

COURT OF APPEAL.—15TH JANUARY, 1932

HOUSE OF LORDS.—20TH AND 21ST FEBRUARY AND
14TH MARCH, 1933

THE COMMISSIONERS OF INLAND REVENUE v. WAHL⁽¹⁾

Super-tax—Estate in course of administration—Liability of sole beneficiary and administrator.

The Respondent's father died intestate in 1915 leaving two sons; one of the sons also died intestate in 1916 leaving the other (the Respondent) as his sole surviving next-of-kin and the sole surviving beneficiary under his father's intestacy. The Respondent took out letters of administration of the estates of his father and brother. The estates consisted in the main of sums recovered through the Enemy Debts Clearing Office which were invested by the Respondent in industrial securities. The Respondent received the income arising therefrom and used the greater part of it for his personal expenses, investing any surplus in his own name. The interest from all investments was paid into banking accounts standing in the Respondent's own name and was there mixed with his private income. There was no banking account in the Respondent's name as administrator.

The Respondent appealed to the Special Commissioners against assessments to Super-tax for 1926–27 and 1927–28 in respect of income arising from the invested proceeds of his father's and brother's estates. It was admitted that the residue of the father's estate had not been ascertained and that the residue of the brother's estate could not therefore be ascertained. The Crown contended that the facts did not support the Respondent's statement (given in evidence) that he still held the funds as administrator; that the Respondent had appropriated the funds to his own use as beneficiary and that the income therefrom formed part of his income for Super-tax purposes.

The Commissioners found that there was not sufficient evidence that the funds in question had been appropriated by the Respondent to his own use and held that the income therefrom did not form part of his income for Super-tax purposes.

Held, that the question whether the Respondent had appropriated the funds to his own use as beneficiary was a question of fact for the decision of the Commissioners and that the Commissioners had not misdirected themselves in law.

⁽¹⁾ Reported (H.L.) 49 T.L.R. 379.

CASE

Stated under the Income Tax Act, 1918, Sections 7 (6) and 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 3rd October, 1929, C. E. J. Wahl (hereinafter called the Respondent) appealed against Super-tax assessments made upon him for the years 1926-27 and 1927-28 in the sums of £6,567 and £8,086, respectively.

2. These assessments, which agreed in amount with the returns of his total income for Super-tax purposes made by the Respondent for the material years, included the income arising from the estate of the Respondent's father, C. F. Wahl, and from the estate of the Respondent's brother, B. W. Wahl. At the time of making the above returns, the Respondent was ignorant that, for Super-tax purposes, there might be a distinction in law between income which arose to him in his own right and income which arose to him in his capacity as administrator.

3. The Respondent's father, C. F. Wahl, died intestate on the 26th May, 1915, leaving two sons, the Respondent and his brother, B. W. Wahl. The latter also died intestate in 1916, leaving the Respondent as his sole next-of-kin and the sole surviving beneficiary under the father's intestacy. The Respondent took out letters of administration of his father's estate in 1915 and letters of administration of his brother's estate in 1919. In the Inland Revenue affidavit made in connection with his father's estate, the Respondent claimed that his father had been domiciled in Germany, and death duties were paid on that footing. Later the Inland Revenue disputed the allegation of a German domicile and claimed duties from the Respondent as administrator on the footing that his father had been domiciled in the United Kingdom. Correspondence ensued without definite result and, in 1928, proceedings against the Respondent were commenced by the Crown by way of English Information and the matter is expected shortly to come before the High Court. If the Crown succeeds in its contention that the Respondent's father died domiciled in the United Kingdom, a sum of further death duties of £16,000 to £20,000 may be payable by the Respondent as administrator. There is also an Income Tax appeal outstanding in connection with sums received by the Respondent, as administrator, from Germany through the Clearing Office after the termination of the war. In view of these outstanding matters, it was claimed by the Respondent that the residue of his father's estate had not been ascertained and that, for similar reasons, the residue of his brother's estate could not be ascertained, and this was admitted on behalf of the Appellants.

4. The estates of the Respondent's father and brother consisted in the main of sums recovered by the Respondent through the

Enemy Debts Clearing Office. These funds have been invested by him in industrial securities and it is the income from these securities which is the subject of the present dispute.

5. The Respondent, who gave evidence before us, stated that he still held all the funds in question as administrator of his father's and brother's estates; that he received the whole of the income arising therefrom and used the greater part of it for his own living and personal expenses, investing the surplus in his own name in any investments he thought worth buying. The investments (both original and subsequent) were not in trustee securities, and the interest from all the investments was paid into banking accounts standing in his own name. There was no banking account standing in his name as administrator, and the income which is the subject of this dispute was not kept separate in any way from his private income, which consisted of an army pension amounting to some £300 per annum. When in England, the Respondent lives at the Carlton Hotel, London. The Respondent further stated that he had throughout held and invested the funds in question with the knowledge that the capital and income or any part thereof might in due course be required to answer and satisfy the large contingent liabilities arising from the claims made by the Revenue as set out in paragraph 3 above. He had therefore invested the estate funds in industrial securities in the hope that capital appreciation might occur and help him in satisfying the said liabilities. From time to time he had sold those securities, but he was not described as administrator in the deed of transfer or in the share register of any company in which the funds or part of them were invested.

6. It was contended for the Respondent :

- (a) that he held all the funds arising from his father's estate as administrator and not in his personal capacity;
- (b) that there had been no appropriation of any of the funds by himself as administrator to himself as beneficiary;
- (c) that, as the residue of his father's estate had admittedly not been ascertained and as there had been no appropriation, the income arising from the estate was not his income for Super-tax purposes;
- (d) that the assessments should be discharged.

7. On behalf of the Crown it was contended :

- (a) that every manner in which the Respondent had dealt with the funds of the estate showed an intention to treat these funds as his own private property and there was no evidence at all to corroborate his statement that he still held the funds in the fiduciary capacity of administrator;

- (b) that, on the contrary, the evidence showed that the Respondent had appropriated the said funds to his own use as beneficiary, which he was entitled to do;
- (c) that the circumstantial evidence available was preferable to statements made after the Respondent had become aware that liability to Super-tax would not exist if he held the funds as administrator;
- (d) that the income from the funds appropriated to his own use formed part of the Respondent's total income for Super-tax purposes, as originally declared by him in his Super-tax returns.

8. We, the Commissioners who heard the appeal, found that there was not sufficient evidence that the funds in question had been appropriated by the Respondent to his own use; and we held that the income therefrom did not form part of the Respondent's total income for Super-tax purposes. We therefore discharged the assessments, there being no liability if the disputed income is excluded.

9. The Appellants, immediately upon the determination of the appeal, declared to us their 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, Sections 7 (6) and 149, which Case we have stated and do sign accordingly.

H. M. SANDERS, } Commissioners for the Special
P. WILLIAMSON, } Purposes of the Income Tax Acts.

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

6th May, 1930.

The case came before Rowlatt, *J.*, in the King's Bench Division on the 9th March, 1931, when judgment was given against the Crown, with costs.

The Solicitor-General (Sir Stafford Cripps, K.C.), Mr. J. H. Stamp and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, K.C., and Mr. J. H. Bowe for the Respondent.

JUDGMENT

Rowlatt, J.—In this case the Respondent, Mr. Wahl, had a father and a brother. They both died intestate and the Respondent

(Rowlatt, J.)

was entitled as sole next-of-kin to the property of both of them. It was thought, as regards the father, that he had been domiciled in Germany, and it was so contended, and that no death duties, as upon a person dying in England, would be payable. It appears that the Respondent entered into possession of these moneys, which he received as moneys, he invested them in industrial securities, and he has lived upon the interest, so far as he needed it, and invested the balance in his own name without reference to the character of administrator or anything of the sort. I have very little doubt myself, and at any rate, the Commissioners may have thought so—I do not know—that this gentleman did not in the least appreciate the legal operation of an executor assenting to a bequest, or an administrator assenting to the beneficial passing of the goods of the intestate. They may have thought that he did not know anything about that question at all, and did not know that there was a question. I expect that is really what happened. At any rate he quite clearly took to the money. It was the father's money and the brother's money belonging to him, and he just took to it.

Then arose a very curious position. It was mooted that the father was domiciled in England, and so it has, unfortunately for him, turned out. Therefore this gentleman finds himself in the position that he has got all his father's estate, and he is in the position of being liable to account to the revenue authorities for very substantial death duties as from his father's death, and for interest upon those death duties, of course, which will absorb or take away from him a great part of the fortune to which he succeeded as a point of capital, and will also take away from him a large sum, representing interest on that part of the fortune which has accrued since. There is another claim outstanding about Income Tax in respect of money which he has received as administrator, they say here, on his father's estate.

It does not quite appear whether the question of the English domicile had been mooted at the time or not; the Commissioners may have known, but it is not in the Case; but he returned the income of all these investments in the ordinary way for Super-tax and he was assessed upon them. He appealed against the assessment and said: "Well, I did not know that I need not return "them if I held them as administrator, and I say now that I do "hold them as administrator." The Commissioners have held that there was not sufficient evidence that the funds in question had been appropriated by the Respondent to his own use, that is to say, there is not sufficient evidence to find that the administrator assented to that about which we have been talking. Undoubtedly this question is a question of fact for the Commissioners, as it is a question of fact—it has been held—or used to be a question of fact, for a jury in a civil case.

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Now, can the decision of the Commissioners be overthrown? The Solicitor-General says that they have gone wrong in point of law in approaching the question as if there was an onus upon the Crown to show that this gentleman had appropriated the property to his own use as beneficiary. I do not think that is perhaps quite the way to look at it. I suppose, speaking generally, there is an onus on the Crown to prove that everybody is liable to taxation, but that is not coming to grips with this question. The question here arises in this way: it is true this gentleman returns and is found in possession, because he returns it, of all this income; but it appears now that this property yielding this income was received by him in his character of administrator. When you get to that point in the history, the next point is to find out whether he has ever ceased to hold as administrator and begun to hold as beneficiary. I do not know whether the word "onus" is a very good word to use, but in following down the facts of this case in the ordinary way you have to enquire as to what has happened, and the Commissioners perhaps you may treat as saying: "We have not sufficient evidence of anything that has happened". That is how they have looked at it. I do not think they really have misdirected themselves at all. I think on the whole they have looked at it rightly. They know the history of the fund so far as it came to him as executor, and they cannot find that it has ever changed its character. I do not know that that is wrong on the ground that it is setting up a wrong onus or burden of proof.

But then it is said—and I think this is the real way of putting it—really the evidence is all one way and there is nothing against it. In that sense it is quite wrong to talk of an onus being unsatisfied, because here this gentleman has got these funds in his own name; he is living upon them, and under those circumstances it is idle to say, unless you can produce something very strong, that he was not treating them as his own property because he had no business to invest them like this and he had no business to spend them like this unless they were his own property, and at any rate some of it must have been his own property. I have been a little troubled, because it is said that this is either Super-tax income or nothing. There is no question of any part of it; it is all or none. The Commissioners, on the other hand, have felt themselves concluded by those considerations.

Then there are these other facts, and there is no getting away from them: there are the facts that there is this outstanding claim by the Revenue, which would go to the capital and the income of this fund right away back for years, and there is another claim for Income Tax. The Commissioners knew there were those facts, and when it comes to asking yourself whether you are to attribute to this gentleman really an artificial mental process, which he probably never went through, that is to say, in point of law his actions

(Rowlatt, J.)

prove an assent, and when you find these claims outstanding now, I do not feel myself able to say that the Commissioners were not at liberty to come to the conclusion to which they did. If there had been some apportionment, one might have been able to deal with it, but there has been no apportionment. The Crown apparently stand out for the view that everything is his own income, at least for the year in question. But it cannot be so if he has got to pay the death duties; it cannot be so in fact.

There is one other argument that I must notice. The Solicitor-General said that what really happened was that this gentleman handed over these things to himself as beneficiary upon the terms that, as beneficiary, he would have to account for them if a claim were made against the estate by the Revenue, or, indeed, by anybody else. Of course, the funds are liable to any such claim. But am I to say that the Commissioners are bound to find a wholly artificial process of that kind? I do not think I can say that. I quite feel the force of all that the Solicitor-General has said, but I am not a Commissioner. I cannot possibly decide that this gentleman has gone through a process of this kind, or that he ought to be deemed to have gone through a process of this kind. Therefore, I think I must dismiss the appeal and leave it where it stands.

Mr. Latter.—The appeal is dismissed with costs, my Lord?

Rowlatt, J.—Yes.

The Crown having appealed against the decision in the King's Bench Division, the case came before the Court of Appeal (Lord Hanworth, *M.R.*, and Greer and Romer, *L.J.J.*) on the 15th January, 1932, when it was remitted to the Special Commissioners to determine the question of fact whether the Respondent had assented to the taking effect of his beneficial interest as next-of-kin.

The Attorney-General (Sir W. A. Jowitt, *K.C.*), Mr. J. H. Stamp and Mr. R. P. Hills appeared as Counsel for the Crown and Mr. A. M. Latter, *K.C.*, and Mr. J. H. Bowe for the Respondent.

JUDGMENT

Lord Hanworth, M.R.—This case must go back to the Commissioners. I agree with Mr. Latter in regretting that it is necessary for us to take that step. I fully appreciate the objection which he has urged to it, that it involves more expense to the parties, both the Crown and the subject. It becomes necessary, because of the unsatisfactory and inconclusive statement in paragraph 8 of the Commissioners' decision. Mr. Latter is entitled to say that it is a hardship upon his client, but it is equally a hardship upon the

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other side, for, after all, the function of the Law Officer in this case is to defend the rights of the general body of taxpayers who, if a particular person escapes, will find a larger charge relatively to be supported by them as a whole.

With those observations I will explain why we send the case back, because it is to go back to these particular Commissioners who signed the case, Mr. Sanders and Mr. Williamson. We quite recognise that they are most experienced Commissioners and we do not in any way desire to usurp or invade their functions. They are persons who have to determine facts, and it is no part of this Court to interfere with their findings on questions of fact so long as there is some evidence in law to enable them to reach whatever conclusion they do reach in fact.

The question that is raised in the case is this, as to whether or not the Respondent is liable in respect of Super-tax to the extent of an assessment made upon him in two years, 1926-27 and 1927-28, in two sums of £6,567 and £8,086 respectively. Those were the returns which he made and upon those returns he was duly assessed. It was an assessment in respect of Super-tax; he, under the law, was bound to make a return to the Special Commissioners and upon the return that he made an assessment has been imposed upon him. The Respondent is the administrator of two estates, first, the estate of his father, who died in 1915, and, second, the estate of his brother who died in 1916. It will be observed at once when these dates are stated that there was a long interval between the death of the second intestate—for both of them died intestate—and the date of the year for which the assessment is made. With respect to the father's estate, the brother who died in 1916 would have taken a share equally with the Respondent, but upon his death the whole of the father's estate would pass to the Respondent as sole next-of-kin to his father, and equally the whole of the brother's estate, he dying in 1916, passed to the Respondent as sole next-of-kin to his brother. The Respondent took out letters of administration of those two estates, and in the Inland Revenue affidavit made in connection with his father's estate the Respondent claimed that his father had been domiciled in Germany and that death duties were payable on that footing. That would release him from a very considerable liability as compared with the liability if the father had been domiciled in England, for in the latter case the administrator would have had to pay death duties upon all the estate of the domiciled Englishman wherever situated, whereas in the earlier case that would not have been so. Now, it is fair to assume that in the case of those two deaths, the last of which took place in 1916, there was a winding-up of the estate in the sense of payment of debts and the like, by some time, let me say, like 1920, but it was not until January of 1920 that the Treaty of Versailles came into force, and under that Treaty a clearing house was set up

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for the purpose of declaring the liabilities and facilitating the recovery in respect of debts due from Germany. So it appears that claims were made, and that the estates of the Respondent's father and brother consisted in the main of sums recovered by the Respondent through the Enemy Debts Clearing Office. We are not told when they were recovered or when the judgment under which they were recovered was given. All that we know is that at some time, which I think must be subsequent to, or not earlier than, 1920, those sums were recovered. More than that we find by a statement in paragraph 3 that "later"—that is later than 1919—"the Inland Revenue disputed the allegation of a German domicile and claimed "duties from the Respondent as administrator on the footing that "his father had been domiciled in the United Kingdom." Upon that claim proceedings were commenced by way of English Information in the High Court, and that litigation is still pending in the sense that it has not been finally determined, the case not having reached the final Court of appeal or the Court to which it may be or is to be taken. We are here now in the year 1932, and it appears that not until 1928 were these proceedings taken, although there was a claim that the father was a domiciled Englishman at some earlier date, exactly when I do not know.

In the meantime we have got these facts, that the Respondent stated that the funds that he had received he had received as the administrator of his father's and his brother's estate, but he tells us that, with an income derived from a pension of £300 a year, he lives at the Carlton Hotel in London and that during this time when he was administrator he was receiving the whole of the income arising from his father's and his brother's estate and used the greater part of it for his own living and personal expenses, investing the surplus in his own name in any investments he thought worth buying. The investments were not in trustee securities and the interest from all the investments was paid into a banking account standing in his own name. There was no banking account standing in his name as administrator, and the income which is the subject of this dispute was not kept separate in any way from his private income. It is also stated that in the deed of transfer whereby he made these various investments, there was no description of himself as administrator, nor in the share register of any company in which the money was invested was there any statement that he held it in a representative capacity. Now, as I have said, the Respondent claimed that he held all these funds as administrator of his father and his brother, but those other facts which he stated to the Commissioners point definitely, or may point—I leave out the word "definitely"—in the direction of his having assented to the funds being held by himself as next-of-kin and beneficiary rather than in a representative capacity. There is now, in respect of this claim made by the Crown arising on the basis that the father was a

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domiciled Englishman, a further sum possibly payable by him of some £16,000 to £20,000, and we are told that if this liability is established, it will exhaust the funds which are held by the Respondent whether as administrator or as having received them from himself as administrator as next-of-kin. It was admitted before the Special Commissioners, and that admission still stands in any further proceedings that it is admitted by the Crown, that, in view of the outstanding matters still to be decided, namely, the claim arising against the estate of the father as a domiciled Englishman, and also a claim in respect of Income Tax in connection with sums received by the administrator in Germany, the amount of the father's and brother's estates could not be definitely ascertained and determined. That admission stands and will stand, as I have said and I repeat, in any further proceedings.

The Crown say that, in view of the facts which I have recapitulated, although it may be claimed by the Respondent that he holds these funds as administrator, it is to be imputed to him that he made the return now in question for Super-tax for the two years in question, and he received an assessment upon the return which he himself made, and coupling that with the facts which I have also recited and which are stated in paragraph 4 of the Case, the proper inference from those facts is that, as administrator, he had assented to his holding and enjoying the property as next-of-kin, and he no longer held a grip upon the funds as administrator of either the father or brother, with the consequence that there would be a liability falling upon him to pay the Super-tax now demanded and in dispute in the present case. The Commissioners have in paragraph 8 made their determination in the following terms: "We . . . found that there was not sufficient evidence that the funds in question had been appropriated by the Respondent to his own use; and we held that the income therefrom did not form part of the Respondent's total income for Super-tax purposes." That decision was reached on the 3rd October, 1929. The Special Case was signed on the 6th May, 1930.

Now, at the time the hearing took place, one of the contentions there presented to the Commissioners was that, in view of the admission made by the Crown, the amount of neither of those two estates could be ascertained, with the consequence that the residue of each of those estates could not be determined. There was an end to the claim of the Crown, because the inference to be drawn from that necessarily was that the Respondent was holding the estates in his capacity as administrator. That argument goes much too far, and it was determined in a case which is now reported in [1930] 1 K.B. at page 713, entitled *The Commissioners of Inland Revenue v. Smith*⁽¹⁾. In that case we had under discussion the case of *Daw v. The Commissioners of Inland Revenue*⁽²⁾, and we

(1) 15 T.C. 661.

(2) 14 T.C. 58.

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went through the principles which are to determine whether there has been an assent or can be an assent to the appropriation of a residue or payment of legacy out of an estate not then completely wound-up. On page 733⁽¹⁾ the question is propounded in this form : " The question is in all cases : Has the administration of the estate reached a point of ripeness at which you can infer an assent, at which you can infer that the residuary estate has been ascertained and that it is outstanding and not handed over merely for some other reason?" Lord Justice Greer, in his judgment at page 739⁽²⁾, referring to the fact that there was an outstanding debt in that case, says this : " That fact, of course, is a very strong fact in favour of the taxpayer in this case, because he says : ' Here there is still remaining one debt : it is quite true it is a mortgage debt, but it is still a substantial debt that has not been paid and the tribunal ought not, therefore, to assume that the trustees have taken to themselves the residue for and on behalf of the beneficiaries.' The time has not come, they say. But that does not, by any manner of means, conclude the matter, because it is quite possible for those who are in the position of trustees, and those who are in the position of beneficiaries, to say : ' The convenient way to deal with this property is to postpone the payment of the mortgage debts and yet at the same time to hand out under the trust in favour of the beneficiaries their share of what can be handed out, having regard to the continued existence of the mortgage debt.' " As plainly as possible, therefore, the Lord Justice indicates that before the complete winding-up of an estate it still may be possible for an aliquot part of the estate to be handed over out and out to a beneficiary even though other matters are still to be determined before the ultimate residue can be measured. After that case has been decided, it seems plain that this argument presented before the Commissioners—that, inasmuch as admittedly the residue could not be ascertained, the Respondent held in the character of administrator—cannot be sustained. There were other arguments, but it is difficult for us to suppose that that first argument did not hold considerable sway upon the Commissioners in reaching their conclusion, expressed as it is in the terms which I have already read from paragraph 8, and if their decision had been in any way influenced by such a consideration, they would have misdirected themselves in law. It is possible, although the estate has not been ascertained finally or conclusively, for the beneficiaries, with the assent of the executor or administrator, to take a portion of the fund and for that to become his in the hand of the beneficiary, although other moneys are still retained for answering the further questions outstanding in respect of the estate.

Having regard to the facts which I have recounted, some of which point strongly to the fact that the Respondent was no

(1) 15 T.C. at pp. 675/6

(2) *Ibid.* at p. 680.

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longer acting administrator but had treated himself as beneficiary in his character as next-of-kin, and having regard to the facts which point the other way, namely, that the estate has not been finally ascertained, and then again, turning to the fact that there had been a return to the Super-tax and the assessment upon it—a matter which may or may not be of great importance, but the substance of the matter has to be ascertained—we find it difficult to ascertain exactly what the Commissioners did find and the law by which they directed themselves. There is a distinct lapse of time not accounted for by the word "Later" used in paragraph 3. It is important for them, the Commissioners, to determine the question whether the Respondent had assented to the taking effect of his beneficial interest as next-of-kin and to the determination of his holding as an administrator. Those matters are questions to be determined as questions of fact, and the facts are for the Commissioners. I do not wish in any way to prejudice their decision. I have recounted the facts, not for the purpose of forming or indicating any conclusion which ought to be reached upon them, but merely for the purpose of explaining to the Commissioners why we have found a difficulty in accepting their paragraph 8, but as I began, the duty of the summation of the facts is for the Commissioners. They will hear the further evidence which must be called and ought to be called as to the meaning of that expression "Later" and some other matters which will be put before them, but I repeat again, for Mr. Latter's satisfaction, that the admission made and recorded in paragraph 3 cannot, even if it is attempted so to do, be withdrawn.

Under all the circumstances, therefore, we think the case must go back for the Commissioners to determine in the light of the guidance given in the *Smith*⁽¹⁾ case, and having regard to the difficulties in which both sides are placed and to the fact that the Attorney-General had to come here to have the matter dealt with, we think in all the circumstances the right Order will be to say that there shall be no costs of this appeal. Of course, the observations that are made to-day are not merely as to the question of corpus but as to the question of income.

Greer, L.J.—I agree. The case as it came before the Commissioners raised a very difficult question of fact, and as I read the Case, they have not treated themselves as quite free to decide that question of fact as they thought it ought to be decided. The question of fact was this. The case was raised with reference to a claim for Super-tax payable by the Respondent in respect of the years 1926-27 and 1927-28. Since the year 1916, the Respondent had been in receipt of considerable funds in some right as representing his father and his brother, and in the first instance it was his duty to receive those funds as administrator of his father's and brother's estates;

(1) *The Commissioners of Inland Revenue v. Sir Aubrey Smith*, 15 T.C. 661.

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but he was also the next-of-kin and after the death of his brother, the sole next-of-kin, and entitled as soon as he, as administrator, assented to the appropriation of the funds to himself as the next-of-kin, to the absolute ownership of the funds, subject to any claim he, as administrator, might subsequently bring against himself in order to meet any unanticipated liabilities. Unfortunately, there were, whether or not they were known in the years 1926-27 and 1927-28, certain possible liabilities that might have to be met. Then the Commissioners were faced with this question: having regard to the conduct of the Respondent, is it right to say that when he took the funds that came from Germany and invested them in securities that were not trustee securities, but industrial securities, and treated the income, the dividends received, exactly in the same way as he would have treated them if he had received the funds and was entitled to them as next-of-kin, are we to draw the inference that he was still dealing with them as administrator, or are we to draw the inference that the true view of the case is that he thought it quite safe as administrator to hand over the property to himself as next-of-kin? Now, that is a question of very great difficulty, because where you have to look into a man's mind for his actions and to put an interpretation upon his actions, it is a difficult problem to decide, and it is not a question of law—it is a question of fact. What is the true inference, setting all the facts together, as to whether he was receiving moneys as his own moneys, not for the purpose of dealing with them as administrator, but for the purpose of treating them as an owner of those funds, entitled to do what he liked with them, and entitled to spend the money coming from the investments in any way that he pleased to spend them?

But it is said on behalf of the Respondent that there cannot be a case in which the funds of an investment can be treated as the funds of the next-of-kin, so long as the estate has not been ascertained, and if there are outstanding debts, no matter what the executor or administrator does, there is no residue which can go to the next-of-kin or to the residuary legatee. Now, I regard the case of *Aubrey Smith*, to which my Lord has referred, in [1930] 1 K.B. 713, as deciding that there may be a case where there are outstanding liabilities and, notwithstanding that, from the conduct of the parties the inference may be drawn that funds which ought to be used for the purposes of administration have in fact been handed over to the residuary legatees as their property and the income of which becomes their income. There is a great deal to be said for the view presented by the Crown that in the present case there are strong reasons for suggesting that this gentleman had treated the funds which he had obtained from Germany as his own unrestricted property, that he invested them, paid them into his own account, mixed them with his own moneys, and invested them in securities that he was not entitled to put them in

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if he was acting as a man in a fiduciary position, as a mere administrator, and if the Commissioners had come to the conclusion that under those circumstances they found as a fact that the income in the years in question was the income of the Respondent, I do not see how this Court could possibly have interfered with that finding. On the other hand, if I were satisfied that the Commissioners had, with an open mind, unaffected by the state of the law as they thought that it was, and as it was represented to be in argument to them at the date of the hearing—if unaffected by that, they had come to the opposite conclusion, it would not be a conclusion which would commend itself to my judgment. Still I think this Court would not be inclined to interfere with the decision of the Commissioners. But it is because I feel the gravest possible doubt as to what they really decided that I think the case ought to go back to them. What they said in paragraph 8 is: "We, the Commissioners who heard the appeal, found that there was not sufficient evidence that the funds in question had been appropriated by the Respondent to his own use." Whether they meant sufficient in law or sufficient in fact, I do not know. I am inclined to think they must have considered, having regard to the state of the authorities, when they first made up their minds about it, that the evidence was not sufficient in law, having regard to the fact that there had been an admission that the residue of the father's estate had not been ascertained and that for similar reasons the residue of the brother's estate was not ascertained, and this was admitted on behalf of the Appellants.

For these reasons I agree with my Lord, though it is regrettable that there should be any necessary expenditure and further costs in a matter of this sort, that the case must go back to the same Commissioners for the doubt as to their decision to be cleared up. I agree also with what my Lord has said about the admission, that a fresh inquiry must be conducted upon the distinct understanding that the admission which was stated in paragraph 3 shall be made at the re-hearing of this matter by the Commissioners. It does not follow from that that there may not be fresh evidence produced by either party bearing on the question of fact which arises for determination. My Lord has indicated one or two points which are not made clear in the Case as to the dates when certain events happened, and that may be most material. I think both sides should be entitled to give evidence of such facts as having a bearing on the question of fact which has to be determined by the Commissioners. I also agree with the Order my Lord has suggested about the costs.

Romer, L.J.—I agree with my Lords that this case must in the circumstances go back to the Commissioners for these two reasons. In the first place, I cannot satisfy myself that the Commissioners have found as a fact that the Respondent never assented to his beneficial interest taking effect in respect of the funds which are

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referred to in the Case. It is, I think, really left in the dark as to whether the Commissioners did not regard the admission that the residue of the two estates had not yet been ascertained as precluding them from investigating that fact further. As has been pointed out by Mr. Stamp, it might well be that the Respondent, as administrator, assented to his beneficial interest taking effect, subject to any outstanding liabilities that there might be. In the second place, even assuming that the Commissioners did find as a fact that the Respondent never assented to his beneficial interest taking effect in respect of the funds, it does not necessarily follow that the income derived from those funds in respect of the years in question did not form part of the Respondent's income. It might well be that the Respondent, while retaining control as administrator over the funds themselves, did assent to his beneficial interest taking immediate effect as regards the income of those funds, and the question whether he did or did not so assent is the question which I think the Commissioners must find as a fact. What the legal result will be if the Commissioners find that there was such an assent in respect of the income is not a matter upon which at present it is necessary to say a word.

I agree to send the case back, and I also agree with the Order that it is proposed to make as to the costs of this appeal.

An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Viscount Buckmaster, Lords Warrington of Clyffe, Tomlin, Russell of Killowen and Wright) on the 20th and 21st February, 1933, when judgment was reserved. On the 14th March, 1933, judgment was given unanimously against the Crown, with costs, reversing the decision of the Court below.

Mr. A. M. Latter, K.C., and Mr. J. H. Bowe appeared as Counsel for the Appellant and the Attorney-General (Sir T. W. Inskip, K.C.), Mr. J. H. Stamp and Mr. R. P. Hills for the Crown.

JUDGMENT

Viscount Buckmaster.—My Lords, this is an appeal from the Court of Appeal, who have reversed a judgment of Mr. Justice Rowlatt dismissing an appeal of the Commissioners of Inland Revenue from the decision of the Special Commissioners.

It relates to two assessments to Super-tax which were made upon the Appellant for the two years ending 5th April, 1927, and 5th April, 1928, in the sums of £6,567 and £8,086, respectively. The Appellant's father, C. F. Wahl, died intestate on the 26th May, 1915, leaving two sons, the Respondent and one brother. The brother also died intestate in 1916, leaving the Appellant as his

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sole next-of-kin, and the Appellant took out letters of administration to both estates. As such administrator, the Appellant received the estates of his father and his brother chiefly in the form of cash and such moneys were paid into a bank in his own name and invested by him in industrial securities. It is the income from those securities that has been made the subject of assessment.

During the periods covered by the assessments, there were unsettled claims outstanding in respect of Estate Duty, it being alleged by the Revenue authorities that the Appellant's father was domiciled in England, whilst the Appellant alleged that he was domiciled in Germany. Had the Appellant's contention been wrong, a wholly unascertained sum of about £20,000 would have been payable for duties.

In these circumstances, the assessments in question were made upon the Appellant upon the ground that, by his action, he had either appropriated to his own beneficial use the estates of his father and brother or, which is, to my mind, the same thing, he had assented in his capacity as administrator to his receipt and enjoyment of the funds as beneficiary.

The Special Commissioners who heard the case found that there was not sufficient evidence that the funds had been so appropriated by the Appellant, and consequently decided that the income did not form part of the Respondent's total income for Super-tax purposes.

The Court of Appeal have remitted the case because, in their opinion, the Commissioners have been misled by the authority of *Daw v. The Commissioners of Inland Revenue*, 14 T.C. 58, without having before them the explanation given in the more recent case of *Smith v. The Commissioners of Inland Revenue*, [1930] 1 K.B. 713⁽¹⁾. I see no reason to think that they have been so misled. Since the case of *Barnardo v. Commissioners of Inland Revenue*, [1921] 2 A.C. 1⁽²⁾, it has been clearly established that the accumulation of income arising from a residuary estate before the appropriation of that estate to the residuary legatees does not cause such income to be regarded as the income of the beneficiary on its ultimate receipt by him and, therefore, where, as in that case, the beneficiary was a charitable institution, they are not entitled to a return of the sums which have been deducted by way of tax from the income at its source. In that decision, in the Court of Appeal, Lord Justice Atkin pointed out that the result would be that, in similar circumstances, Super-tax could not be charged⁽³⁾. The principle is now beyond controversy, and the only remaining point is as to the circumstances in which appropriation of the estate can be established, or assent can be inferred to the receipt of the beneficial interest.

⁽¹⁾ 15 T.C. 661. ⁽²⁾ 7 T.C. 646. ⁽³⁾ *Ibid.* at p. 663.

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Daw's case decided no more than this, that, where the surplus income of the residuary estate was applied to reduce certain mortgages and, subject to such payments, certain small annual payments were made to the residuary legatees, assessments to Super-tax on such payments could not be supported, seeing that the share of the residuary legatee had not been ascertained and he could not enforce payment over to him of his share.

Smith's case decided that the fact that there was an outstanding mortgage for a fixed amount on an estate did not preclude the estate from being duly ascertained and assent being given to the appropriation of the beneficial interest, subject to the mortgage, in favour of the beneficiary.

It does not appear to me that this case really assists in the present instance, where the outstanding claim on the estate was wholly unascertained. The material from which the Special Commissioners could find that the Appellant had, in fact, assented to the beneficial interest passing to himself, consisted in the main of three important facts: (1) that the money was paid into his own bank in his own name without any qualification; (2) that it was invested in securities that were not of a trustee character; and (3) that he received and spent the income. On the other hand, the Appellant, who was aware throughout of the existence of the unascertained nature of the Estate Duty, gave evidence, and asserted that he retained the moneys as administrator of his father's and brother's estates and explained the investment in funds as a means of deriving from their anticipated rise in value the moneys necessary to pay the Estate Duties and, if there had been no ascertainment of the estate and no appropriation, the receipt of the moneys would not affect the position. But for the fact that the beneficiary and the administrator were the same person, the statement of the administrator, unless it was displaced by unequivocal facts, would, if accepted, have been sufficient, and I cannot see that the circumstance of the fiduciary and beneficial interest being united prevents the Commissioners from taking the view they did. It is not for this House to consider whether that is the conclusion they would have reached. The real question is the question of fact upon the finding of the Commissioners and that finding ought not to be overthrown if there was evidence that could support it. In my opinion, the Commissioners were at liberty to believe the Appellant and this they have done.

Lord Justice Romer appears to have thought that there might be a partial assent with regard to the income, but, in my opinion, the finding of the Commissioners covers the whole matter. The contentions on each side are most clearly stated and the allegations as to income are set out in the contentions on behalf of the Crown. The finding of the Commissioners was that there was not sufficient evidence that the funds, which include both capital and income in

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question, had been appropriated by the Respondent to his own use. That, I think, covers the whole matter and I see no ground upon which it can be safely assumed that the Commissioners misdirected themselves in any way.

Lord Warrington of Clyffe.—My Lords, I agree.

Lord Tomlin.—My Lords, I regret that in this case I am unable to reach the same conclusion as that at which the Court of Appeal arrived. The question which the Commissioners had to consider was admittedly a question of fact for them. The meaning of their finding is not, in my opinion, doubtful. The finding is stated in paragraph 8 of the Case in the following terms:—"We, the Commissioners who heard the appeal, found that there was not sufficient evidence that the funds in question had been appropriated by the Respondent to his own use; and we hold that the income therefrom did not form part of the Respondent's total income for Super-tax purposes."

That passage seems to me to contain a finding of fact to the effect that it had not been proved that the Appellant here, who was Respondent in the Case stated, had ceased to hold the funds, from which the income sought to be taxed arose, as legal personal representative of his father and brother and also a conclusion of law that such income was not his for Super-tax purposes.

It is not, in my opinion, permissible to read "sufficient evidence" as meaning "sufficient evidence in point of law." That is not the ordinary and natural meaning of the words, and the phrases "we found" and "we held" in the surrounding context indicate a distinction between a finding of fact and a conclusion of law.

The appeal before the Commissioners was heard before, but the Case stated is dated after, the decision of the Court of Appeal in *Smith v. Commissioners of Inland Revenue*, [1930] I K.B. 713⁽¹⁾. It is suggested that the Commissioners in the present case must have been influenced to take a wrong view of the law by the decision in *Daw v. Commissioners of Inland Revenue*, 14 T.C. 58, which was explained in *Smith v. Commissioners of Inland Revenue* (*supra*). There is nothing upon the Case stated to support this suggestion when once the construction of the words "sufficient evidence" as meaning "sufficient evidence in point of law" is rejected, and mere surmise is not permissible. I cannot, therefore, conclude that the Commissioners have in any way misdirected themselves in regard to the law.

The Appellant gave evidence before the Commissioners to the effect that he still held all the funds in question as administrator of his father's and brother's estates. Apart, therefore, from the

(¹) 15 T.C. 661.

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fact that the Appellant was such administrator, there was some evidence upon which the Commissioners' finding of fact, as I interpret it, could have been based.

In the circumstances, therefore, I think that the conclusion of the Commissioners ought not to be interfered with, and I concur in the motion proposed.

Lord Russell of Killowen.—My Lords, I confess that I would not have been sorry if we could have kept the door open for a further consideration of the question whether the Appellant (who has, after all, had, for the two years in question, an income averaging over £7,000 a year at his disposal) was not liable to pay some Super-tax in respect of that income. If the findings of the Commissioners had been the other way, and they might well have been, the Appellant would have been liable and he could not have complained, not at least, with much hope of success. The Commissioners have, however, as I read the Case, and in particular paragraph 8 thereof, quite plainly found in favour of the Appellant that the facts did not establish that the income in question had ceased to be the income of an administrator.

I do not feel competent to review those findings which were arrived at by gentlemen who had the advantage, which I do not possess, of seeing the fortunate Appellant and of hearing him cross-examined. I therefore concur in the motion proposed.

Lord Wright.—My Lords, I also agree and have nothing to add.

Questions put:

That the judgment appealed from be reversed.

The Contents have it.

That the judgment of Mr. Justice Rowlatt be restored and that the Respondents do pay to the Appellant the costs here and below.

The Contents have it.

[Solicitors :—Solicitor of Inland Revenue; Mills & Morley.]
