HIGH COURT OF JUSTICE—3RD AND 4TH JULY, 1951

COURT OF APPEAL—21ST MAY, 1952

HOUSE OF LORDS—10TH, 11TH, 17TH, 18TH, 24TH, 25TH AND 29TH JUNE AND 20TH JULY, 1953

Dale

v.

Commissioners of Inland Revenue[1]

Special Contribution — Payments to trustee under a will — Whether investment income — Income Tax Act, 1918 (8 & 9 *Geo.* V, *c.* 40), *Section* 14 (3); *Finance Act,* 1948 (11 & 12 *Geo.* VI, *c.* 49), *Sections* 49 (1) *and* 68 (2).

The Appellants were the executors and trustees under a will. In addition to their normal duties as such the trustees had special duties, which occupied the Appellant D for about two hours a day, in connection with the control of a company established by the testator and the administration of a research fund and a research museum and library fund set up under his will. The will provided that £1,000 *a year (free of tax) should be paid to each trustee so long as he acted as such and did not receive remuneration from the company or its associated organisations.*

D was assessed to Special Contribution on the footing that the income paid to him under the will was investment income. On appeal by D (and by the trustees against a notice relating to the amounts of Contribution recoverable from them as " indirect contributors ") the Special Commissioners held that the source of the income was the bequest or gift of the annuity and not an office of profit, and they dismissed the appeals. The Appellants demanded a Case.

Held, *that the income of D was earned income arising from an office of profit and was not chargeable to Special Contribution.*

CASE

Stated under the Finance Act, 1948, Section 60, and the Income Tax Act, 1918, Section 149, by the Commissioners for the Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on 6th January, 1950, Sir Henry Hallett Dale, O.M., G.B.E., hereinafter called " the Appellant ", appealed against an assessment to Special Contribution made upon him under the provisions

[1] Reported (H.C.) [1951] 2 All E.R. 517; [1951] 2 T.L.R. 522; [1951] 1 Ch. 893; (C.A.) 213 L.T. 340; [1952] 1 T.L.R. 1566; [1952] 2 All E.R. 89; [1952] 1 Ch. 704; (H.L.) [1953] 2 All E.R. 671; 216 L.T. 392; [1953] 3 W.L.R. 448.

of Part V of the Finance Act, 1948, and the trustees of the will of Sir Henry Wellcome, deceased (hereinafter called "the trustees") appealed against a notice given to them under Section 60 (2) (*a*) of the Finance Act, 1948, being a notice stating the amount of the Contribution assessed on the Appellant attributable to income arising under the Wellcome Trust. The Appellant also appealed against a "like notice" given to him under Section 60 (2) (*a*) aforesaid.

2. The sole question in dispute concerned an amount of £1,446 which was included in the aggregate investment income of the Appellant for the purpose of the assessment. The said amount represented a sum (together with the appropriate additions thereto in respect of Income Tax and Surtax) received by the Appellant from the trustees in the financial year 1947–48 by virtue of a provision hereinafter set out in the will of Sir Henry Wellcome, deceased.

It was not disputed by the trustees that if the said amount was properly included in the aggregate investment income of the Appellant, the amount of Contribution attributable thereto was recoverable from them by virtue of Section 56 of the Finance Act, 1948, and the sole grounds of the appeals by the Appellant and by the trustees were that the said amount was not investment income.

3. Section 49 (1) of the Finance Act, 1948, provides as follows:—

> "Subject to the provisions of this section and of the Tenth Schedule to this Act"

(which Schedule is not material in this appeal)

> ". . . the expression 'investment income' means income from any source other than a source of earned income."

Section 68 (2) of the Finance Act, 1948, provides:—

> "Save as expressly provided in this Part of this Act, expressions used therein have the same meanings as in the Income Tax Acts."

Section 14 (3) of the Income Tax Act, 1918, provides:—

> "For the purposes of this section the expression 'earned income' means:—
>
> (*a*) any income arising in respect of any remuneration from any office or employment of profit held by the individual . . .; and
>
> (*b*) any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual; . . ."

4. There is annexed hereto, marked A, and forms part of this Case(1), a printed copy of the will of Sir Henry Wellcome, deceased, who died on 25th July, 1936.

Clause 1 of the will provides:—

> "1. I APPOINT GEORGE HENRY HUDSON LYALL, M.B.E., of 5 Bishopsgate in the City of London Solicitor Sir WALTER FLETCHER K.B.E. of 15 Holland Street W.8 in the County of London Sir HENRY HALLETT DALE Knight, C.B.E., M.D., F.R.C.P., F.R.S., M.A. of Mount Vernon House Hampstead in the County of London LANCELOT CLAUDE BULLOCK of 5 Bishopsgate aforesaid Solicitor and MARTIN PRICE of Empire House St. Martin's-le-Grand in the City of London Chartered Accountant to be my EXECUTORS and TRUSTEES and they and the survivor of them or other the Trustees or Trustee for the time being of this my Will are hereinafter called "my Trustees" And after the death or retirement of either the said Sir Walter Fletcher or the said Sir Henry Hallett Dale or should either of them predecease me or for any reason be unfit unable or unwilling to act in the capacities aforesaid then I appoint Thomas Renton Elliott, C.B.E.,

(1) Not included in the present print.

D.S.O., M.D., F.R.C.P., F.R.S. of 8 Cheyne Walk Chelsea in the County of London to be a Trustee and Executor in his place I GIVE AND BEQUEATH the sum of One Thousand Pounds a year free of duty and tax to each Trustee for the time being of my Will so long as he shall continue to act as Trustee and shall not be in receipt of remuneration from the Foundation (other than remuneration for professional services of the character referred to in Clause 18 hereof) or from any of the organizations associated therewith."

Clause 18 provides:—

"18. I DECLARE that my Executors and Trustees may instead of acting personally employ and pay a solicitor or other professional person to transact any business or do any act required to be done in connection with the administration of my estate including the receipt and payment of money and that any Executor or Trustee being a solicitor or other professional person as aforesaid may be employed for the purposes aforesaid and shall be entitled to charge and be paid all usual professional charges for business transacted and acts done by him or any partner of his in connection with the administration of my estate or the execution of any of the trusts powers and provisions therein contained including acts which a Trustee not being in any profession or business could have done personally."

Clause 19 provides:—

"19. I DESIRE that the number of my Trustees shall not remain longer than is possible at less than five and that if at any time there shall be fewer than five of such Trustees then a new Trustee or new Trustees shall as soon as practicable be appointed I consider that five is the ideal number of Trustees. Under no circumstances do I desire my Trustees to be more than five in number. I DESIRE that as far as possible at all times two of my Trustees shall be men who have had experience and be well qualified in medicine and allied sciences and that two shall be men of wide practical business experience one or both of whom should be of high standing and ability in the practice of law and with exceptional experience and qualifications in the conduct and administration of large and important estates."

5. By an Order of the Chancery Division of the High Court of Justice made 1st May, 1939, upon the application of the trustees, it was ordered that for the purpose of effectuating future appointments of new trustees of the will of Sir Henry Wellcome, deceased, and of regulating the same and of remunerating the trustees thereof the provisions of the scheme set forth in the schedule thereto be carried into effect. A copy of the said Order and Schedule is annexed hereto, marked B, and forms part of this Case(1).

6. The trustees, who are now the Appellant, Mr. L. C. Bullock, Mr. M. Price and Professor T. R. Elliott (all of whom were appointed trustees by the said will) and Lord Piercy (who was appointed subsequently), duly paid to the Appellant each year the amounts to which he is entitled under clause 1 of the will he having so long continued to act as a trustee thereof.

Such amount, as regards the year 1947–48, was not £1,000 free of duty and tax as provided therein, but a smaller sum being the "appropriate fraction" thereof determined by reference to Section 25 of the Finance Act, 1941. This sum was received by the Appellant as a net payment after deduction of Income Tax, and it was not disputed that the gross equivalent thereof, together with the Surtax attributable thereto made good by the Trustees, amounted to the sum of £1,446 referred to in paragraph 2 of this Case.

7. The special duties of the trustees (including the Appellant) in exercise of the trusts and powers contained in the will, apart from their duties in connection with the payment of certain annuities (clause 7 of the will), in connection with a memorial to the testator's parents (clause 10) and the

(1) Not included in the present print.

administration of the residuary trust estate (clause 12) may be shortly summarised as follows:—

(1) the exercise of the wide powers conferred on them by clause 2 in relation to the control of The Wellcome Foundation, Limited:

(2) the administration of the research fund established by clause 13, and the application of moneys to and among the various research objects therein indicated:

(3) the administration of the research museum and library fund established by clause 16.

In carrying out these duties the trustees are guided by a memorandum dated 29th February, 1932, signed by the testator, which sets out his policy and aims for the guidance and assistance of his trustees. A printed copy of such memorandum was produced to us; it is not annexed hereto, but may be referred to if necessary as part of this Case.

8. The balance sheet and accounts of the trustees for the year ended 31st August, 1948, were produced to us, and are annexed hereto, marked C, and form part of this Case(1). From these it appears that during the said year expenditure amounting to £16,723 chargeable to the research fund was incurred for seventeen separate objects, and expenditure amounting to £12,025 was incurred chargeable to the research museum and library fund.

During the year 1947-48 the trustees met fortnightly; in addition to their duties in connection with the control of the business of The Wellcome Foundation, Limited, and the administration of the funds and investments, they had a considerable amount of work in relation to the distribution of the funds and in particular the investigation of applications for grants from the research fund. Each application was thoroughly examined, and a list of 64 rejected applications was shown to us; a great deal of this work fell on the Appellant, being one of the trustees specially qualified in medicine and the allied sciences.

9. The Appellant, who holds many degrees and distinctions, and was at one time President of the Royal Society and Chairman of the Scientific Advisory Committee to the War Cabinet, gave evidence before us (which we accepted) that he habitually spent about two hours a day dealing with the affairs of the trust, the trustees providing him with an office and a secretary for the purpose. Among the duties undertaken by the trustees were the establishment of research fellowships in veterinary medicine and pharmacy, and participation in the award of these. They have provided endowments for University Chairs of Tropical Medicine and Pharmacology. In pursuance of these duties a great deal of work was done by the Appellant.

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

(1) that the amount in dispute was income of the Appellant arising in respect of remuneration from an office of profit held by the Appellant;

(2) alternatively, that the said amount was income from property which formed part of the emoluments of an office of profit held by the Appellant;

(3) that the said amount was "earned income" as defined in Section 14 (3) of the Income Tax Act, 1918, and accordingly was not "investment income" for the purposes of Special Contribution;

It was further contended on behalf of the Appellant:—

(4) that the assessment should be reduced by excluding the said amount from the computation of the aggregate investment income of the Appellant;

(1) Not included in the present print.

(5) that the "like notice" issued to the Appellant under Section 60 (2) (*a*) of the Finance Act, 1948, be discharged.

It was further contended on behalf of the trustees:—

(6) that the notice issued to them under the said Section 60 (2) (*a*) be discharged.

11. It was contended on behalf of the Commissioners of Inland Revenue:—

(1) that the amount in dispute was not earned income as defined by Section 14 (3) of the Income Tax Act, 1918;

(2) that the said amount was income of the Appellant from a source other than a cource of earned income, and was investment income for the purposes of Special Contribution;

(3) that the assessment was correct in principle and (subject to some necessary adjustments with which we were not concerned) should be confirmed;

(4) that the notice issued to the trustees and the "like notice" issued to the Appellant under Section 60 (2) (*a*) of the Finance Act, 1948, were correct in principle and should stand good (subject to the like adjustments).

12. We were referred (*inter alia*) to the following decisions:—

Attorney General v. *Eyres & Others*, [1909] 1 K.B. 723.

Cowan v. *Seymour*, 7 T.C. 372.

Young v. *The Naval, Military & Civil Service Co-operative Society of South Africa, Ltd.*, [1905] 1 K.B. 687.

Baxendale v. *Murphy*, 9 T.C. 76.

Jones v. *Wright*, 13 T.C. 221.

Bennett v. *Marshall*, 22 T.C. 73.

Hearn v. *Morgan*, 26 T.C. 478.

13. We, the Commissioners who heard the appeal, gave our decision in the following terms:—

The question for our decision is whether the part of the income of Sir Henry Dale which is in issue is "income from any source other than a source of earned income" within Section 49 (1) of the Finance Act, 1948.

Although *Attorney-General* v. *Eyres*, [1909] 1 K.B. 723, was not cited in *Baxendale* v. *Murphy*, 9 T.C. 76, and the question whether the income there in question arose from an "office" was not considered, nevertheless we regard the latter case as deciding that the income was an

> "annual payment . . . payable by virtue of a deed or will"

chargeable to Income Tax under Rule 1 (*a*) of Case III of Schedule D.

After consideration of all the authorities cited to us, we are of opinion that in view of *Baxendale* v. *Murphy* (*supra*) we ought to hold, and we do hold, that the source of the income in question is the bequest or gift of the annuity by the testator, and the source is not an office of profit held by Sir Henry Dale.

Accordingly we hold that the said income is "investment income" of Sir Henry Dale for the purposes of Part V of the Finance Act, 1948:

we dismiss the appeals of Sir Henry Dale and of the trustees of the will of Sir Henry Wellcome deceased, and we leave the figures to be agreed.

We subsequently reduced the assessment to the agreed figure of £2,926 and reduced the amount of the Contribution attributable to the income arising under the said will to £391 6*s.* 10*d.*

The Appellant and the trustees immediately after the determination of the appeal declared to us their dissatisfaction therewith as being erroneous in point of law and in due course required us to state a Case for the opinion of the High Court pursuant to the Finance Act, 1948, Section 60, and the Income Tax Act, 1918, Section 149, which Case we have stated and do sign accordingly.

The question of law for the opinion of the Court is whether our decision in paragraph 13 of this Case is correct.

R. A. Furtado,
F. N. D. Preston, } Commissioners for the Special Purposes of the Income Tax Acts.

Turnstile House,
94–99, High Holborn,
London, W.C.1.

29th November, 1950.

The case came before Harman, J., in the High Court on 3rd and 4th July, 1951, and on the latter date judgment was given against the Crown, with costs.

Mr. J. Millard Tucker, K.C., and Mr. F. N. Bucher appeared as Counsel for Sir Henry Dale and the trustees, and Mr. John Pennycuick, K.C., Mr. J. H. Stamp and Mr. Reginald P. Hills for the Crown.

Harman, J.—The Appellant, Sir Henry Dale, was one of the trustees appointed by the will of the late Sir Harry Wellcome under which, as I think is publicly known, an organisation called the Wellcome Foundation was set up, a charitable trust to administer which the testator appointed persons whom he thought particularly qualified to act in various capacities. One of these was a qualification in the medical and allied sciences. There is no doubt that Sir Henry Dale was well qualified in this respect. He holds the O.M. He was at one time president of the Royal Society and chairman of the Scientific Advisory Committee to the War Cabinet. To each of these trustees the testator gave the sum of £1,000 a year free of tax

> ". . . so long as he shall continue to act as Trustee and shall not be in receipt of remuneration from the Foundation".

The trusteeship was subsequently settled by a scheme embodied in the Order of the Chancery Division made in 1939 regulating the method of appointment of trustees, and each trustee is to be paid a sum at such a rate as after deducting Income Tax at the standard rate and after providing for that part of the Surtax payable by him which is attributable to his remuneration leaves a clear sum of £1,000 a year.

Sir Henry Dale has performed the duties so desired of him by the testator ever since; and they are onerous duties. They involved, as he said, and as the Special Commissioners accepted, fortnightly meetings and working for two hours a day in an office, with no doubt a good deal of thought and care besides.

(Harman, J.)

In 1948 there was passed by Parliament as part of the Finance Act of that year a provision for a new tax called the Special Contribution. That was levied by Section 47 of the Act by a poundage on individuals whose total income for the year exceeded £2,000 and whose aggregate investment income for the year exceeded £250. To see what the rather obscure term "investment income" means, one must turn to Section 49 which says:

> "the expression 'investment income' means income from any source other than a source of earned income".

That is a tautologous phrase, which I take to signify any income not being earned income. One must then find for this purpose what is not earned income, what is investment income, and one turns over to Section 68 (2) of the Act, which is a subsidiary definition Section, and there finds these words:

> "Save as expressly provided in this Part of this Act, expressions used therein have the same meanings as in the Income Tax Acts".

The case was argued on the footing that there is no other express provision, and if so one must look at the Income Tax Acts, and first at the Finance Act, 1920, Section 33, where are these words:

> "In this Part of this Act and in any subsequent enactment relating to income tax, except where otherwise expressly provided—The expression 'earned income' means income which is earned income within the meaning of section fourteen of the Income Tax Act, 1918 . . ."

Once again one turns back, and finds that Section 14 (3) of the Income Tax Act, 1918, has a definition of "earned income" only for the purpose of that Section, but having by virtue of the 1920 Act the wider application I have mentioned. Section 14 (3) (*a*) reads in these terms:

> "For the purposes of this section the expression 'earned income' means —(*a*) any income arising in respect of any remuneration from any office or employment of profit held by the individual . . ."

There I can stop. Section 14 (3) (*b*) reads:

> "any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual".

After that Act had been passed, in due course of time a demand was made on Sir Henry Dale to pay Special Contribution upon the footing that this £1,000 a year was part of his investment income, and that is the question which the Commissioners had to decide. What they have in fact decided is that this is income which is not earned income. At first sight I must confess that was a view which did not appeal to me at all. In fact I rather felt a sense of frustration at being told that remuneration paid to a very distinguished man for working as I have described is not earned income. But I was told that, whereas to the ordinary man it might be absurd, in this branch of the law one enters the realms of art and nothing means necessarily what it seems to mean when an ordinary man looks at it and that, by the very definition of "earned income" to which the 1948 Act points back, I am driven to take the view that this was income not being earned income. Therefore whatever work the man did he was not earning this part of his income by that work. One asked why he did the work; the answer was that he was bound to do it because he had accepted the trusteeship. One asked what was the consideration for which he accepted the trusteeship; the answer was £1,000 a year free of tax; but for some reason or other the two are to be divorced for the purpose of making him pay the Special Contribution. Anything less like investment income than money so earned it is hard to see. Nevertheless, if the term "earned income" be a term of art in these Acts and if, used as a term of

art, the conclusion I have to come to is that it does not include income earned in this way, then for the purposes of the Special Contribution this must be something other than earned income.

Now how is it that I am said to be bound to come to that conclusion? Chiefly, I think, because of two decided cases in the Revenue Court, namely *Baxendale* v. *Murphy*, 9 T.C. 76, and *Hearn* v. *Morgan*, 26 T.C. 478. These two cases decided, as I understand them, that the remuneration (I use that word without prejudice) of a trustee was not money on which he could be directly assessed for tax but was money which under a different rule was taxable by deduction in the hands of the payers, namely, his co-trustees or, as the case may be, the settlor or beneficiaries. It is said to follow from these two decisions that this is not earned income because, the tax being levied in the way that it is, the remuneration cannot be held to be from an " office of profit " within Section 14.

The Special Commissioners undoubtedly thought that those two cases obliged them so to hold, and though they mention the case of *Attorney-General* v. *Eyres*, [1909] 1 K.B. 723 (which it appears was not cited to Rowlatt, J., or Macnaghten, J., who came to the two decisions in question) they did not feel at liberty to hold that the execution of the duties of a trustee was the performance of the duties of an office: in this they were justified because Macnaghten, J., in *Hearn* v. *Morgan* so held, but before me it was conceded that this was an oversight and that this is an office. They go on like this:

> " . . . we regard the latter case "

(that is, *Baxendale* v. *Murphy*)

> " as deciding that the income was an 'annual payment . . . payable by virtue of a deed or will' chargeable to Income Tax under Rule 1 (*a*) of Case III of Schedule D."

Then they say:

> " After consideration of all the authorities cited to us, we are of opinion that in view of *Baxendale* v. *Murphy* we ought to hold, and we do hold, that the source of the income in question is the bequest or gift of the annuity by the testator, and the source is not an office of profit held by Sir Henry Dale."(1)

If by that they mean the remuneration paid to a paid trustee by the testator is, from the testator's point of view and from the point of view, for instance, of death duty, a legacy, then of course they are right so far. Every practitioner knows, I think, that the remuneration paid to trustees under wills does not rank as a debt if it comes to insolvency. The case of In re *White*(2) shows that quite clearly; so does In re *Brown*(3).

The main case which was relied upon in this connection, as I understand it, was In re *Thorley*, [1891] 2 Ch. 613. That decided that a gift to a trustee or a bequest to a trustee of so much a year, or such and such a sum, on condition that he performed the duties of a trustee, was a gift upon condition. That of course I accept, and indeed it has long been accepted. But how that carries the matter any further I am quite unable to see. If the gift be made upon a condition, and that condition be that certain money will be paid if certain work is done, it seems to me the money is clearly remuneration for the work, and the fact that it is also a legacy seems to me to have nothing to do with the point.

However that may be, the Commissioners clearly thought that the cases to which I have referred bound them to hold in some way or other that

(1) *See* page 472 *ante*. (2) [1898] 2 Ch. 217. (3) (1918), W.N. 118.

(Harman, J.)

this was not remuneration from an office. I think they arrived at that conclusion in this way. Both those cases, as I say, merely decided that trustees who receive remuneration, whether under wills, settlements or orders of court, cannot be directly assessed under Schedule E. It is therefore said that, if that be so, this kind of payment cannot be remuneration, and so therefore, whatever you might think if you did not look at the law, conceding that they are offices, the remuneration which a trustee gets is not a profit. That, as I say, seems to be contrary to common sense, but there it is.

Mr. Pennycuick, very patiently arguing this case, said that you must first look at Section 14 (3) (*a*) of the 1918 Act. There you find the words "remuneration from any office", and in order to be earned income it must be income arising from an office of profit. Now under that Act all offices of profit, if they were private offices, were still chargeable to tax under Schedule D. Case III of Schedule D applied to them, and when one looks at the Rules applicable to Case III of Schedule D the first one says:

> "The tax shall extend to—(*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment . . . by virtue of any . . . will . . ."

That exactly describes the payments received by trustees in this and in a great many other cases. This is an annuity or other annual payment payable by virtue of the will, and therefore chargeable, as Rowlatt, J., held it to be chargeable in *Baxendale* v. *Murphy*(1), under Case III of Schedule D, and not as the Crown had claimed it to be.

By Section 18 of the Finance Act, 1922, profits or gains from an office which under the Income Tax Act, 1918, had been chargeable under Schedule D were transferred to Schedule E, and it is said therefore that unless you come under Schedule E and you can make a direct assessment it cannot be an office of profit. But with all respect to that argument I cannot see why. It seems to me that *Baxendale* v. *Murphy* did decide that Case III of Schedule D applied, which deals with annuities and points you on to the General Rule 19. So after 1922, when the profit was transferred to Schedule E, it still remained chargeable under Rule 19, which is in terms corresponding with the former cases under Rules applicable to Case III of Schedule D. Although this is, as *Baxendale* v. *Murphy* teaches me and the other case, *Hearn* v. *Morgan*(2), confirms, a remuneration which is not assessable directly to tax under Schedule E but remains under Rule 19, nevertheless I am not going to say that because of the fact it is not an office of profit. It seems to me there is nothing which drives me to a conclusion so contrary to the dictates, as I think, of reason; and I decline to take that step. In my judgment, therefore, *Baxendale* v. *Murphy* and the case which followed it, did not bind the Commissioners to reach the conclusion they did. I think they wrongly supposed this was not an office, and that I think has been conceded. I think they also wrongly supposed this was not an office of profit. It does produce a profit, and therefore it is an office of profit. That is what I hold, and therefore I propose to allow this appeal.

I ought to say, I think by way of addition, that Mr. Tucker took a further point under Section 14 of the Income Tax Act, 1918, saying that this also came under Section 14 (3) (*b*) as being income from any property which is attached to or forms part of the emoluments of an office. Now in my judgment, though I need not decide it, I am inclined not to accept

(1) 9 T.C. 76. (2) 26 T.C. 478.

that because it seems to me that, having regard to the position, in order to avoid unnecessary tautology, one must construe Section 14 (3) (*b*) as if the relative "which" governed the word "property" and not the word "income"; that is to say, Sub-section (3) (*b*) only applied to income from property attached to or forming part of the emoluments of an office. It may be there are such cases but I do not think they are very common. But I think that is all to which that applies. So, if the decision had been based on Sub-section (3) (*b*), I should have been against Mr. Tucker's contention.

Mr. J. Millard Tucker.—Then your Lordship will allow both appeals?

Harman, J.—Are there two appeals?

Mr. Tucker.—One appeal by Sir Henry Dale, and the other by the trustees.

Harman, J.—Are they separate?

Mr. Tucker.—Formally I think they should be separate Cases Stated.

Harman, J.—I have only one before me.

Mr. Tucker.—I think that is a short cut to save paper and trouble. No one objects to that. Strictly speaking, there are two parties, each of whom has asked for a Case. Therefore, would your Lordship say this? I am sure my learned friend will agree. Both appeals are allowed; the matter is to be remitted to the Special Commissioners to adjust the assessments in accordance with your Lordship's judgment. I ask your Lordship to make that Order, and to allow the appeals with costs.

Harman, J.—I gather the figures are agreed, are they not?

Mr. Tucker.—There will have to be some adjustment to Sir Henry Dale's assessment to Special Contribution, because he is already liable to some.

Harman, J.—Yes.

Mr. Tucker.—Your Lordship's judgment will have the effect of reducing the liability.

Harman, J.—Undoubtedly.

Mr. Tucker.—There is no dispute about figures

Harman, J.—Do you agree there were two appeals, and that I must allow two?

Mr. John Pennycuick.—I think that is right.

Harman, J.—It is the first I have heard of it, I must say. Why should you not join in one appeal? I do not feel inclined to allow the costs of two appeals.

Mr. Tucker.—It does not increase costs. There is no question of two briefs. There is no question of any increase in costs.

Harman, J.—If it is only a formality I do not mind.

Mr. Tucker.—There is no question of double costs at all.

Mr. Pennycuick.—I think that is so.

Harman, J.—Very well.

The Crown having appealed against the above decision the case came before the Court of Appeal (Sir Raymond Evershed, M.R., Romer and Birkett, L.JJ.) on 21st May, 1952, when judgment was given in favour of the Crown, with costs.

Mr. John Pennycuick, Q.C., Mr. J. H. Stamp and Sir Reginald Hills appeared as Counsel for the Crown, and Mr. J. Millard Tucker, Q.C., and Mr. F. N. Bucher for Sir Henry Dale and the trustees.

Sir Raymond Evershed, M.R.—The short question in this appeal is whether there has arisen a liability to the Special Contribution imposed by Section 47 of the Finance Act, 1948, in respect of the remuneration of £1,000 per annum "free of duty and tax" payable to Sir Henry Dale as one of the trustees of the trust known as the Wellcome Foundation established by the will of the late Sir Henry Wellcome, by virtue of the terms of the will and in accordance with an Order of the Chancery Division of the High Court made on 1st May, 1939. The precise figures are not in dispute. It is agreed on both sides that the gross amount of the remuneration is £1,446, and there has, at all material times, in fact been paid annually to Sir Henry Dale out of the income of the funds subject to the trusts of the Wellcome Foundation the net sum of £1,000, the balance of £446 being retained by the trustees in respect of the tax appropriate to the annual sum. It is also the fact that no separate assessment for Income Tax has ever been made upon Sir Henry Dale under Schedule E or otherwise in respect of this annual sum. The "remuneration" so payable has been uniformly treated for this purpose as being *in pari materia* with other "remuneration" payable under a will or settlement to an individual trustee, namely, as falling within the scope of Case III of Schedule D of the Income Tax Act, 1918, and payable subject to deduction of the appropriate tax by virtue of Rule 19 of the All Schedules Rules: in other words, "remuneration" to such a trustee has not hitherto been regarded as falling within the ambit of Schedule E.

The Special Contribution imposed by the Finance Act, 1948, is leviable (subject to the limitations specified in Section 47) in respect of "investment income"; and that expression is, by the terms of Section 49 (1) of the Act, defined as meaning "income from any source other than a source of earned income." Section 68 (2) of the Act of 1948 having made applicable for the purposes of that Act the definitions to be found in the Income Tax Acts, the meaning of the term "earned income" must be sought in Section 14 (3) of the Income Tax Act, 1918, the definition in that Sub-section having been made generally applicable to the Income Tax Acts by Section 33 of the Finance Act, 1920. So far as relevant that definition is:

> "(*a*) Any income arising in respect of any remuneration from any office or employment of profit held by the individual . . ."

and

> "(*b*) Any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual . . ."

It follows accordingly that the Special Contribution under the 1948 Act is leviable in respect of the sum of income in question unless that income is excluded from the impost on the ground of being "earned income" within the meaning of the Income Tax Acts. For the present I leave out of account any significance that may belong to the repeated use of the word "source" in Section 49 (1) of the Act of 1948.

(Sir Raymond Evershed, M.R.)

It is clear from the facts stated in the Case that the selection of Sir Henry Dale as a trustee of the Wellcome Foundation depended on his special personal and professional qualifications. It is no less clear that the duties imposed upon him by his trusteeship are by no means slight. The meetings of the trustees occur fortnightly, and it is found as a fact that the work involved occupies Sir Henry on an average for two hours of every day. According to the ordinary acceptation of our language Sir Henry indubitably "earns" his remuneration. By ordinary standards of speech his £1,000 a year (net) would be aptly described as "earned income". It certainly could not by such standards be called appropriately "investment income". So the matter appealed, and appealed strongly, to Harman, J., and for my part I greatly sympathise with his satisfaction in being able to reach a conclusion conformable to his sense of the propriety of the language. But the matter is not, unhappily, as simple as it might (and perhaps should) appear. The question is not whether, according to common sense and popular terminology, Sir Henry Dale has earned his remuneration; but whether, according to the proper interpretation of the Finance Act, 1948, the annual sum payable to Sir Henry is exempted from the Special Contribution as falling fairly within the definition of "earned income" comprised in Section 14 (3) of the Income Tax Act, 1918. I add that if it be not so exempted the levy falls, in the end, not upon Sir Henry Dale personally but, by reason of the terms of the will and Section 56 of the 1948 Act, upon the trust premises out of which the annual sum is payable. For that reason the other trustees of the Foundation were joined as Appellants before Harman, J., and are joined as Respondents in this Court.

The main part of the argument before this Court, and before Harman, J., was directed to paragraph (*a*) of the definition in Section 14 (3) of the Act of 1918, and I turn accordingly first to it. Is the duty or office of a trustee entitled to remuneration under the terms of the instrument by which he serves an "office or employment of profit" within the meaning of the paragraph and, if so, can his annual sum be properly described as "arising in respect of any remuneration *from*" that office? Since the case of *Attorney-General* v. *Eyres,* [1909] 1 K.B. 723, it is conceded by the Crown that a trusteeship of the character here in question is an "office"; so that the question is narrowed down to the enquiry: Is Sir Henry Dale's trusteeship an "office of profit"? And since, if the qualifying characteristic is attributable to the remuneration here in question, it must, to my mind, follow that the annual sum he receives must be income "arising in respect of any remuneration from" that office, the significance of the last mentioned words must lie, in my judgment, solely in the bearing that they have upon the vital enquiry: Is the office an office of profit?

The debate before us has in part been directed to the special characteristics belonging to remuneration payable to a trustee as such by virtue of the trust instrument and in part to the structure of the charging provisions of the Income Tax Acts, and particularly to the distinctions which (as it is said) must now be taken to have been established between Case III of Schedule D on the one hand and Schedule E (as the successor for certain purposes since Section 18 of the Finance Act, 1922 of Case II of Schedule D) on the other. I have already said that for many years—and certainly since the case of *Baxendale* v. *Murphy,* [1924] 2 K.B. 494; 9 T.C. 76, which the Special Commissioners regarded as binding them to decide the present case in favour of the Crown—remuneration payable to an ordinary individual trustee, as distinct from the charges which a professional

(Sir Raymond Evershed, M.R.)

trustee may as such be authorised to make, has been regarded as taxable only under the provisions of Case III of Schedule D and payable after deduction of tax in accordance with Rules 19 or 21 of the All Schedules Rules.

The view of the effect of the Income Tax Acts reflected by this practice is undoubtedly advantageous to beneficiaries in the common case of a trust established by deed or will. The annual remuneration authorised by the trust instrument is paid to the trustee, net, out of the trust income which has suffered deduction of tax at the source; and the amount of the tax in respect of the annual sum is retained and becomes available for distribution among the beneficiaries. On the other hand, if such annual remuneration were properly chargeable under Schedule E (formerly under Case II of Schedule D), *prima facie* it would appear that the gross annual amount would have to be paid out of the already taxed income. In effect, Income Tax would be paid or deducted twice in respect of the annual sum in question; first by reason of the fact that all the trust income would have suffered tax by deduction at the source, and second because the recipient is himself chargeable in respect of the gross sum paid to him: and this is indeed, as I understand it, what occurs in practice where a solicitor or other professional trustee is entitled to charge for his professional services in relation to the trust. The result is disadvantageous to the beneficiaries, who thereby lose the enjoyment of that portion of the gross annual sum attributable to tax which would otherwise be retained and distributed.

The Court accordingly would, and should in my opinion, be slow to arrive at a conclusion in the present case which would be liable to disturb a long established practice operating to the benefit of the persons interested in trust premises in the great majority of cases. The point was, therefore, naturally much pressed upon us by Mr. Pennycuick, and Mr. Millard Tucker referred to it as the *argumentum in terrorem*. But Mr. Millard Tucker sought to avoid the difficulty by challenging the validity of the proposition which I have indicated—that if the trustees' remuneration were taxable under Schedule E, it would not be paid out of taxed income after deduction of tax in accordance with Rule 19 of the All Schedules Rules: and it will be necessary to examine this matter more closely hereafter. But it is unfortunate, as I think, that upon this matter the learned Judge appears to have made a slip in the course of his judgment; for in [1951] 1 Ch. at page 897 he said(1):

> "Mr. Pennycuick argued that it is necessary to look first at sub-s. 3 (*a*) of s. 14 of the Income Tax Act, 1918. The words used there are 'remuneration from any office'; and in order to be earned income it must be income arising from an office of profit. Under that Act all offices of profit, if they were private offices, were still chargeable to tax under Case III of Sch. D; and r. 1 of the rules applicable to Case III of Sch. D provides: 'The tax shall extend to—(*a*) any interest of money, whether yearly or otherwise, or any annuity, or other annual payment, . . . by virtue of any . . . will . . .'. That describes the payments received by trustees in this and in many other cases. This is an annuity or other annual payment payable by virtue of the will, and therefore chargeable, as Rowlatt, J. held in *Baxendale* v. *Murphy*,(2) under Case III of Sch. D, and not under Case II of Sch. D as the Crown had in that case claimed it to be. By s. 18 of the Finance Act, 1922, profits or gains from an office, which under the Income Tax Act, 1918, had been chargeable under Sch. D, were transferred to Sch. E. It has been argued that, unless a direct assessment can be made under Sch. E, it cannot be an office of profit. With all respect to that argument, I cannot see why. *Baxendale* v. *Murphy* decided

(1) *See* page 476 *ante*. (2) 9 T.C. 76.

that Case III of Sch. D, which concerns annuities and leads on to r. 19 of the All Schedules Rules, applies to the remuneration of a trustee. After 1922, when these profits were transferred to Sch. E, they remained chargeable under r. 19, which in terms corresponds with the former cases under rules applicable to Case III of Sch. D. Although this is, as *Baxendale* v. *Murphy*(1) shows, and as *Hearn* v. *Morgan*(2) confirms, a remuneration which is not assessable directly to tax under Sch. E, but remains subject to deduction of tax under r. 19, nevertheless I will not say that because of that fact it is not an office of profit. There is nothing which drives me to a conclusion so contrary to the dictates, as I think, of reason; and I decline to take that step."

There can be no doubt that the reference to Case III of Schedule D at the beginning of the passage which I have quoted is a mistake for Case II of Schedule D; and I have felt unable to satisfy myself that the learned Judge was not considerably influenced towards the comforting conclusion which he reached by the consequence which he treated as flowing from his erroneous premise.

In the circumstances it is, I think, important, to concentrate first upon the true meaning and effect of Section 14 (3) of the 1918 Act. Consideration of the Schedules to the Act points to the consequences which properly result from the determination of the question of construction under Section 14 (3): and it is no doubt true that if the question of interpretation be doubtful, the nature of the consequences of one view or the other is proper to be considered in determining the matter of construction.

But I am disposed to think that to pay regard too much or too soon to the Schedules involves a risk of begging the question. I prefer, therefore, to attack the problem first, as I have intimated, by reference to the language of Section 14 (3) itself and without regard to the Schedules.

I have referred already to the fact that trusteeship is admittedly an "office": and the description is particularly appropriate to the derivation of that word. It is given to a large number of Englishmen in the course of their lives to serve at one time or another as trustees of other persons' wills; so much so that the conception of trusteeship as a service or duty in which self-interest must be excluded has acquired an accepted place in public and national affairs. And if it offends common sense to say that Sir Henry Dale does not earn his £1,000 per annum from the Wellcome Foundation, it would, in my judgment, no less be regarded as startling and offensive to the proprieties to describe trusteeship as an "office of profit" or as a profession or vocation in any ordinary sense. And this conclusion depends upon the strict and peculiar characteristics which have always been held by the Court to belong to trusteeship. For it has been long established that in the absence of some special dispensation the trustee can never derive any profit or advantage for himself out of his trust and should be scrupulous to prevent any conflict between his duty and his interest. The strictness of the rule depends upon the circumstance that the trustee is both master and servant at the same time, and, as regards any remuneration, necessarily combines the functions of payer and payee. So by the three cases in this Court to which we were referred, In re *Pooley*, 40 Ch.D. 1; In re *Thorley*, [1891] 2 Ch. 613; and In re *White*, [1898] 2 Ch. 217, it has been laid down that remuneration made payable to a trustee by the terms of the instrument of trust is properly regarded as bounty on the part of the settlor or testator, in all material respects upon the same footing as the bounty conferred upon the other beneficaries under the trust instrument and distinguished only from those others by the characteristic that acceptance of the

(1) 9 T.C. 76. (2) 26 T.C. 478.

(Sir Raymond Evershed, M.R.)

obligation of the " office " is the condition upon which the benefit may be taken. So, in the case of deficiency the trustee can never compete with creditors for his remuneration but must (in the absence of some special priority conferred by the trust instrument) abate rateably with the claims of other beneficiaries ; and so, in the case of a trust created by will, the remuneration was subject, like other legacies, to legacy duty.

It is this quality which in my judgment must be taken to lie at the root of the whole matter. For with whatever truth it may be said that a trustee in the position of Sir Henry Dale " earns " his reward or that a trustee in like position would, and could only be expected to, undertake the burden of the trust because of the expectation of that reward, still the distinction remains (and remains intelligible) between the duties of the office on the one hand and the independent benefaction, albeit conditional upon the assumption of those duties, on the other. The distinction may at first sight seem to be fine, but it rests upon the peculiar and almost sacred character of trusteeship which the Courts of Equity have so jealously preserved. That character denies the existence of any true analogy between a trustee in regard to his remuneration on the one hand and a waiter or porter in regard to the gratuities which he expects, or a secretary of a corporate body in regard to the award ultimately made to him by the shareholders at the end, but by virtue, of his labours (as in the case of *Cowan* v. *Seymour,* 7 T.C. 372) on the other. For the latter occupations are of a character such as of themselves to entitle their holders to claim or expect reward. In the case of the trustee, though the assumption and discharge of the office may qualify the holder to receive some benefaction, the office itself involves a denial of any right to make a profit out of its performance.

Mr. Tucker sought to draw a parallel between the office of a director of a company and that of a trustee, on the ground that a director is, in the absence of provision to the contrary in the company's regulations, equally disabled from claiming any payment for his services. But in my opinion there is no true analogy. In the case of a company and one of its directors the fatal identity between payer and payee is absent. And even where the company's regulations provide that the director's remuneration is to be determined by a general meeting of shareholders, the director is entitled to expect such an award directly by virtue and as an incident of his office ; and once the award has in fact been made, the director becomes a creditor of the company for its amount.

In my judgment, therefore, the office of trustee held by Sir Henry Dale is in truth not an office of profit within the meaning of Section 14 (3) (*a*) of the Income Tax Act, 1918. Put another way (but it is the same thing) the remuneration to which he is entitled by virtue of Sir Henry Wellcome's will and the Order of the Chancery Court is not income arising in respect of remuneration *from* such an office. In my judgment the general language of Atkin, L.J., applied to the case of the secretary in *Cowan* v. *Seymour*[1] is inapplicable to produce a similar result in the present case—and see the language of Younger, L.J., in the same case at page 384 in 7 T.C. A truer analogy—if analogies assist—would be found in the example given in argument of a treasurer or other officer of some charitable body strictly prohibited by the rules of the charity from making any charge for his services, but to whom, so long as he discharged his duties as such officer, a benevolent testator bequeathed an annuity ; or in the case of an incumbent of some poorly

(1) 7 T.C. at p. 380.

endowed ecclesiastical office to whom a similar legacy had been given. Though it is unnecessary for me to decide any case but that now before the Court, it would appear to me at any rate sensible to say that in neither of the cases supposed could the annuity or legacy (as the case may be) be regarded as remuneration from an office of profit. And the case is the more striking if the benefaction took the form of a single legacy rather than a recurring annuity.

In brief, therefore, I think that Mr. Pennycuick was well founded in the proposition which he submitted: an office of profit is an office the tenure of which constitutes the title to the profit, in contrast to an office the tenure of which constitutes merely the condition upon which profit is derived from some other source or title.

If I turn now to the Schedules to the Income Tax Act, it appears that the view which I have formed explains and justifies the practice which, as I have earlier said, has been uniformly followed at any rate since the case of *Baxendale* v. *Murphy*(1) was decided by Rowlatt, J., in 1924. It must, in my judgment, be taken to be established that as regards any income or source of income the Schedules to the Act and the Cases thereunder are *prima facie* mutually exclusive; so that if any sum of income is from its character fairly within the ambit of Case III of Schedule D it should be regarded as outside the scope of Case II of Schedule D or of Schedule E and *vice versa*. (See Lord Atkin in *Salisbury House Estate, Ltd.* v. *Fry*(2), [1930] A.C. 432, at page 455.) And although Rule 19 (1) of the All Schedules Rules cannot (from the fact of its location) be easily regarded as intended to be applicable only in respect of income assessable under Case III of Schedule D, its language undoubtedly reflects the wording of Case III, Rule 1 (*a*), and in a case such as the present the natural conflict is between the application of Case III of Schedule D and Rule 19 of the All Schedules Rules on the one hand and Case II of Schedule D or Schedule E on the other. *Duke of Westminster* v. *Commissioners of Inland Revenue*(3), [1936] A.C. 1, is a classic example of the antinomy. And though during the argument some examples were given of income assessable to tax otherwise than under Case III of Schedule D to which Rule 19 of the All Schedules Rules might be applicable, none was satisfactorily suggested of income falling within the scope of Case II of Schedule D or Schedule E to which the machinery of Rule 19 of the All Schedules Rules would be appropriate—unless it were the present case itself. It is however unnecessary, in my judgment, to express conclusions upon all these general matters. If I have rightly defined the nature and quality, as understood by the law, of the remuneration payable to a trustee by virtue of the instrument of trust, it is to my mind clear that it is an "annual payment" within the meaning of Case III, Rule 1 (*a*), of Schedule D, and (where it is paid out of a fund of income which has already suffered tax) also within the corresponding language of Rule 19 (1) of the All Schedules Rules; and no less clear that it is outside the scope of Schedule E.

In *Baxendale* v. *Murphy* the sum of the trustee's remuneration in question related to a period before the transfer to Schedule E by Section 18 of the Finance Act, 1922, had taken effect, so that the contest was between Case III and Case II of Schedule D. And it is no doubt significant that the word "office" did not occur in Case II, so that *Attorney-General* v. *Eyres*(4) was not cited to Rowlatt, J., and the argument of the Crown was that the trustee's remuneration arose from an "employment". But it is

(1) 9 T.C. 76. (2) 15 T.C. 266, at p. 319. (3) 19 T.C. 490. (4) [1909] 1 K.B. 723.

(Sir Raymond Evershed, M.R.)

in my judgment clear that Rowlatt, J.'s decision at least proceeded on the basis that, having regard to the decisions of In re *Pooley*(1), In re *Thorley*(2) and In re *White*(3), such remuneration was bounty and no more and therefor an "annual payment" within the terms of Case III of Schedule D and also Rule 19 of the All Schedules Rules. And the view has (as I have said already more than once) been consistently followed ever since in regard to such remuneration.

Mr. Tucker carefully avoided any challenge of the correctness of *Baxendale* v. *Murphy*(4) or of the practice since followed. But he sought to say first, that the situation had been materially changed by the effect of the Act of 1922 and that the case was accordingly no authority now against the view that a trustee's remuneration was remuneration from an office of profit so as to bring it squarely within the terms of Schedule E; and second, that the result was nevertheless not to exclude the application of Rule 19 of the All Schedules Rules, at any rate in a case in which the remuneration was in fact paid "out of profits or gains brought into charge to tax".

I have already said that in my judgment the principle of *Baxendale* v. *Murphy* does not depend upon the absence of the word "office" in Case II of Schedule D and that in any event the office of a trustee is not an "office of profit" so as to bring his remuneration within the ambit of Schedule E. And I have the greatest difficulty in accepting the view that remuneration chargeable under Schedule E as arising from an office of profit could be subject to the application of Rule 19 or 21 of the All Schedules Rules; for remuneration so chargeable would not, in my judgment, be income chargeable as such or what Lord Greene, M.R., called "pure income profit" of the character appropriate to the application of Rule 19(5). To my mind the distinction is well illustrated by the case of a professional trustee authorised by the trust instrument (in addition to any remuneration payable to him as a trustee merely) to charge for professional services. Such a case was that of *Jones* v. *Wright*, also before Rowlatt, J., 13 T.C. 221; for (as appears from Rowlatt, J.'s judgment in that case) though the right of the solicitor trustee to send in his bill for professional services was derived from the benefit or privilege to that effect given to him by the testator, still the sum charged was remuneration for professional services and so formed part of his professional earnings in respect of which (subject to the appropriate deduction) he was liable to be independently assessed. The amount of the bill, in other words, is not "pure income profit" and has to be paid accordingly in full without any deduction in respect of tax under Rule 19 or 21 of the All Schedules Rules.

I have earlier drawn attention to the passage in the judgment of Harman, J., in which he is reported as stating that at the time of *Baxendale* v. *Murphy* income from an office of profit fell within the scope of Case III of Schedule D: and from the reasoning of the following passage in the judgment it appears to me that he may have deliberately so intended. If the premise were correct I should for myself find little difficulty in following the learned Judge to his conclusion that the transfer of offices of profit to Schedule E in 1922 would not of itself affect the existing applicability in such cases of Rule 19 of the All Schedules Rules. But it no less follows that if (as is conceded) the premise is incorrect, the learned Judge might well not have reached the conclusion that he did.

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(1) 40 Ch.D.1. (2) [1891] 2 Ch. 613. (3) [1898] 2 Ch. 217.
(4) 9 T.C. 76. (5) *In re* Hanbury, 20 A.T.C. 333, at p. 335.

(Sir Raymond Evershed, M.R.)

I add that in my opinion the use of the word "source" in Section 49 (1) of the Act of 1948 ("income from any source of earned income") to the significance (if any) of which I omitted to refer in the earlier part of this judgment, tends also to support the view which I have formed. It is an essential characteristic of the Income Tax Acts that attention is always directed to the "source" from which the income sought to be taxed is derived. In the case of a trustee entitled as such to remuneration by virtue of the trust instrument it is, in my opinion, both sensible and accurate to regard the "source" of his remuneration as being the bounty of the settlor or testator and his property held in trust rather than the "office" which, as I have tried to show, is characteristically not of itself productive of income or profit.

There remains only to consider Mr. Tucker's alternative submission that the remuneration in question is excluded from the operation of the 1948 Act, since it is earned income within the definition of Section 14 (3) (*b*) of the 1918 Act, as being "income from any property which is attached to or forms part of the emolument of any office . . . of profit . . ." If the view which I have expressed above is well founded, and the trusteeship is not an office of profit, it follows that paragraph (*b*) of Section 14 (3) is necessarily inapplicable as well as paragraph (*a*): and it is unnecessary to pursue further this part of the argument. I think, however, that Mr. Tucker is in any case faced with further and formidable difficulties. In order to bring the case within the paragraph it is necessary to hold that the office or the right to receive remuneration therefor is "property" within the meaning of the paragraph: and though it is unnecessary for me to express any concluded opinion, I am not satisfied that so artificial a meaning ought to be given to the word "property" in the paragraph.

The result is that I have reached a conclusion different from that entertained by Harman, J., and I think that the appeal should be allowed. The result provokes a feeling of some regret and of doubt whether such an item of income as trustee's remuneration could have been intended by Parliament as a fit subject for the Special Contribution levied upon "investment income". But it is my duty to construe the language of the statutes as best I can, and so applying myself I have felt compelled to the view which I have stated.

Romer, L.J.—I agree entirely with the conclusion at which the Master of the Rolls has arrived in this case and with the reasons upon which that conclusion is based. I feel, however, that the contention of the Crown is, at first sight, so contrary to the view which would commend itself to the man in the street that I should like to endorse specifically the explanation of our decision which my Lord has already given.

The testator in this case had established an organisation of considerable importance and, during his lifetime, enrolled the services of men who, by experience and qualification, were peculiarly fitted to the task of supervising and controlling it after his death. One of these men was the Appellant, Sir Henry Dale, whose talents in this particular field are admittedly of the highest order. Those talents were secured by the testator for the Wellcome Foundation upon terms of reasonable remuneration, for few people can afford, in these days, to give their services for nothing. The remuneration accorded to Sir Henry Dale by the will was £1,000 per annum free of tax and, having regard to the quality of Sir Henry's ability and the work which his acceptance of the trusteeship has involved, none would say that that remuneration was excessive. It is nevertheless regarded by

(Romer, L.J.)

the Crown, for purposes of the Special Contribution, as not falling within the description of "earned income", and in our opinion the Crown is right; if, then, Sir Henry's remuneration is not earned income the ordinary man would suppose that this Court has held it to be income that Sir Henry has not earned, and his sense of justice would, in the absence of explanation, be affronted accordingly.

In deciding that Sir Henry's remuneration is not "earned income" we are merely applying a principle that was laid down very many years ago and which it is too late now for this Court to disturb. The principle is simple. The office of trustee is, *par exemple*, an office of honorary service and not an office of profit—so much so indeed that if a trustee makes a profit out of his trusteeship he gets into serious trouble; if, therefore, a testator attaches remuneration to the trusteeship of his will such remuneration is wholly benefaction. From this it follows that the remuneration accorded to Sir Henry Dale is bounty and nothing else and the bounty derives from the testator and not from the office of trustee. Accordingly the remuneration cannot be described as "income arising in respect of any remuneration from any office . . . of profit". It may well be that posterity will think that the Courts went too far in holding that remuneration expressly allowed to a trustee for his services should be regarded as wholly bounty; and that a more realistic approach to the position would have been to put an assessment on the value of the services which the trustee was to render to the trust and then compare that assessment with the value of the remuneration. If the remuneration was worth more than the annual value of the services the difference, and that only, should be treated as a legacy. If that method had been applied to the case of Sir Henry Dale it would be found, I imagine, that his services to the trust are worth at least (if not more than) the amount of his annual remuneration, and that consequently no part of that remuneration could, for any purpose, be regarded as gratuitous. By such a standard the Crown's claim to exclude the remuneration from the category of "earned income" could not succeed. On this, however, two observations must follow: (i) such an approach to the remuneration of a trustee, however valuable or indeed essential he may be to any particular trust, is inconsistent with principles of long standing which are binding on this Court; and (ii) the approach, if adopted would be disastrous to trusts in general for the reasons to which the Master of the Rolls has referred, namely, that as a necessary and logical result a trustee's remuneration would have to be paid without deduction of tax from trust income which had already been brought into charge.

Although, therefore, Sir Henry's remuneration is entitled to be regarded, from any ordinary standpoint, as earned in the fullest sense, it does not conform to the specialised description of "earned income" for the purposes of the Income Tax Act, 1918, and Section 49 of the Finance Act, 1948; and it is with those purposes, and those alone, that we are concerned in the present appeal.

Sir Raymond Evershed, M.R.—Birkett, L.J., has intimated that he agrees with the judgment I have read.

Sir Raymond Evershed, M.R.—The appeal will be allowed.

Sir Reginald Hills.—The appeal will be allowed with costs?

Sir Raymond Evershed, M.R.—What is the result? How do we deal with it?

Sir Reginald Hills.—It goes back.

Sir Raymond Evershed, M.R.—It will be remitted. What about the costs?

Sir Reginald Hills.—I ask for costs.

Mr. J. Millard Tucker.—Your Lordships will have appreciated that this case concerns or could concern a great number of people for the purposes of the Special Contribution as there must be a tremendous number of trusts and persons who receive something from them. If they happen to be persons whose income is such that it goes over a certain amount, the Special Contribution will be charged. In addition to that, there is the wider question which relates to what I may call every-day life in Income Tax matters, and that is whether any trustee, some not professional persons, under some special arrangement, is entitled to an earned income allowance. In particular, there is the point under Section 14 (3) (*b*)—I know your Lordships have answered it—which may affect cases where shares are given, as they are in many cases, to directors so that they can have the dividends on them for their remuneration. In those circumstances, I ask your Lordships to say that the case is important enough and raises a principle which is sufficiently widespread to justify me asking for leave to go to the House of Lords if, after consideration of the judgments, my clients should wish to take the matter there.

Sir Raymond Evershed, M.R.—What do you say about the costs?

Mr. Tucker.—Never in the history of this or, I was going to say, any Court, but this is the only Court it affects, has any question of an additional burden been placed on the taxpayer.

Sir Raymond Evershed, M.R.—No—I was thinking of our Order as to costs of the appeal. Sir Reginald Hills asked, quite naturally, that the appeal be allowed with costs.

Mr. Tucker.—One does not resist that.

Sir Raymond Evershed, M.R.—I think you must submit to that.

Mr. Tucker.—I am afraid I must. I have never known, except in the very old days, where there has been on some occasions a benevolent gesture made by the Crown in which they have said: "Notwithstanding that the Crown has won, it being a very important point the taxpayer should not be mulcted in costs"—the unsuccessful taxpayer escaping liability for costs. I am sure my clients do not wish me to put forward any argument which is not justified in accordance with modern practice. I would be very grateful, of course, if your Lordships felt—and it is a matter entirely for your Lordships' discretion—that, in view of the widespread importance of the point, it is undesirable to make one individual and one charitable organisation bear the whole cost of deciding it, and I should very much welcome an Order that the appeal would be allowed without costs.

Sir Raymond Evershed, M.R.—As regards leave to appeal, we have again discussed it, together and with Birkett, L.J., and it seems to us a case which it would be proper, if your clients are so advised, to give them leave to go to the House of Lords.

Sir Reginald Hills.—If your Lordships had asked me, I should not have offered any objection to that, but when my friend Mr. Tucker said that a very large number of cases was dependent on this case, there must

(Sir Reginald Hills.)

be thousands of trustees who hope that your Lordships' Order will not be disturbed, so my friend is not speaking for the whole body of trustees. That is by the way.

Sir Raymond Evershed, M.R.—That is another matter. It is a case of importance.

Sir Reginald Hills.—One appreciates, having regard to the decision of Harman, J., that it is an important case, and your Lordships might well think it right to give leave. I am not here to object to that, but I am certainly here to ask for the usual Order for costs in this Court. It would be revolutionary not to give me my costs in this Court when I have won. There is a long established practice about it.

Sir Raymond Evershed, M.R.—In this case I think the ordinary Order for costs will be made of the hearing in this Court and the Court below, but we think it is a case in which we would give leave to appeal.

Mr. Tucker.—If your Lordship pleases.

Sir Raymond Evershed, M.R.—Am I correct in what I said about this case having to go back to the Commissioners? As a matter of fact, the Commissioners found in favour of the Crown and the figures were agreed. It need not go back.

Sir Reginald Hills.—No.

Mr. Tucker.—My friend is quite right.

An appeal having been entered against the above decision, the case came before the House of Lords (Lords Normand, Oaksey, Morton of Henryton, Reid and Cohen) on 10th, 11th, 17th, 18th, 24th, 25th, and 29th June, 1953, when judgment was reserved. On 20th July, 1953, judgment was given against the Crown, with costs.

Mr. J. Millard Tucker, Q.C., and Mr. F. N. Bucher appeared as Counsel for Sir Henry Dale and the trustees, and the Solicitor-General (Sir Reginald Manningham-Buller, Q.C.), Mr. John Pennycuick, Q.C., Mr. J. H. Stamp and Sir Reginald Hills for the Crown.

Lord Normand.—My Lords, we have in this appeal to decide a question of importance in Income Tax law though it arises in relation to the Special Contribution imposed by Part V of the Finance Act, 1948. The question, shortly stated, is whether an annuity bequeathed by the will of the late Sir Henry Wellcome to the Appellant, Sir Henry Dale, as executor and trustee under the will is " investment income ".

The testator appointed five persons, including Sir Henry Dale, to be his executors and trustees, and directed that each trustee was to receive the sum of £1,000 per annum free of tax so long as he should continue to act as trustee. He expressed a desire that as far as possible at all times two of his trustees should be men experienced and well qualified in medicine and allied sciences, and that two should be men of wide practical business experience, one or both being of high standing and ability in the practice of law and with

exceptional experience and qualifications in the conduct and administration of large and important estates. The special duties of the trustees included the exercise of wide powers in relation to the control of the Wellcome Foundation, Ltd., the administration of the research fund established by the will and the application of moneys to and among the various research objects indicated by the will, and the administration of the research museum and library fund which were also established by the will. The testator left a written memorandum which set out his policy and aims for the guidance of his trustees. The trustees held frequent meetings, which were necessary for the performance of their duties, and Sir Henry Dale, who as one time President of the Royal Society and Chairman of the Scientific Advisory Committee to the War Cabinet, habitually spent about two hours a day dealing with the affairs of the trust.

Sir Henry Dale's assessment to Special Contribution under the provisions of Part V of the Finance Act, 1948, included, as part of his aggregate investment income, the sum of £1,446, which represented the sum (together with the appropriate additions thereto in respect of Income Tax and Surtax) received by him in the financial year 1947-48 by virtue of the provision by which he was to be paid the sum of £1,000 per annum free of tax so long as he should continue to act as trustee. Sir Henry Dale appealed against this assessment on the ground that the sum of £1,446 was income arising in respect of remuneration from an office of profit within the meaning of Section 14 (3) (*a*) or alternatively that it was income from property which formed part of the emoluments of an office of profit within the meaning of Section 14 (3) (*b*) of the Income Tax Act, 1918, and that it was therefore " earned income ". He and the trustees also appealed against notices given to them under Section 60 (2) (*a*) of the Finance Act, 1948, but these are subordinate and consequential appeals, which stand or fall by the decision on the appeal against the assessment of Sir Henry Dale, whom I call hereafter the Appellant. The Special Commissioners held that the source of the income was the bequest of an annuity and not an office of profit. Against this determination an appeal was taken to the High Court. There, Harman, J., allowed the appeal and reversed the determination. In the Court of Appeal, Sir Raymond Evershed, M.R., Romer and Birkett, LL.J., unanimously reversed the decision of Harman, J., and restored the determination of the Special Commissioners.

The Special Contribution imposed by the Finance Act, 1948, is payable by individuals whose total income for the year 1947-48 exceeded £2,000, and whose aggregate investment income for that year exceeded £250. " Investment income " means income from any source other than a source of earned income (Section 49 (1) of the Finance Act, 1948). Expressions in Part V of the Finance Act, 1948, are, under Section 48 (2) thereof, to have the same meanings as in the Income Tax Acts. Section 14 (3) of the Income Tax Act, 1918, provides—

> " For the purposes of this section the expression ' earned income ' means—
>
> (*a*) any income arising in respect of any remuneration from any office or employment of profit held by the individual, or in respect of any pension, superannuation, or other allowance, deferred pay, or compensation for loss of office, given in respect of the past services of the individual or of the husband or parent of the individual in any office or employment of profit, or given to the individual in respect of the past services of any deceased person, whether the individual or husband or parent of the individual shall have contributed to such pension, superannuation allowance, or deferred pay, or not ; and
>
> (*b*) any income from any property which is attached to or forms part of the emoluments of any office or employment of profit held by the individual ; and

(Lord Normand.)

> (*c*) any income which is charged under Schedule B or Schedule D, or the rules applicable to Schedule D, and is immediately derived by the individual from the carrying on or exercise by him of his trade, profession, or vocation, either as an individual, or, in the case of a partnership, as a partner personally acting therein."

The question in the appeal is, in the simplest terms, whether the annual sum receivable by the Appellant under the testator's will is income arising in respect of remuneration from an office of profit. It is not contended that it is income from an " employment of profit ", for that contention would encounter the difficulty discussed in several of the reported cases that there is no employer. The words " of profit ", I have no hesitation in saying, qualify the word " office ". The first point to consider is whether trusteeship is within the ordinary sense of the word an " office ", and on this I can only say that " office " is an apt word to describe a trustee's position, or any position in which services are due by the holder and in which the holder has no employer. In *Attorney-General* v. *Eyres,* [1909] 1 K.B. 723, Channell, J., held that a trustee is " the holder of an office " within the meaning of Section 2 (1) of the Finance Act, 1894. The word " office " is used both in Section 14 (3) of the Finance Act, 1948, and in Section 2 (1) of the Finance Act, 1894, in its ordinary sense, uncontrolled by any special context, and I agree with Channell, J., in thinking that it includes trusteeship. If the trustee is given an annuity under a will on condition that he continues to act as trustee, I cannot doubt that he holds an office of profit. The phrase is not a term of art, and there is again no context which prevents it from being understood in its ordinary sense. To my mind, a remunerated office is an office of profit. Equally clearly the income received by the Appellant because he continues to act as trustee is income arising in respect of remuneration from his office of trustee. My conclusion is that the opening words of Section 14 (3) (*a*) seem clearly and unambiguously to apply to the disputed income in the present case, and that was, I think, the ground on which Harman, J., decided the case in favour of the Appellant.

What, then, is said on the other side? Sir Raymond Evershed, M.R., held that a trustee could not be described as the holder of an office of profit because

> " the office itself involves a denial of any right to make a profit out of its performance "[1].

In other words, the receipt of a profit for the performance of the duties of a trustee is repugnant to the nature of trusteeship.

My Lords, it is with regret that I feel constrained to differ from the Master of the Rolls, but I think that he has here incorrectly described the fiduciary duty of trustees. The fiduciary duty may arise not only from trust but also *ex lege* and *ex conventione.* The duty was recognised by the civil law and it is, I think, acknowledged in the jurisprudence of all civilised communities. The duty is, to use the Latin phrase, that the person subject to it must not become *auctor in rem suam.* It applied to tutors and curators in the civil law ; and it applies to tutors and curators in the Scots law. It applies also to judicial factors appointed by the Courts in Scotland, and to partners and to agents under a contract of agency, and of course to trustees under a settlement or under a will. That by no means exhausts the area of its operation: but for illustrative purposes the examples I have given will suffice. Some who are subject to the duty are never entitled to remuneration ; some are *ex lege* entitled to payment for their services ; some are entitled to payment *ex conventione,* and some are entitled to payment if the settlor or

[1] *See* page 482 *ante.*

testator so directs. The rule is the same for all: it is not that reward for services is repugnant to the fiduciary duty, but that he who has the duty shall not take any secret remuneration or any financial benefit not authorised by the law, or by his contract, or by the trust deed under which he acts, as the case may be. In England, moreover, the Court has power to order payments to be made to trustees for whom the truster has made no such provision, a power which it is difficult to reconcile with a general principle that remuneration is repugnant to trusteeship. The true rule is indeed stated by the Master of the Rolls himself in the judgment under consideration. He says:

> "it has been long established that *in the absence of some special dispensation*"

(the italics are mine)

> "the trustee can never derive any profit or advantage for himself out of his trust and should be scrupulous to prevent any conflict between his duty and his interest."

The Master of the Rolls referred to certain cases (In re *Pooley*, 40 Ch. D.1 ; In re *Thorley*, [1891] 2 Ch. 613 ; In re *White*, [1898] 2 Ch. 217) which, as he said, decided

> "that remuneration made payable to a trustee by the terms of the instrument of trust is properly regarded as bounty on the part of the settlor or testator, in all material respects upon the same footing as the bounty conferred upon the other beneficiaries under the trust instrument and distinguished only from those others by the characteristic that acceptance of the obligation of the 'office' is the condition upon which the benefit may be taken."[1]

I think there is confusion here between the source of the payment, which is the testator's bounty as expressed in his will, and the quality of the payment as earned or not earned. There need be no incompatibility in saying that the income is the conditional gift of the testator but that it has to be earned by compliance with the testator's condition of serving as a trustee.

I would observe more generally that the question whether income is earned or not is a question which arises between the trustee and the Inland Revenue, and it has no relation either to the legal duty which a trustee owes to the trust and the beneficiaries, or to the legal conception that such a payment as that under consideration derives from a testator and can be regarded as a legacy. The source of the sum and its character as a receipt in the hands of the trustee are two separate and unconnected things.

In my opinion, therefore, the reasoning on which the Master of the Rolls proceeded and in which the other learned Lords Justices concurred does not justify us in refusing to give the ordinary meaning to the words of Section 14 (3) (*a*) which are now under consideration.

My Lords, Counsel for the Crown urged another view of Section 14 (3). It is not, they said, a self-contained definition, or, as they phrased it, a dictionary definition. It contains, so the argument ran, an implicit reference to the Schedules of the Act and their Cases and rules, and there is such identity of the language of the Sub-section with the language of the Schedules as to require reference to the Schedules in order to determine what categories of income are by the Section entitled to be regarded as earned income. For example, no income which appears on first reading of the Sub-section to be income arising from remuneration in respect of an office of profit is to be treated as earned income unless it falls to be taxed *eo nomine* (that is, as income arising from remuneration in respect of an office of profit) under one of the Schedules. Now, since 1924 (*Baxendale* v. *Murphy*[2], [1924]

(1) *See* page 481 *ante*. (2) 9 T.C. 76.

(Lord Normand.)

2 K.B. 294) annual remuneration payable to a testamentary trustee *qua* trustee has been regarded as taxable only under Case III of Schedule D, and as payable after deduction of tax in accordance with Rule 19 or 21 of the All Schedules Rules. The rule applicable was, it was held, Rule 1 (*a*) of Case III, and the sum payable annually to the trustee was taxed under the head or description

> "an annual payment payable by virtue of a will".

Counsel for the Crown contended that income of this kind was properly taxed under Case III and under that description, and that in any event the long-standing practice should not be altered to the possible detriment of beneficiaries who might in consequence be deprived of the benefit which they at present derive from the application of Rule 19. Nor did Mr. Tucker, for the Appellant, press us to hold that it was wrong to tax this income under Case III.

In my judgment this argument breaks down *in limine*. First, the charging section (Section 47 (1)) imposes the Special Contribution only on investment income and there is no charge on any income which is not investment income. It then becomes necessary to define "investment income". That was achieved by Section 49 (1) of the Finance Act, 1948, and by Section 14 (3) of the Income Tax Act, 1918. By Section 49 (1) "investment income" means income from any source other than a source of earned income. There is no reference here to the Schedules. Section 14 (3) defines "earned income". It is a definition which, by paragraph (*a*), enlarges rather than narrows the meaning which "earned income" might normally bear, for it includes as earned income payments made to the husband or parent in respect of the past services of a deceased wife or son. The conception "investment income" cuts across the Schedules to the Act, and accordingly paragraph (*a*) does not treat the Schedules or Cases as divisible into those which tax earned income and those which tax investment income. The natural inference from reading the Sub-section as a whole is that you may find in any one of the Schedules or Cases income from a source of earned income. It is significant that paragraph (*c*) expressely refers to Schedules B and D, and to certain income taxed under these Schedules. It appears, therefore, that the Schedules are referred to when reference to them is necessary or appropriate, and that reference to them is omitted when it is not necessary or appropriate. Then it is to be noted that the language of Section 14 (3) (*a*) does not in fact correspond with the language of the Schedules. For example, the phrase "emolument of any office or employment of profit" is not Schedule language, and the only mention of "office" in the Schedules is to be found in Schedule E, where there is a limitation, absent in Section 14 (3) (*a*), to "public offices". I therefore reject the contention that Section 14 (3) is not a self-contained definition of "earned income".

My Lords, many cases were cited on this part of the argument. They dealt with the question which Schedule, Case or rule is the appropriate Schedule, Case or rule for taxing annual payments receivable by a trustee as such. Some may need consideration on a future occasion, but they are of no relevance to the appeal if Section 14 (3) is a self-contained definition, and I think that it would be inexpedient to discuss them.

I must, however, notice an argument *ab inconveniente* advanced by the Crown. It was said that a decision in favour of the Appellant would involve anomalies. An argument of this sort is of value as an aid to construction only if there is some ambiguity in the words to be construed.

At best, it is an unhandy weapon. For it often means that the Court is to attempt to construe the difficult language of that part of an enactment which is properly before it for construction by the aid of another part of the enactment which is not really before it at all. It is therefore a method which should be shunned unless there is agreement or it is perfectly plain that the decision proposed will in fact lead to the supposed anomaly. Lastly, it cannot be right to decide an action on a balance of competing anomalies when anomalies must arise whatever construction be adopted.

Since I have already said that I find no ambiguity in the language of Section 14 (3) (*a*), the whole argument *ab inconveniente* falls to the ground, but it may be useful to record what were the anomalies which the Crown said must result from the decision of this appeal in the Appellant's favour. First, it was said that it would result in a transfer of the assessment from Case III of Schedule D to Schedule E and a consequential loss of the advantage which the beneficiaries obtain from Rule 19. This is disputed by the Appellant's Counsel, and the dispute led to the citation of a number of authorities and an examination of the Schedules and of Section 18 of the Finance Act, 1922. I cannot say that the matter is at all clear, and I will express no opinion about it, nor shall I refer to the authorities, some of which may yet have to be reconsidered. Second, it was said, that if the Appellant is to succeed, any bequest of an annuity to a trustee payable so long as he continues to be a trustee will be earned income within the meaning of Rule 14 (3), without any inquiry as to the amount of work done to earn it. This is, I think, true, and it must clearly be understood that the Appellant succeeds because he has complied with the condition by continuing to act as trustee, and not because he has in fact performed very valuable and unusual services outside the ordinary scope of a trustee's duty. But if the Crown is right, we have the anomaly that the Appellant must be regarded as having received investment income and as having earned nothing by his services, though it is obvious from the testator's will that he expected services from his trustees. Third, it is said that if an annuity given to a trustee as such is to be regarded as remuneration and therefore as earned income, so also must a lump sum legacy given to a trustee on condition of his accepting the trust. This proposition is denied by Mr. Tucker, and the controversy is not one which can be decided in this appeal.

It has become unnecessary to consider Section 14 (3) (*b*) in detail. But in my opinion it does not apply to the annuity enjoyed by the Appellant under Sir Henry Wellcome's will.

The appeal should be allowed with costs throughout.

Lord Oaksey.—My Lords, I have had the advantage of reading the opinion of the noble Lord on the Woolsack, and I agree with it. As, however, your Lordships are differing from the considered judgments of the Court of Appeal, I wish to add a few words on certain points.

The judgment of Sir Raymond Evershed, M.R., proceeds upon the basis that trusteeship is an office, but that it is not an office of profit because

> "it has been long established that in the absence of some special dispensation the trustee can never derive any profit or advantage for himself out of his trust."(1)

But as in the present case there is a special dispensation, I am unable to see how this trusteeship can be said not to be an office of profit. It is said that the special dispensation proceeds from the bounty of the testator, but, in my opinion, it is no more a matter of bounty than the appointment

(1) *See* page 481 *ante*.

(Lord Oaksey.)

of a particular person to any office of profit may be said to be the bounty of the person who makes the appointment. The condition upon which the appointment is made is the performance of the office. The words " office of profit " do not relate to the creator of or appointer to the office but to the holder of the office, and whether the emoluments of the office come from the bounty of the creator of or appointer to the office or not they are profits of the office from the point of view of the holder of the office, who is entitled to consider, as it seems to me, that the profits are paid to him as remuneration for performance of the office and not as the bounty of anyone.

I see no sound distinction between solicitors, who are frequently appointed trustees under wills which provide that they shall be remunerated, and the case of Sir Henry Dale. The only distinctions suggested are that a solicitor is a professional man and remunerated according to costs settled by law, but, in my opinion, Sir Henry Dale is also a professional man, and money is just as much earned when it is paid on an annual basis as when it is paid on a *quantum meruit*.

The cases of tips to waiters and cab drivers are dismissed by the Court of Appeal by saying that trusteeship has an almost sacred character which involves a denial of any right to make a profit out of its performance. If the character of trusteeship did involve such a denial it would, of course, be true to say that there is no analogy with the case of gratuities, but in point of fact it is admitted that trusteeship does not involve any such denial. Gratuities may, in my opinion, much more accurately be said to be the bounty of the payer than an annual payment fixed before the creation of the office and payable only so long as the office is performed.

Lord Morton of Henryton.—My Lords, I, too, would allow this appeal. The only question which arises for decision is whether the sum received by the first Appellant, Sir Henry Dale, as trustee of the will of Sir Henry Wellcome deceased, during the fiscal year 1947–48, was or was not " earned income " as defined by Section 14 (3) of the Income Tax Act, 1918. The Appellants contend that this sum comes within Section 14 (3) (*a*) as being income arising in respect of remuneration from an office of pofit held by the first Appellant.

My Lords, in agreement with the Court of Appeal, I feel no doubt that the trusteeship of this will is an " office ". Is it an " office of profit "? These are not words of art, and I can find no context in the Act of 1918 which should lead your Lordships to give them a meaning which they would not ordinarily bear. To my mind an " office of profit ", in the ordinary sense of the words, is an office which carries with it remuneration, as distinct from an honorary office. The testator in the present case has undoubtedly attached remuneration to the office of trustee of his will. Sir Raymond Evershed, M.R., and Romer, L.J., point out that this remuneration is regarded as bounty on the part of the testator, and that for this reason the trustee can never compete with creditors for his remuneration: see In re *Thorley*, [1891] 2 Ch. 613; In re *White*, [1898] 2 Ch. 217. I agree, but in my view these facts are in no way inconsistent with the first Appellant's office of trustee being an office of profit. The testator chose to make it an office of profit by attaching remuneration thereto. The first Appellant was free to accept or reject that office. He chose to accept it with its remuneration, and, to my mind, from the moment of acceptance he held an office of profit and the remuneration was in his hands remuneration from that office of profit. If so, it comes exactly within the words of Section 14 (3) (*a*) of the Act of 1918, and the fact that it had its origin in the bounty of the testator seems to me irrelevant.

(Lord Morton of Henryton.)

With regard to the argument *ab inconveniente* advanced by the Crown, I agree with all that has been said by my noble and learned friend on the Woolsack, and I have nothing to add thereto.

Lord Reid.—My Lords, I have had the opportunity of reading the speech of my noble and learned friend on the Woolsack. I agree with it, and I cannot usefully add anything to it.

Lord Cohen.—My Lords, I agree entirely with the observations that have fallen from my noble and learned friend on the Woolsack, and I only desire to add a few words of my own to explain why I differ from the Court of Appeal.

As I read the judgments of the Master of the Rolls and Romer, L.J., they base their conclusion on one ground only, namely, that

> "The office of trustee is . . . an office of honorary service and not an office of profit—so much so indeed that if a trustee makes a profit out of his trusteeship he gets into serious trouble."

The authorities cited for this proposition are In re *Pooley*, 40 Ch.D. 1 ; In re *Thorley*, [1891] 2 Ch. 613 ; and In re *White* [1898] 2 Ch. 217. In In re *Pooley* a direction that a solicitor trustee should be entitled to charge for his services as a solicitor was held to be a beneficial interest under the will and to be void under Section 15 of the Wills Act, 1837, as the trustee in question had witnessed the will. In In re *Thorley*, it was held that annual sums payable under the will of a testator to his trustees while they were carrying on the testator's business, and to his son while managing the business in conjunction with the trustees, were legacies liable to legacy duty under Section 4 of the Stamp Duties Act, 1845. In In re *White* it was held that a solicitor-trustee is not entitled to profit costs when the estate is insolvent since the authority to him to receive such costs is an act of bounty by the testator and no legatee can claim bounty until the creditors are satisfied.

These cases undoubtedly establish that a trustee cannot make a profit out of his trusteeship unless authorised so to do by the instrument creating the trusteeship or by an order of the Court, and that if a testator attaches remuneration to the trusteeship, that remuneration is as between the trustee and the estate bounty, liable to legacy duty while that duty was leviable and postponed to the claims of creditors if the estate was insolvent, but it is clear and was, I think, admitted, that a trusteeship is an office, and I am unable to see anything in these decisions which prevents a trusteeship being properly described as an office of profit if a testator creates the office and attaches remuneration to it. On the contrary, the expression " office of profit " seems to me an exact description of the trusteeship so created.

I would add that a decision that the source of a payment is the bounty of the testator seems to me of little relevance to the question which arises between the trustee and the Inland Revenue as to its character as a receipt in the hands of the trustee.

The Master of the Rolls was, I think, also influenced by the argument addressed to the Court of Appeal and repeated before this House that acceptance of the Appellant's case would disturb a long established practice operating to the benefit of the persons interested in trust premises in the great majority of cases. I agree with my noble and learned friend, Lord Normand, that this is a consideration which could only influence your Lordships' decision if the meaning of Section 14 (3) were ambiguous and

(Lord Cohen.)

that in the present case, for the reasons he gives, there is no ambiguity. For this reason I, too, prefer to express no opinion as to whether this *argumentum in terrorem* was well founded.

For these reasons I am able to arrive at the conclusion which was reached by Harman, J., and which, as I read the judgments in the Court of Appeal, they, too, would have been glad to accept had they not felt themselves bound by authority to reject it. In doing so I do not think your Lordships will detract from the fundamental principle of equity law that a trustee cannot receive anything for his services except so far as he may be authorised so to do by the instrument creating the trust or by the Court. I would allow the appeal and restore the order of Harman, J.

Questions put :

That the Order appealed from be reversed.

The Contents have it.

That the judgment of Harman, J., be restored, and that the Respondents do pay to the Appellants their costs here and in the Court of Appeal.

The Contents have it.

[Solicitors:—Markby, Stewart & Wadesons ; Solicitor of Inland Revenue.]