No. 991—HIGH COURT OF JUSTICE (KING'S BENCH DIVISION)—19TH, 20TH AND 28TH MARCH, 1934

COURT OF APPEAL—20TH AND 28TH JUNE, 1934

HOUSE OF LORDS—6TH AND 7TH FEBRUARY AND 2ND MARCH, 1936

## WILLIAMSON *v.* OUGH (H.M. INSPECTOR OF TAXES)[1]

*Income Tax—Annual payment—Income or capital—Trust fund—Payments to beneficiaries on account of income out of capital of fund.*

*The Appellant was entitled to one-fourth share of the income, after payment of an annuity, of a trust fund created by a will. The trustees had power at their discretion to make payments on account of income to the beneficiaries out of any moneys in their hands, whether representing capital or income, but so that such payments should be charged against income and any payment made out of capital should, so far as practicable and as and when the trustees should think proper, be recouped.*

*The income of the trust fund having become seriously reduced, the trustees in exercise of their powers raised a sum of money and made payments thereout to the beneficiaries without deduction of Income Tax. No recoupment had been made in respect of any of the sums so paid by the trustees.*

*On appeal against assessments to Income Tax, Schedule D, in respect of the payments so made to her by the trustees, the Appellant contended that they were loans by the trustees out of capital, and therefore not subject to Income Tax in her hands.*

Held, *that the sums paid to the Appellant by the trustees under their discretionary powers were income in her hands and were assessable to Income Tax.*

### 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 the 5th July, 1933, Mrs. P. Williamson (hereinafter called the Appellant) appealed against two assessments to Income Tax in the sums of £2,000 and £500 made upon her for the years ending the 5th April, 1928, and the 5th April, 1929, respectively, under Schedule D of the Income Tax Acts.

(1) Reported (K.B. & C.A.) 151 L.T. 459; (H.L.) [1936] A.C. 384.

1. The assessments are in respect of payments made to the Appellant by the Trustees of the will of her father, C. E. Hunter, who died on the 16th May, 1917. A copy of the said will, which is dated the 4th May, 1917, and a codicil thereto dated 7th May, 1917, marked " A ", is annexed to and forms part of this Case(1).

2. Under the terms of the said will, the testator's widow became entitled to an annuity of £6,000 for her life as a prior charge on the estate. The surplus income of the estate was (subject to a trust in the event of the income in any year exceeding £20,000, which has never yet occurred) to be divided in equal quarters between the widow and the testator's three daughters. After the death of the widow each daughter was to receive an equal share of the income for life and after her death her share was settled on her children.

3. Clause 16 of the said will is as follows :—

" During the lifetime of my Wife my Trustees may at " their discretion make payment on account of income to the " persons for the time being entitled to the income of the " Trust Fund notwithstanding that my Trustees may have no " available income in their hands or not sufficient for the " purpose but such payments in advance of income received " shall not exceed £500 for each quarter of a year in respect " of each share of income and such payments may be made " out of any money for the time being in the hands of my " Trustees whether representing capital or income of the " Trust Fund but so that the same shall be duly charged " against income and any payment made out of capital shall " so far as practicable and as and when my Trustees shall " think proper be duly recouped ".

It is under the provisions of this Clause that payments to the Appellant, forming the subject of the assessments under appeal, were made.

4. Clause 20 of the said will gave the Trustees power to mortgage the estate for the purpose of raising sums for a number of different purposes, including payments in advance of income under the provisions of the said Clause 16.

5. The testator was survived by his widow and three daughters.

A considerable portion of the estate consisted of colliery shares and by 1927 it had become clear that the income thereof had become much reduced, and the beneficiaries were left practically without means. As a result, the Trustees obtained an Order of Court, dated the 21st March, 1927, under which they were given liberty to exercise their powers under Clause 16 of the will by making as from 16th November, 1926, to 15th June, 1928, quarterly payments of £500 each in advance on account of income to the testator's widow and three daughters, and to raise such sums as

(1) Not included in the present print.

might be necessary for that purpose out of the capital of the estate by mortgage or charge of any investments in the hands of the Trustees other than a certain holding therein set out, but so that not more than the total sum of £10,000 should be raised out of capital and so also that no payment in excess of £500 per quarter should be made to any of the persons entitled to income on account of income until all sums raised out of capital had been recouped. A copy of the said Order of Court, marked " B ", is annexed to and forms part of this Case(1).

6. As the income of the estate became insufficient to make payments to the beneficiaries under the said will the Trustees availed themselves of the powers given to them under the said Order of Court and raised the sum of £10,000 by pledging with their bank 78,912 £1 Ordinary Shares in a colliery company called Charlaw & Sacriston Collieries Company, Limited, which formed part of the capital of the estate.

7. Out of the said sum of £10,000 the Trustees paid to the Appellant and to each of the other beneficiaries the following sums on the dates stated :—

| | |
|---|---|
| 10th May, 1927... ... ... | £300 |
| 17th May, 1927... ... ... | £200 |
| 13th June, 1927 ... ... | £300 |
| 16th August, 1927 ... ... | £200 |
| 16th November, 1927 ... ... | £500 |
| 16th February, 1928 ... ... | £500 |
| 16th May, 1928... ... ... | £500 |

Income Tax was not deducted in making these payments which form the subject of the said assessments. No recoupment in respect of any of the sums paid by the Trustees out of the said amount of £10,000 has been made nor has the bank been repaid any part of the said sum.

8. A copy of the beneficiaries' income accounts for the years ending 16th May, 1927, 1928, and 1930, and a schedule of investments showing the income received thereon during the two years ending 16th May, 1928, marked " C ", is annexed to and forms part of this Case(1). After paying the said annuity to the testator's widow each beneficiary's share of the balance of income for the year ending 16th May, 1928, was the sum of £76 8*s*. 4*d*. For the year ending 16th May, 1929, there was no beneficiaries' income account as the income of the estate was insufficient to pay the said annuity.

9. A statement, marked " D ", which is annexed to and forms part of this Case(1), shews the appropriation of the total taxed income of the estate (less expenses) received during the 4 years ending 16th May, 1930.

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(1) Not included in the present print.

10. It was contended on behalf of the Appellant :—

(1) That the sums received by her, set out in paragraph 7 above, were receipts of money lent to her by the Trustees out of capital, and therefore not subject to Income Tax in her hands;

(2) That it would be a case of double taxation if she was taxable in respect of these sums since any income of hers subsequently required to replace the sums would also have to bear tax.

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

(1) That the said sums were annual payments and assessable under Case III of Schedule D of the Income Tax Acts;

(2) That the assessments were correct and should be confirmed.

12. We, the Commissioners, held that the Appellant, under the terms of the said will, was only entitled to receive income and that the payments in question which were made to her out of the capital of the estate were income in her hands and liable to taxation.

We held that the assessments were correctly made and confirmed the same.

13. The representative of 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.

R. COKE,
MARK STURGIS, } Commissioners for the Special Purposes of the Income Tax Acts.

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

1st November, 1933.

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The case came before Finlay, *J.*, in the King's Bench Division on the 19th, 20th and 28th March, 1934, and on the last named date judgment was given against the Crown, with costs.

Mr. Cyril Radcliffe appeared as Counsel for the Appellant and the Solicitor-General (Sir Donald Somervell, K.C.) and Mr. Reginald P. Hills for the Crown.

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JUDGMENT

**Finlay, J.**—The point here is whether certain sums paid to the Appellant were or were not her income. The case was extremely well argued by Mr. Radcliffe and Mr. Hills, and I have found the point to be a somewhat difficult one.

**(Finlay, J.)**

The appeal was by the Appellant, a lady, Mrs. Williamson, against two assessments made upon her for the years ending the 5th April, 1928, and the 5th April, 1929, and the matter relates to sums which were paid to her under the will of her father, Mr. C. E. Hunter, who died leaving a widow and three daughters, of whom the Appellant is one.

It is necessary to consider the will, for upon an appreciation of it, I think, this matter turns. By clause 8 of the will an annuity of £6,000 a year was left to the widow. Under clause 14 (*b*) and (*c*) the income of the trust fund is to be divided equally between the wife and three daughters, and, after the death of the wife, for the three daughters. Clause 16 contains the provision upon which the difficulty has now arisen, and it is desirable to read it. "During "the lifetime of my Wife my Trustees may at their discretion make "payment on account of income to the persons for the time being "entitled to the income of the Trust Fund notwithstanding that "my Trustees may have no available income in their hands or not "sufficient for the purpose but such payments in advance of income "received shall not exceed £500 for each quarter of a year in respect "of each share of income and such payments may be made out of "any money for the time being in the hands of my Trustees whether "representing capital or income of the Trust Fund but so that the "same shall be duly charged against income and any payment made "out of capital shall so far as practicable and as and when my Trustees "shall think proper be duly recouped". The situation which arose is explained in paragraph 5 of the Case. What happened was that the estate consisted to a large extent of colliery shares and the income of those shares became very seriously reduced, so seriously that the beneficiaries, as is found, were left practically without means. In those circumstances, the trustees obtained an Order of the Court from Astbury, J., giving them liberty to exercise their powers under clause 16 "by making . . . quarterly payments of Five "hundred pounds each in advance on account of income" to the widow and the three daughters "and to raise such sums as may "be necessary for that purpose out of the capital of the . . . "estate by mortgage or charge . . . but so that not more than "the total sum of Ten thousand pounds shall be raised out of "capital . . . and so also that no payment in excess of Five "hundred pounds per quarter shall be made to any of the persons "entitled to income as aforesaid on account of income until all "sums raised out of capital as aforesaid have been recouped". That Order, as I suppose, entitled the trustees only to do what they could have done under the will, but they very naturally, I suppose, exercising a power of that sort, desired to be protected by an Order of the Court.

The income, as I indicated a moment ago, did become inadequate, and thereupon the trustees proceeded to exercise the powers given them by this Order to which I have just referred. They raised a

**(Finlay, J.)**

sum of £10,000 by pledging with their bank a large number of ordinary shares of a colliery company, and out of the £10,000 thus raised the trustees paid to the Appellant and to the other beneficiaries various sums; the exact details do not matter. Income Tax was not deducted in making these payments and no recoupment in respect of any of the sums paid by the trustees has as yet been made. The beneficiaries' income accounts are set out in detail—it is not necessary to look at them now—but they show in detail the exact position.

I was referred—and it is proper that I should say something about it, because it is important—to a judgment which was given by my brother Bennett(1) in a question relating to this very clause in this will. What had happened was that considerable payments under this clause 16, and under the power given by the clause and given by the Order of Astbury, J., had been made to the widow. She died, and the trustees had in their hands a considerable sum due to her in respect of another source of income, and the question was whether they were entitled to recoup themselves; and I am satisfied that the judgment of my brother Bennett has a close bearing upon the matter which I have to consider now. He describes the trust. He refers to the will. He reads clause 16 of the will and also clause 20, and then he says this: "Under the provisions and powers of clause 16, "the trustees made payments amounting in all to £2,500 to the "testator's widow in advance of income, in advance of her share "of the income of the trust fund, and she had been overpaid to that "extent when she died. Her annuity was in arrear . . ." Then he explains how they had that amount in their hands. He says: "The question is whether the trustees are entitled to utilise the sum "which is in their hands in repayment of advances on account of "the income of the trust fund made by them in exercise of their "powers under clause 16. In substance that is the position. In my "judgment, the answer to it is in the affirmative, for the reason that "the lady, the testator's widow, has been overpaid in respect of that "which she was entitled to receive on account of the income of the "trust fund, and having been overpaid on that account, it seems "to me on a claim on principles of equity the persons who have "made the payment, the trustees who have in their hands funds "which would be payable to her on another account, are entitled to "use those funds in making good that which the lady has been "overpaid". That, as I have indicated, seems to me to have a direct bearing upon the matter which I have to consider, that matter being this: were these payments income of the recipient, or were they an advance creating a debt and therefore repayable? I suppose one can test it in this way. Suppose that the trustees had made one of these payments and then that the recipient had been fortunate

(1) *In re* Hunter, Whately *v.* Elwes, Chancery Division, 30th November, 1933, not reported.

**(Finlay, J.)**

enough to come into a very large legacy from some other source, so that she became a rich woman ; would, or would not, the trustees, in those circumstances, have been entitled to reclaim the money, to get it back ; in fact, was the position as between the beneficiary receiving this and the trustees a position of debtor and creditor or not ? That appears to be the test, because it can hardly be, I think, that it is income of the recipient, if, in truth, it was an advance which she was liable, at the discretion of the trustees, to have to repay. It is, on the other hand, I think, quite clear and is established by several authorities that if this is income in the hands of the recipient, then it is taxable, even though it is paid out of capital. I need not refer to the authorities, but they seem to establish the position quite clearly that if one is entitled, say, to an annuity, that annuity must bear tax, and bear it without any reference to the source, whether capital or not, from which the annuity may be derived.

The question then seems to me to be whether this was income, and that, I think, depends upon whether it was in effect a loan repayable on demand by the trustees, or whether it was not a loan but was a payment of income. I have come to the conclusion—and, in so deciding, I think that I am deciding in accord with the view expressed by my brother Bennett—that this money was money which the trustees were entitled to reclaim. It was not, I think, income ; it was an advance by reason of the circumstance that the income was, owing to unfortunate circumstances, inadequate. The lady was entitled to, was given a right to, income. The source temporarily dried up. Therefore, in order to tide her and her co-beneficiaries over what was obviously an embarrassing position, it was arranged that she should be given not income but a loan to be repaid if circumstances arose which made it possible that it should be repaid.

I cannot really say any more about the case. I have found it, as I indicated at the beginning, a difficult case, though I received the most valuable assistance from Counsel, but, on the whole, I have come to the conclusion, reading clause 16 and applying to it, as, of course, I do apply and follow, the decision of my brother Bennett, that the argument which Mr. Radcliffe urged upon me was right. It accordingly follows that this appeal succeeds.

**Mr. Cyril Radcliffe.**—Your Lordship will give me the costs of the appeal ?

**Finlay, J.**—Yes, the appeal will be allowed with costs.

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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 Slesser and Romer, *L.JJ.*) on the 20th and

28th June, 1934, and on the latter date judgment was given in favour of the Crown (Romer, *L.J.*, dissenting) 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. Cyril Radcliffe for Mrs. P. Williamson.

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JUDGMENT

**Lord Hanworth, M.R.**—I have come to the conclusion that this appeal ought to be allowed.

The question arises upon a Case stated by the Commissioners for the Special Purposes of the Income Tax Acts in regard to two assessments to Income Tax made upon this lady, Mrs. Williamson, in the sums of £2,000 and £500 for the years ending the 5th April, 1928, and the 5th April, 1929, under Schedule D of the Income Tax Acts. The assessments were made in respect of moneys in her hands. They had been paid to her by the trustees of the will of her father, Mr. Hunter. Mr. Hunter had died on the 16th May, 1917, and had left a will of that same year, and there was also a codicil, but I do not think that was relevant at all. He made his will on the 4th May, 1917. These two sums are at present moneys which have been paid to Mrs. Williamson ; she has received them and, there is no question about it, they are gross sums paid into her hands ; that is to say, they had not, before they reached her hands, suffered any deduction by way of Income Tax, and as they are there and have been paid over to her by the trustees, the question arises whether they are not simply a part of her income which she derives under the trusts of the will, or whether the contention which has been set up and was successful before Finlay, J., is correct, that they were not payments to her on account of her income or by way of income, but that they were merely loans made to her by the trustees of her father's will. We have, therefore, to examine the question whether there is a good ground for saying that they were loans to her made by the trustees. That view found favour before Finlay, J. Upon the question whether it was a loan or whether it was a payment of income, he came to the conclusion that it was a loan.

Under the terms of the will of the testator, who had three daughters and also left a widow, a trust fund was created and left in the hands of trustees, whose duty it was to pay an annuity to the wife, and then, in addition to that, they were to divide up the balance of the income which was left from this trust fund to pay in aliquot parts to the wife and to the three daughters ; " after the death of my " Wife the capital and income of the Trust Fund shall . . . be held " in trust for my said three daughters in equal shares but so that the " share of each daughter ", and so on. It was contemplated that, inasmuch as the trustees had to divide a very considerable sum by way of income first of all to the widow, it was possible that in some

**(Lord Hanworth, M.R.)**

years there would not be a possibility of paying the full sum which it was contemplated ought to come to the daughters, so clause 16 was inserted in the will. That clause has been read and I must read parts of it again. In effect it said this, that " During the lifetime " of my Wife " —that is to say, while this heavy annuity was payable to her—" my Trustees may at their discretion make payment on " account of income to the persons for the time being entitled to the " income of the Trust Fund notwithstanding that my Trustees may " have no available income in their hands or not sufficient for the " purpose . . ." In other words, although there is no income available for distribution, the trustees are still to be able to make payments on account of income as if it were income, " but such payments in " advance of income "—that is, by way of income, but before that income has accrued into the hands of the trustees and so has become available for distribution—" shall not exceed £500 for each quarter " of a year in respect of each share of income . . ." In order to enable that to be done, it will be noted that, in clause 20 of the will, there is a power for the trustees to raise any sum or sums for the payment of debts, and also for making a payment under clause 16 of any sums in advance of income. Hence, *ex concessu*, the money that will be distributed in this way by the trustees will not be income, not ripe fruit which has accrued due and is paid into the hands of the trustees ready for distribution, but it will be money which they have either raised under the powers of clause 20 or derived *aliunde*, and is not any part of the available income then in their hands. The clause goes on " and such payments may be made out of any money " for the time being in the hands of my Trustees whether representing " capital or income of the Trust Fund " ; in other words, as I say, it is money which is to be distributed, which reaches or is in the hands of the trustees *aliunde* over from the ripe fruit of income. Then he goes on " but so that the same "—that is, these payments— " shall be duly charged against income ". To my mind, that is a clear direction that the trustees are, if they make such a payment, to make that payment in their accounts and, as between them and the *cestui que trust*, as an item of income paid by them to, and received by, the beneficiary as income. Then these words follow—to my mind, conclusive words—" and any payment made out of capital " shall so far as practicable and as and when my Trustees shall think " proper be duly recouped ". It is quite possible to argue that the word " recouped " merely means a refund, or compensation, to the exclusion of the word " repay ", but I think Mr. Radcliffe is right to say that the word " recouped " may take on different meanings in different connections, and it would not be right to put too much emphasis upon the user of that word. It is, however, noticeable that the word used is not " repaid ", and is, if you like, an equivocal word which may be sufficiently fulfilled by " refunding " or " com- " pensating ". But, to my mind, the important words of the clause

**(Lord Hanworth, M.R.)**

are these: "as and when my Trustees shall think proper". How are the trustees to exercise that discretion? It means this: they will from time to time be receiving income; they will have possibly raised a fund with which to pay some moneys on account of income under clause 20, and they are left the *domini* of the situation; they are to determine as and when this payment shall be recouped. To my mind, that takes it away from the volition or the duty of the recipient, the beneficiary, and leaves the matter in the hands of the trustees, and they can say to a beneficiary to whom they have made a payment on account of income: "Oh, we will not make "you any further payment, because we are going to hold back the "income which has now come to our hands, because we want that "for the purpose of recouping the capital out of which we have made "the payment to you" or: "We want to replace an overpayment "on account of income which we have made to you". I cannot find, in this clause, anything relating to a loan or repayment by the beneficiaries. It appears to me that it is the trustees who have got their discretion to exercise as to whether, in given circumstances, they will ease the difficulty which has occurred by reason of the income being short in their hands, and make a payment to the beneficiary so that the beneficiary may not suffer the disadvantage of having no income in any particular half-year or year.

As between the Crown and Mrs. Williamson, it appears to me that she must admit that she has got a sum which has been paid to her because she is entitled to receive income payments from time to time. That was the reason why this total sum of £2,500 was paid over to her, and, as against the Crown, she must admit that *pro tanto* she has received income, and I do not think it is possible for her to say: "The money that I have received is money which "I shall have to repay". As I have pointed out, there is no indication of advances and repayment of a debt accruing to the trustees as creditors; there is only a power and a duty and a discretion—the discretion of the trustees—to make payments to the beneficiary on account of income. Under these circumstances, it appears to me that there is insufficient ground for holding that these sums were loans and loans only, and I come to the conclusion in accordance with the Commissioners who say that: "We . . . held that the "Appellant, under the terms of the said will, was only entitled to "receive income and that the payments in question which were "made to her out of the capital of the estate were income in her "hands and liable to taxation".

For these reasons, in my judgment, the appeal ought to be allowed with costs here and below and the assessments restored.

**Slesser, L.J.**—I agree that this appeal should be allowed.

The moneys which are here sought to be taxed have been advanced by the trustees under clause 16 of the will and an Order of the Court of the 21st March, 1927, directing the trustees, in certain conditions,

**(Slesser, L.J.)**

to exercise those powers. The greater part of the clause is concerned with the powers which the trustees have to make these advances. The clause provides that the trustees may at their discretion during the lifetime of the wife of the testator make payment on account of income to certain named persons, notwithstanding that the trustees "have no available income in their hands or not sufficient for the "purpose". There follows a limitation of the amounts which they may advance for each quarter of the year; then "such payments "may be made out of any money for the time being in the hands "of my Trustees whether representing capital or income of the "Trust Fund". Pausing there, it is clear, to my mind, that moneys which have been advanced by the trustees, exercising their discretion under that power, are clearly income in the hands of the recipient and liable to taxation as such.

The question which arises is whether the later limb of that clause turns that advance, which is primarily to be considered, I think, as income, into a loan repayable by the recipient so that the recipient cannot be said ever to have acquired any real title in these moneys at all. These are the words: "but so that the same shall be duly "charged against income and any payment made out of capital "shall so far as practicable and as and when my Trustees shall think "proper be duly recouped". So far as the opening words of that limb, "so that the same shall be duly charged against income", are concerned, I do not think they decide the matter at all. They are in part, I think, to be regarded as an accounting direction, and they are in part, perhaps, to be construed with what follows, but in themselves they are inconclusive. "Any payment made out of "capital shall so far as practicable and as and when my Trustees "shall think proper be duly recouped." That seems to me to give power to the trustees subsequently, if practicable, as and when they think right, to diminish future income which the lady has not yet received, in order to recoup the capital of the estate for income which she has already received in advance of that to which she is entitled under the trusts, apart from the specific power given in clause 16. In other words, I have come to the conclusion that, as and when this lady receives this money, it is taxable income in her hands, and the fact that the trustees in their discretion may subsequently reduce further income which she may hereafter receive, or possibly, as Mr. Radcliffe seemed to indicate, though I am not at all sure on this, recoup themselves in some other way as against the moneys which they have paid to her, does not seem to me to make income, as and when she receives it, any the less income.

I disagree with the learned Judge when he concludes that this is a loan. I think it is taxable income and, therefore, this appeal must be allowed.

**Romer, L.J.**—I regret to find myself in disagreement with the other members of the Court. In my opinion, Finlay, J., and Bennett, J., arrived at a right conclusion as to the true

**(Romer, L.J.)**

construction to be put upon clause 16 of the will. By clause 14 (*b*) of the will the trustees are directed, during the lifetime of the testator's wife, "to divide and pay the income of the Trust "Fund equally between my wife and such of my said three daughters "as for the time being shall be living". It will be observed, of course, that the income which the trustees are to divide under that clause may be income which had been already subjected to tax, either because tax would have been deducted at the source of the income before it ever came into the hands of the trustees, or because the trustees, receiving untaxed income, will themselves be responsible in respect of it. Then comes clause 16 which we have to construe; by that clause the testator provides as follows: "During the lifetime of my Wife my Trustees may at their discretion "make payment on account of income to the persons for the time "being entitled to the income of the Trust Fund notwithstanding "that my Trustees may have no available income in their hands "or not sufficient for the purpose but such payments in advance of "income received shall not exceed £500 for each quarter of a year in "respect of each share of income and such payments may be made "out of any money for the time being in the hands of my Trustees "whether representing capital or income of the Trust Fund but so "that the same shall be duly charged against income and any "payment made out of capital shall so far as practicable and as "and when my Trustees shall think proper be duly recouped". I may mention that in clause 20 also the testator refers to any payments made under clause 16 as being payments of sums in advance of income. Mr. Stamp has referred to that clause as being one which enables the trustees to supplement the income of the beneficiaries who are mentioned in sub-clause (*b*) of clause 14. I do not take that view. The clause does not, in my opinion, enable those beneficiaries to receive one penny more of income from the estate than they would in its absence; that is to say, it does not entitle them, in the end, to receive one penny more in respect of income from the testator's estate than they would in the absence of the clause. The object of the clause seems to me to be plain enough. Times will come when the trustees have not in their hands income available for distribution amongst the beneficiaries. In the absence of such a clause, the beneficiaries would either have to wait without income until the trustees were in a position to pay it, or they would have to borrow from elsewhere to meet their needs pending the receipt of the income. I may mention that it is perfectly obvious that, if they borrow the money elsewhere, the money so borrowed would not be taxable money in the hands of the borrower.

Clause 16, as I understand it, was put in to enable the trustees to make advances to the beneficiaries. It does not increase the income; it does not purport to increase their income, but it says that, when the trustees have no available income, then out of capital

**(Romer, L.J.)**

they may make advances to the beneficiaries in respect of, that is, in advance of, their income. I should have thought, myself, that the position of a trustee who makes an advance in exercise of that power is that of a master whose servant is employed by him on commission and who asks for an advance in respect of that commission before the commission for the year has been ascertained. The master makes him an advance. If he does so, and at the end of the year it appears that the commission earned does not amount to, or is less than, the money advanced by the master, the servant is under an implied obligation to repay the excess. So here, where the trustees make an advance to a beneficiary on account of her income, there is an implied obligation on the beneficiary to repay. "Oh," says Mr. Stamp, "but can the trustees call upon the beneficiary to repay the next "day?" I should say "No". The power is not a power to advance money on account of the income of the year in which the advance is made; it is a power to make an advance on account of the income generally, but when the income to which the beneficiary is entitled under the clause is once and for all determined, as it would be on the death of that beneficiary or the death of the wife, then it would be ascertained whether the beneficiary has been overpaid or not, and thereupon an obligation to refund the money to the trustees would arise. For myself, I am inclined to agree with Mr. Stamp that the words at the end of the clause, referring to recoupment, are dealing with income only; that is to say, the trustees are being given a power of recouping the sum they advanced in the interval before the death of the tenant for life, or the death of the widow, without waiting for an ascertainment of the income eventually payable. I see nothing in those words to exclude the case from the ordinary operation of law which would create an obligation to repay a sum paid in advance of income, when it appears in the end that the sum so advanced exceeds the income to which the person who obtains the advance was entitled.

I said just now that Bennett, J., had arrived at the same conclusion. He did so in these circumstances: the widow was entitled to a fixed annuity of £6,000 a year, apart altogether from the provisions of the clause to which I have referred. At the date of her death, that annuity being charged on both corpus and income, there was an arrear due to her of, I think, some £2,800, but, during her lifetime, she had been advanced money by the trustees, under clause 16, in respect of her share in the surplus income under clause 14 (*b*). Bennett, J., held[1], as against her personal representatives, that that sum, which otherwise would have been due to her estate in respect of the underpayment of the £6,000 annuity, was to be set off against the sum which had been advanced to her by the trustees under clause 16 in excess of the sum which had accrued under that

[1] *In re* Hunter, Whateley *v.* Elwes, Chancery Division, 30th November, 1933, not reported.

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clause to her during her life. In other words, Bennett, J., took the view either that the sums paid to her under clause 16 in excess of the total income that had accrued during her lifetime in respect of her share were sums to which she was not entitled under the will—that is to say, were overpayments under the will—or that the money was an advance by the trustees to her and repayable on her death when her share in the income had been finally ascertained. Whichever of those two views he took, it is against the contention of the Crown in the present case, because, if the beneficiaries in the end received more than they were entitled to under the will, no one can say that they are liable for Income Tax in respect of those sums. It is something which has been paid by the trustees to which they are not entitled and is not taxable at all. If it is a loan by the trustees to them, repayable when the total sum accruing due in their life in respect of their income is ascertained, again, a sum so paid is no more liable to Income Tax than would be a sum borrowed by a beneficiary from somebody else in the circumstances that I have already mentioned.

For these reasons I have come to the conclusion that Finlay, J., was right and that this appeal should be dismissed, but, as my brethren take the opposite view, of course the appeal will be allowed.

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An appeal having been entered against the decision in the Court of Appeal, the case came before the House of Lords (Lord Hailsham, *L.C.*, and Lords Blanesburgh, Russell of Killowen, Macmillan and Roche) on the 6th and 7th February, 1936, when judgment was reserved. On the 2nd March, 1936, judgment was given unanimously in favour of the Crown, with costs, confirming the decision of the Court below.

Mr. Cyril Radcliffe, K.C., and Mr. John Sparrow appeared as Counsel for Mrs. P. Williamson and the Attorney-General (Sir Thomas Inskip, K.C.), Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

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JUDGMENT

**Lord Russell of Killowen.**—My Lords, I am authorised to say that my noble and learned friends the **Lord Chancellor**, **Lord Blanesburgh** and **Lord Roche** concur in the opinion which I am about to deliver.

The question here in dispute is whether the Appellant is liable to be assessed to Income Tax in respect of two sums of £2,000 and £500, the assessments being made upon her under Schedule D of the Income Tax Act, 1918, for the years ending the 5th April, 1928, and the 5th April, 1929, respectively.

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The Appellant's father, Charles Edward Hunter, died on the 16th May, 1917. By his will he appointed his wife, Mary Emma Hunter, and two other persons his executors and trustees, and by the joint operation of clauses 8 and 9 thereof bequeathed free of duty to his wife an annuity of £6,000 for her life, payable quarterly, to be a charge on the residue of his estate, unless and until an annuity fund to provide for it was constituted by the trustees of the will. By clause 11 the testator devised and bequeathed to his trustees all the residue of his real and personal estate not otherwise specifically disposed of by his will upon the usual trusts for sale and conversion, and after the usual directions for payment of funeral and testamentary expenses and debts and pecuniary legacies, he (by clause 14) directed his trustees to stand possessed of his residuary trust fund and the annual income thereof (*a*) upon certain trusts for accumulation of surplus annual income exceeding £20,000 during the first fourteen years after his death, which are not material hereto, and subject thereto (*b*) during the lifetime of his wife upon trust to divide and pay the income of the trust fund equally between his wife and such of his three daughters, the Appellant, Mrs. Kathleen Cary Elwes and Lady Sylvia Grant-Lawson, as for the time being should be living and the issue of such of them as should then be dead leaving issue, as therein directed, and (*c*) after the death of his wife upon trust as to both capital and income for the testator's three daughters in equal shares, the share of each daughter being settled upon trusts for her and her issue.

By clause 16 the testator conferred the following power on his trustees: "During the lifetime of my Wife my Trustees may "at their discretion make payment on account of income to the "persons for the time being entitled to the income of the Trust "Fund notwithstanding that my Trustees may have no available "income in their hands or not sufficient for the purpose but such "payments in advance of income received shall not exceed £500 "for each quarter of a year in respect of each share of income "and such payments may be made out of any money for the time "being in the hands of my Trustees whether representing capital "or income of the Trust Fund but so that the same shall be "duly charged against income and any payment made out of "capital shall so far as practicable and as and when my Trustees "shall think proper be duly recouped".

By clause 20 the testator declared that notwithstanding the trust for sale and conversion of his residuary estate contained in his will his trustees might, if they thought proper, raise any sum or sums for any purpose of or under his will "including the payment "under clause 16 hereof of any sums in advance of income" by mortgage or charge of any part or parts of his estate.

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The testator was survived by his wife and his said three daughters.

By the year 1927 the income of the residuary trust fund (which consisted in large part of colliery shares) had become so reduced that the beneficiaries were left practically without income therefrom. In those circumstances the trustees (with the authority of an Order of Court) exercised their powers under clause 16 of the will. They raised a sum of £10,000 from their bank on the security of certain colliery shares which formed part of the capital of the estate. Out of the moneys so raised they paid to the Appellant £2,000 during the financial year ending 5th April, 1928, and £500 during the next financial year. These are the payments which are the occasion of the present dispute. Similar payments were made to the widow and the other two daughters.

The Appellant, having been assessed to Income Tax in respect of these two sums, appealed; but the Special Commissioners confirmed the assessments, and on the requirement of the Appellant stated and signed a Case (dated the 1st November, 1933) for the opinion of the High Court.

Before the case came before the High Court for hearing the testator's widow died and the annuity of £6,000 per annum payable to her under his will thereupon ceased. At the date of her death there were unpaid arrears of her annuity amounting to £2,800 1*s.* 4*d.*, but on the other hand no recoupment had taken place in respect of the £2,500 paid to her under clause 16 of the will. The trustees of the testator's will accordingly took out an originating summons in the Chancery Division raising the question whether the unpaid arrears of annuity in their hands were applicable by them (*inter alia*) in discharging one-fourth of the debt of £10,000 and the unpaid interest and bank charges thereon. By his Order made on the hearing of that summons dated the 30th day of November, 1933, Bennett, J., declared that the unpaid arrears of the annuity were so applicable(1).

The Stated Case was heard by Finlay, J., who by his Order dated the 28th March, 1934, reversed the determination of the Commissioners. The present Respondent then appealed to the Court of Appeal, and by an Order of that Court dated the 28th June, 1934, the appeal was allowed and the determination of the Special Commissioners was restored. Romer, L.J., however, delivered a dissenting judgment.

The Master of the Rolls and Slesser, L.J., both were of opinion that under clause 16 of the will the trustees were empowered to make payments to the beneficiaries so as to secure them an income in any event, that the payments did not create any debt from them, and that the provision for recoupment merely enabled

(1) *In re* Hunter, Whately *v.* Elwes, not reported.

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the trustees, if they thought fit, to replace out of future income capital which had been used in making payments under the clause. The payments were accordingly income in the hands of the present Appellant.

My Lords, I agree with this construction of the clause.

The judgments both of Finlay, J., and Romer, L.J., are based upon the view that there was a personal liability upon the Appellant to repay the moneys paid to her by the trustees in exercise of the powers conferred by clause 16. Finlay, J., puts it thus(1): "I have come to the conclusion—and, "in so deciding, I think that I am deciding in accord with the "view expressed by my brother Bennett—that this money was "money which the trustees were entitled to reclaim . . . . The "lady was entitled to . . . . income. The source temporarily "dried up. Therefore, in order to tide her . . . . over what was "obviously an embarrassing position, it was arranged that she "should be given not income but a loan to be repaid if circum-"stances arose which made it possible that it should be repaid". Though Finlay, J., leaves it uncertain when repayment could be exacted, the relation of debtor and creditor is made clear.

Romer, L.J., arrives at the conclusion(2) that any beneficiary who has received payments from the trustees in the exercise of the powers conferred by clause 16 is personally liable to repay to the trust estate the amount by which on her death it is ascertained that the payments which she has received from the income of residue and her receipts under clause 16 exceed her share of the income actually earned by the residue during her life. This liability arises, according to him, not under the words of the clause but by general law, the operation of which was not excluded by the clause. "I see nothing in those words", he says in reference to the recoupment provision(2), "to exclude the case from the "ordinary operation of law which would create an obligation to "repay a sum paid in advance of income, when it appears in the "end that the sum so advanced exceeds the income to which the "person who obtains the advance was entitled." This view of the Lord Justice, that an obligation to repay arose from operation of law, is founded upon the construction which he placed upon clause 16, and can, I think, only be supported if that construction is right. It is the keystone of the judgment.

The construction which he placed upon the clause can best be stated in his own words(3): "The clause", he says, "does not, "in my opinion, enable those beneficiaries to receive one penny "more of income from the estate than they would in its absence; "that is to say, it does not entitle them, in the end, to receive

(1) *See* page 200 *ante*. (2) *See* page 206 *ante*. (3) *See* page 205 *ante*.

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" one penny more in respect of income from the testator's estate " than they would in the absence of the clause ". If this be the true view, it may be (I say no more than that) that the law would imply a personal liability to repay. But if the clause on its true construction means that sums can be paid under it out of capital to life-tenants, and that the only recoupment to capital is to be made out of future income in the discretion of the trustees, there is no basis on which to establish personal liability either expressly under the clause or by implication under the general law.

My Lords, in my opinion that is the true construction of clause 16. It empowers the trustees when income is not available to provide out of capital payments to a limited amount to supply the place of the absent income. The payments, however, are to be " duly charged against income ", that is to say, each life-tenant is to be debited in her income account with the moneys which she receives under the clause; and in addition there is the provision as to recoupment which only requires recoupment " so far as " practicable " and further only " as and when my Trustees shall " think proper ". These words appear to me to exclude all idea of a personal liability to repay attaching to the recipients; they leave the corpus of the share to bear the burden, unless future income becomes available and the trustees deem it proper to recoup the corpus thereout.

My Lords, I think it is true to say that the existence of this personal liability was not the principal argument of the Appellant in your Lordships' House: but I have dealt with it first because, as I conceive, it was the foundation of the judgments in favour of the Appellant. The main argument here was that if (without any personal liability) there existed a liability so to speak *in rem*, that is to say, that if the payments made under clause 16 were made upon the footing that the future income of the recipient under the trust might be taken to recoup capital, then the payments so made could not form income in the hands of the Appellant assessable to Income Tax. No authority was cited in support of this contention, and I know of no legal principle to justify it. It is well settled that a payment out of corpus may properly be assessable income in the hands of the recipient. A familiar instance is the case of an annuity charged on the income and corpus of an invested fund; all moneys raised out of corpus to provide the amount of the annuity will be assessable income. The present case presents a close analogy; for clause 16 in effect, if and when the trustees choose to exercise their powers thereunder, secures to the life-tenants an income from residue by means of a charge on the corpus thereof.

In my opinion the Appellant has been rightly assessed and this appeal should fail.

**Lord Macmillan.**—My Lords, I am in entire agreement both with the reasoning and with the conclusion of my noble and learned friend Lord Russell of Killowen.

*Questions put:*

That the Order appealed from be reversed.

*The Not Contents have it.*

That the Order appealed from be affirmed and that this appeal be dismissed with costs.

*The Contents have it.*

[Solicitors :—Ellis, Peirs & Co.; Solicitor of Inland Revenue.]