REPORTS

1st Div.

Inland Revenue v. Clark's Trs.

November 2, 1938.

FIRST DIVISION.

(The Lord President, Lords Fleming, Moncrieff, and Carmont.)

2nd November 1938.

1. Inland Revenue *v.* Clark's Trustees.

Revenue—Estate duty—Property passing on death—Settled property under a foreign trust—Character of beneficiaries' interest under trust law of State of New York—Effect on claim for estate duty—Trust executed by an American subject, domiciled in State of New York, providing for payment of income to the truster during his lifetime and to named beneficiaries on his death—Beneficiaries' sole right a claim against the trustees—Trust estate including shares of a company registered in the United Kingdom—Whether, on the truster's death, estate duty exigible in respect of the shares—Finance Act, 1894 (57 & 58 Vict. cap. 30), sections 1, 2 (1) (b) and (c), and 5 (3)—Held that the shares were property passing on the death of the deceased and that estate duty was payable on them.

(*Reported ante*, 1938 S.L.T. 395.)

Reclaiming Motion against Interlocutor of Lord Keith.

The Lord Advocate, for and on behalf of the Commissioners of Inland Revenue, raised an action against Stephen Carlton Clark and Sir Douglas Alexander, Baronet, 149 Broadway, New York City, United States of America, the trustees acting under a trust deed, dated 1st May 1914, granted by the late Edward Severin Clark of Cooperstown, Otsego County, State of New York, United States of America, concluding for delivery of an account of the property passing on the death of the said Edward Severin Clark on 19th September 1933, for the purpose of ascertaining the estate duty chargeable in respect of 106,417½ shares of the Singer Manufacturing Co. Ltd., having its registered office at Singer, Clydebank, Dumbartonshire, held by the said trustees for the said Edward Severin Clark in liferent, and, whether such account be delivered or not, for payment to the pursuer of the sum of £10,400, or such other sum as might be found due, as estate duty.

The circumstances of the action are narrated in the previous report.

On 10th June 1938 the Lord Ordinary (Keith) *ordained* the defenders to deliver an account as concluded for.

The defenders reclaimed, and the case was heard before the First Division on 1st and 2nd November 1938.

Argued for the Defenders and Reclaimers: It was admitted that, by the law of New York State, property held in trust was vested in the trustees and that beneficiaries had no legal or equitable interest therein. No property in the shares of the Singer Company had therefore passed on the death of Edward Severin Clark within the meaning of section 1 of the Finance Act, 1894. The only right which passed on his death was a personal right of action against the trustees. Reference was made to *Archer-Shee* v. *Garland*, [1931] A.C. 212. Beneficiaries had themselves no right of property in estate held for them under an American trust. The position was different from that of a Scottish trust in which the beneficiary had a personal right of property in the trust estate (M'Laren on Wills and Succession, Vol. II. pp. 832, 833, section 1527). Estate duty was exigible only when property changed hands on death (*Earl Cowley* v. *Inland Revenue Commissioners*, [1899] A.C. 198; *Attorney-General* v. *Milne*, [1914] A.C. 765; *Dunderdale's Trs.* v. *Inland Revenue*, 1936 S.C. (H.L.) 20; 1935 S.C. 169). No property had changed hands in the present case. In any event, there must be a passing of property in this country. The ceasing of an interest abroad did not imply the passing of property in the United Kingdom. None of the cases decided on section 1 of the Act was of assistance, as none of them contained the specialty of an American trust. Section 2 (1) (*b*) of the Act was inapplicable, as there was no cesser of an interest in the deceased. Section 2 (1) (*c*) also could not be founded on, as gift had not been averred. Further, under section 5 (3) of the Act there had been no passing of the property. The interlocutor of the Lord Ordinary should be recalled and the action dismissed.

Argued for the Pursuer and Respondent: Estate duty was payable on the death of a person domiciled abroad in respect of property situated in the United Kingdom. The shares

the Singer Co. Ltd. were so situated. The claim *mobilia sequuntur personam* had no application in estate duty law. Estate duty was a mutation duty, not a succession duty. The fact that the property was settled made no difference, nor did it make any difference that the same persons held the property as trustees before and after the death. The property which passed on the death of a liferent beneficiary was not the interest of the beneficiary in the property itself (*Dunderdale's Trs.* v. *Inland Revenue*, (*supra*); *In re Northcliffe*, [1917] 1 Ch. 327). The quality of that interest in American law was irrelevant, and the decision in *Archer-Shee* v. *Garland* (*supra*) had no bearing on the present case. The limited nature of the interest in the beneficiary was no key to the property passing (*Warren's Trs.* v. *Inland Revenue*, 1928 S.C. 806). The Singer shares could not be held notionally to be situated in America (*In re Haig*, unreported, in Court of Appeal, 26th April 1922; Dymond on Death Duties, 8th ed. p. 86). Property passed in the shares within the meaning of section 1 of the Finance Act, 1894. Property in the shares must also be deemed to have passed under section 2 (1) (*b*) in that the shares were property in which the deceased had an interest which ceased on his death. The pleadings were also amendable to admit a claim under section 2 (1) (*c*). The Lord Ordinary had reached a right conclusion, and his interlocutor should be affirmed. On 2nd November 1938 the Court *adhered* to the interlocutor of the Lord Ordinary.

The Lord President (*Normand*).—The defenders reclaim against an interlocutor repelling their plea to the relevancy of the averments in an action in which the Crown claims an accounting in order to ascertain the estate duty due upon shares of the Singer Manufacturing Company, which has its registered office in Clydebank. The shares were settled by an American citizen, domiciled in the United States, by an *inter vivos* trust deed which is governed by the law of the State of New York. The settlor reserved what we should call a liferent of the trust income, and on his death the beneficial interest in the trust passed to other persons. It is common ground that the shares are to be treated as locally situated in Scotland just as much as if they were heritage in Scotland. The Lord Ordinary has held that the claim put forward by the Crown and the averments in support of it are relevant, and that it is a claim which falls within section 1 of the Finance Act of 1894 (57 & 58 Vict. cap. 30). The grounds of his judgment are that the property which formed the assets of the trust, in so far as it was situated in the United Kingdom, passed within the meaning of section 1 when the beneficial enjoyment under the trust changed. The Lord Ordinary also finds that the claim might be justified by other statutory enactments. I am well satisfied by the Lord Ordinary's reasons for holding that section 1 of the Act of 1894 applies. I do not propose to deal with the alternatives under which the claim has been held by the Lord Ordinary to be justified, but I shall add some observations directed to the discussion which took place before us.

It was admitted that if the shares had been held under a typical Scottish trust by which the trustees were directed to hold them and to pay to a liferenter the free balance of income remaining in the hands of the trustees, after meeting prior charges and administration expenses, the property in the shares themselves would be held to pass within the meaning of section 1 on the death of the liferenter. That admission is, I think, a necessary consequence of the decision in *Dunderdale's Trs.* v. *Inland Revenue* (1936 S.C. (H.L.) 20). In that case Lord Russell of Killowen, dealing with the earlier case of *Cowley* ([1899] A.C. 198) and referring to Lord Macnaghten's judgment in that case, said (at p. 25): "As Lord Macnaghten stated in the *Cowley* case, the Finance Act, 1894, has no regard to the destination of the property which passes, or to the interest of the deceased which, if it be a limited interest, can never pass. It was held in that case that on the death of the first equitable tenant for life under a settlement of real estate, the property which passed on his death was neither the interest of the first tenant for life nor the interest of the second tenant for life who succeeded him, but the settled property."

The important point is, then, that on the death of a liferenter it is not the life interest which passes within the meaning of the section but the property in the trust assets themselves. It appears to me that the exact legal description of the interest of the deceased liferenter is entirely immaterial, and, indeed, there are cases where the deceased may have had himself no interest of any kind although the property in the trust assets passes within the meaning of the section upon his death. It is also beyond dispute that property in this country, which is held by foreign trustees, may pass within the meaning of the section on the death of a person domiciled abroad who enjoyed under the trust the income derived from it.

The domicile of the trust is irrelevant in a case like this. The domicile of the trust is of importance, and is conclusive, of course, if the property is not situated in the United Kingdom. But where the property is situated in the United Kingdom it does not matter that the trust is domiciled in America or elsewhere abroad.

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The law of the domicile of the trust may affect the legal character of the beneficial right which passes or emerges on the death, but the exact legal character of the beneficial interest is not material. Nor does it matter that the beneficial interest may be said not to pass in this country if the domicile of the trust is abroad. What matters is that there is property in this country, and it is that which passes when anyone having a beneficial interest in it dies or when a beneficial interest in it emerges on the death of anyone.

The reclaimers' argument was that the beneficial rights under the trust in this case are completely different from the beneficial rights under a Scottish trust, and that the beneficiary's rights under this trust deed are so severed from the assets held by the trustees that the property in these assets cannot be said to pass upon the passing of the beneficial interest. The admission of the law of the State of New York was founded on, and it was said that, whereas the law of that State gives the beneficiary no legal, equitable, or other estate or interest in the property in trust, the law of Scotland gives the beneficiary some direct interest in the trust. In my opinion the argument so presented is entirely irrelevant. As I have said, the important thing is that when a beneficial interest passes upon the death of a person with a liferent or a right of the nature of a liferent, as in this case, the property which passes under section 1 is the assets in the United Kingdom held by the foreign trustees.

But, assuming that the argument is relevant, I am of opinion that it is ill-founded. A passage by Lord M'Laren in his book on Wills and Succession was cited to us, at pages 832 and 833, paragraph 1527. Lord M'Laren there says: "The beneficiary interest has been defined as a *jus crediti* affecting the trustee; a definition which, if accurate at all, is only accurate when applied to the case of a beneficiary interest arising under an *ex facie* absolute disposition, qualified by a separate declaration. The beneficiary interest under deeds of settlement, conveying the estate ostensibly for uses and purposes, may be more correctly defined as a personal right of property in the estate which is the subject of disposition. It is a right of property in the same sense that a ground annual, real burden, or other right by reservation, or an estate standing upon a decree or minute of sale, is a right of property. For although the title to the estate stands in the person of the trustee, the interest of the beneficiary is by the terms of the trust deed protected, in so far as the nature of the property in each particular case admits of protection, against the acts of the trustee and the claims of his creditors." When counsel was asked to state what rights of action a beneficiary has by our law to protect his interest in the trust estate, he was obliged to admit that these rights of action were a right to interdict the trustee from committing any breach of trust, and a right by personal action, for example a declarator or an action of accounting against the trustees, to compel them to administer the trust according to its terms. There is also a personal action of damages against the trustees for breach of trust, and it is open to the beneficiary by suitable procedure in this Court to bring about a change of administration of the trust either by a transfer of the administration to new trustees or by transfer of the administration to a judicial factor. But there is no action by which a beneficiary as such can in any way vindicate for himself any of the trust property. In my opinion it is no exception from, but rather a confirmation of, this proposition, that a beneficiary may compel trustees to give the use of their names or to grant an assignation of their claim against a third party, or that a beneficiary may sue a third party if he calls the trustees as defenders along with him and alleges a league between the trustees and the third party to enable the third party to evade his obligations to the trust. The result of this is, in my opinion, that the beneficiary's right is nothing more than a personal right to sue the trustees and to compel them to administer the trust in accordance with the directions which it contains, and I do not regard Lord M'Laren's observations in the passage which I have read as casting any real doubt upon this proposition. I think the true meaning of the paragraph which I have read is that the beneficiary's right is a patrimonial right, enforceable by action against the trustees, and, if that is all that it means, the paragraph is unexceptionable. Accordingly, I can find no difference between the law of Scotland and the law of New York State, as admitted on record. One of the admissions on record is that the beneficiary had merely a right against the trustees to enforce the performance of the trust, but that covers the whole range of actions which are open to a beneficiary according to the law of Scotland, and since there can be no right without a remedy, the rights of the American beneficiary under the law of the State of New York are just the rights of a Scottish beneficiary under a Scottish trust. The other admission, that the beneficiary has no legal, equitable, or other estate or interest in the property in trust, or in the dividends declared or paid thereon, must be read with the admission that he has a right against the trustees to enforce the performance of the trust, and, whatever be the meaning of the

tatement that the beneficiary has no legal, quitable, or other estate or interest in the roperty in trust, or in the dividends declared r paid thereon, the two admissions taken ogether allow to the American beneficiary as ll rights as those enjoyed by a beneficiary nder a Scottish trust. I confess that I am not uite clear about the precise construction of he words "legal, equitable, or other estate or nterest." These words might have been more asily understood if we had had before us a recise statement of the nature of a beneficiary's ghts at common law in New York or, at any ate, his rights before the enactment referred o in the record became law. The word interest" is linked with the word "estate," hich is a term of art in English trust law, nd it may be that the word "interest" must e construed as if it meant some kind of estate." That is a term unfamiliar to us in cotland, and I prefer not to speculate further bout the true interpretation of the law of ew York State as negatively stated on cord. The positive statement is plain enough, owever, and it gives to the beneficiary the ghts which a beneficiary has by our law.

We were referred to the *Archer-Shee* case 1931] A.C. 212). I agree with the Lord rdinary that that case has no real bearing on he question before us. The Income Tax Act raws a distinction between income from foreign tocks, shares, or rents, and income from foreign ossessions, and where a beneficiary was not ntitled to income from foreign shares but only o claim from foreign trustees the balance of ncome in their hands, which income was eceived by them as income from shares, it was eld that the beneficiary was in receipt of ncome from foreign possessions. There had een an earlier case between the same parties which a different result had been reached, ecause in that earlier case it was assumed that he beneficiary's right under American law was he same as his right would have been under he law of England, and apparently, as Lord renbury said in the earlier case, under the w of England a beneficiary such as a liferenter entitled in equity and specifically during his fe to the dividend upon stocks held by trustees, to an equitable right in possession to receive uring his life the proceeds of the shares and ocks of which he is tenant for life.

Now, no Scottish lawyer would describe the ghts of a liferenter in these terms, which are ntirely alien to our law. Lord Sumner was the minority in the first of the *Archer-Shee* ases, and if his view had prevailed, the decision the first *Archer-Shee* case would have been, ot the decision which was actually given in it, ut the decision which was given in the second the *Archer-Shee* cases ([1927] A.C. 844). He supported Sargant L.J., who adopted the language of Rowlatt J., who said: "What this lady enjoys is not the stocks, shares, and rents or other property constituting the trust fund under the will; what she has is the right to call upon the trustees, and, if necessary, to compel the trustees to administer this property during her life so as to give her the income arising therefrom according to the provisions of the trust. Her interest is merely an equitable one, and it is not an interest in specific stocks and shares constituting the trust fund." In my opinion that is a very accurate description of the rights of a beneficiary enjoying a liferent under a Scottish trust deed, and, as was pointed out by Lord Dunedin, it is a very good description of what was proved to be the law of the State of New York in the second *Archer-Shee* case.

My conclusion is that there is no difference between the law of Scotland as regards the beneficiary's rights and the law which is admitted in the record to be the law of the State of New York. I therefore hold that the contention of the reclaimers that there is some specialty, as compared with our law in the admitted law of the State of New York, which prevents us from holding that the property in the trust assets passed when there was a change of beneficiary is unfounded, first, because I can find no such specialty, and, second, because any specialty such as is alleged would be irrelevant. What we have to find in order that section 1 should be applied, where the trust is foreign, is not the precise nature of the beneficiary's rights, but the fact that upon a death the beneficial enjoyment has either passed from him to another or has emerged in favour of another. Once that is found, the trust assets situated in the United Kingdom attract estate duty. I therefore move your Lordships to affirm the interlocutor and to refuse the reclaiming motion.

Lord Fleming.—I am of the same opinion. It is common ground between the parties that the shares, the property from which estate duty is claimed by the Crown, are locally situated in Scotland, and under the trust deed relating to these shares the late Mr Clark until his death was entitled to the income of them, subject, of course, to deduction of the necessary expenses incurred by the trustees in due course of their administration. Upon his death, under the provision of the trust deed other beneficiaries became entitled to the beneficial enjoyment of the shares, subject to the same deduction. That short statement of the case seems to me to bring it directly under section 1 of the Finance Act of 1894 (57 & 58 Vict. cap. 30), and under the series of cases which have been

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decided upon that section, and particularly the leading case of *Cowley* ([1899] A.C. 198) and the recent case of *Dunderdale's Trs.* (1936 S.C. (H.L.) 20). The circumstances that the deceased was domiciled in America and that the trustees in whose names the shares were registered were trustees of an American trust seem to me to be irrelevant. The Finance Act, 1894, is concerned only with the passing of the beneficial enjoyment of property and not with the passing of mere legal title to property. The question in this case is whether there was property in this country the beneficial enjoyment of which passed upon the death of the late Mr Clark. That question appears to me to admit only of an affirmative answer, and that, in my view, is sufficient for the disposal of the case, but I would like to add that I concur with your Lordship in all the points dealt with in your opinion.

Lord Moncrieff.—I am of the same opinion. I approach the decision of this case under the recognition that two propositions of law may now be regarded as conclusively established by authority. The first proposition is that for the purposes of the Finance Act of 1894 (57 & 58 Vict. cap. 30) moveable property in Scotland is to be regarded as locally situated in Scotland in the same sense as heritable property is locally situated there; and this notwithstanding the fact that such moveable assets may be vested in property in trustees who are domiciled and resident abroad. It may be noted that this proposition introduces into the interpretation of this statute an exception from the general law. It has further been established, and I may refer to the cases which were cited at the debate, that in a case where property locally situated in Scotland, whether heritable or moveable, is vested in trustees but is charged under a Scottish settlement with beneficiary interests in favour of any particular person, upon the release of the charge of that interest by the death of that person it is not his interest which is to be regarded as passing, but what passes is the property upon which that interest had been charged. In this case, accordingly, had this been a Scottish trust, it would have been beyond argument that on the death of Mr Clark, whether that death took place in this country or abroad, what passed for the purposes of the Act of 1894 was not his interest in the shares but was the property in the shares themselves.

Two arguments were relied on by counsel for the appellants as displacing that consequence in the particular circumstances of this case. It was first maintained that the quality of the beneficiary's right, being a right conferred by a foreign trust, was something different from the quality of the beneficiary right which would be conferred by a trust regulated by the law of Scotland. It was further maintained that, whether that should or should not be a proper legal consequence, the fact that the beneficiary right was exigible only in a foreign Court introduced a foreign in place of a local passing of the property.

Dealing with the first of these contentions, I agree with your Lordships that in this case we can affirm upon the averments of the parties that the trust law of New York has no specialty which distinguishes it from the trust law of Scotland. Before that law could be ascertained by this Court we should in normal course have required either the evidence of experts in that law or an answer to a question addressed to a Court in New York; but in this case we can proceed on the averments of the appellants as to the law of New York as these are, for the purposes of the case, accepted and made matter of express admission by the respondent. The law as so set forth in these averments is formulated both positively and negatively. I think, however, that the two divisions of the formulation are intended each to be exhaustive. Taking the positive formulation first, the law is stated in a single sentence. A beneficiary under the foreign law has merely a right against the trustees to enforce their performance of the trust. As so phrased, that occurs to me as being a very concise but very satisfactory formulation of the law of Scotland. It would rather appear from observations in the *Archer-Shee* case ([1931] A.C. 212 and [1927] A.C. 844) that the trust law of England may be different, but with that we are not concerned; although such a difference may explain the ratio of the different results which were arrived at when the question was entertained at the different stages of that case. I may say, however, that I have difficulty in accepting the formulation of the law of Scotland by Lord M'Laren in his Wills and Succession at paragraph 1527. I have difficulty in seeing how the right of the beneficiary can properly be defined as "a personal right of property in the estate which is the subject of disposition." In my view, the right of property in the estate of the trust is vested in the trustees to the exclusion of any competing property, and the right of the beneficiary, exactly as is here said to be the right of the beneficiary under the law of New York, is merely a right *in personam* against the trustees to enforce their performance of the trust. It is true that in the assertion of that right a beneficiary will in certain cases obtain the aid of the Court to enable him to use the names of the trustees, but it is only as representing the trustees in such a case that he can attach or assert any property right over the assets of the trust.

Passing from the positive formulation of the w of New York to the sentence in which it is rmulated by negation of rights, I have a little fficulty in understanding a terminology which not wholly familiar to us as Scottish lawyers. find myself, however, entitled to accept it rely as excluding the beneficiary from rights property in the trust estate and so as being exact obverse of the formulation in its sitive form. I accordingly accept this rmulation of the foreign law, whether rmulated positively or negatively, as excluding the suggested difference.

But then it was said, *esto* that the quality of a right be the same, the forum of the assertion the right is locally different; and, seeing that e right falls to be asserted abroad, that cludes a local and introduces a foreign passing of the property. This argument appears, owever, to ignore the second of the legal propositions, upon a recognition of which I ave proceeded and which was not seriously hallenged at the debate. If in such a case, ontrary to that view of the law, what was garded as passing should have been the harge or interest of the deceasing beneficiaries, hen the forum of assertion of that charge ould have become highly relevant; but if it be, n the other hand, established that by mere elease of the charge, with or without a consequential vesting of a similar charge in someone else, what passes is not the right to exact n accounting from the trustees, but, on the ther hand, the actual corpus of the trust state, then the supplementary consideration of oreign jurisdiction does not introduce, in my iew, any distinction which is relevant. I am ccordingly, with your Lordship, satisfied that no argument has been advanced which should enable us to disturb the finding of the learned Lord Ordinary in his interlocutor. With his opinion I also am well content, and I agree with your Lordship at all the points in the opinion you have delivered.

Lord Carmont.—I also agree with your Lordship. In considering the application of section 1 of the Finance Act of 1894 (57 & 58 Vict. cap. 30) counsel for the reclaimers sought to deprive the Lord Ordinary of the support that he obtained from the line of cases running from *Cowley* ([1899] A.C. 198) to *Dunderdale* (1936 S.C. (H.L.) 20) by pointing out that in these cases there were interests which ceased within the United Kingdom, and he contrasted that state of matters with what is tabled in this case the cesser of an interest in New York. I think that is not a true or distinguishing feature, and that the law would have been laid down precisely in the same way in the cases of *Cowley* and *Dunderdale* if there had been under consideration the cesser of interests outside the United Kingdom.

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Counsel for Pursuer and Respondent, The Lord Advocate (Cooper, K.C.), Simpson; Agent, Stair A. Gillon, Solicitor of Inland Revenue.— Counsel for Defenders and Appellants, Clyde, K.C., Strachan, K.C., J. O. M. Hunter; Agents, J. W. & J. Mackenzie, W.S. (for M'Clure, Naismith, Brodie & Co., Writers, Glasgow).

J. L. D.

FIRST DIVISION.

(The Lord President, Lords Fleming, Moncrieff, and Carmont.)

2nd November 1938.

2. Corporation of Glasgow *v.* Inland Revenue.

Revenue—Stamp duty—Conveyance on sale—Exemption from duty—Acquisition by local authority of heritable subjects for public health purposes—Part of the subjects not to be so used till expiry of certain leases—Whether conveyance exempt from duty—Public Health (Scotland) Act, 1897 (60 & 61 Vict. cap. 38), section 168—Held that the whole of the subjects had been purchased by the local authority in pursuance of the powers conferred on them by the Public Health Acts and that the conveyance was exempt from duty.

Exchequer Cause.

The Corporation of the City of Glasgow presented to the Commissioners of Inland Revenue a disposition in their favour of heritable subjects in Glasgow for the purpose of obtaining the opinion of the Commissioners as to the duty, if any, with which it was chargeable under the Stamp Acts. The disposition bore to be granted in consideration of the sum of £52,800 paid by the Corporation, acting under the Glasgow Police Acts, as local authority under the Public Health (Scotland) Act, 1897, and amending Acts.

The Commissioners assessed the conveyance to £528 of stamp duty, being the full *ad valorem* duty in respect of the whole subjects conveyed. The appellants, being dissatisfied with the determination of the Commissioners, paid the duty assessed, and required the Commissioners, in terms of section 13 of the Stamp Act, 1891, to state a case for the opinion of the Court of Session, as the Court of Exchequer in Scotland.

The case set forth, *inter alia*:

1. The appellants are the local authority under the Public Health Act, 1897, by virtue of section 12 (2) thereof, and administer a special department concerned with public health undertakings and activities known as the Public Health Department.