No. 362.—IN THE HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—28th and 30th July, 1913.

COURT OF APPEAL.—4th, 5th and 27th February, 1914.

HOUSE OF LORDS.—8th and 10th June, 1915.

DRUMMOND v. COLLINS (Surveyor of Taxes).(1)

Income Tax (Schedule D).—Foreign Possessions.—Income Tax Act, 1842, *Section* 100, *Schedule D, Case* 5, *and Section* 41 *of the same Act.—Income Tax Act*, 1853, *Section* 2, *Schedule D.*

An American Citizen by his Will gave property, which was situate abroad, to Trustees resident abroad upon trust for the children of his deceased son. Under the terms of the Will, the Trustees were directed to accumulate the income of the respective shares of the children and to add the accumulations to capital until the children should attain the age of twenty-five years, when they would be entitled to a portion of the accumulated fund. The Trustees were also directed, "out of the net income of the "proportionate share of the trust estate held in trust for any "child," to make provision from time to time for the suitable maintenance and education of such child, as they in their uncontrolled discretion might think necessary or advisable. As the children were minors, the Trustees from time to time in the execution of their trust remitted from the United States to the mother of the children, who was also their Guardian, sums of money for their maintenance and education.

The Appellant, Mrs. Drummond, the Guardian aforesaid, contended that Case 5 *only applied to profits and gains from foreign possessions when those possessions belonged to the person sought to be assessed.*

Held, *that the moneys so remitted were chargeable under Case* 5 *and that the Appellant was properly assessable therefor.*

CASE stated under the Statute 43 and 44 Vic. Cap. 19, Section 59, by the Commissioners for the General Purposes of the Income Tax Acts for the Division of Daventry in the County of Northampton for the Opinion of the King's Bench Division of the High Court of Justice.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the Division of Daventry in the County of Northampton held at the Police Court, Daventry, within the said Division on the 18th day of October, 1911, Mrs. Albertine Drummond, (previously Albertine Field), appealed against an assessment in the sum of £10,000 for the year ending

(1) Reported K.B.D. (1913) 3 K.B. 583; C.A. (1914) 2 K.B. 643; and H.L. in (1915) 31 T.L.R. 428. [1915] AC 104

5th April, 1908, in respect of remittances from foreign possessions, and made under the Fifth Case of Schedule D of the Income Tax Act, 1842, and Section 2, Schedule D of the Income Tax Act, 1853, as hereinafter mentioned.

2. The Appellant in 1890 married the late Mr. Marshall Field, Junior, who died in November, 1905, and by whom she had three children, Marshall, Henry and Gwenderlyn who are minors under the age of 21 years and to whom she is Guardian. In September, 1908, she married Mr. Maldwin Drummond of 4, Down Street, Piccadilly, in the County of Middlesex, who is still living.

3. The Appellant's late husband, Mr. Marshall Field, Junior, was the son of the late Mr. Marshall Field of Chicago who died in January, 1906, having by Will dated the 14th day of June, 1904, (a copy of which Will is annexed to and forms part of the Case)(1) made certain provision for his son and on the death of his son for his son's widow and their children.

4. The material clauses of this Will as affecting the children of the Appellant are as follows:—

"*Seventh.*—After the death of my son if he shall die "leaving any child or children or issue of a child or children "him surviving, I direct said Trustees to hold the trust "estate and to apply the net income and ultimately the "capital as hereinafter provided for the use and benefit of "all the children of my son surviving him and for the use "and benefit of the issue of any child or children that may "have died, said issue taking a parent's share *per stirpes*. "It is my will that in such case the trust estate and the "income thereof shall be so held, administered and applied "by said Trustees that each of my Grandsons, Marshall Field "and Henry Field, now living or their respective issue shall "respectively receive a double portion, that is, twice as much "as any other child or issue thereof, of my son and that any "other surviving children of my son, and their issue *per* "*stirpes*, shall receive equal shares. Out of the net income "of the proportionate share of the trust estate held in trust "for any child of my son, or issue of a child, I direct that "said Trustees make such provision from time to time as they "in their uncontrolled discretion may think necessary or "advisable for the suitable maintenance and education of "such child or issue thereof until such child or issue thereof "shall be entitled under provisions hereinafter contained to "receive payments of income directly from said Trustees. "Such provision shall be paid over by said Trustees from time "to time to each such child or issue thereof or to the "guardian or guardians of each child or issue thereof or may "be otherwise applied for the benefit of each such child or "issue thereof as said Trustees may think desirable. If and "so far as the suitable maintenance or education of any such "child or issue thereof, shall from time to time appear to "said Trustees to be sufficiently provided for in other ways "or from other sources, said Trustees shall refrain from "making any provision therefor out of said trust estate.

(1) Not included in present print.

"In the cases respectively of my son's three children "now living, Marshall and Henry and Gwenderlyn, said "Trustees shall upon the death of my son and subject to "the above directions respecting provision for maintenance "and education, retain and hold all the net income of their "respective shares of the trust estate and invest and re-invest "the same for accumulation, and add the accumulations of "income to the capital of their said shares respectively until "my said three grandchildren shall respectively attain the "age of twenty-five (25) years. From and after the time "when they shall respectively attain the age of twenty-five "(25) years said Trustees shall pay over to them in regular "quarterly instalments during their lives, for their own use "one half (½) of the net income of their respective shares of "the entire trust estate enhanced by accumulations added "thereto as herein directed; and the other one half (½) of the "net income of their respective shares of the entire trust "estate said Trustees shall retain and hold and shall invest "and re-invest for accumulation, adding the accumulations "of income to the capital of their respective shares, until my "said three grandchildren shall respectively attain the age "of thirty-five (35) years. Thereafter from the time when "they shall respectively attain the age of thirty-five (35) "years said Trustees shall pay over to them in regular quar-"terly instalments during their respective lives, for their "own use, all the net income of their respective shares of "the entire trust estate."

"*Twenty-second.*—I direct that no title or interest in any "of the several trust funds in my Will created or in the "money or other property composing them or any of them "or in the income accruing thereon or in its accumulations "shall vest in any beneficiary under any such trust during "the continuance of the trust, nor shall any beneficiary "acquire any right in or title to any instalments or instal-"ment of income otherwise than by or through the actual "payment of each instalment respectively by the Trustee or "Trustees of the respective trust estates and the receipt "thereof in each case by the beneficiary nor shall any bene-"ficiary have any right or power by draft assignment or "otherwise to anticipate or to mortgage or otherwise en-"cumber in advance any instalments or instalment of income "nor to give orders in advance upon the Trustees or Trustee "for any instalments or instalment of income."

5. After the death of her late husband, the said Mr. Marshall Field, Junior, the Appellant resided in America until the beginning of April, 1906, when she left that country with her three children who always resided with her and arrived in London at the end of April, 1906, and resided for a short time at Claridges and other hotels there. Subsequently she travelled for a time in the United Kingdom until the 30th September, 1906, from which date until Christmas, 1906, she rented and resided in a furnished house at Ashby St. Ledgers, in the County of Northampton. From Christmas, 1906, until July, 1907, she resided abroad.

6. In July, 1907, the Appellant took a lease of Danesbury House, Welwyn, Herts, and resided there until the 5th April, 1908.

7. The Appellant received remittances of income in respect of her personal estate abroad amounting to the sum of £274 and liability to be assessed for the year ending the 5th April, 1908, and to pay Income Tax in respect of such remittances was admitted, and no question for the consideration of the Court arises in respect thereof.

8. It was also admitted by the Appellant that considerable remittances, the subject of the present assessment, had been received by her from America from the Trustees of the Estate of the late Mr. Marshall Field in accordance with the provisions of the above-mentioned Will for the education and maintenance of her said three children, but she declined to state the amount of the said remittances on the ground that, as she contended, there was no liability to assessment in respect thereof, and she produced a letter written by the said Trustees dated 14th April, 1911, which was in the following terms:—

"Trust Department.

"Illinois Trust and Savings Bank,
"Chicago,
"April 14th, 1911.

"Mrs. Albertine Drummond,
"Chicago, Illinois.

"DEAR MADAM,

"WE have carefully considered your request for a statement of the amount of moneys advanced to you by us as Trustees under the Seventh Article of the Will of Marshall Field deceased during the last five years and in reply we beg to state:—

"We hold as Trustees under said Will a fund the income on which belongs to us as Trustees. We are empowered by the Will to make such provision from time to time as we in our uncontrolled discretion may think necessary or advisable for the suitable maintenance and education of your children who are the grandchildren of said Marshall Field.

"We are expressly empowered to make such provision in such way as we may think desirable. We have chosen to forward to you from time to time funds held by us under this Article for application by you for the suitable maintenance and education of your children. These funds thus advanced to you we have intended should be used by you for that purpose.

"The funds so advanced are in no sense income payable to you under the terms of the said Will. Continuance of such payment to you is not demanded by the Will but it is open to us to consider any other method of providing for the maintenance and education of the children we may think desirable.

"We object to the diminution of the fund by the payment of any Income Tax levied upon the theory that the moneys so advanced to you are, in a legal sense, income payable to you. If such diminution should occur we should be led to consider some other method of caring for the question of the maintenance and education of the children.

"We understand that you desire the report which you have requested in connection with the demand upon you for the payment of an Income Tax on this Fund. For the reasons stated we must decline to furnish you the statement which you request.

"We think that an accurate statement of the character of the advances made by us should demonstrate that the advances so made are not in any sense income payable to you and that such statement should dispose of any such question.

"Yours truly,

"ILLINOIS TRUST AND SAVINGS BANK,
"By William H. Henkle,
"Secretary.

"CHAUNCEY KEEP
"ARTHUR B. JONES } Trustees."

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

That on the facts proved on the true construction of the said Will and of the said Statutes the fund held by the Trustees was not wholly or in part a foreign possession of the Appellant and/or of her children or any of them; that the mere exercise by the Trustees of their discretion in remitting certain of the monies accruing to them from such fund or part of it did not in law operate to transform such fund or any part of it into a foreign possession of the Appellant and/or of her said children or any of them, and did not render or constitute the said remitted sums a property or concern of the said infants, and the mere exercise of the discretion by the Trustees in remitting such sums to the Appellant did not constitute her a Guardian of the property and concern of the said infants, and that on the facts proved and on the true construction of the said Will and of the said Statutes, the said remittances were in the nature of voluntary payments.

10. The Surveyor contended on behalf of the Crown:—

(*a*) That as by the provisions of the Will of the late Marshall Field the Trustees are directed to make provision for the suitable maintenance and education of his grandchildren, the Trustees, notwithstanding the "uncontrolled "discretion" clause, had no option but to make such payments, seeing that they must be regarded as being in the opinion of the Trustees "necessary or advisable for the suit-"able maintenance and education" of the children and

that the children were not in their opinion otherwise sufficiently provided for.

(*b*) That the payments were not voluntary allowances as contended by the Appellant but were remittances of income to which the grandchildren of the Testator were legally entitled under the provisions of their grandfather's Will.

(*c*) That the Appellant as Guardian of the Testator's grandchildren was correctly assessed in respect of the said remittances under the provisions of Section 41 of the Income Tax Act, 1842.

11. The Commissioners, after hearing and fully considering the evidence and arguments, found:—

That the Appellant received certain remittances amounting to the sum of £274 in her own right, and further remittances, the amount of which was not disclosed, as Guardian of her said three children under the provisions of the Will of their grandfather, the late Mr. Marshall Field, and held that she was liable to be assessed in respect of the said remittances and they confirmed the assessment accordingly.

Whereupon the Appellant expressed dissatisfaction with the determination of the Commissioners as being erroneous in point of law so far as the decision related to her liability to be assessed as Guardian of her said three children in respect of the remittances made to her by the Trustees under the Will of the late Mr. Marshall Field.

No question arises in the Case as to the form of the assessment.

The sole question for the consideration of the Court is whether the Appellant is liable to be assessed as Guardian of her children in respect of the remittances made to her under the provisions of the Will of the late Mr. Marshall Field. If the question is answered in the negative and in favour of the Appellant it is agreed that the assessment is to be reduced to the sum of £274 as representing the amount of the remittance which she received in her own right, and if the question is answered in the affirmative and in favour of the Crown, the Case is to be referred back to the Commissioners to ascertain the amount of the remittances in question and to adjust the amount of the assessment accordingly.

C. V. KNIGHTLEY
CHARLES RODHOUSE
WM. ASHBY
} Commissioners of Taxes for the Division of Daventry.

Dated this 21st day of August, 1912.

The Case came on for hearing before Mr. Justice Horridge on the 28th July, 1913, when Judgment was reserved. Sir Alfred Cripps, K.C., and Mr. G. A. Scott appeared as Counsel for Mrs. Drummond and the Solicitor-General (Sir John Simon, K.C., M.P.) and Mr. W. Finlay appeared as Counsel for the Crown.

Judgment was given on the 30th July, 1913, in favour of the Crown, with costs.

JUDGMENT.

Horridge, J.—The question in this Case is whether or not the Appellant as the Guardian of the infant children of Mr. Marshall Field, Junior, deceased, is liable to pay income tax on certain moneys which have been remitted to her in England by the Trustees of the Will of the late Mr. Marshall Field, of Chicago.

By that Will it was directed that out of the net income of the proportionate share of the trust estate held in trust for any child of Mr. Marshall Field, Junior, or issue of a child, the Trustees should make such provision from time to time as they in their uncontrolled discretion might think necessary or advisable for the suitable maintenance and education of such child or issue thereof, until such child or issue thereof should be entitled, under provisions thereinafter contained, to receive payments of income directly from the said Trustees, and that such provision should be paid over by the Trustees from time to time to each such child or issue thereof or to the guardian or guardians of each child or issue thereof, or might be otherwise applied for the benefit of each such child or issue thereof as the Trustees might think advisable, and if and so far as the suitable maintenance or education of any such child or issue thereof should from time to time appear to the Trustees to be sufficiently provided for in other ways or from other sources, the Trustees should refrain from making any provision therefor out of the trust estate. The income not so applied was to be accumulated on the trusts set out in paragraph 4 of the Case.

In paragraph 8 of the Case it is stated that it was admitted by the Appellant that considerable remittances, the subject of the present assessment, had been received by her from America from the Trustees in accordance with the provisions of the Will for the maintenance and education of her said three children. By Section 2, Schedule D of the Income Tax Act, 1853, a duty is imposed for and in respect of the annual profits and gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situated in the United Kingdom or elsewhere. By the rule under Schedule D contained in the Income Tax Act, 1842, duties are to be paid by the persons receiving or entitled unto the same, and by the 5th Case to Schedule D of the same Act, under which Case the Crown claim the duty in question, the duty is to be charged in respect of possessions in the British Plantations in America or in any other of Her Majesty's dominions out of Great Britain and foreign possessions, and the duty to be charged is to be computed on a sum not less than the full amount of the actual sums annually received in Great Britain.

The Appellant in this case is sought to be charged under Section 41 of the Income Tax Act, 1842, as the Guardian of the infants for whose benefit the sums in question were remitted. For the Appellant it was argued that the sums in question were merely voluntary payments, as the remitting of any sum whatever was entirely in the discretion of the Trustees; and it was further

argued that the Trustees could have paid the bills for the maintenance and education of the children by remitting the money to pay such bills direct to England without paying it either to the children or to the Guardian. As appears from the case of *Colquhoun* v. *Brooks* (14 Appeal Cases, 493)(1), in the opinion of Lord Macnaghten, at page 514, the word " possession " is to be taken in the widest sense possible as denoting everything that the person has as a source of income.

One must consider the actual facts of the Case, which were that the Trustees had in fact exercised a discretion and had remitted moneys for the benefit of the three children for the purposes of their maintenance and education. It seems also to me to be clear from the rule to, and the 5th Case to, Schedule D of the Income Tax Act, 1842, that the person receiving moneys is a person to be charged.

I take the view that the proportionate shares of the trust estates held in trust for the children were, as to each of the children, a foreign possession, and that the sums remitted were sums actually received in respect of foreign possessions. If I am wrong in this, I am further of opinion that when once the discretion had been exercised, the moneys to be remitted and which were in fact subsequently remitted, were in themselves foreign possessions in respect of which the full amounts were received in Great Britain.

For these reasons I am of opinion that the decision of the Commissioners was right and that the Appeal should be dismissed with costs.

Mrs. Drummond having given Notice of Appeal, the Case was heard in the Court of Appeal on the 4th and 5th February, 1914, by the Master of the Rolls, The President of the Probate, Divorce and Admiralty Division and Mr. Justice Joyce. Sir R. B. Finlay, K.C., and Mr. G. A. Scott appeared as Counsel for Mrs. Drummond, and the Attorney-General (Sir John Simon, K.C., M.P.) and Mr. W. Finlay appeared as Counsel for the Crown. On the 27th February, 1914, Judgment was delivered in favour of the Crown with costs, affirming the decision of the Court below (Mr. Justice Joyce dissenting).

JUDGMENT.

Cozens-Hardy, M.R.—Mr. Marshall Field, of Chicago, by his Will, dated June 14th, 1904, made very large provisions for his son, Marshall Field, Junior, and his issue. The son died in November, 1905, in the lifetime of the Testator, who died in January, 1906. The son left three children, two boys and one girl, all of whom are still infants. Their mother, now Mrs. Drummond, is their Guardian. They are residing with her in England. Considerable remittances have been received by her

(1) 2 T.C. 490.

from the Trustees in America for the education and maintenance of the three children. The question on this appeal is whether she is liable to be assessed as Guardian of her children in respect of these remittances. The answer to this question depends (1) upon the true construction and effect of the elaborate Will, and (2) upon the construction of Section 100, Case 5, of the Income Tax Act, 1842, and of Section 41 of the same Act, and upon Section 2, Schedule D, of the Act of 1853. In the event, which happened, of the son's death in the Testator's lifetime, a sum of 5,000,000 dollars was given to Trustees who were "to hold the "trust estate and to apply the net income and ultimately the "capital as hereinafter provided for the use and benefit of all "the children of my son surviving him and for the use and "benefit of the issue of any child or children that may have "died, said issue taking a parent's share *per stirpes*." Each of the two grandsons, Marshall and Henry, was in the events which happened to take two-fifths and Gwenderlyn one-fifth. Then follows the important clause. "Out of the net income of the "proportionate share of the trust estate held in trust for any "child of my son or issue of a child, I direct that said Trustees "make such provision from time to time as they in their uncon-"trolled discretion may think necessary or advisable for the "suitable maintenance and education of such child or issue "thereof until such child or issue thereof shall be entitled under "provisions hereinafter contained to receive payments of income "directly from said Trustees. Such provision shall be paid over "by said Trustees from time to time to each such child or issue "thereof or to the guardian or guardians of each child or issue "thereof, or may be otherwise applied for the benefit of each such "child or issue thereof as said Trustees may think desirable. If "and so far as the suitable maintenance or education of any such "child or issue thereof shall from time to time appear to said "Trustees to be sufficiently provided for in other ways or from "other sources said Trustees shall refrain from making any "provision therefor out of said trust estate." Subject to the directions respecting provision for maintenance and education of the three grandchildren, "the net income of their respective "shares" is to be accumulated until each grandchild attains 25, when one-half of the net income of their respective shares enhanced by accumulations is to be paid to them quarterly during their lives, with similar provisions as to the other moiety when each grandchild attains 35. Subject to the above provisions, the trust estate is settled upon the issue of the grandchildren; on failure of all those trusts, the estate is given to the Testator's brothers and sisters.

It seems to me that each grandchild has a contingent interest in the trust estate. (1) If he attains 25 he will be entitled to a vested life interest in one-half the income of his proportionate share, including accumulations up to that date. (2) If he attains 35 he will be entitled to a vested life interest in the remaining half of the income of his proportionate share, augmented by accumulations. (3) He will also be entitled before attaining 25 to such income as the Trustees in the honest exercise of their

discretion think necessary or advisable for his suitable maintenance and education. (4) If the Trustees neglect or decline to exercise their discretion, I think the American Court might interpose and give relief. The 22nd Clause of the Will contains provisions which purport to deprive the grandchildren, even after attaining 25, of any right to demand payment against the Trustees. Such provisions are in my opinion of very doubtful effect.

It remains to consider whether there is a "possession" in America, in respect of which sums have been annually received in Great Britain and remitted from America. I think the trust fund is a "possession" in America. I cannot doubt that any income remitted from America to a grandchild after attainment of 25 would be taxable, although the grandchild has no interest in the capital. What is the position between 21 and 25? If the Trustees, in the honest exercise of their discretion, remit £1,000 a year to the grandchild, is that in any different position? I think not. When the discretion has been exercised by the Trustees, and to the extent to which it has been so exercised, the grandchild is entitled to the portion of the income so remitted. The £1,000 a year so paid would be allowed to the Trustees if the accounts of the trust estate were taken by the Court. I fail to appreciate the argument that it would be a voluntary gift like an allowance made by a father to a son. The decision of the Court of Session in *Duncan's Trustees* v. *Farmer*, 5 Tax Cases 417, is a direct authority to the contrary. That was not a case falling under Schedule E, but under Schedule D. It is irrelevant to point out that the discretion of the Trustees might have been exercised differently.

What is the position before 21, if during minority the Trustees in the honest exercise of their discretion remit £1,000 a year "to the Guardian," as they are authorised to do? The Guardian is the legal hand to receive, but the money is not in equity her money. She is accountable for the money to the infants. If their interest was vested and not contingent, and the income was paid to her, this could not be doubted. But, on principle, I think whatever money a guardian receives as guardian is the infants' money and must be accounted for by the guardian as such.

Section 41 of the Act of 1842 makes a guardian having the direction, control or management of the property or concern of an infant chargeable to income tax in like manner and to the said amount as would be charged if the infant were of full age, and see Section 92 of the Taxes Management Act, 1880.

The Commissioners held that Mrs. Drummond as Guardian of the infants was liable to be assessed in respect of the remittances. Mr. Justice Horridge has taken the same view. In my opinion his decision was correct, and this appeal should be dismissed with costs.

The President of the Probate Division.—I have had an opportunity of reading and considering the Judgment of the Master of the Rolls, and I agree entirely in its reasoning and its conclusions.

Therefore, I do not wish to add anything.

Joyce, J.—I regret to say that in this Case I do not see my way to agree with the conclusion which my brethren have arrived at.

The question in this Case is whether an allowance for maintenance made under a discretionary power to the mother of certain infants at present residing with her in this country by the Trustees in America of the Will of the father's father, an American whose estate is being administered there, is taxable in this country as being income of the infants.

There is no question of taxing the mother personally as the recipient of the allowance. It is the infants who are sought to be taxed.

In the Court below it was held that the moneys remitted were in themselves "foreign possessions" within the meaning of that expression in the Statute of 1842. This view was, I think, manifestly erroneous, and, as I understood the argument on the part of the Crown before us, it was not attempted to support it.

It was also held in the Court below that the proportionate shares of the trust estate held—or rather described or referred to in the grandfather's Will as being held—"in trust for the "children" were as to each child a foreign possession, meaning, I suppose, a foreign possession of the child's. This view, in my opinion, when the terms of the Will are examined, appears to me to be equally erroneous. These proportionate shares, though in some clauses of the Will referred to as "held in trust for any "child of my son or issue of a child," are not really held in trust for any child of the son, or in other words for any of these infants but, speaking broadly, are directed to be accumulated until the child attains 25, in which event, if and when it ever happens, the child will have a life interest in the income or a portion of the income of the accumulated fund. In the corpus—including the accumulated income—the child never takes anything. This accumulating fund is not now and possibly never may be a possession or property of the infant in any proper or fair sense of the term. It is certainly not so now, nor will it ever be unless or until the child, at present an infant, attains 25.

A merely future interest, *a fortiori* a mere contingent future interest which produces nothing to the owner while it remains future and contingent, cannot be taxable in my opinion under the Income Tax Acts.

If the allowances in question be taxable at all they are so only as being annual profits or gains under Schedule D in the Act of 1853. We have nothing to do with the Schedules in the Act of 1842. Whatever may or may not now be the statutory force of the Rules—which are merely rules as to modes of computation—in the Act of 1842, the Schedules of that Act have been superseded and replaced by the Schedules in the Act of 1853.

If I understand the matter rightly, the annual Finance Act, or whatever it may be called, always provides that Income Tax shall be charged at a certain rate—at present 1*s.* 2*d.* in the £. Then Section 26 of the Finance Act of 1896 provides: "Where "this or any other Act enacts that Income Tax shall be charged

" in any year at any rate, there shall be charged, levied, and paid " during that year in respect of all property, profits and gains " respectively described or comprised in the several Schedules A, " B, C, D, and E in the Income Tax Act, 1853, the tax at that " rate," and so on, explaining more fully how the rate is levied. This sends us back not to the Act of 1842 but to the Act of 1853, Section 2, which provides: " For the purpose of classifying and " distinguishing the several properties, profits and gains for and " in respect of which the said duties are by this Act granted, and " for the purposes of the provisions for assessing, raising, levying " and collecting such duties respectively, the said duties shall " be deemed to be granted and made payable yearly for and in " respect of the several properties, profits and gains respectively " described or comprised in the several Schedules contained in " this Act and marked respectively A, B, C, D and E."

Then I pass over Schedules A, B, C and E, which have nothing to do with this case, and the provision in respect of Schedule D is this: " For and in respect of the annual profits or gains arising " or accruing to any person residing in the United Kingdom " from any kind of property whatever whether situate in the " United Kingdom or elsewhere," and then lower down, passing over the intermediate words which are immaterial, " and for and " in respect of all interest of money, annuities, and other annual " profits and gains not charged by virtue of any of the other " Schedules contained in this Act."

Now it was not and could not be contended that any of the Schedules A, B, C or E comprises or refers to the allowances in question. If chargeable at all they can only be so under Schedule D of the Act of 1853, and I understand it to be claimed by the Crown that these allowances are annual profits or gains arising or accruing to these infants residing in the United Kingdom from property which must be property of theirs situate elsewhere than in the United Kingdom. The only Income Tax taxable under this Schedule is, so far as material to the present case, " annual profits or gains arising or accruing to any person " residing in the United Kingdom from any kind of property " whatsoever "—which I understand to be property of the persons proposed to be taxed—" whether situate in the United Kingdom " or elsewhere."

Now, as I understand, it could not be disputed that mere voluntary allowances or payments, whether for an infant or to an adult, are not taxable as income of the infant or recipient, and for this reason, they are not annual profits or gains of any property of the infant or recipient, nor indeed are they " annual profits or gains " at all in my opinion within the meaning of that expression in the Act of 1853.

If the allowances now in question had been made by the testator himself, the grandfather of the infants, during his life to their mother, his daughter-in-law, such allowances would not have been taxable as income—annual profits or gains—of the infants, nor of the mother to whom they are made in repayment of her expenditure upon the infants. Still less in my opinion could it have been contended that payments made by the testator

directly in discharge of bills for expenses incurred on behalf or for the benefit of the infants would have been taxable as income of theirs.

In my opinion, the securities and investments, whatever they may be, from the income of which the money is derived which provides the allowances now in question, are in no sense property or possessions of the infants. Such income does not and never will belong to the infants under any circumstances; it is not theirs even contingently. Their future contingent life interests do not produce any income at present and may never arise at all.

That the liability of any of the infants to be taxed in respect of these discretionary allowances for maintenance should in any way depend upon the circumstance of a future contingent life interest being limited to such infants in the accumulated fund would to my mind be an absurdity.

If the infants be taxable at all in respect of the allowances they must, I think, be equally so, though no future contingent life interests were limited to them in any share under the grandfather's Will. The fact of there being limitations of these future contingent life interests to the infants is in my opinion absolutely immaterial to the question the Court has now to decide. Considering the whole of that Will I do not agree, nor indeed do I think it was contended before us, that any Court in America—and it is only the Courts in America that would have jurisdiction—would or could at the instance of the infants or any one else compel the Trustees to exercise their uncontrolled discretionary powers of maintenance under this Will.

At all events it is quite clear, I think, that the Trustees could not be compelled to make any such allowance in money as they are doing to the mother. If they were bound to exercise the power, they might either make an allowance to the Guardian or they might otherwise apply the money that they thought proper to apply for the benefit of such child or issue thereof as they might think desirable, making the payments direct. They might, if they pleased, refrain altogether from exercising their discretionary power, and, as I say, at all events if they chose they might defray all bills or expenses by direct payment to the persons with whom such bills might have been incurred on behalf of the infants in respect of their maintenance and education. No Court could, in my opinion, hold that such payments were taxable as income of the infants, nor indeed would they pass through the hands either of the infants or of their Guardian.

Again if the Trustees make an allowance to the mother they are entitled to prescribe and require an undertaking from her as to how the money shall be expended. The money when paid to her is not, in my opinion, free income of the infants which she as the Guardian might dispose of as best she pleased or which she would be bound to deal with and account for according to the general law with respect to the income of a ward received by its guardian.

My conclusion is that the allowances in question are not annual profits or gains arising or accruing to the infants from any property of theirs in the United Kingdom or elsewhere, nor

indeed, in my opinion, are they annual profits or gains arising or accruing to them at all within the meaning of the Act of 1853.

I have one other observation to make. It is a well established rule that the subject is not to be taxed without clear words for the purpose (*see* the observation of Baron Parke in *re Micklethwait*)(1) and, therefore, if the Crown cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law he may be. That is what Lord Cairns says in *Partington* v. *The Attorney General*.(2)

Upon the whole I am of opinion that the decision of the Court below in this case cannot be supported and that this Appeal ought to be allowed.

Cozens-Hardy, M.R.—The Appeal will be dismissed with costs.

The Case was taken by Mrs. Drummond, on appeal, to the House of Lords and was argued before their Lordships on the 8th and 10th June, 1915. Sir R. B. Finlay, K.C., M.P., Mr. P. O. Lawrence, K.C., and Mr. G. A. Scott appeared as Counsel for Mrs. Drummond and the Attorney-General (Sir Edward Carson, K.C., M.P.), the Solicitor-General (Sir F. E. Smith, K.C., M.P.), Mr. William Finlay, K.C. and Mr. T. H. Parr appeared as Counsel for the Crown. On the latter date, Judgment was given in favour of the Crown with costs, affirming the decision of the Court of Appeal.

JUDGMENT.

Earl Loreburn.—My Lords, in this Case an American gentleman left by his Will a large sum of money to Trustees upon trusts which tied up his property with a view to its accumulation for a long time, and created a somewhat complicated series of interests. We have, in my opinion, no concern with the ultimate distribution of these funds. We are concerned only with one provision. The Will authorised and indeed required the Trustees in America to exercise their discretion as to providing money for the maintenance of the testator's grandchildren, who are now minors. In pursuance of this authority the Trustees exercised their discretion and remitted to the now Appellant, the mother of these children, certain sums of money for their maintenance. And the Court of Appeal by a majority has held that these sums are chargeable with income tax because the lady and the children reside in England and the money was received in England. I think the Court of Appeal and Mr. Justice Horridge, whose decision they affirmed, were perfectly right. The Income Tax Acts are framed in very general terms. It is necessary so to frame Acts of this kind lest some case manifestly within the purpose of the Legislature may escape the tax. But Courts of Law have cut down or even contradicted the language of the

(1) (1855) 11 Ex. 452, 456 ; 25 L.T. Ex. 19
(2) (1869) L.R. 4 E. & I. App. H. L. 100, 123.

Legislature when on a full view of the Act, considering its scheme and its machinery and the manifest purpose of it, they have thought that a particular case or class of cases was not intended to fall within the taxing clause relied upon by the Crown. A notable instance is the case of Colquhoun and Brooks(1) decided nearly thirty years ago and always followed. It was a decision of this House. This and similar precedents are often quoted in support of attempts to pare down the statutory language.

In the present case your lordships were urged to do the same thing as was done in the case of Colquhoun and Brooks(1), but to do it in respect of other language, and in my opinion without any justification at all.

It is abundantly clear that the present case falls within the letter of the Act. These sums were derived from remittances from America payable in Great Britain, or from money or value received in Great Britain and arising from property that has not been imported into Great Britain. They also come within the words of Schedule D as profits or gains accruing from property to a person residing in the United Kingdom.

It was argued, however, that these allowances sent from America are not "income" of the children because they were voluntary payments by the trustees. I do not assent to the proposition that a voluntary payment can never be charged, but it is enough to say that these were not voluntary payments in any relevant sense. They were payments made in fulfilment of a testamentary disposition for the benefit of the children in the exercise of a discretion conferred by the Will. They were the children's income, in fact. Then it was contended that the mother to whom the money was paid as guardian could not be charged as guardian under Section 41, because she had not control of the foreign property out from which they were derived. I do not find any language in the Section which gives countenance to this argument. The lady had control of the sums which are sought to be charged with the tax.

My Lords, I can see nothing in these Acts which leads to the view that property of this kind was intended to be free from this taxation, and the words of the Act clearly impose it. Lord Cairns long ago said that "if the person sought to be taxed comes "within the letter of the law he must be taxed."(2) And though there have been cases in which the letter of the law has been disregarded in view of other statutory language, I think it can be done only in case of necessity. It must be a necessary interpretation.

Lord Atkinson.—My Lords, I concur, and I have nothing to add.

Lord Parker of Waddington.—My Lords, I too concur. The monies transmitted in this case from America were certainly profits and gains arising from property. The property from which they arose was, equally clearly, a foreign possession within the meaning of Case 5, as interpreted by the decisions of this

(1) 2 T.C. 490.
(2) In *Partington* v. *Attorney-General* (1869), L.R. 4 E. & I. App. H.L. at p. 122.

House. Why then should these monies not be subject to income tax?

As I understand the Appellants' argument, it depends on the proposition that Case 5 applies only to profits or gains from foreign possessions when these possessions belong to the person sought to be assessed, and that this property did not in the present case belong either to the infants or to their Guardian.

In my opinion it is enough for Case 5 to apply that the person to be assessed has such an interest in the property as to entitle him to the profits or gains in question. The infants had in my opinion such an interest. Though they might be incapable, because of their age, of giving a receipt for the money, it is in my opinion none the less clear that the money in question was as soon as the Trustees had exercised their discretionary trust held in trust for these infants as beneficiaries. Moreover I do not see why the Guardian who received the money for application on the infants' behalf should not be assessable under Section 41. This Section is a collecting section and not a taxing section, and there is no reason in principle why it should not receive a liberal interpretation. It would, in my opinion, be too narrow a view if it were held that the Section was only applicable if the guardian or other person mentioned in this Section actually managed or held the control of this property or concern from which the profits or gains sought to be assessed arose. It seems to me enough that the guardian or other person should receive and have the direction and application on behalf of the owner of the profits and gains sought to be assessed.

Lord Sumner.—My Lords, I concur.

Lord Wrenbury.—My Lords, upon this appeal there are two questions for decision—first, whether the remittances made to this country are income subject to income tax, and secondly, whether if they are, the Appellant is a person proper to be assessed.

Upon the former question the first matter is to investigate, upon the provisions of the Will, what the remittances in question are. In the events which have happened, the Trustees are by the Will directed to hold the trust estate and to apply the net income for the use and benefit of the children. So far, I find a direct and unfettered gift of the income in favour of the children. There follows a direction that out of the net income of the proportionate share held in trust for any child the Trustees make such provision from time to time as they in their uncontrolled discretion think necessary or advisable for the maintenance and education of the child until he is entitled under provisions after contained, to receive the income directly from the Trustees. This provision may be paid to the child or to the guardian of the child. Subject to the above directions the income of the shares is to be accumulated until dates—which have not yet arrived—at which dates payments are to be made to the children direct. In all this I find nothing contingent. The gifts are each one of them in favour of the children, but the dates for payment to the children are fixed with reference to the exercise by the Trustees of their discretion, or the ages from time to time of the children. At the time with which your Lordships have to do, there could be no payment except by exercise of the discretion vested in the Trustees; but so soon as their discretion is exercised

in favour of the child, the resulting payment seems to me, upon the language of the Will, to be a payment of income to which the child is entitled by virtue of the gift made by the testator. I cannot see any ground upon which such income is not subject to income tax.

My Lords, let me, however, assume that the above reasoning is not correct and that the interest of the infants is contingent; that is to say, that the income is income of the child in one contingency and income of another (the person entitled under the gift over) in another contingency—that the money which is paid for the benefit of the child is not income of the child rendered payable by the action of the Trustees, but is income which, but for the action of the Trustees, would have been income of someone else (the person entitled under the gift over), which only comes to the child because the Trustees under the provisions of the Will divert it from that other person and make it available for the child. It remains, however, that in this case the Trustees exercise their discretion in favour of the child, the interest of the child ceases to be contingent and becomes vested. Whether the money is paid to the child, or to the guardian of the child, or to the schoolmaster, or to the tailor or other person who supplies the wants of the child, it is paid to or to the use of the child and is income of the child.

It is, however, contended that the case is not within the Fifth Case of the Act of 1842, for that this is not a foreign possession. This argument, if I rightly understand it, is that property, *e.g.*, income derived from assets in another country, is not a foreign possession unless the person taxed owns the corpus of the foreign possession. If this were true no life tenant or other person having a limited interest in property abroad would be assessable under the Fifth Case. The test is not, I think, whether there is an absolute interest in a foreign possession, but whether there is such an interest in a foreign possession that the party assessed derives income from it. The case is, I think, within the Fifth Case, and whether this is so or not, it is, I think, within Schedule D. of the Act of 1853. The income is annual profits arising to a person residing in the United Kingdom from property situate elsewhere than in the United Kingdom. For these reasons I submit to your Lordships that the remittances are income subject to income tax.

Then is the Appellant a party assessable? I think she is. She is trustee of the fund for the child and Guardian of the child, and has the direction, control or management of the income, being property of the child. The language of Section 41 of the Act of 1842 meets the case.

My Lords, I agree that the appeal fails and should be dismissed.

Questions put.

That the Order appealed from be reversed.

The Not Contents have it.

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

The Contents have it.