to go to the Court) " 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." I regard that statement as the major premise in the reasoning contained in Viscount Sumner's speech, and I regard it as the very proposition on which the majority differed from Viscount Sumner, because of the words which I have quoted from the speeches of the Lords who composed the majority; but it seems to me an accurate statement of what the law of New York State is as found by the tribunal of fact in this case; and I am not at all sure that, if the majority of the Lords had not differed from Viscount

(1) [1927] A.C.; 11 T.C. at p. 767.

(Greer, L.J.)

Sumner as to his major premise, they would not have agreed with his conclusion. At any rate, it seems to me that the right to apply the reasoning of the judgment to a statement of the law of New York State which agrees with the view that Viscount Sumner took of the law of England is applicable to the case when it came before the Courts, and it is only because the majority differed from him as to what the law of England was that they differed from him in the conclusion at which he arrived.

We are not concerned with the question whether the law of the State of New York was accurately stated by the witnesses. Their evidence was evidence which the Commissioners were entitled to accept, and have accepted, as a true statement of the law of the State of New York. The words of Rule 1 of Case IV and Rule 1 of Case V describe the taxable income as income arising from securities, and income arising from stocks, shares or rents, but it is implicit in the decision of the majority of the House of Lords that the income to be taxed is the income accruing from the sources mentioned to the individual assessed or to his wife. It would not be right to apply these rules to all cases where the income before it became the income of the tax payer was money received from securities, stocks, shares or rents. The mere fact that a person who owes a duty to the tax payer performs that duty by paying sums to the tax payer which he has received from the sources mentioned is not sufficient to establish that the money received arises to the tax payer from securities, stocks or shares in which, according to the relevant law, she has no property or interest.

In my judgment, on the facts proved before the Commissioners, the income of Lady Archer-Shee arose from her right to obtain the assistance of the Court of Equity to enforce the obligations of the trustees, and did not arise from the securities, stocks or shares which were the source of the income which she could compel the trustees, through the Court, to use for her benefit. It was not, in my judgment, her income when received by her trustees, and when the balance, after deduction of commission and expenses, was paid into her bank it was indeed her income, but an income which arose to her, not out of stocks and shares, but out of a right *in personam* which the law gives her against her trustees.

For these reasons, as I have already stated, in my judgment the decision of Mr. Justice Rowlatt was right, and this appeal should be dismissed with costs.

Mr. Hills.—My Lord, the figures, I believe, were agreed at the earlier stage when the estoppel point was taken on the footing of the Crown's argument; but I think the Order ought to include a formal Order remitting the matter to the Commissioners, inserting the right figures.

Mr. Edwardes Jones.—Yes. We have not taxed the costs below; but we had better stay until the matter is finally dealt with.

Mr. Hills.—I do not think your Lordships grant stays.

Lord Hanworth, M.R.—Mr. Edwardes Jones, we do not grant stays in this Court; that is a matter for arrangement between you. As a matter of fact it will be: Appeal allowed with costs here and below. Matter remitted to Commissioners.

Mr. Edwardes Jones.—That is it, my Lord.

An appeal having been entered against this decision, the case came before the House of Lords (Lord Buckmaster, Viscount Dunedin, Lords Tomlin, Thankerton and Warrington of Clyffe) on the 18th and 20th November, 1930, when judgment was reserved. On the 15th December, 1930, judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

Mr. A. M. Latter, K.C., Mr. Gavin Simonds, K.C., and Mr. G. M. Edwardes Jones, K.C., appeared as Counsel for the Appellant and the Attorney-General (Sir W. A. Jowitt, K.C.), the Solicitor-General (Sir Stafford Cripps, K.C.) and Mr. R. P. Hills for the Crown.

JUDGMENT.

Lord Buckmaster.—My Lords, the Appellant is, by General Rule 16 of the Income Tax Acts, assessable to Income Tax in respect of the profits of his wife. Her father was a citizen of the United States of America, and under his will, made in New York, she is entitled to receive during her life the income of his residuary estate which is held at present by the Trust Company of New York as executor and trustee of the will. Part of such monies are remitted to this country by the trustee and about these no question is raised, but part remain in New York and the liability of the Appellant to have these retained monies assessed for Income Tax is the sole question on this appeal.

The early history of the case and all material facts are to be found in [1927] A.C. 844(1), which contains the report of the decision when the same dispute as the present was considered by this House under different circumstances. The explanation of why, notwithstanding that decision, this case is again presented to your Lordships lies in the fact that the will of the Appellant's father-in-law under which the property passed was then construed

(1) Archer-Shee *v.* Baker, 11 T.C. 749.

(Lord Buckmaster.)

according to English law, and, so regarded, it was held that the interest of the Appellant's wife was derived from stocks, shares or funds outside the United Kingdom and therefore by Rule 1 of Case V was assessable to Income Tax whether received here or not. The question as to what might happen if the American law differed from the English was left open. Such decision covered the claims up to April, 1925, but since then three assessments have been made in accordance with the law then laid down, and these are the assessments now in dispute. It is obvious, therefore, for the Appellant to succeed he must show that the American law differs in a crucial respect from the law of England, and that the former judgment has accordingly lost its force, and this he now claims to have done.

His contention was accepted by the Commissioners and Mr. Justice Rowlatt, but not by the Court of Appeal, who, with the dissent of Lord Justice Greer, once more found against the Appellant.

To make the point now in issue quite plain it is necessary again to refer to the Statute and the Rules.

Under Schedule D, Rule 1, a tax is 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."

This general provision is then separated into six different cases under which the tax is to be charged, the fourth and fifth of which are the ones relevant to this appeal. They are as follows:— "Case IV.—Tax in respect of income arising from securities out "of the United Kingdom, except such income as is charged under "Schedule C; Case V.—Tax in respect of income arising from "possessions out of the United Kingdom."

Except that these two Cases appear to overlap, the matter seems so far clear, but the mists begin to fall when the Rules are examined, "subject to and in accordance with" which the tax is to be charged, for it is then found that two distinct methods of computation and two distinct liabilities apply to different classes of property under these two Rules.

It will be noticed that Case IV applies only to what are called "securities," and Rule 1 under it provides that the tax is in that case to be "computed on the full amount thereof arising "in the year of assessment, whether the income has been or will be "received in the United Kingdom or not," and this differs from the Rules under Case V, which create the present difficulties. The Rules in question are 1 and 2, and their material portions are as follows:—"1. The tax in respect of income arising from stocks,

(Lord Buckmaster.)

" 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, as directed in Case I, whether the income has " been or will be received in the United Kingdom or not. . . . . " 2. 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, ... on an average of the three preceding " years as directed in Case I, without any deduction or abatement " other than is therein allowed."

If, therefore, the income in this case is income " arising from " stocks, shares or rents," it must be computed on a three years' average, and is liable to be taxed whether received in the United Kingdom or no, but if it is not it is still computed on a three years' average but only " on the full amount of the actual sums annually " received in the United Kingdom."

It is not for us to enquire into the reason for this change; we assume a reason to exist, and that it is wise and just. We are concerned only with whether Rule 1 or Rule 2 applies. That when this matter was formerly raised Rule 1 applied was determined by this House by Lords Justices Wrenbury, Carson and Atkinson, Lords Sumner and Blanesburgh dissenting. Lord Wrenbury's judgment was expressly concurred in by Lord Atkinson, who added no further reasons of his own.

It is, therefore, extremely important to see why Lord Wrenbury and Lord Carson formed this opinion, and the report enables this to be accurately determined. Lord Wrenbury at page 866 says(1) :— " 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 " and on the same page he repeats this conclusion again made dependent upon the hypothesis of the identity of the law in the two countries. He there says :—" 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."

Lord Carson, at page 870(2), supports the same opinion in these words : " 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."

---

(1) 11 T.C. at p. 779. (2) *Ibid.* at p. 782.

(Lord Buckmaster.)

Now the construction of the will was there the construction according to English law, the principles and effect of which had been enunciated by Lord Wrenbury. This opinion was not in accordance with that of Lord Sumner who supported the judgment of Lord Justice Sargant in the Court of Appeal where he said this(1) :— " What this lady enjoys is not the stocks, shares and rents or other " property constituting the trust fund under the will; what she has " is the right to call upon the trustees, and, if necessary, to compel " the trustees to administer this property during her life so as to " give her the income arising therefrom according to the provisions " of the trust. Her interest is merely an equitable one, and it is " not an interest in the specific stocks and shares constituting the " trust fund at all."

This was the opposite view to that held in this House, and it was because it was decided that it did not define accurately Lady Archer-Shee's position under the will according to English law that the decision was given in favour of the Crown.

The evidence of two American lawyers has now been given in the matter on behalf of the Appellant and no one has been called to contradict their statements.

Mr. Richard Powell, a Professor of Law at Columbia University Law School in the City of New York, stated that the provision of the law which directs who shall hold and own the property of a trust was as follows :—" Every express trust valid as such in its " creation, except as herein otherwise provided, shall vest the whole " estate in the trustees in law, and in equity, subject only to the " execution of the trust period. The persons for whose benefit the " trust is created shall take no estate or interest in the lands, but " may enforce the performance of the trust in equity."

This provision, although it relates in terms only to lands, had been held to be equally applicable to personal property, and again he said that Lady Archer-Shee " had no right to any specific " dividends or interest at all " and he explained her rights in these words :—" whilst it was true that under the trust in question " (there being no provision for accumulation) the whole of the net " income (including in the event of death any income accrued but " not paid over) must ultimately be either paid over to or applied " for the benefit of Lady Archer-Shee the manner and times of " doing so were within the discretion of the trustees subject to " judicial supervision; that if the trustees exercised their discretion " unconscientiously Lady Archer-Shee had the right to ask the " Court to supervise their behaviour in the matter both of the " management of the income and of the capital of the trust."

---

(1) 11 T.C. at p. 763.

(Lord Buckmaster.)

This opinion was confirmed by a member of a legal firm of old standing in New York, and is uncontradicted.

The Master of the Rolls(1) thinks that the latter part of the statement I have quoted " in essentials appears to accord with the " statements " of Lord Wrenbury. The same question often presents itself to different minds under different aspects; to my mind the statement which must be taken with the other words I have quoted differs in every essential from Lord Wrenbury's views. At its highest it does no more than express what Lord Justice Sargant thought, but erroneously, was the English law, and it was this that Lord Wrenbury rejected.

I cannot reconcile the statement of the American lawyer that Lady Archer-Shee had " no right to any specific dividends or " interest at all " with the statement of Lord Wrenbury(2) that she was " entitled in equity specifically during her life to the " dividends upon the stocks." Nor, again, can I reconcile the statement that she took " no estate or interest " in the funds, though she might enforce the performance of the trust in equity with the statement of Lord Carson(3) that under English law she was sole beneficial owner of the interest and dividends of all the stocks and shares.

In my opinion, the difference between the two systems of law cannot be better explained than by contrasting the judgments of Lords Sumner and Blanesburgh in the House of Lords, and that of Lord Justice Sargant in the Court of Appeal with that of Lords Wrenbury, Carson and Atkinson which there prevailed. These former learned Judges were held to have imperfectly enunciated the English law, but they have expressed with perfect clearness what we now know is the American law which is the law we are bound to apply.

This to my mind ends the case but the Attorney-General pressed on us with such insistence the case of *Williams* v. *Singer*(4), [1919] 2 K.B. 108, and [1921] 1 A.C., that I feel some comment is necessary.

In that case the trustees of an English settlement were domiciled in this country but the tenant for life was a French subject by marriage and domiciled abroad. The income of the settled fund was paid under orders of the trustees direct to the tenant for life at a bank in New York. In those circumstances, assessments were made on the trustees and these assessments were set aside by this House. One sentence from the judgment of Lord Chancellor Cave will serve to show how little to the present purpose is the consideration of that authority. He says, page 72(5): " The object of the

(1) See page 716 *ante*. (2) 11 T.C. at p. 779. (3) *Ibid.* at p. 782.
(4) 7 T.C. 387. (5) *Ibid.* at p. 411.

(Lord Buckmaster.)

" Acts is to secure for the State a proportion of the profits charge-
" able, and this end is attained (speaking generally) by the simple
" and effective expedient of taxing the profits where they are found.
" If the beneficiary receives them he is liable to be assessed upon
" them. If the trustee receives and controls them, he is primarily
" so liable."

The case of *Syme* v. *Taxes Commissioners for Victoria*, [1914] A.C. 1013, again is no assistance. The tax was there assessed upon income " derived by any person from personal exertion " and this was by the statute declared to include " income arising or accruing " from any trade " although not arisen from the taxpayer's own personal exertion or trade. Under the provisions of a will trustees carried on a business and paid the appellant one-fifth of the profits and on these the tax was held duly assessed under the provisions already quoted. It is rarely profitable to attempt the interpretation of one statute by another and in this case the mere comparison of the language shows it to be useless. The former decision in the case shows that an absolute ownership of the stocks, shares and dividends is not necessary; a limited ownership is sufficient to satisfy the rule, but it shows also that such ownership must be specific in relation to the subject, and the opinion on which we are bound to act shows that is not the true position of Lady Archer-Shee. For these reasons I think this appeal should be allowed.

Viscount Dunedin.—My Lords, the first and indeed crucial point of this case is to make up one's mind as to what was the true *ratio decidendi* in the former case as to the same source of income in this House, for by that decision we are bound. I think the *ratio decidendi* very clearly appears by comparing the judgment of Viscount Sumner, who was in the minority, with the majority judgment which prevailed. Viscount Sumner thought that the specific property in the stocks, shares, securities and other investments which formed the trust fund, was in the hands of the trustees, and that accordingly what the beneficiary in this country got was what came to her from a foreign possession, namely, her right to get the trustees to make payment to her of the balance of the income. That view was rejected by the majority on the view that there was in the beneficiary a specific and equitable interest in each and every one of the stocks, shares, etc., which formed the trust fund, and that the case fell either under Case IV, or, in so far as the funds consisted of stocks and shares, under Rule 1 of Case V, and they remitted the case to find out the exact constituents of the fund. That case was decided without enquiry as to the law of New York. It is obvious that the judgment of the majority turns upon an assumption that the law of New York is what they declared the English law to be.

(Viscount Dunedin.)

Now, in the present case, the law of New York has been enquired into and we have heard the testimony of the lawyers examined. In face of that testimony it seems to me quite an impossibility to hold that, according to that law, there is a specific equitable interest in the beneficiary in each parcel of securities, stocks, etc. The interest of the beneficiary is just what Viscount Sumner thought it was in the former case. Accordingly, I think the appeal must be allowed and the judgment of Mr. Justice Rowlatt restored, for the income of Lady Archer-Shee is drawn from a foreign possession and falls under Rule 2 of Case V.

Lord Tomlin. (Read by LORD THANKERTON)—

My Lords, the answer to the question which falls to be determined on this appeal depends in my opinion *first* upon the effect of the decision in your Lordships' House in *Baker* v. *Archer-Shee*, [1927] A.C. 844, and *secondly* upon the conclusion as to American law to be drawn from the evidence of the American lawyers.

I do not think it can be doubted that the majority of your Lordships' House in the former case founded themselves upon the view that according to English law (with which, in that case, American law was assumed to be identical) the Appellant's wife had a property interest in the income arising from the securities, stocks and shares constituting the American trust and that but for the existence of that supposed property interest the decision would have been different.

The evidence upon American law adduced before the Commissioners in the present case contains statements to the effect that the whole estate in law and in equity in the trust funds is vested in the trustees and that the words of the trust give to the Appellant's wife merely the right to resort to a Court of equity to compel the trustees to discharge the task imposed upon them which was to apply the money which they receive as a net income from the trust to her use, that they have, within the limits of reasonable and conscientious behaviour, an absolute discretion as to the application of the income for her benefit, that if they decided to apply the money for her benefit instead of paying it over they must exercise the power to do so reasonably, and that she had no right to any specific dividends or interest at all.

In the face of these statements, I think the finding of fact must necessarily be that, according to American law, the Appellant's wife has no property interest in the income arising from the securities, stocks and shares constituting the trust fund but has only a chose in action available against the trustees.

Applying the principle of the previous decision of your Lordships' House to the case with the fact as to American law found as I have indicated it should in my opinion be found, I reach the conclusion

(Lord Tomlin.)

that the assessable income, the subject of the appeal, is income arising from a possession out of the United Kingdom other than stocks, shares or rents, viz., a chose in action available against the American trustees and that the assessment should be made not under Case IV and Case V, Rule 1 of Schedule D, but under Case V, Rule 2 of that Schedule.

The appeal therefore in my opinion succeeds.

Lord Thankerton.—My Lords, I concur in your Lordships' opinion.

Lord Buckmaster.—My Lords, my noble and learned friend Lord Warrington of Clyffe has asked me to say that he agrees with the judgment which I have read.

Questions put:—

That the Judgment appealed from be reversed.

The Contents have it.

That the Judgment of Mr. Justice Rowlatt be restored and that the Respondent do pay to the Appellant his costs here and below.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Lewis and Lewis.]