NO. 954—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—26TH JULY, 1933; 29TH JUNE, 1934

COURT OF APPEAL—1ST AND 6TH DECEMBER, 1933; 10TH JULY, 1934

HOUSE OF LORDS—14TH, 15TH, 18TH AND 19TH FEBRUARY, 1935, AND 15TH MARCH, 1935

(1) PERRY (H.M. INSPECTOR OF TAXES) *v.* ASTOR[1]

(2) ADAMSON (H.M. INSPECTOR OF TAXES) *v.* DUNCAN'S EXECUTORS[2]

Income Tax, Schedule D—Foreign stocks and shares settled by foreign trust—Income payable to settlor—Power of revocation reserved by settlor in favour of himself—Extent of liability to tax—Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Schedule D, Case* V—*Finance Act*, 1922 (12 & 13 *Geo.* V, *c.* 17), *Section* 20 (1) (*a*).

(1) *The Respondent in the first case, who was a British national resident in the United Kingdom, by a settlement transferred certain American stocks and shares, to which he had become absolutely entitled, to a trust company in New York upon trust to collect the income therefrom and, after paying all expenses properly chargeable against such income, to pay or apply the balance of the income to or for the use of the Respondent during his life, in such amounts and at such dates as he might direct. The settlement reserved to the Respondent an absolute power to revoke the settlement and the trust thereby created in whole or part. This power had not been exercised during the years material to the case.*

It was agreed for the purposes of the appeal (a) *that the trust settlement was governed by the law of New York State;* (b) *that, under such law, the Respondent had no proprietary interest, legal or equitable, either in the specific assets comprising the corpus of the trust or in the specific dividends or interest collected by the trustee, his sole right being the right in equity to enforce performance of the trust against the trustee; and* (c) *that the power of revocation reserved to the Respondent under the deed was valid, but, unless and until such power was exercised, had no effect at all on the nature of the rights accruing to the Respondent under the settlement.*

The Respondent was assessed to Income Tax under Rule 1 *of Case* V *of Schedule D, on the basis that the whole of the trust income must be deemed to be his income under Section* 20 (1) (*a*) *of the Finance*

(1) Reported (C.A.) [1934] 1 K.B. 260; (H.L.) 51 T.L.R. 325.
(2) Reported (H.L.) 51 T.L.R. 325.

Act, 1922, *on the ground that he could, without the consent of any other person, have obtained for himself the beneficial enjoyment thereof.*

On appeal, the Special Commissioners decided that the matter was concluded in the Respondent's favour by the decision in the case of the Marchioness of Ormonde *v.* Brown (17 T.C. 333) *and amended the assessments by substituting amounts computed under Rule* 2 *of Case* V *for those computed under Rule* 1.

(2) *In the second case, by a settlement, supplemented by a declaration of trust, certain shares in an Indian company were transferred by the settlor, who for some years prior to his death resided in the United Kingdom, to trustees resident in India upon trust to pay the income therefrom to himself during his life, with remainders over. The settlement reserved to the settlor an absolute power to vary or revoke any of the trusts declared by the settlement. This power had not been exercised during the years material to the case.*

It was agreed for the purposes of the appeal that the trust settlement was governed by the law of British India and that, upon a proper construction of the trust settlement under such law, the deceased had no proprietary interest, legal or equitable, in the specific assets of the trust or the specific dividends collected by the trustees, his sole interest therein being his right to enforce performance of the trust against the trustees so as to give him the trust income.

On appeal by the Respondents against assessments to Income Tax made upon them as executors of the settlor under Case V *of Schedule D, the Special Commissioners decided that Section* 20 (1) (*a*) *of the Finance Act*, 1922, *was not applicable to the trust income, and discharged the assessments, none of the trust income having been remitted by the trustees to the settlor in the United Kingdom during the material period.*

Held, *that Section* 20 (1) *of the Finance Act*, 1922, *did not apply and that the liability of the Respondents in each case was limited, by reference to Rule* 2 *of Case* V, *to the actual amounts* (*if any*) *received in the United Kingdom from the trustees abroad.*

Marchioness of Ormonde *v.* Brown, 17 T.C. 333, *approved.*

CASES

(1) *Perry* (*H.M. Inspector of Taxes*) v. *Astor*

CASE

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

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 13th March, 1933, for the purpose of hearing

appeals, the Hon. W. W. Astor, hereinafter called the Respondent, appealed against assessments to Income Tax in the sums of £23,809 for the year ending 5th April, 1930, £23,809 for the year ending 5th April, 1931, and £25,245 for the year ending 5th April, 1932, made upon him by the Additional Commissioners of Income Tax for the Division of St. James under Case V of Schedule D of the Income Tax Act in respect of income from possessions out of the United Kingdom.

2. The Respondent is resident in the United Kingdom, and is a grandson of the first Lord Astor, and under a Settlement made by the said Lord Astor dated 25th May, 1916, became absolutely entitled, upon coming of age in August, 1928, to certain American stocks and shares.

3. By a Settlement dated 13th September, 1929, a copy of which is attached hereto and forms part of this Case, the Respondent transferred the said stocks and shares to the City Bank Farmers Trust Company, hereinafter called the Trustee, to be held upon the trusts therein set out.

4. It was provided by the second and third clauses of the Settlement that the Trustees should collect the income arising from the trust estate and after paying the taxes and other incidental expenses and charges properly chargeable against income should pay or apply the balance of said income to or for the use of the Respondent during his life in such amounts and at such dates as he might from time to time direct, and that upon the death of the Respondent the Trustee should distribute the capital of the trust fund then in its possession to such persons and in such shares or amounts and on such terms and limitations as the Respondent should by will or codicil appoint and in default of such appointment to the issue of the Respondent then surviving in equal shares per stirpes, and should he leave no issue to the descendants of his father living at his death in equal shares per stirpes. By the ninth clause power was reserved to the Respondent at any time or times during his life by instrument under his hand and seal to revoke the Settlement and the trust thereby created concerning all or any part or parts of the trust fund, whether capital or income, or to change or modify the same in any way or to any effect which the Respondent might think fit or proper.

5. It was agreed for purposes of the present appeal :—

(*a*) that the Trust Settlement was governed by the law of New York State ;

(*b*) that upon a proper construction of the Trust Settlement under such law the Respondent had no proprietary interest legal or equitable in either the specific assets comprising the corpus of the Trust or the specific dividends or interest collected by the Trustee ; that the whole legal and

equitable proprietary interest therein was vested in the Trustee, and that the sole right in the Respondent was the right in equity to enforce performance of the trust against the Trustee and in particular to call upon him to pay over (at such times as the Respondent might direct) the balance of income in the Trustee's hands after deducting outgoings from the dividends and interest so collected; and

(*c*) that under such law the provision in the Trust Settlement reserving to the Respondent a power of revocation was valid but (unless and until such power was exercised) had no effect at all on the nature of the rights accruing under the Settlement to the Trustee and Respondent respectively as explained in (*b*) above.

6. The Respondent had not during the material years exercised the power of revocation reserved to him by the ninth clause of the Settlement or made any appointment affecting the trust fund or any part thereof.

7. The assessments under appeal had been made under Rule 1 of Case V of Schedule D on the basis that the whole of the income arising from the stocks and shares comprising the trust fund must be deemed for the purposes of Income Tax to be the income of the Respondent under Section 20 (1) (*a*) of the Finance Act, 1922, on the ground that he could without the consent of any other person have obtained for himself the beneficial enjoyment thereof.

8. It was contended on behalf of the Respondent :—

(*a*) That the income of the trust fund was income of the Trustee, who was resident abroad, and was derived from sources out of the United Kingdom, and was therefore not within the ambit of the Income Tax Acts, and Section 20 (1) (*a*) of the Finance Act, 1922, had no application to it. Reference was made to the decision in the case of the *Marchioness of Ormonde* v. *Brown* (17 T.C. 333).

(*b*) That the Respondent was not or at least might not have been able to obtain for himself the beneficial enjoyment of the income without the consent of the Trustee.

(*c*) That Section 20 (1) (*a*) of the Finance Act, 1922, could not be applicable to the case, as the Respondent was already in beneficial enjoyment of the income under the Settlement without exercising any powers of revocation or other powers thereunder, whereas the Sub-section contemplates only persons who are not in beneficial enjoyment of the income for the time being and can only become so by exercising such a power of revocation or other power.

(*d*) That as from the date of the Settlement the Respondent was chargeable to Income Tax under Rule 2 of the Case V

of Schedule D on the amounts received in the United Kingdom, and the assessments ought to be amended accordingly.

9. It was contended on behalf of the Crown :—

(*a*) The income of which the Respondent had the beneficial enjoyment under the Settlement was not the income arising from the specific stocks and shares comprising the trust fund but was income from a possession other than stocks and shares.

(*b*) That the Respondent was able, without the consent of any other person, by means of the exercise of the power of revocation reserved by the Settlement, to obtain for himself the beneficial enjoyment of the whole of the income arising from the specific stocks and shares comprising the trust fund.

(*c*) That such income was within the ambit of the Income Tax Acts and under Section 20 (1) (*a*) of the Finance Act, 1922, must be deemed for the purposes of Income Tax to be his income.

(*d*) That the assessments had rightly been made under Rule 1 of Case V of Schedule D, and ought to be confirmed.

10. We, the Commissioners who heard the appeal, held that the matter was concluded by the decision in the case of the *Marchioness of Ormonde* v. *Brown*, and that Section 20 (1) (*a*) of the Finance Act, 1922, could not be applied so as to charge the Respondent with Income Tax on foreign income which under the provisions of the Settlement was income of the American Trustee. We accordingly amended the assessments by substituting amounts computed under Rule 2 of Case V for those computed under Rule 1 as from the date of the Settlement.

11. The Appellant immediately after the determination of the appeal 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.

P. WILLIAMSON,
R. COKE,
} Commissioners for the Special Purposes of the Income Tax Acts.

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

15th June, 1933.

EXHIBIT

This Indenture made this 13th day of September in the year One thousand nine hundred and twenty nine by and between William Waldorf Astor of London, England, party of the First part hereinafter called the "Grantor" and City Bank Farmers Trust Company a corporation organized and existing under the laws of the State of New York now having its principal place of business at No. 43 Exchange Place Borough of Manhattan City of New York, party of the second part hereinafter called the "Trustee"

Witnesseth that the Grantor has assigned, transferred, set over and delivered and by these presents does assign, transfer, set over and deliver unto said Trustee the personal property, securities and effects which are mentioned and described in a certain schedule entitled "Schedule referred to in agreement dated the 13th day of "September, 1929, between William Waldorf Astor, of London, "England, and City Bank Farmers Trust Company"(1), and which said schedule for purposes of identification has been signed by the said Grantor and said Trustee. Said property, securities and effects thus assigned, transferred, set over and delivered are to be held by said Trustee upon the following trusts, nevertheless :—

First : The Trustee shall raise and remit to the Grantor such amount as he may hereafter certify to the Trustee as being due for any British Income or Super Tax in respect of income accumulated heretofore and during the minority of the Grantor and charge the same to the principal or capital of the trust fund.

Second : Subject to the above, the Trustee shall invest and keep invested and from time to time reinvest the said trust estate and the proceeds of the same and receive and collect the interest, dividends and other income thence arising and after paying from the income of such trust estate the taxes and other incidental expenses and charges properly chargeable against income, shall pay or apply the balance of said income to or for the use of the Grantor during his life in such amounts and at such dates as he may from time to time direct.

Third : Upon the death of the Grantor the Trustee shall distribute the capital of the trust fund then in its possession to such persons and in such shares or amounts and on such terms and limitations as the Grantor shall by will or codicil, especially referring to this power, appoint and in default of any such appointment by said Grantor then to the issue of the said Grantor then surviving in equal shares per stirpes, and should the Grantor leave no issue him surviving, then to the descendants living at his death of his father Waldorf Astor in equal shares per stirpes.

Fourth : If under any of the provisions of this Indenture any minor shall become entitled to any share of the capital of the trust

(1) Not included in the present print.

estate, such distributive share shall thereupon vest in such minor absolutely, notwithstanding minority, but during such minority the principal of such share shall remain in the care and custody of and be administered by said City Bank Farmers Trust Company which for the purposes of said administration shall have all the powers, authority and discretion granted to it as Trustee hereunder. When such minor shall attain the age of twenty one years, the principal of such share shall be transferred and paid over to him or her.

Fifth : Said Trustee shall have full power and authority to change any investments of capital or principal of said trust estate, in its discretion, and for that purpose, from time to time to sell and assign the above mentioned or any other securities in which said estate, or any part of it, may be invested and likewise to make such investments not only in such securities and other subjects of investments as are, or at the time being, may be permissible for trustees investments by rules of law then applicable, but likewise, in the purchase of Corporate Bonds and Stocks of any description, whether such Corporations be located in the State of New York or elsewhere within or without the United States (excluding only such Corporate Stocks as entail personal liability upon the shareholders) and in State, City and Municipal Bonds, whether such State, City or Municipality be situated within the State of New York or elsewhere it being understood that the Trustee shall have an absolute discretion within the limits above mentioned with regard to investment and shall not be responsible for any loss or depreciation incurred by reason of or in connection with the taking retention or realization by it of any investment hereunder.

Sixth : The Trustee named in this Instrument shall be entitled to receive or to retain out of capital and income of the trust fund, such sums by way of commissions or remuneration upon, or in respect of said capital and income respectively, as may for the time being, be authorized by the laws of the State of New York.

Seventh : In order to remove any doubt as to whether premiums and profits or discounts and losses should belong to or be charged against the principal of the trust fund or against the income it is understood that the full income of the said trust fund, including all income accrued on said trust fund at the date hereof after the deduction of necessary expenses, shall be treated as income and the Trustee shall be under no duty to maintain any sinking fund in order to meet the wearing away of any premium in the market price of any securities that may, at any time, form part of the trust fund or to meet any depreciation or losses in the value of any securities that may be sold or may continue to be held in trust under this Instrument, but any profits that may be made or any appreciation in value that may accrue on any investments or securities and all losses suffered by depreciation or otherwise shall accrue to and be borne by the principal of said trust fund.

Eighth: The Trustee hereunder is hereby authorized, in its discretion, to deposit any of the securities at any time forming part of the trust fund under any plan or plans of reorganization that may commend themselves to its good judgment and to accept the new securities which may be offered to it under any such plan or plans in exchange for such original securities and to pay any and all assessments levied or imposed under such plan or plans of reorganization, and to charge the amount thereof against the principal of the trust fund.

Ninth: These Presents are made upon the following express condition:—

That at any time or times hereafter during the life of the Grantor it shall be lawful for the Grantor, by instrument under his hand and seal, to revoke this Instrument and the trust hereby created concerning all or any part or parts of the trust fund, whether capital or income, or to change or modify the same in any way, or to any effect which said Grantor may think fit and proper.

Tenth: This Instrument shall be construed and the trusts powers and provisions herein above contained shall be administered, exercised and carried into effect according to the laws of the State of New York, and the rights and obligations under these Presents of all persons interested or claiming hereunder or appointed hereby shall, at all times, be regulated by that law notwithstanding that the Grantor and all or any such persons may now, or at any future time, be domiciled elsewhere than in this State.

In Witness whereof the said Grantor has hereunto set his hand and the said Trustee has caused these presents to be duly executed and its corporate seal to be hereunder affixed the date and year first above written.

W. W. ASTOR,
Donor.

William Waldorf Astor
By Charles A. Peabody,
Attorney-in-fact.

City Bank Farmers Trust Company
By H. C. E. (*Sgd.*) M. S. Cardozo,
Vice President.

(2) *Adamson (H.M. Inspector of Taxes)* v. *Duncan's Executors*

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 on the 31st October, 1933, for the purpose of hearing appeals, the executors of W. A. Duncan (deceased) (hereinafter called the Respondents) appealed against assessments to Income Tax under Case V of Schedule D for the years ending 5th April, 1932, and 5th April, 1933, respectively, in respect of income from possessions out of the United Kingdom, made upon the Respondents by the Commissioners for the Division of the City of London.

2. The Respondents are the executors of the will of the late Walter Atholl Duncan (hereinafter called the Deceased) who died on the 13th August, 1932, and who for some years prior to his death resided in the United Kingdom.

3. By a Settlement dated 20th May, 1926, and executed by the Deceased in Paris, the Deceased transferred certain shares in Duncan Brothers & Co., Ltd., a Company registered and carrying on business in Calcutta, to Trustees to pay the income therefrom to himself during his life and after his death to his widow for her life, and subject thereto on certain trusts for his children. By clause 14 of the Settlement the Deceased reserved to himself an absolute power to vary or revoke any of the trusts declared by the Settlement. A copy of the Settlement is annexed hereto marked " A " and forms part of this Case.

4. By a Declaration of Trust dated 1st March, 1928, the Deceased transferred certain further shares in Duncan Brothers & Co., Ltd., of Calcutta, to the Trustees upon the trusts of the Settlement. A copy of the Declaration of Trust is annexed hereto marked " B " and forms part of this Case [1].

5. The Trustees of the Settlement were at all material times resident in British India, where the trust fund was situate. Stamp Duty was paid on the Settlement in India.

6. Until January, 1929, the income of the settled shares was remitted to the Deceased in this country through Messrs. Walter Duncan & Co. of London, who accounted to the Crown for the British Income Tax in respect thereof. During the two years under appeal no income was remitted by the Trustees to the Deceased in this country.

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[1] Not included in the present print.

7. It was agreed for the purposes of the present appeal that the Trust Settlement was governed by the law of British India, and that upon a proper construction of the Trust Settlement under such law, the Deceased had no proprietary interest, legal or equitable, in the specific assets comprising the corpus of the trust, or in the specific dividends collected by the Trustees, and that the sole interest of the Deceased therein was his right to call upon the Trustees, and if necessary to compel them, to administer the trust so as to give him the income according to the terms thereof.

8. It was contended on behalf of the Respondents :—

(*a*) that Section 20 (1) (*a*) of the Finance Act, 1922, was not applicable in the circumstances of this case ;

(*b*) that as from the date of the Settlement the Deceased was chargeable under Rule 2 of Case V of Schedule D, on the basis of the sums remitted ;

(*c*) that as in the two years under appeal there had been no remittances the assessments under appeal should be discharged.

9. On behalf of the Crown it was contended :—

(*a*) that the Deceased was able without the consent of any other person by means of the exercise of the power of revocation reserved by the Settlement to obtain for himself the beneficial enjoyment of the whole of the income arising from the specific stocks and shares comprising the trust fund ;

(*b*) that such income was within the ambit of the Income Tax Acts, and under Section 20 (1) (*a*) of the Finance Act, 1922, must be deemed for the purpose of Income Tax to be income of the Deceased ;

(*c*) that the assessments were correct in principle.

10. We, the Commissioners who heard the appeal, held that Section 20 (1) (*a*) of the Finance Act, 1922, did not apply to the income in question and we accordingly discharged the assessments.

11. The Appellant immediately after the determination of the appeal 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.

H. M. SANDERS,
R. COKE,
} Commissioners for the Special Purposes of the Income Tax Acts.

York House,
23, Kingsway,
London, W.C.2.
3rd April, 1934.

EXHIBIT A

This Indenture made the 20th day of May, 1926, between Walter Atholl Duncan, a Director of Duncan Brothers & Co. Ltd. Merchants Calcutta (hereinafter called " the Settlor ") of the one part Clara Ray Duncan the wife of the said Walter Atholl Duncan (hereinafter referred to as " Mrs. Duncan ") of the second part and Thomas Bryce Nimmo an Assistant to the said Duncan Brothers & Co. Ltd. Thomas Douglas a Director of the said Duncan Brothers & Co. Ltd. and Charles Pomphrey an Assistant to the said Duncan Brothers & Co. Ltd. (hereinafter called " the Trustees ") of the third part Whereas the Settlor is entitled to the stocks shares and securities set out in the Schedule hereto and whereas the Settlor is desirous of settling the said stocks shares and securities in the manner hereinafter appearing and whereas in pursuance of the said desire the Settlor has transferred the said stocks shares and securities into the joint names of the Trustees to be held by them upon the Trusts and with and subject to the powers and provisions hereinafter contained Now this Indenture witnesseth and it is hereby declared and agreed as follows that is to say :—

1. The Trustees shall either allow the said stocks shares and securities to remain as actually invested or at any time with the consent of the Settlor and Mrs. Duncan or the survivor of them during their his or her lifetime and after the death of the survivor at the discretion of the Trustees may sell or convert the same or any of them and shall with the like consent or at the like discretion invest the moneys produced thereby in the names or under the control of the Trustees in or upon any investments hereby authorised with power with such consent or at such discretion as aforesaid to vary or transpose any investments for or into others of any nature hereby authorised.

2. The Trustees shall stand possessed of the said stocks shares and securities and of the investments for the time being representing the same (hereinafter called " the trust fund ") upon trust to pay the income to the Settlor during his life.

3. After the death of the Settlor the Trustees shall stand possessed of the trust fund upon trust to pay the income thereof to Mrs. Duncan during her life if she shall survive him and so that the same shall be subject to restraint on anticipation.

4. After the death of the Settlor and Mrs. Duncan the Trustees shall stand possessed of the trust fund and the income thereof upon trust for such of the four children of the Settlor and Mrs. Duncan namely John Atholl Duncan, Marjorie Ray Duncan, Kathleen Nimmo Duncan and Claire Cicely Duncan as shall attain the age of 27 years or marry and if more than one in equal shares Provided always that should any of the said children die before attaining the age of 27 years the Trustees shall hold the share of any child having married and so dying and the future income thereof in trust for all

the children or child of any marriage of such child so dying who being male attain majority or being female attain majority or marry and if more than one in equal shares.

5. The Trustees shall after the death of the Settlor and Mrs. Duncan apply the whole or such part as they in their discretion shall think fit of the income of the share in the trust fund to which any child of the Settlor or any child of any deceased child of the Settlor shall for the time being be entitled in expectancy either contingently or presumptively under the trusts hereinbefore declared for or towards his or her maintenance education or benefit and may either themselves so apply the same or may pay the same to the guardian or guardians of such child for the purpose aforesaid without seeing to the application thereof.

6. The Trustees may at any time after the death of the Settlor and Mrs. Duncan or in their his or her lifetime with their his or her consent in writing raise any part or parts not exceeding altogether one-half of the then expectant or presumptive or vested share of any child or remoter issue of the Settlor and Mrs. Duncan who shall have attained majority in the trust fund under the trusts hereinbefore declared and may pay or apply the same for his or her advancement or benefit in such manner as the Trustees shall in their absolute discretion think fit.

7. If there shall be no child of the Settlor and Mrs. Duncan who shall attain the age of 27 years or marry and if there shall be no child of a deceased child who being male shall attain majority or being a female shall attain majority or marry then (subject and without prejudice to the trusts powers and provisions hereinbefore declared and the powers by law vested in the Trustees and to every exercise of such powers) the Trustees shall stand possessed of the trust fund in trust for the Settlor his administrators and assigns.

8. Moneys requiring investment under these presents may be invested in or upon any of the stocks funds or securities of the Government of India or in or upon any public stocks or funds or Government securities of any British Dominion Colony Province State or Dependency or the United Kingdom or any Foreign Government or State or in or upon the bonds debentures debenture stock mortgages obligations or securities or the guaranteed or preference or ordinary stock or shares of any company or public municipal or local body or authority in India or any British Dominion Colony Province State or Dependency or the United Kingdom or any foreign country And the Trustees are specially authorised and empowered to hold and retain as trust investments in so far and so long as they consider it proper to do so the investments now conveyed to them as also to deposit the trust fund or any part thereof as a loan to any partnership or joint stock company of or in which the Settlor is at present a partner or otherwise interested and that whether such partnership or company shall or shall not remain of the same personnel as at present.

9. (*a*) The Trustees may deposit any deeds securities or instruments (including securities to bearer) held by them with any banking firm or company for safe custody or receipt of dividends and may pay any sum payable for such deposit and custody out of the income of the trust premises.

(*b*) Notwithstanding the restraint against anticipation of income hereby imposed upon Mrs. Duncan the Trustees may pay or direct payment of such income to any bank or agent whom she may by writing by her appoint to receive the same but so that such appointment shall always be revocable by any other writing signed by Mrs. Duncan and delivered by the Trustees.

10. (*a*) The Trustees shall not be bound in any case to act personally but shall be at full liberty to employ any solicitor banker or any other agent to transact all or any business of whatsoever nature required to be done in the premises (including the receipt and payment of money) and shall be entitled to be allowed and paid for all charges and expenses so incurred and shall not be responsible for the default of any such solicitor or agent or any loss occasioned by his employment.

(*b*) Any Trustee for the time being hereof being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done by him or his firm in relation to the trusts hereof and also his reasonable charges in addition to disbursements for all other work and business done all time spent by him or his firm in connection with matters arising in the premises including matters which might or should have been attended to in person by a Trustee not being a solicitor or other professional person but which such Trustee might reasonably require to be done by a solicitor or other professional person.

11. The Trustees may exercise or concur in exercising all powers and discretions hereby or by law given to them notwithstanding that they or any of them may have a direct or personal interest in the mode or result of exercising any such power or discretion but any of the Trustees may nevertheless abstain from acting except as a formal party in any matters in which such Trustee may be so personally interested and may allow the other Trustees to act alone in the exercise of the powers and discretions aforesaid in relation to such matter.

12. In the proposed execution of the trusts and powers of these presents or of any statutory power no Trustee shall be liable for any loss to any property for the time being subject to the trusts hereof arising by reason of any investment made in good faith or for the negligence or fraud of any agent employed by them although the employment of such agent was not strictly necessary or expedient or by reason of any mistake or omission made in good faith by a Trustee or by reason of any other matter or thing except fraud on the part of the Trustee who is sought to be made liable.

13. (*a*) Any Trustee of these presents who ceases to be ordinarily resident in British India shall on termination of such residence ipso facto cease to be a Trustee and shall take all such steps as may be necessary to transfer the trust property to the continuing Trustees and/or any new Trustee or Trustees.

(*b*) The power of appointing new Trustees shall be vested in the Settlor and Mrs. Duncan during their joint lives and in the survivor of them during his or her life.

14. Notwithstanding anything herein contained the Settlor may at any time or times hereafter but without derogating from the effect of any previous exercise of any of the powers hereinbefore contained or of this power vary or revoke all or any of the trusts and powers hereinbefore declared of all or any part of the trust fund and of the income therefrom respectively and may by the same or any other deed or deeds declare and create any other trusts and powers of and concerning the whole or any parts of the trust fund and of the income therefrom respectively the trusts whereof respectively hereby created shall be varied or revoked as aforesaid.

15. In these presents where the context so admits the expression "the Trustees" shall include in addition to the parties hereto of the third part the survivors and survivor of them or other the Trustees or Trustee for the time being of these presents.

16. The notes in the margin hereof shall not in any way affect the construction or interpretation of these presents.

In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

The Schedule above referred to :

9,000 8% Preference Shares of Rs. 100 each in Duncan Brothers and Company Limited.

900 Founders' shares of Rs. 100 each in Duncan Brothers and Company Limited.

Consular stamps 18/10*d*.

Signed Sealed and Delivered by the above - named Walter Atholl Duncan in the presence of *Sd.* F. H. Wyborn. British Pro-Consul British Consulate General Paris. — *Sd.* W. A. Duncan — Seal of British Consulate General Paris LS

Signed Sealed and Delivered by the above - named Clara Ray Duncan in the presence of *Sd.* F. H. Wyborn. British Pro-Consul British Consulate General Paris. — *Sd.* Clara Ray Duncan — Seal of British Consulate General Paris LS

PERRY (H.M. INSPECTOR OF TAXES) *v.* ASTOR

Signed Sealed and Delivered by the above - named Thomas Bryce Nimmo in the presence of *Sd.* William Wallace Mercantile Assistant 101 Clive Street, Calcutta. } *Sd.* T. B. Nimmo LS

Signed Sealed and Delivered by the above - named Thomas Douglas in the presence of *Sd.* William Wallace Mercantile Assistant 101 Clive Street, Calcutta. } *Sd.* Thos. Douglas LS

Signed Sealed and Delivered by the above - named Charles Pomphrey in the presence of *Sd.* R. W. B. Dunlop Mercantile Assistant 101 Clive Street, Calcutta. } *Sd.* C. Pomphrey LS

The case of *Perry* v. *Astor* came before Finlay, *J.*, in the King's Bench Division on the 26th July, 1933, when judgment was given, by consent, against the Crown, with costs, it being agreed that the case was governed by the first part of the decision in the case of the *Marchioness of Ormonde* v. *Brown* (17 T.C. 333).

The Crown having appealed against that decision, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Slesser and Romer, *L.JJ.*) on the 1st and 6th December, 1933, and on the latter date judgment was given unanimously in favour of the Crown, with costs, reversing the decision of the Court below.

The Attorney-General (Sir Thomas Inskip, K.C.), Mr. J. H. Stamp, and Mr. Reginald P. Hills appeared as Counsel for the Crown, and Mr. A. M. Latter, K.C., and the Hon. Cyril Asquith for the Respondent.

JUDGMENT

Perry (*H.M. Inspector of Taxes*) v. *Astor*

Lord Hanworth, M.R.—This is an appeal by the Attorney-General in a case which was decided by Mr. Justice Finlay in favour of the Respondent.

(Lord Hanworth, M.R.)

The facts are these. Mr. Astor is a national of this country and is resident in the United Kingdom. He became entitled, upon his coming of age in August, 1928, to certain American stocks and shares, and, by a settlement which he made after he had become thus absolutely entitled, dated 13th September, 1929, he transferred the stocks and shares to a trust company in New York, and that trust company, as trustee, holds the stocks and shares upon the trusts set out in the deed which is attached to the Case. By the terms of the trust, the trustee is directed to collect the income arising from the trust estate thus placed in his hands and then, after paying taxes and other incidental expenses and charges properly chargeable against income, he is to apply and pay the balance of the income to or for the use of Mr. Astor during his life at such dates and in such amounts as he from time to time may direct.

It is agreed, for the purposes of the present appeal, that the trust settlement is governed by the law of New York State; secondly, that, upon the proper construction of the trust settlement under that law, the Respondent has no proprietary interest, legal or equitable, either in the specific assets comprising the *corpus* of the trust or the specific dividends or interests collected by the trustee, and the whole legal and equitable proprietary interest therein is vested in the trustee, and that the sole right that the Respondent has is the right in equity to enforce performance of the trust against the trustee and, in particular, to call upon him, at such times as Mr. Astor may direct, to pay over to him the balance of the income in the trustee's hands after these deductions of outgoings; and, thirdly, that, under the law of New York State, the provision in the trust settlement reserving to Mr. Astor a power of revocation is valid, but, unless and until it is actually exercised, has no effect on the nature of the rights accruing under the settlement to the trustee and the Respondent, respectively.

It is important to clear away some points which have been argued and which those facts make it impossible to accept. For instance, we were referred to the case of *Smidth & Co.* v. *Greenwood*, 8 T.C. 193. That was a case in which persons carried on business in a foreign country; they rented an office in London, it is true, but the contracts which were finally made were made in Copenhagen, and that was the place where, in effect, the business was carried on. I have referred to the fact that the Respondent to this appeal is a national of and is resident in this country, clearly within the purview and ambit of the Income Tax Acts.

Another case to which I will refer is *Whitney* v. *Commissioners of Inland Revenue*(1), which concerns the question of whether it is

(1) 10 T.C. 88.

(Lord Hanworth, M.R.)

possible to serve a notice requiring a return of income for Super-tax outside the United Kingdom on a person who was a citizen of and domiciled and resident in the United States.

The last cases to which I will refer are the two *Archer-Shee*(1) cases. In the first case, by a majority, the decision turned upon the supposed fact that the beneficiary had a definite interest in the stocks and shares and the income arising therefrom. I say by a majority because it ultimately turned out that the law, as it was supposed to be, was not in accordance with the supposition; and, in the second *Archer-Shee* case(2), it was determined that the income which came to the estate for which Sir Martin Archer-Shee had to make the return, was income held in the hands of a trustee, the trustee had to remit the balance of the income, and he had an absolute discretion as to the application of the income, and that there was no right in the beneficiary to any specific dividends or interest at all. Lord Dunedin points out that the view which commended itself to the majority in the first case was, upon the facts as ultimately ascertained, wrong, and the true view was that which was stated by Lord Sumner at 11 T.C. 771, when he held this: "Lady Archer-Shee . . . . in "my view, does not for Income Tax purposes own and is not entitled "to any of the stocks, shares, securities or real property that form "part of the New York trust estate. These belong to the trustee "company, to whom also the annual payments made in respect of "them by way of rent, interest or dividends 'arise', 'accrue' and "'belong'. All that she has is a right, in the *forum* of the trustee "and of the trust fund, to have the trust executed in her favour "under an order to be made for her benefit by the appropriate "Court of Equity, and this 'possession' neither consists in the trust's "investments or any of them, nor is situated here. It is 'foreign.'"

The question we have to determine is whether in respect of this income so received by a resident in this country it is to be dealt with and charged under the first Rule or the second Rule of Case V of Schedule D. It will be remembered that Case V deals with tax in respect of income arising from possessions out of the United Kingdom. The Rule 2 of Case V says: "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." The exception to the Rule, "other than stocks, shares or rents", is introduced because the tax in respect of income arising from stocks, shares or rents, is separately dealt with in Rule 1; and, in such cases, if the income arises from stocks, shares or rents in any place out of the United Kingdom, the tax is to be computed on the full amount thereof, whether the income has been or will be received

(1) *I.e.* (*a*) Archer-Shee *v.* Baker, 11 T.C. 749, and 15 T.C. 1, and (*b*) Garland *v.* Archer-Shee, 15 T.C. 693. (2) 15 T.C. 693.

(Lord Hanworth, M.R.)

in the United Kingdom or not. It is abundantly plain, therefore, that it is important to consider, for the purpose of answering the question in the Case, whether or not the income that is received arises from stocks, shares or rents, when the payment is to be made in respect of the full amount thereof, or whether the income is one arising from possessions other than stocks, shares or rents, and is to be computed only on the full amount of the sums actually received in the United Kingdom.

Mr. Latter, for the Respondent, argues that all that is payable is tax upon the amount received of the actual sum sent over to this country, and he invokes the principle in the second *Archer-Shee* case(1) and he says that, as the matter stands at present, all that Mr. Astor is receiving is a sum which is remitted to him after there has been deduction by the trustee of the taxes and other incidental expenses and charges properly chargeable against the income, and he says that, under the agreed law stated in paragraph 5, the Respondent had no proprietary interest, legal or equitable, either in the specific assets comprising the corpus, or the specific dividends, and hence it is an *Archer-Shee* case(1). That does not, however, conclude the matter. We have to take into account that there is a Section in the Finance Act, 1922, Section 20, which deals with such cases. It must be remembered that, although at the time that *Colquhoun* v. *Brooks*(2) was decided, the ambit and the purview and the scope of the Income Tax was limited to what may be called a territorial area, there has in recent years been legislation which has imposed upon those who can be reached by the Income Tax, such as a national resident over here, a liability in respect of what may be broadly called foreign possessions. As Lord Blanesburgh says in *Archer-Shee* v. *Baker*, 11 T.C. at page 789: "Since 1914, with what almost seems an arbitrary exception, such "income, arrived at as is prescribed in the Statute, has been taxed "whether received in this country or not."

Section 20 of the Finance Act, 1922, is a Section which was passed in accordance with the policy under which a liability is imposed upon the nationals of this country to pay, even where the income may not be received by them directly from the source. Section 20 reads in this way, leaving out the immaterial words: "Any income—(*a*) of which any person is able, or has, at any "time since the fifth day of April, nineteen hundred and twenty-"two, been able, without the consent of any other person by means "of the exercise of any power of appointment, power of revocation "or otherwise howsoever by virtue or in consequence of a disposi-"tion made directly or indirectly by himself, to obtain for himself "the beneficial enjoyment . . . . shall . . . . be deemed for the "purposes of the enactments relating to income tax (including "super-tax) to be the income of the person who is or was able to

(1) 15 T.C. 693. (2) 2 T.C. 490.

(Lord Hanworth, M.R.)

" obtain the beneficial enjoyment thereof ; " and, as pointed out in the statement I have already made, there was, in this settlement, a power of revocation which was valid, and, although it has no effect until it is exercised, it stands as a good and effective weapon to be taken into the hand of Mr. Astor at any time when he so pleases. It is, therefore, under this Section, something which was not his income *prima facie*, but is now to be deemed to be his income if the provisions of the Section are satisfied ; and by the very terms that I have read under Sub-clause (*a*), if the fact be that he is able, by means of the exercise of a power of revocation, to obtain for himself the beneficial enjoyment, that brings into his income by the word " deemed " what otherwise lies outside it.

The answer that is suggested to the plain words of the Section is that Mr. Astor is already in enjoyment of the income and therefore the Section cannot apply. But this is in contradiction of the decision in the second *Archer-Shee* case(1), where the effect of the American law agreed as applicable here was considered. Hence that answer suggested will not do, and we come back again to the plain words of the Section.

Then it is said the Section does not cover income which is not already taxable and that sufficient interpretation of user can be given to the Section when you consider that it is possible to deflect the income from one person to another. That suggested interpretation and purpose of the Section seem entirely untenable when emphasis is laid upon the word " deemed ". That word makes it plain that you are then going to neglect the actual facts and to deduce or infer from those actual facts a result which does not directly and immediately flow from them. It appears to me that the Section is intended to bring within the purview of the Income Tax receipts of a person liable to Income Tax, receipts which without that Section would not come within the purview of the Income Tax, but which, by virtue of that Section, are to be deemed to be his income, although, in fact, they are not at the moment. It is plain, that, under the facts as stated here, there is a power in the Respondent to exercise this power of revocation. It is a valid power that has no effect until it is exercised, but it is a power which can be exercised by him without let or hindrance from any other person, and if he did so exercise it, it would secure to him the beneficial enjoyment of the income derived from the dividends payable from these stocks and shares now held by the trustee.

For these reasons, it appears to me that Section 20 (1) (*a*) applies to the present case, that the cases which have been referred to do not apply to the case of this national resident over here, and that the appeal, therefore, must be allowed and an Order made that the Respondent is liable to the full assessment.

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(1) 15 T.C. 693.

(Lord Hanworth, M.R.)

The effect of this decision is inconsistent with the decision in the case of the *Marchioness of Ormonde* v. *Brown*(1), which was followed by the Commissioners, and which perhaps stood in the way of a different decision by the learned Judge below. That case is not consistent with the present decision. I am not sure, but I think, there was no real distinction in that case, and if so, it must be treated as overruled. There was another point which was dealt with in that case which may justify the decision ; but, so far as the principle we are engaged in considering was contained in the case of the *Marchioness of Ormonde* v. *Brown*, our view on that point will, of course, prevail.

For these reasons, the appeal must be allowed with costs and the assessments made.

Slesser, L.J.—I am of the same opinion.

In the present appeal Mr. Justice Finlay has not delivered a separate judgment, because he has conceived that the incidents of this case, so far as they are material to his decision, are the same as those which had to be considered in the case of the *Marchioness of Ormonde* v. *Brown*, 17 T.C. 333, and, although, as my Lord has pointed out, there were other matters which had to be considered in that case, so far as the subject matter of this case is concerned, it is, I think, in all materials, indistinguishable from that case. In that case, we have the benefit of Mr. Justice Finlay's reasons why he came to the conclusion that, as in this case, the person who was sought to be taxed could avail himself of Rule 2 of Case V and say that he was only liable to tax in respect of the actual sums annually received in the United Kingdom on the ground that the income was other than from stocks, shares or rents.

The question which we have here to consider is whether the income received by Mr. Astor falls under Rule 1 or Rule 2 of Case V. As I have indicated, in this case, as in the case of the *Marchioness of Ormonde* v. *Brown*, there was in the trust deed power of revocation given to the settlor. In the case of *Garland* v. *Archer-Shee*, 15 T.C. 693, there was no such power of revocation, but apart from that the law which governed the trust in that case, which was the law of Ohio (which was also the law governing the case of the *Marchioness of Ormonde* v. *Brown*) appears, it is conceded, to be similar to that of the law of New York, and I deal with the legal position created by the trust upon that assumption.

There is no doubt, to my mind, that if in the present case and if in the case of the *Marchioness of Ormonde* v. *Brown* there had been no power of revocation, the decision in the case of *Archer-Shee* would certainly have led to this result, that the income would have been income other than from stocks and shares and would therefore fall to be computed only on the actual sums annually received in the

(1) 17 T.C. 333.

(Slesser, L.J.)

United Kingdom. The reason for that I do not cite from all the speeches of their Lordships in the *Archer-Shee* case, but it is stated very succinctly by Lord Tomlin when he says in that case(1): "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."

Therefore the problem which arises is whether the power of revocation which is contained in the present instrument and which has not in fact been exercised operates to take the case out of Rule 2 and bring it into Rule 1, so that the income should be treated as an income arising from stocks and shares, in which case the full amount thereof is exigible to taxation, or whether it should be treated as income other than from stocks, shares or rents.

The solution of that problem depends upon a proper construction of Section 20 of the Finance Act, 1922, which provides that: "(1) Any income—(*a*) of which any person is able, or has, at any "time since the fifth day of April, nineteen hundred and twenty-"two, been able, without the consent of any other person by means "of the exercise of any power of appointment, power of revoca-"tion or otherwise howsoever by virtue or in consequence of a "disposition made directly or indirectly by himself, to obtain for "himself the beneficial enjoyment . . . . shall . . . . be deemed "for the purposes of the enactments relating to income tax (includ-"ing super-tax) to be the income of the person who is or was able "to obtain the beneficial enjoyment thereof." There is no doubt, to my mind, that Mr. Astor does come exactly within the language of that Section. He is a person who by power of revocation can obtain for himself the beneficial enjoyment. My Lord has referred to the argument of Mr. Latter that the Respondent always had the beneficial enjoyment and therefore cannot be said to have obtained it by a power of revocation, and my Lord has pointed out, and I respectfully agree, that so to hold would be directly in defiance of the decision of the House of Lords in the *Archer-Shee* case, where it is said(1) that, apart from the power of revocation under the settlement, he has no more, to quote Lord Tomlin's language, than "a chose in action". It is clear, therefore, to my mind, that the beneficial enjoyment of the income would be renewed by the exercise of the power of revocation and that otherwise he would not have it. That seems to me to dispose of that argument.

In those circumstances, what is the position? It is provided in the Section that any income which is covered by the Section—and I have already stated that I think this income is so covered—"shall "be deemed for the purpose of the enactments relating to income "tax . . . . to be the income of the person who is or was able to "obtain the beneficial enjoyment thereof." It is found in the Case that the income which we have here to consider is an income to

(1) 15 T.C., at p. 735.

(Slesser, L.J.)

which the Respondent, Mr. Astor, became absolutely entitled from certain American stocks and shares, so that it was an income arising from stocks and shares, to quote the language of Rule 1. If it is provided, as it is, by Section 20, that in the circumstances there contemplated, and which here have happened, the income shall be deemed for the purpose of Income Tax to be the income of the person, it seems to me to follow, that income being as found, arising from stocks and shares, that the operation of this Section is to deem this income, although not at the moment arising from stocks and shares because he has not in fact revoked the settlement, to be an income which does arise from stocks and shares. That seems to me the natural meaning of the words " to be deemed to " be ". That phrase is assuming that a situation, which the phrase " deemed to be " seeks to bring about, has not yet come to be. Were it the fact that this was an income *in praesenti* arising from stocks and shares, it would not be necessary to provide that it should be deemed to be such income, but directly this power of revocation is in the deed as a power, it is so to be deemed to be, and being deemed to be, it is, for the purpose of the Income Tax, within Rule 1.

With every respect, I do not follow the learned Judge when he quotes passages from *Colquhoun* v. *Brooks*(1) and other cases which bring him to the conclusion that this is a mere piece of machinery and not a charging Section. In strictness it is neither. It is an interpretation of the meaning of the word " income ". The charging Section is contained in the Schedule and in the Rules. This is a dictionary to bring within Rule 1 the word " income ", and that is itself explained, its meaning and its operation ; and, in that case, we simply have to consider that this is an income of the settlor. It is an income, therefore, as found by the Case arising from stocks and shares.

There was one other argument which was used by Mr. Latter, to which I may be allowed to refer. As I understand it, Mr. Latter said this. Be it conceded that this power of revocation does make the income the income of the settlor, nevertheless, in so far as the revocation has in fact not been exercised, it is still, in fact, the income of the trustee, and therefore the Section, though it would in one sense make it the income of the settlor, would not make it an income arising from stocks and shares until in fact the power of revocation had been exercised. That argument seems to me an untenable one for the reasons which I have already given. I think that the deeming Section operates to make it not only an income, but an income of that quality which it in fact was before the settlement, and that is stated in terms in the Case to be an income arising from stocks and shares. If it had never been an income arising from stocks, shares

(1) 2 T.C. 490.

(Slesser, L.J.)

or rents, different considerations might arise, but I think the Section brings it in terms within Rule 1 by the notional assumption that it is such an income and, therefore, being an income " deemed to be " an income arising from stocks and shares in a place out of the United Kingdom, the tax must be computed on the full amount thereof.

I have dealt with this matter at some length because we are differing not only from the learned Judge in the present case, but we are, as I see it, overruling the first part of his decision in the case of the *Marchioness of Ormonde* v. *Brown*[1]. It is because we are doing that and therefore disturbing a view which has prevailed and by which the Commissioners have felt themselves bound since last year, that I thought it right to give my reasons at some length.

Romer, L.J.—Under and by virtue of the settlement of the 13th September, 1929, the income arising from the American stocks and shares referred to in the Case is payable to and received by the trustee who is resident outside the United Kingdom. The settlement, however, reserves to the Respondent, who is the tenant for life under it, a power of revocation by which he can, without the consent of any other person, cause the income to be paid directly to himself and for his own benefit. It is, in these circumstances, contended on the part of the Crown that in consequence of the provisions of Section 20 (1) (*a*) of the Finance Act, 1922, such income is to be deemed for the purposes of the Income Tax Acts to be the income of the Respondent and not the income of the trustee. To this contention there would not appear, at first sight at any rate, to be any answer. It seems to be exactly what the Sub-section enacts. The Respondent, however, seeks to escape from the Sub-section on two grounds. He says, in the first place, that the words " any income " with which the Sub-section begins mean any income in respect of which Income Tax is already payable. With all respect to Mr. Justice Finlay who, following his earlier decision in the *Marchioness of Ormonde's* case[1], accepted this contention, I am unable to agree with it. The Sub-section refers in terms to " any income ", and I can see no justification for qualifying those words in any way. The contention seems to be based upon the existence of some presumption that the word " income " when used in reference to the Income Tax Acts means income that is subjected to tax by those Acts. The question of the meaning of the word " income " depends, no doubt, upon the context in which it is to be found and in some contexts the meaning may have to be limited in the way suggested, but I know of no presumption in the matter. Each case must depend upon its own context.

In the present case it is to be observed that the Sub-section does not purport to be imposing any additional tax upon incomes or,

(1) 17 T.C. 333.

(Romer, L.J.)

indeed, to be dealing in any way with the charging or collection of Income Tax. The Sub-section does not, as Mr. Justice Finlay seemed to think would be the case if he accepted the Crown's contention, bring into charge the income from foreign possessions of a foreigner. In the present case, for instance, the American trustee will be no more liable to be taxed in respect of the income received by him than he would have been had the Sub-section never been enacted. The Sub-section does not alter or affect any single provision of the Income Tax Acts. All that the Sub-section does is to enact that in certain circumstances and for the purposes of those Acts the income of one person shall be notionally increased and the income of another shall be notionally diminished. I can see no reason in this for placing any restriction on the natural meaning of the word " income ". Whether this notional additional income will or will not be subjected to Income Tax will depend upon the Income Tax Acts. If the income from foreign stocks and shares accruing to a person residing in the United Kingdom is by virtue of the Sub-section to be deemed to be the income of a person who is not so resident, it will cease to be chargeable. This is admitted by the Respondent. He contends, however, that the Sub-section cannot operate so as to render a person resident in this country chargeable in respect of the income from foreign stocks and shares of which the beneficial enjoyment is vested in a person not so resident. I can see no justification for putting a construction upon the Sub-section that would produce so anomalous a result. If in the first case the income of the resident in this country is to be notionally diminished under the Sub-section, I cannot find from the context any valid reason why in the second case it should not be notionally increased.

The Respondent, however, contends in the next place that the Sub-section does not apply to a case where the owner of the power of revocation already has the beneficial enjoyment of the income in question. This is, of course, quite true. If the income be already his, there would be no sense in enacting that it is to be deemed to be his. If the Respondent is in the beneficial enjoyment of the income from the stocks and shares, he is already chargeable in respect of it. In point of fact, however, he is not chargeable in respect of that income apart from the Sub-section because, and only because, he is not in the beneficial enjoyment of it. For the settlement is one that has to be construed, and that takes effect according to the law of the State of New York and, according to that law, the whole legal and equitable interest in the income is vested in the trustee. The income of which the Respondent is in beneficial enjoyment is derived not from the stocks and shares within the meaning of Rule 1 of the Rules applicable to Case V of Schedule D to the Income Tax Act, 1918, but from the trustee, and is, therefore, income arising from possessions out of the United Kingdom other

(Romer, L.J.)

than stocks, shares or rents within the meaning of Rule 2—see *Garland* v. *Archer-Shee*, 15 T.C. 693. It is, of course, true that this income would have no existence were it not for the fact that the trustee is the legal and equitable owner of the income from the stocks and shares, and if, by the operation of the Sub-section, this last-mentioned income is to be deemed for the purpose of our Income Tax law to be that of the Respondent and not that of the trustee, it necessarily follows that the income at present being received by the Respondent from the trustee must be deemed to have no. existence. The two incomes are, however, essentially different from the point of view of the Income Tax Acts. The Respondent can, therefore, by virtue of his power of revocation place himself in the beneficial enjoyment of an income that must be regarded as being essentially different from the income of which he has the beneficial enjoyment under the settlement. For the purpose of the Acts his income must accordingly be deemed to be increased by the addition of the one and diminished by the subtraction of the other.

For these reasons I agree that this appeal should be allowed, and that the *Marchioness of Ormonde's* case(1), so far as it is in conflict with this decision, should be overruled.

The case of *Adamson* v. *Duncan's Executors* came before Finlay, *J.*, in the King's Bench Division on the 29th June, 1934, when judgment was given in favour of the Crown, with costs. The Respondents' appeal against the decision of the King's Bench Division came before the Court of Appeal (Lord Hanworth, *M.R.*, and Slesser and Romer, *L.JJ.*) on the 10th July, 1934, and was, by consent, dismissed, with costs. It was agreed in each Court that the case was governed by the decision of the Court of Appeal in the case of *Perry* v. *Astor*.

An appeal having been entered in each case against the decisions in the Court of Appeal, the cases came before the House of Lords (Lords Atkin, Tomlin, Russell of Killowen, Macmillan and Wright) on the 14th, 15th, 18th and 19th February, 1935, when judgment was reserved. On the 15th March, 1935, judgment was given against the Crown (Lord Russell of Killowen dissenting) with costs in each case, reversing the decisions of the Court below.

Mr. A. M. Latter, K.C., and Mr. Cyril Asquith appeared as Counsel for the Hon. W. W. Astor, in the first case, and Mr. Wilfrid Greene, K.C., Mr. A. Andrewes Uthwatt, and Mr. Arthur T. Macmillan for the Executors in the second case. The Solicitor-General (Sir Donald Somervell, K.C.), Mr. J. H. Stamp, and Mr. Reginald P. Hills appeared as Counsel for the Crown in both cases.

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(1) 17 T.C. 333.

JUDGMENT

(1) *Perry* (*H.M. Inspector of Taxes*) v. *Astor*
(2) *Adamson* (*H.M. Inspector of Taxes*) v. *Duncan's Executors*

Lord Atkin.—My Lords, in these two cases I have had the opportunity of reading the opinion which is about to be pronounced by my noble and learned friend Lord Macmillan. I entirely agree with it, and find it unnecessary to add anything to it; and I am requested by my noble and learned friend **Lord Tomlin,** who unfortunately is unable to be present here today, to say that he also agrees with it.

Lord Russell of Killowen.—My Lords, I, too, have had an opportunity of reading and considering the opinion about to be delivered by my noble and learned friend Lord Macmillan, but unfortunately I find myself in disagreement with him and the others of your Lordships concerning these appeals. I cannot justify to myself the departure which you are prepared to make from the language used in Section 20 (1) of the Finance Act, 1922.

The words relevant to the present case are crystal clear. "Any "income—(*a*) of which any person is able . . . . without the con- "sent of any other person by means of the exercise of any . . . . ". . . . power of revocation . . . . by virtue . . . . of a disposi- "tion made . . . . by himself, to obtain for himself the beneficial "enjoyment . . . . shall . . . . be deemed for the purposes of "the enactments relating to income tax (including super-tax) to be "the income of the person who is . . . . able to obtain the "beneficial enjoyment thereof . . . . and not to be for those "purposes the income of any other person." There must, of course, be the necessary limitation which is inherent in all our Income Tax legislation, namely, that what is taxed under or by virtue of this provision can only be either (1) income which is here, or (2) income of a person resident here. So far I believe there is no difference of opinion among us; nor is it, I think, in dispute that, if no further limitation is placed on the words of the Section, the case of Mr. Astor (for I will deal with his case in the first instance) falls precisely under those words. The income received by the trustee in the United States is income of which he is able, without the consent of any other person by means of the exercise of the power of revocation contained in the settlement made by himself, to obtain for himself the beneficial enjoyment with the result, if the Section applies, that such income is to be deemed, for the purposes stated, to be his income and no one else's.

Your Lordships, however, are of opinion that the Section does not apply to the case of Mr. Astor because in your view the Section should be subjected to another and further limitation in that the income there mentioned should be confined to income already

(Lord Russell of Killowen.)

charged to tax, and that all that the Section accomplishes is to shift the burden, and to substitute one person for another as the person liable to be charged in respect of income already chargeable.

The justification for so departing from the language employed is, as I understand it, of this nature : a variety of instances is given to show that if read without the further limitation the Section may result in no tax being payable in respect of income which is in fact being received by a person resident here. These are said to be anomalies, and to be in conflict with the provisions of Schedule D ; and because of this it is said that upon the authority of *Colquhoun* v. *Brooks*, 14 A.C. 493(1), we are entitled to give to the words of Section 20 (1) a meaning different from their ordinary meaning. Other parts of the Section are also pointed to as raising difficulties in their application to cases where the person in fact entitled to the income is resident abroad.

My Lords, to say that the natural meaning of the words is in conflict with the provisions of Schedule D is not in my opinion an accurate statement. The income escapes taxation in the cases put only because the artificial facts which the Legislature has created take it out of the annual profits or gains covered by Schedule D. The two enactments are not inconsistent ; there is no conflict, except the conflict of facts which necessarily arises when the Legislature enacts that what is not the fact is to be deemed to be the fact. In *Colquhoun* v. *Brooks* the sole question was whether profits of a trade carried on exclusively abroad fell within Case I or Case V of Schedule D of the Income Tax Act of 1842. As Lord Macnaghten pointed out, the wording of both Cases was apt for the purpose of including the profits in question ; but a consideration of various other provisions of the Act established, from the language which the Legislature had used, that while profits from a trade carried on here, or partly here and partly abroad, fell under Case I, profits from a trade carried on exclusively outside Great Britain fell under Case V. Both Lord Herschell and Lord Macnaghten point out, as I read their speeches, that startling results are not of themselves sufficient to warrant a departure from the ordinary meaning of the words of a statute. *Colquhoun* v. *Brooks* is not in my opinion an authority in point here. My noble and learned friend Lord Macmillan also prays Lord Loreburn in aid, and cites from his speech in *Drummond* v. *Collins*, [1915] A.C. 1011(2), an extract in which he refers to *Colquhoun* v. *Brooks*. I could have wished that the choice had fallen upon a passage from the same speech which exactly expresses my views in regard to the present case, and in which Lord Loreburn uses the following words(2) : " Lord Cairns long ago said that ' if the person sought to

(1) 2 T.C. 490. (2) 6 T.C. 525, at p. 539.

(Lord Russell of Killowen.)

" ' be taxed comes within the letter of the law, he must be taxed '. " And though there have been cases in which the letter of the law " has been disregarded in view of other statutory language, I think it " can only be done in case of necessity. It must be a necessary " interpretation."

My Lords, I can find no necessary interpretation here. The plain words of the Act may in some cases lead to results which to some may appear strange. That does not concern us, or justify us in altering the meaning of the plain words in order to produce what we may consider more sensible or less anomalous results. That course is only open to us if we find it necessitated by the language employed in other parts of the Statute.

One argument needs perhaps to be specifically considered. It was said that one result of reading the Section as I read it would be this : that Mr. Astor would be liable to pay tax in respect of the income received by the trustee in the United States as income deemed to be his, and also liable to pay tax on the income which the trustee was bound to pay over, the latter being (within the decision in the second *Archer-Shee* case(1)) the income springing from a foreign possession, namely, his right of action against the trustee. In my opinion no such double taxation could occur and for the reason given by Lord Justice Romer. Once the income which is the property of the trustee is to be deemed the income of Mr. Astor (that is, is to be treated for the purposes of the Income Tax Acts in all respects as if it were the property of Mr. Astor), it automatically becomes impossible for the purposes of those Acts to say that he receives anything which springs from a right of action against the trustee, in respect of his income.

In view of the fact that your Lordships take a different view I will not occupy time in dealing with the other points argued on behalf of the Appellants. Suffice it to say that on consideration I can find nothing in the various provisions of the Section in question, or in the consequences said to flow therefrom if construed without the suggested qualification, to induce, much less to compel, me to depart from the ordinary meaning of the language which the Legislature has used.

My noble and learned friend Lord Macmillan in his opinion most properly proclaims our disability to amend the law. For myself I feel unable by reason of that very disability to allow Mr. Astor's appeal.

I agree with the decision of the Court of Appeal and would dismiss the appeal accordingly.

The same result should follow in the appeal of *Duncan's Executors* v. *Adamson*, as it was conceded that the two appeals must necessarily share the same fate.

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(1) Garland *v.* Archer-Shee, 15 T.C. 693.

Lord Macmillan.—My Lords, the Appellant, Mr. Astor, is, within the meaning of the Income Tax Acts, a " person residing in " the United Kingdom ". In 1928 he became the owner of certain stocks and shares in the United States of America. By a settlement dated 13th September, 1929, he transferred these stocks and shares to a trustee resident in the United States of America. Under the trust so constituted the duty of the trustee is to collect the income arising from the trust estate, and, after paying the taxes and other incidental expenses and charges properly chargeable against income, to pay or apply the balance of the income to or for the use of the Appellant during his life as he may direct. Power is reserved to the Appellant to revoke the settlement and the trust thereby created in whole or in part at any time during his life.

It is agreed that the trust is governed by the law of the State of New York and that by the law of that State the Appellant has no proprietary interest, legal or equitable, either in the specific stocks and shares forming the capital assets of the trust or in the specific dividends or interest collected by the trustee. The sole right of the Appellant is to enforce performance of the trust, and in particular to call upon the trustee to pay over to him, as he may direct, the balance of income in the trustee's hands after deducting outgoings. It is further agreed that, according to the law of the State of New York, the power of revocation reserved to the Appellant is valid, but that, unless and until exercised, it has no effect on the nature of the Appellant's rights under the settlement as above described. The Appellant has not exercised his power of revocation.

Had the settlement contained no power of revocation the annual profits or gains arising or accruing to the Appellant from his equitable interest under the trust would have been chargeable to Income Tax under Rule 2 applicable to Case V of Schedule D, as being income arising from a possession out of the United Kingdom other than stocks, shares or rents. Under that Rule the tax would have been 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 " . . . . " That is the effect of the decision of your Lordships' House in *Archer-Shee* v. *Garland*, [1931] A.C. 212(1), as applied to the facts of the present case, apart from the question of the effect of the revocation clause.

But the existence of the reserved power of revocation in the settlement is said by the Crown to alter the position. The point arises in this way. Formerly, under Case V, tax on income from all foreign possessions was without distinction charged only on the actual sums annually received in the United Kingdom on a three years' average. The Finance Act, 1914, however, by Section 5,

(1) 15 T.C. 693.

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introduced a distinction between income arising from securities, stocks, shares or rents in any place out of the United Kingdom and income arising from other possessions out of the United Kingdom, and provided that the former should be computed "on the full "amount of the income, whether the income has been or will be "received in the United Kingdom or not". This provision is reproduced in the present Income Tax Act, 1918, as regards securities, in Rule 1 applicable to Case IV of Schedule D, and, as regards stocks, shares or rents, in Rule 1 applicable to Case V of Schedule D.

Then, in 1922, there was enacted by the Finance Act of that year a new provision which has given rise to the question now at issue. It is contained in Section 20, which it is necessary to quote at considerable length in order to appreciate the nature of the enactment. The material parts of the Section read as follows: "(1) Any income—(*a*) of which any person is able . . . . without "the consent of any other person by means of the exercise of any "power of appointment, power of revocation or otherwise howso-"ever by virtue or in consequence of a disposition made directly or "indirectly by himself, to obtain for himself the beneficial enjoy-"ment; or (*b*) which by virtue or in consequence of any disposition "made, directly or indirectly, by any person . . . . (other than a "disposition made for valuable and sufficient consideration), is "payable to or applicable for the benefit of any other person for a "period which cannot exceed six years; . . . . shall, subject to "the provisions of this section . . . . be deemed for the purposes "of the enactments relating to income tax (including super-tax) "to be the income of the person who is . . . . able to obtain the "beneficial enjoyment thereof, or of the person, if living, by whom "the disposition was made, as the case may be, and not to be for "those purposes the income of any other person. . . . . (2) Where "by virtue of paragraph (*b*) . . . . of subsection (1) of this section "any income tax or super-tax becomes chargeable on and is paid "by the person by whom the disposition was made, that person shall "be entitled to recover from any trustee or other person to whom "the income is payable by virtue or in consequence of the dis-"position the amount of the tax so paid, and for that purpose to "require the Commissioners concerned to furnish to him a certifi-"cate specifying the amount of the income in respect of which he "has so paid tax and the amount of the tax so paid, and any "certificate so furnished shall be conclusive evidence of the facts "appearing thereby. (3) Where any person obtains in respect of "any allowance or relief a repayment of income tax in excess of "the amount of the repayment to which he would but for the "provisions of paragraph (*b*) . . . . of subsection (1) of this "section have been entitled, an amount equal to the excess shall be

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" paid by him to the trustee or other person to whom the income " is payable by virtue or in consequence of the disposition, or where " there are two or more such persons shall be apportioned among " those persons as the case may require. If any question arises as " to the amount of any payment or as to any apportionment to be " made under this subsection, that question shall be decided by the " General Commissioners whose decision thereon shall be final."

In reliance upon the combined effect of this Section and Rule 1 applicable to Case V of Schedule D, assessments to Income Tax were made upon the Appellant for each of the three years 1929–30, 1930–31 and 1931–32 in respect of the whole income received in those years by the trustee in the United States in the shape of dividends and interests on the stocks and shares in the United States of which the trust estate consists. The question is whether these assessments are justified or whether, as the Appellant contends, he ought to be assessed under Rule 2 only on the full amount of the actual sums annually received by him in the United Kingdom from the American trustee.

The Special Commissioners held that the matter was concluded by the decision of Mr. Justice Finlay in the case of *Marchioness of Ormonde* v. *Brown*, 17 T.C. 333, and that Section 20 (1) (*a*) of the Finance Act, 1922, could not be applied so as to charge the Appellant with Income Tax on foreign income which under the provisions of the settlement was income of the American trustee. They accordingly amended the assessments by substituting amounts computed under Rule 2 of Case V for those computed under Rule 1.

The Crown appealed to the King's Bench Division, and, on the case coming before Mr. Justice Finlay, admitted that it was entirely covered by his decision in the case of the *Marchioness of Ormonde* v. *Brown*. The decision of the Special Commissioners was accordingly affirmed without argument. On a further appeal by the Crown the Court of Appeal unanimously reversed the decision of Mr. Justice Finlay and upheld the original assessments.

My Lords, the argument for the Crown has at first sight an attractive simplicity. Is the Appellant able, by means of the exercise of a power of revocation contained in a disposition made directly by himself, to obtain for himself the beneficial enjoyment of the income which, under that disposition, his American trustee collects? The answer must plainly be in the affirmative. And does that income arise from stocks and shares in a place out of the United Kingdom? The answer must again be in the affirmative. The words of Section 20 and Rule 1 of Case V fit the facts precisely, and that, contends the Crown, must end the matter.

This appearance of simplicity is delusive, for if, as the Crown submits, the critical words " any income " with which Section 20

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opens, are read without any qualification, territorial or other, the most startling anomalies result. Thus, if the Section is to be read as applicable to any income anywhere of which any person anywhere can by the exercise of a power of revocation obtain for himself the beneficial enjoyment, it covers the case of a revocable disposition to an American trustee of American stocks and shares by a person resident in America under which the income is payable to a person resident in this country. In the case put, the American settlor is able by exercising his power of revocation to obtain for himself the beneficial enjoyment of the income of the stocks and shares which he has settled. That income, therefore, is to be deemed for British Income Tax purposes to be his income and not to be the income for those purposes of the person resident in this country who is entitled to it. Incidentally one asks how a British Income Tax Act can impute to an American citizen " for the purposes of the enactments " relating to (British) income tax (including super-tax) " an income of which the American citizen has by the law of his own country effectually divested himself. Or suppose a resident in America makes a disposition there under which the income of American stocks and shares is payable to a resident in the United Kingdom for a period of five years. The Section, read literally, as the Crown would have your Lordships read it, would have the effect, under paragraph (*b*), of deeming the income to be the income of the American resident who made the disposition and not the income of the beneficiary in this country. In both the cases supposed the person resident in this country would under Section 20 be entirely exempt from tax in respect of the income, however large, to which he was entitled under the American disposition, even although the whole of it were remitted to him in this country.

Perhaps the most anomalous, because the simplest, case that could be put is that of a person resident in this country who makes a revocable settlement of assets abroad under which another person also resident in this country is the beneficiary of the income. The settlor then goes abroad and ceases to be resident in this country. Under Section 20 the income is still, according to the Crown, to be deemed to be his income and not that of the beneficiary; the result is that neither the settlor nor the beneficiary pays any tax, although the whole of the income may be received and enjoyed by the beneficiary in this country.

But under Schedule D the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere, are chargeable to tax. Under this, which is a cardinal provision of our Income Tax legislation, the income, in the three cases I have put, would be chargeable to tax, while under Section 20 of the 1922 Finance Act (which by Section 49 thereof is to be

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construed together with the Income Tax Act of 1918 of which Schedule D is a part) the same income would be exempted from tax.

The learned Solicitor-General did not flinch from these remarkable results of his unqualified reading of the words " any income " in the Finance Act of 1922, but to your Lordships they may well suggest a doubt as to whether these words should not be read in a sense which would avoid such a conflict.

But there are further difficulties. The Section applies not only to cases where a person by the exercise of a power of revocation can obtain for himself the beneficial enjoyment of income; it applies also to cases where a person can do so by the exercise of a power of appointment. Suppose that an American resident by an American settlement of American stocks and shares conferred on a resident in this country a power of appointment of the income, which the donee of the power could exercise in his own favour. The income which he could appoint to himself would be deemed to be his income, although he had not exercised the power, but in that case his income would not be income arising from specific stocks or shares in America but from his equitable right to the American trust income and would be taxed under Rule 2 of Case V on the amount actually received by him in this country, and not under Rule 1 on the whole income received by the American trustee.

Then Sub-section (2) also raises difficulties. If the Crown is right, then if a person resident in this country makes a disposition of the income of American stocks and shares in favour of a resident in America for a period of five years, and under Section 20 (1) (*b*) is charged with tax on that income, he is under Sub-section (2) given a right to recover the tax so paid from the American beneficiary. A reading of our Income Tax legislation which leads to the remarkable result of imposing a liability of recoupment on an American citizen is not lightly to be accepted. Sub-section (3) carries the matter still further, for it would in the case just figured require the person resident in this country in certain contingencies to pay to his American beneficiary sums in addition to the income which he had settled on him, which would be fair enough if under Sub-section (2) he could succeed in recovering from him the tax paid in this country but would otherwise be quite unreasonable.

My Lords, I venture to think that the conflict and the anomalies to which I have drawn attention arise, in the words of my noble and learned friend Lord Tomlin, " from the fact that the amend-
" ments from time to time made to the Income Tax Acts, directed
" as they frequently are to stopping an exit through the net of
" taxation freshly disclosed, are too often framed without sufficient
" regard to the basic scheme upon which the Acts originally rested "
(*Neumann* v. *Commissioners of Inland Revenue*, [1934] A.C. 215,

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at page 222(1)). The enactment contained in Section 20 is intelligible and practical where all the parties concerned are within the United Kingdom and doubtless that was the case which the Legislature had in contemplation. The possible extra-territorial effects of the Section were obviously not thought out and the task which the Legislature has omitted to perform is imposed upon your Lordships of reconciling the resulting conflict. But your Lordships in your judicial capacity are under a disability from which the Legislature is free, for you have no power to amend the law. However anomalous an enactment may be, it must be applied by the Courts according to its terms, unless these terms are susceptible, according to the accepted canons of construction, of an interpretation which avoids the anomalies.

Fortunately, your Lordships are not without authoritative guidance as to the principles upon which the language of taxing statutes may legitimately be construed. In the leading case of *Colquhoun* v. *Brooks*, 14 A.C. 493(2), the Crown were able as here to contend that the statutory language precisely covered their case. " I think," said Lord Herschell, at page 503(3), " that giving to " the language of the enactment its natural meaning the facts stated " do apparently bring this case within it." But he went on to point out that where, as here again, the words of a statute according to their natural meaning lead to " strangely anomalous " results it is legitimate to examine their statutory context in order to see whether they ought to be construed as they would be if read alone. " Courts of law," says Lord Loreburn, L.C., " have cut down or " even contradicted the language of the Legislature when on a full " view of the Act, considering its scheme and its machinery and the " manifest purpose of it, they have thought that a particular case or " class of cases was not intended to fall within the taxing clause " relied upon by the Crown. A notable instance is the case of " *Colquhoun* v. *Brooks*, *cit sup.*, decided nearly thirty years ago and always followed " (*Drummond* v. *Collins*, [1915] A.C. 1011, at page 1017(4)).

So far as the intention of an enactment may be gathered from its own terms it is permissible to have regard to that intention in interpreting it, and if more than one interpretation is possible, that interpretation should be adopted which is most consonant with and is best calculated to give effect to the intention of the enactment as so ascertained. More especially, where two sections forming part of a single statutory code are found, when read literally, to conflict, a court of construction may properly so read their terms as, if possible, to effect their reconciliation.

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(1) 18 T.C. 332, at p. 358. (2) 2 T.C. 490. (3) *Ibid.*, at p. 498.
(4) 6 T.C. 525, at pp. 538–9.

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My Lords, I now propose to examine rather more closely the actual language and structure of Section 20 as a whole in order to see whether any aid is thus afforded in ascertaining the intention of the Legislature and so in interpreting the words " any income " with which the Section opens. It has to be observed at the outset that the Section does not provide that the power of appointment or the power of revocation is to be deemed to have been exercised. On the contrary, it assumes that the power has not been exercised and that the income will continue in fact to be applied as the disposition directs. The Section does not declare that the dispositions with which it deals are to be treated as non-existent in a question between the maker of the disposition and the Inland Revenue. The scheme of the Section is that the income which the settlor by his disposition has diverted from himself and conferred on another shall be notionally restored to him while in fact continuing to be applied as he has directed. Income which in fact is the income of B is to be deemed for Income Tax purposes to be the income of A.

The purpose is notionally to transfer B's income to A, so that A may be charged to tax on the aggregate of his own and B's income. The person to whom the income is payable under the disposition and the person who has made the disposition are to be treated notionally as a single taxpayer. The incomes of the two persons are to be amalgamated. The contention of the Crown goes much further; it proposes not to amalgamate the actual incomes of A and B, but to amalgamate with A's income, not the income which he has conferred on B, but the income which A would have had if he had never made any disposition in favour of B, and it further proposes in the process of amalgamation to change the taxable character of B's income so as to render it chargeable under a different head.

In the present case the income of the trustee is the income of a resident in America derived under an American disposition from American assets. *Prima facie* the Income Tax authorities have no concern with it. But they have concern with the income of residents in the United Kingdom and our Legislature can of course competently " determine the measure of taxation to be applied in the " case of a person so resident " by any standard it pleases (*Colquhoun* v. *Brooks*, 14 A.C., at page 504(1)). If a resident in this country has possessions out of the United Kingdom the Legislature has provided how he shall be taxed in respect of such possessions; if they are securities, stocks, shares, rents, he pays on the full amount of the income therefrom whether brought home or not; if they are not of this character he pays on the amount actually brought home. It is with this existing scheme that Section 20,

(1) 2 T.C., at p. 499.

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which is to be read along with it, has to be reconciled. I have shown how on the Crown's reading these enactments come into conflict. The reconciliation is, I suggest, to be effected by reading Section 20 as designed to effect a notional amalgamation of two existing incomes both charged to Income Tax by the existing law. If the words " any income " are construed, as they reasonably may be, to mean any income chargeable with tax under the British Finance Act of the year, the difficulties of the Crown's interpretation to a large extent disappear. For the income of the American trustee, being the income of a foreign non-resident, is not brought into charge, while the income so far as received by the resident in this country is, consistently with the scheme of the Income Tax Acts, brought into charge under its appropriate head—in the present instance Rule 2—and is by force of Section 20 amalgamated with the resident's income derived from sources within the United Kingdom.

In reaching this conclusion, I have not been much moved by the argument that Section 20 rightly regarded is not a charging section and so ought not to be read as imposing a charge which is not elsewhere created. It seems to me that to say that a particular item of income which belongs to B is for Income Tax purposes to be deemed to belong to A is quite an effectual way of charging A with tax on the transferred income. In *Kirke's Trustees* v. *Commissioners of Inland Revenue*, 1927 S.C. (H.L.) 56; 11 T.C. 323, this House had before it the following words in Rule 4 applicable to Cases I and II of Schedule D: " Where any person has received repayment of any " amount previously paid by him by way of excess profits duty, the " amount repaid shall be treated as profit for the year in which the " repayment is received." Lord Sumner in construing this provision expressed the view that the word " treated " was " an apt word to " impose a charge." " Deemed " in my view is a synonym of equal efficacy. Indeed, on the reading of Section 20 which I propose to your Lordships, the Section is a charging section in the sense that it charges with tax on certain income a person who would not otherwise be chargeable with tax on that income. But it is not a charging section, as the Crown would make it out to be, in the sense of charging with tax income which according to the existing law could not be charged at all, except so far as received in this country. As Lord Wrenbury pointed out in *Williams* v. *Singer*, [1921] 1 A.C. 65, at page 75(1): " The two things are quite distinct; " the property chargeable is one thing, the person liable to be " charged is another." The result of the process of " deeming " which the Section directs is, in my opinion, not to bring into tax income not previously chargeable but to substitute one person for another as the person liable to be charged in respect of income

(1) 7 T.C. 387, at p. 413.

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already chargeable. To justify reading the Section as on the one hand imposing a charge on income not at present subject to charge and on the other hand as exempting from charge altogether income which is at present chargeable—for that is the result of the Crown's contention—would, in my view, require much more express and precise language than the Section contains.

Some confusion is created in the present case by the circumstance that the Appellant is at one and the same time the maker of the disposition in question and the person entitled to the income arising under it. I have disregarded this specialty, for it is obviously merely accidental and irrelevant to the argument; but it may be pointed out that the Section certainly does not in any event very well fit the case for it would be odd that the income of the funds covered by the disposition should be " deemed " to be the income of the person whose income it is in fact. It is, however, on much more fundamental grounds that I have reached the conclusion that the Crown's contentions must fail.

The result on the whole matter is that, in my opinion, the case of the *Marchioness of Ormonde*, 17 T.C. 333, and this case were rightly decided by Mr. Justice Finlay, and that the judgment of the Court of Appeal in the present case should be reversed with costs, and the judgment of Mr. Justice Finlay restored.

The appeal in the case of *Duncan and others* v. *Adamson*, also set down for consideration by your Lordships today, raises, as was agreed at the Bar, precisely the same question of law as that with which I have just dealt. In this instance, however, the decision of Mr. Justice Finlay was in favour of the Crown, following the judgment of the Court of Appeal in the case of *Perry* v. *Astor*, and I propose accordingly that your Lordships should reverse with costs the judgments of Mr. Justice Finlay and the Court of Appeal and restore the determination of the Special Commissioners.

Lord Wright.—My Lords, I have had the opportunity of considering in print the opinion which has just been delivered by my noble and learned friend Lord Macmillan. I am so fully in accord with the reasoning and the conclusions of that opinion that I have nothing to add.

Questions put:

In the case of Perry v. *Astor.*

That the Order appealed from be reversed.

The Contents have it.

That the Order of Mr. Justice Finlay be restored, and that the Respondent do pay to the Appellant his costs here and in the Court of Appeal.

The Contents have it.

In the case of Duncan and others v. *Adamson.*

That the Order of the Court of Appeal be reversed, and that the determination of the Special Commissioners be restored.

The Contents have it.

That the Respondent do pay to the Appellants their costs here and below.

The Contents have it.

[Solicitors:—Solicitor of Inland Revenue; Janson, Cobb, Pearson & Co. for the Hon. W. W. Astor; Sanderson, Lee & Co. for the Executors of W. A. Duncan, deceased.]