No. 430.—IN THE HIGH COURT OF JUSTICE (KING'S BENCH DIVISION).—
24TH AND 25TH JULY, 1919.

COURT OF APPEAL.—9TH DECEMBER, 1919.

HOUSE OF LORDS.—13TH AND 21ST FEBRUARY, AND 14TH MARCH, 1921.

THE KING *v.* THE COMMISSIONERS FOR THE SPECIAL PURPOSES OF THE INCOME TAX ACTS—

(*Ex parte* DR. BARNARDO'S HOMES NATIONAL INCORPORATED ASSOCIATION.)[2]

Income Tax.—Residuary bequest to Charity.—Will disputed.—Income of testator's estate prior to distribution received under deduction of Income Tax.—Claim by Charity for repayment of Income Tax deducted from accrued income of residue.—Rule Nisi for Mandamus.—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *Section* 88, *Sch. C*, *Rule* 3, *and Section* 105.

Mr. Denzil Thomson died on the 15*th November*, 1914, *leaving the residue of his estate to Dr. Barnardo's Homes National Incorporated Association. The Testator's next-of-skin contested the will and the proceedings were compromised by the Association making over to the next-of-kin one-third of the residuary estate. The proceedings delayed the division of the residuary estate, and the investments constituting or representing the same remained under the control of the Executors until May,* 1916, *between which date and December*, 1916, *two-thirds of the invest-*

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(2) Reported K.B.D. [1920] 1 K.B. 26 ; C.A. [1920] 1 K.B. 468, and 36 T.L.R. 123 ; and H.L. in [1921] 2 A.C. 1.

ments were transferred to the Association and one-third to the Testator's next-of-kin. The income arising from the investments was received under deduction of Income Tax and the total amount of tax deducted from such income during the period between the date of the Testator's death and the dates of transfer by the Executors amounted to £498 0*s.* 11*d.*

The Association applied, under Section 105 *of the Income Tax Act,* 1842, *to the Special Commissioners of Income Tax for repayment of two-thirds of that sum, viz.,* £332 0*s.* 7*d., as being Income Tax on income payable to the Association and applicable, and in fact applied, by it solely for charitable purposes. The application being unsuccessful, the Secretary of the Association applied for and obtained a* rule nisi *calling upon the Special Commissioners of Income Tax to show cause why a writ of mandamus should not issue to them commanding them to allow exemption from Income Tax on the income in question and to repay the sum of* £332 0*s.* 7*d.*

Held, *discharging the* rule nisi,

(i) *that the assent of the Executors to the bequest to the Association of the residue of the estate did not relate back to the date of the Testator's death;*

(ii) *(following the decision in* Lord Sudeley *v.* Attorney-General[1]) *that, prior to the ascertainment of the residue, the Association as residuary legatee had no interest in the Testator's property, that the taxed income of the estate prior to such ascertainment was income of the Executors, and that it was not received by them as trustees on behalf of the Association; and*

(iii) *that the Association was, therefore, not entitled to claim repayment of the Income Tax deducted from such income.*

The case came on for hearing in the Divisional Court before the Earl of Reading, *C.J.*, and Darling and Bray, *J.J.*, on the 24th and 25th July, 1919, when Mr. Clauson, K.C., and Mr. Dighton Pollock appeared in support of the Rule for Dr. Barnardo's Homes, and the Attorney-General (Sir Gordon Hewart, K.C., M.P), Mr. Clayton, K.C., Mr. Sheldon, Mr. T. H. Parr and Mr. R. P. Hills showed cause for the Special Commissioners.

Judgment was given unanimously against the Special Commissioners, and the rule nisi for the mandamus against them was made absolute.

JUDGMENT.

The Lord Chief Justice.—A rule nisi for a mandamus was granted calling upon the Commissioners for Special Purposes of the Income Tax Acts to show cause why a writ of mandamus should not issue to them commanding them to allow exemption from Income Tax on the income of trust funds held under the will of one, Denzil Thomson, and to repay the sum of £332 0*s.* 7*d.* deducted for such Income Tax. The question which arises before us is whether or not the Commissioners for Special Purposes ought to have allowed the exemption, and, consequently, if they ought to have allowed it, we are asked to order that they should

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(1) [1897] A.C. 11.

return the sum of money which has been deducted at the source in the ordinary way.

The facts, so far as they are material, are really very short. Mr. Denzil Thomson, the testator, died in November 1914. His will was proved in December 1914 in common form. Then a question arose as to the will, which it is unnecessary to consider save to say that the Executors issued a writ in the Probate Division to establish the will in solemn form. Eventually a compromise was arrived at on the 9th March 1916, and under the compromise Dr. Barnardo's Homes became entitled to two-thirds of the residuary estate of Mr. Denzil Thomson. During the months from September 1916 to December 1916 certain payments were made relating to the Executors' costs of the suit, which were paid by December 4th, 1916, and thereupon a sum was left in the hands of the Executors which was paid over and distributed in due course as to two-thirds to Dr. Barnardo's Homes. During the interval, that is up to the date of December 1916, monies had been in the Executors' hands which were waiting the final determination of the Court, which took place in March 1916 by the settlement, and then the ascertainment of certain costs which they had to pay. On behalf of Dr. Barnardo's Homes it was contended that once the Executors have assented to the bequest of a residuary estate—which they did undoubtedly by December 1916—the effect is that they must be taken to have assented at least to the application and dedication of so much of the monies which remained in their hands, after payment of the Executors' costs of administration and costs of the suit, and debts, and so forth, to Dr. Barnardo's Homes—that is to say, as to two-thirds to Dr. Barnardo's Homes.

A question might have arisen in this case as to the amount, but we are relieved of that, inasmuch as it could only be a small matter, and it is not disputed by the Attorney-General that the amount involved is the £332 0*s*. 7*d*. What we have to decide is a question of principle and not a question of amount.

This dispute depends upon the view we take of the sections of the Income Tax Act, 1842, and in substance it turns upon the meaning to be attributed to the Third Rule of Schedule C, Section 88; but, in truth, this question depends upon the section relating to Schedule D which comes under Section 105 of the Act. Now it is contended that three conditions must coincide before this exemption is permissible. It was stated that the first is that the income as such belongs to the charity or is held in trust for the charity. The second is that the income during the relevant period is applicable to charitable purposes only. The third is that it is applied in fact to charitable purposes only. Now in my view in this case the question depends really upon the date of the assent, because it is not disputed that Dr. Barnardo's Homes is a charitable purpose within the meaning of the Act. It is not disputed that, from the moment the Executors did in fact assent, Dr. Barnardo's Homes would be entitled to the exemption under the Income Tax Acts to which reference has been made. If the assent relates back to the earlier period, that is, September to December 1916, then this amount of £332 0*s*. 7*d*. is to be allowed as an exemption to Dr. Barnardo's Homes. If the assent of the Executors does not relate back to that period but only dates from the period of the assent in fact, then it would follow, or it is enough to say it may follow, that Dr. Barnardo's Homes would not be entitled to the exemption.

In my view the object of this Statute and of the exemption granted was to allow the exemption in respect of income which was to be used for charitable purposes only; as to that there can be no question. What was

contended, and what was in fact decided by the Commissioners for Special Purposes, was that, until the Executors had in fact assented, as they had the right to pay out of capital or income, and as they had never in fact distinguished between capital or income in their hands, and as they had not in fact assented to these monies being applied to charitable purposes only, it followed from the Statute that Dr. Barnardo's Homes could not be brought within the exemption. I am unable to assent to that view. I think that the effect of the statute and the law applicable to executors is to make the assent, once it had been given, relate back and to make it applicable to all the monies that were in the Executors' hands which were applicable to charitable purposes, provided that the monies were in fact applied to charitable purposes, which is not disputed in this case. The real controversy may be thus illustrated : if the Executors—charged with the duty of applying the money in their hands, when they have assented, to the residuary legatee—in this case the Dr. Barnardo's Homes—held the monies in their hands for a period of years, during which there was litigation, the Commissioners say that, notwithstanding that it turned out in fact that that money which was in their hands has by reason of subsequent facts been determined to be exclusively applicable to charitable purposes, yet the exemption does not prevail in their favour; whereas those appearing and arguing for the residuary legatee, Dr. Barnardo's Homes, contend that, when there has been the assent, they are entitled to the full benefit of it if the other conditions, to which I have referred, apply. Once we are satisfied, as I am, that the assent when given relates back, and that the monies were applicable to charitable purposes only, and were in fact so applied, I think there is no question which remains in controversy in this case.

Our attention has been called to a passage in Williams on Executors, 10th Edition, Volume 2, at page 1108, in which it is said "The assent "of an executor shall have relation to the time of the testator's death : "hence, in the case of a devise of a term of years in tithes . . . if "after the testator's death, and before the executor's assent, tithes are set "out . . . the assent by relation shall perfect the legatee's title to "these several interests"—I exclude the references to the realty as this is dealing with personalty. In my judgment that in principle is the principle to be applied to this case. Once I have come to that conclusion the point is answered which is in dispute.

I am glad that I am able to arrive at this determination of the controversy, because I cannot but think that it was the intention of the Legislature that the exemption to be given was not to depend upon how long the litigation, or the payment of debts, or the inquiry as to debts, or the administration was kept open by the executors, but was in fact intended to be applied for the benefit of the charitable purposes when it had once been established that the monies were applicable to charitable purposes and had in fact been so applied. Although it is quite true that the exemption could not be claimed so long as there had been no assent, yet I think that, when once the assent had taken place and it is clear and unequivocal, as it is in this case, that the monies so held by virtue of that assent were monies applicable to these purposes and were in fact so applied, then the charitable purposes—in this case Dr. Barnardo's Homes—are entitled to the benefit of the exemption.

For these reasons I am of the opinion that the Rule should be made absolute.

Darling, J.—I am of the same opinion and for the same reasons.

Bray, J.—I agree.

Mr. Clauson.—My Lords, the Rule will be made absolute with costs?

The Lord Chief Justice.—No question arises with regard to costs, does it, Mr. Attorney?

The Attorney-General.—My Lords, as I understand it, it is not the practice in such a case for costs to be either paid or received.

The Lord Chief Justice.—Is it not as regards the Commissioners for Special Purposes? It is not like a case against the Crown.

The Attorney-General.—No, My Lord, these are not General Commissioners, but the Commissioners for Special Purposes.

The Lord Chief Justice.—I do not quite follow the distinction. We do usually grant costs in these Income Tax cases, as you know from more recent recollection than I. When these cases are heard in the Revenue Paper, the Order is as a rule, unless there are any special circumstances, that the costs follow the event. That is so in my experience.

The Attorney-General.—In the case of the Revenue Paper there is a statutory authority and there the case is stated by the Commissioners of Inland Revenue, and it is provided for by the statute.

Mr. Clauson.—I notice in the case of the *Commissioners for Special Purposes of the Income Tax* against *Pemsel*,(1) which went to the House of Lords under the same section, claiming the exemption, although it does not shew what happened about costs in the Court below, when it came before the House of Lords the Commissioners were ordered to pay costs, unquestionably.

The Lord Chief Justice.—Were the same Commissioners the parties there?

Mr. Clauson.—Yes, my Lord, the Commissioners for Special Purposes : it was under the same section.

The Lord Chief Justice.—Then the Court allowed the claim on the ground of charitable purposes.

Mr. Clauson.—Yes. Your Lordship will remember that Lord Macnaghten's judgment laid down the law.

The Attorney-General.—There is a difference between General Commissioners and Special Commissioners.

The Lord Chief Justice.—That case to which Mr. Clauson has drawn attention was a case against the Commissioners for Special Purposes.

Mr. Clauson.—Yes, that was the Order as to costs in the House of Lords.

Mr. Justice Darling.—The only point seems to be that if you went to the House of Lords and lost there, Mr. Attorney, you might by virtue of that case be ordered to pay costs. Why should not the same rule apply here?

The Attorney-General.—I do not know if the point was taken in that case. I am told that the point is not without importance. It is under Section 59, Sub-section (2) of the Taxes Management Act, 1880, that costs are given in the cases stated before the Revenue Judge. Sub-section 2 (*b*) of that section says " The High Court shall hear and determine," &c., and " may make such Order as to costs as to the High Court may seem " fit." It is under the provisions of that statute that costs are given in that class of case.

The Lord Chief Justice.—That is the section under which the ordinary Case Stated comes before the Revenue Judge.

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(1) R. *v.* Special Commissioners (*Ex parte* Pemsel) 3 T.C. 53.

The Attorney-General.—Yes.

The Lord Chief Justice.—The question may not be without importance to the Crown and the Commissioners apart from this particular case, and, therefore, what we propose is not to deal with the costs until to-morrow morning so as to give you the opportunity of considering it and saying then whether you wish to argue it. Then we can deal with it.

The Attorney-General.—If your Lordship pleases.

Mr. Clauson.—As a matter of fact, the point is dealt with in Dowell and the result of the cases appears to be that it has been decided in a case in 21 Queen's Bench Division that the Commissioners for Special Purposes are not the Crown for this purpose, and they pay costs.

The Lord Chief Justice.—That is my impression, but I do not remember the authority for it.

Mr. Clauson.—The cases are all quoted on page LXVIII. in my copy of Dowell, which is the 6th edition.

Mr. Justice Darling.—If you give us the name of the case, we can find it.

Mr. Clauson.—*The Queen* v. *Commissioners for Special Purposes of the Income Tax*, 21 Queen's Bench Division, page 313.[1]

Mr. Justice Bray.—It is with reference to a particular section of the Act?

Mr. Clauson.—No, my Lord, it is on ordinary principles, and is put in this way in Dowell: " And where the legislature has constituted certain " Commissioners of the Crown agents to do a particular act—where there " is a statutory obligation upon them to perform a duty towards third " persons as opposed to their duty as servants of the Crown, a mandamus " will lie against them as individuals designated to do that act "; and below that it says: " Where the Commissioners of the Crown act as " servants of the Crown a writ will not lie. The Common Law rule that " the Crown neither pays nor receives costs remains unchanged with " regard to the prerogative writ of mandamus." From that I infer that where it is the Commissioners against whom mandamus will lie to perform a duty towards third persons costs are payable.

The Lord Chief Justice.—I do not see anything in the report of that case in 21 Queen's Bench Division, which I have before me, about the costs.

Mr. Clauson.—Does not it say how the costs were dealt with, my Lord?

The Lord Chief Justice.—No, it only says " Appeal allowed."

Mr. Clauson.—In *Pemsel's* case[2] the mandamus was not granted by the Queen's Bench Division but was granted by the Court of Appeal, and there it does not say anything about costs. Perhaps we may deal with it to-morrow morning if necessary.

The Lord Chief Justice.—Yes, I think that will be better. My recollection does not serve me at the moment as to the precise point, but it may be worth considering. I have some recollection of a point of this kind being argued in one or other of the *Singer* cases in this Court.

The Attorney-General.—I understand that was a case of General Commissioners. There is no doubt that there were two cases in which Orders were made—ex parte *Pemsel* and ex parte *Fletcher*; but the submission, as I am at present instructed, I should seek to make to your Lordships is

(1) **R. v. Special Commissioners (Cape Copper Mining Co.) 2 T.C. 332.**

(2) **R. v. Special Commissioners (*Ex parte* Pemsel) 3 T.C. 53.**

that in those two cases wrong Orders were made. There was a third case, the North Wales University case,[1] reported in 5 T.C., where the matter was reserved and costs were conceded *ex gratia*. But, my Lords, by to-morrow morning I will collect the authorities.

The Lord Chief Justice.—That is the better course, and we will hear you only as to the question of costs.

After hearing legal argument, the Court delivered judgment against the Special Commissioners, their Lordships holding that, if the Court has power to issue a mandamus to the Special Commissioners, it has power to order them to pay costs; and that the Common Law rule, that the Crown neither receives nor pays costs, would not apply, since mandamus would lie against the Commissioners in their capacity as persons expressly charged with a statutory duty and not in the capacity of agents of the Crown acting in the exercise of the Crown's prerogative.

JUDGMENT.

The Lord Chief Justice.—The question raised is whether or not this Court has power to order the Commissioners for Special Purposes of the Income Tax Acts to pay the costs in a proceeding where the Court has ordered a Rule Absolute for a mandamus commanding the Commissioners for Special Purposes of the Income Tax Acts to do certain things—to allow an exemption and to make an order for repayment. The decision was given by us yesterday. For the Commissioners the arguments may be stated quite briefly in the following proposition : That the Commissioners for Special Purposes of the Income Tax Acts are to be regarded for these purposes as the Crown, and at Common Law the rule is that the King and any person suing to his use neither pays nor receives costs. To quote from Blackstone's Commentaries, "As it is his prerogative not to pay "them to a subject, so it is beneath his dignity to receive them." And consequently the Common Law rule still obtains. Costs are not payable by the subject in an unsuccessful litigation with the Crown, nor by the Crown in an unsuccessful litigation with a subject. If this case falls within that proposition then I should accede at once to the Attorney-General's view that no costs could be ordered against him. But there is another proposition of law, and the one which is invoked in this case by the successful applicant. It is a proposition which is stated by Lord Esher, when Master of the Rolls, in 21 Queen's Bench Division in *The Queen* v. *Commissioners for Special Purposes of the Income Tax*, reported at page 313. The passage in question is on page 317.[2] "With "regard to the question whether mandamus will lie"—now it is to be observed that that is a mandamus to the Commissioners for Special Purposes of the Income Tax Acts—that is, the same officials who are ordered by this Court to do certain acts. In the same way in that case the Commissioners had refused to issue certain orders for repayment, and the Court ordered a writ to issue, and Lord Esher says this : "With regard "to the question whether mandamus will lie, I am of opinion that the

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[1] R. *v.* Special Commissioners (*Ex parte* University College of North Wales) 5 T.C. 408.

[2] R. *v.* Special Commissioners (Cape Copper Mining Co.), 2 T.C. at 348.

" case falls within the class of cases, where officials having a public duty " to perform, and having refused to perform it mandamus will lie on the " application of a person interested to compel them to do so." Now to my mind that is a far reaching and most salutary provision of the Common Law. Although it is true that we, sitting here as the representatives of the Crown, and issuing orders from this Court commanding persons to carry out duties in the name of the Crown, cannot order the Crown to carry out a duty, we can order persons who are charged with statutory obligations to carry them out if they fail to do so, if they come within the words of the proposition laid down by Lord Esher. It has often been said by this Court, and certainly within the last few years on more than one occasion, quoting from a well known judgment of Chief Justice Cockburn in *The Queen* v. *Lords Commissioners of the Treasury*,(1) in Law Reports, 7 Queen's Bench, at page 394. " With reference to that " jurisdiction "—he refers to the jurisdiction as to the issue of a mandamus directed to the Crown or to a person simply acting in his capacity of servant of the Crown—" we must start with this unquestionable " principle, that when a duty has to be performed (if I may use that ex- " pression) by the Crown, this Court cannot claim even in appearance to " have any power to command the Crown; the thing is out of the question. " Over the Sovereign we can have no power. In like manner where the " parties are acting as servants of the Crown, and are amenable to the " Crown, whose servants they are, they are not amenable to us in the " exercise of our prerogative jurisdiction."

In my judgment that is not a principle of law which is applicable to this case, that is to say, I do not think that this is a case which invokes the jurisdiction of this Court to order the Crown (if one may use that expression) to do a particular act or to order a person who is a servant of the Crown, amenable to the Crown, to do a particular act. There must be something more than that before we can order a mandamus.

In this case I think that it is clear that the Commissioners for Special Purposes were charged with the duty created by the Act of Parliament, and upon the view which we have expressed they failed to carry out that duty. A reference to Section 105 of the Income Tax Act, 1842, to be found in Dowell (7th Edition), at page 323, shows that there is the power, because the words are " such exemption shall be allowed by the " commissioners for special purposes, on due proof before them; and the " amount of the duties which shall have been paid by such corporation, " fraternity, society, or trustee . . . . . shall be repaid under the order " of the said commissioners for special purposes in the manner herein- " before provided."

Now the Commissioners for Special Purposes failed to allow the exemption on due proof before them and failed to make the order which it was incumbent upon them to make by statute, and this Court therefore has issued the mandamus commanding them to do it, in order that when they have issued their order that order may be taken to the Accountant-General or whoever may be the proper officer at His Majesty's Treasury so that the money, which has been deducted at the source from monies which we have held were properly monies applicable to charitable purposes and to which an exemption applies, should be returned, as we have held that this £332 was money which Dr. Barnardo's Homes were entitled to have returned to them. This is the only way they can get it. From the valuable and most interesting argument which Mr. Clauson addressed to us it became quite clear that this was the proper remedy, and although

(1) [1872] L.R. 7 Q.B., 394.

it may be there is a little tendency and has been a little tendency not to look as closely as one should to the actual order made or to the position occupied by the person to whom it is addressed, nevertheless, when we come to a question of this kind it is essential to see exactly how it stands.

Now that being the case, it follows that the Court can issue a mandamus, and in my judgment it equally follows that the Court can order the officers to whom the mandamus is issued to pay the costs, just as they could order them, if the applicant had been unsuccessful, to receive the costs. In other words I think the limitation as to costs of this Common Law rule applicable to the Crown is not applicable to the case where it is an officer charged with duty under the statute, but who nevertheless is discharging functions, as the Attorney-General has quite rightly pointed out to us, as a servant of the Crown, the essential difference to my mind being that he is charged with a statutory duty by the express provision of the statute.

It seems to me that it follows as a matter of course that wherever the Court can issue a mandamus to an officer charged with a statutory duty it can order that officer to receive or pay costs, for the reason that the mandamus is not an order directed to the Crown, which this Court can never issue, but is an order directed to an officer who is bound to execute a certain duty under the Act of Parliament.

It is interesting to observe that in a number of cases which have come before this Court, this Court has made orders upon the Commissioners for Special Purposes to pay or to receive costs. I do not propose to go through them because in my view, although it was most useful to have our attention directed to them, they form no satisfactory basis for a decision inasmuch as the point was never really argued out. There are two cases at least in the House of Lords in which the Court has ordered the costs to be paid by these Commissioners for Special Purposes. There are undoubtedly cases in the Court below, notably the case to which attention was called in 21 Queen's Bench Division, in which it has been pointed out by a Law Officer or by Counsel that such cases came within the general rule of the Common Law, that costs were not paid or received by the Crown. There has been acquiescence. Sometimes it is because the Counsel representing the Special Commissioners has said that although he cannot be ordered yet, as a matter of concession, he will pay the costs of the successful applicant, or the matter has passed *sub silentio*. In truth these cases do not, in my opinion, assist us.

Now we have had the point carefully argued and it is very desirable that it should have been argued. In my judgment it is of the greatest public importance that persons should know that if they have litigation with the Commissioners for Special Purposes of Income Tax, where they think they have a right to an exemption and a return of Income Tax deducted at the source, which has been refused to them by the Commissioners, they can come to this Court and invoke the jurisdiction of this Court and, if they are successful in the litigation, receive the costs from the Commissioners for Special Purposes. I have considered very carefully, with the assistance of the learned Attorney-General, as to whether there is anything in laying down this general rule which might be said to be to the public inconvenience. I have come to the conclusion that it is really for the public convenience that the rule should be stated and understood for the future, so that, according to the decision of this Court, there can be no misunderstanding. As was said by the learned Attorney-General, the Crown has no interest in resisting the jurisdiction of the Court. It has, in pursuance of duty, naturally presented to us arguments to assist us

against those of Mr. Clauson. It may or may not turn out to its interest to pay and receive costs, but it certainly has no interest, so far as I can see, in resisting this general rule. The Crown represents the public, and such uncertainty as existed is removed by virtue of what we have said.

Now, I think it unnecessary to go through the authorities to which our attention has been called, because, once we have got really to the end of the argument, I prefer to base my decision upon the broad principle which I laid down at the beginning of the judgment, and to stand by that. I will only add that in the case of the General Commissioners, and certainly with reference to cases stated which come before this Court under Section 59 of the Taxes Management Act of 1880, there is an express provision, and no doubt you do find in a number of these cases express provisions really to remove doubts, to make quite clear what the jurisdiction of the Court is. I find nothing in any one of the authorities to which our attention has been called which prevents our laying down the rule as I have enunciated it. I find much support for it, particularly in the case to which I have called attention, and the other cases which have been cited, in which this Court has purported to exercise this jurisdiction, and notably in *Pemsel's*(1) case.

On the whole, therefore, I have come to the conclusion that this is a case in which we have jurisdiction, and as we stated yesterday we should, we exercise it for the benefit of the successful applicant and say that the Commissioners must pay the costs.

Darling, J.—I am of the same opinion. It is remarkable that a question which merely has to deal with costs should raise, as I think this does, what amounts to nothing less than a constitutional argument. The decision to which we are coming to-day is, to my mind, a decision of very great importance, but I think it has been sufficiently argued to-day to enable us to arrive at what I believe to be the correct conclusion. The question is whether costs can be given here to the successful litigant or whether they cannot, and if they cannot be given to him it must be because, although he has obtained a mandamus against the persons in regard to whom he asked for it, and although they are subject to this particular mandamus, they are really to be regarded as the Crown and, because they are the Crown, exercising its prerogative, therefore no costs can be given against them. If the Special Commissioners are the Crown, and if, because they are the Crown, their prerogative protects them from paying the costs of the obtaining of the mandamus, to my mind it is impossible to say that they are subject to the mandamus, because this Court derives all its authority from the Crown, and can make no order against the Crown itself, although it may make orders against people who are doing things which they have been told to do by the Crown, and which they refused to do.

The matter was put by Lord Chief Justice Cockburn, who always, to my mind, dealt with these questions on broad well-ascertained principles, in this way in the case of *The Queen* v. *The Lords Commissioners of the Treasury*, at page 394 of the Law Reports, 7 Queen's Bench, in the year 1872. He was dealing with this very question of the jurisdiction of this Court to issue a writ of mandamus, and he said this : "I take it, with "reference to that jurisdiction, we must start with this unquestionable principle, that when a duty has to be performed (if I may use that ex-"pression) by the Crown, this Court cannot claim even in appearance to "have any power to command the Crown ; the thing is out of the question.

(1) 3 T.C. 53.

"Over the Sovereign we can have no power. In like manner where the "parties are acting as servants of the Crown, and are amenable to the "Crown, whose servants they are, they are not amenable to us in the "exercise of our prerogative jurisdiction." He came to the conclusion that the Lords of the Treasury had not done their duty, not acted as they should have done, and he said this on the next page: "Although the "Lords of the Treasury have made a very great mistake, and although the "present state of things is of the most anomalous and most unsatisfactory "character, I regret to say, according to the true principle upon which "this prerogative jurisdiction ever has been and ought to be exercised, I "do not see that this Court has authority to issue this writ of mandamus."

Now we came to the conclusion that here there were people who had made a very great mistake, but we came to the conclusion that things are not of an anomalous and unsatisfactory character with regard to the Special Commissioners of Income Tax, and that we could issue the mandamus; we all agreed upon that, and it has not been argued really by the Attorney-General that we could not issue it against these people. It is only when the question of costs comes that the difficulty arises.

Now, if we can issue it, what is there to prevent the costs being given against these people who are to obey the Writ? The only argument is that they are the Crown acting in the exercise of the Crown's prerogative, because this rule which prevents the giving of costs, is this, as it is expressed by Sir William Blackstone. The Crown cannot be made to pay the costs because what it is doing is done by its prerogative and there is no Court above the prerogative of the Crown; the Crown will not receive costs because it is beneath the dignity of the Crown to receive costs. But I find many cases in the books where people in the position of these people have received costs. Their dignity does not seem to prevent their pocketing costs; when necessary they say, "we desire to have the preroga-"tive, but we are quite content to forego our dignity occasionally."

To my mind these Special Commissioners are merely salaried officials of the Department which collects the taxes. They are not great officers of the State, but subordinates, and we cannot confuse them with the Crown so as to hold that their dignity is such that they could not stoop to receive costs, neither have they the prerogative not to pay them.

The conclusion therefore at which I have arrived is exactly that which has been expressed by my Lord, and which, I believe, is also the view of my Brother Bray.

It was asked by my Lord whether, if we pronounced this decision that costs should be paid by the Special Commissioners—we know quite well of course that they will be reimbursed to them by the public department—we should be doing something which would be greatly to the public detriment. Of course we do not desire to do anything inconvenient. Although, if the law compels us, we must do it, even if it does appear inconvenient, still one would do it with regret and one would try to find out whether one were bound to do it. So far we have heard no argument brought before us to show that this decision of ours will be against the public interest, or unjust to any individual. And I feel bound to say that there are many cases in which taxpayers have a right to be exempt from making payment or are entitled to a return of money already paid, but the taxpayers often do not know all their rights, and I believe that this ignorance is sometimes taken advantage of by those who demand the taxes or resist their return. So far from being a disadvantage I hope and believe that this decision of ours is a just one and will be fruitful of other justice.

Bray J.—I agree. In this Case we have made absolute a rule for a mandamus to the Commissioners for Special Purposes of the Income Tax Acts. Now the applicants in the Case, who have succeeded, have asked that the Commissioners be ordered to pay the costs. The Attorney-General's answer to the application is this, that the Common Law rule applies in this Case, namely, that the Crown neither pays nor receives costs, and that is the question which we have to determine.

Now in order to see whether it is applicable we have to see what the mandamus is which is to go. The mandamus is granted to perform a duty which is imposed upon the Commissioners by Section 105 of the Income Tax Act, 1842, which says this :—I will not read the preliminary part— "and the amount of the duties which shall have been paid by such "corporation, fraternity, society or trustee, in respect of such interest "or yearly payment, either by deduction from the same or otherwise, "shall be repaid under the order of the said commissioners for special "purposes in the manner hereinbefore provided for the repayment of "sums allowed by them in pursuance of any exemption contained in "the said Schedule (C)." The mandamus therefore is for an order that the Commissioners do make the order there referred to. In making the order are they servants or representatives of the Crown, or are they persons interposed between the subject and the Crown? In my opinion that question was practically decided in the Case, which has already been referred to, of *The Queen* v. *The Commissioners for Special Purposes of Income Tax*, reported in volume 21 Q.B.D. Lord Esher's judgment has been cited but there is an important passage in Lord Lindley's judgment at the end, on page 322.(1) "With regard to the question whether mandamus would lie, I have looked into the authorities and I come to the "conclusion that the case is one in which it will lie. It is no doubt "difficult to draw the line, and some of the cases are not easy to reconcile; "but I think that the Counsel for the applicants were right in saying that "the application is not to enforce payment of money by the Crown, but to "enforce the making of an order by the Commissioners which it is the "duty of the Commissioners to make, and without which the repayment "cannot be obtained."

The point was not taken by the Attorney-General during the argument for the mandamus, probably because he was aware of this decision. If it had been taken in my opinion it would have failed. If the Commissioners were merely the servants of the Crown it is quite clear that the order for the mandamus would not lie. That has been decided more than once. It was quite clearly decided by the Court of Appeal in *The Queen* v. *The Secretary of State for War* ([1891], L.R., 2 Q.B.D. 326). Lord Esher says on page 338 : "Assuming that the Crown were under "any obligation to make this allowance to the claimant, a mandamus "would not lie against the Secretary of State, because his position is "merely that of agent for the Crown, and he is only liable to answer to "the Crown whether he has obeyed the terms of his agency or not : he "has no legal duty as such agent towards any individual."

In this case, according to the decision which I have cited, it seems to me that it is clear that these Special Commissioners are not acting merely as servants of the Crown. They are answerable it may be to the Crown, but they are answerable to the subject who is entitled to exemption. They are directed to make an order without which the repayment cannot be obtained. That being the case, it seems to me quite clear that the Common Law rule does not prevail because in fact the order for costs

(1) R. v. Special Commissioners (Cape Copper Mining Co.), 2 T.C. at p. 356.

is not against the Crown; the order for costs is against the Commissioners for Special Purposes of the Income Tax Acts who have an independent position and are answerable to the subject if they have refused to make an order which they ought to have made. On these grounds I am of opinion that the order must go with costs.

I ought perhaps to say this. I think it is usual not to make this order until it has been determined whether the parties against whom the mandamus goes are going further or not, but no objection has been taken on that ground, and I do not think we need pursue the subject whether it is premature or not.

Mr. Clauson.—I think your Lordships directed that the form of mandamus should correct what is an ambiguity really in the Order Nisi.

The Lord Chief Justice.—Yes.

Mr. Clauson.—It should be to allow exemption, and so on, and instead of the words "and to repay the sum", it should be "and to issue an "order for repayment of the sum", because they are not the people that we paid, of course.

The Lord Chief Justice.—Yes.

Mr. Clauson.—Your Lordship will allow it to run in that form?

The Lord Chief Justice.—Yes.

The Special Commissioners having appealed, the case came before the Court of Appeal, (Lord Sterndale, M.R., and Atkin and Younger, *L.JJ.*), on the 9th December, 1919, when judgment was given in favour of the Special Commissioners, reversing the decision of the Court below.

The Attorney-General (Sir Gordon Hewart, K.C., M.P.), Mr. Clayton, K.C., Mr. Sheldon, Mr. T. H. Parr and Mr. R. P. Hills appeared for the Special Commissioners, and Mr. Disturnal, K.C., Mr. Clauson, K.C., and Mr. Dighton Pollock as Counsel for Dr. Barnardo's Homes.

JUDGMENT.

The Master of the Rolls.—This is an appeal from a decision of the Divisional Court making absolute a Rule for a mandamus calling upon the Commissioners for the Special Purposes of the Income Tax Acts to allow exemption from Income Tax on the income of certain funds held under the will of Mr. Denzil Thomson and to repay a sum of over £300 which had been deducted for such Income Tax. The Rule was moved on behalf of the Dr. Barnardo Homes, the ground being that they, being a charitable institution, were entitled to this return of Income Tax because the Income Tax had been charged upon income which was devoted by them as a charitable institution to charitable purposes. Mr. Thomson died in November, 1914, and by his will he gave some specific bequest to Dr. Barnardo's Homes and to a gentleman mentioned there and also a pecuniary bequest of £100 to a person also named in the will, and after that he bequeathed the whole of the residue of his estate and effects, subject to the payment of his debts and funeral and testamentary expenses, to Dr. Barnardo's Homes Association. The will was proved very soon after the testator's death in common form. Then a question

arose as to it and litigation followed, the result of which was that a compromise was arrived at by which it was agreed that the will should be proved in solemn form without any further opposition, and that after making certain other arrangements, one-third of the residue of the estate should go to the next-of-kin and that two-thirds of it should go to Dr. Barnardo's Homes. It also said that the next-of-kin were to receive one-third of the capital of the estate and one-third of the income which had accrued due since the date of his death, the other two-thirds, of course, going to the residuary legatee. That litigation occupied some time and delayed the winding-up of the estate for some time. The date of the settlement was March, 1916. The executors then, the matter having been settled, proceeded with the administration of the estate, and in December of 1916 they arrived at the sum which was to be given to the next-of-kin as to one-third of the estate and to Dr. Barnardo's Homes in respect of the other two-thirds of the estate. It will be seen, therefore, that about two years elapsed between the testator's death and the date when the amount of the residue was arrived at. In the meantime dividends had been accruing upon the estate, moneys had been received and moneys had been paid out. Some moneys had been advanced by the Bank for the purpose of paying duties for the ordinary reason because the executors could not, of course, touch the balances in the Bank till after they had obtained probate and they were repaid when the executors were able to deal with the assets, with the result, as I have said, that in December the amount of residue was arrived at. In the meantime Income Tax had been deducted at the source upon the dividends which had been received from time to time, and it is that Income Tax which Dr. Barnardo's Homes now seek to have refunded to them on the ground that these dividends were dividends to which they were entitled, that they were dividends which were received by the executors on their behalf and that, therefore, they being a charitable institution and these being funds devoted to charity, they are entitled to have the Income Tax refunded.

That depends partly upon general principles of law and partly upon the provisions of the Income Tax Act. Section 88 of the Income Tax Act (1842) provides: "The said last-mentioned duties shall be paid by "persons and corporations respectively entrusted with the payment "of the annuities, dividends, and shares of annuities, therein charged, on "behalf of the persons, corporations, companies, or societies entitled "thereto, their executors, administrators, successors, or assigns, and shall "be assessed" in the way there mentioned "except in the following "cases of exemption from the said duties, viz.," and then the third is: "The stock or dividends of any corporation, fraternity, or society of "persons, or of any trust established for charitable purposes only, or "which, according to the rules or regulations established by Act of "Parliament, charter, decree, deed of trust, or will, shall be applicable "by the said corporation, fraternity, or society, or by any trustee, to "charitable purposes only, and in so far as the same shall be applied to "charitable purposes only." That deals with the income which is chargeable under Schedule C. Section 100 deals with the Income Tax chargeable upon other funds, and not those contained in Schedule C, and Section 105 provides in substance that where Income Tax is chargeable under Schedule D, charitable institutions shall have the same exemption for funds applied to charitable purposes as is provided under Schedule C. We therefore come back really in this case to Schedule C, because whether these funds fall under one Schedule or the other the exemption is the same.

Now it seems to me that in order to obtain the return of this income it is incumbent on Dr. Barnardo's Homes to show that that tax was paid on their behalf in the first instance by the executors, because Schedule C provides, as I have read, that the duty shall be paid by the persons and corporations entrusted with the payments on behalf of the persons and corporations entitled thereto. If, therefore, Dr. Barnardo's Homes cannot show that those dividends received before December during the administration of the estate were received on their behalf, they fail *in limine* it seems to me.

The position was this, as I have said. Up to December the residue was not ascertained, and not only was it not ascertained, but it really did not exist. I have always been under the impression that the residue had not really come into existence until the payments had been made which were necessary to arrive at it, and I am glad to find that that is expressed very clearly by Sir George Jessel in *Trethewy* v. *Helyar* in 4 Chancery Division (p. 53), where he says: "It appears "to have been long settled law that there is no residue of personal estate "until after payment of the debts, funeral and testamentary expenses, "and all costs of the administration of the estate of the testator. There- "fore until you have paid the costs you do not arrive at the net residue at "all, and when you do arrive at it it is distributed according to law. That "is the principle."

The only way in which the executors in this case could have been paying the Income Tax on behalf of Dr. Barnardo's Homes would have been if Dr. Barnardo's Homes were the persons entitled to the dividends and the income. The executors as soon as the residue was ascertained became trustees for the residuary legatees of that fund, but until that was ascertained there was no fund to which they could become, or did become, trustees for the residuary legatees at all. The income that they were receiving in the meantime was income which they were receiving, not on behalf of the residuary legatees at all, but on behalf of themselves as executors for application in the due administration of the estate. I think, therefore, that these dividends, and this income up to December, when the residue was ascertained, were not received on account of the residuary legatees at all, and the residuary legatees were not the persons entitled to that income, or to those dividends, and therefore, the Income Tax was not paid on their behalf; and I think that that is sufficient to dispose of the case. In the Divisional Court the decision went very much upon the doctrine as applied to the assent of the executor to a legacy, and the Court seemed to have held that the executors having assented to the bequest of the residue by the payment of it in December, that assent related back to the testator's death. Now I do not propose to discuss very much whether an executor does or does not or can or cannot assent to a residuary bequest. There seemed to me to be a little difference between the learned Counsel who argued the case for the Respondent upon the point. But it seems to me to be obvious that if he can, and if he does, assent in any way, the incidents connected with assent are absolutely different, and the operation is absolutely different, in the case of a residuary bequest, and in the case of a specific bequest. In the case of a specific bequest at the time of the testator's death there does exist the thing which he bequeaths. It may be a horse. He bequeaths that horse, and the testator assenting to that, the title of the legatee to the horse dates from the death of the testator. In the case of a residue it does not exist. As I have pointed out, there is no such thing until the estate has been administered, and the residue has been ascertained.

No assent could possibly take place in this case before December, because there is nothing to which that assent can attach. There might be a promise to pay the residue when ascertained, but that is an entirely different thing from assenting to the bequest of a specific thing. If there be such a thing as an assent it seems to me it cannot possibly relate further back than the date at which the thing to which the assent attaches comes into existence, and the first date that that can be in this case, I think, would be in December. I prefer not to put my judgment in this case upon the doctrine of assent, or the principle of assent at all. I put it upon the ground that these dividends, and this income, up to December, 1916, were not received on account of these residuary legatees at all, and that therefore the Income Tax that was paid by deduction was not paid on their behalf. The fund they got was the residue when ascertained. It is quite true that in the making up of that fund two things entered, the capital of the testator's estate, and income derived from the testator's estate; but those two things formed but one fund to which these persons were entitled when it was ascertained, and I think, as I have said, that the Income Tax was not paid on their behalf. The income and the dividends were not received on their behalf, and it is practically impossible to tell out of what funds the executors made their payments in the administration of the estate. They received the funds generally, and they made the payments generally, and there were no specific dividends or income received on account of any particular legatee, certainly not on account of these legatees.

I think, therefore, that this appeal must be allowed, and the result, I suppose will be that the Rule will be discharged with costs here and below.

Atkin, L.J.—I agree. It appears to me that the applicants in this case had to bring themselves within either Section 105 or Section 88; in fact, I think they have to bring themselves within both. Section 105, which is the exemption from duties on interest chargeable under Schedule D, my Lord has read, and Section 88 is the exemption in respect of the duty charged under Schedule C. The charging words in Section 88 are : " The duties shall be paid by the persons and corpora-" tions respectively entrusted with the payment of the annuities, divi-" dends, and shares of annuities, therein charged, on behalf of the persons, " corporations, companies, or societies entitled thereto." It appears to me that the same principle has got to be applied to the claim in respect of exemption from duties charged under Schedule D. In other words, it is in respect to payments which have been deducted on behalf of the persons entitled thereto. I think, therefore, that the Association in this case has got to establish that the duty was deducted from dividends to which they, the Association, were entitled.

Now how did they establish that? I leave out of account the question as to the dividend which would be apportioned as belonging to the testator's estate. It appears to me quite plain that a very large proportion of the duty was in fact duty which was charged in respect of interest which accrued during the testator's lifetime. But that is not the material point in this case, because we are to decide the question of principle. I will treat them as being confined solely to duties deducted from dividends which accrued entirely after the testator's death. Now were the Association entitled to those dividends when the duty was deducted from them? It appears to me that they were not. They were

left the residue of this estate, and it appears to me plain that they did not become entitled to that residue until the residue came into existence, and was ascertained, in other words, until the estate was administered so that the executors were able to know what the fund was which they were eventually bound to hand over to the Association. On that simple ground I think that the claim must fail.

It is said, however, that though that might have been so at the particular moment at which the interest was deducted, and the dividends were received by the executors, yet the title of the Association related back to the testator's death as soon as the executors had fully administered the estate, and had intimated to the beneficiaries that they had so administered the estate, and pointed out to them what the exact amount of the residue was, in other words, said they assented to the legacy.

Now in respect of that matter there has been no authority produced before us at all to establish that the doctrine of relation back of the legatee's title upon the assent by the executors to the legacy in the case of a specific legacy, applies in the case of a residuary bequest, and on principle one is not surprised that there should be that lack of authority. The two things appear to differ, and differ in the very root of things, because whereas in the one case of a specific legacy there is something which has existed at the date of the death, and which the testator intended the legatee to receive in that form; on the other hand in the case of a residue there is something which did not exist at the date of the death, and which the testator did not intend the legatee to receive in any form in which he possessed it or at that particular time. It is not merely that the amount of the legacy is not ascertained but that the legacy is not even in existence in the form in which it is bequeathed to the legatee. It appears to me that there is no authority for the proposition that the title of a residuary legatee relates back to the death as soon as the executor has ascertained the amount and has intimated to the legatee what that amount is. I think on principle there should be no relation back.

I myself feel great difficulty in this case, because I am unable precisely to ascertain what was in the mind of the Divisional Court, the judgment of which was given by the Lord Chief Justice, on this point. I am inclined to think that there has been some misreport of the judgment in this matter, because in the judgment as we have it, the learned Lord Chief Justice says this: "It is not disputed that, from "the moment the executors did in fact assent, Dr. Barnardo's Homes "would be entitled to the exemption under the Income Tax Acts to which "reference has been made. If the assent relates back to the earlier "period, that is September to December, 1916, then this amount of "£332 0s. 7d. is to be allowed as an exemption to Dr. Barnardo's Homes. "If the assent of the executors does not relate back to that period, but "only dates from the period of the assent in fact, then it would follow, "or it is enough to say it may follow, that Dr. Barnardo's Homes would "not be entitled to the exemption." Now what the period of September that is mentioned here is, or what the relevance of it is, I am unable to ascertain. The only previous reference to the matter is a reference made in an earlier part of the Lord Chief Justice's judgment in which he says: "During the months from September 1916, to December, 1916, "certain payments were made relating to the executor's costs of the "suit, which were paid by December 4th, 1916," and so on. Whether he is referring to that or not, or whether by "September" he means

the date of the testator's death, I am sure I do not know, and Counsel were not able to help. I think it is unfortunate that we are not quite in a position to appreciate exactly what was intended to be put in the Court below. However, it appears to me on authority that there is no reason for supposing that the doctrine of relation back does apply in the case of a residuary bequest under these circumstances, and therefore I think that the appeal should succeed.

I think it is to be noticed that one of the results is what was pointed out by the Attorney-General, that, generally speaking, this result is more favourable perhaps to the community than the opposite result; because if, in fact, the legatee who receives a residuary bequest does not receive it divided up into capital and income, but receives it as a lump sum by way of capital, then it is plain that the Income Tax Commissioners, the Revenue Authorities, are not entitled to say that he has received so much capital, but also so much income, and therefore they are not entitled as against him to apportion the income so as to say that he has received income for the purpose, it may be, of Super-tax, or for the purpose of increasing, or diminishing, or removing altogether, any right to abatement which otherwise he was entitled to.

However, we are not to determine this case by reason of the consequences which may follow. It appears to me that the claim of the Crown here is correct, and I think this appeal should be allowed.

Younger, L.J.—I am of the same opinion. It was, I think, conceded by Mr. Disturnal that no claim in this case could be made by his clients except in respect of the Income Tax deducted from some dividend or interest to which Dr. Barnardo's Homes can now say that they were entitled at the date of the deduction. It is accordingly necessary that the title at that date to the dividend from which the deduction was made should be established.

Now the administration of this estate, as one sees from the accounts to which Mr. Sheldon has called our attention has been of the most ordinary and usual kind, the result of which has been—as is the case in the great majority of estates consisting of personal property only—that the actual ascertained residue available for division amongst the residuary legatees represented, in fact, the proceeds of sale of the testator's entire estate, any income upon portions of that estate received by the executors prior to the sale, and any interest which might have been received by them in respect of money lent or on deposit, less the costs of administration, the debts which were paid, the legacies which were satisfied, and the charges and expenses of the executors which had been incurred and were defrayed. They are left with a net sum available for division by virtue of the agreement which was come to in the Probate Court, to which I will refer in a moment, and which only has effect, as I understand it, as an agreement made by the person who was the sole residuary legatee, and who was *sui juris*, with other persons who had in that Court established a possible claim, under which by direction of the person entitled under the will, the particular proportion of this residue which would have gone to him is to be divided in the proportions set forth in that agreement.

Now that was the particular fund which was available in this case for division in the month of December—I think it was December 4th, 1916—and if there had been no more in the case than that, I myself doubt whether it would have occurred to the advisers of Dr. Barnardo's Homes that they could make any claim against the Crown in respect

of any deduction of income tax on any part of the testator's property which had been deducted prior to the time the balance was ascertained. And for this reason, that if that was all that had happened it would have appeared impossible to anybody to state what was the source originally of any one part of that sum which was paid over to them when the residue was distributed, so as to enable them to say that any one of those parts represented the proceeds of sale of any particular security from which any particular deduction has been made in respect of any particular legatee. I think also that that is confirmed by what the Master of the Rolls has read from the judgment of Sir George Jessel, and what one, I think, has always understood to be the principle applicable to administration actions and actions of trustees with reference to residue, and that is this, that until the residue is ascertained, and until its existence as net residue has been acknowledged by the trustee, either by payment to the residuary legatee, or, if the residue be settled, by the appropriation of a fund to meet the settled residue, the residuary legatee has no interest in any part of that which subsequently becomes residue as a specific fund, but that his right is, until that moment of time arrives, to have the estate administered in due course, to have the debts and the legacies and the expenses paid, to have that which remains realised, and to have the net proceeds handed over to himself, and he receives those net proceeds as a specific fund to which he is entitled only after all these preliminary matters of administration have been carried out and have been duly adjusted.

Now that is the ordinary case, and that would have been this case but for an agreement which is really, as it seems to me, entirely irrelevant to the particular rights of the parties, but which has brought into existence the particular claim made here with a force that I think otherwise that claim would not have been felt to possess. I look at this settlement of the Probate action, and I find that the first clause is this: "The last will to be proved in solemn form without any further "opposition." That means that the testator's wishes as expressed in his will are to have full testamentary effect.

We then come to the subsequent arrangements as between the persons claiming that fund and personally one to the other, and the first is this: "(2) The executors to pay or hand over to the next-of-kin or to their "solicitors, Messrs. Willis & Willis, upon production by them of an "authority to receive the same, one-third of the capital of the testator's "estate and one-third of the income which has accrued due since the "date of his death."

Now admittedly income which has accrued due since the date of his death is not all of it income which is available for any legacy, specific or otherwise. To the extent to which it has accrued before the death it would not be part of any specific legacy; but they have purported to agree amongst themselves to a division of one-third of the income which has accrued since the death, and it is noticeable that this sum of £332 0s. 7d. (which is the sum which it is said is admitted by the Attorney-General for the purposes of discussion) represents the tax on two-thirds of the actual income which has accrued due since the date of the death, some substantial portion of which represents income which had accrued before the death of the testator at all.

Then we go on: "(3) The capital of the estate for the purpose of "the last preceding term to be arrived at by taking the gross estate and "deducting therefrom (1) the testator's debts and funeral expenses in-"cluding sums paid to Dr. Butler and Mrs Dover (2) The Estate and

"Legacy Duties, (3) the cost of proving the will in common form and "of the collection and distribution of the estate and (4) the legacies "bequeathed by the will but no costs of this action are to be deducted." That is to say, the parties by agreement between themselves, they being the only persons on this settlement beneficially interested, agreed to the marshalling of the particular debts in the testator's administration upon capital irrespective altogether of what, even in a question between income and capital, would be the rights. Then "each party is to "pay his own costs of this action," and so forth.

What we find, therefore, is this, that the parties in the Probate Division by agreement between themselves to which the Crown was no party, and for their own convenience, have in point of fact (and they were quite entitled to do so) agreed that there shall be appropriated, in respect of what is called a fund of income, to one of the parties one-third of it, and in respect of what is called another fund of income, to the other parties two-thirds of it, and then the other party entitled to two-thirds of income which under this settlement he purports to receive as an untouched fund, then comes and says: "now this has "been my income all through; this is the income on my part of the "residue which has now been ascertained; from that income which was "mine all through, as is shown by this settlement, there has been a de-"duction in respect of Income Tax. I am a Charity, and I ask that that "which has been deducted shall be repaid."

Now, as I say, the terms of this settlement do give a force to that contention which it would not possess, but which it would altogether lack, if this division, instead of being arranged in this way had simply been, as it well might have been, that one-third of the fund in the hands of the executors representing residue is to be paid to the next-of-kin, and two-thirds of the fund representing residue is to be paid to the persons named under the will as entitled to the whole. If those had been the terms of settlement then it appears to me that there would have been nothing even on paper to alter the right of the residuary legatee in respect of the two-thirds which he would have received from that which, apart from this agreement, would have been his. But it seems to me that a settlement of this kind can make no difference to the rights either as between the executor and the legatee on the one hand, or the Crown against whom this claim is made. This really as a settlement, as it seems to me, is irrelevant to the actual question which has to be determined, although the form in which the settlement is couched appears to me to suggest the very nature of the claim which is made.

The matter is not altogether unimportant. It is important in this sense that if it had not been possible, relying on the terms of this settlement, for the charity in this case to make a definite claim to a sum of £332 0*s.* 7*d.* it would have been found to be absolutely impossible to make a claim to any sum at all; and the fact that it would have been impossible to frame a claim for any definite sum at all goes to confirm the view which has been expressed by the other members of the Court, and in which I concur, namely, that the only right which there is either in the next-of-kin or in Dr. Barnardo's Homes under this settlement is to receive by virtue of the agreement, in the one case one-third and in the other case two-thirds of the net sum which represents the net proceeds of the realisation of the whole of the testator's estate after all the prior charges and the debts and the legacies have been defrayed throughout, and until that moment it appears to me there

was no claim on the part of either of these people to any part of that fund.

Mr. Sheldon.—With regard to costs, my Lord, would the right order here be to discharge the order of the 25th July except so far as it relates to costs, because we agree to bear the costs?

The Master of the Rolls.—Yes, I beg your pardon; I had forgotten that you had agreed to pay the costs. There will be no order as to costs. The order will be to discharge the Rule except as to costs.

Younger, L.J.—You do not want to have an order for costs, Mr. Sheldon?

Mr. Sheldon.—No, My Lord. As a matter of principle we are glad to have it decided.

Mr. Clauson.—I understand the Crown are going to pay our costs?

The Master of the Rolls.—So the Attorney-General said.

Notice of Appeal having been given by Dr. Barnardo's Homes, the Case came on for hearing in the House of Lords on the 18th and 21st February, 1921, before Viscounts Finlay and Cave, and Lords Atkinson, Moulton and Sumner, when judgment was reserved.

Mr. Clauson, K.C., Mr. Disturnal, K.C., and Mr. Dighton Pollock appeared as Counsel for the Appellants, and the Attorney-General (Sir Gordon Hewart, K.C., M.P.), Mr. Clayton, K.C., Mr. Sheldon, and Mr. R. P. Hills for the Special Commissioners. On the 14th March, 1921, judgment was delivered in favour of the Respondents, with costs, affirming the decision of the Court of Appeal.

[Reported in [1921] 2 A.C. 1 *sub nomine* Dr. Barnardo's Homes National Incorporated Association *v*. The Commissioners for Special Purposes of the Income Tax Acts.]

JUDGMENT.

Viscount Finlay.—My Lords, this is an Appeal from the decision of the Court of Appeal reversing the Court of King's Bench. The claim of the Appellant is to a return of Income Tax on the ground that as a charity the Appellant is entitled to exemption.

The Appellant is a corporation for charitable purposes. The Court of King's Bench (The Lord Chief Justice and Mr. Justice Darling and Mr. Justice Bray) made absolute a Rule for Mandamus to the Commissioners for Special Purposes of Income Tax to repay the sum of £332 0*s*. 7*d*., which had been deducted for Income Tax in respect of the income of the securities forming the estate of the testator, the Appellant being the residuary legatee. The Court of Appeal reversed the Court of King's Bench and discharged the Rule.

The testator died on the 15th November, 1914. His will made certain bequests and left the whole residue of his estate to the Charity. The will proved on the 21st December, 1914, was disputed by the next-of-kin and an action was commenced by the executors in April, 1915, to have the will established. This action was settled on the 9th March, 1916, on the terms that the executors should hand over to the next-of-kin one-third of the capital of the testator's estate and one-third of the accrued income. The testator's debts were small and had been paid by the executors soon after probate was granted. During the period which elapsed before the settlement of the litigation with

the next-of-kin, the executors received the dividends and interest on the stocks, shares and securities which formed the testator's estate. Income Tax was deducted at the source. The residue was ascertained on the 4th December, 1916, and the balance paid over to the next-of-kin, and the Appellant. Considerable payments had already been made on account, beginning on the 13th April, 1916, after the settlement of the action with the next-of-kin. These payments are set out on page 73 of the Appendix.(1)

On the 23rd March, 1917, the Appellant made a claim for repayment of the Income Tax which had been deducted from the income paid to the executors, on the footing that as to two-thirds the income must be taken to be income of the charity in accordance with the terms on which the probate action had been settled and therefore entitled to exemption. The Court of King's Bench issued a Mandamus to the Commissioners to pay over these moneys, but this Mandamus was recalled by the Court of Appeal, from whose decision the present Appeal has been brought.

Provision is made for exemption from the duties in Schedules C and D in the case of charities (Income Tax Act, 1842, Section 88 and Section 105). The third rule under Schedule C, which is applied also to Schedule D, defines the exemption as being in the case of—" Third.—The " stock or dividends of any corporation, fraternity, or society of persons, " or of any trust established for charitable purposes only, or which, " according to the rules or regulations established by Act of Parliament, " charter, decree, deed of trust, or will, shall be applicable by the said " corporation, fraternity, or society, or by any trustee, to charitable " purposes only, and in so far as the same shall be applied to charitable " purposes only; or the stock or dividends in the names of any trustees " applicable solely to the repairs of any cathedral, college, church, or " chapel, or any building used solely for the purpose of divine worship, " and in so far as the same shall be applied to such purposes; provided " the application thereof to such purposes shall be duly proved before " the said commissioners for special purposes by any agent or factor on " the behalf of any such corporation, fraternity, or society or by any " of the members or trustees." The exemption is to be granted on application to the Commissioners for Special Purposes, and they may be compelled by Mandamus to return to the applicant any sum in respect of which exemption is properly claimed.

The exemption is granted by Rule 3 in respect of the stock or dividends of any charity applicable to charitable purposes only, " in so far as the same shall be applied to charitable purposes only ", provided the application to such purposes shall be duly proved before the said Commissioners. It is claimed for the charity that in substance the income to the extent of two-thirds must be taken to have been their own at the time the deduction was made. Under the compromise, it is said, the charity got this share, and although the residue had not been ascertained at the date of the deduction, the amount coming to the charity ultimately was diminished by these deductions in respect of Income Tax. For the Crown it is contended that the charity never received the income in question as such. The charity received, it is said, a lump sum, arrived at by adding to the amount of the share of the capital two-thirds of the amount of the income which had been received by the executors while the estate was in course of administration.

(1) Omitted from the present print.

The King's Bench decided in favour of the charity on the ground that the executors had assented to the bequest of the residue and that this assent related back to the death of the testator, so that the dividends were by such relation the dividends of the charity when the deduction was made. The doctrine of relation, however, which applies to specific legacies is not applicable to the bequest of a residue as the residue only comes into existence when the administration is completed. No attempt has been made in your Lordship's House to support the claim of the charity upon this ground.

It appears to me that the present case is really decided by the decision of this House in *Lord Sudeley's* case ([1897] A.C. 11). It was pointed out in that case that the legatee of a share in a residue has no interest in any of the property of the testator until the residue has been ascertained. His right is to have the estate properly administered and applied for his benefit when the administration is complete. The income from which this Income Tax was deducted was not the income of the charity. It was the income of the executors. They were, of course, bound to apply it in due course of administration, but they were not trustees of any part of it for the charity. There had been no creation of a trust in favour of the charity in respect of this income, it was never paid over to the charity as income. What was ultimately paid over on the close of the administration was the share of the whole estate, consisting of capital and accumulated income, which fell to the charity. The executors, not the charity, were the recipients of this income, and there is no relation back in the case of the bequest of a residue. If no right of deduction at the source had existed it is the executors and the executors only who could have been made liable for the tax.

In my opinion, the decision of the Court of Appeal was right and this Appeal should be dismissed.

Viscount Cave.—My Lords I am of the same opinion. The third exemption in Section 88, Schedule C, of the Income Tax Act, 1842, applies to "the stock or dividends of any corporation, fraternity, or "society of persons, or of any trust established for charitable purposes "only, or which, according to the rules or regulations established by "Act of Parliament, charter, decree, deed of trust, or will, shall be "applicable by the said corporation, fraternity, society or by any trustee, "to charitable purposes only, and in so far as the same shall be applied "to charitable purposes only . . ." Section 98 provides machinery for obtaining the return of any duty deducted from stock or dividends which fall within the exemption. Section 105 extends the above exemption to any yearly interest or annual payment chargeable under Schedule D of the Act in so far as the same are applied to charitable purposes only, and continues as follows: "and the amount of the duties which "shall have been paid by such corporation, fraternity, society, or trustee "in respect of such interest or yearly payment, either by deduction "from the same or otherwise, shall be repaid under the order of the "said commissioners for special purposes in the manner herein-before "provided for the repayment of sums allowed by them in pursuance of "any exemption contained in the said Schedule (C)." It is under these sections that the Appellants claim repayment of duty.

On reading the above provisions it is clear that exemption is given only in respect of any dividends, interest or other annual payments "of"—that is to say, belonging to—a charity, or which according to its trust instruments are applicable to charitable purposes only, and only in so far as they are in fact applied to charitable purposes. The Appellants

must, therefore, in order to succeed in their claim, prove that the dividends from which tax was deducted were dividends (*a*) belonging to the Appellants or (*b*) applicable to their charitable purposes only, and (*c*) in fact so applied. Plainly this cannot be said of these dividends when received. When the personal estate of a testator has been fully administered by his executors and the net residue ascertained, the residuary legatee is entitled to have the residue as so ascertained, with any accrued income, transferred and paid to him; but until that time he has no property in any specific investment forming part of the estate or in the income from any such investment, and both corpus and income are the property of the executors and are applicable by them as a mixed fund for the purposes of administration. This was fully explained in *Lord Sudeley* v. *The Attorney-General* (L.R. [1897], A.C. 11).

But it is argued on behalf of the Appellants that, the residue having now been ascertained and divided, they are at liberty to investigate the accounts and to ascertain what part of the fund so divided represented income, and to recover the tax on their share of the sum so ascertained; and for that purpose they claim to resort to the well-known rule in *Allhusen* v. *Whittell* (L.R. [1867], 4 Equity 295), where it was held as between a tenant for life under a will and the remainderman, the tenant for life is entitled as from the death of the testator to a sum equal to the income of the residue of the estate after deducting such portion of the capital as, together with the income of such portion for one year, was required to pay the testator's debts and legacies. In my opinion this argument is misconceived. The rule in *Allhusen* v. *Whittell* is confined to cases where a residuary fund is held in trust for several persons in succession, and where for the purposes of ascertaining the rights of the beneficiaries *inter se*, it is necessary to disentangle the accounts and to determine what part of the total fund should be treated as income and paid to the life tenant. In this case there is no trust and no life tenant; and there is no authority whatever for applying the rule in question to a case where the residuary legatee is absolutely entitled to the residue. In my opinion this contention also fails.

For the above reasons I agree that the Appeal should be dismissed with costs.

Lord Atkinson.—My Lords, I think the judgment appealed from was right. I further think that the King's Bench Division were by the Counsel for the Special Commissioners of Income Tax induced to give a judgment in favour of the present Appellants, on the erroneous assumption that a certain principle applicable to the case of a specific legacy applied to a bequest of the residue of a testator's estate, namely, that the assent of an executor to a specific legacy when once given relates back to the death of the testator and vests in the legatee the property in the specific legacy from that date. That principle has no application whatever, and could not in the nature of things have any application whatever, to a legacy of the residue, which is, as the name indicates, only the property or fund which remains after all claims upon the testator's estate have been satisfied. The case of *Sudeley* v. *Attorney-General* ([1897], A.C. 11) decided in this House conclusively established that, until the claims against the testator's estate for debts, legacies, testamentary expenses, &c., have been satisfied, the residue does not come into actual existence. It is a non-existent thing until that event has occurred. The probability that there will be a residue is not enough. It must be actually ascertained. And if this be so, then it cannot be held that until the residue has been ascertained any residuary legatee is entitled thereto

within the meaning of Section 88, Schedule C, of the Income Tax Act, 1842, or that the payment of Income Tax on any portion of the income of the testator is a payment made on behalf of the residuary legatee. Rule 3 of Schedule C does not apply because what is applicable to the charity is the residue when ascertained.

The principle applied by a Court of Equity to a case between a tenant for life and a remainderman of a residue to prevent the entire income of that fund being, during the life of the tenant for life, taken towards discharging the claims on the testator's estate has no application to the present case. The compromise of the Probate suit cannot, of course, affect the right of the Crown to levy Income Tax on that income, or affect the question in controversy in this suit. I think the Appeal should be dismissed. Owing to the course which was taken I do not think the Crown are entitled to costs either here or in either of the Courts below.

Lord Sumner.—My Lords, I concur.

Viscount Finlay.—My Lords, I am informed that Lord Moulton, who sat on the hearing of this Appeal, had prepared before his death a judgment arriving at the same result which has been expressed in the opinions which have been delivered.

Questions put:

That the Order appealed from be reversed.

The Not-Contents have it.

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

The Contents have it.

Mr. Clauson.—My Lords, might I respectfully be permitted on behalf of the Appellants to enquire whether this is a case in which the representatives of the Special Commissioners really ask for costs in the circumstances against the charity? I had rather gathered not, from the observations that fell from one of your Lordships.

Mr. Reginald Hills.—My Lords, I was under the impression that your Lordships had given judgment for the Crown with costs.

Viscount Finlay.—We have.

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